REPORT TO THE
NUCLEAR REGULATORY COMMISSION

POLICY ISSUES RAISED BY INTERVENOR REQUESTS FOR FINANCIAL ASSISTANCE IN NRC PROCEEDINGS

July 18, 1975

Prepared By
Berlinsky, Hirsch, Pierce & Knox
Washington, D. C.

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BY INTERVENOR REQUESTS

FOR FINANCIAL ASSISTANCE IN

NRC PROCEEDINGS

Prepared By

Boasberg, Hewes, Klores & Kass
Attorneys-At-Law
1225 - 19th Street, N.W.
Washington, D. C. 20036

Technical Consultants

Dr. Frank von Hippel
Center for Environmental Studies
Princeton University
Princeton, New Jersey 08540

Dr. William D. Hinkle
Energy Laboratory
Mass. Institute of Technology
Cambridge, Massachusetts 02139

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APPENDICES

I. INTRODUCTION

On November 20, 1974, the Commission issued a memorandum and order in Consumers Power Co. (Big Rock Point Nuclear Plant)[1] dealing with requests for financial assistance to intervenors in licensing cases. The Commission concluded that substantial policy questions were raised by such requests which should be explored in a rulemaking proceeding, and that:

> In order to focus the rulemaking comments, and to help development of the issues which have thus far not been briefed, we shall direct the conduct of an examination and the issuance of a report by persons other than Commission employees. It is our intention that the examination be conducted and the report be issued expeditiously so as to serve as a basis for the comments in the rulemaking proceeding. This report shall be made a part of the public record. An appropriate notice of rulemaking will be published in the Federal Register promptly on issuance of the report. Whether or not any rule should be promulgated is, of course, a question for decision by the new Nuclear Regulatory Commission, after review of the report and the rulemaking record. [2]

Soon thereafter, the Commission issued a Request for Proposal to the general public asking any interested person to submit a proposal for the conduct of a study on financial assistance to intervenors.[3] On the basis of competitive review

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1 CLI-74-42, RAI-74-11-820.

2 Id. at 824.

3 RFP No. RS-75-4 (Dec. 30, 1974).

procedures, the law firm of Boasberg, Hewes, Klores & Kass was awarded the contract to conduct the study and prepare this Report.[4]

A. Purpose

The purpose of this Report, then, is to focus and develop the myriad issues raised by intervenor requests for financial assistance for the NRC's proposed rulemaking proceeding. In accordance with the terms of our contract, this Report does not make specific recommendations on how the NRC should resolve these complex questions. Rather, it analyzes and assesses the various alternatives open to the Commission, and collects relevant data and material which may be informative to those participating in and conducting the rulemaking.

B. Contents

This Report examines three major questions: first, should the Commission, as a matter of policy choice, provide financial assistance to intervenors in NRC proceedings; second, are there preferable alternatives to direct intervenor financial aid, such as the establishment of an office of public counsel or provision of other forms of Commission assistance; and third, what are the legal, administrative and policy considerations involved in

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4 Contract No. AT(49-24)-0138 (Apr. 7, 1975), commencing April 18, 1975, and ending July 18, 1975.

implementing a determination to award financial assistance to intervenors, should the Commission so decide.

Once again, this Report does not take a position on any of these questions. It seeks to assess the subsidiary issues raised by each of the three major questions in order to better focus the Commission's rulemaking proceeding. It also documents the relevant experience of other federal and state agencies and of the courts and commentators.

Following this Introduction is an Executive Summary. This Chapter is designed so that it may be detached from the body of the Report and circulated separately. It contains no footnotes or new material, and may be skipped by those with the time (and the fortitude) to read the whole of the Report.

The next two chapters, Background and Initial Considerations, set the stage for the detailed discussion of the study's three major questions. The Background chapter gives the reader an overview of how other federal agencies, Congressional statutes, the courts and commentators have treated the subject of financing greater public participation in the administrative process. The chapter on Initial Considerations first discusses which NRC proceedings the study will focus upon, and then analyses which intervenors should be considered eligible for such assistance.

Each of the three major questions is developed in its own subsequent chapter. This is not to say that each bears no

relationship to the other. Indeed, it may well be that one is initially disposed to provide financial assistance to intervenors, but is dissuaded therefrom by the attractiveness of the public counsel alternative, or by the difficulty of resolving the administrative problems associated with the implementation of such assistance. Thus, the resolution of the first question - whether direct financial assistance should be provided to intervenors - may be very much influenced by how one resolves the other two major questions. However, at the expense of some logical consistency, the Report treats the three major questions in separate chapters, because each clusters around itself a set of distinctive subsidiary issues.

C. Excluded Matters

Our contract specifically excluded consideration of whether the Commission has the statutory authority to provide financial assistance to intervenors.[5] Nor were we to examine how the Commission will obtain the funds necessary to implement such assistance or to establish an office of public counsel. Our Report, however, does assume that implementation monies would be public funds, and will not be derived from the

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5 See Contract No. AT (49-24)-0138 note 4 supra.

applicant or any other party to an NRC proceeding.[6] Therefore, the possibility that the funding source would be non-public in nature has been excluded as a consideration pro or con the treatment of the study's three major questions.

In addition, we were not to consider any changes in the Commission's Rules of Practice.[7] Many of those interviewed felt that if intervenor financial assistance were to be provided, the Commission should re-examine its existing practices in such areas as standing to intervene, use of general denials, discovery procedures, scope of cross-examination, raising of new issues, sua sponte[8] nature of Atomic Safety and Licensing Board (ASLB) and Atomic Safety and Licensing Appeal Board (ALAB)

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6 For a discussion of possible alternate sources of funding intervenors, see, e.g., Cramton, The Why, Where and How of Broadened Public Participation in the Administrative Process, 60 Geo. L.J. 525, 538-46 (1972) [hereinafter cited as Cramton]; Gellhorn, Public Participation in Administrative Proceedings, 81 Yale L.J. 359, 388-98 (1972) [hereinafter cited as Gellhorn]; Jacks, The Public and the Peaceful Atom: Participation in AEC Regulatory Proceedings, 52 Texas L. Rev. 466, 521-23(1974)[hereinafter cited as Jacks]; Lazarus & Onek, The Regulators and the People, 57 Va. L. Rev. 1069, 1096-1106(1971) [hereinafter cited as Lazarus & Onek].

7 10 C.F.R. Part 2, App. A (1975).

8 Sua sponte means on its own initiative; of its own will.

review, and current applications of the doctrines of res judicata and collateral estoppel.[9] Others believed that intervenor financing should be accompanied by Commission or Congressional reconsideration of generic rulemaking practices, and the types of issues to be determined in individual facility construction permit and operating license adjudications.[10] While the Commission may decide to entertain suggestions for changes in its Rules of Practice at its proposed rulemaking on intervenor financial assistance, this Report has necessarily examined the three major questions presented in the context of the Commission's present practices.

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9 But see Hearings on H.R. 11957, H.R. 12823, H.R. 13484 and S. 3179 Before the Joint Comm. on Atomic Energy, 93d Cong., 2d Sess. 120-40 (1974) (prepared statement of Anthony Z. Roisman) [hereinafter cited as Roisman]; Dignan, 1972 Changes in the Rules of Practice Applicable to Proceedings for Licensing Nuclear Plants as Seen by Applicants' Counsel (ALI-ABA Course, Washington, D.C., Sept. 20, 1974) [hereinafter cited as Dignan], both of which speak to changes in the Commission's Rules of Practice, and consider certain aspects of intervenor financing. See also Cramton, supra note 6, at 537-50; Gellhorn, supra note 6, at 388-404; Green, Public Participation in Nuclear Power Plant Licensing: The Great Delusion, 15 Wm. & Mary L. Rev. 503, 517-25 (1974) [hereinafter cited as Green]; Jacks, supra note 6, at 511-25; Lazarus & Onek, supra note 6, at 1096-1106.

Res judicata and collateral estoppel are legal doctrines which limit subsequent challenges of already decided matters.

10 See Text Ch. IV, A infra.

We should add that it is also beyond the purview of our contract to assess the competence and objectivity of the NRC staff, boards, commissioners, or of its advisory council, consultants, contractors, or the national laboratories. To the contrary, this Report assumes their respective expertise and integrity, similarly as it hypothesizes that parties to NRC proceedings will pursue their contentions honestly, forcefully and within the prescribed boundaries of the hearing process. This does not mean that one's views of the questions discussed herein are not colored by one's perception of another's actual conduct, diligence or command of the issues. It indicates only that this Report analyses the financing of intervenors in the above context, because of the impossibility of postulating otherwise. [11]

D. Methodology

The principal author of this Report is Tersh Boasberg. Other partners of our law firm, as well as Mr. Boasberg, conducted interviews, assisted him in gathering material, and aided in the conceptualization, organization and preliminary drafting of this Report. All of the partners involved

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11 It was obvious, during the course of our interviews, that we had not entered the serene confines of a mutual admiration society; but antagonism surfaced more against particular individuals than toward component parts or representative parties in the system.

have had government managerial as well as legal experience. Brief biographies of those participating in the study may be found in Appendix A.

The technical consultants to the law firm were Dr. Frank von Hippel, a high energy nuclear physicist, now with the Center for Environmental Studies at Princeton, and Dr. William D. Hinkle, a nuclear engineer, currently with the Energy Laboratory at MIT.[12] They served as pathfinders and translators on our legalistic voyage to the atomic world. Both of them explained (in the most simple terms) its underlying scientific concepts and technical jargon. They also provided us with valuable insights into the nature and workings of the nuclear community. Drs. von Hippel and Hinkle critiqued the drafts of this Report from their technical vantage points, and added scientific and technical references from their own experience. However, neither authored any sections of the Report and we remain solely responsible for its entire contents.[13] Appendix O contains additional comments from Drs. von Hippel and Hinkle.

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12 Both Drs. von Hippel and Hinkle assisted us in their individual capacities. Their views do not necessarily represent those of either Princeton or MIT.

13 A sad commentary on the polarization of the nuclear power debate is that we made over a dozen efforts to locate a single technical consultant, both knowledgeable on the issues and viewed as objective by all the participants. We could not find such an individual, even though we were asking only for analysis - not for conclusions on the issues raised by our study. Hopefully, one of the encouraging results of engaging both Drs. von Hippel and Hinkle will be to demonstrate that, while responsible technical persons can and do disagree over the answers, they are perfectly able to sit down and calmly analyze the issues and offer suggested avenues for their resolution.

In the course of our three-month study, we personally interviewed approximately one hundred persons and spoke with numerous other interested observers. Formal interviews ordinarily lasted from one to three hours, but some were of even longer duration. We sought a spectrum of opinion within each of the general participant groups contacted. Names of persons interviewed were garnered from peers within their respective groups, and from outsiders and adversaries as well. Appendix B contains the names of all persons interviewed.

In order to make the interviews as productive as possible, we promised anonymity to the persons involved. This enabled many to talk more frankly than their public postures might allow. Often, people volunteered direct answers to the major questions presented. However, the purpose of the interview process, like that of the Report, was not to conduct a mini-Gallup opinion poll, but to help us assess and develop the chief concerns entailed in framing and presenting the study's principal questions.

Obviously, we could not interview all persons interested in this controversial topic. The Commission's rulemaking proceeding will permit a much more comprehensive presentation of views and compilation of pertinent material. Because our travel budget was limited, we made brief trips only to Chicago, New York, Boston and a one-day visit to the Seabrook[14] hearing

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14 Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), AEC Docket Nos. 50-443, -44.

in Nashua, New Hampshire. This worked a particular hardship on those applicants and local intervenors outside the areas visited, and beyond the Washington perimeter. We tried to rectify this somewhat by telephone contacts, but found this a poor substitute for personal interviews.

Our research concentrated on NRC(AEC) and other federal and state agency proceedings, Congressional statutes, judicial decisions, and commentaries specifically discussing public participation or intervenor financing in the administrative process. Examination included administrative and legal comment, briefs, Congressional hearings, and speeches and reports on this extensively treated subject. We did not read widely in the nuclear scientific and engineering domain, relying on the expertise of our technical consultants, and our view that the questions herein presented called primarily for a legalistic or procedural approach.

We wrote or personally contacted each federal department and agency for its relevant experience, and identified most states which had established consumer advocate or public counsel offices. Surely we have failed to uncover all the available data and pertinent experience in this area. However, these omissions can be remedied by the Commission's rulemaking proceeding.

Lastly, we would be remiss if we did not publicly acknowledge a special debt of thanks to those persons we interviewed during the course of our study. Most were extremely busy people who could ill afford our lengthy interruptions. Without exception, they contributed generously of their time, their insights and their experience. (They also magnanimously suffered the indignities of our questioning, which often bordered on cross-examination.)

It is an understatement to say of those interviewed that they held strong personal convictions on the questions presented. The issues are emotionally charged and value laden. Nevertheless, we were greatly impressed with our interviewees' depth of understanding, their ability to see the other side of a controversial issue, and their genuine desire to resolve the problems encountered. We are most grateful for their important contributions to this Report.

II. EXECUTIVE SUMMARY

Of Report To The NRC On Policy Issues Raised By Intervenor Requests For Financial Assistance*

This chapter is an Executive Summary of the complete Report on the same subject. The Executive Summary contains no references to the Report's text, footnotes or appendices, and it is intended for those without adequate time (or fortitude) to read the full text. It is designed to be detached separately from the Report and is unnecessary reading for those able to review the latter's entire contents.

I. INTRODUCTION

On November 20, 1974, the NRC issued a Memorandum and Order in Consumers Power Company (Big Rock Point Nuclear Plant) dealing with requests for financial assistance to intervenors in licensing cases. The Commission concluded that substantial policy questions were raised by such requests, which should be explored in a rulemaking proceeding, and that:

> [I]n order to focus the rulemaking comments, and to help development of the issues which have thus far not been briefed, we shall direct the conduct of an examination and the issuance of a report by persons other than Commission employees.

The purpose of our Report, then, is to focus and develop the many policy issues raised by intervenor requests for financial

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* The full Report and appendices, prepared by Boasberg, Hewes, Klores & Kass, were submitted to the NRC on July 18, 1975.

assistance for use in the proposed NRC's rulemaking proceeding. In accordance with the terms of our contract, the Report does not make specific recommendations as to how the NRC should resolve these substantial issues.

The Report examines three major questions:

First, should the Commission, as a matter of policy, provide financial assistance to intervenors in NRC proceedings;

Second, are there preferable alternatives to direct intervenor financial aid, such as the establishment of an Office of Public Counsel, or extension of other forms of assistance; and

Third, what are the legal, administrative, and budgetary considerations involved in implementing a decision (if any) to award financial assistance to intervenors.

Our contract specifically excluded consideration of the following matters:

A. Whether the Commission has the statutory authority to provide intervenor financial assistance;

B. From what public sources, and in what amounts, the Commission will obtain the requisite funds to implement such assistance, if it decides in favor thereof.

C. Any changes in the Commission's existing Rules of Practice.

Dr. Frank von Hippel from Princeton University, and Dr. William Hinkle from MIT, served as technical consultants to our

law firm. The study's methodology consisted principally of in-depth interviews of approximately 100 people, representing a wide spectrum of opinion on the questions presented. Our research concentrated on NRC and other federal and state agency decisions, statutes, court cases, and the many commentaries specifically addressed to the question of public participation and intervenor financing in the administrative process.

II. BACKGROUND: INTERVENOR FINANCING

Currently, the only federal agency providing direct financing of intervenors is the Federal Trade Commission, under a recent statute. Assistance is limited to rulemaking cases. Proposed FTC regulations state that financing will be provided:

> ...to any person who has or represents an an interest which would not otherwise be adequately represented in a rulemaking proceeding, and representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and who is unable effectively to participate in such proceeding (because such person cannot afford to pay costs of making oral presentations, conducting cross examination, and making rebuttal submissions in such proceeding).

Providing financial assistance to intervenors is the subject of a number of Bills pending before Congress, and the question is being studied by state and other federal agencies as well.

The Atomic Energy Act is silent on the precise question of intervenor financing. A recent Supreme Court case (in the absence of statutory language) refused to change the prevailing

"American Rule" that parties to litigation must bear their own costs (including attorneys' fees), regardless of whether they prevail on their contentions. Another recent lower court decision held that the Federal Communications Act (which made no specific mention of intervenor financing) did not authorize successful intervenors to recover their expenses from an unwilling party to the agency's proceeding. These cases may be distinguishable from our study, on the grounds that: (1) the legislative history involving the deletion of the Kennedy Amendment from last year's Energy Reorganization Act did discuss the NRC's statutory authority to finance intervenors; and (2) both the above cases refused to shift costs from an unwilling private party to a successful plaintiff. However, these cases were decided after the award of our contract.

There are about 50 Congressional statutes, many of them fairly new, which specifically provide for award of attorneys' fees to a successful (or to any) party. There are also a host of law review articles, an Administrative Conference Report and numerous other commentaries speaking both for and against intervenor financing.

III. INITIAL CONSIDERATIONS

A. Types of NRC Proceedings

The NRC engages in a variety of proceedings and for each type the factors governing questions of intervenor financing

may be different. The Report looks at NRC rulemakings, construction permit and operating licenses, other licensing procedures, enforcement actions, and antitrust reviews. It suggests that in considering whether or not questions of intervenor financing are pertinent to any or all of these proceedings, one should examine (1) the purpose of the hearing, (2) the nature of the contested issues, (3) the role of the NRC staff, (4) the proposed contributions intervenors can make, and (5) the anticipated costs of such interventions.

B. Eligibility of Intervenors for Financing

The Report assumes that in order for an intervenor to become eligible for financing (if any), it must first satisfy the NRC standing regulations. While many of the same criteria are applicable to standing determinations, questions of eligibility for financing raise other considerations as well. These include whether one takes a "public interest" or "functional" approach to intervention, and issues of relative intervenor need for public funds.

The Report focuses on NRC rulemakings and construction permit and operating licenses, because this is where the vast preponderance of interventions have occurred.

In exploring whether or not intervenor eligibility for financing should be limited only to those who represent the "public interest," the Report concludes that such questions as "who represents the public interest," and "what is the

"public interest" are almost impossible obstacles to overcome. It suggests that a better framework for consideration of intervention issues is a "functional" approach. This reasons that there are many interests which should be considered by agency decision makers, and that, under certain circumstances, the representation of these interests may be deserving of public assistance, because it can be helpful to the regulatory process. Under the functional approach to determinations of intervenor financial eligibility, the Commission would examine (1) duplication of represented interests, (2) the importance and nature of the contested issues, and (3) the intervenor's relative need for financial assistance.

Where the interests of an intervenor may be adequately represented by other parties, or by the NRC staff, there is less reason to finance such intervention. This, however, leads to problems of how one determines whether another's interest is "adequately represented;" the responsibility and capability of intervenors to raise significant issues; and whether they are "accountable" for the interests they put forward.

Another consideration under the functional approach is the nature and importance of the issues to be contested. Some issues lend themselves better to intervention than others. For example, issues which raise broad or generic concerns or new policy considerations may be better suited to public participation than narrow enforcement questions. This analysis also creates problems, such as deciding what is "important"?

Issues which at first appear unimportant may later become critical to the hearing. And should the issues be important only to the NRC or to the intervenor as well?

The issue of relative financial need also raises difficult questions of its own: (1) should public entities, such as small towns and counties, be eligible for assistance; (2) what about large national organizations, which may not have enough funds for all they wish to accomplish, but would have sufficient money to enter a particular proceeding; (3) should the Commission look behind the corporate shell of the intervening organization to the individual resources of its members; and (4) should the Commission consider what actions the intervenor has undertaken to raise funds of its own?

After discussion of background matters and certain initial considerations, we move to the study's three major questions.

IV. SHOULD FINANCIAL ASSISTANCE BE PROVIDED TO INTERVENORS

The Report suggested that one must balance the arguments in favor of intervenor financing with those against it.

A. Arguments in Favor of Intervenor Financing

1. Contribution of Intervenors

Proponents of financing claim that intervenors have made a number of significant contributions to the hearing process.

These include contributions to radiological health and safety, to environmental concerns, and to the administrative process. A number of such claimed contributions are cited in the Report. Critics, however, contend that these do not constitute significant contributions at all, and may well represent instances of delay and nuclear blackmail. One of the purposes of the rulemaking will be to examine these alleged contributions and to balance them against the costs involved.

2. The Gadfly Role

Intervenors also argue that they serve as a gadfly to the hearing process, that their very presence tends to make the applicant, the staff, and the ASLB do their homework. But opponents point out that the basic staff review is done without knowing whether there will be an actual intervention; and that, additionally, the NRC's procedures are already laden with sufficient safeguards.

Intervenors also note that the nature of a gadfly's role is not one of primary scientific research but rather one of analysis and questioning. This kind of function, therefore, does not demand an extensive national intervenor laboratory system.

3. Public Education and Confidence

Intervenors also claim that if they were financed it would enhance the public's education and information. Yet, while Congress mandated public hearings at the permit stage, it

did not specifically address itself to intervenor financing, even in this proceeding. Intervenors also maintain that financing would increase public confidence in the NRC's regulatory process. Others, however, wonder how much public hearings actually contribute to public confidence.

Proponents of intervenor financing further suggest that in our democratic society, with enormous power concentrated in institutions, the private citizen is often overwhelmed; that informed and conscientious public participation in matters as important as atomic power is critical to the health of a knowledgeable citizenry.

4. How Safe Is Safe Enough?

Another argument raised by intervenors is that, when dealing with a potentially hazardous area such as nuclear power, providing assistance to intervenors is a small price to pay for another safety layer, which conceivably could help avert an accidental catastrophe. However, others believe that the risks involved in the use of nuclear power are greatly exaggerated, and, further, no other agency has such extensive safety review procedures. These include study by the NRC staff of every application, selected review by the ACRS, independent hearings by the ASLB, sua sponte review by the ALAB, as well as possible consideration by the Commissioners.

5. An Outside View

Proponents of intervenor financing also contend that, unlike other fields, the nuclear power area has been dominated by

the government and the commercial industries it regulates, and that most of the technical experts are employed by them. Thus, such persons affirm that where this type of monopoly is present, it is prudent to have a fresh outside view, which the intervenors can provide. Critics note, however, that this argument is weakened by the ERA split of NRC and ERDA, and that the NRC now is concerned only with licensing functions. Moreover, they note that if one is going to have knowledgeable nuclear regulators, they normally would have had to gain their experience in either government or industry.

B. Arguments Against Intervenor Financing

In addition to those arguments noted above, opponents of intervenor financing raise the following points.

1. Cost of Financing Intervenors

In any scheme of intervenor financing, there will be associated costs. These costs are measured not only by the amount of money provided to intervenors, but also by the resulting delays in the hearing process. Such potential or actual delays mean both that the taxpayer has to pay for the increased expenses of an extended hearing process, and that lengthened "on-line" plant time could result in higher costs to the ultimate consumer of electric power. Proponents of financing, however, note that delay is a relative matter and inherent in any regulatory process; that if delay is occasioned by valid safety and other considerations, it is fully warranted; and

that interventions cause only minor delays (if any) in getting plants on-line.

Critics of intervenor financing also contend that applicant concessions to construction of cooling towers and overly restrictive safety requirements really represent examples of nuclear blackmail. These are extracted at the expense of the ultimate consumer, to satisfy the whims of a few self-appointed and nonaccountable environmental groups. As noted above, the question of significant intervenor contributions and associated costs, such as delay and blackmail, are issues to be balanced by the Commission in its rulemaking proceeding.

2. The Agency Protects the Public Interest

Another argument advanced against intervenor financing is that the NRC truly represents the public interest, and that this body has been charged by Congress with the duty of regulating nuclear power. Since the American people, through their elected representatives, have determined to pay the NRC regulators, why then should they also bear the costs of others to watch over NRC shoulders?

Proponents, however, point out that the public interest is not a monolith; that there are many interests which should be represented in a proceeding; and that the NRC cannot represent all such interests. Therefore, if representation of certain interests can be helpful to the Commission, then, under the functional approach to intervention, financing makes sense in order to help

the Commission reach a more balanced judgment, based on full consideration of all the issues.

3. The Anti-Nuclear Intervenors

Another argument against financing is that most of the intervenors seem to be dead-set against nuclear power in any form. Thus, to finance them means that the money will be used only to delay the proceeding, since these intervenors cannot accomplish their primary goal of "stopping the nukes" within the legitimate purview of the hearing process. Others point out, however, that such issues as a nuclear moratorium are not being argued in licensing hearings. Further, they note that many intervenors are not anti-nuclear, and that even the anti-nuclear intervenors should be able to advance their concerns about those health, safety, and environmental issues which are properly before ASLBs.

4. The Adversary Process

Another argument against financing intervenors questions whether the NRC adversary process is the most efficient way of developing complex issues of a technical character. These persons suggest that extensive cross examination and other legalistic fact-finding techniques are ill-suited to the pursuit of scientific truth, where the real issues are not the credibility or deportment of a witness. They also note that, often, lawyers have turned the hearing process into a courtroom drama, playing to media, rather than getting to the meat of technological issues.

In responding to this argument, proponents maintain that many of the issues in an NRC proceeding are also non-technical in nature, and call for value judgments which the public is well qualified to comment upon. They also feel, while the hearing process may not be perfectly designed to adduce scientific truth, that nuclear scientists and technicians, too, must lay open to questioning the foundations of their hypotheses, and that cross examination is the best tool we have for doing this.

5. Alternatives and Administrative Difficulties

Two other arguments advanced against financing intervenors are (a) that there are better alternatives available to the Commission, and (b) that the implementation of direct financing poses insurmountable administrative difficulties. These are taken up in the next two sections.

V. ALTERNATIVES TO DIRECT INTERVENOR FINANCIAL ASSISTANCE

A. Procedural Cost Reductions

The Report examines possible cost reductions for filing, multiple copies and transcripts. It also discusses providing increased access to NRC technical staff. However, use of the agency's own staff, or that of the national laboratories on behalf of intervenors raises serious questions about an agency's ability to control and supervise its own personnel.

B. Public Counsel - The Federal Experience

The Report looks at the advantages of a public counsel

office outside of the Nuclear Regulatory Commission, and notes that a consumer protection agency has been proposed by the Congress. However, there is serious doubt whether it will be enacted and signed into law by the President, or ever have the resources to intervene in the extensive and highly technical NRC-type proceeding.

The Report goes on to examine some public counsel offices which have been created by federal agencies such as those at the Interstate Commerce Commission, the Civil Aeronautics Board and the Postal Rate Commission. It notes that most of these offices do not intervene in agency adjudicatory proceedings, and act more as facilitators than as public advocates.

C. Public Counsel - The State Experience

Many states have experimented more than the Federal Government with offices of public counsel. Most of these state offices are relatively new and intervene in utility ratemaking proceedings. The Report then briefly describes the experience of public counsel in the States of California, New York, New Jersey, Indiana, Montana, Connecticut, Missouri, Maryland and Vermont.

D. Public Counsel: A Summary

There are a number of advantages to offices of public counsel. These include: (1) enabling attorneys and technical staff to build expertise in extremely complicated areas; (2) having a staying power not possible for under-financed intervenor

groups; (3) being a known budgetary quantity, thus avoiding many of the administrative headaches associated with direct intervenor financing, such as determinations of intervenor financial need, whether or not to make interim awards, how much to pay intervenor counsel and experts, and how much intervenors have contributed to the proceedings. Also, public counsel rather than intervenors would determine which experts to retain and which issues to contest, and this could tend to avoid repetitious and duplicative interventions.

Of course, to many, the above advantages are the very problems of public counsel. This is especially the case for an in-house public counsel office which raises fundamental questions of independence and credibility. Given the current relationships between the NRC and most intervenor groups, this will be a formidable hurdle. Moreover, offices of public counsel may have the same difficulties as private intervenors in choosing which issues to develop and which cases to enter. They also lack the pluralism of the Private Bar.

E. Independent Intervenor Assistance Centers

The Report also examines NRC creation of independent legal and/or technical centers. Such centers could be funded through universities or bar associations, as the Office of Economic Opportunity has done in the case of its own legal back-up centers.

The major advantage of an independent center over an in-house public counsel is that it may well offer greater

independence and freedom of action to center personnel. However, here, too, the nature of the NRC funding source might condition the center's independence and credibility with intervenor groups.

Others have pointed out that independent centers may be more appropriate for technicians than lawyers. These persons believe that it is necessary for intervenors to have greater access to technical skills, and that, since most of the technical people work for government or industry, a center, if adequately financed, could become a source of independent expertise for intervenors.

F. Other Types of Assistance

The Report also examines other types of assistance which might be available to intervenors, such as pro bono legal services from the bar, increased funding from foundations, and the Commission's use of advisory groups to facilitate broader public participation in the Agency's processes.

VI. IMPLEMENTATION OF FINANCIAL ASSISTANCE

This section considers some of the administrative difficulties of implementing financial assistance, if the Commission so decides.

A. Which Intervenor Expenses Should Qualify

The Report discusses compensation for intervenor experts. Two of the problems associated therewith are: first, whether the Commission should exercise any control over which experts

are chosen; and, second, to what degree should the Commission pay for independent studies.

The Report then delves into the question of attorneys' fees. On the one hand, many suggest that attorneys' fees are just as necessary an intervenor expense as expert fees. They point out that a good attorney will enable an intervenor to present its case in a clear and concise manner, thus serving to reduce hearing delays. Others, however, worry about whether an attorney has an inherent conflict of interest, since he may be less concerned about advancing his client's cause than in ensuring his own paycheck. However, it should be noted that attorneys often work on contingent fee matters and that many Congressional statutes do provide for recovery of attorneys' fees to successful plaintiffs.

B. At What Stage Of The Proceeding Should Assistance Be Provided

There is considerable discussion in the Report of the advisability of intervenor interim financing. Intervenors strongly contend that without such assistance many of them will be unable to participate at all. However, there are certain difficulties associated with intervenor financing: (1) most court awards are provided only at the end of a proceeding when it is possible to make a determination of such factors as the degree of counsel's skill, the novelty and complexity of the issues, and the benefits conferred by the litigation; (2) it is difficult to ascertain at the beginning of any proceeding

which intervenors and which issues are most deserving of financing; and (3) many observers feel that, before obtaining any financial assistance, intervenors must make some demonstration of their bona fides, by reaching a threshold of independent support.

Perhaps a compromise is possible by allowing some interim funding; by waiting until after the completion of the preliminary hearings, when the nature and quality of the intervenor's presentation may be better ascertained, to make full awards.

C. What Criteria Should Govern Assistance Awards

The Report considers whether awards should be made only to a "prevailing" party, or also to those intervenors who have made a "significant contribution" to the hearing process. Many observers believe that intervenors do not "prevail" or "win" a rulemaking or licensing case, in the technical sense of that term, and what is really important is that intervenors make a significant contribution in order to secure public financing. A concomitant difficulty is determining what is "significant."

There are other considerations involved in delineating criteria for making awards. For example, upon what criteria should attorneys' fees be based? Court decisions point to a variety of factors, such as the lawyer's skill, the time and labor involved; the novelty and difficulty of the questions presented; the customary fee in the locality; and the experience and reputation of the attorney.

There is also wide discrepancy in court decisions ajudicating hourly rates for attorneys. These range from $20-30 an hour under Criminal Justice statutes, to well over $100 an hour in antitrust proceedings. The new FTC Rules limit attorney awards to $50 per hour, in the absence of unusual circumstances.

D. Maximum Amounts

Another question presented is whether intervenor experts and consultants should be compensated at rates in excess of those currently paid by the NRC, $138 per day. Proponents of increased amounts note that the present rates are unreasonably low, and that the very purpose of financing is to enable intervenors to attract the kinds of people who can help them make a maximum contribution to the proceedings. Others, however, point out that the rationale of financing intervenors is not to make their experts and attorneys rich. They argue that those working for intervenors have done so voluntarily, because of considerations other than money, and that this is a healthy condition.

E. A Matching Concept

One of the proposals discussed is that the Commission could provide assistance on a 50-50 or other matching basis. The advantages of a matching formula (which might vary in percentage according to relative need) are: first, it could stretch the Commission's limited money so that funds would be available for more intervenors; second, it lessens the risk which the Commission might take on interim funding, since

intervenors would have to put up a portion of their own costs; and third, a required match allows an intervenor to establish its bona fides.

There are also difficulties associated with a matching concept. One is that it may tend to favor those intervenor groups which are financially better off than others. A possible solution to this problem is to allow intervenors to contribute "in-kind" services, as well as cash, to their portion of their matching share. Another problem with matching is that it forces the Commission to make delicate determinations as to which intervenors receive which variable matching awards, and when.

F. Expenditure Oversight

The Report also discusses what responsibility the Commission might have in supervising public assistance to intervenor groups, as well as the kinds of record keeping and documentation which intervenors should maintain to support their awards.

G. Impact of Assistance on Issue Consolation

If financing is provided, many believe this will attract additional intervenors and lead to a proliferation of interventions. Others, however, argue that if intervenors knew that only a limited amount of money was allocated to any given proceedings, this would force them to consolidate their interests in order to maximize their available financing.

H. Allocation of Limited Funds

One of the most difficult questions presented by the study

was how the Commission should allocate limited funds. The two possible polar alternatives are to allocate funds equally by proceeding, or to give the Commission discretion to allocate among proceedings, among issues and intervenors in any single proceeding, and to determine when and how much.

The advantages of allocating funds equally by proceeding is first, that it takes the Commission off the political hook of deciding which intervenors to fund, since it could simply say that so much was available, and that the intervenors would have to divvy it up among themselves; second, it avoids the problems of having to deal with such difficult line-drawing determining which intervenors are more deserving of financing than others; which issues are most important; how much to pay experts and counsel; and how to decide which intervenors have made the most significant contributions. However, the arguments against this approach are equally compelling. If funds are allocated equally by proceedings, it may mean that while everyone gets something it would be very little - perhaps not enough to enable anyone to make a significant contribution. Moreover, it means that funds would not be allocated with regard to merit or to the demonstrable value of an intervenor's contribution to the hearing process.

The Report also explores a two-tiered approach to financing. Under the first tier, perhaps half the total funds would be allocated by proceedings, so that most intervenors received a little something. However, the second tier would award funds

only after the proceedings have been completed, to those intervenors who have made the most meaningful contributions.

I. Who Decides

The last issue considered in the Report is whether financing decisions should be made by the ASLBs, the ALAB, or by some other body, such as a petition panel, which would consider only questions of intervenor awards.

VII. CONCLUSION

The questions raised by the Report are complex; but they are probably not as difficult, or as significant, as the decisions made every day by the Commission on important questions of public health and safety, national security, and the environment. Emotions run high on the advisability of facilitating greater public participation in agency proceedings, and, particularly, on subsidizing private interventions. The heated issues which cluster around the Nation's current nuclear debate are often injected into intervenor financing considerations.

On the other hand, many of those people interviewed believe that these issues could and should be resolved, and that a decision one way or the other would neither bring the nuclear industry to its knees, nor wipe out intervenors. The Report considers these questions in a framework of a legal procedure for decision making, not a revolution in the streets.

III. BACKGROUND: INTERVENOR FINANCING

Before exploring the three major questions discussed in our study, it is appropriate to first give the reader a summary of the law, administrative practice and commentary on the subject of intervenor financing. Needless to say, we are not the first to examine these issues.

A. Nuclear Regulatory Commission

While the NRC has not taken a position on the desirability of intervenor financial assistance, the question has arisen on a number of occasions. The Consumers Power Co. matter,[15] noted above, also involved intervenors in Vermont Yankee[16] and the Public Service Co. of New Hampshire,[17] all of whom petitioned for interim funds to pay attorneys' fees and experts' expenses. In its decision, the Commission wrestled with the question of its statutory authority to provide funding, and concluded that interim financing requests would be denied "...pending the outcome of the

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15 See notes 1 and 2 supra and accompanying text.

16 AEC Docket No. 50-271.

17 AEC Docket Nos. 50-443, -44.

rulemaking in which this issue will be reexamined."[18] It was this decision which led to our study and this Report.

As the Commission noted in Consumers Power Co., the Atomic Energy Act (AEA),[19] does not make specific reference to the subject of intervenor financing. In 1974, Senator Edward Kennedy (D -Mass.) proposed an amendment to the Energy Reorganization Act (ERA),[20] Title V, which made express provision for granting financial assistance to intervenors under certain circumstances. While Title V passed the Senate,[21] the House version of the ERA contained

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18 RAI-74-11-820, 825. See also Consumers Power Co. (Midland Plant, Units 1 and 2) AEC Docket Nos. 50-329A,-30A, CLI-74-26, RAI-74-7-1 (July 10, 1974). In Citizens for a Safe Environment v. AEC, 489 F.2d 1018 (3d Cir. 1974), the Court of Appeals for the Third Circuit ruled that it lacked jurisdiction to consider the AEC's rejection of an intervenor petition for interim financial assistance because the Commission's decision was not a final reviewable order under prevailing federal statutes.

19 42 U.S.C. §2011 (1970).

20 Pub. L. No. 93-438, 88 Stat. 1233 (U.S. Code Cong. & Ad. News, 93d Cong., 2d Sess. 1401 (1974)). The ERA abolished the AEC and transferred its regulatory functions to the NRC which officially came into existence on January 19, 1975. The ERA also created the Energy Research and Development Administration (ERDA), which assumed the AEC's nuclear R&D functions, along with other forms of energy development.

21 120 Cong. Rec. S 15050-54 (daily ed. Aug. 15, 1974).

no comparable language. Title V was deleted by the House-Senate Conference Committee;[22] but in so doing, the Conferees noted:

> The deletion of Title V is in no way intended to express an opinion that parties are or are not now entitled to some reimbursement for any or all costs incurred in licensing proceedings. Rather, it was felt that because there are currently several cases on this subject pending before the Commission, it would be best to withhold Congressional action until these issues have been definitively determined. The resolution of these issues will help the Congress determine whether a provision similar to Title V is necessary since it appears that there is nothing in the Atomic Energy Act, as amended, which would preclude the Commission from reimbursing parties where it deems it necessary. [23]

Title V appears in Appendix C, together with a substantially similar version introduced by Mr. Kennedy this year as S.1665.[24]

B. Federal Trade Commission (FTC)

The only federal agency currently providing direct financing to intervenors (in rulemaking proceedings) is the

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22 S. Rep. No. 93-1252, 93d Cong., 2d Sess. (1974) (Conference Report).

23 Id. at 37 (emphasis added).

24 S. 1665, 94th Cong., 1st Sess. (1975), a bill to provide financial assistance to public intervenors in nuclear licensing proceedings, introduced May 6, 1975, as an amendment to the Atomic Energy Act. Hereinafter proposed Title V of the Energy Reorganization Act will be referred to as the Kennedy Amendment and S. 1665 will be referred to as S. 1665.

FTC. Pursuant to statutory authority in the Magnuson-Moss Warranty Federal Trade Commission Improvement Act,[25] the FTC promulgated proposed regulations providing compensation:

> ...to any person, who has or represents, an interest which would not otherwise be adequately represented in a rulemaking proceeding, and representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and who is unable effectively to participate in such proceeding (because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding).[26]

The FTC financing proviso emanated from the Magnuson-Moss Conferees' belief that, since the new statute substantially formalized the FTC's rulemaking procedures, compensation for intervenors would better enable them to participate effectively in the newly structured hearings.[27] The pertinent portions of the FTC statute and proposed regulations are contained in Appendix D.

The subject of providing financial assistance to intervenors in FTC proceedings has a prior history. In 1969, in

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25 Pub. L. No. 93-637, 88 Stat. 2138 (U.S. Code Cong. and Ad. News, 93d Cong., 2d Sess. 2534 (1975)).

26 40 Fed. Reg.15238 (1975). Note that compensation is limited to rulemaking proceedings. Final regulations have not been issued as of this date.

27 Interviews with Edward A. Merlis and S. Lynn Sutcliffe, Senate Commerce Committee Staff, in Washington, D.C., May 8, 1975.

the American Chinchilla Corp. matter,[28] the FTC had ruled that upon adequate showing of financial need, a respondent in an adjudication proceeding was entitled to have legal counsel furnished by the Government. Soon thereafter, a group of students from George Washington University filed a motion to intervene in forma pauperis in a deceptive advertising complaint which the Commission had filed against the Firestone Tire and Rubber Company.[29] Uncertain of its authority to pay intervenor expenses, the FTC asked the Comptroller General for his opinion.[30] The Comptroller General replied:

> Insofar as intervenors are concerned, section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(b) specifically authorizes the Commission to grant intervention "upon good cause shown." Thus, if the C mission determines it necessary to allow a person to intervene in order to properly dispose of a matter before it, the Commission has the authority to do so. As in the case of an indigent respondent, and for the same reasons, appropriated funds of the Commission would be available to assure proper case preparation.[31]

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28 [1967-1970 Transfer Binder] Trade Reg. Rep. ¶19,059 (FTC 1969).

29 See Firestone Tire & Rubber Co., 3 Trade Reg. Rep. ¶19,373 (FTC 1970).

30 Letter from FTC Chairman Miles W. Kirkpatrick to Comptroller General Elmer Staats, Mar. 17, 1971.

31 Letter from Comptroller General Elmer Staats to FTC Chairman Miles W. Kirkpatrick, Aug. 10, 1972, at 2-3.

Thereupon, the FTC did reimburse certain intervenor expenses in that proceeding. [32]

C. Other Federal Agencies

The question of an agency's willingness to finance intervenor costs has generally arisen in the context of whether the agency's governing statute authorized such payments, either from its own appropriated funds, or from a private party to the proceeding.[33] Agencies have rarely raised such questions as a matter of policy choice, on their own initiative, or in the absence of specific legislative direction. As the discussion in this chapter illustrates, many of the determinations involved are of recent origin.

1. Federal Communications Commission (FCC)

In a series of often cited decisions involving the Church of Christ's Communications Unit, the Court of Appeals for the District of Columbia Circuit has spoken in favor of broadened

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32 See Firestone Tire & Rubber Co., FTC Docket No. 8818 (1972). However, attorneys' fees were neither requested nor reimbursed.

33 See, e.g., Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972), discussed at text Ch. III, C 2 infra. See generally cases collected in Comment, Public Participation in Federal Administrative Proceedings, 120 U. Pa. L. Rev. 702, 768-73 (FCC), 811-12 (FTC), 821-25 (FPC) (1972) [hereinafter cited as Comment, Public Participation].

public participation in FCC broadcast renewal licensing proceedings.[34] In the third of these cases (Church of Christ III[35]), the Court overturned an FCC decision which had denied attorneys' fees to an intervenor, although the fees were payable as part of a written settlement between the intervenor and the broadcaster, who had agreed to alter his station's programming content. The Court noted:

> When such substantial results have been achieved, as in this case, voluntary reimbursement which obviously facilitates and encourages the participation of groups like the Church in subsequent proceedings is entirely consonant with the public interest.[36]

Following Church of Christ III, the next question presented to the FCC was whether it could order a broadcaster to pay intervenor expenses in a license renewal proceeding - in the absence of an agreed-upon settlement arrangement. In

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34 See Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) [Church of Christ I] (standing issues); Office of Communication of United Church of Christ v. FCC, 425 F.2d 543, petition for rehearing en banc denied, 425 F.2d 551 (D.C. Cir. 1969) [Church of Christ II] (burden of proof and treatment of intervenors as "interlopers").

35 Office of Communications of United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972) [Church of Christ III], rev'g KCMC, Inc., 25 F.C.C. 2d 603 (1970).

36 Id. at 528. During our interviews, we did run across instances where applicants had paid attorneys' fees as part of settlements whereby intervenors or potential intervenors withdrew from NRC proceedings.

Station WSNT Inc.,[37] the FCC Commissioners split 4-1, holding that they did not have the express statutory authority to compel an award of intervenor expenses from a private party. This time the Court of Appeals, in Turner v. FCC, [38] upheld the Commission. Distinguishing Church of Christ III, the Court in Turner concluded:

> It is one thing to approve a voluntary agreement in which a litigant has agreed to reimburse his adversary his expenses and attorney's fees in an appropriate case. It is quite another for an agency to order a litigant to bear his adversary's expenses. Before an agency may so order, it must be granted clear statutory power by Congress. [39]

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37 FCC Docket No. 19167, File No. BR-3268 (Feb. 12, 1974). The statute in question was the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(l) (1970).

38 ___ F.2d ___, ___ U.S. App. 938 (D.C. Cir. June 23, 1975).

39 Id. at 940. The Turner Court based its decision squarely on the Supreme Court's recent decision in Alyeska Pipeline Co. v. Wilderness Society, 95 S. Ct. 1612 (May 12, 1975), holding:

> The reasoning of the Supreme Court in Alyeska Pipeline Co. v. Wilderness Society is fully applicable to litigation before the Federal Communications Commission. Congress has no more extended a "roving commission" to the FCC than it has to the Judiciary "to allow counsel fees as costs or otherwise whenever the [Commission] might deem them warranted."

Id. at 940 (footnotes omitted). (Alyeska is discussed at text Ch. III, D infra.)

While our study does not embrace the question of the NRC's statutory authority to finance intervenors, the Commission will undoubtedly consider this question in the light of the recent Turner and Alyeska cases (both of which were decided after our contract was awarded); the legislative history

2. Federal Power Commission (FPC)

Courts also have encouraged wider public participation in FPC proceedings.[40] However, such participation has stopped short of public financing. In a number of decisions dealing with citizen intervenors, the FPC has consistently held that it did not have the authority to "...transfer our operating funds to others in order to finance their activities in proceedings before this Commission."[41]

Moreover, the Second Circuit has affirmed the FPC's decisions, at least on the question of whether it had statutory

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surrounding the deletion of the Kennedy Amendment from the ERA, see notes 21-25 supra and accompanying text; and the fact that the Commission is not proposing to reimburse intervenor expenses from private parties to its proceedings.

One final note to the FCC treatment of intervenor financing, is that on June 18, 1975 (a week before the Turner decision) Congressman Torbert H. MacDonald (D-Mass.), Chairman of the House Communications Subcommittee, introduced H.R. 8014 which provides for financing participants in FCC rulemaking proceedings. Its language closely follows the new FTC statute discussed above. Compare §8 of the FCC Reorganization and Reform Act (H.R. 8014), 121 Cong. Rec. E 3309 (daily ed. June 18, 1975), with Title II, § 202(h)(1)-(3) of the Warranty Federal Trade Commission Improvement Act, Appendix D infra.

40 Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971).

41 Power Authority of the State of New York, Project No. 2685, 46 F.P.C. 1101, 1103 (1971). Accord, Consolidated Edison Co. of New York, Project No. 2338 (FPC Feb. 21, 1975, Jan. 15, 1975); Gulf Oil Corp., 47 F.P.C. 205 (1972), 46 F.P.C. 1364 (1971); Initial Rates for Future Sales of Natural Gas for All Areas, 44 F.P.C. 655, 1060 (1970).

authority to award interim intervenor financing. In Greene County Planning Bd. v. FPC,[42] the Court said:

> Having determined that the petition for review is timely, we find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clearer congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings.[43]

3. Consumer Product Safety Commission (CPSC)

The new CPSC has ruled that it has the authority to pay for counsel of an indigent respondent, and to reimburse those expenses of respondents "reasonably necessary to make meaningful the representation by counsel."[44] The CPSC, also, has paid the transportation expenses of at least one witness to a rule-making proceeding on the grounds that such was "...necessary for a full and complete hearing...."[45] The CPSC, like

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42 455 F.2d 412 (2d Cir. 1972).

43 Id. at 426. The statute in question was the Federal Power Act, §§ 309 and 314(c), 16 U.S.C. §§ 825(h), 825m(c) (1970).

44 In the Matter of Esquire Carpet Mills, Inc., FTC Docket No. 8013 (CPSC June 2, 1975) slip op. at 3.

45 39 Fed. Reg. 36041 (1974). See In re Fireworks Devices, CPSC Docket No. 74-3.

the NRC, is currently reviewing the whole question of providing financial assistance to intervenors.[46]

D. The Private Attorney General Rationale

As noted above, a number of courts have encouraged greater public participation in administrative proceedings. They have done this either by enlarging the scope of standing for persons seeking judicial review of agency decisions,[47] or by relaxing notions of standing for groups desiring to intervene in the administrative process.[48] Aside from the Turner and Greene

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46 Interview with Alan C. Shakin, CPSC Office of General Counsel, in Washington, D.C., April 23, 1975.

47 See, e.g., United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied sub nom, Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

48 See, e.g., National Welfare Rights Organization v. Finch, 429 F. 2d 725 (D.C. Cir. 1970); Palisades Citizens Ass'n., Inc. v. CAB, 420 F.2d 188 (D.C. Cir. 1969); City of San Antonio v. CAB, 374 F.2d 326 (D.C. Cir. 1967); Office of Communication of United Church of Christ v. FCC, 349 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965). See also agency decisions in Duke Power Co. (Catawba Nuclear Station Units 1 & 2), ALAB-150, RAI-73-10-811 (1973); Firestone Tire & Rubber Co., 3 Trade Reg. Rep. ¶ 19,373 (FTC 1970); Campbell Soup Co., [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 19,261 (FTC 1970).

County decisions, discussed in the immediately preceding sections, courts have generally addressed the question of recovery of attorneys' fees and experts' costs in the context of a judicial rather than an agency proceeding.

Those who successfully challenged agency determinations in the courts frequently ask for reimbursement of their expenses, either from the agency involved or from the other parties to the judicial proceeding. However, 42 U.S.C. § 2412 prohibits the award of attorneys' fees against the United States (including, of course, its administrative agencies).[49] This statute incorporates the so-called "American Rule," providing that parties to a law suit must bear their own fees and expenses, even when they prevail on their contentions.[50]

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49 See Alyeska Pipeline Service Co. v. Wilderness Society, 95 S. Ct. 1612 (May 12, 1975). Some courts also have interpreted the Eleventh Amendment to the Constitution as similarly barring recovery against states. See, e.g., Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974); Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974); San Antonio Conserv. Soc'y. v. Texas Highway Dept., 496 F.2d 1017 (5th Cir. 1974).

50 See generally Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849 (1975) [hereinafter cited as Dawson]; Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N.Y.U. L. Rev. 301 (1973) [hereinafter cited as Nussbaum]; Comment, Court-Awarded Attorney's Fees and Equal Access to the Courts, 122 U.Pa. L. Rev. 636 (1974) [hereinafter cited as Comment, Attorney's Fees] and cases cited therein.

This has meant that successful plaintiffs have had to fashion an exception to the American Rule, if they were to gain reimbursement for their expenses. For a number of years prior to the Supreme Court's decision in Alyeska,[51] federal district and appellate courts had developed such an exception, known as the private attorney general rationale.[52] Under this theory, the courts awarded attorneys' fees to litigants who, by their actions, effectuated a strong Congressional policy; benefited persons other than themselves; and protected the legal rights of members of the public which, if it were not for their litigation, would have otherwise been neglected.

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51 95 S. Ct. 1612 (May 12, 1975).

52 See, e.g., Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974); Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Morales v. Haines, 486 F.2d 880 (7th Cir. 1973); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972). The Supreme Court specifically overruled these cases in Alyeska, 95 S. Ct. at 1628 n. 46.

In expounding the private attorney general rationale, the courts often emphasized the need for encouraging greater public participation in the administrative process; approved of the role played by private citizens in questioning agency decision making; and took cognizance of the financial burdens placed on such public "guardians." Illustrative of this reasoning is the District Court's decision in La Raza Unida v. Volpe:[53]

> Responsible representatives of the public should be encouraged to sue, particularly where governmental entities are involved as defendants. As the amicus brief points out, only private citizens can be expected to "guard the guardians."
>
> However, these exhortations towards citizen participation can sound somewhat hollow against the background of the economic realties of vigorous litigation. In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of "taking on" an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle.[54]

The private attorney general rationale, as exemplified in such case as La Raza Unida, was specifically disapproved in

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53 57 F.R.D. 94 (N.D. Cal. 1972).

54 Id. at 100-01.

Alyeska which held that 42 U.S.C. § 2412, and the traditional American Rule incorporated therein, barred recovery of attorneys' fees, either against the Federal Government or against a private party - in the absence of specific Congressional authorization therefor.[55]

E. Congressional Statutes

The question of financing public participation or, more precisely, of shifting attorneys' fees from an unwilling

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55 Senator John Tunney (D-Cal.) is now considering legislation to offset the Alyeska decision. See Goldfarb, In the Public Interest, Washington Post, June 11, 1974, at A.18, col. 4. Our interview with Senator Tunney on July 9, 1975 disclosed that over a score of Congressional bills have now been introduced to provide for fee-shifting since the Alyeska decision.

In connection with the Alyeska matter, which grew out of the Alaska pipeline controversy, it is interesting to note how the Canadian Government has treated the disputes surrounding its own Arctic pipeline. For example, the Canadian Ministry of Indian Affairs and Northern Development allocated substantial funds in 1974 and 1975 to native Indian communities in the Mackenzie Valley, to hire intervenor attorneys to represent their interests in the hearings being held by Judge Berger on the public interest issues raised by the proposed construction of the Arctic natural gas pipeline. Canadian Minister Macdonald, also, has proposed that the Department of Energy, Mines and Resources set aside funds for citizen interest groups so that they might have an effective voice in future National Energy Board hearings on the Arctic pipeline issues. Letter from Richard O'Hagan, Minister Counsellor (Information), Canadian Embassy, Washington, D. C., to Tersh Boasberg, July 2, 1975. See also Anglin, Aspects of the Canadian Review of Proposals to Deliver Arctic Natural Gas, a paper presented at St. Lawrence Univ., Canton, N.Y. (April 17, 1975).

private or governmental defendant to a prevailing plaintiff, has been the subject of numerous Congressional statutes. (Approximately fifty of these statutes are discussed in Appendix E.) In recent years, Congress has increasingly provided for fee shifting in such newer areas of legislative concern such as civil rights, social action programs, and environmental matters.

Many of these statutes provide fees to the successful or prevailing litigant. Others allow courts to award expenses to "any party."[56] However, in drawing too close a parallel between intervenor financing and recent Congressional fee shifting statutes, one must be alert: (1) that these statutes speak only to recovery of court costs, not expenses incurred in agency proceedings; and (2) that their underlying rationale often is encouragement of private citizen action as a supplement to agency enforcement.[57] Nonetheless, an analysis of the

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56 See analysis in Appendix E infra, especially the Clean Air Act Amendments and the Federal Water Pollution Control, Marine Protection, Research and Sanctuaries Acts, at 8-9. See also analysis in Mashaw, Private Enforcement of Public Regulatory Provisions, Report to the Administrative Conference of the United States (1975).

57 See Alyeska, 95 S. Ct. at 1624.

statutes in Appendix E helps to place the question of intervenor financing in the larger context of administrative responsibilities to the public and the costs associated with securing agency responsiveness.[58]

F. Commentaries

In addition to agency determinations, court decisions and Congressional statutes, there has been abundant discussion of financing intervenors, specifically in NRC proceedings,[59] and

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58 As the Senate Judiciary Committee noted in connection with the attorneys' fees provision of the recent amendments to the Freedom of Information Act, 5 U.S.C.A. § 552(4)(E) (Supp. I, 1975):

> [A provision for attorneys' fees] was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act's mandates. Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law.
> S. Rep. No. 93-854, 93d Cong., 2d Sess. at 169 (1974).

59 See, e.g., S. Ebbin and R. Kasper, Citizen Groups and the Nuclear Power Controversy: Uses of Scientific and Technological Information, 200 passim (1974) [hereinafter cited as Ebbin & Kasper]; Jacks, supra note 6, at 500; Murphy, The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Charta or Agency Coup de Grace?, 72 Colum. L. Rev. 963, 995-96 (1972) [hereinafter cited as Murphy, NEPA]; Hearings on H.R. 11957, H.R. 12823; H.R. 13484, S. 3179 Before the Joint Comm. on Atomic Energy, 93d Cong., 2d Sess. 1205-61 (1974); Hearings on S. 2135, S. 2744 Before the Subcomm. on Reorganization, Research and International Organizations of the Senate Comm. on Government Operations, 93d Cong., 2d Sess. 172 passim (1974) [hereinafter cited as Ribicoff Hearings].

more generally in the administrative process.[60] It would serve no good purpose to detail these numerous commentaries here. Professor Gellhorn, writing in the Yale Law Journal, well summarizes the arguments of proponents of intervenor financing:

> The demand for broadened public participation in governmental decision making rests on the belief that government, like all other institutions, rarely responds to interests not represented in its deliberations. An administrative agency is usually exposed only to the views of its staff, whose position necessarily blends a number of discrete public interests, and of private persons with a clear financial stake in the proceeding. The emergence of individuals and groups willing to assist administrative agencies in identifying interests deserving protection, in producing relevant evidence and argument suggesting appropriate action, and in closing the gap between the agencies and their ultimate constituents presents an opportunity to improve the administrative process.[61]

The remarks of Harold L. Russell, Esq., a past Chairman of the ABA's Administrative Law Section, is an equally good refutation:

> It is believed that those who have advocated the expenditure of taxpayers' money to support the intervention of public interest representatives in agency proceedings have generally taken

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60 See, e.g., Cramton, supra note 6, at 537-46; Gellhorn, supra note 6, at 388-98; Lazarus & Onek, supra note 6, at 1096-1103; Panel II: Standing, Participation and Who Pays?, 26 Ad. L. Rev. 423 passim (1974) [hereinafter cited as Panel II]; Comment, Public Participation, supra note 33, at 746 passim.

61 Gellhorn, supra note 6, at 403.

> a one-sided view of the problem. Usually, I have heard that such funds would be devoted to fostering the causes of consumers and users and the like, whereas it is undoubtedly true that the public interest also extends to the welfare of the investors and of the employees whose money and labor are expended in the production of the service consumed by the user. All have a right to the proper consideration of their interests, and each is as much entitled to the expenditure of public funds for the protection of his interest as any of the others.
>
> Further, if there were a tax money fund to support public interest participation in agency proceedings, I am confident that we would not lack for allegedly genuine public interests to exhaust that fund, even if it were greater in amount than the combined budgets of the federal agencies. I believe that funding public intervention with tax money would lead to the assertion of spurious interests, and would also - as I have said before - corrupt genuine interest.62

In 1971, the Administrative Conference of the United States considered the issue of financing intervenors. Its Recommendation 28 endorses broadened public participation in agency proceedings. It recognizes that "the cost of participation in trial-type proceedings can render the opportunity to participate meaningless."[63] However, while the Administrative Conference urged agencies to minimize the costs of filing, distribution

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62 Panel II, supra note 60, at 449-50.

63 Administrative Conference of the United States, Recommendation 28: Public Participation in Administrative Hearings at 4 (Dec. 7, 1971) [hereinafter cited as Recommendation 28].

requirements, transcripts, and to make their information and experts more available,[64] it voted against recommending provision of such financial assistance as counsel and witness fees to intervenors.[65] Recommendation 28 is reproduced in Appendix F.

G. Summary

This chapter has summarized how other federal agencies and the courts are dealing with questions of public participation and intervenor financing. It has pointed out analogies raised by Congressional fee-shifting statutes, and introduced the reader to some of the leading commentaries in the field.

As noted above, only the FTC is now providing financing to intervenors, in rulemaking proceedings, under a recent statute. While many courts have encouraged broader public participation in the administrative process, the Turner and Greene County decisions have held that agency shifting of fees from an unwilling private party to a prevailing intervenor is not warranted in the absence of specific statutory provisions. The Alyeska ruling, also, is in accord with these lower court decisions as to recovery of court litigation fees and expenses.

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64 Id. §§ D1, D2, D3, respectively.

65 Id. But see dissenting statements of Max D. Paglin (now a permanent member of the ASLB Panel) and others. Id. at 5-7. See also Recommendation, ABA Section of Individual Rights and Responsibilities (Aug. 1974) (report of Albert E. Jenner, Chairman, to the ABA House of Delegates).

However, the impact of these three cases must be viewed in the light of:(1) the Congressional history surrounding the deletion of last year's Kennedy Amendment; and (2) the NRC's consideration of using its own public funds to finance intervenors, as a matter of agency choice.

IV. INITIAL CONSIDERATIONS

Having set the subject of intervenor financing in perspective, there are two initial subjects which should be discussed before we examine the arguments pro and con the study's three major questions. First, for what NRC proceedings is financing being considered and, second, which intervenors might be eligible for such assistance? While it is difficult to discuss both of these topics before considering the merits of the three major questions, it seems even more troublesome to analyse the issues without first knowing the types of proceedings and the kinds of intervenors which are the subject matter of our inquiry.

A. Types of NRC Proceedings

The NRC engages in a variety of proceedings. Rulemaking, licensing, enforcement actions and antitrust review are the major ones. For each type of proceeding, the considerations governing the question of intervenor financing may well be different. One of the purposes of the NRC proposed rulemaking will be to consider to what extent, if any, these proceedings warrant different determinations. In making these decisions, it is important to examine: (a) the purpose of the proceeding; (b) the nature of the contested issues; (c) the role of NRC staff and boards; (d) the alleged contributions intervenors can make; and (e) the costs of such intervention.[66]

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66 See Cramton, supra note 6, at 527 passim; Gellhorn, supra note 6, at 369 passim; Green, supra note 9, at 513-17; Jacks, supra note 6, at 500-14; Comment, Public Participation, supra note 33, at 734-46.

1. Rulemaking

The NRC holds both legislative-type (notice and comment) rulemaking and adjudicatory rulemaking.[67] Both types frequently involve general issues of agency policy or serve to particularize the often vague guidelines laid down by Congressional directives.[68]

Commentators have noted that, of all agency proceedings, rulemakings probably are best suited for public participation since (a) their very purpose is to seek broad and diverse input; (b) they usually involve issues of great public moment which affect large numbers of people; and (c) their decisions are

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67 Examples of the most recent NRC adjudicatory-type rulemakings are: (1) the controversial and protracted hearings on Emergency Core Cooling Systems, In the matter of Acceptance Criteria for Emergency Core Cooling Systems for Light-Water-Cooled Nuclear Power Reactors, AEC Docket No. RM-50-1 [hereinafter cited as ECCS Hearings]; (2) the As Low As Practicable hearings, In the matter of Effluents from Light-Water-Cooled Nuclear Power Reactors, AEC Docket No. RM-50-2, [hereinafter cited as ALAP hearings]; (3) hearings on The Uranium Fuel Cycle, In the Matter of Amendment of 10 C.F.R. Part 50 - Licensing of Production and Utilization Facilities, AEC Docket No. RM-50-3; and (4) hearings on the Uranium Fuel Cycle Transportation, In the Matter of Amendment of 10 C.F.R. Part 50 - Licensing of Production and Utilization Facilities, AEC Docket No. RM-50-4.

68 It is beyond the purview of this Study to discuss the proper scope of intervenor participation in these types of NRC rulemaking proceedings. See generally Roisman, supra note 9, at 118 passim; Murphy, NEPA, supra note 59, at 990-97; Murphy, Explanatory Memorandum for the Administrative Conference of the United States on Environmental Issues in Licensing Proceedings, November 23, 1973 [hereinafter cited as Murphy, Admin. Conf.]; Freeman, A Call for Reevaluation of the Administrative Procedure Act (Paper delivered at the ALI-ABA Course, Washington, D.C., Sept. 19, 1974); Bauser, The Development of Rulemaking Within the Atomic Energy Commission: The Nuclear Regulatory Commission's Valuable Legacy, 27 Ad. L. Rev. 165 (1975) [hereinafter cited as Bauser].

difficult to collaterally attack on judicial review or challenge in future agency adjudications.[69]

Further, rulemaking may allow intervenors to consolidate their positions and marshall their resources in a single proceeding, instead of having to contest similar issues in numerous separate licensing cases.[70] In addition, certain rulemaking proceedings may reduce intervenor counsel expenses, depending upon the scope of discovery and cross-examination allowed.[71]

Arguments against financing intervenors in rulemakings (as distinguished from other types of proceedings) are: (a) that the potential for delay is magnified many times over by the huge numbers of parties which may seek to be heard;[72] (b) that, while it is hard enough to decide which intervenors to fund in licensing cases, it is almost impossible to do so in a rulemaking;[73] and (c) that the degree of intervenor concern

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69 Cramton, supra note 6, at 535-37; Gellhorn, supra note 6, at 369-71; Jacks, supra note 6, at 490 passim; Comment, Public Participation, supra note 33, at 735 passim. On participation in rulemakings see National Petroleum Refiners Association v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974); Bell Telephone Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974). On denial of collateral attack see the recent decision of the Court of Appeals of the D.C. Circuit in Nader v. NRC, No. 73-1872 (D.C. Cir. May 30, 1975). On non-challengeability of the NRC Regulations in licensing proceedings see 10 C.F.R. § 2.758 (1975).

70 See Murphy, Admin. Conf., supra note 68, at 3.

71 But note extensive cross-examination and use of counsel in the ECCS Hearings, supra note 67.

72 FPC Commissioner Rush Moody, Jr. noted that one of the Commission's cases had a service list of 15 pages. Comment by Mr. Moody, Panel II, supra note 60, at 451.

73 See text Ch. VII, H infra.

in rulemakings may be less than in licensing cases, which touch upon sensitive, site-related issues, and seem to generate the most fervent intervenor controversy.[74]

2. Construction Permits and Operating Licenses

The licensing of nuclear electric generating facilities is the heart of the NRC's regulatory activities. It occupies by far the greatest amount of hearing, staff, board, applicant and intervenor time and resources. Utilities must secure both a construction permit and an operating license. Procedures and considerations affecting each step are slightly different.[75] (See Appendix G for detailed charts of these processes.)

At the construction permit stage a public hearing is mandated even if there are no intervenors.[76] An ASLB is convened to resolve radiological health and safety questions; the cost-benefit balancing required under the Environmental Policy Act (NEPA);[77] as well as the applicant's technical and financial qualifications.[78]

Hearings for operating licenses (usually five or six years after the permit stage) are necessary only in contested

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74 See text Ch. IV, B 3 infra.

75 For a good description of these procedures, see Jacks, supra note 6, at 481-88; Murphy, Atomic Safety and Licensing Boards: An Experiment in Administrative Decision Making on Safety Questions, 33 Law & Contemp. Prob. 566, 566-70 1968) [hereinafter cited as Murphy, Safety].

76 Atomic Energy Act, 42 U.S.C. § 2239(a) (1970).

77 42 U.S.C. § 4321 et seq. (1970).

78 See 10 C.F.R. Part 2, App. A, V-VI (1975).

proceedings.[79] Unlike the permit hearing, in operating licenses the board determines only those matters in controversy among the parties.[80] These matters can include radiological health and safety questions, as well as NEPA issues, within certain limits.[81] Since the facility already has been constructed, there is immense pressure on the utilities to conclude the hearing process swiftly because of the economic necessities of beginning electric power production.

Aside from Commission rulemaking, arguments for and against intervenor financing have been raised almost exclusively in the context of construction permits and operating licenses.[82] Indeed, most persons interviewed confined their comments to these proceedings and to the few instances of recent rulemaking.

Because of this history of intervention in construction permits and operating licenses, our Report concentrates heavily on these proceedings. The next three chapters examine in detail the contentions of both proponents and critics of intervenor financing; the purposes of the construction permit and operating license hearings; the role of the NRC staff therein; the nature and importance of the issues contested; the function of the ASLB

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79 Atomic Energy Act, 42 U.S.C. § 2239(a) (1970).

80 See 10 C.F.R. Part 2, App. A, VIII (1975).

81 Id.

82 See, e.g., Consumers Power Co. (Big Rock Nuclear Plant), AEC Docket No. 50-155, CLI-74-2, RAI-74-11-820 (Nov. 20, 1974); Consumers Power Co. (Midland Plants, Units 1 & 2), AEC Docket Nos. 50-329A, -30A, CLI-74-26, RAI-74-7-1 (July 10, 1974).

and ALAB; and the adversary format of these adjudicatory proceedings.[83]

3. Other Licensing Functions

The NRC licenses a great many activities. These include the construction and operation of facilities other than nuclear power plants, as well as the possession, shipment, ownership and export of nuclear materials. While public hearings are not mandated in any of these proceedings, intervention is permitted and hearings can be held upon the request of "...any person whose interest may be affected...."[84] Many of these licensing proceedings, especially those having to do with enrichment, repossessing, transportation, and export of nuclear materials, even now, are generating great public interest.[85] These licensing proceedings

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83 See discussion on public participation in adjudicatory-type proceedings in Cramton, supra note 6, at 527 passim; Gellhorn, supra note 6, at 369-90; Comment, Public Participation, supra note 33, at 825-40; and Panel II, supra note 60, at 489 passim.

84 Atomic Energy Act, 42 U.S.C. §§ 2073, 2139 (1970).

85 A municipality has intervened in a transportation matter. See City of New Britain v. AEC, 308 F.2d 648 (D.C. Cir. 1962). Also, the Center for Law and Social Policy, Washington, D.C., has contemplated intervention in nuclear materials export matters. Interview with Eldon Greenberg in Washington, D.C., July 3, 1975.

In just the few months of our study, a number of articles in The Washington Post and The New York Times illustrate the growing public interest in some of these other nuclear licensing areas. See, inter alia, Robert Gillette, One Danger of Nuclear Progress: Nuclear Waste, The New York Times, June 11, 1975, at 4, col. 3; James Reston, The Nuclear Power Race, The New York Times, June 4, 1975, at 35, col. 7; Three Groups Consider Building Nuclear Fuel Plants, The New York Times, June 23, 1975, at 16, col. 3; World Spread of A-Plants Stirs Fears of Bomb Potential, The Washington Post, June 6, 1975, at A16, col. 1.

do not seem to entail major substantive differences from those concerns noted in the preceding section with regard to operating licenses. Accordingly, these so-called "other" licensing proceedings may well be considered appropriate for a discussion of intervenor financing therein, even though, to date, there have been very few intervention requests in such areas.

4. Enforcement Actions

The NRC may take action to modify, suspend or revoke any license, or to impose civil penalties on a licensee.[86] These enforcement actions differ significantly from the rulemaking and licensing proceedings noted above, and may raise separate considerations for intervenor financing.[87] One difference is that enforcement actions generally pit the NRC staff against the licensee, as antagonists, rather than as mutually supportive parties. Also, enforcement issues may be limited and lacking in broad public interest. Further, intervenor contributions may be made as well through written submissions as by cross-examination and trial-type tactics. However, when enforcement proceedings involve important issues of public policy or set

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86 10 C.F.R. § 2.200 et seq. (1975). There have been very few enforcement actions which actually have gone to the hearing stage.

87 See Cramton, supra note 6, at 532-33; Gellhorn, supra note 6, at 371.

general agency precedents, then they differ much less from the other types of proceedings discussed above.[88]

5. Antitrust Review

Under Section 105 of the AEA, the NRC considers antitrust aspects of facility license applications.[89] Hearings are not mandatory, but, as in other proceedings, may be requested by intervenors whose "interests are affected" and ASLBs will be convened.[90] Ordinarily, antitrust hearings are held separately from those involving radiological health and safety and NEPA-type issues.[91]

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88 There has been at least one request for intervenor financial assistance made in an NRC enforcement action. See Consumers Power Co. (Midland) ALAB-270 (May 8, 1975). For an enforcement action against a utility for making material false statements and raising public policy issues as to the nature of the penalties to be imposed, see the intervention in Virginia Electric and Power Co. (North Anna Power Station, Units 1, 2, 3 & 4), AEC Docket Nos. 50-338, -339, -404, -405, and Construction permits Nos. CPPR-77, -78 (Memo and Order of April 4, 1975).

89 Atomic Energy Act, 42 U.S.C. § 2135 (1970).

90 10 C.F.R.§2.714 also governs intervention in antitrust proceedings.

91 The NRC has held (or is holding) only four antitrust hearings. See (1) Consumers Power Co. (Midland Plants, Units 1 & 2), AEC Docket Nos. 50-329A, -30A; (2) Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Unit 1, Perry Plant, Units 1 & 2), AEC Docket Nos. 50-346A, -440A, -441A; (3) Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit No. 1), AEC Docket No. 50-482A; (4) Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), AEC Docket Nos. 50-348, -364.

The Section 105 review, also, is a different kind of proceeding from NRC licensing. As in the case of enforcement actions, the nature of antitrust review has a direct impact on questions of financing intervenors therein.[92] For example, independent analysis by the Department of Justice's Antitrust Division always accompanies NRC staff review.[93] Should a hearing be required after completion of both agencies' review, NRC staff and the applicant are generally protagonists.[94]

Then, too, the nature of the contested issues in a Section 105 hearing differs substantially from the kinds of health, safety, and environmental concerns of licensing proceedings. The purpose of the antitrust review is solely to determine whether the applicant's activities under the proposed license "...would create or maintain a situation inconsistent with the antitrust laws as specified in Section 105(a)."[95] The intent of Congress was to ensure that the original governmental control of atomic

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92 No requests for financial assistance have been made by intervenors in §105 matters, although in two of the approximately 100 reviews (not hearings) to date, environmental groups have made appearances.

93 Atomic Energy Act, 42 U.S.C. § 2135 (1970).

94 Often, so is the Attorney General, although either the NRC staff or the A.G. (or an intervenor) may request a hearing, and find one or the other on the applicant's side.

95 Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), AEC Docket No. 50-382A; CLI-73-025, RAI-73-9-619, 619-20 (1973).

power "...should not be permitted to develop into a private monopoly via the AEC (sic) licensing process...." [96]

Moreover, the types of intervenors in antitrust hearings are frequently distinguishable from those who contest NRC licensing matters. They tend to be competitor utilities of the applicant, concerned with obtaining access to the latter's increased generating or transmission capacity. Antitrust intervenors are often municipal utilities or REA cooperatives, and their need for public funding ordinarily will be less acute than that of individuals or local citizen groups. [97]

Also, intervenors in antitrust proceedings are free to pursue their remedies at law. Suits to recover treble damages and attorneys' fees are allowable under certain antitrust statutes.[98]

B. Eligibility of Intervenors for Financing

After examining the type of NRC proceeding in which discussion of intervenor financing may be appropriate, the second

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96 Id.

97 "Need," as discussed here, goes to the type of NRC proceeding for which financial assistance to intervenors is being considered. "Need," as discussed in Ch. IV, B3c infra, goes to the eligibility of the intervenor to qualify for assistance, regardless of the type of proceeding.

98 See antitrust statutes in Appendix E. Standards for winning antitrust suits differ from guidelines for §105 review, since the latter embraces only activities "inconsistent with," not in violation of, the antitrust statutes.

initial consideration we turn to is: which intervenors would be eligible for such assistance, should the Commission decide in favor thereof. This is a different question from who has standing to intervene. Again, our study presupposes no changes in the NRC's standing rules.[99] Before an intervenor can be eligible for financial assistance, therefore, it must first satisfy the Commission's standing regulations.

While standing to intervene is a distinct question from intervenor eligibility for financing, nevertheless, considerations involved in both determinations are closely related. In deciding eligibility, the Commission could well make reference to its own comprehensive standing criteria enumerated in 10 C.F.R. §2.714, governing requests for standing to intervene. Such factors include: an analysis of the proposed benefits and costs of intervention; availability of other means to protect the intervenor's interests; the nature of the intervenor's interest; and the anticipated effect of the Commission's action on such interests.[100] (Selected federal standing criteria

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99 10 C.F.R. §2.714 (1975).

100 For discussions of standing to intervene in agency proceedings, see Albert Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief, 83 Yale L.J. 425 (1974) [hereinafter cited as Albert]; Cramton, supra note 6; Davis, Administrative Law: Today and Tomorrow, 23 (Emory) J. of L. 335 (1973); Gellhorn, supra note 6; Scott, Standing in the Supreme Court - A Functional Analysis, 86 Harv. L. Rev. 645 (1973); Shapiro, Some Thoughts on Intervention Before Courts, Agencies and Arbitrators, 81 Harv. L. Rev. 721 (1968); Comment, Public Participation, supra note 33; and cases cited notes 47 and 48 supra.

of other agencies are gathered in Appendix H). For purposes of exploring intervenor financing, one may add to the above factors an examination of (a) the underlying purposes of the hearing; (b) the importance of the issues to a fair determination; and (c) the intervenor's need for public funds.

1. Purpose of the Hearing

As noted in the section immediately above, various NRC proceedings have different purposes. Since much of our study discusses licensing procedures, special mention should be made of construction permits - the only activity requiring a mandatory public hearing whether or not there is intervention.[101]

There are at least two major purposes to permit hearings. The obvious one is to determine, on a record, whether there is reasonable assurance that the facility can be constructed at the proposed site without "undue risk to the health and safety of the public"; that it will not be "inimical to the common defense and security of the public"; that the cost-benefit balancing required under NEPA is satisfied; and that the applicant possesses both the requisite technical and the financial qualifications therefor.[102] While these issues may not be as broad as those involved in some rulemakings, they are neither narrow questions, nor without substantial public interest.

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101 42 U.S.C. § 2239(a).

102 Rules of Practice, 10 C.F.R. Part 2, App. A VI (1975).

The second major purpose of the permit hearing, underscored by its mandatory nature, is to ensure that NRC licensing decisions are fully exposed to public view, and to inform and educate the citizenry on the potential advantages (and dangers) of nuclear power.[103] Thus, there is both a functional and an educational purpose to the permit hearing and, perhaps, to the whole licensing process as well.

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103 See S. Rep. No. 296, 85th Cong., 1st Sess. 12 (1957):

> The Joint Committee concluded that full, free, and frank discussion in public of the hazards involved in any particular reactor would seem to be the most certain way of assuring that the reactors will indeed be safe and that the public will be fully apprized of this fact.

There were also economic considerations involved. Senator Anderson, sponsor of the mandatory hearing provision noted:

> Although I have no doubt about the ability and integrity of the members of the Commission, I simply wish to be sure they have to move where everyone can see every step they take; and if they are to grant a license in this very important field, where monopoly could so easily be possible, I think a hearing should be required and a formal record should be made regarding all aspects, including the public aspects.

Hearings on Governmental Indemnity and Reactor Safety Before the Joint Comm. on Atomic Energy, 85th Cong., 1st Sess. 7 (1957). However, as Professors Murphy and Green have both observed, there was remarkably little attention given by Congress to the unusual requirement of a mandatory public hearing. Green, supra note 9, at 510; Murphy, Safety, supra note 75, at 574.

2. "Public Interest" Intervenors

Many persons interviewed initially assumed that the study was concerned with providing financial assistance principally to "public interest" intervenors. But the questions "who represents the public interest" and, indeed, "what is the public interest" were difficult hurdles to cross. [104]

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104 For a discussion of the public interest in the context of agency intervention see Panel I: What is the Public Interest? Who Represents It?, 26 Ad. L. Rev. 385 (1974) [hereinafter cited as Panel I]; Comment, Public Participation, supra note 33, at 723-46; compare the majority opinion by Mr. Justice White with the dissenting opinion by Mr. Justice Marshall, Alyeska Pipeline Service Co. v. Wilderness Society, 95 S. Ct. 1612 (May 12, 1975). See letter from John P. Madgett, General Manager, Dairyland Power Cooperative, to Angelo Giambusso, NRC Deputy Director for Reactor Projects, May 22, 1975 at 4:

> It is difficult to understand the legality of intervention action imposed by one or 50 members of a group which adversely affects the adequacy and cost of power for approximately 100,000 consumers who are neighbors of the interventionists. We fail to understand how such a group truly represents the common interests of the majority.

Dairyland Power Cooperative (La Crosse Boiling Water Reactor), AEC Docket No. 50-409.

Intervenors come in all shapes and sizes: from the U.S. Marine Corps, state attorneys general, cities and towns, to large national organizations, such as the Sierra Club and the Natural Resources Defense Council (NRDC), to local citizen groups, high school biology teachers, Bob Hope and the ubiquitous housewife. How is it possible to distinguish from among these intervenors who best represents the public interest?

Aside from the NRC staff, perhaps the applicant most genuinely represents the public interest.[105] What about an association of stockholders formed to ensure a fair return on its utility investments?[106] Or a rate-payers group which argues that nuclear power is the cheapest source of its electricity? Do not they, too, represent the public interest? Further, is a single property owner, adjoining the proposed site, less a guardian of public health and safety than a large national organization? Does a local group, 1000 strong, have greater credibility than ten concerned nuclear engineers?

To the argument that the public interest equates with unrepresented interests,[107] is the rejoinder that many unrepresented interests can be purely private in character, such as

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105 See Remarks of Charles F. Luce, Chairman of Consolidated Edison, Panel I, supra note 104, at 405-12.

106 See Remarks of Harold L. Russell, Panel II, supra note 60, at 449.

107 See Comment, Public Participation, supra note 33, at 723.

the landowner dissatisfied with the price he receives for his parcel; or the esthetic damage a proposed facility may cause to his bucolic setting. Also, does the direct financial interest of a commercial fisherman or clamdigger favor or cut against his representation of public interests? If the Commission is to limit financing to "public interest" intervenors, it will take a better definition of this term than we were able to develop.

3. A Functional Approach to Intervention

Many authorities have suggested that we could more profitably determine intervenor eligibility for financial assistance on a functional basis, rather than by wrestling with the semantic niceties of "public interest." The functional approach to intervention postulates that "the public interest is not a monolith";[108] that there are many interests which should be considered by agency decision makers; and that, under certain circumstances, their representation may be deserving of public

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108 Gellhorn, supra note 6, at 360.

assistance.[109] The underlying rationale of the functional approach is that intervenors can be helpful in the agency's regulatory process. Under such a functional approach, determinations of intervenor eligibility for financing are made on the basis of (a) avoidance of duplication, (b) importance and nature of the contested issues, and (c) demonstrable need for funds.[110] While none of these considerations can be easily resolved, the functional approach does help point the way out of the public interest definitional labyrinth.

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109 See generally Cramton, supra note 6; Gellhorn, supra note 6; Jacks, supra note 6; Lazarus & Onek, supra note 6; Panel II, supra note 60. Accord, Panel I, supra note 104, at 396, quoting Albert, supra note 100:

> In a highly pluralistic society with many interest groups...there is no "unitary public interest." Agencies must deal with a constellation of interests which often compete with each other...none of the interests relevant to an administrative decision so clearly captures the common good that it can properly be regarded as public and left exclusively to an agency.

110 The FTC proposed intervenor financing rules take a functional approach to the problem. They focus on avoidance of intervenor duplication, importance of the contested issue, and intervenor need. See Appendix D infra. The NRC's standing rules, 10 C.F.R. § 2.714, are also basically functional in nature.

a. Duplication of Interests

Many proponents of intervenor financing argue that not all intervenors should be publicly assisted. One consideration is the desirability of avoiding duplication.[111] Where the interests of an intervenor may be adequately represented by other parties (or by the staff), this tends to limit wasteful and repetitive testimony, cross-examination, and other unnecessary hinderances to the orderly conduct of hearings.[112]

Avoiding duplicate interventions, however, can raise some thorny questions. For example, how does one determine which interests are "adequately represented" by others? This leads into a discussion of the capability and responsibility of intervenors to advance their own contentions effectively.[113]

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111 See proposed 16 C.F.R. § 1.17, 40 Fed. Reg. 15238 (1975) (compensation of parties in FTC rulemaking), Appendix D infra; Kennedy Amendment §501(a), 120 Cong. Rec. S 18729 (daily ed. Oct. 10, 1974), and S. 1665, 94th Cong., 1st Sess. § 193(a) (1975), Appendix C infra. See generally Cramton, supra note 6, at 537; Gellhorn, supra note 6, at 384; Comment, Public Participation, supra note 33, at 722, 734.

112 At this point we are examining the issue of duplication as one of the factors considered in the functional approach to intervenor eligibility for assistance. The impact of financing on intervenor consolidation of issues is discussed in text Ch. VII, G infra.

113 See, e.g., Church of Christ I, 359 F.2d 994, 1005; Gellhorn, supra note 6, at 380-82; Jacks, supra note 6 at 494; Murphy, NEPA, supra note 59, at 993; Comment, Public Participation, supra note 33, at 746.

For example, is a large national organization with experienced litigators and experts more capable of representing certain interests than lay intervenors or a newly formed local citizen group which has no established track record? Yet, many citizen organizations are able to buttress their own effectiveness by their closeness to the issues. A number of persons interviewed said that intervenor interests bear a direct relationship to facility proximity. Then again, the particular interests of local groups and national organizations may not coincide.

There is also an element of sincerity or accountability in making these determinations. Intervenors must be concerned enough about certain issues in order to press home their disputations in the face of the rigors and vicissitudes of a protracted hearing.[114] And, in delineating the adequacy of interest representation, another factor to be considered is the organization and accountability of the client-intervenor. At the least, it should have sufficient cohesiveness to curb possible misrepresentation of its own interests.[115]

These, then, are some of the factors which should be considered in avoiding duplicative awards and in determining whether

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114 See Panel II, supra note 60, at 429. This is also the underlying rationale of the "case or controversy" doctrine.

115 See Comment, Public Participation, supra note 33, at 733. Of course this interest does not have to be economic or monetary in nature. See 10 C.F.R. § 2.714 (1975).

intervenor interests are adequately represented by others in a proceeding: intervenor capability, responsibility, genuine concern in the outcome and accountability.

b. Nature and Importance of the Issues

As all intervenors may not necessarily be financed, so too, all issues raised by a single intervenor need not qualify for assistance. Certain issues, by their very nature, lend themselves better to public participation than others.[116] For example, issues which raise broad agency concerns or new policy considerations may be better suited to adversarial contest than narrow enforcement questions. Such issues may be site-related as well as generic.

Importance of an issue to a fair determination of the hearing is also vital. Since the functional approach assumes that one of the major purposes of intervention is to help the agency reach difficult legal, economic and technical judgments, the agency should have a voice in determining which issues or interests are important enough to warrant further exploration.[117] This can mean that those issues which may seem most important to an intervenor may not be deemed as equally critical by a

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116 See Cramton, supra note 6, at 531-35; Gellhorn, supra note 6, at 376-79; Jacks, supra note 6 at 495-97, 511-12; Comment, Public Participation, supra note 33 at 745.

117 See authorities cited note 116 supra.

hearing board.[118] Also, issues appearing at first unimportant may later prove to be the most critical ones as the hearing evolves.[119]

Nevertheless, many believe that it is possible for participants to generally agree on some, if not all, the key issues in a proceeding.[120] Choosing important issues is a process not substantially different from that involved in deciding questions of standing.[121] Further, ASLBs have the knowledge and experience to focus on a hearing's vital issues.

c. Financial Need

The costs of intervenor participation in NRC proceedings may run anywhere from a few thousand dollars to amounts of $150,000 and up.[122] Most intervenors, obviously, are not able

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118 See text Ch. V, B3 infra for a discussion of those issues of great interest to some intervenors, but which are outside the scope of the hearing.

119 E.g., Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

120 This has special significance with regard to the issue of interim intervenor financing. See text Ch. VII, B infra.

121 See discussion on standing, text Ch. IV, B supra, and authorities cited at note 100 supra.

122 See Roisman, supra note 9, at 116. Applicant costs may run $500,000 to $1 million and more. See Ribicoff Hearings, supra note 59 at 227. See also text Ch. VII, H and note 392 infra.

to afford these sums.[123] On the other hand, some intervenors are better financed than others. When public funds are being requested, seemingly there should first be a determination of financial need.[124]

Need is always a relative question. The proposed FTC intervenor financing regulations are helpful in this regard. Under §1.17(a) an applicant for assistance must be:

> ...unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

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123 See Memorandum to the ERA Senate and House Conferees from Matthew Schneider, Senate Government Operations Reorganization Subcommittee, 120 Cong. Rec. S 18724, S 18727 (daily ed. Oct. 10, 1974) [hereinafter cited as Schneider Memorandum].

124 See Consumers Power Co. (Midland), RAI-74-7-1, in which the Commission turned down a request for intervenor financial assistance on the ground "that whatever the scope of our authority, if any, to grant financial assistance to intervenor groups, the Saginaw petition must be denied for lack of a proper showing of need." See also Citizens for a Safe Environment v. AEC, 489 F.2d 1018 (3d Cir. 1974).

Further, under § 1.17(c) (4), those requesting funding must give:

> A statement of the reasons the applicant is unable effectively to participate in the rulemaking proceeding without financial assistance including information relating to:
>
> (i) The economic stake of the interest involved as compared with the costs of participation;
>
> (ii) The feasibility of contributions to the costs of participation by individual representatives of the interests;
>
> (iii) The resources of the applicant, or of the interest represented by the applicant.125

As their rules suggest, the FTC is looking for something less than affluence, but more than abject poverty.

In making determinations of financial need, some of the considerations which the NRC's rulemaking may wish to explore are:

(1) Public Entities - Many of the proposed nuclear facilities are located outside of major metropolitan areas for low-density population siting reasons. Should these smaller towns and counties be eligible for assistance if they choose to intervene?[126] What about financially pressed large

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125 40 Fed. Reg. 15238. See entire text of § 1.17 Appendix D infra.

126 The New York State Plant siting law requires an applicant to pay a $25,000 "fee" to be used only by municipalities to help defray the cost of their interventions. See N.Y. Public Service Law §____(6) (McKinney 19__); N.Y. Public Service Comm'n Rules of Procedure, Ch. 1, §70.25 (1973).

cities, such as New York, Newark and Detroit? What about state attorneys general or state offices of public counsel?[127]

It is true that public entities, while lacking current funds budgeted for interventions, do have the authority and (at least theoretically) the ability to raise funds of their own. But can a small town realistically tax its residents for the enormous costs of an extended NRC intervention? Yet, such public bodies admittedly represent important citizen interests; are certainly accountable for their actions; and have an undisputed legitimacy - all important factors to be considered under the functional approach to intervention. Moreover, they have made requests for financial assistance in some agency proceedings.[128]

(2) Degree of Need - It may be relatively easy to determine an individual's ability to finance his or her intervention. The harder issues are presented by those non-profit organizations which have some money, but not enough

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127 Our interviews with state attorney general and public counsel offices indicated they wished to be considered eligible for intervenor funding.

128 E.g., Power Authority of the State of New York, Project No. 2685, 46 F.P.C. 1101 (1971), aff'd sub nom, Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972) (intervenor Town of Durham, N.Y. requested financial assistance).

to accomplish all they would like to do.[129] This often becomes a question of ordering priorities within the organization.

As the Commission held in Consumers Power (Midland), where both the Sierra Club and the United Auto Workers of America were intervenors requesting financial assistance:

> Intervention in our licensing proceedings, based on affirmations of bona fide interest, carried with it an obligation to bear often substantial costs to the extent of the intervenor's capabilities. Thus, intervention may sometimes require an intervening organization to re-order its budgetary priorities.130

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129 Should, for example, an IRC §501(c)(3) organization automatically qualify for intervenor financing because it is a "charity"?

130 Consumers Power Co. (Midland), RAI-74-7-1, 2. See also Gulf Oil Corp., 46 F.P.C. 1364, in which the Washington Urban League requested leave to proceed in forma pauperis. In denying the motion, the FPC noted:

> On the other hand, the sworn affidavit of the Associate Director of the Urban League disclosed revenues in excess of $900,000. While the Associate Director averred that none of this income is allocated to meeting the costs of this proceeding, we cannot equate choice of priorities with lack of funds. Accordingly, the motion of the Urban League for leave to proceed in forma pauperis is denied.

Id. at 1365.

Yet, a number of courts have turned a sympathetic ear to the financial problems of national non-profit groups.[131] The difficulty is articulating a needs standard which takes

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131 See, e.g., Church of Christ III, 465 F.2d 519 (D.C. Cir. 1972), in which the D.C. Circuit had no difficulty with the Office of Communications of the United Church of Christ receiving attorney's fees. In KCMC, Inc., 25 F.C.C. 2d 603 (1970), Commissioner Cox, dissenting, stated:

> The costs incurred by public groups in filing petitions to deny and negotiating with the affected stations are usually small when compared with the expenses of a comparative hearing, or even a fully litigated hearing on such a petition. But they may run to several thousands of dollars--as in this case--and if the Commission rules that such parties can never recover their out-of-pocket costs this will either discourage local groups from becoming involved with station renewals or limit the quality of the job they can do in such cases. And the impact on national organizations like the United Church of Christ, which may be called upon to assist in renewal challenges in a number of widely separated communities, will simply be to restrict the number of such requests they can honor. If this is what the majority wish to accomplish, I think they should frankly admit it. I do not think such an objective is even remotely in the public interest.

Id. at 609.

into account the relative resources of a wide variety of organizations.[132]

(3) Piercing the Veil - Another issue in determining intervenor need is whether the Commission should look behind a corporate shell to ascertain the individual wealth of the organization's members.[133] How far should this examination carry? Suppose a millionaire is a $25 dues-paying member of the NRDC?[134] Further, when local chapters of

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132 One way out of this dilemma may be to adopt a "maintenance of effort" proviso in any intervenor financing plan. Many federal agencies incorporate such a clause in their grants to non-profit organizations. See, e.g., Regulations of the Community Services Administration (CSA), 40 Fed. Reg. 27668 (July 1, 1975). The intent of a maintenance of effort provision is to ensure that a grantee does not use the federal grant funds to replace funds of its own being devoted to the same purposes for which the grant was made. Thus, if a school system is already providing pre-school services for poor children, it cannot use a Head Start grant to replace these monies and divert them to an audio-visual program for high school students. It must, instead, use the grant to expand its ongoing early childhood program for low-income youngsters.

133 See Gulf Oil Corp., 46 F.P.C. 1364, 1365, in which the Commission noted in regard to an ad hoc student intervenor group, Students Opposing Unfair Practices, Inc. (S.O.U.P.):

> However, the showing by a corporate intervenor must consist of more than a mere assertion of poverty. The opportunity to adopt the corporate form simply as a subterfuge masking the wealth of members is too apparent.

134 Note the FTC handling of this problem in proposed rule §1.17(c)(4)(ii) when it talks about the "feasibility" of contributions to an organization (Appendix D).

national organizations seek financial assistance as intervenors, should the nature of their organizational relationship to the parent group be scrutinized? Again, should these kinds of standards be articulated, or should the NRC retain broad discretion in these areas?

(4) Fund-raising Efforts - Not only is the intervenor's relative lack of resources a factor in determining its need for financial assistance; but shouldn't the Commission also inquire into the efforts the intervenor has made to raise its own funds for the contest? Once more, as the Commission said in Consumers Power (Midland):

> While we do not suggest that an intervenor must show that it is totally without funds from any source as a precondition to seeking assistance from this Commission, we would require a substantial showing, from a responsible official, that all reasonable efforts have been made unsuccessfully to provide sufficient funds for the intervention. Absent such a showing, the bona fides of the intervention is called into question.[135]

C. Summary

This chapter has discussed the various types of NRC hearings and the different considerations which questions of intervenor financing present for each. It suggests why the body of the Report concentrates more on rulemaking and licensing proceedings than on enforcement actions or antitrust review.

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135 RAI-74-7-1, 2. Accord, Gulf Oil Corp., 46 F.P.C. 1364. See also the discussion of pro bono aid and foundation assistance in text, Ch. VI, F infra.

The chapter also explains the functional approach to intervention and, consequently, to the issues surrounding determinations of intervenor eligibility for financing. This analysis takes into account the purpose of the hearing; the nature and importance of the interests to a fair determination of the proceedings; and the relative financial need of the intervenor for public funds. These initial considerations - the types of NRC proceedings involved and the factors pertinent to intervenor eligibility decisions - allow us to examine the study's three major questions in a more constructive manner.

V. SHOULD FINANCIAL ASSISTANCE BE PROVIDED TO INTERVENORS

We turn now to the study's major question: Should the NRC, as a matter of policy choice, provide financial assistance to intervenors?

In exploring this question, we analyze both the reasons advanced by proponents of intervenor financing and those arguments voiced by opponents of the notion. These positions will be more fully developed in the Commission's proposed rulemaking and a net balance can then be struck.

A. Arguments in Favor of Intervenor Financing

The arguments made by proponents can be reduced to five basic contentions: (1) intervenors have made and can make significant contributions to the NRC hearing process; (2) they serve as a gadfly to the staff and boards; (3) funding will increase the public's education and confidence in the efficacy and safety of nuclear technology; (4) no modest effort should be spared thoroughly to review all the health, safety, economic and environmental factors involved in licensing nuclear facilities; and (5) intervenors represent an outside view which should be heeded in an area dominated by governmental and powerful interests.[136]

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136 See Ebbin & Kasper, supra note 59; Cramton, supra note 6; Gellhorn, supra note 6; Jacks, supra note 6; Lazarus & Onek, supra note 6; Panel II, supra note 60; Comment, Public Participation, supra note 33.

1. Contributions of Intervenors

Proponents point to a number of significant intervenor contributions to the hearing process, made either directly by intervenors or as considerations initially raised by intervenors, and then consolidated by staff or board action.[137] Proponents also note that intervenor contributions would be of even greater magnitude, had they the resources necessary to develop more fully their contentions.

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137 Also, in this category, would be certain research and studies which intervenors claim would not have been undertaken as soon as they actually were, without intervenor pressure. There is an argument that, since all administrative agencies are pressed for funds, even when they know they need to do additional research, they may not have enough money therefor. For example, some of the current research in the ECCS area (Hearings, supra note 67) and, perhaps, the Rasmussen Report (Reactor Safety Study - An Assessment of Accident Risks in U.S. Commercial Nuclear Power Plants, WASH - 1400 (August, 1974) [hereinafter cited as Rasmussen Report]) might have been undertaken sooner because of the pressures of intervenors. See J. Primack & F. von Hippel, Advice and Dissent: Scientists in the Political Arena 232 (1974) [hereinafter cited as Primack & von Hippel]. Thus, intervenors may provide the squeeky wheel which Congress or the Office of Management and Budget will grease.

The real issue here may not be whether intervenors have made contributions, but how significant these contributions were and at what cost they were made.

a. Radiological Health and Safety

Proponents claim these contributions in the general area of reactor safety:

(1) Improvements in the specificity of the requirements for the evaluation of light-water-reactor emergency core cooling systems, resulting from the ECCS rulemaking;[138]

(2) New guidelines on off-sight radioactive exposures, to be kept "as low as practicable" or approximately one percent of original limits, growing out of the ALAP rulemaking;[139]

(3) Re-analysis of steam and high pressure line routing to reduce dangers of pipe rupture, outside the containment, damaging safety systems;[140]

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138 ECCS Hearings, supra note 67; see Primack & von Hippel, supra note 137 at 218-232; Comment, AEC Rulemaking and Public Participation, 62 Geo. L.J. 1737 (1974); Cotrell, The ECCS Rulemaking Hearing, 15 Nuclear Safety 30 (Jan. - Feb. 1974).

139 ALAP hearings, supra note 67; see Concluding statement of the AEC Regulatory Staff in the ALAP Hearing; 15 Nuclear Safety 443 (July - Aug., 1974).

140 See Roisman, supra note 9, at 10

(4) Closer examination of guidelines for determining distance and activity of earthquake faultlines on acceptability of proximate location of reactors;[141]

(5) Improvement in NRC guidelines and operating practices of licensees and contractors in the areas of quality control and quality assurance;[142]

(6) Uncovering weaknesses in plant security requirements;[143]

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141 Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), AEC Docket Nos. 50-443, -44; Southern California Edison Co. et al. (San Onofre Nuclear Generating Station, Units 2 and 3), AEC Docket Nos. 50-361, -62, ALAB-248, LBP-73-36, RAI-73-10-929 (Oct. 15, 1973); Virginia Electric and Power Co. (No. Anna Power Station, Units 1,2,3, and 4), AEC Docket Nos. 50-338, -339, -404, -405, ALAB-256 RAI-75-1-10 (Jan. 27, 1975).

142 Consumers Power Co. (Midland Units 1 and 2), ALAB-106, RAI-73-3-182, and Duke Power Co. (McGuire), ALAB-128, RAI-73-6-399.

143 In the Indian Point No. 2 proceeding, the ALAB commented:

> Our review of the in-camera record convinces us that the development of plant security requirements was influenced considerably by the probing questions of CCPE's counsel. The Licensing Board found "reason for some of the questions and concerns of the Citizens Committee". So do we.

Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2), AEC Docket No. 50-247, ALAB-177, RAI-74-2-153 at 154 (Feb. 26, 1974).

(7) Successfully raising questions as to the impact of fuel pellet densification on the safe operational level of certain boiling water reactors;[144]

(8) Other contributions claimed include more serious attention being given by ASLBs to possible emergency evacuation routes and facilities for medical care in the event of a major nuclear plant accident; reexamination of welding defects in at least one facility; redesign of reactor containment in another; closer examination of pressure vessel integrity; improved safety measures taken during transport of spent fuel; and many other alleged contributions in individual facility licensing cases.[145]

(b) Environmental

In the environmental area, intervenors claim these contributions:

(1) Greater applicant use of closed cycle cooling towers and ponds to lessen heated discharges into rivers and lakes;[146]

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144 See Petition for Derating of Certain Boiling Water Reactors, AEC Docket Nos. 50-219, -237, -249, -254, -265, -220, -245, -263, -293, LBP-74-3, RAI-74-1-74 (Jan. 9, 1974).

145 Obviously, we cannot detail every contribution claimed by intervenors in each hearing. This kind of documentation may well be appropriate for the NRC's rulemaking.

146 Consolidated Edison Co. (Indian Point Station, Unit No. 2), RAI-73-9, -751.

(2) Increased attention now being given to the problems of fish entrapment and marine life entrainment caused by design and location of a plant's cooling water intake;[147]

(3) More careful review of effects of release of radioactive materials on marine life, shellfish and clam beds;[148]

(4) Improved determination of "need for power" including examination of a factor such as impact of potential energy conservation measures;[149]

(5) Closer scrutiny of utilities' technical and financial qualifications.[150]

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147 Id.

148 See Public Service Co. (Seabrook Station) AEC Docket Nos. 50-443, -44.

149 See Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2), AEC Docket No. 50-410, LBP-74-26, ALAB-264, NRCI-75-4-347; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), AEC Docket Nos. 50-448, -49.

150 See Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), AEC Docket No. 50-471; Public Service Co. (Seabrook Station), AEC Docket Nos. 50-443, -44.

c. Procedural

Intervenors claim these contributions in the procedural and due process areas:

(1) Revamping of the AEC's NEPA review procedures resulting from the Calvert Cliffs[151] decision;

(2) Reexamination of the agency's plant siting criteria stemming from the Bailly[152] case;

(3) Public assessment of the environmental impact of any decision to proceed with plutonium recycling;[153]

(4) Public assessment of the environmental impact of any decision to go forward on the liquid metal fast breeder reactor development program;[154]

(5) Opening of meetings to the public of the Advisory Committee on Reactor Safeguards (ACRS);[155]

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151 Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

152 Porter County Chapter of the Izaak Walton League of America v. AEC, No. 74-1751 (7th Cir. April 1, 1975).

153 GESMO, 40 Fed. Reg. 20142 (May, 1975).

154 Liquid Metal Fast Breeder Reactor Project Program, 38 Fed. Reg. 17263 (June, 1973).

155 Business and Professional People for the Public Interest, Ann. Rep. at 1. (1973); but cf. Federal Advisory Committee Act, 5 U.S.C. App. 1 (Supp. II, 1972).

(6) The hearing process has relaxed former NRC procedures relating to the strict use of proprietary documents;[156]

(7) NRC discovery practices and early notice provisions have been much improved;[157]

(8) The Commission now favors "greater openness and candor in dealing with intervenors and other interested members of the public;"[158]

(9) Intervenors have made significant contributions to general public discussion of nuclear power issues;[159]

(10) Intervenor pressure helped split the AEC into the NRC and ERDA.[160]

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156 Interviews with various members of the Intervenor Bar, Appendix B infra.

157 See Remarks by William O. Doub, Atomic Industrial Forum Annual Conference at 8, November 12, 1973 [hereinafter cited as Doub].

158 See Remarks by L. Manning Muntzing, Thirteenth USAEC Air Cleaning Conference, August 14, 1974, as reported in 5 AEC News Releases No. 34 (Aug. 21, 1974) at 5 [hereinafter cited as Muntzing].

159 Id. at 7.

160 Cf. Ribicoff Hearings, supra note 59.

Proponents of intervenor financing also point to the remarks of the ALAB in the River Bend proceeding,[161] where the Board, in responding to a disparaging remark by the applicant on the value of interventions, noted:

> While we fail to see the possible legal relevance of these remarks to the question of whether petitioners have satisfied the intervention requirements of Section 2.714(a), we nevertheless cannot leave unsaid our total disagreement with such a sweeping condemnation of intervenor participation as being essentially worthless. Our own experience--garnered in the course of the review of initial decisions and underlying records in an appreciable number of contested cases--teaches that the generalization has no foundation in fact. Public participation in licensing proceedings not only "can provide valuable assistance to the adjudicatory process," but on frequent occasions demonstrably has done so. It does no disservice to the diligence of either applicants generally or the regulatory staff to note that many of the substantial safety and environmental issues which have received the scrutiny of licensing boards and appeal boards were raised in the first instance by an intervenor.[162]

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161 Gulf States Utilities Co. (River Bend Station Units 1 & 2) AEC Docket Nos. 50-458-459, ALAB-183, RAI-74-3-222 (March 12, 1974).

162 Id. at 227-28 (footnotes omitted). See also Muntzing:

> In the last several years we have witnessed a steady and most gratifying improvement in the constructiveness of intervention. During this time intervenors have become better organized and won new support. The Calvert Cliffs lawsuit, culminating in the court decision of July 23, 1971, had of course an immense influence on AEC's regulatory processes insofar as its responsibilities under the National Environmental Policy Act were concerned.

Muntzing, supra note 158, at 5.

Whether the contributions of intervenors noted above, and others not mentioned, are truly significant, or are worth the cost incurred in making them, is a hotly debated issue. Not only do most applicants and their attorneys question the value of these contributions, but many believe their impact to be actually negative - mere indicia of delay and nuclear blackmail, resulting in higher costs eventually borne by electric power consumers.[163]

Our job is not to determine whether these alleged contributions are significant additions to the hearing process or, indeed, are contributions at all. This will be the kind of balancing addressed by the Commission's rulemaking proceeding, during which all interested parties will have a chance to fully present their contributions.

2. The Gadfly Role

The second major argument advanced by proponents of intervenor financing is that intervenors perform the valuable function of a regulatory gadfly.

a. Presence of Intervenors in the Proceeding

This argument is a slight variation on the contribution theory discussed above. Here, intervenors reason that their

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163 See text Ch. V, B 1 infra.

very presence in the hearing process - especially when it is a knowledgeable and forceful presence - tends to make the applicant and staff do their homework. As a result, their more careful scrutiny of questions which may later be contested leads to a safer plant and a better balancing of environmental issues.[164] This is especially true in licensing matters, when the staff and the applicant have worked closely together over a period of many months and arrive at the hearing in a mutually supportive role.[165]

The staff and the applicant are only human, proponents argue, and given their lack of omniscience and the scores of conceivable issues involved, intervenors can perform a useful and productive service in the proceedings. As

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164 See Hearings on H.R. 11957, H.R. 12823, H.R. 13484 and S. 3179 Before the Joint Comm. on Atomic Energy, 93d Cong., 2d Sess. 529, 530 (1974) (prepared statement of Albert K. Butzel) [hereinafter cited as Butzel Statement]; Roisman, supra note 9, at 111-15; Jacks, supra note 6, at 498 passim; and see note 136 supra.

165 Intervenors claim that the very presence of an intervenor in a proceeding can stiffen the staff's resolve and better enable them to withstand applicant pressure on certain matters. See Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2), AEC Docket No. 50-247, LBP-73-33, RAI-73-9. Some intervenors also suggest that their presence enables NRC staff members who may disagree with their supervisors to use intervenors as a vehicle to carry their viewpoints to the hearing board. Cf. Primack and von Hippel, supra note 137, at 220 passim.

Alan Rosenthal, the respected head of the ALAB Panel, noted:

> Conceivably, I place too much value upon the adversary system of adjudication as a means for ascertaining where the truth - and by that I mean the whole truth - lies. But every time I look at an uncontested case - or at one in which the contest is essentially of a token variety - I am left with the uncomfortable feeling that there may remain submerged safety and environmental concerns which would, as they should, have surfaced if a competent and responsible intervention had been in the picture.[166]

The counter arguments to this are: first, that the basic staff review of an application is done without knowing whether or not there will be an actual intervention, and that, in any event, the staff review process resembles a boxing match much more than it does a love affair with the utility; second, that the costs of the gadfly role are not worth the benefits, since the NPC's review process is already laden with a plethora of safeguards;[167] and third, that no one really knows whether outside pressure works more

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166 Remarks by Alan S. Rosenthal, Atomic Industrial Forum Seminar on Legal, Policy and Legislative Considerations in Reactor Licensing, April 17, 1974 at 11 [hereinafter Rosenthal Forum Speech].

167 See text Ch. V, A 4 infra.

to keep the staff and ASLB "honest," or to make them flabby, because it tends to diffuse their accountability on initial determinations. As Professor Green has stated:

> If a licensed plant turns out to have demonstrably adverse consequences to the health and safety of the public, it can be readily conceived that the regulatory staff will contend that it did the best it could, that its efforts were subject to review by the Atomic Safety and Licensing Board, and that there was full opportunity for members of the public to participate and to call deficiencies to the attention of the Board. The process [of intervention] thus can result in shifting responsibility for mistakes from the staff, where the mistakes were really made, to the ASLB or to the public generally.[168]

b. Articulation on a Record

There is another advantage to the gadfly role, claimed by proponents of financing. This is the greater articulation of administrative standards and reasoning, often necessitated because of the contested nature of a proceeding. As Judge Bazelon suggested in EDF v. Ruckelshaus:[169]

> ...Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible...

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168 Green, supra note 9, at 516; cf. Murphy, Safety, supra note 75, with regard to effect of sua sponte Board review on adequacy of staff's homework

169 439 F. 2d 584 (D.C. Cir. 1971).

> When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.[170]

Greater agency articulation not only helps its own decision making and the courts, but it builds the kind of public record which the Congress and the electorate can find useful in resolving ultimate nuclear power questions.[171]

c. Nature of the Role

Another aspect of the gadfly role, while not technically a "contribution", should be mentioned at this point. This is that the nature of the gadfly's role may not require the same kind of extensive affirmative case presentation as that demanded of the applicant and staff. Those disposed to finance intervenors do not envision establishing an entire network of university research facilities and elaborate national laboratories. The gadfly envisions intervenors more as analysts, probers, and prodders, than as independent primary nuclear technology

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170 Id. at 598. But see remarks by Joseph L. Sax in materials submitted by Professor Clark Byse, Panel IV: Judicial Review of Agency Action, 26 Ad. Law Rev. 545, 549 (1974).

171 See Remarks by Senator Metcalf in text accompanying note 181 infra.

research specialists.[172] This may have an important bearing on the kind and amount of intervenor assistance which may be desirable.[173]

3. Public Education and Confidence

This third argument in favor of intervenor financing has a number of elements. It deals with the public's need for information and education on nuclear power, building public confidence in its commercialization, and the nature of public participation in a democracy's administrative processes.

a. Information and Education

Proponents of intervenor financing maintain that one of the major purposes of the mandatory hearing process is to provide a forum for the public's education and information in the exotic field of atomic energy.[174] Indeed, few other

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172 See Murphy, NEPA, supra note 59, at 996 (footnotes omitted):

> Primarily the function of the intervenor should be to assist the agency, to present positions relevant to the ultimate decision, to expose inconsistencies in the applicant's position, to bring to bear information not likely to be brought forth by the applicant, and to challenge assumptions.

173 See text Ch. VII, A 1 infra.

174 See text Ch. IV, B 1 supra.

agencies dealing with potentially hazardous materials hold open hearings as a part of their normal practices.[175] If concerned members of the public are to become informed and educated in a meaningful manner, runs this theory, then it will require more than token participation - i.e., some kind of financial or technical assistance is necessary. The benefits of an informed and and educated public will be its increased contributions to the licensing hearings, greater articulation and exposure of agency decision-making (i.e., the gadfly role), and improved understanding of the commercial use and regulation of nuclear power.

Of course, the antithesis of this is that Congress never intended that public information should be equated with public financing; that the costs of increased participation in an agency's hearing process are not worth the supposed incremental benefits; and that the highly technical nature of atomic power is the very reason why Congress gave its regulation to an administrative agency with the expertise to ensure that its commercialization was commensurate with the public's health and safety, and the Nation's common defense and security.[176]

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175 See Green, supra note 9, at 503

176 But see Roisman, supra note 9, at 115-18. See also text Ch. V, B 4 infra.

b. Public Confidence

Many proponents also argue that informed (i.e., financed) participation will increase overall public confidence in the use and regulation of nuclear materials. As Professor Gellhorn notes:

> If agency hearings were to become readily available to public participation, confidence in the performance of government institutions and in the fairness of administrative hearings might be measurably enhanced.[177]

There is little doubt that the NRC needs to build public confidence in its ability to fairly regulate the industry and in the safe and efficient use of nuclear power.[178] As former AEC Commissioner Doub said:

> While the overwhelming consensus of the scientific community supports the safety, environmental and technical feasibility and advantages of nuclear technology, no conscious or even subjective choice, positive or negative, has been made by many Americans...Rather, there are all too many instances of public doubt and questioning of the wisdom of such decisions. And yet even in areas where controversy has been engendered in the context of individual licensing hearings, surveys have shown the level of acceptability for nuclear power has been significantly increased.

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177 Gellhorn, supra note 6, at 361.

178 See Green, supra note 9; Jacks, supra note 6; Muntzing, supra note 159; Roisman, supra note 9; Schneider Memorandum, supra note 123.

> The conclusion is obvious. Exposure to the facts concerning nuclear technology via public participation and the media generates a higher degree of acceptability. The technology can withstand the most searching inquiry in the most public forum and emerge with a public acceptability an order of magnitude higher than when the dispute began.[179]

Critics, however, wonder how much the hearing process really contributes to public confidence. They point to the empty rows of seats in most hearing rooms once the first day's limited appearances are heard. Many would agree with Professor Green:

> Moreover, the hearing procedures are counterproductive from the standpoint of gaining public acceptance of nuclear power plants. Those concerned about the safety of a plant are not persuaded by the conclusions reached in the hearing process.[180]

True, a number of intervenors may feel frustrated by the ultimate results of a hearing. What may be more important in generating public confidence, however, is not whether individual intervenors win or lose their particular contentions; but rather whether the public realizes NRC procedures are an open process, available to all interested persons, and where, under certain circumstances, the intervenor can qualify for public funding.

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179 Doub, supra note 158, at 7.

180 Green, supra note 9, at 517.

c. The Citizen in a Democracy

This element of the public education and confidence argument postulates that in a democratic society, as large and pluralistic as ours, with enormous power concentrated in industry, government, the media, and other institutions, the private citizen is repeatedly overwhelmed. Therefore, public financing of informed and conscientious citizen participation, in matters as critical as atomic power, will help to right the balance. It was this sense of democratic participation which characterized Senator Metcalf's remarks on the Senate Floor, during last year's debate on the ERA Conference Report:

> I have refused to sign the conference report on this bill, not because I am opposed to an Energy Research and Development Administration, or to an independent nuclear licensing commission, but because the House conferees refused to negotiate any reasonable protection for the public to be adequately informed and represented in the regulation of nuclear power....
>
> The right of a citizen to petition his government for a redress of grievances is a very precious part of our Constitution. Unfortunately, in the haste of making and promoting government policy, that right sometimes is forgotten, or worse, it is deliberately ignored.
>
> The intent of the Senate was to assure a balanced record before the Commission and to place the public intervenor--petitioning his grievances--in at least

> a reasonably adequate position to make his case. 181

4. How Safe is Safe Enough

The fourth major argument advanced by proponents of intervenor financing is that no other regulatory

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181 120 Cong. Rec. S. 18723 (daily ed. Oct. 10, 1974); see also Roisman, supra note 9, at 115:

> It is the cornerstone - really the whole foundation - of a democracy that the people must be allowed and encouraged to actively participate in the decisions which affect them. Few decisions which are made by this Government are as important to the general public as the decisions involved in the commitment to and construction and operation of nuclear power reactors.

A variation of this argument asks: If you have to live next to a reactor, would you rather be in Vermont or County X, assuming both reactors were American designed, manufactured and tested? But see remarks by Harlan Cleveland, The Costs of 'Openness', The Washington Post, Jan. 11, 1975, at Editorial Page, col. 4:

> The very great benefits of openness and wide participation are flawed, then, by apathy and non-participation, by muscle-binding legalisms, by processes which polarize two adversary sides by an excess of voting and parliamentary procedure, by the nay-saying power of procedural objections, by the encouragement of mediocrity. And one thing more. It seems clear now that very wide consultation tends to discourage innovation and favor stand-pattism.

agency deals with as potentially hazardous a subject as atomic energy. These persons suggest that in matters of nuclear safety there is no margin for error, as there may be in licensing a dangerous drug, a supertanker or a 747. Therefore, they reason, comparatively modest payments to intervenors are a small price to pay for another layer of safety, which conceivably could help avert a nuclear catastrophe.[182]

This emphasis on an "extra safety margin" - because of the potentially hazardous nature of nuclear materials - is also illustrated by Senator Metcalf's remarks on the Senate floor:

> ...the public has a right to know about the problems, the dangers, and the mistakes in nuclear power development, even if the truth hurts--because safety is at the heart of the matter, and without credible assurance of a safe system from production to use, to reprocessing to storage, any reliance on nuclear material as an energy resource may not be worth the effort.[183]

Yet, most experts believe that the risks involved in the use of nuclear power are no higher (and, in fact, are much less) than those we face every day in driving, flying

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182 See, e.g., Jacks, supra note 6, at 525.

183 120 Cong. Rec. S 18723 (daily ed. Oct. 10, 1974).

swimming, smoking, and being slightly overweight.[184] While the scare potential is enormous (because atomic power conjures up sordid visions of Hiroshima and nuclear holocaust), many scientific studies greatly minimize the possibility and probability of atomic devastation caused by reactor accidents.[185]

Further, opponents argue that safety precautions are uppermost in the minds of the applicants, because no one realizes better than the utilities what the impact of a disaster would be on the future of the industry.[186] As some

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184 See Studies done by Bernard C. Cohen as noted in Muntzing, supra note 159, and the Rasmussen Report, supra note 137.

185 Compare Rasmussen Report, supra note 137, with the Report to the American Physical Society of the Study Group on Light-Water-Reactor Safety, 47 Reviews of Modern Physics, Supp. I (Summer 1975).

186 See, e.g., Palfrey, Energy and the Environment: The Special Case of Nuclear Power, 74 Colum. L. Rev. 1375, 1396 (1974):

> The future of nuclear power and the nuclear industry is at stake. One major reactor accident could bring the industry to a halt. This means that the greater the zeal for nuclear power, the greater the preoccupation with safety. The inherent and obvious dangers of nuclear reactors to the human environment call into being an intensity of scrutiny by the Government and a common interest with industry which provides the public with its greatest source of protection.

But see Jacks, supra note 6, at 467, and text Ch. V, A 1, 2 supra, and 5, infra.

have said, there is no technology which cannot be made safer - it just costs more. "A nuclear power plant can be as safe as possible only if it does not operate at all."[187] The real question, then, is whether the increased costs of financing intervenors are worth the extra level of safety they allegedly provide.

This analysis depends, in turn, on one's view of the value of intervenor contributions, as noted above, balanced against the requisite costs, as summarized in the next section. But this assessment also should be buttressed by the knowledge of the Commission's existing safety review precautions - perhaps unequaled by any other agency's regulatory procedures.[188]

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187 Green, supra note 9, at 508 n. 19. See also Jacks, supra note 6, at 525.

188 For a good description of the NRC licensing process see Ebbin and Kasper, supra note 59; Murphy, Safety, supra note 75; Green, Safety Determinations in Nuclear Power Licensing: A Critical View, 43 Notre Dame Law. 633 (1968); Green, supra note 9; Jacks, supra note 6.

First, there is detailed analysis by the vendor's own experts and safety evaluation by the applicant's engineers. Then comes a lengthy and extensive NRC staff review of every application by a number of technical divisions. Each application for a construction permit also must be submitted for review to the ACRS. Then, at the permit stage, regardless of whether there is an intervention, an ASLB is convened and must hold a mandatory public hearing,[189] and make specific findings.[190]

Next, the ALAB reviews all initial ASLB permit decisions, whether or not an appeal is taken, or if intervenors even appeared before the ASLB. ALAB review is sua sponte, that is, it is not limited to the issues contested below. The Commission, too, may review and alter any ALAB decision which it considers inconsistent with its own policy.[191]

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189 42 U.S.C. §2239(a) (1970).

190 10 C.F.R. Part 2, App. A VI (1975).

191 See Hearings on H.R. 11957, H.R. 12823, H.R. 13484 and S. 3179 before the Joint Comm. on Atomic Energy, 93d Cong., 2d Sess. 755, 759 (1974) (prepared statement of Alan S. Rosenthal) [hereinafter cited as Rosenthal Statement]. Of course appeals from ALAB or Commission decisions may be taken to Federal Courts of Appeal. 42 U.S.C. §2239 (b) (1970).

5. An Outside View

Proponents of intervenor financing also advance a fifth reason. They suggest that the NRC should be particularly receptive to the contentions of intervenors because, unlike most of the persons in the vendor, applicant, and staff review process, intervenors have a different point of view. They point out that the development of commercial uses for atomic power has been guided exclusively by the Commission and its predecessors.[192] The government has had a virtual monopoly on the research and testing of nuclear reactors. Further, this argument notes that the pay checks of most nuclear technicians and engineers derive from either the NRC-regulated industry or from the government itself and the research laboratories and university programs they underwrite.[193] Many of the NRC regulators also come from this environment. Thus, at the least, there are unconscious commitments to nuclear power at all levels of the industry and the agency, and this creates a genuine need for the kind

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192 See, e.g., Ebbin and Kasper, supra note 59, at 210 passim; Jacks, supra note 6, at 500; Schneider Memorandum, supra note 123, at S 18727.

193 Even if outside experts were compensated, there is a question of their "availability" to testify on behalf of (some) intervenors. See Jacks, supra note 6, at 500 passim; Like, Multi-Media Confrontation - The Environmentalists' Strategy for a "No-Win" Agency Proceeding, 1 Ecology Law Quarterly 495, 502-03 [hereinafter cited as Like]; text Ch. VI, E 2 infra.

of refreshing outside view which intervenors can provide.[194]

The rejoinders to this argument are that: first, it loses its vitality as old NRC personnel ties to ERDA loosen, and the Commission concentrates on its sole function as a regulatory agency; second, the knowledge to regulate a highly technical area must be acquired somewhere; and that "somewhere" has to be either the government or industry; and third, the argument impugns the integrity of all nuclear scientists

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194 Note, many commentators have argued that one reason for financing intervenors in agency proceedings was to offset the fact that much of a regulatory staff's information came from the supervised industries; and that the staff's perspectives were necessarily limited by the information available to them. See Bloch and Stein, The Public Counsel Concept in Practice: The Regional Rail Reorganization Act of 1973, 16 Wm. and Mary L. Rev. 215, 216 (1974) [hereinafter Bloch and Stein]; Cramton, supra note 6, at 529; Lazarus and Onek, supra note 6, at 1074.

In the case of the NRC, however, with its own knowledgeable staff and an extensive national laboratory network to call upon, it can develop its own information about the issues raised by the industry. The problem, therefore, may be more the staff's educational and employment background, which might color its views of nuclear power, than lack of unbiased information furnished by non-industry sources. Thus, the relevance of an intervenor outside view, argue proponents of financing, is not so much to serve as a counterbalance to industry-supplied information, but rather to question and examine the nascent hypotheses of both government regulators and industry managers. See discussion of the gadfly role, text Ch. V, A 2 supra.

and engineers and of all industrial and regulatory managers. It blatently assumes that all of these persons are able to look only at one side of the issue when, in reality, some of the most effective nuclear critics have come from these ranks.[195]

B. Argument Against Intervenor Financing

Many of the arguments against intervenor financing have already been noted in the preceding section as the obverse of the considerations advanced by proponents of the question. These need not be repeated here. However, there are other reasons put forward by opponents to changing current NRC practices with regard to financing intervenors, and these we will now focus upon.

1. Costs of Financing Intervenors

Many recognize that there have to be some expenses of broadened public participation - if only the costs borne by the agency in financing or otherwise assisting that intervention.[196] The essential consideration, however, is to balance these added costs against the proposed benefits, as this chapter suggests.

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195 This is perhaps the water's edge of the Nader-Lapp debate about who has the most Nobel Prize winners - a subject well beyond our study's scope.

196 See Cramton, supra note 6, at 526, 538-42; Gellhorn, supra note 6, at 389-98; Jacks, supra note 6, at 511-14. But see Roisman, supra note 9, at 119, arguing financing will reduce hearing costs because intervenors will be able to hire their own experts and rely less on lengthy cross-examination tactics. See also Butzel statement, supra note 164, at 532-33.

The threshold argument against financing is that intervenors do not benefit the hearing process at all, nor have they made any significant contributions to the agency's proceedings.[197] Most opponents of public financing, however, acknowledge some contributions of intervenors, but argue that their costs outweigh any alleged significance. They point to two prominent reasons for this: delay and blackmail.

a. Delay

Delay or the "potential for delay"[198] is ever present in interventions. Hearings can become "long and acrimonious, with much procedural wrangling."[199] This means increased costs to the taxpayers who eventually must pay the salaries of regulatory staff, NRC lawyers, ASLB and ALAB members, and the additional expenses of expert witnesses and detailed

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197 See Remarks by Troy B. Conner, Jr. to the Atomic Industrial Forum Conference on Accelerating Nuclear Power Plant Construction at 10 (March 4, 1975):

> With one possible exception, I have yet to see a case where an intervenor made a contribution of any real significance to a Commission hearing.

198 Murphy, NEPA, supra note 59, at 981.

199 Green, supra note 9, at 512, 517. See also the discussion of the ECCS Hearings in Bauser, supra note 68, at 170-73; and authorities cited supra note 138. There also have been many lengthy facility adjudications. Interviews with members of the Nuclear Bar, Appendix B infra.

studies, inflated by excessively legalistic and protracted hearings.[200] Delay also results in increased charges to the electricity consuming public, which must bear the eventual costs of postponed construction and power generation.[201]

Delay, however, is a relative term, a question of whose ox is being gored. As the report of the Association of the Bar of the City of New York noted:

> The word 'delay' itself implies a particular viewpoint on the problem. Unless one believes that utilities alone should weigh electric power and the environment, the time needed for some regulatory consideration is time well spent if it improves the quality of the final decision. But,

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200 See, e.g., Cramton, supra note 6, at 532-33; Jacks, supra note 6 at 508, Murphy, NEPA, supra note 59 at 981, 994-97. Cf. Gellhorn supra note 6, at 372-88

201 There are many reasons for the lengthening "on-line" time for the construction and operation of nuclear plants. To isolate the part played by intervenors in this "delay" is not an easy task. See, e.g., Atomic Industrial Forum Staff Survey, The Causes of Nuclear Power Plant Delays (April, 1974); Discussion of Carolina Power & Light Concerns Affecting the Continued Use of Nuclear Power to Generate Electrical Energy, attached to letter from Shearon Harris, Chairman and President of C.P.&L., to Senator John Pastore, April 29, 1975 (copy in author's file) [hereinafter cited as C.P.&L. Discussion].

> opinion varies widely as to the extent of appropriate review. Accordingly, there are as many ideas about the causes of delay as there are ideas about what form the licensing of power generating facilities should take.
>
> Thus, for those utility executives who see environment as an emotional fad, the source of the delay is the environmental intervenors. For the environmentalist who sees the administrative process as a sham, the real delay is the period of time during which the utility and the regulatory staff keep the plans secret. Similarly, utility lawyers criticize allegedly foot-dragging commission staffs who in turn blame the poor applications submitted by the utilities. The commissioners themselves blame reversals by the courts, while the courts castigate commissioners for begrudgingly administering laws designed to protect the environment.[202]

Further, delay inures in the nature of any regulatory system. As the ASLB said in Vermont Yankee:[203]

> In short, delay in the issuance of an operating license attributable to an intervenor's ability to present to a licensing board legitimate contentions

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202 Ass'n of the Bar, Special Committee on Electric Power and the Environment, Electricity and the Environment: The Reform of Legal Institution, 125 (1972), quoted in Butzel supra note 164, at 529-30.

203 Vermont Yankee Nuclear Power Corporation, AEC Docket No. 50-271, ALAB-124, RAI-73-5-358 (May 23, 1973).

> based on serious safety problems uncovered by the staff would establish not that the licensing system is being frustrated, but that it is working properly. Any delay in such a situation would be fairly attributable not to the intervenors but to the non-readiness of the facility for operation. Delay in the issuance of the license is entirely appropriate--indeed, mandated--in that circumstance.[204]

Moreover, proponents of assisting intervenors maintain that dysfunctional conduct aimed primarily at causing delay should not be monetarily rewarded;[205] that the purpose of financing intervenors, in the first place, is to help the Commission - not to interfere with its orderly process and ability to conduct an expeditious, fair hearing.[206] Thus,

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204 Id. at 365; see also Doub, supra note 157, at 3-5; Schneider Memorandum, supra note 123, at S 18726; Murphy, NEPA, supra note 59, at 981; Roisman, supra note 9, at 119-20; Rosenthal Statement, supra note 192, at 757.

205 Gellhorn, supra note 6, at 373; Jacks, supra note 6, at 506-11.

206 Contra, Like, supra note 194, at 506:

> The public's interest and attention must be sustained and the community exposed to a continuous learning process. This may produce a somewhat disjointed hearing record but the formal orderliness of the proceeding must be subordinated to the preferred objective of transforming the hearing into what it is really supposed to be--a full and open forum which educates the public while it provides the licensing board with a record on which to base its decision.

they reason that under the functional approach to financing intervention delay will be discouraged.

b. Blackmail

Actual or potential delay, in addition to increasing public expense through protracted hearings and extended "on-line" plant time, also can play a role in extracting tribute from the applicant. Many critics of intervenor financing believe that concessions to constructing cooling towers, and overly restrictive safety requirements and radioactive release controls, are, in reality, examples of nuclear blackmail wrapped in the gossamer of intervenor "contributions."[207] Further, they argue, this tribute has been extorted from the utilities against their better judgment (and against the overwhelming desire of the public for cheap electricity), to satisfy the whims of a few self-anointed and unaccountable "representatives" of the

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207 See Comment by James T. Ramey, Panel I, supra note 104, at 403:

> However, the individual case does give the intervenor great leverage on the unility applicant, to carry on what I have called "nuclear blackmail": to use the threat and reality of delay to obtain concessions from the applicant not otherwise obtainable through the normal, rational administrative process.
>
> This occurred in the Palisade case and in the Point Beach case, where completed plants located on opposite sides of Lake Michigan and costing hundreds of millions of dollars, sat around for a year or so before the utility gave in.

public interest.[208]

Proponents, however, claim that whether such concessions are intervenor "contributions" to safety and environmental concerns, or represent instances of "blackmail", are appropriate determinations for the ASLB to make. Further, coerced settlements, against the public interest, can be set aside by the ASLB or by the ALAB.[209] Nevertheless, it is a widely

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208 See C.P.&L. Discussion, supra note 201:

> The licensing of nuclear power plants has been delayed in numerous instances by small interest groups who ask the "right" standard questions. These groups do not represent any significant segment of the general population but are allowed by the regulatory process to hold up the issuance of construction permits and operating licenses.

Proponents maintain, however, that the increased costs are warranted by proper safety and environmental concerns and result from the utilities' intransigence to make the necessary changes in the first place. They also point out that delay is a two-edged sword which works most harshly against underfinanced intervenors, who do not have the staying power to do battle with the large companies, always able to pass on their increased costs to the rate-payers. See Gellhorn, supra note 6, at 384; Jacks, supra note 6, at 510 n. 154.

209 See Jacks, supra note 6, at 510-11; see Rosenthal Forum Speech, supra note 167, at 5 (referring to Commonwealth Edison Co. (LaSalle Nuclear Station) ALAB-153); and the discussion of settlement agreements in Church of Christ III, 465 F. 2d 519 (D.C. Cir. 1972); and KCMC, Inc., 25 F.C.C. 2d 603 (1970).

held belief among critics of intervenor financing that given all the interminable delays present in the regulatory process, the soaring expenses of construction and operation of nuclear plants, the pressing energy needs of the nation, and the ability of clever intervenors to delay a hearing, that now to publicly finance these interventions could be the proverbial straw that breaks the camel's back.

2. The Agency Protects the Public Interest

A second argument advanced by those who oppose intervenor financing is that decisions regarding the health, safety, security and environmental issues raised by nuclear power have been specifically entrusted to the NRC by Congress. If any single body claims to represent the public interest, surely it is our elected representatives, and they have chosen to delegate regulatory responsibilities to an administrative agency with the expertise, time and resources to fully explore the ramifications of these highly complex issues.[210]

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210 Cf. Initial Rates for Future Sales of Natural Gas for All Areas, 44 F.P.C. 655, 657 (1970):

> Although the participation of POWER and all other parties is encouraged in this proceeding, the Commission has not and will not abdicate its mandate to represent the public interest.

But see, e.g., Gellhorn, supra note 6, at 381; authorities cited note 136 supra; AEC Regulatory Staff Internal Rep., Study of the Reactor Licensing Process (1973).

Since the public is already paying the costs of NRC regulators, the argument continues, in the absence of a specific Congressional mandate to the contrary, why should the public also be forced to subsidize others to do the same job - indeed, others without any public accountability for their actions?[211] Further, once we pay for guardians to watch the guardians - where will it all end? Better, say these persons, if we are displeased with the manner in which the NRC operates to change the nature of its regulatory scheme or its personnel, rather than to construct another pretentious layer of dubious value.

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211 See Consumers Power Co. (Big Rock Point) RAI-74-11-820, at 823 n. 5:

> It may be argued that public funds should never be used to finance essentially private litigation. Although many intervenors style themselves as champions of the "public interest," they have mandates beyond their own memberships, which are frequently quite limited. While it can be contended that the "public interest" in this context lies in the presentation of diverse viewpoints from which a better substantive result may, hopefully, emerge, the fact remains that intervenors are not necessarily identified with that result, and that they are largely unaccountable for the positions they espouse.

However, as has been pointed out above, the issue of "accountability" may go more to the question of an intervenor's cohesion and its ability to represent its own interest (Ch. IV B 3a supra) than to the issue of public subsidy; that is if we follow the functional approach to financing intervenors rather than try to define the "public interest." See text Ch. IV, B 2 and Ch. IV, B 3, supra.

The argument that the agency represents the public interest also suggests that regulatory commissions are not mere arbitrators, resolving only the questions put before them by the parties. On the contrary, agencies are charged with the affirmative duty of protecting the public regardless of the specific contentions of participants in particular proceedings.[212] Further, unlike some agencies which cannot review all licenses or renewals in detail, the NRC staff intensely scrutinizes every application, and has at its disposal ample scientific and technical resources.[213] In

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212 See Scenic Hudson Preservation Conference v. F.P.C. 354 F. 2d 608, 620 (2d Cir. 1965):

> In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

Accord, Rosenthal statement, supra note 192, at 758:

> The Commission's adjudicatory responsibilities extend far beyond merely serving as an arbiter of those specific issues, if any, raised by the parties to the particular proceeding.

213 See note 194 supra.

fact, financing interventions could hurt rather than help the NRC protect the public interest, because it serves to alter the safeguarding nature of its staff review and hearing process by transforming it from a regulating procedure into a mechanism for mediation.[214]

The countervailing arguments have been delineated above:[215] the public interest is not a monolith; the functional approach to intervention postulates that certain interests may best be represented by parties other than the staff; the applicant and the staff are mutually supportive at the hearing stage; public education and confidence are increased; and there are benefits to the agency, the courts and the public from a contested hearing on the record.[216]

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214 See Green, supra note 9, at 516-17.

215 See text Ch. IV, B and Ch. V, A, supra.

216 Often we think of the subject of financing intervenors only in the context of what has gone before. It may well be that the availability of funds also will change the complexion of those who intervene. While environmentalists undoubtedly still will contest proceedings, so may "conservative" associations of ratepayers, consumer groups, stockholders, and minority organizations. Doubtlessly, this will raise issues of hearing manageability and consolidation of interests; (see Ch. VII, G infra) but it may also allow a wider and ever-changing spectrum of the public to put forward its views.

3. The Anti-Nuclear Intervenors

One of the major concerns of many persons interviewed was that the majority of intervenors seemed to be dead set against nuclear power in any form. Therefore, it makes little sense to finance them in a proceeding where, even they agree, the ultimate questions about uses of nuclear power are outside the proper scope of the licensing hearing. [217] Such persons believe that since the primary goal of these groups is to "stop the nukes," public funds will be used by them only to delay and frustrate the administrative process. [218]

There are two counter-arguments to this line of reasoning. First, an ASLB is fully capable of deciding which issues are properly before it.[219] Those issues outside the scope of the licensing proceeding (nuclear moratorium, commitment to the breeder reactor, ultimate waste disposal)

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217 10 C.F.R. Part 2, Appendix A, V-VIII (1975)

218 Cf. Like, supra note 194, at 504-08.

219 See Rosenthal Statement, supra note 192, at 757.

will not be considered, and need not absorb the time of the parties.[220]

Second, proponents of intervenor financing acknowledge that many intervenor groups are, indeed, anti-nuclear, but that others are not. Further, both pro-nuclear and anti-nuclear groups are concerned that facilities be "as safe as possible," and be constructed and operated in a manner fully consistent with environmental protections.[221] Thus, they contend, since existing NRC procedural rules are able to confine the hearing to its pertinent issues, even the anti-nuclear forces should be allowed to advance legitimate health, safety and environmental concerns.

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220 This is not to say that these are unimportant issues. However, most intervenors recognize that their consideration is outside the scope of the NRC's adjudicatory licensing process; and for this reason, have recommended development of new hearing mechanisms so that their concerns in these areas can be aired. See Roisman, supra note 9, at 127. Cf. Murphy, NEPA, supra note 59, at 974, 985-90; Comment, Public Participation, supra note 33, at 744.

221 See Green, supra note 9, at 508.

4. The Adversary Process

The fourth argument against financing intervenors seriously questions whether the NRC's adversary process is the most efficient way to develop complex issues of scientific and technical character.[222] Supporters of this position reason that extensive cross-examination and other legalistic fact-finding techniques were originally designed for courts and juries. These methods are ill-suited to a pursuit of technological truth, where scientific judgments are at stake rather than the credibility and deportment of witnesses.[223]

In addition, financing intervenors turns the hearing into a courtroom drama, with counsel playing to the media, and further polarizing the antagonists.[224] Dull, complicated scientific jargon and technical details are not the meat of most trial lawyers. The net effect is to create only an illusion of public participation, while the reality of

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222 See, e.g., Remarks by George L. Freeman, Atomic Industrial Forum Annual Meeting, Session on Shortening the Licensing Path, November 12, 1973; Dignan, supra note 9, at 16.

223 See, e.g., Boyer, Alternatives to Administrative Trial - Type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 Mich. L. Rev. 111 (1972); Murphy, Safety, supra note 75.

224 Like, supra note 194.

technological exploration is hidden under a facade of legal posturing. In the long run, this produces minimal contributions to plant safety and a balanced environment, and undermines public confidence in the credibility of the regulatory process.[225]

In responding to this criticism, proponents of intervenor financing argue that many of the issues raised in licensing proceedings are also non-technical in nature. These often call for decisions as to what may be best for society (e.g. as safe as possible, NEPA balancing), and that these are the kinds of judgmental issues upon which the public is well qualified to comment.[226] In addition, if the public is ever to understand and have confidence in the regulation and use of atomic power, the applicant and the Commission should be able to reduce scientific and technical verbiage to lay terms.

Further, say proponents, while other methods of adducing scientific truth may be available, the current NRC hearing process is adversarial in nature. Scientists and technicians, too, should lay open their hypotheses to questioning,

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225 See Green, supra note 9, at 517; Murphy, NEPA, supra note 59, at 996-97.

226 See Ebbin & Kasper, supra note 59, at 190; Green, supra note 9, at 508.

and cross-examination is still the best tool we have devised for testing judgments and exposing sophistry and error.[227] Moreover, argue these persons, actual instances of courtroom theatrics are rare. And the hearing board has ample power to control obstreperous conduct.[228]

5. Alternatives and Administrative Difficulties

Two other arguments against financing intervenors are (a) that there are better alternatives available to the Commission, such as establishing an office of public counsel; and (b) that implementation of financing creates insurmountable administrative problems. These are more properly the detailed subjects of the next two chapters.

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227 See Comment by Chief Administrative Law Judge of the Federal Power Commission, Joseph Zwerdling, Panel III, Decision Making in Agency Proceedings, 26 Ad. Law Rev. 489, 496 (1974) [hereinafter Panel III]:

> In my judgment the handling of expert witnesses on the basis solely of written presentations does not produce the most useful and reliable record for the decision-maker. The decision-maker will be in a far better posture if the competing positions of the experts are developed and tested in open hearing, in the crucible of cross-examination and rebuttal.

228 See Rosenthal Statement, supra note 192, at 756-57.

C. Summary

This chapter has summarized the major arguments for and against direct financing of intervenors. Those favoring financing claim: (1) intervenors have made and can make significant contributions to the NRC regulatory process; (2) they serve as a gadfly to the staff and boards; (3) their funding will increase the public's education and confidence in the efficacy and safety of nuclear technology; (4) they add an extra review layer to important health, safety, and environmental determinations of the potentially dangerous use of nuclear power; and (5) intervenors represent an outside view which should be heeded in a field dominated by government and powerful commercial interests.

On the other hand, those opposing financing claim: (1) the costs of intervenor delay and blackmail outweigh any alleged benefits; (2) the NRC procedures are already laden with ample safeguards, and the dangers associated with nuclear reactors have been grossly exaggerated; (3) Congress has determined that the agency best represents the public interest, and the taxpayers should not have to support additional self-appointed guardians and unaccountable private groups; (4) financing wi further polarize the hearing process, turning it into a courtroom drama, and making it even more difficult to adduce scientific and technological truth; and (5) there are better alternatives available to the Commission (Ch. VI infra), and

implementation of direct financing creates insurmountable administrative problems (Ch. VII infra.).

Chapter V has endeavored to organize the many sub-issues of each argument pro and con intervenor financing in a manageable format, citing from pertinent materials and participants in NRC proceedings whenever possible. Most of these postulates should, and undoubtedly will, be elaborated upon during the Commission's rulemaking. Perhaps "mini-case studies" can be developed to detail more precisely the costs and benefits of public intervention. But this is the kind of balancing process the rulemaking will address. Again, this Report takes no position on the merits of the respective contentions developed herein.

VI. ALTERNATIVES TO DIRECT INTERVENOR FINANCIAL ASSISTANCE

The purpose of this chapter is to explore alternative forms of assistance - other than provision of direct financial aid to intervenors - which could facilitate meaningful public participation in NRC proceedings. It is not necessary to consider any of these options as mutually exclusive. For example, it would be possible to have both a NRC Office of Public Counsel and, at the same time, provide direct intervenor financial assistance.[229] Of course, these decisions often will be based on budgetary considerations. Establishing an office of public counsel may well take funds away from direct intervenor financing. But there is no systemic reason why two or more forms of assistance cannot exist simultaneously.[230]

A. Procedural Cost Reductions

There are a number of ways to reduce intervenor costs which the Commission may want to consider in its proposed rulemaking. Appendix I contains a compilation of state public service commissions' policies regarding filing and distribution requirements, transcripts, and access to agency information and experts.

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229 New York State, for example, finances municipal intervenors under its plant siting statute (supra, note 126), while at the same time it has established a state intervenor program (Public Counsel Office) within its Consumer Protection Board. See text Ch. VI, C 2 infra.

230 Jacks, for example, seems to argue for both an NRC public counsel and direct intervenor financing, see note 6 supra at 521-22.

1. Filing and Distribution Requirements

The Administrative Conference has suggested that all agencies reexamine their filing and copy distribution requirements to minimize the costs of public participation in their proceedings.[231] Professor Gellhorn recommends:

> Where even reasonable and necessary requirements for the filing of multiple copies work a hardship on public participants, agencies should be generous in waiving these requirements. In addition, agencies should permit use of their duplication facilities at minimum cost in order to assist parties who lack access to such services.[232]

2. Transcripts

Another recommendation of the Administrative Conference was that the costs of recording formal agency proceedings should be borne by the agencies, not the parties, and that

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231 Recommendation 28, supra note 63, at § D 1, Appendix F infra.

232 Gellhorn, supra note 6, at 390. A number of agencies have established in forma pauperis proceedings. See, e.g., Initial Rates for Future Sales of Natural Gas for All Areas, 44 F.P.C. 1060, 1061 (1970). Also, the Food and Drug Administration requires only one copy for its in forma pauperis participants, and the agency will duplicate and distribute the requisite copies. See proposed new FDA regulations, 40 Fed. Reg. 22950 - 23046 (May 27, 1975), as described in Letter from Peter B. Hutt, Chief Counsel, FDA to Tersh Boasberg (May 12, 1975) [hereinafter cited as Hutt Letter].

transcripts should be furnished without charge to an "indigent participant."[233] Current transcript costs vary widely among federal agencies, from little or nothing to $4.00

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233 Recommendation 28, supra note 63, at §D2. See also letter dated June 6, 1975 from the State of California's Energy Resources Conservation and Development Comm'n to "all interested parties" in Case No. 75-FOR-5 (Ten-Year Forecast of Electric Loads) at 1:

> On or shortly after June 9, 1975, the commission will have available copies of the exhibits admitted into evidence and a transcript of the June 2, 1975 hearing. Interested parties desiring copy of these documents should communicate in writing at once to the Secretary to the Commission. Because of the commission's overriding desire to facilitate and maximize public participation, the commission will make these documents available at no charge at this time. (The commission anticipates that to meet the cost of reproducing lengthy documents it will soon be required to assess a charge for documents, except to those interested parties who file a Declaration of Financial Hardship.) To assist the commission in maximizing public participation, while simultaneously minimizing costs, all interested parties should request only those exhibits or documents which they need.

But, "what is sauce for the goose may be sauce for the gander." See Petition for Rulemaking, asking NRC to reduce current fees charged applicants, on the theory that much of the work done by the Commission is for the benefit of the public, not the applicants. NRC Docket No. PRM-170-2; see 39 Fed. Reg. 17849 (1974) Cf. National Cable Television Association v. U.S., 415 U.S. 336 (1974); FPC v. New England Power Co., 415 U.S. 345 (1974).

per page, and can severely burden the treasuries of many citizen intervenor groups.[234]

Another area which might warrant attention is the location and number of copies of the lengthy pre-hearing materials which are available at local sites.[235]

3. Access to Technical Information and Staff

The Administrative Conference also recommended that agencies should assist the public by making as much information available as possible.[236] The NRC has moved

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234 See Cramton, supra note 6, at 539; Gellhorn, supra note 6, at 390-93. Arguments against reducing filing, copy, and transcript costs are simply a variation of those against intervenor financing. See text Ch. V, B supra. While perhaps minimal charges will discourage frivolous interventions (see discussion of matching, Ch. VII, E infra) it still may be possible to have some kind of in forma pauperis procedures without raising the larger issues of intervenor financing. See note 232 supra.

235 "I do not believe 8 intervenors trying to share one copy of a PSAR in a local library is a reasonable procedure." Dignan, supra note 9, at 5. One local intervenor group told us the local documents room chosen by the NRC for a particular proceeding was the County Judge's private chambers. The judge was not overly enthusiastic about the intervenors' constant demands to review the materials in a corner of his own office.

236 Recommendation 28, supra note 63, at §D 3. Accord, Cramton, supra note 6, at 539; Gellhorn, supra note 6, at 393.

in this direction through its early notice procedures, and by requiring that public participants receive copies of all documents related to a particular facility simultaneously with their receipt by the staff or other parties.[237] However, intervenors claim that much more material should be made available. They believe the Commission still overly relies on the Freedom of Information Act exemptions.[238]

The more difficult problem is providing public participants with in-house technical expertise. If the agency's own staff or that of the national laboratories is used, serious questions are raised about the agency's ability to control and supervise its own operations and personnel.[239] Even those commentators who recommend giving the public greater access to technical help talk about the possibility of one agency making available experts from an agency other than itself,

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237 See Doub, supra note 157, at 8.

238 Pub. L. No. 93-502, 88 Stat. 1561 (U.S. Code Cong. & Ad. News 93d Cong., 2d Sess. 1801 (1974)),amending 5 U.S.C. §552 (b). See the discussion on the use of interrogatories to the NRC staff in Murphy, NEPA, supra note 59, at 995 n. 133. See also Jacks, supra note 6, at 523.

239 See ECCS Hearings, supra note 67; and the problems of AEC staff testimony, discussed supra note 165 and accompanying text.

rather than asking its own technical people to serve two masters.[240] This approach, however, offers little consolation to intervenors gaining access to reactor safety experts.

Another possibility is for the NRC to pay for outside experts requested by intervenors, or to have such experts appear at the Commission's own request to testify on behalf of intervenors.[241] Since this approach raises the whole question of providing financial assistance to intervenors, or establishing offices of public counsel, it is best discussed in those contexts.

B. Public Counsel - The Federal Experience

The initial question in any consideration of an office of public counsel is whether that office should be established outside of or within the NRC.

1. Outside Public Counsel

The obvious reason for establishing a public counsel's office outside of the regulatory agency before which it must

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240 See, e.g., Recommendation 28, supra note 63, at §D 3; Gellhorn, supra note 6, at 394; but cf. Jacks, supra note 6, at 523.

241 Recently, in the Seabrook proceeding, AEC Docket No. 50-443, -44, the ASLB supoenaed an outside expert on behalf of an individual intervenor, in the absence of objection from applicant's counsel. The Board Chairman carefully qualified his remarks saying, "[The Board] does not wish this in any way construed as a motion for financial assistance...." Transcript at 2756 (Afternoon Session, June 6, 1975).

practice is to preserve both the appearance and the reality of counsel's independence and integrity.[242] Almost without exception, persons interviewed felt that an "in-house" NRC public counsel would have serious difficulty establishing its credibility with intervenor groups. Sooner or later, they believed, it would find itself embroiled in intra-agency battles over its freedom of action.

At present, there is nothing at the federal level which could be called an independent office of public counsel. The proposed Consumer Protection Agency (CPA)[243] would come closest to fulfilling this position. Its mandate would be broad enough to encompass intervention in any agency's proceedings.[244] It would not, however, act as attorney

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242 See, e.g., Cramton, supra note 6, at 543-46; Gellhorn, supra note 6, at 395-98.

243 S. 200 creating CPA passed the Senate, 121 Cong. Rec. S 8382 (daily ed. May 15, 1975). The companion bill, HR 7575, is scheduled for consideration by the full House Government Operations Committee on July 17, 1975.

244 Id. See also Leighton, The Consumer Advocacy Agency Proposal...Again, 27 Ad. Law Rev. 149 (1975).

for specific clients or private organizations.

The pertinence of CPA to our study is questionable. First, there is no guarantee of its enactment and establishment.[245] Second, in all likelihood, it will not be able to develop the kind of expertise and resources needed for the complex and time-consuming type of irterventions demanded by the nature of NRC rulemakings and adjudications.

This discussion is not meant to forestall the Commission's recommending to Congress that an Office of Public Counsel should be created, independent of the NRC. It could be established as a separate executive agency or attached to the legislative branch. Indeed, the NRC's proposed rulemaking may well want to explore this option.

2. In-House Public Counsel

A few federal agencies have established their own offices of public counsel.

a. Interstate Commerce Commission (ICC)

Under the Regional Rail Reorganization Act of 1973,[246] an Office of Public Counsel was established within the Rail

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245 President Ford requested Congress to postpone further action on a CPA. Letter from Gerald R. Ford to members of Congress, April 17, 1975.

246 45 U.S.C. §701 et seq. (Supp. III, 1973).

Services Planning Office (RSPO) of the ICC.[247] The primary duty of public counsel is to assist communities and rail service users articulate their concerns in a series of public hearings held to consider the consolidation of many Midwestern and Northeastern railroads, and the potential loss of service resulting therefrom. Counsel protected the interests of the public by alerting it to the proposed reorganization hearings, helping it understand the nature of the problems involved, and facilitating its testimony and comment.[248]

The RSPO Office of Public Counsel also has appeared on behalf of the public in a Congressional hearing,[249]

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247 For an excellent description of this Public Counsel Office, see Bloch & Stein, supra note 195; see also Reports of the Office of Public Counsel, ICC, Rail Services Planning Office (1974-75). Note, this office maintains space apart from the ICC building, has subpoena powers independent of ICC authority, and has a separate appropriations authorization. Bloch & Stein, supra note 195, at 223. The Public Counsel reports to the head of RSPO, who reports directly to the ICC Chairman.

248 See Bloch & Stein, supra note 195, at 221-26.

249 Id. at 231.

a rulemaking proceeding,[250] and in at least one court case.[251] It has access to the technical experts within the RSPO and has hired its own experts and consultant firms to make technical studies. It retains up to 15 outside private attorneys to perform outreach functions in assisting citizens and communities participate in the public hearings called for under the Act.[252]

The ICC Public Counsel deals only with matters under the Rail Reorganization Act. It does not participate in other ICC proceedings, nor does it intervene on behalf of private individuals, organizations or communities in the kinds of adjudications and rulemakings held by the NRC. It acts more as a facilitator for public comment,

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250 Id. at 228.

251 In re Penn Central Transp. Co., 382 F. Supp. 856 (E.D. Pa. 1974).

252 By statute, the office may pay up to $250 per day for such outside experts and private attorneys, in addition to government per diem and transportation rates. 42 U.S.C. §715 (c)(1) (Supp. III, 1973). See discussion Ch. VII, D infra on maximum rates of compensation. The Office did not assist private persons or business interests who could afford their own counsel. Interview with A. Grey Staples, Jr., RSPO Public Counsel, in Washington, D.C., May 21, 1975.

than as an adversary representing distinct interests. Ordinarily, it does not engage in discovery, filing briefs and motions, cross-examining witnesses, or in undertaking a full range of representational legal services.

b. The Civil Aeronautics Board (CAB)

An Office of Consumer Affairs was created by the CAB in 1970 to serve as a complaint handling mechanism in a purely advisory capacity.[253] In October, 1974, this office was renamed the Office of Consumer Advocacy (OCA) and given status to enter certain CAB rulemakings and adjudications as a party representing public interests of consumers and air-travellers.[254] The head of OCA reports directly to the Board. The office has a staff of 22 people, including attorneys, analysts and researchers.[255]

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253 Reprint of Statement of Jack Yohe, Director of the Office of Consumer Advocacy, before the Senate Subcomm. on Administrative Practice and Procedure (February 19, 1975) [hereinafter cited as Yohe Statement]; see C.A.B. Manual §151 (November 16, 1973).

254 14 C.F.R. § 302.9 (1974).

255 Interview with Jack Yohe, in Washington, D.C., June 11, 1975 [hereinafter cited as Yohe Interview]. Budget approximations for the Office in FY 74 were $273,000 and for FY 75, $435,000. CAB Report, Budget Estimates, Fiscal Year 1976, Salaries and Expenses and Payments to Air Carriers at 15-16 (February, 1975).

The OCA is currently participating in six CAB rule-makings, none of which has been completed as yet. There are a number of limitations on the Office's activities: it cannot appeal CAB decisions in the courts;[256] it may participate as a party only in "appropriate" proceedings;[257] and it seems to act more as a facilitator of public concern, in the manner of ICC public counsel, rather than as an adversary pitted against CAB staff.[258]

c. Postal Rate Commission (PRC)

The PRC was established under the Postal Reorganization Act of 1970 [259] to advise the Postal Service on matters having to do with postal rates, fees and classifications.

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256 Yohe Interview, supra note 255.

257 14 C.F.R. § 302.9 (1974). For example, during the Emergency Reservations Practices Investigation, OCA was denied the right to participate therein. Yohe Statement, supra note 253.

258 Also, it has had trouble establishing its credibility with consumer intervenors. See Remarks of Reuben B. Robertson, III, Luncheon Panel: Special Committee on Public Interest Practice, 26 Ad. Law Rev. 531, 539-44 (1974).

259 39 U.S.C. §3601 (1970).

Before the PRC makes certain recommendations, it must accord an opportunity for a hearing to the Postal Service, users of the mails, and to "an officer of the Commission who shall be required to represent the interests of the general public."[260] The PRC designates a member of its own general counsel's litigation division to serve as such an "officer" for the general public.[261]

There is no separately identifiable PRC Office of Public Counsel, in an institutional sense. In fact, a number of different lawyers in the PRC's litigation division have served as officers for the public in the Commission's few rulemaking-type hearings which have been held to date.[262]

d. Other Federal Agencies

The Small Business Administration has established an Office of Small Business Advocacy.[263] This Office serves

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260 39 U.S.C. § 3624 (a) (1970).

261 39 C.F.R. § 3002.6 (b) (1973).

262 While the officer has access to the agency's technical people, he (or she) has no separate staff. Officers have taken no appeals from PRC's decisions. Interview with Norman Schwartz, Assistant General Counsel, PRC, in Washington, D.C., June 16, 1975.

263 Originally established pursuant to Executive Order No. 11, 518, 3 C.F.R. 274 (1974), 15 U.S.C.A. §634 (Supp. 1975).

as a focal point for complaints affecting small businesses; counsels them on how to resolve questions which they may have with other federal agencies; and, generally, tries to represent the views of small businesses before other government agencies.[264] It has a small staff, but does not formally or informally intervene, either in SBA's or any other agency's proceedings.[265] It seems to be more of a complaint handling mechanism than a public counsel advocacy office.

The Federal Maritime Commission has an "Informal Complaint Activity" (ICA) within its Office of Domestic Commerce. The ICA unit handles over 700 complaints a year, but cannot be considered a true office of public counsel and does not intervene in agency proceedings.[266]

C. Public Counsel - The State Experience

The states have experimented with offices of public or consumer counsel to a much greater extent than the Federal

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264 Small Business Administration, S.O.P. Continuation Sheet, §00, App. 120, at 148-50 (Jan. 15, 1975).

265 Interview with Gene Van Arsdale, Deputy Chief, Counsel for Advocacy, SBA in Washington, D.C., June 17, 1975.

266 Interview with Eugene P. Stakem, Chief, Office of Domestic Commerce, FMC in Washington, D.C., June 5, 1975.

Government.[267] Much of their experience is in the area of utility ratemaking before state public service commissions. While many of these state public advocacy offices are relatively new, they appear to offer vigorous and forceful representation of public interests. For a compilation of those states where representation of consumer interests is handled by an office other than the regulatory agency, see Appendix I.[268]

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267 While we cannot claim to have made a thorough search of all state public counsel offices, we did interview or correspond with the following states: New York, California, Connecticut, Vermont, Missouri, Indiana, New Jersey, Montana and Maryland.

268 In addition, it should be noted that the National Association of Attorneys General recommends that a state Attorney General should represent the public before regulatory agencies. At least 12 state Attorneys General do intervene on behalf of consumers in opposition to utility rate increases. See National Ass'n of Attorneys General, State Programs for Consumer Protection at 69 (Dec. 1973).

1. California

The Division of Consumer Services of the Department of Consumer Affairs, within the State of California's Agriculture and Services Agency, is an office of public counsel, which does intervene on behalf of consumer interests in both agency and court proceedings.[269] Its chief is appointed directly by the Governor, and the Division has a staff of approximately 30 persons. It may call upon experts from both within and outside of State government. Under the new Governor, it has just begun to flex its muscles and expects to play an important role in advancing consumer interests in California.

Another kind of public counsel is that provided by California's statute establishing an Energy Resources, Conservation and Development Commission. This statute creates an "advisor" to the Commission, who must be an attorney licensed to practice in California.[270] The advisor's job is to ensure that all interested citizen groups and the public at large fully participate in the Commission's public hearings, and in its proceedings for planning, siting and

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269 Letter from Richard Spohn, Chief, Division of Consumer Service to Tersh Boasberg, May 21, 1975. The summary in the text is taken from this letter.

270 Cal. _____ Code §§25217, 25222 (West 197_).

certifying utility facilities. While the adviser does not intervene, as such, he is specifically responsible for facilitating broadened public participation in the Commission's administrative process.[271]

2. New York State

Under legislation enacted in 1974, the independent Consumer Protection Board has established a utility rate intervenor public counsel program.[272] Authorized at $800,000, with a proposed staff of 40 lawyers, engineers, rate analysts, investigators and accountants, this program has directly intervened in about 30 large rate matters before the State's Public Service Commission. It acts on behalf of the general public and does not represent any particular group or organization.[273]

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271 Interview with Antonio Rossmann, newly appointed advisor to ERDC, in Washington, D.C., June 19, 1975. Mr. Rossmann also will try to help public intervenors secure pro bono or reduced fee legal and expert services. See also note 233 supra.

272 New York Public Service Law ch. 650, 651 (McKinney 1974).

273 Interview with Thomas Basil, Chief Counsel, Intervenor Program in Washington, D.C., May 29, 1975. According to Mr. Basil, the Office never received its full appropriation and is operating at about half strength. As noted above, New York State also has funded, out of utility applicant fees, a program for municipal intervenors under its Plant Siting Act. See note 126 supra and accompanying text.

The intervenor program has authority to go outside of its own staff and State government to retain experts at market rates.[274]

3. New Jersey

Probably the most extensive state public counsel's office in the nation is New Jersey's independent State Department of Public Advocate. This department, also created in 1974, contains: the Office of the Public Defender (criminal cases); an inmate advocacy program (prisoner representation); a division of mental health; an office of "Public Interest Advocacy"; a citizen complaints and disputes settlements office; as well as a separate Division of Rate Counsel.[275] The Department of Public Advocate intervenes in a wide variety of agency and court cases. By late March, 1975, the Division of Rate Counsel's case load had reached 75 matters, including public interventions in telephone, gas, electric and water utility rate proceedings.[276] As in New York's intervenor program, the New Jersey Division of Rate

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274 See Basil interview note 273 supra.

275 Public Advocate Act of 1974, Ch. 52, §27 E-1 et seq, [1974] N.J. Acts _____

276 The Division of Rate Counsel also intervenes before federal agencies, and in such matters as hospital rate increases, bus fare cases, solid waste disposal and medical insurance matters. See Department of Public Advocacy, First Quarterly Report (1975).

Counsel represents the general public interest and does not appear on behalf of private parties or organizations.

4. Indiana

The Office of the Public Counsellor of Indiana consists of four attorneys who represent the interests of Indiana citizens, primarily in Public Service Commission hearings, in opposition to utility rate increase requests. The Public Counsellor is appointed directly by the Governor for a four-year term.

In major rate cases, the Office relies on outside expert witnesses which it hires, at market rates, in its own discretion, at an average cost of about $50,000 per proceeding.[277] It also has access to the staff of the Indiana Public Service Commission. The Public Counsellor has an annual budget of $375,000.[278] Attached as Appendix J is the June 30, 1974 Annual Report of the Counsellor, which gives a more detailed review of his activities.

5. Montana

The Montana Consumer Counsel, unlike the others noted above, is an agency of the legislative branch of State government, which engages in extensive intervention in court

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277 Letter from Frank J. Biddinger, Public Counsel to Tersh Boasberg, June 18, 1975.

278 Id.

and agency proceedings, primarily in the areas of utility and transportation matters. In addition to its own modest staff of counsel and a transportation analyst, it retains outside attorneys and experts. Because of its relevance to our study, we attach Counsel's informative letter of May 19, 1975, together with his in depth 1974 Annual Report to the Legislature in Appendix K.

6. Other States

Both Missouri and Connecticut have small offices of consumer or public counsel, operating on $30-35,000 budgets, which represent the general interests of the public in utility rate cases before their State Public Service Commissions. Both offices were established in July, 1974, and have engaged in a number of large agency interventions. But because of budgetary limitations, they have not used outside experts widely.[279]

Maryland also has a People's Counsel who appears before the Public Service Commission. While that office is occupied only part-time by a member of the Maryland Bar, it does have

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279 See Letter from William M. Barvick, Public Counsel, Dept. of Consumer Affairs, Regulation & Licensing of Missouri to Tersh Boasberg, May 27, 1975; and letter from David Silverstone, Consumer Counsel, Public Utility Commission of Connecticut to Tersh Boasberg, June 6, 1975.

authority to hire outside experts.[280]

In Vermont, the Public Service Board, which has jurisdiction over utilities, hires private counsel to represent the public in rate cases. The Board pays counsel at private market rates and last year spent approximately $125,000 for these services.[281]

D. Public Counsel: Summary

There could be a number of distinct advantages to an NRC office of public counsel. First, it would enable attorneys (and technical staff if any) to build an expertise in an extremely complicated area such as the regulation of nuclear power.[282] This kind of expertise is difficult to acquire for most attorneys who do not specialize in NRC interventions. To the extent outside experts are utilized, they inject a quality of independent technical review to the hearing process. Public counsel also can have a degree of persistence and staying power which may not be possible for underfinanced intervenor groups.

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280 Maryland Code Ann. art. 78, §§ 14 et seq. (1975).

281 The Board passes on these charges to the regulated utilities. See letter from Martin K. Miller, Chairman, Public Service Board of Vermont to Tersh Boasberg, May 20, 1975.

282 See, e.g., Cramton, supra note 6, at 543-46; Gellhorn, supra note 6, at 397-98; Jacks, supra note 6, at 524-25; Comment, Public Participation, supra note 33, at 748-51.

Second, public counsel is a known budgetary quantity. It avoids many of the administrative headaches associated with direct intervenor financial assistance, such as making difficult determinations of intervenor financial need; whether or not to provide interim awards; how much to pay intervenor counsel and experts; and measuring intervenor contributions to the proceedings.[283]

Third, it gives the agency some supervision over its own intervention process. Public counsel, not intervenors, would decide which experts to retain and which attorneys to assign to particular cases. Counsel would also determine the most significant issues to advance in each proceeding, thus avoiding repetitious and duplicative contentions. It also tends to remove the independent "entrepreneurial" element associated with financing intervenor attorneys.[284] Because of these reasons--expertise, supervision and control--public counsel may be the most efficient use of the taxpayers' dollars.

Of course, to many, the advantages noted above are really the major drawbacks. This is especially true for any in-house public counsel's office, which raises serious questions

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283 See discussion Ch. VII infra.

284 See Dawson, supra note 50, at 887-88.

of counsel's independence and credibility.[285] Given the current relationships between the NRC and most intervenor groups, this will be a formidable hurdle. Further, most persons interviewed who were familiar with public counsel activities noted that, invariably, an in-house office comes into conflict with the agency's regular staff, supervisory personnel and commissioners.[286]

Moreover, an office of public counsel, like a plan for direct financing, may have the same difficulty in choosing which interests and issues to develop, and which cases to enter. This is because its own funding undoubtedly would be limited.[287] Offices of public counsel also lack the

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285 See Cramton, supra note 6, at 545-46; Gellhorn, supra note 6, at 398. Most state public counsels interviewed believed that in-house offices simply could not gain the confidence of intervenor groups.

286 This was the case even when great efforts were made to separate public counsel's authority, budget and personnel from the agency's regular activities.

287 State public counsels interviewed noted they never had enough money to do everything they felt necessary, and employed only their own rough sense of the "public interest" in determining which matters to contest and which proceedings to enter.

heterogeneous interests represented by the Private Bar and its potential intervenor clients. Thus, the price of efficiency may well be loss of independence and credibility.

E. Independent Intervenor Assistance Centers

A variation of the public counsel concept is the notion of independent or "back-up" centers to assist intervenors in agency proceedings.[288] These might be established by NRC contracts or grants, and could embrace funding centers for either lawyers or technical experts, or both.

1. Legal Back-up Centers

The Legal Services Program of the Community Services Administration (CSA), formerly the Office of Economic Opportunity (OEO), currently funds 12 independent centers, each of which generally specializes in a specific area of poverty law, such as housing, migrants, consumer affairs, health and education.[289] Often, these centers have been funded

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288 See Ebbin & Kasper, supra note 59, at 273-76; Cramton, supra note 6, at 543-44; Gellhorn, supra note 6, at 397.

289 Much of the information in this section is taken from the author's own experience with OEO (1964-1968) and his evaluation of many local legal services programs and backup centers. See also Boasberg, The Private Practice of Urban Law, 20 Case W. Res. L. Rev. 323 (1969), and authorities cited therein.

through universities, although most have their own governing boards. Appendix L identifies each center and its annualized funding level.

The CSA centers offer back-up assistance to the agency's numerous community legal services programs. They assist hard-pressed local attorneys in the preparation of pleadings, briefs, and research memoranda on particular matters. They author leading articles in their fields, file amicae briefs in nationally important cases, and act as co-counsel and appellate counsel for local attorneys.

Centers also have commented on administrative regulations; negotiated with federal and state agencies on behalf of low-income clients; and, in limited instances, appeared for and against agencies in administrative and court proceedings.[290]

One center, the Legal Action Support Project of the non-profit Bureau of Social Science Research, Inc., acts as a technical back-up unit for CSA's centers and community programs. It has undertaken statistical analyses, economic impact studies and examination of utility rate increase requests

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290 Interview with Alfred Corbett, Acting Chief, CSA Legal Services Program in Washington, D.C., June 6, 1975 [hereinafter cited as Corbett Interview]. See also Friedman, the Future of The Legal Services Program, Council of New York Law Associates Community Service Publication.

for CSA's local legal projects.[291]

One advantage of an NRC financed advocacy center over an in-house public counsel office is that it may well offer greater independence and freedom of action to its staff members. The CSA back-up centers, for example, have preserved their credibility both with local legal services program attorneys and with low-income and minority client groups.[292] In fact, the major criticism of the back-up centers has been that they may be too independent of their current CSA funding source. They have been accused of being overly aggressive on behalf of their clients, leading to Congressional doubt as to the wisdom of the government funding lawyers to sue itself.[293]

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291 See grant documents of the Bureau of Social Service Research on file with the Office of Legal Services, CSA, 1111-18th Street, N.W., Washington, D.C.

292 See note 289 supra.

293 However, the centers have not engaged in significant litigation against CSA or many other federal agencies. Corbett Interview, supra note 290. They have, on the other hand, encountered Congressional opposition, and their continued funding under the newly established Legal Services Corporation, Pub. L. No. 93-355, 88 Stat. 378 (U.S. Code Cong. & Ad. News, 93d Cong., 2d Sess. 423 (1974)), is questionable.

According to a number of state public counsel personnel interviewed, their offices are often in an extended battle with their state legislatures over increased budgets and overly vigorous representation of their clients' interests.

Other advantages of independent legal centers, like offices of public counsel, include their ability to build up specialized expertise; a known administrative budget; avoidance of some of the administrative problems associated with implementing direct intervenor financing; elimination of the lawyer entrepreneur; and perhaps more efficient attorney staff utilization.

The great disadvantage of back-up centers is that the NRC funding source might actually (or appear to) condition the center's independence, leading to a loss of credibility with client groups. This potential danger might be reduced by funding centers under long-term contracts through a university, law school, bar association or other non-profit organization, whose own independence could help act as a buffer between the NRC and the center.[294] Another suggestion is to design the governing board of any center in such a manner as to stamp it clearly as an independent and strong

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294 CSA has tried to do just this. But many universities and bar associations do not eagerly seek out controversial projects. If the actual NRC grantee is merely a conduit for the center, it may not offer stiff resistance to Commission or Congressional importunings.

intervenor advocate.[295]

Aside from potential limits on independence, there are other pitfalls of legal assistance centers. One is the endemic problem of how to avoid institutional hardening of the arteries, especially under long-term contracts.[296] Another difficulty is that many of the intervenor lawyers we interviewed had doubts about any center being able to attract and hold skilled litigation-oriented attorneys.[297] As in the case of in-house public counsel offices, these intervenor lawyers also voiced concern that the center concept might tend to homogenize and stifle attorney initiatives, and the multiplicity of ideas stemming from private

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295 A board with Ralph Nader, Daniel Ford, David Comey, inter alia (whatever else may be said for or against it), would not have difficulty in establishing its credibility with most current intervenor groups. But see discussion on center scientific credibility, Ch. VI, E 2 infra, and note 296 infra and accompanying text.

296 Even independent governing boards must still choose their own successors. As constituent views change and new intervenors appear on the scene, the former stalwarts may well appear as defenders of the status quo ante.

297 For example, CSA and local legal service programs have had great difficulty retaining trial lawyers; but this may well be due in part to the agency's oft-publicized political gyrations.

representation. Moreover, invariable budgetary constraints would confront center lawyers with the same difficulties as public counsel in choosing which interests and groups to represent in which proceedings.

2. Technical Centers

We have already discussed how the problem of obtaining technical expertise has handicapped intervenors.[298] While part of this difficulty is attributable to lack of intervenor funds to pay for expert witnesses and independent review, much also may be due to the reluctance of many experts, especially in reactor safety, to appear on behalf of some intervenors.[299] Most knowledgeable nuclear scientists and engineers are directly employed by either government or industry. Naturally, it is difficult to ask them to testify against their own economic interests.[300]

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298 See discussion Ch. V, A supra; Green, supra note 9, at 514. Also, see text Ch. VII, A 1 infra.

299 See Ebbin & Kasper, supra note 59, at 210-11; and text Ch. V, A 5 supra.

300 See also Ebbin & Kasper, supra note 59, at 265-66, 273-76; Jacks, supra note 6, at 524; and discussion Ch. V, A 5 supra.

The basic argument for a separately funded technical center(s) is that it could offer meaningful employment opportunities for experts who wished to work independently of both government and industry. This assumes, of course, that such centers would have more than a handful of staff positions available, and that their funding would be on a relatively long-term basis. Further, if such centers were established, then arguably a number of presently employed governmental and industrial experts might be better able to resist peer pressures against their cooperation with intervenors, because alternative employment could be sought. In addition, a center with its own independent capability would lessen the need for intervenors to rely on technical assistance from NRC's own staff and the national laboratories, thus alleviating potential conflict of interest and agency management problems.[301]

A technical center, however, has many of the same problems associated with legal back-up units. Will the NRC funding source constrain or appear to influence the independence of its work and its credibility with intervenor groups? Can the center attract the kind of high quality technical

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[301] See text Ch. VI, A 3 supra.

staff which will enable it to offer a meaningful counterweight to government and industry experts?[302] How does it choose which intervenor interests to concentrate upon, and how does it avoid institutional rigidity?

It should be remembered that any discussion of independent centers also should include mention of those which combine both legal and technical expertise. As noted above, many state offices of public counsel, as well as a few of the larger intervenor organizations, employ both attorneys and experts on their staffs.[303] There is much to be said for such an interdisciplinary approach to interventions in NRC proceedings.

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302 Again, the technical areas and depth of study will depend on one's view of the nature of the intervenor role, as noted at Ch. V, A 2 c supra. It does not seem profitable, for example, to set up a whole network of centers competing with the national labs. Yet, there must be enough positions available, at proper salaries and with relative security to attract a "critical mass" of experts. Otherwise, the notions of substantive technical contributions or alternative employment opportunities are meaningless.

303 The Natural Resources Defense Council, for example, has one or two full-time scientists on its staff. The Union of Concerned Scientists has mainly experts available and utilizes outside attorneys. Business and Professional People for the Public Interest employs both house counsel and lay experts.

F. Other Types of Assistance

There are a number of other possible forms of assistance which the Commission may want to examine in its rulemaking.

1. Pro Bono Legal Aid

In the past, intervenors have received a limited amount of pro bono publico assistance from the Private Bar.[304] Many, if not most, intervenor attorneys also have taken cases on a greatly reduced or no fee basis. However, reliance on lawyers' charitable impulses is not an effective way of ensuring quality representation on a continuing basis.[305]

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304 For example, a major Washington law firm recently briefed and argued the appeals in Natural Resources Defense Council, Inc. v. NRC, Nos. 74-1385 and 74-1586 (D.C. Cir., filed ____ __, 1975). The FTC has apparently arranged for pro bono representation of a few indigent respondents (not intervenors) in its cease and desist adjudications from lawyer-members of the ABA's Anti-Trust Section Committee on the Federal Trade Commission. See Letter from FTC (then) Chairman Miles Kirkpatrick to Comptroller General Elmer Staats, Mar. 17, 1971.

305 See, e.g. Cramton, supra note 6, at 541-42; Gellhorn, supra note 6, at 389. State counsel offices interviewed also discouraged placing any reliance on pro bono assistance.

According to members of both the Nuclear and Intervenor Bars interviewed, the complexity and duration of NRC interventions is beyond the available pro bono resources of all but the largest law firms. And even these firms can offer their services on a most limited basis.[306]

2. Foundations

Interviews with foundation-funded organizations and the Council for Public Interest Law disclosed that current economic conditions were forcing many foundations to cut back their support of environmental groups and law centers.[307] Nor can CSA legal service programs be of assistance in this regard.[308] While intervenor groups can, and should, raise funds from their own memberships or within their local communities, dependence upon national foundation support to sustain a meaningful intervenor assistance program is probably not realistic.

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306 See Tucker, Pro Bono Publico or Pro Bono Organized Bar? 60 A.B.A.J. 916 (1974); Tucker, The Private Lawyer and Public Responsibility - The Profession's Armageddon, 51 Nebr. L. Rev. 367 (1972).

307 See Who Will Pay for Public Interest Law? 20 ABA American Bar News 3 (May, 1975); Adams, Responsible Militancy - The Anatomy of A Public Interest Law Firm, reprinted from The Record of The Association of the Bar of the City of New York for November, 1974. Accord, Brief for Respondent, Alyeska Pipeline Service Co. v. Wilderness Society, 95 S. Ct. 1612 (May 12, 1975) at 94-95.

308 There are no OEO Back-up Centers in the regulatory field. Corbett Interview, supra note 290.

3. Advisory Groups

A number of federal agencies have used advisory groups to better enable them to meet their responsibilities to the public. CSA, for example, has a Clients' Council which the agency funds to advise its Legal Services Office on program direction, responsiveness to client concerns, and to serve as members of the evaluation teams it uses to monitor local programs and back-up centers.[309] The CAB recently announced the formation of a 15-person outside advisory committee to consider how it could streamline its regulatory procedures, reduce overall costs and be more responsive to public concerns.[310]

The Food and Drug Administration's new regulations provide for agency-paid consumer representatives to sit on FDA technical advisory panels.[311] Such representatives are democratically selected through publication of a notice in the Federal Register requesting nominations, and are voted upon by a permanent list of consumer organizations.[312]

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309 Corbett Interview, supra note 290.

310 The Washington Post, June 22, 1975, at A 3, Col. 2.

311 See Hutt Letter, supra note 232.

312 Id.

The Environmental Protection Agency has used policy task forces to advise it on implementation of new legislation. Citizen groups were well represented on these advisory groups.[313] The FCC also has made extensive use of outside experts and citizen representatives to supplement the Commission's information on important subjects of general interest.[314] And, as noted in this chapter, states have devised a variety of means to encourage increased public participation in their regulatory process.

The NRC may wish to consider some of these alternatives in its rulemaking. These could include creation of special advisory councils, perhaps in the environmental field (similar in function to the ACRS); employment of an advisor

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313 Former EPA administrator William D. Ruckelshaus noted in connection with the EPA's use of these task forces:

> This experiment, I think, has borne great fruit. It has forced members of the public who otherwise would stand and criticize what the agency was doing, to become involved in the formulation of that policy itself, thereby giving them a much greater understanding of all of the ramifications involved, and the complexities in attempting to formulate a policy and take into account the total public interest.

Panel I, supra note 104, at 393.

314 See Remarks by FCC Chairman Richard E. Wiley, Panel III, supra note 237, at 502-03.

to the Commission to help facilitate public participation; use of outside attorneys or experts to assist any office of public counsel; establishment of advisor(s) to certain rulemaking proceedings; and a variety of other advisory or extra-agency mechanisms to broaden citizen participation in its proceedings.

G. Summary

This chapter has considered alternatives to provision of direct financial assistance to intervenors. It has noted the possibility of reducing costs of filings, copy distributions and transcripts. It has summarized the experience of federal and state governments with public counsel offices and has briefly examined the concept of funding independent legal and technical assistance centers.

Advantages of public counsel and assistance centers are (1) build-up of concentrated expertise; (2) persistence and staying power; (3) a known budgetary quantity; (4) avoidance of many administrative problems associated with implementing direct intervenor financial assistance; and (5) greater supervision over and increased efficiency in the utilization of the intervention process.

The major disadvantages are: (1) real or apparent loss of lawyer and expert independence; (2) credibility problems with intervenors; (3) potential conflict with other personnel

in the agency; (4) institutional rigidity and loss of Private Bar and intervenor pluralism; (5) questionable ability to attract quality staff; and (6) difficulty in choosing which interests and issues to contest in which proceedings.

Lastly, the chapter explored other possible forms of assistance such as pro bono representation, foundation funding, and agency use of advisory mechanisms. These alternatives, and others, will be studied in greater detail in the Commission's rulemaking.

VII. IMPLEMENTATION OF FINANCIAL ASSISTANCE

The third major question of this study is whether the net advantages (if any) of providing direct financial assistance to intervenors are outweighed by the administrative and management problems associated with implementation thereof. Once again, this Report does not assume that the Commission has decided to provide financial assistance to intervenors. Indeed, as we have noted above,[315] the administrative problems associated with them may be a prohibitive reason against making such a determination. Nevertheless, our contract called for us to examine these issues.

A. Which Intervenor Expenses Should Qualify

We have already discussed those intervenor costs associated with filing fees, multiple copy requirements, and transcripts.[316] If these expenses were not borne by the NRC, perhaps through some type of in forma pauperis proceeding, they would be proper costs under a direct intervenor financing plan. The principal intervenor expenses, however, are experts' and attorneys' fees.

1. Compensation of Experts

Most persons interviewed believed, if the Commission decided to provide financial assistance to intervenors, that one of the

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315 See text, Ch. I, B and Ch. V, B, 5 supra.

316 See text, Ch. VI, A supra.

chief purposes thereof would be to compensate experts.[317] Experts' expenses include travel and per diem, as well as hourly or daily fees, and may well constitute half to two-thirds of intervenor total costs of participation in NRC proceedings.[318] Under the functional approach to intervention, noted above,[319] if intervenors are to make substantive contributions to the proceedings, they seemingly must put great reliance on expert witnesses.[320]

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317 Some agencies have allowed intervenor expert compensation. E.g., Firestone Tire & Rubber Co., FTC Docket No. 8818 (1972); Tiidee Products, Inc., 194 N.L.R.B. 1234, 1236-37 (1972) (supplemental decision). Also, §1.17(e) (2), 40 Fed. Reg. 15239, of the FTC's proposed new rules provide for expert compensation. See Appendix D infra. Accord, Section 501(a) of the Kennedy Amendment, 120 Cong. Rec. S 18729; and S 1665, 94th Cong., 1st Sess. §193(a). See Appendix C infra. Further, witness fees may be recovered as costs under statutes providing for awards of attorneys' fees, see statutes collected in Appendix E infra. Prior to Alyeska, experts' fees had been included in awards of expenses under the private attorney general rationale, e.g., La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972). For cases in which attorneys' fees and expert witness fees were awarded under other legal theories, see, e.g., Pyramid Lake Tribe of Pauite Indians v. Morton, 360 F. Supp. 669 (D.D.C. 1973), rev'd on other grounds, 499 F.2d 1095 (D.C. Cir. 1974); Beens v. Erdahl, 349 F. Supp. 97 (D. Minn. 1972). Cf. Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942 (1972).

318 See Ribicoff Hearings, supra note 59, at 227.

319 See text, Ch. IV, B 3 supra.

320 See, e.g., Ebbin & Kasper, supra note 59, at 265-67, 286-87; Cramton, supra note 6, at 540; Gellhorn, supra note 6, at 393-94; cf. Green, supra note 9, at 514. See text Ch. VI, E 2 supra.

The two key issues associated with paying experts are (a) to what degree should the Commission control intervenor choice of experts; and (b) how much intervenor independent study and original research should be compensated.[321]

Those in favor of allowing intervenors complete freedom of choice in retaining experts argue that, only in this manner, can intervenors be sure of the experts' independence and confidential relationship. Others, however, believe since the underlying reason for compensating intervenor experts is to help the Commission, that, within certain broad limits, the Commission ought to be able to decide if such experts possess the requisite qualifications to make a meaningful contribution to the hearing.[322]

The second issue raises the question, how far should the Commission go in paying for intervenor's independent studies, model simulation, detailed testing and original research?[323] The answer lies somewhere between what is necessary for experts' review and examination of pre-hearing documents, and the kind of basic work done by the national laboratories. In dealing with this problem, much will depend on one's analysis of the

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321 For discussion of amount of expert compensation see text, Ch. VII, C and D infra.

322 See controversy surrounding participation of Dan Ford in ECCS hearings, note 67 supra; see Ebbin & Kasper, supra note 59, at 214-217; Primack & von Hippel, supra note 137, at 218.

323 Intervenors have undertaken significant environmental studies, such as that done on striped bass in Consolidated Edison Co. (Indian Point Station, Unit No. 2), RAI-73-9-751.

role of intervenors - as prodders and probers vs. primary researchers.[324] Much also is contingent on one's view of the advisability of interim financing.[325] Perhaps, possible reimbursement for more extensive studies should await the conclusion of the hearing, when their contribution to the proceedings can be more accurately measured.[326]

2. Attorneys' Fees

Attorneys' fees seem as integral a portion of intervenor expenses as expert witness fees.[327] Depending on the nature and duration of the proceeding, attorneys' fees often constitute a significant part of total intervenor costs. Those in favor of providing compensation for intervenor lawyers note that attorneys enable an intervenor to present its case in an orderly and concise manner, thus serving to reduce possible hearing delays.[328] They argue that so long as the ASLB process

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324 See text, Ch. V, A 2c supra.

325 See text, Ch. VII, B infra.

326 See text, Ch. VII, H 2 infra.

327 Section 1.17(e)(2) of the FTC's proposed rules, 40 Fed. Reg. 15239 (Appendix D infra); Section 501(a) of the Kennedy Amendment, 120 Cong. Rec. S 18729; and S. 1665, 94th Cong., 1st Sess. §193(a) (Appendix C infra), all provide for attorney's fees. Accord, authorities cited note 6 supra.

328 Cf. Interviews with ASLB Panel Members (Appendix B infra).

is highly adversarial and legalistic in nature, attorneys are absolutely necessary - in spite of Shakespeare's admonition to the contrary.[329]

Those who object to providing attorneys' fees in any general plan of intervenor financing note that, unlike experts, attorneys have an inherent "conflict of interest" between advancing their clients' cause and ensuring their own fee entitlements. This is especially true, they assert, when aggressive, independent-minded attorneys represent weak and unsophisticated clients with tenebrous goals.[330] These critics also contend that private lawyers traditionally have not been compensated by public funds; and, in any event, the rash of NRC interventions to date have not seemed to suffer from a lack of intervenor legal talent.

Proponents, on the other hand, maintain there is no conflict of interest between a client's objectives and its lawyer's representational activities. All lawyers owe a professional duty to advance their client's case, regardless of their

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329 "The first thing we do, let's kill all the lawyers." Henry VI, Part II, Act IV, Scene 2, line 86.

330 Query whether this objection does not cut more toward the question of a client's accountability and responsibility. See text, Ch. IV, B 3 and note 211 supra.

personal interest in the outcome.[331] Legal compensation in NRC proceedings, they point out, would be no different from the Private Bar's normal practices in contingent fee and statutory award matters. Proponents also argue that it is counter-productive for intervenors to depend upon legal charity, since the underlying purpose of any financing plan is to enable intervenors to help the Commission by putting on their best case possible.

B. At What Stage Should Assistance Be Provided

This section considers whether, in any financing plan, the NRC should provide interim assistance to intervenors, or wait until the proceedings are concluded.[332] Intervenors vigorously

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331 ABA Code of Professional Responsibility Canon No. 5.

332 The proposed FTC rules, the Kennedy Amendment, and S 1665 all make allowance for interim assistance. In ruling that the FPC did not have statutory authority to award the interim assistance requested in Greene County, the Second Circuit nevertheless recognized the importance of such assistance:

> Despite the Commission's argument that petitioners have made an inadequate showing of financial hardship, it is clear to us that a refusal to award petitioners expenses as they are incurred, particularly expenses related to production of expert witnesses, may significantly hamper a petitioner's efforts to represent the public interest before the Commission. And, a retroactive award of experts' fees would be small consolation to a petitioner if the hearings are finished, the record is complete and these experts were not called because of inadequate funds.

455 F.2d at 426 (footnotes omitted).

contend that without some degree of interim financing many of them will not be able to participate effectively in hearings at all.[333] Further, if one of the primary purposes of intervenor funding is to assist the Commission resolve important issues, then lack of interim financing denies them the ability to mount a meaningful presentation.

Also, waiting until the conclusion of the proceedings may work a particular hardship on under-financed local citizen groups, and favor the larger national organizations. The latter may be better able to withstand an immediate drain on their resources, if they know they can recoup their costs at the hearing's end.

The problems associated with interim financing, however, are considerable. First, fee-shifting statutes and court decisions allow expenses only at the conclusion of a proceeding, when it is possible to base an award upon such factors as amount of time expended, degree of counsel's skill demonstrated, novelty and complexity of the issues contested, nature of the public benefit conferred, and value of the party's contribution.[334] Second, it is difficult to ascertain at the outset of any proceeding which of the intervenors (and which

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333 See Schneider Memorandum, supra note 123, at S 18727.

334 See statutes collected at Appendix E infra and authorities cited notes 350-51 infra.

of their issues) will be most important for ASLB consideration, and, therefore, most deserving of preliminary financing.[335] Third, many observers believe that in implementing any plan of financial assistance, the intervenor ought to first demonstrate its own bona fides, either by reaching a threshold level of independent financial support, or by exhibiting the kind of staying power and internal cohesion which can enable it to participate effectively.[336]

Perhaps some compromise on interim funding is possible. For example, one could allow limited interim financing upon a proper showing of intervenor good faith and financial need. Such interim funding could be held back until after the notice of hearing and the first prehearing conferences. At this time, the ASLB would have a clearer indication of the nature and importance of intervenor contentions, and the potential value of their contributions. Then, additional assistance might be available at the conclusion of the proceedings. [337]

In determining when to provide assistance, it also would be appropriate for the Commission's proposed rulemaking to consider whether intervenor awards should be allowed only for

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335 See, e.g., Cramton, supra note 6, at 544-45; Jacks, supra note 6, at 522-23 n. 189.

336 See Consumers Power Co. (Midland Plant, Units 1 & 2), Construction Permits Nos. 81 & 82, CLI-74-26, RAI-74-7-1 (July 10, 1974), quoted in text at Ch. IV, B 3 c(2) supra; and see text Ch. VII, E infra.

337 For a discussion on allocation of limited funds and interim financing see text Ch. VII, H infra.

expenses incurred at the prehearing and hearing stages, or should embrace appeals to the ALAB and to the Commission as well.[338]

C. What Criteria Should Govern Assistance Awards

Two issues are involved in this topic: first, should intervenors have to prevail on their contentions in order to receive any assistance; and second, what criteria should govern the amount of intervenor awards.

1. Prevailing Party v. Significant Contribution

Most statutes shifting fees and expenses do so for a "successful" or "prevailing" party.[339] Lately, though, a number of Congressional enactments allow for an award to "any party."[340]

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338 Or include appeals from NRC final decisions to Federal Courts - although, most of those interveiwed thought this might be stretching the point.

339 See statutes collected in Appendix E.

340 E.g., Federal Water Pollution Control Act Amendments of 1972, Marine Protection Research and Sanctuaries (Ocean Dumping) Act of 1972, Clean Air Act Amendments of 1970. See Appendix E infra.

Even under these statutes, however, courts disagree on whether losing counsel should be compensated. Compare Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1338 (1st Cir. 1973), with Colorado Public Interest Research Group, Inc. v. Train, 373 F. Supp. 991, 995-96 (D. Colo. 1974), and Delaware Citizens for Clean Air v. Stauffer, 62 F.R.D. 353 (D. Del. 1974).

Generally, courts have also reimbursed fees and costs only to a prevailing party, in the absence of specific statutory language.[341] However, there are a number of recent cases where courts have awarded fees in the absence of a final verdict,[342] to those parties whose challenges are "constructive and reasonable";[343] advance "important legislative policy";[344] and where litigation serves as a "catalyst" to effect change and thereby achieve a "valuable public service."[345]

Moreover, as many persons note, court contests differ significantly from agency proceedings. NRC intervenors rarely are successful in the sense of winning a rulemaking, or prevailing in a licensing adjudication, since in almost every instance a construction permit or operating license is

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341 See, e.g., Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

342 E.g., Yablonski v. United Mine Workers, 466 F.2d 424 (D.C. Cir. 1972), cert. denied, 412 U.S. 918 (1973).

343 Natural Resources Defense Council, Inc. v. EPA, 484 F.2d at 1338.

344 Wilderness Society v. Morton, 495 F.2d 1026, 1034 (D.C. Cir. 1974), rev'd sub nom, Alyeska Pipeline Service Co. v. Wilderness Society, 95 S. Ct. 1612 (May 12, 1975). It should be noted that the award of fees in Wilderness was overruled by Alyeska, not on the ground that the intervenors did not "prevail," but because the Supreme Court rejected the private attorney general rationale on which the fee award was premised. See discussion text Ch. III, D supra.

345 Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429-30 (8th Cir. 1970). Except for Wilderness, none of the cases cited in notes 341-345 awarded fees under a nonstatutory private attorney general theory.

ultimately granted.[346] However, intervenors argue that they do make meaningful contributions to a proceeding in that they often raise significant new issues for the Board's consideration; obtain changes in the applicant's construction or operating plans, or in its license terms; and effect progressive modifications in Commission standards and procedures.[347]

Proponents of a "significant contribution" criterion for assistance awards assert that rulemaking and licensing proceedings are not designed to pick a winner or a loser. The traditional considerations involved in shifting fees from an unwilling defendant to a prevailing plaintiff are not

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346 See Green, supra note 9, at 513. Moreover, if criteria were limited to a "successful" or "prevailing" intervenor, the possibility of interim funding may be reduced significantly. See text Ch. VII, B supra.

347 These contentions, of course, are disputed. See discussion Ch. V,A and B supra. The appropriateness of awarding fees, should the parties agree to a settlement may be another issue the Commission may wish to consider. Compare the FCC's majority opinion, KCMC, Inc., 25 F.C.C. 2d 603 (1970), with the dissenting opinions of Commissioners Burch, Cox and Johnson, id. at 605, 606, 617, and see Church of Christ III, 465 F.2d 519 (D.C. Cir. 1972) (overruling KCMC, Inc.). See also note 209 supra and accompanying text.

present when the agency is providing the assistance from public funds.[348] Further, they contend a principal reason for financing intervenors is to assist the Commission make intricate judgments on public health, safety and environmental policies. What is important in this context is not so much that intervenors prevail on their contentions, but rather that they advance the hearing process by making significant contributions.[349]

If a significant contribution criterion is relied upon, this raises the additional difficulty of determining exactly which contributions are, indeed, "significant," and which are not deserving of financing. However, these are the same kinds of issues which courts have grappled with in the private attorney general cases, and in deciding appropriate compensation due to counsel under the many fee-shifting statutes noted in Appendix E. These factors are discussed in greater detail in the next section.

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348 Cf. Jacks, supra note 6, at 522-23.

349 The new FTC rules are silent on these particular issues of financing criteria. The Kennedy Amendment, § 501, and S.1665, § 193, (Appendix C infra) require the Commission to consider the extent of intervenor contributions. But see Schneider Memorandum, supra note 123 at S 18725:

> Thus, only by making a meaningful contribution to the proceeding and demonstrating financial need can an intervenor be eligible for reimbursement.

(Emphasis added.)

2. Factors Considered in Determining Amounts

This section describes some of the standards which courts have relied upon in determining attorneys' and experts' compensation.[350] There are literally hundreds of judicial decisions discussing the factors which should be considered in awarding reasonable attorneys' fees.[351] One of the most frequently cited cases is Johnson v. Georgia Highway Express,

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350 Except for considerations regarding maximum expert fees, see text Ch. VII, D infra, courts seem to award expert fees at reasonable market rates. See, e.g., Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973), rev'd in part, 502 F.2d 43 (5th Cir. 1974); Pyramid Lake Tribe of Pauite Indians v. Morton, 360 F. Supp. 669 (D.D.C. 1973), rev'd on other grounds, 499 F.2d 1095 (D.C. Cir. 1974); Sims v. Amos, 340 F. Supp. 834 (M.D. Ala.), summarily aff'd, 409 U.S. 942 (1972); Clark v. American Marine Corp., 320 F. Supp. 709 (E.D. La. 1970), aff'd per curiam, 437 F.2d 959 (5th Cir. 1971).

351 For discussion of factors courts should consider in determining fee awards see Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); accord, Evans v. Sheraton Park Hotel, 503 F.2d 177, 186-89 (D.C. Cir. 1974); Evans v. Seaman, 496 F.2d 1318, 1319 (5th Cir. 1974); Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 447 (5th Cir. 1974); Wallace v. House, 377 F. Supp. 1192, 1202-08 (W.D. La. 1974); In re Delta Food Processing Corp., 374 F. Supp. 76 (N.D. Miss. 1974); Morton v. Charles County Bd. of Educ., 373 F. Supp. 394 (D. Md. 1974). See also Lindy Bros. Builders, Inc. v. American Radiator & Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); Pyramid Lake Pauite Tribe, 360 F. Supp. 669, 671; Wyatt v. Stickney, 344 F. Supp. 387, 409, decision reserved sub nom, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); and scores of cases collected in Derfner, Attorneys' Fees in Pro Bono Publico Cases, Lawyers' Committee for Civil Rights Attorneys' Fees Project, 4 Gillon St., Charleston, S.C. 29401; Dawson, supra note 50, at 922-29; Nussbaum, supra note 50 at 334-35; Comment, Attorney's Fees, supra note 50 at 701-06.

Inc.[352] which adopted the following guidelines in assessing reasonable compensation for counsel:

1) Time and labor required;
2) the novelty and the difficulty of the questions;
3) the skills requisite to perform the legal service properly;
4) the preclusion of other employment by the attorney due to the acceptance of the case;
5) the customary fee;
6) whether the fee is fixed or contingent;
7) time limitations imposed by the client or the circumstances;
8) the amount involved and the results obtained;
9) the experience, reputation, and ability of the attorneys;
10) the "undesirability" of the case;
11) the nature and length of the professional relationship with the client;
12) awards in similar cases. [353]

Other courts have leaned on somewhat more general criteria, such as:

> ...the reasonable value of the services rendered, taking into account all the surrounding circumstances, including, but not limited to, the time and labor required on the case, the benefit to the public, the skill demanded by the novelty or complexity of the issues, and the incentive factor.[354]

In its rulemaking, the Commission may wish to consider which of the many factors noted above are most appropriate to its own proceedings.

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352 488 F.2d 714 (5th Cir. 1974).

353 Id. at 717-19. See also ABA Code of Professional Responsibility Disciplinary Rule 2-106, ABA Canons of Professional Ethics No. 12, for a similar detailed list of appropriate factors.

354 Wilderness Society v. Morton, 495 F.2d at 1036. For a discussion of the "incentive factor," a factor sometimes increasing awards because of the difficulty of winning the issues contested see Dawson, supra note 50, at 906-07.

3. Hourly Rate

Hourly rates have varied widely in reported court cases.[355] One often mentioned decision is Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp.,[356] where the court noted:

> The value of an attorney's time generally is reflected in his normal billing rate. A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time -- taking account of the attorney's legal reputation and status (partner, associate). Where several attorneys file a joint petition for fees, the court may find it necessary to use several different rates for the different attorneys. Similarly, the court may find that the reasonable rate of compensation differs for different activities. [357]

In Appendix M, we have collected numerous cases which detail hourly rates of pay. In general, courts look to prevailing local legal rates; the age, experience and skill of counsel; the novelty and complexity of the contested issues; and such other factors

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355 Compare, e.g., Wyatt v. Stickney, 344 F. Supp. 387, 410 ($20-$30 an hour), and Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971) (approximately $19 an hour), with Stern v. Lucy Webb Hays Nat'l Training School, Civ. No. 267-73 (D.D.C. Nov. 15, 1974) ($75 an hour), and Donson Stores, Inc. v. American Bakeries Co., 60 F.R.D. 417 (S.D. N.Y. 1973) (over $200 an hour). For further discussion see Dawson, supra note 50, at 922-29; Comment, Attorney's Fees, supra note 50, at 701-05.

356 487 F.2d 161 (3d Cir. 1973).

357 Id. at 167

as whether the time was spent in or out of court,[358] or on trial matters or appellate work.[359] Courts have sometimes used the yardstick of the Criminal Justice Act,[360] which limits rates to $20 and $30 per hour for attorneys working on assigned criminal cases.[361] However, many have pointed out that these rates are too low, even for criminal cases, and Appendix N speaks to the reasons why. The proposed FTC intervenor financing rules provide:

> Attorneys' fees at a rate in excess of $50 per hour will be considered presumptively unreasonable and compensation will not be provided for such excess in the absence of sufficient justification.[362]

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358 E.g., United States v. Gray, 319 F. Supp. 871 (D.R.I. 1970) ($35 an hour for out of court, $50 an hour for in court).

359 E.g., Perkins v. Standard Oil Co., 474 F.2d 549 (9th Cir.) cert. denied, 412 U.S. 940 (1973) ($46 an hour for trial work, $40 an hour for appellate work).

360 18 U.S.C. § 3006A(d)(1) (1970).

361 See Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Thonen v. Jenkins, 374 F. Supp. 134 (E.D. N.C. 1974); Stevens v. Dobs, Inc., 373 F. Supp. 618 (E.D. N.C. 1974); Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973), rev'd in part, 502 F.2d 43 (5th Cir. 1974); Wyatt v. Stickney, 344 F. Supp. 387.

Courts also referred to local bar association minimum fee schedules. However, the Supreme Court recently invalidated such schedules as violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Goldfarb v. Virginia State Bar, 43 U.S.L.W 4723 (U.S. June 16, 1975).

362 § 1.17(e)(2), 40 Fed. Reg. 15239, Appendix D infra.

One suggestion made during our interviews was that the Commission might determine appropriate hourly rates for intervenor counsel, based on comparable NRC legal staff salaries or the salaries of attorneys engaged full time by groups such as the Sierra Club or NRDC. [363] Also, CSA has had a great deal of experience in establishing attorney pay schedules for its legal service programs and back-up centers.[364] What is important in determining hourly rates is to provide sufficient incentive to attract competent counsel so that intervenors can present their most effective case - not to make lawyers rich.

In this connection, another issue which the Commission may wish to explore in its rulemaking is whether it is better to use such detailed guidelines as those employed by the Johnson[365] and Lindy[366] courts, or if it should adopt the more general approach suggested by the proposed FTC rules

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363 Appropriate allowances, of course, would have to be made for fringe benefits and overhead. Detailed salaries and overhead rates have been compiled in annual surveys conducted on private law firms and corporate law departments by Altman & Weil, Management Consultants, Ardmore, Pa. 19003. (It was also suggested that intervenor counsel receive the same rates as applicants counsel.)

364 Information available from CSA, Office of Legal Services, 1111 - 18th Street, Washington, D. C.

365 488 F.2d 714.

366 487 F.2d 161.

with a maximum amount.[367] Another consideration is the advisability of using a flat hourly rate for all attorneys in view of the difficulties of making precise individual dollar determinations. However, this would not allow the Commission to suit the award to the merits of the intervention; nor could awards be used to discourage dysfunctional conduct.[368]

"Hard cases make bad law" runs a legal maxim. While it is undoubtedly difficult for anyone to decide delicate questions of how much an individual lawyer or expert should be paid, it is worth noting that courts have been doing it for many years.[369] Again, it is more important to determine if attorneys' fees should be awarded at all, than whether a particular lawyer should receive $40 or $45 per hour.

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367 Both the Kennedy Amendment, § 501(a), and S.1665, § 193(a), use the words "reasonable attorneys' fees." See Appendix C infra.

368 On the other hand, "aggressive" attorneys, who rock the boat, would be treated the same as other counsel. Gellhorn, supra note 6, at 396.

369 As Minnesota U.S. District Court Judge Miles Lord remarked, after computing an extremely complicated fee division in a large antitrust case, "There are no unmanageable cases. There are only lazy judges." Gelfand, 'Risk Factor' Is Cited In Setting Legal Fees, Washington Post, May 28, 1975, at A___, col. 6.

D. Maximum Amounts

Another issue raised by any proposed plan of intervenor financial assistance is whether rates of pay for experts or attorneys should have ceilings. One obvious consideration in this regard is that, the higher the individual awards, the less total funds will be available for all intervenors.[370] Another factor is the maximum allowable daily rate which federal agencies, such as the NRC, can pay to its own experts and consultants.[371] However, since intervenor experts and attorneys technically would not be employed by, or acting as consultants to, the NRC, it is questionable if there is any legal maximum on their rates of pay - other than that which might be imposed by a general standard of reasonableness.[372]

Still, there is the practical consideration of the prudence of compensating intervenors at rates higher than those permitted the Commission's own experts and consultants,

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370 See discussion Ch. VII, H infra.

371 5 U.S.C. §§ 3109, 5532 (1970). The current NRC limit is $138 per day. This limitation does not apply to personnel of government contractors. 41 C.F.R. §§ 1-15.205-6, -31, 1-15.309-7, -26 (1974). The ICC Office of Public Counsel has a statutory ceiling of $250 per day for "qualified experts." Rail Reorganization Act of 1973, § 205(c)(1), 45 U.S.C. § 715(c)(1) (Supp. III, 1973).

372 See 5 U.S.C. § 3109; cf. Federal Personnel Manual, ch. 304 (Aug. 23, 1973).

including the non-permanent members of the ASLB and ALAB panels.[373] For example, the proposed FTC rules do limit intervenor consultants (not attorneys) to a rate "...not to exceed the highest rate at which experts and consultants to the Commission are compensated."[374]

The considerations here do not differ substantially from those discussed above in regard to attorneys' fees. The goal is to attract the kinds of experts and consultants which will enable intervenors to present an effective case. If these rates are deemed to be higher than those paid to NRC's own consultant personnel, then this consideration must be balanced against the possible damage to the morale and effectiveness of the Commission's own experts and consultants.[375]

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373 Some have argued that paying intervenors at higher rates might even force the Commission to go to Congress and seek greater pay for its own experts and consultants. See Rail Reorganization Act, supra at note 368.

374 Section 1.17(e)(2). 40 Fed. Reg. 15239, Appendix D infra.

375 In this regard, it should be noted that many state public counsel offices do not appear to be limited to state government rates in employing experts and attorneys. See discussion, Ch. VI, C supra.

E. Matching Concept

One of the more imaginative suggestions our interviews brought out was the possibility of incorporating a matching concept into any intervenor financing plan which the NRC might adopt. For example, instead of the Commission making awards of 100 cents on the intervenor cost dollar, it might provide assistance on a matching basis. Proponents of such a matching concept talk about funding on a 50-50 or 75-25 percent basis.[376] This concept could have a number of possible advantages.

First, it may stretch the Commission's limited money so that additional funds could be available for more intervenors or for more proceedings. Second, it might well ease some of the problems associated with interim financing, since an intervenor would be underwriting a significant portion of its own representation.[377] This, in turn, could lessen the Commission's risk-taking on the ability of an intervenor to see the proceedings through, and to make a significant contribution to the hearing process.[378]

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376 Of course, the percentages in any matching formula vary depending on one's view of funding intervenors in the first place.

377 See discussion Ch. VII, B supra.

378 See discussion Ch. III, B, 3a supra. A matching concept also tends to reduce frivolous interventions.

Third, requiring an intervenor to finance a portion of its own undertaking would enable it to demonstrate its bona fides.[379] Many believe that, unless an intervenor is able to convince a minimal number of people to "put their money where their mouths are," common sense dictates that the intervenor may not have a significant issue. Raising its own funds or attracting the support of others lends credibility to the legitimacy of the intervenor's contentions, and the public importance of its issues. Thus, federal funding of such intervenors may be more warranted.

Fourth, a matching assistance award may work like a foundation challenge grant to spur additional intervenor fund raising. Many federal agencies award grants on a matching basis to encourage mobilization of local resources and reduce the grantee's complete reliance on Uncle Sam.

A matching concept, however, may create as many issues as it solves. For instance, it tends to reward the better funded organizations at the expense of poorer intervenor groups and individuals.[380] This may be somewhat remedied by adoption of a matching formula which is flexible enough to allow intervenors to include, as part of their local share, "in-kind" contributions, as well as cash donations. Quite a

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379 Accord, Consumers Power Co. (Midland), RAI-74-7-1, 2.

380 Although, arguably, matching leaves intervenors in the same relative position as they occupied before any assistance.

few federal agencies allow the local share of their matching grants to be composed of the market worth of donated space and equipment, the reasonable value of time contributed by volunteers and professionals, as well as other types of in-kind contributions.[381] This would enable underfinanced local groups and dedicated individuals to make up in "sweat-equity" that which they lacked in monetary resources.

Another variable factor which could be incorporated into a matching concept is the possibility of raising and lowering the percentage of NRC assistance, depending on the degree of financial need of the intervenor. For example, while most CSA grants are made on an 80% federal - 20% local matching basis, the agency does make 100% grants to the Nation's poorest counties.[382] A variable percentage matching formula may, in turn, require articulated standards for its application. However, as in the case of measuring experts' and attorneys' fees, general criteria such as those embracing intervenor relative need, available resources, and fund raising efforts, should

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381 HEW and CSA, for example, have set forth schedules for valuing "in-kind" contributions. E.g, 45 C.F.R. § 74.53 (1975); OEO Instruction 6802-1a (Mar. 17, 1974).

382 See proposed 45 C.F.R. § 1068.20-4, -5, 40 Fed. Reg. 27667-68 (July 1, 1975), which would supersede OEO Instruction 6802-06, Part B (Mar. 23, 1967).

not be overly difficult to delineate to the satisfaction of reviewing appellate courts.[383]

F. Expenditure Oversight

The Commission would have responsibility to ensure that its awards of public funds were spent for the intended purposes.[384] As many court decisions note, time of attorneys and experts should be detailed as to the nature of the work done, hours expended, and expenses incurred.[385] The Commission

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383 Appellate courts are loathe to upset lower court decisions as to reasonableness of attorney compensation. See, e.g., Perkins v. Standard Oil Co., 399 U.S. 222 (1970); Pete v. United Mine Workers Welfare and Retirement Fund, Civil No. 73-1270 (D.C. Cir. Feb. 12, 1975); Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974); Wilderness Society v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974), rev'd on other grounds sub nom, Alyeska Pipeline Service Co. v. Wilderness Society, 95 S. Ct. 1612 (May 12, 1975); Weeks v. Southern Bell Tel. & Tel. Co., 467 F.2d 95, 97 (5th Cir. 1972); United Pacific Ins. Co. v. Idaho First Nat'l Bank, 378 F.2d 62 (9th Cir. 1967). The same considerations should apply to agency determinations of intervenor relative financial need.

384 The proposed FTC rules are silent on this question. See Appendix D infra.

385 E.g., Pyramid Lake Tribe of Pauite Indians v. Morton, 360 F. Supp. 669, 671 (D.D.C. 1973), rev'd on other grounds, 499 F.2d 1095 (D.C. Cir. 1974); Wyatt v. Stickney, 344 F. Supp. 387, 410 (M.D. Ala. 1972), decision reserved sub nom, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Highway Truck Drivers & Helpers Local 107 v. Cohen, 220 F. Supp. 735 (E.D. Pa. 1963); Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974).

should be able to rely on the affidavits of counsel, together with supporting documentation, for this purpose.[386]

The NRC already exercises an oversight responsibility with regard to its contractors and consultants. Presumably, an intervenor receiving assistance would be subject to similar general federal accounting and auditing procedures and would have to observe whatever conditions were attached to the award. It could not use the funds for other than the purposes noted in its award or request for assistance and ought to maintain reasonable records and accounts. Funding might possibly be terminated for breach of award conditions or, perhaps, for the convenience of the government.[387]

G. Impact of Assistance on Issue Consolidation

If financing is generally provided for intervenors, many believe this will mean a necessary proliferation of intervenors

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386 Failure to keep adequate records may be a factor limiting fees. Blank v. Talley Industries, Inc., 390 F. Supp. 1 (S.D. N.Y. 1975).

387 See generally 40 Fed. Reg. 6304-12 (Feb. 10, 1975), GSA's proposed Uniform Administrative Standards for Agreements with Public and Private Institutions of Higher Education, Public and Private Hospitals, and Other Public and Private Non-profit Organizations. These rules are scheduled for publication by the end of this year. Conversation with Palmer Marcantonio, GSA Office of Financial Management in Washington, D. C., July 8, 1975.

and intervenor interests. [388] Others maintain, however, that intervenors would be eager to consolidate their cases and use whatever funds were available to maximize their presentations.[389] For example, intervenors might be told

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388 Currently, all operating license hearings are being contested and only 12% of construction permits are uncontested. Letter from Nathaniel H. Goodrich, Chairman, ASLB Panel to Tersh Boasberg, June 3, 1975 [hereinafter cited as Goodrich letter].

But note (then) Judge Burger's oft-quoted statement, made in regard to expanding standing criteria in FCC proceedings:

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

Church of Christ I, 359 F.2d 994, 1006. Accord, Remarks of Harold L. Russell, Panel II, supra note 60, at 450.

389 For example, the five intervenors who were interviewed in the Seabrook proceeding, AEC Docket No. 50-443, -44, believed that the availability of NRC financial assistance would serve to consolidate rather than expand their presentations. ASLBs now have the power to consolidate issues and summarily dispose of certain questions. 10 C.F.R. §§ 2.749, 2.752 (1975). See also Schneider Memorandum, supra note 123, at S 18725.

that only "x" amount was available for any given proceeding, and that they could apportion it themselves or, failing their agreement, the ASLB would do so for them.[390] However, if the primary purpose of financing intervenors is to assist the Commission reach a balanced judgment then, regardless of how many intervenors chose to enter a proceeding, the NRC still could decide to fund only those who are able to make (or have made) a significant contribution.[391] Since these determinations raise the difficult questions associated with allocation of limited funds, they are best considered in detail in the next section.

H. Allocation of Limited Funds

In the view of many, how best to allocate limited funds was probably the single most difficult administrative issue encountered in our study. The obvious solution - to appropriate or allocate enough money - is simple enough. Yet, like death and taxation, limited funds are a reality with which every agency must contend. However, we should emphasize that numerous persons interviewed believed that "severely" limited

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390 See discussion Ch. VII, H infra.

391 Under the functional approach to intervention (Ch. IV B 3 supra) and a discretionary financing allocation formula (Ch. VII,H infra), proliferation of intervenors would not occur since funding would not be available for all. To the extent money was made available on a non-discretionary, per-proceeding basis (Ch. VII,H 1 a infra), proliferation would be more of a problem. But see note 279 supra.

funding might be worse than no funds at all because of exacerbated intervenor perceptions, and all the bundle of problems associated with tokenism.[392]

Any discussion of allocation and award of limited funds simultaneously involves these complex determinations: first, should the Commission allocate funds equally or by discretion among all proceedings, or only by individual proceeding (Ch. VII, H infra); second, which NRC proceedings are to be included, i.e. rulemakings, licensing (Ch. IV, A supra); third, should awards be made partially or totally, on a per-proceeding basis or upon periodic review of intervenor contributions in all proceedings (Ch. VII, H infra); fourth, should interim assistance

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392 Our contract did not ask us to look into an appropriate total intervenor funding pool. The FTC, for example, has set aside $1 million for financing intervenors in its rulemaking proceedings; but neither FTC personnel nor Senate Commerce Committee staffers could point to any particular reason for choosing this figure. Authorization projections for the Kennedy Amendment were between $3-4 million, total, for a three-year period. Schneider Memorandum, supra note 123, at S 18725. In arriving at this amount, in his briefing memorandum for ERA Congressional conferees, Mr. Schneider used the estimate of $50-75,000 for intervenor reimbursements in individual facility adjudications. Id. See also note 122 supra and accompanying text. He also mentioned that applicants budget between $1/2-1 million to present their own licensing cases; and that facilities were costing from $500 million to $1 billion each.

Mr. Goodrich noted that in the 14-month period Jan. 1, 1974 to Feb. 28, 1975, there were a total of about 60 NRC proceedings. Some of these proceedings, however, were only two or three day ALAB remands, or pre-hearing conferences. Mr. Goodrich indicated that an uncontested hearing normally ran 2 to 4 days, while contested proceedings lasted 15 to 70 days. Goodrich letter, supra note 388.

be allowed in all, some,or no proceedings (Ch. VII, B supra); fifth, what role should intervenors play in apportioning available funds themselves, in any given proceeding, especially interim awards (Chs. VII, H infra and VII, B supra); and sixth, what discretion should the Commission retain, within an individual proceeding, as to which intervenors to fund (Ch. IV, B 3 supra), which contentions of a particular intervenor to assist (Ch. IV, B 3 supra), and how to calculate the amount of awards (Ch. VII, C 2, 3 & D supra).

1. The Alternatives

The two polar alternatives in allocating limited funds are: (a) to simply divide the total available money equally by the number of proceedings,[393] and let the intervenors haggle over who gets what; and (b) to retain complete NRC discretion to fund which proceedings, which intervenors, which issues, when, and for how much. There are also any number of hybrid positions in between.[394]

a. Allocation By Proceeding

The advantages to this approach are: first, it takes the Commission off the political hook of deciding which intervenors and which contentions of intervenors to fund; second,

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393 This is the general approach taken by the Kennedy Amendment, § 501(b), and S.1665, § 193(b), Appendix C infra.

394 As noted above, this discussion is complicated by the question of interim financing (Ch. VII, B supra). However, one may allocate "by proceeding" or "by discretion" on either an interim basis or at the conclusion of the proceedings, or at both times. Again, hybrid positions also can be adopted for either interim or end financing, or both.

it tends to avoid the exasperating problems associated with determining such issues as relative intervenor financial need, appropriate compensation for counsel and experts, and significance of intervenor contributions; third, it places the burden of dividing the available money on the intervenors' backs; and fourth, it alleviates certain budgetary headaches as to how to allocate funds over a given time period.

The arguments against this approach are also compelling. Equal allocation by proceeding tends to give everyone a little something - but probably not enough to make a significant difference in the quality of intervenor presentations. It also does not allow the Commission to treat proceedings on a differential basis, say, by holding back larger amounts for particularly important or novel hearings like ECCS or the Atlantic Generating Station. Moreover, it means that funds will be apportioned without regard to claim of merit, importance of the issues contested, or demonstrable value of the intervenor's contribution to the hearing process. It thus negates the very reasons why intervenor financing was thought desirable in the first place.

b. Allocation By Discretion

The arguments for and against this approach are the obverse of those noted immediately above. It entails the disagreeable risk of offending practically everyone and completely satisfying no one. It also creates administrative budgeting

problems. Yet, if the Commission is to adopt a functional approach to intervention, it is admittedly difficult to avoid exercising some discretion.[395]

2. A Two-Tiered Approach

Any compromise on the alternatives raised by either of the above polar positions, like the issue of matching, raises almost as many questions as it answers. Those who tend to regard the objectivity of the Commission with suspicion may lean toward limiting its discretion the most. On the other hand, those intervenors who feel they can mount the best presentations favor greater Commission discretion, hoping to benefit the most from available funds.

One suggestion might be to construct a two-tiered administrative procedure. Under the first tier, perhaps half the total available funds would be allocated on a per-proceeding basis, with the hearing boards leaning toward allowing the intervenors to divide the funds, especially in interim financing situations. This would serve to ensure that all intervenors at

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395 It is also possible that financing decisions will be appealed - either those involving interim assistance or final awards. On appealability of interim financing decisions, see Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972); but see Citizens for a Safe Environment v. AEC, 489 F.2d 1018 (3d Cir. 1974). See, in addition, Kennedy Amendment, § 501(b)(1), and S.1665, § 193(b)(1), Appendix C infra, on their treatment of appeals from interim awards; and cases cited note 383 supra on the broad discretion of trial judges in analogous situations.

least had a chance to be heard; that everyone got a little something; that generic questions were not favored over more site-related issues; and that some funds were available to assist intervenors into the hearing stage.[396]

Under the second tier, the remaining funds would be awarded on something like a competitive basis, in NRC discretion, after the completion of the proceedings. Then could be determined with greater precision, the value of an intervenor's contribution, the skill and diligence of counsel, the novelty and importance of the issues raised, and the total cost of the intervention.[397]

The advantages of a two-tiered approach are not without their offsetting complications. Some may feel that it incorporates the worst features of both the equal allocation and the purely discretionary systems. It further reduces the total amount of allocated funds available for each proceeding, thus limiting interim financing; while at the same time, it holds intervenors hostage to the discretion of a callous Commission.

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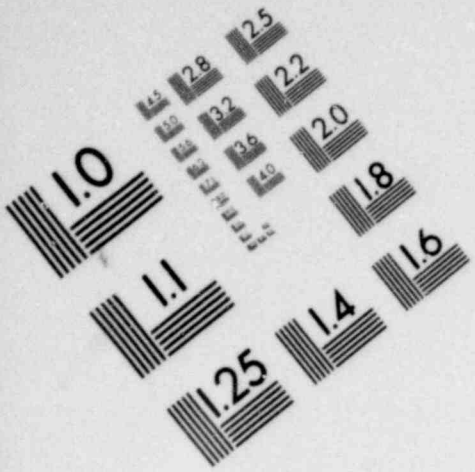
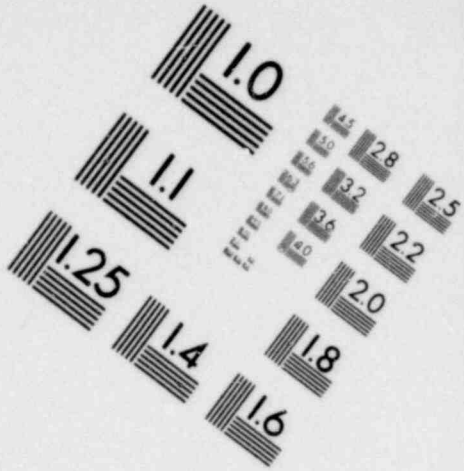
396 The first tier may operate either with or without interim financing. The general idea of the first tier is to spread the money around.

397 The second tier could be competitive within each proceeding or on a periodic overview of all proceedings.





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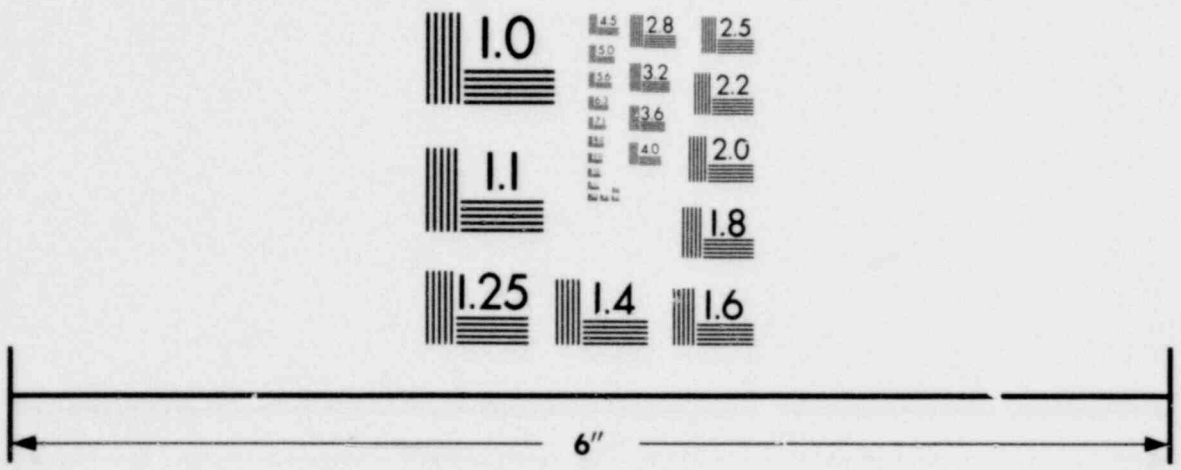

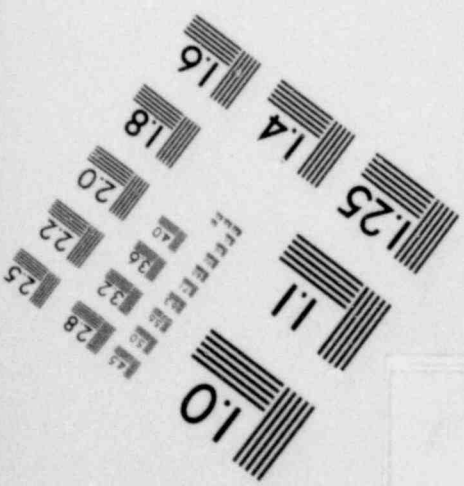

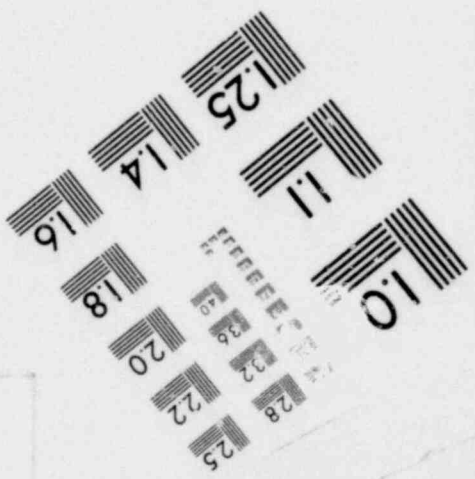

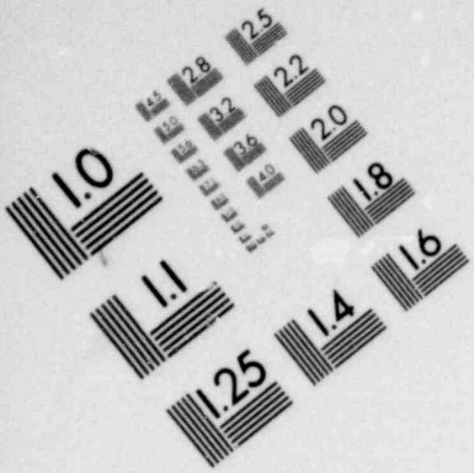

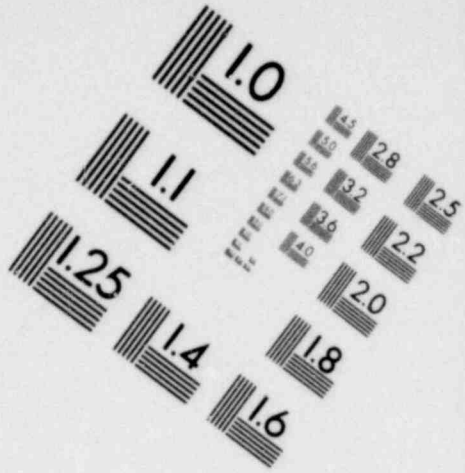

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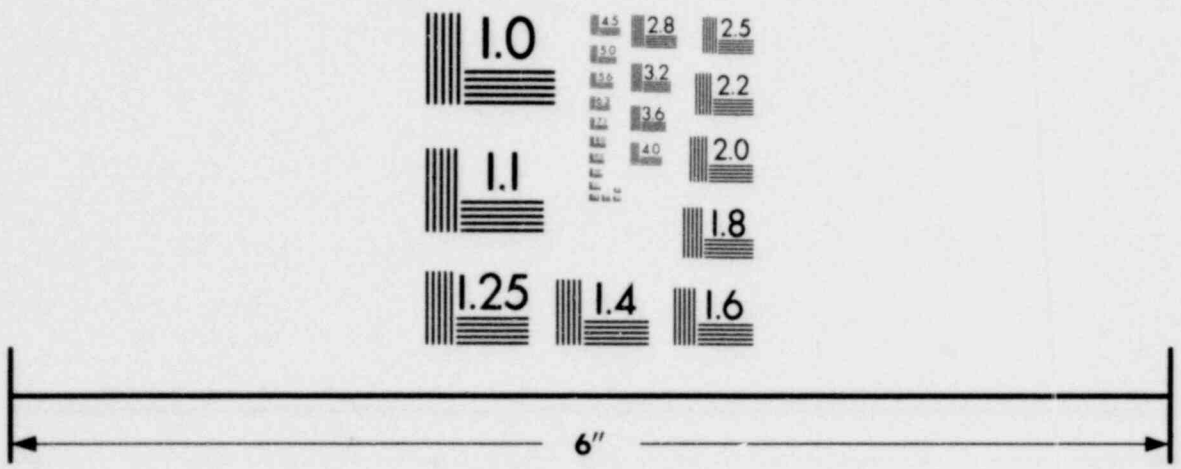

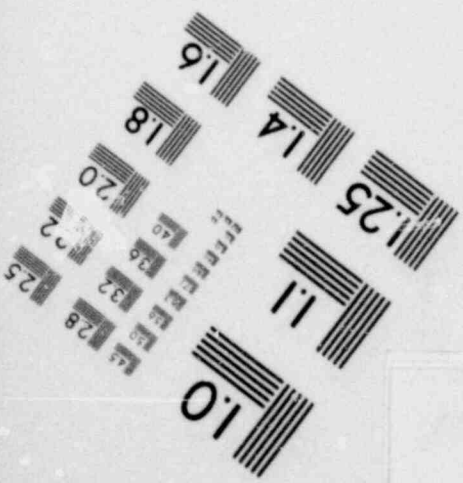

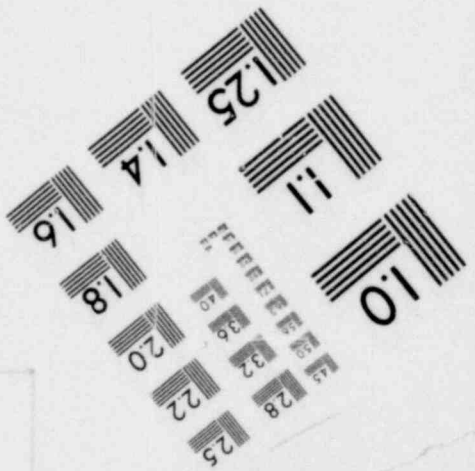

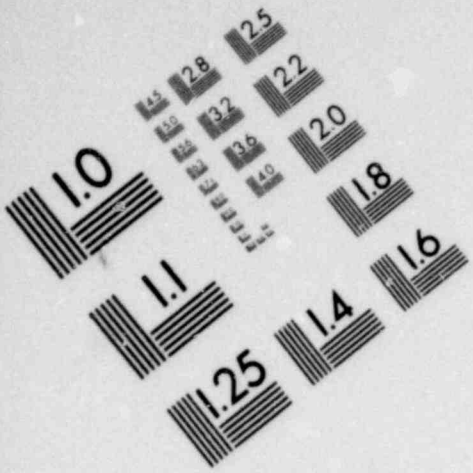

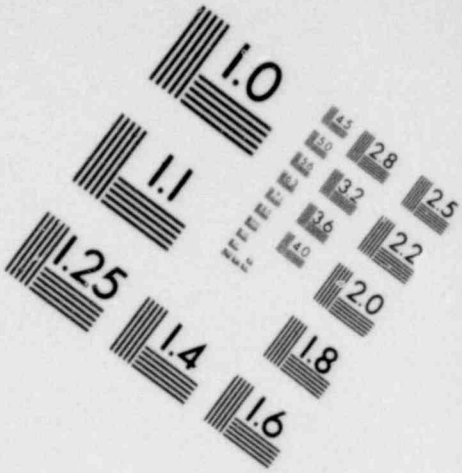

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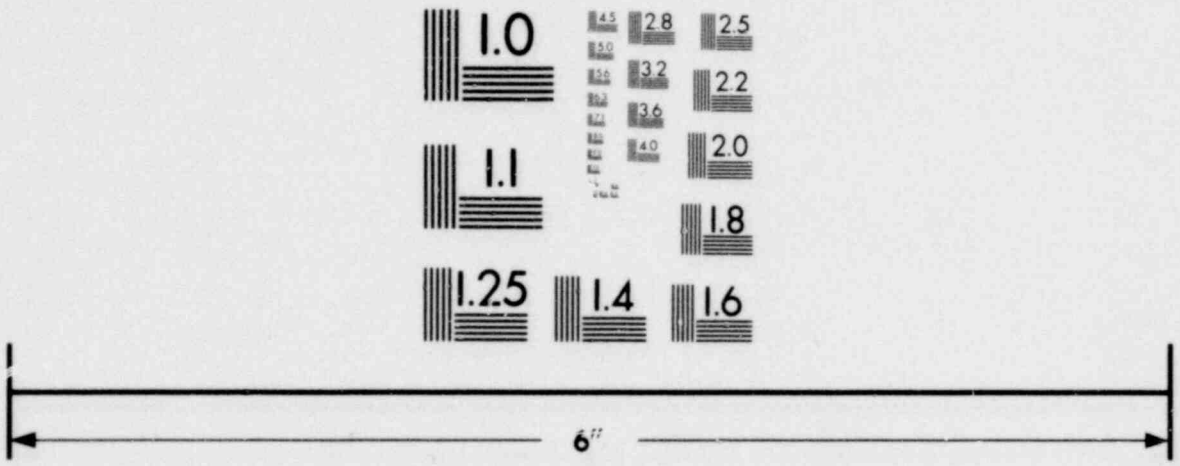
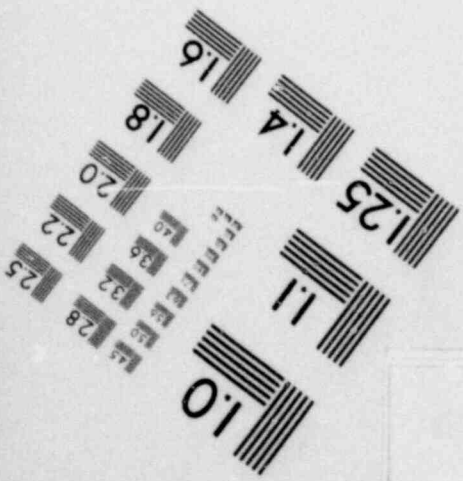
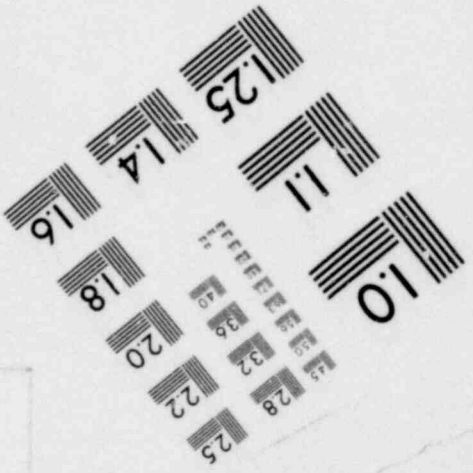
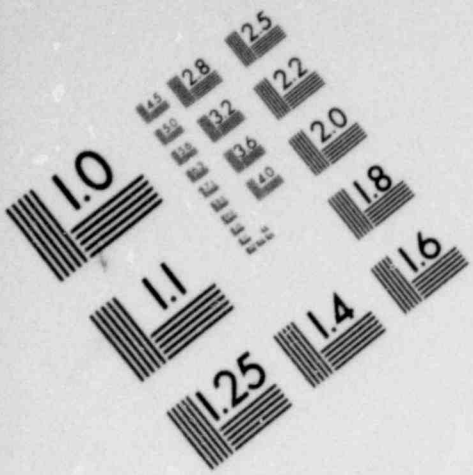








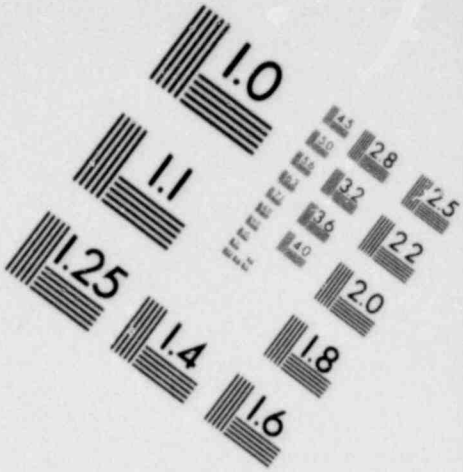
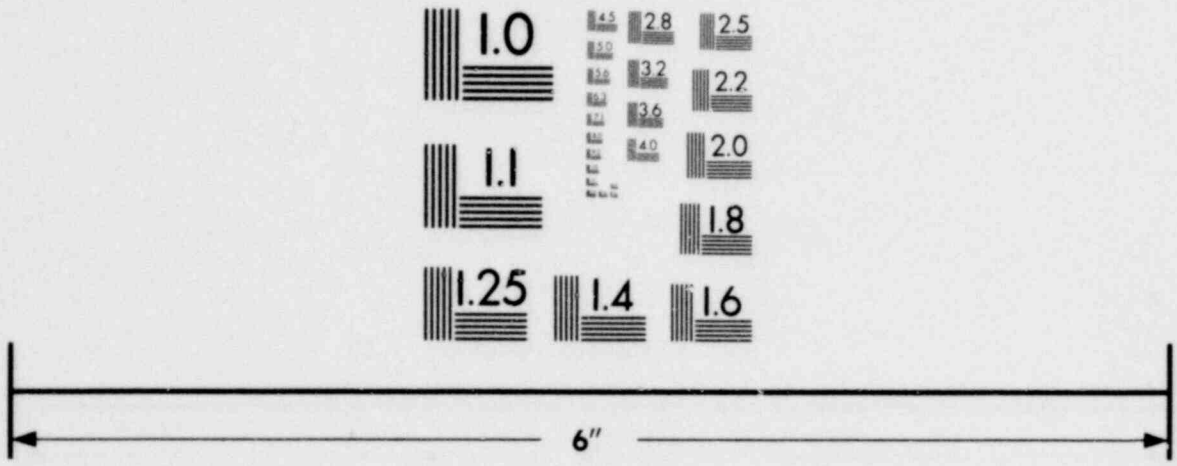
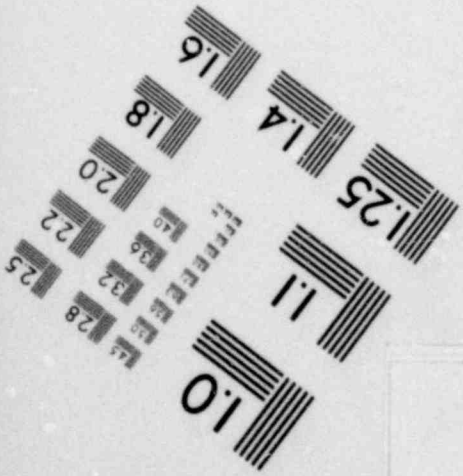
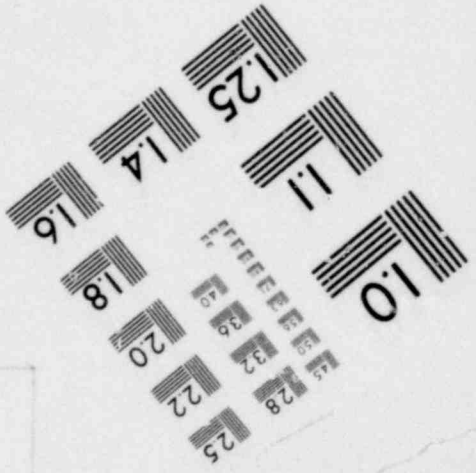


IMAGE EVALUATION TEST TARGET (MT-3)







It also may well pose additional administrative burdens if ASLBs have to consider difficult funding questions at two levels. It does, however, give the Commission a good deal of flexibility, by combining broad discretion with some fixed per-proceeding apportionment.

I. Who Decides

Who should decide the intervenor financing questions of to whom, when and how much? Many of those interviewed thought that the ASLB should make these determinations.[398] They reasoned that only the Board was in a position to fully observe the conduct of intervenors and understand the dimensions and importance of the issues raised in each proceeding.[399] Furthermore, some suggested that if the ASLBs had discretion over financial assistance awards, it might well enhance their ability to discourage dysfunctional conduct.[400]

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398 It should be remembered that like the ALAB Panel, the ASLB Panel contains both permanent members and non-permanent consultants. Accordingly, any single ASLB can be made up of both permanent and consultant panel members.

399 This follows normal court practices, where trial judges have broad discretion to set allowable fees. See note 383 supra.

400 It is true that ASLBs lack the contempt power of judges and, perhaps, the robes of judicial prestige. Nevertheless, ASLBs do have strong authority to keep a hearing under firm control. 10 C.F.R. §§ 2.718, 2.721 (1975). See text Ch. V, B 4 supra.

Others, however, felt the ASLB was not the best entity to make these decisions.[401] They assert that such determinations could entangle the Board in impossible line-drawing and unnecessarily alienate the parties before it. These observers also noted that individual Boards would not be able to make overall funding decisions if the Commission determined to provide awards on a basis other than a per-proceeding formula.

However, possible alternatives to ASLB financing apportionments raise problems of their own. A separate screening panel consisting of ASLB permanent or consultant members might be convened to consider only questions of intervenor financing.[402] Yet, such a screening panel would not have day-to-day contact with the proceedings; would constitute an additional administrative layer; and, unless it sat on all cases, also would lack an overall view.

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401 Under the proposed FTC rules, the hearing officer makes the initial findings on intervenor financing determinations, but the final decision is made by the Director of the Bureau of Consumer Protection. See § 1.17(d)(1)(2), Appendix D infra. Jacks, supra note 6, at 522-23 n. 189, suggests that the ASLB should make the initial decision, subject to de novo (new) ALAB review.

402 The NRC has made some use of "Petition Boards," i.e. ASLBs which can consider limited aspects of a proceeding. See, with respect to intervention, 10 C.F R. §§ 2.105(e), 2.714 (1975); see generally 42 U.S.C. § 2239(a) (1970); 10 C.F.R. § 2.721(a)(1975). In the event the Commission decides to use such "Petition Boards" to determine intervenor financing questions, it may wish to tighten its regulations in this regard. But see text Ch. I, C supra, noting that suggested procedural changes are beyond the scope of our study.

The ALAB is another possibility, since it reviews all construction permit hearings, regardless of whether an appeal is taken. The ALAB could receive written testimony from the ASLB involved and from intervenor and applicant counsel. If necessary, it could hold a separate hearing just on financing and take oral evidence as well.[403] In addition, the ALAB would have a more global view and, perhaps, a more detached perspective than the ASLB. The difficulty is that it lacks day-to-day contact with the pre-appellate process, and often a written record will not disclose the real merits of intervenor participation. In addition, the ALAB would not automatically review all non-permit matters. Further, determining financial assistance awards in numerous proceedings would greatly increase its workload.

To the extent NRC limited funds are equally allocated by proceeding and that interim financing is permitted, ASLBs seem to be the most logical choice. Where the Commission uses its discretion to pick and choose among proceedings, to

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403 Courts often hold separate evidentiary hearings on attorney's fees. E.g., Lindy Bros. Builders, Inc. v. American Radiator & Std. San.Corp., 487 F.2d 161, 169-70 (3d Cir. 1973); see Comment, Attorney's Fees, supra note 50, at 707. In England, where the losing party must pay attorneys' fees and costs (unlike the "American Rule") a special "taxing master" makes the determinations, when the parties disagree among themselves on the proper amount of such expenses. Id. at 638 n. 7.

provide assistance only at the conclusion of the hearing or appellate process, or where it awards a portion of its assistance on a competitive basis among proceedings, then an individual ASLB will be less appropriate. In the latter instances selected members of the ASLB Panel might be the more appropriate decision maker, or a special group composed of permanent ASLB and ALAB panel members and, perhaps, outside expert and attorney consultants.

J. Summary

This chapter has considered some of the administrative, budgetary and procedural issues involved in implementation of any plan for provision of direct financial assistance to intervenors. Once again, neither this chapter nor this Report assumes that a decision has been made to finance interventions. Indeed, as we have pointed out above, the problems associated with implementation may be a prohibitive reason against making such a determination. Nevertheless, our contract called for an examination of these administrative issues.

This is not to imply that these issues are more inextricable than those raised in the preceding chapters dealing with intervenor eligibility (Ch. IV), the arguments for and against financing intervenors (Ch. V), and the possible alternatives to direct financing, such as public counsel offices (Ch. VI). The delineation of the issues raised in this Chapter VII, like the

analysis of those issues in the chapters noted above, all are part of the study's basic task: to focus and develop the major questions of intervenor financing for the Commission's proposed rulemaking.

VIII. CONCLUSION

The questions raised by this study are complex. Yet they probably are not as difficult nor as significant as the decisions made every day by the ASLBs, the ALAB and the Commission on public health and safety, national security and environmental concerns. This is not to diminish the importance of the proposed rulemaking on intervenor financing, but rather to place it in a context of solvability.

Emotions run high on the wisdom of facilitating broader public participation in agency proceedings, and, particularly, of subsidizing private intervenors at the taxpayers' expense. The heated issues clustered around the nuclear power debate often are injected into questions of intervenor financing. Battle lines are drawn and sides tend to be polarized.

On the other hand, most of those interviewed believed these issues could and should be promptly determined. A decision one way or the other would neither bring the nuclear industry to its knees, nor wipe out intervenors. After all, what is under discussion is a concordant procedure for dispute resolution - not a clandestine plan for revolution.

Our own firm has been engrossed in the instant study. But we are reminded of the story told about an Arkansas Supreme Court judge, who, exhilarated by a particularly abstruse aspect of the Rule in Shelley's Case then under contention, turned to one of the lawyers arguing the appeal, and asked if he, too,

was not overwhelmed by the majesty of the Rule's intricacies. Counsel quickly replied: "Your Honor, in Booneville, we talk of little else!"[404]

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404 Indebtedness acknowledged to Dean Roger Cramton, Panel I supra note 104, at 385.

APPENDIX A

Brief Biographical Sketches of Study Team Members

Tersh Boasberg graduated from Yale College, magna cum laude, in 1956 and from Harvard Law School in 1959. Since then he has spent five years in private law practice in San Francisco and four years at the Office of Economic Opportunity in Washington, occupying positions of Director of Field Operations for the Community Action Program and Director of Special Projects. Since 1968, Mr. Boasberg has been a senior partner of the law firm of Boasberg, Hewes, Klores and Kass. He has participated in the firm's studies for the EPA, the National Endowment for the Arts, and OEO. His publications include, "The Private Practice of Urban Law", 20 Case Western Reserve Law Review 323 (1969), and numerous articles on federal grants and administration in "The Washington Beat", a regular feature of The Urban Lawyer, a quarterly publication of the ABA's section on Local Government Law. He lectured at Yale University in 1971-72.

Laurence I. Hewes III received his B.A. from Yale College in 1956 and his LL.B from Yale Law School in 1959. He worked as Associate Counsel of the Senate Subcommittee on Migrant Labor of the Committee on Labor and Public Welfare. From 1961-62 he served as Assistant to the Chief Counsel of the Area Redevelopment Administration (now the Economic Development Administration) of the Department of Commerce. He was also Counsel and Staff Director of President Kennedy's Committee on Equal Opportunity

in the Armed Forces. Before joining his present firm, Mr. Hewes was a partner in the Washington firm of Hydeman and Mason. He is the author of numerous articles on taxation, medical finance, migratory farm labor, and federal grants and contracts.

Noel Klores received his A.B. in economics and political science from New York University in 1954 and his J.D. from Harvard Law School in 1957. From 1958 to 1963 he worked with the Atomic Energy Commission as Director of Administration for the Commission's Health and Safety Laboratories in New York. He also spent a year in Washington at NASA as a program management specialist and six years at OEO headquarters, as Director of Special Programs. From 1970 to 1972 he served as a member of the Cabinet of the Mayor of New York City and as Director of the City's Washington office. Mr. Klores is the recipient of the William A. Jump Memorial Foundation Meritorious Award for Exemplary Achievement in Public Administration and OEO's Meritorious Service Award. He has beer in private law practice since 1972.

James Feldsman, a partner with the firm since 1970, received his B.S. in economics from the Wharton School of the University of Pennsylvania in 1961 and his J.D. from the Georgetown University Law Center in 1965. He was General Counsel of the President's Council on Youth Opportunity and Director of its Division of Federal Programs. His experience with the federal government includes five years at the Department of

Labor as Special Assistant to the Administrator of the Bureau of Work-Training Programs and as an attorney in the Solicitor's Office. Among his publications are articles on the energy crisis, medical malpractice, and manpower. He is currently completing, as principal author, the firm's Federal Grant Law and Administration Reporter.

Marna S. Tucker received her B.S. from the University of Texas in 1962 and an LL.B from the Georgetown University Law Center in 1965. Before becoming a partner of the firm in 1973, she worked as the Deputy Director of the Western Region of OEO's Neighborhood Legal Services Project and as the Director of the ABA's Project to Assist Interested Law Firms in Pro Bono Publico Programs. She served as Vice-president of the National Legal Aid and Defender Association (1972-73), and has taught as an Adjunct Professor of Law at the Georgetown Law Center (1972) and as a Lecturer at Catholic University's Columbus School of Law (1972-73). Ms. Tucker is the author of The Private Law Firm and Pro Bono Publico Programs: A Responsive Merger, American Bar Association, 1971 and "Justice in Sneakers, A Neighborhood Law Office in Operation", Office of Economic Opportunity, 1966.

Law Research Assistants

Joan K. Lawrence, B.S. Florida State University, 1967, M.S.T. University of Florida, 1969, Columbus School of Law of Catholic University, Class of 1976.

Vaughan Finn, B.A. Radcliffe College, 1973, Dip. Crim. University of Cambridge, 1974, Harvard Law School, Class of 1977.

Technical Consultants

Dr. Frank von Hippel is a Research Scientist at the Center for Environmental Studies of Princeton University. He received a B.S. from MIT in 1959 and a Ph.D in physics from Oxford University, where he was a Rhodes Scholar, in 1962. He has worked as a Research Associate at the Fermi Institute of the University of Chicago and at the Physics Department of Cornell University. From 1966 to 1969 he was an Assistant Professor of Physics at Stanford University. Among his other activities, Dr. von Hippel has been a consultant to the G.A.O., Office of Technology Assessment, and the House of Representatives' Interior Committee, on nuclear policy issues. Among Dr. von Hippel's numerous publications, are the Report to the American Physical Society of the Study Group on Light Water Reactor Safety, 47 Review of Modern Physics, Summer Supp. 1(1975) and Nuclear Reactor Safety, Bulletin of the Atomic Scientists, Oct. 1974 (with J. Primack). He was awarded the A.P. Sloan Foundation Fellowship (1969-70) and a N.A.S. Resident Fellowship (1973-74).

Dr. William D. Hinkle is the Director of Nuclear Environmental and Electric Power Technology Programs for the MIT Energy Laboratory. He received his B.S. in Mechanical Engineering from Ohio University in 1958, his M.S. from MIT in 1960, and his Sc.D. in nuclear engineering from MIT in 1967. His work includes three years as Shift Supervisor of the MIT Research Reactor and eight

years at the Yankee Atomic Electric Co., where he was also Manager of Research and Engineering Development from 1972-74. As Section Head of the Nuclear Engineering section of Yankee Electric, he supervised work in the areas of core design, accident analysis, licensing, and analysis of plant data. He presented testimony on behalf of the Consolidated Utilities [illegible]p at the ECCS Rulemaking Hearing in Washington, D.C. and has assisted on various committees, including the ERC Task Force on Nuclear Safety Research, the EEI Reactor Assessment Panel and the EPRI Research Priorities Committee. He has published a number of articles on the nuclear reactor system, including "Review of the Design of the Yankee Safety Injection System," YAEC-1025R, February, 196[illegible].

APPENDIX B

Persons Interviewed During The Study

1. Nuclear Regulatory Commission

   A. Technical Staff

   Edson G. Case - Dpty. Dir. Off. Nuclear Reactor Regulation
   Victor Stello, Jr. - Asst. Dir. Reactor Safety, Div. of Rev.
   Daniel R. Muller - Asst. Dir. Environmental Projects
   Ralph A. Birkel - Sen. Proj. Mgr., Directorate of Licensing
   Lester S. Rubenstein - Leader, Reactor Fuel Section, Div. Tech. Rev.
   Jan A. Norris - Environ. Proj. Mgr., Environ. Proj. Branch No. 4.

   B. Office of General Counsel

   Peter L. Strauss - Gen. Couns.
   Guy Cunningham - Asst. Gen. Couns.
   James L. Kelley - Asst. Gen. Couns.

   C. Office of Executive Legal Director

   Howard K. Shapar - Ex. Leg. Dir.
   James Murray - Chief, Rulemaking & Enforcement Couns.
   Joseph Rutberg - Chief, Antitrust Couns.
   Joseph Gallo - Chief, Hearing Couns.
   Joseph Scinto - Sp. Asst. Chief Hear. Couns.
   William Massar - Asst. Chief Hear. Couns.
   David Kartalia - Asst. Chief Hear. Couns.
   Frederick Gray - Act. Asst. Chief Hear. Couns.
   Jeffrey Gitner - Attorney

   D. ASLB Panel

   Nathaniel Goodrich - Chairman
   Dr. Marvin Mann - Vice Chairman
   Dr. R. F. Cole
   Daniel Head
   Samuel Jensch
   Max Paglin
   Dr. Frederick Sohn

   E. ALAB Panel

   Alan Rosenthal - Chairman

Dr. John H. Buck - Vice Chairman
Dr. Lawrence Quarles
Michael Farrar

2. Vendor and Utilities

* C. Eicheldinger - Mgr. Nuclear Safety, Westinghouse Nuclear Corp.
Shubert Nexon - Sr. V.P. Commonwealth Edison
* Tracy Danese - V.P. Publ. Aff. Fla. Power & Light
Gene A. Blanc - Asst. to Pres. Pac. Gas & Electric Co.
Philip Crane - Pac. Gas & Electric Co.
Jerry Scovil - Mgr. Nuclear Safety & Environ. Affairs, PEPCO
* David Barry - Sr. Coun. So. Cal. Edison
* Charles Kocher - Asst. Coun. So. Cal. Edison
* Ashby Baum - Mgr. Lic. & Quality Ass. VEPCO

3. Nuclear Bar

Gerald Charnoff - Shaw, Pittman, Potts & Trowbridge
Troy Conner - Conner, Hadlock & Knotts
William O. Doub - LeBoeuf, Lamb, Leiby & MacRae
Thomas Dignan - Ropes & Gray
George Freeman - Hunton, Williams, Gay & Gibson
Michael Miller - Isham, Lincoln & Beale
Harold Reis - Lowenstein, Newman, Reis & Axelrad
William Ross - Wald, Harkrader & Ross
Harry Voight - LeBoeuf, Lamb, Leiby & MacRae

4. Atomic Industrial Forum

Harry S. Price - Staff Counsel
Robert A. Szalay - Lic. & Safety Project Mgr.

5. Intervenors

June Allen) No. Anna Environmental
Margaret Dietrich) Coalition

Richard Ayres) NRDC
Angus Macbeth)

David Comey) Bus. & Prof. in Pub. Int.
Robert J. Vollen)

Daniel Ford - Un. Concerned Scientists
James Harding - Friends of the Earth
John Hoffman - Sierra Club

Diana P. Sidebotham) New Eng. Coalition on
and friends) Nuclear Pollution

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* Telephone Interview

Elizabeth Weinhold - Housewife

6. Intervenor Bar

Albert Butzel - Berle, Butzel & Kass
Myron Cherry - Atty.
Harold Green - Fried, Frank, Harris, Shriver & Kampelman
Edward Osann - Wolfe, Hubbard, Leydig, Voit & Osann
Anthony Roisman - Roisman, Kessler & Cashdan

7. Congressional

Senator John V. Tunney (D-Cal.)
Mark Schneider - Sen. Kennedy's Staff
Lynn Sutcliff - Sen. Commerce Comm.
Richard Wegland) Sen. Govt. Opr. Comm.
Matt Schneider)

8. Federal Agencies

Alfred Corbett - Chief CSA (OEO) Leg. Services
James DeLong - Asst. Spec. Proj. Bureau of Consumer Protection, FTC
Norman Schwartz - Asst. Gen. Couns. Postal Rate Comm.
Alan Shakin - Genl. Couns. Off. Cons. Prod. Saf. Comm.
* Eugene P. Stakem - Chief Off. Dom. Comm. FMC
* Gene Van Arsdale - Atty., SBA Off. Sm. Bus. Advoc.
Jack Yohe - Dir. OCA, CAB

9. State Agencies

Paul Shemin - Atty. N.Y. Atty. Gen. Off.
Don Stever - Atty. N.H. Atty. Gen. Off.
Ellyn Weiss - Atty. Mass. Atty. Gen. Off.
Thomas Basil - Chief Coun. Intervenor Pgm., N.Y.
William M. Barvick - Public Coun. Dept. Cons. Aff., Mo.
Antonio Rossman - Advisor, Calif. Energy, Cons. & Dev. Comm.
David Silverstone - Cons. Coun., P.U.C., Conn.

10. Others

Lee Botts - Lake Michigan Federation
Tom Ferriter - Reporter, N.H. State News Service
Paul Gewirtz - Cen. for Law & Social Policy
Charles Halpern - Council for Public Interest Law
Sumner Katz - Atty., NARUC

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* Telephone Interview

David Lilienthal - Past Chm. AEC
Frank Lloyd - Ex. Dir. Citizens Comm. Center
Prof. Arthur Murphy - Colum. Law Sch.
Richard O'Hagen - Min. Couns. Canadian Embassy
Bruce Terris - Atty.

APPENDIX C

Kennedy Amendment (Title V) to the Energy Reorganization Act of 1974*

TITLE V—COSTS AND FEES

SEC. 501. (a) With respect to any hearing held pursuant to section 189(a) of the Atomic Energy Act of 1954 or any other agency proceeding for the granting, suspending, revoking, or amending of any license or construction permit or application to transfer control, or any agency proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, the Nuclear Safety and Licensing Commission shall, upon request, reimburse eligible parties for the cost of participation, including reasonable attorneys' fees, of any party in any related hearing or agency proceeding. The amount paid, if any, shall

* Passed by the Senate, Aug. 15, 1974; deleted by the Senate - House Conferees, S. Rep. No. 93-1252, 93d Cong., 2d Sess. (1974).

SENATE PASSED LANGUAGE

be determined after due consideration of the following eligibility:

(1) The extent to which the participation of the party contributed to the development of facts, issues, and arguments relevant to the hearing or proceeding.

(2) The ability of the party to pay its own expenses.

(b) The Commission shall establish a maximum amount to be allocated to each hearing or agency proceeding and shall apportion that amount among the parties seeking reimbursement of costs based upon the factors enumerated in subsection (a). The maximum amount established pursuant to this subsection shall be established and adjusted from time to time by the Commission with due regard to the following factors:

(1) The actual costs of public participation in the hearing or proceeding based upon a nonduplicative presentation of opposing viewpoints on all relevant issues.

(2) The cost of participation in the hearing or proceeding of the Commission's staff and applicants to the Commission.

(c) Payment of costs under this section shall be made within three months of the date on which a final decision or order disposing of essentially all of the matters involved in

SENATE PASSED LANGUAGE

the hearing or proceeding is issued by the Commission, except that if a party establishes that—

(1) its ability to participate in the hearing or proceeding will be severely impaired by the failure to receive funds prior to conclusion of the hearing or proceeding; and

(2) there is reasonable likelihood that its participation will help develop facts, issues, and arguments relevant to the hearing or proceeding,

then the Commission shall make from time to time (but at least quarterly) advance payments to permit the party to participate or to continue to participate meaningfully in the hearing or proceeding with due regard to the maximum amount payable for costs of this hearing or proceeding and the possible requests for reimbursement of costs of other parties.

(d) In the case of any judicial review arising out of an appeal of a decision reached in a hearing or agency proceeding before the Commission, the court may order the Commission to reimburse a party for all costs incurred in the course of such judicial review, including reasonable attorneys fees, if such party meets the requirements of subsection (a).

(e) The provisions of this section shall become effective upon the adoption by the Commission of regulations implementing them or upon the expiration of ninety days after

SENATE PASSED LANGUAGE

the enactment of this section, whichever first occurs. This section shall apply to all hearings, agency proceedings, and judicial proceedings in which final decisions or orders disposing of essentially all of the issues involved in the hearing or proceeding or final orders of courts have not been issued by the Commission or court prior to the date of enactment of this section and to all hearings, agency proceedings, and judicial proceedings commenced after such date of enactment. In the case of any judicial proceedings pending when this section is enacted, the reimbursement of costs provided for in this paragraph shall apply only to costs referred to in subsection (d) and not to costs of the hearing or proceeding being reviewed.

(f) Nothing in this section shall diminish any right which any party may have to collect any costs, including attorneys' fees, under any other provision of law.

(g) The authority to make payments under this section shall not apply to any hearings, agency proceedings, or judicial proceedings arising out of such hearings or proceedings, if the hearings or proceedings commence later than three years after the date of enactment of this Act.

(h)(1) Any decision made by the Commission pursuant to this section shall be reviewable to the same extent as any other Commission decision, except that no stay may be issued based upon any alleged violation of this section

SENATE PASSED LANGUAGE

and no court order determining that the provisions of this section have been violated shall, solely as a result of that determination, require a reversal of the Commission's decision with respect to any other issue.

(2) Any determination pursuant to subsection (c) of this section shall be a final and appealable order within the meaning of section 2342 of title 28, United States Code, if the Commission determines that the party, although not financially able to participate meaningfully in the hearing or proceeding, is nonetheless not entitled to the relief requested.

(i) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

94TH CONGRESS
1ST SESSION

S. 1665

IN THE SENATE OF THE UNITED STATES

MAY 6 (legislative day, APRIL 21), 1975

Mr. KENNEDY (for himself, Mr. PHILIP A. HART, and Mr. STAFFORD) introduced the following bill; which was read twice and referred to the Joint Committee on Atomic Energy

A BILL

To provide for financial assistance to public intervenors in nuclear licensing proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Intervenors Assistance Act".

SEC. 2. The Atomic Energy Act of 1954 (42 U.S.C. 2011) is amended by adding after section 192 the following new section:

"PUBLIC INTERVENORS; COSTS AND FEES

"SEC. 193. (a) With respect to any hearing held pursuant to section 189a or any other agency proceeding for the granting, suspending, revoking, or amendment of any license

or construction permit or application to transfer control, or any agency proceeding for the issuance or modification of rules and regulations dealing with the activities of licenses, the Commission shall, upon request, reimburse eligible parties for the cost of participation, including reasonable attorneys' fees, of any party in any related hearing or agency proceeding. The amount paid, if any, shall be determined after consideration of the following eligibility factors:

"(1) The extent to which the participation of the party contributed to the development of facts, issues, and arguments relevant to the hearing or proceeding.

"(2) The ability of the party to pay its own expenses.

"(b) The Commission shall establish a maximum amount to be allocated to each hearing or agency proceeding and shall apportion that amount among the parties seeking reimbursement of costs based upon the factors enumerated in subsection (a). The maximum amount established pursuant to this subsection shall be established and adjusted from time to time by the Commission with regard to the following factors:

"(1) The actual costs of public participation in the hearing or proceeding based upon a nonduplicative presentation of opposing viewpoints on all relevant issues.

"(2) The cost of participation in the hearing or proceeding of the Commission's staff and applicants of the Commission.

"(c) In order to facilitate public participation, the Commission shall, wherever possible, make a determination of a party's eligibility for reimbursement pursuant to subsection (a) (2) of this section prior to the commencement of a hearing or proceeding.

"(d) Payment of costs under this section shall be made within ninety days of the date on which a final decision or order disposing of essentially all of the matters involved in the hearing or proceeding is issued by the Commission, except that if a party establishes that—

"(1) its ability to participate in the hearing or proceeding will be severely impaired by the failure to receive funds prior to conclusion of the hearing or proceeding; and

"(2) there is reasonable likelihood that its participation will help develop facts, issues, and arguments relevant to the hearing or proceeding,

then the Commission shall make from time to time (but at least quarterly) advance payments to permit the party to participate or to continue to participate meaningfully in the hearing or proceeding with regard to the maximum amount payable for costs of the subject hearing or proceeding and

the possible request for reimbursement of costs of other parties.

"(e) In the case of any judicial review arising out of an appeal of a decision reached in a hearing or agency proceeding before the Commission, the court may order the Commission to reimburse a party for all costs incurred in the course of such judicial review, including reasonable attorney's fees, if such party meets the requirements of subsection (a).

"(f) The provisions of this section shall become effective upon the adoption by the Commission of such regulations as are deemed necessary for implementation or upon the expiration of ninety days after the date of enactment of this section, whichever first occurs. This section shall apply to all hearings, agency proceedings, and judicial proceedings in which final decisions or orders disposing of essentially all of the issues involved in the hearing or proceeding or final orders or courts have not been issued by the Commission or court prior to the date of enactment of this section and to all hearings, agency proceedings, and judicial proceedings commenced after such date of enactment. In the case of any judicial proceedings pending when this section is enacted, the reimbursement of costs provided for in this paragraph shall apply only to costs referred to in subsection (e) and not to costs of the hearing or proceeding being reviewed.

"(g) Nothing in this section shall diminish any right which any party may have to collect any costs, including attorneys' fees, under any other provision of law.

"(h) The authority to make payments under this section shall not apply to any hearings, agency proceedings, or judicial proceedings arising out of such hearings or proceedings, if the hearings or proceedings commence later than three years after the date of enactment of this section.

"(i) (1) Any decision made by the Commission pursuant to this section shall be reviewable to the same extent as any other Commission decision, except that no stay may be issued based upon any alleged violation of this section and no court order determining that the provisions of this section have been violated shall, solely as a result of that determination, require a reversal of the Commission's decision with respect to any other issue.

"(2) Any determination pursuant to subsection (c) or (d) of this section shall be a final and appealable order within the meaning of section 2342 of title 28, United States Code, if the Commission determines that the party is not financially able or—

"(i) the party has the ability to pay its own costs and therefore is not eligible for reimbursement, or

"(ii) the party, although not financially able to

participate meaningfully in the hearing or proceeding, is nonetheless not entitled to the relief requested.

"(j) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.".

APPENDIX D

Pertinent Intervenor Compensation Provisions of the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act of 1975 and the FTC's Proposed Rules Issued Thereunder

Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (U.S. Code Cong. & Ad. News, 93d Cong., 2d Sess. 2550 (1975)).

"(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

"(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

"(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000."

FTC's Proposed Rules

§ 1.17 Compensation for representation in rulemaking proceedings.

(a) *Purpose of compensation.* The Commission may provide compensation to any person who has or represents an interest which would not otherwise be adequately represented in a rulemaking proceeding, and representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

(b) *Level of funding.* At or after the time of the initial notice of proposed rulemaking, the Commission may announce a tentative total level of funding for compensation for participation in that proceeding.

(c) *Applications.* An application for compensation for participation in a rulemaking proceeding may be filed at any time after the publication of the initial notice of proposed rulemaking. An application for compensation shall be filed prior to the time when the costs for which compensation is sought are incurred. Such application shall contain the following:

(1) A description of the interest the applicant has or represents in the rulemaking proceeding;

(2) A statement of the reasons representation of such interest is necessary for a fair determination of the proceeding taken as a whole taking into account the number and complexity of the issues involved, and the importance of a fair, balanced representation of all interests;

(3) The reasons why such interest would not otherwise be adequately represented in the proceeding;

(4) A statement of the reasons the applicant is unable effectively to participate in the rulemaking proceeding without financial assistance including information relating to:

(i) The economic stake of the interest involved as compared with the costs of participation;

(ii) The feasibility of contributions to the costs of participation by individual representatives of the interests;

(iii) The resources of the applicant, or of the interest represented by the applicant;

(5) Insofar as possible, a specific statement of the expenses to be incurred for which compensation is sought, including an estimate of the total anticipated expenses; and

(6) A statement of the applicant's organizational and financial status in such form as the Commission may prescribe.

(d) *Determination of applications.*—(1) *By the presiding officer.* The presiding officer shall consider applications for compensation filed under this section and forward initial findings to the Director of the Bureau of Consumer Protection as to whether the applicant meets the criteria of paragraph (a) of this section. In connection with his determination the presiding officer may conduct such inquiry of the applicant or require the production of such documents as he deems necessary.

(2) *By the Director of the Bureau of Consumer Protection.* The Director of the Bureau of Consumer Protection shall review applications and the initial findings of the presiding officer and determine, in his discretion, to what extent compensation shall be authorized under this section.

(e) *Payment of compensation.*—(1) *In general.* The Commission will compensate the applicant only for those authorized expenses actually incurred. Appropriate proof of actual expenditures may be required by the Commission. The Commission may make any payments under this section in advance where necessary to permit effective participation in the rulemaking proceeding. Payment will be conditioned upon the execution by the applicant of an appropriate agreement setting forth the terms and conditions of the compensation.

(2) *Attorneys' Fees; Expert Witness Fees.* Attorneys' fees at a rate in excess of $50 per hour will be considered presumptively unreasonable and compensation will not be provided for such excess in the absence of sufficient justification. Experts and consultants will be compensated a rate not to exceed the highest rate at which experts and consultants to the Commission are compensated.

40 Fed. Reg. 15238-39 (April 4, 1975)

APPENDIX E

Congressional Statutes Providing for Award of Attorneys' Fees

1. Interstate Commerce Act (1887), 49 U.S.C. § 16 (2) (1970)

A carrier which does not comply with an order for the payment of money within the time limit of the order may have suit filed against it by any person for whose benefit the order was made. If the plaintiff prevails, he shall be allowed a reasonable attorney's fee as part of the costs of the suit.

2. Clayton Anti-Trust Act (1914), 15 U.S.C. §15 (1970)

Any person injured in his business or property by reason of anything forbidden in the antitrust law, may sue in the appropriate district court, regardless of the amount in controversy, and shall recover treble damages and the cost of the suit, including a reasonable attorney's fee.

3. Unfair Competition Act (1916), 15 U.S.C. § 72 (1970)

This section of the Act punishes the importation or sale of articles within the United States at less than market value or wholesale price. Any person injured in his business or property by reason of such an act may bring suit in the appropriate district court, regardless of jurisdictional amount, and shall recover treble damages and the cost of the suit, including a reasonable attorney's fee.

4. Packers and Stockyards Act (1921), 7 U.S.C. § 210 (f) (1970)

A defendant who fails to comply with an order for the payment of money within the time allotted may, within one year of the date of the order, have suit filed against him by anyone for whose benefit the order was made. A successful plaintiff shall be allowed reasonable attorneys' fees as part of the court costs.

5. Railway Labor Act (1926), 45 U.S.C. § 153 (p) (1970)

A prevailing plaintiff shall be allowed a reasonable attorney's fee to be collected as part of the costs of the suit against a carrier which does not comply with an order of a division of the Railroad Adjustment Board within the time allotted.

6. Longshoremen's and Harbor Workers' Compensation Act (1927), 33 U.S.C. § 928 (1970)

No claim for legal services in respect of a claim or award of compensation is valid unless approved by the deputy commissioner of the U.S. Employees' Compensation Commission or by a court. The manner and extent of the claim shall be fixed by the deputy commissioner or the court and shall be a lien on the compensation awarded.

7. Perishable Agricultural Commodities Act (1930), 7 U.S.C. § 499 g(b) (1970)

If any commission merchant, dealer, or broker fails to pay a reparation award within the specified time, then any person for whose benefit the order was made may bring suit within three years of the date of the order. If the petitioner prevails, he shall be allowed a reasonable attorney's fee as part of the costs of the suit.

8. Norris-LaGuardia Act (1932), 29 U.S.C. § 107 (e) (1970)

A party requesting a temporary restraining order or a temporary injunction must provide security to cover his opponent's expenses, including a reasonable attorney's fee, in attacking the order, should that order be denied.

9. Securities Act of 1933, 15 U.S.C. § 77k (e) (1970)

Any person acquiring security containing a false registration statement may bring suit at law or in equity. The losing litigant may, upon the motion of the other party, have the costs of the suit, including a reasonable attorney's fee, assessed against him if the court believes the suit or the defense to have been without merit.

10. Securities Exchange Act of 1934, 15 U.S.C. §§ 78i (e), 78r(a) (1970)

Any person who willfully participates in a manipulation of securities prices may have suit brought against him in law or at equity by a party who bought or sold a security affected by the transaction. The court may, in its discretion, assess reasonable costs, including reasonable attorneys' fees, against either party litigant. § 78i (e)

A party who, in reliance on a false or misleading statement, buys or sells a security at a price affected by the statement may bring suit at law or in equity against the person responsible for the falsehood. The court has discretion to assess reasonable costs, including reasonable attorneys' fees, against either party litigant. § 78r (a)

11. Communications Act of 1934, 47 U.S.C. § 206 (1970)

A common carrier shall be liable to any person injured through a violation of the provisions of this chapter for the full amount of damages sustained, together with a reasonable attorney's fee, to be fixed by the court in every case of recovery.

12. Bankruptcy Act (1935), 11 U.S.C. § 205(c) (12) (1970)

Within the maximum limits set by the Interstate Commerce Commission, the judge may make an allowance to be paid out

of the debtor's estate for expenses, including reasonable attorneys' fees. The award may be made to a number of parties in interest, such as reorganization managers and other representatives of creditors and stockholders.

13. Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970)

Any person injured in his business or property by reason of forbidden actions or agreements by carriers may bring suit in the appropriate district court, regardless of the amount in controversy, and shall recover treble damages and the cost of the suit, including a reasonable attorney's fee.

14. Fair Labor Standards Act (1938), 29 U.S.C. § 216 (b) (1970)

In a suit by an employee against his employer for unpaid overtime compensation or for violation of the minimum wage standard, the court shall, in addition to any judgment awarded the plaintiff, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

15. FED. R. CIV. P. 37(a)

When a refusal to answer is found to be without substance, expenses incurred by a party in obtaining an order to compel an answer, including a reasonable attorney's fee, shall be awarded by the court.

FED. R. CIV. P. 37(b)

The court shall require a deponent failing to obey an order of the court directing him to answer certain questions, the attorney advising him, or both to pay reasonable expenses, including attorneys' fees, caused by the failure.

FED. R. CIV. P. 37(c)

The court will require payment of expenses, including a reasonable attorney's fee, incurred by one party in proving the genuiness of documents whose validity is wrongfully denied by the other party.

16. Trust Indenture Act (1939), 15 U.S.C. § 77 www(a) (1970)

A person who makes a false or misleading statement in any document filed with the Securities and Exchange Commission shall be liable to any person who buys or sells a security affected by the statement. The court may, in its discretion, require an undertaking of reasonable costs, including reasonable attorneys' fees, against either party litigant, having due regard to the merits and good faith of the suit or defense.

17. Interstate Commerce Act (1940), 49 U.S.C. §§ 908(b), 908(e) (1970)

A carrier shall be liable for any act or omission declared unlawful by this chapter to the persons injured thereby for the full amount of damages sustained, together with a reasonable attorney's fee, to be fixed by the court and collected as part of the costs. § 908(b)

If a carrier fails to comply with an order for the payment of money within the time allotted, a party for whose benefit the order was made may bring suit. If the plaintiff finally prevails, he shall be allowed a reasonable attorney's fee to be collected as part of the costs of the suit. § 908(e)

18. Housing and Rent Act (1947), 50 U.S.C. § 1895 (1970)

A landlord who violates the maximum rent provisions of this Act or who unlawfully evicts a tenant shall be liable to the person injured thereby for reasonable attorneys' fees and costs as determined by the court, plus liquidated damages.

19. Copyright Act (1947), 17 U.S.C. § 116 (1970)

In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

20. Tort Claims Act (1948), 28 U.S.C. § 2678 (1970)

The court rendering a judgment for the plaintiff pursuant to §§ 1346(b) (liability of U.S. employee while acting within the scope of his office), 2672 (administrative adjustment of claims of $2,500 or less) or 2677 (compromise of 1346(b) claims by the Attorney General) may allow reasonable attorney's fees. If the recovery is $500 or more, the fees shall not exceed 10% of the amount received under §2672 or 20% of the amount received under §1346(b).

21. International Claims Settlement Act (1950), 22 U.S.C. § 1623 (f) (1970)

The Foreign Claims Settlement Commission may, upon written request of the claimant or his attorney, determine and apportion reasonable attorneys' fees in connection with any claim decided under this subchapter in which an award is made. The total amount of the fees may not exceed 10% of the total recovery and any such payment shall be deducted from the recovery.

22. Defense Production Act of 1950, 50 U.S.C. § 2109(c) (1970)

A seller who violates a regulation setting a price ceiling shall be liable for reasonable attorneys' fees, as determined

by the court, to a buyer who brings the action within one year of the violation.

23. Bankruptcy Act (as amended 1952), 11 U.S.C. §104(a) (1970)

Among the debts to have priority over the payment of dividends to creditors, and to be paid in full out of bankrupt estates, shall be one reasonable attorney's fee. This shall be irrespective of the number of attorneys employed and in return for services rendered to petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow.

24. Veterans' Benefits Act (1958), 38 U.S.C. § 1822(b) (1970)

Whoever knowingly participates in a sale of property to a veteran for a consideration in excess of its reasonable value, as determined by the Veterans' Administration, shall be liable for three times the amount of such excess consideration. Actions under this section may be brought by the veteran concerned in any district court, which court may award costs and reasonable attorneys' fees as part of any judgment.

25. Veterans' BenefitsAct (1958), 38 U.S.C. § 3404(c) (1970)

The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees: (1) shall be determined by the Administrator; (2) shall not exceed $10 per claim and; (3) shall be deducted from the recovery.

26. Labor-Management Reporting & Disclosure Act (1959), 29 U.S.C. §501(b) (1970)

Any member of a labor organization may sue a representative of the organization for violation of his duties. The trial judge may allot a reasonable part of the recovery to pay the fees of counsel prosecuting the suit at the instance of the member.

27. Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000 a - 3(b) (1970)

In any action brought under this subchapter, the court has the discretion to allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. The United States shall be liable for costs the same as a private person. The Supreme Court has held that this title of the Civil Rights Act constitutes a mandatory award, in the absence of exceptional circumstances. See Alyeska Pipeline Service Co. v. Wilderness Society, 95 S. Ct. 1612, 1624 (May 12, 1975).

28. Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5k (1970)

In any action or proceeding under this section, the court may, in its discretion, allow the prevailing party, other than the Equal Employment Opportunity Commission or the United States, a reasonable attorney's fee as part of the costs. The Commission and the United States shall be liable for costs the same as a private person.

29. American-Mexican Treaty Act of 1950 (as amended 1964), 22 U.S.C. § 277d-21 (1970)

The International Boundary Commissioner, in rendering an award in favor of a claimant, may allow reasonable attorneys' fees as part of the award. The fee may not exceed 10% of the amount awarded and will be paid out of the award.

30. Social Security Act Amendments of 1965, 42 U.S.C. § 406(b)(i) (1970)

Whenever a court renders a favorable judgment to a claimant under this subchapter, the court may determine and allow as part of its judgment a reasonable attorney's fee. This fee may not exceed 25% of the past-due benefits awarded by the judgment and will be subtracted from the judgment.

31. Interstate Commerce Act, (as amended 1965), 49 U.S.C. 1017(b)(2) (1970)

Any person injured by reason of a violation of the permit regulations of § 1010 may bring suit in the proper district court to enforce the regulation. The party who prevails in the action may recover reasonable attorneys' fees to be fixed by the court, in addition to any costs allowed under the Federal Rules of Civil Procedure.

32. 5 U.S.C. § 8127 (1966), (1970)

(a) A claimant may authorize an individual to represent him in any proceeding under this subchapter before the Secretary of Labor.

(b) A claim for legal or other services furnished in respect to a case, claim, or award for compensation under this subchapter is valid only if approved by the Secretary.

33. Fair Housing Act (1968), 42 U.S.C. § 3612(c) (1970)

The court may grant reasonable attorneys' fees to a prevailing plaintiff for violation of a right secured by the Act if the plaintiff is considered unable financially to pay the fees.

34. Agricultural Fair Practices Act (1968), 7 U.S.C. §2305(c) (1970)

Any person injured in his business or property by reason of a violation of §2303 (prohibited practices) of this title may sue in the appropriate district court, regardless of the amount in controversy. The court may allow the prevailing party a reasonable attorney's fee as a part of the costs.

35. Truth-in-Lending Act (1969), 15 U.S.C. § 1640(a) (1970)

A creditor who fails to disclose any information required under this section in a consumer credit transaction will be liable to a successful plaintiff for the costs of the action together with a reasonable attorney's fee, as determined by the court.

36. Federal Contested Elections Act (1969), 2 U.S.C. § 396 (1970)

The Committee on House Administration may allow any party reimbursement from the contingent fund of the House of Representatives for his reasonable expenses from the contested election case, including reasonable attorneys' fees.

37. Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c) (1970)

Any person injured in his business or property by reason of a violation of § 1962 (prohibited activities) of this chapter may sue in the appropriate district court and shall recover treble damages and the cost of the suit, including a reasonable attorney's fee.

38. Federal Credit Union Act (as amended 1970), 12 U.S.C. § 1786(o) (1970)

A court which has jurisdiction of a proceeding instituted under this section by an insured credit union or its director, officer, or committee member may allow such a party reasonable expenses and attorneys' fees.

39. Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1975 (1970)

Any person injured in his business or property by reason of a violation of § 1972 (prohibition of certain tying arrangements by banks) may sue in the appropriate district court, regardless of the amount in controversy, for treble damages and the cost of the suit, including a reasonable attorney's fee.

40. Jewelers' Hall-Mark Acts (as amended 1970), 15 U.S.C. § 298 (b) (1970)

Any party injured by reason of a violation of §§ 294 (Importation or transportation of falsely marked gold or silver), 295 (Standard of fineness of gold articles),

296 (Standard of fineness of silver articles), or 297 (Stamping plated articles) of this title, is entitled to injunctive relief and may sue in the appropriate district court, regardless of the amount in controversy, and shall recover damages and the cost of the suit. including a reasonable attorney's fee.

41. Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-2 (1970)

"The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."

The broad standing provisions allow "any person," without a particular showing of interest, to bring suit against any person, including the United States and any other governmental agency, to the extent permitted by the 11th Amendment, to have an emission standard or administrative or state order enforced. Suit may also be brought against the Administrator for failure to perform a non-discretionary duty.

No action may be commenced prior to 60 days after the plaintiff has notified the EPA, the state in which the violation occurred, and the alleged violator or if the Administrator or state is "diligently prosecuting" a civil action to require compliance with the standard.

The Senate Report of the Committee on Public Works gives an idea of the reason for including this provision.

> It is the Committee's intent that enforcement of those control provisions be immediate, that citizens should be unconstrained to bring these actions and that the courts should not hesitate to consider them.

The Senate Report also had this to say about outcome:

> [t]he court may award costs of litigation to either party whenever the court determines such award is in the public interest without regard to the outcome of the litigation. S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970)

42. Education Act Amendments of 1972, 20 U.S.C. § 1617 (Supp. II, 1972)

Upon entry of a final order against a local, state, or federal educational agency, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

43. Federal Water Pollution Control Act (1972), 33 U.S.C. § 1365 (Supp. II, 1972)

"The court, in issuing any final orders in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."

Standing to bring an action under this Act is limited to a "citizen" or "citizens," defined as "any person...having an interest which is or may be adversely affected." The citizen enforcement action lies "to apply any appropriate civil penalties" as well as to enforce an effluent standard or limitation.

The Senate Committee on Public Works makes the following comments:

> The courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and, in such instances, the courts should award costs of litigation to such a party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict.
> S. Rep. No. 92-414, 92d Cong., 2d Sess. (1972)

44. Marine Protection, Research and Sanctuaries (Ocean Dumping) Act of 1972, 33 U.S.C. § 1415(g)(Supp. II, 1972)

The court, in issuing any final order in any suit brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Like the Clean Air Act, the Ocean Dumping Act has broad standing language which does not require a showing of an adversely affected interest. Unlike the Air Act, however, there is no provision for a suit against the Administrator for failure to carry out "non-discretionary" duties and the citizens' suit is precluded by criminal enforcement or administrative proceedings as well as by a civil action for enforcement by the government.

45. Noise Control Act of 1972, 42 U.S.C. § 4911 (d) (Supp. II, 1972)

"The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate."

The language relating to the power to bring suits is substantially similar to that of the Clean Air Act. In addition to bringing suit against the Administrator of the EPA, any person may bring suit against the Administrator of the FAA for failure to perform a non-discretionary duty. Unlike the Air Act, however, there is no provision for a citizen's suit with respect to "orders" of the EPA Administrator pursuant to the Act.

46. Consumer Product Safety Act (1972), 15 U.S.C. § 2073 (Supp. II, 1972)

Any interested person may bring an action in an appropriate district court to enforce a consumer product safety rule. No separate suit shall be brought if the same alleged violation is the subject of a pending civil or criminal action by the United States. An interested party may elect to recover a reasonable attorney's fee, in which case the court shall award the costs of suit, including a reasonable attorney's fee, to the prevailing party.

47. Section 502(g) of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829.

In any action under this title by a participant, beneficiary, or fiduciary, the court, in its discretion, may allow a reasonable attorney's fee and costs of action to either party.

48. Freedom of Information Act (1974), 5 U.S.C.A. § 552 (4) (E) (Supp. I, 1975)

"The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."

APPENDIX F

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037

OFFICE OF
THE CHAIRMAN

RECOMMENDATION 28 (71-6)

PUBLIC PARTICIPATION IN ADMINISTRATIVE HEARINGS

(Adopted Dec. 7, 1971)

Individuals and citizen organizations, often representing those without a direct economic or personal stake in the outcome, are increasingly seeking to participate in administrative hearings. Their concern is to protect interests and present views not otherwise adequately represented in the proceedings. Agencies are exposed to the views of their staffs, whose positions necessarily blend a number of interests, and to the views of those whose immediate stake is so great that they are willing to undertake the cost of vigorous presentation of their private interests. The opportunity of citizen groups to intervene as parties in trial-type proceedings where their views are unrepresented, formerly challenged on doctrinal grounds that they lacked a sufficient interest to have "standing," has been greatly broadened by statutes, administrative actions, and judicial decisions. Agency decisionmaking benefits from the additional perspectives provided by informed public participation. However, the scope and manner of public participation desirable in agency hearings has not been delineated. In order that agencies may effectively exercise their powers and duties in the public interest, public participation in agency proceedings should neither frustrate an agency's control of the allocation of its resources nor unduly complicate and delay its proceedings. Consequently, each agency has a prime responsibility to reexamine its rules and practices to make public participation meaningful and effective without impairing the agency's performance of its statutory obligations.

RECOMMENDATION

In connection with agency proceedings where the agency's decision is preceded by notice and an opportunity to be heard or otherwise to participate—namely, notice-and-comment rulemaking, on-the-record rulemaking and adjudication—each agency should, to the fullest extent appropriate in the light of its capabilities and responsibilities, apply the following criteria in determining the scope of public participation and adopt the following methods for facilitating that participation:

A. Intervention or Other Participation

Agency rules should clearly indicate that persons whose interests or views are relevant and are not otherwise represented should be allowed to participate in agency proceedings whether or not they have a direct economic or personal interest. Whatever the form of the proceeding, reasonable limits should be imposed on who may participate in order (*a*) to limit the presentation of redundant evidence, (*b*) to impose reasonable restrictions on interrogation and argument, and (*c*) to prevent avoidable delay. In every determination of whether participation is appropriate, the agency should also determine whether the prospective participant's interests and views are otherwise represented and the effect of participation on the interests of existing parties.

1. *Notice-and-comment rulemaking proceedings.*—Agencies engaging in notice-and-comment rulemaking should, to the extent feasible: (*a*) make available documents, materials and public submissions upon which the proposed rule is based; (*b*) invite the presentation of all views so that the agency may be apprised of any relevant consideration before formulating policy; (*c*) develop effective means of providing notice to the affected public and to groups likely to possess useful information; and (*d*) if there is a hearing, allocate time fairly among all participants.

2. *On-the-record rulemaking and adjudicative hearings.*—Public participation should be freely allowed in trial-type proceedings where the agency action is likely to affect the interests asserted by the participants. Intervention or other participation in enforcement or license revocation proceedings should be permitted wh[illegible] significant objective of the adjudication is to develop and test [illegible] policy or remedy in a precise factual setting or when the prospective intervener

is the de facto charging party. Public participation in enforcement proceedings, license revocations or other adjudications where the issue is whether the charged respondent has violated a settled law or policy should be permitted only after close scrutiny of the effect of intervention or other participation on existing parties.

B. Selection of Interveners

Intervention by a particular group or person as a party in a trial-type proceeding should depend upon a balancing of several factors, including:

(*a*) The nature of the contested issues;

(*b*) The prospective intervener's precise interest in the subject matter or possible outcome of the proceeding;

(*c*) The adequacy of representation provided by the existing parties to the proceeding, including whether these other parties will represent the prospective intervener's interest and present its views, and the availability of other means (*e.g.*, presentation of views or argument as an *amicus curiae*) to protect its interest;

(*d*) The ability of the prospective intervener to present relevant evidence and argument; and

(*e*) The effect of intervention on the agency's implementation of its statutory mandate.

C. Scope of Participation

The scope of an intervener's participation in a trial-type proceeding must assure it a fair opportunity to present pertinent information and to provide the agency a sound basis for decision, without rendering the hearing unmanageable. The nature of the issues, the intervener's interests, its ability to present relevant evidence and argument, and the number, interests and capacities of the other parties should determine the dimensions of that participation. In general, a public intervener should not be allowed to determine the broad outline of the proceeding, such as the scope or compass of the issues. A public intervener generally should be allowed all the rights of any other party including the right to be represented by counsel, participate in prehearing conferences, obtain discovery, stipulate facts, present and cross-examine witnesses, make oral and written argument, and participate in settlement negotiations. Where the intervenor focuses on only one aspect of the proceeding or does not seek to controvert adjudicative facts, consideration should be given to limiting its participation to particular issues, written evidence, argument or the like. Agencies should be cautious in advance of actual experience in anticipating that intervention will cause undue delays.

D. Cost of Participation

The cost of participation in trial-type proceedings can render the opportunity to participate meaningless. Agencies have an obligation to minimize transcript charges, to avoid unnecessary filing requirements; and to provide assistance in making information available; and they should experiment with allowing access to their staff experts as advisers and witnesses in appropriate cases.

1. *Filing and distribution requirements.*—Filing and distribution requirements (*e.g.*, multiple copy rules) should be avoided except as necessary and provision should be made for a waiver where the requirement is burdensome. Existing filing and distribution requirements should be re-examined. Agencies should make every effort to provide duplication facilities at a minimum cost.

2. *Transcripts.* The cost of recording formal proceedings should be borne by the agencies, not by the parties or other participants to the proceeding (except to the extent that a person requests expedited delivery). Existing contracts and arrangements should be revised to provide for the availability, either through a reporting service or the agency itself, of transcripts at a minimum charge reflecting only the cost of reproducing copies of the agency's transcript. Transcripts should be available without charge to indigent participants to the extent necessary for the effective representation of their interests. Where the aggregate of these transcript costs imposes a significant financial burden on the agency, the agency should seek and Congress should provide the necessary additional appropriation.

3. *Availability of information and experts.*—An agency should provide assistance to participants in proceedings before it or another agency, provided that the agency's resources will not be seriously burdened or its operations impaired. Assistance should include advice and help in obtaining information from the agency's files. Each agency should experiment with allowing access to agency experts and making available experts whose testimony would be helpful in another agency's proceeding.

E. Notice

Each agency should utilize such methods as may be feasible, in addition to the Federal Register's official public notice, to inform the public and citizen groups about proceedings (including significant applications and petitions) where their participation is appropriate. Among the techniques which should be considered are factual press releases written in lay language, public service announcements on radio and television, direct mailings and advertisements where the affected public is located, and express invitations to groups which are likely to be interested in and able to represent otherwise unrepresented interests and views. The initial notice should be as far in advance of

hearing as possible in order to allow affected groups an opportunity to prepare. Each agency should consider publication of a monthly bulletin,[3] listing:

(*a*) The name and docket number or other identification of any scheduled proceeding in which public intervention may be appropriate;

(*b*) A brief summary of the purpose of the proceeding;

(*c*) The date, time and place of the hearing; and

(*d*) The name of the agency, and the name and address of the person to contact if participation or further information is sought

Statement of Max D. Paglin, Chairman of the Committee on Agency Organization and Procedure; joined by Arthur B. Focke, George A. Graham, and Henry N. Williams, Committee Members, and by John A. Buggs, Arthur E. Hess, and David F. Sive

The Conference has taken constructive action to assist agencies in the enhancement of their decisionmaking process through this Recommendation, which is designed to assure meaningful and effective participation in such process by citizens and public intervener groups.

The one area of the recommendation, as put before the Conference by the Committee on Agency Organization and Procedure, which was not adopted was the subsection dealing with litigation expenses in section D entitled "Cost of Participation". It was the Committee's view, and still is our view that, unless aided by other resources, the costs of meeting necessary legal expenses in trial-type proceedings could constitute insuperable barriers to effective participation by citizens and public intervener groups. The committee recommendation was framed in terms of encouraging agencies to experiment, in appropriate cases and when authorized by law, in the use of various suggested alternative techniques (recognized in other administrative and judicial proceedings, as well as in pending consumer legislation). At the same time, the recommendation's language recognized the need for, and urged the agencies to seek, necessary legislation and/or additional appropriations where required to accomplish the objectives set forth in the recommendation.

This is a critical problem which will have to be resolved if public participation is to be an aid and not a hinderance to agency performance, and if, in the words of the then Circuit Judge Warren Burger in the second *United Church of Christ* case, 425 F. 2d 543, 548–549 (D.C. Cir., 1969), the selected "Public Intervenors who were performing a public service" are to be accorded the status of "an ally" and not "an opponent" by the agencies. As experience is gained in the

[3] This recommendation does not supersede Recommendation 4, Consumer Bulletin.

future in the area of broadened public participation, we urge that further attention be given by the Conference, the agencies and the Congress to implementing such assistance by appropriate means and methods.

Statement of John A. Buggs

I deeply regret that subsection 4 of part D of the recommendation concerning public participation in administrative hearings was rejected by the Administrative Conference. It is unfortunate that the Conference did not recognize that this section was the most meaningful part of Recommendation 28. Agency proceedings are often protracted and expensive for participants. Private interests, such as businesses, are able to afford costs of participation far better than consumers or other public interest groups, which cannot pass on the costs of participation. Having recognized the right of these groups to take part in administrative proceedings, it is unfair to place a means test upon their effective participation. It is unrealistic to believe that public interest groups can regularly participate in administrative proceedings without financial assistance. Subsection 4 suggested reasonable ways for agencies to provide, on an experimental basis, such assistance. The Conference should have accepted the fact that changes in governmental practice to increase fairness may require expenditure of public funds.

Statement of Kenneth Culp Davis

Recommendation 28, by its terms, is limited at many points to adjudication and rulemaking, and it is for the most part further limited to on-the-record hearing and notice-and-comment rulemaking. My opinion is that the agencies in implementing Recommendation 28 should often go beyond these limitations in allowing citizen groups to exert their influence on administrative action (or inaction).

For instance, intervention by citizen groups probably should often be permitted in investigatory hearings, such as those of the Civil Rights Commission considered in *Hannah* v. *Larche*, 363 U.S. 420 (1960). And such groups should often be allowed to intervene in abridged adjudicative hearings that are not deemed "on-the-record," as well as in conference-type and speech-making hearings, whether or not adjudicative.

I think the role of citizen groups should neither be confined to adjudication and rulemaking nor be confined to "hearings" and "proceedings." The vital interests of such groups extend to all kinds of administrative action (or inaction), including determinations of whether or not to investigate, to initiate, to prosecute, to contract, to advise, to threaten, to conceal, to publicize, and to supervise. Such provisions of Recommendation 28 as those about notice, availability

of information, and access to agency experts may be especially important for informal action (or inaction) involving neither adjudication nor rulemaking.

Statement of Malcolm S. Mason

The Conference has adopted a modest and conservative recommendation encouraging intervention and other forms of participation by citizen groups in administrative proceedings with a due balancing of factors of convenience. One of these balancing factors stressed by the recommendation is whether prior parties provide adequate representation of the prospective intervener's interests and views. This will push in the direction of limiting intervention to a single representative of a particular interest, and thus will appear to give credentials to that group as "the" representative of the poor or the consumer or the public or other citizen interest however characterized. This danger was pointed out on the floor of the Conference by Professor Auerbach. It was part of my objection to the concept of "a" people's counsel for the poor, because the poor are many and different and must be able to speak with many voices, as I noted in my separate statement with respect to Recommendation No. 5 on representation of the poor (1968). I believe that the recommendation should have explicitly taken account of this danger.

Apart from this, I think it unfortunate that the Conference has failed to urge active exploration and experiment with available methods for assisting groups in meeting the necessary expenses of citizen participation in trial type proceedings. These methods need not be costly. Until we have experimented with them we will not know what the costs are and will not be able to balance rationally costs against benefits. In some instances it will prove more costly not to assist such groups than to assist them, for the presence of representative groups may save the agency from serious substantive error and from serious delay. No agency, however conscientious, has a monopoly of wisdom. The wisest agencies are those that encourage others to inform them and do not pretend to speak for the public interest with the only qualified voice.

Statement of Harold L. Russell joined by Walter Gellhorn

Paragraph D–3 of Recommendation 28 was adopted by a 27–24 vote of the members of the Conference. Being one of the 24, I wish the record to reflect my views. The basic purpose of Recommendation 28 is to encourage greater participation in agency proceedings by intervenors. Paragraph D–3 would subvert that purpose. Instead of encouraging the development of evidence which the intervenor may be uniquely able to develop, it would turn the intervenor to the agency's files and experts and to experts in other agencies for the development of evidence already available to the agency. Moreover, it is not believed that agencies are staffed, or should be staffed, to undertake such work for intervenors.

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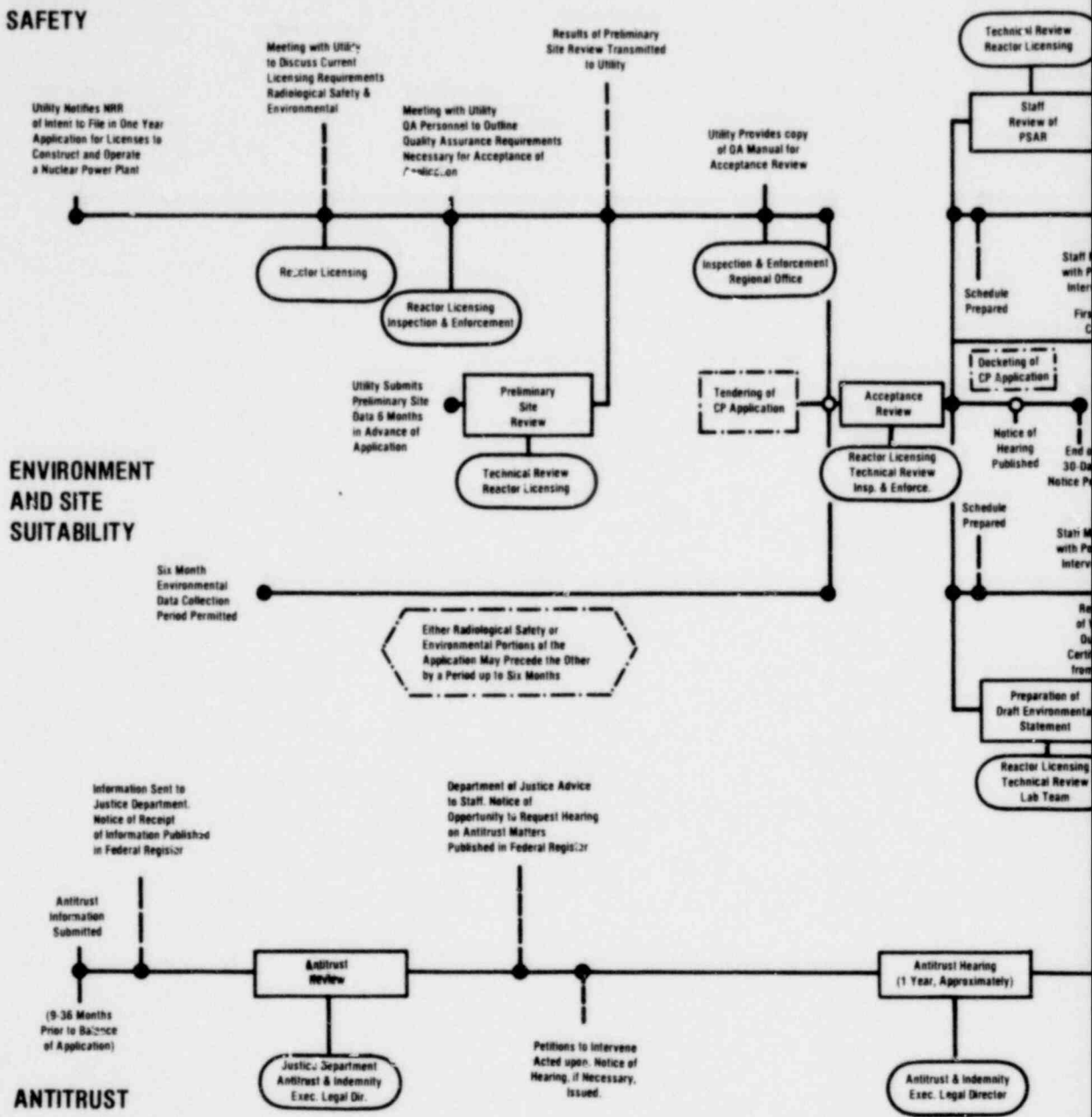

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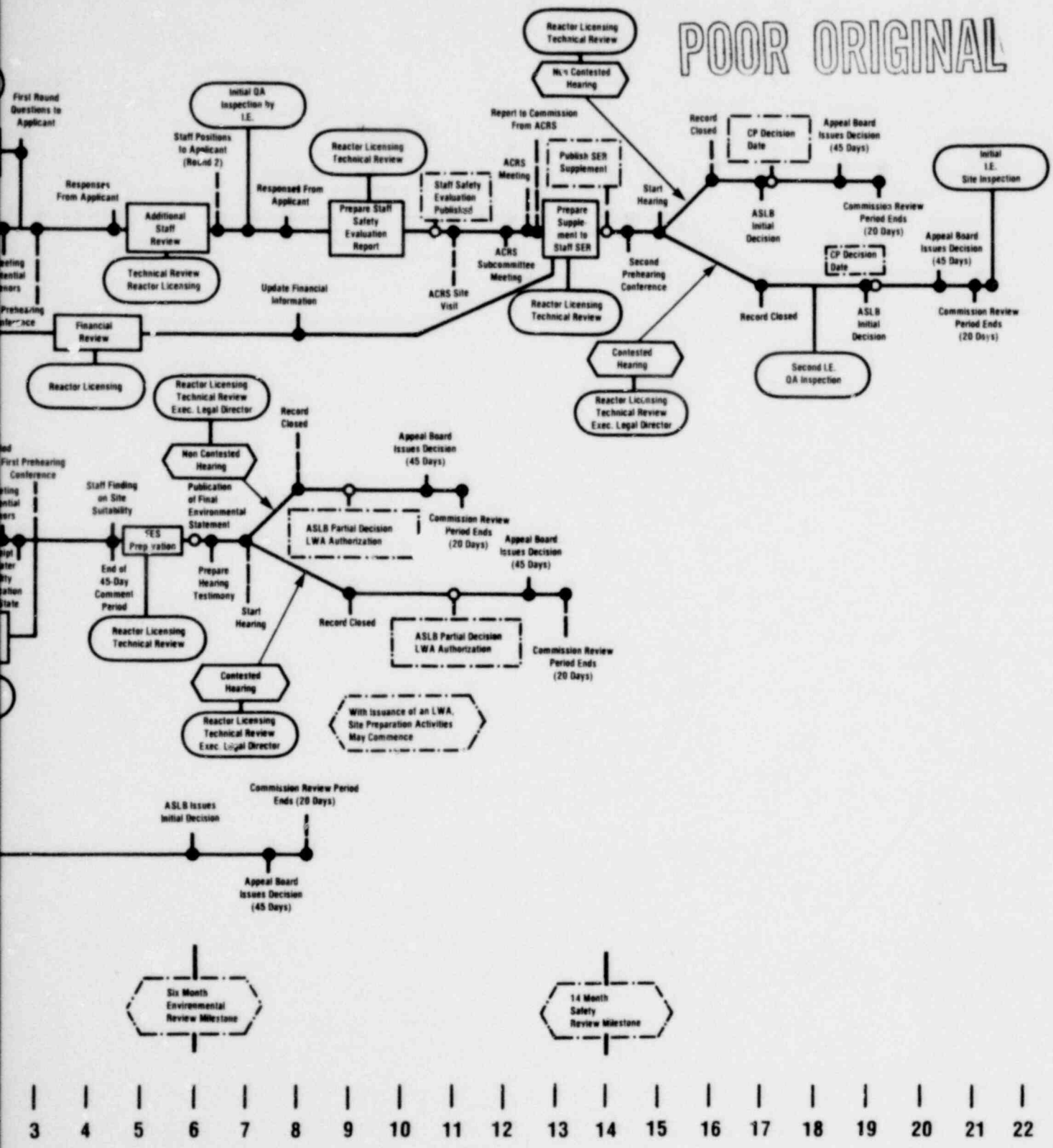

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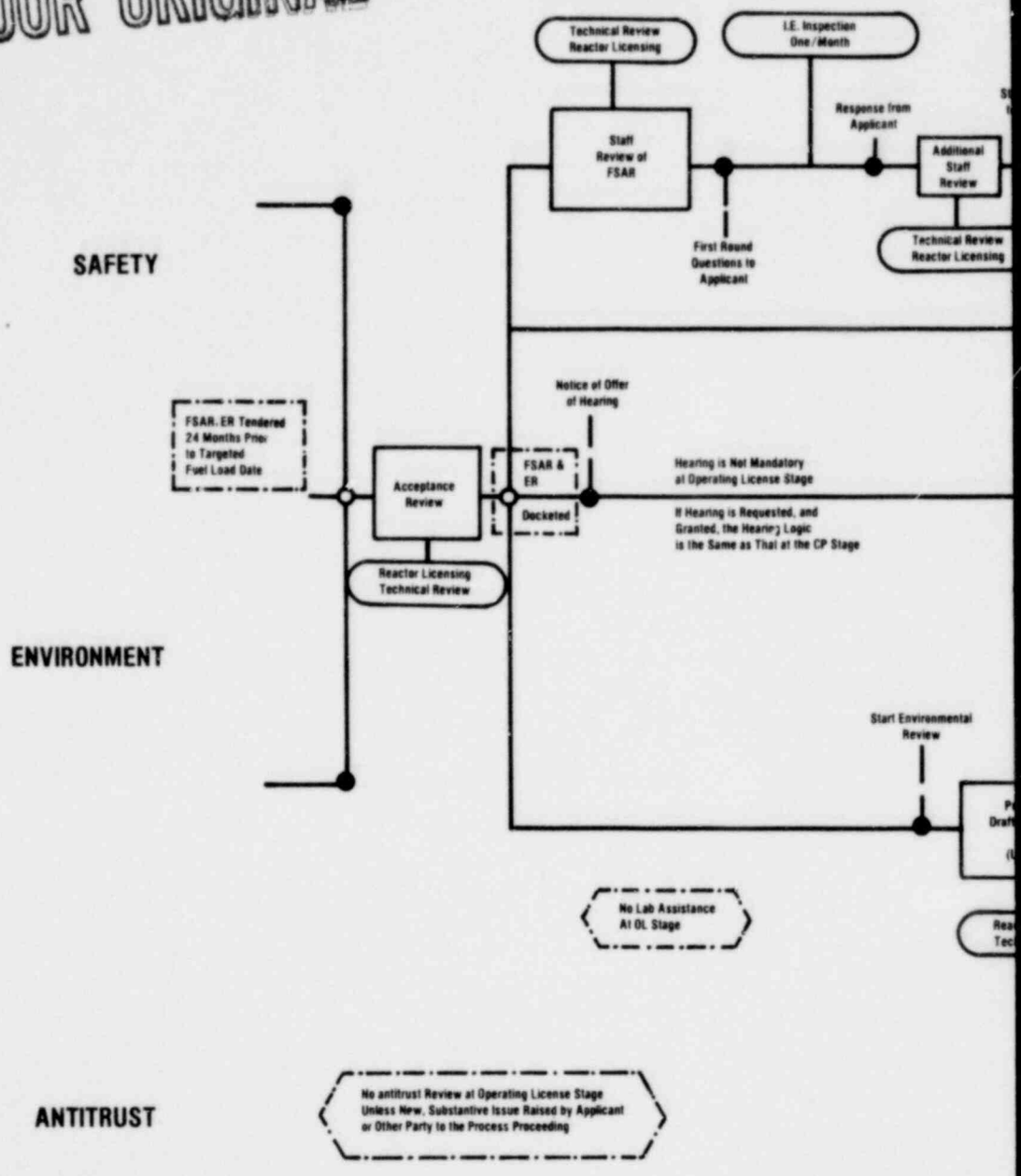

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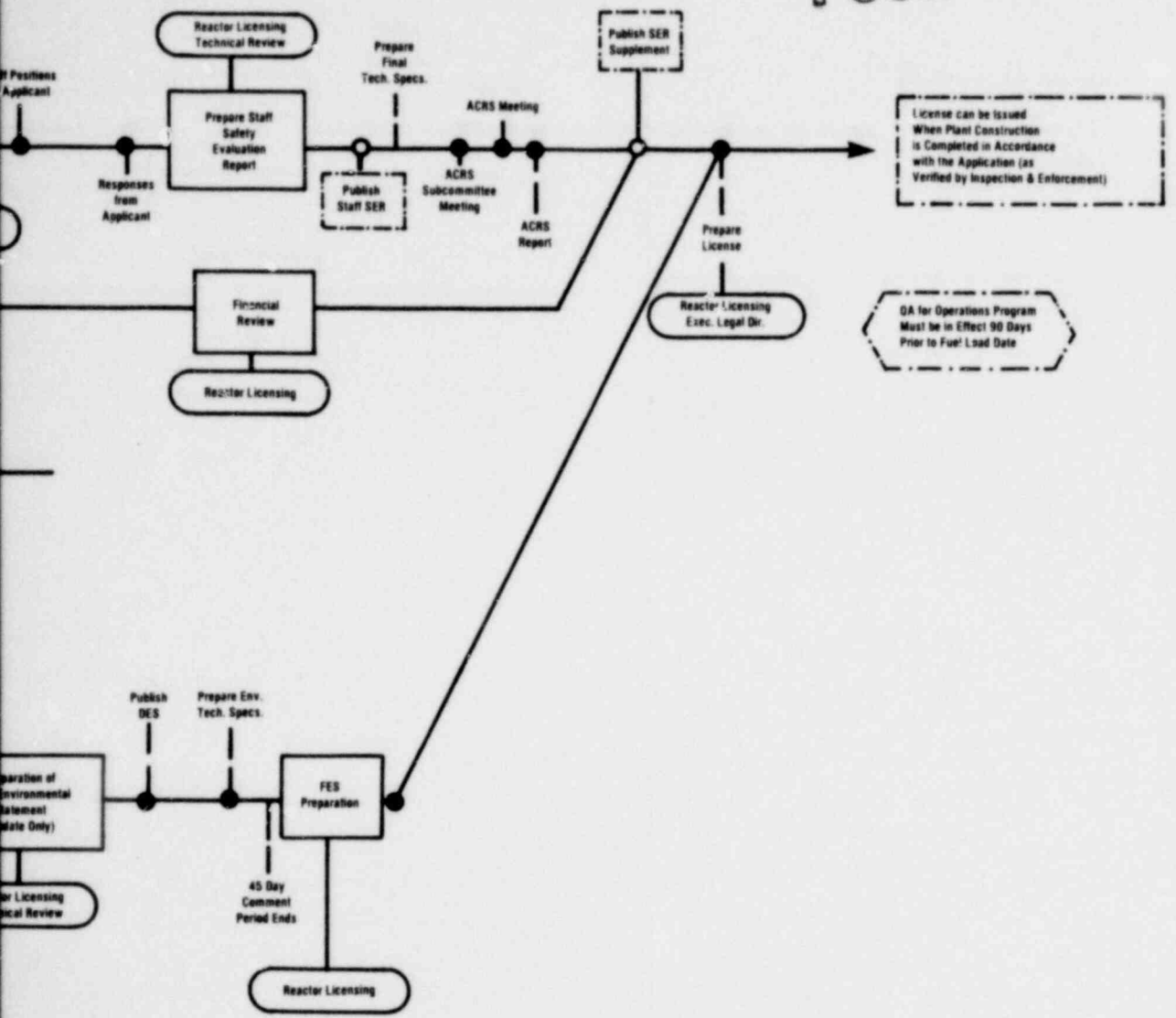

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RIOR TO FACILITY FUEL LOAD DATE

APPENDIX H

Intervenor Standing Criteria of Selected Federal Agencies

Nuclear Regulatory Commission

10 C.F.R.

§ 2.714 Intervention.

(a) Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition under oath or affirmation for leave to intervene. In a proceeding noticed pursuant to § 2.105, any person whose interest may be affected may also request a hearing. Any petition and/or request shall be accompanied by a supporting affidavit identifying the specific aspect or aspects of the subject matter of the proceeding as to which he wishes to intervene and/or on which he bases his request for a hearing, and setting forth with particularity both the facts pertaining to his interest and the basis for his contentions with regard to each aspect on which he desires to intervene. The petition and/or request shall be filed not later than the time specified in the notice of hearing, or as provided by the Commission, the presiding officer, or the atomic safety and licensing board designated to rule on the petition and/or request, or as provided in § 2.102 (d)(3). Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request that the petitioner has made a substantial showing of good cause for failure to file on time, and with particular reference to the following factors in addition to those set out in paragraph (d) of this section:

(1) The availability of other means whereby the petitioner's interest will be protected.

(2) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(3) The extent to which petitioner's interest will be represented by existing parties.

(4) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

(b) The petition shall set forth the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, and any other contentions of the petitioner including the facts and reasons why he should be permitted to intervene, with particular reference to the factors set forth in paragraph (d) of this section. [illegible] relating only to matters outside the jurisdiction of the Commission shall be denied.

(c) Any party to a proceeding may file an answer to a petition for leave to intervene within five (5) days after the petition is filed, with particular reference to the factors set forth in paragraph (d) of this section. However, the regulatory staff may file such an answer within ten (10) days after the petition is filed.

(d) The Commission, the presiding officer or the atomic safety and licensing board designated to rule on petitions to intervene and/or requests for hearing shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:

(1) The nature of the petitioner's right under the Act to be made a party to the proceeding.

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

(e) An order permitting intervention and/or directing a hearing may be conditioned on such terms as the Commission, presiding officer or the designated atomic safety and licensing board may direct in the interests of: (1) Restricting irrelevant, duplicative, or repetitive evidence and argument, (2) having common interests represented by a spokesman, and (3) retaining authority to determine priorities and control the compass of the hearing.

(f) In any case in which, after consideration of the factors set forth in paragraph (d) of this section, the Commission or the presiding officer finds that the petitioner's interest is limited to one or more of the issues involved in the proceeding, any order allowing intervention shall limit his participation accordingly.

(g) A person permitted to intervene becomes a party to the proceeding, subject to any limitations imposed pursuant to paragraph (f) of this section.

(h) Unless otherwise expressly provided in the order allowing intervention, the granting of a petition for leave to intervene does not change or enlarge the issues specified in the notice of hearing.

[37 F.R. 15132, July 28, 1972, as amended at 37 FR 28711, Dec. 29, 1972; 39 FR 17972, May 22, 1974]

Civil Aeronautics Board

14 C.F.R.

§302.14 Participation in hearing cases by persons not parties. . . .

• • •

(b) Requests for expedition. In any case to which the Board's principles of practice, Part 300, are applicable, any interested person, including any State, subdivision thereof, State aviation commission, or other public body, may by motion request expedition of such case or file an answer in support of or in opposition to such motions. Such motions and answers shall be served as provided in §302.8 hereof.

15 C.F.R.

§302.15 Formal intervention in hearing cases

(a) Who may intervene. Petitions for leave to intervene as a party will be entertained only in those cases that are to be decided upon an evidentiary record after notice and hearing. Any person who has a statutory right to be made a party to such proceeding shall be permitted to intervene. Any person whose intervention will be conducive to the ends of justice and will not unduly delay the conduct of such proceeding may be permitted to intervene. The Board does not grant formal intervention, as such, in non-hearing matters, and any interested person may file documents authorized under this part without first obtaining leave.

(b) Considerations relevant to determination of petition to intervene. In passing upon a petition to intervene, the following factors, among other things, will be considered: (1) The nature of the petitioner's right under the statute to be made a party to the proceeding; (2) the nature and extent of the property, financial or other interest of the petitioner; (3) the effect of the order which may be entered in the proceeding on petitioner's interest; (4) the availability of other means whereby the petitioner's interest may be protected; (5) the extent to which petitioner's interest will be represented by existing parties; (6) the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record; and (7) the extent to which participation of the petitioner will broaden the issue or delay the proceeding.

(d) Effect of granting intervention. A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by the Board 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 judicial review of such order.

National Labor Relations Board

29 C.F.R.

Subpart B—Procedure Under Section 10(a) to (i) of the Act for the Prevention of Unfair Labor Practices

• • •

§102.20. Intervention; requisites; rulings on motions to intervene

Any person desiring to intervene. . . shall file a motion. . . stating the grounds on which such person claims an interest. . . . The regional director . . . may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper.

• • •

Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Sections 9(b) of the Act.

§120.65 Motions; interventions

(b) Any person desiring to intervene. . . shall make a motion for intervention, stating the grounds upon which such person claims to have an interest. . . . The regional director may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper. . . .

Federal Communication Commission

47 C.F.R.

§1.223 Petitions to Intervene

(a) [I]n cases involving applications for construction permits and station licenses. . . any person who qualifies as a party in interest. . . may acquire the status of a party by filing. . . a petition for intervention showing the basis of its interest. [where the alleged interest is based upon a claim of interference, engineering data must be supplied.] Where the person's status as a party in interest is established, the petition to intervene will be granted.

(b) Any other person [other than a party in interest] desiring to participate as a party in any hearing may file a petition for leave to intervene. . . . The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question. . . . The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to particular issues or to a particular stage of the proceedings.

(c) The granting of any petition to intervene shall not have the effect of changing or enlarging the issues specified in the Commission's notice of hearing. . . .

§1.225 Participation by non-parties; consideration of communications

(a) Any person who wishes to appear and give evidence on any matter, and who so advises the Secretary, will be notified. . . .

(b) No person shall be precluded from giving any relevant, material and competent testimony at a hearing because he lacks a sufficient interest to justify his intervention as a party in the matter.

Interstate Commerce Commission

49 C.F.R.

§1100.72 Intervention; petitions. (Rule 72)

(a) Content generally. A petition for leave to intervene must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. . . .

• • •

(c) Broadening issues; filing. If the petitioner seeks a broadening of the issues and shows they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in season to permit service [etc.]. . . .

• • •

(e) Disposition. Leave will not be granted except in averments reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner thereby becomes an intervenor and a party to the proceeding.

§1100.73 Participation without intervention. (Rule 73)

In [most certificate and rate proceedings] . . . an appearance may be entered at the hearing without filing a petition in intervention. . . if no affirmative relief is sought, if there is full disclosure of the person or persons on whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

Federal Power Commission

18 C.F.R.

§1.8 Intervention

• • •

(b) Who may petition. A petition to intervene may be filed by any person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. Such right or interest may be:

(1) A right conferred by statute of the United States;

(2) An interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioners may be bound by the Commission's action in the proceeding (the following may have such an interest: consumers served by the applicant, defendant, or respondent; holders of securities of the applicant, defendant, or respondent; and competitors of the applicant, defendant, or respondent).

(3) Any other interest of such nature that petitioner's participation may be in the public interest.

• • •

(f) Notice and action on petitioner

(2) Action on petitions. No petitions to intervene may be filed or will be acted upon during a hearing unless permitted by the Commission after opportunity for all parties to object thereto. Only to avoid detriment to the public interest will any presiding officer tentatively permit participation in a hearing in advance of, and then only subject to, the granting by the Commission of a petition to intervene.

(g) Limitation in hearings. Where there are two or more intervenors having substantially like interests and positions, the Commission or presiding officer may, in order to expedite the hearing, arrange appropriate limitations on the number of attorneys who will be permitted to cross-examine and make and argue motions and objections on behalf of such intervenors.

APPENDIX I

Compilation of State Public Service Commissions' Policies Regarding Filing and Distribution Requirements, Transcripts and Access to Agency Information and Experts; and Those States Where Representation of Consumer Interests is by Other Than Regulatory Agencies *

* Taken from National Ass'n of Regulatory Utility Comm'ners, Annual Report on Utility and Carrier Regulation at 935-37, 751, 803 (1973).

SECTION V

ASSISTANCE TO INTERVENORS

The commissions' policies for making available copies of transcripts, related costs of reproduction and the requirements for filing and distributions by the intervenors is shown in tables 52 and 53. Also shown in table 52 are the commissions which provide assistance to participants in proceedings and allow public access to agency reports, as well as those commissions which make available experts, whose testimony would be helpful to another agency's proceedings.

Forty-two commissions make available copies of the transcripts to the intervenors. The cost of these transcripts vary from $.08, by the page, charged by the FPC to $2.25, by the page, charged by the Iowa State Commerce Commission.

There are twenty-nine commissions which have requirements for filing and distribution by the intervenors which are detailed in table 53.

I-3

Table 52 - ASSISTANCE TO INTERVENORS

STATE	The Commission - Makes available to Intervenors, copies of transcripts	Cost to purchaser: By page	Cost to purchaser: By transcript	Cost to purchaser: Other	Has requirements for filing and distribution by intervenors	Provides duplication facilities	Provides assistance: To participants in proceedings before it or another agency	Provides assistance: When positive it includes advice and help in obtaining information from the Commission files	Allows public access to agency reports	Makes available experts whose testimony would be helpful to another agency's proceeding
FPC	X	.36 32/	.08 33/		X	X	X	X	X	X
FCC	X	34/	34/		X	X	X	X	X	X
ALABAMA	X					X	X	X		
ALASKA	X			1/	2/	X	X	X	X	
ARIZONA	X	.50		.20 3/			X	X		X
ARKANSAS	X	.25			X	X	X	X	X	X
CALIFORNIA	X	.90			X	X	X 4/	X	X	
COLORADO	X 5/	5/				X	X	X	X	X
CONNECTICUT	X	6/	6/	6/		X				
DELAWARE 7/										
DISTRICT OF COLUMBIA	X			8/	X			X	X	
FLORIDA	X	.60			X	X 9/	X	X	X	X
GEORGIA	X	.75				X	X	X	X	X
HAWAII	X	1.75			X	X 10/			X	X
IDAHO					X				X	
ILLINOIS	X	.80 11/			X	X	X	X	X	X
INDIANA		.90			X	X	X	X	X	X
IOWA	X 12/	2.25				X	X	X	X	
KANSAS	X 12/	.85					X	X	X	
KENTUCKY						X	X	X	X	
LOUISIANA	X	.50			X	X	X	X	X	X
MAINE	X	.75			X	X 13/	X	X	X	X 14/
MARYLAND	X	1.10 31/				X	X 15/	X		
MASSACHUSETTS	X 16/						X 17/	X		
MICHIGAN	X			3/	X	X	X	X	X	X
MINNESOTA	X	.65			X	X	X	X	X	
MISSISSIPPI	X					X	X	X	X	X
MISSOURI	X	.30			X	X	X	X	X	X
MONTANA	X 18/	19/	19/	19/	X	X	X	X	X	X
NEBRASKA		.75				X			X	X
NEVADA						X			X	
NEW HAMPSHIRE	X	.35			X	X	X	X	X	
NEW JERSEY	X	1.00			X	X	X	X	X	
NEW MEXICO	X	.75		20/		X	X	X	X	X
NEW YORK	X	.70			X	X	X	X	X	X
NORTH CAROLINA	X	.30	21/		X	X	X	X	X	X
NORTH DAKOTA	22/				X	X	X	X	X	X
OHIO	23/				X				X	
OKLAHOMA 7/										
OREGON							X	X	X	X
PENNSYLVANIA	X	.75			X	X 24/	X	X	X	25/
PUERTO RICO	X	1.00							X	X
RHODE ISLAND	26/				X					
SOUTH CAROLINA	X	.75					X	X	X	X
SOUTH DAKOTA							X	X	X	X
TENNESSEE	X	.75			X	X	X	X	X	X
TEXAS	X	.75				X	X	X	X	X
UTAH	X	.60 27/				X	X	X	X	
VERMONT	X	1.50			X	X	X	X	X	X
VIRGINIA	X	.50	1/		X	X	X	X	X	
VIRGIN ISLANDS	X 12/	10/	6/						X	
WASHINGTON	28/					29/	X	X	X	X
WEST VIRGINIA	X	.95			X	X	X	X	X	X
WISCONSIN	X	8/	8/	8/	X	X	X	X	X	
WYOMING	X 28/	2.00			X	30/	X	X		
JAMAICA	X	.07				X	X	X		

Footnotes - Table 52 - ASSISTANCE TO INTERVENORS 937

1/ Purchase from reporter.
2/ No specific requirements.
3/ Folio.
4/ Not monetary.
5/ Charge is made by reporter, not commission. $1.50 per page for complete transcript or miscellaneous pages. Additional copies at time of original order, 60¢ per page.
6/ Various.
7/ No reply to 1973 survey.
8/ No charge.
9/ $1.00 per page.
10/ At a cost of $.25 per page.
11/ Transcript is available from court reporting firm which is under contract with commission.
12/ No. May be purchased from court reporter.
13/ Cost, 50¢ per page or sheet.
14/ Seldom done, but would do so when required.
15/ Through Peoples Counsel.
16/ Available for examination in docket or proceeding. Copies must be purchased from stenographic firm.
17/ To a limited extent.
18/ Furnished by the Commission Reporter.
19/ Cost not specified.
20/ Purchaser may have transcript reproduced at less cost at a commercial copier.
21/ Minimum, $5.00.
22/ Through and by independent reporter.
23/ They can arrange with reporter.
24/ At specified costs.
25/ Certain records only.
26/ Copies are made available by official court reporter who charges rates customary for court transcripts per pag
27/ Original, $1.20.
28/ Transcripts are available to outside parties for use in the Commission's offices but may not be taken out. Intervenors who require an individual copy arrange to purchase direct from reporting firm.
29/ Charge is made for records reproduced for outside parties.
30/ Limited duplication by State.
31/ This is our cost for two copies. Additional copies beyond first two are 50¢ a page.
32/ Charge made by stenographic firm for delivery within 14 days of request; 83¢ per page for delivery not later than 8:00 a.m. of the following the proceeding; $1.08 per page for delivery by 9:00 a.m. of the day of the proceeding.
33/ Reproduction by commercial copier.
34/ Purchase from reporter: $1.80 per page for one-day service and 10¢ per page for 7-day service.

REPRESENTATION OF CONSUMER INTEREST OTHER THAN BY REGULATORY AGENCY

	Consumer Representative	Government Branch	Annual Budget	No. of Staff Members	Authority Citation
Alabama	Governor's Office of Consumer Protection Attorney General				
Alaska	Attorney General	Dept. of Law	(Not Available)		Sec.42.05.111 of Alaska PUC Act
Arizona	Attorney General				
Arkansas (PSC)	Attorney General				
California	Consumer Protection Agency	Executive	$3 million	1,080	Consumer Affairs Act
Colorado					
Connecticut	Consumer Counsel	Executive	$37,800		Public Act 74-216
Delaware					
D.C.	None				
Florida	Office of Public Counsel	1/		3	Sec.350.061 FS
Georgia	None				
Hawaii					
Idaho	Attorney General				
Illinois	None				
Indiana	Public Counselor	Executive	$140,260	4	Ind.Burns Stat. 54-111
Iowa					
Kansas	Attorney General				
Kentucky	Attorney General	Dept. of Law	None	None	Ky. Rev. Stat.
Louisiana	Governor's Office of Consumer Protection Attorney General				
Maine	None				
Maryland	People's Counsel		$93,000	2 p.t	Md.Code Art. 78
Massachusetts					
Michigan	Attorney General				Act. 232,PA 1919
Minnesota	Attorney General				
Mississippi	Attorney General			3	H.B. 41
Missouri	Public Counsel	Executive	$30,200	2	Ch.386, RS Mo 1969
Montana	Consumer Counsel	Legislative			Const.,Art.XIII, Sec. 2; R.C.M. 1947-Sec.70-701, et seq.
Nebraska	None				
Nevada					
New Hampshire	Attorney General				
New Jersey	Attorney General				N.J.S.A. 48:2-31.1 et seq.
New Mexico (SCC)	Attorney General				
New York	Attorney General 2/				
North Carolina	Attorney General	Executive		5	G.S. 62-20
North Dakota	None				
Ohio	None				
Oklahoma	Consumer Protection Agency Attorney General				
Oregon	None				
Pennsylvania					
Puerto Rico					
Rhode Island					
South Carolina	Attorney General				
South Dakota	Commerce and Consumer Affairs Agency	Executive		4	
Tennessee	Division of Consumer Affairs				
Texas					
Utah	None				
Vermont					
Virginia	Attorney General	Executive	$1,250,000		
Virgin Islands	None				
Washington	Attorney General				
West Virginia	Attorney General	Judicial	$100,000	5	Ch. 46A, W. Va. Code
Wisconsin	None				
Wyoming	None				
Jamaica					

1/ Appointed by Joint Legislative Auditing Committee. 2/ In addition to the Attorney General, New York State has a Consumer Protection Board. By legislation enacted at the 1974 Session of the State Legislature, the Board was authorized to participate in proceedings before the Public Service Commission and to initiate complaints on behalf of consumers. For such purpose the Board was granted an appropriation of $825,000 for staff and expenses.

NOTE: The Office of Consumer Affairs, Department of Health, Education and Welfare, has published a 44-page Directory of State, County and City Government Consumer Offices, DHEW Publication No. (OS) 74-104, U.S. Government Printing Office: 1974 546-476/5016. For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington D.C. 20402. Price: $1.10.

Table 5 - REGULATION OF RATES - MISCELLANEOUS

STATE	Year in which last formal rate case was decided			In formal Commission rate proceedings the consumer interest is usually represented by -				
	Electric	Gas	Telephone	Commission staff	Consumer State Official of State agency	Attorney General	Local units of government	Other
FPC	1972	1973		X	4/	4/	4/	4/
FCC			1967	X 2/				
ALABAMA	1972	1971	1973	X	X	X	X	
ALASKA	1973		1973	X		X	X	X
ARIZONA	1973	1973	1973	X		X	X	X
ARKANSAS	1973	1973	1973	X			X	X
CALIFORNIA	1973	1973	1973	X			X	X
COLORADO	1973	1973	1973	X			X	X 9/
CONNECTICUT	1973	1973	1972	X		X		
DELAWARE 47/								
DISTRICT OF COLUMBIA	1973	1973	1973	X				X 9/
FLORIDA	1973	1973	1973	X		X 5,6/	X 5/	X 5/
GEORGIA	1973	1973	1973	X		X	X	X
HAWAII	1973	1970	1973	X				
IDAHO	1970	1971	1968	X		X	X	
ILLINOIS	1973	1973	1973	X		5/	X	X
INDIANA	1973	1973	1973					X 10/
IOWA	1973	1973	1973	X			X	
KANSAS	1973	1973	1972	X				
KENTUCKY	1973	1973	1973	X	X			
LOUISIANA	1973	1973	1973	X	X	X		
MAINE	1973	1973	1973	X			X	X
MARYLAND	1973	1/	1973	X				X 11/
MASSACHUSETTS	1973	1973	1973	X	X	X		
MICHIGAN	1973	1973	1973	X	X	X	X	X
MINNESOTA			1973			X 7/	X	
MISSISSIPPI			1973	X				X 12/
MISSOURI	1973	1973	1973		X		X	
MONTANA	1971	1973	1968				X	X 14/
NEBRASKA			1973	X				
NEVADA	1973	1973	1973	X	X	X	X	
NEW HAMPSHIRE	1973	1973	1973	X		X		X 15/
NEW JERSEY	1973	1973	1973		X	X	X	X 16/
NEW MEXICO	1973	1973	1973	X		X 4a/	X	X 17/
NEW YORK	1973	1973	1973	X	X	8/	X	X
NORTH CAROLINA	1973	1973	1973	X 3/		X		
NORTH DAKOTA	1973	1973	1973	X			X	
OHIO	1973	1973	1973	X			X	
OKLAHOMA 47/								
OREGON	1973	1973	1973	X		X		
PENNSYLVANIA	1973	1973	1973	X			X	X 18/
PUERTO RICO		1969	1964	X	X			
RHODE ISLAND	1973	1971	1973		X			X 19/
SOUTH CAROLINA	1973	1973	1973	X	X	X	X	X 9/
SOUTH DAKOTA			1968	X				X 14,19/
TENNESSEE	1973	1972	1973	X				
TEXAS		1971		X			X	
UTAH	1973	1972	1973	X		X		20/
VERMONT	1973	1973	1972	X		X		X 10/
VIRGINIA	1973	1973	1973	X		X	X	X
VIRGIN ISLANDS	None	N/A	1972	X				X 9/ 21/
WASHINGTON	1972	1973	1973			X		
WEST VIRGINIA	1973	1973	1973	X			X	X
WISCONSIN	1973	1973	1973	X			X	X
WYOMING	1973	1973	1973	X			X 5/	X 9,18/
JAMAICA			1971	X				X

APPENDIX J

ANNUAL REPORT
OF THE
PUBLIC COUNSELOR
OF INDIANA

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FOR THE PERIOD ENDING

JUNE 30, 1974

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FRANK J. BIDDINGER, PUBLIC COUNSELOR

GENERAL INFORMATION

The office of the Public Counselor was created in 1941 to represent members of the general public in all hearings before the Public Service Commission of Indiana concerning public utility matters, in appeals from the orders of the Public Service Commission of Indiana and in all suits and actions in any court which may involve rates for services, extensions and contracts for service, valuations of utilities, application for authority by utilities to issue securities, application for mergers and sales and in all other proceedings and suits and actions in which the subject matter of the action affects the patrons of any public utility or the public. The major duty of the Public Counselor is to represent the public in Public Service Commission cases wherein utilities are seeking rate increases.

Indiana Bell's full rate proceeding which was filed in fiscal 1972-73, continued into this year along with Bell's Directory Assistance. Outside experts were retained in both of these cases. Other major rate cases included were Indianapolis Power and Light Company - Steam, Richmond Water, Indianapolis Water, Kokomo Gas, Kokomo Water, Public Telephone, West Lafayette Water, Painted Hills Water, Northern Indiana Public Service Company - Electric and Muncie Water.

Major hearings were conducted with various railroads requests to close grade crossings. This office took a strong stand against these closings in general. This office also

thought that it was inappropriate for the Public Service Commission to close any public streets and highways.

The office of the Public Counselor is governed by one act, recited in Burns Indiana Statutes Annotated, Section 54-111.

In performing its functions, the office of the Public Counselor conducts investigations of matters over which it has jurisdiction principally in cases involving electricity, gas, sewage, railroad, telephone and water cases. For the most part, these investigations are conducted by the staff of the Public Service Commission of Indiana at times in cooperation with and at times indirectly under the direction of the Public Counselor. From time to time, field investigations are conducted by attorneys on the staff of the Public Counselor. Independent expert accountants, engineers and economists may be hired by the office of the Public Counselor utilizing funds in the budget of this department approved by the office of the Governor to make studies and appear in cases in which the public had indicated a great deal of interest and which appear to be controversial and strongly contested. Money from the unappropriated General Fund may be used for such outside experts with the approval of the Governor. Governor Bowen approved the expenditure of up to $85,000.00 to retain outside experts to fight the latest Indiana Bell request for increased exchange rates which continued into this fiscal year, as well as funds for similar expenditures in

in regard to Indiana Bell's directory assistance case and Public Telephone's petition for a general rate increase. The firm of Troupe Kehoe Whiteaker & Kent was retained to assist the Office of the Public Counselor in these cases. Funds are not available for the full time employment of such experts.

During fiscal 1973-74 forty-eight (48) of Indiana's Rural Electric Membership Cooperatives (REMCs) petitioned the Commission for upward adjustments to their retail electric rates. A large number of these were on an emergency basis due to wholesale power costs charged the REMCs by Public Service Corporation of Indiana, Indiana and Michigan and Indiana Statewide Rural Electric Cooperative. Similar mass filings and multiple hearings may be anticipated should the wholesale cost of purchased power continue to increase, as permitted by the authority of the FPC and PSCI.

After Public Counselor investigations which relate to the analysis of engineering and accounting data, research of the law involved, and personal contacts with the rate payers and utilities involved, the members of the Public Counselor's staff appear in such proceedings as come before the Commission for and on behalf of such patrons and rate payers. It is again recommended that the Office of the Public Counselor have a number of staff of accountants, engineers and rate experts to independently analyze the most important of the rate cases.

All members of the staff, except the secretary, are attorneys. Hearings at which these attorneys appear are adversary

in nature with the Public Service Commission of Indiana acting as a quasi-judicial fact finding body.

The office of the Public Counselor is now organized with the Public Counselor and two assistants. All of the secretarial work of this office is performed by one secretary who also handles all of the myriad of duties required by the office as far as bookkeeping, personnel and payroll duties.

This office is also concerned with matters affecting the operations of railroads in the State of Indiana. In all cases where the railroads are seeking to reduce their service to the general public by elimination of freight stations, etc., it is necessary that they petition the Public Service Commission for approval. In such cases, an attorney of the staff of the Public Counselor appears to represent the public interest at these hearings. The office of the Public Counselor is also involved in all cases in which crossing signals or other safety devices are sought for those railroad crossings that appear to be extra hazardous in nature. In these cases, the office of the Public Counselor works in cooperation with local counsel in order to get the railroads to install crossing safety devices to protect the members of the riding public. With the constantly changing highways, the additions of new businesses, and the increase in the size of freight trains, this area of activity remains at a constant high volume.

Due to a U.S. Secretary of Transportation Report of February 1, 1974, Congress recommended that in excess of 37%

of existing railroad track in the State of Indiana be abandoned. This office took a strong stand opposing this track abandonment and the Public Counselor testified before the ICC public hearing in the Spring of 1974. The Public Counselor is a member of the Governor's Committee to advise the Governor on the proper steps to support the railroad system. All passenger traffic in Indiana except for commuter lines, is now the responsibility of Amtrack and, therefore, not subject to action by this office. The Public Counselor is ready to fight further efforts by South Shore or other commuter lines to eliminate railroad passenger service in Indiana.

During the course of the year numerous customers of Utilities had occasions to contact the office of the Public Counselor. These people were always informed as to their rights and advised by the office as how to settle their problems. In some cases, the utility was contacted by the office and in some cases the matter was referred to the engineering staff of the Public Service Commission of Indiana for negotiations and settlement. The office always welcomes contacts from members of the public and attempts to assist these people to the best of its ability. The Public Counselor and his staff are always ready to appear before members of the public and discuss with them any problems they may have with regard to utilities and railroads in the State of Indiana.

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STATISTICAL DATA

Number of Employees:	Four
Number of Vehicles Operated:	None
Number of Persons Served:	General Public
OTHER: *Amount of charges made to Public Utilities during the fiscal year 1973-1974:	$1,835.00

APPEARANCES

Electric	88
Steam	11
Water	92
Sewage	30
Gas	20
Electric and Gas	5
Telephone	97
Railroad	89
Promulgation of Rules	2
Total	434

Field Hearings

Telephone	9
Water	1
Electric	1
I.C.C.	1

(*) The Indiana State Legislature enacted a law that after March 14, 1969 no charges would be assessed by the Public Counselor against the Utilities. Charges are, however, being assessed by the Public Service Commission for Public Counselor services in the municipal causes. Charges are being assessed for Public Counselor Service against the Railroads only when they are the Petitioner.

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FINANCIAL REPORT

MINOR OBJECT EXPENDITURES FOR FISCAL YEAR 1973-1974:

	Classification	Expenditures
Salaries and Wages	101	$ 54,316.10
Fire Marshall Reimbursement	189	21,765.86
*Personal Services-Not Class ID # Required	198	45,204.72
Postage	201	155.64
Dues and Subscriptions	206	922.33
Local Telephone Service	220	945.25
Long Distance	221	278.54
Printing	302	31.14
Rental of Office Equipment	312	35.28
Office Equipment Repairs	339	33.00
Stationery and Office Supplies	401	81.75
In-State Travel - Per Diem	815	60.00
In-State Travel - Transportation	816	111.56
Out-of-State Travel	925	346.26
		$124,287.43

(*) Expert Witnesses Fees

MAJOR OBJECT EXPENDITURES FOR FISCAL YEAR 1973-1974:

	Classification	Expenditures
Personal Services	100	$121,286.68
Services Other Than Personal	200	2,301.76
Services By Contract and N.O.C.	300	99.42
Materials and Supplies	400	81.75
In-State Travel	800	171.56
Out-Of-State Travel	900	346.26
		$124,287.43

Total Appropriations

Personal Services	$121,286.68
Miscellaneous Appropriations	3,000.75
	$124,287.43

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APPENDIX K

MONTANA CONSUMER COUNSEL
330 FULLER AVENUE
HELENA, MONTANA 59601

TELEPHONE (406) 449-2771

May 19, 1975

Mr. Tersh Boasberg
Boasberg, Hewes, Klores & Kass
Attorneys at Law
1225 Nineteenth Street NW
Washington, D.C. 20036

Dear Mr. Boasberg:

In response to your letter of May 16, 1975 inspired by a rulemaking proceeding contemplated by the United States Nuclear Regulatory Commission, I submit the following answers and enclosures to questions for public counsel offices:

1. Please send us the governing statute creating your office and indicate when your agency actually became operative.

   Copies of constitutional provisions and statutes are enclosed.

2. Is it possible to get a general idea of your annual budget and how the budget is approximately broken down into the following three categories:
   a. Salaries for attorneys
   b. Overhead (including paraprofessionals, secretaries, utilities, rent, etc.)
   c. Court or administrative costs (expert witness fees, filing, reproduction, discovery, transcripts, etc.)

   Because this office is still in its formative stages and is addressing itself to individual cases as they arise, the following breakdown of our annual budget does not, in my opinion, reflect what the breakdown of the budget will be once conditions have somewhat stabilized and the staff has been fully implemented:

a. Salaries for attorneys:	Consumer Counsel	23,000 + benefits
	Contracted Attorney	18,000
b. Overhead:	Salary for Transportation Cost Analyst	20,000 + benefits
	Salary for Secretary	9,000 + benefits
	General Office Operating	14,100
c. Court or administrative costs, including travel:		32,000

Based upon certain assumptions, in my opinion, in approximately two years, the budget will be:

$25,000 - Consumer Counsel
$15,000 - second attorney
$23,000 - two overhead men *
$11,000 - secretary
(15%) - benefits

There may be one-time expenditures for expert witness fees in cases involving major local utilities. As a stab in the dark, I would estimate $25,000 per case.

3. Could you give us a brief overview of your operating history, such as how many cases have been handled each year? In your larger agency proceedings, such as ratemaking cases (if any), is it possible to put a dollar figure on how much time the office has spent on each matter. In other words, we're interested in approximately how much it costs to handle a major agency intervention.

We enclose a copy of our office's annual reports for the years 1973 and 1974. It is not possible to quote reliable dollar figures on how much time this office has spent on larger agency proceedings. We view each such case as having the potential of going to the U.S. Supreme Court. We have had to hire the services of outside counsel and experts on occasions and on a very selective basis with an eye on our appropriation for the year. It is possible that to do an adequate job with counsel and witnesses of the same caliber as those relied upon by the larger regulated companies could cost upwards to $100,000 per case. We do what we can with the resources available.

4. Do you have a written report on your operations? Or a summary of achievements and/or failures?

See our annual reports.

5. Could you discuss, briefly, the question of responsibility and independence; i.e., how is your Director chosen; to whom is he responsible; are there any particular statutory or practical measures which safeguard his independence?

As appears from the Montana Consumer Counsel Act, the Consumer Counsel is appointed by a bi-partisan committee of legislators to whom he is responsible. In my opinion, the real"safeguard" is against abuse of authority and mischief exercised by the party holding office of Consumer Counsel. With respect to day-to-day business, it obviously is impractical to burden the committee with such matters. On the other hand. decisions when to litigate, what tactics to employ involving major utilities, and how to implement the office should be made with the prior approval of the governing committee. I personally feel that I have a great deal of independence in handling day-to-day functions of the office. Any time I feel my governing committee is too repressive, I have the option to resign.

* Total of $46,000 for two overhead transportation and utilities specialists.

6. How do you obtain expert testimony? Do you have access to state agency technical experts? If so, is there any conflict between the agency who employs the technical experts and your own office? Has it been difficult to hire expert consultants? What rates of pay can you provide?

Expert testimony in utility matters presently is obtained on an occasional basis. We have a directory of experts throughout the country which is expanding with our experience and exposure. We have hired a motor carrier cost expert on a salaried basis. We cooperate with the transportation specialist of the Montana Department of Agriculture in railroad rate matters, we consult with the faculty of the state university system, the Aeronotics Division and the Investment Division of the administrative branch of government and the staff of the state regulatory agency. Since we are sensitive to the appearance of conflict, there has been no recognizable conflict to date.

It has been difficult to hire expert consultants at this time because of the excessive volume of rate cases across the country. When we have been able to hire such consultants, we have paid them in the neighborhood of $50 per hour plus actual expenses.

7. How do you choose which cases to enter, or which clients to represent?

a. Is there any established criteria for deciding which cases or agency proceedings are more important than others?

During our formative stages, we have attempted to ascertain whether there is actual, identifiable public resistance to the relief sought in a particular case; whether there is a case of public concern as contrasted to a competitive matter between regulated companies; whether there is adequate cost justification of record in the regulatory proceedings and whether there are any fair trial-type procedural implications.

b. Is there any indigency factor which first has to be met before you will choose to represent an interest?

The only indigency factor considered is that we try to avoid taking part in cases where the shipper or other non-regulated business implicated is big enough to take care of itself.

c. Do you also represent private persons, such as citizens, or do you basically represent the "public interest" as your agency determines it?

We basically represent public interests and avoid what would otherwise be attorney fee generating matters involving private persons. There will be statutory authority to represent private persons in some cases of utility service termination without hearing as of July 1, 1975. Little or no occasion to invoke this authority is anticipated.

d. How do you allocate your limited resources among proceedings or cases; i.e., first-come, first-serve?

We take our cases as they arise. We conduct investigation of both justifications of record and of public concern. Obviously, cases involving more money and more detail take more time to be heard and expend more of our resources. On the other hand, it is the policy of our governing committee that there are no second-class consumers.

8. Could you briefly advise as to whether or not you believe paying for a public counsel office is better than using the same amount of funds to reimburse costs and attorneys' fees for intervenors? What do you feel about a system which pays for both private intervention as well as for establishing an office of public counsel?

Not having had any experience with using public funds to reimburse costs and attorney fees for intervenors, I hesitate to give an opinion. However, the following observations occur to me:

If a limited amount of public funds were available, the race for such funds would go to the swift and some worthy applicants might be left out in the cold.

A public counsel office operating in apparent perpetuity would have more staying power in pursuing cases at issue to their appropriate end, whereas private counsel's enthusiasm might wain if the source of attorney fees dried up.

Public counsel would be better geared to monitor <u>all</u> transportation and utility applications.

A public counsel office likely would have salaried experts available to participate in <u>all</u> cases.

A public counsel office operating with salaried experts likely would not have at its disposal all of the expert testimony that a major utility or transportation company might have. It would then either lack something in its presentation or be obliged to seek emergency appropriations from the legislature for expert witnesses.

In my opinion, a system which pays for both private intervention and an office of public counsel could be ideal, if adequately funded.

9. Have you had any luck in getting donated legal services by the Bar, or other legal groups?

We have not sought donated legal services from the Bar or any other legal group.

10. Can you indicate how your efforts have been received by prospective citizen groups or "public interest" intervenors? By state agency boards or regulated companies?

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Public apathy prevails. With the exception of some local citizen groups representing low-income and elderly people, chambers of commerce of small communities, and one citizen activist group, there has been no reception one way or the other. The local groups cooperate and seem to be very appreciative. We report annually to the activist group and have in the past received expressions of support for more realistic appropriations.

Counsel for regulated companies have been cooperative at arms length in our efforts to assure fair, open and informative hearings. Some railroads and trucking companies have been reluctant to respond to discovery proceedings or otherwise make cost justification available in advance of hearing.

For some reason, the greatest resistance appears to come from high levels of the staff of the state regulatory agency and some agency members. Most of the salaried staff of the state agency is cooperative, as are some high-level administrators and some commissioners. It apparently depends upon the individual, his public identity problems, his political philosophy and his level of inefficiency.

Respectfully,

Geoffrey L. Brazier

Geoffrey L. Brazier
Montana Consumer Counsel

GLB/cl
Enclosures

ANNUAL REPORT OF THE MONTANA CONSUMER COUNSEL TO THE MONTANA LEGISLATIVE CONSUMER COMMITTEE FOR THE YEAR 1974

The Montana Consumer Counsel herewith and hereby respectfully submits his annual report for the year 1974 pursuant to the provisions of R.C.M. 1947, 70-707(7).

CREATION OF OFFICE

The Montana Consumer Counsel is a creature of the Montana Constitution of 1972, which mandated the legislature to provide for such an office to represent consumer interests in hearings before the Montana Public Service Commission or any other successor agency. The constitution also spoke to the funding of the office.

At the first legislative session following the adoption of the Montana Constitution of 1972, the legislature considered alternatives for implementing the constitutional mandate, and enacted what is now signed into law as Chapter 65 of the Laws of 1972 as the most acceptable alternative. In so doing, the legislature elected to implement the office as an agency of the Legislative Branch of government answerable to a committee of legislators called the Legislative Consumer Committee composed of one member of each major political party in each house of the legislature, which has authority to hire the Consumer Counsel and approve the staff structure. The committee has exerted authority over projects and priorities of the office, major equipment purchases, leasing of office space, decisions to litigate and decisions to participate in proceedings conducted by federal regulatory agencies.

In 1974, the Consumer Counsel Act was amended to lend the Legislative Consumer Committee more flexibility regarding meeting dates, to give the Consumer Counsel more discretion over what administrative matters he should participate in (the original Act mandated the Consumer Counsel to attend all proceedings conducted by the Public Service Commission), to participate in proceedings before both state and

federal regulatory agencies and courts, and to exercise discovery powers provided by the Montana Administrative Procedure Act and the Montana Rules of Civil Procedure.

Under the new Constitution, the Montana Administrative Procedure Act and the Montana Consumer Counsel Act, the Montana Consumer Counsel, subject to the approval of the Legislative Consumer Committee, now has authority to proceed through the executive branch of state and federal government, the judicial branch of state and federal government and the legislative branch of state government to defend and advocate the interests of the transportation and utility consumers of the State of Montana or substantial elements thereof.

The Montana Consumer Counsel is the only such agency enjoying constitutional status. It is also the only such agency functioning as an agency of the legislative branch of government. Recent studies disclose that there are at least seven such agencies executing similar functions in sister states and three consumer-type agencies functioning in the federal government. Many other sister states make an effort to advocate consumer interests in regulatory matters, although no specific consumer or public counsel office has been created. Known alternative approaches to the function are appointment of an attorney for the public in major utility rate matters by the regulatory agency; designation of a member of the state attorney general's staff to represent the interests of the consuming public in major regulatory matters; appointment of a consumer counsel by the governor to operate as an agency of the executive branch of state government; and representing consumer interests in utility rate matters by an attorney for the state consumer protection office. Some questions of conflict have arisen in sister states because the attorney general's office sometimes provides attorneys for both the regulatory agency and the consumers, because the consumer counsel and the member of the regulatory commission are sometimes both appointed by the governor, and because the interrelationship between the offices discourages the consumers' attorney from appealing decisions of the regulatory agency if such action would otherwise be indicated. Because of Montana's unique arrangement

for the regulatory process, those criticisms do not pertain.

IMPLEMENTATION OF OFFICE

Full implementation of the office and staff and full, efficient execution of the functions and powers of the office have not as yet been achieved. The office is still in its formative stages, and it appears likely that its staff structure and development of skills will evolve for some time to come. The position of Consumer Counsel was filled by the hiring of Geoffrey L. Brazier, an attorney from Helena, Montana, who assumed his position on August 1, 1973 and proceeded deliberately to hire a staff.

During the first four months of its existence, the office was housed in a legislative committee room in the State Capitol Building, but increasing demands by governmental agencies for space and the approach of a convened session of the legislature necessitated a move to facilities elsewhere in the city of Helena. It is a stated long-term priority of the Department of Administration that the permanent office of Consumer Counsel ultimately be housed in the State Capitol Building. The Department of Administration has established the completion and occupation of an additional wing on the Mitchell Building in the Capitol complex as the point of departure for returning the office of Consumer Counsel to the State Capitol Building, where it will have ready access to the state law library and other governmental resources, and where legislators will have ready access to it. For the time being, the Consumer Counsel is renting space at 330 Fuller Avenue, Helena, Montana.

A priority in the implementation of the office was and is the identification and hiring of experts in the fields of utility and transportation accounting, rate-making, and cost analysis. Toward this purpose, the committee and Counsel were fortunate enough to hire the services of Mr. Patrick F. Flaherty formerly of Washington, D.C. as a transportation cost expert. Mr. Flaherty's background includes extensive experience with the Bulk Carrier Conference, Inc. of Arlington, Virginia;

John C. McWilliams Transportation Consulting; and the American Trucking Association. He was selected from among five candidates screened for personal interviews out of over 20 applicants for the position. Mr. Flaherty commenced employment in September, 1974 and his expertise appears to have had an immediate impact upon the transportation regulatory field at both the state and federal level.

The Committee and Counsel also were recently privileged to retain the services of William M. Johnson, of Helena, Montana, as a utility cost and rate expert. Mr. Johnson for many years was the head of the utility division of the Montana Department of Public Service Regulation, his employment terminating in the spring of 1974 upon advice of his physician. Mr. Johnson's return to health and his availability as a resource person came to the attention of the Consumer Counsel in November, 1974 and an agreement for the hiring of his services satisfactory to both parties was negotiated shortly thereafter. Mr. Johnson's grasp of the subject matter and his knowledge of the history of regulation of all regulated utilities in the State of Montana have resulted in immediate contributions to the functions and effectiveness of the office and the regulatory process and promise to be invaluable to the Consumer Counsel and the Public Service Commission for the foreseeable future.

We have also enjoyed the services of a legal secretary with background in regulatory matters who understands the scheme of things and the words of art employed in the field.

Under statutory authority, the office has the option of hiring other help as the occasion may arise and finances of the office permit. In addition to the foregoing experts, the Consumer Counsel has made extensive use of the services of Mr. William E. O'Leary, of Helena, Montana, who was the attorney for the Public Service Commission for a period of approximately ten years. Mr. O'Leary's services are confined to railroad and utility matters. He anchored the presentation of the consumers' case in a recent matter involving a major utility at both the regulatory commission and district court levels.

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The office has also made use of the knowledge and ability of a member of the Carroll College faculty in the Business Department and three first-year law students from the University of Montana Law School in Missoula. These hirings were on a one-time only basis. It is not expected that either practice will continue in the future, although it is entirely possible that services of individuals, particularly experts, will be hired on an occasional basis as circumstances dictate. In this respect, the office has twice had occasion to hire the services of Mr. George Hess of Minneapolis, Minnesota, a nationally recognized utility rate expert.

The services of Montana Quality Commodities, Inc., of 121 Third Street South, Glasgow, Montana, were hired on a one-time only basis to make the fact-finding study and report contemplated by Senate Joint Resolution 59 of the second regular session of the Montana Legislature in 1974.

Attorneys and cost and regulatory experts in the Washington, D.C. area who would be available for hire to assist in presenting cases before the Interstate Commerce Commission and federal courts under appropriate circumstances have been identified and contacted, as have consumer counsels of sister states. Their resources have been pledged for appropriate cases.

In addition to the foregoing, the office has explored the availability of other employees of state government to assist on appropriate occasions and has cooperated with the transportation specialist of the State Department of Agriculture, Mr. Gene Carroll, in major railroad rate cases conducted before the Montana Public Service Commission and the Interstate Commerce Commission. It has also on occasion joined with members of Montana's congressional delegation and the Public Service Commission in participating in rate matters coming before the Interstate Commerce Commission.

ACQUISITION OF CAPITAL EQUIPMENT

During the year 1973, the office made what will probably be its most extensive expenditure for capital equipment.

Upon the hiring of Mr. Flaherty, purchases of additional shelf space and dictating equipment were made.

Perhaps the most extensive expenditures for office use were in the acquisition of technical publications to strengthen the library facilities of the office. No particular expenditures for capital equipment or library are anticipated at this time. It is entirely possible that the biggest expenditure for the office's benefit in the foreseeable future will be the cost of moving the office back to the State Capitol Building. This expenditure could well be offset by savings in copying equipment and services, since central copying equipment will be available in the State Capitol Building on a metered basis, and by reduced rent.

EXPENDITURES

Functions of the office are financed by fees charged against the gross operating revenues of all companies regulated by the Public Service Commission. This approach to financing is sanctioned by both the Constitution and statutes. The legislature appropriated $80,000 per year for the functions of the office for the first biennium of its existence.

The rate of the fee charged is computed by the Department of Revenue based upon appropriations to the office of Consumer Counsel and total gross operating revenues of all regulated companies.

Due to late implementation of the office, expenditures for the first year of the biennium were substantially less than amounts appropriated. Representatives of the Department of Administration and the Department of Revenue advised that funds unexpended during the first year of the biennium could be expended during the second year of the biennium. With this rare luxury in mind, the office felt at liberty to underwrite the expense of the study required by Senate Joint Resolution 59 and hire the services of law students for the summer, as well as pay the expense of travel of applicants for the job of transportation cost analyst to interviews in Helena

and the expense of moving the successful applicant and his family to Helena. All of these expenditures were on a one-time only basis, and no similar experiences are anticipated in the foreseeable future. An additional unanticipated expense is that for copies of transcripts of proceedings before the Public Service Commission, an item which could be a continuing one of a substantial nature.

Because of the foregoing and because of the unusual but necessary expenditures for professional expert witnesses and attorneys to represent the office and consumers in the recent application by the Montana Power Company to raise its rates for natural gas service, expenditures for the second year of the biennium are running substantially ahead of amounts appropriated and are anticipated to bring combined expenditures for the two years of the biennium up to total amounts appropriated for those two years.

The Legislative Consumer Committee has been regularly favored with copies of computer printouts supplied by the Department of Administration showing the current financial posture of the office, with updated comparisons of anticipated and actual expenditures for the operations of the office. As supplementary material, the Consumer Counsel herewith submits the following summary of expenditures of the office for the months of January through November, 1974 inclusive.

Salaries	$35,155.75
Other Compensation	1,325.00
Benefits	3,601.26
Contracted Services	34,384.05
Supplies	2,115.71
Communications and Transportation	1,551.97
Travel	5,139.11
Rent	5,500.00
Other Expenses	1,239.63
Equipment	4,455.35
	$94,517.83

Based upon experience to date, and in contemplation of current and prospective salaries and retainer fees of permanent staff, as-well-as projections for hired services of other attorneys and professional e pert witnesses in appropriate cases, costs of transcripts of proceedings before the Public Service Commission, and travel involving discovery and litigation of major regulated company cases at both the state and federal levels, it is anticipated that this office will require a substantially increased appropriation to function up to the standards of the past year,without any consideration given to expanding the functions or subjects within which the office would participate. The variable over which there is no control and the extent of which there is no way of anticipating is the requirement for expert witness fees in major utility rate cases. We have been advised that in one recent utility rate case in Montana the fee of a cost-of-money expert witness for the regulated utility was $50,000. Since the customers are paying for such witnesses for the utility, it appears reasonable to ask that customers have the same quality of witnesses available to present their side of the case.

CONSUMER COMPLAINTS

The title of the office is "Consumer Counsel". It is taken from language in the Constitution. This has lead to the assumption on the part of many people that the functions of this office include attending to problems of the classic retail consumer nature. Quite predictably, the office has had numerous occasions to correct the mistaken assumptions and refer the complaining party to the Consumer Affairs Division of the State Department of Business Regulation. No count was kept of the actual number of the referrals, but it is the impression of the staff that at least two referrals a week have been made.

In addition to referrals, this office has received and handled 75 complaints relating to matters within the regulatory field during the year. Subjects of complaint have included motor carrier damage claims, fr eight delays, water meter problems, water use imitations, estimated utility bills, deposits required by

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utilities and the merits of authorizing United Parcel Service to do business in the State of Montana. Many of the utility-type complaints were handled in concert with the administrator of the utility division of the Public Service Commission.

Experience in handling complaints relating to loss and damage claims lead this office to successfully advocate an amendment to R.C.M. 1947, 8-812 relating to liability of inland carriers for loss during the 1974 session of the legislature.

LITIGATION

There is a distinct probability that by the end of 1974 the Consumer Counsel will have indulged in more litigation than he will in any future year. There are five cases pending in the District Court of Lewis and Clark County and there is a possibility that authority will be sought to file another action before the end of the year.

Most cases involve the question of whether constitutional bill of rights protections and the Montana Administrative Procedure Act apply to proceedings conducted by the Montana Public Service Commission. To date there appears to be a great deal of reluctance on the part of the incumbent Commission and some members of its staff to give cognizance to the Montana Administrative Procedure Act and effect to the citizens' right of participation and right to know articulated in Sections 8 and 9 of Article II of the Montana Constitution of 1972. The cases litigated by no means reflect the incidence in which the Commission's failure to embrace the constitutional and statutory safeguards was made an issue. The cases involve either classic incidents in which issues are clearly defined or substantial amounts of money to consumers are involved. Every case has the potential of resulting in a judgment clarifying the applicable substantive or procedural law. Two cases invoke issues of the sufficiency of justification submitted for the relief applied for. One case involves an issue whether the Commission can authorize the closing of a railroad station located in a town which is a county seat or has over 1,000 population in

view of R.C.M. 1947, 72-627.

The litigation involving the Montana Power Company involved approximately $12 million a year to Montana consumers, and at one stage of the litigation, issues were injected which had the potential of raising the cost to consumers to over $25 million a year. Cases of that magnitude obviously require added emphasis and increased detail. It is the position of the Consumer Counsel and associated counsel that issues raised are of significance. In addition to emphasizing the fair hearing aspects of the Commission's proceedings under the guidelines of the Montana Administrative Procedure Act and the Commission's own rules of practice adopted pursuant thereto, the constitutionality of the automatic adjustment clause approach to utility rate regulation was challenged. Issue was also taken whether certain increased costs of Montana natural gas were reasonable and prudent under the circumstances and whether they resulted in utility service "used and useful" to Montana consumers. That particular case generated more publicity than any others involving the office. As of this writing, it has not been decided by the district court.

The first case filed by the Consumer Counsel in the year 1974 was from a motor carrier rate increase hearing. The main issue raised was whether jurisdictional error occured because the carrier failed to file tariff sheets with its initial application as expressly required by applicable statutes and whether prejudicial error occured when the Commission made an order not supported by findings and conclusions and failed to notify interested parties of its decision, which came to the attention of the Consumer Counsel four months after the order was made. In layman's terms, the issues are whether the express provisions of the Motor Carrier Act and the Administrative Procedure Act mean anything. If they do not, the legislature should be advised of that circumstance.

One of the side aspects of that case is that it has been pending for many months awaiting the filing of transcript of the administrative hearings by the court reporter for the Commission. This experience is similar to experiences in another

case and suggests that, because of the delay, the carrier involved in the particular hearing under litigation has the advantage because the issues will be stale by the time the transcript of proceedings is filed. For example, in this particular case, the issue as to the applicability of the Administrative Procedure Act likely will be decided in the Montana Power Company case under litigation which was filed with the court some six months after the motor carrier case.

Another case involving the Consumer Counsel was one in which he intervened on behalf of shippers and consumers in the Philipsburg area with respect to propriety of proceedings leading to the transfer of major motor carrier authority. In that case, it was the contention of the Consumer Counsel that license transfers are not proper unless the consuming public is given notice and an opportunity for hearing before approval of the proposed transfer. It has come to the attention of this office that its contentions have considerable merit, because there have been at least five (5) transfers of major operating authority in the recent years without such circumspection. The transportation service in many cases has declined afterwards. This suggests the conclusions that there has been speculation with respect to operating authorities and that there hasn't been enough attention given to safeguarding the shipping public against the loss of transportation service as a result of such transfers.

The Consumer Counsel has filed a Petition for Judicial Review of an order of the Commission authorizing a railroad station closing in Boulder. One issue in the case is the constitutionality and applicability of R.C.M. 1947, 72-627 to station closings in county seats and in cities and towns having a population of over 1,000. An added issue is the propriety of justification offered for closing the facilities by the rail carrier.

The Montana Consumer Counsel has also requested its governing committee for authority to litigate the question whether the Montana Administrative Procedure Act and the new constitutional provisions repeal procedural guidelines set forth in the

Public Utilities Act with respect to authorizing regulated utilities to raise rates to its customers without notice and hearing. This seems basic. If the Commission can take such action, then the Montana Administrative Procedure Act means nothing. That circumstance should be called to the attention of the legislature so that it can consider the merits of taking remedial action.

As of this writing, the Montana Consumer Counsel has also filed a request for a rehearing in a case in which the Commission not only reversed itself and granted a rate increase to a tariff bureau, but in so doing, changed rates involving four (4) carriers operating under tariffs that were never a part of the hearing and considered evidence ex parte without giving the Consumer Counsel or other interested persons an opportunity to participate and challenge that evidence. Moreover, the circumstances suggest there may be an issue regarding propriety of the existence of tariff bureaus under the Montana law. The Commission has not deliberated on the merits of the request for rehearing. It is assumed that the request will be denied, in which event authority from the Committee to challenge the propriety of the Commission's action will be requested.

ADMINISTRATIVE HEARINGS

Prior to July 1, 1974, under statutory mandate, it was incumbent upon the Consumer Counsel to attend all hearings conducted by the Commission. The statutory mandate proved to be self-defeating, because its effect was to burden the Consumer Counsel with attending many hearings involving minor motor carrier authorities necessitating the expenditure of time and travel money to observe proceedings which were almost perfunctory in nature, such as granting authority to haul garbage to a sanitary land fill dump in some small community. Experience also taught that the subject matter is in a competitive field and that where competition is truly involved, the competing carriers hire the services of counsel who ask the same questions on cross-examination that the Consumer Counsel would otherwise be inspired to ask.

Although all applications made to the Commission for affirmative relief that come to the attention of the Consumer Counsel are evaluated and monitored, the Counsel has tended to refrain from involvement in cases related to applications for motor carrier authority, applications for authority to increase the water rates in small communities and applications to increase rates for pipeline carriers.

The administrator of the utility division of the Commission has been most cooperative in exploring procedures whereby the Consumer Counsel may be made aware of all applications for affirmative relief that are assigned to the utility division, whereas the same degree of cooperation has not pertained with respect to transportation administrators for the Commission. At any rate, this office is pursuing internal cooperative procedures whereby all regulatory matters that are filed with the Commission come to the attention of the Consumer Counsel.

With respect to proceedings before federal agencies, both the Federal Power Commission and the ICC have been requested to put this office on the mailing list to receive notice of all matters of interest to Montana consumers. The Federal Register which contains notices and orders issued by federal regulatory agencies has been subscribed to. The effectiveness of the office in monitoring such proceedings is improving and lines of communication with other parties who monitor such activities have been established.

Emphasis presently is placed upon proceedings before the Public Service Commission relating to the public utility rate increases and proposed carrier rate increases, as well as proceedings before the Interstate Commerce Commission relating to proposed carrier rate increases.

During the year 1974 the Consumer Counsel attended and participated in twenty-two (22) proceedings involving motor carrier authorities, eleven (11) proceedings involving proposed motor carrier rate increases, thirteen (13) proceedings involving proposed railroad facility abandonments, and two (2) proceedings involving utility

rate increases. It also attended one (1) proceeding before the Federal Power Commission involving proposed authority of a utility to extend its facilities into Montana.

The Consumer Counsel participated in writing in twenty-eight (28) proceedings involving applications for carrier authority, twenty-five (25) proceedings involving applications for authority to raise motor carrier rates, six (6) proceedings involving applications for authority to increase rail rates, three (3) proceedings for authority to abandon rail carrier facilities and three (3) proceedings involving applications for authority to modify utility rates. It also participated in writing in three (3) proceedings before the Interstate Commerce Commission involving applications for motor carrier authority and six (6) proceedings involving applications for authority to raise rail rates.

Litigation and handling of complaints are detailed elsewhere in this narrative, as are references to cooperation with other state employees and offices.

A hasty calculation of the involvements of the Consumer Counsel in administrative hearings and litigation discloses that the facts support a conclusion that the Consumer Counsel has participated in transportation and utility proceedings resulting in forestalling of the imposition of rates in excess of $600,000 during the year 1974 in transportation matters and in excess of $2,650,304 in utility matters.

REMEDIAL LEGISLATION

Under the provisions of Section 7(4) of the Act, the Consumer Counsel has authority to recommend remedial legislation to the Legislative Consumer Committee. In actual practice, the subjects of legislation are suggested by both the Committee and Counsel. The discretion reposes with the Committee what proposed bills should actually be introduced and carried. The facts that the terms of all Committee members expire with the convening of the new legislature and that only one member of the Committee will be eligible to be a member of the next Legislative Consumer Committee

bearing upon the inclinations of the Committee to advocate remedial legislation.

Serious deliberation with respect to the relative merits of proposed bills drafted pursuant to suggestion of all involved throughout the year was had at the Committee's final formal meeting on December 20. Most bills meriting consideration had been distributed to the Committee members in advance of the meeting. Minutes of the December 20, 1974 meeting of the Legislative Consumer Committee reflect the fact that the Committee felt it adviseable to wait and see how the new Public Service Commission handles its regulatory business and avoid burdening the legislative process when cooperation at the administrative level might achieve the desired results quicker.

The Consumer Counsel and Committee member, Representative Quilici, were authorized to prepare for submittal a resolution calling for a study of the rates of return of Montana motor carriers and a bill relating to the liability of inland motor carriers in Montana for loss of and damage to commodities in shipment by amending R.C.M. 1947, 8-812.

Respectfully submitted,

Geoffrey L. Brazier

Geoffrey L. Brazier
Montana Consumer Counsel

Dated

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APPENDIX L

CSA Legal Services Back-Up Centers

Name of Center	Annualized Funding Levels
1. National Juvenile Law Center St. Louis, Mo. (affiliated with St. Louis School of Law	$ 198,000
2. Migrant Legal Action Program, Inc. Washington, D.C.	370,000
3. Youth Law Center San Francisco, Calif.	72,000
4. Center on Social Welfare Policy and Law, Inc. New York, New York (affiliated with Columbia University, until Dec. 1971)	395,000
5. Legal Action Support Project Bureau of Social Science Research Washington, D.C.	208,951
6. National Clearinghouse for Legal Services, Inc. Chicago, Illinois (affiliated with Northwestern University until May, 1974)	280,000
7. National Consumer Law Center, Inc. Boston, Mass. (affiliated with Boston College until February, 1972)	396,50
8. National Housing and Economic Development Law Project (affiliated with the University of California at Berkeley Housing Section Economic Development Section	 403,800 271,200
9. Center for Law and Education Boston, Mass. (affiliated with Harvard University)	391,104

10.	National Employment Law Project, Inc. New York, New York (affiliated with Columbia University until December, 1971	224,850
11.	National Health Law Program Los Angeles, Calif. (affiliated with the University of California at Los Angeles	356,664
12.	Indian Law Back-Up Center Boulder, Colo. (affiliated with the University of Colorado)	65,000
	TOTAL	$ 3,633,073*

* All figures from the Office of Legal Services of the Community Services Administration, 1111-18th Street, N.W., Washington, D.C.

APPENDIX M

Compilation of Recent Court Opinions Regarding Attorneys' Fees Hourly Rates *

Following is a partial collection of recent cases awarding fees at prevailing market rates; premium or weighted hourly rates are noted where so indicated by the court:

Pete v. UMWA, Civil No. 73-1270, (D.C. Cir. Feb. 12, 1975) (en banc), two consolidated cases, affirming award of $40 per hour plus a 10% premium in one case, slip opinion at 27-31; affirming award of $50 per hour but reversing award of bonus of 5% of the recovery in addition and remanding for recalculation of the premium on the basis of a percentage of the total hourly compensation, id. at 36-37, in the other.

Meadows v. Ford Motor Co., 9 EPD ¶9907 (6th Cir. 1975), Title VII, awarding $11,500 for 275 hours, averaging $46/hour; no monetary recovery for plaintiffs.

Perkins v. Standard Oil Co., 474 F.2d 549, 554 n.7 (9th Cir. 1973), Clayton Act, awarding $80 for partners and $40 for associates for appellate work in Washington, D.C.

Clark v. American Marine Corp., 437 F.2d 959 (5th Cir. 1971)(aff'g 320 F. Supp. 709 (E.D.La 1970), Title VII, referring to Louisiana State Bar minimum fee schedule of $30 for beginning attorneys, young attorneys were awarded $35/hour.

Freeman v. Ryan, 133 U.S. App. D.C. 1, 408 F.2d 1204 (1968), fees of $185,000 apparently far in excess of time expended, were allowed.

Kelsey v. Weinberger,Civil No. 1660-73 (D.D.C. Apr. 8, 1975) Emergency School Aid Act, awarding $35,100 at $100/hour plus 50% bonus for "novelty,...skills,...and results," for total average of $150/hour.

Day v. Weinberger,Civil No. 74-292 (D.D.C. Apr. 1, 1975) Title VII, awarding attorneys' fees of $60, and $50 at an average of $52.28/hour.

Swann v. Charlotte-Mecklenburg Bd. of Education,Civil No. 1974, Order, Feb. 24, 1975 (W.D.N.C.) school desegregation case under 20 U.S.C. §1617, awarding attorneys' fees of approximately $65/hour, consisting of $175,000 for 2,700 hours.

Smith v. Concordia Parish School Bd., 9 EPD ¶9898 (W.D. La. 1975), Title VII, awarding $10,000 fee; no mention of hours, citing Johnson, mentioning opposition of defendant at every step.

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* Reproduced with permission of William A. Dobrovir from Appendix A, Brief for Appellants, Smith v. Levi, No. 74-1939 (D.C. Cir. May 19, 1975).

Nat'l Council of Community Mental Health Centers, Inc. v. Weinberger, Civil No. 1223-73 (D.D.C. Dec. 20, 1974), impoundment of federal funds, awarding $50,000 and $15,000 bonus. We are advised that the time expended amounted to 335 hours, averaging over $190/hour.

Adams v. Richardson, Civil No. 2095-70 (D.D.C. January 16, 1974), Title VII, settled, government paid $97,000. We are advised that the award amounts to a rate of $55/hour.

Citizens Ass'n of Georgetown v. Washington, 383 F. Supp. 136 (D.D.C. 1974) awarding fees to losing plaintiffs' attorneys at the rate requested, noting that it was "far below the commercial rate in this city," at 145. We are advised that the rate requested was an average rate of $40 per hour.

Stern v. Lucy Webb Hays National Training School, Civil No. 267-73, Order Nov. 15, 1974; see 367 F. Supp. 536 (D.D.C. 1973) awarding fees of $150,000 based on "the standard generally prevailing in this city of $75 per hour for partners."

Lindy Bros. v. American Radiator and Standard Sanitary Co., 382 F. Supp. 999, 1005, 1024 (E.D. Pa. 1974), Clayton Act, on remand, the court found normal hourly charges of counsel to range from $35-$125; awarded hourly charges at $70 to $250, weighted for contingency and quality.

Wade v. Mississippi Cooperative Extension Service, 8 EPD ¶9498 (N.D. Miss. 1974), private attorney general, racial discrimination; $40 asked, $35 awarded, totalling $12,000; high praise for counsel.

Barton*v. Bayou Candy Co., 7 EPD ¶9378 (E.D. La. 1974), Title VII, awarding rates of $50 and $40 to young attorneys, recognizing that "the customary fee for attorneys in the New Orleans area begins at $35 per hour...and increase substantially...as an attorney gains experience." at 7705. Total award was $6,160; contingent nature of fee and skill especially noted.

Sabala v. Western Gillette, Inc., 371 F. Supp. 385 (S.D. Tex. 1974), Title VII, awarding $47,000, including premium for time, complexity and novelty.

Western Addition Community Organization v. Alioto, Civil No. C-70-1335 WTS (N.D. Cal. Sept. 19, 1974)(Magistrates' Findings re Attorneys' Fees), Title VII, magistrate found $100/hour a reasonable fee for 841 hours of work by 4 attorneys, and increased the rate for contingency and quality to nearly $240/hour.

In re Gypsum Cases, Civil No. 46414-A AJZ (N.D. Cal. Aug. 19, 1974) antitrust, award "reasonable attorneys' fees" up to $300 per hour.

* (sic)

Davis v. County of Los Angeles, 8 EPD ¶9444 (C.D. Cal. 1974), Title VII, hourly rates of $60, $55 and $35 plus a bonus of 15% for result, totalling $60,000 for 720 hours, averaging $55/hour.

Sierra Club v. Ruckelshaus, Civil No. 1031-72, Order, Oct. 31, 1973; see 344 F. Supp. 253 (D.D.C.) aff'd per curiam (D.C. Cir. 1972), aff'd by an equally divided Court sub.nom. Fri v. Sierra Club, 412 U.S. 541 (1973), Clean Air Act award of $48,500, equated to hourly rate of $49.90.

United States v. United States Steel, 371 F. Supp. 1045 (N.D. Ala. 1973) Title VII, $205,000 in fees, despite leading role of U.S. government.

In four cases courts have adopted the hourly rates set forth in the Criminal Justice Act, 18 U.S.C. §3006A(d)(Supp. III 1973). In none of the four was there any statutory authority for the award, the courts finding justification for the award only under the "private attorney general" theory.

Souza v. Travisono, ___ F.2d ___, Civil No. 74-1243 (1st Cir. 1975) (March 11, 1975), action asserting inmates' rights against state prison official; plaintiffs prevailed only to limited extent and failed in principal objective: to establish right of inmates to be accessible to law students for personal legal matters unrelated to crime. Court awarded approximately $16,000 in fees at CJA rates. Slip opinion at 7.

Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233, 1253 (D. Kan. 1974), sex discrimination action under Civil Rights Act of 1871, no monetary recovery. Court awarded $1150 in fees at CJA rates.

Sierra Club v. Lynn, 364 F. Supp. 834, (W.D. Tex. 1973), rev'd on other grounds, ___ F.2d ___ (5th Cir. 1974), No. 73-3378 (Oct. 4, 1974), action to enforce National Environmental Policy Act, plaintiff was denied all relief, district court felt public benefit was conferred and awarded plaintiff $20,000 fees at CJA rates, against private defendant, stating the award was not intended to make either plaintiff or its attorney whole, declining to follow even the Texas Bar minimum fee schedule.

Wyatt v. Stickney, 344 F. Supp. 387, 410 (M.D. Ala. 1972) aff'd in part sub nom., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) action attacking constitutionality of state mental institutions' operations; no monetary recovery, district court

awarded approximately $37,000 in fees to three attorneys at CJA rates, noting that attorney awarded $23,600 had claimed 18 months time without substantiation. Fee award appealed by defendant, issue reserved.

APPENDIX N*

REPORT ON CRIMINAL DEFENSE SERVICES IN THE DISTRICT OF COLUMBIA BY THE JOINT COMMITTEE OF THE JUDICIAL CONFERENCE OF THE D.C. CIRCUIT AND THE D.C. BAR (UNIFIED)

(April 1975)

Prepared under Grant No. 1973-A-311, O.C.J.P.
Subgrant No. 74-101, Law Enforcement
Assistance Administration

* Reproduced with permission of William A. Dobrovir from Appendix B, Brief for Appellants, Smith v. Levi, No. 74-1939 (D.C. Cir. May 19, 1975).

G. ADEQUACY OF COMPENSATION

(1) Compensation to Counsel

The legislative history of the Criminal Justice Act indicates that compensation to attorneys representing indigent defendants was never designed to be on a par with fees charged in retained criminal cases. Congress evidently intended - and the courts have so interpreted the Act - that attorneys taking CJA cases are discharging, at least partially, a pro bono function. Consequently, compensation over the last several years has been limited to a statutory maximum of $30 for in-court time and $20 for out-of-court time.[24/]

A majority of the 26 CJA attorneys interviewed indicated that the allowable maximums were adequate, but just barely and only on the assumption that vouchers are not cut back. However,

24/ The Courts have consistently interpreted the statutory language as giving them discretion to award less than the maximum hourly amounts authorized. See, in particular, the opinion of Chief Judge David Bazelon in United States v. Thompson, 361 F. Supp. 879 (1973).

comparing CJA compensation with fees that attorneys charge in retained cases suggests that, in fact, most of these attorneys consider their services to be worth considerably more. A small minority maintain a distinction between charges for in-court and out-of-court time, but most attorneys do not make this differentiation. The usual procedure is for counsel and client to determine together what the defense of a case may involve and then to agree on a flat fee. In practice, this will work out to an hourly rate of anywhere from $30 to $100, depending on the individual attorney and his billing practices. The average hourly rate charged by CJA practitioners in retained cases falls somewhere between $40 and $50.

A considerable number of the attorneys whose practice is predominantly, if not exclusively, CJA cases maintain a minimum overhead. Many do not have secretaries and pay relatively little in office rental. This would appear to be at least partly attributable to the low CJA fee schedule. Indeed, certain expenses are explicitly excluded under the Act - i.e., office overhead, rent, telephone, secretarial help, and printing of briefs. Regular CJA practitioners naturally try to keep such costs to a minimum.

The sole CJA practitioner, however, cannot provide a reliable measure of the costs of running an adequately staffed and equipped law office. A survey of four recently-established law firms with moderate operating costs disclosed that monthly overhead per attorney (including rent, secretarial salaries, payroll taxes,

office supplies, telephone, reproduction, etc.) ranged from a low of $1,028 in a three-man partnership to a high of $1,550 in a two-man firm. The two-man firm estimated that a busy attorney could bill clients for no more than 30 hours a week. On the basis of this estimate, overhead per billable hour in the two above-cited examples ranges from $9.00 to $13.00.

It is clear from attorney interviews that many lawyers who take $1,300 worth of CJA cases per month (see discussion of the $18,000 Limit, infra) are engaged in CJA practice almost full time. Thus, it is evident that the attorney whose overhead is $1,028 cannot clear more than $472 a month, and the attorney whose overhead is $1,550 would actually lose money by taking CJA cases. Attorneys receiving $20 an hour for out-of-court time would clear from $7.00 to $11.00 an hour for out-of-court time.[25/] The conclusion to be drawn is that the full-time CJA practitioner can survive financially only by keeping overhead costs to an absolute minimum, thereby reducing the range and quality of services he can provide his client.

Attorneys often provide services for which there is no compensation whatever. For instance, when counsel signs up in the morning to take CJA cases in Superior Court, he or she will cus-

25/ Based on a random selection of 104 vouchers submitted by counsel during June 1974, we found that attorneys spend, on the average, 74% of their time in out-of-court preparation on a case. This time is, of course, compensable at the rate of $20 an hour.

tomarily be appointed to one or two cases. The first duty of counsel is to interview the client in the cellblock, to call relatives and employers, to verify information essential for the bond hearing, and, if necessary, to arrange for third party custody. Counsel may then wait an hour or more in court for the case to be called, only to learn that the case has been "no papered." If a case is not papered, it is not numbered and no voucher is prepared. In short, any work that counsel may have done on the case is uncompensated, and it is by no means rare for counsel to spend the better part of a day preparing and waiting for an arraignment or presentment that does not take place.

As noted earlier, there are also a large number of criminal offenses - e.g., disorderly conduct, welfare fraud, traffic violations, and violations of police regulations - which are prosecuted by the D.C. Corporation Counsel and are not compensated under the Criminal Justice Act. Judges are naturally reluctant to allow indigent defendant accused of these offenses to act pro se - indeed, Argersinger now requires the appointment of counsel in any case where incarceration is likely. As a rule, third year law students are appointed to these cases, but this is not always possible and, thus, regular practitioners must be assigned to provide representation. Unless counsel can obtain compensation directly from the client, he or she will remain unpaid.

(a) The $18,000 Limit

Congressional distress generated by publicity three years ago about the large payments made to a few CJA attorneys led Superior Court to impose an $18,000 ceiling. Thus, attorneys now practicing under the Act cannot receive more than $18,000 in CJA payments in any one year. This policy has been applied on a monthly basis, with attorneys excluded from appointments if they have submitted $1,500 in vouchers during the previous month. The $18,000 limitation has not worked particularly well. Since the exclusion is based on attorneys' voucher claims and not on actual compensation, attorneys may, in fact, be held well below the ceiling when their vouchers are cut; because attorneys have sixty days within which to submit vouchers, they may be able to circumvent the monthly ceiling by their timing of voucher submissions; some able attorneys have been excluded from further CJA appointments at times when the court could well have used their services; and, finally, the ceiling has forced practitioners into U.S. District Court where there is no ceiling and where, in fact, they are not needed as badly as in Superior Court.

The $18,000 ceiling serves a public relations function at best. It blinks at the overriding reality that the majority of CJA practitioners rely on appointed cases for their living and it does not necessarily discriminate between competent and incompetent attorneys. The overall effect of the limitation is

to depress arbitrarily the income that attorneys can make - a factor that is particularly significant during times of rapid inflation.

Rec. 4.3. THE RATE OF COMPENSATION UNDER BOTH THE LOCAL AND FEDERAL CRIMINAL JUSTICE ACTS SHOULD BE RAISED TO NOT LESS THAN $40 AN HOUR FOR BOTH IN-COURT AND OUT-OF-COURT TIME.

No one disputes that existing rates of CJA compensation are low relative to what attorneys charge in retained cases. This distinction between CJA and retained practice has been maintained largely because of a continuing belief that attorneys practicing under the Acts are discharging, at least partly, a pro bono function. We reject that notion as an invalid basis for providing compensation under the Acts.

The existing $30 and $20 limits were established in 1970.

Since then, inflation has cut substantially into real income.[37/] Furthermore, we alluded in Sec.I.G.(1), supra, to the reduced services that regular CJA practitioners provide their clients because of the low rates of compensation as well as to the high cost of running an adequately staffed and equipped law office. We therefore think it appropriate at this time to recommend a flat rate of not less than $40 an hour, regardless of whether time claimed is spent in or out of court.[38/] Most attorneys do not make this differentiation and, in fact, we find little logic in the distinction. In reality, close to 90% of all criminal cases are disposed of short of trial, and the time that counsel spend investigating and preparing their cases represents nearly 75% of all time that they put in.[39/] Since this out-of-court preparation on a case, whatever the outcome, lies at the heart of an effective defense, we cannot see a rationale for compensating it at a rate lower than that awarded for time spent in court.

The recommendation that we make is a moderate one, repre-

37/ See Sec. I.B., supra.

38/ The Committee notes that in Blankenship v. Boyle, U.S.D.C. Civil No. 2186-69 (Jan. 7, 1972), Judge Gerhard Gesell awarded plaintiffs' counsel $45 an hour for the 14,886 hours of work involved and additionally awarded a bonus of $15 an hour because of the contingency of recovery and the complexity of the case. Thus, the Committee's recommendation still falls short of rates of compensation deemed fair and equitable in other types of cases.

39/ See Fn. 22, supra.

senting, as it does, a compromise between the principle of full compensation at rates which retained counsel would customarily charge and the economic realities of increasing competition for limited public funds. We are mindful that many lawyers practicing under the Act are willing to accept appointments at current rates, but believe that the proposed increase in compensation represents the absolute minimum necessary to attract and hold good criminal lawyers and assure their ability to render effective representation to their clients.

APPENDIX O

Princeton University SCHOOL OF ENGINEERING / APPLIED SCIENCE
CENTER FOR ENVIRONMENTAL STUDIES
THE ENGINEERING QUADRANGLE
PRINCETON, NEW JERSEY 08540

Additional Comments of Dr. von Hippel

The Boasberg Report should be of great assistance in structuring and providing background for the subsequent discussion of possible NRC assistance to intervenors. The focus of the information gathering process will now be shifted to the rule-making hearing. The purpose of these comments is to offer my suggestions on two areas where additional information might be particularly useful to the Commission.

1. Case Studies

In Chapter V, A 1, the Boasberg Report enumerates some of the significant contributions to the public health and safety, environmental protection, and licensing procedures which have been cited by intervenors. The NRC might wish to solicit more detailed assessments of the extent of these contributions (and associated costs) from the principal parties in some of the hearings noted. In addition, the NRC might ask the parties in those hearings to elaborate their views on the differences which NRC funding or alternative forms of assistance (public counsel, independent technical centers, etc.) might have made in helping the intervenors to: (i) come more directly "to the point"; (ii) focus on issues of substance; and (iii) profit from technical information made available to them.

2. Technical Back-up for Intervenors

As a scientist, I am particularly concerned about the quality of technical expertise available to intervenors. I am also sensitive that many mechanisms for the provision of legal support to intervenor groups may not adequately include the provision of requisite technical support. Among the potential difficulties in obtaining technical assistance for intervenors are: (i) most lawyers work on "cases" for clients; while most scientists and engineers do not; (ii) scientists and engineers are not trained in adversary procedures; and (iii) it is not at all certain their participation in such proceedings will result in enhancing their professional standing.

I would strongly suggest, therefore, that the NRC in its request for advice and comment, distinguish between legal and technical support and that it solicit statements in particular from scientists and engineers who have been involved in or observed NRC and AEC proceedings.

It might be useful to keep clearly in mind also that technical experts play at least three roles in the hearing process: i) as specialists on specific phenomena (e.g. the behavior of fish around a thermal plume, or the two-phase flow of fluid out of a broken pipe); (ii) as analysts, offering a perspective on the importance of specific information on particular phenomena, for example, in assessment of the safety of a reactor; and (iii) as technical interlocutors of expert witnesses. Unlike attorneys, these roles are often played by different individuals.

Finally, I would like to suggest that, since the debate over nuclear energy policy is currently so active and the participants so overcommitted, the NRC may have to make special efforts to obtain thoughtful responses to its requests for comments on the subject of assistance to intervenors. In particular, the NRC will have to convince potential commentators that it has committed adequate staff resources so that comments will be seriously considered in the NRC policy making process. This might best be done if the staff commitment is demonstrated in advance by supplementing public requests for comment with specific requests to persons and organizations whose experience may make their comments in particular areas especially useful.

Frank von Hippel

Dr. Frank von Hippel

APPENDIX O

Energy Laboratory
Massachusetts Institute of Technology
Cambridge, Massachusetts 02139
(617) 253-3400

Additional Comments of Dr. Hinkle

I would agree that the Boasberg Report will be of great assistance to the Commission in helping to structure its proposed rulemaking on financial assistance to intervenors. As a nuclear engineer, I, too, am vitally interested in this important subject.

I believe the Commission should ensure that those engineers and scientists, who have had direct involvement in NRC matters, have a clear opportunity to offer their comments in this proceeding, based on their experience. This experience and their technical backgrounds can be especially helpful to the Commission in examining the pros and cons of interventions in specific rulemaking and licensing proceedings and in exploring alternate mechanisms for technical assistance.

Dr. William D. Hinkle