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INTERVENTION BY THIRD PARTIES IN FEDERAL ADMINISTRATIVE PROCEEDINGS

*Qui aliquid statuerit parte inaudita altera, aequum licet dixerit,
haud aequum fecerit.**

I. Introduction

Intervention is the means employed by a third person seeking to become a party to an adjudicative proceeding.¹ The typical suit at common law was an *A v. B* proceeding. Entry by third persons was virtually unknown.² Intervention originated in the more flexible procedures utilized by courts of equity and was used especially in *in rem* actions and in bills in the nature of interpleader. The practice was later adopted by the law courts. The purpose of intervention was to prevent a "failure of justice."³ The Federal Rules of Civil Procedure allow intervention in all civil actions.⁴ Whether to allow intervention by a third party is left, in most cases, to the sound discretion of the trial judge,⁵ but there are situations in which a party may request intervention as of right.⁶ The person to whom intervention is granted enjoys equal status with all other parties to the proceeding.

Intervention before the federal administrative agencies is infinitely more complex than intervention before a judicial tribunal, because administrative rulings, as a practical matter, may affect many diverse groups and interests.⁷

* "He who decides anything, one party being unheard, though he should decide right, does wrong. 6 Co. 52, 4 Bla. Com. 483." 2 Bouv. L.D. 2157 (Rawle's 3d rev. ed. 1914).

1 "Intervention deals with persons who want to become parties to the action and ask permission to enter." Holtzoff, *Entry of Additional Parties in a Civil Action*, 31 F.R.D. 101 (1963).

2 For an excellent discussion of the history of intervention see Moore & Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565 (1936). See also Holtzoff, *supra* note 1; *Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 897 (1958).

3 *Krippendorf v. Hyde*, 110 U.S. 276, 285 (1884).

4 FED. R. CIV. P. 24. See 2 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* §§ 591-604 (Wright ed. 1961); WRIGHT, *FEDERAL COURTS* § 75 (1963).

5 FED. R. CIV. P. 24(b).

Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

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

Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

7 For a general treatment of intervention in administrative law see DAVIS, *ADMINISTRATIVE LAW* §§ 8.11 & 22.08 (1959); Boros, *Intervention in Civil Aeronautics Board Proceedings*, 17 AD. LAW REV. 5 (1964); Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 COLUM. L. REV. 759 (1949); Oberst, *Parties to Administrative Proceedings*, 40 MICH. L. REV. 378 (1942).

Thus, the interest of allowing all persons who may be substantially affected by an agency determination to participate as parties must be weighed against the equally important interest of conducting administrative proceedings with a reasonable amount of speed and dispatch.⁸

Section 6(a) of the Administrative Procedure Act provides:

So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function.⁹

The rules of intervention before the various agencies are determined by statute, agency rule, and administrative and judicial decisions.

II. Procedural Aspects of Intervention

A. *Filing Petition to Intervene*

The rules of the various federal administrative agencies specifically provide the procedure to be followed by one desiring to intervene in a proceeding.¹⁰ A petition must first be filed with the agency in the manner prescribed, setting forth facts sufficient to show the petitioner's interest.¹¹ It must be specific. Mere

8 Participation as parties of persons only insubstantially or remotely interested or affected is not necessary for protection of either private right or public interest. Exclusion of such persons from participating as of right is necessary for efficient conduct of the Commission's functions and to keep the hearings within manageable bounds.

[On the other hand,] a rule which posits the basic right of hearing exclusively upon mere convenience to the Commission or whether the petitioner's participation "will be of assistance to it in determining the issues," leaving this to be determined solely in its discretion, is not reasonable. It is a denial of any right to hearing. That it may be inconvenient or time-consuming for such a body to hear persons substantially interested and affected, or that, in the Commission's exclusive discretion, they may not be able to aid it, furnishes no basis for refusal to hear their side of the case, whether on the facts or on the law. Efficiency is not to be sought at such a price to essential fairness. *National Broadcasting Co. v. FCC*, 132 F.2d 545, 556-57 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943).

9 60 Stat. 240 (1946), 5 U.S.C. § 1005(a) (1964).

10 See, e.g., 14 C.F.R. §§ 301.6, 302.15 (1966) (Civil Aeronautics Board); 16 C.F.R. § 3.9 (Supp. 1966) (Federal Trade Commission); 17 C.F.R. § 201.9 (1964) (Securities Exchange Commission); 18 C.F.R. § 1.8 (1961) (Federal Power Commission); 29 C.F.R. §§ 102.29, 102.65, 102.102, 102.109 (1966) (National Labor Relations Board); 47 C.F.R. § 1.223 (1966) (Federal Communications Commission); 49 C.F.R. §§ 1.40, 1.41, 1.47, 1.72, 1.73, 1.240(c), 1.245(c), 1.246(e) (1963 and 1966 Supp.) (Interstate Commerce Commission).

11 There are exceptions to the requirement that an interested third party must file a petition. For instance, the Securities Exchange Commission allows any state or federal agency to become a party merely by filing a written notice of appearance. 17 C.F.R. § 201.9(a) (1964). The Federal Power Commission allows a state commission, having jurisdiction to regulate rates on electric energy or natural gas, to become a party by filing a notice of intervention. 18 C.F.R. § 1.8(a)(1) (1961). See also 17 C.F.R. § 201.9(a) (SEC) (1964). However, the agency can still properly exclude these public commissions if it determines they have no legitimate interest in the proceeding. See *National Ass'n of Secs. Dealers, Inc.*, 15 S.E.C. 577, 580 (1944), where the SEC stated that the interest must be more than merely theoretical or academic. In this case the SEC allowed the Department of Justice to intervene because of its interest in enforcing the antitrust laws. But see *Austral Oil Co.*, 22 F.P.C. 858 (1959) and *Southern Nat'l Gas Co.*, 18 F.P.C. 179 (1957). In both cases, the Public Service Commission of New York was denied participation since it could not make a showing of interest. Compare, *Public Serv. Comm'n v. FPC*, 295 F.2d 140 (D.C. Cir.), *cert. denied*, 368 U.S. 948 (1961).

allegations that the petitioner will be affected, without any affirmative showing of fact, will be held insufficient.¹²

An otherwise proper petition may be dismissed if it is not filed during the time prescribed by the agency's rules.¹³ However, much discretion is exercised as to what constitutes a timely petition,¹⁴ and agencies will not refuse to consider it in extraordinary cases where good cause is shown for the delay.¹⁵ Failure to see published notice of the hearing,¹⁶ failure to appreciate the nature of the hearing and its possible adverse affect on the petitioner,¹⁷ and the negligent failure of an employee to file a petition¹⁸ have been held insufficient to constitute good cause in individual cases. One does not waive his right to intervene by failing to seek participation in a prior proceeding in which he had no substantial interest.¹⁹ Individual agency rules may require a petitioner to give timely notice to the other parties in the proceeding of his intention to intervene. Though he

12 The Civil Aeronautics Board is perhaps the most stringent. It requires a petitioner in an economic proceeding to make specific reference to the following factors:

(1) the nature of the petitioner's right under the statute to be made a party to 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 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. 14 C.F.R. § 302.15(b) (1966).

The Federal Communications Commission requires that the petitioner set forth his interest and how his participation will assist in determining the issues in question. The petition must be accompanied by an affidavit of a person with knowledge of the facts set forth in the petition. 47 C.F.R. § 1.223(b) (1966). If the petitioner is seeking intervention on the ground that the granting of a license will cause interference with his existing station, his petition must be accompanied by the affidavit of a qualified radio engineer showing the actual extent of the interference. 47 C.F.R. § 1.223(a) (1966).

For a sampling of some of the agency decisions dismissing petitions for failure to state specific facts, see, e.g., *J. Capone & Sons, Inc.*, 83 M.C.C. 505 (1960); *Niagara Frontier Amusement Co.*, 4 P. & F. Ad. L.2d 27 (FCC 1954); *Mid-South Broadcasting Co.*, 3 P. & F. Ad. L.2d 441 (FCC 1953). See also *United Fuel Gas Co.*, 15 P. & F. Ad. L.2d 527 (FPC 1964), where the FPC allowed a competitor to intervene but noted that in future cases it would reserve the matter of injury for hearing prior to the authorization of intervention.

13 The FCC requires petitions to be filed no later than thirty days after publication of the hearing issues in the Federal Register. 47 C.F.R. § 1.223(d) (1966). The CAB requires petitions to be filed no less than ten days prior to the hearing in air safety proceedings, 14 C.F.R. § 301.6 (1966); and, in economic proceedings, the petition must be filed prior to the pre-hearing conference or, if no conference, fifteen days prior to the hearing, 14 C.F.R. § 302.15(2) (ii) (1966). The ICC merely provides that petitions be filed prior to the proceeding or at the time it is called for hearing. The NLRB perhaps has the most liberal rules. It allows a party to file a written motion to intervene prior to the hearing, or he can make an oral motion at the hearing itself. 29 C.F.R. § 102.29 (1966).

14 The Commission may waive a time limit which it has imposed. *The Middle West Corp.*, 11 S.E.C. 355 (1942).

15 Most agencies incorporate the good cause exception right into their rules. See 14 C.F.R. §§ 301.6, 302.15(2) (iii) (1966) (CAB); 18 C.F.R. § 1.8(d) (1961) (FPC); 47 C.F.R. § 1.223(d) (1966) (FCC); 49 C.F.R. § 1.72(b) (1963) (ICC).

16 *United Gas Line Co.*, 29 F.P.C. 883 (1963); *Woody Common Carrier Application*, 73 M.C.C. 1 (1957).

17 *Saint Louis-Southeast Serv. Case*, 8 P. & F. Ad. L.2d 777 (CAB 1958); *Service to Phoenix Case*, 7 P. & F. Ad. L.2d 738 (CAB 1957). However, good cause was shown where the ICC had given, without notice, a new interpretation to a statute adversely affecting the petitioner. *National Bus Traffic Ass'n v. U.S.*, 212 F. Supp. 659 (N.D. ILL. 1962).

18 *Chem-Haulers Inc.*, 16 P. & F. Ad. L.2d 876 (ICC 1964).

19 See *Zenith Radio Corp. v. FCC*, 211 F.2d 629 (D.C. Cir. 1954).

may give timely notice to the agency, his application will be denied if he fails to fulfill this requirement.²⁰

B. *Status of the Intervenor*

One who is allowed to intervene becomes a party to the proceedings. However, agencies do impose limits on the intervenor's right to participate.²¹

The original parties to the proceeding may possess the right to subpoena witnesses, examine them, cross-examine opposing witness, enter objections to questions, file briefs, take exceptions to the intermediate report and the proposed findings, and present oral argument. But an intervenor does not necessarily enjoy the same rights.²²

Furthermore, an intervenor may be interested in only one of several issues being considered in the proceeding, and his participation may be properly limited to that one issue.²³ Failure to file a timely petition may also be grounds for limiting the intervenor's rights of participation.²⁴ The extent or terms of participation are thus considered to be largely within the discretion of the agency.²⁵

The Commission's objective of keeping the hearings within manageable bounds is to be achieved . . . not . . . by excluding persons who rightfully should come in, but by controlling through reasonable regulation the extent to which they may take part. As to this the Commission has and rightfully may exercise much authority in various specific ways.²⁶

The Commission, however, cannot unduly restrict an intervenor's right to participate, nullifying his presence in the proceeding as a party.²⁷ As a practical

20 See 49 C.F.R. §§ 1.40(c) & 1.241 (1963) (ICG). Intervention was held improper under these circumstances in *Lawrence Extension—Mineral Wool*, 79 M.C.C. 73 (1959). Compare *Hart v. ICG*, 226 F. Supp. 635, 645 (D. Minn. 1964), where the ICG allowed various parties who had failed to file protests in a certificate proceeding to intervene, and the plaintiff objected on the ground that he was confronted with unexpected protestants and therefore deprived of due process under the fifth amendment. The court, noting that this was a serious objection, dismissed the contention because the plaintiff failed to develop it beyond a mere assertion. In rare cases a party might be legitimately surprised by the appearance of an intervenor, and thus be deprived of a fair hearing. It would be desirable, therefore, for the agencies to provide that notice be given to all parties before a third person is allowed to intervene, and this notice, as a practical matter, should include reference to the petitioner's interest and the issues he intends to contest.

21 See 16 C.F.R. § 3.9(b) (1966 Supp.) (FTG).

22 *Oberst, Parties to Administrative Proceedings*, 40 MICH. L. REV. 378, 393 (1942). See *Maislin Bros. Transp.-Ltd.*, 75 M.C.C. 329 (1958).

23 See, e.g., *Memphis Light, Gas & Water Div. v. FPC*, 243 F.2d 628 (D.C. Cir. 1957); *Seaboard & W. Airlines v. CAB*, 181 F.2d 515 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 963 (1950); *National Broadcasting Co. v. FCC*, 132 F.2d 545 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943); *Northern Nat'l Gas Co.*, 23 F.P.C. 708 (1960). See also *American-La. Pipe Line Co.*, 17 F.P.C. 671 (1957), where an intervenor's participation was terminated when further participation would serve no real purpose.

24 *Wilson & Co. v. U.S.*, 335 F.2d 788 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965). Here the court found it proper for the Commission to limit the party to the state of the proceeding at the time he intervened and to refuse him the right of cross-examining witnesses.

25 "If the Board is not unreasonable in its limitation of a proceeding, the courts ought not to interfere, even if they have power to do so." *Eastern Air Lines v. CAB*, 247 F.2d 562, 566 (D.C. Cir. 1957).

26 *National Broadcasting Co. v. FCC*, 132 F.2d 545, 561 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943).

27 See *Hunt Oil Co. v. FPC*, 334 F.2d 474 (5th Cir.), *rev'd on other grounds*, 376 U.S. 515 (1964).

matter, the proceeding can probably best be controlled not by placing arbitrary restrictions upon the rights of intervenors, but rather by giving the examiner discretion to exclude irrelevant or unduly repetitious evidence. Where several intervenors have substantially the same interest, limitations may be placed upon their individual rights to cross-examine or present argument.²⁸

Most agencies do have rules which allow persons to participate in proceedings without the formal process of intervention.²⁹ Under these rules, any person may appear at the hearing and present relevant evidence. With the examiner's consent, he may also cross-examine witnesses, present argument, or otherwise participate as the examiner deems appropriate. The usual requirement is that the person have relevant evidence or that he be of assistance to the agency in formulating its order. No showing of interest is necessary. These provisions, however, should not be an excuse for denying an interested party's petition to intervene. They are analogous to an *amicus curiae* in suits at law and, thus, do not afford interested persons the status of "party."³⁰

As a general rule, parties enter the proceeding as they find it. Granting intervention does not change or enlarge the issues.³¹ In its discretion, however, the agency may broaden the issues when conducive to arriving at a just order. The Interstate Commerce Commission barred a third party from filing a complaint for reparation because he failed to assert the issue in a prior proceeding, in which he was allowed to intervene, contesting the reasonableness of certain railroad rates. The plaintiff contended that to have asserted the issue of reparation would have had the effect of enlarging the issues and thus would be prohibited under § 1.72(e) of the agency's rules. The Commission, however, noted that in prior cases it had allowed such a complaint to be filed in the initial proceeding. It held: in the interest of preventing piecemeal litigation, the new complaint should be barred.³² Efficiency is promoted by broadening the issues in a case where the remedy sought depends upon the factual and legal issues to be determined in the initial proceeding. In many proceedings the interests of justice require enlarging the issues to enable an agency to study all relevant aspects of a given problem.

An intervenor is treated as a party. Hence the failure of an original party to give him notice of a motion which would substantially affect his interest and thereby deprive him of a chance to respond may be grounds for vacating the subsequent order.³³ The intervenor may also call a nonparty witness, who has been denied intervention, to give relevant testimony even though the effect is to circumvent the previous order of the agency.³⁴ Also, an intervenor may be

28 See 18 C.F.R. § 1.8(g) (1961) (FPC).

29 See 14 C.F.R. §§ 302.14(b), 302.214 (1966) (CAB); 17 C.F.R. §§ 201.9(c) & (d) (1964) (SEC); 47 C.F.R. § 1.225 (1966) (FCC); 49 C.F.R. § 1.73 (1963) (ICG). See also National Airlines, Inc., 9 C.A.B., 264 (1948); United Gas Pipe Line Co., 29 F.P.C. 883 (1963); Electric Bond & Share Co., 11 S.E.C. 359 (1942); United Light & Power Co., 8 S.E.C. 561 (1941).

30 See *FCG v. NBC (KOA)*, 319 U.S. 239, 246 (1943); *Seaboard & W. Airlines v. CAB*, 181 F.2d 515 (D.C. Cir. 1949), cert. denied, 339 U.S. 963 (1950).

31 *Trans-Gold Express, Inc.*, 15 P. & F. Ad. L.2d 823 (ICG 1964); *American Tel. & Tel. Co.*, 7 P. & F. Ad. L.2d 702, 704 (FCG 1957).

32 *Keystone Steel & Wire Co. v. Chicago, B. & Q. R.R.*, 279 I.C.G. 178 (1950).

33 *Hurley Oil & Gas Co.*, 29 F.P.C. 417 (1963).

34 *Tisdale Transfer & Storage Co.*, 73 M.C.G. 541 (1957).

required to prove his actual interest in the proceeding by producing various records requested by the other party.³⁵ He cannot rely upon the allegations of interest stated in his petition to prevent an applicant from developing a proper record to show that the intervenor would not in fact be adversely affected by the issuance of the requested certificate. Though an intervenor is not required to come into the proceeding, once he enters, he cannot leave at will. He remains a party until he is dismissed by the agency, and the agency may properly refuse to allow him to remove himself or to amend or withdraw an averment.³⁶

An intervenor does not always have standing to seek review of an agency's final order.³⁷ An administrative agency is not bound by the constitutional requirement of case or controversy as are federal courts. Complex rules have been developed to determine who possesses sufficient standing to assert a claim in a federal court.³⁸ Nothing in the Constitution, however, restricts appearance before an administrative body. Thus, if not prohibited by statute, an agency may allow anyone to appear as a party regardless of whether he would have standing in a judicial proceeding. Consequently, when an intervenor seeks review of an administrative order, the mere fact that he had standing before the agency does not mean he has standing before the court.³⁹ The person seeking review is commencing a new proceeding, and he must establish anew that he is adversely affected.

C. *Appeal from Denial of Intervention*

One may appeal an order denying intervention in an administrative proceeding. The important question being: is the order final and thus immediately appealable? There are sound practical reasons for allowing an immediate appeal

35 Texas E. Transmission Corp., 15 F.P.C. 1565 (1956).

36 See *Southwestern Publishing Co. v. FCC*, 243 F.2d 829 (D.C. Cir. 1957); *Area Rate Proceeding*, 29 F.P.C. 737 (1963); *Texas E. Transmission Corp.*, 16 F.P.C. 705 (1956). In the latter case the FPC noted that:

A person should not be permitted to intervene in a proceeding and by his participation bring about a long and protracted hearing and then, by the simple expedient of amendment to or withdrawal of an averment in the petition to intervene, remove himself from a given phase of a case without at least having undertaken voluntarily to present to us all changes in facts with respect to the interest theretofore averred to be such as would be adversely affected. Justification for withdrawal or amendment should equal the justification for intervention. . . .

Statements made by counsel for a party to a proceeding before us in offering to withdraw requests are not controlling. Our duty "to explore all pertinent aspects of intervenor's relationship to the matter under consideration" to the end that the record will contain facts with respect to the true interest and possible aggravement of intervenor's is paramount. *Texas E. Transmission*, *supra* at 706, 709.

37 See *DAVIS, ADMINISTRATIVE LAW*, § 22.08 (1959).

38 See, e.g., *Tileston v. Ullman*, 318 U.S. 44 (1943); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

39 In the *Chicago Junction Case*, 264 U.S. 258, 268 (1924), J. Brandeis stated that allowing the petitioner to intervene before the agency showed that he possessed interest and could seek review. However, only a few years later, J. Brandeis held that allowing the petitioner to intervene gave him no right to review. He noted that in this case the petitioner suffered only indirect harm from the operations of a competitor and that the Commission's order did not really affect him. *Pittsburgh & W. Va. R.R. v. U.S.*, 281 U.S. 479, 486 (1930).

For cases denying review to intervenors for failure to show sufficient interest, see *Southwestern Publishing Co. v. FCC*, 243 F.2d 829 (D.C. Cir. 1957); *Panhandle E. Pipe Line Co. v. FCC*, 219 F.2d 729 (3d Cir. 1955); *Interstate Elec. Inc. v. FCC*, 164 F.2d 485 (9th Cir. 1947).

from an order denying intervention. The arguments against piecemeal review are far outweighed by the time wasted if a party must wait until the administrative proceeding is terminated before obtaining a judicial determination of the correctness of an order. If at that time the court finds the petition improperly denied, the previous proceedings are vacated and a new hearing is required. Such a procedure would unduly complicate and delay the administrative process. To remedy this situation, most courts have held denial of the right to intervene an immediately reviewable, final order.⁴⁰ In *Public Serv. Comm'n v. FPC*,⁴¹ the United States Court of Appeals for the District of Columbia Circuit stated that a would-be intervenor can seek review of a denial of intervention at the time his petition to intervene is dismissed. The court also held that the time limit for his right to appeal is dated from the denial and not from the final order of the agency. This decision is sound. As a practical matter, a person should not be allowed to thwart the administrative process by delaying his appeal until the proceeding is finally terminated. Of course, the mere fact that the proceeding terminates before his right to appeal expires would not defeat his right to review.⁴²

The federal courts in civil proceedings have distinguished between the denial of intervention as of right and the denial of discretionary intervention.⁴³ They hold the former immediately appealable, but dismiss the latter as interlocutory. The courts have followed this distinction in deciding appeals from administrative bodies.⁴⁴ The distinction is largely illusory and serves no practical purpose. In order to decide whether intervention is of right or merely discretionary, the court must look at the merits. To then dismiss for lack of jurisdiction is incongruous. The right-discretion distinction should be abolished.

Federal courts are reluctant to grant a temporary stay of agency proceedings pending review of an order denying intervention.⁴⁵ While courts should sparingly use the injunctive remedy to regulate administrative proceedings,⁴⁶ it can be persuasively argued that when the petitioner's evidence on the merits shows that he is likely to be granted intervention, public interest is best served by enjoining the agency from proceeding with a hearing which may ultimately be nullified. The petitioner probably will be unable to show the requisite irreparable injury to himself to justify the injunction, but the expense and time consumed in having to reconduct a hearing are public policy factors in favor of halting proceedings to await a determination by the court.

40 *American Communications Ass'n v. U.S.*, 298 F.2d 648 (2d Cir. 1962); *Interstate Broadcasting Co. v. U.S.*, 286 F.2d 539 (D.C. Cir. 1960); *Public Serv. Comm'n v. FPC*, 284 F.2d 200 (D.C. Cir. 1960); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

41 284 F.2d 200 (D.C. Cir. 1960).

42 *Id.* at 206.

43 See 2 BARRON & HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* § 604 (Wright ed. 1961); WRIGHT, *FEDERAL COURTS* § 75 (1963). See also *Brotherhood of R.R. Trainmen v. Balt. & O. R.R.*, 331 U.S. 519 (1947).

44 See *American Communications Ass'n v. U.S.*, 298 F.2d 648 (2d Cir. 1962); *Interstate Broadcasting Co. v. U.S.*, 286 F.2d 539 (D.C. Cir. 1960); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Alston Coal Co. v. FPC*, 137 F.2d 740 (10th Cir. 1943).

45 *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Sykes v. Jenny Wren Co.*, 78 F.2d 729 (D.C. Cir. 1935); *Sunshine Broadcasting Co. v. Fly*, 33 F. Supp. 560 (D.D.C. 1940).

46 See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

III. Who May Intervene

The question whether a third person is entitled to intervene in an adjudicatory proceeding must be determined upon the facts of each case. Due process guarantees an absolute right to participate as a party, to one who will be directly bound by a final judgment.⁴⁷ The problem intervention presents is who besides those who are directly involved should be allowed to participate. Most statutes simply allow "any interested person" or "any person who will be adversely affected by the proceeding" to intervene.⁴⁸ Thus, ultimately the agencies and the courts determine what third parties display sufficient interest to entitle them to be made parties.

It is frequently stated that one who has a right to judicial review of an agency's final order should be permitted to intervene.⁴⁹ This view is correct. One who is entitled to review should be entitled to participate in the hearing from the outset. Where judicial review can only be sought by a party to the proceeding, it is clear that review could be defeated if an agency adopts a restrictive policy toward intervention.⁵⁰

Where the same statute confers the right of review and the right to intervene to any interested person, these two provisions are analogous. However, to say that one who may appeal may intervene begs the question. In either case it must be determined whether the third party's interest is sufficiently substantial to confer this right upon him.

The claim of the original parties that they are prejudiced by the appearance of third parties is no ground for denying intervention to interested parties.⁵¹ Also an agency does not abuse its discretion by denying intervention in an adjudicative proceeding when the petitioner has been allowed to argue the very same points in a prior rule-making hearing.⁵²

Perhaps the most common type of intervention occurs when the petitioner has an economic interest in the proceeding. It was recognized early by the Interstate Commerce Commission that competitors may intervene in its proceedings.⁵³ The federal courts have consistently held that a competitor has standing to challenge the FCC's grant of a license to a rival station.⁵⁴ Of course,

47 See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Ohio Bell Tel. v. Public Util. Comm'n*, 301 U.S. 292 (1937); *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464 (1918); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

48 See Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U.S.C. § 45(b) (1964) (good cause); Atomic Energy Act, 76 Stat. 409 (1962), 42 U.S.C. § 2239(a) (1964) (any person whose interest may be affected); Communications Act, 74 Stat. 889 (1960), 47 U.S.C. § 309(e) (1964) (party in interest); Federal Aviation Act, 72 Stat. 796 (1958), 49 U.S.C. § 1489 (1964) (all persons interested in or affected by the matter).

49 *American Communications Ass'n v. US*, 298 F.2d 648 (2d Cir. 1962); *National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951); *Seaboard & W. Airlines v. CAB*, 181 F.2d 515 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 963 (1950).

50 *National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951).

51 *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *Oscar Porter*, 72 M.C.C. 537 (1957).

52 *Coastal Bend TV Co. v. FCC*, 234 F.2d 686 (D.C. Cir. 1956).

53 See *Alton R.R. v. U.S.*, 315 U.S. 15 (1942) (trucker in competition with R.R.); *Clairborne-Annapolis Ferry Co. v. U.S.*, 285 U.S. 382 (1932) (ferry in competition with R.R.); *Chicago Junction Case*, 264 U.S. 258 (1924) (other railroads as competitors).

54 *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Interstate Broadcasting Co. v. FCC*, 285 F.2d 270 (D.C. Cir. 1960); *Frontier Broadcasting Co. v. U.S.*, 265 F.2d 353 (D.C. Cir. 1959); *Elm City Broadcasting Corp. v. U.S.*, 235 F.2d 811 (D.C. Cir. 1956); *Granik v. FCC*, 234 F.2d 682 (D.C. Cir. 1956); *Greenville Television Co. v. FCC*, 221 F.2d

where the economic effect of the proceeding on the competitor is not sufficiently shown or is too remote, intervention will not be allowed.⁵⁵

In *National Coal Ass'n v. FPC*,⁵⁶ a leading case on the status of competitors, a gas company applied to the Federal Power Commission for a certificate of public convenience and necessity, under the Natural Gas Act, to construct a pipeline to the Atomic Energy Plant at Oak Ridge, Tennessee. The FPC granted a petition to intervene by the National Coal Association, a competitor of the applicant, and the United Mine Workers, representing the employees of the association. The court held that the petitioners were interested parties likely to be aggrieved by the displacement of coal by natural gas.⁵⁷ The court also recognized that a possible loss of employment could make the employees "aggrieved," entitling them to judicial review. It stated:

We see no reason and none is suggested to us, for considering the interest of employees in retention of their employment in the competing companies as any less substantial than the interest of competitors in retaining their markets or the prospect of loss of employment any less direct and immediate than the loss of markets with which the competing companies are threatened. The employees of competing companies, as much as the owners thereof, have a sufficiently direct relationship to the subject matter of the Commission's order to be "aggrieved."⁵⁸

Perhaps the most liberal decision holding a competitor to be an interested party is *Philco Corp. v. FCC*.⁵⁹ The Federal Communications Commission granted a television license to NBC for the Philadelphia area. Philco filed a protest. Philco was not in the broadcasting business; it manufactures electronics equipment and in no way competed with NBC. NBC, however, is owned by RCA, which does manufacture electronics equipment and is in competition with Philco. Philco alleged that RCA was granted advertising preferences on NBC thereby violating trade practices under the antitrust laws. The United States Court of Appeals for the District of Columbia Circuit held that Philco, as a competitor of RCA, had standing to protest the license granted to NBC.⁶⁰

870 (D.C. Cir. 1955); *Salinas Broadcasting Corp.*, 3 P. & F. Ad. L.2d 369 (FCC 1953); *Versluis Radio & TV, Inc.*, 3 P. & F. Ad. L.2d 365 (FCC 1953). For decisions concerning other agencies to the same effect, see *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956); *Northeastern Gas Transp. Co. v. FPC*, 195 F.2d 872 (3d Cir. 1952); *Cia Mexicana De Gas v. FPC*, 167 F.2d 804 (5th Cir. 1948); *Balair Ag.*, No. 16816, CAB, Feb. 9, 1966.

55 See, e.g., *Michigan Consol. Gas Co. v. FPC*, 282 F.2d 854 (D.C. Cir.), cert. denied, 364 U.S. 913 (1960); *Interstate Broadcasting Co. v. FCC*, 280 F.2d 626 (D.C. Cir. 1960); *U.S. Cane Sugar Refiners Ass'n v. McNutt*, 138 F.2d 116 (2d Cir. 1943); *Houston Texas Gas & Oil Corp.*, 15 F.P.C. 1570 (1956); *Yellow Cab Co.*, 3 P. & F. Ad. L.2d 367 (FCC 1953); *Kansas State College of Agriculture & Applied Science*, 2 P. & F. Ad. L.2d 738 (FCC 1952); *Station KFST*, 1 P. & F. Ad. L.2d 450 (FCC 1951).

56 191 F.2d 462 (D.C. Cir. 1951). See also *American Communications Ass'n v. U.S.*, 298 F.2d 648 (2d Cir. 1962); *Virginia Petroleum Jobbers Ass'n v. FPC*, 265 F.2d 364 (D.C. Cir. 1959).

57 *Id.* at 465.

58 *Id.* at 466.

59 257 F.2d 656 (D.C. Cir. 1958), cert. denied, 358 U.S. 946 (1959).

60 The court, however, stated that:

Our decision gives standing to a competitor in the position of Philco only to protest a renewal after it is known that licensed facilities are being used by the competing manufacturer directly to obtain a preferential economic advantage over the protestant. Furthermore, even in those circumstances the standing here is to protest only with respect to renewal of a license of a station wholly owned or controlled by

Competitors with sufficient interest must be allowed to intervene by the Civil Aeronautics Board in final hearings to determine mail rate subsidies.⁶¹ However, intervention is seldom allowed in temporary rate proceedings where time is of the essence and the interest of the applicant and the public demand a less cumbersome proceeding.⁶² But even here the Board may permit third parties to present evidence.⁶³

Employees and their unions may be economically affected by agency orders. When this occurs, they should be allowed to intervene.⁶⁴ Intervention is seldom an issue in unfair labor practice proceedings before the National Labor Relations Board. The Board automatically includes as parties the person filing the charge, any person named as respondent, as employer, or as party to a contract in the proceeding; and also any labor organization alleged to be dominated, assisted, or supported in violation of § 8(a)(1) or § 8(a)(2) of the National Labor Relations Act.⁶⁵ These liberal provisions include nearly anyone who would be affected by the proceeding. Thus, intervention is seldom resorted to.⁶⁶

Stockholders may have an economic interest in proceedings before the Securities Exchange Commission. However, the SEC seldom permits intervention as a party, but leave to appear as a limited participant is most freely given.⁶⁷

The Supreme Court has ruled that economic injury is not the only basis upon which one may assert his rights as a party in interest. In *FCC v. NBC*

the competitor, which would not often be the case. We leave other situations for other cases. *Id.* at 659.

61 See *Seaboard & W. Airlines v. CAB*, 181 F.2d 515 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 963 (1950); *Boros, Intervention in Civil Aeronautics Board Proceedings*, 17 AD. LAW REV., 5, 27 (1964).

62 *Seaboard & W. Airlines v. CAB*, 181 F.2d 515 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 963 (1950); *Northwest Airlines, Inc.*, 12 C.A.B. 185 (1949); *American Airlines*, 10 C.A.B. 185 (1949); *National Airlines, Inc.*, 9 C.A.B. 264 (1948).

63 See *National Airlines, Inc.*, 9 C.A.B. 264 (1948), where the Commission allowed the *Airline Pilots Ass'n* and the *Int'l Ass'n of Machinists* to present evidence of a labor dispute at temporary rate proceedings.

64 See, e.g., *National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951); *Power Reactor Dev. Co.*, 6 P. & F. Ad. L.2d 549 (AEC 1956); *National Airlines Inc.*, 9 C.A.B. 264 (1948). See also *American Fed'n of Musicians v. FCC*, 356 F.2d 827 (D.C. Cir. 1966), where the court avoided the question whether the *American Federation of Musicians* had standing to protest renewal of a license when the licensee had originally promised to devote a certain amount of time to live music and failed to do so.

65 29 C.F.R. § 102.8 (1966). This rule puts to rest some rather confusing Supreme Court decisions. In *NLRB v. Pennsylvania Greyhound Lines Inc.*, 303 U.S. 250 (1938), the Court held that a dominated union need not be made a party to a proceeding under § 8(a)(2) of the *National Labor Relations Act*. *Accord*, *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941); *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940); *NLRB v. Indiana & Mich. Elec. Co.*, 124 F.2d 50 (6th Cir. 1941); *Inland Steel Co. v. NLRB*, 109 F.2d 9 (7th Cir. 1940). However, in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 232 (1938), the Supreme Court, in distinguishing the *Pennsylvania Greyhound*, said that the Board should have accorded the union notice and a hearing before setting aside its contract with the employer.

66 Letter from Thomas P. Healy, Ass't Director of Information, NLRB, to the NOTRE DAME LAWYER, April 15, 1966, on file with the NOTRE DAME LAWYER. See *Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388 (8th Cir.), *cert. denied*, 332 U.S. 758 (1947) (refusal to allow employees to intervene in § 8(a)(1) and § 8(a)(5) proceeding within discretion of agency); *NLRB v. Star Publishing Co.*, 97 F.2d 465 (9th Cir. 1938).

67 See 17 C.F.R. §§ 201.9(c), (d) (1964). Letter from David Ferber, Solicitor, SEC, to the NOTRE DAME LAWYER, April 26, 1966, on file with the NOTRE DAME LAWYER. See, e.g., *Electric Bond & Share Co.*, 3 P. & F. Ad. L. 41g.51-3 (1947); *Electric Bond & Share Co.*, 11 S.E.C. 359 (1942); *United Light & Power Co.*, 8 S.E.C. 561 (1941), for cases allowing stockholders limited participation.

(*KOA*),⁶⁸ the Supreme Court held that the holder of an existing broadcasting license may intervene to protest the granting of a license which will cause channel interference with his operations. The FCC had allowed an increase in power and time to a Boston station. Though there was no formal modification of a Denver station's license, since it was a clear channel station at night, the increase did cause a certain amount of electrical interference with the station's operations some seven hundred miles east of Denver. This was sufficient, the Court said, to make the Denver station a party in interest and to entitle it to become a formal party to the proceeding.⁶⁹ The United States Court of Appeals for the District of Columbia Circuit has held: if the FCC assigns additional frequencies, already assigned to existing licensees, to go into effect at the expiration of the former licenses, if proper rule-making procedures are followed, there is no modification requiring an adjudicatory, evidentiary hearing.⁷⁰

Private parties are not the only ones who may be affected by agency decisions. What distinguishes administrative from judicial proceedings is that the former will affect large segments of the public. Thus a competitor may have a vital interest in whether the FCC will grant an additional broadcasting license, or whether the CAB will route additional airlines to a particular city, but his interest is no greater than the interest of the public who is to be served by these facilities. In fact, his interest may be opposed to that of the public. For this reason, intervention limited to interested, private parties and dependent upon them to assert the public interest, is unrealistic.⁷¹ It may be said that the commissioners themselves represent and protect the public interest, but this is a mere generalization. The CAB cannot possibly know whether the public interest is best served by routing planes traveling from Florida to California through Dallas or Houston, unless opposing groups are able to present their case before the Board. For this reason, intervention should be freely given to public agencies, municipalities, and civic groups. Many agencies allow interested state and federal agencies, municipalities, or other public groups to appear before them as parties, merely by filing a notice of appearance without requiring a formal petition to intervene.⁷² Very often these public bodies can show some

68 319 U.S. 239 (1943).

69 The court found the fact that petitioner had been allowed to present oral argument *amicus curiae* before the Commission immaterial. *Id.* at 246. Under the FCC's rules, one desiring to intervene must state with particularity the extent of the interference he will suffer, and this must be attested to by a qualified engineer. 47 C.F.R. § 1.223(a) (1966).

70 *Goodwill Stations, Inc. v. FCC*, 325 F.2d 637 (D.C. Cir. 1963). The court stated further that:

The practical effect, and the legal result which we think follows, is that there actually was no modification prior to the expiration of the licenses. These remained with their original integrity for the three year terms of their existence. *Id.* at 641. See also DAVIS, *ADMINISTRATIVE LAW* § 8.11 (1965 Supp.).

71 See *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *rev'd*, 320 U.S. 707 (1943), in which J. Frank outlined the private attorney generals concept. He stated that interested parties appeared before the commissions as private attorney generals. See also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); DAVIS, *ADMINISTRATIVE LAW* § 22.05 (1959). Such an analysis is a simplification of reality. An intervenor will assert his own interest. This evidence is in the public interest insofar as it develops a more complete record, but it cannot be equated with the public interest. The public interest is found only by weighing the testimony of all interested groups.

72 See note 11 *supra*.

direct economic effect entitling them to intervene,⁷³ but this should not always be required. An agency's decision may also have a direct effect upon policies entrusted to another public body. For instance, the Department of Justice may have a vital interest in many agency decisions because of its duty to enforce the antitrust laws. This interest, as a practical matter, should give it standing to appear before that agency.⁷⁴

Private individuals and groups, who have no other interest than as members of the general public, have generally been denied intervention by the agencies.⁷⁵ This denial rests on sound practical reasons. To allow members of the general public to become formal parties would unduly burden the administrative process. When such persons have relevant evidence to present to agencies, they are generally accorded limited participation.⁷⁶

A recent decision rendered by the United States Court of Appeals for the District of Columbia Circuit gives a very realistic approach to the issue of intervention by private parties who can show no actual economic effect. In *Office of Communication of United Church of Christ v. FCC*,⁷⁷ various members of the listening public protested the renewal of station WLBT's license in Jackson, Mississippi, alleging the station discriminated on the grounds of race and religion. The FCC denied the petition to intervene and renewed the license on a one-year probationary period. The would-be intervenors appealed on the ground that they represented nearly one-half of WLBT's potential listening audience and were denied the right to present their side of the controversy. The court reversed the denial, and, after taking cognizance of the widespread fear that a host of parties would disrupt agency proceedings, stated:

Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. This much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist. . . .

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys

73 For cases allowing intervention, see, e.g., *City of Houston v. CAB*, 317 F.2d 158 (D.C. Cir. 1963); *Public Serv. Comm'n v. FPC*, 295 F.2d 140 (D.C. Cir.), cert. denied, 368 U.S. 948 (1961); *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956); *Detroit-Toronto, Erie-Toronto Route Case*, No. 16928, CAB, April 11, 1966; *Los Angeles/Chicago-Toronto Serv. Case*, No. 16901, CAB, March 16, 1966; *Reopened So. Transcontinental Serv. Case*, No. 7984, CAB, 3, 1964. See also Boros, *supra* note 61, at 21.

74 See *National Ass'n of Secs. Dealers, Inc.*, 15 S.E.C. 577 (1944). But see *New York-Fla. Renewal Case*, 14 P. & F. Ad. L.2d 474 (CAB 1963).

75 See *Memphis Light, Gas & Water Div. v. FPC*, 243 F.2d 628 (D.C. Cir. 1957) (private corp. which had no economic interest refused intervention); *The Good Music Station, Inc.* 6 P. & F. Ad. L.2d 930 (FCC 1957) (local citizens group refused intervention); *WJR, The Goodwill Station, Inc.*, 4 P. & F. Ad. L.2d 753 (FCC 1954) (citizens group made no showing of economic interest and was refused intervention); *Capital Broadcasting Co.*, 2 P. & F. Ad. L.2d 704 (FCC 1952) (Transit Riders Ass'n, composed of members of public who travel on vehicles of transit company, held to have no interest). But see *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965) (conservation committee, allowed to intervene in FPC hearing).

76 See statutes and cases cited *supra* note 29.

77 359 F.2d 994 (D.C. Cir. 1966).

general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.⁷⁸

To keep hearings within manageable bounds, the court noted that intervention need not be granted to all of the petitioners so long as one or more responsible representatives were allowed to assert their interest.⁷⁹

IV. Conclusion

Who may appear before an administrative agency must be determined on a case-by-case basis. The Administrative Procedure Act states that any interested person may appear before an agency, and most statutory provisions are similarly broad. Thus, it falls upon the agencies and the courts to determine who is an interested person entitled to intervene. Very often the agencies emphasize the impact that the participation of a third party will have on the agency procedure itself rather than the actual interest of the third party.⁸⁰ Such a narrow approach is not really consistent with congressional directives. There is no metaphysical formula that can be devised to determine who is a party in interest. The constitutional requirement of case and controversy does not apply to administrative agencies. Thus who can intervene need not be limited to the narrow rules governing who can constitutionally secure judicial review. The policy in favor of broad participation must be balanced against the fact that the agencies have a job to do which must be accomplished with a reasonable amount of speed and dispatch. For this reason courts should be reluctant to impose restrictions upon the functioning of the administrative process.⁸¹ Intervention thus depends upon the practical considerations in each case. If a petitioner has a legitimate interest in the proceeding which will not be adequately represented by existing parties, he should be allowed to intervene. Though the participation of third parties may cause proceedings to be more complex and lengthy, the various agencies do have a basic duty to act in the "public interest," and the "public interest" can be determined only by securing relevant evidence from all interested groups. Administrative agencies were developed in a large part because the traditional two-party adversary approach of the courts was incapable of adjudicating some of the more complex questions affecting the general public. The usefulness of administrative adjudication lies precisely in the fact that it is not limited by the more formalized procedures of the courts. If it restricts and formalizes its procedures, the usefulness of the administrative process as a complement to the judicial process will cease.

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78 *Id.* at 1002-03.

79 *Id.* at 1006.

80 See Boros, *supra* note 61, at 7.

81 See *FCC v. NBC (KOA)*, 319 U.S. 239, 248 (1943) (dissenting opinion).