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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D. C. 20548

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STATEMENT OF

MILTON J. SOCOLAR, GENERAL COUNSEL

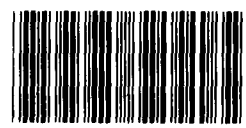
BEFORE THE

SUBCOMMITTEE ON ENERGY AND POWER

HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

ON

GETTY OIL SETTLEMENT



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Mr. Chairman:

I understand that your primary reason for requesting my testimony concerns the legality of the Department of Energy final plan to distribute $25 million collected from the Getty Oil Company under the terms of a consent order. We have prepared a detailed opinion addressing the specific issues involved. That opinion was delivered to you last Friday. My statement today will essentially summarize our formal opinion. I will be happy to answer any questions you and the subcommittee members may have.

The Getty consent order itself is not remarkable. By its terms, it settles (with stated exceptions) all claims and disputes between Getty and DOE concerning the manner of Getty's compliance with oil price and allocation regulations during the period August 19, 1973, through December 31, 1978. The order required Getty, among other things, to deposit $25 million of alleged overcharges in an escrow account with a Washington, D. C. bank, to be disbursed at the sole discretion of a DOE official. There is nothing in the order which provides a method for distribution of the funds or explains the purposes for which the funds could be used.

The Getty settlement is unique, however, in that under it the Department of Energy has developed, adopted, and has started to implement a special plan for distribution of the settlement funds without regard or concern as to whether the

distributees had been affected by the overcharges in the first instance. In other settlements to date there has been some effort to return at least a portion of overcharge funds collected to the customers or ultimate consumers who were affected by pricing violations. A reasonable effort to make restitution--which we define in ordinary dictionary terms as the act of restoring something taken from its rightful owner--is, in our view, mandatory for funds collected under the remedial or consent orders in question.

I recognize that DOE emphatically disagrees with our restrictive view of its powers and authorities. But it is difficult to rationalize the expansive view of its authority taken by DOE. Nowhere in the Emergency Petroleum Allocation Act of 1973, in the Economic Stabilization Act of 1970 (some parts of which were incorporated by reference into the Allocation Act), or in the Department of Energy Organization Act is there spelled out authority for DOE to make even restitution payments as part of its power to issue remedial orders. That authority was expressly given to the District Courts. Nevertheless, the court in Bonray Oil Company v. The Department of Energy held that the Department has implied authority to order a violator of its regulations to return overcharges directly to its customers. We think it too great a stretch to move from implied restitution authority to the proposition that DOE is authorized to distribute overcharge funds for any purpose it determines to be judicious.

Under the July 11, 1980 "final" plan, $21 million was to be distributed to 20 state governments in rough proportion to Getty's total heating oil sales in those states during the winter of 1978-1979. The states were asked to submit plans for the use of the money. According to draft DOE criteria, the money could only go to low income residents at or under 150% of the poverty level, either to defray heating oil costs directly or by funding energy-related programs.

DOE targeted the remaining $4 million for low ranking servicemen who currently live off base in one of the states in which Getty did business during the winter of 1978-79.

At no time since the funds were first deposited has DOE attempted to return any portion of them to persons who were overcharged (except that some victims of the overcharges and beneficiaries under the plan might coincide by chance). For example, low income persons with heating problems may benefit, under the draft criteria for state plans, whether or not they were former Getty customers, or, in the case of servicemen, whether or not they used oil to heat their homes. Beneficiaries need not even be persons in need of heating cost assistance. The first distribution made under the new plan to the State of Missouri was to assist residents in need of electric fans or air conditioners because of a heat wave.

It is unlikely that the servicemen to receive payments were affected by Getty's overcharges, given the mobility of

most servicemen. On the other hand, bona fide customers who bought oil at the inflated prices for agricultural purposes or who are not at or below 150% of the poverty level would not be eligible for any part of the refund.

A further problem lies in the fact that DOE has ignored its own regulatory requirement for ascertaining the identity of customers who have been overcharged and for establishing a claims procedure when their identities cannot be readily ascertained. We do not agree with DOE that use of its subpart V claims procedures, discussed in detail in our opinion, is permissive rather than mandatory. We think that the only option available to DOE, in cases where it cannot make refunds, is to initiate the subpart V procedures. If, after application of those procedures, funds remain for which overcharged persons cannot be identified, such funds remaining must be deposited in the Treasury as miscellaneous receipts. This is so because Getty under the terms of its settlement has no claim to the funds and DOE has no authority to dispose of them otherwise.

The bottom line, Mr. Chairman, is that DOE is treating these funds as though they were appropriated to be disposed of in DOE's sole discretion for any worthy energy-related purpose. They are not United States funds--not until all attempts to return them to the persons entitled to restitution have failed. At that time, they revert to the use of

the United States and, as required by 31 U.S.C. 484, must be deposited in the Treasury as miscellaneous receipts.

Before closing I would like to make an explanatory comment. I have said that DOE may only disburse overcharges collected to those who were injured, that DOE must follow its regulatory procedures in seeking to identify persons who may have been injured, and that any funds remaining must be deposited in the Treasury as miscellaneous receipts. I do not wish to convey the impression that it would be necessary always to identify with great specificity and proof a precise justification for individual payments. There might well be situations in which DOE could identify classes of persons with sufficient connection to overcharges collected to justify payments on a gross formula basis. The essence of my testimony in this regard is that in my judgment recipients of disbursements planned under the Getty order will not bear a sufficient relationship to those persons overcharged to support a finding of restitution.

Finally, I would say that I do not question the merit or desirability of the targets DOE has established for distribution purposes. My point here is only that once we get beyond restitution as now authorized by law and regulation, the distribution of moneys collected by DOE for other purposes must await further statutory sanction.

Mr. Chairman, that concludes my prepared statement.

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

October 10, 1980

B-200170

The Honorable John D. Dingell, Chairman
Subcommittee on Energy and Power
Committee on Interstate and Foreign Commerce
House of Representatives

Dear Mr. Chairman:

You have requested that we review the legality of plans by the Department of Energy (Energy) to distribute $25 million it holds under the terms of a consent order with Getty Oil Company. The consent order resulted from allegations by Energy that Getty had violated Federal oil price and allocation regulations. Energy has announced that it plans to distribute $21 million of the Getty funds to 20 states in which Getty sells heating oil to be used to benefit low-income residents. The remaining $4 million will be distributed through the Department of Defense (Defense) to lower pay grade members of the armed services who reside off base in states where Getty does business.

On July 23, 1980, you wrote to the Secretary of Energy concerning the Getty fund, requesting, among other things, a legal memorandum by Energy's General Counsel justifying the proposed plan for distribution. In the legal memorandum, dated August 20, 1980, Energy argues that it has implied power to order restitution as a remedy for violations of price and allocation regulations; that it has consistently interpreted its own enforcement powers as including any action necessary to eliminate or compensate for the effects of violations; that the Getty distribution plan is based on restitution and is therefore within Energy's powers; that the Getty funds are not moneys received for the use of the United States, and therefore need not be deposited into the Treasury as miscellaneous receipts; and that Energy's own regulation, which provides that when the victims of price regulation violations cannot be identified overcharge refunds may be made directly to the Treasury, is not mandatory and need not be followed in this case.

We conclude that, because Energy's distribution plan does not effect restitution, as we define that term, and because Energy has not followed its own regulations, Energy may not lawfully implement the Getty distribution plan.

The Facts

The Consent Order was approved by Getty Oil Company on November 26, 1979, and by Energy on December 3, 1979. By its terms the Order settled, with stated exceptions, all claims and disputes between Getty and Energy concerning Getty's compliance with oil price and allocation regulations during the period August 19, 1973, through December 31, 1978.

The Order provided that Getty would deposit $25 million into an escrow account with National Savings and Trust Company, Washington, D.C. The Order stated that "Getty will have no responsibility for, or participation in, the withdrawal, distribution or investment of funds from said escrow account." Such matters were to be subject to an escrow agreement between Energy and the bank. Under the Order Getty further agreed to surrender its entitlement to $50 million in future gasoline and propane price increases.

Under the terms of the Order, performance by Getty was to constitute full compliance with all Federal oil price and allocation regulations. The Order specifically provided that execution of the Order would constitute neither an admission by Getty nor a finding by Energy that Getty had violated any statutes or regulations.

The Order made no provision for the distribution of the $25 million nor did it state the purposes for which the money would be used. Further, the order contains no provision that Energy's procedural regulations would not apply with respect to these funds.

Energy announced the Getty Consent Order in a press release dated December 5, 1979. The release indicated that the $25 million in the escrow account would be "used to defray heating oil costs of low-income persons." The release further stated that details of the distribution of the funds would be announced after the Order became final.

On December 11, 1979, Energy published notice of the Order in the Federal Register and requested comments. See 44 Fed. Reg. 71453. This notice again indicated that the Getty fund would be used to defray heating oil costs of economically disadvantaged persons. Subsequently, on February 14, 1980, Energy published notice that the Getty Consent Order had become final. See 45 Fed. Reg. 9992. In this notice Energy indicated that the $25 million would be used "to mitigate energy costs of economically disadvantaged persons." The notice also stated that Energy would "determine how to distribute the funds."

Energy has considered various plans for distributing the Getty fund. Among these were distribution to states which had the greatest need for assistance in meeting the heating oil burden of the poor; distribution to states in proportion to Getty's total middle distillate sales in those states during the winter of 1978-1979, with the states using the money to assist the poor; distribution to states in proportion to Getty's non-industrial sales of middle distillates, with the money being used to assist the poor; and a plan under which half the money would be used to reduce prices of Getty propane users and half would be paid to indigent servicemen living off base. Also under consideration were joint programs with the Department of Housing and Urban Development and the Community Services Administration to make grants for energy-related purposes.

The current plan for distributing the Getty money was announced July 11, 1980. Under this plan $21 million is to be distributed to 20 state governments in rough proportion to Getty's total heating oil sales in those states. Before receiving the money, each state must submit a plan for using the funds to defray heating oil costs of the poor. The remaining $4 million is to be distributed directly to lower pay grade servicemen in States where Getty sells heating oil.

Under the distribution plan as announced, the state of Missouri was to receive $1,344,000. On July 15, 1980, the Governor of Missouri proposed to Energy that Missouri's share of the Getty fund be made available immediately to provide assistance to low income individuals suffering the effects of a severe heat wave. In response to this request, on July 18, 1980, Energy agreed to make Missouri's share of the Getty money available:

> "a. To defray costs of purchase and installation of fans and other low-cost mechanisms, and lease or rental of air conditioners.
>
> "b. To pay for emergency transportation to temporary shelter, and for the shelter of, those severly affected by the heat.
>
> "c To help defray higher than normal utility bills incurred by those affected by the heat."

I - ENERGY CANNOT IMPLEMENT ITS PLAN BECAUSE IT IS NOT DESIGNED TO EFFECT RESTITUTION AND IS THUS BEYOND ENERGY'S REMEDIAL AUTHORITY.

Energy's Statutory Enforcement Powers

Section 503 of the Department of Energy Organization Act, 42 U.S.C. § 7193 (Supp. I 1977) (Organization Act) authorizes the Secretary of Energy or his representative to issue a "remedial order" to any person believed to have violated any regulation, rule or order promulgated under the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751 et seq, (Allocation Act). The remedial order is to be in writing and is to describe with particularity the nature of the violation, including a reference to the provision of the regulation alleged to have been violated. The remedial order becomes a final order of the Secretary unless contested within 30 days, in which case the issue will be decided by the Federal Energy Regulatory Commission.

The Organization Act provides no guidance as to what a "remedial order" is intended to be. The legislative history indicates that section 503 of the act is not creating a new enforcement power, but rather is providing a means for those accused of violations to challenge the determination within the agency.

The bulk of the enforcement and remedial provisions concerning regulations issued under the Allocation Act is contained in section 5 of the Allocation Act itself, 15 U.S.C. § 754. Section 5 first provides that sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, (Stabilization Act) shall apply to price and allocation regulations under the Allocation Act. Section 5 then provides for both civil and criminal penalties for violation of the price and allocation regulations.

Of the provisions of the Stabilization Act incorporated into the Allocation Act, sections 209 and 210 create enforcement powers. Section 209 authorizes the United States to bring suit against an alleged violator in a United States District Court and authorizes the court to enjoin a person from violating a regulation. Further, the court may order the person to comply with the regulation and may order restitution of moneys received in violation of the regulation. Section 210 authorizes those adversely affected by violation of the regulations to bring suit for declaratory judgment, injunction, or damages.

Energy's Power to Order Restitution

Energy acknowledges that it has no express statutory authority to order restitution as a remedy for violation of its price and allocation regulations. However, it argues that it impliedly has this power as necessary to enforce its regulations.

As we indicated above, the Allocation Act provides several methods for the enforcement of regulations issued under its terms. The Act provides for civil and criminal penalties; authorizes the United States to bring suit for injunctions; authorizes the United States district courts to enjoin violation and compel compliance with the regulations, and to order restitution of any overcharges; and authorizes private injured parties to bring suit for declaratory or injunctive relief or damages.

Although the Act specifically grants the power to order restitution to the district courts, and does not specifically grant this power to Energy, it has been determined that the Federal Energy Administration (Energy's predecessor) has implied power to order violators to refund overcharges. Bonray Oil Co. v. Department of Energy, 472 F. Supp 9. (W.D. Okl. 1978), aff'd per curiam, 601 F.2d 1191 (TECA 1979).

Energy interprets Bonray Oil as confirming that it has, by implication, a broad restitutionary power. However, the court in Bonray Oil did not go so far. In Bonray, Energy's predecessor issued a remedial order finding that Bonray had violated the price and allocation regulations, and ordering Bonray to make refunds to its overcharged customers. After affirming the determination that Bonray had violated the regulations, the District Court ruled

that Energy's predecessor had the power to order a violator of its regulations to make direct refunds to the customers it had overcharged. Bonray Oil only confirms Energy's authority, as part of a remedial order which determines that violations have occurred, to order the violator to return overcharges directly to its customers.

In our opinion, under Bonray Oil, and the Organization and Allocation Acts, Energy's remedial authority is limited to ordering a violator to make refunds to overcharged customers.

Energy Regulations

In its regulations Energy has set forth the scope of the remedial action it may take as follows:

> "(a) A Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance, or a Consent Order may require the person to whom it is directed to roll back prices, to make refunds equal to the amount (plus interest) charged in excess of those amounts permitted under DOE Regulations, to make appropriate compensation to third persons for administrative expenses of effectuating appropriate remedies, and to take such other action as the DOE determines is necessary to eliminate or to compensate for the effects of a violation ***. Such action may include a direction to the person to whom the Order is issued to establish an escrow account or take other measures to make refunds directly to purchasers of the products involved, notwithstanding the fact that those purchasers obtained such products from an intermediate distributor of such person's products, and may require as part of the remedy that the person to whom the Order is issued maintain his prices at certain designated levels, notwithstanding the presence or absence of other regulatory controls on such person's prices. In cases where purchasers cannot be reasonably identified or paid or where the amount of each purchaser's overcharge is incapable of reasonable determination, the DOE may refund the amounts received in such cases directly to the Treasury of the United States on behalf of such purchasers." (10 CFR § 205.199 I).

Energy's Interpretation of its Powers

Energy argues that it, and its predecessors, have for a long time applied a broad interpretation of its remedial authorities, including the concept of restitution. Energy claims that the regulations have always made clear that remedy includes any action necessary to eliminate or to compensate for the effects of a violation. Moreover, Energy asserts that, in reenacting authorizing legislation for Energy and its predecessors while this regulation was in effect, the Congress has approved this interpretation of the statutory powers.

As previously stated, we find nothing in the governing statutes which goes beyond remedial purposes including restitution. An examination of 10 CFR § 205.199I (quoted above) shows that the underscored words upon which Energy relies are weak support, indeed, for the expansive authority it asserts. The regulation provides that remedial orders may require rollbacks of prices, refunds equal to the amount of actual overcharges, compensation to third parties for administrative expenses, as well as such other action as Energy determines is necessary. It further defines what "such other action" means by stating that it may require the creation of an escrow account or "other measures to make refunds directly to purchasers of the products involved," and may require the person to whom the order is directed to maintain prices at a certain level. The regulation finally states that, where overcharged purchasers cannot be identified or the amount each purchaser was overcharged cannot be determined, the amount of the refund may be deposited in the Treasury of the United States on behalf of the purchasers.

In our opinion, each of the specified remedies is designed to force the violator of the regulation to remit its unlawful gains and for the customers of the violator to recover the amounts they have been overcharged, if possible. The regulation does not permit Energy to order "any action," but rather only "such other action" — that is, action similar to the specified remedies — which will eliminate or compensate for the effects of the violation. The further definition of "such action" makes it clear that its purpose should be to force the violator to remit overcharges and, if possible, to return them to the customers who have actually been overcharged.

Energy also argues that, in reenacting authorizing legislation for Energy and its predecessors while the regulation on remedies was in effect, the Congress has approved Energy's interpretation of its powers. However, Congress has not approved or ratified any broad interpretation of Energy's remedial powers.

Ordinarily, the mere reenactment of an agency's authorizing legislation does not signify Congressional approval of the agency's administrative interpretations unless it is shown that the Congress was aware of these interpretations. Mobil Oil Corp. v. Federal Energy Agency, 566 F. 2d 87, 100 (TECA 1977). Ratification may be inferred only from a consistent administrative interpretation of a statute shown clearly to have been brought to the attention of the Congress and not changed by it. Id.

As we are not aware that Energy has ever communicated such a broad interpretation of its own regulations to the Congress, we do not interpret the inaction of the Congress as ratification.

Restitutionary Nature of the Getty Distribution Plan

Energy claims that the Getty distribution plan satisfies the statutory and regulatory requirements for restitution. It states that these requirements are met if the plan has as its purpose the elimination of the effect of alleged violations sustained by ultimate consumers. We do not agree that the Getty plan is designed to accomplish this purpose.

To determine whether the Getty plan is in fact restitutionary, it is first necessary to examine the nature of the violation, so as to determine who the injured parties were. The Getty Consent Order is devoid of any facts from which we can determine the nature of the violation. However, we accept Energy's assessment that some time between August 19, 1973, and the end of 1978, Getty charged prices in excess of those permitted to purchasers of petroleum middle distillates, including but not limited to home heating oils, and that the $25 million placed in escrow represents those middle distillate overcharges. Thus, those who suffered the effects of the violation were all purchasers or users of Getty middle distillates during the years in question.

In order for any distribution of the Getty funds to satisfy the statutory and regulatory requirements for restitution, it must be made in approximate proportion to the injury actually sustained to Getty customers and to ultimate consumers of Getty products who were the victims of the overcharges. In our view, Energy's plan does not meet this test.

With respect to the $4 million to be distributed to servicemen, the only connection is that these servicemen currently reside in states in which Getty did business during the winter of 1978-79. In all other respects distribution to these servicemen is unrelated to Getty's violation.

The terms of the distribution to servicemen are described in an agreement between Energy and Defense:

> "1. An eligible recipient is any enlisted member at or below grade levels designated by DOE who is on active duty in the U.S. Military Services on May, 30, 1980, in any state designated by DOE as served by Getty Oil, and who, with one or more dependents, occupies non-government quarters in that state.
>
> "2. DOD will prepare a listing of potentially eligible personnel and will expeditiously distribute the entire sum transferred by the Office of Special Counsel on a equal per capita basis among eligible recipients deemed qualified by DOE in the manner and at the times most convenient to the DOD."

It is clear that any lower grade enlisted member of the services, with dependents, residing off base in a state in which Getty does business is eligible to receive a portion of the "refund." Energy has made no attempt to limit payments to individuals who were even likely to have been victims of the Getty overcharges. Although the Getty overcharges took place between 1973 and 1978, the date for determining eligibility is May 30, 1980. Considering the high mobility of enlisted members of the Armed Forces, it is questionable that those eligible to receive Getty payments under the plan would have been living in the same area during the period of violations. Moreover, eligibility is unrelated to use of Getty middle distillates. A service member may live in a residence heated by electricity, natural gas, propane, coal, or wood, and yet be eligible for a share of the "refund."

The plan of distribution to servicemen is not related to the Getty violations. Rather than being a plan to remedy the effects of violations, this proposed distribution is a plan for $4 million in assistance to individuals whom Energy considers to be in need.

The proposed distribution to 20 states is also not sufficiently related to the Getty violations to constitute a plan of restitution. Under the distribution plan, Energy will transfer a portion of $21 million to each of the states. The states will be required to formulate plans for use of the money. Under draft Energy criteria, the money will be provided to low income residents to defray heating oil costs, either through direct payments or by funding energy-related programs that will result in heating oil savings. Low income residents are defined as those at or under 150 percent of the poverty level.

Again there seems to have been no attempt to link the prospective recipients within the states to the Getty violations. Although the Getty violations took place between 1973 and 1978, recipients of the payments will be individuals residing within the states in 1980. Distribution will be limited (presumably) to users of home heating oil, but there has been no attempt to make payments only to Getty customers. Although the victims of the Getty violation were all users of Getty middle distillates, only users of home heating oil will benefit from Energy's distribution plan. And although all consumers of Getty home heating oil were victims of the Getty violations, only individuals with incomes at or below 150 percent of the poverty level are eligible to benefit under the Energy distribution plan.

Energy argues that illegal pricing by one supplier within a market affects pricing conduct by its competitors and thus all heating oil consumers are affected. The issue, however, is limited to distribution of the Getty overcharges to Getty customers and Energy's rationale is, in any event, highly speculative.

Energy asserts that agricultural and industrial users of middle distillates were excluded because, unlike residential users, they were able to pass through the added costs rather than having to absorb them. However, these nonresidential users were ultimate consumers of Getty middle distillates and thus victims of the overcharges. They are as much entitled to receive refunds as are other Getty customers or ultimate consumers. Moreover, it is not clear that market conditions would have permitted nonresidential consumers to fully pass through the Getty overcharges.

Energy argues that low income consumers are entitled to receive the entire "refund" because they are likely to have been most harmed by overcharges and are least likely to be able to pursue private remedies. However, all ultimate consumers of Getty heating oil, regardless of income, were injured by the violations and should be entitled to a portion of the refunds. The fact that an individual has a higher income than 150 percent of the poverty level does not deprive that individual of the right to receive restitution for overcharges, nor does it free Energy of the obligation to enforce its regulations on behalf of all consumers.

In short, although the Energy distribution plan may embrace persons who have been injured by the Getty violations, their inclusion results more by happenstance than by design. Fundamentally the plan provides assistance for groups of lower income energy users with a nominal but not very real connection to Getty. We do not question the merit or desirability of providing aid to these groups. We assert only that it is the Congress, not The Department of Energy which must initially determine the manner and the extent to which this should be done. Accomplishing such public policy objectives does not constitute restitution for unlawful overcharges.

In this connection, we recognize also that it is frequently not possible to identify each individual customer or consumer who has been overcharged nor is it always possible to make a precise determination of the amounts each individual has been overcharged. So long as a good faith effort was made to identify overcharged individuals, we would not view a distribution scheme which lacked dollar for dollar precision as unauthorized. However, the Energy distribution scheme in the Getty case does not sufficiently relate distributees to those injured to support a finding of restitution.

In the case of the distribution already made to the State of Missouri, it is difficult to postulate a rationale under which the use of Getty funds to aid the victims of a heat wave can in any way be related to restitution for Getty overcharges.

II. ENERGY CANNOT IMPLEMENT ITS PLAN BECAUSE ENERGY HAS FAILED TO FOLLOW ITS OWN REGULATIONS

Energy's regulations (10 CFR Part 205, Subpart V) set forth a procedure for distribution of overcharge refunds when Energy cannot readily identify those individuals entitled to refunds or the amount of refunds these individuals are entitled to receive. The scope and purpose of subpart V are set forth as follows:

> "This subpart establishes special procedures pursuant to which refunds may be made to injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy. This subpart shall be applicable to those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified in a Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive." (10 CFR § 205.280.)

Under these regulations, an Energy enforcement officer files a petition with Energy's Office of Hearings and Appeals indicating that the officer has been unable to identify the victims of overcharges or the amounts these victims are entitled to receive. After considering the matter and soliciting comments from the public, the Office of Hearings and Appeals issues a decision and order setting forth the manner in which individuals may apply for refunds and in which the refunds will be distributed. After all applications have been processed and refunds made, and

after deducting the costs of the proceeding, any remainder of the refund is to be deposited in the United States Treasury or distributed in any other manner determined by the Office of Hearings and Appeals.

Although Energy claims it it has been unable to identify the victims of the Getty overcharges, it has not used the Subpart V procedure. Energy indicates that as part of the agreement which produced the Consent Order, it agreed with Getty that the Subpart V procedure would not be used in distributing the Getty fund. Therefore, it argues, the Subpart V procedure was not available to it in this case.

We have examined the Getty Consent Order and we find no indication that Energy has agreed to refrain from using its Subpart V procedure. Nor does the press announcement, or do public notices of the Order, indicate that the procedure established by regulation is not to be followed. We question whether Energy is bound by any unwritten agreement it may have had with Getty, particularly as we conclude that Energy is not authorized to forego use of its Subpart V procedure when called for.

In our view, it is clear that the regulation is designed for protecting the rights of overcharged customers and that the Subpart V procedure is mandatory.

Subpart V is a statutory regulation issued under the authority of section 644 of the Organization Act. Such a regulation, so long as it is in effect, is binding upon the agency which has issued it. See, e.g., United States v. Nixon, 418 U.S. 683, 694-96 (1974). An agency may not waive its statutory regulations in individual cases. See 57 Comp. Gen. 662, 663 (1978); 49 Comp. Gen. 145, 147 (1969).

We conclude that, because Energy's plan for the distribution of the Getty funds is not restitutionary and because Energy has not followed its regulatory procedures, Energy may not lawfully implement the plan.

Deposit of the Getty Funds in the United States Treasury

Energy raises the issue as to whether the Getty funds were received for the use of the United States and thus should have been deposited in the Treasury of the United States, as required by 31 U.S.C. § 484. Energy argues that, since the basic purpose of Energy's receipt of this money was its return to overcharged customers, it was not received for the use of the United States but rather for the use of others. Energy cites two cases for the proposition that not all funds received by a Federal agency are public funds which need be deposited in the Treasury (Varney v. Warehime, 147 F.2d 238, 245 (6th Cir. 1945), and Emery v. United States, 186 F.2d 900 (9th Cir. 1951)).

We agree that under 31 U.S.C. § 484, only moneys received for the use of the United States need be deposited in the Treasury as miscellaneous receipts. Moneys properly held by a Federal agency in a trust capacity are not required to be deposited as miscellaneous receipts of the Treasury. To the extent that Energy receives funds that it will return to overcharged customers, either directly when those customers can be identified or through the Subpart V procedure, it need not deposit them in the general fund of the Treasury.

In the Getty case, however, Energy has not attempted to distribute the funds to those who were overcharged and entitled to refunds. Rather, from the time that Getty agreed to place the funds in an escrow account, Energy has been seeking to use them to carry out energy policies unrelated to returning funds to overcharged persons.

Energy contends it is merely holding this money as trustee for its rightful owners. Yet with each formulated plan for distribution, Energy has constantly changed the beneficiaries of this so-called trust. Energy has not made it clear just exactly for whom it is holding this money in trust. In our opinion, by claiming for itself the unlimited right to determine (and to change the determination at will) who shall receive payment, in what amount, and the purposes for which the money shall be used, Energy may not be considered as acting as a trustee.

In sum, to the extent that Energy seeks to distribute the Getty funds to a class of individuals of its own choosing, rather than to the actual overcharged Getty customers, it is not holding the funds in trust and under 31 U.S.C. § 484 it must deposit them in the Treasury as miscellaneous receipts.

Payments to Servicemen

You have specifically requested that we determine whether the Department of Defense is authorized to supplement the salary of servicemen by making the payments under the Energy distribution plan. As we have already indicated, Energy may not lawfully implement its plan and therefore payments to servicemen cannot be made.

However, assuming that Energy's plan provided for reimbursement of overcharges to servicemen actually overcharged, we would not question the processing of payments by Defense on behalf of the Department of Energy. We have examined the legal memorandum prepared by the General Counsel of Defense, and we agree that these payments to servicemen would not violate any specific provision of law. We do not consider that these payments, unrelated to any Defense operation or expenditures, would constitute anaugmentation of Defense's appropriations.

Conclusion

The current Energy plan for distribution of the Getty funds is unauthorized and Energy cannot lawfully implement it. Under Subpart V of Part 205 of its regulations Energy must use the procedures it has adopted for distributing refunds in instances where victims of violations cannot be readily ascertained. Any portion of the Getty funds which cannot be distributed under Subpart V must be deposited in the Treasury as miscellaneous receipts.

Enforcement

You have asked what action this Office would take to prevent DOE from implementing its distribution scheme in the event we determined that the plan is unlawful.

We will apprise the Department of Energy that we take issue with any failure to account properly for the funds involved either as reimbursement to appropriate persons or as deposits in the Treasury within a reasonable time after implementation of the Subpart V procedure. The authority of the Department of Energy to enter into Consent Orders on other than injunctive or restitutionary terms has been challenged in court. Under such circumstance we would not be inclined to take any further action, since the court will ultimately resolve the issues we have covered.

Sincerely yours,

Milton J. Socolar

For the Comptroller General
of the United States