FEDERAL REGULATION OF ENERGY: THE EXCEPTIONS PROCESS

BY WILLIAM FOSTER COCKRELL, JR.*

Responding to the energy crisis, the Federal Energy Administration (FEA) has since late 1973 regulated the allocation and pricing of energy resources. Mandatory Allocation and Price Regulations (hereinafter sometimes separately referred to as the Allocation Regulations and the Price Regulations) have been promulgated which essentially freeze price and supply patterns as they existed at certain reference dates.

General regulations which essentially freeze relationships may have unintended consequences in specific circumstances, and thereby result in hardship or inequity to affected persons and entities. An exceptions process has been established to alleviate hardships and inequities resulting from the regulations involved. The FEA employs that process in appropriate circumstances to grant relief to entities affected by FEA Regulations. Generally, exception relief permits the applicant to ignore the requirements of the regulatory provisions to which an exception has been requested. Thousands of entities, including not only the major integrated oil companies, energy producers and retailers, but also endusers of energy resources such as common carriers, are affected by the FEA exceptions decisions. However, the exceptions process is not generally understood, particularly how the criteria involved, serious hardship and gross inequity, are to be applied in specific circumstances.

STATUTORY AND REGULATORY BASIS OF ENERGY REGULATION

The most important foundations of the control of energy prices and supply patterns by the federal government have been the Economic Stabilization Act of 1970[1] and the Emergency Petroleum Allocation Act of 1973 (EPAA). The EPAA provides that:

> " . . . (T)he President shall promulgate a regulation providing for the mandatory allocation of crude oil, and each refined pe-

*J.D. University of Texas, 1969; M.B.A. Harvard University, 1972. Member, District of Columbia and Texas Bar Associations. Mr. Cockrell formerly worked as an attorney in the Office of Exceptions and Appeals of the Federal Energy Administration, and presently is associated with the law firm of Bracewell & Patterson, Washington, D.C.

1. The Economic Stabilization Act expired on April 30, 1974.

troleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation."[2]

The regulatory provisions promulgated in response to this statutory mandate have reflected its chief objectives and are principally concerned with controlling prices and supply patterns.

Price Controls

Under the FEA Regulations controlling the pricing of crude oil, a two-tier pricing system has been adopted by which the prices of domestic crude petroleum generally equivalent to 1972 production levels ("old" oil) have been frozen at the highest posted price in effect on May 15, 1973, at the field of production, plus $1.35,[3] totaling approximately $5.25 per barrel, except that a dollar-for-dollar pass through of increased costs is generally allowed.[4] Crude oil produced in excess of 1972 production levels from the same property ("new" oil) is exempt from price controls, and each barrel of new oil produced releases from controls a barrel of old oil ("released" oil).[5] Furthermore, oil produced from new properties and oil produced from properties whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well ("stripper" wells)[6] is exempt.

Price Regulations were supplemented effective December 4, 1974, by promulgation of the Cost Entitlement Program under which refiners and non-refiner eligible firms are required to submit information whereby the FEA can calculate the national old oil and crude oil receipts ratio and individual old oil to crude oil receipts ratio. A refiner is issued a number of "entitlements" equal to the national old oil ratio. To the extent that his old oil ratio exceeds the national old oil ratio, he is required to buy additional "entitlements" from other refiners and eligible firms in order that his total "entitlements" equal his total number of barrels of old oil. An "entitlement" is the right to include one barrel of old oil in a refiner's crude oil receipts in a

2. EPAA §4(a), 15 U.S.C. §753 (1973). The EPAA expired on August 30, 1975, but at the time this article was written, was expected to be temporarily extended retroactive to September 1, 1975.

3. 10 C.F.R. §212.73.

4. 10 C.F.R. §212.82, 212.93.

5. 10 C.F.R. §212.72.

6. 10 C.F.R. §212.54.

particular month, or in essence, the right to refine one barrel of old oil in the refiner's refineries.[7]

The prices of most finished petroleum products are controlled by Price Regulations that include three important features. First, price patterns existing on a reference date, May 15, 1973, have been frozen.[8] Secondly, cost increases are permitted to be passed through, generally on a dollar-for-dollar basis.[9] Thirdly, the profit margin[10] which a "firm"[11] established during a "base period"[12] is to be retained.[13]

Allocation Controls

The Allocation Regulations, which were issued January 14, 1974, require that supplier/purchaser relationships be maintained as they existed on certain reference dates. Relationships involving crude oil must be generally maintained as they existed on December 1, 1973.[14] In addition, large integrated refiners (classified as "refiner-sellers")[15] are required to allocate a portion of their crude oil to small and independent refiners.[16] Presently, use of a "buy-sell" list, published by the FEA on a quarterly basis, controls these transfers.[17]

Base period relationships are also required to be maintained for finished petroleum products.[18] The controlling date for motor gasoline, for example, is the month of 1972 corresponding to the current month;[19] for residual fuel oils, it is the month of 1973 corresponding

7. 10 C.F.R. §211.67.

8. That date like all reference dates used by the FEA, has been selected because it is believed by the FEA to be both relatively recent and free of distorting influences such as the oil embargo and strict price controls by the federal government. Prices were relatively free of governmental control during Phase III of the Economic Stabilization Program which began January 11, 1973, and ended with a freeze of prices on June 13, 1973.

9. 10 C.F.R. §212.83.

10. 10 C.F.R. §212.31. Essentially, a firm's profit margin is the ratio its net income before taxes bears to its net sales.

11. FEA Regulations define "firm" to correspond generally to a business entity. *See* 10 C.F.R. §212.31.

12. Generally, any two-year period following August 15, 1968, at the option of the firm. 10 C.F.R. §212.31.

13. 10 C.F.R. §212.11.

14. 10 C.F.R. §211.63

15. 10 C.F.R. §211.62

16. 10 C.F.R. §211.65.

17. 10 C.F.R. §211.65(e).

18. 10 C.F.R. §211.9.

19. 10 C.F.R. §211.102.

to the current month.[20]

THE EXCEPTIONS PROCESS

Statutory recognition of the need for the exceptions process is reflected in the specific directive that the President should provide for "special redress"[21] and should "assure that energy programs are designed and implemented in a fair and efficient manner so as to minimize hardship and inequity while assuring that the priority needs of the nation are met."[22] Founded on this statutory authority, FEA regulations provide that the FEA may grant an application for exception to the regulations to alleviate or prevent serious hardship or gross inequity.[23]

The FEA has instituted procedures whereby:

> (i) applications for exception to regulations involving adjustment of maximum supply volumes of gasoline, fuel oil or propane to which firms are allowed by law and to regulations controlling prices relating to the retail sale of gasoline, heating oil, diesel fuel or propane are properly filed with the appropriate FEA Regional Office[24] (of which there are presently ten); and
> (ii) all other applications are properly filed with the FEA's National Office of Exceptions and Appeals.[25]

The FEA has held that:

> "As indicated in Section 205.55(b)(1) of the FEA Procedural Regulations, exception relief is generally appropriate only where no other administrative procedure is available to the applicant."[26]

Additionally, before considering exception relief, the FEA determines if any other alternative not involving FEA action exists which would effectively remedy the applicant's difficulties.

Furthermore, there must be causal connection between the hardship or inequity alleged and the regulations involved if exception

20. 10 C.F.R. §211.122.
21. Federal Energy Administration Act §21(b), 15 U.S.C. §780(b) (1974).
22. Federal Energy Administration Act §5(b), 15 U.S.C. §764(b) (1974).
23. 10 C.F.R. §205.55(b)(1).
24. 10 C.F.R. §205.52(b).
25. 10 C.F.R. §205.52(a).
26. *Shell Oil Company*, 2 FEA ¶ 83,116 (April 18, 1975). Cases are cited to the official reports. See also CCH Energy Management.

relief is to be granted. The FEA has generally held that exception relief should be prospective only unless a firm presents compelling reasons demonstrating that retroactive relief is warranted or that it would experience irreparable injury in the absence of such relief.[27]

Importance of the Exceptions Process in Policy Development

The exceptions process has played an important part in the development of energy policy by the FEA. The exceptions process has served to balance competing national policy objectives in several instances, including the following:

(i) in applications for exceptions to the requirements of the Old Oil Entitlements Program, to reconcile various conflicting objectives;
(ii) in applications for exception to base period supply relationships filed by minority-owned small businesses, to reconcile the Congressional goals specified in the Small Business Act and the Emergency Petroleum Allocation Act;
(iii) in applications for new refinery capacity to reconcile goals to the Crude Oil Allocation Program with the goals of expanding refinery capacity and stimulating production of new crude oil.

In defending use of the exceptions process to balance competing national policy considerations, the FEA has stated that the "process of reaching an accommodation between conflicting national policies is an inherent aspect of the regulatory review function:"[28]

CASE-BY-CASE DEVELOPMENT OF EXCEPTIONS CRITERIA[29]

SERIOUS HARDSHIP

The FEA, has generally required that a firm's viability be threatened before granting relief based on serious hardship.[30] In late 1974,

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27. *See, Commonwealth Oil Refining Company, Inc.*, 2 FEA ¶ 83,064 (March 12, 1975).

28. *Agway Petroleum Corporation*, 2 FEA ¶ 80,600 (June 6, 1975).

29. For a detailed examination of how the FEA applied the exceptions criteria in 1974, *see* Cockrell, "Exceptions to Federal Regulations for Management of the Energy Crisis: The Emerging Agency Case Law", *Oklahoma Law Review*, (Summer 1975).

30. More recently, the FEA has recognized that harm of sufficient magnitude is present if a firm's competitive position is threatened. E.G., *OKC Corporation*, 2 FEA ¶83,074 (March 21, 1975).

the FEA characterized its approach to serious hardship determination as follows:

> ". . . (T)he FEA utilizes a broad definition of serious hardship which embraces a wide range of evidential factors. The FEA's practice is to analyze the business operations of the firm, relying for example on such financial indices as markup data, gross margin data, competitive pricing, historic sales volumes, profits, revenues, product cost, and projections of financial viability . . . ."[31]

However, this statement should not be taken at face value. At the time it was made, the FEA had established by its record in granting serious hardship exceptions that a substantial decrease in net profits was in effect the only basis upon which exception relief would be granted. In fact, in twenty of the apporximately twenty-one published decisions issued in 1974 in which relief was granted solely on the basis of serious hardship, the applicants had demonstrated present or projected operating loss. However, since late in 1974, the FEA has indicated that a firm need not necessarily demonstrate operating losses, that substantial decrease in profitability would be sufficient to establish serious hardship. Specifically, the FEA granted exception relief to a firm which indicated that its levels of profitability had declined 48%,[32] relative to its recent financial history. In contrast, the FEA has specifically held that a reduction in profits of 16% does not constitute harm of sufficient magnitude to form the basis of a serious hardship finding.[33]

Recently, particularly in considering requests for exceptions to the requirements of the Entitlements Program, the FEA has placed increasing emphasis on another financial indicator, the profit margin of a firm. For example, in one case, the FEA emphasized profit margin as a gauge of serious hardship, and did not even indicate the percentage reduction in profitability of the firm. Specifically, the FEA held that a serious hardship was established where the firm demonstrated a 60% decline in its profit margin.[34] However, if a 60% decline in profit margin establishes serious hardship, evidently a 16% decrease does not; the FEA denied relief where a firm's profit margin

31. *Martin Oil Service, Inc.*, 1 FEA ¶ 20,185 (November 19, 1974).
32. *Greenville Automatic Gas Company*, 2 FEA ¶ 83,127 (April 25, 1975).
33. *Morissette & Son Oil Company*, 1 FEA ¶ 20,174 (November 7, 1974).
34. *The Oil Shale Corporation*, 2 FEA ¶ 83,103 (March 28, 1975).

had decreased from 9.2% in the past year to 7.78% in the current year.[35]

The FEA has cited but not given controlling effect to other indices of financial distress in the exceptions it has granted including capital loss, excessive cost of fuel which cannot be effectively passed through to ultimate purchasers, cash flow problems preventing a firm from meeting its debt obligations, substantial reduction in revenues, substantial reduction in market share, substantial reduction in sales volume, and substantial loss of customers. The FEA has also applied various financial indices in denying exception relief including, return on investment, return on assets, earnings per share, return on equity, and even net income per barrel of crude oil refined.

In summary, although the FEA has applied various indices, the paramount test for granting exception relief based on serious hardship has been whether the applicant has suffered a substantial percentage decrease in net profits or profit margin.

A result of the FEA's stringent conception of serious hardship has been that no major integrated oil company[36] has yet received an exception based on serious hardship from the FEA. The major oil firms have made significant gains in net income in recent years (until 1975), and the FEA has consistently rejected the argument sometimes made by the major integrated oil companies (as well as small and independent firms) that a serious hardship is established if a firm's profits would be less if exception relief were denied.[37] (However, the FEA has extended exception relief based on gross inequity considerations to the major firms in several instances.)[38]

Similarly, subsidiaries of major integrated oil companies have yet to receive a serious hardship exception. The FEA considers the subsidiary and the parent to be a single firm for serious hardship determination and pierces the corporate structures of the major integrated oil companies in examining net profits.

Serious hardship determination has been applied to consistently focus on the "firm", which the FEA considers to include any entity which the applicant either controls or is controlled by. This broad concept of the firm was clearly illustrated in one case where an appli-

35. *Plateau, Inc.*, 2 FEA ¶ 83,095 (March 27, 1975) in which the FEA emphasized that the firm's total net profits had increased 20% despite its reduced profit margin.

36. Defined here to include only those firms classified by the FEA as "refiner-sellers" for purposes of the Buy-Sell List *supra*.

37. *See, e.g.*, *Charter Oil Company*, 2 FEA ¶ 83,077 (March 27, 1975).

38. Discussed *supra*.

cant established that it was incurring an operating loss, but FEA determined that there existed a close interrelationship between the applicant and another entity by virtue of the common management and control of the two firms. In denying relief, the FEA emphasized that an arithmetical combination of the operating results of the affiliated firms indicated at 63% improvement in net profits.[39] Furthermore, not only is the FEA likely to apply an expansive definition of firm in particular circumstances, but also the Agency exercises the discretion to consider only that portion of an applicant's operations which relates to products subject to FEA regulation (covered products).[40] In further refinement of its applicable definition of firm, the FEA has refused to restrict its consideration to less than all of a firm's covered product operations. For example, the FEA has held that declining sales in one product line does not constitute a serious hardship when the firm's total petroleum operations are profitable.[41]

The FEA generally grants exception relief based on serious hardship only when financial hardship is present or will be imminently experienced. The FEA has repeatedly stated that exception relief is not appropriate where alleged future difficulties are merely speculative.

If present or imminent financial difficulty is established, the FEA scrutinizes the firm's financial history. The FEA has held that:

> " . . . a comparison of a firm's financial and operating posture prior to the inception of an FEA regulatory program and subsequent to the implementation of the program is a principal element of the exceptions process since exception relief on serious hardship grounds should generally be granted only to alleviate those serious hardships which *result* from application of an FEA regulatory program to the firm.[42]

In this connection, the FEA has held that a firm is not incurring a serious hardship where present earnings in the absence of exception relief will be consistent with its historic earnings pattern.[43] Also, the FEA has held that a firm's unprofitable history prior to promulgation

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39. *Walter Simas/Simas Bros.*, 1 FEA ¶20,738 (December 13, 1974).

40. *See, e.g., Industrial Oil Company*, 2 FEA ¶ 83,016 (February 7, 1975) where at the suggestion of the applicant which primarily engaged in contract hauling services, the FEA considered only that portion of the firm's operations which involved motor gasoline.

41. *Weso Corporation*, 1 FEA ¶ 20,706 (November 12, 1974).

42. *OKC Corporation*, 2 FEA ¶ 80,604 (June 5, 1975).

43. *Falco, Inc.*, 2 FEA ¶ 83,174 (June 13, 1975).

of FEA Regulations indicates a lack of causal connection necessary to support exception relief.[44]

Causal Connection

The specific requirements of causal connection necessary to support exception relief have not been clearly identified by the FEA. The agency has predominately required that financial difficulty result "primarily"[45] from application of the FEA Regulations, but has not stated specifically the boundaries of that causation standard. Furthermore, in many instances the FEA has not clearly specified the standard of causal connection it has applied. Moreover, in one decision the FEA determined that only 21% of a firm's operating losses were caused by application of the provisions of FEA Regulations; nevertheless, the Agency granted exception relief after concluding that FEA Regulations were "contributing significantly" to those difficulties.[46] Application of the requirement that FEA Regulations contribute significantly to a firm's difficulties would seem to be considerably less stringent than the requirement that those difficulties result *primarily* from FEA regulatory requirements. However, this distinction may be academic because the "significant contribution" test of causation has been applied in only one instance, and that single decision may therefore represent a temporary aberration.

GROSS INEQUITY

In contrast to serious hardship determination, gross inequity analysis has involved an approach both more subjective and broader in scope. The FEA has refined and developed three general gross inequity criteria which the Agency presently applies. Gross inequity is present if it is demonstrated that:

(1) The purpose of the regulatory provision involved would be distorted by strict application of its literal provisions; or

(2) A firm is uniquely affected by a regulatory provision and is thereby experiencing a disproportionate burden relative to other similarly situated firms; or

(3) Application of a regulatory provision frustrates the realization of a major national policy objective.

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44. *See, e.g., Anderson Petroleum Company*, 1 FEA ¶ 20,697 (November 7, 1974).

45. *See, e.g., A&R Enterprises, Inc.*, 1 FEA ¶ 20,749 (December 23, 1974) and *Clark Oil and Refining Company*, 2 FEA ¶ 83,040 (February 12, 1975)

46. *Taylor Butane Company, Inc.*, 1 FEA ¶ 20,726 (December 6, 1974).

Regulatory Purpose Distorted

An anomalous situation is almost invariably involved where a gross inequity finding is made based on distortion of regulatory purpose. In fact, the FEA has held that if an applicant argues that regulatory purpose is subverted in circumstances concededly not unique to the applicant, that the exceptions process is not an appropriate forum to evaluate the application because issues involving the general application of FEA Regulations are properly considered in rulemaking proceedings. In addition, an anomalous situation in which a firm is uniquely affected may not constitute a distortion of regulatory purpose. For example, where a firm alleged that its refining operations had been suspended because of a labor strike thereby resulting in a loss of entitlements benefits to the firm, the FEA held that even if the allegation were true, relief would not be appropriate because the Entitlements Program is designed to reward benefits only to the extent that a firm actually has crude oil refined.[47]

However, where an anomalous situation is established that does result in a distortion of regulatory purpose, exception relief based on gross inequity is appropriate. For example, the FEA has held that where a firm demonstrates that unusual or anomalous results occurred during a base period, exception relief should be granted.[48] Similarly, where it is established that reference dates which control the setting of prices[49] are unrepresentative, exception relief is usually granted.

Disproportionate Burdens Imposed

Just as an anomalous situation in which a firm is uniquely affected need not necessarily distort a regulatory purpose, neither need an anomalous situation in which a firm is uniquely affected necessarily result in an unfair distribution of burdens. In developing its conception of "disproportionate burden," the FEA has observed that:

> "The application of any general regulatory provision whatsoever will affect different firms in a different manner depending on the nature of their operations. The effect of any such regulation will also result in a particular firm being more adversely affected

47. *Vulcan Asphalt Refining Company*, 2 FEA ¶ 83,055 (March 6, 1975).

48. *See, e.g., Tenneco Oil Company*, 2 FEA ¶ 83,108 (March 31, 1975).

49. *See, e.g., Carlos R. Leffler, Inc.*, 2 FEA ¶ 83,162 (May 30, 1975) where a firm's markup on May 15, 1973 (the reference date for purposes of setting prices) was 1,051 percent lower than the markup used during its three previous years.

> than any other firm. This result is an unavoidable element of the regulatory process, and exception relief is not appropriate under these circumstances solely on the basis of a showing that on a scale which measures the adverse impact of a particular regulatory provision a given firm is more adversely affected than other firms. However, exception relief may well be appropriate where a showing is made by a firm that in addition to experiencing a greater adverse impact as a result of a regulatory provision as compared to other firms, the nature or extent of the adverse impact on the firm significantly impedes its operations or places it in a substantially different position from other similarly situated firms when viewed in the context of the entire regulatory program."[50]

It would not appear that financial difficulties of serious hardship magnitude are required to establish that a firm's operations are significantly impeded. However, more than minimal difficulty to the firm must be established. The FEA has held that a reduction in gross revenues of only 6.5% is insufficient financial difficulty to quality for an exception based on gross inequity considerations.[51] Even if a firm's operations are significantly affected, the firm may not be shouldering a disproportionate burden. For example, the FEA has concluded in the following instances that disproportionate burden is not established:

> (i) A firm is denied the opportunity to earn revenues on its sales of a particular product which are at least equal to the revenues earned by its competitors;[52]
> (ii) A firm must purchase crude oil at a relatively high price to replace crude oil which it must sell as required by the provisions of the Mandatory Crude Oil Allocation Program;[53]
> (iii) A firm must purchase substantially more entitlements[54] than other firms because its sources of crude oil are predominately subject to FEA Price Regulations.[55]

In contrast, the FEA has found disproportionate burden in other

50. *Crown Central Petroleum Corp.*, 2 FEA ¶ 83,026 (January 28, 1975).
51. *Victoria Land and Investment Company*, 2 FEA ¶ 83,145 (May 8, 1975).
52. *See, e.g., Sun Oil Company*, 2 FEA ¶83,101 (March 27, 1975).
53. *See, e.g., Texaco, Inc.* (J&W Refining, Inc.), 1 FEA ¶ 20,190 (November 21, 1974).
54. *See* discussion of the Entitlements Program, *supra.*
55. *See, e.g., Falco, Inc.*, 2 FEA ¶ 83,174 (June 13, 1975).

circumstances. For example, where a firm has made a substantial investment prior to promulgation of a regulatory provision which frustrates the purpose of that investment, the FEA has generally concluded that gross inequity exists.[56] In more unique circumstances, the FEA held that certain low-volume service stations were disproportionately burdened by regulations limiting non-product cost pass-through which forced the stations to absorb the entire cost of installing vapor recovery units which benefited the entire community.[57]

Frustration of National Policy Objectives

National policy objectives have been consistently cited by the FEA to mitigate for or against exception relief. In 1974, the FEA gradually evolved frustration-of-national-policy-objectives as a specific criterion of gross inequity determination. In an August 1974 decision, the FEA had specifically concluded that frustration of a national policy objective, conservation of energy supplies, did not constitute a gross inequity. In that case, a public transportation company had established that its higher than anticipated fuel costs would prevent expansion of its mass transportation facilities unless the FEA granted it an exception resulting in assignment to it of a lower-priced fuel supplier.[58] Although the FEA did not make a gross inequity finding, in recognition of the national importance of conserving energy supplies, the Agency granted relief based on its power to afford special redress.[59] Rather than relying on its special redress powers in subsequent cases of a similar nature, however, the FEA explicitly held in December 1974, that frustration specified in the EPAA or the Federal Energy Administration Act could, in appropriate circumstances, constitute gross inequity.[60]

The FEA has granted exception relief where the following national policy objectives would have been otherwise frustrated:

(i) increasing domestic supplies of crude oil and scarce refined

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56. *See, e.g., J&W Refining, Inc.*, 2 FEA ¶ 83,128 (April 25, 1975) and *Saber Refining Company*, 1 FEA ¶ 20,736 (December 13, 1974) where small refiners had made substantial investments in expanding refining capacity in reliance on contracts providing for dependable sources of crude oil, but FEA regulations controlling supplier/purchaser relationships preempted the contracts and prevented the firms from obtaining those crude oil supplies on a regular basis.

57. *County of San Diego, California*, 1 FEA ¶ 20,667 (September 27, 1974).

58. *Greater Richmond Transit Company*, 1 FEA ¶ 21,302 (August 22, 1974).

59. Federal Energy Administration Act §21(b), 15 U.S.C. §780(b) (1974).

60. *Apco Oil Corporation*, 1 FEA ¶ 20,750 (December 23, 1974).

petroleum products;
(ii) restoring and fostering competition in the petroleum industry;
(iii) preserving and enhancing the competitive viability of small and independent refiners;
(iv) providing for equitable distribution of petroleum products at equitable prices;
(v) protection of public health, safety and welfare (including maintenance of residential heating);
(vi) expanding domestic refining capacity; and
(vii) equitable distribution of the benefits of price-controlled oil;

In recognition that in some instances national policy objectives may conflict to some degree, the FEA has attempted to balance competing national objectives in several instances.[61]

CONSIDERATION OF THIRD PARTY IMPACT

The FEA has generally considered third party impact in evaluating all exception applications. In fact, the FEA Procedural Regulations (10 C.F.R., Part 205) require that affected third parties be notified of exception applications and have an opportunity to respond. Moreover, the FEA has specifically granted applicants exception relief based on the finding that gross inequity would be experienced by third parties. For example, in several instances the FEA has increased the base period volume of an applicant service station where it has been established that a community is dependent on the station for its supply of gasoline and the station's gasoline supply is inadequate to substantially satisfy the community's requirements.[62] Furthermore, adverse impact on third parties has been often cited by the FEA as a reason to deny exception applications.

SCOPE OF EXCEPTION RELIEF

Exception relief is rarely granted in as broad a form as is usually requested. Rather, the FEA generally limits the relief provided to that which is sufficient to restore a firm to a financial and operating posture historically most representative. As might be expected, the

61. *See, e.g., Pasco, Inc.*, 2 FEA ¶ 83,021 (January 20, 1975), and "Importance of the Exceptions Process in Policy Development", *supra.*

62. *See, e.g., Corbin Produce and Service Station*, 2 FEA ¶ 83,158 (May 23, 1975).

representative historical period chosen has varied from case to case. For example, in one instance a firm's most recently completed fiscal year was selected.[63] In another, the FEA granted relief designed to permit a firm to operate in a manner approximating its financial and operating posture achieved during its previous three fiscal years.[64]

CONCLUSIONS

An application for an exception may be granted to alleviate or prevent serious hardship or gross inequity. Serious hardship exists where severe financial difficulties have been demonstrated, as indicated usually by a substantial percentage reduction in a firm's net profits or in its profit margin, which reduction has primarily resulted from application of the FEA regulations. Gross inequity exists where it is demonstrated that because of an anomalous situation in which a firm is uniquely affected by a regulatory provision, either the regulatory purpose is distorted or the firm is disproportionately burdened. In addition, gross inequity exists if a national policy objective would be frustrated by strict application of the terms of a regulatory provision in particular circumstances.

The FEA has interpreted the exceptions criteria of serious hardship and gross inequity through an interative process in which published decisions have been issued on the merits of more than 400 exception applications. Although in many instances those decisions have not clearly set forth important factual elements involved or specifically identified the tests applied, nevertheless, increasingly precise standards have been stated and increasingly consistent treatment has been given similar situations. Because of the substantial published body of exceptions decisions rendered to date, it is now possible to forecast with increased certainty, the likely response of the FEA to particular problems identified in exception applications.

Although it is fair to expect that the specific meaning of the exceptions criteria in particular circumstances will continue to evolve, the large body of administrative decisions rendered to date ought to serve as a precedential foundation for future refinement of exceptions law. It would be a capricious act for the FEA, in exercising the considerable discretion it reserves to interpret the meaning of the exceptions criteria, to abruptly and fundamentally alter its basic interpretation. Instead, if the energy environment should substantially change, the

63. *Pasco, Inc.* 2 FEA ¶ 83,021 (January 20, 1975).
64. *Famariss Oil Corporation*, 2 FEA ¶ 83,080 (March 28, 1975).

more appropriate response would be for the federal government to change the applicable statutes and energy regulations accordingly.

If in response to fundamentally changed conditions, the central concept of the present regulatory scheme for energy - a freeze of relationships as they existed on a representative reference date - is abandoned, the exceptions process might play a less important role, and more traditional administrative procedures might become correspondingly more important. However, the nation's energy problems are so serious that the relatively severe regulatory method of freezing relationships may continue and, if this is the case, the exceptions process should remain a crucially important procedure.