Interior promulgated regulations of Title 30, Code of Federal Regulations, Chapter VII (43 FR 49932–49952) under the Surface Mining Control and Reclamation Act of 1977, Pub. L. 95–87, (30 U.S.C. 1211, 1242). Those regulations which required collection, submission or retention of information, were promulgated subject to review and clearance by the GAO pursuant to 44 U.S.C. 3512. The GAO solicited comments on these regulations by public notice in the **Federal Register** on June 19, 1979 (44 FR 35290–35292).

OSM is restating paragraphs of its June 13, 1979 clearance notice that relate to 30 CFR Parts 872, 877, 879, 882, 884 and 886. The list of approved clearances follows:

The reporting and recordkeeping requirements contained in 30 CFR 872.11(b)(2) and (3) and 872.12(a) have been approved by the U.S. General Accounting Office under number B–190462 (R0643).

The reporting requirements contained in 30 CFR 877.12(b) and 877.13(b) and (c) have been approved by the U.S. General Accounting Office under number B–190462 (R0644).

The reporting and recordkeeping requirements contained in 30 CFR 879.13 and 879.15 have been approved by the U.S. General Accounting Office under number B–190462 (R0645).

The reporting and recordkeeping requirements contained in 30 CFR 882.12, 882.13(b), and 882.14(b) have been approved by the U.S. General Accounting Office under number B–190462 (R0646).

The reporting requirements contained in 30 CFR 884.13 and 884.15 have been approved by the U.S. General Accounting Office under number B–190462 (R0647).

The reporting requirements contained in 30 CFR 886.14, 886.15, 886.18(c)(2), 886.23, and the recordkeeping requirement contained in 886.24 have been approved by the U.S. General Accounting Office under number B–190462 (R0648).

During GAO's review, three changes were made. First, section 872.13(a) was omitted from clearance because fewer than 10 respondents will be subject to this requirement. However, if there are 10 or more respondents at some future time, this section will be submitted for clearance. Second, § 877.13(b) contains a part of the reporting requirement which is associated with § 877.13(c). Consequently, § 877.13(b) is included in this clearance. Third, § 882.14(b) contains reporting requirements associated with § 882.13(b); therefore, § 882.14(b) is included in this clearance.

Dated: October 12, 1979.

Paul L. Reeves,

Acting Director, Office of Surface Mining Reclamation and Enforcement.

Amendment to Rules:

The following Parts of Chapter VII of Title 30 of the Code of Federal Regulations are amended:

Parts 872, 877, 879, 882, 884 and 886.

PART 872—ABANDONED MINE RECLAMATION FUNDS

Part 872 is herby amended to include at the end of Part 872 the following note:

Note.—The reporting and recordkeeping requirements contained in 30 CFR 872.11(b)(2) and (3) and 872.12(a) have been approved by the U.S. General Accounting Office under number B–190462 (R0643).

PART 877—RIGHTS OF ENTRY

Part 877 is hereby amended to include at the end of Part 877 the following note:

Note.—The reporting requirements contained in 30 CFR 877.12(b) and 877.13(b) and (c) have been approved by the U.S. General Accounting Office under number B–190462 (R0644).

PART 879—AQUISITION, MANAGEMENT AND DISPOSITION OF LANDS AND WATER

Part 879 is hereby amended to include at the end of Part 897 the following note:

Note.—The reporting and recordkeeping requirements contained in 30 CFR 879.13 and 879.15 have been approved by the U.S. General Accounting Office under number B–190462 (R0645).

PART 882—RECLAMATION ON PRIVATE LAND

Part 882 is hereby amended to include at the end of Part 882 the following note:

Note.—The reporting and recordkeeping requirements contained in 30 CFR 882.12, 882.13(b), and 882.14(b) have been aproved by the U.S. General Accounting Office under number B–190462 (R0646).

PART 884—STATE RECLAMATION PLANS

Part 884 is hereby amended to include at the end of Part 884 the following note:

Note.—The reporting requirements contained in 30 CFR 884.13 and 884.15 have been approved by the U.S. General Accounting Office under number B–190462 (R0647).

PART 886—STATE RECLAMATION GRANTS

Part 886 is hereby amended to include at the end of Part 886 the following note:

Note.—The reporting requirements contained in 30 CFR 886.14, 886.15, 886.18(c)(2), 886.23, and the recordkeeping requirement contained in 886.24 have been approved by the U.S. General Accounting Office under number B–190462 (R0648).

[FR Doc. 79–32306 Filed 10–18–79; 8:45 am]

BILLING CODE 4310–05–M

OFFICE OF MANAGEMENT AND BUDGET

34 CFR Ch. I

OMB and Federal Management Circulars; Transfer and Redesignation of Regulations

AGENCY: Office of Management and Budget.

ACTION: Final rule.

SUMMARY: At the request of the Office of the Federal Register, the Office of Management and Budget is transferring and redesignating the regulations in Title 34 to Title 5. This action will consolidate all Office of Management and Budget regulations in a single title of the *Code of Federal Regulations* and aid the Office of the Federal Register in the orderly development of the *Code of Federal Regulations*.

EFFECTIVE DATE: October 19, 1979.

ADDRESS: Office of Management and Budget, Room 5208, New Executive Office Building, 726 Jackson Place, Washington, DC 20503, ATTN: David Leuthold.

FOR FURTHER INFORMATION: David Leuthold, (202) 395–7250.

Accordingly, Part 1, OMB and Federal Management Circulars, of Title 34 (44 FR 37913, June 29, 1979) is transferred and redesignated as 5 CFR Part 1310, under a new "Subchapter B—OMB Directives". The existing regulations in 5 CFR Chapter III, Parts 1300, 1301, 1302 and 1303 are placed in a new "Subchapter A—Administrative Procedures."

Title 34—Chapter I is vacated.

David Leuthold,

Budget and Management Officer.

[FR Doc. 79–32577 Filed 10–18–79; 8:45 am]

BILLING CODE 6820–27–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 600

[FRL–1303–1]

Fuel Economy of Motor Vehicles; Technical Amendment

AGENCY: Environmental Protection Agency.

ACTION: Final Rule.

SUMMARY: This document makes a technical amendment to EPA regulations

concerning calculation of the average fuel economy of motor vehicles. The amendment corrects an error brought about through the inadvertent publication of an obsolete regulatory provision.

DATES: This amendment is effective October 19, 1979.

FOR FURTHER INFORMATION CONTACT: Paul A. J. Wilson, Regulatory Management Staff, Office of Mobile Source Air Pollution Control (ANR–455), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, Telephone: (202) 755–0596.

SUPPLEMENTARY INFORMATION: EPA began work on a large technical amendment package in the early spring of 1978, which included revisions to 40 CFR 600.510–80 (d) and (e). This rulemaking action was not published until November 14, 1978 (43 FR 52932). However, a different amendment was published September 5, 1978 (43 FR 39375) which deleted sections (d) and (e) from § 600.510–80. The regulation published on November 14 inadvertently was not revised to reflect this change and was published with the amendment to § 600.510–80(d) and (e) intact. Therefore, the amendment published November 14, 1978 revised a section which did not exist. For the purpose of clarity, the text of § 600.510–80 is printed below as it should have appeared on November 14, 1978, with paragraph (d) and (e) deleted.

This technical amendment does not change the stringency of the fuel economy regulations nor does it impose any additional burden on the regulated industry. It simply corrects a clerical error. For these reasons the Agency finds good cause for omitting as unnecessary a notice of proposed rulemaking and an opportunity for public comment. Since vehicle manufacturers are currently in the process of calculating average fuel economy, immediate correction of the clerical error is necessary to avoid possible confusion. Therefore, the amendment will be effective immediately.

Under Executive Order 12044 EPA is required to judge whether a regulation is "significant" and therefore subject to the procedural requirements of the Order or whether it may follow other specialized development procedures. EPA labels these other regulations "specialized." I have reviewed this regulation and determined that it is a specialized regulation not subject to the procedural requirements of Executive Order 12044.

Dated: October 12, 1979.

Douglas M. Costle,

Administrator.

Part 600 of Chapter I, Title 40 of the Code of Federal Regulations is hereby amended as follows:

1. By amending § 600.510–80 to read as follows:

§ 600.510–80 Calculation of average fuel economy.

(a) * * *

(3) An average fuel economy calculation will be made either for all nonpassenger automobiles or for each category of nonpassenger automobile (four-wheel drive general utility vehicles and all other nonpassenger automobiles) in accordance with the preference indicated by the manufacturer in § 600.512.

(b) * * *

(2) * * *

(iii) The fuel economy value of diesel powered model types will be multiplied by the factor 1.0 to correct gallons of diesel fuel to equivalent gallons of gasoline.

* * * * *

(vi) If a model type is comprised of some vehicles that are four-wheel drive general utility vehicles and some that are not as defined at 42 CFR 553.4 by the Secretary of Transportation, and if the manufacturer has indicated in § 600.512(c)(8) that average fuel economy will be calculated separately for four-wheel drive general utility vehicles, then separate model type calculations will be made for those vehicles that are not.

* * * * *

(d) [Reserved].

(e) [Reserved].

(Title V, Motor Vehicle Information and Cost Savings Act (15 U.S.C. 1901 et seq.))

[FR Doc. 79-32425 Filed 10-18-79; 8:45 am]

BILLING CODE 6560-01-M

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Health Care Financing Administration

42 CFR Part 405

Federal Health Insurance for the Aged and Disabled; Target Rate Reimbursement for Institutions Furnishing Home Dialysis Supplies, Equipment, and Support Services

AGENCY: Health Care Financing Administration (HCFA), HEW.

ACTION: Final rule with comment period.

SUMMARY: This regulation provides a new optional method of Medicare reimbursement for the cost of home dialysis supplies, equipment and support services furnished to self-care home dialysis patients under the direct supervision of an approved provider or facility. Payments will be made on the basis of an annually determined target reimbursement rate per treatment. The regulation implements section 1881(b)(4)–(6) of the Social Security Act, established by the End-Stage Renal Disease Program Amendments of 1978 (Pub. L. 95–292). This method is intended to encourage the efficient delivery of home dialysis services.

DATES: This regulation is effective as of April 1, 1979. Consideration will be given to written comments or suggestions received by December 18, 1979, with a view to making any necessary changes.

ADDRESS: Address comments to: Administrator, Health Care Financing Administration, Department of Health, Education, and Welfare, P.O. Box 17073, Baltimore, MD 21235. When commenting, please refer to file code MAB–92–RC. Agencies and organizations are requested to submit their comments in duplicate. Comments will be available for public inspection, beginning approximately 2 weeks after publication, in room 5231 of the Department's offices at 330 C Street, SW., Washington, D.C., on Monday through Friday of each week, from 8:30 a.m. to 5:00 p.m. (telephone 202–245–0950).

FOR FURTHER INFORMATION CONTACT: Mr. Stanley Weintraub, telephone: (301) 594–6535.

SUPPLEMENTARY INFORMATION: Section 299I of the Social Security Amendments of 1972 (Pub. L. 92–603) provided Medicare coverage for end-stage renal disease patients who meet certain entitlement requirements. While the end-stage renal disease program has been generally successful in meeting the needs of renal disease patients for protection against the catastrophic costs of obtaining needed care, there is great concern about the high and steadily rising cost of the program and the burden it can place on the Medicare trust funds unless steps are taken to put it on a more cost-effective basis.

The Congress has noted that while the high cost of the program is in part a reflection of the costly technology required for treatment and the need in many cases for lifetime care, it is generally agreed that rising program costs are also a reflection of disincentives in the program to the use of lower cost self-dialysis procedures and settings. Appropriate incentives for more cost-effective use of self-care

dialysis settings can help significantly to contain rising program costs without impairing the quality or availability of needed services. Since 1972, the percentage of the total patients on dialysis dialyzing at home has declined from over 40 percent to less than 10 percent in 1976. While various reasons for this decline have been offered (including changes in the patient population under treatment, professional disinterest in encouraging home dialysis, and increased access to institutional facilities), the Congress concluded that the evidence suggests that one of the major reasons is the existence of financial disincentives for patients to undertake self-care dialysis.

Pub. L. 95–292 (enacted June 13, 1978) addressed this problem through amendments designed to achieve several objectives, including the increased use of self-dialysis and transplantation, and the use of incentive reimbursement methods to encourage economies in the delivery of services.

One such incentive method is addressed in this regulation. It provides for payment on the basis of an annually determined target reimbursement rate for the dialysis services of patients dialyzing at home under the supervision of a facility. It is an optional method for providers and renal dialysis facilities which furnish all necessary home dialysis medical supplies, equipment, and supportive services (including the services of qualified home dialysis aides) that are medically necessary to enable patients to continue dialyzing in the home setting. See section 1881(b)(4)–(6) of the Act, 42 U.S.C. 1395rr.

Major Provisions

1. *Setting Target Rates*

Separate rates for home dialysis, one for each hemodialysis session and one for each peritoneal session (referred to hereafter as a "per treatment rate"), adjusted for regional variations, will be established each calendar year. Once established, the rates shall be utilized, without recomputation, throughout the calendar year for which they are established. Accordingly, there is no appeal available to a provider or renal dialysis facility if the actual costs for covered services exceed the target rates. In establishing the rates, HCFA will allow for the cost of providing medically necessary home dialysis supplies and equipment, the cost of providing personnel to aid in home dialysis, administrative costs, and an incentive to increase home dialysis through more cost-effective and efficient delivery of needed services.

Under Pub. L. 95–292, this statutory amendment became effective as of April 1, 1979. Because of insufficient cost information regarding new services required under this option (e.g., the cost of providing home dialysis aides), as well as the urgency required in publishing the target rates, the target reimbursement rate per treatment established for the remainder of 1979 will be equal to the maximum rate permitted under the statute. The maximum rate permitted shall not exceed 70 percent of the national average payment before application of the coinsurance requirement, adjusted for regional variations, for maintenance dialysis services furnished in approved providers and facilities during the preceding fiscal year.

To establish the target rate and the 70 percent limitation for the current calendar year, HCFA has used data from accounting periods ending in the calendar year 1977 to develop combined provider and facility average outpatient maintenance dialysis payments for both hemodialysis and peritoneal dialysis. These average dialysis payments were derived from a summary maintained by HCFA of maintenance dialysis payments made to providers and renal dialysis facilities and were determined for each of the ten regional areas.

The average dialysis payment data were then actuarially adjusted by HCFA to reflect the fiscal year 1978 average dialysis payments which are the bases for the target rate and 70 percent limitation for the current calendar year. Separate rates were then determined for each of the ten regional areas. This is in compliance with the requirement in Pub. L. 95–292 that the target rate established as well as the maximum rate permitted shall be "* * * adjusted for regional variations in the cost of providing home dialysis." The ten regional areas were used as the regional basis because the supporting dialysis payment data is accumulated in that format.

Home dialysis target rates established in succeeding calendar years (commencing with January 1, 1980), will be based on the most recent data available to HCFA at the time, including determination of the actual cost of home dialysis supplies and equipment and related support services furnished under this option. In establishing these rates, HCFA is authorized to utilize a competitive-bid procedure, a prenegotiated rate procedure, or any other procedure it determines is appropriate and feasible in complying with the statute.

By December 1 each year, HCFA will publish a notice in the **Federal Register** announcing the rates developed for the following calendar year. In compliance with the statute, the effective date of the rates set for the calendar year 1979 was April 1. These rates will be published in a separate notice.

2. *Agreements With HCFA*

Under Pub. L. 95–292, any provider or renal dialysis facility that wants to receive payment on the basis of a target reimbursement rate for furnishing home dialysis supplies and equipment and self-care home dialysis support services must file an agreement with HCFA. Section 1881(b)(4) and (5) of the Act discuss these requirements.

The agreement will require that the provider or facility agree to:

A. Assume full responsibility for directly obtaining or arranging for the provision of:

i. Such medically necessary dialysis equipment as is prescribed by the attending physician;

ii. Dialysis equipment maintenance and repair services;

iii. The purchase and delivery of all necessary medical supplies; and

iv. Where necessary, the services of trained home dialysis aides to all patients for which it is furnishing any home dialysis services;

B. Perform all such administrative functions and maintain such information and records as HCFA may require to verify the transactions and arrangements described in A. above;

C. Submit cost reports, data and information as HCFA may require to determine the costs incurred for equipment, supplies, and services furnished to the facility's home dialysis patient population; and

D. Provide HCFA full access to all such records, data, and information required to perform its functions under section 1881 of the Act.

The agreement shall be effective with respect to services rendered on or after the date it is accepted by HCFA. (During the remainder of 1979, HCFA will approve agreements with an effective date of April 1, 1979, for providers and facilities that have been furnishing services in a manner consistent with this regulation.)

Provision is also made in the agreement for the termination of the agreement by either HCFA or the provider or facility.

3. *Incentive.*

The incentive for providers and renal dialysis facilities electing this optional method of reimbursement is the right to retain the difference between their actual cost for covered supplies, equipment and services, and the target rate. We believe that providers and

renal dialysis facilities, therefore, have an incentive under this method to exercise additional restraints on home dialysis costs by implementing more effective purchasing procedures for supplies and equipment and by more rigorously assessing the actual need for particular services.

Waiver of Proposed Rulemaking

Pub. L. 95–292 was enacted on June 13, 1978. The provisions being implemented by this action—section 1881(b) (4)–(6) of the Act—became effective April 1, 1979. Because of the need to develop sufficient cost information on which to establish the target rates, the complexity of this rate development process and the relatively brief period between enactment and the effective date of this provision in which to accomplish these complex steps, we were unable to publish these regulations as a notice of proposed rulemaking. Moreover, we believe that it is important to implement these provisions promptly because of the advantages they provide to beneficiaries.

Accordingly, we find that good cause exists to waive the notice of proposed rulemaking. However, recognizing that the target reimbursement method is both new and dissimilar from current Part B payment mechanisms, we invite comments on these regulations, which we will consider in making any future amendments to these regulations.

42 CFR Part 405 is amended as follows:

1. A new § 405.440 is added to read as follows:

§ 405.440 Target rate reimbursement for home dialysis services.

(a) *Purpose.* This section implements section 1881(b) (4) and (6) of the Social Security Act by specifying:

(1) The conditions under which approved renal dialysis facilities and providers may receive payment for home dialysis services (as specified in § 405.231(p)) under an optional target reimbursement rate per treatment; and

(2) How the target rate will be determined and applied.

(b) *Conditions for, and limitation on, payment.* (1) In order for a provider or renal dialysis facility to receive reimbursement under this section: (i) It must have an agreement with HCFA in accordance with § 405.691; and (ii) the specified services must be furnished to patients whose self-care home dialysis is under the direct supervision of the provider or facility.

(2) The target reimbursement rate per treatment established under this section shall be considered as payment in full for specified services provided in accordance with paragraph (b)(1) of this section.

(3) Payment will be made under Part B of Medicare at 80 percent of the target reimbursement rate per treatment or 80 percent of the balance of the rate after first applying any unmet Part B deductible. The beneficiary is liable for the balance of 20 percent of the target reimbursement rate per treatment or 20 percent of the balance of the rate after first applying any unmet Part B deductible.

(c) *Establishment of rate.* (1) HCFA will establish for each calendar year a separate target reimbursement rate per treatment for hemodialysis and peritoneal dialysis, adjusted for regional variations.

(2) Rates will be computed during the last quarter of each calendar year and will apply to the following calendar year. They will be based upon the most recent data available to HCFA at the time (including the actual cost of supplies, equipment and support services furnished under this section). In establishing the rates, HCFA may utilize a competitive-bid procedure, a prenegotiated rate procedure, or any other procedure it determines is appropriate and feasible in order to carry out the provisions of this section in an effective and efficient manner.

(3) The rates are intended to cover:

(i) The cost of providing medically necessary home dialysis supplies and equipment;

(ii) The cost of providing personnel to aid in home dialysis;

(iii) The administrative cost of providing these services; and

(iv) An allowance to provide an incentive for the efficient delivery of home dialysis services.

(d) *Allowable and excluded costs.* (1) Allowable costs included in the target reimbursement rate will be the reasonable costs of home dialysis services provided to medicare beneficiaries. Reasonable costs include all necessary and proper expenses incurred by the provider or renal dialysis facility in the provision of home dialysis services, such as administrative costs, maintenance costs, supply costs, employee compensation and travel costs, and premium payments for employee health and pension plans. They include both direct and indirect costs, and normal standby costs.

(2) Excluded from reasonable costs are costs which:

(i) Are not related to patient care under this section;

(ii) Are for items or services specifically not reimbursable under the program; or

(iii) Flow from the provision of luxury items or services (items or services substantially in excess of, or more expensive than, those generally considered necessary for the provision of needed health services).

(e) *Reimbursement principles.* (1) Except as specified in paragraph (e)(2) of this section, the cost reimbursement principles specified in Subpart D, beginning with § 405.415, Depreciation, shall also apply in recording and reporting costs of home dialysis services.

(2) The following principles shall not apply:

(i) Section 405.429, Return on equity capital of proprietary providers;

(ii) Section 405.430, Inpatient routine nursing salary cost differential;

(iii) Section 405.436, Reimbursement of organ procurement agencies (OPA) and histocompatibility laboratories;

(iv) Section 405.451, Cost related to patient care;

(v) Section 405.452, Determination of cost of services to beneficiaries; and

(vi) Section 405.454, Payments to providers, through § 405.488, Effect of principles.

(f) *Effect of opting for 100 per cent reimbursement.* If a provider or facility elects the target reimbursement rate method and also elects to enter into an agreement (under § 405.690) for 100 percent reimbursement for installation and maintenance of equipment, the target rate will be adjusted by excluding all costs associated with the purchase, depreciation, installation, maintenance and reconditioning of dialysis equipment and the cost of supportive equipment.

(g) *Limitations on rate.* (1) The target reimbursement rate shall not exceed 70 percent of the national average payment before application of the coinsurance requirement, adjusted for regional variations, for maintenance dialysis services furnished in approved providers and facilities during the preceding fiscal year.

(2) In determining the national average, payments for cost components that are not covered for home dialysis services under this section (e.g., physician services rendered to renal dialysis patients (see § 405.542)) shall be excluded.

(h) *Publication and use of rates.* (1) On or before December 1 of each year, HCFA will publish the list of target reimbursement rates, adjusted for regional variations, for the following calendar year.

(2) Once published, those rates shall be used, without recomputation, throughout the calendar year for which they are established.

2. Section 405.601 is revised to read as follows:

§ 405.601 Scope of subpart.

The provisions of §§ 405.602–405.626 discuss provider agreements which an eligible provider of services must file with the Secretary in order to qualify for participation in the health insurance program for the aged. Sections 405.651–405.663 and §§ 405.670–405.678 discuss agreements under which Part A intermediaries and Part B carriers will perform specified functions necessary in the administration of the hospital insurance and supplementary medical insurance programs. Section 405.685 discusses agreements with the Secretary shall enter into with any State for the purpose of assisting the Secretary in determining whether an institution or agency situated in such State is a hospital, skilled nursing facility, or home health agency, and whether an independent laboratory meets the conditions for coverage of services, or whether a clinic, rehabilitation agency or public health agency meets the requirements of section 1861(p)(4). Section 405.690 discusses agreements that HCFA will enter into with approved providers of services and renal dialysis facilities for full reimbursement of the reasonable cost of purchase, installation, maintenance, and reconditioning of home dialysis equipment. Section 405.691 discusses agreements that HCFA will enter into with approved providers of services and renal dialysis facilities for reimbursement for the cost of home dialysis supplies and equipment and self-care home dialysis support services on the basis of a target reimbursement rate.

3. A new § 405.691 is added to read as follows:

§ 405.691 Agreements with approved providers or ESRD facilities for reimbursement of home dialysis supplies, equipment, and support services on a target reimbursement rate basis.

(a) *General requirement.* As provided by section 1881(b) (4) and (5) of the Act and § 405.440 of this part, HCFA may execute agreements for reimbursement on a target reimbursement rate basis with approved providers or ESRD facilities which demonstrate their ability to furnish efficiently the full scope of services, including, where necessary, the services of trained home dialysis aides as specified in § 405.231(p)(4). The agreement shall be effective with respect to services rendered on or after the date it is accepted by HCFA. (See § 405.440 for conditions for target rate reimbursement.)

(b) *Terms.* The agreement must provide that the provider or facility agrees to:

(1) Assume full responsibility for directly obtaining or arranging for the provision of necessary supplies, equipment, and services specified in § 405.231(p) to all patients for which it is furnishing any home dialysis services.

(2) Perform all administrative functions and maintain information and records as HCFA may require to verify the transactions and arrangements specified in paragraph (b)(1) of this section;

(3) Submit cost reports, data, and information as HCFA may require on costs incurred for equipment, supplies, and services furnished to home dialysis patients; and

(4) Provide HCFA full access to all records, data, and information required to perform its functions.

(c) *Review.* Agreements will not have a fixed expiration date. However, each provider or facility having an agreement under this section will be reviewed by HCFA at least once a year to determine whether it is complying with the terms of the agreement.

(d) *Termination by HCFA.* (1) If HCFA finds that a provider or facility has failed to perform its obligations under paragraph (b) of this section, HCFA may terminate its agreement with the provider or facility. HCFA will notify the provider or facility in writing of its intention to terminate the agreement and state the reasons for the termination. The provider or facility will be given the opportunity to submit a statement and evidence as to why the agreement should not be terminated.

(2) If no statement or evidence is received within 30 days after the date of initial notification, or if HCFA is not persuaded to alter its determination by the statement or evidence, HCFA shall give written notice of termination to the provider or facility at least 15 days before the effective date of termination of the agreement. In addition to giving notice to the provider or facility, HCFA shall also give notice of such termination to the public.

(3) Within 30 days after the effective date of the termination, the provider or facility must make a final accounting for all equipment purchased under the provision for 100 percent reimbursement for installation and maintenance of home dialysis equipment (see § 405.438) and comply with directions from HCFA regarding the disposition of equipment so purchased. HCFA will arrange for continuation of all necessary supplies, equipment, and support services to patients whose self-care home dialysis is under the direct supervision of the provider or facility.

(4) Any provider or facility dissatisfied with a determination terminating the agreement under this section shall be entitled to administrative review in accordance with the procedures set forth in 42 CFR 405.1502–405.1595.

(e) *Termination by provider or facility.* (1) An approved provider or ESRD facility having an agreement under this section may terminate the agreement after giving written notice to HCFA of its intention to terminate such agreement. The notice shall state the effective date of termination of the agreement (preferably the first day of a month).

(2) HCFA may accept the termination date stated in the notice or set a different date. If the notice does not specify the date for the termination of the agreement, HCFA will set a date that is not more than 3 months from the date on the notice filed by the provider or facility.

(3) In addition to giving notice to HCFA, the provider or facility must also give at least 15 days notice to the public by publishing in one or more local newspapers a statement of the date of termination of the provider or facility agreement with HCFA.

(4) Within 30 days after the effective date of termination, the provider or facility must make a final accounting for all equipment purchased under the provision for 100 percent reimbursement for installation and maintenance of home dialysis equipment (see § 405.438) and comply with directions from HCFA regarding disposition of the equipment.

(Secs. 1102, 1814(b), 1833, 1861(v)(1), 1871 and 1881 of the Social Security Act; (42 U.S.C. 1302; 1395(f)(b), 1395, 1395x(v)(1), 1395hh and 1395rr))

(Catalog of Federal Domestic Assistance Program No. 13.773 Medicare—Hospital Insurance and No. 13.774, Medicare—Supplementary Medical Insurance)

Dated: September 4, 1979.

Leonard D. Schaeffer,

Administrator, Health Care Financing Administration.

Approved: October 5, 1979.

Patricia Roberts Harris,

Secretary.

[FR Doc. 79-31094 Filed 10-16-79; 8:45 am]

BILLING CODE 4110-35-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 1

[FCC 79-588]

Revising Rules Concerning Petitions for Reconsideration and Applications for Review

AGENCY: Federal Communications Commission.

ACTION: Amendment of the Commission's rules.

SUMMARY: The Federal Communications Commission amends those sections of its rules dealing with petitions for reconsideration and applications for review. The purpose of these amendments is to correct some shortcomings and inconsistencies in the rules.

EFFECTIVE DATE: October 22, 1979.

ADDRESSES: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Lewis J. Paper or Lee J. Peltzman, Office of General Counsel, (202) 254-6530.

Adopted: September 27, 1979.

Released: October 15, 1979.

By the Commission: Commissioner Lee absent.

In the matter of amendment of §§ 0.251, 0.281, 0.371, 1.104, 1.106, 1.115 of the Commission's rules of practices and procedures.

1. The purpose of this Order is to correct some shortcomings and inconsistencies in §§ 0.251, 0.281, 0.371, 1.104, 1.106 and 1.115 of the Commission's Rules, 47 CFR 0.251, 0.281, 0.371, 1.104, 1.106, 1.115.

2. In essence, the changes adopted here are intended to serve three basic purposes. The first purpose concerns our procedures for applications for review, 47 CFR 1.115. Under existing rules, the Commission does not entertain a petition for reconsideration of an order denying an application for review without reasons. At the same time, the rules do allow a petition for reconsideration if the Commission gives reasons for denying an application for review. Upon reexamination, we now believe that equal treatment should be accorded all orders denying an application for review, regardless of whether the Commission gives reasons for the denial. We are therefore changing the rules to allow a petition for reconsideration of any order denying an application for review if—but only if—the petitioner relies on new facts or changed circumstances.

3. The second purpose of our rule changes concerns the scope of Commission options in reviewing petitions for reconsideration and applications for review. The present rules allow the Commission to grant a petition for reconsideration or application for review and, in the same order, affirm the action being appealed. The rules, however, do not distinguish that option from a situation where the Commission proposes to deny the petition or application and affirm the earlier order. In order to avoid confusion, the changed rules state that the Commission may not grant a petition for reconsideration or an application for review and simultaneously affirm the original order.

4. The third purpose of the new rules is to make it clear that the Commission may act on petitions for reconsideration of actions taken on delegated authority. Other minor changes are also adopted.

5. In order to promote a full understanding of our action here, we believe it would be helpful to examine each of the three foregoing purposes and related changes in greater detail.

Petitions for Reconsideration of Orders Denying Applications for Review

6. Section 5(d)(4) of the Communications Act of 1934 [1] provides that a party may ask the Commission to review any action taken on delegated authority. The action further provides that the Commission may deny such applications for review "without specifying any reasons therefor." 47 U.S.C. 155(d)(5). The Commission's present rules state that a petition for reconsideration will not be entertained if an application for review has been denied without reasons. 47 CFR 1.106(b), 1.115(g). The unstated premise of this rule is fairly apparent. Section 405 of the Act [2] requires the Commission to issue a concise statement of reasons if it denies a petition for reconsideration. It would simply make no sense to allow the Commission to deny an application for review *without* specifying reasons and then require the Commission to provide reasons if it then wants to deny a petition for reconsideration of that order.[3]

7. Despite the logic of the Commission's rule, it has been criticized by the courts. It has been stated that the Commission cannot invoke its procedural rules to avoid a petition for reconsideration supported by good cause. In *Eagle Broadcasting Co.* v. *FCC*,[4] for example, the Commission had refused to consider a petition for reconsideration of an order denying review without reasons. The court ultimately affirmed the Commission's decision. In the course of its opinion, however, the court said it was troubled by the Commission's rule:

> Reliance by the Commission on its own rule against reconsideration would in itself be a clearly inadequate reason for the refusal to rehear. The rule may have some justification where the summary denial of review reflects a Commission judgment that the appeal was frivolous and where the request for rehearing is only a rehash of the same frivolous arguments. But the fact that no reasons were thought necessary when the Commission first heard the case is no basis for rejecting a proffer of new evidence. 514 F.2d at 855. *See also WSTE-TV, Inc.* v. *FCC*, 566 F.2d 333, 337 (D.C. Cir. 1977).

8. The court was even more critical of the Commission in *Crosthwait* v. *FCC*, 584 F.2d 550 (D.C. Cir. 1978). In that case, the Review Board denied a construction permit application for Folkways Broadcasting Company because of the applicant's faulty ascertainment effort. Folkways' application for review was later denied without reasons. On the same day, however, the Commission issued a separate decision in which it allowed a different applicant to file an amendment to cure an ascertainment problem. Folkways therefore asked the Commission to reconsider its decision and to provide it with the same opportunity to amend its ascertainment showing. In rejecting Folkways' petition, the Commission said that its rules preclude reconsideration of an application for review denied without reasons.

9. The court reversed the Commission. The court acknowledged that the Commission could refuse a petition that was " 'a rehash of the same, frivolous arguments' " or a " 'belated attempt to repair (a) defective showing made at the hearing,' not involving newly discovered evidence nor otherwise attended by good cause. (Footnote omitted.)" 584 F.2d at 555. At the same time the court said that Folkways offered a new ascertainment survey which, under the circumstances, should have been considered. On this basis the court concluded that "the Commission improperly invoked its procedural regulations as a basis for declining reconsideration." *Id.*

10. The court's message is plain: the Commission must entertain a petition for reconsideration of an order denying an application for review if the petition is supported by good cause. We are

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[1] 47 U.S.C. 155(d)(4).

[2] 47 U.S.C. 405.

[3] We feel justified in accepting this logic since laws should be interpreted in a sensible manner to avoid absurd results. *Worthy* v. *United States*, 328 F.2d 386, 391 (5th Cir. 1969).

[4] 514 F.2d 854 (D.C. Cir. 1975).

therefore taking this opportunity to amend §§ 1.106(b) and 1.115(g) of the Commission's rules by adding language to specify that the Commission will allow such petitions if they rely on newly discovered facts or on changed circumstances.[5] If a petition does not satisfy that standard, however, we will not hesitate to dismiss it. Otherwise, the Commission would be forced to spend its limited resources reviewing arguments it has already considered and rejected.

11. The rule change described above will nonetheless increase the opportunities to file petitions for reconsideration. Other rule changes being adopted here will decrease the opportunities for reconsideration. These other changes concern Commission orders that deny applications for review *with* reasons. Under our present rules, such orders are subject to petitions for reconsideration. See 47 CFR 1.106(b), 1.115(g). In adopting those rules, the Commission did not explain how or why it distinguished applications denied with reasons from those applications denied without reasons. *See Amendment of Part 1*, 23 RR 1560 (1962). Clearly, however, the distinction lies in the application of the rehearing requirements of Section 405 of the Act. As explained previously, that section requires the Commission to issue a concise statement of reasons when it disposes of a petition for reconsideration. As also explained previously, it makes no sense to require the Commission to give reasons in denying a petition for reconsideration if the action complained of (an application for review) was denied without reasons. This logic obviously would not apply to situations where the Commission had offered reasons in denying an application for review.

12. The Commission's distinction between two kinds of orders—those denying review without reasons as opposed to those denying review with reasons—has created internal problems for the Commission. On occasion the Commission wishes to deny an application for review but, at the same time, wants to clarify the decision rendered by delegated authority. In these instances the Commission may forego the opportunity for such clarification because it knows that the articulation of reasons in denying an application for review will provide an opportunity for reconsideration. This approach is certainly justified if the Commission feels that no new facts or arguments have been presented or could be presented and that acceptance of such petitions would be a waste of the Commission's limited resources. In other words, the Commission may feel that the benefit of greater clarity may not be worth the cost of another round of pleadings.

13. In retrospect, however, we believe this manner of proceeding is not fair to the public. As a general principle, the public is always entitled to a full and complete explanation of any action taken by the Commission. The public is also entitled to a proper allocation of resources so that the Commission does not spend the public's money rehearing the same arguments for the third and fourth time. Unfortunately, the present rules sometimes require the Commission to make a choice between those two goals. And no matter what the choice, one public interest will have to suffer.

14. Upon reexamination of applicable statutory provisions and their legislative history, we now conclude that there is no reason to place the Commission in this dilemma. We believe that, consistent with the language and purposes of the Communications Act, the Commission can refuse to entertain petitions for reconsideration of all orders denying applications for review—even those which specify reasons—unless the petition relies on new facts or changed circumstances.[6]

15. Initially, it should be noted that section 5 of the Act itself does not subject orders on applications for review to the rehearing requirement of section 405. This is significant because, in adopting the new language in section 5(d) in 1961, Congress obviously recognized the potential relationship between section 405 and section 5(d). See 47 U.S.C. 155(d)(6). If Congress wanted section 405 to apply to Commission actions on applications for review, presumably Congress would have made its intentions clear. It is also noteworthy that the statute does not state or suggest the need for different rules if the Commission chooses to deny an application for review with reasons. Again, if Congress wanted to make that distinction, it presumably would have done so, especially given its apparent recognition of the relationship between section 405 and section 5(d).

16. In providing like treatment for all decisions on applications for review, the new rules adopted here do not undermine the purposes for which Congress enacted section 5(d) of the Communications Act. In considering amendments to that section in 1961, Congress made clear its desire to make the Commission's adjudicatory process more efficient.[7] For example, in proposing new language for that section the Senate Commerce Committee stated as follows:

> The purpose of this legislation is to amend the Communications Act of 1934 so that the Federal Communications Commission will be able, by making better use of its own time and more effective use of experienced and technically qualified personnel, to handle its large workload of adjudication cases with greater speed and efficiency than is presently possible. *Facilitating the Prompt and Orderly Conduct of the Business of the Federal Communications Commission*, Committee on Commerce, United States Senate, 87th Cong., 1st Sess., p. 5 (Report No. 576 1961). *See also Facilitating the Prompt and Orderly Conduct of the Business of the Federal Communications Commission*, Committee on International and Foreign Commerce, House of Representatives, 87th Cong., 1st Sess., p. 1 (Report No. 723 1961).

17. The new section 5 of the Act satisfied this purpose of efficiency in several ways. Among other things, the new provisions allowed the Commission to delegate more of its decision-making authority. The procedures on applications for review were then rewritten only to assure the Commission an opportunity to review a case before it became subject to judicial review. Specifically, the Senate Commerce Committee stated as follows:

> The filing of an application for review is made a condition precedent for judicial review of a delegated decision; and the application cannot rely on questions of fact or law upon which the delegated authority has been afforded no opportunity to pass. In this way, the case will be presented to the Commission (and if the application is denied to the courts) with a ruling on every issue, and the Commission will have an opportunity

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[5] "Changed circumstances" here would include legislative changes in the law or cases decided by a court or other forum after the pleading cycle had ended. We wish to emphasize however, that "changed circumstances" would not include those instances in which a party or parties consciously chose to withhold information or did not take advantage of available information. "We cannot allow [a party] to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941). Nor would we allow reconsideration when the Commission on review merely clarified language or offered additional reasoning to support the decision of the delegated authority. Reconsideration would only be warranted where the Commission changed that decision's result.

[6] In order to implement this change, we are amending § 1.106(b) to make clear that where a petition for reconsideration of an order denying an application for review fails to rely on new facts or changed circumstances, it may be dismissed by the staff as repetitious. It is noted, however, that in those cases where the petition does allege new facts or circumstances, the staff shall continue to operate as it presently does in bringing the petition to the Commission.

[7] The Commission already had power to delegate authority in non-adjudicatory matters.

to review the decision before the matter goes before the courts. . . .

These provisions would give the Commission much needed authority, now withheld under present section 5(d)(1), to employ panels of Commissioners or employee boards to pass on adjudicatory cases . . . With the new authority the Commission would be able to concentrate on the important cases involving major policy or legal issues, and hearing of all cases by some authority within the agency should be substantially expedited. *Senate Report, supra* at 8.

18. In other words, the application for review procedure is simply a means for the Commission to review the work of delegated authority.[8] With this procedure, the Congress obviously hoped that the Commission could expedite the processing of its workload and enable the Commissioners themselves to concentrate on important issues. This purpose would not be served if the Commission had to subject itself to another round of pleadings simply because it wanted to clarify the decision by the delegated authority. This seems especially so since reconsideration of delegated decisions can take place at that lower level. *Id. See also* 47 CFR 1.104. It would therefore frustrate the Congressional hope for efficiency if a party could invoke Section 405's rehearing rights twice: once before the delegated authority, and again before the Commission on an application for review denial. Rather than shorten the adjudicatory process, such an interpretation would lengthen it considerably.

[8] Congress intended that the application for review procedure would be patterned after the procedure used by the United States Supreme Court in reviewing petitions for certiorari. *Senate Report, supra*, at 6. Normally, the Supreme Court does not issue an opinion when it denies a petition for certiorari. That fact does not in any way undermine the right of the Commission to set forth reasons in denying an application for review. To begin with, nothing in section 5(d) of the Communications Act prohibits the Commission from explaining such a denial; in fact, by stating that the Commission may deny an application for review without reasons, the language seems to contemplate that, in some cases at least, the Commission will offer reasons. Moreover, it must be remembered that the Commission's relationship with the delegated authority is different than the Supreme Court's relationship with a lower court. In the Commission's case, any decision by the delegated authority ultimately becomes the decision of the Commission for purposes of judicial appeal (unless of course the Commission changes the decision on review). In contrast, a denial of certiorari by the Supreme Court does not in any way constitute an opinion by that court. Therefore, unlike the Supreme Court, the Commission has a continuing responsibility to correct shortcomings in decisions rendered by delegated authority. Nothing in our re-regulation order on adjudicatory practices is inconsistent with this analysis. *Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865 (1976). The relevant portion of that order only explained why the Commission need not take *de novo* review of every decision made under delegated authority.

19. Under the rules adopted here, then, every party will still have at least two bites at the apple. Matters decided initially by the Commission will still be subject to section 405 rehearing requirements. Those matters decided by delegated authority will also be subject to that section 405 requirement as well as the application for review procedure (and, if attended by good cause, reconsideration of the order on review). In this way, every party will have more than adequate opportunity to make its case to the Commission.

Options Concerning Applications for Review and Petitions for Reconsideration

20. Our next set of rule changes here concern the Commission's options in disposing of applications for review and petitions for reconsideration. Our present rules indicate that the Commission or delegated authority may grant a petition for reconsideration and, in the same order, affirm the original action. 47 CFR 1.106(k). Our rules with respect to applications for review explicitly state that the Commission may simultaneously grant an application for review and affirm the original order. 47 CFR 1.115(i).

21. In retrospect, these rules are not entirely clear. In denying a petition for reconsideration, for example, the Commission must issue a concise statement explaining its disposition. 47 U.S.C. 405. A denial of such a petition, in effect, amounts to an affirmance of the original action. The rules do not provide any indication as to how that situation differs from one where the Commission grants reconsideration and then affirms the original order. The application for review procedures suffer from the same ambiguity. Because of these ambiguities, there has been a lack of consistency in Commission approaches. Sometimes the Commission grants reconsideration and then affirms the original order; in other cases the Commission simply denies reconsideration and allows the original order to stand. Similar inconsistencies also appear in our decisions disposing of applications for review.

22. We wish to take this opportunity to clarify our rules on this point. Specifically, we are amending §§ 1.106(k) and 1.115(i) to state that the Commission or designated authority will not grant a petition or application and simultaneously affirm the original order. (Under the new rules the Commission will, of course, continue to have the authority to supply additional explanation in an order which denies reconsideration but, through that denial, effectively affirms the prior decision.) If additional proceedings are ordered, however, the Commission or delegated authority may affirm the original order after the completion of those additional proceedings. Affirmance is appropriate in these latter cases because the Commission or delegated authority has done something more than consider the merits of the petition or application; it has engaged in rehearing to allow *de novo* review of the matter.

Minor Clarifications

23. We are making other minor changes to clarify our rules on petitions for reconsideration and applications for review. Thus, the present § 1.104(b) states that all petitions requesting reconsideration of final actions taken pursuant to delegated authority will be acted on by the delegated authority. This provision conflicts with § 1.106(a) of the rules, which explicitly allows the delegated authority to refer the petition to the Commission. We are therefore amending § 1.104(b) to allow that referral to the Commission.[9]

24. In another change, we are amending § 1.104(d) of the Rules, which concerns deadlines for filing applications for review under certain circumstances. The rule specifies that such pleadings should be filed "within 30 days after final action" on petition for reconsideration. Unlike other rules concerning deadlines, this provision does not account for the situation when there is a public announcement of the action but no release of the full text of the Commission order. In these latter situations, the time for filing an application for review should begin to run the day the public notice is released. The new rule makes the appropriate changes so that this provision is consistent with the other provisions of our rules.

25. Finally, other sections of the rules have been renumbered and/or rewritten in the interest of consistency.

Conclusion

26. The changes adopted here concern Commission procedure and practice. Moreover, since the changes primarily only reflect a desire to make our rules consistent with established case law, we find that public comment will not be necessary. For these reasons, the Commission need not comply with the prior public notice, comment and effective date provisions of the

[9] We are also changing § 1.104(b) of the rules to require referral to the Commission if reconsideration is requested of a designation order. Since an individual bureau automatically is made a party in hearing cases, it would be inappropriate for the bureau to reconsider the matter on the merits. A similar change is being made for consistency in our delegated authority rules. 47 CFR 0.281.

Administrative Procedure Act, 5 U.S.C. 553(b).

27. Authority for adoption of the rule amendments contained herein is set forth in sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r).

Accordingly, it is ordered that, effective October 22, 1979, §§ 0.251, 0.281, 0.371, 1.104, 1.106 and 1.115 of the Commission's rules, 47 CFR 0.251, 0.281, 0.371, 1.104, 1.106, and 1.115, are amended as set forth in the attached Appendix.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303).

Federal Communications Commission.

William J. Tricarico,

Secretary.

PART 0—COMMISSION ORGANIZATION

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations, is amended as follows:

1. Section 0.251, paragraph (e) is added to read as follows:

§ 0.251 Authority delegated.

* * * * *

(e) The General Counsel is delegated authority to dismiss as repetitious any petition for reconsideration of a Commission order denying an application for review which fails to rely on new facts or changed circumstances.

* * * * *

2. Section 0.281, paragraph (b) is revised to read as follows:

§ 0.281 Authority delegated.

* * * * *

(b) * * *

(2) Petitions and other requests for reconsideration of actions taken by the Chief, Broadcast Bureau, when such petitions or requests contain new or novel arguments not previously considered by the Commission, present facts or arguments which appear to justify a change in Commission policy, or request reconsideration of orders designating cases for hearing.

3. Section 0.371, paragraph (j) is added to read as follows:

§ 0.371 Authority delegated.

* * * * *

(j) To dismiss, as repetitious, any petition for reconsideration of a Commission order denying an application for review which fails to rely on new facts or changed circumstances.

PART 1—PRACTICE AND PROCEDURE

Part 1 of Chapter I of Title 47 is amended as follows:

1. Section 1.104, paragraphs (b) and (d) are revised to read as follows:

§ 1.104 Preserving the right to review; deferred consideration of application for review.

* * * * *

(b) Any person desiring Commission consideration of a final action taken pursuant to delegated authority shall file either a petition for reconsideration or an application for review (but not both) within 30 days from the date of release of the document containing the full text of such action, or in case such document is not released, after release of a public notice announcing the action in question. The petition for reconsideration will be acted on by the designated authority or referred by such authority to the Commission: *Provided,* That a petition for reconsideration of an order designating a matter for hearing will in all cases be referred to the Commission. The application for review will in all cases be acted upon by the Commission.

Note.—In those cases where the Commission does not intend to release a document containing the full text of its action, it will state that fact in the public notice announcing its action.

* * * * *

(d) Any person who has filed a petition for reconsideration may file an application for review within 30 days from the date of release of the document containing the full text of the final action on his petition, or in case the document is not released, after release of a public notice announcing the final action on his petition. If a petition for reconsideration has been filed, any person who has filed an application for review may: (1) Withdraw his application for review, or (2) substitute an amended application therefor.

Note.—In those cases where the Commission does not intend to release a document containing the full text of its action, it will state that fact in the public notice announcing its action.

2. Section 1.106, paragraph (b), (c), (d) and (k) are revised to read as follows:

§ 1.106 Petitions for reconsideration.

* * * * *

(b)(1) Subject to the limitations set forth in paragraph (b)(2) of this section, any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present:

(i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or

(ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

(3) A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.

(c) A petition for reconsideration which relies on facts not previously presented to the Commission or to the designated authority may be granted only under the following circumstances:

(1) The facts fall within one or more of the categories set forth in § 1.106(b)(2); or

(2) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest.

(d)(1) The petition shall state with particularity the respects in which petitioner believes the action taken by the Commission or the designated authority should be changed. The petition shall state specifically the form or relief sought and, subject to this requirement, may contain alternative requests.

(2) The petition for reconsideration shall also, where appropriate, cite the findings of fact and/or conclusions of law which petitioner believes to be erroneous, and shall state with particularity the respects in which he believes such findings and conclusions should be changed. The petition may request that additional findings of fact and conclusions of law be made.

* * * * *

(k)(1) If the Commission or the designated authority grants the petition for reconsideration in whole or in part, it may, in its decision:

(i) Simultaneously reverse or modify the order from which reconsideration is sought;

(ii) Remand the matter to a bureau or other Commission personnel for such further proceedings, including rehearing, as may be appropriate; or

(iii) Order such other proceedings as may be necessary or appropriate.

(2) If the Commission or designated authority initiates further proceedings, a ruling on the merits of the matter will be deferred pending completion of such proceedings. Following completion of such further proceedings, the Commission or designated authority may affirm, reverse, or modify its original order, or it may set aside the order and remand the matter for such further proceedings, including rehearing, as may be appropriate.

(3) Any order disposing of a petition for reconsideration which reverses or modifies the original order is subject to the same provisions with respect to reconsideration as the original order. In no event, however, shall a ruling which denies a petition for reconsideration be considered a modification of the original order. A petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious.

Note.—For purposes of this section, the word "order" refers to that portion of its action wherein the Commission announces its judgment. This should be distinguished from the "memorandum opinion" or other material which often accompany and explain the order.

* * * * *

3. Section 1.115, paragraphs (g), (h) and (i) are revised to read as follows:

§ 1.115 Application for review of action taken pursuant to delegated authority.

* * * * *

(g) The Commission may grant the application for review in whole or in part, or it may deny the application with or without specifying reasons therefor. A petition requesting reconsideration of a ruling which denies an application for review will be entertained only if one or more of the following circumstances is present:

(1) The petition relies on facts which related to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or

(2) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

(h)(1) If the Commission grants the application for review in whole or in part, it may, in its decision:

(i) Simultaneously reverse or modify the order from which review is sought;

(ii) Remand the matter to the designated authority for reconsideration in accordance with its instructions, and, if an evidentiary hearing has been held, the remand may be to the person(s) who conducted the hearing; or

(iii) Order such other proceedings, including briefs and oral argument, as may be necessary or appropriate.

(2) In the event the Commission orders further proceedings, it may stay the effect of the order from which review is sought. (See § 1.102.) Following the completion of such further proceedings the Commission may affirm, reverse or modify the order from which review is sought, or it may set aside the order and remand the matter to the designated authority for reconsideration in accordance with its instructions. If an evidentiary hearing has been held, the Commission may remand the matter to the person(s) who conducted the hearing for rehearing on such issues and in accordance with such instructions as may be appropriate.

Note.—For purposes of this section, the word "order" refers to that portion of its action wherein the Commission announces its judgment. This should be distinguished from the "memorandum opinion" or other material which often accompany and explain the order.

(i) An order of the Commission which reverses or modifies the action taken pursuant to delegated authority is subject to the same provisions with respect to reconsideration as an original order of the Commission. In no event, however, shall a ruling which denies an application for review be considered a modification of the action taken pursuant to delegated authority.

* * * * *

[FR Doc. 79-32081 Filed 10-18-79; 8:45 am]

BILLING CODE 6712-01-M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1011

Commission Organization; Delegations of Authority

AGENCY: Interstate Commerce Commission.

ACTION: Final rule (Administrative rule change).

SUMMARY: New rules and procedures affecting the Commission's internal organization became effective January 1, 1978 (49 FR 65181) and were amended August 1, 1978. This document further amends the rules at 49 CFR 1011 to provide that transfer applications which are filed with directly related operating rights conversion applications and/or directly related securities issuance applications will be decided, where possible, on a consolidated basis, by the Review Board assigned to handle finance proceedings rather than the Commission's Motor Carrier Board. Because this amendment involves the internal organization and procedures of the Commission, it is being issued in final form, and public comments are not being requested.

EFFECTIVE DATE: September 27, 1979.

FOR FURTHER INFORMATION CONTACT: Michael Erenberg, 202-275-7245.

SUPPLEMENTAL INFORMATION: At present, processing of transfer applications filed under 49 U.S.C. 10926 which have directly related securities applications filed under 49 U.S.C. 11301-11302 or directly related conversion applications filed under 49 U.S.C. 10922 or 10923 are handled by three different decisional bodies. The Motor Carrier Board has delegated authority over transfer applications under 49 CFR 1011.6(b)(4); and operating rights review board has authority over conversion applications under 49 CFR 1011.6(g); and the Finance Board has authority over securities application proceedings under 49 CFR 1011.6(c). This separation is caused by the limited jurisdiction of each decisional body.

The handling of this type of finance proceeding (the transfer application) which causes the need for the other two types of directly related proceedings would be greatly facilitated by combining the applications into one proceeding for handling by the employee Review Board handling finance matters. Such consolidated handling will greatly speed up case processing, reduce paper work, free staff time for other work, and reduce the possibility of paper processing errors. To enhance the conformity of decisions on these consolidated, and somewhat more complicated, proceedings, these cases will be assigned to the employee Review Board handling finance matters.

It is ordered:

49 CFR 1011.6(g) is amended by adding subdivision (3) thereto which will read as follows:

§ 1011.6 Employee boards.

* * * * *

(g) * * *

(3) The employee Review Board handling finance matters will determine, in the first instance, and where possible, consolidated applications relating to the transfer of Certificates and permits filed under 49 U.S.C. 10926 which have directly related securities applications filed under 49 U.S.C. 11301-11302 and/or directly related conversion applications filed under 49 U.S.C. 10922 or 10923.

This decision does not affect significantly the quality of the human

environment or energy consumption. These rules are issued under the authority of 49 U.S.C. 10305 and 5 U.S.C. 553.

By the Commission.

Dated: October 12, 1979.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 79-32400 Filed 10-18-79; 8:45 am]

BILLING CODE 7035-01-M

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49 CFR Ch. X

[Ex Parte No. MC 121]

Policy Statement on Motor Carrier Regulation

AGENCY: Interstate Commerce Commission.

ACTION: Policy statement.

SUMMARY: The Commission adopts a policy statement describing its standards for deciding applications seeking motor carrier authority. Where applicants for authority show that the service proposed is responsive to a useful public purpose, and that they are fit to perform that service, the Commission will grant the application unless those opposing it demonstrate that a grant of authority would endanger their operations, contrary to the public interest.

EFFECTIVE DATE: November 19, 1979.

FOR FURTHER INFORMATION CONTACT: Donald J. Shaw, Jr. (202) 275-7292.

SUPPLEMENTARY INFORMATION: We instituted this proceeding on December 5, 1978, by the publication of a notice in the **Federal Register** (43 FR 56979) in which we announced that we were considering adoption of a policy statement which would articulate, and if necessary modify, the criteria used in deciding cases involving motor carrier entry and acquisition. In light of the maturity of the motor carrier industry and changing economic conditions, we stated that, in carrying out regulatory responsibilities in the motor carrier area, more emphasis would be given to the benefits of healthy competition than to the protection of existing carriers.

To accomplish this goal in common carrier proceedings, we proposed to alter the three-part test first established in *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936). These criteria are:

> * * * [W]hether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

We proposed eliminating the second part of the test, which concerns existing carriers' ability to meet the demonstrated public purpose as well as applicant. We announced that, in evaluating motor common carrier application, we would follow these standards:

> (1) An applicant must demonstrate that the service proposed will serve a useful public purpose, responsive to a public demand or need; and
>
> (2) The Commission will grant common carrier authority commensurate with the demonstrated need unless it is established by those opposing the application that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers contrary to the public interest.

Our proposed standard for evaluting contract carrier applications will be described below.

We also stated that we were considering formulating new rules relating to the issuance of emergency temporary authority and new policy guidelines for handling applications for the merger, acquisition, and consolidation of motor carriers.

Preliminary Matters

Since this proceeding was instituted, we have determined that it was necessary to institute a rulemaking proceeding to formulate new rules pertaining to emergency temporary authority. One proposal in that area is now pending in Ex Parte No. MC-64 (Sub-No. 2), *Special Temporary Authority Procedures*, published in the **Federal Register** on March 20, 1979 (44 FR 16996). Due to the complex issues involved in the establishment of new policies and guidelines in the area of motor finance transactions, we now believe that those issues will require separate consideration. We have, therefore, instituted Ex Parte No. 55 (Sub-No. 38), *Antitrust and Competition Factors in Motor Carrier Finance Cases*, (44 FR 21953).

The motor common carriers of passengers argue that their situation is different from that of motor carriers of property and that a different policy is required for them. Applicants for common carrier authority to transport both passengers and property must bear the burden of proving public convenience and necessity. The support normally relied upon by these two kinds of applicants differs. Property carriers can usually rely upon support from repetitive shippers, often with professionally staffed traffic departments. Passenger carriers, on the other hand, are more likely to serve the occasional user—persons who take intercity bus trips or who charter buses relatively infrequently—whose testimony is harder to obtain and who cannot usually be as firm in describing future service needs. Thus, passenger and most property carriers face different problems in pursuing an application for operating authority. However, it does not necessarily follow that the policies we apply in evaluating the necessarily different kinds of evidence that might be introduced in different kinds of proceedings should themselves be different. The *Pan American* case itself, after all, was a passenger application, and the standards developed there have worked well in evaluating property carrier applications. We believe that we can develop a statement on entry policy that will be applicable both to property and passenger carriers.

Western Pacific Transport Company, a motor common carrier that is a wholly-owned subsidiary of the Western Pacific Railroad, is concerned about Commission policy which requires rail-affiliated motor carriers to show "special circumstances" over and above the normal showing of public convenience and necessity before they can obtain unrestricted motor carrier authority. It requests clarification of that policy here. Any change in the "special circumstances" policy would have a significant impact on the rail and motor carrier industries. Since that issue is beyond the scope of this proceeding, we will not change our policy in that area here. It will be considered in Ex Parte No. 230 (Sub-No. 5), *Improvement of TOFC/COFC Regulation*, in which an advance notice of proposed rulemaking was issued August 21, 1979 (44 FR 49279).

The Comments

Seventy-one initial statements were submitted in response to our proposed policy statement. Thirty-seven separate comments were submitted by individual motor carriers or groups of motor carriers. Those comments are the views of approximately 175 regulated motor carriers, representing almost all the segments of the motor carrier industry. They include both common and contract carriers; established carriers; new entrants; regular-route, general commodities carriers; specialized, irregular-route carriers; and passenger carriers. Six separate comments were submitted by various motor carrier associations: The American Trucking Associations, Inc., on behalf of itself and four specified member conferences; The Common Carrier Conference—Irregular Route of the American Trucking

Associations, Inc.; The Regular Common Carrier Conference of The American Trucking Associations, Inc.; The Contract Carrier Conference, Inc.; The Oil Field Haulers Association, Inc.; and National Automobile Transporters Association.

Six Federal agencies—the Department of Transportation, the Department of Justice, the Federal Trade Commission, the General Services Admininstration, the Council on Wage and Price Stability, and the Department of the Army—and the States of New Jersey, Utah, and Illinois submitted comments. The views of the shipping public were represented by comments from a total of 13 manufacturing companies, trade associations, and shipping groups, such as the National Industrial Traffic League, National Small Shipments Traffic Conference, Drug and Toilet Preparation Traffic Conference, and American Paper Institute, Inc. Statements were also filed by the Motor Carrier Lawyers Association; The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; Act, Inc.; and two individuals, one a registered ICC practitioner and the other a property and casualty underwriter. We appreciate the time and effort expended by these participants to inform us of their views with respect to the proposed policy statement.

The comments cover the entire spectrum of positions on the subject. The lines are very sharply drawn between the motor carrier industry and the Federal agencies. The regulated carriers and their trade associations (except the Contract Carrier Conference, Inc.) generally oppose adoption of the proposed policy statement and many of the current steps that this Commission has taken to change motor carrier regulation. Some argue that the regulatory changes which the Commission proposes here go to the basic purposes of the statutory scheme itself, that they cannot lawfully be made administratively, and that they would require statutory change. Some point to chaotic conditions which existed prior to regulation and predict that any further loosening of entry controls will destroy the present stability and prosperity of the trucking industry. They do not, however, claim that the industry is comparable to that which existed in 1935. Some point out that not all trucking companies are large and enormously profitable, but none has argued convincingly that the regulated segment of the industry, taken as a whole, is anything but financially healthy.

The Federal agencies applaud the proposed policy change and urge this Commission to go even further to institute an open-entry policy. They rely largely on the application of economic theory, and cite the opinions of professional economists to the effect that the motor carrier industry is naturally competitive, and that freer entry will result in lower prices with no harmful reduction in service quality. One of the government parties—the Federal Trade Commission—in support of its argument that the industry, while it may have needed regulatory protection in 1935 does not need it today, has provided comparisons between the industry as it was then and as it is now.

The views expressed by shipper interests are somewhat varied, but shippers generally take a middle position. They favor increased competition, and they also commend the Commission on its recent actions regarding regulatory reform of the motor carrier industry. Some, however, fear that adoption of this proposal may lead to completely open entry into motor transportation, which they believe might adversely affect the shipping public. Those same respondents favor entry control to guard against overcapacity, and they support continued regulation of such matters as financial responsibility and adequate insurance as necessary to protect the public. Several shippers favor total open entry.

The State agencies are primarily concerned with local issues. The Illinois Department of Revenue believes that the proposed policy could hinder its ability to collect State motor fuel tax from interstate carriers. The New Jersey Department of Transportation is concerned about the effect of the policy on interstate commuter bus operations. The Utah Motor Carrier Committee of the Utah Department of Transportation fears that adoption of the proposed policy statement may have an adverse impact on motor carrier service to small Utah communities.

Motor Carrier Entry Policy

The primary purpose of this proceeding is to appraise our policy relating to motor carrier entry control and to articulate a statement pertaining to the role of competition in applications for motor carrier authority. We are mindful that in *Trans-American Van Service, Inc.* v. *United States*, 421 F. Supp. 308 (N.D. TX, 1969), and *P. C. White Truck Line, Inc.* v. *ICC*, 551 F. 2d 1326 (DC Cir. 1977), the Commission was required to consider "* * * the contribution that increased competition might make to the public weal." *P. C. White, Supra*, 551 F. 2d at 1329. In instituting this proceeding, we suggested that elimination of the second *Pan-American* criterion regarding consideration of the adequacy of existing service might be the proper course to follow to give competition adequate consideration. We noted too, that we believed that in the past the Commission might have relied too heavily on adequacy of existing service, thus impeding the growth of beneficial competition.

The need for Federal regulation of the motor carrier industry followed the Supreme Count's decision in the landmark cases of *Buck* v. *Kuykendall*, 267 U.S. 307 (1925), and *Bush Co.* v. *Maloy*, 267 U.S. 317 (1925). There, the Court declared that it was unconstitutional for States to establish any entry control laws or regulations for interstate motor carriers, because the laws or regulations interfered with the free flow of interstate commerce. For approximately 10 years, Congress debated and considered legislation to create a regulatory system intended to support a coordinated nationwide transportation system involving motor carriers and other modes of transportation.

The culmination of this study and debate was the Motor Carrier Act of 1935, which contained a franchise system modeled after the regulatory programs adopted by a number of States. Included in the 1935 Act was a policy statement which was incorporated into the national transportation policy created by the Transportation Act of 1940. We still follow that policy today, see 49 U.S.C. 10101. That policy statement and the legislative history of the Motor Carrier Act of 1935, see 79 Cong. Rec., 12204–12237 (1935), demonstrate that two of Congress' primary goals were to ensure that the public had safe, efficient, and economic transportation services available and to stabilize the motor carrier industry so it could grow and develop. See *Regulation of Transportation Agencies*, S. Doc. No. 152, 73d Cong., 2nd Sess. (1935).

Congress intended the legislation to protect the interests of many different segments of the public, not just the interstate motor carrier industry. It sought to protect shippers from competitors within their own industries that were willing to make use of carriers engaging in discriminatory and unfair practices to obtain lower rates and other concessions; the general public from unsafe and irresponsible operators; and the railroads regulated by the Federal Government and intrastate carriers regulated by individual States from

unfair competition by unregulated interstate carriers. Competition, especially competition between the different modes of transportation was to continue to play an important role in the national transportation system. However, competition was to be held within reasonable limits and kept from becoming destructive and wasteful.

The legislation included an entry control system designed to guard against congestion and oversupply of transportation. However, there was never any intention to create monopoly situations. As was stated by a proponent of the legislation:

> There is nothing in the bill to prohibit the Commission from granting two or more certificates over the same route and there are many operators competing over the same route now that will receive certificates under the grandfather clause as a matter of course. The effect of such a provision is to place the authority in the hands of the Commission, a Government body, to determine whenever public convenience and necessity require additional operations on the public highway. 79 Cong. Rec., 12206 (1935).

The statute required new applicants to meet certain criteria before a certificate or permit could be granted. In deciding applications for common carrier authority, the Commission is required to find whether the present or future public convenience and necessity require the service proposed. See 49 U.S.C. 10922. In a contract carrier application, the Commission must find whether a new operation would be consistent with the public interest and the national transportation policy. These statutory standards are not self-limiting, but instead are extremely broad and flexible. They do not suggest that the Commission should be either open-handed or tight-fisted in dealing with applications. This has meant that the task of defining and refining the statutory concepts has necessarily fallen to the Commission, and we must assume that the Congress knew that this would be the case and acted consciously when it adopted such broad criteria.

Contract carriage.—For the sake of convenience, and because it will require relatively brief comment, we shall turn our attention first to contract carriage. The test here is consistency with the public interest and the national transportation policy, and it is usually assumed to entail a lesser standard of proof than is required in common carrier applications. Also, specific statutory criteria (see 49 U.S.C. 10102(12) and 10923) applicable to contract carrier applications serve to make the applicant's task easier, as they have been construed to place evidentiary burdens upon the opposing carriers. *I.C.C.* v. *J-T Transport Co.*, 368 U.S. 81, 90 (1961). Thus the standard which we announced we would apply in contract carrier applications represents no change from long-standing policy, and it is reaffirmed.

In considering motor contract carrier applications, the Commission's policy will be to find that the effect of a grant of contract carrier authority upon protesting carriers will not be a significant factor unless the protestants themselves can establish that such a grant would endanger or impair their operations to an extent contrary to the public interest.

Common carriage.—Soon after the passage of the Motor Carrier Act of 1935, the Commission, in the *Pan-American* case, articulated tests which it has used since in applying the statutory standard of public convenience and necessity. These tests—the three *Pan-American* criteria—are quoted at the beginning of this decision. The first criterion is directed to whether there is a public demand or need for the proposed service; that is, whether if new authority is granted, it will be used and useful to a prospective customer of the applicant (as is the case in most applications for new authority) or to the applicant and its existing customers (as is the case of applications to use alternate routes or to eliminate gateways). This standard has the effect of placing the overall burden of proof upon the applicant, as required by the Administrative Procedure Act, 5 U.S.C. 556(d). The second *Pan-American* criterion addresses the issue of "adequacy" of existing service. Its effect has been widely construed as placing on the applicant the specific burden of showing that the service it proposes cannot be provided as well by existing carriers. The third criterion goes to the effect which a new competitive service would have on existing carriers' ability to meet the needs of the public they serve.

As we pointed out in the notice initiating this proceeding, the motor carrier industry today is vastly different than it was during the 1930's when the Motor Carrier Act was being considered and enacted by the Congress, and when the standards for its interpretation and application were being formulated by the Commission.[1]

From a struggling industry in 1935, characterized by one-truck operators providing largely short-haul and local drayage service,[2] trucking today is one of the largest businesses in America. According to the American Trucking Associations, Inc., trucking is the nation's largest employer, with over 9 million employees.[3] The trucking industry's share of the available freight traffic increased from 10 percent in 1940, when it handled about 62 billion ton miles, to 24 percent in 1977.[4] The trucks carried some 510 billion ton miles of freight in 1976, with Federally-regulated carriers handling about 44 percent of that amount, or 225 billion ton miles.[5] Operating revenues as reported to the Commission for 1977 by 857 of the largest motor carriers of property and passengers amounted to over 23.2 billion dollars.[6] The average return on equity for the 100 largest trucking companies, which account for half of all industry revenues, was 18.5 percent for the year ending September 30, 1978,[7] as contrasted to a 14 percent average for industry generally.[8]

As the motor carrier industry has developed, and especially in the past two years, the Commission has placed more emphasis on the need for additional competition than on the protection of carriers already in the market. Our statistics bear this out. During the first ten months of fiscal year 1979 (October 1, 1978–July 31, 1979), 98.4 percent of the motor carrier applications which were decided on the merits resulted in full or partial grants of authority. Of these, all but 4.2 percent represented total grants of the authorities ultimately sought by the applicants.

We wish to emphasize that any change that may have occurred in the direction of a more liberal approach to determining application cases did not result from a repudiation of all or any one of the *Pan-American* criteria. In deciding applications, in balancing the need for a new service against the

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[1] Comments of the Federal Trade Commission, filed February 5, 1979, pages 18–21. See also *Issues in Regulating Interstate Motor Carriers*, Study of the Staff of the U.S. General Accounting Office, pages 12–14 (June 20, 1978).

[2] Hearings before the Senate Committee on Interstate Commerce on S. 1629, S. 1632, and S. 1635, 74th cong., 1st Sess. 312 (1935). The vast majority of firms at that time had only one vehicle and were either owner-operated or employed by one person. In contrast, the average number of vehicles operated by regulated carriers by 1968 was 43. G.A.O. Study page 12.

[3] American Trucking Associations, Inc., *Trucking '77*, 1977 Annual Report, page 9.

[4] Transportation Association of America, *Transportation Facts and Trends*, 14th edition (July 1978).

[5] Interstate Commerce Commission, *92nd Annual Report*, page 134 (1978).

[6] Ibid., page 133.

[7] Interstate Commerce Commission, Bureau of Accounts, *Large Class I Motor Carriers of Property, Selected Earnings Data*, page 1 (December 1978).

[8] Investigation and Suspension Docket No. M-29772, *General Increase, S.M.C.R.C.*, slip opinion, page 24 (November 27, 1978).

impact which added competition would have on existing carriers' ability to perform service to the public, we have routinely and consistently addressed and resolved three issues. Has the applicant established a public need for the proposed service? Can existing carriers satisfy the demonstrated need? Will the proposed service cause the protestants to be harmed to such extent as to outweigh the benefits to the public? These three questions are no more than articulations of the three *Pan-American* criteria. *Liberty Trucking Co., Ext.—General Commodities*, 131 M.C.C. 573, 574 (1979).

Also working within the framework of the *Pan-American* criteria we have continuously refined the protestant's evidentiary burden. No longer can the mere willingness of an authorized carrier to perform service, or the showing that it has successfully served a supporting shipper, defeat an application. *Superior Trucking Co., Inc., Ext.—Agric. Machinery*, 126 M.C.C. 292 (1977). In the *Liberty* decision on reconsideration, cited above, we reaffirmed our prior finding that a protestant should be required to demonstrate how new competition might materially jeopardize its ability to serve the public, contrary to the public interest. *Liberty*, supra, at 575; *May Trucking Co.* v. *United States*, 593 F. 2d 1349 (D.C. Cir. 1979).

Today, we take a step further. We adopt a policy statement to the effect that an opposing carrier must bear the evidentiary burden of showing that a grant of authority will adversely affect its operations to the detriment of the public interest, and we expressly eliminate as a factor in making our decision the second *Pan-American* criterion. In addition, we suggest certain non-traditional ways in which an applicant might carry *its* burden of showing that its proposed service will serve a useful public purpose.

Our actions here should not be taken as evidence that we have abdicated our function to determine whether a given proposal is required by the public convenience and necessity. Rather, it means that we are convinced that we have the duty as regulators, charged with administering in today's world a statute that was written and originally construed under vastly different economic and social conditions, to change the standards we use in interpreting and applying the terms and concepts reflected in that statute. See *American Trucking* v. *A., T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967). Our policy, as stated here, reflects our conviction that today's motor carrier industry is generally financially strong, that many segments of the industry have largely competitive characteristics and are capable of being regulated primarily by the economic forces of the marketplace,[9] and that the artifical protections which strict government regulation of entry can provide are currently unnecessary in those instances.

The first of the *Pan-American* criteria places the burden upon the applicant to come forward with evidence of a public need or demand for its service. Under that standard, applicants must show that the service they propose would serve a useful public purpose, responsive to a public demand or need. The normal way to establish this has been for applicants to submit evidence of those who would use the service proposed. We think that this is still the most satisfactory means for an applicant to proceed, for it provides us with the information we need to frame a grant of authority, and provides a factual framework for dealing with the application and the interests of the parties on both sides.

The second *Pan-American* criterion speaks to the question whether the "useful public purpose" which a proposed new operation would meet "can and will be served as well by existing lines or carriers." Thus it raises the issue of adequacy of existing service. In the early days of entry regulation, the effect of this standard was to place upon the applicant the burden of showing that the service it proposed could not be performed as well by existing carriers. As already discussed above, over the years applicants have still been encouraged to provide evidence of their supporting witnesses' experience with available services, but the lack of a showing by the applicant that the existing service is inadequate has not been fatal to its case. Rather the burden has been thrust upon opposing carriers to bear an ever greater evidentiary burden.

The placing of this burden squarely on the opposing carriers is clearly required by today's conditions in the surface transportation industry. As we stated in the notice instituting this proceeding, it is only the opposing carrier who is in a position to show the impact which a grant of authority will have upon it, and it is logical to place upon it the responsibility for developing the record and bearing the burden of producing the evidence as to this issue. We are convinced that the second of the criteria laid down in the *Pan-American* case has outlived its usefulness, and it will no longer be applied.

In determining applications for motor common carrier authority, we will apply these tests:

(1) The applicant must demonstrate that the operation proposed will serve a useful public purpose responsive to a public demand or need.

(2) The Commission will grant authority commensurate with the demonstrated purpose unless it is established by parties opposing the application that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to an extent contrary to the public interest.

Evidentiary Guidelines

The public comments have brought to our attention that, in light of our current entry policy, many carriers do not seem to be aware of the means by which they may oppose effectively an application and thus protect what may be legitimate rights. They are uncertain what evidence must be presented to demonstrate that authorization of a new service might have serious adverse effects upon their ability to continue to provide essential services. It is our responsibility to clarify our current policy regarding the evaluation of applications for permanent motor carrier operating rights.

A carrier opposing a motor carrier entry application should present certain basic evidence to allow us to make a determination about its ability to meet the supporting shipper's service needs. The Commission needs specific factual information to evaluate the degree to which an intervenor's existing operations, and consequently its service to the general public, may be impaired or endangered, to an extent contrary to the public interest, if a new competitive service is authorized. This evidence should be presented in the opponent's verified statement under modified procedure or at the presentation of its case at oral hearing.

The information should include:

(1) A precise description of its pertinent operating authority;

(2) A description of the type and amount of equipment and facilities that it has available to meet the avowed purpose of the application;

(3) A discussion of its present operation, including a description of the specific service it is providing those supporting the application;

(4) The amount of traffic which it has handled that would be subject to diversion to the applicant if the authority sought is granted, and the impact of that diversion on its profitability;

(5) A description of the probable impact on operations which are directly competitive

[9] Interstate Commerce Commission, Initial Report of the Motor Carrier Task Force (May 1979).

with the service which the applicant proposes;

(6) A statement concerning other adverse impacts of a grant of authority on its business generally and on the public such as:

(a) Need to close particular terminals or other facilities;

(b) The number of employees that would be furloughed or dismissed;

(c) The imbalance of its operations and other inefficiencies;

(d) Its ability to continue its existing service to the public due to a reduction in total business, loss of particular traffic in a geographic area, or other factors; and

(e) Effects on fuel efficiency.

This decision does not significantly affect the quality of the human environment or energy consumption.

This notice is promulgated under authority contained in 49 U.S.C. 10101, 10321(a), 10921, 10922, 10923, and 5 U.S.C. 553.

Dated: September 26, 1979.

James H. Bayne,

Acting Secretary.

By the Commission. Chairman O'Neal, Vice Chariman Stafford, Commissioners Gresham, Clapp, Christian, Trantum, Gaskins and Alexis. Vice Chairman Stafford and Commissioner Gresham dissenting.

Vice Chairman Stafford, Dissenting

I strongly agree with Commissioner Gresham that this Policy Statement really means quite little in terms of actual impact.

The statement is more symbolic than practical. It evidences the Commission's current attitude toward (or should I say against) regulation in general and entry controls in particular. If anyone needed it, the statement is an indication that things will not be done the way they used to be done. Old theories and old policies will not carry material weight in future deliberations.

Removal of traditional entry barriers is not the only indication of this attitude. Virtual elimination of rate bureaus as ratemaking organizations is about to be realized. Rate flexibility (in terms of no-suspend zones and even no-notice zones) appears not too far away.

The policy statement disturbs me because it implies that what the ICC has been doing for over forty years has not been in the public interest. I have said it before, and it may sound trite, but I believe the ICC has done a surprisingly good job of regulating. Service is generally better than adequate, and prices are reasonable. There is substantial and healthy competition in the trucking industry. Obviously, the industry has matured. But with all the rhetoric, no one has ever shown with any degree of reliability that most of the same problems that existed before the Motor Carrier Act of 1935 will not be visited upon us again when all of these so-called reforms are implemented.

Had all of these changes occurred in one proceeding, I am confident that any reviewing court would have found that they exceed the bounds of what an agency may do toward self-deregulation. The tactic of smaller, individual rulemakings, each with a limited specific change, has proven very effective in achieving major changes without legislation. Unfortunately, no reviewing court has had the big picture before it; and I doubt if any court ever will. This proceeding represents one more minor rulemaking that is part of a major policy overhaul.

Commissioner Gresham, Dissenting:

How does the majority's statement of "new" policy really change the actual policies which currently are followed by the Commission in deciding the fate of operating rights application cases? This is the real question as I see it. The answer seems to be that no real change has been made. Candidly, I must label this policy statement as "window dressing."

Those who are familiar with current Commission policy undoubtedly can accept this label as accurate and must surely wonder why the Commission has expended so much time and effort merely for the sake of telling them what they already know. Frankly, I do not know why.

At one point the majority states "that in the *past* (emphasis added) the Commission might have relied too heavily on adequacy of existing service, thus impeding the growth of beneficial competition." The key words in that quote are "in the past." I believe even extreme critics of regulation would agree that this quoted analysis of the past does not accurately depict the trend of current regulation by this Commission. I believe these critics would even concede that currently, adequacy of existing service is not the decisive factor in final decisions of this Commission. Going a step further, these critics, if objective, would confirm that today the Commission decides application cases by determining whether the public benefits of a grant of new authority outweigh the detriments which would flow from such a grant and by considering the competitive impact of the outcome of application cases. Today these are the decisive factors, not mere adequacy of existing service. So again, I must ask why the majority has taken such pains to bury court approved and time-tested standards which, as presently applied by the Commission, result in the enhancement of effective competition while avoiding the extremes of destructive competition?

I wonder what the majority believes it actually has changed. Does the majority think that this "new" policy will alter the outcome of application cases? I think not. To illustrate, consider a hypothetical, and very simplistic case. A person who wants new operating authority asks a shipper to support his application for this authority. The shipper agrees to do so. This supporting shipper then tells the Commission that it receives wholly adequate service from existing carriers and that carrier competition for its traffic is intense. Assuming that there are no other issues or overriding factors present in the case such as substantial fuel saving which would result from a grant of this new authority, would the fate of this application differ under the "new" policy from its fate under current Commission policy? The answer is no! I believe that the application would be denied irrespective of whether the "new" policy or the current policy of this Commission was in effect. The only real difference would be in the words used in the decision. Under current policy, the Commission's decision might mention that existing service is adequate although its analysis went far beyond that particular aspect of the case to factors such as the effect of a grant on competition. Under the "new" policy the Commission would merely avoid mentioning the fact that existing service is adequate and instead might say that its denial is based on the fact no useful public purpose would be served by a grant of this new authority. Thus, we have a distinction without difference! Here we have another semantic wrestling match, an exercise from which I will refrain and to which I must respectfully dissent.

As a final point, I challenge the majority to count the number of cases in which this Commission has followed the current administrative policy that operating authority may be granted even if an applicant does not prove that existing service is inadequate. Yes, they are too numerous to count! Again, I must ask why so "much ado about nothing?"

[FR Doc. 79-32279 Filed 10-18-79; 8:45 am]

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Proposed Rules

Federal Register
Vol. 44, No. 204
Friday, October 19, 1979

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 581

Processing Garnishment Orders Issued Against the United States for Child Support or Alimony

AGENCY: Office of Personnel Management.

ACTION: Proposed rulemaking.

SUMMARY: In the matter of proposed uniform procedures for the Executive Branch, including therein, the Territories and Possessions of the United States, the United States Postal Service, the Postal Rate Commission, any Wholly Owned Federal Corporation Created by an Act of Congress, and the Government of the District of Columbia. This proposed rule is published in compliance with Executive Order 12105, December 19, 1978. The purpose of the rule is to provide uniform procedures throughout the executive branch of the Government for the garnishment of moneys (the entitlement to which is based upon remuneration for employment) due and payable by the United States or the District of Columbia, where the garnishment, or similar legal process, is brought to enforce child support or alimony obligations. The executive branch of the Government, for the purpose of this rule, includes the territories and possessions of the United States, the United States Postal Service, the Postal Rate Commission, any wholly owned Federal corporation created by an Act of Congress, and the government of the District of Columbia.

DATE: Comments will be considered, if received no later than December 18, 1979.

ADDRESS: Send comments to: Office of the General Counsel (Room 6H31), Office of Personnel Management, 1900 E Street, N.W., Washington, D.C. 20415.

FOR FURTHER INFORMATION CONTACT: Murray Meeker, Attorney, Office of the General Counsel, Office of Personnel Management, 1900 E Street, N.W., Washington, D.C. 20415 (202–632–5530).

SUPPLEMENTARY INFORMATION:

The Social Services Amendments of 1974

On January 4, 1975, Congress amended the Social Security Act with the enactment of Public Law 93–647, cited as the Social Services Amendments of 1974. Public Law 93–647 added a number of new sections to the Social Security Act, including section 459 which waived the sovereign immunity of the United States to allow for the acceptance of garnishment orders. In substance, section 459 provided that moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States, shall be subject to legal process brought for the enforcement of legal obligations to provide child support or make alimony payments, in like manner and to the same extent as if the United States were a private person.

Tax Reduction and Simplification Act of 1977

On May 23, 1977, Congress enacted the Tax Reduction and Simplification Act of 1977, Public Law 95–30. Title V of Public Law 95–30 further amended the Social Security Act by clarifying and supplementing the garnishment provisions contained in section 459. Additionally, Public Law 95–30 authorized the President or his designee to promulgate regulations for the implementation of the Act in the executive branch.

Executive Order 12105

By Executive Order 12105, dated December 19, 1978, the President authorized the United States Civil Service Commission (now the Office of Personnel Management), in consultation with the Attorney General, the Secretary of Defense, and the Mayor of the District of Columbia, to promulgate garnishment regulations for the executive branch.

On April 27, 1979, the Office of Personnel Management submitted advance copies of the proposed regulations to former Attorney General Griffin B. Bell, Secretary of Defense Harold Brown, and Mayor Marion Barry. We shall complete our consultation with these officials during the period for comment on this proposed rule.

Office of Personnel Management.

Roderick S. Speer,

Assistant Issuance System Manager.

Accordingly, it is proposed that 5 CFR Part 581 be added as follows:

PART 581—PROCESSING GARNISHMENT ORDERS ISSUED AGAINST THE UNITED STATES FOR CHILD SUPPORT OR ALIMONY

Subpart A—Purpose and Definitions

Sec.
581.101 Purpose.
581.102 Definitions.
581.103 Moneys which are subject to garnishment.
581.104 Moneys which are not subject to garnishment.
581.105 Exclusions.
581.106 Future payments.

Subpart B—Service of Process

581.201 Official to receive process.
581.202 Service of process.
581.203 Information minimally required to accompany legal process.

Subpart C—Compliance With Process

581.301 Suspension of payment.
581.302 Notification of obligor.
581.303 Response to legal process or interrogatories.
581.304 Nonliability for disclosure.
581.305 Honoring legal process.
581.306 Lack of moneys due from, or payable by, a governmental entity served with legal process.

Subpart D—Consumer Credit Protection Act Restrictions

581.401 Aggregate disposable earnings.
581.402 Maximum garnishment limitations.

Subpart E—Implementation by Governmental Entities

581.501 Rules, regulations, and directives by governmental entities.

Authority: 42 U.S.C. §§ 659; 661–662; 15 U.S.C. § 1673; E.O. 12105.

Subpart A—Purpose and Definitions

§ 581.101 Purpose.

Section 659 of title 42 of the United States Code, as amended, provides that moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia to any individual, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement of such individual's legal obligations to provide child support

and/or make alimony payments. The purpose of this part is to implement the objectives of section 659 as it pertains to the executive branch of the Government of the United States.

§ 581.102 Definitions.

In this part:

(a) "The executive branch of the Government of the United States" means all "governmental entities" as hereinafter defined, including therein the territories and possessions of the United States, the United States Postal Service; the Postal Rate Commission, any wholly owned Federal corporation created by an Act of Congress, and the government of the District of Columbia.

(b) "Governmental entity" means each and every department (both civilian and military), agency, independent establishment, or instrumentality of the executive branch, including the United States Postal Service, the Postal Rate Commission, any wholly owned Federal corporation created by an Act of Congress, any office, commission, bureau, or other administrative subdivision or creature of the executive branch, and the governments of the District of Columbia and of the territories and possessions of the United States.

(c) "Private person" means a person who does not have sovereign or other special immunity or privilege which causes such person not to be subject to legal process.

(d) "Child support", when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which the individual has such an obligation, and (subject to and in accordance with State or local law) includes but is not limited to, payments to provide for health care, education, recreation, clothing, or to meet other specific needs of such a child or children; the term also includes attorney's fees, interest, and court costs, when and to the extent that the same are expressly made recoverable pursuant to a decree, order, or judgment issued in accordance with applicable State or local law by a court of competent jurisdiction.

(e) "Alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State or local law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; the term also includes attorney's fees, interest, and court costs, when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State or local law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his/her spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses of former spouses.

(f) "Legal process" means any writ, order, summons, or other similar process in the nature of garnishment (which may include attachments, writs of execution, and court ordered wage assignments), which—

(1) Is issued by (i) a court of competent jurisdiction within any State, territory, or possession of the United States, or the District of Columbia, (ii) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process, or (iii) an authorized official pursuant to an order of such a court of competent jurisdiction or pursuant to State or local law, and

(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support and/make alimony payments.

(g) "Legal obligation" means an obligation to pay alimony and/or support which is enforceable under appropriate State or local law.

(h) "Obligor" means an individual having a legal obligation to pay alimony and/or child support.

(i) "Remuneration for employment" means compensation paid or payable for personal services, whether such compensation is denominated as wages, salary, commission, bonus, pay, or otherwise, and includes, but is not limited to those items set forth in § 581.103.

§ 581.103 Moneys which are subject to garnishment.

(a) For the personal service of the obligor in the employment of the executive branch of the Government of the United States as a civilian employee:

(1) Saved pay;
(2) Retained pay;
(3) Night differentials;
(4) Sunday and holiday premium pay;
(5) Overtime pay;
(6) Standby pay;
(7) Environmental differentials;
(8) Hazardous duty pay;
(9) Tropical differentials;
(10) Recruitment incentives;
(11) Any payment in consideration of accrued leave;
(12) Severance pay;
(13) Sick pay;
(14) Physicians comparability allowances;
(15) Special pay for physicians and dentists;
(16) Amounts paid pursuant to a personal services contract where the contractor recipient is a Federal employee;
(17) Merit pay;
(18) Incentive pay;
(19) Cash awards;
(20) Agency and Presidential incentive awards (except wher such award is for making a suggestion); and
(21) Senior Executive Service rank and performance awards.

(b) For the personal service of the obligor in the uniformed services of the United States;

(1) Basic pay (including service academy cadet and midshipmen pay);
(2) Special pay (including inlistment and re-enlistment bonuses);
(3) Lump sum reserve bonus;
(4) Continuation pay for physicians and dentists;
(5) Special pay for physicians, dentists, optometrists, and veterinarians;
(6) Incentive pay;
(7) Variable incentive pay;
(8) Inactive duty training pay;
(9) Administrative duty pay;
(10) Academy official pay (other than personal money allowances);
(11) Any payments made in consideration of accrued leave (basic pay portion only);
(12) Readjustment pay;
(13) Disability retired pay; and
(14) Severance pay (including disability severance pay).

(c) For obligors generally:

(1) Periodic benefits (including a periodic benefit as defined in section 428(h)(3) of title 42 of the United States Code) (Social Security Act) or other payments to such individuals under the programs established by subchapter II of chapter 7 of title 42 of the United States Code (Social Security Act) and by chapter 9 of title 45 of the United States Code (Railroad Retirement Act) or any other system or fund established by the United States (as defined in section 662(a) of title 42 of the United States Code) which provides for the payment of:

(i) Pensions;
(ii) Retirement;

(iii) Retired/retainer pay;
(iv) Annuities;
(v) Refunds of retirement contributions where an application has been filed; and
(vi) Dependents' or survivors' benefits when payable to the obligor.
(2) Amounts received under any Federal program for compensation for work injuries; and
(3) Benefits received under the Longshoremen's and Harbor Workers' Compensation Act.

However, remuneration would not include any payment as compensation for death, including any lump sum death benefit under any Federal program, any payment under any Federal program established to provide "black lung" benefits, any payment by the Veterans Administration as pension, or any payments by the Veterans Administration as compensation for a service-connected disability or death, except any compensation paid by the Veterans Administration to a former member of the Armed Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his/her retired pay in order to receive such compensation. In such case, only that part of the Veterans Administration payment which is in lieu of the waived retired/retainer pay, is subject to garnishment.

§ 581.104 Moneys which are not subject to garnishment.

(a) Amounts paid by way of reimbursement for expenses incurred by an individual in connection with his/her employment, or allowances in lieu thereof, would not be remuneration for employment, including, but not limited to:
(1) In the case of civilian employees:
(i) Uniform allowances;
(ii) Travel and transportation expenses (including mileage allowances);
(iii) Relocation expenses;
(iv) Storage expenses;
(v) Post differentials;
(vi) Foreign areas allowances;
(vii) Education allowances for dependents;
(viii) Separate maintenance allowances;
(ix) Post allowances and supplementary post allowances;
(x) Home service transfer allowances;
(xi) Quarters allowances;
(xii) Cost-of-living allowances (COLA); and
(xiii) Per diem allowances.
(2) In the case of members of the uniformed services:
(i) Position pay (Navy only);
(ii) Basic allowance for quarters;
(iii) Basic allowance for subsistence;
(iv) Station allowances;
(v) Armed Forces health professions scholarship stipends;
(vi) Travel and transportation allowances;
(vii) Dislocation allowances;
(viii) Family separation allowances;
(ix) ROTC subsistence allowance;
(x) Allowance for recruiting expenses;
(xi) Education allowances for dependents;
(xii) Clothing allowances for enlisted personnel; and
(xiii) Uniform allowances for General and Flag officers and for the Surgeon General of the United States.
(3) In the case of volunteers serving under either the Domestic Volunteer Service Act of the Peace Corps Act, all allowances, including, but not limited to, readjustment allowances, stipends, and reimbursements for our-of-pocket expenses.
(b) Remuneration for employment would not include payments made pursuant to:
(1) The provisions of the Federal Tort Claims Act, as amended, sections 1346(b) and 2671 *et seq.*, of title 28 of the United States Code;
(2) Payments or portions of payments made by the Veterans Administration pursuant to section 501–560 of title 38 of the United States Code, in which the entitlement of the payee is based on non-service-connected, disability or death, age, and need;
(3) Refunds in connection with tax overpayments from the Internal Revenue Service;
(4) Grants;
(5) Fellowships; and
(6) Contracts, except where the contractor recipient is a Federal employee.

§ 581.105 Exclusions.

In determining the amount of any "moneys due from, or payable by, the United States" to any individual, there shall be excluded amounts which—
(a) Are owed by such individual to the United States;
(b) Are required by law to be deducted from the remuneration or other payment involved, including, but not limited to deductions for programs under title II of the Social Security Act, as amended, Federal employment taxes, amounts mandatorily withheld for the U.S. Soldiers' and Airmens' Home, and fines and forfeitures ordered by court-martial or by a commanding officer;
(c) Are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and if amounts withheld are not greater than would be the case if such individual claimed all dependents to which he/she was entitled (the withholding of additional amounts pursuant to section 3402(i) of title 26 of the United States Code may be permitted only when such individual presents evidence of a tax obligation which supports the additional withholding);
(d) Are deducted as health insurance premiums, including, but not limited to, amounts deducted from civil service annuities for Medicare where such deductions are requested by the Social Security Administration;
(e) Are deducted as normal retirement contributions (not including amounts deducted for supplementary coverage). (Amounts withheld as Survivor Benefit Plan or Retired Serviceman's Family Protection Plan payments are considered to be normal retirement contributions. Amounts voluntarily contributed toward civil service annuity benefits under section 8343 of title 5 of the United States Code, are considered to be supplementary); or
(f) Are deducted as normal life insurance premiums from salary or other remuneration for employment (not including amounts deducted for supplementary coverage). (Both Servicemen's Group Life Insurance and "regular" Federal Employees' Group Life Insurance premiums are considered to be normal life insurance premiums; "optional" Federal Employees' Group Life Insurance premiums and life insurance premiums paid for by allotment, such as National Service Life Insurance, are considered to be supplementary.)

§ 581.196 Future Payments.

Moneys paid by a governmental entity which may be due and payable to an individual at some future date, shall not be considered due such individual unless and until all of the conditions necessary for payment of the moneys to the individual have been met, including, but not limited to, the following conditions which might apply: (a) Retirement; (b) resignation from a position in the Federal service; (c) application for payment of moneys by the individual.

Subpart B—Service of Process

§ 581.201 Official to receive process.

The head of each governmental entity shall designate an official or officials, identified by title of position, mailing address, telephone number, and, if applicable, geographical area or region, upon whom service of legal process against the entity may be accomplished in order to facilitate and expedite the

entity's compliance with such legal process.[1]

§ 581.202 Service of process.

(a) A party using this part shall serve on the designated official of the governmental entity which has moneys due and payable to the obligor, legal process which names the governmental entity as the garnishee.

(b) Service of legal process brought for the enforcement of an individual's obligation to provide child support and/or make alimony payments shall be accomplished by certified or registered mail, return receipt requested, or by personal service, upon the appropriate agent designated in the appendix to this part for receipt of such service of process (or, if no agent has been designated for the governmental entity having payment responsibility for the moneys involved, then upon the head of such governmental entity). Service upon a United States Attorney is not valaid service of process. The governmental entity shall make every reasonable effort to facilitate proper service of process on the official(s) designated to receive legal process for the governmental entity. If, for example, legal process is not directed to any particular official within the entity, or if it is addressed to the wrong official, the recipient shall, nonetheless, deliver the legal process to the individual who has been designated by the entity to receive service.

(c) Where it does not appear from the face of the process received that it has been brought to enforce the legal obligation(s) authorized in paragraphs (d) and/or (e) of § 581.102, the process must (1) be accompanied by a certified copy of the court order establishing such legal obligation(s), or (2) where the State or local law provides for the issuance of legal process without a support order, such other documentation establishing that it was brought to enforce legal obligation(s) authorized in paragraphs (d) and/or (e) of § 581.102, must be submitted.

(d) In order for the party who caused the legal process to be served to receive the additional five (5) percent provided for in either § 581.402 (a) or (b), it must appear on the face of the legal process that the process was brought for the enforcement of a support order with respect to a period which is twelve (12) weeks in arrears, or a certified copy of the support order (or other evidence acceptable to the head of the governmental entity), establishing this fact, must be submitted.

§ 581.203 Information minimally required to accompany legal process.

(a) Sufficient identifying information must accompany the legal process in order to enable processing by the governmental entity named. Therefore, the following identifying information, if known, is requested:

(1) Full name of the obligor;

(2) Date of birth of the obligor;

(3) Employment number, social security number, or civil service retirement claim number of the obligor;

(4) Component of the governmental entity for which the obligor works, and the official duty station or worksite of the obligor; and

(5) Status of the obligor, e.g., employee, former employee, or annuitant.

(b) In the event that the information submitted is not sufficient to identify the obligor, the legal process shall be returned directly to the court, or other authority, with an explanation of the deficiency. However, prior to returning the legal process, if there is sufficient time, an attempt should be made to inform the party who caused the legal process to be served, or his/her representative, that the legal process will not be honored unless adequate identifying information is supplied. If legal process is returned to the court, or other authority, the governmental entity may wish to send copies of the returned documents to the United States Attorney for the district embracing the jurisdiction from which the legal process issued.

Subpart C—Compliance With Process

§ 581.301 Suspension of payment.

Upon proper service of legal process, together with all supplementary documents and information as required by §§ 581.202 and 581.203, the head of the governmental entity or his/her designee, shall identify the obligor to whom that governmental entity holds moneys due and payable as remuneration for employment, and shall suspend payment of such moneys for the amount necessary to permit compliance with the legal process in accordance with this part and the law of the jurisdiction from which it was issued. However, if the governmental entity receives a subpoena, summons, or other document which merely requests information concerning moneys due an obligor, no suspension action shall be taken.

§ 581.302 Notification of obligor.

(a) As soon as possible, but not later than fifteen (15) calendar days after the date of valid service of legal process, the agent designated to accept legal process shall send to the obligor, at his or her duty station or last known home address, written notice:

(1) That such process has been served, including a copy of the legal process, together with such other documents as may be required by § 581.202;

(2) Of the maximum garnishment limitations set forth in § 581.402, with a request that the obligor submit supporting affidavits or other documentation necessary for determining the applicable percentage limitation; and

(3) Of the percentage that will be deducted if he/she fails to submit the necessary documentation.

(b) The governmental entity may provide the obligor with the following additional information:

(1) Copies of any other documents submitted in support of the legal process;

(2) That the United States does not represent the interests of the obligor in the pending legal proceedings;

(3) That the obligor may wish to consult legal counsel regarding defenses to the legal process that he or she may wish to assert; and

(4) That obligors in the military service may avail themselves of the protections provided in sections 520, 521, and 523 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S. Code App. §§ 501 *et seq.*).

§ 581.303 Response to legal process or interrogatories.

(a) Except under the circumstances set forth in paragraph 581.305(a), whenever the agent designed to accept service is validly served with legal process, the agent shall respond within thirty (30) calendar days, or within such longer period as may be prescribed by applicable State or local law, after the date valid service is made. Interrogatories which accompany legal process shall also be responded to within this time period.

(b) If State or local law authorizes the issuance of interrogatories prior to or after the issuance of legal process, the agent shall respond to said interrogatories within thirty (30) calendar days after receipt thereof, provided that the document(s) required by § 581.202(c) have been presented.

§ 581.304 Nonliability for disclosure.

No Federal employee whose duties include responding to interrogatories

[1] The head of each governmental entity shall, within 45 days of the publication of these proposed regulations, provide the Office of Personnel Management with the information requested in section 581.201, in order that this information may be included in the appendix of these regulations when they are published as a final rule.

pursuant to § 581.303(b), shall be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or an account of, any disclosure of information made by him/her in connection with the carrying out of any of his/her duties which pertain (directly or indirectly) to the answering of any such interrogatory.

§ 581.305 Honoring legal process.

(a) The governmental entity shall comply with legal process, except where such legal process cannot be complied with because:

(1) It does not, on its face, conform to the laws of the jurisdiction from which it was issued;

(2) The legal process would require the withholding of funds not deemed moneys due from, or payable by, the United States as remuneration for employment;

(3) The legal process is not brought to enforce legal obligation(s) for alimony and/or child support;

(4) It does not comply with the mandatory provisions of this part;

(5) An order of a court of competent jurisdiction enjoining or suspending the operation of the legal process has been served on the governmental entity; or

(6) The governmental entity has been directed by the Department of Justice not to comply with the legal process.

(b) Under the circumstances set forth in paragraph 581.305(a), the governmental entity shall immediately refer the matter to the United States Attorney for the district embracing the jurisdiction from which the legal process issued, and shall inform the party who caused the legal process to be served, or his/her representative, that the legal process will not be honored. To ensure uniformity in the executive branch, governmental entities which have statutory authority to represent themselves shall coordinate their representation with the United States Attorney. When simple administrative matters are involved concerning undisputed problems such as the lack of sufficient identification of the obligor or the lack of proper authorization for the legal process, the governmental entity may file an answer directly with the court, setting forth its objections to the legal process, without referring the matter to the United States Attorney.

(c) In the event that a governmental entity is served with more than one legal process with respect to the same moneys due or payable to any individual, then such moneys shall be available to satisfy such processes on a first-come, first-served basis, provided that in no event will the total amount garnisheed for any pay or disbursement cycle exceed the applicable limitation set forth in § 581.402.

(d) Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due from, or payable by, the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this part. However, where a governmental entity negligently fails to comply with legal process, the Federal Government shall be liable to the same extent that a private person would be liable.

(e) Governemental entities affected by legal process served for the enforcement of an individual's child support and/or alimony payment obligations shall not be required to vary their normal pay or disbursement cycles in order to comply with such legal process. However, legal process which is received too late to be honored during the disbursement cycle in which it is received, shall be fully honored to the extent that the legal process may, in compliance with this part, be satisfied from the next payment due the obligor. The fact that the legal process may have expired during this period would not relieve the governmental entity of its obligation to fully comply.

§ 581.306 Lack of moneys due from, or payable by, a governmental entity served with legal process.

(a) When legal process is served on a governmental entity, and the individual identified in the legal process as the obligor is found not to be entitled to moneys due from, or payable by, the governmental entity, the entity shall follow the procedures set forth in the legal process for such contingency or, if no procedures are set forth therein, shall return such legal process to the court, or other authority from which it was issued, and advise such court, or other authority, that no moneys, the entitlement to which is based upon remuneration for employment are due from, or payable by, the governmental entity to the named obligor.

(b) Where it appears that remuneration for employment due the obligor is only temporarily exhausted or otherwise unavailable, the court, or other authority, shall be fully advised as to why, and for how long, said remuneration will be unavailable, if such information is known by the governmental entity.

(c) In instances where an obligor employee separates from his/her employment with a governmental entity which is presently honoring a continuing legal process, the entity shall inform the party who caused the legal process to be served, or his/her representative, and the court, or other authority, that the payments are being discontinued. In cases where the obligor has retired, separated and requested a refund of retirement contributions, transferred, or is receiving benefits under the Federal Employee's Compensation Act, the entity shall state, if known, the new disbursing governmental entity.

Subpart D—Consumer Credit Protection Act Restrictions

§ 581.401 Aggregate disposable earnings.

The "aggregate disposable earnings", when used in reference to the amounts garnishable under the Consumer Credit Protection Act for child support and/or alimony, are the obligor's remuneration for employment less those amounts deducted in accordance with § 581.105.

§ 581.402 Maximum garnishment limitations.

Pursuant to section 1673(b)(2)(A) and (B) of title 15 of the United States Code, as amended, unless a lower maximum garnishment limitation is provided by applicable State or local law, the maximum part of the aggregate disposable earnings subject to garnishment to enforce any support orders shall not exceed:

(a) Fifty (50) percent of such obligor's aggregate disposable earnings for any workweek, where the obligor asserts by affidavit, or by other acceptable evidence (e.g., a marriage license, birth certificate, or adoption order), that he/she is supporting a spouse and/or dependent child (other than the [former] spouse and/or child with respect to whose support such order is issued), except that an additional five (5) percent will apply if it appears on the face of the legal process, or from other evidence submitted in accordance with § 581.202(d), that such earnings are to enforce a support order with respect to a period which is twelve (12) weeks prior to such workweek.

(b) Sixty (60) percent of such obligor's aggregate disposable earnings for any workweek, where the obligor fails to assert by affidavit, or establishes by other acceptable evidence, that he/she is supporting a spouse and/or dependent child (other than a [former] spouse and/or child with respect to whose support such order is issued), except that an additional five (5) percent will apply if it appears on the face of the legal process, or from other evidence submitted in accordance with § 581.202(d), that such earnings are to enforce a support order with respect to a period which is twelve (12) weeks prior to such workweek.

(c) Where, pursuant to § 581.402(a), an obligor submits evidence that he/she is supporting a second spouse and/or child, copies of such evidence shall be sent by the governmental entity to the garnishor, or his/her representative, together with notification that the obligor's support claim will be honored. If the garnishor disagrees with the obligor's support claim, he/she should immediately refer the matter to the court, or other authority, for resolution.

Supart E—Implementation by Governmental Entities

§ 581.501 Rules, regulations, and directives by governmental entities.

Appropriate officials of all governmental entities shall issue implementing rules, regulations, and directives that are consistent with this part.

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 113

Viruses, Serums, Toxins, and Analogous Products; Standard Requirement for Pasteurella Multocida Bacterin, Avian Isolate, Type 4

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed amendment would revise the regulations by adding new standard requirements for purity, safety, potency, and efficacy to be met by all biological products containing Pasteurella Multocida Bacterin, Avian Isolate, Type 4. It would also delete the general requirements for Pasteurella Multocida Bacterins, Avian Isolates, that are presently found in the standards. Such general requirements would be incorporated in the introductory paragraphs of the standard requirements for Pasteurella Multocida Bacterin, Avian Isolates, Types 1, 3, and 4. Safety test procedures presently found in the standard requirements for types 1 and 3 isolates would also be revised to be consistent with the proposed new standards for the type 4 isolate.

DATE: Comments must be received on or before December 18, 1979.

ADDRESS: Interested parties are invited to submit written data, views, or arguments regarding the proposed regulations to: Deputy Administrator, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 828–A, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

FOR FURTHER INFORMATION CONTACT: Dr. R. J. Price, 301–436–8245.

SUPPLEMENTARY INFORMATION: Standard requirements consist of test methods, procedures, and criteria established by Veterinary Services (VS) for evaluating biological products for purity, safety, potency, and efficacy. Until such standard requirements are developed by VS and are codified in the regulations (9 CFR Part 113), test methods, procedures, and criteria to be used in the evaluation of a product are developed by the licensee and are written into an Outline of Production, which is required to be filed with VS.

When standard requirements for a biological product have been developed by VS, they are proposed for codification in the regulations. Such codfication assures uniformity and general applicability of such standard requirements to all licensees and to the general public. This proposed amendment contains the standard requirements for evaluating all licensed products containing Pasteurella Multocida Bacterin, Avian Isolate, Type 4.

The codification of this new standard requirement would make most of the general requirements for Pasteurella Multocida Bacterins, Avian Isolates, presently found in § 113.101 obsolete. The obsolete general requirements would, therefore, be deleted and those general requirements that remain applicable would be included in the revised § 113.101 and also would be incorporated in the introductory paragraphs of §§ 113.102 and 113.103, which contain standard requirements for Pasteurella Multocida Bacterin, Avian Isolates, Types 1 and 3, respectively.

The safety test contained in §§ 113.102 and 113.103 would be revised to provide flexibility in order to avoid conducting retests when a test bird dies accidentally or shows other unfavorable reactions that are not attributable to the product. This revision will make the present standards for Pasteurella Multocida Bacterin, Avian Isolates, Types 1 and 3, consistent with the proposed new standard for Pasteurella Multocida Bacterin, Avian Isolate, Type 4.

The first letter in each word of the headings for §§ 113.101, 113.102, and 113.103 is to be capitalized.

1. Section 113.101 would be revised to read:

§ 113.101 Pasteurella Multocida Bacterin, Avian Isolate, Type 4.

Pasteurella Multocida Bacterin, Avian Isolate, Type 4, shall be prepared with cultures of *Pasteurella multocida*, avian isolate, type 4 (Little and Lyons classification), which have been inactivated and are nontoxic. Each serial of biological product containing Pasteurella Multocida Bacterin, Avian Isolate, Type 4, shall meet the applicable requirements in § 113.85 and shall be tested for purity, safety, and potency, as prescribed in this section. A serial found unsatisfactory by any prescribed test shall not be released.

(a) *Purity test.* Final container samples of completed product shall be tested for viable bacteria and fungi, as provided in 9 CFR 113.26.

(b) *Safety test.* Observation of the vaccinated turkeys during the prechallenge period of the potency test provided in paragraph (c) of this section shall consitute the safety test. If unfavorable reactions that are attributable to the product occur, the serial is unsatisfactory. If unfavorable reactions that are not attributable to the product occur in one turkey, test results shall be determined by observing the remaining 20 turkeys. If unfavorable reactions that are not attributable to the product occur in two or more turkets, the test shall be declared inconclusive and repeated; provided that, if the test is not repeated, the serials shall be declared unsatisfactory.

(c) *Potency test.* Bulk or final container samples of completed product shall be tested for potency of the type 4 strain, using the two-stage test provided in this paragraph. Turkeys at least 6 weeks of age obtained from the same source and hatch shall be properly identified and used, as provided in this paragraph.

(1) *Vaccinates.* Each of not more than 21 turkeys shall be injected with the dose and by the route recommended on the label. A second dose shall be injected after 3 weeks and the turkeys observed for an additional 2-week prechallenge period.

(2) *Positive controls.* Each of not more than 21 turkeys shall be injected with two doses of a reference bacterin available from Veterinary Services upon request.

(3) *Unvaccinated controls.* Each of not more than 21 turkeys shall be held as controls.

(4) *Challenge.* Not less than 14 days after the second injection, each of 20 vaccinates, each of 20 positive controls, and each of 20 unvaccinated controls shall be challenged intramuscularly with virulent *Pasteurella multocida* strain P–1662, type 4 (Little and Lyons