



Recommendation 71-6

Public Participation in Administrative Hearings

(Adopted December 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:



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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 when a significant objective of the adjudication is to develop and test a new policy or remedy in a precise factual setting or when the prospective intervenor 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;



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(b) The prospective intervenor'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 intervenor'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 intervenor 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 intervenor'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 intervenor'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 intervenor should not be allowed to determine the broad outline of the proceeding, such as the scope or compass of the issues. A public intervenor 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.



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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 proceedings.

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



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affected groups an opportunity to prepare. Each agency should consider publication of a monthly bulletin,¹ 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.

Citations:

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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

¹ This recommendation does not supersede Recommendation No. 68-4, Consumer Bulletin.



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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 hindrance 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 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 71-6. 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 71-6, 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 71-6



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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 71-6 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 intervenor'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. 68-5 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



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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 71-6 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 71-6 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.