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Interlocutory Order

IN THE MATTER OF

THE NEW ENGLAND MOTOR RATE BUREAU, INC.

Docket 9170. Interlocutory Order, November 17, 1989

ORDER

Respondent and complaint counsel agree that, pursuant to Section 3.82(d)(2) of the Commission's Rules of Practice, respondent's application for attorney's fees and expenses under the Equal Access to Justice Act should be held in abeyance pending final disposition of respondent's appeal of the Commission decision.

It is so ordered.

IN THE MATTER OF

MOTOR TRANSPORT ASSOCIATION OF CONNECTICUT, INC.

*Docket 9186. Interlocutory Order, November 17, 1989*ORDER DENYING REQUEST FOR AN AWARD
UNDER THE EQUAL ACCESS TO JUSTICE ACT

This case was dismissed by the Commission's Final Order dated August 25, 1989. Respondent Motor Transport Association of Connecticut, Inc. (the "Association") now requests attorney's fees and costs under the Equal Access to Justice Act ("the Act"), 5 U.S.C. 504. The Act provides such an award for eligible parties that prevail in a Commission proceeding unless the "Commission's position in the proceeding was substantially justified or special circumstances make the award unjust."¹

On September 18, 1984, the Commission issued a complaint alleging that the Association had violated Section 5 by fixing prices for the intrastate transportation of property in Connecticut. By a Joint Stipulation dated November 17, 1986, the parties stipulated the facts. The Initial Decision to dismiss the complaint was filed on January 9, 1987, and affirmed by the Commission's Final Order.

A. *The Act*

Under the Equal Access to Justice Act, an eligible party that prevails in a Commission proceeding may receive attorney's fees and other expenses unless the Commission's position was "substantially justified." Congress passed the Act "in response to its concern that persons 'may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights.'" *Sullivan v. Hudson*, 109 S.Ct. 2248, 2253 (1989). The government has the burden of proving that its position was substantially justified by a preponderance of the evidence. *Sierra Club v. Secretary of Army*, 820 F.2d 513, 517 (1st Cir. 1987). An award under the Act does not follow automatically in every case where the private party prevails over the government, however, and the fact that the government lost in the underlying litigation does not create a presumption that its position

¹ Docket 9186(a)