a benefit in whose acquisition it played no part. (Such a resource could be countable under criterion (ii), if the resource is "appropriated or mandated" by the State, tribe, or territory for distribution through the LIHEAP program.) Benefits from vendors that are negotiated by or result from competitive bidding conducted by (or with substantive participation of) subrecipients (e.g., local administering entities) under a State, tribal, or territorial LIHEAP program acting in that capacity, also are countable under criterion (i) as long as all other requirements also are met.

We agree that the interim rule's requirement that the involvement of the grantee's LIHEAP program in the acquisition or development of the resource be "substantial" and "considerable, important, material, and of real value or effect" in some cases may be confusing and subject to subjective interpretation. In grantees' leveraging reports on FY 1991 and FY 1992 leveraging, most resources claimed under criterion (i) clearly met this test, and several clearly did not. However, there also were a number of claimed resources for which we had to request additional information from the grantee to substantiate "substantial" involvement, and on several of these we still had to make difficult judgments about whether to count the resource. Short of requiring that the grantee LIHEAP program acquire or develop the resource completely on its own, or saying that the grantee program need have no role at all in acquiring or developing the resource—which we do not believe to be appropriate-we see no way to write regulatory language that would totally eliminate such situations.

We also have found that several grantees were confused about whether criterion (i) applied only to resources obtained from energy vendors. The statute clearly limits this criterion to resources/benefits "that are obtained from energy vendors through negotiation, regulation, or competitive bid," not from charitable organizations, etc.

To clarify criterion (i) without materially changing its substance, we amended \S 96.87(d)(2)(i) as follows in the final rule:

"The grantee's LIHEAP program had an active, substantive role in developing and/or acquiring the resource/benefits from home energy vendor(s) through negotiation, regulation, and/or competitive bid. The actions or efforts of one or more staff of the grantee's LIHEAP program—at the central and/or local level—and/or one or more staff of LIHEAP program subrecipient(s) acting in that capacity, were substantial and significant in obtaining the resource/ benefits from the vendor(s)."

Comments and Response

There have been several questions about the statutory requirement that resources countable under criterion (ii) be distributed "through" the grantee's (LIHEAP) program. The interim rule and this final rule state that this means "within" and "as a part of" the grantee's LIHEAP program. Under criterion (ii), the leveraged resource/benefit is administered by the LIHEAP agency or agencies under the LIHEAP statute and regulations, consistent with the eligibility standards and benefit levels used by the grantee for its Federal LIHEAP funds; it is considered a LIHEAP benefit. Resources counted under criterion (ii) do not have to be specifically identified in the grantee's LIHEAP plan if they are clearly covered by the plan. For example, the plan would not have to say that leveraged cash resources are used to provide heating assistance, as long as the plan describes a heating assistance program that is funded with LIHEAP resources and the leveraged resources are used in accordance with this description.

Five letters addressed the statutory and regulatory requirements that resources countable under criteria (ii) and (iii) must be "appropriated or mandated" by the grantee "for distribution" through the grantee's LIHEAP program (criterion (ii)) or under the grantee's LIHEAP plan and integrated with the LIHEAP program (criterion (iii)).

Using similar language, two Congressional letters said the regulation should "make clear" that leveraging initiatives that qualify for incentive funds because they are "mandated" by State action must be created by legislation, rule, contract, binding agreement, or another specific action or identifiable "mandate" or requirement—the grantee cannot merely list voluntary charitable efforts in its LIHEAP plan in order to meet these criteria. Two other commenters said that the interim rule was not sufficiently clear regarding the requirements for "mandated" resources. One of these commenters said that "merely mentioning a program in the state's plan do not constitute a mandate"; a mandate "should be a regulation, order, or other formal agreement or expression by the state agency governing the control and the distribution of the leveraged resource."

We agree that a mere list of voluntary charitable efforts in a grantee's LIHEAP plan does not meet these two criteria. Resources/benefits that are mentioned in the plan, but are neither provided through nor integrated with the LIHEAP program, are not countable under these criteria.

We do not believe that the statute or legislative history require that resources countable under these criteria be 'created'' by State, tribal, or territorial "mandate," however. We therefore did not make a change in response to comments supporting such a requirement. The statute requires instead that the resource/benefits be "appropriated or mandated by the State [or tribal or territorial grantee] for distribution" through its LIHEAP program (criterion (ii)) or under its LIHEAP plan and also integrated with its LIHEAP program (criterion (iii)). For example, oil overcharge funds counted under criterion (ii) would not be created by State mandate; they would be mandated by the State for distribution through its LIHEAP program. We believe that "by the State" means

We believe that "by the State" means that the State, tribe, tribal organization, or territory—the grantee—must appropriate or mandate the resource/ benefits for distribution. A subrecipient such as a local nonprofit agency might actually "distribute" the resource/ benefits on behalf of the grantee, but the grantee must take the action that meets the requirement to appropriate or mandate the resource/benefits for distribution through its LIHEAP program or under its LIHEAP plan, etc.

The grantee's LIHEAP applicationwhich includes the plan-is an official, formal document in which the grantee makes a binding commitment to distribute resources in certain ways. We therefore believe that it is reasonable to assume that the inclusion of the leveraged resource/benefits in the LIHEAP plan means that the grantee has "mandated" the resource for distribution as described in the plan. Inclusion of appropriate information in the plan is documentation of the mandate. Because the grantee's LIHEAP plan is a formal expression by the grantee that governs the distribution of the leveraged resource, we consider resources appropriately described in or covered by the plan to be mandated by the grantee for distribution as required by criteria (ii) and (iii).

Another commenter believed that criterion (ii) "can reasonably be read to require that some state entity (in the Executive, Legislative or Judicial branch) provide the additional resources to the State program for distribution by the program, that is, they were appropriated or mandated by the Governor or legislature or by the judiciary * * *." On the other hand,