

making hearing becomes apparent. In addition, agency rule making has other advantages over adjudication.<sup>86</sup> First, the agencies are generally staffed with experts in the field of regulation in which they operate, an expertise seldom enjoyed by the courts.<sup>87</sup> Second, the agencies, because of the wide discretion given to them as regulatory bodies, have a more comprehensive range of remedies available at their disposal.<sup>88</sup> Third, judicial intervention could severely limit the discretion needed by the agencies to provide supervisory and managerial functions. And, finally, the ability of the agency to act informally makes it a more suitable forum for eliciting the information needed to formulate broad policy judgments, such as the degree of conglomerate media ownership that should be permitted.<sup>89</sup> Judge Tamm's observations as to the need for judicial scrutiny of agency rules, however, are not without merit. If representatives of the public are to have a meaningful right of intervention on matters of excess concentration of ownership, their right should not depend on the FCC changing its own pleading rules but rather should be guaranteed by the courts.<sup>90</sup> The *Hale* court, then, by balancing the competing interests of agency discretion and individual rights found in this instance that the practical effects and inherent advantages of rulemaking, especially at a time when the rules were being reviewed, would better resolve the issues of ownership concentration of broadcast media than would agency adjudication.

## V. ANCILLARY MATTERS

### *Intervention in Agency Proceedings*

In *Firestone Tire & Rubber Co.*<sup>1</sup> the Federal Trade Commission permitted a consumer-interest organization to intervene in forma pauperis in an adjudicatory proceeding involving charges of deceptive advertising with respect to the price and safety of Firestone tires. The

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86. See generally Fuchs, *The New Administrative State: Judicial Sanction for Agency Self-Determination in the Regulation of Industry*, 69 COLUM. L. REV. 216 (1969) (discussion of the various advantages of agency determination over court adjudication).

87. See Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 382 (1968).

88. See *id.* at 380.

89. See *id.* at 387.

90. 425 F.2d at 565-66; Fuchs, *supra* note 86.

1. 27 AD. L.2d 877 (FTC 1970).

organization, Students Opposing Unfair Practices, Inc. (SOUP), alleged that a proposed cease and desist order was inadequate to protect the public interest but was denied permission to intervene by the hearing examiner. The Commission allowed an interlocutory appeal from this decision<sup>2</sup> and granted SOUP permission to intervene for the limited purposes of exercising reasonable discovery rights, presenting evidence on the adequacy of the cease and desist order, and presenting briefs and oral argument.<sup>3</sup>

Intervention in administrative proceedings is controlled in four ways—by statutory provisions, agency rules, agency practices, and judicial decisions.<sup>4</sup> The Administrative Procedure Act provides that a “party” to an agency proceeding includes “a person or agency . . . properly seeking and entitled as of right to be admitted as a party”<sup>5</sup> and permits the participation of “interested parties” in adjudicatory proceedings “when time, the nature of the proceeding, and the public interest permit.”<sup>6</sup> To the extent that a controversy is not resolved by consent, such a party is entitled to a full hearing.<sup>7</sup> “Interested persons,” as distinct from “parties,” are permitted to appear before an agency to present evidence or request determination of an issue “so far as the orderly conduct of public business permits.”<sup>8</sup> The statutory provision governing intervention before the FTC is even less precise, indicating only that “upon good cause shown” one may be permitted by the Commission to intervene.<sup>9</sup> The applicable rule promulgated by the agency indicates only that the hearing examiner or Commission may permit intervention upon such terms as “provided by law or as otherwise may be deemed proper.”<sup>10</sup> The statutory provisions and regulations governing intervention before other agencies illustrate the lack of uniformity among the agencies in this area. The Communications Act permits “any party in interest”<sup>11</sup> to file a

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2. *Id.* at 880.

3. *Id.* The case was remanded to the hearing examiner for further proceedings.

4. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 8.11, at 564 (1958) [hereinafter cited to as DAVIS].

5. 5 U.S.C. § 551(3) (Supp. V, 1970).

6. *Id.* § 554(c)(1).

7. *Id.* § 554(c)(2). *See also* section 555(b), which provides that a party may appear in person or by counsel and section 556(d), which permits a party to present evidence and conduct cross-examination.

8. *Id.* § 555(b).

9. 15 U.S.C. § 45(b) (1964). *See also* *FTC v. Klesner*, 280 U.S. 19, 26, n.2 (1929).

10. 16 C.F.R. § 3.14 (1970).

11. 47 U.S.C. § 309(d)(1) (1964).

petition to oppose a license application before the Federal Communications Commission, but the Commission is authorized to dispose of such a petition without a hearing if it raises no "substantial and material questions of fact."<sup>12</sup> If such a question is raised, however, a hearing must be held.<sup>13</sup>

Detailed rules regarding intervention have also been promulgated by the Federal Power Commission. The statutory provision authorizing intervention gives the FPC complete discretion to admit parties and specifically includes "any representative of interested consumers" on the list of possible parties.<sup>14</sup> The regulations provide that any party intervening under a right conferred by statute, representing interests which are not already adequately protected, or representing the public interest will be granted status as a party or be permitted to intervene in such limited fashion as is necessary or appropriate.<sup>15</sup> The statute governing proceedings of the Civil Aeronautics Board mandates only that they be in conformance with the APA and that any person may appear before the Board and be heard in person.<sup>16</sup> The Board has, however, promulgated detailed rules regarding intervention.<sup>17</sup> At hearings other than enforcement proceedings, any person may appear to present evidence and, with the consent of the hearing examiner, cross-examine witnesses.<sup>18</sup> Formal intervention as a party is permitted only in cases to be decided upon an evidentiary record after notice and hearing. Status as a party is granted to those having a statutory right to become a party but may

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12. *Id.* § 309(d)(2). A material question of fact is one which is material to a determination of whether the public interest, convenience, or necessity will be served by the granting of the application in question. COMMUNICATIONS ACT AMENDMENTS, H.R. No. 1800, 1960 U.S. CODE CONG. & ADM. NEWS 3516, 3520 (June 13, 1960).

13. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1006-07 (D.C. Cir. 1966); 47 U.S.C. § 309(e) (1964). The hearing examiner may also grant the right to intervene as a party to any person without such a showing, 47 C.F.R. § 1.223(b) (1970), and the Commission's rules specifically provide that no person will be denied the right to intervene for the limited purpose of giving testimony for lack of sufficient interest to justify his intervention as a party. *Id.* § 1.225(b).

14. 16 U.S.C. § 825g(a) (1964).

15. 18 C.F.R. §§ 1.8(b),(f)(2) (1970). When the Commission does permit intervention it normally does so without conceding that the party in question is aggrieved in fact or otherwise. See, e.g., Arizona Power Authority, F.P.C. Project 2702 (Nov. 18, 1970); Tennessee Gas Pipeline Co., F.P.C. No. RP 71-6 (Nov. 18, 1970).

16. 49 U.S.C. § 1481 (1964).

17. 14 C.F.R. § 302.14 (1970) (participation in hearing cases by persons not parties); *id.* § 302.15 (formal intervention in hearing cases).

18. *Id.* § 302.14(b). Such persons may also file briefs.

also be granted to any person whose intervention will be “conductive to the ends of justice” and will not unduly delay the proceedings.<sup>19</sup>

In addition to the specific requirements of the agency in question, an intervenor must also meet several prerequisites of more general applicability. A petition to intervene must be timely filed,<sup>20</sup> although agencies normally retain discretion to permit late filing if good cause for the delay is shown.<sup>21</sup> Intervention may be denied altogether if the interest of the intervenor is already adequately represented<sup>22</sup> or if the information he is seeking to provide would be merely duplicative of materials presented by parties already participating.<sup>23</sup> Similarly, the evidence presented and issues raised by the intervenor must be pertinent and material to the matters being considered.<sup>24</sup> If permitting intervention will lead to an undue broadening of the issues or delay the proceedings for other reasons, it may also be refused.<sup>25</sup> In addition, agencies routinely inquire whether the intervenor’s participation in the proceedings will be in the public interest.<sup>26</sup> Thus, intervention as a party requires the showing of a right to intervene, in terms of both the possible resultant injury and the provisions of an applicable statute; a showing that the evidence to be presented and issues to be raised are material to those being considered in the proceeding; and a showing that the participation of the intervenor will not be duplicative. With the exception of the adjustments necessary to assure that

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19. *Id.* § 302.15(a). In granting intervention the Board stipulates, as does the Federal Power Commission, that it does not thereby concede that the intervenor has such a substantial interest in the matter in question as to entitle him to judicial review of any Board decision. *Id.* § 302.15(d). See *Palisades Citizen’s Ass’n, Inc. v. CAB*, 400 F.2d 188 (D.C. Cir. 1969) (Formal intervention denied, but informal participation permitted).

20. See, e.g., *Easton Util. Comm’n v. AEC*, 424 F.2d 847, 851 (D.C. Cir. 1970); *Smith & Solomon Trucking Co. v. United States*, 255 F. Supp. 243, 250 (D.N.J. 1966) (I.C.C.); 14 C.F.R. § 302.15(c)(2) (C.A.B.); 18 C.F.R. § 1.8(d) (1970) (F.P.C.); 47 C.F.R. § 1.223(b) (1970) (F.C.C.).

21. See, e.g., 14 C.F.R. § 302.15(c)(2) (1970) (C.A.B.); 18 C.F.R. § 1.8(d) (F.P.C.); 47 C.F.R. § 1.223(d) (1970) (F.C.C.). When tardy intervention is permitted, the intervenor’s participation may be limited so as not to delay the completion of the proceedings. *San Antonio v. CAB*, 374 F.2d 326 (D.C. Cir. 1967); *Wilson & Co., Inc. v. United States*, 335 F.2d 788, 795-96 (7th Cir. 1964).

22. *San Antonio v. CAB*, 374 F.2d 326 (D.C. Cir. 1967); *Duke Power Co.*, 24 AD. L.2D 1057, 1059 (AEC 1968).

23. *American Tel. & Tel. Co.*, 20 AD. L.2d 78, 81 (F.C.C. 1966).

24. See, e.g., *Martin-Trigona v. FCC*, 432 F.2d 682, 683 (D.C. Cir. 1970).

25. 1 DAVIS § 8.11, at 564.

26. See, e.g., *National Capital Airlines, Inc. v. CAB*, 419 F.2d 668, 676 (D.C. Cir. 1969), *cert. denied*, 398 U.S. 908 (1970); *First Nat’l Bank Corp.*, 27 AD. L.2D 82-84 (Fed. Res. Bd. 1970).

administrative proceedings remain manageable,<sup>27</sup> these standards are similar to those required to show standing for judicial review. Indeed, cases concerning the question of standing to seek judicial review have been used interchangeably with those resolving questions of standing to intervene.<sup>28</sup> In the law of intervention, as with the law of standing, the trend has been away from the "closed concept" of a legally protected interest as the basis for the right to intervene to such criteria as potential economic injury, with respect to competitors, or representation of the public interest by persons aggrieved in fact.<sup>29</sup>

The courts have applied two distinct theories of standing to obtain judicial review in order to reach the question whether intervention in the "public interest" should be permitted in an agency proceeding. The first, the "private-attorney general" theory, is invoked when a specific statute providing for judicial review is applicable<sup>30</sup> and permits one who has been adversely affected by the decision of the administrative agency in question to bring suit to vindicate the public interest.<sup>31</sup> Competitors and others not generally considered public-interest groups who are aggrieved have been granted standing on these grounds.<sup>32</sup> Recently, standing has also been granted on the basis of the private attorney general concept even though a specific review statute was not in question on the theory that section 10(a) of the APA<sup>33</sup> was applicable in the absence of such a statute.<sup>34</sup> The second theory of standing utilized by the courts in intervention cases is applied when no specific statute providing for judicial review is applicable.<sup>35</sup> In these cases, after ascertaining that the plaintiff has suffered economic or personal injury, the courts have sought to determine whether the substantive statutory provision invoked, either explicitly or implicitly,

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27. Agencies are typically allowed broad discretion in these matters. *See, e.g.*, *WFTL Broadcasting Co. v. FCC*, 376 F.2d 782 (D.C. Cir. 1967).

28. *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 732-33 (D.C. Cir. 1970).

29. *Id.* at 733; *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1002-04 (D.C. Cir. 1966).

30. 429 F.2d at 732.

31. *FCC v. Sanders Brothers Radio Stations*, 308 U.S. 470 (1940); *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943).

32. *See, e.g.*, *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14-15 (1942).

33. 5 U.S.C. § 702 (Supp. V, 1970).

34. *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970); *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); *Keco Indus., Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970).

35. *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968); *Chicago Junction Case*, 264 U.S. 258 (1924).

reflected a legislative purpose to protect the interest asserted.<sup>36</sup> Recently, this test has been liberalized so that the appropriate inquiries are whether the challenged action caused the plaintiff injury in fact, economic or otherwise, and whether the interest sought to be protected is arguably within the zone of interests sought to be regulated or protected by the statute in question.<sup>37</sup> In an early decision involving intervention in an FPC proceeding<sup>38</sup> the court determined that the petitioners were proper parties to be granted standing to obtain judicial review as private-attorneys general and also indicated that such a party clearly had a right to intervene in the administrative proceedings below.<sup>39</sup> Similar issues were involved in a later case in which the FCC denied the right to intervene to a trade union on the ground that the union sought to broaden the issues being considered in the proceeding.<sup>40</sup> Again the court concluded that the union had standing on the basis of the private-attorney general theory and held that one with such a recognized interest in the outcome of an agency proceeding must be permitted to participate in it fully from the outset. While judicial review in this instance was not limited by statute to those who had participated in the agency proceeding,<sup>41</sup> the court pointed out that full intervention was a practical necessity since the union's right to judicial review would not be effective unless it had the opportunity to present evidence, cross-examine witnesses, and present arguments at the agency hearing.<sup>42</sup> The court also noted that section 6 of the APA<sup>43</sup> limits the discretion of agencies in denying intervention because it grants "any interested person" the right to appear and be heard in a proceeding "so far as the orderly conduct of public business permits," thereby apparently curtailing the discretion of the agencies in favor of permitting at least limited intervention.<sup>44</sup>

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36. 390 U.S. at 6.

37. *Association of Data Processing Service Org. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

38. *National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951). *See also* *Virginia Petroleum Jobbers Ass'n v. FPC*, 265 F.2d 364 (D.C. Cir. 1959).

39. In justifying this conclusion the court observed that only parties to Commission proceedings could obtain judicial review and that if it did not look beyond a decision by the Commission to deny intervention, such denials could be effectively used to foreclose all judicial review. 191 F.2d at 467. *See also* *Juarez Gas Co. v. FPC*, 375 F.2d 595, 597 (D.C. Cir. 1967); *Lynchburg Gas Co. v. FPC*, 284 F.2d 756, 760-61 (3d Cir. 1960).

40. *American Communications Ass'n v. United States*, 298 F.2d 648 (2d Cir. 1962).

41. *Compare* 47 U.S.C. § 402(b) (1964), *with* 16 U.S.C. § 825(f) (1964).

42. 298 F.2d at 650-51.

43. 5 U.S.C. § 555(b) (Supp. V, 1970).

44. 298 F.2d at 640. *See also* *Philadelphia Electric Co. (Peach Bottom Atomic Power Station Units 2 & 3)*, 25 AD. L.2D 85, 87 (AEC 1968).

In *Office of Communication of United Church of Christ v. FCC*,<sup>45</sup> in which petitioners sought to intervene in a license renewal proceeding on the ground that the television station's programs reflected racial bias, the court reviewed the history of the private attorney general theory and utilized the standards developed thereunder in holding that one of petitioners was properly qualified to intervene as a party in interest consistent with the applicable statute.<sup>46</sup> The court noted that public interest groups could contribute materially to Commission proceedings by providing information to which the FCC did not have access, such as monitoring studies. Recognizing the possible impairment of the Commission's efficiency which could result if intervention were permitted too freely, the court directed that the agency select one of the petitioners to intervene in behalf of the public interest, observing that at some point the viewing public should have an opportunity to make itself heard even if administrative efficiency were slightly impaired. The *Church of Christ* rationale was applied in *National Welfare Rights Organization v. Finch*,<sup>47</sup> in which the court permitted intervention in agency proceedings being conducted to determine whether state welfare laws were in compliance with Social Security Act requirements. The administrator and the state agencies interpreted the applicable statute and agency rule<sup>48</sup> to mean that only the state could be a party to such a hearing but nevertheless permitted the Welfare Organization to submit information and arguments in connection with the negotiations. Injunctive relief permitting more extensive participation was sought. In deciding in favor of the Welfare Organization the court observed that intervention in administrative proceedings is governed in some measure by the law of standing,<sup>49</sup> that section 10 of the APA creates a presumption favoring judicial review, and that the Welfare Organization was injured in fact and was a group representative of interests which were to be protected by the statute.<sup>50</sup> While the statute in question provided only that the states should have judicial review of such decisions, the court did not find that this in any way indicated that welfare recipients should not also have review.

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45. 359 F.2d 994 (D.C. Cir. 1966). See also *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

46. 47 U.S.C. § 309(d)(1) (1964).

47. 429 F.2d 725 (D.C. Cir. 1970).

48. 42 U.S.C. 604(a) (Supp. V, 1970); 45 C.F.R. § 201.5 (1970).

49. 429 F.2d at 732.

50. See notes 35-37 *supra* and accompanying text.

Concluding that the Welfare Organization could represent the public as a private attorney general, the court granted it the right to call witnesses and cross-examine other parties, thereby broadening the limited intervention permitted by the Administrator. The *National Welfare Rights Organization* case, perhaps more than any other decision, indicates that the courts will make every effort to permit reasonable participation in administrative proceedings by at least one person or organization as a representative of the public interest, when his interest or reason for participation is bona fide.

In *Firestone Tire & Rubber Co.*<sup>51</sup> the FTC modified views expressed in an earlier 1970 decision, *Campbell Soup Co.*,<sup>52</sup> wherein it had denied SOUP the right to broaden its limited participation in a proceeding involving a proposed cease and desist order concerning false advertising — the placing of glass marbles at the bottom of a soup bowl to make the soup appear more chunky in a television commercial. SOUP's petition to intervene more extensively in *Campbell Soup Co.* was denied because the Commission did not think the matter merited the expenditure of the additional resources which would be needed to consider a harsher penalty such as affirmative disclosure. In denying that petition the Commission set forth two criteria for intervention: that the intervenors raise substantial issues of law or fact that would not otherwise be properly raised and that such issues be sufficiently important to justify expenditure of the Commission's resources.<sup>53</sup> In *Firestone*, the Commission added three further criteria: the intervenor's ability to contribute to the resolution of the case; the need for expedition in the handling of the case; and possible prejudice to the rights of the original parties.<sup>54</sup> One distinction made by the Commission between *Firestone* and *Campbell Soup* was that in the former a public safety issue was involved, making the case a particularly appropriate one for affirmative disclosure. The Commission also indicated that intervention in *Firestone* might contribute to a fuller appreciation of the need for stronger remedies in FTC cases. The Commission characterized the right to intervene as a "matter of privilege,"<sup>55</sup> apparently not recognizing that "any interested person" has at least a limited right to intervene "so far as the orderly conduct of business permits."<sup>56</sup> In

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51. 27 AD. L.2D 877 (FTC 1970).

52. 26 AD. L.2D 1011 (FTC 1970).

53. *Id.* at 1013-15.

54. 27 AD. L.2D at 879.

55. *Id.*

56. See notes 43-44 *supra* and accompanying text.

addition, it expressed some reluctance and apprehension in permitting intervention, indicating that its decision was to have limited precedential value, if any, and that this step was being taken on a probationary basis. At least part of this reluctance was apparently due to the belief that public interest intervention is not as necessary in FTC proceedings as in those of other agencies, because the FTC "has a built-in-public-interest prosecutor in all of its proceedings."<sup>57</sup> Commissioner MacIntyre argued in a separate statement that the intervention rights granted to SOUP were too broad and were likely to cause undue delay in the proceeding, such that a substantial denial of justice would result.<sup>58</sup>

The *Firestone* decision undoubtedly is an important one for the Federal Trade Commission, notwithstanding the Commission's claim that the case has limited precedential value, since the Commission has not customarily permitted public interest intervenors to take part in adjudicatory proceedings. However, its impact is necessarily limited in that other agencies appear to be more liberal in permitting intervention. The Civil Aeronautics Board's regulations, for example, permit any interested person to make an appearance to present evidence, except at enforcement proceedings.<sup>59</sup> In considering a license application, the Federal Communications Commission is required to grant a hearing to any party in interest who raises a "substantial and material" question of fact,<sup>60</sup> and FCC rules permit any interested person to intervene for the limited purpose of presenting testimony.<sup>61</sup> The primary advance made by SOUP beyond such routine participation is their attainment of "reasonable and necessary" discovery rights. Although the Commission indicates that SOUP has been given "all the rights of a party"<sup>62</sup> with respect to the limited purpose for which it was permitted to intervene, it is not at all clear from the Commission's order whether SOUP has been granted the vital right to cross-examine. However, even though SOUP was not granted full status as a party and it appears that under the applicable

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57. 27 AD. L.2D at 879.

58. *Id.* at 880-81.

59. See notes 17-18 *supra* and accompanying text. Compare *Moss v. C.A.B.* 430 F.2d 891 (D.C. Cir. 1970), discussed at p. 200 *supra*.

60. See notes 11-13 *supra* and accompanying text. But see *Hale v. FCC*, 425 F.2d 526 (D.C. Cir. 1970), discussed at p. 223 *supra*.

61. See note 13 *supra*. But see Comment, *Administrative Agencies, the Public Interest, and National Policy: Is a Marriage Possible?* 59 GEO. L.J. 420, 445 (1970).

62. 27 AD. L.2D at 878.

statute they could not obtain judicial review of an adverse decision,<sup>63</sup> SOUP was apparently granted sufficient rights to carry out its purpose. Significantly, the Commission permitted intervention *in forma pauperis*, for SOUP, like many public-interest intervenors, undoubtedly has limited financial backing.<sup>64</sup> For these reasons the Commission's decision in *Firestone* appears to be a sincere step forward in ensuring that the public interest is represented before the Commission. While the Commission indicates that the difference between *Firestone* and *Campbell Soup* is that *Firestone* involves a question of public safety, it appears in reality that in *Firestone* the Commission simply relaxed the position taken in the earlier case. *Firestone* undoubtedly was a more compelling case because it did involve a public safety question. However, SOUP's contention was basically the same in both cases: that the adverse effect of deceptive advertising on both competitors and the public continued long after the advertising campaign itself was discontinued and that affirmative action was required to negate its residual effects. While *Firestone* did not affirm this view, by permitting intervention it did decide that this contention presented a factual question on which evidence was needed before a proper sanction could be imposed, precisely the position

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63. The pertinent statutory provisions indicate that only parties made subject to a cease and desist order or other penalty imposed by the Commission have the right to obtain judicial review of a Commission decision. 15 U.S.C. §§ 45(b), (c), (1), & 56 (1964); see *Wholesale Grocer's Ass'n v. F.T.C.*, 277 F. 657, 661 (5th Cir. 1922). See also *FTC v. Klesner*, 280 U.S. 19, 25-26 (1929). But see *National Coal Ass'n v. FPC*, 191 F.2d 462, 466-67 (D.C. Cir. 1951), wherein the court held that the F.P.C. could not use its discretion to exclude intervenors as a mechanism to prevent them from obtaining judicial review, where the applicable statute provided that those seeking judicial review must have participated in the agency proceedings below. Since the FTC's discretion to deny intervention is limited by the APA, see notes 43-44 *supra* and accompanying text, it is arguable that if a group like SOUP were arbitrarily denied permission to intervene in FTC proceedings they might be granted judicial review for the purpose of deciding whether their right to limited intervention had been abused.

64. Even though some agencies appear increasingly receptive to public-interest intervenors, the financial obstacles to participation may limit the potential benefits from this trend. Most agencies require multiple copies of any documents being submitted, see, e.g., 14 C.F.R. § 302.3(c) (1970) (C.A.B. requires an original and 19 copies), and copies must often be mailed to every participant in a proceeding. Another major expense is the purchase of transcripts of agency hearings. Many, if not all, the federal agencies individually negotiate contracts with various transcribing services from which interested parties must buy transcripts if they desire to have them. The result is that fees vary widely: 20 cents per page at the FPC; 45 cents per page at the CAB; 50 cents per page at the FTC; 85 cents per page at the ICC; and 95 cents at the SEC. These figures were specified in contracts with reporting services for the period ending June 30, 1970, and represent the *minimum* charge to the public; certain expedited copies of SEC transcripts, for example, might cost as much as \$2.50 per page. There have been indications in 1970 that the agencies are becoming aware of the financial burden which such expenses represent

rejected by the denial of more extensive intervention in *Campbell Soup*.<sup>65</sup> Apart from the FTC, whether public-interest intervention will have any significant impact on administrative agencies is difficult to forecast. Cases such as *Church of Christ*, in which the petitioners attempted unsuccessfully for more than ten years to have a television station's license revoked, illustrate the hurdles. The agencies have exhibited irritation and hostility toward efforts which have the effect of enlarging their constituencies. To the extent that there is such hostility it can result in the exercise of administrative discretion in a manner unfavorable to the intervenor and cause delay when the intervenor appeals such decisions.<sup>66</sup> Absent such hostility there will still be a great deal of litigation generated by public-interest intervenors who take a position adverse to that of the private party involved, as in *Firestone*. In addition to clogging the dockets, such delay may in some cases mitigate the effects of any just conclusion that is reached.<sup>67</sup> Moreover, to sustain such prolonged litigation, a public-interest intervenor must be well-organized and well-financed. Notwithstanding these difficulties, so long as public-interest intervenors can continue to participate in agency proceedings, even if in only a limited number of cases, it seems inescapable that such participation will ultimately result in more careful administrative action. The *Firestone* decision is an example of precisely this effect.

## VI. HEARINGS

### *Administrative Discovery*

The Court of Appeals for the Second Circuit held in *NLRB v.*

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to individual intervenors who do not have adequate financial backing. The FCC granted the request of a student group that it be permitted to file only the original and one copy of its petition. Interview with Mr. Bass, Broadcasting Rules and Standards, FCC, July 9, 1970, concerning the *oral permission* in Petition for Rule Making of TUBE (Termination of Unfair Broadcasting Practices) for Adoption of Standards Designed to Eliminate Deceptive Advertising From Television, RM 1553, filed Jan. 13, 1970. The FTC granted two requests concerning transcripts in 1970. Student participants in *Campbell Soup Co.* were granted a free transcript and permission to file single copies of documents. 26 AD. L.2D at 1016. Second, a Washington consumer-protection group was permitted to buy a transcript of proceedings at the lesser FTC photocopying rate—30 cents per page instead of 50 cents. Letter from Joseph W. Shea, Secretary, FTC, to Benny Kass, February 25, 1970.

65. See separate statement of Commissioner Elman, 26 AD. L.2D at 1016.

66. See, e.g., *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

67. See separate statement of Commissioner MacIntyre, 427 AD. L.2D at 880.