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By electronic filing

September 27, 2013

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto, ON M4P 1E4

Dear Ms. Walli,

Review of Framework Governing the Participation of Intervenors in Board Proceedings – Consultation and Stakeholder Conference
Board File No.: EB-2013-0301
Our File No.: 339583-000167

I. Introduction

The Board's letter of August 22, 2013, invites Interested Parties to submit written comments on seven (7) questions pertaining to the manner in which the Ontario Energy Board ("Board"), going forward, should exercise its discretion with respect to intervenor status, cost eligibility, and assessment of intervenor costs.

These questions are being posed in the context of a review which the Board has initiated with respect to the participation of intervenors in proceedings before the Board. The questions posed by the Board fall within the ambit of the first phase of this review, which is to examine whether there are modifications that should be made in the near term regarding the Board's approach to intervenor status, cost eligibility and cost awards. In the second phase of its review, the Board plans to examine whether, over the longer term, it should consider adopting a model different from the current framework regarding the representation of consumer interests in Board proceedings.

The comments in this letter on the questions posed by the Board are being provided on behalf of our client, Canadian Manufacturers & Exporters ("CME").

II. CME and its Participation in Proceedings Before the Board

CME is Canada's leading business network. Its members represent about 75% of manufactured output in the province of Ontario and 90% of all exports.

While the manufacturing sector has undergone a considerable restructuring over the last decade, the sector represents approximately 13% of GDP and over $270B in manufacturing shipments annually. It employs approximately $2M Ontarians, either directly or indirectly. Every dollar invested in manufacturing generates over $3.50 in total economic activity, the highest multiplier of any major sector. Ontario has a world class base of manufacturing talent and expertise from which to build. A sound energy plan is a key area in which the province can significantly improve the business environment for manufacturing.

The outcomes of proceedings before the Board are key components of energy availability for manufacturers. Accordingly, outcomes of Board proceedings which help improve the competitiveness of Ontario's manufacturers are a key component of an action plan for retaining and growing Ontario's manufacturing base.

CME is a not for profit organization funded by membership fees and revenues from the services it renders to federal and provincial governments and agencies to foster the development of national and international markets for its members to break down trade barriers. About 85% of CME's 1,400 Ontario-based member companies are Small to Medium sized business Enterprises ("SMEs") with 500 employees or less.

CME's ability to regularly participate in proceedings before the Board is dependent upon intervenor status and cost eligibility determinations in its favour. Over the years, CME has regularly been accorded intervenor and cost eligibility status and, as a result, has regularly participated in numerous Board proceedings.

Generally speaking, this active participation has been confined to proceedings pertaining to the large gas and electricity utilities which the Board regulates, such as Enbridge Gas Distribution Inc. ("EGD"), Union Gas Limited ("Union"), Hydro One Networks Inc. ("Hydro One"), and Ontario Power Generation Inc. ("OPG"). CME has also participated in various policy and other consultatives which the Board initiates. CME lacks the necessary resources and will be unable to participate in future Board proceedings if it no longer receives the benefit of cost awards.

Before the Board, CME is represented by a group of solicitors who have extensive experience in regulatory and consultative proceedings before the Board. These CME representatives work closely with other long-standing cost eligible intervenors such as:

- Association of Major Power Consumers in Ontario ("AMPCO")
- Association of Power Producers of Ontario ("APPrO")
- Building Owners and Managers Association of the Greater Toronto Area ("BOMA")
- Consumers Council of Canada ("CCC")
- Energy Probe Research Foundation ("Energy Probe")
- Federation of Rental-housing Providers of Ontario ("FRPO")
- Industrial Gas Users Association ("IGUA")
- Green Energy Coalition ("GEC")
- London Property Management Association ("LPMA")
- Low Income Energy Network ("LIEN")
- Pollution Probe
- School Energy Coalition ("SEC"), and
- Vulnerable Energy Consumers Coalition ("VECC")

In the Settlement Conference processes that take place in the proceedings in which CME participates, CME's representatives work with other intervenors in an attempt to organize and present intervenor positions in a framework which facilitates settlements on many of the matters in issue.

CME's mandate in proceedings before the Board is to represent the interests of its members in their capacity as customers and ratepayers of utilities which the Board regulates. CME's representatives in Board proceedings report to Paul Clipsham, CME's Director of Policy – Ontario Division. CME has an Energy Committee which periodically meets and provides general policy direction to Mr. Clipsham on CME's energy-related objectives. When approving positions taken by CME in proceedings before the Board, CME relies heavily upon the expertise and recommendations of those representing its interests in such proceedings.

III. Context

A. The Evolution of the Current Framework and its Rationale

The history of the Board's cost award regime is described at page 3-29 of Zacher and Duffy's text entitled *"Energy Regulation in Ontario"* as follows:

> *"For many years, the Board only awarded costs in "special" or "extraordinary" circumstances. In a 1985 Decision, the Board determined that the increasing complexity of hearings necessitated that a broad range of interests be represented at the hearings to canvass the essential issues in depth. The Board decided to award costs to intervenors who contributed something of value to the hearing."*

Appended as Attachment 1 to this letter (Tab 1) are pages 177 to 179 of the Board's 1985 Report in E.B.O. 116 entitled "In the matter of a Hearing under the *Ontario Energy Board Act* Regarding Awarding of Costs and Related Procedural Matters." These excerpts contain the rationale for the awarding of costs to intervenors which includes the following:

(a) The complexity of issues in proceedings before the Board giving rise to an increasing need for the Board to ensure that a broad range of interests is represented so that the essential points are canvassed in sufficient depth to produce a record which provides maximum assistance to the Board;

(b) The need to remove the financial barriers to meaningful intervention by interests having genuine concerns;

(c) The Board's ability to control frivolous, vexatious or otherwise irresponsible interventions; and

(d) The Board's recognition that the additional costs of cost eligible interventions are warranted in order to achieve the flow of high quality information to the Board for decision making purposes.

Within Appendix B to the Board's E.B.O. 116 Report is a suggested Bibliography of Costs articles and jurisprudence which the Board considered prior to issuing its Report. If an updated Bibliography of such material has been compiled by Board Staff in conjunction with the Board's determination to initiate this review proceeding, then we respectfully request that the updated Bibliography be provided to all those participating in this process so that everyone will be familiar with this information.

The parameters of the existing intervenor status, cost eligibility and cost award regime are found in Rules 23 and 41 of the Board's *Rules of Practice and Procedure* appended as Attachment 2 (Tab 2) and in the Board's *Practice Direction on Cost Awards* revised March 19, 2012, appended as Attachment 3 (Tab 3).

B. Increased Complexity since 1985

The guiding principles upon which the current regime is founded are as valid today as they were some 28 years ago when the Board issued its E.B.O. 116 Report. Moreover, proceedings before the Board today are far more complex than they were 28 years ago.

With the enactment of the *Energy Competition Act, 1998* the scope of the Board's mandate has materially broadened. The Board became responsible for regulating local distribution companies and for ensuring that the distribution companies fulfil their obligations to connect and serve their customers. The Board also became responsible for licensing certain market participants.

Since that time, the Board's role has become exponentially more complex with the enactment of the *Ontario Energy Board Consumer Protection Act, 2003*, the *Ontario Energy Board Amendment Act (Electricity Pricing), 2003*, the *Electricity Restructuring Act, 2004*, the *Green Energy and Green Economy Act, 2009*, and the *Energy Consumer Protection Act*.

The result is that the nature of the issues and entities regulated by the Board has substantially increased. The utilities the Board regulates now include more than 80 rate-regulated entities. Most of the electric utilities now regulated by the Board were unaccustomed to the stringent filing and other requirements faced by rate-regulated entities. Many of these utilities have been overwhelmed by the burden which they are required to discharge to have their rates approved in the public interest.

C. Experienced Cost Eligible Intervenor Constituency

What has emerged over the past 28 years of the Board's operation under the auspices of the guiding principles expressed in the E.B.O. 116 Report is a cost eligible intervenor constituency represented by individuals who have considerable expertise in matters which form the subject of proceedings before the Board. This intervenor constituency encompasses the broad range of interests from which the Board should hear in order to discharge its statutory obligations in the public interest.

As a result of the existence of this experienced cost eligible intervenor constituency, the representations made in proceedings before the Board are responsible, comprehensive

and balanced. The Board does not exercise its powers on the basis of one sided or imbalanced representations in favour of the utilities, or of a single ratepayer interest group.

The quality of public interest decisions is improved when representatives of the various affected interests participate. The benefits derived from this type of diversity within the intervenor constituency is addressed in an article entitled "Increasing Citizen Participation in Administrative Proceedings: Can Federal Financing Bridge the Costs Barrier?". In that article, Coeta Chambers observes as follows:

> *"Yet, perhaps the most significant reason for recent attempts to develop greater public participation is the widespread recognition of the "capture phenomenon" – that an agency, exposed to the views of those groups subject to its regulation (hereinafter "industries"), will tend to adopt rules which reflect the industries' points of view.*
>
> *The perceived bias of agency decisions is not a product of corruption or collusion, but rather a natural result of the decision-making process. As with other decision makers, agency staffs' "perspectives are limited by the information that is available to them, and their attitudes are shaped by the rewards and feedback that our system provides to them." The regulated industries have the resources to participate vigorously in the process at every level. Thus, due to such vigorous participation and the inability of opposing viewpoints to participate effectively, agency staffs will, in many instances, depend on information supplied by the industries."*

This article is appended as Attachment 4 (Tab 4).

Increased participation by the intervenor constituency fosters a better balance in Board decisions by offering a greater range of ideas. They apprise the Board of facts that might not otherwise come to its attention, and can assert different perspectives on the consequences of a decision which challenge those of the regulated utility. In this way, the Board gains a fuller understanding of the range of dimensions that comprise the public interest it is charged with serving.

Placing more points of view on the record has the pragmatic effect of permitting the Board to give consideration to those views, and in so doing, fully canvassing the public interest. To this end, the Atomic Safety and Licensing Appeal Board which reviews Nuclear Regulatory Commission licensing decisions in the U.S. "has stated on numerous occasions that citizen participation in their proceedings has been extremely useful, has developed safety questions which otherwise would not have been developed, and has improved the safety of nuclear reactors." Similarly, the Federal Power Commission has stated that, "most administrators and regulators recognize that opening of the administrative process yields better results, both procedurally and substantively, than attempted maintenance of a closed system".[1]

[1] See pages 35-36 of Attachment 4.

D. Board Staff Does Not Represent Intervenor Interests

The role of Board Staff in proceedings before the Board has also evolved over time. The size of Board Staff has increased materially in tandem with the material enlargement of the scope of the Board's mandate. Moreover, like the representatives of members of the cost eligible intervenor constituency, Board Staff have become increasingly skilled in assisting in the development of a record that provides the maximum assistance to the Board.

However, Board Staff's primary role is to assist and represent the Board. Neither Board Staff nor the utilities which seek relief from the Board represent any members of the intervenor constituency. Modifications to the Board's current approach to intervenor status, cost eligibility and cost awards should not be rationalized on the grounds that intervenor interests can be adequately represented by Board Staff and/or the utilities.

E. Utilities Do Not Represent Intervenor Interests

Utilities do not and cannot reasonably be relied upon to fully and completely represent the interests of their customers. The nature, frequency and duration of utility communications with its customers should not be relied upon to dilute the role of intervenors in proceedings before the Board. In proceedings before the Board, the priority of the utilities is to represent the interests of their owner.

F. Utility Complaints About Intervenor Representation

As a consequence of the burden which the electricity utilities must discharge in proceedings before the Board, their representative, the Electricity Distributors Association ("EDA"), has been advocating for changes to the existing intervenor cost eligibility and cost awards regime on the grounds that it is the cost eligible intervenor constituency which is materially increasing the costs which utilities incur to obtain Board approval of their rates in the public interest.

This ground for seeking change is incompatible with the guiding principles on which the Board's cost award regime is founded, which include an elimination of the barriers to meaningful interventions by interests having genuine concerns, the need for balanced representation in proceedings before the Board, and the Board's consideration of the broad range of interests affected by an exercise of its statutory obligations.

Changes to the existing regime should not be rationalized on the grounds that the mere presence of the cost eligible intervenor constituency increases the burden that utilities are required to discharge to have their rates approved. The raison d'être for the presence of that constituency is to assure that the representations made to the Board pertaining to all of the affected interests are complete and balanced. The burden which all Board-regulated utilities must discharge is the burden of establishing that the relief which they seek is a fair and reasonable response to all of the interests affected thereby.

G. Criteria to be Satisfied to Justify Change

The existing framework provides the Board with a ratepayer funded intervenor constituency which provides responsible and skilled interventions on behalf of the broad range of interests from which the Board needs to hear to render quality decisions in the public interest.

We respectfully suggest that for changes to the existing regime to be warranted, there must first be some convincing evidence that, overall, there are material inefficiencies in the existing framework. Absent some convincing evidence of such inefficiencies, then the existing framework should be maintained with relatively few, if any, adjustments. On the other hand, if there is credible evidence which establishes the existence of material and unreasonably costly inefficiencies in the existing regime, then adjustments to the current regime should be considered and, if appropriate, implemented.

H. Evidence Relied upon by Proponents for Change

(a) Total Annual Intervenor Costs

The proponents for change point to the total annual cost to ratepayers of the cost eligible intervenor constituency which was about $5.5M for the 12 months ending March 31, 2013. The advocates for change suggest that this overall amount is excessive without pointing to any appropriate benchmarks to verify such a conclusion.

There a number of benchmarks which could be used to demonstrate that the $5.5M annual cost for the entire cost eligible intervenor constituency is neither excessive nor unreasonable. For example, a conclusion with respect to excessiveness and unreasonableness of the total cost of the cost eligible intervenor constituency cannot reasonably be made without considering the total of the ratepayer funded regulatory costs which the Board and regulated utilities incur on an annual basis.

We respectfully suggest that the ratepayer funded $5.5M amount for the representations made by the broad range of interests encompassed by the cost eligible intervenor constituency is miniscule in comparison to the total of the ratepayer funded regulatory costs which the Board and the regulated utilities incur. Moreover, the overall amount of $5.5M is hardly material when considered in the context of the total annual amount of Board approved revenue requirements for all of the utilities which the Board regulates.

To this end, we have had the benefit of reviewing the draft submissions of CCC, SEC and VECC. We believe that the observations made by these groups with respect to intervenor costs are valuable to the Board's review of these issues.

The Overall Quality and Effectiveness of Interventions

In terms of the overall quality and effectiveness of the interventions conducted by the intervenor constituency as a whole, it is worthy of note that the mass majority of contested cases are either settled or substantially settled by the utilities and the cost eligible intervenor constituency.

Settlements are achievable because of the combined effect of the existence of the cost eligible intervenor constituency covering a broad range of interests and the representation of members of that constituency by individuals who, over the years, have acquired an expertise equivalent to the expertise of those representing utility interests.

Without such settlements, the Board would be hard pressed to find sufficient time in a year to hear and determine all of the regulatory proceedings requiring a determination. We respectfully suggest that these settlements materially contribute to the efficient operation of the Board.

We are unaware of any statistical or other evidence which convincingly demonstrates that there are material inefficiencies in the existing framework which are operating to produce an excessive level of cost incurrence for the involvement of the cost eligible intervenor constituency in proceedings before the Board. Absent such evidence, changes to the existing regime should not be rationalized on the grounds that there are material deficiencies in the overall quality and effectiveness of the interventions conducted by cost eligible intervenors under the auspices of the current framework.

(b) Intervenor Management of Overlapping Interests

There is no doubt that within the broad range of interests represented by the cost eligible intervenor constituency, there are entities whose interests on various issues in proceedings before the Board are common. That said, the mere existence of a group of intervenors who have common interests with respect to particular issues should not become a ground for adding measures which decrease the flexibility and increase the rigidity of the existing regime.

What can and should be considered, on a case by case basis, is whether the management of common or overlapping interests by intervenors is frivolous, vexatious or otherwise unreasonably wasteful. In this connection, forcing parties with overlapping interests in a particular proceeding to collaborate or combine their interventions prior to the completion of an analysis of the application, including the pre-hearing discovery processes, is unlikely to save time and increase the efficiency of the overall process.

We suggest that the efficiency of the process is best served by allowing all parties to analyze the application and to elicit information in the discovery process in a depth which is sufficient to enable them to determine the extent to which they can subsequently work together and combine their efforts with those who take the same or similar positions on common issues. This, we suggest, is the most efficient way of minimizing duplication in the presentation to the Board of positions which two or more intervenors support.

Some duplication of effort is necessary in order to enable those with common interests to effectively manage the presentation of a common position. Forcing parties to collaborate and combine positions too early in the stage of the process will dilute and not increase the quality of information which the Board requires for decision making purposes.

I. Controls Over the Amounts Claimed and Awarded for Intervenor Costs

The amount of time which a particular intervenor needs to reasonably and prudently participate in a particular proceeding before the Board varies, having regard to the nature of the application, the nature of the intervenor interest, and the range of issues which the case raises. In these circumstances, flexibility and not rigidity is required when assessing the reasonableness of the amounts claimed and awarded for intervenor costs.

(a) Intervenor Budgets

We suggest that one cannot reasonably pre-establish how much time a particular representative of a particular interest is likely to need to spend in various stages of a particular case without first consulting with the representative of that interest. Calling for budgets from representatives of the experienced cost eligible intervenor constituency in a particular case is unlikely to save time or otherwise increase the efficiency of the process before the Board.

(b) Pre-Established Time and Disbursement Limits

Conversely, imposing, without consultation, pre-established limits on cost eligible intervenors in applications involving a broad range of issues is arbitrary. If the limits are unreasonably low, then they will create a financial barrier to representation by the broad range of affected interests from which the Board should hear before rendering decisions. Such an outcome is incompatible with the rationale and guiding principles upon which the existing framework is founded. Similarly, pre-establishing limits for disbursements without prior consultation is arbitrary and could prove to be entirely unreasonable. Even with consultation, the establishment of reasonable disbursement limits will be difficult because the predicting and estimating of all of the disbursements likely to be incurred in a particular matter is a challenging forecasting exercise.

J. Determinations of the Reasonableness of Amounts Claimed

We submit that adding more rigidity to the existing framework is incompatible with the rationale and guiding principles upon which the intervenor status, cost eligibility and cost award regime has been established. In our view, the better course to follow is to use the flexibility that exists in a transparently fair and reasonable manner.

(a) Time Spent

In assessing the reasonableness of the overall quantum of cost eligible intervenor cost claims, care should be taken in the use of cost claims submitted by other intervenors as comparators. There needs to be sufficient flexibility in the regime to recognize that some intervenors can reasonably spend materially more or less than others in their preparation for and presentation of a particular issue for the Board's consideration. This is particularly the case where, as a result of intervenor cooperation, one group takes a leadership role on a particular aspect of the proceeding.

(b) Breadth of the Range of Reasonableness

When assessing the breadth of the range of reasonableness for intervenor cost claims, the Board, like the Courts, should also consider, as a benchmark, the time and costs the utility incurred in the pre-hearing and hearing stages of a proceeding. This information should be used as a supplement to the Board's current practice of considering the cost claims of other intervenors as comparators for evaluating reasonableness.

(c) Settlement Conference Activity

One area of cost eligible intervenor activity which is not currently transparent to the Board members assessing the reasonableness of intervenor cost claims is the role of Intervenors in the Settlement Conference process. In that connection, we have provided at Attachment 5 (Tab 5) a description of the process that generally takes place during a Settlement Conference.

This description is provided in an attempt to assure the Board that sincere efforts are made by all participants in the Settlement Conference process to elicit, organize and present intervenor positions on issues in a framework which facilitates the achievement of settlements on a significant number of matters in issue. Board members assessing the reasonableness of intervenor cost claims need to be aware of the fact that it is generally the cost eligible intervenors and not the facilitators, who elicit, organize and formulate that framework for settlement. Considerable intervenor time and effort go into achieving such a framework within a reasonably compressed time frame.

Benchmarks available to assess the reasonableness of time spent by intervenors in preparing for and attending Settlement Conferences include the total time spent by an applicant's internal staff and external representatives in such activities and the total time spent by Board Staff and its consultants, if any, therein. If the Board members require further information on the reasonableness of time spent by cost eligible intervenors in the Settlement Conference process, then one possible source of such information could be a report provided by the facilitator and/or Board Staff on the activities that occurred during the course of that phase of the proceeding without disclosing any confidential communications that took place between the participants therein.

(d) Inappropriate Hearing Room Conduct

If the conduct of intervenor representatives in the hearing room is of concern to the Board, then the Board Hearing Panel should express its concerns when the troublesome behaviour occurs. The intervenor representative will then have an opportunity to respond to the Board's concern and, if the Board is not swayed by that response, then the intervenor representative is on notice and aware that he or she is facing a cost reduction risk if the offending behaviour continues.

The foregoing are examples of the kinds of things a Hearing Panel can do under the auspices of the flexibility that currently exists to enhance the perceived fairness of the way it exercises its discretion in determining the reasonableness of the quantum of cost claims in a particular proceeding. In every case where an issue of the reasonableness of a

particular cost claim arises, the over-arching requirement should be to determine that issue in a transparently fair and reasonable manner.

IV. CME's Responses to the Board's Questions

The foregoing provides the context for the comments which follow on each of the questions posed by the Board.

Intervenor Status

1. What factors should the Board consider in determining whether a person seeking intervenor status has a "substantial interest" in a particular proceeding before the Board? For instance, should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?

Rule 23.02 of the Board's *Rules of Practice and Procedure* provides as follows:

> *"The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by crossexamining a witness."*

Rule 23.03(a) provides as follows:

> *"Every letter of intervention shall contain the following information:*
>
> *(a) a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention."*

In our view, the Board should be reluctant to introduce measures which purport to limit the factors upon which a person seeking intervenor status might rely to support a contention that he or she has a "substantial interest" in a particular proceeding before the Board. A determination of this issue should depend upon the nature of the interest sought to be represented.

Should the Board begin to refuse intervenor status on the grounds that it considers the degree of consultation or engagement by a particular intervenor applicant with the affected constituency to be inadequate, then, in future proceedings, the Board can reasonably expect to be faced with a parade of individuals and/or entities asserting a wish to be represented by a particular organization or individual in a particular Board proceeding. Such an outcome will not enhance the efficiency of proceedings before the Board.

While the degree of consultation or engagement between a particular intervenor applicant and a constituency directly affected by the application is a matter which the Board can take into account, the Board should refrain from introducing measures which will operate to foreclose the possibility that a case of "substantial interest" might be made in a particular case by someone who cannot demonstrate consultation or engagement with a constituency directly affected by the application. The Board should refrain from fettering the scope of its current discretion to grant

intervenor status in circumstances which satisfy the Board that the intervenor applicant has a substantial interest in a particular Board proceeding.

2. ***What conditions might the Board appropriately impose when granting intervenor status to a party? For instance, should the Board also require an intervenor to demonstrate how the intervening group or association governs the participation by its legal counsel and other representatives in the application?***

Any condition which the Board might consider imposing ought not to be imposed before advance notice of the condition is provided to the intervenor applicant, along with the evidence upon which the proposed condition is based. The Board should refrain from imposing any conditions pertaining to the operation of the relationship between the party granted intervenor status and its counsel or representative. If there is some evidence to indicate that a relationship between an intervenor applicant and its counsel or representative does not exist, then that evidence should be taken into account when determining the intervenor status request and not imposed as a condition subsequent which effectively subjects that intervenor/counsel relationship subject to on-going Board supervision. Such an outcome is unlikely to enhance the efficiency of proceedings before the Board.

Cost Eligibility

1. ***What factors should the Board consider in determining whether a party primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board? For instance, should the Board require the party to demonstrate consultation or engagement with a class of consumers directly affected by the application?***

As with Intervenor Status Question 1, consultation or engagement with a class of consumers directly affected by the application is a factor which the Board can consider when determining cost eligibility. That said, the Board should refrain from adopting this factor as a pre-requisite to cost eligibility because such action would foreclose the possibility that a case could be made by someone asserting that he or she does represent the direct interests of consumers in relation to services that are regulated by the Board, notwithstanding the fact that the party neither consults with or is engaged by a class of consumers directly affected by the application. The Board should not fetter the scope of its current discretion under section 3.03 of its *Practice Direction on Cost Awards* which provides as follows:

> *"A party in a Board process is eligible to apply for a cost award where the party:*
>
> *(a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board;"*

2. ***What factors should the Board consider in determining whether a party primarily represents a public interest relevant to the Board's mandate?***

The nature of the "public interest" which the applicant asserts he or she represents should be considered along with all of the information upon which the applicant relies to support that

contention. The Board should refrain from fettering the scope of its discretion under section 3.03(b) of its *Practice Direction on Cost Awards* which provides as follows:

> *"A party in a Board process is eligible to apply for a cost award where the party:*
>
> *(b) primarily represents a public interest relevant to the Board's mandate;"*

The Board should not foreclose a consideration of any cost eligibility applications by one who contends that he or she represents a public interest without first considering all of the grounds and information advanced by that person to support the request.

3. ***What conditions might the Board appropriately impose when determining the eligibility of a party for costs? For instance, what efforts should the Board reasonably expect a party to take to combine its intervention with that of one or more similarly situated parties? Should the Board reasonably expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation)?***

For the reasons already outlined in the body of this letter, the Board should refrain from establishing conditions of eligibility which are incompatible with the guiding principles on which the Board's existing cost award regime is based. The existing regime calls for a broad range of interests to be represented so that complex issues can be examined in depth and for the removal of financial barriers to the presentation of meaningful interventions by interests having genuine concerns.

There is no evidence to support the conclusion that there are material inefficiencies in the operation of the existing regime or that the total cost awards to the cost eligible intervenor constituency are unreasonable or excessive.

We are unaware of any specific evidence supporting the contention that similarly situated parties within the cost eligible intervenor constituency are failing to take appropriate action to minimize duplication. In these circumstances, no specific measures are currently required to prompt a greater adherence to the minimization of duplication objective.

For the reasons already outlined in the body of this letter of comment, the Board cannot reasonably expect cost eligible intervenors to join forces with respect to the presentation of a common position in a complex case until each of them have analyzed the application, participated in the pre-hearing discovery process and in the initial settlement conference process where positions are formulated within the context of a framework which has been developed to facilitate the settlement of matters in issue.

Mandated combinations of interventions by different intervenors are unlikely to achieve any efficiencies over and above those already being achieved under the auspices of the Board's directions that intervenors with overlapping interests are expected to act in a manner which minimizes duplication. Imposing a combination requirement before the application analysis and pre-hearing discovery processes have been completed will likely dilute rather than enhance the effectiveness of the cost eligibility intervenor constituency in maximizing the flow of quality

information to the Board. Such a condition is incompatible with the guiding principles upon which the existing cost award regime is based.

4. ***Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an approach that provides for pre-approved budgets, pre-established amounts for each hearing activity (similar to the approach for policy consultations), and pre-established amounts for disbursements?***

Until there has been a convincing demonstration that the existing approach is resulting in awards of costs to intervenors which are unreasonable and excessive, there is no need to consider different approaches to determining cost awards in adjudicative proceedings.

The adoption of a pre-approved budget process, which, in fairness, requires consultation between a representative of the Board and the cost award applicant, will add another level of bureaucracy to the intervenor cost award process. This is likely to lengthen, rather than shorten, the duration between the filing of an application with the Board and its ultimate disposition. Such a process is inefficient in that it is unlikely to save any time and is likely to increase, rather than decrease, the total costs of regulatory proceedings before the Board.

Similarly, an approach which establishes, without consultation, pre-determined time limits for the steps involved in conducting a prudent intervention in a complex case would be arbitrary. If adopted, such a process will need to take into account the nature of each particular application, the issues it raises, and a sound base of information from which to establish a reasonable amount of time to allow intervenors to analyze the application and participate in the pre-hearing discovery, settlement conference, and hearing processes. To develop a sound base of information from which to derive reasonable estimates of such limits would require someone to classify each application that the Board receives, having regard to its complexity and the issues it raises, and then consider the total time spent by intervenors and other comparable proceedings before the Board. This would be a time consuming and, in our view, an unnecessary task.

A far better approach is to continue to apply the "Principles in Awarding Costs" specified in section 5.01 of the Board's *Practice Direction on Cost Awards* as follows:

> *"5.01 In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party:*
> *(a) participated responsibly in the process;*
> *(b) asked questions in interrogatories or on cross-examination which were unduly repetitive of questions already asked by one or more other parties;*
> *(c) made reasonable efforts to ensure that its evidence or intervention was not unduly repetitive of evidence presented by or the intervention of one or more other parties;*
> *(d) made reasonable efforts to co-operate with one or more other parties in order to reduce the duplication of interrogatories, evidence, questions on cross-examination or interventions;*
> *(e) made reasonable efforts to combine its intervention with that of one or more similarly interested parties;*

(f) *contributed to a better understanding by the Board of one or more of the issues in the process;*

(g) *complied with directions of the Board, including directions related to the pre-filing of written evidence;*

(h) *addressed issues in its interrogatories, its written or oral evidence, its questions on cross-examination, its argument or otherwise in its intervention which were not relevant to the issues in the process;*

(i) *engaged in any other conduct that tended to lengthen unnecessarily the duration of the process; or*

(j) *engaged in any other conduct which the Board considers inappropriate or irresponsible."*

The Board should not fetter the current discretion it has with respect to cost awards by adding rigidity to the broad discretion it currently exercises. Instead, the Board should continue to exercise its broad discretion in a manner that is fair and transparent as described earlier in this letter.

The only fair and transparent manner to administer the awarding of disbursements is to adhere to the principles expressed in section 7 of the *Practice Direction on Cost Awards* to the effect that reasonable disbursements will be allowed in accordance with the Board's Tariff, including as applicable the principles and rules set out in the *Travel, Meal and Hospitality Expenses Directive* referred to in the Tariff. It is likely to be extremely difficult, if not impossible, to pre-establish reasonable amounts for disbursements likely to be incurred by a cost eligible intervenor in any particular proceeding.

Recommended Modifications

1. Are there modifications that the Board should consider making to the Rules and the Practice Direction?

The *Rules* and the *Practice Direction* broadly define the Board's discretion with respect to intervenor status, cost eligibility, and the assessment of cost awards. In combination, these provisions give the Board all the power it needs to continue to determine matters pertaining to intervenor participation in proceedings before the Board in a fair and transparent manner and at a cost which is compatible with the guiding principles upon which the Board's cost award regime is based.

In these circumstances, we submit that no modification to the *Rules* and the *Practice Direction* are needed to assure that the Board's awards to cost eligible intervenors are appropriate and reasonable. Neither the obligation of the utilities to more frequently consult and communicate with their customers, nor the Board's plan to make greater use of customer surveys and focus groups, should operate to dilute the ability of cost eligible intervenors to present meaningful interventions which fully and completely express their concerns.

More frequent meetings between utilities and their customers, focus groups and customer surveys are not a substitute for a thorough analysis and subsequent pre-hearing discovery examination followed, if necessary, by the examination of utility witnesses under oath by persons experienced with utility rate applications. This is the type of scrutiny which is needed to

uncover the millions and millions of dollars which are ultimately found to have been unreasonably proposed by the utilities to recover from ratepayers as a whole, or from particular classes of ratepayers who did not cause the utility to incur any increased costs.

Yours very truly,

Peter C.P. Thompson, Q.C.

PCT\VJD\slc
Enclosures

c. EB-2013-0301 Interested Parties
Paul Clipsham

OTT01: 5897803: v1

TAB 1

Attachment 1

Ontario Energy Board

In the matter of
a hearing under the
Ontario Energy Board Act
regarding
Awarding of Costs
and
Related Procedural Matters

E.B.O. 116

REPORT OF THE BOARD

CHAPTER IV - CONCLUSIONS OF THE BOARD BY ISSUES

ISSUE 1: FOR WHAT REASONS SHOULD COSTS BE AWARDED TO INTERVENORS?

While this Board may have been reluctant in the past to adopt specific procedures for the awarding of costs to intervenors, a general move has been evident for some time towards a more liberal interpretation of the Board's discretion under section 28 of the OEB Act.

The Board believes it should have available to it a broad range of opinions and information for its decision-making. Hearings before the Board are becoming increasingly complex. In such circumstances the Board considers that in fulfilling its duty towards the public interest, which is implicit in the OEB Act, there is an increasing need to ensure that a broad range of interests is represented at the Board's hearings and that the essential points are canvassed in sufficient depth to

develop a record that will provide the maximum assistance to the Board.

Removal of the financial barrier to meaningful intervention on the part of interests having genuine concerns would, in the Board's view, enhance public awareness of and confidence in the regulatory process. Furthermore, without the informed intervention that the Board sees as necessary, there is a real danger that rate hearings will become non-representative of all of the interests which the Board should consider in reaching decisions. The Board is not interested in the quantity of interventions per se; rather it seeks to provide a forum in which balanced representations can be received from those who have something of value to contribute to the hearing. The Board has concluded that intervenors making such contributions should be recognized through the awarding of costs.

The Board does not accept the views of some participants that the prospect of cost

awards will encourage parties to intervene even though their interest may be limited, nor that cost awards will encourage frivolous or vexatious interventions. If, however, such interventions should occur, the Board believes it can control them. Moreover, by adopting a policy of awarding costs more regularly, the Board does not guarantee an award of costs to any particular intervenor.

The Board considers that awarding costs to intervenors will not necessarily prolong the hearings. While the overall cost of hearings may increase initially, the additional cost will be worthwhile if the overall objective of improving the flow of information for decision-making purposes is achieved. Probably the most compelling rationale for cost awards is that it should encourage the flow of high quality, helpful information to the Board.

TAB 2

21. Notice

21.01 Any notices required by these Rules or a Board order shall be given in writing, unless the Board directs otherwise.

21.02 The Board may direct a party to give notice of a proceeding or hearing to any person or class of persons, and the Board may direct the method of providing the notice.

21.03 Where a party has been directed to serve a notice under this Rule, the party shall file an affidavit or statement of service that indicates how, when, and to whom service was made.

22. Levels of Participation

22.01 A person who wishes to participate in a proceeding, shall comply with the Rules applicable to the intended level of participation:

(a) To actively participate in the proceeding as a party, the person shall comply with **Rule 23**.

(b) To provide comments in writing or through an oral presentation, the person shall comply with **Rule 24**.

(c) To participate as an observer, the person shall comply with **Rule 25**.

22.02 The manner in which persons may participate in a proceeding as identified in **Rule 22.01** is subject to any provision to the contrary in a notice or procedural order issued by the Board.

23. Intervenor Status

23.01 Subject to **Rule 23.05** and except as otherwise provided in a notice or procedural order issued by the Board, a person who wishes to actively participate in the proceeding shall apply for intervenor status by filing and serving a letter of intervention by the date provided in the notice of the proceeding.

23.02 The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and

responsibly in the proceeding by submitting evidence, argument or interrogatories, or by crossexamining a witness.

23.03 Every letter of intervention shall contain the following information:

(a) a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention;

(b) subject to **Rule 23.04**, a concise statement of the nature and scope of the intervenor's intended participation;

(c) a request for the written evidence, if it is desired;

(d) an indication as to whether the intervenor intends to seek an award of costs;

(e) if applicable, the intervenor's intention to participate in the hearing using the French language; and

(f) the full name, address, telephone number, and fax number, if any, of no more than two representatives of the intervenor, including counsel, for the purposes of service and delivery of documents in the proceeding.

23.04 Where, by reason of an inability or insufficient time to study the document initiating the proceeding, a person is unable to include any of the information required in the letter of intervention under **Rule 23.03(b)**, the person shall:

(a) state this fact in the letter of intervention initially filed; and

(b) refile and serve the letter of intervention with the information required under **Rule 23.03(b)** within 15 calendar days of receipt of a copy of any written evidence, or within 15 calendar days of the filing of the letter of intervention, or within 3 calendar days after a proposed issues list has been filed under **Rule 30**, whichever is later.

23.05 A person may apply for intervenor status after the time limit directed by the Board by filing and serving a notice of motion and a letter of intervention

that, in addition to the information required under **Rule 23.03**, shall include reasons for the late application.

23.06 The Board may dispose of a motion under **Rule 23.05** with or without a hearing.

23.07 A party may object to a person applying for intervenor status by filing and serving written submissions within 10 calendar days of being served with a letter of intervention.

23.08 The person applying for intervenor status may make written submissions in response to any submissions filed under **Rule 23.07**.

23.09 The Board may grant intervenor status on conditions it considers appropriate.

24. Public Comment

24.01 Except as otherwise provided in a notice or procedural order issued by the Board, a person who does not wish to be a party in a proceeding, but who wishes to communicate views to the Board, shall file a letter of comment.

24.02 The letter of comment shall include the nature of the person's interest, the person's full name, address and telephone number, as well as any request to make an oral presentation to the Board in respect of the proceeding.

24.03 The Board shall serve a letter of comment filed under **Rule 24.01** on the party who commenced the proceeding and on any other party who requests a copy.

24.04 Any party may file a reply to the letter of comment, and shall serve it on the person who filed the letter and such other persons as directed by the Board.

24.05 Where the Board has permitted a person to make an oral presentation, that person shall contact the Board Secretary to arrange a time to be heard by the Board.

24.06 A person who makes an oral presentation shall not do so under oath or affirmation and shall not be subject to cross-examination, unless the Board directs otherwise.

(b) by a person seeking intervenor status at the time the application for intervenor status is made; or

(c) by a person making an oral presentation under **Rule 24** who indicates to the Board Secretary the desire to make the presentation in French.

39.03 Where all or part of a hearing is to be conducted in French, the notice of the hearing shall specify in English and French that the hearing is to be so conducted, and shall further specify that English may also be used.

39.04 Where a written submission or written evidence is provided in either English or French, the Board may order any person presenting such written submission or written evidence to provide it in the other language if the Board considers it necessary for the fair disposition of the matter.

40. Media Coverage

40.01 Radio and television recording of an oral or electronic hearing which is open to the public may be permitted on conditions the Board considers appropriate, and as directed by the Board.

40.02 The Board may refuse to permit the recording of all or any part of an oral or electronic hearing if, in the opinion of the Board, such coverage would inhibit specific witnesses or disrupt the proceeding in any way.

PART VI - COSTS

41. Cost Eligibility and Awards

41.01 Any person may apply to the Board for eligibility to receive cost awards in Board proceedings in accordance with the *Practice Directions*.

41.02 Any person in a proceeding whom the Board has determined to be eligible for cost awards under **Rule 41.01** may apply for costs in the proceeding in accordance with the *Practice Directions*.

TAB 3

Attachment 3

ONTARIO ENERGY BOARD

Practice Direction

On

Cost Awards

Revised March 19, 2012

ONTARIO ENERGY BOARD

PRACTICE DIRECTION ON COST AWARDS

1. DEFINITIONS

1.01 In this Practice Direction, words have the same meaning as in the *Ontario Energy Board Act, 1998* or the Ontario Energy Board's Rules of Practice and Procedure, unless otherwise defined in this section.

"Act" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B;

"applicant" means:

(a) when used in connection with a process commenced by an application to the Board, the person(s) who make(s) an application;
(b) when used in connection with a process commenced by reference, Order in Council, or on the Board's own initiative, the person(s) named by the Board to be the applicant; and
(c) when used in connection with a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the Board, the person(s) from whom cost awards will be recovered in relation to the process, as determined by the Board;

"intervenor", in respect of a proceeding, means a person who has been granted intervenor status by the Board and, in respect of a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the Board, means a person who is participating in that process, and "intervention" shall be interpreted accordingly;

"municipality" has the same meaning as in the *Municipal Act, 2001,* S.O. 2001, c.25;

"party" means an applicant, an intervenor and any other person participating in a Board process;

"person" includes (i) an individual; (ii) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or other private or public body corporate; and (iii) an unincorporated association or organization;

"process" means a process to decide a matter brought before the Board whether commenced by application, reference, Order in Council, notice of appeal or on the Board's own initiative, and includes a notice and comment process under section 45 or 70.2 of the Act and any other consultation process initiated by the Board;

"Tariff" means the Cost Award Tariff contained in Appendix A to this Practice Direction;

"*Travel, Meal and Hospitality Expenses Directive*" means the Ministry of Government Services, Management Board of Cabinet, *Travel, Meal and Hospitality Expenses Directive*,

dated April 1, 2010, as may be revised from time to time; and

"wholesaler" means a person who purchases electricity or ancillary services in the IESO-administered markets or directly from a generator or who sells electricity or ancillary services through the IESO-administered markets or directly to another person, other than a consumer.

2. COST POWERS

2.01 The Board may order any one or more of the following:

(a) by whom and to whom any costs are to be paid;
(b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed;
(c) when any costs are to be paid;
(d) costs against a party; and
(e) the costs of the Board to be paid by a party or parties.

2.02 The timelines set out in this Practice Direction shall apply unless, at any stage in a particular process, the Board determines or orders otherwise.

3. COST ELIGIBILITY

3.01 The Board may determine whether a party is eligible or ineligible for a cost award.

3.02 The burden of establishing eligibility for a cost award is on the party applying for a cost award.

3.03 A party in a Board process is eligible to apply for a cost award where the party:

(a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board;
(b) primarily represents a public interest relevant to the Board's mandate; or
(c) is a person with an interest in land that is affected by the process.

3.04 In making a determination whether a party is eligible or ineligible, the Board may:

(a) in the case of a party that is an association or other form of organization comprised of two or more members, have regard to whether the individual members would themselves be eligible or ineligible;
(b) in the case of a party that is a commercial entity, have regard to whether the entity primarily represents its own commercial interest (other than as a ratepayer) rather than the public interest, even if the entity may be in the business of providing services that can be said to serve a public interest relevant to the Board's mandate; and
(c) also consider any other factor the Board considers to be relevant to the public interest.

3.05 Despite section 3.03, the following parties are not eligible for a cost award:

(a) an applicant;
(b) an electricity transmitter, wholesaler, generator, distributor, retailer, and unit sub-meter provider, either individually or in a group;
(c) a gas transmitter, gas distributor, gas marketer and storage company, either individually or in a group;
(d) the Independent Electricity System Operator;
(e) the Ontario Power Authority;
(f) the Smart Metering Entity;
(g) the government of Canada (including a department), and any agency, Crown corporation or special operating agency listed in a schedule to the *Financial Administration Act* (Canada) that has not at the relevant time been privatized;
(h) the government of Ontario (including a ministry), and any public body or Commission public body listed in Table 1 of Ontario Regulation 146/10 (Public Bodies and Commission Public Bodies – Definitions) made under the *Public Service of Ontario Act, 2006* (Ontario);
(i) a municipality in Ontario, individually or in a group;
(j) a conservation authority established by or under the *Conservation Authorities Act* (Ontario) or a predecessor of that *Act*, individually or in a group;
(k) a corporation, with or without share capital, owned or controlled by the government of Canada, the government of Ontario or a municipality in Ontario; and
(l) a person that owns or has a controlling interest in a person listed in (a), (b) or (c) above.

For the purposes of paragraph (k), control has the same meaning as in the *Business Corporations Act* (Ontario).

For the purposes of paragraph (l): (i) a person has a controlling interest in another person listed in (a), (b) or (c) that is a limited partnership if the person is a general partner; (ii) a person has a controlling interest in another person listed in (a), (b) or (c) that is any other form of partnership if the person is a partner; and (iii) a person has a controlling interest in another person listed in (a), (b) or (c) that is a corporation if the person controls the corporation or controls a corporation that holds 100 percent of the voting securities of the first-mentioned corporation, control having the same meaning as in the *Business Corporations Act* (Ontario).

3.06 Notwithstanding section 3.05, a party which falls into one of the categories listed in section 3.05 may be eligible for a cost award if it is a customer of the applicant.

3.07 Also notwithstanding section 3.05, the Board may, in special circumstances, find that a party which falls into one of the categories listed in section 3.05 is eligible for a cost award in a particular process.

3.08 The Board may, in appropriate circumstances, award an honorarium in such amount as the Board determines appropriate recognizing individual efforts in preparing and presenting an intervention, submission or written comments.

4. COST ELIGIBILITY PROCESS

4.01 A party that will be requesting costs must make a request for cost eligibility that includes the reasons as to why the party believes that it is eligible for an award of costs, addressing the Board's cost eligibility criteria (see section 3). The request for cost eligibility shall be filed as part of the party's letter of intervention or, in the case of a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the Board, shall be filed by the date specified by the Board for that purpose. For information on filing and serving a letter of intervention, refer to the Board's Rules of Practice and Procedure.

4.02 An applicant in a process will have 10 calendar days from the filing of the letter of intervention or request for cost eligibility, as applicable, to submit its objections to the Board, after which time the Board will rule on the request for eligibility.

4.03 The Board may at any time seek further information and clarification from any party that has filed a request for cost eligibility or objected to such a request, and may provide direction in respect of any matter that the Board may consider in determining the amount of a cost award, and, in particular, combining interventions and avoiding duplication of evidence or interventions.

4.04 A direction mentioned in section 4.03 may be taken into account in determining the amount of a cost award under section 5.01.

5. PRINCIPLES IN AWARDING COSTS

5.01 In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party:

(a) participated responsibly in the process;
(b) asked questions in interrogatories or on cross-examination which were unduly repetitive of questions already asked by one or more other parties;
(c) made reasonable efforts to ensure that its evidence or intervention was not unduly repetitive of evidence presented by or the intervention of one or more other parties;
(d) made reasonable efforts to co-operate with one or more other parties in order to reduce the duplication of interrogatories, evidence, questions on cross-examination or interventions;
(e) made reasonable efforts to combine its intervention with that of one or more similarly interested parties;
(f) contributed to a better understanding by the Board of one or more of the issues in the process;
(g) complied with directions of the Board, including directions related to the pre-filing of written evidence;
(h) addressed issues in its interrogatories, its written or oral evidence, its questions on cross-examination, its argument or otherwise in its intervention which were not relevant to the issues in the process;
(i) engaged in any other conduct that tended to lengthen unnecessarily the duration of the process; or

(j) engaged in any other conduct which the Board considers inappropriate or irresponsible.

6. COSTS THAT MAY BE CLAIMED

6.01 Reference should be made to the Board's Tariff.

6.02 Cost claims shall be prepared using the applicable Board-approved form attached to this Practice Direction as Appendix "B".

6.03 The burden of establishing that the costs claimed were incurred directly and necessarily for the party's participation in the process is on the party claiming costs.

6.04 A party that is a natural person who has incurred a wage or salary loss as a result of participating in a hearing may recover all or part of such wage or salary loss, in an amount determined appropriate by the Board.

6.05 A party will not be compensated for time spent by its employees or officers in preparing for or attending at Board processes. When determining whether an individual is an officer or employee of the party, the Board will look at the true nature of the relationship between the individual and the party and the role the individual performs for the party. The Board may deem the individual to be an officer or employee of the party regardless of the individual's title, position, or contractual status with the party. Furthermore, an employee or officer of a company or organization that is affiliated with or related to the party that is eligible for an award of costs will be deemed to be an employee or officer of the party.

6.06 Counsel fees will be accepted in accordance with the Board's Tariff.

6.07 Paralegal fees will be accepted in accordance with the Board's Tariff. To qualify for consideration as a paralegal service, a paralegal must have undertaken services normally or traditionally performed by legal counsel, thereby reducing the counsel's time spent on client affairs.

6.08 Where appropriate, fees for articling students may be accepted in accordance with the Board's Tariff.

6.09 Cost awards will not be available in respect of services provided by in-house counsel and supporting employees, including in-house paralegal and articling students.

6.10 Consultant and case management fees will be accepted in accordance with the Board's Tariff. A copy of the consultant's curriculum vitae must be attached to the completed form attached to this Practice Direction as Appendix "B" if the consultant has not already provided a curriculum vitae to the Board in another process within the preceding 24 months.

6.11 No differentiation will be made between the rates for preparation and attendance.

6.12 The Board may award costs to a party on the basis of a fixed amount per day for participation in workshops, working groups, advisory groups, stakeholder meetings, technical conferences, issues conferences, settlement conferences or pre-hearing conferences.

7. DISBURSEMENTS

7.01 Reasonable disbursements, such as postage, photocopying, transcript costs, travel and accommodation, directly related to the party's participation in the process, will be allowed in accordance with the Board's Tariff, including as applicable the principles and rules set out in the *Travel, Meal and Hospitality Expenses Directive* referred to in the Tariff.

7.02 A party may be compensated for the reasonable disbursements of an employee or officer of the party which are necessarily and directly incurred as a result of participation in a Board process.

7.03 Itemized receipts must be submitted with the cost claim (credit card slips or statements are not sufficient). If an itemized receipt cannot be provided, a written explanation must be submitted to explain why the receipt is unavailable and a description itemizing and confirming the expenses must be provided.

8. GROUP INTERVENTIONS

8.01 In a case where a number of eligible parties have joined together for the purpose of a combined intervention, the Board will normally allow reasonable expenses necessary for the establishment and conduct of such a group intervention.

8.02 The reasonable costs of meeting room rentals and associated costs required for the formation and coordination of a group, and which are specific to the intervention, will normally be allowed. The travel costs and personal expenses of group members attending such meetings will, however, normally be excluded.

8.03 Attendance at a hearing should be limited to the number of representatives required to effectively monitor and provide input into the processes. When groups are not represented by counsel and/or experts, the reasonable out of pocket disbursements directly incurred for the attendance of a maximum of four group members will normally be accepted. When the group is represented by counsel and/or experts, the reasonable out of pocket disbursements incurred for the attendance of a maximum of two group members, as advisors, will normally be accepted.

9. HARMONIZED SALES TAX ("HST")

9.01 A party will be compensated for the HST it pays on goods and services which are

determined by the Board to be eligible for an award of costs.

9.02 To be compensated, a party shall provide the following required HST information when completing the applicable form attached to this Practice Direction as Appendix "B":

(a) the tax status of the party, e.g. full registrant, unregistered, qualifying non-profit, zero-rated, tax exempt, etc;
(b) the HST registration number, if any; and
(c) the details of costs incurred showing the HST related to each item of cost.

10. COST CLAIMS

10.01 All cost claims will be subject to review by the Board for compliance with the Board's Tariff, including as applicable the principles and rules set out in the *Travel, Meal and Hospitality Expenses Directive* referred to in the Tariff.

10.02 Cost claims pertaining to a process must be accompanied by a letter addressing the reasons why costs should be awarded, and shall be filed with the Board and served on the party(ies) paying the cost awards within the time and in the manner determined by the Board in respect of the process.

10.03 Cost claims shall be prepared using the applicable Board-approved form attached to this Practice Direction as Appendix "B" and shall be provided in a clear and legible format.

10.04 Where a party who is a natural person represents himself or herself in a process and claims costs, the Board may accept the claim in the form of a letter providing details of the costs directly and necessarily incurred by the individual as a result of his or her participation in the process.

11. COST ASSESSMENT

11.01 A party which the Board has determined shall pay the costs shall have 10 calendar days from the date of submission by a party claiming costs to file any objection to any aspect of the costs claimed. One copy of the objection is to be filed with the Board and one copy is to be served on the party against whose claim the objection is being made.

11.02 The party claiming costs shall have 7 calendar days from the date of the filing of an objection to file a reply with the Board and to serve a copy on the objecting party.

11.03 The Board will then issue its Decision and Order directing to whom and by whom costs are to be paid and detailing the costs to be awarded to each party. The Decision and Order may also address the Board's costs.

12. SPECIAL PROVISIONS FOR CONSULTATION PROCESSES INITIATED BY THE BOARD

12.01 Persons who will be ordered to pay cost awards for any consultation process initiated by the Board will be informed of their obligation at the commencement of the consultation process.

12.02 If the persons being ordered to pay the cost awards are part of a class of regulated entities who have to pay cost assessments under section 26 of the Act, the cost awards may be apportioned between the members of the class in the same manner as costs are apportioned within the class under the Board's Cost Assessment Model or as otherwise determined by the Board.

12.03 If the persons being ordered to pay cost awards are part of more than one class of regulated entities who have to pay cost assessments under section 26 of the Act, the cost awards may be apportioned between the classes in the same manner as costs are apportioned between the classes under the Board's Cost Assessment Model or as otherwise determined by the Board.

12.04 In some cases, the Board may act as a clearing house for all payments of cost awards in consultation processes initiated by the Board. In those cases, invoices for cost awards will be sent out to regulated entities who have to pay cost assessments under section 26 of the Act at the same time as the invoices for cost assessments are sent out. The persons paying the cost awards shall submit their payment to the Board in accordance with the invoices issued by the Board. Payment of these invoices will be due at the same time that cost assessments are due.

12.05 The Board will not send out the payments for the cost awards to persons eligible to receive the cost awards until at least eighty percent (80%) of the total amount owed by the payor(s) has been received by the Board.

13. PUBLICATION OF COST AWARD INFORMATION

13.01 The Board may, in its discretion, publish a summary of the costs awarded to each party in relation to that party's participation in Board processes. This publication is in addition to the publication of information pertaining to cost award eligibility and cost awards within the scope of a given process.

14. EFFECTIVE DATE

14.01 This revised Practice Direction on Cost Awards shall come into effect on March 19, 2012, and applies to all cost eligibility requests, cost claims and other cost award-related materials filed on or after that date.

APPENDIX "A"

COST AWARD TARIFF

NOTE: All tariffs are exclusive of applicable HST.

Legal Fees - Hourly Rates

Provider of Legal Services	Completed Years Practising	Maximum Hourly Rate
Lawyer	20+	$330
Lawyer	11 to 19	$290
Lawyer	6 to 10	$230
Lawyer	0 to 5	$170
Articling Student/Paralegal	-	$100

Analyst/Consultant Fees - Hourly Rates

Consultants are experts in aspects of business or science such as finance, economics, accounting, engineering or the natural sciences such as geology, ecology, agronomy, etc.

Time spent providing expert evidence, providing expert professional advice to the Board, or acting as an expert witness will be compensated at the appropriate analyst/consultant rate set out in the table below. A copy of the analyst/consultant's curriculum vitae must be attached to the cost claim if the analyst/consultant has not already provided a curriculum vitae to the Board in another process within the preceding 24 months.

If a consultant provides case management services, these hours are to be listed separately and will be compensated at the case management rate.

Analyst/Consultant Fees (including Case Management)

Provider of Service	Years of Relevant Experience	Maximum Hourly Rate
Analyst/consultant	20+	$330
Analyst/consultant	11 to 19	$290
Analyst/consultant	6 to 10	$230
Analyst/consultant	0 to 5	$170
Case Management	-	$170

Disbursements

Reasonable disbursements, such as postage, photocopying, transcript costs, travel and accommodation, directly related to the party's participation in the process, will be allowed, as applicable in accordance with the principles and rules set out in the *Travel, Meal and Hospitality Expenses Directive* which is available on the Ministry of Government Services website. Except as provided in section 7.03 of this Practice Direction, itemized receipts substantiating the disbursement must accompany the cost claim.

APPENDIX "B"

COST CLAIM FORMS

The form of "Cost Claim for Hearings" and the form of "Cost Claim for Consultations" are attached as separate documents

TAB 4

Attachment 4

Increasing Citizen Participation in Administrative Proceedings: Can Federal Financing Bridge the Costs Barrier?

*Coeta Chambers**

Due to the pervasive effects of administrative activities on American society, there have been efforts to increase public participation in agency proceedings in order to counter the institutional bias which had formerly favored regulated interests in the decisionmaking process. Along with these efforts came the realization that many public representatives were precluded from participating because of the prohibitive cost of effective participation. Professor Chambers examines two programs which attempt to provide federal funding for such participation—an established program within the Federal Trade Commission and a proposed program presented in a recent Senate bill. She concludes that the approach of the Federal Trade Commission, expanded to all agencies in a program similar to that in the Senate bill and supplemented with express directions in areas which were either ambiguous or omitted under previous programs, would assure adequate public participation, reduce agency bias, and produce better agency decisions in the public interest.

INTRODUCTION

AS THE PROBLEMS facing this nation have become more complex, Congress has increasingly turned to administrative agencies for solutions. The original wisdom was that the best solutions are devised by experts guided only by their specialized, technical skills.[1] Today, however, there is a burgeoning recognition that "no particular government agency or group of agencies . . . is wise or knowledgeable enough to make the judgments without informed citizen participation."[2] Thus, decisionmakers, scholars, and others concerned with effective, equitable administrative process have endeavored to increase public participation in agency procedures.

There have been many forceful arguments regarding the bene-

* Visiting Assistant Professor of Law, University of Santa Clara School of Law. A.B., Stanford Univ. (1961); J.D., University of Santa Clara School of Law (1977); J.S.M., Stanford University School of Law (1979).

1. Charles Reich refers to this concept as the "central myth" in our administrative process. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1236 (1966).

2. Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 AD. L. REV. 391, 392 (1976).

fits of increased public participation: greater agency responsiveness to the public,[3] legitimization of agency discretion through consideration of all interests,[4] increased confidence in government,[5] and more diligence by the agencies themselves.[6] Yet, perhaps the most significant reason for recent attempts to develop greater public participation is the widespread recognition of the "capture phenomenon"—that an agency, exposed to the views of those groups subject to its regulation (hereinafter "industries"), will tend to adopt rules which reflect the industries' points of view.[7]

The perceived bias of agency decisions is not a product of corruption or collusion, but rather a natural result of the decisionmaking process. As with other decisionmakers, agency staffs' "perspectives are limited by the information that is available to them, and their attitudes are shaped by the rewards and feedback that our system provides to them."[8] The regulated industries have the resources to participate vigorously in the process at every level.[9] Thus, due to such vigorous participation and the inability of opposing viewpoints to participate effectively,[10] agency staffs will, in many instances, depend on information supplied by the industries.[11]

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3. *See generally* Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 525–31 (1972).

4. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1712 (1975).

5. *Id.* at 1761. Yet, such claims of increased citizen involvement may be overstated since most citizens are probably unaware of the efforts of citizen groups on their behalf. *Id.* at 1767.

6. Lenny, *The Case for Funding Citizen Participation in the Administrative Process*, 28 AD. L. REV. 483 (1976).

7. Cramton, *supra* note 3, at 529.

8. *Id.* at 529–30.

9. For a penetrating analysis of the advantages of the use of financial resources in decisionmaking, see Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974). One agency has noted the resulting imbalance:

> Consumer advocacy before the FDA [Food and Drug Administration] is rare, sporadic, and virtually always underfinanced, while the regulated industries maintain continuous and well-financed advocacy directly and through their trade associations. (One measure of this imbalance is FDA's Public Calendar, which indicates constant and routine contacts between members of the regulated industries, and only occasional contacts with nonindustry spokespersons.)

41 Fed. Reg. 35,855 at 35,857 (1976).

10. *Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess., pt. 1, at 4 (1977) [hereinafter cited as *Hearings I*] (statement of Calvin J. Collier).

11. *See* Bloch & Stein, *The Public Counsel Concept in Practice: The Regional Rail*

Increased participation by non-industry interests may foster a better balance in administrative decisions by offering a greater range of ideas,[12] and an opportunity to consider alternatives not previously advanced, thus encouraging more decisions that are in the "public interest." Agencies may be willing to take a broader outlook if non-industry groups can provide new political support. Moreover, simply placing more points of view on the record may have the pragmatic effect of forcing agencies to give consideration to those views in order to avoid reversal on review.[13]

Increased participation by those representing non-industry interests is advocated not only by those in academia. Decisionmakers within the agencies also recognize the need for additional points of view. The Atomic Safety and Licensing Appeal Board, which reviews Nuclear Regulatory Commission (NRC) licensing decisions, "has stated on numerous occasions that citizen participation in their proceedings has been extremely useful, has developed safety questions which otherwise would not have been developed, and has improved the safety of nuclear re-

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Reorganization Act of 1973, 16 WM. & MARY L. REV. 215, 216 (1974); Cramton, *supra* note 3, at 529; Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069, 1074 (1971); Stewart, *supra* note 4, at 1777.

12. Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 381 n.90 (1972).

13. Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 HARV. L. REV. 1815, 1817 (1975). A collateral issue pervading any discussion of whether and how the public should participate in agency proceedings is who should represent the public in such proceedings. Although the agency in many cases represents the public through statutory mandates to determine what is in the "public interest," *see* note 16 *infra*, getting greater participation by representatives from so-called "public interest groups" seems to be the objective of those wishing greater public participation in agency proceedings. One commentary has noted several characteristics of such groups: large, impecunious membership (*e.g.*, welfare recipients); large, wealthy membership with small or non-economic individual interests (*e.g.*, environmentalists); dispersed, small membership suffering great hardship (*e.g.*, persons with uncommon handicaps); or membership which is not easily organized (*e.g.*, institutionalized persons). R. FRANK, J. ONEK & J. STEINBERG, PUBLIC PARTICIPATION IN THE POLICY FORMULATION PROCESS (1977), *reprinted in Hearings I, supra* note 10, at 555, 589.

Notably, critics of such groups claim that they do not represent the public interest but rather represent private, special interests of their own. *See Hearings I, supra* note 10, at 83 (questions of Senator Thurmond), 132 (statement of David B. Graham). Yet, such criticism merely demonstrates the difficulty in defining the "public interest." Commentators indicate that "public interest" as used by these groups (and perhaps as best formulated by agencies) is not a uniform, consistent, monolithic theme, or abstract formula to impose on society, Gellhorn, *supra* note 12, at 360, but rather a commitment to the idea that "everyone affected by corporate or bureaucratic decisions should have a voice in those decisions, even if he cannot obtain conventional legal representation." Halpern & Cunningham, *Reflections on the New Public Interest Law Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095, 1109 (1971).

actors."[14] Rush Moody, a Federal Power Commission (FPC) Commissioner, believes that "most administrators and regulators recognize that opening of the administrative process yields better results, both procedurally and substantively, than attempted maintenance of a closed system."[15]

While many procedural and legal issues which once presented serious barriers to public participation have been surmounted,[16]

14. *Hearings I, supra* note 10, at 84 (statement of Anthony Z. Roisman).

15. Panel II, *Standing, Participation and Who Pays?* 26 AD. L. REV. 423, 451 (1974) (statement of Rush Moody, Jr.).

16. Traditionally, the major barrier to increased participation in the administrative process has been a narrow interpretation of standing—the interest required to intervene in agency proceedings, 5 U.S.C. § 555(b) (1976), or to gain judicial review of agency decisions, 5 U.S.C. § 702 (1976). A major breakthrough for public participation came in 1966 in Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). In that case the court rejected the idea that the Federal Communications Commission (FCC) could adequately represent the public interest. *Id.* at 1003. For a discussion of statutory agency mandates which require agencies to act in the public interest as a formula for providing the agency with sufficient discretion to act effectively without overstepping congressional authority through a delegation of policymaking power, see Reich, *supra* note 1, at 1233. *Cf.* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) where the court said that an agency's role in representing the public interest "does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right must receive active and affirmative protection at the hands of the [agency]. . . ."

The court in *United Church of Christ* held that "some 'audience participation' must be allowed in license renewal proceedings." 359 F.2d at 1005. Noting that such public intervention would create problems for the Commission, the court suggested the development of formalized standards "to regulate and limit public intervention to spokesmen who can be helpful." *Id.* The court approved of the FCC criterion and determined that the appellants were "responsible spokesmen for representative groups having significant roots in the listening community." *Id.* This standard was appealing to those wishing greater public participation in agency proceedings since it seemingly eliminated "the distinction between the intervenor and the 'ordinary' member of the public," a distinction which was formerly required for standing since a member of the public per se had no particular interest to represent. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 729–30 (1968).

Four years after *United Church of Christ*, the Supreme Court further liberalized the requirements for standing. In Association of Data Processing Serv. v. Camp, 397 U.S. 150 (1970) the Court, referring to the Administrative Procedure Act, stated the test as "whether the interest sought to be protected by the Complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. In a later case, Sierra Club v. Morton, 405 U.S. 727 (1972), the Court made clear that non-economic interests such as "aesthetic, conservational, and recreational," were included in the standing test. *Id.* at 154.

The advent of these cases and subsequent agency regulations assure that standing is no longer the primary obstacle to increased public participation it once was. *See, e.g.*, 10 C.F.R. § 2.714 (1978) (Nuclear Regulatory Commission (NRC)); 14 C.F.R. § 302.15 (1978) (Civil Aeronautics Board (CAB)); 18 C.F.R. § 1.8 (1979) (Federal Energy Regulatory Commission (FERC) (formerly the Federal Power Commission)); 47 C.F.R. § 1.223 (1978) (FCC); 49 C.F.R. § 1100.70 (1978) (Interstate Commerce Commission (ICC)).

citizen groups seeking to participate in the administrative process still face significant practical obstacles—particularly costs. Although limited forms of participation, such as submitting a written statement of position or testifying at a hearing, are feasible for the most impecunious of groups, such procedures simply do not constitute "effective advocacy" of an interest in this context. To make a real impact on the record upon which the agency decision must rest, public interest groups must take advantage of all available methods of participation in regulatory proceedings.[17]

Activities which constitute effective advocacy include gathering factual data to present alterative solutions, providing expert witnesses, and hiring attorneys skilled at both effectively representing their interests, and cross-examining staff and industry witnesses.[18] Such participation entails a "serious commitment of personnel, resources, and finances."[19] The cost of active intervention in Federal Communications Commission (FCC) license renewal proceeding has been estimated to be from $350,000 to $400,000.[20] Similar intervention in a Food and Drug Administration (FDA) rulemaking proceeding would cost $30,000–$40,000.[21] Transcript costs, multiple-copy requirements, and expert witness' and attorneys' fees constitute the primary expenses.

A copy of the transcript is essential for effective participation in an ongoing proceeding. Agencies contract with private companies for transcripts, and the costs per page vary widely depending on the terms of the contract.[22] Since an average hearing day produces approximately 100 pages of transcript,[23] the costs can be significant. Even a relatively short hearing of one or two weeks

17. *Hearings I, supra* note 10, at 54 (statement of William J. Scott); Cramton, *supra* note 3, at 539. *See also* Galanter, *supra* note 9.

18. Cross-examination can be a particularly important device "to prevent broader issues from being obscured by a narrow focus on technical matters, to prevent factual inconsistencies from being buried in the record and to bring out pro-industry orientation of expert witnesses or staff witnesses." Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702, 744 (1972).

19. *Hearings I, supra* note 10, at 54 (statement of William J. Scott).

20. Comment, *supra* note 18, at 771 n.466.

21. Cramton, *supra* note 3, at 538.

22. Costs also depend upon how quickly the transcript is needed: "ordinary" delivery (5–10 days) varies from 28¢–95¢ per page; next day delivery, 64¢–$1.85 per page; and "immediate" delivery (same day), 84¢–$3.00 per page. Gellhorn, *supra* note 12, at 391 n.122. A more recent study reported that costs were as high as $4.00 per page in some cases. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, REPORT TO THE NUCLEAR REGULATORY COMMISSION: POLICY ISSUES RAISED BY INTERVENOR REQUESTS FOR FINANCIAL ASSISTANCE IN NRC PROCEEDINGS 133–34 (1975).

23. Gellhorn, *supra* note 12, at 392.

will produce between 500 and 1,000 pages of transcript, placing a heavy financial burden on citizen intervenor groups.[24] Commentators have persuasively argued that transcript costs should be considered a legitimate cost of the agency responsible for the hearings and that copies should be made available to participants at the cost of reproduction.[25]

Multiple copy rules also add to participation costs. For example, both the Civil Aeronautics Board (CAB) and the Federal Energy Regulatory Commission (FERC) require that nineteen copies of all documents be filed.[26] The Administrative Conference of the United States has recommended that such requirements be waived in cases where it is "burdensome" and that all "filing and distribution requirements should be re-examined."[27] Alternatively, like transcript costs, it seems that duplication costs for meeting these requirements should be borne by the agencies responsible for the hearings to encourage public participation.[28]

As may be expected, costs of gathering information and producing expert witnesses are also burdensome to citizens groups. Fees for experts range from anywhere between $2,500 and $5,000 in FDA proceedings to $50,000 in large Interstate Commerce Commission (ICC) rate investigations.[29] One commentator has suggested requiring agencies to assist public interest groups by providing access to government information and experts.[30] Others

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24. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 134.

25. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 28, PUBLIC PARTICIPATION IN ADMINISTRATIVE HEARINGS 4 (1971), *reprinted in* T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, app. F [hereinafter cited as RECOMMENDATION 28]; Cramton, *supra* note 3, at 539; Gellhorn, *supra* note 12, at 392–93.

26. 14 C.F.R. § 302.3(c) (1978) (CAB); 18 C.F.R. § 1.15(b) (1979) (FERC).

27. RECOMMENDATION 28, *supra* note 25, at 4, *reprinted in* T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, app. F.

28. Some agencies have addressed this problem; the FDA, for example, adopted a regulation in 1977 giving the Commissioner the discretionary power to exempt needy participants from multiple copy rules. 21 C.F.R. § 12.82 (1979).

29. Cramton, *supra* note 3, at 540. Aside from the financial inaccessibility of experts for most public interest intervenors, there is a political dilemma. Commentators have observed that many experts are reluctant to assist citizen groups because the experts feel that identification with the views of those opposing the regulated industry will jeopardize their prospects of employment. *Id.*; *see also* Gellhorn, *supra* note 12, at 393.

30. *Id.* at 393–94. The Administrative Conference of the United States has suggested that each "agency should experiment with allowing access to agency experts and making available experts whose testimony would be helpful in another agency's proceeding." RECOMMENDATION 28, *supra* note 25, at 4, *reprinted in* T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, app. F. *Cf.* Freedom of Information Act, 5 U.S.C. § 552 (1976). This Act directs agencies to disclose information to any "person," unless such information is specifically exempted.

disagree with this idea arguing that such a requirement would threaten an agency's ability to control its own operations and personnel.[31] Apart from its effect on the agency, such access could adversely affect the hearing process itself. If the information is used for cross-examination purposes, or as the basis of additional information, it will be beneficial; however, if participants rely simply on agency information and experts, failing to develop the information which they could otherwise do by virtue of their unique position, the purpose of increased public participation will be subverted.[32]

The largest expenses for intervention in major proceedings are attorneys' fees, which may, in major proceedings, exceed $100,000.[33] Not surprisingly, the issue of how (and whether) to help meet this expense has engendered considerable controversy. Critics of rules which provide for attorney fee compensation to groups participating in rulemaking or other administrative procedures have derided such provisions as "full employment bill[s] for lawyers."[34] Yet, such provisions have precedents in civil rights and antitrust statutes[35]—areas in which they serve a similarly important function.

From the foregoing discussion, it seems clear that the major obstacle to effective public participation is the cost of such activity. Faced with potentially enormous costs and the inability to pass such costs on to their constituencies, "public interest"—*i.e.*, non-industry—representatives cannot reasonably be expected to intervene in agency proceedings unless they receive financial assistance.[36] Thus, to counteract the effects of an imbalanced decisionmaking process, which is characterized by the "capture phenomenon,"[37] efforts have been initiated to provide public funds for public intervention in federal agency proceedings.

This paper analyzes recent efforts to provide public funds to finance citizen group participation in federal agency proceedings. First, the experience of the Federal Trade Commission (FTC) and

31. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 135.

32. *Id.*, app. F at 7 (statement of Harold L. Russell).

33. Gellhorn, *supra* note 12, at 394.

34. Schotland, *After 25 Years: We Come to Praise the APA and Not to Bury It*, 24 AD. L. REV. 261, 273 (1972).

35. *Id.*

36. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, app. F at 5 (statement of John A. Briggs).

37. *See* text accompanying notes 7–11 *supra*.

its compensation program will be examined.[38] This was the first comprehensive statutory program for funding participation in rulemaking. The focus of the analysis then shifts to an evaluation of a recent congressional attempt to apply a program, similar to that developed by the FTC, to all agencies and all types of proceedings.[39] Hopefully, this discussion will enable decisionmakers to intelligently consider better methods for public access to agency procedures.

I. THE FTC PROGRAM

The FTC experience with public funding originated in *American Chinchilla Corp.*,[40] where the Commission ruled that an indigent respondent was entitled to appointed counsel.[41] Shortly thereafter, a group of students petitioned for FTC funds to intervene in *Firestone Tire & Rubber Co.*,[42] thus prompting the Commission to seek the opinion of the Comptroller General regarding the Commission's authority to reimburse the expenses of indigent intervenors. He replied in the affirmative, stating that the Commission had the power to make funds available for such purposes under its authority to "assure proper case preparation."[43]

With the path at least nominally clear for partial funding by the Commission, it remained for Congress to authorize the FTC to institute its current, more comprehensive program of funding intervention in the public interest.

A. *Eligibility Standards*

The current program began in January, 1975 when Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act[44] and granted explicit statutory authority to the FTC to compensate participants in rulemaking proceed-

38. *See* notes 40–101 *infra* and accompanying text.

39. *See* notes 102–256 *infra* and accompanying text.

40. 76 F.T.C. 1016 (1969) (order which prohibited misrepresentation in the sale of chinchilla breeding stock).

41. *Id.*

42. 77 F.T.C. 1666 (1970) (order allowing intervenors to represent the public interest by participation in certain procedures).

43. Letter from Comptroller General Elmer Staats to FTC Chairman Miles W. Kirkpatrick, Aug. 10, 1972, at 2–3, *reprinted in* 31 AD. L.2d 474–75 (1973).

44. Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified in scattered sections of 15 U.S.C. (1976)).

ings.[45] Specifically, the statute gave authority to the FTC to provide compensation for costs of participation in rulemaking proceedings to (1) "any person", (2) who represents an interest, (3) which would not otherwise have been "adequately represented", and (4) which was "necessary for a fair determination of the rulemaking proceeding taken as a whole."[46] Such persons would also have to be unable to participate effectively but for such compensation.[47] Originally, the Commission delegated authority for the program to its Bureau of Consumer Protection.[48] Later, these functions were assumed by the Commission's General Counsel.[49] The Bureau established application procedures and guidelines according to its interpretation of the statutory language.[50] Relying on the language of the Conference report, which indicated that the purpose of the program was "to provide to the extent possible that all affected interests be represented in rulemaking proceedings so that rules adopted thereunder best serve the public interest . . . ,"[51] the Bureau gave a broad interpretation to the eligibility standards enunciated in the statute.

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45. Pub. L. No. 93-637, § 202(h), 88 Stat. 2183 (codified at 15 U.S.C. § 57a(h) (1976)). This section provides:

> (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.

15 U.S.C. § 57a(h) (1976).

46. *Id.* at § 57a(h)(1).

47. *Id.*

48. 16 C.F.R. § 1.17 (1978).

49. 16 C.F.R. § 1.17(d)(1), (2) (1979).

50. *See* FEDERAL TRADE COMM'N, RULEMAKING AND PUBLIC PARTICIPATION UNDER THE FTC IMPROVEMENT ACT (1977) [hereinafter cited as FTC, RULEMAKING], *reprinted in Hearings I, supra* note 10, at 376-400; FEDERAL TRADE COMM'N, APPLYING FOR REIMBURSEMENT OF FTC RULEMAKING PARTICIPATION (1977)[hereinafter cited as FTC, REIMBURSEMENT], *reprinted in Hearings I, supra* note 10, at 401-17.

51. FTC, RULEMAKING, *supra* note 50, at 13, reprinted in *Hearings I, supra* note 10, at 389.

First, by reference to definitions in the Administrative Procedure Act,[52] the Bureau interpreted the phrase "any person" to include any entity, except a part of the executive branch of the federal government.[53] Second, the Bureau determined that any "person" who might be "crucially affected" by a proceeding had a sufficient "interest."[54] Third, a representative provided "adequate representation" of a particular interest only if that party could make a significant contribution which was competent, but not duplicative of other efforts.[55] Fourth, if the rule significantly affected the interest represented, then the representation was "necessary for a fair determination."[56]

In summary, an applicant must show that it represents a "unique" interest that will be affected by the proposed rule and that it can provide a significant contribution to the proceeding.

The language concerning financial requirements for funding eligibility[57] has proven more nebulous, and the Bureau's interpre-

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52. 5 U.S.C. § 551(1), (2) (1976).

53. FTC, RULEMAKING, *supra* note 50, at 13, *reprinted in Hearings I, supra* note 10, at 389.

Within the first two years of the program approximately $800,000 was allocated to thirty different applicants, mostly groups, in thirteen rulemaking proceedings. *See Hearings I, supra* note 10, at 23–29 (statement of Calvin J. Collier). This does not mean individuals were by-passed by the system. For example, during the hearings on the proposed hearing aid industry rules, the National Council of Senior Citizens, as part of its participation in the compensation program, brought nine elderly consumers to Washington to testify. In the view of the Council, the presentation of "real life experiences" added a "vital element" to the hearings and "enabled individuals on low, fixed incomes to personally take part in a decision-making process which would usually be far removed from them." *Id.* at 247 (letter from the National Council of Senior Citizens, Inc.).

Presumably, this interpretation of "any person" would also include state agencies and state attorneys general. *See id.* at 409. Although the records do not reveal whether state representatives have yet applied for FTC funds, *see id.* at 23–29, many state officials have indicated that states definitely feel a need to be included in federal financing programs. *See id.* at 45 (statement of William J. Scott, Attorney General, State of Illinois); *id.* at 70 (statement of Stanley C. Van Ness, New Jersey Public Advocate); *id.* at 187 (telegram from Carl R. Ajello, Attorney General for the State of Connecticut).

54. FTC, RULEMAKING, *supra* note 50, at 16, *reprinted in Hearings I, supra* note 10, at 391.

55. *Id.* at 18–20, *reprinted in Hearings I, supra* note 10, at 393–95.

56. *Id.* at 17–18, *reprinted in Hearings I, supra* note 10, at 392–93.

57. *See* text accompanying notes 46–47 *supra*. The statute provides that up to twenty-five percent of the available funds may go to persons subject to the proposed rule. 15 U.S.C. § 57a(h)(2) (1976). Yet, the regulations are silent on this part of the program. The Bureau guidelines merely state that "[s]uch application should be made on the same forms and will be treated in the same manner as any other application." FTC, REIMBURSEMENT, *supra* note 50, at 8, *reprinted in Hearings I, supra* note 10, at 401, 408. Experience has shown, however, that representatives of such groups seldom apply. When they have ap-

tation has been the target of criticism.[58] While it is clear that an indigent would qualify and a wealthy applicant would not, the vast majority of applicants fall in a gray area between those extremes. According to the Bureau regulations, one factor to be evaluated is the size of the applicant's economic stake in the interest compared to the cost of participation.[59] The Bureau interprets this language to mean that even if the aggregate economic stake is large, if it is dispersed so that each individual has little incentive to participate, the applicant may qualify.[60] Thus, it is the Bureau's view that the statute does not prohibit compensation by the Commission to "established groups which have been able to maintain themselves through general public subscriptions, foundation grants, sale of consumer goods, or services or other devices."[61]

This position is unacceptable to many. For example, the FTC was criticized by Senator Thurmond for funding Consumers Union, which he called "a major business enterprise with over two million subscribers to its magazine. . . ."[62] FTC Chairman Collier responded by noting that the crucial question was whether the group could *effectively* participate without financial assistance. He explained that the answer to that question "does not necessarily turn on a balance sheet."[63]

In other subsequent comments, the FTC revealed additional justifications for including groups such as Consumers Union:

> It is not in the public interest that an organization with the experience and reputation of Consumers Union be forced to spend itself into destitution before it becomes eligible. Nor is it in the public interest that agencies be deprived of the benefits of Consumers Union's expertise and knowledge.[64]

Notably, applications must explain why compensation is necessary—including detailed information on the applicant's current budget, a financial statement regarding sources of funds and commitments to other activities, and the feasibility of individual con-

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plied, they have had difficulty meeting the eligibility requirements apparently due to their presumed access to adequate private funding. *See* notes 65 & 76 *infra*.

58. *See* notes 62–64 *infra* and accompanying text.

59. 16 C.F.R. § 1.17(d)(1) (1979).

60. FTC, RULEMAKING, *supra* note 50, at 23, *reprinted in Hearings I, supra* note 10, at 390.

61. *Id.* at 24, *reprinted in Hearings I, supra* note 10, at 399.

62. *Hearings I, supra* note 10, at 9 (statement of Calvin J. Collier).

63. *Id.* at 10.

64. *Id.* at 40 (Response to Additional Questions of Senator Kennedy Submitted to the FTC).

tributions towards the costs of participation.[65]

B. *Types of Participation Covered*

Participation which qualifies for funding takes several forms and may take place at various stages of the proceeding.[66] Immediately after publication in the Federal Register of the initial notice of a proposed rulemaking, the Commission accepts written statements of opinions and arguments on all issues of fact, law, or policy.[67] At this time, groups or individuals may present requests for designation of specific issues for cross-examination and may begin developing factual data.[68] During the hearing, participants may appear as witnesses to present testimony or factual information developed in studies, present expert witnesses, and cross-examine other witnesses.[69] Rebuttal arguments may be prepared and post-hearing comments may be submitted for the record.[70]

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65. *See* 16 C.F.R. § 1.17(c) (1979). Demonstrating the infeasibility of raising funds may be one of the major stumbling blocks for representatives of regulated interests. Robert Lee, testifying on behalf of the National Hearing Aid Society, said that his conclusion on why the Society did not receive an unconditional approval for funds from the FTC was that "we were businessmen and had the capability of raising the necessary funds if we chose to do so." *Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judicary*, 95th Cong., 1st Sess. pt. 2, at 15 (1977) [hereinafter cited as *Hearings II*] (statement of Robert W. Lee). In fact, the exchange of correspondence between the Society and the FTC indicates that the Society had begun a fund raising campaign, which was ultimately successful, among its members at the time of its application. Although the FTC had approved the Society's application for $38,000, the group did not receive any funds from the FTC since the Society could—thanks to its fund raising—participate without such funds. *See id.* at 350–87.

Given this experience, it certainly seems possible that a requirement which allows compensation only if participation would be otherwise impossible "might create a negative incentive to energetic solicitation efforts" as well as reduce the incentives for individuals to contribute to such organizations. *Hearings I, supra* note 10, at 285 (letter from the Air Transport Association).

66. FTC, REIMBURSEMENT, *supra* note 50, at 1, *reprinted in Hearings I, supra* note 10, at 401. Applications for funding may be accepted immediately after publication of the proposed rule in the Federal Register. 16 C.F.R. § 1.17(c) (1979). Applications are first reviewed by the Presiding Officer for the proceeding, *id.* § 1.17(d)(1); the final decision had been made by the Director of the Bureau of Consumer Protection, 16 C.F.R. § 1.17(d) (1978), but is now made by the Commission's General Counsel. 16 C.F.R. § 1.17(d)(2) (1979). The staff will discuss any problems in the application with the applicant, and application policy permits unlimited re-applications; in addition, regulations and guidelines have been developed for the evaluation of applications. *Id.* § 1.17(d), (e).

67. FTC, RULEMAKING, *supra* note 50, at 7, *reprinted in Hearings I, supra* note 10, at 382.

68. *Id.*

69. *Id.*

70. *Id.* at 9, *reprinted in Hearings I, supra* note 10, at 384. For a list of the kinds of

Guidelines formulated by the Bureau expressly exclude compensation for three types of particular expenses: the costs incurred in petitioning the Commission to initiate a rulemaking proceeding, the cost of applying for funds under this program, and the cost of judicial review of a Commission decision.[71] Such activities either precede or follow the rulemaking proceeding and, thus, are not interpreted as participation in rulemaking per se.[72]

C. *Expenses Covered*

A group may decide to participate in one or several of the various stages of a proceeding.[73] An eligible applicant may be compensated for costs incurred in any phase of its participation.[74] Those costs must be actually incurred (verified by receipts and records) and must be "reasonable."[75] According to FTC regulations, travel expenses (transportation, meals, and lodging) are limited to those acceptable under government standards. Civil service salaries are used to determine "market rates" for payments to third parties. Current regulations and guidelines also provide that attorneys' fees "at a rate in excess of $50 per hour will be considered presumptively unreasonable . . . ."[76]

Similarly, the regulations provide that experts and consultants "will be compensated at a rate not to exceed the highest rate at which experts and consultants to the Commission are compensated."[77] Compensation is available for the costs of staff employ-

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participation involved in FTC rulemaking, see *Hearings I, supra* note 10, at 35–37 (statement of Calvin J. Collier).

71. FTC, RULEMAKING, *supra* note 50, at 11–12, *reprinted in Hearings I, supra* note 10, at 386–87.

72. *Id.* at 12, *reprinted in Hearings I, supra* note 10, at 387.

73. *Id.* at 6–10, *reprinted in Hearings I, supra* note 10, at 381–85.

74. *Id.* at 11–12, *reprinted in Hearings I, supra* note 10, at 386–87.

75. 16 C.F.R. § 1.17(e) (1979).

76. *Id.* § 1.17(e)(2). However, the Bureau, using civil service salary equivalents based on numbers of years of experience, has devised a chart of maximum amounts and has not reimbursed more than $42 per hour. *See Hearings I, supra* note 10, at 415. In practice this is interpreted to mean not only that the amount reimbursed cannot exceed the limit, but that the group cannot pay more than the maximum amount. *See* Attachment to Letter to Anthony Di Rocco from Margery Waxman Smith, July 20, 1976, *reprinted in Hearings II, supra* note 65, at 305. The National Hearing Aid Society complained that the FTC limitations "substantially, if not entirely, foreclose use of the funds allocated to NHAS." Letter to Margery W. Smith from Anthony Di Rocco, Aug. 4, 1976, *reprinted in id.* at 374. NHAS complained that the "maximum billable rates by our attorneys simply does not make sense. . . . This proviso effectively precludes any organization from retaining outside counsel in connection with its participation in an FTC rulemaking proceeding." *Id.* at 375. At the time of this exchange the FTC had limited attorneys' fees to $75 per hour.

77. 16 C.F.R. § 1.17(e)(2) (1979).

ees of citizen groups (including attorneys) based on their actual salaries plus overhead (figured at twenty-five percent of the employee's hourly rate) and fringe benefits.[78] Secretarial time is not included in overhead and may be budgeted separately at six dollars per hour.[79] All personnel are asked to sign statements regarding the number of hours devoted to the participation and the nature of their work.[80] To ease the job of accounting for expenditures, the Bureau suggests that applicants maintain separate bank accounts for reimbursable expenses.[81] Records must be kept for three years.[82]

D. *Advance Payments*

Applicants may also submit periodic requests for reimbursement without waiting until the end of their participation.[83] The regulations provide for advance payments "where necessary to permit effective participation in the rulemaking proceeding."[84] Under this very flexible clause, the Bureau will advance up to fifty percent of the amount approved for use.[85] This, combined with periodic reimbursements, enables even very low-budget groups to participate.[86]

The FTC staff has had a favorable initial experience with its compensation program. The staff believes that the funded groups have not only "developed information, proposed evidence and conducted surveys for the record which have added materially to the quality of the records in the rulemaking proceedings,"[87] but also have provided views differing from those of the FTC staff.[88] Commenting on the hearings on the Funeral Industry Rule,

78. FTC, REIMBURSEMENT, *supra* note 50, at 7, 15, *reprinted in Hearings I, supra* note 10, at 407, 415.

79. *Id.* at 16, *reprinted in Hearings I, supra* note 10, at 416.

80. *Id.* at 10, *reprinted in Hearings I, supra* note 10, at 410.

81. *Id.* at 10–11, *reprinted in Hearings I, supra* note 10, at 410–11.

82. *Id.* at 11, *reprinted in Hearings I, supra* note 10, at 411.

83. Because of the length of time involved in a rulemaking proceeding, this is undoubtedly crucial to any group needing funds in order to participate. Of the thirteen FTC rulemaking proceedings initiated between the passage of the Magnuson-Moss Warranty—FTC Improvement Act in 1975 and the time of recent hearings, none had been completed by mid-1977. *See Hearings I, supra* note 10, at 7 (statement of Calvin J. Collier).

84. 16 C.F.R. § 1.17(e)(1) (1979).

85. FTC, REIMBURSEMENT, *supra* note 50, at 9, *reprinted in Hearings I, supra* note 10, at 409.

86. *Id.*

87. *Hearings I, supra* note 10, at 7 (statement of James V. DeLong).

88. *Id.* at 12 (statement of Calvin J. Collier).

Chairman Collier echoed similar sentiments: none of the six groups that participated under the compensation program "hesitated to object to FTC staff positions or to take independent ones."[89]

There are, however, weaknesses in the FTC program that should be considered before its wholesale adoption as a model for other agencies. One of the most basic limitations of the FTC program is that it applies only to rulemaking. This limit was no doubt a result of the FTC's interpretation of its power—since the program was part of a bill which gave the FTC rulemaking authority, the program extends only as far as the bill. Viewed in a positive light, such proceedings were obviously a logical starting point for a federal funding program for several reasons. Rulemaking is plainly a legislative activity. Consequently, the broadest spectrum of ideas should be heard in any such process. One scholar has suggested that in rulemaking hearings, agencies should try to duplicate the political process—encouraging participation by "individuals and groups, whether or not directly affected by the rule."[90] Input from as many interests as possible is particularly important in the administrative context since agency decisionmakers are not accountable at the ballot box. Another factor favoring increased participation in rulemaking is that the resulting "decisions are difficult to collaterally attack on judicial review or challenge in future agency adjudications."[91]

Yet, the existence of these positive aspects of participation in rulemaking in no way justifies limiting participation to such proceedings. Important policy decisions are made in many kinds of non-rulemaking agency proceedings. For example, the FTC has often used unfair trade cases (technically enforcement proceedings) to establish new trade-practice rules.[92] In addition, FTC officials have indicated that participation funding should be extended beyond rulemaking proceedings, noting that "[p]ublic representation can be just as valuable in other proceedings, such as licensing or adjudication."[93]

E. *Control Within Each Agency*

Another problem inherent in the FTC compensation program,

89. *Id.* at 20 (statement of Calvin J. Collier).
90. Cramton, *supra* note 3, at 531.
91. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 58–59.
92. Cramton, *supra* note 3, at 533.
93. *Hearings I, supra* note 10, at 39 (statement of Calvin J. Collier).

identified by FTC Chairman Collier, is the fact that it is administered by the agency itself. Under FTC procedures, the staff working on the rule is not involved in the compensation program. Nonetheless, funding decisions are made within the agency and that may, in the words of Chairman Collier, "give rise to an appearance of favoritism for one group whose views might be deemed acceptable,"[94] which, in the long run, may give rise to distortion of the program.[95]

The FTC has already been accused of using the compensation program to bolster support for a rule favored by its staff. A representative of the National Hearing Aid Society claimed that the proposed rule concerning the hearing aid industry "was punitive in nature," and that although they had "no knowledge of what transpires within the FTC decisionmaking processes," it was the Society's opinion that the compensation program was not administered with "an even approach."[96]

Such charges seem inevitable in a situation where compensation awards are being made within the agency. Because of the requirement that no compensation will be granted if the applicant could participate without funding,[97] it will be difficult for any regulated group to qualify for funds.[98] Therefore, from their point of view, the agency is proposing a new rule against them (any new regulation will likely be viewed that way by the regulated interests) and in addition, is paying for other groups to back up the agency's position.

Furthermore, with funding administered within the agency, there is a danger (also borne out by FTC experience) of confusion between the compensation program and regular staff investigations. As part of its normal preparation for such hearings, the staff is responsible for developing information for the record and procuring witnesses and consultants. An article by James J. Kilpatrick accused the FTC staff of spending $440,000 in order to "round up a host of favorable witnesses to support the proposed trade rule for the funeral industry."[99] Chairman Collier protested that that activity had nothing to do with the compensation program and that the FTC never solicits applications for that pro-

94. *Id.* at 7 (statement of Calvin J. Collier).
95. *Id.* (statement of Calvin J. Collier).
96. *Hearings II, supra* note 65, at 15 (statement of Robert W. Lee).
97. *See* notes 59–65 *supra* and accompanying text.
98. *See* notes 57, 65 *supra*.
99. *Hearings I, supra* note 10, at 10 (statement of Senator Strom Thurmond).

gram.[100] Yet, critics remained unconvinced, claiming that the FTC "can go out and pay somebody to come in . . . and represent whatever group [it wanted] . . . them to."[101]

Such charges could undermine all efforts to seek greater public participation in agency proceedings through financing the activities of public interest representatives. Even if unfounded, they may engender considerable lack of confidence in the system. One way to minimize the problem would be to administer the compensation program from outside of the agency, even though an outside group would not be as familiar with the issues raised in the proceedings. The application process might be somewhat lengthier as a result, but that would be an acceptable price for increased confidence in the system.

II. S. 270: The Public Participation in Federal Agency Proceedings Act of 1977

Based on findings that "effective functioning of the administrative process"[102] requires agencies to "seek the views of all affected citizens,"[103] and that access to the process "is frequently an exclusive function of a person's ability to meet high costs of participation,"[104] the authors of Senate Bill 270 of the 95th Congress (S. 270) sought to establish a compensation program for all federal agencies similar to the program developed by the FTC. Although S. 270 was not passed by the 95th Congress,[105] it provides a good model for future proposals. This paper next discusses and evaluates S. 270. The discussion emphasizes a comparison of the approach taken by S. 270 with that of the FTC program already examined.

A. *Eligibility Standards*

The basic criterion of eligibility in S. 270 was whether the applicant could make a "substantial contribution" to the proceeding. Although this language did not parallel the FTC statutory language,[106] it incorporated the test actually used by the FTC.[107] The

100. *Id.* at 13 (statement of Calvin J. Collier).

101. *Id.* at 12 (statement of Senator Strom Thurmond).

102. S. 270, 95th Cong., 1st Sess. § 2(a) (1977), *reprinted in Hearings II, supra* note 65, at 96.

103. *Id.*

104. *Id.*

105. This bill was not reported out of committee.

106. *See* notes 46–47 *supra* and accompanying text.

107. *See* notes 51–56 *supra* and accompanying text.

language of the FTC Act in focusing on the "interest" of the applicant, provides that such an interest must not only be "adequately represented"[108] by the applicant but also that the representation of such interest by the applicant must be "necessary for a fair determination."[109] In its interpretation of this standard, the FTC considerably reduced the complexities of the statutory formula, providing in its guidelines that anyone affected by a proposed rule who can make a significant contribution to the proceeding satisfies this part of the test.[110]

The S. 270 approach seems preferable not only because it is more direct, but also because it focuses attention on the purpose of participation: to accommodate applicants who have a contribution which would be a valuable addition to the proceeding.[111] The legislation enumerated several factors for determining whether an applicant could be expected to make a substantial contribution: the likelihood that the interest is already adequately represented, the number and complexity of issues involved, the importance of encouraging public participation (that is, evaluating whether the public has sufficient economic incentive to participate as individuals), and the need for presentation of a fair balance of interests.[112] The Act did not specify how this list was to be utilized.

A list of express criteria to consider is meritorious since it directs the agencies to weigh various factors, yet leaves agencies free to exercise discretion. The first factor (whether the interest is already represented), for example, may be appropriately used to deny compensation when an applicant has nothing new to add to the record. There may be times, however, when "the intensity and concern of several intervenors may be cumulatively valuable"[113] even if duplicative to some extent. In such a situation, the agency could simply place limits on the intervenors' presentations to avoid undue delay.

S. 270 also required that the applicant be an "effective repre-

108. 15 U.S.C. § 57a(h) (1976).

109. *Id.*

110. *See* note 51-56 *supra* and accompanying text.

111. *See Hearings I, supra* note 10, at 69 (statement of Stanley C. VanNess).

112. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 98-99.

113. Gellhorn, *supra* note 12, at 382.

sentative."[114] This standard would presumably require an agency to evaluate organizational representatives in terms of their constituencies, accountability, and capability.[115] The FTC, for example, similarly gathers information such as the number of members, amount of dues, and whether the officers are elected.[116] This kind of evaluation is difficult, however, when an applicant purports to represent an interest that traditionally has been unorganized. Poor people, for example, generally lack an organized voice to express their concerns. Moreover, as one commentator has suggested, "the views of 'poor people's groups', or of the controlling leadership of such groups, may frequently be out of touch with, or divergent from, the interests of the mass of the poor."[117] Thus, future legislation may well have to take several contending voices into account as well as the usual criteria for evaluating effectiveness.

Consequently, future proposals should stress that the evaluation of whether a group is an effective representative or whether an interest is already represented is not intended to result in limiting funding to a single representative per interest. Giving credentials to a single group as " 'the' representative of the poor or the consumer or the public or other citizen interest however characterized"[118] should be avoided. Such a development would be particularly disadvantageous for newly-formed local groups without established records of participation.[119] Under S. 270, these details were apparently to be left to each agency as it published guidelines for its program. These issues, however, should be uniformly treated;[120] therefore, Congress should provide some direction in

114. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 98.

115. These standards are similar to those used in the FTC process. *See* notes 116–17 *infra* and accompanying text.

116. FTC, RULEMAKING, *supra* note 50, at 19–21, *reprinted in Hearings I, supra* note 10, at 395–97.

117. Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 529 (1969).

118. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at app. F at 7 (statement of Malcolm S. Mason).

119. *Id.* at 74. The Consumer Products Safety Commission (CPSC), when announcing its proposed regulations covering funding for participation in informal rulemaking, specifically noted that its criterion of a "capability to represent a point of view . . . does not in any way require that a participant have such prior experience." 42 Fed. Reg. 15,711 at 15,714 (1977).

120. One witness at the 1976 hearings on a bill similar to S. 270, made the following observation about the need for uniformity: "If we have different requirements for the several agencies . . . only more Washington lawyers will possess the keys to participation."

this area in future legislation.

Interestingly, the drafters of S. 270 emphasized the need for broad public participation by omitting any requirement that an intervenor's views prevail as a condition for funding. Apparently, the drafters believed that better decisions would be made if more views were heard and considered. The crux of the issue is not that someone won or lost, but assuring that no view is left out.[121] Thus, any participation that provides an "effective illumination of matters that result[s] in an improved agency decision should be viewed as a positive contribution."[122]

S. 270 defined "person" with reference to section 551(2) of the Administrative Procedure Act—the same definition used by the FTC.[123] Notably, it was not intended to apply only to groups that have no resources. Although the FTC has been criticized for its similar interpretation of the financial need requirement in the FTC statute,[124] the drafters of S. 270 left no doubt that the FTC approach was preferable. Thus, the bill explicitly allowed funding of a group if the economic interest of a substantial majority of the individual members is small compared with the cost of participation.[125] Critics claimed that such language would permit "wealthy" organizations with diverse financial resources to gain agency funding and urged that such organizations should not be eligible for the compensation program.[126] Yet, this concern simply does not seem very compelling. The FTC experience demonstrates that large groups can contribute significantly to agency

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Hearings on S. 2715 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 11 (1976) (statement of Elizabeth Lederer).

121. Gellhorn, *supra* note 12, at 380.

122. Cramton, *supra* note 3, at 545. *See also* R. FRANK, J. ONEK & J. STEINBERG, *supra* note 13, at 114, *reprinted in Hearings I, supra* note 10, at 555, 674. As noted above with the FTC interpretation, *see* note 53 *supra* and accompanying text, state and local government units could be eligible if other criteria are met.

123. *See* notes 52–53 *supra* and accompanying text.

124. *See* text accompanying notes 59–65 *supra*.

125. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 99.

126. *Hearings I, supra* note 10, at 135 (statement of George Gleason). As an example of "wealthy groups" that may be funded, Mr. Gleason identified the Natural Resources Defense Council (NRDC) noting from its 1975 audit an income of $1.7 million, including $1.1 million from foundations. *Id.* at 138–39. Another witness, however, pointed out that although NRDC may be considered a "big" environmental group, its total budget for all nuclear matters is less than half the amount spent by an average utility on one intervention. *Id.* at 86 (statement of Anthony Z. Roisman).

proceedings. It does not seem sensible to require them to meet an indigency test.

B. *Types of Participation Covered*

Like the FTC Act, S.270 did not enumerate the types of activities that would be compensated (although of course, the types of expenses covered provide some guidance). For any bill that covers a wide range of proceedings in all agencies, it would probably be impossible to draft a meaningful, comprehensive list of all the possible activities that may be considered as "participation."

Preparation of various written submissions will undoubtedly qualify as participation under any program. However, in future legislation, Congress should clarify whether studies, surveys, and background research are to be considered "participation." Proponents of allowing funding for this purpose have urged that effective participation requires that funds be made available to allow groups to "dig up new data with which to challenge usual regulator/regulatee [*sic*] discussions."[127] However, it may be argued that since agencies conduct their own studies and investigations, the compensation program should be used only to assist groups in presenting data already gathered, and thus, not facilitate their independent research to develop new ideas. Ultimately this issue may turn on whether intervenors are viewed as auditors or primary researchers.[128] To assure consistency, Congress should make its intent on this matter clear.

C. *Expenses Covered*

Other than attorneys' and experts' fees, S. 270 did not specify what expenses were to be reimbursed; it merely allowed compensation for "other costs of participation incurred by eligible persons. . . ."[129] Costs for witnesses, travel, and reproduction of documents and transcripts should unquestionably qualify.[130] These categories should be specified as covered in future proposals. One witness at the S. 270 hearings felt that the bill should clarify whether reimbursement would be available to compensate regular employees of nonprofit groups.[131] The FTC has consis-

127. *Hearings I, supra* note 10, at 233 (letter from Robert B. Choate).

128. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 171–72.

129. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 97–98.

130. *See* notes 17–35 *supra* and accompanying text.

131. *Hearings I, supra* note 10, at 101 (statement of William T. Coleman, Jr.).

tently compensated groups for properly documented staff time.[132] Future proposals should clearly state that such compensation is anticipated since it seems inefficient to require an intervenor to hire staff on an ad hoc basis for each proceeding in which it participates.

Fees for experts and attorneys were limited by S. 270. As with the FTC regulations,[133] compensation for experts was not to exceed "the highest rate of compensation for experts and consultants paid by the agency involved."[134] Some commentators have suggested that problems could arise concerning the degree of control an agency has over an intervenor's choice of experts.[135] These individuals reason that since an intervenor's experts are supposed to aid the agency, the agency may perhaps wish to determine whether such experts will, in fact, aid it in its deliberations.[136] However, agency determination based on the merits of an expert's views should be avoided. Since the objective of increased participation is to bring new points of view to the attention of agency decisionmakers, funding decisions should not be used to constrain the point of view proffered:

> Any proposal that provides compensation for attorneys' fees must try to establish reasonable limits for such expenditures and must simultaneously try "to provide sufficient incentive to attract competent counsel so that intervenors can present their most effective case. . . ."[137]

Unlike the FTC Act, the 1976 version of S. 270 did not include dollar limits on attorneys' fees; it simply called for compensation for reasonable attorneys' fees at "prevailing rates."[138] The original version of S. 270 also used the prevailing rate standard, but added a $75.00 per hour maximum.[139] In a later version, the limit was reduced to $50.00 per hour.[140] This

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132. *See* notes 78–82 *supra* and accompanying text.

133. 16 C.F.R. § 1.17(e)(2) (1979).

134. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 101.

135. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 171.

136. *Id.*

137. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 185.

138. S. 2715, 94th Cong., 1st Sess. (1977), *reprinted in Hearings on S. 2715 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 137, 140 (1976).

139. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 79. Attorneys' fees in excess of $75 per hour were available only if the agency determined that special considerations warranted a higher fee. *Id.*

140. *See id., reprinted in Hearings II, supra* note 65, at 101. The bill did permit awards in excess of $50 per hour based upon an agency finding that "special factors, such as an

coincides with the limit established in the FTC regulations.[141] This limit was also endorsed by several public interest attorneys who testified at the hearings and viewed the fifty dollar figure as "more than adequate to cover the salary of a lawyer and the overhead expenses associated with it."[142]

While retaining a maximum figure probably will not unduly hinder the efforts of citizen groups to find competent counsel,[143] it may help to defuse some of the arguments against public financing. Critics of S. 270 called the bill a "lawyers' bill" which would only "enrich a class of lawyers [who] do little but milk the system."[144] Others have commented that the bill was "yet another way the public is required to support lawyers"[145] or a "bonanza for lawyers."[146] Yet, the fact that such "bonanzas" would be curtailed not only by the express statutory limit but by the requirement that such fees be "reasonable,"[147] seems to blunt the force of these critical concerns.

Such fee limits will not, however, eliminate a related concern—that lawyers will control the public participation program.[148] One commentator noted the "potential atrophy of political consciousness and responsibility [that would arise] were judges and lawyers to assume custody over issues properly resolved by political means."[149] This concern may derive from the nature of the relationship that often exists between citizen groups and their lawyers. After describing the Center for Law and Social Policy, a major public interest law firm, a study concluded:

To some extent, then, the Center not only represents these

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increase in the cost of living or limited availability of qualified attorneys for the proceedings involved justify a higher fee." *Id.*

141. 16 C.F.R. § 1.17(e)(2) (1979).

142. *Hearings I, supra* note 10, at 88 (statement of Anthony Z. Roisman).

143. Any program, however, must include a provision such as the S. 270 "special factors" section in order to permit agencies to adjust fees to account for inflation. *See* note 140 *supra*.

144. *Hearings I, supra* note 10, at 76 (statement of Senator James B. Allen).

145. *Id.* at 168 (statement of Curtis Clinkscales).

146. *Id.* at 265 (statement of the United States Industrial Council). There seemed to be no end to such sentiments: the bill was also called a "raid on the Treasury of the United States," *id.* at 167 (statement of Curtis Clinkscales), in order to establish a "slush fund for activists and lawyers who frequently have little of the traditional restraint and discipline of the real world. . . ." *Id.* at 110 (statement of Ben Blackburn).

147. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 101.

148. *See generally* Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970).

149. Stewart, *supra* note 4, at 1803.

> groups, but in doing so tends to define their goals and, perhaps, their structures and internal organizations as well, if only in the discretion it exercises in choosing the types of cases it will take, what strategies will be used, what remedies sought, what compromises accepted.[150]

This relationship reflects the current financing system. It is public interest law firms, not citizen groups, which receive foundation grants.[151] In the present system, "the decision as to which 'public' interest will enjoy representation before the agency rests primarily with the private attorneys and the foundations that provide the funding for such representation."[152]

Representation of a group need not necessarily translate into control of a group. The safest course to ensure that representation does not parlay into control is to enforce the eligibility requirements strictly for all applicants. In order to be eligible for funds under a funding program similar to S. 270, an organization should be an "effective representative" of an interest. The group should have to show that it has a constituency to which it is accountable. If it appears that the group is controlled by its lawyers or is merely a front for the lawyers, rather than being controlled by the interest it purports to represent, then an agency should deny its application for funding. Notably by providing funds to citizen groups, rather than to lawyer groups, S. 270 was an improvement over the existing system for financing public participation in administrative proceedings which consists largely of foundation grants to lawyer groups.

D. *Advance Payments*

Like the FTC regulations,[153] S. 270 provided for advance payments if the applicant "establishes that [its] ability . . . to participate in the proceeding will be impaired by failure to receive funds prior to the conclusion of such proceeding."[154] This was a crucial section since participation would be impossible for many local groups if they were forced to wait until the end of the proceeding for any reimbursement.[155] Without the availability of advance

150. Comment, *supra* note 18, at 733.

151. Stewart, *supra* note 4, at 1764.

152. *Id.*

153. 16 C.F.R. § 1.17(e) (1979). *See* notes 83–86 *supra* and accompanying text.

154. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 101. The section also provides for repayment of funds advanced if the applicant fails to participate as promised. *Id.* at 102–03. FTC Chairman Collier testified that the latter provision was too restrictive. *Hearings I, supra* note 10, at 22 (statement of Calvin J. Collier).

155. *Hearings I, supra* note 10, at 254–55 (statement of Terrence Roche Murphy); R.

payments, or at least a progressive payment system, a federal funding program would likely only be able to assist large national organizations.[156] One person, who is experienced with the FTC program, has suggested that agencies should routinely advance fifty percent of the award at the time the application is approved, pay another twenty-five percent as needed during the proceeding, and then pay the final twenty-five percent after a final accounting at the end of the proceeding.[157]

Under S. 270, unless a participant could qualify for advance payments, it would have to wait for compensation until the proceeding, or perhaps a phase of the proceeding, was completed.[158] Yet, to construe a phase of the proceeding in a manner to provide for periodic reimbursements would be a strained interpretation, since it is not only logically unappealing but also inconsistent with the definition used by agencies for other purposes.[159] Consequently, in future proposals, Congress should expressly provide for periodic reimbursements in all cases, as well as advances where appropriate. In addition, once an application has been approved, there appears to be no valid reason to withhold the funds until the end of the proceeding since once an applicant has qualified, it need only prove that it had incurred expenditures. Therefore, periodic reimbursements should not be considered "advances."

E. *Type of Proceedings Included*

One of the most significant differences between the FTC program and S. 270 was that the latter encompassed almost all agency proceedings. It covered "all rulemaking, ratemaking, and licensing proceedings, and . . . other proceedings involving issues which relate directly to health, safety, civil rights, the environ-

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FRANK, J. ONEK & J. STEINBERG, *supra* note 13, at 113, *reprinted in Hearings I, supra* note 10, at 673.

156. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 174–77. The Second Circuit has recognized the importance of interim reimbursements to intervenors:

> [I]t 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.

Green Cty. Planning Bd. v. FPC, 455 F.2d 412, 426 (2d Cir. 1972) (footnote omitted).

157. *Hearings I, supra* note 10, at 232 (letter from Robert B. Choate).

158. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 100–01.

159. *See, e.g.*, notes 71–72 *supra* and accompanying text.

ment, or the economic well-being of consumers in the marketplace."[160]

The goal of a federal program to compensate participants in agency proceedings is to ensure that a broad spectrum of ideas will be heard and considered in agency decisionmaking processes.[161] That goal is clearly advanced by funding participation in rulemakings which are patently legislative proceedings.[162] The administrative process, however, does not fall neatly into categories. Policy is frequently made in enforcement or adjudicatory proceedings. For example, adjudicatory proceedings are used by the CAB for allocating routes. The focus of this type of proceeding, however, is quite general and has wide impact on the public. Recognizing that public participation is desirable in such proceedings, the CAB has developed "relatively refined rules regarding intervention which attempt to adjust the degree of permitted participation to the intensity of the applicant's interest and the applicant's ability to contribute information relevant to specific issues or the overall decision to be made."[163] The desirability of encouraging intervention in such cases suggests that compensation should not be limited to rulemaking.[164]

Intervention is particularly important in cases where the agency staff and the license applicant have already worked out their differences before the hearing.[165] For example, the AEC

160. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 97–98. "Proceeding" was defined as "any agency process including rulemaking, ratemaking, licensing, adjudication, or any other agency process in which there may be public participation pursuant to statute, regulation, or agency practice, whether or not such process is subject to the provisions of this subchapter." *Id.* at 97. Some have suggested that an even broader concept is appropriate:

> 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.

T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, app. F at 6 (statement of Kenneth Culp Davis).

161. *See* notes 1–39 *supra* and accompanying text.

162. *See* text accompanying notes 90–91 *supra*.

163. Comment, *supra* note 18, at 740.

164. License renewal proceedings before the FCC also involve policy issues which peculiarly invite citizen intervention. The court in Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.D.C. 1966), recognized that such proceedings enabled local groups to make a valuable contribution by monitoring the broadcast facility and providing factual information that the FCC has neither the staff nor the money to gather. *Id.* at 1004. *See also* Gellhorn, *supra* note 12, at 377.

165. *See generally* Green, *Safety Determinations in Nuclear Power Licensing: A Critical View*, 43 NOTRE DAME LAW. 633 (1968).

viewed the primary purpose of licensing hearings as the opportunity "to convince the public that the AEC staff has diligently reviewed an application and to demonstrate that [the license] is decidedly in the public interest."[166]

The decision whether to encourage participation in a given proceeding cannot be made on the basis of the name attached to it. Functional criteria should be devised, focusing on the nature of the issues presented and the potential impact of the decision. To the extent that intervention delays enforcement or subjects a respondent to more than one adversary, intervention must be limited; but to the extent that such proceedings are used to formulate policy, intervention should be encouraged.[167]

Restricting the bill to rulemaking proceedings, as suggested by some opponents of the bill,[168] would simply reinforce the propensity of certain agencies to employ ad hoc adjudicatory processes for establishing policy. Such choices should not be encouraged since reliance on adjudication tends to "foreclose consideration of unargued alternatives or attention to unrepresented interests, [and] inhibits the independent formation of general policies."[169] Moreover, "making decisions case-by-case on the basis of a lengthy evidentiary record may favor the regulated interest at the expense of the 'public' interest because it throws the decision into the forum in which the industry groups are best equipped to compete."[170]

Admittedly, a federal compensation program such as S. 270 will not improve public participation in the unknown number of government decisions that are made in informal meetings.[171] Although some informal contacts are probably "necessary, useful, and inevitable,"[172] the "practice of putting 'all the action' into secret consultations"[173] provides an undesirable opportunity for im-

166. Comment, *supra* note 18, at 831.

167. *Id.* at 799.

168. *See, e.g., Hearings I, supra* note 10, at 114 (statement of William H. Cuddy); *id.* at 134–35 (statement of George Gleason).

169. Comment, *supra* note 18, at 723.

170. Cramton, *supra* note 3, at 536. *See also* Galanter, *supra* note 9.

171. "My own guess is that perhaps 90 per cent [*sic*] of the Government's work is conducted outside the boundaries of the Administrative Procedure Act." Gardner, *The Procedures by Which Informal Action Is Taken*, 24 AD. L. REV. 155, 156 (1972).

172. R. FRANK, J. ONEK & J. STEINBERG, *supra* note 13, at 78, *reprinted in Hearings I, supra* note 10, at 555, 638.

173. Schotland, *supra* note 34, at 267.

The Administrative Conference of the United States formed a committee to study the extent and effects of informal agency action. For a report of the beginning work of that

proper influence and thus seriously undermines confidence in the system. According to one observer, "the content of rulemaking decisions is often largely determined in advance through a process of informal consultation in which organized interests may enjoy a preponderant influence."[174] However, a genuine tension exists between the need to defer to agency decisions concerning their own priorities regarding the amount of resources to devote to formal proceedings and the need for openness and greater participation in important decisions. Thus, any proposal in this area must consider these concerns.

F. *Compensation for Judicial Review*

Two other important departures from the FTC scheme were the provisions in S. 270 for review of the compensation decision[175] and for compensation for judicial review of agency decisions generally.[176] Review of award decisions can be critical to the viability of a compensation program in an agency unsympathetic to the concept of broadened participation. The possibility of review could prevent unfair denial of funding and provide such an agency with an incentive to make careful decisions.[177]

While the FTC Act is ambiguous on whether compensation may be granted for expenses incurred in obtaining judicial review of agency decisions, FTC guidelines clearly preclude such compensation.[178] Nonetheless, compensation for successful or meritorious judicial review of agency decisions seems wholly justified. As one witness noted, "[P]ublic interest groups that succeed in ridding the books of an invalid, unauthorized, or unconstitutional regulation or act, should be compensated for that contribution."[179]

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committee, see Lockhart, *The Origin and Use of "Guidelines for the Study of Informal Action in Federal Agencies"*, 24 AD. L. REV. 167 (1972).

174. Stewart, *supra* note 4, at 1775.

175. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 103–04.

176. S. 270, 95th Cong., 1st Sess. § 3 (1977), *reprinted in Hearings II, supra* note 65, at 106.

177. William Foley, Deputy Director of the Administrative Office of the U.S. Courts, expressed concern that the criteria established for compensation involved "considerations of policy" and so "are highly inappropriate for judicial review." *Hearings I, supra* note 10, at 184 (statement of William E. Foley). Yet, this argument is unconvincing when one notes that courts are engaged daily in making decisions involving policy issues. In addition, the review of award decisions will not be any more difficult than decisions courts are already making under the many statutes that permit fee-shifting.

178. *See* text following note 72 *supra*.

179. *Hearings I, supra* note 10, at 54 (statement of William J. Scott).

G. *Control Within Each Agency*

The most troubling aspect of S. 270 was that it left administration of the compensation program to each individual agency. This apparently reflected an opinion that only the agency or hearing officer could adequately evaluate the contributions of the participants.[180] The weakness in this rationale is that award decisions are usually made *before* the proceeding, so the analogy to a judge awarding costs at the end of a trial is inapt. Furthermore, agency control of public participation funding programs could seriously impair such programs in agencies that are unsympathetic to public participation—the very agencies where the need for more participation is most acute.

It is certainly true that the agency staff is more familiar with its own procedures than any outside group. The agency staff's proximity to the issues and the resultant ability to detect possible benefits of participation more easily than an outside group also argues for agency control. The agency must also have discretion to control its own proceedings. It must determine the scope of the proceedings and what kinds of intervention and participation are appropriate. Once the scope of a proceeding is established, however, it seems entirely reasonable to expect that an outside group or agency could evaluate the potential contributions of applicants.[181]

One problem in a compensation system controlled within each agency is that the decision whether to fund a particular applicant will necessarily require an assessment of the merits of the positions of the applicant.[182] One commentator noted, "There is reason to fear that a fair, objective, and nonideological determination of requests would be difficult."[183] The possibility for favoritism towards certain interests may undermine confidence in the program. A witness representing the United States Industrial Council at the S. 270 hearings complained that the bill would be "opening

180. *See* T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 201–02.

181. In fact, an outside group may be better able to judge whether a group has a unique point of view or represents an interest not otherwise represented. It would be quite tempting for an agency—within the agency control model—to decide that its own staff can represent a particular interest even if the eligibility standards specified that that was not a proper factor to consider. *See* S. 270, 95th Cong., 1st Sess. § 2, *reprinted in Hearings II, supra* note 65, at 98.

182. For a discussion of other problems, see text accompanying notes 94–101 *supra*.

183. Cramton, *supra* note 3, at 544.

the way for 'stacked' hearings."[184] Another witness, who was extremely critical of the FTC program, testified that a government compensation program would enable agency staffs to finance "witch hunts" against businesses by paying "enough moneyseekers to heavily outweigh the honest and valid arguments of those directly affected by the agency action."[185]

To the opposite effect, there can be no doubt that some persons see agency control of program guidelines as a means of keeping certain unwanted groups out of the proceedings.[186] FTC experience has borne out the prediction that agency award decisions will be viewed with suspicion.[187] FTC Chairman Collier strongly recommended that the S. 270 program be administered by a single agency to avoid the appearance of bias.[188]

Another factor favoring centralized administration is the need for uniform application procedures and guidelines.[189] Even if future proposals are more specific than S. 270, it is likely that many operating details would be determined by agency guidelines. The existence of varying procedures and conflicting requirements may be a serious disadvantage to small, local organizations which might not have the wherewithal to cope with diverse demands.[190] In addition, administration by one agency would greatly facilitate congressional oversight of the entire program.[191]

Central administration of the program may not require the creation of a new agency. Several existing agencies have been suggested: the Department of Justice, Department of the Treasury, the Office of Management and Budget (OMB), and the General Services Administration (GSA).[192] Of course, the program

184. *Hearings I, supra* note 10, at 265 (statement of the United States Industrial Council).

185. *Id.* at 168 (statement of Curtis Clinkscales).

186. *Id.* at 137 (statement of George Gleason).

187. *Id.* at 6–7 (statement of Calvin J. Collier).

188. *See id.* at 10–17 (statement of Calvin J. Collier). S. 270 required that compensation decisions be made by a division within the agency other than the one responsible for the proceeding. S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 102.

189. *Hearings I, supra* note 10, (statement of William T. Coleman, Jr.). *See also* note 120 *supra*.

190. *See Hearings I, supra* note 10, at 256 (statement of Terrence Roche Murphy).

191. *Id.* at 6 (statement of Calvin J. Collier).

192. *Id.* at 21 (statement of Calvin J. Collier); *id.* at 101 (statement of William T. Coleman, Jr.). The Justice Department may not be the best choice of centralized control suggested. Since it represents the government in cases of judicial review of agency decisions, potential conflicts of interest may arise which are similar to the conflicts present where the funding program is run by the individual agencies.

need not be administered by an agency at all; it may be preferable to establish a semi-public corporation for that purpose.[193]

Whatever mechanism is used, there is a need to find an outside group "that could make an objective judgment of the utility of the intervention."[194] If central administration of the program is to be achieved it is essential that it be built into any future program from the beginning. It is simply inconceivable that such a change could be effected once each agency has established its own program and guidelines.

H. *Priorities Among Groups*

Another shortcoming of S. 270 was its failure to provide sufficient guidance for choosing among those applicants competing for funds. Three kinds of allocations would be required under such a program. The entire sum of money appropriated would initially be allocated among the agencies. Each agency's share would then be allocated among proceedings and, finally, divided among applicants. S. 270 placed the responsibility for allocation among agencies upon the OMB[195] but was silent about allocation among proceedings. Future proposals should address this issue. The easiest solution would probably be to make compensation available for any proceeding in which intervention is permitted, with the amount of money available dependent upon the importance of the issues and the number of intervenors.

The bill did offer a list of alternatives for handling multiple applications,[196] but this constituted little more than an express recognition that agencies would have substantial discretion in this area.[197] Establishing priorities among competing applicants was left to each agency. The drafters of S. 270 may have decided that because of the general lack of experience within the agencies in establishing such priorities, it would be preferable to allow agencies to experiment with various criteria. Agencies have not traditionally had to make such decisions. Restrictive standing requirements and the high costs of participation[198] created such

193. *See* Bonfield, *supra* note 117, at 540.

194. Cramton, *supra* note 3, at 545.

195. *See* S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 104–05.

196. *Id.* § 2, reprinted in *Hearings II, supra* note 65, at 100.

197. One alternative, for example, was for the agency to "select one or more effective representatives to participate." *Id.*

198. *See* note 16 *supra*. Costs have been expressly recognized as barriers to "too

barriers to broad participation that the "problem" of choosing among intervenors rarely, if ever, arose.

One study suggested that the following factors should be considered:

> —the group's experience and expertise in the substantive area;
>
> —the group's experience with the procedures and approach of the agency;
>
> —the extent to which the group has a constituency and the degree to which the group is accountable for its activities to its constituency;
>
> —the general competence of the group as evidenced by its prior activities; and
>
> —the specificity of its proposed involvement in the agency's work.[199]

Although it seems essential that the agency scrutinize the activities of the applicants "to ensure that theirs is a valid commitment to the issues,"[200] too much attention to that criterion could adversely affect the ability of new local groups to participate.[201] Furthermore, agencies may exhibit a natural bias in favor of moderate groups, which may impede the development of new organizations with truly innovative ideas. The CAB, recognizing the dilemma inherent in considering how much weight to give past experience or prior participation, has acknowledged an uncertainty about whether it should encourage the development of "a full-time 'public bar' by repetitive grants to representatives who have developed expertise through prior activities. . . ."[202]

Related to the past participation criterion is the issue of whether agencies (or Congress) should establish a ceiling on the amount of compensation that a single organization may receive in

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much" intervention. *See, e.g.*, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), where the court noted:

> 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. . . .

Id. at 1006.

199. R. FRANK, J. ONEK & J. STEINBERG, *supra* note 13, *reprinted in Hearings I, supra* note 10, at 555, 673. In the proposed DOT program, priorities were to be judged by the "applicant's interest, proposals, and past performance in regulatory proceedings." 42 Fed. Reg. 2865 (1977).

200. *Hearings I, supra* note 10, at 231 (letter from Robert B. Choate).

201. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 75.

202. CAB, Advance Notice of Proposed Rulemaking, 42 Fed. Reg. 8663 (1977), *reprinted in Hearings I, supra* note 10, at 472, 481.

any year.[203] Such limits could serve the dual purpose of compelling organizations to establish priorities among proceedings in which they wish to intervene and of inhibiting agency favoritism.[204] On the other hand, until there is evidence that an agency is misusing funds, it seems difficult to justify establishing artificial barriers to participation because of an applicant's past success. Moreover, given the ease with which organizations can be formed around a given issue or project, it is questionable whether spending ceilings would be an effective solution to the problem of experienced groups acquiring the lion's share of agency funds even if a problem were shown to exist.[205] Notably, the FTC imposes no ceilings and, based on its experience, sees no need for them.[206]

I. *The S. 270 Critics*

As demonstrated by those who participated in the hearings on S. 270, the concept of federal financing for public participation in agency proceedings has widespread support. Federal agency officials, state officials, representatives of private industry, public interest lawyers, and grassroots citizen groups all voiced their support. Still, critics exist. Some opponents seem simply to misunderstand the purpose of the program. One witness at the hearings, for example, stated that the "fundamental fallacy" of the bill was that "no agency can determine . . . which participant best represents the interests of the general public."[207] Yet, no one would argue that an agency could or should try to identify a single representative of the public interest. Rather, the objective of a program of public funding is to broaden the number of views presented. By promoting "an awareness of the complexities of an issue and its potential impact," a decision can be made that is in the public interest.[208]

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203. *See* T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 187; *Hearings I, supra* note 10, at 146 (statement of George Gleason).

204. Note, *supra* note 13, at 1833.

205. The CAB has recognized that the strict financial need standard established by the Comptroller General, *see* text accompanying note — *infra*, creates difficulties that are "multiplied by the ease with which new organizations can be formed, tailored to meet whatever test of indigency is necessary." CAB, Advance Notice of Proposed Rulemaking, 42 Fed. Reg. 8663 (1977), *reprinted in Hearings I, supra* note 10, at 472, 481.

The Consumer Product Safety Commission's proposed rule for a compensation program specifies that groups organized "solely to participate in Commission proceedings are included. . . ." 42 Fed. Reg. 15,712 (1977).

206. *Hearings I, supra* note 10, at 42 (statement of Calvin J. Collier).

207. *Id.* at 274 (statement of the National Association of Motor Bus Owners).

208. Gellhorn, *supra* note 12, at 381.

Other critics remain unconvinced that increased participation is necessary. They assert that "the duty of representing the public in the Government is the duty of the Congressmen and Senators"[209] or that "the various and often competing interests of the numerous constituencies are presented effectively by governmental agencies with different primary goals . . . . [Thus,] private litigants are not needed to force Government to act in the public interest."[210] However, the fact that the agencies cannot adquately represent the public interest has been widely recognized for more than a decade.[211] It is remarkable that in 1977 the FPC Chairman would oppose S. 270 on the basis that the agency "is obligated by existing law to represent the overall public interest itself, and *it does in fact fulfill that obligation* without the necessity for new legislation."[212] Such an attitude simply reinforces the need for legislation similar to that proposed in S. 270.

The most strident opposition to the Public Participation Act came from those who were alarmed by increased participation. These parties predicted that such a program would "cause great disruption in agency licensing, rulemaking, and ratemaking proceedings,"[213] open a pandora's box of "adventurism by those whose ends are publicity and self-service,"[214] and "subsidize agitation by interest groups."[215]

Others opposed to S. 270 cited delay as their basic concern. These parties reasoned that since high costs—once a "natural"

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209. *Hearings I, supra* note 10, at 103 (statement of Ben Blackburn).

210. *Id.* at 124 (statement of David B. Graham). Similar arguments have been made elsewhere:

> Since the public is already paying the costs of NRC regulators, the argument continues, . . . why should the public also be forced to subsidize others to do the same job . . . ? Further, once we pay for guardians to watch the guardians—where will it all end? Better, . . . if we are displeased with the manner in which NRC operates to change the nature of its regulatory scheme or its personnel, rather than to construct another pretentious layer of dubious value.

T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 121.

211. *See, e.g.*, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

212. *Hearings I, supra* note 10 at 188 (letter from Richard L. Dunham) (emphasis added). "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." T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, app. F at 7 (statement of Malcolm S. Mason). *See also* note 2 *supra* and accompanying text.

213. *Hearings I, supra* note 10, at 74 (statement of Senator James B. Allen).

214. *Id.* at 167 (statement of Curtis Clinkscales).

215. *Id.* at 266 (statement of the United States Industrial Council).

barrier to excessive intervention[216]—were removed by providing compensation, the agencies would be overrun by intervenors, resulting in interminable, costly delays.[217] Although this argument has some logical appeal, it is not necessarily accurate. First, the availability of compensation would allow citizen groups to find competent technical experts and counsel to assist them in focusing on the issues. Some observers believe that that would expedite, not delay, administrative proceedings.[218] For example, several of the intervenor groups in the NRC Seabrook hearings said that "the availability of NRC financial assistance would serve to consolidate rather than expand their presentations."[219] Furthermore, in some cases, improved public participation may actually save money and time, "for the presence of representative groups may save the agency from serious substantive error and from serious delay."[220]

Moreover, the delay argument rests to some extent on the assumption that the proceedings would get "out of control" because of increased intervention. However, a public financing program would neither create new rights of intervention[221] nor alter the intervention rules and procedures created by agency guidelines.[222] By proper application of their own rules, the agencies themselves can "assure that the risks of delay or deflection of the hearings from their proper focus are insubstantial."[223] Furthermore, even with liberal rules of intervention, agencies have wide discretion to

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216. *See* note 198 *supra* and accompanying text.

217. *Hearings I, supra* note 10, at 191 (statement of Richard L. Dunham).

218. *Id.* at 82 (statement of Anthony Z. Roisman).

219. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 194 n.389.

220. *Id.*, app. F at 7 (statement of Malcolm S. Mason).

221. *See* S. 270, 95th Cong., 1st Sess. § 2 (1977), *reprinted in Hearings II, supra* note 65, at 98.

222. For some intervention rules, see note 16 *supra*. As an example of the control that an agency can exercise over its proceedings, the FERC (formerly the FPC) rule contains the following provision:

> Where there are two or more interveners 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 interveners.

18 C.F.R. § 1.8(g) (1978).

In addition, agencies often have broad discretion to decide whether to hold a public hearing at all. Such authority was granted to the FCC in 1955 to enable the Commission "to curb the abuses of the protest procedure through the power in appropriate cases, to dispose of protests without holding a full evidentiary hearing." S. REP. No. 1231, 84th Cong., 1st Sess. § 3 (1955).

223. Gellhorn, *supra* note 12, at 384.

structure their proceedings and limit the scope of participation.[224] Not all intervenors need be accorded full party status; participation can be tailored to the particular contribution involved. It is not uncommon for participation to be limited to the submission of an amicus brief, an appearance as a witness, or the presentation of evidence on one of several issues.[225]

Some delays should not legitimately be charged solely to intervention. For example, power plant sitings now take longer because of the time required to consider the environmental impact. Such delay is not the arbitrary result of environmentalists bringing suit for any whimsical purpose—rather, they seek to force agency compliance with the law.[226] Delay for such purposes has been characterized as "essential to successful performance of the agency's mandate."[227] Finally, it should be noted that participation under a compensation program similar to S. 270 would depend upon a finding that the applicant will make a substantial contribution to the proceeding; if an intervenor meets this criterion, then the time required for participation would be well-used and should not be disparaged as "delay."[228]

Other critics focused not on the issue of intervention, but on the concept of providing federal funds. To these critics, S. 270 represented "a blank check on the Federal Treasury to subsidize existing organizations which fear that they cannot justify continued existence in the marketplace of the general public."[229] The rationale was simple: if an interest is worth being heard, its proponents will be able to raise adequate funds to represent that interest; if member support and nongovernment sources are not sufficient, "it is reasonable to assume that the organization's positions are not broadly supported."[230]

Financial support, however, does not always gravitate toward

224. Cramton, *supra* note 3, at 537. *See, e.g.*, FTC, REIMBURSEMENT, *supra* note 50, at 9, *reprinted in Hearings I, supra* note 10, at 409.

225. *See* Gellhorn, *supra* note 12, at 386; Shapiro, *supra* note 16, at 755.

226. *See, e.g.*, Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).

227. Gellhorn, *supra* note 12, at 383. Of course, delay is often used as a tactic, but such use is not confined to any single group or interest, "public" or "private." As one witness at the S. 270 hearings noted: "often times [*sic*] it is the regulated industry, through its financial ability that may lengthen proceedings and pursue numerous appeals while the evil sought to be cured continues." *Hearings I, supra* note 10, at 54 (statement of William J. Scott).

228. *See Hearings I, supra* note 10, at 69 (statement of Stanley C. Van Ness).

229. *Id.* at 104 (statement of Ben Blackburn).

230. *Id.* at 179 (statement of Frederick T. Poole).

worthy causes or programs. The public interest law movement in general and a federal compensation program in particular are attempts to remedy the effects of scarce resources and to reduce hostility toward those who have not previously had a voice in agency decisionmaking due to lack of funds.

Furthermore, it simply is not accurate to claim that "credible intervenor groups have adequate opportunities for funds."[231] It is common knowledge among public interest lawyers that the foundations, which provide essential seed money enabling many groups to begin operations, cannot be expected to continue such subsidies indefinitely.[232] The obverse of this argument is a concern that public funding may have adverse effects on public interest groups—that they may become too concerned about being "fundable" or may themselves fall prey to a sort of reverse capture phenomenon wherein the public interest groups fall under the control of the agencies.[233] Consequently, the eligibility criteria should provide a check against such effects within the groups. If an organization becomes interested only in being funded, it is likely to lose its constituents, and no longer qualify as an effective representative.

J. *The Search for Alternatives*

Other suggestions for securing public representation in agency proceedings—such as establishing an office of public counsel within each agency or simply permitting agencies to establish their own programs for compensating public intervenors—are unsatisfactory alternatives to the approach of S. 270. Offices of public counsel have occasionally been used in federal agencies to provide a voice for the consumer or generally to represent the public.[234] This alternative has two fundamental weaknesses. First, it seems inevitable that an "in-house" public representative will often disagree with the agency position, thus jeopardizing either its own funding (and existence) or its independence.[235] The history of

231. *Id.* at 125 (statement of David B. Graham).

232. *See* T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 163; Gellhorn, *supra* note 12, at 389; Halpern & Cunningham, *supra* note 13, at 1112; Lenny, *supra* note 6, at 485; Schotland, *supra* note 34, at 272.

233. *See Hearings I, supra* note 10, at 270 (letter from Pacific Legal Foundation); *id.* at 283 (letter from the Air Transport Association); Halpern & Cunningham, *supra* note 13, at 1112.

234. *See* Bloch & Stein, *supra* note 11.

235. T. BOASBERG, L. HEWES, N. KLORES & B. KASS, *supra* note 22, at 153; Cramton, *supra* note 3, at 546. *See generally* Lazarus & Onek, *supra* note 11.

such offices bears out this prediction. Except in a few cases, these offices have been ineffective in the administrative process. One commentator has noted that "almost all of the consumer's counsel offices organized as separate entities within the federal establishment have atrophied and disappeared."[236]

Second, a single representative for the public interest is insufficient. Indeed, the effort to increase public participation in the administrative process is a response to the failure of the notion that the agencies alone can represent the public interest. Although new offices may function vigorously at first, "the same forces which have led to agency favoritism toward organized interests could in time produce a similar bias on the part of advocacy agencies."[237] Individuals with experience in state public advocacy agencies echoed these sentiments at the S. 270 hearings. Citing examples of conflicts among the interests they are expected to represent, one witness, who strongly endorsed S. 270, concluded that it is "impossible for one governmental agency to represent all consumer interests."[238]

Not only is the concept of in-house public representatives an inadequate alternative, it may even be counterproductive to the objectives of a compensation program. Agencies unsympathetic to public intervention could use the presence of such an office as an excuse to deny any alternative intervention to that of the in-house public counsel. Thus, there is a risk that public participation could actually be reduced if this alternative were accepted.[239]

A second alternative is to permit each agency to establish its own compensation program. There has been a recent trend in this direction.[240] In a few bills introduced since the 1975 FTC amendments, Congress has expressly provided for such funding pro-

236. Bonfield, *supra* note 117, at 538.

237. Stewart, *supra* note 4, at 1770.

238. *Hearings I, supra* note 10, at 63 (statement of Arthur Penn). One example of the difficulty of such public representatives in effectively representing diverse interests occurred with the New Jersey Office of Public Advocate. For a case of utility rate increases the Office not only represented the broad interest of obtaining service at the lowest possible cost, but also represented Senior Citizens who wanted special rates, which in turn would cause higher rates for other consumers. *Id.*

239. *See* Comment, *supra* note 18, at 751.

240. *See* 42 Fed. Reg. 1492 (1977), *reprinted in Hearings I, supra* note 10, at 463 (advance notice of proposed rulemaking by the Environmental Protection Agency); *id.* at 2864 (final rule and advance notice of proposed rulemaking by National Highway Traffic Safety Administration); *id.* at 8663 *reprinted in Hearings I, supra* note 10, at 472 (advance notice of proposed rulemaking by CAB); *id.* at 15,711 (proposed policies and procedures by CPSC).

grams.[241] Most of the programs, however, rely on the inherent power of the agency to cover expenses necessary for carrying out its function. This concept originated in a 1976 decision of the Comptroller General in response to an NRC inquiry concerning the propriety of having its own compensation program. The Comptroller General concluded that

> if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose.[242]

In a subsequent letter the Comptroller General indicated that the NRC decision also applied to nine other agencies—FCC, FTC, FPC, ICC, the Consumer Products Safety Commission (CPSC), the Securities and Exchange Commission (SEC), the FDA, the Environmental Protection Agency (EPA), and the National Highway Traffic Safety Administration (NHTSA)—and "to agencies other than the ones mentioned . . . assuming that there was no specific legislative prohibition against it."[243]

While the NRC decision is encouraging, programs established under the Comptroller General's interpretation are an inadequate alternative to a comprehensive federal program. Because there may be statutes which prohibit an agency from developing a funding program, not all agencies may have inherent authority to establish participation compensation programs. In addition, even those programs which could be established through the inherent authority of an agency may be limited in scope. According to the Comptroller General, no payments may be made to a representative who is not indigent, under programs established by an agency's inherent authority.[244] Thus, in one case, the Comptroller General struck down an FDA program which had adopted liberal interest and indigency standards,[245] similar to those developed by

241. *See, e.g.*, Toxic Substances Control Act, § 21(b)(4)(C), 15 U.S.C. § 2620(b)(4)(C) (1976).

242. Decision of the Comptroller General, Costs of Intervention—Nuclear Regulatory Commission, Feb. 19, 1976, *reprinted in Hearings I, supra* note 10, at 418, 421.

243. *Id.* at 431 (letter from the Deputy Comptroller General to Hon. John E. Moss, May 10, 1976). At least one agency has announced a program based on the "other agency" clause. *See* 42 Fed. Reg. 8663 (1977), *reprinted in Hearings I, supra* note 10, at 472 (advance notice of proposed rulemaking by CAB).

244. Decision of the Comptroller General, Costs of Intervention—Food and Drug Administration, Dec. 3, 1976, *reprinted in Hearings I, supra* note 10, at 455, 460.

245. *Id.* For FDA program standards, see 41 Fed. Reg. 35,855 app. A, at 35,860 (1976).

the FTC[246] and proposed by S. 270.[247] The Comptroller General found that advance payments were also prohibited in such programs.[248]

As previously noted, both the broader standard of financial eligibility adopted by the FTC[249] and proposed in S. 270[250] and the ability to tender advance payments[251] are essential to ensure the success of a government-wide program.

Another weakness in relying on the inherent power of an agency to create a federal funding program is that the decision to establish the program is left entirely to each agency's individual discretion. Ironically, the NRC—the agency whose inquiry initiated the Comptroller General's opinion—has decided *not* to establish a compensation program. The Commission announced that since such a program involved using public money to finance what it regarded as a "private viewpoint," the NRC should not act without express authorization from Congress.[252] Referring to the Comptroller General's decision,[253] the Commission concluded, "we certainly cannot say that we 'cannot make' the safety, safeguards, environmental or antitrust findings required of us by relevant statutes unless we fund these parties . . . ."[254] The FCC has also declined to initiate a funding program, claiming that the "primary problem for the FCC is our uncertainty as to whether Congress will support such a reimbursement program, and [our belief that] . . . it would be imprudent to proceed further without specifically earmarked funds for such purposes."[255]

To argue that Congress should leave the issue to the agencies, while some agencies refuse to act in the absence of express Congressional authority, produces an absurd circularity. Even if all agencies were able and willing to establish compensation programs, a program such as that proposed by S. 270 would still be the preferable alternative. The Comptroller General, while acknowledging the authority of individual agencies to establish

246. *See* notes 57–65 *supra* and accompanying text.
247. *See* notes 124–26 *supra* and accompanying text.
248. *See* note 244 *supra*.
249. *See* notes 57–65 *supra* and accompanying text.
250. *See* notes 124–26 *supra* and accompanying text.
251. *See* notes 83–86, 153–59 *supra* and accompanying text.
252. Release from NRC Office of Public Affairs, No. 76–251, Nov. 12, 1976, *reprinted in Hearings I, supra* note 10, at 450.
253. *See* note 242 *supra*.
254. *Hearings I, supra* note 10, at 451.
255. 123 Cong. Rec. 6969 (1977).

funding programs, stressed the desirability of Congressional action in order to provide some uniformity among the programs.[256] Even S. 270, which left administration of the program to each agency, would have at least provided a uniform framework and consistent eligibility criteria. Most importantly, a program like S. 270 would provide the express Congressional authority and direction sought by reluctant agencies and essential to a democratic system.

III. CONCLUSION

The necessity for a better balance among interests represented in the administrative process is widely felt and recognized. It is now clear that costs are the primary remaining obstacle to increased public participation. Expecting the government to help eliminate this obstacle is appropriate; the proper functioning of the federal administrative process is at stake, and it is "too important and urgent . . . to entrust its support to the uncertainties of private fund raising."[257] The FTC program demonstrates that federal financing can be an effective method of increasing the number and diversity of interests represented in agency proceedings.

By extending to all proceedings of all federal agencies a program similar to that of the FTC, Congress can provide the means for a truly democratic agency decisionmaking process. A compensation program modeled after S. 270, but with centralized administration and with greater specificity accorded to details of implementation, would provide a significant boost to public participation in agency proceedings. The price for increasing that participation may seem high, but the price of public noninvolvement is "intransigence of agency prejudice, resistance to enforcement, and further lack of confidence or credibility in Government."[258]

256. Decision of the Comptroller General, Costs of Intervention—Nuclear Regulatory Commission, Feb. 19, 1976, *reprinted in Hearings I, supra* note 10, at 418, 425. "The lack of consistency which exists among those agencies actively encouraging paid public participation fosters increased public frustration and alienation." *Id.* at 207 (statement of the National Consumers League). For a comparison of the procedures used by three agencies, see *id.* app. A, at 211–28.

257. Bonfield, *supra* note 117, at 543.

258. *Hearings I, supra* note 10, at 54 (statement of William J. Scott).

TAB 5

Attachment 5

Intervenor Participation in Settlement Conference Processes

Settlement Conferences normally commence with a meeting between the Applicant, participating intervenors and Board Staff. After the initial meeting, the Applicant leaves the meeting room so that the intervenors and Board Staff can have private discussions.

Normally, one or two of the intervenor representatives will then lead all intervenors in a discussion of their respective positions on matters in issue, including the rationale for those positions. These discussions normally proceed on an issue by issue basis and are "around the table" discussions so that each intervenor is called upon to address each issue.

From these discussions, a determination is made of the further information required from the Applicant before intervenors can confirm the positions they wish to take with respect to those matters in issue which have been discussed.

The Applicant and its representatives then return to the Settlement Conference, at which time an intervenor spokesperson outlines the issues on which intervenors require further information, including the rationale for the further information requests. Particular intervenors seeking additional information supplement the spokesperson's remarks whereupon the Applicant's representatives either provide the information requested, if it is immediately available, or leave the hearing room and return later with the additional information.

Once the positions of each intervenor on all issues are canvassed along with the evidence and information upon which intervenors rely to support their positions with respect to those issues, the extent to which intervenor consensus is emerging can be determined.

Those leading the discussion may have already arranged the issues in a framework that will facilitate subsequent settlement discussions with the utility. If not, then this type of a framework will evolve as the issue by issue discussion proceeds. Once a consensus appears to be emerging on a bundle of matters in issue, participating intervenors can then determine what segments of the Issues List can be packaged into a settlement proposal. Once formulated, the intervenor spokesperson obtains approval from the intervenors of what will be presented to the Applicant. The Applicant is then invited to return to the Settlement Conference to hear that presentation.

The presentation of an initial settlement proposal generally leads the Applicant to seek clarification of the proposal from intervenors. The Applicant and its representatives then leave the Settlement Conference to seek instructions from their superiors and to consider how to respond.

The Applicant and its representatives eventually return to the Settlement Conference to present its response. This generally prompts further questions from intervenors pertaining to rationale

and impacts. The Applicant will immediately answer questions which it is able to answer and retire to prepare impact related responses to which they are unable to immediately respond.

There can be several rounds of offers and counter-offers with respect to two or more subsets of matters on the Issues List before a consensus emerges between the Applicant and the majority of intervenors which leads to a conclusion that a bundle of issues have been settled.

Once matters in issue have either been settled or identified as unsettled, the Applicant and its representatives undertake to prepare the initial draft of the Settlement Agreement. The initial draft is circulated to all participating intervenors who, one after another, add their comments to sequential blackline versions of the initial draft. The process pertaining to the eventual approval of the final wording of the Settlement Agreement can extend over several days and may require a further face-to-face meeting of the parties, or a teleconference to clarify and finalize the wording of settled issues. Once finalized, the utility then files the Settlement Agreement with the Board.

It takes a significant amount of time to properly prepare for and participate in a Settlement Conference. It also takes time to reach consensus on the appropriate wording for all resolved issues in the Settlement Agreement.

Settlement Conferences in cases in which CME representatives have been involved are conducted as efficiently as they can be having regard to the diverse range of interests who actively participate therein.

If the Board requires further information on the reasonableness of time spent by cost eligible intervenors in the Settlement Conference process, then one possible source of such information could be a report provided by the facilitator and Board Staff on the activities that occurred during the course of the conference, including the time line over which such activities took place. Such a report could be provided without disclosing any confidential communications that took place between conference participants.