Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Administration for Children and Families	)	DATE: June 1, 1993
	)	
- v. -	)	
	)	Docket No. C-92-040
Pennsylvania Department of Community Affairs,	)	Decision No. CR269
	)	
Respondent,	)	
	)	
and	)	
	)	
Pennsylvania Directors' Association for Community Action,	)	
	)	
Intervenor.	)	
	)	

DECISION

This case is before me on the request of the Pennsylvania Department of Community Affairs (DCA) for a hearing to determine whether the State of Pennsylvania's determination that the Pennsylvania Directors' Association for Community Action (PDACA) is an eligible entity under section 673(1) of the Community Services Block Grant (CSBG) Act is clearly erroneous.[1] At issue is the propriety of Pennsylvania's funding of PDACA from the 90 percent share of CSBG funds that are to be set aside for

[1] PDACA was incorporated on June 23, 1975 as the Pennsylvania Delaware Association for Community Action. On October 23, 1981, the Pennsylvania Delaware Association for Community Action changed its name to the Pennsylvania Directors' Association for Community Action. For the purposes of this decision, I will refer to both the Pennsylvania Directors' Association for Community Action and its predecessor, the Pennsylvania Delaware Association for Community Action, as PDACA.

"eligible entities" as defined in section 673 of the CSBG Act, 42 U.S.C. § 9902. For the reasons that follow in this Decision, I find clearly erroneous the Pennsylvania Attorney General's determination that PDACA is an eligible entity within the meaning of section 673(1) of the CSBG Act.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

The CSBG Act

Section 672(a) of the CSBG Act, 42 U.S.C. § 9901(a), authorizes the Secretary of the United States Department of Health and Human Services (Secretary) to make grants to States to ameliorate the causes of poverty in communities within the State.

As a requirement for receiving CSBG funds, a State must annually submit an application to the Secretary which contains assurances by the chief executive officer of the State that the State will meet the conditions enumerated in section 675(c) of the CSBG Act. Section 675(a) of the CSBG Act, 42 U.S.C. § 9904(a).

Specifically, section 675(a)(2)(A) of the CSBG requires the chief executive officer of each State to certify that the State agrees to

> use . . . for fiscal year 1985 and for each subsequent fiscal year, not less than 90 percent of the funds allotted to the State under section [674] of this title to make grants to use for the purposes described in clause (1) to eligible entities (as defined in section [673(1)] of this title) or to organizations serving seasonal or migrant farmworkers, except that no more than 7 percent of the funds available for this subclause shall be granted to organizations which were not eligible entities during the previous fiscal year . . .

Definition of "Eligible Entity"

The definition of the term "eligible entity" has been amended several times since 1981. As originally enacted on August 13, 1981, section 673 of the CSBG Act (42 U.S.C. § 9902 (1981)) provided in relevant part:

> (1) the term "eligible entity" means any organization which was officially designated as a community action agency or a community action program under the provisions of section 210 of the

> Economic Opportunity Act of 1964 [42 U.S.C. § 2790] for fiscal year 1981. . . .

On December 29, 1981, section 673(1) of the CSBG Act (Pub. Law 97 - 115, 96 Stat. 1609) was amended to add a second sentence as follows:

> The term eligible entity includes any limited purpose agency designated under Title II of the Economic Opportunity Act of 1964 for fiscal year 1981 which served the general purposes of a community action agency under title II of such Act . . . and any grantee which received financial assistance under section 221 or section 222(a)(4) of the Economic Opportunity Act of 1964 [42 U.S.C. §§ 2208 or 2209(a)] in fiscal year 1981.[2]

The 1981 amendment to section 673(1) of the CSBG Act thus expanded the definition of an eligible entity to include those limited purpose agencies (LPAs) that perform the functions of community action agencies (CAAs), but which are not technically CAAs. House Conference Report No. 386, 97th Cong., 1st Sess. 38, reprinted in 1981 U.S.C.C.A.N. 2574.

On October 30, 1984, the second sentence of section 673(1) was amended, in relevant part, by Public Law 98-558 (98 Stat. 2884), to delete the reference to grantees under section 221 of the Economic Opportunity Act (EOA). Subsequent to the October 30, 1984 amendment to section 673(1) of the CSBG, in order to retain status as an eligible entity, a grantee must have been either an LPA designated under Title II of the EOA of 1964 for FY 1981 which served the general purposes of a CAA under Title II of the EOA of 1964 or a grantee which received financial assistance under section 222(a)(4) of the EOA of 1964.

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[2] Section 221(a) of the EOA of 1964 empowered the Director of the Office of Community Services (OCS) to provide financial assistance to community action agencies for the "planning, conduct, administration and evaluation of community action programs and components." Section 221(b) empowered the Director to provide financial assistance for certain limited activities or projects. Section 222(a)(4) allowed development of special programs for "Rural Housing Development and Rehabilitation."

Section 210 of the EOA, 42 U.S.C. § 2790, as referenced in the CSBG Act, defined a CAA as a:

> (1) State, (2) political subdivision, (3) combination of political subdivisions, (4) public or private nonprofit agency or organization designated by a State, political subdivision or combination of political subdivisions, or (5) an Indian tribal government which:
>
> > (1) has the power and authority and will perform the functions set forth in section 2795 of this title, including the power to enter into contracts with public and private nonprofit agencies and organizations to assist in fulfilling the purposes of this subchapter, and
> >
> > (2) is determined to be capable of planning, conducting, administering and evaluating a community action program and is currently designated as a community action agency by the Director.

The concept that a CAA serves a specific geographic area and controls the delivery of services to that area is addressed by section 221(b) of the EOA:

> If the Director [of OCS] determines that a limited purpose project or program involving activities otherwise eligible under this section is needed to serve needs of low-income families and individuals in a community and no community action agency has been designated for that community pursuant to section 210, or where a community action agency gives its approval for such a program to be funded directly through a public or private nonprofit agency or organization, he may extend financial assistance for that project or program to a public or private nonprofit agency which he finds is capable of carrying out the project in an efficient and effective manner consistent with the purposes of this title.

Purposes of Title II of the EOA

The basic purposes which Congress had in funding programs under Title II were outlined in section 201(a) of the EOA, 42 U.S.C. § 2781(a) (1967) as follows:

> . . . [T]o stimulate a better focusing of all available local, State, private, and Federal

resources upon the goal of enabling low-income families, and low-income individuals of all ages, in rural and urban areas to attain the skills, knowledge, and motivations and secure the opportunities needed for them to become fully self-sufficient. Its specific purposes are to promote, as methods of achieving a better focusing of resources on the goal of individual and family self-sufficiency --

(1) the strengthening of community capabilities for planning and coordinating federal, State, and other assistance related to the elimination of poverty, so that this assistance, through the efforts of local officials, organizations, and interested and affected citizens can be made more responsive to local needs and conditions;

(2) the better organization of a range of services related to the needs of the poor, so that these services may be made more effective and efficient in helping families and individuals to overcome particular problems in a way that takes account of, and supports their progress in overcoming related problems;

(3) the greater use, subject to adequate evaluation, of new types of services and innovative approaches in attacking the causes of poverty, so as to develop increasingly effective methods of employing available resources;

(4) the development and implementation of all programs and projects designed to serve the poor or low-income areas with the maximum feasible participation of residents of the areas and members of the groups served, so as to best stimulate and take full advantage of capabilities for self-advancement and assure that those programs and projects are otherwise meaningful to and widely utilized by their intended beneficiaries; and

(5) the broadening of the resource base programs directed to the elimination of poverty, so as to secure, in addition to the services and assistance of public officials, private religious, charitable, and neighborhood organizations, and individual citizens, a more active role for business, labor, and

> professional groups able to provide employment opportunities or otherwise influence the quantity and quality of services of concern to the poor.

Regulatory provisions in effect during FY 1981[3]

45 C.F.R. § 1060.1-2(a)(1) declared as follows: "[a]n essential objective of community action is extensive and intensive participation by the poor and residents of poverty areas in the planning, conduct, and evaluation of programs which affect their lives."

45 C.F.R. § 1060.1-2(b)(1)(iv) described the fundamental responsibilities of a CAA to include "providing employment for poor persons in all phases of the community action program."

45 C.F.R. § 1062.200-4 provided as follows:

> LPAs are not required to have broad community representation on their policy making boards, but they must have either a board of directors which is composed of at least one-third representatives of the poor or an advisory committee at least a majority of which are democratically selected representatives of the poor.

45 C.F.R. § 1063.130-6(a) provided:

> The operation of programs meeting high priority needs is an effective vehicle through which the CAA can stimulate increased responsiveness to the needs of the poor. Programs produce immediate, tangible benefits to the poor in terms understandable to the poor and non-poor alike. By operating programs and delivering services, either directly or through delegate agencies, the CAA establishes a base from which it can inform the community of the needs and aspirations of the poor, gain practical experience in dealing with poverty problems, and strengthen its stature as a community resource.

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[3] Sections 1062 and 1063 of these regulations were repealed at 46 Fed. Reg. 43690 (1981). However, since they were in effect during FY 1981, they are the ones that I considered in this Decision.

45 C.F.R. § 1063.130-3(b) provided an elaboration upon the statutory statement of the basic purpose of a CAA under the EOA:

> The key phrase in this [statutory] statement is "to stimulate a better focusing of all available . . . resources." The Act thus gives the CAA a primarily catalytic mission: To make the entire community more responsive to the needs and interests of the poor by mobilizing resources and bringing about greater institutional sensitivity. A CAA's effectiveness, therefore, is measured not only by the services which it directly provides but, more importantly, by the improvements and changes it achieves in the community's attitudes and practices toward the poor and in the allocation and focusing of public and private resources for antipoverty purposes . . . .

The mission of a CAA is stated in 45 C.F.R. § 1063.130-6(b) as follows:

> While the operation of programs is the CAA's principal activity, it is not the CAA's primary objective. CAA programs must serve the larger purpose of mobilizing resources and bringing about greater institutional sensitivity. This critical link between service delivery and improved community response distinguishes the CAA from other agencies. . .

The geographic exclusivity of CAAs is addressed by 45 C.F.R. § 1062.71(d) and (e), which state as follows:

> (d) When a political subdivision makes a designation for a community extending beyond its boundaries, any political subdivision within that larger community may, of course, exercise its right to opt out. However, where, for example, a county opts out from a county-wide designation made by a municipality, the opt-out applies only to that portion of the county outside the designating municipality. If the latter (together with any other municipalities which may wish to join it) has a population of 100,000 or more, its designation may still be recognized.
>
> (e) When two or more political jurisdictions make simultaneous designations for all or part of the same community, the designation of the smallest jurisdiction shall take precedence, since its designation shall be considered as equivalent to an opt-out from the designation of the larger jurisdiction(s). For example, if a State designates

itself as the CAA and one or more counties make their own designations, the county designations shall be recognized by OEO and the State CAA will serve only that portion of the State outside those counties.

BACKGROUND

Between December 5 and December 9, 1988, pursuant to section 679(b)(1) of the CSBG Act, the Office of Community Services (OCS) (which is a component of the Administration for Children and Families (ACF)) conducted a program implementation assessment (PIA) in Pennsylvania. According to ACF, the PIA revealed that the State of Pennsylvania was impermissibly funding PDACA from the 90 percent share of its CSBG funds that are to be set aside for "eligible entities" as defined in section 673(1) of the CSBG Act, 42 U.S.C. § 9902. As originally enacted and subsequently amended, section 673(1) of the CSBG Act defined the types of organizations that may be considered "eligible entities." In order to qualify as an eligible entity and receive 90 percent set aside funding, PDACA must have been in fiscal year (FY) 1981 (October 1, 1980 - September 30, 1981) an LPA which served the general purposes of a CAA under Title II of the EOA of 1964, a grantee which received financial assistance under section 222(a)(4) of the EOA of 1964, or an organization officially designated as a CAA or a community action program.

On March 31, 1989, OCS sent a letter to DCA which raised questions about the propriety of funding PDACA as an "eligible entity" under the CSBG Act. DCA responded to OCS on May 23, 1989, setting forth DCA's position that PDACA was an eligible entity within the meaning of the CSBG Act. On July 21, 1989, DCA advised PDACA that its funding was being terminated. On August 1, 1989, PDACA asked the Secretary to review DCA's action. In a letter to DCA dated August 21, 1989, the Director of OCS stated that DCA's submissions did not furnish sufficient documentation that PDACA was an eligible entity as defined by section 673(1) of the CSBG Act. The August 21 letter further requested that DCA obtain from the Pennsylvania Attorney General rulings on: 1) whether PDACA was eligible to receive funding from the 90 percent set aside funds allotted to the State under the CSBG Act; and 2) whether PDACA's board of directors was in compliance with section 675(c)(3) of the CSBG Act. The letter indicated also that the State was to continue funding PDACA until the Attorney General had provided these rulings and OCS had had the opportunity to review them. This direction to continue funding was further

clarified and emphasized in a subsequent letter dated October 30, 1989.

By letter dated September 22, 1989, DCA requested assistance from OCS in the form of clarification as to what program activities constituted compliance with the requirement of serving the general purposes of a CAA. Apparently OCS did not respond, but on February 28, 1990, DCA requested the Pennsylvania Attorney General to make a determination on behalf of the State concerning the eligibility of PDACA to receive funding under the CSBG Act.

In a decision dated June 12, 1990, the Pennsylvania Attorney General determined that PDACA was an eligible entity under the applicable statutes and that Pennsylvania was not violating its assurances under the CSBG Act by funding PDACA.

In a letter dated February 28, 1991, OCS informed DCA that it had determined that the June 12, 1990 decision of the Pennsylvania Attorney General was clearly erroneous and that PDACA should not receive funding as an "eligible entity" under the CSBG Act. On October 31, 1991, OCS notified DCA of its intent to withhold CSBG funds from the State if PDACA continued to be funded as an eligible entity under the CSBG Act. OCS's position was that, by funding PDACA, the State was violating its assurances under section 679(a)(1) of the CSBG Act.

In a letter dated November 19, 1991, the Chief Counsel for DCA requested that OCS provide a hearing regarding PDACA's eligibility status. In a letter dated December 19, 1991, ACF requested the appointment of a presiding officer, and I was appointed by the Chair, Departmental Appeals Board (DAB).

On January 29, 1992, I conducted a prehearing conference. At that conference, DCA and ACF agreed to a schedule through which this case was to proceed to hearing on April 14, 1992, in Harrisburg, Pennsylvania. However, on March 12, 1992, after receiving and considering a motion to intervene from PDACA and an opposition from ACF, I ruled that PDACA would not be allowed to intervene as a party in this proceeding, although I would have permitted PDACA to participate in the proceeding as an amicus curiae.

On March 31, 1992, the DAB Chair convened a telephone conference to respond to DCA's and PDACA's attempt to take an interlocutory appeal from my ruling denying PDACA participation in this case as a party. On April 7, 1992,

the Chair remanded to me for reconsideration PDACA's motion to intervene in light of DCA's and PDACA's contention that their interests in this case were no longer identical. On June 7, 1992, I issued a Ruling granting PDACA's petition to intervene as a party in this case.

On July 8, 1992, I conducted a second prehearing conference. At the second prehearing conference, the parties agreed that the issue to be decided in this case was whether the Pennsylvania Attorney General's determination that PDACA is an eligible entity under section 673(1) of the CSBG Act is clearly erroneous. Subsumed in that issue is whether PDACA served the general purposes of a CAA in FY 1981, within the meaning of Title II of the EOA of 1964, as amended.

I conducted an in-person hearing in this case in Carlisle, Pennsylvania, on November 23, 1992, and in Harrisburg, Pennsylvania, on November 30 and December 1, 1992.[4] I have considered all of the arguments, testimony, and exhibits in this case, and find that the determination of the Pennsylvania Attorney General, that PDACA is an eligible entity within the meaning of section 673(1) of the CSBG Act, is clearly erroneous. I find also that PDACA did not fulfill all of the purposes of a CAA as set out in section 201(a) of the EOA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Pennsylvania's CSBG program is administered by DCA.

2. As a recipient of CSBG Act funding, Pennsylvania is required to comply with the assurances set forth in section 675 of the CSBG Act (42 U.S.C. §9904(c)).

3. In submitting its annual applications for CSBG funding, DCA has certified its compliance with the assurances that are required of States under section 675 of the CSBG Act.

4. The CSBG Act assurances require, among other things, that Pennsylvania distribute at least 90 percent of its CSBG Act funding to "eligible entities," as defined in

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[4] The imminent retirement and relocation of one of ACF's witnesses necessitated the taking of that witness' testimony in Carlisle prior to the dates on which the hearing had been scheduled.

section 673(1) of the CSBG Act (42 U.S.C. §9904(c)(2)(a)).

5. Pursuant to the Human Services Amendments of 1984 (Pub. L. 96-558), DCA has funded PDACA as an "eligible entity" under the CSBG Act. ACF Ex. 9, 27.[5]

6. As originally enacted on August 13, 1981, section 673(1) of the CSBG Act defined "eligible entity" to include any organization which was officially designated as a CAA or a community action program under section 210 of the EOA of 1964 for FY 1981. Section 673(1) of the CSBG Act.

7. In order for an entity to be eligible to receive 90 percent set aside funding, the grantee must be an LPA designated under Title II of the EOA of 1964 for FY 1981 which served the general purposes of a CAA under Title II of the EOA. Section 673(1) of the CSBG Act, as amended October 30, 1984.

8. Section 673(1) of the CBSG Act also permits a grantee which received financial assistance under section 222(a)(4) of the EOA of 1964 to receive 90 percent set aside funding. Section 673(1) of the CSBG Act, as amended October 30, 1984.

9. PDACA does not contend that it was a grantee which received financial assistance under section 222(a)(4) of the EOA of 1964.

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[5] I refer to the PDACA's exhibits as "PDACA Ex. (exhibit number at page)." I refer to DCA's exhibits as "DCA Ex. (exhibit number at page)." I refer to ACF's exhibits as "ACF Ex. (exhibit number at page)." I refer to the transcript of the testimony taken in Harrisburg, Pennsylvania on November 30 - December 1, 1992 as "Tr. (page)."

The exhibits I have marked as Presiding Officer Exhibits (PO Ex.) 1 - 3 contain the lists of received exhibits from DCA, PDACA and ACF, respectively. At the November 30, 1992 hearing, I received into evidence ACF Ex. 1 - 55, 56A, 57 - 59, 61 and 62; DCA Ex. 1 - 33; and PDACA Ex. 1 - 4. On January 5, 1993, I received into evidence ACF Ex. 60, which is a transcript of the testimony given by witness John Finley on November 22, 1992 in Carlisle, Pennsylvania. ACF Ex. 56 was withdrawn at the November 30, 1992 hearing in Harrisburg.

10. PDACA does not contend that it was ever designated as a CAA or a community action program under any version of the EOA.

11. In FY 1981, PDACA was an LPA designated under Title II of the EOA. ACF Trial Memorandum at 1.

12. To qualify as an eligible entity, PDACA must be an LPA which, in FY 1981, served the general purposes of a CAA under Title II of the EOA. CSBG Act, Section 673(1), as amended October 30, 1984; FFCL 7 - 9.

13. ACF is obligated to defer to the State's interpretation of its assurances and of the provisions of the CSBG Act unless that interpretation is clearly erroneous. 45 C.F.R. § 96.50(e).

14. Clearly erroneous means that a determination will be upheld unless the reviewing authority finds that the original determination is unsupported by substantial evidence, contrary to the clear weight of the evidence, or induced by an erroneous view of the law. Gasifier Mfg. Co. v. General Motors Corporation, 138 F.2d 197, 199 (8th Cir. 1943).

15. In making his determination that PDACA was an eligible entity, the Pennsylvania Attorney General considered activities conducted by PDACA outside of FY 1981. DCA Ex. 18.

16. In making his determination that PDACA was an eligible entity, the Pennsylvania Attorney General relied on a statutory provision that was not applicable and had been repealed. DCA Ex. 18; EOA of 1964, as amended in 1967 (Pub. L. 90-222 (1967)); Section 673(1) of the CSBG, as amended.

17. In making his determination that PDACA was an eligible entity in accordance with section 673(1) of the CSBG Act, the Pennsylvania Attorney General relied on PDACA's 1989 bylaws. DCA Ex. 18.

18. The Pennsylvania Attorney General's Opinion did not address whether PDACA, in FY 1981, had the "maximum feasible participation by residents of the areas and members of the groups served . . .", within the meaning of section 201(a)(4) of the EOA. DCA Ex. 18.

19. The Pennsylvania Attorney General's Opinion did not address whether PDACA, in FY 1981, undertook activities with the regular participation of the poor, within the meaning of section 211(f)(3) of the EOA. DCA Ex. 18.

20. The Pennsylvania Attorney General's Opinion did not address whether PDACA, in FY 1981, undertook activities with the "extensive and intensive participation by the poor and residents of poverty areas in the planning, conduct, and evaluation of programs which affect their lives," within the meaning of 45 C.F.R. § 1060.1-2(a)(1). DCA Ex. 18.

21. Under the EOA, an entity that is serving the general purposes of a CAA is required to undertake activities with the regular participation of the poor. Section 211(f)(3) of the EOA.

22. Under the EOA, an entity that is serving the general purposes of a CAA is required to have the maximum feasible participation of residents of the areas and members of the groups served, so as to best stimulate and take full advantage of capabilities for self-advancement and assure that those programs and projects are otherwise meaningful to and widely utilized by their intended beneficiaries. Section 201(a)(4), 42 U.S.C. § 2781(a)(4); 45 C.F.R. §§ 1062.1-2, 1060.1-3(a)(2)(i)(a), 1061.50-6(a)(6), 1063-130.3, and 1063.130-4; ACF Ex. 56A at 15 and 26; ACF Ex. 60 at 43 - 44; Tr. 162, 251-252, 289-290.

23. An essential objective of community action is "extensive and intensive participation by the poor and residents of poverty areas in the planning, conduct, and evaluation of programs which affect their lives." 45 C.F.R. § 1060.1-2(a)(1).

24. PDACA's articles of incorporation and bylaws, through and including FY 1981, made no provision for the participation or representation of poor persons on its board of directors. ACF Ex. 10, 32; Tr. 389.

25. In FY 1981, PDACA did not have a board of directors with at least one-third membership from poor persons in the community served by PDACA. Tr. 332 - 474; DCA Ex. 18.

26. PDACA's articles of incorporation and bylaws, through and including FY 1981, made no provision for input from or participation by poor persons in decisions about its activities or in carrying out its activities. ACF Ex. 10, 32; Tr. 389.

27. In FY 1981, PDACA did not have an advisory committee composed of at least a majority of democratically selected members of the poor. Tr. 332 - 374, 384 - 89, 413 - 14; DCA Ex. 18

28. PDACA undertook several activities that were carried out statewide in Pennsylvania in FY 1981 such as 1) the development of rural housing capacity; 2) an energy program which included funding to counties which did not have CAAs; and 3) a domestic violence project, where PDACA contracted to provide training and to attempt to organize groups to assist them in setting up women's shelters and contracted to advocate for State funding or for an ongoing resource that could be developed to support expansion of women's shelters across Pennsylvania. DCA Ex. 18; Tr. 348 - 55.

29. There is insufficient evidence in the record from which I can conclude that PDACA, in conducting statewide activities across Pennsylvania in FY 1981, provided for extensive and intensive participation of the poor, within the meaning of the EOA and 45 C.F.R. § 1060.1-2(a)(1). DCA Ex. 18; section 2201(a)(4) of the EOA, 42 U.S.C. § 2781 (1981); 45 C.F.R. § 1060.1-3(a)(2)(i)(a), 1061.50-6(a)(6), and 1063.130-4 (1980); FFCL 20, 23 - 28.

30. In FY 1981, PDACA did not provide for the maximum feasible participation of residents of the areas and members of the groups served, so as to best stimulate and take full advantage of capabilities for self-advancement and assure that those programs and projects are otherwise meaningful to and widely utilized by their intended beneficiaries. Section 201(a)(4), 42 U.S.C. § 2781(a)(4); 45 C.F.R. §§ 1062.1-2, 1060.1-3(a)(2)(i)(a), 1061.50-6(a)(6), 1063-130.3, and 1063.130-4; ACF Ex. 56A at 15 and 26; ACF Ex. 60; Tr. 162, 251-252, 289-290, 413. FFCL 18, 24 - 28.

31. The determination of the Pennsylvania Attorney General that PDACA is an eligible entity under section 673(1) of the CSBG Act is clearly erroneous. FFCL 12 - 30.

32. ACF did not establish that a requirement of control over a specific geographic area is mandated by the statute or regulations for all CAAs or LPAs serving the general purposes of CAAs. Section 221(b) of the EOA; ACF Ex. 2 at 25; 45 C.F.R. § 1062.71(d) and (e); ACF Ex. 60 at 55 - 56; Tr. 178, 378, 450.

33. There is insufficient evidence in the record from which I can conclude that, in FY 1981, PDACA conducted a comprehensive needs assessment.

34. ACF did not establish that an LPA serving the general purposes of a CAA in FY 1981 was required to conduct a comprehensive needs assessment in order to

qualify as an eligible entity under section 673(1) of the CSBG.

35. ACF did not establish that an LPA serving the general purposes of a CAA in FY 1981 was required to provide services to poor persons directly. 45 C.F.R. § 1063.130-6(b) - 132.3(d).

36. LPAs serving the general purposes of a CAA in FY 1981 were required to provide "a sufficient number of projects or components to provide, in sum, a range of services and activities having a measurable and potentially major impact on the causes of poverty in the community." Section 210(a) of the EOA; 42 U.S.C. § 2790(a).

37. ACF did not establish that PDACA did not provide for "a sufficient number of projects or components to provide, in sum, a range of services and activities having a measurable and potentially major impact on the causes of poverty in the community" in accordance with section 210(a) of the EOA. FFCL 28, 36; DCA Ex. 18.

38. One requirement for LPAs serving the general purposes of a CAA in FY 1981 is that the organization conduct activities that are "responsive to the needs of the poor which are not otherwise being met." 42 U.S.C. § 2795(b)(3).

39. ACF did not establish that PDACA did not conduct activities in FY 1981 that were "responsive to the needs of the poor which are not otherwise being met," in accordance with 42 U.S.C. § 2795(b)(3). FFCL 28, 38; DCA Ex. 18.

40. There is insufficient evidence in the record from which I can conclude that, in FY 1981, PDACA did not provide services to poor persons directly, within the meaning of the EOA.

41. In FY 1981, local initiative funding (also termed 01 account funding) was available to CAAs to plan, conduct, administer and evaluate their community action programs. Tr. 253; 45 C.F.R. §1067.41-3 (Appendix B) (1980); ACF Ex. 28, 31, 48, 49.

42. In FY 1981, PDACA did not receive local initiative (01 account) funding. ACF Ex. 28, 31, 48, 49.

43. ACF did not establish that a requirement for being an eligible entity under section 673(1) of the CSBG in FY 1981 was the receipt of local initiative (01 account)

funding. Section 673(1) of the CSBG; Section 201(a) of the EOA of 1964, as amended in 1967.

44. PDACA was incorporated in 1975 under the name "Pennsylvania Delaware Association for Community Action" and retained that name until October 23, 1981, when it amended its bylaws to substitute "Directors'" for "Delaware" in its name. ACF Ex. 10, 32.

45. PDACA's members are and always have been, including during FY 1981, CAAs. ACF Ex. 12, 32.

46. ACF did not establish that PDACA could not have been an eligible entity in FY 1981 within the meaning of section 673 of the CSBG Act by virtue of its name or corporate title.

47. DCA has not been denied proper notice by ACF. ACF Ex. 9, 19, 22.

48. PDACA has not been denied proper notice by ACF. ACF Ex. 9, 19, 22; FFCL 47.

49. PDACA cannot meet the definition of an "eligible entity" under section 673(1) of the CSBG Act unless it served the general purposes of a community action agency under Title II of the EOA in FY 1981. FFCL 6 - 12.

50. In FY 1981, PDACA did not serve the general purposes of a CAA under Title II of the EOA. Section 201(a) of the EOA (42 U.S.C. § 2781(a)); section 210(a) of the EOA (42 U.S.C. §2790(a)); section 212 of the EOA (42 U.S.C. §2795); section 221(a) of the EOA (42 U.S.C. §2808(a)); 45 C.F.R. Parts 1060 through 1067 (1980). FFCL 28 - 30.

51. PDACA is not an "eligible entity" under the CSBG Act. Section 673(1) of the CSBG (42 U.S.C. § 9902(1)); Title II, Economic Opportunity Act of 1964, as amended, section 201 et seq. (42 U.S.C § 2781 et seq.); 45 C.F.R. Parts 1060 through 1067 (1980). FFCL 21 - 30.

52. The State of Pennsylvania was clearly erroneous in finding PDACA to be an "eligible entity" under the CSBG Act. FFCL 31

53. In funding PDACA from its 90 percent set-aside funds, Pennsylvania violated the required assurances prescribed by section 675(c) of the CSBG Act. FFCL 1 - 5, 31, 52.

ISSUE

The issue in this case is whether the June 12, 1990 decision of the Pennsylvania Attorney General (Opinion) that PDACA is an eligible entity within the meaning of section 673(1) of the CSBG Act is clearly erroneous.

DISCUSSION

ACF, of which OCS is a component, contends that the June 12, 1990 Opinion that PDACA is an eligible entity within the meaning of section 673(1) of the CSBG Act is clearly erroneous. Subsumed within the issue of whether the Pennsylvania Attorney General's determination is clearly erroneous is whether PDACA served the general purposes of a CAA during FY 1981.

There is no dispute that PDACA was not designated as a CAA in FY 1981. The parties also do not dispute that in FY 1981 PDACA was an LPA. ACF Trial Memorandum at 1. The dispute in this case centers around whether PDACA was an LPA which served the general purposes of a CAA in FY 1981.

I. To qualify as an eligible entity under the CSBG Act, PDACA had to have served the general purposes of a community action agency in FY 1981.

As enacted on August 13, 1981, section 673(1) of the CSBG Act defined an eligible entity as "any organization which was officially designated as a community action agency or a community action program under the provisions of section 210 of the Economic Opportunity Act of 1964 [42 U.S.C. § 2790] for fiscal year 1981 . . ." 42 U.S.C. § 9902 (1981).

On December 29, 1981, the definition of the term "eligible entity" as it appeared in section 673(1) of the CSBG Act was expanded to include any limited purpose agency designated under Title II of the Economic Opportunity Act of 1964 for FY 1981 which served the general purposes of a community action agency under Title II of such Act and any grantee which received financial assistance under section 221 or section 222(a)(4) of the EOA of 1964 (42 U.S.C. § 2208 or 2209(a)) for FY 1981. After the enactment of this provision, any organization which had been receiving section 221 or 222(a)(4) funding as well as any LPA designated under Title II of the EOA for FY 1981 which served the general purposes of a CAA qualified as an eligible entity.

However, on October 30, 1984, section 673(1) of the CSBG Act was amended by Public Law 98-558 to delete the reference to grantees under section 221 of the EOA. It is precisely because of this amendment that FY 1981 is the relevant time period to be looked at here, because it is only by complying with this provision that PDACA could qualify as an eligible entity under the CSBG Act. PDACA does not contend that it was officially designated as a CAA or a community action program under section 210 of the EOA of 1964, nor does PDACA contend that it was, at any time, a grantee which received financial assistance under section 222(a)(4) of the EOA. As of October 30, 1984, PDACA could qualify as an eligible entity only if it was an LPA which served the general purposes of a CAA under Title II of the EOA in FY 1981, or a grantee which received financial assistance under section 222(a)(4) of the EOA of 1964. Section 202 of Pub. L. 98-558, Human Services Reauthorization of 1984. Accordingly, in order to qualify as an eligible entity to receive 90 percent set aside funds, PDACA must have qualified as a ". . . limited purpose agency designated under title II of the Economic Opportunity Act of 1964 for fiscal year 1981 which served the general purposes of a community action agency under title II of such Act . . . ."

II. The Pennsylvania Attorney General found PDACA to be an eligible entity on the record before him.

On June 12, 1990, as a result of OCS' August 21, 1989 letter questioning PDACA's eligibility to receive CSBG funding out of the 90 percent set aside, the Pennsylvania Attorney General issued an Opinion. The Opinion stated, in relevant part:

> . . . we have examined the relevant federal statutes and regulations, the Joint Stipulation prepared by DCA and PDACA, the PDACA Memorandum of Law, the correspondence among the parties, and the other exhibits and documents submitted with your request. As a result of our review, I have determined that PDACA is an eligible entity under the applicable statutes.
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> As framed by Ms. Thomas' letter, the question to be addressed is whether PDACA "serves the general purposes of a community action agency" as required by the CSBG Act.
>
> Section 202(a) of the Original Act, Title II of the Economic Opportunity Act of 1964, P.L. No. 88-452, defines a community action program to be a program:

> (1) which mobilizes and utilizes resources, public or private, of any urban, rural, or combined urban and rural, geographical area (referred to in this part as a "community"), including but not limited to a State, metropolitan area, county, city, town, multi-city unit, or multi-county unit in an attack on poverty;
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> (2) which provides services, assistance, and other activities of sufficient scope and size to give promise of progress toward elimination of poverty or a cause or causes of poverty through developing employment opportunities, improving human performance, motivation, and productivity, or bettering the conditions under which people live, learn, and work;
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> (3) which is developed, conducted, and administered with the maximum feasible participation of residents of the areas and member of the groups served; and
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> (4) which is conducted, administered, or coordinated by a public or private nonprofit agency (other than a political party), or a combination thereof.

A review of PDACA's articles of incorporation and by-laws shows that PDACA is a private nonprofit agency and its purposes are, inter alia, to promote programs for relief of the poor and to support a range of services and activities having an impact on the causes of poverty in Pennsylvania both directly and through the activities of its member agencies, including activities designed to assist low income participants:

> (1) to secure and retain meaningful employment;
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> (2) to attain an adequate education;
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> (3) to make better use of available income;
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> (4) to obtain and maintain adequate housing and a suitable living environment;
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> (5) to obtain emergency assistance through loans or grants to meet immediate and urgent individual and family needs, including the need for health related services, nutritious foods, housing, and employment-related assistance;

> (6) to remove obstacles and solve problems which block the achievement of self-sufficiency;
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> (7) to achieve greater participation in the affairs of the community; and
>
> (8) to make more effective use of other programs related to the purposes of this Association.

These corporate purposes are consistent with the statutory purposes of a community action agency.

In addition, PDACA and DCA have provided a description of various programs and activities carried out by PDACA in fulfilling the above corporate purposes. These programs are listed on the attached report and include initiatives in education, housing, family services, employment training, energy assistance, and public protection. PDACA planning and administration of programs includes consultation with and participation by residents and members of the various groups to be served.

On the basis of the information submitted for my review, I have determined that PDACA is an eligible entity under the applicable statutes and continues to meet the general purposes of a community action agency.

DCA Ex. 18 at 1 - 3.

III. The State's interpretation is entitled to deference unless it is shown to be clearly erroneous.

OCS is obligated to defer to a State's interpretation of its assurances and of the provisions of the block grant statutes unless the interpretation is clearly erroneous. 45 C.F.R. § 96.50(e).

The "clearly erroneous" standard has been interpreted as follows:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

Findings have been held to be "clearly erroneous" when they are unsupported by substantial evidence, contrary to the clear weight of the evidence, or induced by an erroneous view of the law. Gasifier Mfg. Co. v. General Motors Corporation, 138 F.2d 197, 199 (8th Cir. 1943).

IV. The Opinion is clearly erroneous because it relied on inappropriate factual and legal bases to support its conclusion.

ACF contends that the Opinion is clearly erroneous because it did not address the central issue of whether PDACA is a limited purpose agency designated under Title II of the EOA of 1964 for FY 1981 which served the general purposes of a community action agency under Title II of the EOA. ACF notes that instead the Opinion simply cited to PDACA's articles and bylaws, as amended several years after 1981, in concluding that PDACA's corporate purposes are consistent with the statutory purposes of a community action agency. ACF contends further that the Opinion is clearly erroneous because it includes no discussion or analysis of PDACA's activities during the relevant time period.

ACF contends that a list of PDACA programs appended to the Opinions contains many that should not have been considered, because those programs were not operated during FY 1981 and thus were not relevant to the determination as to whether PDACA was an eligible entity. According to ACF, two of the programs listed in the attachment to the Opinion predate FY 1981. Furthermore, ACF contends that there was no documentation provided as to the source of funding for those programs.

I have reviewed all of the evidence with respect to the basis for the Opinion. For the three reasons that follow, I find that the Opinion is clearly erroneous because it incorrectly relied on legal and factual materials which were not appropriate or relevant to the determination of whether PDACA was an eligible entity in FY 1981.

A. The Opinion erroneously considered programs conducted by PDACA outside of FY 1981, the relevant timeframe.

One of the bases for the Attorney General's determination was the "description of various programs and activities carried out by PDACA in fulfilling the above corporate purposes." DCA Ex. 18 at 3. However, the list of programs considered by the Attorney General reveals that at most only four could have been funded in FY 1981 -- a

Statewide Rural Housing Coalition program funded between 1981 and 1984; a Coalition on Domestic Violence program funded between 1979 and 1980; an Energy Assistance Grants program funded between 1979 and 1982; and a Rural Housing Project program funded between 1981 and 1983.[6] DCA Ex. 18. The other 15 programs on which the Attorney General relied were funded outside the relevant timeframe of FY 1981. DCA Ex. 18 at 3 - 8.

The Opinion therefore does not limit its consideration to FY 1981 as the crucial year involved in making the determination as to whether PDACA was an eligible entity. Accordingly, I find that the Opinion is clearly erroneous because, in considering programs carried out by PDACA outside of FY 1981, it does not appropriately consider whether PDACA qualified as a "limited purpose agency designated under title II of the Economic Opportunity Act of 1964 for fiscal year 1981 which served the general purposes of a community action agency under title II of such Act . . . ."

B. The Opinion erroneously relied on a statutory provision that was not applicable and had been repealed.

Although the Opinion purports to have taken into account the relevant federal statutes and regulations, it relied on section 202(a) of the original enactment, Title II of the EOA of 1964, P.L. No. 88-452 (1964), as the relevant statute for defining a community action program. However, such reliance is misplaced.

The EOA of 1964 (Public Law 88-452 (1964)) as amended by the Green Amendments of 1967 (Public Law 90-222) was repealed in 1981 by 42 U.S.C. §§ 2790, 2791. However, the definition of eligible entity contained in section 673(1) of the CSBG Act (42 U.S.C. § 9902 (1981) specifically contains reference to an eligible entity under the EOA of 1964. Section 673(1) of the CSBG was enacted in August 1981, simultaneous with the repeal of the EOA. Thus, the reference in the CSBG Act necessarily means the EOA of 1964 as amended in 1967. Therefore, to determine what Congress meant by the general purposes of

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[6] Because the Opinion does not specify whether the "Year Funded" column appearing in the attachments references the fiscal year or the calendar year, I have considered the dates in the broadest possible terms, i.e., I considered any date within the period from October 1, 1980 through December 31, 1981, as if it did fall during FY 1981.

a CAA, one must look to the EOA of 1964 as amended in 1967.

The definition of a community action program contained in section 201(a) of the EOA of 1964 as amended in 1967 by the Green Amendments is admittedly somewhat similar to the statement of the purposes of CAAs contained in section 202(a) of the EOA, which also was repealed in 1967. However, my examination of these two provisions reveals that section 201(a) contains a more stringent, specific, and elaborate statement as to the general purposes of Title II organizations (CAAs). Section 202(a) is merely a definition for a community action program, not a statement of the general purposes of CAAs. As such, section 202(a) does not provide guidance to the critical determination of whether PDACA served the general purposes of a CAA, within the meaning of section 673(1) of the CSBG Act. Because section 201(a) provides a focused and specific statement of the general purposes of a CAA, the Pennsylvania Attorney General should have looked to this section, rather than section 202(a), to define an eligible entity.

In relying on section 202(a), the Opinion therefore relies on an incorrect statement of the law as a basis for its conclusion that PDACA was an eligible entity. I find this misplaced reliance on a repealed statutory provision sufficient basis to conclude that the Opinion is clearly erroneous.

C. The Opinion erroneously relied on PDACA's 1989 bylaws.

The Opinion cited PDACA's articles of incorporation and bylaws to support its determination that PDACA is an eligible entity. However, the bylaws cited are not those that were in effect in FY 1981. While the bylaws cited in the Opinion are those of PDACA, they contain changes made by amendments dated August 14, 1989. ACF Ex. 12. The bylaws cited in the Opinion are therefore not relevant to the determination as to whether PDACA served the general purposes of a CAA in FY 1981. Accordingly, the Opinion is clearly erroneous because its determination that PDACA was an eligible entity relies on PDACA bylaws that were not in effect in FY 1981.

The Opinion is therefore clearly erroneous because it considered programs conducted by PDACA outside of the relevant timeframe of FY 1981, it relied on a section of the EOA that was inappropriate and had been repealed, and it relied on PDACA bylaws that were not in effect in FY 1981.

V. The Opinion is clearly erroneous because PDACA did not serve the general purposes of a CAA in FY 1981.

ACF contends that the Opinion is clearly erroneous not only for the reasons cited above, but because PDACA did not "carry out the general purposes of a community action agency", within the meaning of section 673(1) of the CSBG Act in FY 1981. PDACA and DCA contend that PDACA did serve the general purposes of a CAA in FY 1981. I conclude that the analysis that has preceded this section contains a more than sufficient basis for my conclusion that the Opinion is clearly erroneous. However, PDACA has requested that, if I conclude that the Opinion is clearly erroneous, I remand it to the Pennsylvania Attorney General for a redetermination of the case in light of the applicable evidence. I do not have express authority to remand the case to the Pennsylvania Attorney General to make such a redetermination. However, it is not necessary for me to consider such a move, because I find that, independent of my determination that the Opinion was clearly erroneous, PDACA did not serve the general purposes of a CAA in FY 1981 and thus is not an eligible entity.

ACF contends that PDACA did not undertake the planning and implementation of programs in accordance with section 211(f)(3) of the EOA, which requires the "regular participation" of the poor. ACF alleges that PDACA, in FY 1981, did not provide for "extensive and intensive participation of the poor and residents of poverty areas in the planning, conduct, and evaluation of programs which affect their lives." 45 C.F.R. § 1060.1-2(a)(1). To this end, ACF contends that CAAs were obligated to "ensure that the views of the poor - especially those without organized representation - are adequately expressed." ACF Ex. 51 at 10.

ACF contends also that in order to comply with the statutory and regulatory requirements of participation of poor persons in their operations, CAAs had to establish mechanisms for actively involving the poor in all phases of program planning, development, operations, and evaluation. ACF Ex. 56A at 15. Accordingly, ACF posits that to the extent PDACA in FY 1981 did not have in place mechanisms to ensure regular, extensive and intensive participation of the poor, PDACA was not an LPA serving the general purposes of a CAA.

Section 201(a)(4) of the EOA provides explicitly that one of the purposes of CAAs is the requirement to promote

> the development and implementation of all programs and projects designed to serve the poor or low-income areas with the maximum feasible participation of residents of the areas and members of the groups served, so as to best stimulate and take full advantage of capabilities for self-advancement and assure that those programs and projects are otherwise meaningful to and widely utilized by their intended beneficiaries. . .

ACF argues that PDACA did not provide for the "maximum feasible participation" by the poor persons served by PDACA's programs because PDACA did not develop and implement its programs and projects with the maximum feasible participation of residents of the areas and members of the groups served. Section 204(a)(4) of the EOA.

At the hearing, John Wilson, PDACA's president during FY 1981, testified as to the purposes and activities of PDACA during the relevant time period. Mr. Wilson testified that the purposes of PDACA were to

> advance the mission of community action, to increase the opportunities for low-income individuals and families within Pennsylvania, to have the opportunities to become self-sufficient and move out of poverty, to do that in concert with community action agencies where they didn't have in their own area sufficient resources to focus on the problem, but where there was a statewide or nearly statewide issue.

Tr. 359.

Mr. Wilson testified also that PDACA planned and coordinated its activities with input from low income persons in the areas served and with input from representatives of the poor. He stated that this was accomplished by means of an advisory council which was established some time between the between the beginning of his term as PDACA's president in 1980 and the end of his term in 1982. Tr. 342 - 48. However, he was unable to recall more precisely the date when the advisory council was constituted and whether the advisory council was drawn from all of the communities served by PDACA. Tr. 342 - 43, 385.[7]

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[7] ACF stipulated that PDACA was an LPA in FY 1981. See ACF's Trial Memorandum at 1. As an LPA, PDACA was required to involve the poor by having at least one-

PDACA was unable to locate the bylaws in effect during FY 1981. However, PDACA did produce copies of its bylaws as amended on October 23, 1981. ACF Ex. 32. Mr. Wilson acknowledged at the hearing that the October 23, 1981 bylaws did not make any reference to representation of the poor, participation of the poor in programs, or establishment of an advisory council. Tr. 389.

I conclude that PDACA, during FY 1981, did not meet the requirement of maximum feasible participation of the poor. It is undisputed that, during FY 1981, PDACA conducted its activities in an area encompassing at least the entire state of Pennsylvania. PDACA Ex. 14. However, despite the many communities served, PDACA was able to point to only "eight or ten" poor persons who participated in advisory council meetings, and not necessarily during FY 1981. This is simply not sufficient to meet the statutory test where that requirement includes "the maximum feasible participation of residents of the areas and members of the groups served." Section 201(a)(4) of the EOA (1967).

Despite admittedly serving communities throughout the entire State of Pennsylvania, PDACA offered no evidence that, in a significant number of the communities where PDACA served or conducted activities, poor residents participated in any meaningful or relevant fashion. There is insufficient evidence in the record from which I can conclude that PDACA undertook the planning and implementation of programs in accordance with section 211(f)(3) of the EOA, which requires the "regular participation" of the poor. Furthermore, there is insufficient evidence in the record from which I can conclude that during FY 1981 PDACA, in serving the State of Pennsylvania, obtained any type of participation from poor residents in the communities which it served.

Moreover, the record is totally devoid of any evidence that PDACA ever provided for "extensive and intensive participation by the poor and residents of poverty areas in the planning, conduct, and evaluation of programs

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third of the membership of its board of directors be representatives of the poor or by having an advisory committee composed of at least a majority of democratically selected representatives of the poor. 45 C.F.R. § 1062.200 - 4 (1980). However, by stipulating that PDACA was an LPA, ACF did not concede that PDACA met all of the requirements of an LPA, such as an advisory committee. Mr. Wilson's testimony does not establish that PDACA met this requirement.

which affect their lives." 45 C.F.R. § 1060.1-2(a)(1). According to Mr. Wilson's testimony, PDACA had only eight or ten poor persons on its advisory council. There is no evidence in the record from which I can conclude that these eight or ten advisory council members were so geographically diverse that they could participate in the planning, conduct, and evaluation of PDACA programs on a statewide basis. Nor was there any evidence introduced from which I could conclude that PDACA's advisory council assisted the planning, conduct and evaluation of any of PDACA's programs, in accordance with the regulatory requirements.

Even if I were to conclude that the advisory council members were geographically diverse, such a small number of persons would not constitute the type of intense, local participation that is contemplated by the EOA and the regulations. While PDACA may have had some input from poor persons, it fell far short of the statutory requirement of maximum feasible participation. Thus, the Pennsylvania Attorney General's Opinion is clearly erroneous for this reason also.

VI. ACF did not establish that PDACA was not an eligible entity in FY 1981 because: 1) it did not serve a specific and limited geographic area not served by a CAA; 2) it did not conduct a comprehensive needs assessment and provide direct services to the poor; 3) it did not receive local initiative funding; and 4) it is an association of community action directors.

ACF advanced several other reasons why it contended the Pennsylvania Attorney General's Opinion is clearly erroneous. As discussed below, I reject these reasons. Unlike the statutory basis discussed in Part V of my Decision, ACF's other contentions were based chiefly on regulatory provisions applicable to CAAs. The record is devoid of any regulatory provision specifically applicable to LPAs serving the general purposes of a CAA. If I used as my criteria the requirements for a CAA, then there would seem to be no distinction between a CAA and an LPA serving the general purposes of a CAA. On the other hand, it seemed appropriate to use as a criterion the purposes of a CAA as set out in the statute. ACF relied also on the testimony of various federal officials who related anecdotal experiences with other LPAs serving the general purposes of a CAA. As discussed in more detail below, I was not persuaded that the regulations and testimony relied on by ACF constituted a preponderance of the evidence on whether the Opinion of the Pennsylvania Attorney General was clearly erroneous.

A. ACF did not establish that PDACA was not an eligible entity in FY 1981 because of the nature of the community which it served.

ACF takes the position that PDACA's statewide activities in FY 1981 show that PDACA could not have been serving the general purposes of a CAA within the meaning of section 673(1) of the CSBG. ACF avers that while a CAA can serve an entire State, it can do so only when there are no other CAAs designated within that State. ACF contends that it has established that there were other CAAs serving in Pennsylvania in geographic areas overlapping PDACA's service area during the same time PDACA was performing activities in those areas. ACF Ex. 35. According to ACF, PDACA had to obtain consent of other CAAs within the State to perform its functions. Thus, PDACA did not have exclusive control over a specific geographic area, as is mandated by section 221(b) of the EOA. Under ACF's analysis, this is support for its position that PDACA was not performing the functions of a CAA and so therefore was not an eligible entity in FY 1981. Section 221(b) of the EOA; ACF Ex. 2; 45 C.F.R. §§ 1062.71(d) and (e).

PDACA and DCA argue that an LPA serving the purposes of a CAA could serve a statewide community, even if another CAA served part of the State. 45 C.F.R. §§ 1062.1(a) and 1062.50(a)(1). PDACA and DCA contend that there was conflicting testimony from ACF's witnesses on this issue of geographic constraint. ACF Ex. 60 at 55 - 56; Tr. 178. PDACA contends further that it is irrelevant whether or not CAAs can serve the same geographic area since PDACA is not asserting that it is a CAA, but is asserting instead that it is an LPA serving the general purposes of a CAA. PDACA contends it is not bound to comply with the regulatory provisions to the extent they specify what a CAA can or cannot do.

It is undisputed that PDACA was not a CAA in FY 1981. This is illustrated by ACF Ex. 35, which is a map showing the areas controlled by various CAAs within the State of Pennsylvania. It is also undisputed that, in FY 1981, PDACA undertook statewide activities and programs such as: 1) the development of rural housing capacity through education and stimulation of collective organizing efforts; 2) an energy program which included funding to counties which did not have CAA's; and 3) a domestic violence project in which PDACA contracted to provide training and to attempt to organize groups to assist them in setting up women's shelters, and contracted to advocate for State funding or for an ongoing resource

that could be developed to support expansion of women's shelters across Pennsylvania. Tr. 348 - 55.

John Wilson (PDACA's president during FY 1981) is the current director of a CAA encompassing a two-county area in Pennsylvania. Mr. Wilson described himself as a person with approximately 21 years of experience in community action programs and someone who is very familiar with the statutes that govern CAAs and LPAs. Tr. 334 - 38. Mr. Wilson testified that PDACA provided services in counties that were served by other CAAs only to the extent that those CAAs gave their permission. Tr. 424. Mr. Wilson testified also that, with regard to providing services to an area that is already being served by a CAA, "I don't think that ever under the legislation or regulations could you go into an area without the permission of a community action agency." Tr. 450.

While I find general support for ACF's contention that the EOA mandates that CAAs must serve a specific geographic area, I do not find ACF's analysis on this issue to be persuasive as to PDACA's status as an LPA which served the general purposes of a CAA in FY 1981. ACF cites 45 C.F.R. § 1062.71(d) and (e) as support for its contention that, to be an eligible entity, PDACA was required to serve a specific and limited geographic area. However, the regulations cited by ACF refer to a CAA only, and are silent with regard to an LPA serving the general purposes of a CAA. Arguably, one of the ways that such an LPA differs from a CAA is this requirement. However, since PDACA is not contending that it is a CAA, and the regulations cited by ACF do not mention LPAs, ACF's analysis is not germane. Thus, ACF has not persuaded me that on this issue PDACA did not meet the standard for an LPA serving the general purposes of a CAA. Accordingly, I am unable to conclude that because PDACA did not serve a specific defined geographic area PDACA was not an eligible entity in FY 1981.

B. ACF did not establish that an LPA serving the general purposes of a CAA must conduct a comprehensive needs assessment and provide direct services to the poor.

ACF argues that PDACA could not have served the general purposes of a CAA because it did not provide services directly to the poor. In support of its contention, ACF cites 45 C.F.R. § 1063.130-6(b), which declares that the operation of programs is the principal activity of a CAA. According to ACF, any program serving the general purposes of a CAA must address poverty or one of its

underlying causes by "developing employment opportunities, improving human performance, motivation and productivity, or bettering the conditions under which people live, learn, and work." 45 C.F.R. § 1063.132-3(d).

According to ACF, a CAA, or any organization serving the general purposes of a CAA in FY 1981, was required also to perform a comprehensive needs assessment, with input from community residents. ACF Ex. 51, 52, 56A. ACF states that the purpose of that planning process was to assess the causes of poverty in the community and provide a program of services designed to attack those causes. ACF contends that since PDACA has claimed that it was an LPA which served the general purposes of a CAA for the entire State of Pennsylvania, it was required to have assessed the causes of poverty on a statewide basis and to have developed a plan for a statewide provision of services. According to ACF, inasmuch as there is no evidence in the record that PDACA did any of these things, particularly on a statewide basis, PDACA could not have been serving the general purposes of a CAA.

ACF contends further that any organization that was serving the general purposes of a CAA had to perform, at a minimum, certain functions. Section 212(b)(3) of the EOA (42 U.S.C. § 2795(b)(3)) specified that CAA functions were to include, at a minimum, "initiating and sponsoring projects responsive to the needs of the poor which are not otherwise being met, with particular emphasis on providing central or common services that can be incorporated into other programs." 42 U.S.C. § 2795(b)(3). Also, ACF contends that, as an organization serving the general purposes of a CAA, PDACA was required to conduct a community action program (CAP) to include "a sufficient number of projects or components to provide, in sum, a range of services and activities having a measurable and potentially major impact on causes of poverty in the community." Section 210(a) of the EOA; 42 U.S.C. § 2790(a).

The December 1981 amendments to the CSBG permitted LPAs serving the general purposes of CAAs in FY 1981 to be funded as eligible entities. Pursuant to the amendments, and as guidance to the States as to what organizations constituted eligible entities, OCS served general public notice and provided a copy to each State of the following:

> Since Congressional intent in funding organizations in fiscal year 1982 under the CSBG and its transition provisions appears to have been to

> provide bridge funding to those organizations which had been operating community based projects within a State and had been dependent upon funding under the Economic Opportunity Act, OCS has included in its criteria for evaluating any application the determination that a grantee has established service capabilities, has provided services directly to the poor, and that its fiscal year 1981 grant did not indicate it was a one-time-only funding.

47 Fed. Reg. 6998 - 99 (1982).

Mr. Wilson testified regarding the programs carried out by PDACA in FY 1981. He described various projects, many of which seemed very worthwhile, but none of which provided direct services to the poor. For example, with regard to the rural housing project, Mr. Wilson stated that PDACA "did not provide direct housing to clients nor did that project build houses." Tr. 415. He further stated, with regard to PDACA's rural housing project, "this is a non-service project." Tr. 417.

With regard to projects funded in FY 1981, Mr. Wilson stated that PDACA undertook a long term energy program, but that PDACA subcontracted it to other organizations. Tr. 350. He also testified that PDACA undertook, in FY 1981:

> a grant to subcontract to the Pennsylvania Coalition Against Domestic Violence . . . to provide training and to attempt to organize groups to assist them in setting up women's shelters, and to advocate for state funding or for an ongoing resource that could be developed to support expansion of women's shelters across Pennsylvania, and to look at the laws that might support women and children that are in family disruptions that need shelter as the result of the domestic violence.

Tr. 351.

Mr. Wilson stated PDACA's role in this project was "primarily in training and technical assistance to community groups." Tr. 354.

Mr. Wilson stated also that PDACA undertook a "transition planning grant" in FY 1981. ACF Ex. 14. According to Mr. Wilson, this transition planning grant encompassed activities such as presenting suggestions to the legislature and meeting with the State Department of Welfare and Bureaus of Human Resources and Weatherization. Tr. 458. Mr. Wilson remarked that, "we were

really rather busy . . . as a state association fulfilling these requirements." Tr. 459.

ACF's argument on this issue boils down to their contention that PDACA, in FY 1981, did not provide direct services and conduct activities with a direct impact on the low-income people served. Under ACF's analysis, PDACA could not perform these functions because they were providing services to organizations rather than people. According to ACF, the functions or projects undertaken by PDACA in FY 1981 did not provide services directly to the poor, and, therefore, PDACA could not have been serving the general purposes of a CAA in FY 1981.

PDACA and DCA contend that ACF's interpretation of the statutory language is unduly narrow. PDACA and DCA state that a CAA and an LPA serving the general purposes of a CAA could differ in many respects. PDACA and DCA contend that the basic purpose of the EOA can be found in regulations that state:

> The key phrase in this [statutory] statement is "to stimulate a better focusing of all available resources." The Act thus gives the CAA a primarily catalytic mission: To make the entire community more responsive to the needs and interests of the poor by mobilizing resources and bringing about greater institutional sensitivity. A CAA's effectiveness, therefore, is measured not only by the services which it directly provides, but more importantly, by the improvements and changes it achieves in the community's attitudes and practices toward the poor and in the allocation and focusing of public and private resources for antipoverty purposes.

45 C.F.R. § 1063.130-3(b).

PDACA further states that:

> while the operation of programs is the CAA's principal activity, it is not the CAA's primary objective. CAA programs must serve the larger purpose of mobilizing resources and bringing about greater institutional sensitivity. This critical link between service delivery and improved community response distinguishes the CAA from other agencies . . .

45 C.F.R. § 1063.130-6(b).

PDACA's and DCA's analyses on this issue thus differ from ACF's. PDACA and DCA assert that it is not a necessary

requirement for an entity to provide direct services to the poor to be serving the general purposes of a CAA. Instead, PDACA contends that since it fulfilled the broader purposes of mobilizing resources and bringing about institutional sensitivity in accordance with 45 C.F.R. § 1063(b), it qualified as an eligible entity because, in performing these functions, it served the general purposes of a CAA. PDACA disputes the relevancy of the Federal Register reference mentioned by ACF (47 Fed. Reg. 6998 - 99 (1982)), contending that it was an announcement for solicitation of grants under the CSBG and did not purport to present interpretative language of the CSBG.

I find that ACF did not establish that providing direct services to the poor was a requirement for an entity to "serve the general purposes of a CAA" in FY 1981. ACF has cited many statutory and regulatory provisions in support of its contention on this issue. However, these are ambiguous at best. While PDACA's activities in FY 1981 did not provide direct services to the poor, the regulations cited by ACF, taken as a whole, do not support ACF's contention that, to be an eligible entity, PDACA had to provide services directly to the poor. For example, the requirements of 45 C.F.R. § 1063.130-6(b), which acknowledge that the operation of programs is the principal activity of a CAA, is at odds with the requirements of 45 C.F.R. § 1063.132-3(d), which provide for "developing employment opportunities, improving human performance, motivation and productivity, or bettering the conditions under which people live, learn, and work."

Moreover, ACF's contention that any organization serving the general purposes of a CAA in FY 1981 was required also to perform a comprehensive needs assessment, with input from community residents, is supported by exhibits that apply only to CAAs. ACF has not established that this requirement must necessarily bind LPAs that are serving the general purposes of a CAA. ACF Ex. 51, 52, 56A. Arguably, this is one of the ways that an LPA serving the general purposes of a CAA differs from a CAA.

Additionally, ACF has not shown that the activities conducted by PDACA in FY 1981 were not in accordance with either section 212(b)(3) of the EOA, 42 U.S.C. § 2795(b)(3) or section 210(a) of the EOA; 42 U.S.C. § 2790. For example, PDACA's sponsorship in FY 1981 of a program to combat domestic violence appears to have been a project that was "responsive to the needs of the poor

which are not otherwise being met," in accordance with 42 U.S.C. § 2795(b)(3).

Likewise, it is arguable that PDACA's projects, as a whole, did not provide for a "a sufficient number of projects or components to provide, in sum, a range of services and activities having a measurable and potentially major impact on causes of poverty in the community," in accordance with Section 210(a) of the EOA (42 U.S.C. § 2790(a)). ACF did not establish what a "sufficient number of projects" was under the EOA.

ACF has cited 47 Fed. Reg. 6998 - 99 (1982) (set out previously) in support of its position. However, PDACA appears to be correct in its assertion that this section was not intended to provide an interpretive or comprehensive statement as to what constitutes an eligible entity under the CSBG. Accordingly, ACF has not provided an adequate basis from which I can conclude that PDACA did not constitute an eligible entity in FY 1981 because it did not provide direct services to the poor.

Likewise, ACF's contentions that PDACA did not conduct planning to assess the causes of poverty in the community and, therefore, could not have served the general purposes of a CAA is based on the premise that PDACA was bound by the CAA manual, without any assessment or focus by ACF as to what specific activities PDACA undertook in FY 1981 and why they were out of line for an LPA serving the general purposes of a CAA.

Accordingly, ACF has not shown either that PDACA failed to undertake comprehensive needs assessment and provision of direct services to the poor in FY 1981. More importantly, ACF has failed to show that such requirements were even binding upon PDACA, as an LPA serving the general purposes of a CAA in FY 1981.

C. ACF has not established that an LPA serving the general purposes of a CAA must have received local initiative funding to qualify as an eligible entity under the CSBG Act.

ACF contends that PDACA was not an eligible entity in FY 1981 because it did not receive certain types of funding. According to ACF, CAAs received what was called local initiative (01 account) funding to plan, conduct, administer and evaluate their community action programs. Tr. 253; 45 C.F.R. § 1067.41-3 (1980). ACF contends that since PDACA did not receive account 01 funds, PDACA could not have been an eligible entity. ACF contends further

that grant awards to PDACA reflect termination dates, in accordance with those of an LPA under the EOA. CAAs were presumed to be re-funded every year, whereas LPAs received funding with a specified termination date.

However, while ACF has again spelled out the requirements for a CAA, it has failed to state how this requirement is binding on PDACA. As I noted previously, regulatory provisions which apply to CAAs do not necessarily apply to LPAs serving the general purposes of CAAs. Thus, ACF has failed to persuade me that PDACA could serve the purposes of a CAA only if it received grant awards with no specified termination date.

D. ACF has not established that an organization which is an association of community action directors could not be an LPA serving the general purposes of a CAA.

ACF has asserted that, by its very name, PDACA cannot be an eligible entity, because it is an association composed of "directors." ACF avers that this type of organization does not and cannot qualify as an eligible entity because it serves organizations and not poor persons. As proof of this, ACF offered the testimony of Mr. Buckstead, who stated that associations of community action directors exist to meet the needs of their member organizations. Tr. 70. Mr. Penland testified that associations of community action directors could not qualify as eligible entities because they have no representatives of the poor. Tr. 259. As further proof of this proposition, ACF states that under PDACA's bylaws of October 23, 1981, PDACA limited its membership to "Community Action Agencies qualified to receive funds under the EOA of 1964, as amended." ACF Ex. 32.

PDACA contends that ACF's analysis falls short on this issue because ACF has presented no evidence or testimony that PDACA's activities were not similar to those of other LPAs serving the general purposes of a CAA under the CSBG Act. Additionally, PDACA points out that none of the witnesses proffered by ACF were familiar with the activities of PDACA. PDACA also avers that the fact that other associations of community action directors with which ACF's witnesses had contact were not CAAs should not serve as a basis to disqualify PDACA.

I conclude that PDACA's name alone cannot be a basis for determining that it is an eligible entity. The relevant inquiry is whether PDACA was an LPA which served the general purposes of a community action agency in FY 1981.

Accordingly, I find ACF's argument and analysis on this issue to be irrelevant.

VII. DCA and PDACA were not denied proper notice.

Notwithstanding my determination that the Opinion was clearly erroneous, DCA and PDACA contend that they were denied due process in this case because they did not have advance notice of the facts and law relied upon by OCS, in accordance with the requirements set forth in the Administrative Procedure Act (APA), 5 U.S.C. § 554(b). Specifically, DCA and PDACA contend further that they did not receive proper notice of the basis for OCS's determination that the Opinion was clearly erroneous. DCA and PDACA aver that OCS and ACF have been inconsistent in their reasoning and in articulating the underlying basis of why PDACA is not an eligible entity within the meaning of section 673(1) of the CSBG. DCA and PDACA take the position that they were hampered in their preparation of the case because they were not provided with a clear statement of the issues until ACF filed its pretrial memorandum on November 25, 1992.

PDACA and DCA contend that ACF changed its theory of the case in midstream, so that they could not prepare for the issues confronting them. PDACA and DCA contend that ACF inappropriately asserted and then later equivocated on the issue of whether an entity serving a statewide community could qualify as an eligible entity under the CSBG Act. PDACA and DCA contend also that ACF initially asserted that PDACA was required to have a tripartite board of directors in FY 1981, as defined by section 675(c)(3) of the CSBG, then dropped this assertion.

ACF contends that it provided more than adequate notice to DCA and PDACA. ACF points to several letters of correspondence in which it advised DCA that PDACA was not an eligible entity under section 673(1) of the CSBG Act. ACF cites a March 31, 1989 letter from OCS to DCA which asserted:

> the purpose and structure of PDACA are those of an association of community action agencies and not those of an agency serving the general purposes of a community action agency. PDACA serves organizations but not poor people. There has been no evidence submitted that it does or ever did serve the general purposes of a community action agency.

ACF Ex. 9.

ACF states that DCA responded to the March 31, 1989 letter on May 23, 1989, and disputed OCS's position but did not indicate a lack of understanding of its meaning. ACF contends further that OCS reiterated its position that PDACA was not an eligible entity by letter dated August 21, 1989. ACF Ex. 19.[8]

I find that OCS and ACF have provided sufficient notice to DCA and PDACA. DCA was entitled to notice at the outset of these proceedings. PDACA is an intervenor and thus not entitled to notice, at least not in the same way or to the extent DCA was. Also, PDACA was not even a party to these proceedings until my Ruling of June 7, 1992. Any right which PDACA has to notice would therefore apply, if at all, only after June 7, 1992, the date on which it became a party to these proceedings.[9] However, there is ample evidence in the record from which I can conclude that OCS provided sufficient notice to both DCA and PDACA.

Notice was provided by OCS in letters sent to DCA on March 31, 1989, and August 21, 1989. ACF Ex. 9, 19. Both of these letters allege that PDACA did not serve the general purposes of a CAA. Moreover, on February 28, 1991, OCS provided DCA with detailed information with respect to the basis for OCS's conclusion that PDACA was not an eligible entity. ACF Ex. 22. That letter provided several reasons to explain why OCS was taking this position.[10]

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[8] Subsequently, by letter dated September 22, 1989, DCA asked OCS to clarify what programs, activities, or agency mission constitute compliance with the requirement to serve the general purposes of a community action agency. DCA Ex. 14. OCS apparently did not respond to this letter, at least not prior to the June 12, 1990 Opinion of the Pennsylvania Attorney General.

[9] The CSBG Act does not provide for any direct relationship between OCS and entities which are funded by the States with Block Grant funds. The CSBG Act and its regulations provide only that the State is required to provide certain assurances and that OCS may terminate its funding if those assurances are violated.

[10] OCS's letter of February 28, 1991 stated, in relevant part:

> While PDACA received Local Initiative funding under Title II of the Economic Opportunity Act (EOA) in FY 1981, PDACA did not serve the general purposes of a

ACF subsequently stipulated that PDACA did not have to meet the tripartite board requirement of section 675(c)(3). However, neither PDACA nor DCA have been able to show that this has caused them any harm. Indeed, PDACA and DCA benefitted from ACF's decision not to pursue this issue. Moreover, although the tripartite board requirement was cited in the earlier correspondence, it is one of several reasons given for OCS's determination.[11] Of particular significance, OCS

> community action agency under Title II of such Act, namely, having direct responsibility for planning, coordinating, evaluating and administering local anti-poverty projects providing direct services to low-income people in a manner which provides for 'the maximum feasible participation of residents of the areas and members of the groups served.' . . .
>
> PDACA's articles of incorporation indicated that it was intended to carry out a coordinating function among community action agencies and not to have direct contact with community programs and residents. In addition, PDACA has failed to demonstrate compliance with the tripartite board requirements of Section 675(c)(3) of the Act. The foregoing information leads us to conclude that PDACA did not itself function as a community action agency.

ACF Ex. 22.

[11] DCA and PDACA contend that they were provided with inadequate notice because ACF asserted, then abandoned, its theory that an entity serving a statewide community could not qualify as an eligible entity under the CSBG Act. According to PDACA, the testimony of ACF witness John Finley (ACF Ex. 60) contradicted earlier assertions made by ACF's counsel prior to the hearing regarding the eligibility of statewide CAAs.

However, my review of the record reveals that this is not the case. ACF's position on this issue, as stated in its brief, has been that 1) a CAA serves a specific geographic area that cannot be served by any other CAA without obtaining consent from the CAA already present in that area and 2) a CAA may serve a statewide community only when no other CAA serves a part of that State. Mr. Finley testified that it was possible for an LPA to serve a statewide area under the regulations. ACF Ex. 60 at 57. Mr. Finley testified also that an LPA could operate within a CAA's jurisdiction, but qualified that

cited also PDACA's alleged failure to be directly responsible for planning, coordinating, evaluating, and administering local anti-poverty projects providing direct services to low-income people in a manner which provides for "the maximum feasible participation of residents of the areas and members of the groups served." ACF Ex. 22. In addition to the OCS correspondence prior to the commencement of this action, further clarification was provided by ACF at the October 27, 1992 and November 10, 1992 prehearing conference calls.

Most importantly, ACF has stated that it does not take the position that PDACA or DCA has to refund any of the monies received by PDACA, even if it is determined that PDACA is not an eligible entity. Tr. 325 - 27. ACF's position is that this proceeding is to have no retroactive effect on any monies given in the past to PDACA as an eligible entity. Fairness concerns might arise where PDACA, unsure of what was expected of it, tried in good faith to comply with the statute and then was subjected to the whimsy of ACF and required to return funding from past years. But such is not the case here. ACF has explicitly stated that the effect of any determination here would be prospective, i.e., if ACF prevails, it would mean only that PDACA could no longer obtain 90 percent set aside funding in the future. Tr. 325 - 27. As a result, this decision itself will serve as notice as to whether DCA can continue to fund PDACA as an eligible entity out of 90 percent set aside monies. Accordingly, I find no merit in DCA's and PDACA's contentions that they were not provided with sufficient notice and that they were somehow victimized by the shifting theories of ACF.

CONCLUSION

I conclude that the June 12, 1990 Opinion of the Pennsylvania Attorney General that PDACA is an eligible entity under the CSBG Act is clearly erroneous. I further conclude that, based on the evidence and arguments presented, PDACA, in FY 1981, did not comport with the statutory requirements for maximum feasible

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with the statement that they could do so only for the purpose of performing limited jobs that the CAA was not performing. Id. Mr. Finley's testimony, therefore, is in line with ACF's arguments. Therefore, ACF's position with regard to the eligibility of statewide CAAs has been reasonably consistent, and neither DCA nor PDACA has suffered harm from a change in position from ACF on this issue.

participation and regular participation of poor persons under sections 201(a)(4) and 211(f)(3) of the EOA, respectively. Additionally, I conclude that PDACA, in FY 1981, did not comport with an essential objective for community action, namely that of extensive and intensive participation of the poor and residents of poverty areas, in accordance with 45 C.F.R. § 1060.1-2(a)(1). Accordingly, I conclude that PDACA was not, in FY 1981, an entity that served the general purposes of a CAA within the meaning of section 673(1) of the CSBG Act. PDACA was therefore not eligible to receive 90 percent set aside funding in FY 1981. I further conclude that because PDACA was not an eligible entity in FY 1981 and did receive 90 percent set aside funding, the State of Pennsylvania violated its assurances under section 675 of the CSBG Act.

/s/

Gerald P. Choppin
Presiding Officer