

THE LAW OF ADMINISTRATIVE STANDING AND THE PUBLIC RIGHT OF INTERVENTION

Statutes creating most federal regulatory agencies¹ provide for intervention to assist in determining the public interest by persons likely to be affected by the results of a proceeding. In an effort to balance the need for representation of the general public against inherent limitations on agencies' capacity to hear and consider argument, the courts have developed rules defining the kind of interest a person must possess to be entitled to standing to intervene. Until recently, the right to participate in broadcast license application cases was afforded to parties only if the injury they asserted fit within one of two categories: economic harm or electrical interference. These standing rules have been gradually liberalized by granting standing to parties asserting progressively more tenuous claims of economic harm or electrical interference. *Office of Communication of the United Church of Christ v. FCC*,² a 1966 decision, allowed television viewers, who suffered no injury cognizable within the two previously accepted categories, to challenge the renewal of a television station's license. The court recognized that liberalization of the standing requirements within those categories had not achieved the desired result of litigating the public interest. In response to this problem the court recognized a public right of intervention.

I. DEVELOPMENT OF THE LAW OF STANDING

The watershed case in the development of the law of administrative standing is the 1940 decision in *FCC v. Sanders Bros. Radio Station*.³ Prior to *Sanders*, the general rule was that one was entitled to challenge administrative action only if he was protecting a legal right.⁴ Although the

1. *E.g.*, Securities Act of 1933, ch. 38, § 9(a), 48 Stat. 80, *as amended*, 15 U.S.C. § 77i(a) (1964); Public Utility Holding Company Act of 1935, ch. 687, § 5, 49 Stat. 834-35, 15 U.S.C. § 79x(a) (1964); Natural Gas Act, ch. 556, § 19(b), 52 Stat. 831 (1938), *as amended*, 15 U.S.C. § 717r(b) (1964); Federal Power Act, ch. 687, § 313(b), 49 Stat. 860 (1935), *as amended*, 16 U.S.C. § 8251(b) (1964); Communications Act of 1934, ch. 652, § 402(b) (2), 49 Stat. 1093, *as amended*, 47 U.S.C. § 402(b) (2) (1964); Federal Aviation Act of 1958, § 1006(a), 72 Stat. 795, *as amended*, 49 U.S.C. § 1486(a) (1964).

2. 359 F.2d 994 (D.C. Cir. 1966).

3. 309 U.S. 470 (1940). Landmark decisions on administrative standing seem to have a habit of originating with FCC proceedings, perhaps simply by chance.

4. *See* 3 K. DAVIS, ADMINISTRATIVE LAW § 22.04 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 505-14 (1965); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 261-71 (1961); Comment, *Standing of*

legal right concept is circular—since a party has standing only if his interest is legally protected and his interest is legally protected only if he is afforded standing—it is the usual test for allowing or denying intervention.⁵ In *Sanders* a competitor of the proposed licensee was allowed to appeal from the decision of the Federal Communications Commission because of the economic injury he might suffer as a consequence of the grant of the license, even though no legal right was involved.⁶ The Supreme Court emphasized that the economic injury *Sanders* was likely to suffer was not itself a relevant issue before the Commission. It was relevant only in that it afforded *Sanders* standing for the purpose of litigating the public interest.⁷

Three years later the *FCC v. NBC (KOA)*⁸ case, with some assistance from the earlier *Scrrips-Howard Radio v. FCC*⁹ case, added the electrical interference corollary to the *Sanders* doctrine. The *KOA* case holds that if a proposed licensee's station would cause electrical interference with an existing station's signal to the point of modifying its license, the existing station is entitled to participate in the hearing and to appeal.¹⁰ Unlike *Sanders* no direct allegation of economic harm was made by, or required of, the

Television Viewers to Contest FCC Orders: The Private Action Goes Public, 66 COLUM. L. REV. 1511, 1511-12 (1966). The concept of legal right emerging from Supreme Court decisions on standing appears to be a confused one. See 3 K. DAVIS, ADMINISTRATIVE LAW § 22.04 (1958). In general, it probably means that one has standing to enforce a statute designed to protect his interests or to enforce a common law right. See *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 137 (1937); *The Chicago Junction Case*, 264 U.S. 258 (1924); 3 K. DAVIS *supra*; L. JAFFE, *supra*.

Prior to 1939 the Federal Communications Commission was an exception to the legal right rule. Until that date the regulations on intervention were so lax that almost anyone could and did intervene, so that the efficiency of the agency was threatened and the regulations were changed. See 47 C.F.R. § 1.152 (1938). See also 49 COLUM. L. REV. 579, 581 (1949).

5. 3 K. DAVIS, *supra* note 4, at § 22.04.

6. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940); see Davis, *Standing in Administrative Law*, 49 COLUM. L. REV. 759, 778 (1949); Note, *Competitors' Standing to Challenge Administrative Action Under the APA*, 104 U. PA. L. REV. 843, 845 (1956).

7. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476 (1940).

8. 319 U.S. 239 (1943).

9. 316 U.S. 4 (1942).

10. *FCC v. NBC (KOA)*, 319 U.S. 239 (1943).

11. In the *KOA* case the Supreme Court stated:

Here *KOA*, while not alleging economic injury, does allege that its license ought not to be modified because such action would cause electrical interference which would be detrimental to the public interest. *FCC v. NBC (KOA)*, 319 U.S. 239, 247 (1943).

intervenors.¹¹ But, as in *Sanders*, the intervenors were granted standing to litigate the public interest because of the possibility of private injury.¹²

Standing to appeal agency decisions under the *Sanders* doctrine was reconciled with the constitutional requirement of a case or controversy¹³ by Judge Frank in *Associated Indus. v. Ickes*.¹⁴ Judge Frank argued that the case or controversy requirement is met when an officer such as the Attorney General challenges the constitutional or statutory authority of an agency's action. Thus, if a citizen is considered as a "private Attorney General" to challenge agency actions, the case or controversy requirement is met, even though the citizen was not litigating a legally protected right of his own.

The *Sanders* doctrine, as explained and refined by subsequent case law, had become applicable to the entire field of administrative law. Its expansion was predictable, since many regulatory agencies had similar statutory language in their standing requirements.¹⁵

A. Economic Injury Cases

The early cases applying *Sanders* limited the doctrine by holding that one had to prove direct economic injury to satisfy the standing requirements.¹⁶ A trilogy of early FCC cases,¹⁷ and several comparatively recent ones,¹⁸ indicate that there may still be a minimal requirement that the

12. *Id.*; *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942).

13. U.S. CONST. art. III, § 2.

14. 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

15. Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511, 1513 (1966).

16. *American Lecithin Co. v. McNutt*, 155 F.2d 784 (2d Cir. 1946); *United States Cane Sugar Refiners' Ass'n v. McNutt*, 138 F.2d 116 (2d Cir. 1943).

17. *WOKO, Inc. v. FCC*, 109 F.2d 665 (D.C. Cir. 1939); *Ward v. FCC*, 108 F.2d 486 (D.C. Cir. 1939); *Tri-State Broadcasting Co. v. FCC*, 107 F.2d 956 (D.C. Cir. 1939).

18. *Interstate Broadcasting Co. v. FCC*, 280 F.2d 626 (D.C. Cir. 1960) (*Big River*); *Red River Broadcasting Co. v. FCC*, 267 F.2d 653 (D.C. Cir. 1959); *Southwestern Publishing Co. v. FCC*, 243 F.2d 829 (D.C. Cir. 1957). The *Interstate* (*Big River*) case was argued both on economic injury and electrical interference. The case is but one in a series. Interstate was allowed to intervene in two other hearings. *Interstate Broadcasting Co. v. FCC*, 285 F.2d 270 (D.C. Cir. 1960) (*Patchogue*); *Interstate Broadcasting Co. v. United States*, 286 F.2d 539 (D.C. Cir. 1960) (*Grossco*). In the *Patchogue* case the court explained that the cumulative effect of numerous small incursions upon Interstate's service area did give it standing, even though the first incursion, the *Big River* case, did not meet the statutory "party in interest" test. In the *Red River* case only about 200 persons were likely to be in the overlap area, and this was inadequate electrical interference to qualify as a party in interest.

economic injury or electrical interference be significant. Recent decisions,¹⁹ allowing intervention upon a showing of remote and indirect economic injury, indicate that the general trend is toward liberalization of the economic injury test, and that restrictive use of the test will only be made to prevent parties having no real interest in a proceeding from intervening and thereby reducing administrative efficiency.

Decisions from several other agencies demonstrate the relaxation of the economic injury test.²⁰ For example, coal mine owners and unions rep-

19. *Interstate Broadcasting Co. v. United States*, 286 F.2d 539 (D.C. Cir. 1960) (Grossco); *Interstate Broadcasting Co. v. FCC*, 285 F.2d 270 (D.C. Cir. 1960) (Patchogue); *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958); *Metropolitan Television Co. v. United States*, 221 F.2d 879 (D.C. Cir. 1955); *Camden Radio v. FCC*, 220 F.2d 191 (D.C. Cir. 1955). See also Jaffe, *supra* note 4, at 274-75; Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511, 1513-14 (1966); Note, *Intervention by Third Parties in Federal Administrative Proceedings*, 42 NOTRE DAME LAW. 71, 78 (1966); 52 VA. L. REV. 1360, 1362 (1966). An example of this relaxation is the series of *Interstate* cases, analyzed in note 18, *supra*.

20. *California v. FPC*, 353 F.2d 16 (9th Cir. 1965); *Sunray DX Oil Co. v. FPC*, 351 F.2d 395 (10th Cir. 1965); see *Lynchburg Gas Co. v. FPC*, 336 F.2d, 942 (D.C. Cir. 1964); *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956); *Seaboard & W. Airlines v. CAB*, 181 F.2d 515 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 963 (1950); *Seatrains Lines v. United States*, 152 F. Supp. 619 (D. Del.), *aff'd per curiam*, 355 U.S. 181 (1957). The *Sunray* case is, perhaps, the farthest any court has been willing to go in relaxing the standing requirements. The court admitted that it was not sure that *Sunray* would be able to demonstrate economic harm resulting from an FPC order; but, since the FPC had refused to afford *Sunray* a hearing on that issue, standing was accorded.

Some writers have distinguished intervenors who are competitors from those who are not competitors. Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511, 1513-15 (1966). Whatever value there may be to this analysis, the result seems to be the same in both cases; a continual process of liberalization of the standing rules. The leading competitive injury cases are as follows: *Railway Express Agency v. CAB*, 243 F.2d 422 (D.C. Cir. 1957); *City of Pittsburgh v. FPC*, *supra* (competing barge owner given standing); *National Coal Ass'n v. FPC*, 191 F.2d 462 (2d Cir. 1951); *Seaboard & W. Airlines v. CAB*, *supra*; *Land O'Lakes Creameries v. McNutt*, 132 F.2d 653 (8th Cir. 1943); *Seatrains Lines v. United States*, *supra*; *Mid-America Pipeline Co. v. FPC*, 330 F.2d 226 (D.C. Cir. 1964) (*dictum*); *National Capital Ins. Co. v. Jordan*, 148 F. Supp. 317 (D.D.C. 1957); *Pacific Inland Tariff Bureau v. United States*, 129 F. Supp. 473 (D. Ore. 1955); *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346 (D.D.C. 1953); Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511, 1513-15 (1966); Note, *Intervention by Third Parties in Federal Administrative Proceedings*, 42 NOTRE DAME LAW. 71, 78-79 (1966). The *National Coal Association* case is the leading case in this area.

The leading non-competitive injury cases are as follows: *National Motor Freight Ass'n v. United States*, 372 U.S. 246 (1963); *Parker v. Fleming*, 329 U.S. 531 (1946); *California v. FPC*, *supra* (state allowed to intervene as a consumer); *Lynchburg Gas Co. v. FPC*, *supra*; *Memphis Light, Gas & Water Div. v. FPC*, 250 F.2d 402 (D.C. Cir. 1957), *rev'd on other grounds sub nom.*, *United Gas Pipe Line Co. v. Memphis Light*,

resenting the mine and railway workers successfully intervened to challenge a Federal Power Commission order allowing construction of a natural gas pipeline.²¹ The coal mine operators were indirect competitors of the natural gas company. Because they could have suffered some economic harm they were allowed to intervene. Since unions are affected by competition to their industry, they too were accorded standing.

The leading case illustrating relaxation of the economic injury requirement is *Philco Corp. v. FCC*.²² Philco was allowed to intervene to oppose renewal of NBC's license to operate its Philadelphia television station despite the fact that Philco was not at that time in the broadcasting business. The basis of Philco's petition to intervene was that NBC was a subsidiary of RCA, a rival manufacturer, and that RCA was gaining a "preferential economic advantage in advertising" from NBC's operation of the station. While Philco's allegations demonstrated only indirect and speculative economic harm, standing was afforded.²³

A related liberalization of the standing requirements was the development of the rule that a party need not make an evidentiary showing of economic harm or electrical interference to be allowed to intervene. A series of decisions from various agencies hold that a would-be intervenor need only *allege* facts sufficient to indicate that he would suffer economic injury and that the grant of the proposed license would not be in the public interest.²⁴ Further, it is clear, at least in FCC proceedings, that a party

Gas & Water Div., 358 U.S. 103 (1958); *City of Pittsburgh v. FPC*, *supra* (city afforded standing as a customer); *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943); *A.E. Staley Mfg. Co. v. Secretary of Agriculture*, 120 F.2d 258 (7th Cir. 1941); Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM L. REV. 1511, 1515 (1966). The *Associated Industries* case is the "seminal decision in this vein." *Id.*

21. *National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951).

22. 257 F.2d 656 (D.C. Cir. 1958).

23. *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958). For an interesting discussion of the *Philco* case see Jaffe, *supra* note 4, at 275-85. Professor Jaffe is somewhat critical of the *Philco* case and finds the dissent by Judge Madden convincing, but seems to conclude that there are instances in which it is desirable to allow "public action." With this part of the *Philco* decision he would seem to agree. See also 35 GEO. WASH. L. REV. 393, 394-95 (1966).

24. *Sunray DX Oil Co. v. FPC*, 351 F.2d 395 (10th Cir. 1965); *Interstate Broadcasting Co. v. United States*, 286 F.2d 539 (D.C. Cir. 1960) (*Grossco*); *Interstate Broadcasting Co. v. FCC*, 285 F.2d 270 (D.C. Cir. 1960) (*Patchogue*); *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958); *Metropolitan Television Co. v. United States*, 221 F.2d 879 (D.C. Cir. 1955); *Camden Radio v. FCC*, 220 F.2d 191 (D.C. Cir. 1955) (*dictum*); see *Seatrains Lines v. United States*, 152 F. Supp. 619 (D. Del. 1957), *aff'd per curiam*, 355 U.S. 181 (1958).

However, failure to assert a public interest argument at the proper time may bar a party from asserting it at a later time. *American Fed'n of Musicians v. FCC*, 356 F.2d 827 (D.C. Cir. 1966); *Valley Telecasting Co. v. FCC*, 338 F.2d 278 (D.C. Cir. 1964);

who satisfies the standing requirements must be allowed to intervene as a matter of right rather than at the discretion of the agency.²⁵

Having liberalized the requirements for intervention, the federal courts were faced with the problem of determining the degree of participation to be given an intervenor in an FCC proceeding. Early in the development of the standing rules, the Supreme Court in *KOA* held that an intervenor alleging a "license modification" through electrical interference must be given full rights of intervention.²⁶ Over a decade later the Supreme Court held that an intervenor alleging economic injury must be given a full hearing²⁷ and defined a full hearing as including the right to present oral, documentary or rebuttal evidence and the right to cross-examination.²⁸

Ward v. FCC, 108 F.2d 486 (D.C. Cir. 1939). These cases hold that failure to assert an issue at an earlier time is fatal, even though the issue would normally satisfy the standing requirements. The *Valley* case holds that the proper time to challenge the grant of a license because of economic injury is at the time of the initial grant; if not presented at that time it is waived in the absence of "very unusual circumstances." *Valley Tele-casting Co. v. FCC*, *supra*, at 279. An example of such "very unusual circumstances" is found in an earlier FCC case in which Radio Station WOW did not oppose the initial grant of a license to Star Broadcasting Co. because it was assumed that Star's engineer's report was accurate and no objectionable interference would result from the granting of a license to Star. With the operation of the new station it was discovered that the report was in error and objectionable interference did result. The federal court allowed WOW to intervene at the renewal hearing to raise the electrical interference issue stating:

An error in good faith as to a proposed operation seems to us to leave that particular matter open for determination upon application for renewal. We repeat, for emphasis, that it is the statutory requirement as to renewal which reopens matters as to which bona fide error was originally made.

We do not mean to intimate that an application for renewal reopens all the questions which were considered upon the original application.

Radio Station WOW v. FCC, 184 F.2d 257, 260 (D.C. Cir. 1950).

25. *Elm City Broadcasting Corp. v. United States*, 235 F.2d 811, 816 (D.C. Cir. 1956). The Commission argued that even though a party satisfies the standing requirements, the Commission had the discretion to deny a party the right of intervention. The only appealable question would then be whether or not the Commission had abused its discretion by capricious and arbitrary action. It is clear that had the Commission prevailed in this argument, few unsuccessful intervenors would have successfully challenged the Commission's decision on appeal. However, the court ruled that under § 309 of the Communications Act a party who satisfies the standing requirements must be allowed to intervene as a matter of right.

26. *FCC v. NBC (KOA)*, 319 U.S. 239 (1943); *accord*, *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793 (D.C. Cir. 1948); *Davis, supra* note 6, at 770. *But cf.* *Gerico Inv. Co. v. FCC*, 255 F.2d 893 (D.C. Cir. 1958). *See also* *NBC v. FCC*, 362 F.2d 946, 954-55 (D.C. Cir. 1966).

27. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *accord*, *Interstate Broadcasting Co. v. FCC*, 323 F.2d 797 (D.C. Cir. 1963); *Philco Corp. v. FCC*, 293 F.2d 864 (D.C. Cir. 1961); *see* *Frontier Broadcasting Co. v. United States*, 265 F.2d 353 (D.C. Cir. 1959); *Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956). *But see* *NBC v. FCC*, 362 F.2d 946, 954-55 (D.C. Cir. 1966) (had in fact received a full hearing even though FCC denied right of intervention).

28. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). Under present

While the federal courts have relaxed the economic injury requirements, the requirement that an intervenor offer to litigate the public interest remains,²⁹ though it may be no more than a pleading requirement.³⁰ Indeed, the desire to secure litigation of the public interest may have occasioned the relaxation of the standing rules.³¹ Unfortunately, there is evidence that private parties who have been allowed to intervene have not litigated the public interest.³²

B. *Non-Economic Injury Cases*

Prior to *United Church of Christ*, standing was rarely afforded a party suffering a non-economic injury to challenge an agency's actions. Indeed, the cases in which standing was afforded can usually be explained on a theory other than a recognition of a public right of intervention.

Two commonly cited non-economic injury cases involved transit riders.³³

rules, the Commission is required to file a statement of reasons for granting the license or renewal if a "petition to deny" has been filed by an intervenor who has standing as a "party in interest" within the meaning of 47 U.S.C. § 309d(1) (1964) and 47 C.F.R. § 1.580(i) (1966). 47 U.S.C. § 309d(2) (1964); 47 C.F.R. § 1.591(c) (1966). A hearing on the petition is required only if the Commission is unable to determine whether granting the license would be in the public interest or a hearing is necessary to resolve a substantial question of fact. 47 U.S.C.A. § 309e (Supp. 1966); 47 C.F.R. § 1.593 (1966). Parties who are not afforded standing must be content to file "informal objections" under 47 C.F.R. § 1.587 (1966), and no statement of findings is required. Thus, there may be no record of the Commission's action on informal objections, precluding judicial review.

29. *WOKO, Inc. v. FCC*, 109 F.2d 665 (D.C. Cir. 1940); *Yankee Network v. FCC*, 107 F.2d 212 (D.C. Cir. 1939). The Federal Communications Act requires "specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section." 47 U.S.C. § 309d(1) (1964); 47 C.F.R. § 1.580(i) (1966). Subsection (a) sets forth the "public interest, convenience, and necessity" standard for issuance of licenses. 47 U.S.C. § 309(a) (1964). The latter requirement of subsection (d) recognizes what the federal courts have continually stressed—that parties are allowed to intervene only because they raise questions relevant to the public interest. This thought was recently re-emphasized in the *United Church of Christ* case:

It is important to remember that the cases allowing standing to those falling within either of the two established categories [*Sanders*' economic test and *KOA's* electrical interference test] have emphasized that standing is accorded to persons not for the protection of their private interest but only to vindicate the public interest.

Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1001 (1966).

30. *Elm City Broadcasting Corp. v. United States*, 235 F.2d 811 (D.C. Cir. 1956).

31. See Jaffe, *supra* note 4, at 283-85.

32. See *Missouri-Illinois Broadcasting Co.*, 1 F.C.C.2d 780 (1965); *National Broadcasting Co.*, 37 F.C.C. 427 (1964); *Key Broadcasting Systems, Inc.*, 22 F.C.C. 1 (1957). See generally notes 67-79 *infra*, and accompanying text.

33. *Henderson v. United States*, 339 U.S. 816 (1950); *Pollak v. Public Util. Comm'n*, 191 F.2d 450 (D.C. Cir.), *rev'd on other grounds*, 343 U.S. 451 (1951).

In one, riders were allowed to challenge an agency order permitting radio loudspeakers in public buses.³⁴ In the other, Negro transit riders were allowed to challenge allegedly discriminatory ICC transportation practices.³⁵ In both it appears that standing was afforded because the parties were protecting legal rights, thus satisfying traditional standing requirements.³⁶

In *United States ex rel. Chapman v. FPC*,³⁷ the Secretary of the Interior was allowed to challenge a ruling of the Federal Power Commission granting a license to construct a hydroelectric facility to a private company. Clearly, the Secretary was not asserting a private economic injury as the basis for standing. Since the Supreme Court opinion limits the case to its facts,³⁸ the case is of little value as precedent for a public right of intervention.

Of the remaining cases normally grouped as involving non-economic injury, most could be said to involve some economic interest.³⁹ However, one recent case, *Scenic Hudson Preservation Conference v. FPC*,⁴⁰ seemed to recognize a public right of intervention. In that case a group of private citizens was opposed to the Hudson River Storm King project of the Federal Power Commission because of its effect on the recreational, aesthetic, and conservational aspects of the area. The FPC recognized that it functioned "to protect non-economic as well as economic interests"⁴¹ and af-

34. *Pollak v. Public Util. Comm'n*, 191 F.2d 450 (D.C. Cir.), *rev'd on other grounds*, 343 U.S. 451 (1951).

35. *Henderson v. United States*, 339 U.S. 816 (1950).

36. *Id.*; *Pollak v. Public Util. Comm'n*, 191 F.2d 450 (D.C. Cir.); *rev'd on other grounds*, 343 U.S. 451 (1951).

37. 345 U.S. 153 (1953).

38. The Supreme Court stated:

We hold that petitioners have standing. Differences of view, however, preclude a single opinion of the Court as to both petitioners. It would not further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations, to set out the divergent grounds in support of standing in these cases.

United States ex rel. Chapman v. FPC, 345 U.S. 153, 156 (1953). *But cf.* *Johnson v. Chesapeake & Ohio Ry. Co.*, 188 F.2d 458 (4th Cir. 1951), denying standing before the ICC to a ferry boat owner and a dentist to review the abandoning of railway service between two cities in Virginia. The Virginia State Corporation Commission had issued the order without the approval of the ICC, and the petitioners sought to show that the Commission had acted without authority.

39. *Parker v. Fleming*, 329 U.S. 531 (1947) (tenant whose rent is fixed by law); *Houston v. CAB*, 317 F.2d 158 (D.C. Cir. 1963) (city allowed to challenge agency order affecting its air service); *Reade v. Ewing*, 205 F.2d 630 (2d Cir. 1953) (consumers allowed to challenge an agency order allowing oleomargarine manufacturers to use synthetic vitamins without stating same on the label).

40. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

41. *Id.* at 615.

forded the group standing. While some potential economic harm was found to exist,⁴² the economic basis is so weak as to justify describing the case as a clear departure from traditional theory and a forerunner of *United Church of Christ*.

II. THE PUBLIC RIGHT OF INTERVENTION

*In Office of Communication of the United Church of Christ v. FCC*⁴³ various private organizations and citizens sought to intervene as representatives of the public interest to object to the renewal of a television broadcast license. The would-be intervenors alleged that the station practiced racial and religious bias in programming and was guilty of excessive use of commercials.⁴⁴ The FCC refused to grant the parties standing, but considered their arguments without a formal hearing.⁴⁵ As a result the station was granted only a one-year conditional license rather than the normal three-year license.⁴⁶ The Court of Appeals for the District of Columbia reversed the FCC, holding that the appellants, as representatives of the public interest, were proper parties to intervene at a renewal hearing⁴⁷ and remanded the case for an evidentiary hearing.⁴⁸ The Court recognized that in prior FCC cases standing had been accorded to parties qualifying under one of the two traditional categories: economic harm or electrical interference. However, the court reasoned that these categories were not the "exclusive grounds for standing."⁴⁹ Finding no Congressional intent to limit standing to these two classifications,⁵⁰ the court concluded from the rationale of *Sanders, KOA*, and the non-economic injury cases of

42. *Id.* at 616.

43. 359 F.2d 994 (D.C. Cir. 1966).

44. *Id.* at 997-99.

45. *Id.* at 1005.

46. The license was renewed on the following conditions:

(i) That the licensee comply strictly with the established requirements of the fairness doctrine. . . .

(ii) For the same reasons, that the licensee observe strictly its representations to the Commission in this area—namely, that as to the programs originating locally, it will at all times provide each side in any controversial issue with time. . . .

(iii) That, in the light of the substantial questions raised by the United Church petition, the licensee immediately have discussions with community leaders, including those active in the civil rights movement (such as petitioners), as to whether its programing [sic] is fully meeting the needs and interests of its area. . . .

(iv) That the licensee immediately cease discriminatory programing [sic] patterns. . . .

Lamar Life Broadcasting Co., 38 F.C.C. 1143, 1154-55 (1965).

47. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966).

48. *Id.* at 1006-07.

49. *Id.* at 1001.

50. *Id.* at 1001-02.

other agencies that representatives of an appreciable segment of the viewing or listening public have standing to litigate the public interest at a license renewal hearing.⁵¹

While the *Sanders*, *KOA*, and non-economic injury cases lend support to the conclusion reached in *United Church of Christ*, it is important to recognize that this decision for the first time states a new doctrine: The right of intervention which has been a right vested in competitors and major consumers, is now also vested in representative groups of the general public.⁵²

A. *Effect on the FCC*

The holding of the *United Church of Christ* case was limited by the court to license renewal hearings.⁵³ However, the opinion does not expressly preclude expansion of the right of public intervention to initial license application hearings. But at present all problems arising from initial license application proceedings are unaffected by the right.⁵⁴

1. *Administrative Efficiency*

In opposing the motion for intervention, the FCC argued that the efficiency of its operation would be seriously endangered if its hearings were opened to parties such as the appellants.⁵⁵ For a number of reasons, this fear does not seem well-founded.⁵⁶ The FCC has always had the power to dismiss a petition for intervention if, assuming all the would-be inter-

51. *Id.* at 1005.

52. See *Smith & Soloman Trucking Co. v. United States*, 255 F. Supp. 243, 253 (D. N.J. 1966).

53. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (1966).

54. The FCC has suffered great criticism for its alleged abuse of discretion in awarding licenses for new stations. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 881 (1962); LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, 86th Cong., 2d Sess. 53 (1960); cf. Elias, *Administrative Discretion—No Solution in Sight*, 45 MARQ. L. REV. 313, 314 (Winter 1961-62).

55. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1000 (D.C. Cir. 1966).

56. This conclusion seems to be shared by the other writers who have considered the *United Church of Christ* case. Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511, 1527 (1966); Note, *Intervention by Third Parties in Federal Administrative Proceedings*, 42 NOTRE DAME LAW. 71, 82 (1966); 35 GEO. WASH. L. REV. 393, 397 (1966); 80 HARV. L. REV. 670, 673 (1967); 44 TEXAS L. REV. 1605, 1609-10 (1966); 52 VA. L. REV. 1360, 1366 (1966).

venor's allegations to be true, the license should still be issued.⁵⁷ More importantly, the *United Church of Christ* decision provides the FCC with broad discretion to control intervention. First, a proposed intervenor must demonstrate that he represents an appreciable segment of the public to be affected by the order.⁵⁸ Further, if more than one party seeks to intervene, as in *United Church of Christ*, the FCC may select one to champion the public interest.⁵⁹ An application of *United Church of Christ* in a Civil Aeronautics Board proceeding has been to deny intervention to a party when other intervenors have raised substantially the same issues in the same proceeding.⁶⁰ Finally, the cost involved in intervening at a license renewal hearing will no doubt reduce participation by those not seriously committed to litigating on behalf of the public interest.⁶¹

2. *Issues Relevant to the Public Interest*

A question equally as basic as the question of who has standing is, what issues are relevant? In *United Church of Christ* the issues the intervenors sought to raise—the licensee's practice of racial and religious bias in programming and excessive use of commercials—were clearly relevant to the FCC's deliberations.

In *United Church of Christ* the court seemed to find the need for improving the quality of television, a point not urged by the intervenors, to be a persuasive argument for a public right of intervention.⁶² With respect

57. Since the Commission has failed to define standards determining the scope of the public interest, it may be difficult for the Commission to be sure an issue is truly irrelevant. See 52 VA. L. REV. 1360, 1366-67 (1966).

58. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966).

59. *Id.* This would seem to be an area where the court will permit the FCC wide latitude in the use of its discretion. Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511, 1524-27 (1966); 44 TEXAS L. REV. 1605, 1610 (1966). However, there is evidence that the FCC is having some difficulty in determining which parties asserting the public interest should be allowed to intervene. 80 HARV. L. REV. 670, 673 (1967).

60. See *City of San Antonio v. CAB*, 374 F.2d. 326, 332 (D.C. Cir. 1967).

61. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966); see 35 GEO. WASH. L. REV. 393, 397 (1966). See generally Note, *Competitors' Standing to Challenge Administrative Action Under the APA*, 104 U. PA. L. REV. 843, 862, (1956); Note, *Standing to Protest Before the FCC*, 55 COLUM. L. REV. 209, 224 (1955).

62. It may be that the court is merely talking about regulating to achieve balanced broadcasting that serves the needs of the community rather than quality control. However, language such as "the potential contribution of widespread public interest and participation in improving the quality of broadcasting," indicates that regulations of quality is what the court intended. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1004 (D.C. Cir. 1966). Further, other writers have been of the

to this problem, the relevancy requirement seems to limit the utility of the public right of intervention. Though the Commission can and does regulate the allotment of time to particular types of programming,⁶³ the Commission has consistently taken the position that it has no power to regulate program content to achieve quality television.⁶⁴

License renewal cases support the Commission's position. Very few licenses have ever been denied or refused because of objectionable broadcasting.⁶⁵ Of those that have, all but one involved obscene and slanderous language rather than the general level of program content.⁶⁶ The one maverick case⁶⁷ involved an application for an increase in signal strength by two rival stations. Because one station admitted accepting all network programs, while the other station was more selective in presenting them, the latter station was successful. The utility of this decision as precedent for

opinion that the court was concerned with regulation of quality. Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511, 1522 (1966); 52 VA. L. REV. 1360, 1365 (1966); see 35 GEO. WASH. L. REV. 393, 395 (1966).

63. Friendly, *supra* note 54, at 1059; Irion, *FCC Criteria for Evaluating Competing Applicants*, 43 MINN. L. REV. 479, 487 (1959); 2 VAND. L. REV. 464, 466 n.10 (1949).

64. Loevinger, *The Issues in Program Regulation*, 20 FED. COMM. B.J. 3 (1966). Three explanations are offered to support this conclusion:

- (1) The First Amendment prohibits such action. Loevinger, *supra*, at 15.
- (2) Section 326 of the Communications Act of 1934 (48 Stat. 1091, as amended, 47 U.S.C. § 326 (1964)) prohibits such action.
- (3) This is not a proper function of the FCC. Loevinger, *supra* at 15; Pierson, *The Need for Modification of Section 326*, 18 FED. COMM. B.J. 15 (1963).

Pierson wishes to change section 326 so as to leave no doubt that it prohibits quality regulation. This suggestion may well be an attempt to minimize the effect of certain cases upholding FCC actions which, arguably, are attempts at quality control. See, e.g., *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

65. The following cases are the only ones in which objectionable broadcasting was the basis of FCC action in denying an application for renewal of a license or modification of a license. *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964); *Simmons v. FCC*, 169 F.2d 670 (D.C. Cir.), *cert. denied*, 335 U.S. 846 (1948); *Trinity Methodist Church, South v. FRC*, 62 F.2d 850 (D.C. Cir. 1932); *KFKB Broadcasting Ass'n v. FRC*, 47 F.2d 670 (D.C. Cir. 1931).

66. *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964); *Trinity Methodist Church, South v. FRC*, 62 F.2d 850 (D.C. Cir. 1932); *KFKB Broadcasting Ass'n v. FRC*, 47 F.2d 670 (D.C. Cir. 1931). The latter two cases clearly involve slanderous or abusive language and false advertising rather than censorship. Segal, *Recent Trends in Censorship of Radiobroadcast Programs*, 20 ROCKY MT. L. REV. 366 (1948). The *Robinson* case involves a slightly different twist. *Robinson* employed an announcer who persisted in the use of coarse, vulgar and suggestive language. *Robinson*, in attempting to obtain a renewal of his license, told the Commission he had been shocked to discover these facts and had fired the announcer. It became clear that *Robinson* had known very well what had been going on and had wilfully deceived the Commission. His application for renewal was denied because of his lack of character.

67. *Simmons v. FCC*, 169 F.2d 670 (D.C. Cir.), *cert. denied*, 335 U.S. 846 (1948).

program content control is questionable, even coupled with the *United Church of Christ* decision, and the relevancy requirement seems to preclude use of the public right of intervention to litigate program content.

3. *Insuring Litigation of the Public Interest*

The primary reason for creating a public right of intervention was the fear that this was the only means by which the public interest would be adequately litigated.⁶⁸ Competitors who have been granted standing do in fact limit their efforts to the litigation of their own private interests rather than the public interest.⁶⁹ The FCC has been unable or unwilling to litigate the public interest adequately on its own.⁷⁰ The result is that the public interest, despite the statutory commandment,⁷¹ has not been extensively litigated.⁷² The response of the federal courts is the creation of a public right of intervention.⁷³

The history of standing before the FCC prior to *United Church of Christ* provides strong support for the conclusion that a public right of intervention is necessary.⁷⁴ The most striking demonstration of a need for a public

68. See *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003-4 (D.C. Cir. 1966).

69. See *Missouri-Illinois Broadcasting Co.*, 1 F.C.C.2d 780 (1965); *National Broadcasting Co., Inc.*, 37 F.C.C. 427 (1964); *Key Broadcasting System, Inc.*, 22 F.C.C. 1 (1957).

70. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966); Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511, 1521-23 (1966); see *Missouri-Illinois Broadcasting Co.*, 1 F.C.C.2d 780 (1965).

71. Communications Act of 1934, ch. 652, § 309(a), 48 Stat. 1085, as amended, 47 U.S.C. § 309(a) (1964).

72. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966); Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511, 1521-22 (1966); 35 GEO. WASH. L. REV. 393, 397 (1966); 80 HARV. L. REV. 670, 672-73 (1967); see notes 68-69 *supra*.

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

74. In *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955), for example, a local newspaper was granted standing as a competitor who would suffer economic injury by the grant of a station license. The newspaper alleged that one of the two rival applicants for the license had withdrawn from the hearing after receiving \$14,390 as compensation for "out-of-pocket" expenses from the other applicant. The newspaper contended that there should have been a thorough investigation to determine that the money was in fact no more than compensation for the expenses incurred by the applicant in pursuing its application. The court agreed and remanded the case. At the remand hearing, the newspaper requested and was allowed to withdraw because it was satisfied that the transactions of the applicants were in the public interest. Upon the newspaper's withdrawal the original grant was affirmed without a finding on the issue of the reimbursements. *Ohio Valley Broadcasting Corp.*, 22 F.C.C. 745 (1957).

right of intervention is *KGMO Radio-Television, Inc. v. FCC*.⁷⁵ KGMO sought to intervene to oppose the grant of a construction permit for a competing station because of the economic injury it would suffer and because there was insufficient talent in the area to support two stations. The FCC denied the petition because the issues were too broadly framed, but the Court of Appeals reversed and remanded. On remand the Commission consolidated for a single hearing the application for the new license with KGMO's application for renewal.⁷⁶ Apparently sensing something resembling a comparative hearing at which only one party might prevail, both KGMO and the applicant requested that KGMO's petition for intervention be dismissed and both licenses be issued. The Commission acquiesced.⁷⁷ Commissioner Cox, in the course of his dissent, observed:

KGMO felt strongly enough about its claim to appeal the Commission's initial dismissal of its petition for reconsideration. Upon remand of the case by the Court, petitioner further supplemented its claims. Thereafter both the application for KZYM for a new station and the pending renewal application of KGMO were designated for hearing in a consolidated proceeding. Suddenly both parties agreed that further prosecution of the proceedings would entail excessive expense, and jointly petitioned the Commission, in effect, to forget the whole question of possible detriment to the public interest, and authorize both stations to operate.⁷⁸

The conclusion suggested above is inescapable: private parties are concerned solely with their private interests, and the Commission, at least in some cases, cannot or will not adequately consider the public interest on its own.⁷⁹

75. 336 F.2d 920 (D.C. Cir. 1964).

76. *Missouri-Illinois Broadcasting Co.*, 1 F.C.C.2d 780 (1965).

77. *Id.* at 780-81.

78. *Id.* at 781 (footnotes omitted). In the *Clarksburg* case the District of Columbia Court of Appeals had held that the Commission must find that issuing a license serves the public interest, even if the granting or renewing of a license is unopposed. *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 522 (D.C. Cir. 1955). Apparently the Commission does not believe this means that a hearing must be held. Perhaps, given the Commission's work load, this makes sense as a general rule. However, in a case such as this one a full hearing seems in order. Commissioner Cox argued:

It was only when their [KGMO's] renewal was placed in issue in the event of a finding that the area would not support a new station that the matter of expense was mentioned. I don't think parties should be permitted to make such abrupt changes in their representations to the Commission without a complete showing of reasons therefor, nor should the Commission gloss over public interest issues it has set for hearing simply because the private party who raised them initially has suddenly lost interest in the matter for reasons solely related to his own private interests.

Missouri-Illinois Broadcasting Co., 1 F.C.C.2d 780, 782 (1965).

79. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966).

Although the public right of intervention as announced in *United Church of Christ* applies only to renewal hearings, cases such as *KGMO* involving an initial license application present occasions for extension of the doctrine.⁸⁰ Certainly the logic of the *United Church of Christ* decision would seem to be consistent with such an extension.

4. *Controlling Administrative Discretion*

The decision in *United Church of Christ* illustrates an important and little-recognized function of the standing law as a vehicle by which the courts indicate to regulatory agencies what issues the courts consider relevant to a determination of the public interest.⁸¹ A decision that a party has standing usually implies that the issues he seeks to raise are relevant for agency consideration, and some cases expressly state that certain issues are relevant.⁸²

In order to appreciate the significance of this function of the standing cases, one must remember that the legislative body may delegate power to an administrative agency without definite standards for the use of that power.⁸³ The Congressional theory, in delegating power to regulatory agencies without definite standards, was that such agencies could better

80. The *Clarksburg Publishing Co.* case involved an initial license application, and, like *KGMO*, would seem to suggest an expansion of the *United Church of Christ* doctrine. See note 73 *supra*.

81. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 505 (1965); 35 *GEO. WASH. L. REV.* 393, 395 (1966); 44 *TEXAS L. REV.* 1605, 1610 (1966). The standing rules are not the only procedural device used by federal courts to control the exercise of the Commission's discretion in determining the public interest. Other procedural rules, such as the following have been so utilized. All decisions must be based on a finding of fact. *Saginaw Broadcasting Co. v. FCC*, 96 F.2d 554 (D.C. Cir.), *cert. denied*, 305 U.S. 613 (1938). For an interesting and critical analysis of the *Saginaw* case see Timberg, *Administrative Findings of Fact*, 27 *WASH. U.L.Q.* 169 (1942). A comparative hearing must be held when there are two mutually exclusive applicants before a license can be issued. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); see *Capitol Broadcasting Co. v. FCC*, 257 F.2d 630 (D.C. Cir. 1958). The rule has even been extended, in a modified form, to cover temporary license grants. *Community Broadcasting Co. v. FCC*, 274 F.2d 753 (D.C. Cir. 1960). A Commissioner cannot cast the deciding vote when he has not heard the oral arguments in the proceeding. *WIBC, Inc. v. FCC*, 259 F.2d 941 (D.C. Cir.), *cert. denied*, 358 U.S. 920 (1958). Neither can the verification requirement on an application for a license be waived. *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C. Cir. 1949).

82. *Philco Corp. v. FCC*, 293 F.2d 864 (D.C. Cir. 1961); *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959); *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958); *Hall v. FCC*, 257 F.2d 626 (D.C. Cir. 1958); *Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); *Camden Radio v. FCC*, 220 F.2d 191 (D.C. Cir. 1954).

83. Elias, *supra* note 54, at 316.

develop their own standards—flexible enough to allow for proper exercise of administrative discretion but definite enough to allow for predictability of agency decisions.⁸⁴ The Federal Communications Act is a good example of such a delegation of power. The sole criterion for granting or renewing a broadcast license is the “public interest, convenience, and necessity.”⁸⁵ Unfortunately, the record of the FCC has not vindicated the Congressional theory.⁸⁶ Rather, the FCC has failed to provide meaningful standards,⁸⁷ has been subject to objectionable *ex parte* communications,⁸⁸ and has been charged with being subject to network domination.⁸⁹

Faced with failure of the FCC to delineate viable standards,⁹⁰ the federal courts seem to have turned to standing doctrine as a means of instructing the FCC as to what issues are relevant to its consideration. One example of such action is *Carroll Broadcasting Co. v. FCC*.⁹¹ The FCC had not interpreted the *Sanders* decision as holding that economic injury to a competitor of a proposed licensee is relevant to a determination of the public interest.⁹² In the *Carroll* case by according standing to a competitor who had unsuccessfully sought to raise the economic harm issue at a license application hearing, the court instructed the FCC that such an issue is relevant when it is alleged to have an adverse affect on the public interest and must be considered in awarding a license.⁹³

The most encouraging aspect of this use of standing doctrine is that the FCC, at least on occasion, on the remand of the case gives full con-

84. Note, *The Function of the Supreme Court in the Development and Acquisition of Powers by Administrative Agencies*, 42 MINN. L. REV. 271 (1957).

85. Communications Act of 1934, ch. 652, § 309(a), 48 Stat. 1085, as amended, 47 U.S.C. § 309(a) (1964).

86. Friendly, *supra* note 54, at 1055-72.

87. See HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 85th CONG., 2D SESS., STUDY ON REGULATION OF BROADCASTING 154 (SUBCOMM. PRINT 1958). Friendly, *supra* note 54; LANDIS, *supra* note 54; cf. Elias, *supra* note 54; MacDonald, *The Need for Standards in Selection of Licensees*, 17 AD. L. REV. 61, 68-69 (1964).

88. *Jacksonville Broadcasting Corp. v. FCC*, 348 F.2d 75 (D.C. Cir.), *cert. denied*, 382 U.S. 893 (1965); *Fort Harrison Telecasting Corp. v. FCC*, 324 F.2d 379 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 915 (1964); *WKAT, Inc. v. FCC*, 296 F.2d 375 (D.C. Cir.), *cert. denied*, 368 U.S. 841 (1961); *Massachusetts Bay Telecasters v. FCC (WHDH)*, 261 F.2d 55 (D.C. Cir. 1958), *cert. denied*, 336 U.S. 918 (1961); LANDIS, *supra* note 54; COLON, *The Court and the Commissions: Ex Parte Contacts and the Sangamon Valley Case*, 19 FED. COM. B.J. 67 (1964-65).

89. *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959); LANDIS, *supra* note 54.

90. Friendly, *supra* note 54, at 881.

91. 258 F.2d 440 (D.C. Cir. 1958).

92. *CATV and TV Repeater Services*, 26 F.C.C. 403, 434-35 (1959); see *West Georgia Broadcasting Co.*, 27 F.C.C. 161, 169 (1959).

93. *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958).

sideration to issues raised by the successful intervenor. While it is true that the large majority of the standing cases remanded to the FCC were simply affirmed,⁹⁴ there are notable exceptions to the rule. One such exception is *Hall v. FCC*.⁹⁵ In that case a competitor of Hall had asked to be allowed to move its radio station which Hall claimed would cause objectionable electrical interference. The federal courts remanded the case to the Commission three times for failure to consider the effect of the alleged electrical interference and the effect of misrepresentations made by the competitor in its application.⁹⁶ Eight years after granting the competitor's application, the FCC concluded it had erred and reversed its former decision.⁹⁷

The *Philco* case, discussed previously, also illustrates this little-recognized function of the standing cases. The Court of Appeals remanded the case twice and on the second remand explicitly held that Philco's allegations as to preferential advertising and monopolistic practices were relevant to NBC's application for renewal of the license for its Philadelphia station.⁹⁸ While it appears that these issues did not enter into the Commission's final disposition of the case,⁹⁹ on remand the Commission heard testimony which caused it to reverse its original grant to NBC. The Commission found that NBC had used the threat of withdrawing its network affiliation to force the Westinghouse Company, then the Philadelphia licensee, to trade the Philadelphia station to NBC in exchange for a station in the smaller Cleve-

94. *KGMO Radio-Television, Inc. v. FCC*, 336 F.2d 920 (D.C. Cir. 1964), *original decision aff'd*, *Missouri-Illinois Broadcasting Co.*, 1 F.C.C.2d 780 (1965); *Interstate Broadcasting Co. v. FCC*, 323 F.2d 797 (D.C. Cir. 1963), *original decision aff'd*, *Berkshire Broadcasting Corp.*, 35 F.C.C. 1 (1963) (Grossco); *Patchogue Broadcasting Co.*, 35 F.C.C. 8 (1963) (Patchogue); *Frontier Broadcasting Co. v. United States*, 265 F.2d 353 (D.C. Cir. 1959), *original decision aff'd*, *Western Nebraska Television, Inc.*, 24 F.C.C. 513 (1958); *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958), *original decision aff'd*, *West Georgia Broadcasting Co.*, 27 F.C.C. 161 (1959); *Elm City Broadcasting Corp. v. United States*, 235 F.2d 811 (D.C. Cir. 1956), *original decision aff'd*, *Key Broadcasting System, Inc.*, 22 F.C.C. 1 (1957); *Granik v. FCC*, 234 F.2d 682 (D.C. Cir. 1956), *original decision aff'd*, *W. Wright Esch*, 22 F.C.C. 82 (1957); *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955), *original decision aff'd*, *Ohio Valley Broadcasting Corp.*, 22 F.C.C. 745 (1957).

Perhaps, from evidence such as this, Professor Elias has reached the conclusion that judicial relief for a party aggrieved by administrative action is wholly illusory. Elias, *supra* note 54. See generally Goldfarb, *Administrative Agency Action After Remand*, 18 W. Res. L. Rev. 565 (1967).

95. 257 F.2d 626 (D.C. Cir. 1958); *Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); *Greenville Television Co. v. FCC*, 221 F.2d 870 (D.C. Cir. 1955).

96. See cases cited in note 95 *supra*.

97. *Spartan Radiocasting Co.*, 33 F.C.C. 765 (1962).

98. *Philco Corp. v. FCC*, 293 F.2d 864 (D.C. Cir. 1961).

99. *National Broadcasting Co.*, 37 F.C.C. 427 (1964).

land market.¹⁰⁰ This finding precluded a holding that the public interest would be served by renewal of NBC's license, and the Commission ordered NBC to return the station to Westinghouse.¹⁰¹

These cases demonstrate the desire on the part of the federal courts to insure the litigation of the public interest. As noted in previous sections, however, private parties often are not concerned with litigation of the public interest and the Commission may well have been justified in viewing their arguments with suspicion. The federal courts, by providing a public right of intervention to complement the use of the standing cases to direct the discretion of the FCC have further indicated their desire that the Commission utilize its broad discretion to serve the public interest.

B. *Effect on Other Administrative Agencies*

For a number of reasons, it is likely that the public right of intervention will be extended to other agencies. The statutory language, "party in interest" and "persons aggrieved," construed in *United Church of Christ* is common or at least comparable to the organic statutes of most regulatory agencies.¹⁰² The application of the *Sanders* rule to other agencies indicates that interpretation of such commonly-used statutory language can have wide application in federal administrative law.¹⁰³

One of the best indications of the likelihood of the general applicability of the public right of intervention is the existing case law construing *United Church of Christ*. Because the opinion is so recent such case law is necessarily limited. However, all the cases applying *United Church of Christ* have been favorable to the public right doctrine.¹⁰⁴ In one case a labor

100. *Id.* at 445-50.

101. *Id.*

102. *E.g.*, Securities Act of 1933, ch. 38, § 9(a), 48 Stat. 80, *as amended*, 15 U.S.C. § 77i(a) (1964); Public Utility Holding Company Act of 1935, ch 687, § 5, 49 Stat. 834-35, 15 U.S.C. § 79x(a) (1964); Natural Gas Act, ch. 556, § 19(h), 52 Stat. 831 (1938), *as amended*, 15 U.S.C. § 717r(b) (1964); Federal Power Act, ch. 687, § 313(b), 49 Stat. 860 (1935), *as amended*, 16 U.S.C. § 8251(b) (1964); Communications Act of 1934, ch. 652, § 309(d), 48 Stat. 1085, *as amended*, 47 U.S.C. § 309(d) (1964).

103. Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 68 COLUM. L. REV. 1511, 1513 (1966).

Absent a statutory provision similar to that in *Sanders*, the *Sanders* rationale has sometimes been rejected entirely. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 287 (1961). The leading case is *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955), in which a group of private electrical companies sought to challenge a federally supported power program. The court refused to accord the companies standing, even though they would suffer adverse competition, because they were not protecting a "legal right."

104. *Juarez Gas Co., S. A. v. FPC*, 375 F.2d 595, 599 (D.C. Cir. 1967); *International Chemical Workers Union v. Planters Mfg. Co.*, 259 F. Supp. 365, 367 (N.D. Miss. 1966); *Smith & Soloman Trucking Co. v. United States*, 255 F. Supp. 243, 252-53 (D.N.J. 1966).

union sought to litigate alleged discriminatory practices of an employer in violation of the Civil Rights Act of 1964.¹⁰⁵ Though it appears that the union was neither protecting a legal right nor suffering economic harm, standing was accorded.¹⁰⁶

A further indication of the probable general applicability of the doctrine is the foundation provided by earlier case law of other agencies. As previously noted, consumers of a product have been allowed to challenge administrative orders affecting that product;¹⁰⁷ passengers on buses have been allowed to challenge the use of loud speakers¹⁰⁸ and discriminatory practices;¹⁰⁹ cities have been allowed to challenge orders affecting their power supply¹¹⁰ or air service;¹¹¹ and government officials, who must necessarily litigate the public interest, have been allowed to challenge agency awards.¹¹² These cases presage a public right of intervention. In particular, the previously discussed *Scenic Hudson Preservation Conference* case allowing intervention to protect "non-economic interests" seems to depart from traditional analysis.¹¹³

The conclusion reached with respect to FCC proceedings that a public right of intervention will not decrease administrative efficiency,¹¹⁴ is applicable to all agencies. Indeed, as noted earlier, one application of *United Church of Christ* in a Civil Aeronautics Board proceeding has been to deny intervention to a party when other parties have raised nearly identical issues before the Board in the same proceeding.¹¹⁵

Finally, the primary argument for a public right of intervention—that

105. *International Chemical Workers Union v. Planters Mfg. Co.*, 259 F. Supp. 365, 367 (N.D. Miss. 1966).

106. *Id.* at 368. The court's explanation for according the union standing is reminiscent of the *Chapman* case. See notes 37-38 *supra* and accompanying text. The court stated:

At this point in time and in the development of law in this area, this court is bound to say that the plaintiff union is a "party aggrieved" within the meaning of the statute with which we are concerned.

107. *Reade v. Ewing*, 205 F.2d 630 (2d. Cir. 1953).

108. *Pollak v. Public Util. Comm'n*, 191 F.2d 450 (D.C. Cir.), *rev'd on other grounds*, 343 U.S. 451 (1951).

109. *Henderson v. United States*, 339 U.S. 816 (1950).

110. *Memphis Light, Gas & Water Div. v. FPC*, 250 F.2d 402 (D.C. Cir. 1957), *rev'd on other grounds*, *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958); *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956).

111. *City of Houston v. CAB*, 317 F.2d 158 (D.C. Cir. 1963).

112. *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

113. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

114. See notes 61-67 *supra* and accompanying text. *But see* Comment, 80 HARV. L. REV. 670, 673 (1967).

115. *City of San Antonio v. CAB*, 374 F.2d 326, 332 (D.C. Cir. 1967).

without such a right the public interest is often not litigated—applies with equal force to all regulatory agencies.

CONCLUSION

The public right of intervention is a long-overdue advance in administrative law. Since administrative agencies were originally delegated power to serve public rather than private interest, the public, through representative spokesmen, should have the right to participate in administrative proceedings. By recognition of such a right the federal courts have taken an important step to reconcile the realities of regulatory agencies' operation with the theoretical standard of service to the public.