Michigan Law Review

Volume 61 | Issue 5

1963

Administrative Law--Procedure--Right of Interention in FCC Rate-Making Proceeding

Jon E. Denney
University of Michigan Law School

RECENT DECISIONS

ADMINISTRATIVE LAW—PROCEDURE—RIGHT OF INTERVENTION IN FCC RATE-MAKING PROCEEDINGS—In response to a petition of the Western Union Telegraph Company, the Federal Communications Commission began an investigation of the American Telephone and Telegraph Company's tariff charges on its "telpak" service.[1] The American Communications Association, a trade union representing Western Union workers in the New York City area, petitioned to intervene. The hearing examiner's decision to deny intervention was affirmed by the Commission. A motion for reconsideration was also denied by the FCC[2] because the union failed to show how its intervention in the proceeding would assist the Commission in determining the issues, as required by the rule reserving to the FCC discretion over petitions for intervention.[3] On appeal, *held*, reversed. Section 6(a) of the Administrative Procedure Act[4] gives any interested person a right to intervene as long as the "orderly conduct of business" is not impaired. *American Communications Ass'n v. United States*, 298 F.2d 648 (2d Cir. 1962).

Although standing to seek judicial review of an administrative action and intervention into an administrative proceeding are closely related, they are governed by different principles.[5] In general, the Administrative Procedure Act (APA) confers standing on persons suffering a legal wrong or adversely affected or aggrieved by any agency action.[6] Basically the same language governs standing to appeal FCC decisions.[7] Filing a petition for a rehearing is a condition precedent to judicial review when the person aggrieved or adversely affected was not a party to the proceeding or such person relies on questions of fact or law upon which the Commission has had no opportunity to pass.[8] To be deemed sufficiently affected to have standing, a person must be adversely affected or aggrieved in fact,[9]

1 "Telpak" designates low tariff charges filed by American Telephone & Telegraph Company on private line service for volume customers using numerous types of communications facilities. The service is designed to meet competition from privately owned microwave systems. 27 FCC ANN. REP. 89 (1961).

2 American Tel. & Tel. Co., 22 P & F RADIO REGS. 799 (1961).

3 47 C.F.R. § 1.104(b) (1958). The rule was made in accordance with 48 Stat. 1068 (1934), 47 U.S.C. § 154(j) (1958).

4 60 Stat. 240 (1946), 5 U.S.C. § 1005(a) (1958), which provides: "So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for presentation, adjustment, or determination of any issue, request, or controversy in any proceeding . . . or in connection with any agency function."

5 See 3 DAVIS, ADMINISTRATIVE LAW § 22.08 (1958). See generally *id.* §§ 22.01-.18.

6 Administrative Procedure Act § 10(a), 60 Stat. 243 (1946), 5 U.S.C. § 1009(a) (1958).

7 48 Stat. 1093 (1934), as amended, 47 U.S.C. § 402(b) (1958), which provides: "Appeals may be taken from decisions and orders of the Commission . . . . (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application in paragraphs (1)-(4) of this subsection."

8 48 Stat. 1095 (1934), as amended, 47 U.S.C. § 405 (Supp. III, 1961).

9 S. Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946). "This subsection [10(a)] con-

but need not have suffered an injury to a legally protected interest.[10] In *FCC v. Sanders Bros. Radio Station*,[11] the Supreme Court made it clear that persons economically harmed by an FCC broadcast order could attack its validity as affecting him even though the economic harm was not itself a basis for upsetting the order. On the other hand, the primary problem in allowing a person to intervene is the effect that the intervention might have on the efficient conduct of the proceeding.[12] Although the APA has no specific provision governing intervention, the Communications Act gives a "party in interest"[13] a right to intervene in FCC licensing proceedings. The Senate report[14] on the 1952 amendments to the Communications Act limits the concept of "party in interest" to existing licensees who would be subject to electrical interference[15] and persons who would be affected by economic competition.[16] By incorporation of the *Sanders* doctrine relating to standing into the statutory concept "party in interest" for the purpose of intervention, the criteria for becoming a "person aggrieved or whose interests are adversely affected"[17] and a "party in interest" are almost indistinguishable. In fact, the FCC has stated that the terms are synonymous.[18]

The problem of intervention has usually arisen in the context of FCC licensing proceedings. The Communications Act of 1934 made no provision for intervention;[19] however, under its rules the Commission originally

fers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute." See 3 DAVIS, *op. cit. supra* note 5, § 22.02.

10 See 3 DAVIS, *op. cit. supra* note 5, § 22.04.

11 309 U.S. 470, *rehearing denied*, 309 U.S. 642 (1940); *accord*, Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942) (dictum). "The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications." *Id.* at 14. This doctrine is popularly known as "private Attorney Generals." 3 DAVIS, *op. cit. supra* note 5, § 22.05. For the reasoning behind the doctrine, see Associated Indus., Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943).

12 See 3 DAVIS, *op. cit. supra* note 5, § 22.08, at 241. The author views the main problem in intervention as the disadvantage to the tribunal and other parties of extensive cross-examination.

13 74 Stat. 891 (1960), 47 U.S.C. § 309(e) (Supp. III, 1961), which provides: "When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest." The term "party in interest" was first used under the old § 309(b) and (c), ch. 879, 66 Stat. 715 (1952), as amended, 68 Stat. 35 (1954).

14 S. REP. No. 44, 82d Cong., 1st Sess. 8 (1951); see Note, 55 COLUM. L. REV. 209 (1955).

15 FCC v. National Broadcasting Co., 319 U.S. 239 (1943). Specific facts must be alleged that electrical interference will cause a loss of listeners. Interstate Broadcasting Co. v. FCC, 285 F.2d 270 (D.C. Cir. 1960).

16 *E.g.*, Camden Radio, Inc. v. FCC, 220 F.2d 191 (D.C. Cir. 1954), *rehearing denied*, 220 F.2d 195 (D.C. Cir. 1955).

17 48 Stat. 1093 (1934), as amended, 47 U.S.C. § 402(b) (1958). For the text of this statute, see note 7 *supra*.

18 St. Louis Telecast, Inc., 10 P & F RADIO REGS. 1185 (1954); *accord*, Paul A. Brandt, 8 P & F RADIO REGS. 409 (1952). *But see* Radio Cleveland, 11 P & F RADIO REGS. 352 (1954).

19 Communications Act of 1934, § 309, 48 Stat. 1085, as amended, 47 U.S.C. § 309

admitted almost anyone to full party status,[20] but later reversed this policy when it became evident that many parties were interested merely in delaying the licensing of competitors.[21] Although presently any "party in interest" has a right to intervene in licensing proceedings, no such statutory mandate is contained in the provisions of the present Communications Act relating to rate making.[22] This is the reason that the court in the principal case looked to the APA[23] to find statutory authority for granting the right to intervene in the instant rate-making investigation. The House of Representatives' report on the APA indicates that section 6(a) is a statutory mandate giving "interested persons" a right merely to present their proposals or cases before the agency.[24] As interpreted by the Attorney General's Manual, the sentence of section 6(a) relied upon for the decision in the principal case relates only to *informal* proceedings.[25] It merely gives a person "an opportunity to confer or discuss with responsible officers or employees of the agency matters in which he is properly interested."[26] It would seem that the section does not justify the inference that persons aggrieved have a right to *intervene* since they have ample opportunity to present their proposals before the FCC without acquiring full party status.[27] Commission rules permit anyone to present relevant material and testimony;[28] and, furthermore, a person actually aggrieved by FCC action can

(Supp. III, 1961). However, persons aggrieved or adversely affected could petition the Commission for a rehearing under § 405, 48 Stat. 1095 (1934), as amended, 47 U.S.C. § 405 (Supp. III, 1961), and such persons had the right of judicial review under § 402(b), 48 Stat. 1093 (1934), as amended, 47 U.S.C. § 402(b) (1958).

20 Intervention was granted when a party showed "a substantial interest in the subject matter." 47 C.F.R. § 1.152 (1938). See Att'y Gen. Comm. on Adm. Proc., *Administrative Procedure in Government Agencies*, S. Doc. No. 186, pt. 3, 76th Cong., 3d Sess. 16-17 (1940), where it was pointed out that many intervenors used dilatory tactics to increase the size of the record and to confuse the issues.

21 In 1939 the Commission changed its rule on intervention to require the petitioner to show not only his interest but also how his intervention would aid the public interest. 47 C.F.R. § 1.102 (Supp. 1944). The Commission clearly stated that, under this rule, intervention was within its discretion. In the Matter of Hazelwood, Inc., 7 F.C.C. 443 (1939).

22 Rate making is under the title of the act dealing with common carriers. Communications Act Title II, §§ 201-22, 48 Stat. 1070 (1934), as amended, 47 U.S.C. §§ 201-22 (1958).

23 60 Stat. 240 (1946), 5 U.S.C. § 1005(a) (1958). For the text of this statute, see note 4 *supra*.

24 H.R. REP. No. 1980, 79th Cong., 2d Sess. 31-32 (1946). For the legislative history of the act, see *id.* at 7-16.

25 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 63-64 (1947).

26 *Id.* at 63; see BUREAU OF NATIONAL AFFAIRS, ADMINISTRATIVE PROCEDURE ACT 20 (1946), where the words "orderly conduct of public business" were interpreted as precluding "undue harassment of the administrative agencies by numerous petty appearances in such cases as rate-making procedures of the Federal Communications Commission . . . where thousands of interested persons might be affected."

27 The principal case is the only authority interpreting the section as giving interested persons a right to intervene. *But cf.* National Coal Ass'n v. FPC, 191 F.2d 462, 466-67 (D.C. Cir. 1951).

28 47 C.F.R. § 1.105(b) (1958).

petition for a rehearing.[29] Although there is no substantive right to be free from competition, competitors have sufficient standing, as defined by the *Sanders* doctrine,[30] to intervene in licensing proceedings for the purpose of seeing that the Commission does not misconceive the public interest. On the other hand, elimination of unnecessary delay, expense and voluminous records in administrative proceedings is also in the public interest.[31] In essence, the propriety of admitting a competitor to full party status is a matter of balancing the advantage of having it adduce evidence, cross-examine witnesses and present arguments against the additional time and expense which would result from intervention.[32] The Commission's rule reserving discretion in itself to grant intervention requires only that the petitioner show how its "participation will assist the Commission in the determination of the issues in question"[33] and state specifically the nature of the evidence which it intends to introduce in the proceeding.[34] Since granting intervention does not change or enlarge the issues,[35] the Commission could admit any person and still maintain efficiency by requiring participants to adhere to the issues and refrain from presenting irrelevant evidence.[36] However, it is reasonable for the Commission to use both methods to insure an efficient proceeding: restricting the parties to those who will aid in determining the issues, and, when admitted as parties, requiring them to adhere to the issues. When a petitioner fails to meet these requirements, the public interest and the interest of the original parties are best served by a denial of intervention. This is especially true where, as in the principal case, other competitors are already parties in the proceeding representing the public interest.[37] The denial would be neither unfair nor injurious to the competitor since it could still present relevant material and, if aggrieved by Commission action, petition for a rehearing.

29 48 Stat. 1095 (1934), as amended, 47 U.S.C. § 405 (Supp. III, 1961).

30 See note 11 *supra*.

31 REPORT OF PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE 13, 66 (1953) See also LANDIS, REPORT ON REGULATORY AGENCIES 53-54 (1960).

32 Although there is a chance of delay in the rehearing process, it is contingent. A party may not be aggrieved by the Commission's decision. Furthermore, even if a party gives sufficient reason to justify a rehearing, "no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission . . . believes should have been taken in the original proceeding shall be taken on any rehearing." 48 Stat. 1095 (1934), as amended, 47 U.S.C. § 405 (Supp. III, 1961).

33 47 C.F.R. § 1.104(b) (1958).

34 Enterprise Co., 14 P & F RADIO REGS. 1270 (1957); Music Broadcasting Co., 9 P & F RADIO REGS. 629 (1953). On the other hand, the Commission has not enumerated its standards for evaluation of facts set out in a petition. In fairness to the petitioner, the Commission should state these standards. For an enumeration of factors considered by the Civil Aeronautics Board when passing on a petition to intervene, see 14 C.F.R. § 302.15(b) (1962).

35 47 C.F.R. § 1.104(c) (1958).

36 Virginia Petroleum Jobbers Ass'n v. FPC, 265 F.2d 364, 367-68 n.1 (D.C. Cir. 1959).

37 See 107 U. PA. L. REV. 551 (1959). The author takes the view that the legislative purpose of allowing a competitor to intervene in a licensing proceeding is served when one competitor is admitted as a party and that multiplication of intervenors consumes time.

The decision in the principal case opens the door for the extension of the principles of intervention applicable to licensing into the area of rate making. Three factors strongly suggest that the Commission should retain discretion over intervention in this latter area. Congress has specifically provided that the FCC shall give preference to a rate-making question "over all other questions pending before it and decide the same as speedily as possible."[38] A competitor's motive in attempting to prolong a rate-making proceeding is frequently, as in FCC licensing hearings, to effectuate a form of severe economic pressure, in this situation by means of delaying a rate increase.[39] Secondly, Congress has not specifically granted the right of intervention in rate-making proceedings to anyone.[40] Finally, the Commission, which is well acquainted with the nature and scope of the proceedings, is in a better position than a court to determine how a person's participation will affect the "orderly conduct of business." It is clear that the court in the principal case rejects the idea and, by implication, the rule of excluding a party who fails to show how it will aid the Commission in determining the issues.[41] However, the court regrettably fails to suggest any criteria for determining at what point intervention of an additional party will disrupt the "orderly conduct of business."

Jon E. Denney

38 48 Stat. 1072 (1934), 47 U.S.C. § 204 (1958).

39 See GELLHORN & BYSE, ADMINISTRATIVE LAW 834 (4th ed. 1960), where the authors state that a "species of economic blackmail" is made possible by the "easy involvement of multiple parties."

40 *But see* principal case at 651 n.5.

41 Principal case at 651. See text accompanying note 36 *supra*.