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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-202380

Mr. Thomas O. Mann
Acting Deputy Director
Office of Hearings and Appeals
Department of Energy
Washington, D.C. 20461

April 28, 1981

Dear Mr. Mann:

Re: Case No. DFF-0006

In response to your request, we submit the following comments with regard to the Proposed Decision and Order in the captioned case, concerning the disposition of funds obtained ~~by the Department of Energy (Energy)~~ by DOE through a consent order between Energy's Office of Enforcement and the Vickers Energy Corporation.

In our opinion, this proposed disposition of settlement funds is not in compliance with the interpretation of Energy's authority to order restitution set forth in our opinion of October 10, 1980 (B-200170, 60 Comp. Gen. __), and April 1, 1981 (B-200170) prepared for the current Chairman of the House Committee on Energy and Commerce, copies of which were provided to Energy. For your convenience, we have enclosed a copy of the April 1 opinion.

In these opinions we analyzed the statutory framework under which Energy operates, and pointed out that the only specific grant of restitutionary power in that legislation is found in section 209 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, and is limited to actions which can be taken by the United States District Courts. We also stated that in Bonray Oil Co. v. Department of Energy, 472 F. Supp. 899 (W.D. Okla. 1978), aff'd per curiam, 601 F. 2d 1191 (TECA 1979), the court ruled that Energy's predecessor had the power to order a violator of its regulations to make refunds to the customers it had overcharged. Energy's authority is similarly limited.

Nowhere in Energy's enabling legislation is Energy's administrative remedial power delineated (other than granting it the power to issue "remedial orders"), nor is its responsibility regarding settlement funds set forth. Rather, the legislation contains broad statements of purpose and policy, and no authority is expressly granted to Energy--or to the administrative components of Energy responsible for the energy price and allocation programs--to promote the interests of consumers in general through direct payments to them or through grants made on their behalf to states or other entities. Nowhere in Energy's enabling legislation

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is there authority to expend these funds by making grants to state and local public utilities for the eventual distribution to energy consumers who may also happen to have been consumers of products sold by Vickers, as is proposed.

At pages 8-11 of our April 1 opinion, we determined that 10 C.F.R. § 205.287(c), the regulation intended to set forth the authority of the Office of Hearings and Appeals (OHA) to make broad restitutionary distributions of settlement funds is, in fact, limited in its scope. In our view, this regulation, insofar as it purports to grant to OHA the authority to use overcharge refunds to finance activities which OHA (or the Economic Regulatory Administration) is not authorized by statute to carry out, is not valid. The Congress did not grant broad equitable or restitutionary powers to Energy. Energy and OHA can exercise only those equitable powers specified in their legislation or in judicial interpretations of their legislative mandate. On this basis, Energy can effect restitution only to injured consumers of oil company products, and not to energy consumers in general.

Innovative relief measures such as the one at issue here must, instead, be created by the Congress, through the appropriation process. Energy, lacking the authority to freely dispose of these fund balances, can only deposit them in the Treasury to be held for a period of time for the benefit of possible claimants, and ultimately to be placed in the general fund.

We also are concerned with the assertion in Part II A of the proposed order that Energy's view of its authority to order restitution has been approved by the Congress. This assertion is based on Congressional reenactment of Energy's enabling legislation during the years in which Energy was issuing remedial orders directing that refunds be made to remedy regulatory violations. As we stated in the October opinion mentioned previously, the mere inaction of the Congress cannot be interpreted as ratification of Energy's own interpretations of its regulations. See Mobil Oil Corp. v. Federal Energy Administration, 566 F. 2d 87, 100 (TECA 1977).

Thank you for considering our comments.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel

Enclosure