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Testimony

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DOE's State Energy  
Conservation Grant Programs

Statement for the Record by  
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Before the  
Subcommittee on Energy  
and Power  
Committee on Energy and  
Commerce  
U.S. House of Representatives



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Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to present information on our reviews of the Department of Energy's (DOE) four state and local energy conservation grant programs--the State Energy Conservation Program, the Energy Extension Service Program, the Weatherization Assistance Program, and the Institutional Conservation Program. These programs are designed to encourage energy conservation program initiatives at the state and local level and help low-income persons meet home energy costs. We hope this information will be helpful as you consider H.R. 711, a bill that seeks to increase the efficiency and effectiveness of the programs by, among other things, authorizing new and innovative energy conservation activities; promoting coordination between federal, state, and local institutions; and establishing new energy conservation goals for the states.

Our statement covers information in our report to you entitled, Energy Management: Appeals Procedures for State and Local Assistance Programs (GAO/RCED-89-127, May 10, 1989), which covered the first three programs, and findings to date from our ongoing work on the Institutional Conservation Program, which is also being carried out at your request. The statement discusses some problems regarding the mechanisms available to the states to appeal decisions made by DOE support offices on all four programs, as well as some possible modifications to the Institutional Conservation Program.

In summary we found that

- confusion exists among the states and DOE on which procedures the states may use to appeal decisions made by DOE support offices on the four state energy grant programs,

- a DOE policy that requires grantees to have clear title to equipment purchased with grant funds may be an impediment to efforts by states and grantees to use performance contracting in connection with the Institutional Conservation Program, and
  
- energy savings might result if local school administration buildings and buildings constructed after 1977 were included in the Institutional Conservation Program.

### BACKGROUND

At DOE headquarters, the Office of State and Local Assistance Programs (OSLAP) is responsible for program policy and guidance for the four energy conservation grant programs. In the field, six operations offices that report directly to the Office of the Secretary are responsible for implementing OSLAP's policies and for administering the grant programs. For the most part, the operations offices have delegated their grant program responsibilities to 10 DOE field offices called support offices. These support offices report directly to the operations offices, rather than to OSLAP. The support offices are primarily responsible for reviewing and approving states' annual program plans, which identify the proposed uses of the grant funds; determining whether individual projects contained in the annual plans comply with program regulations; and administering the grant programs.

Administrative review procedures are designed to give states an avenue to appeal decisions made by support offices. For example, the procedures permit states to appeal disapprovals of states' annual program plans under the State Energy Conservation Program, the Energy Extension Service Program, and the Weatherization Assistance Program. Administrative review

procedures have not been established for the Institutional Conservation Program.

In recent years appropriated funds for the grant programs have been relatively small, totaling \$212.1 million for fiscal year 1988 and \$211.2 million for fiscal year 1989. However, according to DOE, states have also received more than \$3.6 billion in oil overcharge funds, which they can use to fund program activities.

CONFUSION EXISTS REGARDING  
APPEALS PROCEDURES

In our work, we found concern and confusion regarding procedures states may use to appeal support office decisions. The concern and confusion were related to (1) whether support office decisions on individual projects could be appealed under the programs' administrative review procedures (2) whether the administrative review procedures are biased against the states, and (3) other appeal routes that may be used in addition to the administrative review procedures.

Uncertainty exists as to whether individual projects within a program's annual program plan submitted to DOE for approval may be appealed under the programs' administrative review procedures or whether the states can only appeal a support office decision to reject the entire plan. While disagreements generally arise over specific projects within the annual plan, the administrative review procedures may be interpreted to mean that only the rejection of a state's annual plan may be appealed. Some DOE and state officials we contacted believe individual projects can be appealed while others do not.

Also, the state officials viewed the procedures in the energy conservation and energy extension programs as potentially biased against the states. In these programs, the review procedures

require that the operations office manager appoint a panel that renders a decision after hearing evidence from all concerned parties. The panel's recommendation is subject to review by the DOE secretary. State officials were concerned that the possibility exists that a review panel appointed by a DOE operations office manager would be biased in favor of the support office view, especially if the operations office manager delegated the panel selection to the support office director.

Confusion has also arisen because in addition to the administrative review procedures, other appeal routes may be available to the states. On the basis of guidance from DOE officials, two states recently appealed support office decisions on individual projects in the State Energy Conservation Program to DOE's Office of Hearings and Appeals (OHA),<sup>1</sup> rather than using the program's administrative review procedures. OHA accepted the cases. There is disagreement within DOE on whether OHA has the authority to hear such cases.

#### Appeals Under the Institutional Conservation Program

In our ongoing review of the Institutional Conservation Program, we have also found confusion over what can be appealed and to whom the appeals can be made. The Institutional Conservation Program provides federal funds, usually on a 50/50 matching basis, for technical assistance analyses and energy conservation measures to cut energy costs in schools and hospitals. Performance contracts, also called savings-based agreements, provide for the purchase and installation of energy conservation measures by a contractor in return for payments that are usually based on the savings achieved by the conservation

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<sup>1</sup>OHA issues final DOE orders of an adjudicatory nature, except those over which the Federal Energy Regulatory Commission or the Energy Board of Contract Appeals has final jurisdiction.

measures. Institutions are interested in performance contracts because DOE has said that they may be used to finance the grantee's matching share of an institutional conservation grant.

The problems between states and support offices have included disagreements regarding the procurement practices grantees use in soliciting performance contracts. No specific administrative review procedures exist for the Institutional Conservation Program, and DOE has formally advised this Subcommittee that no formal appeals procedure is available for states to appeal a support office's decision to disapprove using a performance contract.

However, an official of OHA's Office of Legal Analysis told us that some of the support office actions regarding the Institutional Conservation Program with which the states disagree could possibly have been appealed to either OHA or to the DOE Financial Assistance Appeals Board (Board).<sup>2</sup> However, the OHA official said there could not be certainty whether either OHA or the Board would have jurisdiction because no state has yet attempted to appeal these institutional conservation grant matters to OHA or the Board.

#### Actions Needed to Improve Appeals Procedures

Until DOE resolves the various appeal issues described above and the decisions are communicated to states and DOE support offices, confusion is likely to continue regarding appeals procedures for the energy conservation grant programs. In March 1989 the Assistant Secretary for Conservation and Renewable Energy told us that the Secretary is going to have DOE conduct a review of the structure of the Department, including the roles of OSLAP, the

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<sup>2</sup>According to DOE, the DOE Financial Assistance Rules provide for appeals to the Financial Assistance Appeals Board of certain DOE decisions.

support offices, and the appeals procedures. He estimated it would take about 6 months to complete the review and implement changes.

In our May report we recommended, among other things, that DOE (1) clarify the types of decisions appealable under the energy conservation, energy extension, and weatherization programs' administrative review procedures and revise the administrative review procedures to eliminate the potential for bias which the states perceive in the energy conservation and energy extension procedures and (2) ensure that DOE and state officials have a clear understanding of these procedures, as well as when to use other appeal routes that are available.

Our May report did not include the Institutional Conservation Program because it is the subject of a separate review requested by your office. However, our work to date indicates that action is needed to clear up the confusion regarding appeals procedures for this program as well. For example, some disputes between the states and support offices have continued for up to 3 years. While DOE can take action administratively to improve appeals procedures, the Subcommittee may also wish to provide additional emphasis to the need for clear, consistent appeals procedures for the four programs by including appeals procedures in H.R. 711.

CLEAR TITLE REQUIREMENT MAY  
HINDER USE OF PERFORMANCE CONTRACTS

Our work to date on the Institutional Conservation Program indicates that an existing DOE requirement may hinder the use of performance contracting. DOE requires that grantees have clear title to energy conservation equipment at the time the grant is closed out. According to representatives of energy service companies, the clear title requirement makes it difficult to use performance contracts to finance matching contributions for institutional conservation grants. This is the case because

financial institutions normally require a lien on the equipment provided under performance contracts for the term of the contract, which often runs beyond the grant close-out date. A DOE program manager also believed that the requirement makes it difficult for grantees to obtain financing for their matching funds.

According to the Director of the Office of State and Local Assistance Programs, DOE is attempting to resolve the clear title issue in the context of proposed revisions to (1) OMB's circulars providing guidance to federal agencies on internal grants management issues and (2) the governmentwide "common rule" providing rules for grant administration to state and local grantees.<sup>3</sup> As presently worded, the proposed revisions to the common rule would allow grantees to encumber their title. In addition, the revisions would permit governmental agencies awarding grants to nongovernmental grantees to hold recorded liens. However, the latter provision does not specifically cover grants to governmental grantees, such as public school districts, one of the largest groups of Institutional Conservation Program grantees.

DOE believes it should be permitted to hold liens on institutional conservation grant property in all cases to protect the government's interest. Through the rulemaking process, DOE has proposed that the common rule provision relating to liens be revised to include all grantees. According to DOE program officials, if this change is made, DOE will allow banks and energy service companies to hold liens on property or equipment purchased with institutional grant program funds beyond the grant closeout date because the government's rights in this property will also be

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<sup>3</sup>OMB Circulars A-102 and A-110 provide federal agencies with guidance on internal grants management issues. The Uniform Administrative Requirements for Grants and Cooperative Agreements rule, referred to as the "common rule," provides state and local governmental grantees with consistent grants management rules and has been implemented by all federal agencies.



protected by a lien. The revised common rule is currently scheduled for publication this summer, with an effective date of October 1, 1989.

INFORMATION ON POSSIBLE  
MODIFICATIONS TO THE  
INSTITUTIONAL CONSERVATION PROGRAM

As part of our ongoing work, we obtained information on several possible modifications to the institutional conservation program which you asked us to examine. These modifications relate to making local school administration buildings and buildings constructed after 1977 eligible for the program and changing criteria affecting participation by small and hardship institutions.

Local School Administration Buildings

Currently, administration buildings for local schools<sup>4</sup> are not eligible for Institutional Conservation Program funding. Several state and DOE program officials told us that including these buildings in the program could lead to reductions in their energy use and, thus, provide for significant potential energy savings. Some of the reasons provided in support of a change in the program to include these buildings are (1) school administration buildings, unlike classrooms, generally operate 12 months instead of 9 months a year; therefore, they use more energy than comparably sized classroom buildings; (2) administration buildings generally house more energy intensive equipment than classrooms; and (3) such a change would place local school administration buildings on an equal basis with university and

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<sup>4</sup>State and DOE officials refer to the administration buildings currently excluded from this program as K-12 administration buildings (kindergarten through high school).

hospital administration buildings which are eligible for institutional conservation funding.

On the basis of our work to date, it appears that this change could offer the potential for increased energy savings by adding projects with the potential for significant energy savings into the pool of eligible projects. Moreover, DOE officials could not identify any specific reason for continuing the legislative exclusion of these buildings from program eligibility.

#### Buildings Constructed After 1977

Buildings constructed after April 20, 1977, are not eligible for Institutional Conservation Program funding. State and DOE officials told us that buildings constructed after 1977 are not as energy efficient as had been anticipated. For example, Georgia, Mississippi, and Pennsylvania State Energy Office officials told us that buildings constructed after 1977 show significant energy savings potential. Although they did not have a recommendation as to how far the date should be extended, DOE program officials we spoke with generally supported including buildings constructed after April 20, 1977. Based on our discussions with state and DOE officials, an extension of the date for eligible buildings may be appropriate. We note that H.R. 711 would expand the pool of eligible buildings to those constructed up through December 31, 1984.

#### Awards to Small Institutions

Institutional conservation grant awards are based on ranking criteria established by DOE regulation. According to DOE and state officials, the weight placed on payback--the amount of time it takes for the energy savings to pay for the project--and quantity of energy saved sets the goal of energy conservation ahead of other factors, such as equity in distribution. This may make it more

difficult for smaller institutions to receive grants because larger institutions can save more energy. DOE studies have indicated that larger schools, colleges, and hospitals tend to receive institutional conservation grants more frequently than smaller schools; colleges, and hospitals.

According to a DOE headquarters program manager, small institutions have more difficulty qualifying for grant funds than large institutions under the ranking structure because the projects and the associated energy savings are usually quite small. This official believes that any changes in this area would have to be initiated by the Congress because the current grant award criteria, which emphasize payback and the amount of energy saved, are consistent with the program's goals as stated in the original legislation.

#### Awards to Hardship Institutions

Up to 10 percent of each state's program funds can be awarded to hardship institutions. Under hardship grants, the federal share of financing may be up to 90 percent of the project, compared with the typical 50/50 split. The responsibility of formulating hardship criteria has been delegated to the states. According to State Energy Office officials in Georgia, Michigan, and Mississippi, the 10-percent cap on the level of funding available for hardship institutions limits states' ability to provide assistance to many financially disadvantaged institutions.

DOE headquarters program officials also believed the 10-percent set-aside limit would need to be changed by legislation to direct additional program grants toward financially disadvantaged institutions. However, they believe that changes in the hardship provision should be considered carefully, taking into account such things as the need for regional differences in hardship criteria.

## CONCLUSION

Our work indicates that there are several areas within the state energy conservation programs in which changes may be appropriate. For example, we have recommended to DOE that it clarify the types of decisions appealable under the state energy conservation, energy extension, and weatherization administrative review procedures. The Subcommittee may also wish to provide additional emphasis to the need for clear, consistent appeals procedures for the energy conservation grant programs by including appeals procedures in H.R. 711. In addition, the Institutional Conservation Program could be modified legislatively to include school administration buildings and buildings constructed after 1977. We hope the information we have provided to you on these issues will be useful in deliberations on H.R. 711.