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The State of South Carolina

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The Honorable T. W. Edwards, Jr., Chairman
Joint Legislative Committee on Energy
Post Office Box 11867
Suite 104, Blatt Building
Columbia, S.C. 29211

Dear Representative Edwards:

You have requested our opinion concerning the definition of "administrative expenses" under Section 155 of P. L. 97-377 (the Warner Amendment) and Department of Energy Ruling 1983-1, and under what conditions, if any, Warner Amendment Funds (Oil Overcharge Funds) may be used for pertinent administrative or direct program expenses in this State.

Such funds, you advise, have been or will be received by the State pursuant to court decisions, administrative rulings, and settlements and are required to be used in certain specified energy conservation programs intended to indirectly benefit the consumers who were victimized by overcharges for oil products in violation of federal law. Such funds received by the States are restricted for use under various energy conservation laws, Department of Energy regulations, rulings, Office of Hearings and Appeals decisions, and court decisions. Approved energy conservation programs have been identified as including:

(A) The program under Part A of the Energy Conservation and Existing Buildings Act of 1976 (42 U.S.C. 6861, et seq.);

(B) The programs under Part D of Title III of the Energy Policy and Conservation Act (relating to primary and supplemental state energy conservation programs)(42 U.S.C. 6321, et seq.);

(C) The program under Part G of Title III of Energy Policy and Conservation Act (relating to energy conservation for schools and hospitals), (42 U.S.C. 6371 et seq.);

(D) The program under the National Energy Extension Service Act, 42 U.S.C. 70001, et seq.); and

(E) The program under the Low-Income Home Energy Assistance Act of 1981 (42 U.S.C. 8621 et seq.).

The Warner Amendment (Section 155 of P. L. 97-377) further provides, among other things:

(1) The funds must be used to benefit consumers under the specified conservation programs.

(2) Funds shall be used to supplement, and not supplant, funds otherwise available for such programs.

(3) No funds disbursed under this Amendment may be used for any administrative expenses of the Department of Energy or of any State, whether incurred in connection with any energy conservation program or otherwise.

The statutory language of the Warner Amendment raised a number of questions concerning the manner in which the funds may be used by the States. Accordingly, the Department of Energy subsequently issued an interpretative ruling to clarify the appropriate uses. DOE Ruling 1983-1 stated, in pertinent part:

(1) If there is a conflict between the provisions of Section 155 of the Act and a provision of the program regulations, the provisions of Section 155 will apply.

(2) A state may not use Section 155 funds for administrative expenses. "Administrative expenses" are those expenses which States have historically considered to be administrative expenses under each program.

(3) State expenses for administering the DOE conservation programs may be taken only from appropriated funds and not from Section 155 funds.

Additionally, in U.S. v. Exxon, 561 F. Supp. 816 (D.C. D.C. 1983), aff'd, 773 F.2d 1240 (TECA 1985), cert. den., _____ U.S. _____, 88 L. Ed.2d 926, 106 S.Ct. 892 (Jan. 27, 1986), the district court provided, inter alia, that funds paid to the States in accordance with its decision "be disbursed in accordance with the procedures set forth in Section 155." Id. at 856. By subsequent Order filed June 10, 1986, the court expressly confirmed the applicability of DOE Ruling 1983-1 to the disbursement of funds involved in that case.

In South Carolina, the Joint Legislative Committee on Energy has been vested with, among other things, responsibility for ensuring that the proposed use of such funds for program administrative costs, if any, is within any restriction imposed by the courts and Department of Energy rules and regulations applicable to the use of any oil overcharge refunds and that any administrative cost is absolutely justified. Act No. 552 of 1986. In keeping with the Joint Committee's responsibility in this and other regards, you advise that it will be issuing guidelines governing the use of such funds. Therefore, our opinion as to the definition of "administrative expenses", as mentioned above, is sought.

The prohibition of the Warner Amendment against the use of such funds "for any administrative expenses of the Department of Energy or of any State, whether incurred in connection with any energy conservation program or otherwise," is clear and unambiguous. Section 155(f). Ruling 1983-1 appears to consistently interpret pertinent questions in accordance with that expression of Congress' intent. The definition of "administrative expenses" is noted therein as being "those expenses which States have historically concerned to be administrative expenses under each program." The Exxon court agreed with that definition by confirming the applicability of DOE Ruling 1983-1 to disbursements under its jurisdiction. Order filed June 10, 1986.

The answer to your question, therefore appears to necessarily involve this State's past accounting practices under each program. Since the State apparently has successfully administered those programs to DOE's satisfaction for a number of

years now, the prudent course would appear to be one employing existing practices historically accepted by DOE as being in compliance with each program. Consistent application of those accounting practices, from a practical standpoint, would help ensure continued acceptance by DOE upon subsequent review. What has historically been deemed "administrative expenses" under each program, of course, is a question for the program staff and their accountants.

In that regard, we have recently been advised by the staff of the Governor's Office, which administers these energy programs, that they propose to handle the situation in accordance with the following guidelines:

> In the use of oil overcharge money from the "Warner Amendment" and "Exxon" oil overcharge refunds, the State of South Carolina will use the following guide to distinguish between "administrative expenses" and other expenses so that the state will be capable of complying with the prohibition of paying "administrative expenses" with "Warner Amendment" or "Exxon" monies.
>
> > "Administrative expenses", for the purposes of complying with the prohibition mentioned above, are those expenses that are:
> >
> > 1) defined as administrative expenses or costs by a federal law or regulation that is applicable to a federal energy program which is allocated as "Warner Amendment" or "Exxon" money;
> >
> > 2) in the case of a federal energy program that is not specifically provided a definition of "administrative expenses" by applicable federal law or regulation, "administrative expenses" shall be those costs that are not clearly associated with a specific project, effort or goal, but, rather, are costs incurred for the benefit of an entire series of projects, all projects, or all program goals. These types of costs are often called "indirect" or management costs, in addition to administrative costs.

> This guide is consistent with the historical practice of South Carolina's accounting of administrative costs in the federal energy programs. It is also consistent with U.S. Department of Energy (DOE) guidance. DOE has continually said, "Administrative expenses are those expenses which states have historically considered to be administrative expenses under each program." In addition, they have advised that, "indirect costs, sometimes referred to as 'administrative costs', are those incurred for a common or joint purpose benefitting more than one specific activity or program measure..."

The guidelines quoted above appear to be consistent with the aforementioned restrictions. Nevertheless, should questions arise in the future concerning the legality of a particular expenditure, we will be pleased to review them at that time.

Therefore, it is the opinion of this Office that the definition of "administrative expenses" under the Warner Amendment and DOE Ruling 1983-1 is "those expenses which States have historically considered to be administrative expenses under each program." The application of that definition to each program may be determined by reference to existing accounting practices historically accepted as being in compliance with each program and its regulations.

I trust the preceding discussion adequately answers your question, however, if any further assistance or explanation is required, please contact Senior Assistant Attorney General Kenneth P. Woodington.

Very truly yours,

Richard P. Wilson
Assistant Attorney General

RPW:bvc

REVIEWED AND APPROVED BY:

ROBERT D. COOK
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cc: Kenneth P. Woodington
Senior Assistant Attorney General