

The Yale Law Journal

Volume 81, Number 3, January 1972

Public Participation in Administrative Proceedings**

Ernest Gellhorn†

The purpose of allowing parties to intervene in a legal action, as the Supreme Court explained long ago in connection with a private two-party suit, is to prevent a "failure of justice."¹ It is not surprising, then, that in a time when government agencies are challenged as being unresponsive to public needs and to the public interest, one "solution" frequently suggested is to broaden citizen involvement and participation in administrative decision making.² Reflecting this concern, courts more frequently require agencies "to cut the squarest of procedural corners," ruling, for example, that all interested persons must be allowed an "unrestricted" opportunity to be heard.³ One consequence of this trend is that citizen groups and individuals without a significant personal or economic stake in the outcome are allowed to intervene as full scale "public" parties in administrative

* This article draws heavily from studies prepared by the staff of the Administrative Conference of the United States (by Margaret Gilhooley and James H. Johnston), speeches and testimony of Chairman Roger C. Cramton, and memoranda prepared by the staff (by Barry B. Boyer and Richard K. Berg, the Research Director). These materials were careful, thoughtful and imaginative. A succinct analysis of many of the questions discussed here was presented by Mr. Cramton, in an article entitled, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972). Despite the length of these "credits," the final responsibility for this article, of course, necessarily rests with me.

This article is based upon a report prepared for the Committee on Agency Organization and Procedure of the Administrative Conference; the recommendation adopted by the Conference is reprinted at the end of Mr. Cramton's article *supra*.

† Professor of Law, University of Virginia. B.A. 1956, LL.B. 1962, University of Minnesota.

1. *Krippendorf v. Hyde*, 110 U.S. 276, 285 (1884).
2. *Cf. Cahn & Cahn, The New Sovereign Immunity*, 81 HARV. L. REV. 929 (1968).
3. *See, e.g., Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *id.*, 425 F.2d 543 (D.C. Cir. 1969) (reversing FCC decision on remand). The court held, *inter alia*, that merely allowing listeners to file statements or appear as witnesses was not sufficient. Full protection of the interests they represent requires, the court held, participation as parties and a formal hearing. An "unrestricted" opportunity to be heard here refers to the familiar tactic of agencies seeking to dispose of interveners by allowing them to submit their views as witnesses or in writing; *Church of Christ I* and other decisions, however, reject such "restricted" alternatives and have held that participation as parties without limitation may be required.

hearings.⁴ Such intervention is allowed for the purpose of presenting "public" views not otherwise adequately represented in the proceedings.

The size of the group's constituency is not generally significant, except at the narrowest range,⁵ though the "public interest" tag under which individuals and groups are allowed to participate at agency hearings is often misunderstood.⁶ The agency or its staff, it is commonly asserted, has the statutory obligation and does in fact represent the public interest; it is argued that it runs contrary to common sense and to democratic government to suggest that private groups can arrogate that status and power to themselves. The "public interest," however, is not a monolith.⁷ It involves a balance of many interests, and the presentation of otherwise unrepresented views should be viewed as a potential aid rather than a hindrance to agency operations.

In their appearances before administrative agencies, nongovernmental public interest groups have asserted a variety of interests. Conservationists have pressed environmental interests in selected power plant licensing cases before the FPC and AEC.⁸ Minority groups and environmentalists have presented their objections in DOT hearings on highway planning and location.⁹ Listener groups and individuals

4. For example, a "public interest group" representing environmental interests of the community before an administrative proceeding may include all persons concerned with the protection of the environment; but at the point where the group involves only the environmental interests of adjoining landowners, its private stake is more significant and the group comes within the usual definition of interested persons entitled to be heard because of the impact of the agency's decision on the interests of landowners.

5. For our purposes, there is no need to demarcate precisely between public interest and private representation. It is sufficient to note that agencies recognize public interest groups as a distinct category, and that procedural consequences follow from this designation.

6. In fact, these groups now frequently use the more neutral phrase, "citizen groups," but this self-styled moniker has not caught on. At one time I flirted with the idea of attaching the acronym "PIG" to "public interest groups," particularly after the Georgetown Institute for Public Interest Representation adopted the title of "INSPIRE," but on reflection I decided not to distract from the more urgent message of this article.

7. The use of the terms "public interest group" and "public participation" reflects no judgment of the positions asserted by such groups. The public nature of the advocacy distinguishes it from the familiar participation by private parties. It does not imply a superior moral position. It is suggested, however, that the public interest is composed of a number of discrete interests. In performing its advocacy function, an agency staff often cannot give each view separate representation. Hence, the need for public interest group participation. For a discussion of the distinctions between "public interest" as a decisional standard in regulatory statutes and decisions, and its reference to "points of view which do not enjoy the sponsorship of an industry or other well-organized constituency," see Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069, 1077 (1971).

8. *E.g.*, *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966); *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

9. *See, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

Public Participation in Administrative Proceedings

have sought to intervene in broadcast license renewal hearings.¹⁰ Welfare rights organizations have participated in six state conformity hearings at HEW.¹¹ And consumer groups have been admitted experimentally in two FTC false advertising proceedings and have intervened in one ICC railroad rate case.¹²

The threat of public intervention still far outweighs its impact in active cases. But public groups have not confined themselves to intervening in active cases. They have also urged agencies such as the FCC and the EPA to hold hearings to discontinue licenses and permits, and on occasion have taken judicial action to compel recalcitrant agencies to begin hearings.¹³ Even agency inactions or refusals to act have had to be explained because of public interest group litigation.¹⁴

There are a number of potential social advantages to public participation in administrative hearings. Public intervention can provide agencies with another dimension useful in assuring responsive and responsible decisions; it can serve as a safety valve allowing interested persons and groups to express their views before policies are announced and implemented; it can ease the enforcement of administrative programs relying upon public cooperation; and it can satisfy judicial demands that agencies observe the highest procedural standards. If agency hearings were to become readily available to public participation, confidence in the performance of government institutions and in the fairness of administrative hearings might be measurably enhanced.

Most efforts on behalf of public intervention to date have been focused on establishing a "right" to intervene. This battle has largely been won, except for the question of how far the "right" extends. The focus of attention is shifting from the courts to the agencies; the disputed issues now involve the contours of the procedural rights of public interveners and the amount of assistance, if any, which should be provided to facilitate public intervention.

This article and the resulting recommendations seek to assist agencies in determining the proper role and scope of public participation

10. *E.g.*, *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

11. *National Welfare Rights Organization v. Finch*, 429 F.2d 725 (D.C. Cir. 1970).

12. *Campbell Soup Co.*, 26 Ad. L.2d 1011 (FTC 1970); *Firestone Tire & Rubber Co.*, 27 Ad. L.2d 877 (FTC 1970).

13. *E.g.*, *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970).

14. *E.g.*, *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 92 S.Ct. 577 (1972).

in formal administrative hearings.¹⁵ It focuses on trial-type proceedings, for it is in this area that new guidelines for public intervention most need to be established. Few, if any, controls for intervention are needed in informal rulemaking proceedings since, as quasi-legislative hearings, they are designed to incorporate diverse interest groups and to serve as an outlet for community expression. After examining recent judicial developments establishing that public interveners are welcome participants in administrative hearings, the article will first consider how public participation should be structured, suggesting criteria for determining whether and when participation should be permitted or encouraged, who should participate, and what role the participant should play in the hearing. Ways of coping with unnecessarily high barriers to effective public interest group participation will then be explored.

I. The "Right" to Intervene

The recent and dramatic expansion of intervention in administrative proceedings has built upon doctrinal developments in three distinguishable but related areas: the right to intervene in court adjudications; standing to seek judicial review of administrative action; and standing to intervene in administrative adjudications.

Traditionally, the right to intervene in court adjudications was quite narrow, depending primarily upon the existence of "property

15. The question of participation and intervention by public interest groups in administrative hearings, of course, calls into question whether the procedures for policy making should also be revised. Some have reviewed *Scenic Hudson* and concluded that a new administrative agency with nationwide authority to plan and control the growth of electric generating capacity is necessary. See, e.g., Kaufman, *Power for the People—And by the People: Utilities, the Environment, and the Public Interest*, 46 N.Y.U.L. REV. 867 (1971). Others have responded that the environmental interest represented by the interveners in *Scenic Hudson* will be protected more adequately by courts than by agencies. See *Lakeland Property Owners Ass'n v. Township of Northfield*, 40 U.S.L.W. 2649 (Mich. Cir. Ct. Feb. 29, 1972); J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971). But see *Roberts v. Michigan*, 2 E.R.C. 1612 (Mich. Cir. Ct. 1971) (holding unconstitutional any application to automotive pollution of a Michigan statute modeled on Professor Sax's suggestion). These explorations need to continue. It is equally important, however, that today's realities—of fragmented agency authority and public participation—be recognized and that public interveners be integrated into administrative agency procedures. Not only is the public interest likely to be served in the interim, but a viable alternative may develop from experience. This article seeks to fulfill that objective.

In addition, this article focuses on public participation in *formal* agency action. This is not to say that informal action is not equally (or, often, more) significant or that public participation in informal proceedings should be ignored. See, e.g., *North City Area-Wide Council, Inc. v. Romney*, 40 U.S.L. Week 2572 (3d Cir. Feb. 25, 1972); K. DAVIS, *DISCRETIONARY JUSTICE* (1969). Every study has its limits—and this one is no exception. However, many of the recommendations offered here seem relevant to informal administrative action.

Public Participation in Administrative Proceedings

which is in the custody or subject to the control or disposition of the court," and requiring a showing that the intervenor's interest was inadequately protected by existing parties.¹⁶ The grounds for demonstrating inadequacy of representation were sharply circumscribed.¹⁷

Amendments to the Federal Rules of Civil Procedure have liberalized the property requirement, so that under the present rules all an intervenor need show is "an interest relating to the property or transaction which is the subject of the action."¹⁸ Relaxation of the representation requirement has also occurred. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, the Supreme Court held that a state, a customer, and a competitor had a sufficient interest to intervene in a government antitrust divestiture proceeding because their interest was inadequately represented.¹⁹ Though the full effect of *El Paso* on criteria for intervention as of right in court trials is not yet clear, several lower court opinions have concluded that the rules now create a presumption in favor of the right to intervene.²⁰

Liberalization of the rules governing standing to seek judicial review of agency action has been slower, but no less extensive. The early view was that a party seeking judicial scrutiny had to show that he had a legally protected interest, rather than a mere economic stake, that was adversely affected by the agency's decision.²¹ After a time, however, the doctrinal barriers began to crumble. The first major breakthrough was *FCC v. Sanders Bros. Radio Station*,²² where the Supreme Court held that the statutory language granting judicial review to "persons aggrieved" by FCC decisions meant that competing licensees could seek review solely on the basis of potential economic

16. The historical development of intervention as of right is traced in the dissenting opinion of Justice Stewart in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 143 (1967).

17. 3B J. MOORE, FEDERAL PRACTICE ¶ 24.09-1[4], at 24-316 (2d ed. 1969).

18. FED. R. CIV. P. 24(a).

19. 386 U.S. 129 (1967), discussed in Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 729-31, 741-45 (1968). For an excellent analysis of third party public participation in antitrust law enforcement, see Buxbaum, *Public Participation in the Enforcement of the Antitrust Laws*, 59 CALIF. L. REV. 1113 (1971).

20. See *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc); *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). But cf. 3B J. MOORE, FEDERAL PRACTICE ¶ 24.09-1[4], at 24-316 (2d ed. 1969).

21. See *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1937). For an overview of the changing law of standing to seek judicial review of agency action, see Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). See also Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 MICH. L. REV. 540 (1971). See also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151-52 (1951) (Frankfurter, J., concurring).

22. 309 U.S. 470 (1940).

injury. In enacting the review provision, the Court concluded, Congress "may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission" ²³

The Court expanded this rationale in *Scripps-Howard*,²⁴ noting that "these private litigants have standing only as representatives of the public interest." Then, in *FCC v. National Broadcasting Co. (KOA)*, the Court added a new thought: "It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing."²⁵ These two concepts—that private litigants seeking review of administrative action are properly viewed as vindicators of the public interest,²⁶ and that there is a logical nexus between the right to seek judicial review of the administrative decision and the right to participate in the agency's decision-making process²⁷—were to prove pivotal factors in the emerging law of public interest group intervention.

23. *Id.* at 477.

24. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942).

25. 319 U.S. 239, 246 (1943).

26. The logical extension of this rationale was classically stated by Judge Frank in *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943):

While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

See also *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 863-65 (D.C. Cir. 1970).

27. Significant refinement of this rationale took place in *National Coal Ass'n v. FPC*, 191 F.2d 462, 466-67 (D.C. Cir. 1951):

It is said that the Commission is authorized to permit or deny intervention at its discretion and that, since these petitioners had no right to intervene, they can have no right to judicial review. The Commission itself admits, however, that it may not abuse its discretion. This, to us, means that there are some persons who have a right to participate in Commission proceedings and some who do not. We think it clear that any person who would be "aggrieved" by the Commission's order, such as a competitor, is also a person who has a right to intervene. Otherwise, judicial review, which may be had only by a party to the proceedings before the Commission who has been "aggrieved" by its order, could be denied or unduly forestalled by the Commission merely by denying intervention.

Public Participation in Administrative Proceedings

The adoption of the Administrative Procedure Act (APA) in 1946, providing in § 10(a) that a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute"²⁸ could obtain judicial review, also contributed to the liberalizing trend. Its main thrust was to limit administrative power by providing a minimum standard of review in the absence of an express review provision in particular regulatory statutes. It was also suggested, however, that the APA did not merely codify the existing "legal interest" theory, but expanded the availability of standing in requiring that the complainant prove only that he was adversely affected in fact.²⁹ Such a reading would construe the Act along the lines of *Sanders*, allowing anyone suffering potential economic injury to have standing to seek judicial review, on behalf of the public interest, whenever the APA applies.

This construction was not accepted by most courts, which concluded instead that § 10 was merely declaratory of prior law and granted no new rights of judicial review.³⁰ But a number of lower courts did rely upon § 10 to allow standing where another statute protected or regulated some interest of the plaintiff, even though that statute did not itself grant judicial review.³¹ Under this view the APA granted standing for the assertion of interests already recognized by Congress.

At first the Supreme Court merely refrained from discouraging this trend. In *Hardin v. Kentucky Utilities Co.*, the Court held that "when the particular statutory provision does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision."³² It was not novel for statutory interest to be a basis for standing, but the Court was at pains to probe legislative history to find a primary congressional purpose to benefit the plaintiff. Even more significant, however, was the Court's readiness to distinguish *Kansas City Power & Light Co. v. McKay*,³³ where the D.C. Circuit had ruled that § 10 of the APA did

28. 5 U.S.C. § 702 (1970).

29. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.02 (1958). The argument depended upon a somewhat strained interpretation of an ambiguous legislative history and an ungrammatical reading of the statute. See Note, *Competitors' Standing to Challenge Administrative [sic] Action Under the APA*, 104 U. PA. L. REV. 843, 856-61 (1956).

30. See, e.g., *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 931-32 (D.C. Cir.), cert. denied, 350 U.S. 884 (1955). *Contra*, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970).

31. See, e.g., *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 933 n.26 (2d Cir. 1968); *Road Review League v. Boyd*, 270 F. Supp. 650, 660-61 (S.D.N.Y. 1967).

32. 390 U.S. 1, 6 (1968).

33. 225 F.2d 924 (D.C. Cir. 1955).

not confer standing; this suggested that the Court might cease to read § 10 so narrowly.³⁴

By the time *Hardin* was decided, the first two landmark decisions on public intervention in agency adjudication had been rendered. The major breakthrough came in *Scenic Hudson*,³⁵ where the Second Circuit upset the FPC's rejection of evidence of alternative power sources proffered by conservation groups and others opposing a power plant project in a licensing proceeding. Although the specific holding was limited to a ruling that the statutory standard of an "aggrieved person" for purposes of judicial review was satisfied by the aesthetic, conservation, and recreation interests of the petitioners, the court also endorsed the "private attorney general" concept as justifying intervention in the agency hearing by those without a direct personal or economic interest in the agency decision.³⁶

The next significant doctrinal advance came in the D.C. Circuit's *Church of Christ* decision,³⁷ where the court held that the listening public's interest in programming content, which was characterized as an "obvious and acute concern," was sufficient not only to seek judicial review, but also to confer standing to intervene in an FCC adjudicatory proceeding involving a license renewal.³⁸ Once again there was heavy reliance on the private attorney general concept, and on the recognition that in practice the agency staff could not always

34. In the same term, the Supreme Court also held that satisfaction of the case and controversy requirement of Article III of the Constitution—that is, a showing of such a personal stake in the controversy as to assure "concrete adverseness"—may be all that is necessary to establish standing. In *Flast v. Cohen*, 392 U.S. 83 (1968), a taxpayer was allowed to challenge the constitutionality of federal financial aid to parochial schools. Since the taxpayer also had to show a logical nexus between his status as a taxpayer and a specific limitation on the congressional taxing and spending power in the Constitution, it is not clear whether injury in fact is the only "constitutional" minimum. In any case, this "minimum" approach generally has not been adopted for determining whether the complainant has standing to seek review of agency action.

35. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

36. *Id.* at 615-16, 619. However, the decision stopped short of concluding that standing to seek review implied an unqualified right to participate fully in the administrative proceedings: "Since the right to seek [judicial] review . . . is limited to a 'party' to the Commission proceedings," the court reasoned, "the Commission has ample authority reasonably to limit those eligible to intervene or to seek review." *Id.* at 617. Moreover, the opinion left open the possibility that the Commission's obligation to receive and consider the evidence proffered by the public interest groups arose from the FPC's statutory mandate to undertake comprehensive planning as part of its licensing responsibility, and that the case could therefore be distinguished on that ground. *See id.* at 620.

37. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

38. The question of whether judicial and administrative standing criteria should be the same was not litigated; instead, the court observed:

All parties seem to consider that the same standards are applicable to determining standing before the Commission and standing to appeal a Commission order to this court. . . . We have, therefore, used the cases dealing with standing in the two tribunals interchangeably.

359 F.2d at 1000 n.8; *see* note 42 *infra*.

Public Participation in Administrative Proceedings

effectively represent the listener interest. Finally, while the opinion explicitly left to the agency discretion to promulgate regulations regarding public intervention, it also gave short shrift to the FCC's contention that existing avenues of public input, such as the Commission's willingness to hear citizen complaints and have complainants appear as witnesses, were sufficient. Instead, the court simply reversed the argument, noting that it would be no great burden for the Commission to go a little bit further and permit the complainants to become formal adjudicatory parties.³⁹

More recently, the Supreme Court liberalized the rules of judicial standing in the *Data Processing*⁴⁰ and *Barlow* cases,⁴¹ which apparently reduced the entire complex body of standing doctrine to two straightforward questions: (1) Is the plaintiff "aggrieved in fact"? (2) Is the interest sought to be protected by the plaintiff "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"? The D.C. Circuit was quick to apply these tests to a question of standing to intervene in state conformity hearings in *National Welfare Rights Organization v. Finch*.⁴²

39. Upon review of the remanded decision, the D.C. Circuit again reversed the FCC, this time because the interveners had been forced to assume the burden of proof and had otherwise been treated as "interlopers." 425 F.2d 543 (D.C. Cir. 1969). In the course of its opinion, the court made clear that it was adopting the *Scenic Hudson* concept that the agency had an affirmative duty to build a record on the issues raised by the interveners, notwithstanding the absence of any "planning" responsibility in relevant portions of the FCC's organic statute. See *id.* at 546, 548-49.

40. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

41. *Barlow v. Collins*, 397 U.S. 159 (1970).

42. 429 F.2d 725 (D.C. Cir. 1970). The court also concluded that standing to obtain judicial review implied a right to participate in administrative proceedings, since "without participation in the administrative hearing, issues which appellants here might wish to raise . . . may have been foreclosed as a topic for review." *Id.* at 737.

In addition the court noted: "Cases concerning the question of standing before one or the other tribunal have been used interchangeably in resolving questions of standing to intervene. Except for the adjustments necessary for assuring the manageability of administrative proceedings, the criteria for standing for review of agency action appear to assimilate the criteria for standing to intervene." *Id.* at 732-33. *Accord*, *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1000 n.8 (D.C. Cir. 1966) (quoted at note 38 *supra*). In reaching this conclusion, the court took note of the "seemingly contrary viewpoint" that standing to seek judicial review is a different question from right to intervene (see 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 22.08, at 241 (1958)), but apparently rejected this contention in large part.

It should be noted that literal application of the *Data Processing* tests to intervention questions would mean that the agencies could not distinguish between groups and individuals, since the "injury in fact" and "zone of interests" formulations provide no logical basis for such a distinction. The D.C. Circuit seems to have adopted this rationale. See, e.g., *Hale v. FCC*, 425 F.2d 556, 558 n.2 (D.C. Cir. 1970). *But cf.* *Martin-Trigona v. FCC*, 432 F.2d 682, 683 (D.C. Cir. 1970). On the other hand, a major part of the rationale for allowing intervention in *Church of Christ I* is the usefulness of the contribution that interveners can make to the proceeding. But it would be difficult to draw a general distinction between individuals and groups on this basis. See, e.g., *Yohalem v. WMATC*, 436 F.2d 171 (D.C. Cir. 1970); *Banzhaf v. FCC*, 405 F.2d 1082

Courts have also recognized certain situations in which public interest group intervention is improper. For example, the D.C. Circuit has indicated that an agency may refuse to consider an issue raised by an intervener in a license renewal hearing if it has a pending rulemaking proceeding on the same subject.⁴³ Also, denial of intervention in an adjudicatory proceeding has been upheld if the contentions urged by the intervener are so lacking in relevance to the facts of the adjudication that they should be presented in the form of a petition for rulemaking.⁴⁴ The agency should also consider the posture of named parties in the action, and whether their rights will be prejudiced by a grant of leave to intervene. A private party that finds itself in a position analogous to a criminal defendant⁴⁵—for example, a firm which is the object of an SEC action to revoke a broker-dealer license—should be accorded more protection against possible harassment by multiple interveners than a company which is seeking a benefit such as a broadcasting license. The public interest in speedy adjudication is greatest in the quasi-criminal case.

Agency response to these developments in the law of public interest intervention has not been extensive, perhaps because they are relatively recent and their full implications are far from clear. In addition, many agency rules are phrased broadly enough to allow substantial compliance with court decisions under existing regulations.⁴⁶ A few agencies have revised their rules to permit greater public participation,⁴⁷ or have indicated their willingness to grant intervention more freely⁴⁸ and to experiment with various forms of public intervention.⁴⁹

(D.C. Cir. 1968). Finally, several cases have concluded that, at least where the citizen's group is a corporate entity, it may not have an interest sufficient to support standing distinct from the interests of its individual members. See, e.g., *Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (9th Cir.), cert. denied sub nom. *Leslie Salt Co. v. Alameda Conservation Ass'n*, 402 U.S. 908 (1971); *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), aff'd, 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972).

43. *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970).

44. *Martin-Trigona v. FCC*, 432 F.2d 682 (D.C. Cir. 1970).

45. For a discussion of this analogy in the context of FTC adjudication, see *American Chinchilla Corp.*, 26 Ad. L.2d 284 (FTC 1970); FTC Statement of Policy, 35 Fed. Reg. 18,998 (1971) (appointment of counsel for indigent respondents).

46. See, e.g., 14 C.F.R. §§ 302.14-.15 (CAB 1971); 16 C.F.R. § 3.14 (FTC 1971).

47. See 36 Fed. Reg. 1454-55 (1971) (revisions in rules of procedure for conformity hearings by Social and Rehabilitation Service of HEW).

48. E.g., SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 91ST CONG., 1ST SESS., RESPONSES TO QUESTIONNAIRE ON CITIZEN INVOLVEMENT AND RESPONSIVE AGENCY DECISION-MAKING, 85-86 (Comm. Print 1969) (Response of the FTC):

The Commission has made a conscious effort to provide widespread notice to the public about matters where public input would be useful or required. . . . Although in the past we have not always permitted individual landowners to intervene in cases where their land might be affected, we have recently permitted such interventions and I believe we must find mechanisms which will permit a more meaningful input by individual citizens.

49. See *Firestone Tire & Rubber Co.*, 27 Ad. L.2d 877 (FTC 1970).

Public Participation in Administrative Proceedings

Since the cases explicitly reserve to the agencies substantial discretion to administer intervention,⁵⁰ agencies must devise methods to incorporate public participation while preserving the degree of control required for their orderly operation.

II. Preliminary Issues in Structuring Intervention

A. *Intervention and the Type of Hearing*

Four broad categories of administrative hearings have been established by the APA and other statutes—notice-and-comment rulemaking, rulemaking-on-a-record, ratemaking, and adjudication. To a limited degree the format of an administrative hearing determines the extent to which public participation is appropriate.

1. *Notice-and-Comment Rulemaking*

Notice-and-comment rulemaking is a quasi-legislative proceeding in which an agency submits tentative rules for written and oral comment. After these comments are received, the agency usually reconsiders the tentative rules and issues a final version effective thirty days after publication. The format of such proceedings is modeled on the representative and political process of legislatures. A participant merely presents his views; usually witnesses are not cross-examined, and discovery is not allowed. The need for, and desirability of, public participation in this procedure is axiomatic; the process is designed for promulgating standards of broad applicability. This article will not focus on public intervention in notice-and-comment rulemaking proceedings, however, since these proceedings have not been the source of major problems in structuring intervention. Public interest groups generally have been allowed to participate freely in notice-and-comment rulemaking. The only serious question has been how to communicate notice of these proceedings to the public and their group representatives. This does not mean that changes in rulemaking formats could not make public participation more effective. For example, where feasible, agencies should make available information and materials relied upon to formulate the proposed rule.

50. Compare *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005-06 (D.C. Cir. 1966), with *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 738-39 (D.C. Cir. 1970).

2. *Rulemaking-on-a-Record*

Unlike notice-and-comment rulemaking, rulemaking-on-a-record invariably involves some form of oral hearing, where evidence and argument are received and the agency's decision must be based upon and limited to the hearing record.⁵¹ Procedurally, they often resemble adjudicatory hearings. A mere description of this type of hearing, however, does not suggest the proper scope of public intervention. Rulemaking-on-a-record is employed for a variety of purposes, ranging from something similar to informal ("legislative") rulemaking in which broad policy issues are involved and basic facts are undisputed (*e.g.*, food standards),⁵² to trial-type proceedings concerning relatively narrow questions, where basic facts are often in dispute and the decision will have a significant impact on a few named parties (*e.g.*, setting minimum wage rates in the island possessions).⁵³ In the latter case, the problems presented in establishing guidelines for public intervention are similar to those raised by adjudicatory proceedings. Thus, rather than being structured by broad guidelines appropriate for all rulemaking-on-a-record, public participation would seem to depend on such functional factors as the issues involved and the number of parties, as well as the hearing format (*i.e.*, the manner in which evidence is received).

3. *Ratemaking*

The setting of rates to be charged by a regulated business contains elements of both adjudication and rulemaking. Although ratemaking, like rulemaking, is of "future effect," it is based primarily upon the proof of past "adjudicative" facts, and usually has "particular" rather than "general" applicability.⁵⁴ Consequently, ratemaking proceedings are usually trial-type hearings where testimony is sworn and subject to cross-examination and the resultant order has an impact on named parties. It seems clear that public participants can contribute to ratemaking decisions, primarily on broad policy issues such as the distribution of charges among affected segments of the public and the quality

51. See generally Hamilton, *Rulemaking on a Record*, REPORT FOR THE COMMITTEE ON RULEMAKING, ADMIN. CONF. OF THE U.S. (Sept. 23, 1971).

52. 21 U.S.C. § 371(e) (1970).

53. 29 U.S.C. § 205 (1970).

54. Compare *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908), with *Morgan v. United States*, 298 U.S. 468, 480 (1936); see 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01 n.1 (1958). The Administrative Procedure Act considers ratemaking to be rulemaking. 5 U.S.C. § 551(4) (1970).

Public Participation in Administrative Proceedings

of service rendered by the utility. The only serious questions involve the extent of public participation. Since the functional criteria suggested for determining participation in other adjudicatory hearings seem fully applicable to ratemaking, they need not be considered separately.

4. *Adjudications*

Administrative agencies frequently rely on trial-type hearings for deciding disputed questions of fact and for ordering compliance by named parties with specific laws and regulations. Generally the parties are represented by counsel, the trial examiner is treated with deference, evidence is received in question and answer form, and it is subject to cross-examination and rebuttal. Despite the overall similarity to judicial trials, the rules of intervention in judicial proceedings provide scant guidance.⁵⁵ As with rulemaking-on-a-record and ratemaking, a mere description of the format of adjudicatory hearings does not suggest methods of structuring intervention. For adjudications, too, are employed in a number of different contexts, only some of which would benefit from public interest group participation. For example, when the adjudication is a complaint case involving only the application of settled doctrine to a particular respondent—especially if a penalty could be imposed—there seems to be very little for the intervener to do outside of presenting an amicus brief or appearing as a witness. Intervention by public groups as parties in such hearings would subject the charged party to the prosecutorial resources not only of the government but also of the intervener. On the other hand, adjudications are often used by agencies as vehicles for formulating new policies of broad applicability, and frequently have an explicit or implicit resource allocation function affecting substantial segments of the economy. In the area of adjudicative proceedings, then, structuring intervention merely according to the category of the hearing is seldom appropriate.

B. *Determining Intervention by a Functional Analysis*

This analysis suggests that except for notice-and-comment rulemaking, determining whether public interest groups should be encour-

⁵⁵ Rules regarding permissive intervention at trial proceedings are limited to broad, general guidelines which permit substantial judicial discretion. See 3B J. MOORE, FEDERAL PRACTICE ¶ 24.10, at 24-351 (2d ed. 1969).

aged to participate in administrative hearings should not depend upon the hearing format. The other administrative hearings described above tend in practice to vary between quasi-legislative proceedings at one extreme and trial-type hearings at the other.

Public participation should be encouraged whenever the proceeding is quasi-legislative in nature. Structuring public intervention in trial-type hearings, on the other hand, appears to be a matter of weighing the potential contribution of public interest group interveners against the need for agencies to retain some control over their proceedings, all in the context of highly particular situations. Whether public intervention should be encouraged in trial-type hearings, therefore, requires a functional analysis. But this need not mean that agencies must (or should) resort to wholly ad hoc decisions regarding intervention. Specific criteria useful in determining the appropriate scope of public intervention can be developed. What follows is an attempt to delineate guidelines for agencies to structure such intervention. Whether or not one accepts the particular conclusions reached here, reliance upon a functional analysis should provide a sound basis for understanding and charting future developments in public interest group intervention in administrative hearings.

III. Criteria for Structuring Intervention

The issues raised by public intervention in trial-type hearings occur at two procedural stages. First, in determining whether a particular applicant should be allowed to intervene, and second, in determining the scope or range of intervention allowed that applicant. For convenience of analysis, these questions are discussed separately; as a practical matter agencies usually consider them together, especially since some of the considerations will overlap.

A. *Selection of Interveners in Trial-Type Proceedings*

Although a general "right" to intervene has been recognized by courts and required of agencies, it is far from absolute. Administrative expedience and fairness to other parties may require the denial of intervention in a particular case. Thus, even where the propriety of intervention is generally established, it is necessary to decide who among potential interveners may exercise the "right."

Public Participation in Administrative Proceedings

1. *Judicial Control*

In the recent crop of judicial decisions regarding public interest intervention, the courts have given some indication as to who should be permitted or denied access to agency proceedings. One of the earliest decisions, and probably still the most significant on the issue of selection, is *Church of Christ*.⁵⁶ The four interveners were two church groups (an office of the national denomination with a substantial membership in the station's prime service area and its Tougaloo congregation) and two individual residents of the area (both of whom were owners of television sets and active civic and civil rights leaders). The interveners sought to represent "all other television viewers in the State of Mississippi." Addressing the question of which interveners should be permitted to participate, the court first noted that "[b]y process of elimination those 'consumers' willing to shoulder the burdensome and costly processes of intervention . . . are likely to be the only ones 'having a sufficient interest' to challenge a renewal application."⁵⁷ The court effectively relied on cost as an automatic selection device, suggesting that, at least until the cost issue is satisfactorily resolved, an agency should seldom interfere and select among interveners. Beyond this cautionary signal to the agencies, the court spelled out at length some suggestions for determining which interveners, if any, should be accepted:

We recognize this will create problems for the [Federal Communications] Commission but it does not necessarily follow that "hosts" of protestors must be granted standing to challenge a renewal application or that the Commission need allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests. The Commission can avoid such results by developing appropriate regulations by statutory rulemaking. Al-

56. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

57. *Id.* at 1005. The court returned to this theme, after suggesting several criteria for selecting interveners, as follows:

The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome.

Id. at 1005. Professor Buxbaum has correctly noted that the delay and diversion of agency resources is an "overkill argument"; "it can be met . . . by insisting upon high threshold levels of allegation and disposing of dubious cases through appropriate summary techniques, and by evaluating the transactional and institutional context of the specific activity against which the complaint is directed." Buxbaum, *supra* note 19, at 1123.

though it denied Appellants standing, it employed ad hoc criteria in determining that these Appellants were *responsible spokesmen for representative groups having significant roots in the listening community*. These criteria can afford a basis for developing formalized standards to regulate and limit public intervention to spokesmen who can be helpful. . . .

The responsible and representative groups eligible to intervene cannot here be enumerated or categorized specifically; such community organizations as civic . . . and educational institutions or associations might well be helpful to the Commission. These groups are found in every community; they usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests.⁵⁸

*Scenic Hudson*⁵⁹ is another case where the court suggested standards for selecting public interveners. There, an unincorporated association consisting of several nonprofit "conservation" corporations was allowed to intervene in a hydroelectric license hearing to assert the public interest in "the aesthetic, conservational, and recreational aspects of power development." The court held that "those who by their activities and conduct have exhibited a special interest in such areas" were within the class of "aggrieved" parties under the FPC Act.⁶⁰ The plaintiff was a particularly appropriate intervener. It was expert in the field; the environmental interest was not otherwise separately or effectively represented in the proceeding; and representation of a common interest by one organization gave a voice to each constituent group while limiting the number of interveners, thereby expediting the administrative process. This approach was recently approved by the D.C. Circuit.⁶¹

Courts have also begun to stake out limits on the selection of interveners. In *Palisades Citizens Ass'n v. CAB*,⁶² two citizen groups sought to intervene in a helicopter license case. Intervention was denied for several reasons. The two groups, each representing similar interests and viewpoints, vied for the right to intervene; the Department of Transportation had already intervened to press the environmental impact through testimony and exhibits; the petitioners were late in seeking intervention; and the denial of intervention had little practical

58. *Id.* at 1005-06 (emphasis added).

59. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

60. *Id.* at 616 (emphasis added).

61. *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 739 (D.C. Cir. 1970).

62. 420 F.2d 188 (D.C. Cir. 1969).

Public Participation in Administrative Proceedings

effect, since the petitioners did participate in the final prehearing conference and were given the opportunity to present exhibits, cross-examine witnesses and make oral arguments. Moreover, the court noted that the CAB had promulgated prospective rules regulating intervention, considering, *inter alia*:

(1) The nature of the petitioner's right under the statute to be made a party of the proceeding; (2) the nature and extent of the property, financial or other interest of the petitioner; (3) the effect of the order which may be entered in the proceeding on petitioner's interest; (4) the availability of other means whereby the petitioner's interest may be protected; (5) the extent to which petitioner's interest will be represented by existing parties; (6) the extent to which the petitioner's participation may reasonably be expected to assist in the development of a sound record; and (7) the extent to which participation of the petitioner will broaden the issue or delay the proceeding.⁶³

2. Agency Rules

As *Palisades Citizens* suggests, occasional guidance is provided by agency rules regarding intervention. Even where the rules go no further than noting that intervention is available, an additional gloss may have developed, as has happened with the FTC. While the organic act provides for intervention in adjudicative hearings "upon good cause shown,"⁶⁴ FTC rules merely state that intervention may be permitted by the Commission or by an examiner in adjudicative proceedings; the "good cause" test is not repeated.⁶⁵ And in the first significant test of the FTC's rules by a public participant, the Commission relied on these rules alone as a basis for allowing intervention in a consent order proceeding.⁶⁶

Further interpretation of the FTC rules was provided in *Firestone Tire & Rubber Co.*,⁶⁷ in which the same citizens group, law students operating under the acronym SOUP (Students Opposing Unfair Practices, Inc.), was allowed to intervene in an adjudicative proceeding for the limited purpose of presenting evidence and argument on

63. 420 F.2d 188, 193, *citing* 14 C.F.R. § 302.15(b) (CAB 1968). These rules have not been altered in the meantime. *Id.* (1971). The protective shield which well-drafted agency rules can supply in subsequent judicial tests of its denial of intervention is another useful by-product of the CAB's rules. *See* *San Antonio v. CAB*, 374 F.2d 326, 331 (D.C. Cir. 1967).

64. FTC Act § 5(b), 15 U.S.C. § 45(b) (1970).

65. 16 C.F.R. § 3.14 (FTC 1971).

66. *Campbell Soup Co.*, 26 Ad. L.2d 1011 (FTC 1970).

67. 27 Ad. L.2d 877 (FTC 1970).

whether the remedy urged by the staff would adequately protect the public. Noting that it was "beginning a delicate experiment, one requiring caution and close observation," the agency emphasized that in determining whether the public participants were appropriate parties, it must be demonstrated that the interveners will "raise *substantial* issues of law or fact which would not otherwise be properly raised or argued," and that these issues "are of sufficient importance and immediacy." As the FTC indicated, this latter phrase meant that the added costs incurred by the intervention were not inconsistent with the agency's allocation of its resources.⁶⁸ While a precise formula was not stated by the Commission, it concluded that several additional factors should also be considered before intervention in adjudication is approved: "the applicant's ability to contribute to the case; the Commission's need for expedition in the handling of the case; and the possible prejudice to the rights of the original parties if intervention is allowed."⁶⁹

3. *Functional Criteria*

Whether a particular group or individual should be permitted to intervene as a party in an administrative trial depends upon the potential contribution it can make to the proceeding and the adverse consequence that may be involved. This suggests a particularistic, functional approach to determine whether and to what extent intervention by the petitioning party is appropriate.⁷⁰

a. *Nature of the Contested Issues.* A useful line of inquiry centers around the issues raised in the proceeding, rather than the roles and interests of the participants. When a new remedy or policy of potentially broad applicability is at issue, there are obvious advantages to be gained in obtaining the broadest spectrum of public input, consistent with considerations of manageability and orderliness in the proceedings.

A more difficult situation, however, is one in which the prospective intervenor seeks to raise an issue that neither the staff nor the named parties has any desire to litigate. If the issue is tangential to the main

68. *Id.* at 879-80 (emphasis in original).

69. *Id.* See also American General Ins. Co., 3 TRADE REG. REP. ¶ 19,915 (Jones, Comm'r, dissenting).

70. For a careful exploration of the functional approach, see the seminal article by Professor David Shapiro of Harvard Law School. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968) [hereinafter cited as Shapiro]. See also Comment, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 559 (1971) [hereinafter cited as NWRO Comment].

Public Participation in Administrative Proceedings

thrust of the proceedings and it would be burdensome to consider in the existing procedural context, denial of intervention may be proper. On the other hand, public participants may draw agency attention to issues and interests which the agency is required by statute to consider but which it fails to include within the compass of the hearing. In *Scenic Hudson*⁷¹ and *Calvert Cliffs*,⁷² for example, conservationists forced power plant licensing agencies to consider the environmental impact not otherwise accounted for in their decisions.

Interveners have also drawn agency attention to new techniques for fulfilling their mandate and have emphasized the importance of remedies in enforcement proceedings. Two FTC cases, *Campbell Soup*⁷³ and *Firestone*,⁷⁴ illustrate this point. In each the FTC had charged a private party with false advertising. Neither involved a departure from settled precedent. In one the respondent was charged with having put clear marbles in the bottom of soup bowls pictured in its ads, causing the soup to appear "heartier" than it was in fact; the other asserted that respondent's claims of safe and effective tire performance were untrue or unsubstantiated. Yet intervention was allowed in each because the issue which the public group intervener sought to contest—the appropriate remedy—was not settled by prior decision. Though the Commission had previously asserted it had the power to require corrective advertising as the intervener asked,⁷⁵ there had been no clarification of the circumstances in which such an order would issue. The question needed exploration in a factual setting, evidence and argument regarding the impact of deceptive and corrective advertising was appropriate, and the public interveners demonstrated a particular interest in the subject.

At times intervention by public groups supplements agency resources. The FCC cannot constantly monitor the performance of thousands of radio and television licensees; indeed, it is more accurate to say that it almost never does. Listener groups, however, can monitor licensee performance.⁷⁶ The ICC staff likewise makes no effort to

71. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

72. *Calvert Cliffs' Coordinating Comm. v. AEC*, 29 Ad. L.2d 249 (D.C. Cir. 1971).

73. *Campbell Soup Co.*, 26 Ad. L.2d 1011 (FTC 1970).

74. *Firestone Tire & Rubber Co.*, 27 Ad. L.2d 877 (FTC 1970).

75. Cf. Comment, *Corrective Advertising: The FTC's New Formula For Effective Relief*, 50 TEXAS L. REV. 312 (1972); Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 HARV. L. REV. 477 (1971); Note, *Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways*, 70 MICH. L. REV. 374 (1971).

76. At the Sixth Plenary Session of the Administrative Conference of the United States, December 6-7, 1971, Mr. Max Paglin, FCC Special Assistant for Administrative Procedure, reported that listener groups were currently intervening or seeking to intervene (and thereby requesting a formal hearing) in eighty-three broadcast license renewals.

question commodity rates, relying instead upon disadvantaged shippers to assert the consumer's interest. When the shippers can simply pass on increased costs, however, that protection fails and public interest representatives can perform a valuable service.⁷⁷

An inquiry into the nature of the contested issues will not always lead to an allowance of intervention. For example, in two recent FCC proceedings, a renewal hearing and a revocation petition,⁷⁸ intervention was denied. In each the intervener sought to raise questions about the antitrust implications of FCC licensing policy. Each case was appealed to the D.C. Circuit, which had opened the door for public participants in administrative hearings in *Church of Christ*. The court held that it was not necessary to consider the antitrust issue in the manner urged, because the issue was "more appropriate for exploration and resolution in rulemaking than in adjudication."⁷⁹ The policy questions raised by the interveners applied to the entire communications industry and not just to one unit.⁸⁰

This rationale for denying intervention in an adjudication obviously ought not to be invoked too freely, since a rebuffed intervener has scant leverage to compel the agency to consider the issue he is arguing in a rulemaking proceeding, if one has not already begun.⁸¹ The failure of many agencies to rely upon informal rulemaking proceedings rather than trial-type hearings to decide general policies is itself a significant cause for public intervention in trial-type proceedings. There are good reasons for the broad discretion accorded agencies to choose between rulemaking and adjudication in situations where either procedure is arguably proper.⁸² Nevertheless, when it appears that substantial numbers of public interest groups will seek to par-

77. *Vegetable & Melons Transcontinental Eastbound*, 335 I.C.C. 798 (1970), discussed in Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069, 1098-99 (1971).

78. *Martin-Trigona v. FCC*, 432 F.2d 682 (D.C. Cir. 1970); *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970). Cf. *Pikes Peak Broadcasting Co. v. FCC*, 422 F.2d 671, 680-81 (D.C. Cir.), cert. denied, 395 U.S. 979 (1969).

79. *Martin-Trigona v. FCC*, 432 F.2d 682 (D.C. Cir. 1970).

80. Perhaps most significant (and decisive for one member of the court) was the fact that the FCC was already pursuing this very question in actual investigations looking toward rulemaking as well as in current rulemaking proceedings. 22 F.C.C.2d 306, 35 Fed. Reg. 5948 (1970); 16 F.C.C.2d 436, 34 Fed. Reg. 2151 (1969); see *Hale v. FCC*, 425 F.2d 556, 560-66 (D.C. Cir. 1970).

For another illustration of how the nature of the issue may determine the appropriateness of intervention, see Buxbaum, *supra* note 19, at 1138-39.

81. *But cf.* *Environmental Defense Fund, Inc. v. HEW*, 428 F.2d 1083 (D.C. Cir. 1970); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

82. *E.g.*, *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966); *Regular Common Carrier Conference v. United States*, 307 F. Supp. 941 (D.D.C. 1969). For a perceptive and literate analysis of this issue, see Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 188 U. PA. L. REV. 485 (1970).

Public Participation in Administrative Proceedings

ticipate in an adjudicative proceeding or when there are a multiplicity of petitions to intervene filed during the early stages of an adjudication, it would be sound policy for the agency to consider converting the adjudication into rulemaking.

In examining the nature of the contested issue, one must penetrate beyond a mere description of the proceeding and consider the nature of the underlying dispute. Though all license renewal, suspension, or revocation proceedings are similar in that they are contests between the agency and the respondent, the impact of the agency's decision on the public varies, and the differences may be critical. For example, license revocations before the SEC (broker-dealer disciplinary hearings) seem less appropriate than FCC license revocations for public intervention. The difference is that the SEC's regulatory scheme is not aimed primarily at limiting access to the industry; the public has only a limited interest in whether a broker or dealer is barred from further business because there is a broad choice among brokers and dealers. By contrast, an FCC licensee holds one of a quite limited number of franchises, and the public has a much stronger interest in whether the licensee's derelictions are met by mere admonishment, a stringent penalty, or the transfer of the franchise.

b. Intervener's Interest in the Outcome. As Professor Shapiro accurately observed, "[a]t the heart of almost every intervention case is the nature and extent of the applicant's interest in the proceeding."⁸³ The intervener's interest is significant both in determining whether exclusion is unfair to the intervener (*i.e.*, to the public interest it represents) and whether the intervener is likely to have a separate and distinct position to present, thereby making a significant contribution to the hearing. To some extent, of course, the latter question may be circular, since the intervener's position may be relevant only to an issue which it is seeking to add to the proceeding. In this case, the threshold question is the propriety of entertaining the issue at all. But evaluation of the petitioner's interest in the outcome will not always be so difficult. The welfare intervener in state welfare conformity hearings, for example, has a clear and direct interest in compliance⁸⁴—the welfare recipient's interest is so critical, in fact, that it has been suggested "that procedural fairness requires an effective opportunity to be heard prior to governmental interference with

83. Shapiro, *supra* note 70, at 729; see 14 C.F.R. § 302.15(b) (1971) (CAB rule on intervention quoted at pp. 374-75 *supra*).

84. See *National Welfare Rights Organization v. Finch*, 429 F.2d 725 (D.C. Cir. 1970).

financial interests which go to the core of sustenance."⁸⁵ Similar arguments may be made with respect to the interest of listener groups in broadcast licensing.

The welfare recipient's viewpoint is also important because it is likely to be distinct from that of the state or of HEW, and in reaching a sound decision these views should not be ignored. Listeners likewise can make a distinct contribution in FCC hearings, especially when it is remembered that the purpose of government regulation is to benefit the listening public. Conservationists are well qualified to comment on aspects of the environmental impact of power plant locations. When the prospective intervener is a de facto charging party, such as a labor union in an NLRB case involving an unfair labor practice charge against an employer,⁸⁶ there are obviously stronger arguments in favor of permitting intervention than there are in situations where the group seeking to participate represents an interest which is difficult to distinguish from that of the general public. In general, the public intervener's interest criterion serves to identify not only the contribution which the intervener can make to the administrative hearing, but also the right of those who will be significantly affected by an agency's decision (even though the immediate, direct impact may not be significant or distinct) to be afforded a reasonable opportunity to be heard.⁸⁷

c. *Adequacy of Representation of Intervener's Interests by Existing Parties.* The crux of public interest group intervention is not whether the intervener's interest is adverse to that of existing parties, but whether its legitimate interests are otherwise represented adequately in the hearing. If they are, the intervener should be encouraged to assist the existing parties; to allow intervention in this situation may be wasteful, duplicative and unnecessarily burdensome on the hearing

85. NWRO Comment, *supra* note 70, at 570.

86. See, e.g., *UAW Local 283 v. Scofield*, 382 U.S. 205 (1965); *Solien v. Miscellaneous Drivers & Helpers Union Local 610*, 28 Ad. L.2d 449 (8th Cir. 1971). *But cf.* *Terminal Freight Cooperative Ass'n v. NLRB*, 29 Ad. L.2d 280 (3d Cir. 1971).

87. In regard to the opportunity to be heard, the right of public intervention is part of a continuous development established in a constitutional framework in *Londoner v. Denver*, 210 U.S. 373 (1908).

It is, of course, somewhat anomalous to rely upon the intervener's precise interest in the outcome as a basis for selection when public representation in agency proceedings was most significantly expanded on the "private attorney general" theory and the intervener's interest was only an incidental touchstone. However, the criterion of the intervener's interest in the outcome looks not to the right to intervene (it now being beyond question in many administrative proceedings that public interest participation is generally desirable), but to whether *this* intervener is likely to make a substantial contribution to the proceeding.

Public Participation in Administrative Proceedings

process.⁸⁸ As noted earlier, it is not persuasive for agency staffs to argue that their presence in a proceeding assures representation of the public interest. Since the public interest is multi-faceted, separate representation of identifiable views will promote an awareness of the complexities of an issue and its potential impact. Public intervention softens the artificial two-sidedness which is often a by-product of the adversarial adjudicative process. Furthermore, it is not always clear that the staff and public interest positions exactly coincide. It is frequently asserted, and sometimes acknowledged, that agencies are "captured" by the interests they regulate.⁸⁹ In other situations, such as welfare conformity hearings, the interests of the so-called adverse parties may coincide, to the detriment of the intended beneficiaries of the legislation.⁹⁰ And, on occasion, even the competence and good faith of government representation have been authoritatively questioned.⁹¹

A related argument frequently raised against public intervention is that to permit citizen groups to intervene when the public is represented by government prosecutors is an anomaly forcing agencies to reallocate resources. Congress has delegated this decision to the agencies and not to meddlesome interlopers, however pure their motives. In addition, if the adjudication is a complaint case, intervention deprives the prosecutor of control of the case. The argument is a weak one, however. Intervention does not replace government discretion as to whether or not to prosecute, and once an action is begun the agency's resource commitment has already been made.⁹² Nor is delegation of prosecutorial discretion to the agency inconsistent with a supplementary right of public intervention. As the initiator of the

88. See, e.g., *San Antonio v. CAB*, 374 F.2d 326, 331-32 (D.C. Cir. 1967).

89. E.g., L. KOHLMEIER, *THE REGULATORS* 69-82 (1969).

90. Though recipients' interests theoretically cannot be adverse to both the state and HEW on a particular issue, adversity arises out of practical realities of welfare administration. The state has an economic interest adverse to recipients when it must increase expenditures on public assistance to achieve conformity. HEW, through its matching grant system, must also allocate more funds to a state coming into conformity. Both the state and HEW respond to popular sentiment against rising welfare costs. Furthermore, recent administrations have found it advantageous to maintain a cooperative relationship with the states to facilitate the free flow of information between federal and state officials. This interlocking bureaucracy encourages HEW to identify its interests with the states rather than with recipients. NWRO Comment, *supra* note 70, at 572-73 (footnotes omitted). Cf. *Trbovich v. United Mine Workers*, 92 S. Ct. 630, 636-37 (1972) (intervention in court action under Landrum-Griffin Act by union member approved, because member's interest and Secretary of Labor's advancement of "public interest" not identical); *Cleveland v. Cities Service Oil Co.*, 47 F.R.D. 543 (N.D. Ohio 1969) (reluctant plaintiff an inadequate representative).

91. Cf. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

92. Shapiro, *supra* note 70, at 746.

proceeding, the prosecutorial staff will retain primary control of the manner in which the case is tried. Even when accorded full party status, the intervener may not interfere with the prosecution of the case nor may it burden the proceeding with redundant or irrelevant evidence.

d. *Ability of Intervener to Represent Its Interests.* Unless the public participant can represent its interest adequately, intervention will not be maximally productive. Thus, listeners seeking to participate in an FCC license hearing must be "responsible" and "representative" spokesmen.⁹³ Invocation of this criterion does not suggest that only organized groups can adequately represent the public's interest, although, where a choice of public interveners exists, an agency should select those best able to advance their views. Caution should surround the exercise of this selection, lest an agency be charged with having abused its discretion by effectively denying the right to intervene.

Use of this criterion also does not necessarily suggest that only one public intervener should be allowed, even if several applicants seek to promote the same view. The intensity and concern of several interveners may be cumulatively valuable, especially if the cost to the agency's proceedings is comparatively slight.

To the extent that agencies become able to assist public interveners and enhance the effectiveness of their participation, it will become less important to scrutinize the intervener's ability to represent its interests. Recommendations aimed at providing such assistance are outlined below. But until these or similar steps are taken, and perhaps even then, agencies should consider the intervener's ability to finance effective participation, as well as the nature and uniqueness of the evidence and arguments it seeks to submit.

e. *Effect of Intervention on Agency Proceeding.* In evaluating the merits of a proposed intervention, agencies must be cognizant of the *net* effect of their decision. The significance of the case, its impact on the public, and the effect of intervention on agency resources are all factors to be considered. In some instances intervention may be inappropriate. For example, there may be sound tactical reasons for postponing intervention until a better case arises. Intervention may result in extensive delay when it is important that an issue be decided quickly. Another valid consideration might be whether the public

93. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966). Whether the intervener in broadcast licensing hearings must be a member of the listening audience (*i.e.*, a resident of the station's prime area) is less clear.

Public Participation in Administrative Proceedings

participant is seeking to initiate a proceeding, or is simply trying to take part in one already in progress.⁹⁴

Although agencies must be accorded some leeway to take account of costs, this criterion should not become a self-justifying means for routinely denying intervention. Intervention may be costly, as the administration of justice always is. Although the evidence for a sophisticated cost-benefit analysis is unavailable, the courts have already decided that in many contexts intervention is in the public interest. In those situations, cost considerations should be subordinate to the adequate representation of conflicting viewpoints.

Agencies should also take care in assigning particular costs to intervention. For example, when agency proceedings in the past have been substantially extended or have become more costly as a result of intervention, it has frequently been because interveners have raised new issues which the agency is required to consider but previously had failed to examine. Utility plant site proceedings now require additional hearing time to consider environmental impact. Yet this cost cannot be legitimately charged as a drawback of public interest group participation, since a prior judgment has been made that consideration of that issue is essential to successful performance of the agency's mandate.⁹⁵

B. *Scope of Participation*

Determining the extent to which public interveners should participate in trial-type proceedings presents peculiar problems.⁹⁶ The right to intervene is conditioned not solely on the direct impact of the agency's decision on the public intervener, as is generally the case for private interveners, but rather on what the public intervener can contribute to the administrative proceedings.⁹⁷ Consequently, the

94. *E.g.*, *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 739 (D.C. Cir. 1970).

95. *See Scenic Hudson Preservation Conference v. FPC*, 3 BNA ENVIR. REP. CASES 1232, 1245 (2d Cir. 1971) (upholding FPC's license for construction of Storm King project):

We do not consider that the five years of additional investigation which followed our remand [in 354 F.2d 608] were spent in vain. The petitioners performed a valuable service By reason of their efforts the Commission has reevaluated the entire Cornwall project. The modifications in the project reflect a heightened awareness of the conflict between utilitarian and aesthetic needs.

96. This discussion concentrates on trial-type proceedings because notice-and-comment rulemaking presents no significant problems of scope of participation. They are usually one-appearance affairs, and the question is only one of fairness in allowing all participants an equal opportunity to be heard.

97. *See, e.g.*, *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 603 (2d Cir. 1965); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *id.*, 425 F.2d 543 (D.C. Cir. 1969).

participatory limits imposed on other interveners often have little significance in determining the scope of public intervention.

A few general principles, however, can be set forth. Most are obvious and seem indisputable. The agency must maintain control of each trial proceeding to assure an expeditious conclusion. Observance of rules of order are the *sine qua non* of a fair and full hearing. Each agency must retain, and delegate to its hearing examiners, considerable discretion to structure the public intervener's participation.⁹⁸ Irrelevant, duplicative and repetitive evidence and argument can and should be restricted. Common interests may be required to select a single spokesman, and the agency must retain the right to determine priorities and control the compass of the hearing.

1. *Unlimited Participation*

Contrary to the view of some agency staffs, hearing examiners and commission members, public interveners in trial-type proceedings should generally be accorded full participation with all the rights of other parties, if they can make a serious showing of the need to participate in all aspects of the litigation. This conclusion rests on two foundations, one practical, the other analytical. Practically, the cost of scrutinizing the scope of intervention is likely to exceed the potential risk of full participation where it is sought.⁹⁹ Interveners are unlikely to delay proceedings unduly or to increase their costs substantially, even where they are allowed full participation as parties. The cost of participation and the intervener's interest in an expedited resolution of the issue make obstructionist tactics unlikely. In addition, where the public intervener's right to participate is unfairly restricted, the agency invites unnecessary appeals and expensive retrials.

The analytical foundation for full participation is that proper application of the tests for selection of responsible and representative public interveners should assure that the risks of delay or deflection of the hearings from their proper focus are insubstantial. It would be incongruous at best if an agency carefully applied the criteria for selecting public interveners only to frustrate the objective of inter-

98. Reliance for proper control of the hearings and the orderly compilation of the hearing record must, of course, be on the hearing examiner. He is fully authorized to be the arbiter of the relevance of proffered testimony and of the proper scope of cross-examination and to insist that all parties address themselves to the business at hand with dignity and dispatch.

National Welfare Rights Organization v. Finch, 429 F.2d 725, 739 n.46 (D.C. Cir. 1970).

99. In fact, the cost of intervention either to existing parties or to the agencies is unlikely to be significant unless the right and scope of participation is put in issue. Cf. *Campbell Soup Co.*, 26 Ad. L.2d 1011, 1016-17 (FTC 1970) (Comm'r Elman, dissenting).

Public Participation in Administrative Proceedings

vention by hampering the intervener's participation in the hearings.

Full participation with all the rights of a party to the proceeding covers many possible areas. The right to appear by counsel obviously is necessary if participation is to be effective and helpful to the agency. There is no reason to bar an intervener from prehearing conferences; in fact, such conferences may set the tone and determine the scope of the proceeding. Even though a public intervener is frequently allowed to participate because of its particular information or expertise, discovery may be necessary in order for it to protect its position or complete its preparation. Expedition of the trial requires that the intervener be as free to obtain admissions or fact stipulations as any other party. Most important is the right to be heard by presenting evidence, cross-examining witnesses, stating objections, and asserting views through oral argument and written submissions.¹⁰⁰

One possible exception to allowing public interveners unlimited participation is in settlement negotiations. Informal negotiations might be hampered by the participation of additional parties, and settlement is a legitimate objective. The public intervener's interests would be arguably protected in most situations by allowing the intervener to study the result and comment upon any proposed settlement prior to its acceptance by the examiner or the agency. Exclusion of an intervener from settlement negotiations raises the possibility, however, that the agency and the other parties may freeze him out and settle the case to his disadvantage. Public interveners could of course challenge such settlements, and challenges should prompt scrutiny of the settlement, including a hearing if any factual issue remains in doubt. This procedure may be a fair resolution of the conflicting interests of interveners, agency and existing parties in promoting settlement, and is supported by agency and court precedent.¹⁰¹

100. In *NWRO*, the court spelled out the intervener's rights as follows:

- (a) To appear by counsel or other authorized representative, in all hearing proceedings.
- (b) To participate in any prehearing conference held by the presiding officer.
- (c) To enter into stipulation as to facts which will be made a part of the record.
- (d) To make opening statements at the hearing.
- (e) To present relevant evidence on the issues at the hearing.
- (f) To present witnesses.
- (g) To cross-examine witnesses for other parties.
- (h) To present oral arguments at the hearing.
- (i) To submit written briefs, proposed findings of fact and proposed conclusions of law, after the hearing.

NWRO v. Finch (Final Order Nov. 24, 1970), quoted in *NWRO Comment*, *supra* note 70, at 577 n.114.

101. *Id.* (paragraph 2 of Final Order); *Campbell Soup Co.*, 26 Ad. L.2d 1011 (FTC 1970). See also Letter from Donald F. Turner, Assistant Attorney General, to Representative Emanuel Celler, March 17, 1967, in *BNA ANTITRUST & TRADE REG. REP.*, March 21, 1967, at X-1.

In many situations, however, permitting intervention in settlement negotiations does seem appropriate. Most private attorneys and agency personnel with experience in the area of public intervention claim that excluding interveners from the settlement process may ensure an unacceptable result. The cost of the intervener's inclusion in settlement negotiations, both to the agency and the parties, will usually be no greater than the cost of intervention in the hearing itself. Public interveners may also facilitate settlement, by being freer to suggest compromises acceptable to the major protagonists. Given the possibility that interveners may be prejudiced by settlements arrived at without them, and the chance that they might expedite settlement negotiations, it seems wisest for agencies to include all participants in settlement procedures unless substantial reasons to the contrary are demonstrated.

Further aspects of the scope of intervention include the initiation of agency proceedings and the addition of issues by interveners. Technically, in most instances only the agency can initiate a trial proceeding.¹⁰² Any person or group may petition the agency and seek to establish why an agency hearing is necessary,¹⁰³ although participation by the petitioner is not assured if a hearing is granted.¹⁰⁴ "Intervention," then, is technically limited to participation in an ongoing agency proceeding.

The line between intervention in and a petition for a hearing becomes unclear, however, where the agency is required by a court or its enabling statute or procedures to initiate a hearing on request and to permit the petitioner to intervene. For example, the Communications Act requires that the FCC allow a licensee a "full [adjudicative] hearing" before an application for renewal is denied.¹⁰⁵ Consequently, if a public interest group petitions the FCC to deny a license renewal and presents supporting evidence, the agency may be required to hold a hearing and allow the public group to intervene.¹⁰⁶ Even if an agency is forced in this way to hold a hearing, the question of whether a trial-type hearing is necessary is usually within

102. See Shapiro, *supra* note 70, at 726-29. But see L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* 18 (3d ed. 1968) (ICC reparation procedures).

103. Administrative Procedure Act § 4(d), 5 U.S.C. § 553(e) (1970).

104. Cf. *Campbell Soup Co.*, 26 Ad. L.2d 1011 (FTC 1970). Denial of such a petition may now be subject to judicial review. See, e.g., *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

105. 47 U.S.C. §§ 308, 309(d) (1970); 47 C.F.R. §§ 1.539, 1.580, 1.587, 1.591, 1.593 (FCC 1971); see Note, *Standing to Protest Before the FCC*, 55 COLUM. L. REV. 209 (1955).

106. E.g., *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *id.* 425 F.2d 543 (D.C. Cir. 1969) (*Church of Christ II*).

Public Participation in Administrative Proceedings

the agency's discretion, so that it can establish priorities and control its resources.¹⁰⁷ The general rule of full participation does not impinge on this discretion, but agencies must be prepared to explain why proceedings or rules urged by public interest groups are not pressed.¹⁰⁸

Similarly, public interveners may seek to broaden the issues or to alter the focus of the proceeding, and here again the agency must be allowed to exercise control.¹⁰⁹ Unlimited participation by public interveners in most cases where they seek full party status does not mean that any issue raised by the intervener is appropriate for a full hearing. If the issue is relevant to the case, if substantial doubt exists or the facts are in dispute, and if it will not otherwise be canvassed, the issue should be included. In general, however, interveners should not select the issues or control the course of trial proceedings. The reason public intervention is allowed and encouraged in agency proceedings is usually to explore issues already raised by the parties, but from a different perspective. If this opportunity is overextended, the benefits of intervention may no longer outweigh the costs.

2. *Limited Participation*

Intervention as a full party is not the only possibility, and it is not uncommon for agencies to permit "interveners," with or without the status of parties, to participate in trial hearings by submitting amicus briefs, appearing as a witness, presenting evidence, or cross-examining witnesses.¹¹⁰ Public interveners will frequently be satisfied with one of these alternatives, provided that limited participation does not restrict the interveners' right to appeal. By specifying the opportunity for limited participation in their rules, agencies can encourage public interveners to accept a more restricted—but not necessarily less effective—role.

In order to keep the hearings manageable and fairly protect the interests of existing parties, an agency in some instances may be obliged to permit only limited intervention. The criteria suggested for selection of interveners may be relevant in coming to this decision. Where numerous parties seek to participate and some of their interests

107. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

108. See *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 92 S.Ct. 577 (1972); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

109. See generally Shapiro, *supra* note 70, at 754-55.

110. 14 C.F.R. § 302.14 (CAB 1971); 47 *id.* § 1.225 (FCC); see Boros, *Intervention in Civil Aeronautics Board Proceedings*, 17 *Ad. L. Rev.* 5 (1964).

are similar, consolidation of briefs and limitation of the right to cross-examine may be appropriate.¹¹¹ Where the public intervenor's interest is limited to one aspect of the adjudication, *e.g.*, the remedy, the agency should consider limiting the intervenor's participation to that issue.¹¹² Similar limitations seem desirable where the intervenor does not seek to controvert adjudicative facts—here, a written presentation without cross-examination would be adequate.

One general caveat must be repeated, primarily because of the latent hostility toward public intervention which occasionally surfaces in agencies. In assessing the proper dimensions of public participation, it is invariably asserted that “[t]he public would be ill-served by an agency whose proceedings were vulnerable to disruption and agonizing delay by means of the proliferation of parties and other participants.”¹¹³ The point is a valid one if kept in perspective. But as suggested earlier, agencies should be extremely cautious in ascribing much significance to potential delay or to harassment from public intervenors. Courts have been right to distrust the cries of impending disaster. The available evidence, confirmed by the examination conducted by the Administrative Conference's staff in support of this article, suggests that public intervention has not impaired, and seems unlikely to hinder, the efficiency or effectiveness of agency proceedings.¹¹⁴

IV. Eliminating Barriers to Effective Public Participation

Expansion of the “right” of public groups to intervene in administrative proceedings stems in part from a recognition by courts and agencies of the public intervenors' contribution to the administrative process. “[T]hey serve as ‘private attorney generals,’ ”¹¹⁵ and thereby supplement agency resources.¹¹⁶ But standing to intervene is not auto-

111. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966).

112. It is further ordered that the examiner be, and hereby is, directed to permit SOUP to intervene for the limited purposes of:

1. presenting, at the conclusion of complaint counsel's case-in-chief, relevant, material, and non-cumulative evidence on the issue of whether the proposed order to cease and desist adequately protects the public interest;

2. presenting, with respect to said issue, briefs and oral argument in such manner and to such an extent as the examiner may deem reasonable; and

3. exercising with respect to said issue, such discovery rights as the examiner shall deem reasonable and necessary.

Firestone Tire & Rubber Co., 27 Ad. L.2d 877, 880 (FTC 1970).

113. *Id.* at 879.

114. See note 95 *supra*.

115. *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 738 (D.C. Cir. 1970).

116. Unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant sur-

Public Participation in Administrative Proceedings

matically translated into effective participation. Frequently the cost of participation in an administrative proceeding mounts into tens of thousands of dollars, and prolonged, multiple party proceedings cost even more. Public interest groups are often financially unable to participate. Some organized and established groups have been able to finance participation by fund-raising, relying on foundations and individual contributions. Ad hoc committees, *pro bono publico* efforts of lawyers, and volunteered services of students and others are occasionally relied upon to meet the cost of participation. But these random, ad hoc sources of support obviously cannot meet the cost of effective participation on a sustained and reliable basis.

A. Cost of Participation

Any method proposed to meet the cost of public interest group participation in administrative trials is likely to be controversial. Those who support intervention by self-sufficient public groups may oppose governmental encouragement of intervention through various subsidy programs, particularly if the cost of participation is relied upon to reduce the number of "intermeddlers" and assure responsible participation.

If the government is to subsidize public intervention, it may be asked whether the further step of providing for specific, on-going representation of certain public interests should not also be taken. Perhaps it should.¹¹⁷ But one need not go this far to argue that some of the existing cost barriers are unnecessary and should be eliminated. If public intervention is in fact a "right" which agencies have a mandate to foster, failure to render some assistance amounts to a practical subversion of that mandate. With the stakes so high, agencies should pursue a variety of approaches which will reduce the cost of participation and support effective intervention at a reasonable price. Because experience in this area is limited, what follows is but an initial examination of ways in which cost barriers can be reduced.

Four aspects of intervention have proved especially costly to public

veillance over every licensee, some mechanism must be developed so that the *legitimate* interests of listeners can be made a part of the record which the Commission evaluates.

Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966) (original emphasis).

117. 1 RECOMMENDATIONS & REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE U.S. 13, 71 (1970) (Recommendation 5: Representation of the Poor in Agency Rulemaking of Direct Consequence to Them). See Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969).

participants and constitute barriers to their participation: multiple copy rules, high transcript charges, expert assistance charges, and attorney fees.

1. *Multiple Copy Requirements*

Many agencies require the filing of multiple copies of all documents submitted by parties. The FPC requires a total of fifteen "copies";¹¹⁸ the CAB requirement is twenty.¹¹⁹ Reliance on extensive written (direct) testimony exchanged prior to the hearing, and on voluminous exhibits which are frequently part of agency hearings, aggravates the multiple copy burdens. When added to the additional burden of serving documents on other parties, multiple copy rules present a substantial obstacle to poorly financed potential interveners.

Some action has already been taken to meet this problem. In April 1971, the FCC reviewed its rules and reduced the number of copies required for filing.¹²⁰ Some agencies waive multiple copy rules when petitioned by public groups claiming hardship.¹²¹ The number of copies parties are required to file should be reduced to a minimum; flexibility might be allowed by permitting the hearing officer to determine how many copies are needed in a proceeding. Where even reasonable and necessary requirements for the filing of multiple copies work a hardship on public participants, agencies should be generous in waiving these requirements. In addition, agencies should permit use of their duplication facilities at minimum cost in order to assist parties who lack access to such services.

2. *Transcripts*

Transcripts of administrative proceedings are prepared by private reporting companies operating under annual contracts with the agencies. Three classes of service varying in price and speed of delivery are offered. In descending order of cost these classes are: "immediate" or "rush" copy delivered on the same day as the hearing; "daily" copy delivered on the morning after the hearing; and "ordinary" copy delivered five to ten days after the hearing.

118. 18 C.F.R. § 1.15(b) (FPC 1971) (original and fourteen copies).

119. 14 C.F.R. § 302.3 (CAB).

120. *In re* Reducing the Number of Copies of Pleadings Filed in Commission Proceedings, 28 F.C.C.2d 443 (1971).

121. See, e.g., *Campbell Soup Co.* [1967-1970 Transfer Binder], TRADE REG. REP. ¶ 19,006, at 21,623 (FTC 1969); *Firestone Tire & Rubber Co.*, 3 TRADE REG. REP. ¶ 19,519, at 21,575 (FTC 1971) (interlocutory order).

Public Participation in Administrative Proceedings

The terms and prices of reporting services for the agency holding the hearing, as well as for the public, vary greatly among agencies.¹²² The CAB, FCC and FPC receive their own copies of transcripts at no charge, while the ICC pays a reduced rate for its copies. The FTC and SEC pay for their copies but the charge per copy to them is less than that charged other parties; the FTC receives several copies at a total price only slightly in excess of the single copy charge to others. The FDA and SRS, on the other hand, pay more for their copies of the transcript than do other parties. All of these agencies make a copy of the transcript available to the public as soon as it is received. Most agencies do not permit reproduction of this copy, however, requiring it to be used in place and only during the agency's business hours.

Although "rush" copy of transcripts may be desirable for cross-examination or for consultation with co-counsel and advisers not present at the hearing, the significant need for transcripts in most cases is in preparing proposed findings, arguments and briefs. For

122. The relevant aspects of the various reporting contracts are summarized by the following table:

Agency	No. Copies to Agency	Total Price per Page to Agency Ordinary/Immediate	TRANSCRIPT COSTS*			FY 1971	
			Ordinary Copy	Price (Per Page Per Copy) to Public Daily Copy	Immediate Copy	Copy for Public Inspection	Copying Permitted
CAB	10	Free if ordered by others	\$.68	Negotiated	NR ^b	Yes	No
FCC	7-15	Free	\$.54	\$1.35	\$2.16	Yes	No
FDA	5	\$1.25	Negotiated ^c	NR ^b	Negotiated	Yes	No
FPC	15	Free	\$.28	\$.64	\$.84	Yes	No
FTC	3	\$.95/ \$2.50	\$.75	\$1.85	\$3.00	Yes ^d	After 30 days with FTC approval
ICC	1-11	\$.56/ \$1.00	\$.85	\$1.75	NR ^b	Yes	No
SEC	3-5	\$.90/ \$2.00	\$.95	\$1.75	\$2.50	Yes	No
SRS	several	\$4.00 (est.)	NA ^e	NA ^e	NA ^e	Yes ^d	Yes

- * Public sessions in Washington, D.C., except for SRS data which are for field hearings.
- Total price per page for all copies; single copy price therefore determined by dividing number of copies to agency into total price to agency.
 - NR (not requested).
 - Most recent price was \$.15.
 - Free copy made available to indigents in a limited number of cases.
 - NA (not applicable; no continuing contract).

this purpose "ordinary" copy is sufficient. But even at the "ordinary" copy rate a complete transcript is expensive. An average hearing day results in over 100 transcript pages, so that even relatively short proceedings taking only a week or two result in transcripts of 500 to 1,000 pages, costing hundreds of dollars. Rate cases in the FCC, FPC and CAB, or contested licensing proceedings in the FCC and FPC, typically require lengthy hearings with thousands of pages of transcript at a cost of several thousand dollars.

In a few instances, parties can avoid purchase of the transcript by using the public copy. But this copy is only available to attorneys in Washington, D.C. Furthermore, attorneys using it must work away from their offices and only during the business hours of the agency. It is consequently difficult for those who have access only to the public copy of the transcript to use it effectively, and the quality of representation is likely to suffer.

The problem of transcript costs derives from the pricing structure used by agencies in contracting with reporting companies. By obtaining their own copy free or at a reduced rate, the agencies pass all or part of their transcript costs onto the parties. The parties effectively subsidize the cost of hearings which agencies are usually required by law to conduct.¹²³

Although some agencies make provision for providing transcripts to public participants at reduced rates or without charge,¹²⁴ the most sensible reform would seem to be a complete revision of the pricing structure for transcripts. Preferential pricing systems are likely to prove difficult to administer, and pressures will develop to include private parties in the preferred categories. Furthermore, reporting companies might raise prices to protect themselves because of actual or potential loss of revenues.

There is an additional reason for insisting that agencies bear the full cost of transcription. The agency usually initiates the hearing and controls it, and it is the agency's responsibility to transcribe the proceedings and maintain records. Transcription thus seems to be a legitimate cost of government, and should be paid for out of general revenues. If the added expense for the agency is burdensome, additional funds should be appropriated for this purpose. All other parties

123. See 5 U.S.C. § 557(c) (1970). The Administrative Procedure Act is neutral on the allocation of transcript costs, however. APA § 7(d), 5 U.S.C. § 556(e) (1970) (transcript available to parties "on payment of lawfully prescribed costs").

124. See, e.g., *Campbell Soup Co.*, 26 Ad. L.2d 1011, 1016 (FTC 1970) (granting request for free copy of transcript).

Public Participation in Administrative Proceedings

to the proceeding, both public and private, should be able to purchase a copy of the transcript prepared for the agency at a price based solely on the cost of duplication.¹²⁵

While this procedure might result in a substantial increase in the price paid by the agency for transcripts, it would give the agency greater control of the pricing system and would make transcript copy available to nearly all participants. Where a party desires faster delivery than the agency requests or a fair hearing requires, the party seeking expedited delivery should bear the extra cost. In the event that an indigent party is unable to purchase transcript even at the proposed minimal price, the agency should permit access to a copy free of charge.

3. *File Information and Experts*

Obtaining the information and qualified assistance necessary to support substantive arguments is one of the most difficult and expensive aspects of public participation.¹²⁶ File information is not identified or readily available. Qualified experts able to provide this information and to testify in a proceeding command large fees, which public groups are frequently unable to pay. Even when they can afford to pay, public groups find that experts are reluctant to testify against the commercial interests which might employ their services on a more frequent basis.

Many experts who are not so constrained are employed by government agencies, yet are still unavailable to public participants. Frequently the experts are not employed by the agency holding the hearing. Even when they are so employed, agencies are reluctant to make their experts available to parties for advice or testimony, because the experts' views might contradict the agencies' position, creating problems of supervision and morale. As a result, public participants have normally been short of expert testimony, operating with only occasional private experts who share their concerns and are willing to work without compensation.

125. This recommendation differs from that of the 1953 Interim Administrative Conference which suggested that reporting service contracts "generally should require the quotation of rates on the same basis to the Government as to others having an interest in the proceedings"; it also approved "free copies, or copies at reduced rates, to the Government when the proceedings are of such a character that as a matter of general policy the cost of reporting and proceeding should be borne by the parties." REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE 42-43 (1953) (Recommendation 16).

126. See *Firestone Tire & Rubber Co.*, 3 TRADE REG. REP. ¶ 19,519, at 21,575 (FTC 1971) (request that FTC pay fees of expert witnesses deferred pending ruling of Comptroller General).

If the purpose of the administrative proceeding is to make a rational decision after consideration of all relevant views and information, a public group recognized as an intervener for the purpose of making a contribution to this decision should have access to the government information and experts. Problems of implementing that access are not insurmountable. Agencies should engage in a sustained effort to make file information more readily available by development of usable data retrieval systems. Indices of file information need to be expanded and also made available.¹²⁷ While an agency's interest in controlling its operations and personnel deserves protection, making expert advisers and witnesses available upon request to public groups may not interfere with that interest, especially when the experts are not employees of the agency hearing the case. Institutional separation is a hallmark of administrative adjudication. At the least, agencies should be willing to experiment with this proposal.

4. *Attorney Fees*

Invariably, representation by legal counsel is the most expensive aspect of participation in administrative proceedings. Estimates of fees charged by attorneys in "typical" cases¹²⁸ begin at \$4,000 for comparatively simple ICC tariff proceedings. Fees for formal rulemaking proceedings at the FDA are estimated, conservatively, at \$40,000. Intervention in a major FTC proceeding might cost \$100,000 or more in fees. Major rate proceedings in the CAB, FCC or FPC and major licensing contests in the FCC or FPC often generate fees in excess of \$100,000.

There is little likelihood that public interest groups can muster resources of this magnitude, whether in cash or the equivalent in volunteered services, without some sort of assistance. Although agencies have very limited experience in methods of providing such assistance to public groups, the needs are analogous to those being met by various legal services programs both within and outside the administrative process. These programs suggest five different approaches for providing representation: (1) encouraging *pro bono publico* work by

127. This suggestion parallels the index requirement of section 3 of the Administrative Procedure Act, 5 U.S.C. § 552(a)(2) (1970).

128. The rough cost estimates that follow are based upon Administrative Conference staff interviews with informed persons, including agency staff members, public interest lawyers, and private practitioners. Obviously, great variation in cost results from the nature of the proceeding, its scope, the degree of participation, and similar factors.

Public Participation in Administrative Proceedings

the bar; (2) awarding attorneys' fees and costs to successful interveners; (3) appointing government attorneys to represent discrete interests not separately represented; (4) developing a legal services program for representing affected groups in administrative proceedings; and (5) establishing new government entities, independent from the agencies, as advocates of the various interests brought forward by public groups. These suggestions are not mutually exclusive, and our experience is so limited that it would be useful to experiment with each of the approaches.

a. *Pro bono publico*. Although public participants already have sought *pro bono publico* representation on their own, government agencies can play a role in encouraging and aiding bar associations to organize and direct these efforts. The ABA Section on Individual Rights and Responsibilities has suggested a number of different models for such programs, ranging from special sections in each law firm to multi-firm-operated offices, contributions to public interest firms, and task forces from bar associations concentrating on specific areas of interest.¹²⁹

The FTC, implementing its decision in *American Chinchilla*,¹³⁰ secured the cooperation of the Antitrust Section of the ABA in providing *pro bono* representation for indigent respondents. Similar programs might be developed to provide services to suitable public groups.

b. *Fee awards*. A second approach to the cost problem is to permit public groups to obtain awards of attorneys' fees. The device of shifting the cost of attorneys' fees to the losing party is increasingly favored in court cases as a means of assisting groups whose damage award alone would be insufficient to justify an action to enforce their legal rights.¹³¹ Legislation establishing a new right of action often allows recovery of attorneys' fees and costs as a means of encouraging the protected class to enforce its rights.¹³² Courts have also emphasized the value of fee shifting in situations where the absence of damages

129. ABA SECTION ON INDIVIDUAL RIGHTS AND RESPONSIBILITIES, THE PRIVATE LAW FIRM AND "PRO BONO PUBLICO" PROGRAMS: A RESPONSIVE MERGER (1971). See Note, *Structuring the Public Service Efforts of Private Law Firms*, 84 HARV. L. REV. 410 (1970).

130. *American Chinchilla Corp.*, 26 AD. L.2D 284 (FTC 1969). See FTC Statement of Policy, 35 Fed. Reg. 18,998 (Dec. 15, 1971).

131. See, e.g., Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

132. See, e.g., 7 U.S.C. §§ 2305(a), (c) (1970) (awards for unfair trade practices affecting producers of agricultural products); 15 U.S.C. § 15 (1970) (treble damages, attorneys' fees, and other costs in private antitrust actions); 15 U.S.C. § 1640(a) (1970) (limited damages plus costs and attorneys' fees in truth-in-lending actions).

deters parties from litigating.¹³³ Similarly, intervention in administrative hearings could be encouraged by allowing public groups to recover attorneys' fees and costs when their participation has made a contribution to the decision. In regulated areas in which the number of parties is limited and costs can be assessed without substantial difficulty, fees could be shifted to opposing parties. In areas in which there are no private parties (for example, rulemaking-on-a-record establishing standards having industry-wide applicability), public interveners' attorney fees could be shifted to the government.

While offering the benefits that flow from representation by a private attorney, such as free choice in selecting counsel, freedom from government control, and the attorney's obligation to represent the interest of his client, this approach has several weaknesses. Administration of the program would be difficult. The agency would be obliged to determine whether a group has made a contribution, an especially difficult question in the event of settlement, and would have to determine the amount to be paid.¹³⁴ Furthermore, it would be difficult for the agency to insure that its decision on fees and costs is not influenced by the extent to which it is in agreement with the intervener's position. Aggressive attorneys who "rock the boat" or who obtain judicial reversals of agency decisions might be disfavored—and additional judicial appeals would probably follow. If judicial review of an agency decision denying an award is limited to instances of abuse of discretion, the agency may be able to convert its ability to grant awards into an ability to regulate presentations. Courts have dealt with similar problems, however, in supervising judicial fee-shifting arrangements. For now it remains an empirical question whether the advantages of helping public groups to secure representation from private attorneys would outweigh the disadvantage of burdening the agency with control of the award.

133. See, e.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). The benefit to the class need not be financial; nor need the case be fully adjudicated. See *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir. 1971).

Of course, from the standpoint of the public groups it makes little difference whether their costs are paid for by the other parties to the proceeding or by the agency. Indeed where agencies are self-sustaining because of user charges, the money for reimbursing public groups will come from regulated interests and, ultimately, from consumers of the regulated industries.

134. For a further discussion of this approach in the context of awarding attorney fees in settlement of an FCC licensing dispute, see *KCMC, Inc.*, 25 F.C.C.2d 603 (1970), *reversed and remanded sub nom.* Office of Communication of the United Church of Christ v. FCC, — F.2d — (D.C. Cir. Mar. 28, 1972). See also *In re Letter to Combined Communications Corp.*, FCC Docket 72-89, Feb. 9, 1972; *Strauss Broadcasting Co.*, 31 F.C.C. 2d 550 (Aug. 26, 1971).

Public Participation in Administrative Proceedings

One method of easing the agency's burden of fee control would be to provide for payment of attorney fees in every case of need—on the criminal defense model. This approach, however, would still raise the question of denying awards on the basis of inadequate representation. Perhaps there should eventually be a presumption that fees and costs will be awarded public interveners unless there is a showing of inadequate representation. As a first step, however, their allowance upon a showing by the interveners of a "substantial contribution" seems desirable.

c. *Intra-agency representation.* Public group representation might also be funded by having each agency appoint special counsel to represent the interests of public participants. Such an approach has considerable merit, for it would assure separate representation of distinct public interests. Problems may also develop under this method of providing counsel, however. If public groups do not feel that the staff of the agency is protecting their interests, they may be unlikely to feel that a specially appointed staff of the agency will protect them either. Moreover, in some circumstances it may be difficult to insulate the appointed counsel from agency pressure, since the agency would be the source of his salary and promotion. Finally, it will be extremely difficult to provide enough special counsel to meet the demands of each "public interest," and if there is a shortage, selecting one group over another would be difficult.

d. *Legal services model.* Another method for providing counsel to public groups is to establish a program for administrative proceedings on the model of legal services programs initiated by the Office of Economic Opportunity. Attorneys would be representing the interests of their clients, the public participants, and would be free from control by the agency in whose proceedings they were participating. This approach requires a determination of which proceedings will benefit from participation and which group or interest should be represented when several groups seek assistance. The latter question would be less difficult if several offices with separate specialties were available. Again the question is essentially one of priorities, and the advantage of independence would be lost if the "public counsel" retained no discretion. Of course controls would have to be established, but this is hardly a novel requirement in publicly provided legal service programs.

e. *Independent advocate.* Finally, public groups might be represented by an independent government advocate—a separate agency re-

sponsible for presenting the views of various segments of the public. Although the advocate would be expected to maintain close contact with public groups, it would not function as their attorney. Instead, the independent advocate would develop its own positions based upon an evaluation of public needs and views. The Department of Agriculture, for example, has such a responsibility for representing the interests of farmers in administrative proceedings¹³⁵ and the proposed Consumer Protection Agency¹³⁶ would be given similar powers. Such programs permit various interests to receive organized and continuous representation. They are more likely, however, to be subject to political pressure and to lose the flexibility and integrity of less structured methods.

B. *Notice of Agency Proceedings*

Even if public interest groups did not face significant cost hurdles, their participation in administrative proceedings would be severely handicapped by the general lack of effective notice to the public of prospective agency hearings. Unless the public and representatives of their interests are aware of agency proceedings, the right to intervene is of limited value and cost reforms will be fruitless. On the other hand, it is equally obvious that large, imprecisely defined groups cannot be individually served by formal notice.

1. *Agency Obligations*

An agency's obligation to provide effective public notice rests upon several grounds. To the extent that members of the public have relevant information, enabling them to participate contributes to the quality of the agency's decision. Public participation in the process of decision making is appropriate to democratic institutions and important for public support. It is also arguable that administrative agencies whose actions have a significant impact on large numbers of the public have a legal obligation to provide public notice for their formal proceedings.¹³⁷

135. See 7 U.S.C. §§ 1291, 1622(j) (1970).

136. H.R. 10835, 92d Cong., 1st Sess. (1971); S. 1177, 92d Cong., 1st Sess. (1971).

137. See, e.g., *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 736-37 (D.C. Cir. 1970); *American Communications Ass'n v. United States*, 298 F.2d 648, 650-51 (2d Cir. 1962). See also Administrative Procedure Act §§ 5(a), (b), 5 U.S.C. §§ 554(b), (c) (1970).

In addition, particularized notice is frequently required in agency proceedings. E.g., 16 U.S.C. § 797(f) (1970) (FPC publication in local newspapers and notification of interested government officials). Other statutes include a general requirement that notice be

Public Participation in Administrative Proceedings

Whatever the basis, notice requirements are not satisfied by observance of mere formalities; notice procedures must be reasonably adapted to the circumstances.¹³⁸ By statute, the Federal Register is "reasonable notice" except when another statute provides otherwise or when notice by publication is "insufficient in law."¹³⁹ The Supreme Court has ruled in other contexts that notice by publication is not always constitutionally adequate. It has stated the test to be that publication alone is adequate in a civil suit only "where it is not reasonably possible or practicable to give more adequate warning."¹⁴⁰ Whether this constitutional principle of reasonable notice requires agencies to go beyond publication of notice in the Federal Register is questionable.¹⁴¹ Nonetheless, more adequate notice by supplemental action is clearly desirable. That existing procedures conform to constitutional minima is not a reason for agencies to fail to explore appropriate procedures for providing effective notice to the affected public and their representatives.

2. Meeting Public Notice Needs

The adequacy of notice to potential public participants should meet at least two standards. First, agencies should be required to provide identified, accessible sources of information about proceedings in which public participation is possible. Notice by some systematic method of publication is likely to be effective, at least for those with a continuing interest in the subject and with the ability and resources to make the effort necessary to follow developments. Second, effective notice to the general public and its representatives requires that proceedings of national or regional importance be highlighted for public attention. Otherwise public participants can be drowned in a sea of notice. The volume of federal administrative proceedings is so substantial that unless sophisticated methods are employed, the prac-

given without specifying to whom, or that notice be given to "interested" parties, both of which could be interpreted as including the affected public. See 49 U.S.C. § 1482(d) (1970) (CAB, "after notice"); 21 U.S.C. §§ 371(c)(1), (3) (1970) (FDA, "due notice" of hearing; order to be "made public"); 49 U.S.C. § 305(e) (1970) (ICC, interested parties); 15 U.S.C. § 717f(c) (1970) (FPC, interested persons); 47 U.S.C. § 309(b) (1970) (FPC, public notice of licensing applications). Cf. *Murphy Motor Freight Lines, Inc. v. United States*, 148 F. Supp. 471 (D. Minn.), *aff'd per curiam sub nom. Monson Dray Line, Inc. v. Murphy Motor Freight Lines, Inc.*, 355 U.S. 11 (1957) (motor carrier competitors entitled to notice of new applications because they were "interested" parties under ICC Act) (alternative grounds).

138. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

139. 44 U.S.C. §§ 1507-08 (1970). See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 330 (1947). But see 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, ch. 17 (1958, Supp. 1970).

140. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950).

141. See 5 U.S.C. § 552 (1970).

tical impact of an improved notice procedure may be to decrease the actual notice provided.

a. *Convenient access.* Agency publications and the Federal Register are the usual government sources of information about the initiation of proceedings. Their use varies between and within agencies.¹⁴² Publication in the Federal Register is required for the initiation of most rulemaking,¹⁴³ but whether such publication is given for formal proceedings depends not only upon specific statutory requirements but also on agency practices.¹⁴⁴

While uniformity is not necessary, agencies should provide in rules and publications a concise guide listing the sources of notice for their proceedings; the guide should include sources that selectively highlight major proceedings. Notable gaps exist in the published notice currently provided for in agency proceedings, particularly in applications for rate changes.¹⁴⁵ The volume of rate applications is so large that government publication may be infeasible, but agencies could at least indicate the extent to which published information is available from other sources. Major applications should be separately identified.¹⁴⁶ Agencies also need to coordinate their publications with the Federal Register. These publications overlap frequently, and the latter is unreadable and unusable except as a reference. Though it seems an obviously sensible practice, few agencies consolidate into one entry in the Federal Register similar material that varies only as to details. Bulky materials which are of interest to specialized groups might be

142. For example: the ICC does not publicize applications; the CAB makes lists of applications available only to subscribers, but these do not cover tariffs; the FTC issues free press releases on every complaint, as well as a weekly calendar and a monthly summary of significant events; the FCC publishes a free weekly news digest including applications and duplicating many items in the Federal Register.

143. Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970).

144. For specific statutes requiring Federal Register publication, see, e.g., 15 U.S.C. § 80a-39(a) (1970) (alternative notice under Investment Holding Company Act); 47 U.S.C. § 309(e) (FCC hearing issues in broadcast licensing); 1 C.F.R. app. B (1971). Agencies have different practices regarding what they place in the Register; the CAB publishes a notice of each hearing and prehearing conference in formal cases; the SEC does so only when it is ordered in a particular proceeding. E.g., 17 C.F.R. § 201.6(c) (SEC 1971). The FTC publishes cease and desist orders and consent orders as rules (16 C.F.R. § 4.9(c)(3) (1971)); other agencies do not routinely publish orders. The ICC publishes notices of motor carrier licensing applications, but not other types of applications; only the publication of applications by intrastate carriers is required by law. 49 U.S.C. § 306 (1970).

145. For example, ICC notice provisions are in several unconnected parts of its procedural rules as well as in the application form rules. 49 C.F.R. §§ 1100.200-247, 1122.5, 1130.1(b), 1131.5(a)(3), 1306.6 (ICC 1971). The FTC does not indicate the coverage of its press releases. See 16 *id.* § 4.9 (FTC).

146. The ICC, for instance, might consider listing publications of the carrier rate bureaus, which function under agreements with the ICC in providing public notice. The CAB has recently made its registry of significant tariff filings available for public inspection, but its availability is not noted in the CAB's rules or publications.

Public Participation in Administrative Proceedings

better published in agency newsletters or by private services.¹⁴⁷ At a minimum, each agency should (a) strive to provide notice as far in advance of the proceeding as possible, and (b) prepare a separate bulletin issued periodically, identifying the proceeding and providing relevant information.¹⁴⁸ This measure would be particularly useful to public interest groups located outside Washington, which are less likely to learn of agency proceedings through informal contacts. It also suggests that the primary function of the Federal Register should be as an official reference and source of government regulations and announcements, and as constructive notice. Agencies must look to vehicles other than the Federal Register to provide effective public notice.

The need to supply adequate public notice applies not only to those proceedings for which hearings have already been scheduled, but is equally great at the time the proceeding commences, *i.e.*, when an application for a license or rate increase is first filed with an agency. Otherwise, public participation is likely to come too late to be effective.¹⁴⁹

b. *Attracting and focusing public attention.* The public can be made aware of important agency proceedings in many ways: press releases directed to national and regional news media; requirements that applicants directly inform users; special notice to governmental bodies, citizen groups or trade associations; and separate agency listings of significant matters. Each agency should utilize these and similar measures to inform the public of significant applications and important proceedings in which participation is appropriate.

147. 1 RECOMMENDATIONS & REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE U.S. 12, 66 (1970) (Recommendation No. 4, Consumer Bulletin) is not superseded or replaced by this suggestion. The monthly consumer listing of informal rulemaking and legislative matters issued by the Office of Consumer Affairs has drawn such a large readership that it was recently announced that this service would no longer be available without charge; however, the announced subscription charge was postponed by the wage-price freeze.

148. Although beyond the scope of this report, a separate study of the Federal Register and its operations as well as the publication practices of the various agencies seems desirable. For example, ICC motor carrier applications, which occupied approximately five per cent of the Federal Register in April 1971 (this month was picked because the Conference's staff study of the ICC was written in May), might be separately published by the ICC and only cross-referenced in the Federal Register. FTC consent orders also needlessly fill the pages of the Federal Register. Consideration should be given to other changes in the Federal Register which would emphasize significant proceedings. They include: the addition of a regional index of licensing and other proceedings with a major geographic impact; development of subsections—for example, grant and benefit programs, procedural notices, general announcements; publication of a separate daily and weekly topical index which would be sufficient for readers seeking to watch for developments but with only an occasional need to refer to the full text.

149. *Cf. Palisades Citizens Ass'n v. CAB*, 420 F.2d 188 (D.C. Cir. 1969).

Coverage in the news media is perhaps the most effective way of reaching the average citizen, and public interest groups and agencies should make special efforts to encourage reporting of their activities.¹⁵⁰ Factual press releases written in lay language should explain the significance of the proceedings and the opportunities for public participation. Releases describing important proceedings with a local geographical impact should be sent to area news media. In major matters, agencies might consider public service advertisements and announcements over local broadcast facilities.¹⁵¹ Direct mailings are yet another alternative.

User notice is already required in several agency proceedings: proposed train discontinuances are posted on trains, and gas distributors and utility purchasers often must be sent notice of applications to the FPC proposing rate changes.¹⁵² The FCC is considering rules which would require announcement on television stations of license renewal applications.¹⁵³ These notice procedures should be continued, along with express invitations to public interest organizations. A similar technique is already in use, where federal agencies are required to notify state and local government agencies and labor organizations of specified proceedings. Occasionally (usually in utility or transportation rate or route matters), an agency will develop listings of governmental agencies and private consumer groups to whom notices of proceedings are sent. Agencies should expand this practice by developing mailing lists of organizations interested in major public issues and providing them with notice. These organizations can assist agencies in performing their notice function by informing their constituents.

In summary, a variety of notice techniques should be relied upon to publicize agency proceedings. Since there is a natural incentive for

150. Agencies have press information offices that issue releases, but these often are primarily promotional enterprises and do not focus on important applications seeking agency approval. In fact many of their practices seem objectionable. See Lemov, *Administrative Agency News Releases: Public Information Versus Private Injury*, 37 GEO. WASH. L. REV. 63 (1968); Note, *Disparaging Publicity by Federal Agencies*, 67 COLUM. L. REV. 1512 (1967). See also Gellhorn, *The Treatment of Confidential Information by The Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 131-42 (1968).

151. The AEC has utilized such announcements in communities where nuclear plant licensing hearings are held. See also Davis, *Nuclear Facilities Licensing: Another View*, 110 U. PA. L. REV. 371, 373-74 (1962); Murphy, *Atomic Safety and Licensing Boards: An Experiment in Administrative Decision Making on Safety Questions*, 33 LAW & CONTEMP. PROB. 566 (1963).

152. 49 C.F.R. § 1122.5 (ICC 1971) (train discontinuances); 49 C.F.R. § 1306.6(e) (ICC 1971) (increases in passenger rates on suburban buses); 18 C.F.R. §§ 35.2(d), 154.16 (FPC 1971).

153. FCC Docket 19153, 36 Fed. Reg. 3902 (1971).

Public Participation in Administrative Proceedings

agencies to limit public notice of agency proceedings by way of minimizing public participation, a deliberate effort needs to be made to ensure that notice of agency hearings is not sacrificed to agency harmony and economy.¹⁵⁴

V. Conclusion

The demand for broadened public participation in governmental decision making rests on the belief that government, like all other institutions, rarely responds to interests not represented in its deliberations. An administrative agency is usually exposed only to the views of its staff, whose position necessarily blends a number of discrete public interests, and of private persons with a clear financial stake in the proceeding. The emergence of individuals and groups willing to assist administrative agencies in identifying interests deserving protection, in producing relevant evidence and argument suggesting appropriate action, and in closing the gap between the agencies and their ultimate constituents presents an opportunity to improve the administrative process.

Standing to intervene on behalf of the public interest has been recognized. Concern must now shift toward structuring intervention. Unless aided by other resources, the costs of maintaining an adequate watch on agency developments and of purchasing competent legal services and expert assistance will constitute insuperable barriers to effective participation. In addition, if public participation is to be effective as an aid and not a hindrance to agency performance, sensible and sensitive rules guiding that participation within reasonable channels must be developed by the agencies. The difficult questions, then, are in what way and to what extent agencies should permit public interest groups to participate in their hearings and what steps, if any, society should take to support the efforts of those groups. This article and its recommendations are only a first step toward answering those questions.

The experience of the agencies over the next several years in im-

154. One problem, for example, is that charges for information services provided by an agency are by law usually paid into the U.S. Treasury as miscellaneous receipts rather than being returned to the agency's budget to defray the costs of the service provided. 31 U.S.C. §§ 483a, 484 (1970). There are a few anomalous exceptions to this requirement. 31 U.S.C. § 488a (1970) ("Smokey Bear" receipts applied to forest fire prevention campaign); 7 U.S.C. § 2244 (1970) (Agriculture Department library authorized to retain receipts of book sales).

plementing these recommendations should develop additional suggestions. Methods developed by administrative agencies for structuring public participation in their proceedings are likely to be instrumental in guiding other governmental institutions and, perhaps, in encouraging other segments of society to allow an input by unrepresented constituencies.¹⁵⁵ Agencies now have an opportunity to alter the course of events beyond their immediate jurisdictions, because the ideal of broadened public participation is not limited to the administrative process.

155. See, e.g., H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 150-53 (1971) (suggesting the importance of including unrepresented groups in certain aspects of collective bargaining by public employees).

The Yale Law Journal

Volume 81, Number 3, January 1972

DAVID M. SCHULTE
Editor-in-Chief

STEPHEN R. MUNZER
Executive Editor

THOMAS M. JORDE
JOHN B. KUHN
JERRY L. SIEGEL
Article Editors

JEFFREY I. GLEKEL
STEPHEN J. HADLEY
ANDREW D. HURWITZ
DAVID H. KAYE
ERIC R. NEISSER
*Note & Comment
Editors*

LAURENCE S. LUSTGARTEN
*Comment & Reviews
Editor*
HENRY M. FIELDS
Managing Editor

RALPH R. ARDITI
DEAN D. AULICK
DANIEL J. BELLER
RICHARD A. BLOCK
RICHARD BLUMENTHAL
ERIC J. BRANFMAN
MICHAEL M. CONWAY
KATHLEEN M. DOGGETT
ROBERT W. FISHER
ROGER W. FONSECA
GARY L. FONTANA
BRUCE G. FREEDMAN
DONALD J. FRIEDMAN
ROBERT E. GIPSON
FREDERICK T. GOLDBERG
PETER T. GROSSI, JR.
CHARLES A. GOLDMARK

HENRY B. HANSMANN
TIMOTHY S. HARDY
FREDERICK K. HELLER, JR.
JAMES R. HUNTWORK
STANLEY N. INGBER
RANDALL K.C. KAU
KENNETH M. KAUFMAN
DANIEL J. KORNSTEIN
EUGENE A. LUDWIG
JOSEPH M. MALKIN
ROBERT B. MANN
SAMUEL H. MAYS, JR.
JOHN B. OAKLEY
NEIL H. O'DONNELL
STEPHEN A. OXMAN
JAY E. POWELL

ROBERT C. POZEN
LINDA L. RANDELL
ROBERT S. RAYMAR
ROBERT B. REICH
MICHAEL L. SCHLER
GEOFFREY B. SHIELDS
LESLIE N. SILVERMAN
AVIAM SOIFER
MARK I. SOLER
SIDNEY H. STEIN
ALEXANDER R. SUSSMAN
ROBERT M. SUSSMAN
RICHARD J. UROWSKY
ALAN J. WILENSKY
JERALD L. WILKERSON
CHARLES L. WOLTMANN
JEFFREY I. ZUCKERMAN

Business Secretaries M. OLIVE BUTTERFIELD, PAMELA WILLMOTT

Student Contributors to This Issue

Stephen J. Hadley, Timothy S. Hardy, Harold J. Kwalwasser and
Linda L. Tedeschi, *Union Elections and the LMRDA: Thirteen
Years of Use and Abuse*

