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PARTIES TO ADMINISTRATIVE PROCEEDINGS

*Paul Oberst**

DISCUSSIONS of administrative law have been increasingly concentrated in recent years on the actual procedure of administrative agencies. Attention has been focused particularly on standards of notice and hearing. However, much of this discussion has been general, and has been applicable primarily to the notice and hearing which must be given to the party against whom the order will be made and who will be directly affected thereby. Only occasional consideration has been given the rights of other persons—let us call them for convenience "third persons"—who may be collaterally interested in, and affected by, administrative proceedings, but who are not specifically designated, even though the orders may effectively impair or foreclose their interests.[1] The problem has occasionally been considered from the standpoint of individual agencies, but it is proposed herein to survey federal administrative procedure as a whole, and to discuss the rights of third persons to participate in administrative proceedings, whether such rights be derived from statutory provisions, commission rules, or constitutional requirements as laid down in judicial decisions.[2]

Because of the ever-present tendency to compare the administrative hearing with its judicial counterpart, it may be well at the outset to consider briefly the experience of the courts in the matter of parties. The typical court proceeding normally involves an action by a single

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[1] This article is concerned primarily with participation of third persons in the more formal administrative proceedings, usually involving a hearing, but it must be recognized that a great many controversies are disposed of by informal procedures. Representation of third persons in the various informal procedures is probably very infrequent even though their interests may be affected by the order issued.

Recognition of an interest in third persons may cause a change from an informal procedure to a more formal one. Witness the abandonment of the consent order policy in modification of stockyard rates by the Department of Agriculture, in favor of a hearing at which the rate payers may intervene.

[2] For the only general discussion of interests of third parties in administrative proceedings, see GELLHORN, ADMINISTRATIVE LAW—CASES AND COMMENTS 466 (1940). From the standpoint of a single agency, see Gellhorn and Linfield, "Administrative Adjudication of Contract Disputes—The Walsh-Healey Act," 37 MICH. L. REV. 841 (1939); Freer, "Federal Trade Commission Procedure and Practice," 8 GEO. WASH. L. REV. 316 (1940); 11 AIR L. REV. 73 (1940); 40 COL. L. REV. 898 (1940); 13 SO. CAL. L. REV. 450 (1940).

plaintiff against a single defendant. The common-law procedure was strict regarding the persons who should be made parties to an action, and joinder was dependent upon union of the substantive rights of the litigants. Equity procedure enlarged the rules of joinder and used them as a procedural device to save repetition of trials by deciding in one proceeding issues in which several persons had a common or general interest.[3] In addition to recognizing "indispensable parties," equity utilized the devices of "permissive joinder," intervention, and class suits. The procedural codes of the states and the Federal Rules of Civil Procedure have incorporated the more liberal equity practice, and, with the aid of a large number of judicial decisions, indicate with some definiteness the necessary, proper, and permissible parties to judicial proceedings.[4]

Several sharp contrasts appear when we consider the question of parties to administrative proceedings. Administrative action that affects only one person is the exception rather than the rule and the number of persons likely to be affected by an administrative order varies greatly. It is true that the action of the Veterans' Administration on a pension claim will concern to an appreciable extent only the government and the veteran. But the action of the Civil Aeronautics Authority on the application by an air-line for permission to establish a new route will not only affect the applicant itself, but in addition it will indirectly affect competing air-lines which are serving, or may wish to serve, the same territory, and, to some extent, it will affect the cities which are competing for the facilities along the proposed route. An exercise of price-fixing power by the Bituminous Coal Commission will affect directly, not one, but thousands of producers, and will also affect indirectly millions of consumers. The problem of ascertaining the necessary and permissible parties to administrative proceedings is inherently many times more difficult than that of determining the parties to a judicial proceeding. Moreover, there is no uniform code of administrative procedure or substantial body of case law to point out with any certainty the necessary and proper parties to administrative proceedings. The very diversity of administrative proceedings has undoubtedly been an important factor in preventing the development of any coherent principles concerning the rights of third parties. Any attempt to establish a single standard of notice and hearing for all persons affected by administrative action, or to assimilate administrative

[3] CLARK, CODE PLEADING 241-292 (1928).

[4] Federal Rules of Civil Procedure for the District Courts of the United States, Rules 21-25 (1938).

notice and hearing to judicial notice and hearing, would necessarily be foredoomed to failure.[5] To a great extent, however, variations in the rights of third parties to participate in administrative proceedings are merely a reflection of the haphazard growth of the administrative system. Where two administrative agencies are exercising virtually identical powers over differing subject matters, there would seem to be little basis for wide differences in the extent of recognition of third-party interests. Yet such differences often exist.

Furthermore, judicial decisions have not as yet been helpful in formulating principles of notice and hearing to third parties to administrative proceedings. Perhaps this has resulted from the fact that in the majority of administrative proceedings the question of the rights of third parties has presented no controversy. In cases in which only a single person in addition to the government is interested, the question obviously cannot arise. In cases in which others may also be interested, administrative agencies have for the most part given the widest possible notice and have allowed great liberality in the admission of parties to the hearings. Under such circumstances there is no aggrieved person to seek relief from the courts. Only when the administrative agency, perhaps in the interest of more expeditious procedure, decides to limit the notice and restrict the scope of the issues or the number of parties is objection likely to be made. Generally the question raised is one of interpretation of the statutory provisions. Where no statute grants the right to notice and hearing, in a few scattered cases the courts have found that third persons have such interest in administrative proceedings that the agency must give them notice and hearing to satisfy constitutional due process or the requirements of fair play and equitable procedure.[6] The small number of such cases may perhaps be an indication of reluctance on the part of the courts to establish any specific requirements from general constitutional limitations.

It is the purpose of this article to examine the statutory provisions, and the regulations and practices of the federal agencies, dealing with the rights of third persons, along with the relevant judicial decisions. The rights of third persons to notice, to participation in the hearing, and to appeal will be considered in turn. In general, the ultimate pur-

[5] See the FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 20 (1941).

[6] Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206 (1938); Clarksburg-Columbus Short Route Bridge Co. v. Woodring, (App. D. C. 1937) 89 F. (2d) 788; Nord v. Griffin, (C. C. A. 7th, 1936) 86 F. (2d) 481; Journal Co. v. Federal Radio Commission, (App. D. C. 1931) 48 F. (2d) 461.

poses of an administrative hearing are to inform the agency, to serve as a check upon arbitrary action, and to enable the individuals who will be affected by the decision to confront their opponents and to present their case in its best light. Participation of third persons in an administrative hearing should depend very largely upon the extent to which these ends can be served thereby.

I

NOTICE

A few statutes contain definite notice requirements, naming the persons, other than the applicant or persons against whom the proceeding is directed, who are entitled to be notified. For example, in proceedings under section 12(f) of the Securities Exchange Act of 1934 to extend or terminate unlisted trading privileges, the commission is required by express provision to notify the applicant, the issuer of the security, the exchange, and any other exchange on which such security is listed or admitted to unlisted trading privileges.[7] The Interstate Commerce Act provides that upon receipt of an application for a certificate of public convenience and necessity, the commission must cause notice to be given to the governor of each state in which the line of railroad is proposed to be constructed. Whenever the commission has completed a tentative valuation of railroad property, it must give notice by registered letter to the carrier, the Attorney General of the United States, the governor of any state in which the property is located, and such additional parties as the commission may prescribe.[8]

More often the statute simply requires that notice be given to "interested persons" or the equivalent, and the administrative agency is left to determine who is "interested" within the meaning of the statute. For instance, the Administrator of the Fair Labor Standards Act, upon the filing of a report by an industry committee, must give "due notice to interested persons . . . by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons."[9] Again, the Longshoremen's and Harbor Workers' Compensation Act provides that the deputy commissioner must notify "the employer and any other

[7] 48 Stat. L. 892 (1934), as amended by 49 Stat. L. 1375 (1936), 15 U. S. C. (Supp. 1939), § 78l (f).

[8] 49 U. S. C. (1934), §§ 1 (19), 19a (h).

[9] 52 Stat. L. 1064 (1938), 29 U. S. C. (Supp. 1939), § 208 (d) and (g).

person (other than the claimant), whom the deputy commissioner considers an interested party."[10]

Generally the agencies by regulation, or by practice without specific regulation, interpret the statutory provisions with liberality and give even wider notice than that prescribed. The notice so given may, of course, be a matter of grace rather than of right, and it does not follow that all persons given notice will be permitted to participate in the hearing. As an example of extremely liberal notice, the Civil Aeronautics Act provides that on the filing of an application for a certificate of public convenience and necessity, the authorities must give "due notice thereof to the public by posting a notice of such application in the office of the Secretary of the Authority, and to such other persons as the Authority may by regulation determine."[11] The regulations of the authority require that an application must state that "the applicant has caused a notice of its intention to file such application with the Board to be served upon each person named in the most recently issued list of scheduled air carriers. . . ."[12] When a hearing has been set, the authority notifies all air carriers in the United States, officials of the states through which the proposed routes extend, officials of cities named as stopping points on the proposed routes, and a list of persons who have requested to be notified of all formal proceedings before the authority.[13]

The National Labor Relations Act, as to unfair labor practice cases, requires only that the employer-respondent be given notice and hearing.[14] The board by its present regulations also makes the complaining union a party.[15] However, under earlier regulations no provision for notice to other interested unions was required and litigation arose involving the question whether or not a notice and hearing should be afforded another labor organization having an existing contract with the employer. In *National Labor Relations Board v. Pennsylvania*

[10] 44 Stat. L. 1435 (1927), 33 U. S. C. (1934), § 919 (b).

[11] 52 Stat. L. 991 (1938), 49 U. S. C. (Supp. 1939), § 482 (e).

[12] Civil Aeronautics Authority, Economic Regulations, § 2381 (j) (6), as amended Nov. 8, 1940, 5 FED. REG. 4455 (1940).

[13] ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: MONOGRAPHS OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, SENATE DOCUMENT 10, 77th Cong., 1st sess. (1941), pt. 6, p. 7. The Attorney General's Committee Monographs have been published in two series: SENATE DOCUMENT 186, 76th Cong., 3d sess. (1940) (hereinafter referred to as S. Doc. 186) and SENATE DOCUMENT 10, 77th Cong., 1st sess. (1941) (hereinafter referred to as S. Doc. 10).

[14] 49 Stat. L. 453 (1935), 29 U. S. C. (Supp. 1939), § 160 (b).

[15] National Labor Relations Board, Rules and Regulations, Series II (1939), § 5, 29 CODE FED. REG. (Supp. 1939), § 202.5.

Greyhound Lines,[16] the United States Supreme Court sustained an order requiring the employer to withdraw recognition of a "company-dominated" union, and as to the right of the company union to notice held that "As the order did not run against the . . . [union] it is not entitled to notice and hearing. Its presence was not necessary in order to enable the Board to determine whether respondents had violated the statute or to make an appropriate order against them."[17] On the other hand, in the later *Consolidated Edison* case,[18] the Court declared this rule inapplicable to the rights of an "independent" labor union having valuable existing contracts. Such a union was held to be an "indispensable party" upon an analogy to the rule in equity procedure, which "is not of a technical character but rests upon the plainest principles of justice."[19] In a third case, *National Licorice Company v. National Labor Relations Board*,[20] the Court sustained an order forbidding the employer to take benefit from contracts with individual employees procured through violation of the act, but went on to declare that where rights possessed by the employees under the contracts were *preserved* by the order they were not indispensable parties. The Court pointed out that the Labor Board proceedings are to vindicate public rights, not to adjudicate private rights, and "there is little scope or need for traditional rules governing the joinder of parties in litigation determining private rights."[21] Even in private litigation "the court may, in a proper case, proceed to judgment without joining other parties to the contract, shaping its decree in such manner as to preserve the rights of those not before it."[22] Consequently it was said that the only question for the Court in the *National Licorice Company* case was whether the board abused its discretion in failing to make the employees parties.

Under the new rules of the Labor Board, the question probably will not again arise since these rules go beyond the minimum requirements laid down in the decisions. The rules provide that

> "Whenever the complaint contains allegations under section 8(2) of the Act, any labor organization referred to in such allegations shall be duly served with a copy of the complaint and notice

[16] 303 U. S. 261, 58 S. Ct. 571 (1937).

[17] Id., 303 U. S. at 271.

[18] Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206 (1938).

[19] Id., 305 U. S. at 233.

[20] 309 U. S. 350, 60 S. Ct. 569 (1940).

[21] Id., 309 U. S. at 363.

[22] Id.

of hearing. Whenever any labor organization, not the subject of any 8(2) allegation in the complaint, is a party to any contract with the respondent the legality of which is put in issue by any allegation of the complaint, such labor organization shall be made a party to the proceeding."[23]

Under the Communications Act of 1934, the Federal Communications Commission may deny applications for licenses only after notice and hearing, but may grant licenses to applicants without hearing.[24] Since the number of wave bands available is sharply limited by natural laws, the granting of the application of one party may seriously affect other persons in the broadcasting field.[25] The predecessor of the present commission, under the Radio Act of 1927, licensed a Florida and also a Maine station to operate on the same 620 KC wave band that it had previously granted to a Wisconsin station operated by the Journal Company. This caused severe interference and limited the effective operating area of the latter company to twenty miles. The federal circuit court of appeals held, on appeal from the order by the Journal Company, that the appellant was entitled to notice and an opportunity to be heard before the commission made the assignments which affected it, although the statute made no such requirement.[26] The 1934 act likewise makes no provision for notice to third parties in cases of granting licenses, but the commission has covered the matter by regulations.[27] In practice the commission now gives very wide notice. Notice of applications is sent to all persons who have been placed on the commission's mailing list and in addition to certain individuals designated by the engineering department. These include all licensees in the same community, all holders of station licenses with whose signals the proposed station is likely to conflict, and others who may be affected in any way.[28]

From time to time aggrieved persons have contested administrative action on the ground that they have not been given the notice required

[23] National Labor Relations Board, Rules and Regulations, Series II (1939), § 5, 29 CODE FED. REG. (Supp. 1939), § 202.5.

[24] 48 Stat. L. 1085 (1934), 47 U. S. C. (1934), § 309 (a).

[25] For an illustration of this technical problem, see Woodmen of the World Life Ins. Soc. v. Federal Communications Commission, (App. D. C. 1939) 105 F. (2d) 75.

[26] Journal Co. v. Federal Radio Commission, (App. D. C. 1931) 48 F. (2d) 461; and see Woodmen of the World Life Ins. Soc. v. Federal Communications Commission, (App. D. C. 1939) 105 F. (2d) 75.

[27] Federal Communications Commission, Rules of Practice and Procedure (1939), §§ 196, 197, 47 Code Fed. Reg. (Supp. 1939), §§ 1.196, 1.197.

[28] S. Doc. 186, pt. 3, p. 13.

by statute. One of the most interesting of these contests arose in connection with the Railroad Adjustment Board and turns on the meaning of the words "the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."[29] In *Estes v. Union Terminal Company*,[30] it became necessary to interpret a seniority clause in a contract between the Brotherhood of Railway and Steamship Clerks and the company. The company had transferred Lane, a stationmaster not under the contract, to the position of gateman, displacing Estes, who was first on the seniority list of gatemen. The board decided that Lane did not have seniority rights, and ordered his removal. In a suit to enforce the order, the company filed a plea in abatement based on the failure of the board to give notice to Lane of the proceedings before it. The circuit court of appeals held that Lane was a party "involved" in the dispute and was entitled to receive notice. The court conceded that the word "involved" was ambiguous, but considered that it was the intent of the law that no person should be deprived of his means of livelihood without an opportunity to defend himself. In another Railroad Adjustment Board case decided a year prior to the *Estes* decision, *Nord v. Griffin*,[31] the circuit court of appeals held that the board could not enter an order in a dispute between the Brotherhood of Railroad Trainmen and the railroad which had the effect of depriving a non-Brotherhood employee of his job without notice and hearing. The opinion of the court was unique, however, in that it made no attempt to construe the statute, but was based entirely on due process of law. The court said that the case turned upon

> "... solely the question of whether the appellee is to be bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice. The mere statement of the proposition is conclusive of its unsoundness. The rights of the plaintiff are protected by the Fifth Amendment."[32]

[29] 44 Stat. L. 578 (1926), as amended by 48 Stat. L. 1189 (1934), 45 U. S. C. (1934), § 153 (j).

[30] (C. C. A. 5th, 1937) 89 F. (2d) 768.

[31] (C. C. A. 7th, 1936) 86 F. (2d) 481.

[32] Id. at 484. Labor members of the board consider that the disputes to be adjusted under the act are between the railroads and the Brotherhoods as representative of the employees, and that the Brotherhoods, but not the individual employees, are entitled to notice and hearing. Despite the decisions in the Estes case and Nord v. Griffin, they continue to vote against giving notice to the individual employee in cases before the board. As a result of the deadlock, notice is not ordinarily given. S. Doc. 10, pt. 4, p. 8.

Turning to another field of administrative action, the Secretary of War under the Act of March 28, 1906, is given the power to prescribe "reasonable and just rates" for toll bridges.[83] No notice or hearing is provided by statute. Pursuant to this act the secretary ordered a reduction of thirty-five per cent in the toll on the Parkersburg, West Virginia, bridge. The owners of a competing bridge brought action for an injunction against the order on the ground that the order, made without notice and hearing, caused irreparable loss by diverting traffic to the Parkersburg bridge. In *Clarksburg-Columbus Short Route Bridge v. Woodring*[84] the Court of Appeals for the District of Columbia reversed a decree dismissing the bill and ordered an injunction on the ground that the secretary's action was a taking of property without due process of law. The imposition of a standard of reasonableness by Congress was held to imply the requirement of a quasi-judicial hearing, and at such hearing the effect on competitors must be considered since that was an element of a "reasonable rate." The court apparently evolved the whole requirement of notice to the plaintiff out of the words "reasonable and just rates" on the basis of satisfying constitutional limitations. The opinion was based on the "close analogy" to the rate-making power of the Interstate Commerce Commission.

From the foregoing it may be seen (1) that the statutes contain only a few instances in which specifically designated third persons must be given notice; (2) that occasionally there is a statutory requirement that notice must be given "interested persons"; (3) that many agencies in practice give wider notice than is actually required by statute, although it does not follow that all of these persons will automatically be given full rights at the hearing; (4) that in a few instances, in the absence of statute or regulation, the courts have drawn a requirement of notice and hearing directly from constitutional provisions. Whether these latter cases indicate a fundamental limitation on administrative procedure or constitute merely isolated instances of judicial interference is a question that will have to be determined on the basis of future developments. No doubt, however, to a considerable extent the provisions for third parties in the statutes and administrative regulations are a reflection of constitutional considerations.

The solution of the problem of notice involves striking a proper balance between private interests and administrative necessities. No

[83] 33 U. S. C. (1934), § 494.

[84] (App. D. C. 1937) 89 F. (2d) 788, reversed, Woodring v. Clarksburg-Columbus Short Route Bridge Co., 302 U. S. 658, 58 S. Ct. 365 (1937), on the ground that the cause was moot.

general rule will suffice to handle all cases because of the wide variety of fact situations encountered. Moreover administrative agencies cannot be expected always to determine in advance of proceedings all persons who will be affected by the order and hence entitled to a notice. On the other hand, administrative agencies should not be content with giving notice only to parties directly proceeded against, or with giving nominal notice to the public such as that afforded by publication in the Federal Register. Many agencies might well maintain information sections, charged with the responsibility of determining the scope and type of notice advisable in each proceeding and of giving such notice. In general, it would seem desirable to give as broad and effective notice as possible. Agencies which are in fear of being overwhelmed by swarms of interveners should safeguard their procedure by denial of intervention petitions of those most remotely affected and by imposing limitations on the extent of participation of interveners, rather than by narrowing the scope of the notice given.

II

INTERVENTION

A. *In General*

Persons who are "necessary parties" by constitutional or statutory requirement are entitled to notice and hearing as of right. Very often, however, there are other persons, less directly affected, who may have received notice of, and desire to participate in, the administrative proceedings. Such persons may seek permission to intervene, and be permitted to participate, to a greater or less extent, under intervention procedures created by statutes or agency rules.

Very rarely does a statute provide for an absolute right of intervention to specific parties.[85] More often the statute simply provides for intervention in favor of "interested parties,"[86] or to "any person" in

[85] Federal Power Act, 49 Stat. L. 855 (1935), 16 U. S. C. (Supp. 1939), § 825a (b); Natural Gas Act, 52 Stat. L. 826 (1938), 15 U. S. C. (Supp. 1939), § 717h (b); Public Utilities Holding Company Act, 49 Stat. L. 832 (1935), 15 U. S. C. (Supp. 1939), § 79s; Motor Carriers Act, 52 Stat. L. 1238 (1938), 49 U. S. C. (Supp. 1939), § 305 (f); Interstate Commerce Act, 49 U. S. C. (1934), §§ 1 (19), 20a (6).

[86] Civil Aeronautics Act, 52 Stat. L. 1025 (1938), 49 U. S. C. (Supp. 1939), § 649; Fair Labor Standards Act, 52 Stat. L. 1064 (1938), 29 U. S. C. (Supp. 1939), § 208d; Federal Power Act, 49 Stat. L. 858 (1935), 16 U. S. C. (Supp. 1939), § 825g (a); Natural Gas Act, 52 Stat. L. 824 (1938), 15 U. S. C. (Supp. 1939), § 717 f (c); United States Tariff Commission, 46 Stat. L. 701 (1930), 19 U. S. C. (1934), § 1336 (a).

the discretion of the administrative body.[37] Some statutes make no provision for intervention,[38] but even if the statute is silent the agency may by regulation permit it.[39]

The extent of the right of intervention varies not only from agency to agency, but also within a given agency depending upon the type of proceeding. In proceedings before the Federal Trade Commission leading to cease and desist orders, the right of intervention is very limited. Rule 5 provides that "The Commission may, by order, permit intervention by counsel or in person to such extent and upon such terms as it shall deem just."[40] The complainant is not considered a party to the proceeding and ordinarily is not permitted to intervene, because the commission does not want its proceedings to assume the aspect of private controversies.[41] Persons who may be adversely affected by the commission's order may be permitted to intervene, but usually third persons are limited to the submission of briefs or oral argument amicus curiae.[42] In contrast, the National Labor Relations Board always makes the complainant a party in cases involving unfair labor practices. Any labor organization which has a contract with the respondent employer, except an alleged "company-dominated" union, is also made a party. Any person or labor organization may be permitted to intervene to such extent as the trial examiner may deem just. Any "party" has the right to call, examine, and cross-examine witnesses, to make an oral argument, to file a brief, to take exceptions to the intermediate report,

[37] Federal Trade Commission Act, 38 Stat. L. 719 (1914), 43 Stat. L. 939 (1925), 15 U. S. C. (1934), § 45; Natural Gas Act, 52 Stat. L. 829 (1938), 15 U. S. C. (Supp. 1939), § 717n (a) ("any other person whose participation may be in the public interest"); National Labor Relations Act, 49 Stat. L. 453 (1935), 29 U. S. C. (Supp. 1939), § 160 (b); Packers and Stockyards Act, 42 Stat. L. 161 (1921), 7 U. S. C. (1934), § 193 (a).

[38] Marine Inspection Act, 49 Stat. L. 1381 (1936), 50 Stat. L. 544 (1937), 46 U. S. C. (Supp. 1939), § 239; Federal Communications Act, 48 Stat. L. 1085 (1934), 47 U. S. C. (1934), § 309.

[39] Federal Communications Commission, Rules of Practice, 47 CODE FED. REG. (Supp. 1939), § 1.102. The Bureau of Marine Inspection and Navigation makes no provision for representation by the union in a hearing on charges of disobedience of seamen or by the shipowner in hearings on charges of negligence or misconduct against a ship's officer, although they are generally very much interested. That counsel representing accused seamen and officers are in the employ of the union and the owner, respectively, accomplishes in practice much the same objective as would intervention of the union or owner. S. Doc. 186, pt. 10, p. 10.

[40] Federal Trade Commission, Rules of Practice (1940), § 2.5, 5 FED. REG. 2424 (1940), formerly Rule 10, 16 CODE FED. REG. (1938), § 2.10.

[41] S. Doc. 186, pt. 6, p. 14, note 37.

[42] Id.

to take exceptions to the proposed findings and order, and to seek permission to argue orally before the board.[43]

In hearings on applications for licenses or certificates of public convenience and necessity, the pressure of competition for available facilities may bring forward many would-be interveners. The Civil Aeronautics Authority allows intervention freely in such cases. Formal intervention, with full rights of participation, is granted to competing air carriers and to cities along the proposed new route whether or not they are designated as stops in the application.[44] The Federal Communications Commission, in hearings on application for license for commercial broadcasting, formerly granted the right of intervention to anyone whose petition showed he had "a substantial interest in the subject matter." So freely was this requirement interpreted that few petitions were denied. The result of this policy has been described as follows:

> "...Not only was the record unnecessarily prolonged by the discussion of noncontroversial issues, but the evidence relevant to each issue was increased manyfold by virtue of the extended cross-examination of witnesses by each intervener. More often than not the interveners presented no affirmative evidence on the issues at hand. The major functions served by them were apparently to impede the progress of the hearing, to increase the size of the record, and to obfuscate the issues by prolonged and confusing cross-examination. Nor were these dilatory and destructive tactics confined to the hearing itself. Each intervener would customarily avail himself of his rights to take exceptions to the examiner's report, to oral argument before the Commission, and, in many cases, to appeal from the Commission's order to the District of Columbia Court of Appeals. . . . The purpose of the intervener's dilatory tactics was, in many cases, to frustrate the licensing and operation of a competing station for as long a period as possible. It was believed that the cost of maintaining proceedings before the Commission and the courts could easily be covered by the continued revenue from sponsors who might be lost if a competing station were in existence."[45]

The new rules of the Communications Commission attempt to meet this situation. Petitions for intervention must now set forth the grounds of the proposed intervention, the position and interest of the petitioner

[43] National Labor Relations Board, Rules and Regulations, Series II (1939), §§ 19, 25, 29, 33, 35, 37, 29 CODE FED. REG. (Supp. 1939), § 202.19 ff.

[44] S. Doc. 10, pt. 6, p. 10.

[45] S. Doc. 186, pt. 3, pp. 16-17, and note 75.

in the proceeding, and the facts on which the petitioner bases his claim that his intervention will be in the public interest.[46] In addition the commission's notices of hearing are carefully drawn so as to include only those issues which it desires to hear. The rules specify that the granting of intervention will not have the effect of changing or enlarging the issues specified.

In proceedings for the issuing of general rules or for making broad wage or price determinations, intervention is freely allowed, e.g., Wage-Hour hearings under the Fair Labor Standards Act, equalization proceedings before the United States Tariff Commission, and hearings on the regulations of the Department of Agriculture under the Federal Food, Drug, and Cosmetic Act. Such hearings are of the "legislative type" and the authorities are interested in gathering general and informative data. Usually the participation of the parties consists of giving evidence. Cross-examination of one party by another is by permission only and is closely limited or not allowed at all.[47]

Comparison of these few typical procedures illustrates how greatly the possibilities of intervention vary in extent even in proceedings that are similar or perhaps even identical. The variations are attributable primarily to the failure of Congress to indicate the standards to be applied, thus leaving the solution of the problem to the individual agencies. The agencies in turn, guided primarily by the need of expediting their own particular processes, have evolved empirical solutions which they can abandon if proved inexpedient. On the other hand, there is frequently sharp disagreement among investigators and writers as to what is the better procedure in given cases. Gerard Henderson, after a survey of Federal Trade Commission procedure, reached the conclusion that the complainant, who is not made a party under the commission's rules, should be made a party and required to assume the burden of litigation.[48] In contrast, the reporter for the Attorney General's Committee on National Labor Relations Board procedure concluded that the complaining union, which is now made a party under the board's rules, should not be permitted to participate in the trial stage of the board's proceedings.[49]

[46] Federal Communications Commission, Rules of Practice, 47 CODE FED. REG. (Supp. 1939), § 1.102. In addition the petition must be subscribed and verified in the same manner as an application for a license.

[47] S. Doc. 10, pt. 1, p. 79 (child labor regulations). But see S. Doc. 10, pt. 14, p. 16 (cost investigations by Tariff Commission).

[48] HENDERSON, THE FEDERAL TRADE COMMISSION 333 (1924).

[49] S. Doc. 10, pt. 5, p. 14.

B. *Requirements and Limitations Imposed on Interveners*

Intervention is a broad term which is loosely applied to all types of third-party participation in administrative proceeding, no matter how restricted the privilege may be. No real picture of the rights of third persons can be obtained without considering the restrictions that may be placed on interveners by the rules and practices of the various agencies. It is therefore pertinent to inquire into the requirements that must be met by those who seek to intervene, and the limitations that are imposed upon them.

One common requirement is that the intervention shall be timely. Motion for leave to intervene in a Civil Aeronautics proceeding must be filed not less than five days before the hearing, except for good cause shown.[50] Interveners in a Wage-Hour hearing must file a notice of intent to appear within four or five days before the hearing.[51] Petitions to intervene before the Federal Power Commission must be filed not less than five days before the day set for hearing, but leave to intervene thereafter may be granted for good cause shown.[52] Intervention in an Interstate Commerce Commission proceeding may take place during the hearing, but "if the petitioner seeks a broadening of the issues . . . the petition should be filed in season to permit service upon and answer by the parties before the hearing, thus making it possible in some instances to grant leave where otherwise it would be denied in fairness to the parties to the pending proceeding."[53] The Securities and Exchange Commission usually requests in its notices of hearing that interveners notify the commission on or before a specified date (usually three days before the hearing), but failure to notify does not preclude intervention or participation.[54] Intervention in proceedings before the Maritime Commission may be granted at any time before the close of the hearing.[55] Intervention may apparently take place at any time in Federal Trade Commission proceedings. In one

[50] Civil Aeronautics Authority, Rules of Practice, Rule 4, 14 CODE FED. REG. (Supp. 1939), § 285.4. Intervention may be allowed in the later stages of a proceeding. In one case a carrier was permitted to intervene after the release of the examiner's report. S. Doc. 10, pt. 6, p. 11.

[51] S. Doc. 10, pt. 1, p. 23.

[52] Federal Power Commission, Rules of Practice, § 1.31, as amended May 9, 1939, 18 CODE FED. REG. (Supp. 1939), § 1.31.

[53] Interstate Commerce Commission, Rules of Practice, Rule II (l) (3), 49 CODE FED. REG. (1938), § 1.2 (l) (3).

[54] S. Doc. 10, pt. 13, p. 61, note 127.

[55] S. Doc. 186, pt. 4, p. 8.

case the commission allowed intervention subsequent to issuing a cease and desist order, and reopened the case.[56]

It seems entirely reasonable for an agency to require some notice of intervention in advance of the hearing, especially when it is in the interest of other parties and of the agency itself in preparing for the hearing. On the other hand, there seems to be nothing objectionable in permitting intervention at a later stage as long as it does not put the other parties to an unfair disadvantage. Furthermore, as the hearing becomes less adversary and more quasi-legislative in nature, the need of giving an advance notice of intention to participate would seem to diminish.

A second commonly-met requirement stipulates that the application for the privilege of intervention conform to a prescribed form. The method of securing permission to intervene ranges from the informal entry of appearance to a formal petition. The rules of the Civil Aeronautics Authority permit third persons to "appear" to present relevant evidence or memoranda, but "formal intervention" is granted only on motion.[57] "Appearances" may be entered in Interstate Commerce proceedings for investigation and suspension, in general investigations, and in proceedings for the issuance of a certificate of public convenience and necessity without applying for leave to intervene.[58] A disadvantage of the informal "appearance" is the lack of warning to the other parties and to the examiner who is conducting the hearing. They are not informed of the number of interveners, the nature of their interest, or the issues in which they are interested.

A person wishing to appear at a Wage-Hour hearing must file a notice of intention to appear which shall contain (1) his name and address, (2) the name and address of the person he represents, (3) whether he is for or against the determination, and (4) the length of time requested for his presentation.[59] These conditions are obviously based on a desire to effect an orderly development of the evidence at the hearing, rather than on any wish to limit the parties.

Intervention before the Federal Trade Commission is accomplished by application in writing setting forth the grounds on which the inter-

[56] Freer, "Federal Trade Commission Procedure and Practice," 8 GEO. WASH. L. REV. 316 (1940).

[57] Civil Aeronautics Authority, Rules of Practice, Rule 4, 14 CODE FED. REG. (Supp. 1939), § 285.4.

[58] Interstate Commerce Commission, Rules of Practice, Rule II (l) (5), 49 CODE FED. REG. (1938), § 1.2 (l) (3).

[59] S. Doc. 10, pt. 1, p. 23.

vener claims to be interested.[60] The National Labor Relations Board makes a similar requirement.[61] The most highly formalized requirements for intervention petitions are those of the Securities and Exchange Commission and the Federal Communications Commission. The new requirements of the Federal Communications Commission for intervention petitions have already been mentioned.[62] A person wishing to intervene in a Securities and Exchange Commission proceeding must make written application showing he possesses or represents a legitimate interest which is or may be inadequately represented in such proceeding, and no person will be permitted to intervene if the commission finds that his participation would not be in the public interest, or for the protection of investors or consumers. The application must be accompanied by an affidavit setting forth in detail the intervener's interest and stating whether the position which he proposes to take with respect to the pending matter is one already taken by other parties to the proceeding.[63]

The formal requirements of securing the right of intervention seem, in general, to be somewhat related to the freedom with which intervention is allowed. Where it is granted almost as a matter of course, mere entry of appearance may be sufficient. When intervention is restricted, the agency is likely to require a formal petition stating facts which will enable it to decide whether or not to permit intervention.

Turning now to limitations upon the activities of interveners, we find that administrative agencies may grant intervention rights and at the same time impose limitations on the extent and method of participation. The original parties to the proceeding may possess the right to subpoena witnesses, examine them, cross-examine opposing witnesses, enter objections to questions, file briefs, take exceptions to the intermediate report and the proposed findings, and present oral argument. But an intervener does not necessarily enjoy the same rights. Many agencies may grant limited intervention rights, permitting only one or a limited number of these methods of participation.

[60] Federal Trade Commission, Rules of Practice (1940), § 2.5, 5 FED. REG. 2424 (1940), identical to Rule X of the Rules of 1938, 16 CODE FED. REG. (1938), § 2.10.

[61] National Labor Relations Board, Rules and Regulations, Series II (1939) § 19, 29 CODE FED. REG. (Supp. 1939), § 202.19. The original of such motion must be signed and sworn to by the person filing, and copies must be served on each of the other parties.

[62] Supra, at note 46.

[63] Securities and Exchange Commission, Rules of Practice (1938), Rule XVII (b), 17 CODE FED. REG. (Supp. 1938), § 201.17 (b).

For example, the Civil Aeronautics Act provides that "it shall be lawful to include as parties, or to permit the intervention of, all persons interested in or affected by the matter under consideration."[64] But in its rules the board has provided both for "formal intervention" with full rights of parties, and for "appearances." A person who "appears" has the right to present evidence and suggest questions to be propounded by counsel for the board to witnesses called by other persons. With the consent of counsel for the board such third persons may also cross-examine witnesses directly and submit memoranda of their views and opinions.[65] It has been ruled that a person who merely "appears" has no standing to object to questions addressed to witnesses, nor will he ordinarily be served with a copy of the examiner's report or be permitted to file exceptions to it.[66]

A similar situation exists in the practice of the Federal Power Commission, there without the aid of specific statute or regulation. The acts provide that "the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party" any person whose participation may be in the public interest.[67] The rules of the commission provide for petitions to intervene.[68] In practice, however, the commission may not permit full intervention with all the privileges and rights of a party. It may grant the right to participate merely to the extent of introducing relevant evidence, presenting argument and filing briefs, or it may limit the applicant to an appearance amicus curiae. There has been a tendency to limit the intervention of persons on whom the determination will not fall directly to participation in the hearing only, without formally giving them a status as parties. Since only a "party" may apply for a rehearing or appeal the order to the courts, this is a serious limitation.[69]

The National Labor Relations Act provides that in addition to the respondent "any other person may be allowed to intervene in the pro-

[64] 52 Stat. L. 1025 (1938), 49 U. S. C. (Supp. 1939), § 649.

[65] Civil Aeronautics Authority, Rules of Practice, Rule 4, 14 CODE FED. REG. (Supp. 1939), § 285.4.

[66] S. Doc. 10, pt. 6, pp. 9-10.

[67] Federal Power Act, 49 Stat. L. 858 (1935), 16 U. S. C. (Supp. 1939), § 825g (a); Natural Gas Act, 52 Stat. L. 829 (1938), 15 U. S. C. (Supp. 1939), § 717n (a).

[68] Federal Power Commission, Rules of Practice, 18 CODE FED. REG. (Supp. 1939), § 1.31. A former provision that if leave to intervene was granted, the petitioner thereby became a party to the proceeding, 18 CODE FED. REG. (1938), § 1.31, is omitted in the amendment of May 9, 1939.

[69] S. Doc. 10, pt. 12, pp. 33-34.

ceeding and to present testimony."[70] Section 19 of the rules provides for the intervention of any person or labor organization "to such extent and upon such terms" as the regional director or the trial examiner shall deem just.[71] "Any party" has the right to call and examine witnesses, to make an oral argument at the close of the hearing, to file a brief, to take exceptions to the intermediate report, the proposed findings of fact, proposed conclusions of law, and the proposed order of the board, and to seek permission to argue orally before the board.[72] The statute and section 19 of the rules would seem to authorize the granting of a limited intervention in the discretion of the agency, without full rights of parties as set out in other sections of the rules. In an unfair labor practice proceeding against the Montgomery Ward plant at Kansas City, Missouri, directed at the disestablishment of the alleged "company-dominated" Union of Ward Employees, the union filed a petition of intervention. The trial examiner granted the motion on the following conditions:

> ". . . That the Union of Ward Employees shall have the right to be represented in this proceeding by counsel who may, with other counsel in the proceeding, sit at the counsel table and take notes, but shall not be permitted to cross-examine witnesses or to adduce any evidence until the Board and the Respondent have completed their case. If at that time the intervener wishes to adduce additional evidence beyond that which has already been introduced in the proceeding in support of its contention that it is not a company dominated Union, or for such other purposes as may be relevant at that time, the Union of Ward Employees will then have an opportunity to produce such evidence and to participate in the proceedings with relation to such evidence."

Upon objection by counsel for the union that cross-examination of witnesses of the respondent and the board was essential to its right of participation in the hearing, the motion to intervene was denied. After lengthy argument the examiner modified his ruling on the motion as follows:

> ". . . the motion to intervene is granted on condition that the right of counsel for the intervener to cross-examine, introduce evidence and otherwise participate in the proceeding, shall be limited to such issues which are concerned with the . . . charge that the

[70] 49 Stat. L. 453 (1935), 29 U. S. C. (Supp. 1939), § 160 (b).

[71] National Labor Relations Board, Rules and Regulations, Series II (1939), § 19, 29 CODE FED. REG. (Supp. 1939), § 202.19.

[72] Id., §§ 25, 29, 33, 35, 37.

Union of Ward Employees is a company dominated union; and with the further understanding that the right is reserved by the Examiner to curtail any cross-examination by the intervener if in his opinion such cross-examination is repetition or unduly prolonged or for any other reason either unnecessary or improper; and the same limitation shall apply to the right to introduce evidence; that is, the right to introduce evidence is limited to such evidence as is not repetitious and will not unnecessarily and improperly prolong the proceeding."

The examiner exercised rather freely throughout the hearing his reserved right to curtail cross-examination by the union counsel. On petition by the company to review the cease and desist order of the board, the union intervened. One of the main grounds of the court's decision, setting aside the order of the board because of bias of the examiner, was:

". . . a distinct hampering of inquiry on the part of the company and the intervener. One instance of this was repeated refusal to allow answers as to membership in the C.I.O. With the issues of fact as they took form here in the evidence, these exclusions were plainly harmful to the company and the intervener in the development of their theories as to the facts. This observation is not made as concerned with an erroneous ruling on introduction of evidence but as, possibly, having a bearing upon the partiality of the examiner." [73]

The *Montgomery Ward* decision does not bear directly upon the right of the examiner to limit intervention in a Labor Board hearing, but it does demonstrate one effect that undue limitation may have when the question of denial of a fair hearing is before the court.

The rules of the Federal Trade Commission and the Securities and Exchange Commission provide for the admission of interveners subject to the terms prescribed by the commission.[74] Where a person will be adversely affected by its order, the Federal Trade Commission may permit intervention with full rights of parties. Petitioners to whom intervention is denied are permitted to file briefs or to argue orally

[73] Montgomery Ward v. National Labor Relations Board, (C. C. A. 8th, 1939) 103 F. (2d) 147 at 156. The trial examiner's rulings, quoted above, are set out in the margin of the opinion, pp. 149-150.

[74] Federal Trade Commission, Rules of Practice (1940), § 2.5, 5 FED. REG. 2424 (1940). (The commission will permit intervention "to such extent and upon such terms as it shall deem just.") Securities and Exchange Commission, Rules of Practice (1938), § 17 (a), 17 CODE FED. REG. (Supp. 1938), § 201.17 (a).

amicus curiae, but they are not considered parties.[75] The Securities and Exchange Commission grants full rights of participation to interveners, but sometimes denies intervention, while affording the opportunity to be heard and to examine and cross-examine witnesses. This form of participation occurs most frequently under the Holding Company Act, which gives an appeal to persons other than parties.[76]

Some agencies, on the other hand, have seemingly not recognized the possibility of limiting participation, but instead they grant all interveners full rights of parties. The Federal Communications Commission, the Interstate Commerce Commission, and the Maritime Commission pursue this practice.[77]

Another way in which participation of third parties is sometimes limited is by permitting intervention only on those particular issues in which the interveners are most directly interested. The National Bituminous Coal Commission has utilized this procedure. In Docket 15 the commission was engaged in fixing prices on a national scale with hundreds of parties who had only local interests. It attempted to require parties to plead their specific interests by directing them to set forth concise written statements of the facts they expected to establish. Unfortunately, however, parties who wished to range broadly through the record pleaded with a wide sweep, and those who pleaded more narrowly were nevertheless permitted to examine indefinitely on matters related only remotely to their interests in the proceeding, so that little was accomplished by the provision.[78] Another effort to limit intervention to specific issues was put forth in the *Montgomery Ward* case.[79] The issues before the board were supported by allegations of restraint of the C. I. O. union, improper discharge of an employee, improper refusal to hire a certain individual, and domination of the Union of Ward Employees. On motion to intervene by the Union of Ward Employees, its participation was limited by the examiner to the issue of domination.[80]

Restriction of intervention to the issues in which the intervener

[75] S. Doc. 186, pt. 6, p.14.

[76] S. Doc. 10, pt. 13, p. 61.

[77] E. g., Interstate Commerce Commission, Rules of Practice, Rule II (l) (4), 49 CODE FED. REG. (1938), § 1.2 (l) (4): "If leave is granted the petitioner thereby becomes an intervener and a party to the proceeding." And see Chicago Junction case, 264 U. S. 258 at 268, 44 S. Ct. 317 (1924).

[78] S. Doc. 10, pt. 10, pp. 12-13.

[79] Montgomery Ward v. National Labor Relations Board, (C. C. A. 8th, 1939) 103 F. (2d) 147, discussed supra.

[80] See also In Matter of Lennox Shoe Co., 4 N. L. R. B. 372 (1937).

is directly interested seems a desirable way of limiting the size of the record in a hearing without being unfair to the intervener. If his interest is in fact restricted in scope, there is no reason why he should be permitted to introduce evidence or cross-examine on issues in which he is no more interested than would be a stranger to the proceeding. This form of limitation seems preferable to restrictions on the method of participation. The latter is a device that is difficult of application, and raises the question how far the administrative agency may go in restricting the participation of third persons before it reaches the point where it may be charged that they have not been fairly and adequately heard.

Another fairly common limitation is the requirement that intervention shall not broaden the issues beyond those raised by the original parties. The rules of the Interstate Commerce Commission provide: "Leave will not be granted except on allegations reasonably pertinent to the issues already presented and which do not unduly broaden them."[81] It has been held that an intervener will not be permitted to go beyond the issues raised in the original complaint by putting in issue rates from points other than those named in the complaint.[82] But in reparations proceedings persons seeking reparations not covered in the complaint are permitted to intervene more freely. "The controlling consideration . . . is as to whether the carriers are placed upon proper notice of the issues they are called upon to defend."[83]

Where the purpose of the third persons seeking to broaden the issues is merely to secure a hearing of a dispute which could be litigated in a separate proceeding, the agency might well refuse, at its convenience, to allow it. On the other hand, if the decision of the agency will foreclose the interest of the third party seeking to intervene and broaden the issues, the agency should exercise its discretion with more care. A much litigated question has been the right of the Federal Communications Commission to deny the intervention petitions of radio broadcasting stations in the same locality as that proposed to be served by the applicant for a new license. These petitions seek to broaden the hearing to include the so-called "economic issue."

Under the 1935 rules of the commission any person whose petition disclosed a "substantial interest in the subject matter of the hearing"

[81] Interstate Commerce Commission, Rules of Practice, Rule II (l) (3), 49 CODE FED. REG. (1938), § 1.2 (l) (3).

[82] 4 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 193 (1937).

[83] Id.

could intervene.[84] Station WHB, a Kansas City, Missouri, station operating in the daytime only, filed an application for modification of its license to permit operation in the evening hours also. Upon assignment of the application for hearing, the Jenny Wren Company, operating on unlimited time in Leavenworth, Kansas, filed a petition for intervention. It alleged that the company had operated its station since 1927, that it was in severe and active competition with four other stations in the Kansas City area for advertising revenue, high-grade program material, and listening audience, and that its revenues from advertising were barely sufficient to enable it to maintain operation in accordance with standards required by the commission.[85] The petition prayed that the notice of hearing be amended to include a determination of the "effect of the proposed operation upon the public service rendered by existing stations serving the Kansas City area." Intervention was denied. The Jenny Wren Company then sought an injunction against the granting of the application by the commission or the holding of any hearing without an opportunity for it to participate. The Court of Appeals of the District of Columbia, in *Sykes v. Jenny Wren Co.*,[86] ordered the bill for injunction dismissed on the ground that the plaintiff had an adequate remedy at law in the appeal from the commission's final order provided by the statute, and that this was the exclusive remedy.

Justice Groner, in a dissenting opinion, characterized this remedy as "the equivalent of locking the stable door after the horse is gone," and called the action of the commission arbitrary and in direct conflict with its own rules and regulations.[87] He argued that where the granting of a license to one applicant would so seriously diminish the profits of an existing station as to destroy the privilege which it enjoyed, notice and hearing are required, and that the economic effect of the proposed station on the other stations in the locality, together with the resulting effect on the public interest, convenience, and necessity, was a question which the commission, under the statute, was bound to notice.

In several cases subsequent to the *Jenny Wren* case, the commission granted intervention on the economic question and decided it

[84] Federal Communications Commission, Rules and Regulations (1935), § 105.19, 47 CODE FED. REG. (1938), § 1.151.

[85] Sykes v. Jenny Wren Co., (App. D. C. 1935) 78 F. (2d) 729, cert. den. 296 U. S. 624, 56 S. Ct. 147 (1935).

[86] Id.

[87] Id. at 735.

adversely to the interveners. In these cases the Court of Appeals of the District of Columbia has accepted the findings of the commission, and has sustained the orders.[88] In *Sanders Bros. Radio Station v. Federal Communications Commission*,[89] however, the Court of Appeals reversed the order of the commission for failure to make findings on the economic question and held that the granting of an application for the new station in the absence of such findings was arbitrary and capricious. On appeal the Supreme Court reversed the lower court and held that economic injury to an existing station is not in and of itself an element which the commission must weigh and as to which it must make findings.[90] At the same time the Court held that the commission must consider the effect that competition would have on the ability of both stations to render adequate service to the public, and that the existing station had the requisite standing to appeal as an "aggrieved person" within the meaning of the act, not for the purpose of redressing a private injury, but as the instrument of redressing an injury to the public service.[91]

The economic issue almost inevitably rises under the new hearing rules of the commission, since now the commission designates only such issues for hearing as the law department thinks desirable.[92] If, upon application for a new license, the department does not designate the economic issue for a hearing, what are the rights of competing stations? According to the *Sanders* case, the effect on the public of competition between the proposed station and the existing stations is one of the factors that the commission must consider, and existing stations may appeal from the decision granting the license. It does not follow, however, that the existing stations must be permitted to intervene and the issues broadened to include the economic issue. There is no right of the existing stations to be protected from competition; apparently the public interest is sufficiently vindicated by the appeal. If, on appeal, the court finds that the granting of a new license by the commission will work economic ruin and impair the service to the public, it may reverse the decision of the commission. This remedy is largely illusory,

[88] Great Western Broadcasting Assn. v. Federal Communications Commission, (App. D. C. 1937) 94 F. (2d) 244; Pulitzer Pub. Co. v. Federal Communications Commission, (App. D. C. 1937) 94 F. (2d) 249.

[89] (App. D. C. 1939) 106 F. (2d) 321.

[90] Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470, 60 S. Ct. 693 (1940).

[91] Id., 309 U. S. at 477.

[92] S. Doc. 186, pt. 3, 15.

however, since the court is bound by the findings of the commission if supported by substantial evidence. As Justice Groner pointed out in his dissenting opinion in the *Jenny Wren* case:

> ". . . To contend, therefore, that the petitioner has an adequate remedy, when it is bound by facts found without its intervention and without an opportunity on its part to be heard, is to effectively foreclose its rights before they are known and render an appeal to this court . . . wholly bootless."[93]

In a recent case the commission assigned the application of station KMAC of San Antonio for hearing on the issue of electrical interference. The Sunshine Broadcasting Company, owners of station KTSA in San Antonio, sought to intervene and enlarge the issues to include the economic question. The petition was denied. The Sunshine Company thereupon sought to enjoin the commission from granting the application of KMAC or holding a hearing thereon without participapation by the plaintiff. The court denied the injunction, saying that the plaintiff had no legal or equitable right to be heard on the economic question, citing the *Sanders* case, and that its only remedy was by appeal. On appeal it might show that the commission's disposal of the economic question was such an abuse of discretion as to amount to an error of law.[94]

The history of the "economic question" in Federal Communications Commission practice illustrates one of the most urgent, and at the same time one of the most difficult, problems in representation of third parties in administrative proceedings, namely the lack of an adequate definition of the necessary "interest." Congress has delegated powers to the commission under the broad standard of "public interest, convenience and necessity." If the commission had at an early stage taken a position on the participation of competing stations on the economic question, either by rule-making or by denial of all such intervention petitions, much lost motion would have been saved. It is obviously impossible for Congress to define in advance the interest required for intervention of third persons in the proceedings of the administrative agencies it establishes. It may even be undesirable for the agencies to attempt to do it themselves by rule-making. Nevertheless, each agency should endeavor to indicate as soon and as definitely as possible, the nature of the interest required of interveners. Naturally, there must

[93] Sykes v. Jenny Wren Co., (App. D. C. 1935) 78 F. (2d) 729 at 735.
[94] Sunshine Broadcasting Co. v. Fly, (D. C. D. C. 1940) 33 F. Supp. 560.

be variations, according to the substantive law administered by the agencies, but the experience of other agencies can be drawn upon where applicable.

Intervention serves the same purpose, in general, as does any hearing. It affords the agency information helpful in reaching an enlightened decision; it discourages arbitrary action; it permits the individual to confront his opponents; and it enables him to present his case in its most favorable light to the authority which makes the decision. All of these factors should be taken into consideration by the agency in acting on petitions for intervention. Even if it feels that the hearing of the parties most directly proceeded against will sufficiently inform it, intervention may still serve the other purposes. Unnecessary prolongation of the record can be avoided by a more careful conduct of the hearing, and the imposing of limitations on the intervener's participation.

III

THIRD PARTIES IN THE APPEAL

When the statute provides for an appeal by any "party" to an administrative proceding, the question arises who is a "party" for the purposes of appeal. Anyone who has been permitted to intervene and has been given full rights of original parties is clearly entitled to appeal. Where, however, the intervention has been limited, the right to appeal is not so clear. For instance, the Federal Power Act provides that "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review. . . ."[95] The commission frequently admits persons to hearing without giving them formal status as parties. It is questionable whether they have standing to seek judicial review, and if not, then the question arises as to how far the commission may go in thus narrowing the field of possible applicants for judicial redress.[96]

Some statutes provide for an appeal by *any* "interested" or "aggrieved" person, without requiring that the appellant have been a party to the administrative proceeding. In *Red River Broadcasting Company v. Federal Communications Commission*,[97] it was held, however, that a person aggrieved by an order had no standing to appeal

[95] 49 Stat. L. 860 (1935), 16 U. S. C. (Supp. 1939), § 825l (b).

[96] S. Doc. 10, pt. 12, p. 33.

[97] (App. D. C. 1938) 98 F. (2d) 282, cert. den., 305 U. S. 625, 59 S. Ct. 86 (1939).

where he had actual notice of the administrative hearing and had not invoked the administrative remedies of intervention or petition for rehearing provided by the rules of the commission. A legislative enactment of this judicial doctrine of exhaustion of administrative remedies is frequently found in the statutes. In the Public Utility Holding Companies Act, for instance, it is provided that an appeal may be taken by any person aggrieved, but "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure to do so."[98]

When the statute provides that any "interested" person may appeal, we are faced with the question what is the necessary interest. The Judicial Code formerly provided:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their own counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party. . . ."[99]

In the *Chicago Junction Case*[100] the Interstate Commerce Commission had authorized the purchase of Chicago terminal lines by the New York Central. Six competing railroads, interveners in the proceeding, filed suit for an injunction against the order. The defendant contended that the plaintiffs had no interest to entitle them to challenge the order. The Court sustained the interveners' right to sue, and pointed out, among other things, that the granting of intervention in the proceeding before the commission was a finding by the commission that the plaintiffs had an interest.

Several agencies in their rules have attempted to circumvent this result of granting intervention. For example, the rules of the Civil Aeronautics Authority provide that "Interventions herein are for administrative purposes, and no decision to grant leave to intervene shall be deemed to constitute a finding or determination that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to demand review of such order by

[98] 49 Stat. L. 834 (1935), 15 U. S. C. (Supp. 1939), § 79x (a).

[99] Judicial Code, § 212, 36 Stat. L. 1150 (1910), 28 U. S. C. A. (1927), § 41 (27), historical note.

[100] 264 U. S. 258, 44 S. Ct. 317 (1924).

the circuit courts. . . ."[101] The Federal Communications Commission's rules state that "The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding."[102]

In addition to the appeal from the final order of the administrative agency discussed above, there is a possibility of court review of the order of the agency denying permission to intervene, either by injunction or appeal from the order itself. As was illustrated by the *Jenny Wren* case,[103] however, the statutory appeal by "any aggrieved person" may be held to be the exclusive remedy, and prevent resort to the injunction. Appeal from the order will probably be denied on the grounds that the order is interlocutory and that there can be no appeal until entry of the final order.[104]

Out of the conflicts, gaps and uncertainties in the handling of third-party interests in administrative proceedings at the present time, it is possible to form a few generalizations. First, constitutional requirements, although ever present to guarantee fair play in a broad sense, are not likely to provide any considerable amount of detail in the form of specific rules concerning notice and hearing to third parties, save in extreme cases. Representation of third persons will depend largely upon the statutes and rules of practice of the agencies. Second, the present statutes vary in their provisions for third parties, ranging all the way from the few that specifically require notice and hearing to named third persons, to those which are completely silent on the subject. Third, many agencies, by regulation or practice, give wide notice and are very liberal in admitting third parties, but other agencies, fearing that they will be overwhelmed by persons wishing to participate in their proceedings, have attempted in various ways to restrict participation. The wisdom, and even the fairness, of some of these efforts is questionable.

Finally, there is an urgent need for a comparative examination of the procedures of the administrative agencies, for the purpose of study-

[101] Civil Aeronautics Authority, Rules of Practice, Rule 4, 14 CODE FED. REG. (Supp. 1939), § 285.4.

[102] Federal Communications Commission, Rules of Practice, 47 CODE FED. REG. (Supp. 1939), § 1.102.

[103] Sykes v. Jenny Wren Co., (App. D. C. 1935) 78 F. (2d) 729, discussed supra at note 86.

[104] GELLHORN, ADMINISTRATIVE LAW—CASES AND COMMENTS 518 (1940).

ing the prevailing methods of affording hearings both to "necessary" parties and to the various classes of interveners, to the end that some improvement may be made in the handling of the numerous third-party interests in administrative proceedings. Such study could best be carried on by some impartial group, such as the oft-suggested Office of Administrative Procedure. The desired improvement could be brought about by enactment of a statutory code of procedure, by amendment of specific statutes, or, most simply of all, merely by amendment of the rules of procedure by the agencies themselves. In the meantime, there is some satisfaction in the thought that the divergent practices of the present form a valuable proving ground for the procedures that will be adopted in the future.