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EFFECTIVENESS OF CERTAIN FEDERAL AGENCIES

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

VOLUME III

PUBLIC PARTICIPATION IN REGULATORY
AGENCY PROCEEDINGS



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SUMMARY OF FINDINGS

The following is a restatement of the major findings and conclusions of this report, listed by chapter.

→ NEED FOR PUBLIC PARTICIPATION (CHAPTER 1)

(1) Full public participation in the regulatory process is essential if regulatory agencies are to effectively discharge their mandate to regulate in the public interest.

(2) Increased public participation and input can provide regulators with a greater range of ideas and information, broaden the active constituency of the agency, and place greater emphasis on public interest concerns and viewpoints. A lack of such public participation, on the other hand, requires regulators to rely too heavily on input from the industry they are charged with regulating.

EXTENT AND COST OF PARTICIPATION (CHAPTER 2)

* → (3) At agency after agency, participation by the regulated industry predominates—often overwhelmingly. Organized public interest representation accounts for a very small percentage of participation before Federal regulatory agencies. In more than half of the formal proceedings, there appears to be no such participation whatsoever, and virtually none at informal agency proceedings. In those proceedings where participation by public groups does take place, typically it is a small fraction of the participation by the regulated industry. One-tenth is not uncommon; sometimes it is even less than that. This pattern prevails in both rulemaking proceedings and adjudicatory proceedings, with an even greater imbalance occurring in adjudications than in rulemaking.

(4) The single greatest obstacle to active public participation in regulatory proceedings is the lack of financial resources by potential participants to meet the great costs of formal participation. Lack of funds has prevented public participation in many important proceedings.

* → (5) The regulated industry consistently outspends public participants by a wide margin in regulatory agency proceedings. In every case or agency reviewed, industry spent many times more on regulatory participation than their public interest counterparts. In some instances, industry committed as much as 50 to 100 times the resources budgeted by the public interest participants. For example, in 1976 the nation's 11 trunk airlines spent more than \$2.8 million on outside counsel to represent them in regulatory proceedings before the CAB. By contrast, the Aviation Consumer Action Group, the principal representative for public interest organizations at CAB proceedings, had a total 1976 budget of \$40,000, of which approximately half was spent on participation in CAB proceedings.

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(6) Lack of resources has limited the amount of technical expertise that participant groups have been able to bring to bear in agency proceedings.

(7) Opportunities for citizen participation are hampered by significant administrative costs such as transcript fees and reproduction of required materials.

STANDING AND INTERVENTION RIGHTS (CHAPTER 3)

(8) The Supreme Court in recent years has taken an increasingly restrictive view of the standing requirements that make it difficult for citizens to obtain judicial review of allegedly unlawful Government action. At present, some of the Supreme Court's decisions in this area constitute a considerable barrier to citizen participation in the regulatory process.

(9) Although agencies generally have relaxed intervention requirements in recent times, there is considerable variance in the standards between agencies. In some cases, the standards have not been precisely or clearly defined; in the case of other agencies, the standards have been conservatively applied. Greater clarity and uniformity is needed to assure full public access to administrative agency proceedings.

ADMINISTRATIVE OBSTACLES TO PARTICIPATION (CHAPTER 4)

(10) Delay, which is a general problem in regulatory agency activities, is particularly burdensome to participating citizen groups. Prolonged proceedings result in straining further the usually limited resources of such groups and hinders effective and constructive participation. The prospect of expensive, protracted proceedings, has a chilling effect which frequently means that public participation is effectively precluded from the outset.

(11) Potential public participation is often foreclosed by inadequate notice of pending proceedings. Although some agencies have utilized the general and trade press, mass mailings, and agency publications, most agencies seldom make active efforts to solicit public views on important proceedings. This may be the only way for individual citizens, as opposed to citizen groups, to be alerted to proceedings which may affect them.

(12) Some agency proceedings provide inadequate time for effective public participation. These include FPC proceedings in which rate increases are granted with no opportunity for participation until after the rate increase goes into effect; FPC proceedings in which multiple and updated filings change the matters being decided by the agency; and NRC proceedings in which public participants are effectively excluded at early stages as a result of agency staff working with the regulated industry in advance of an announcement of a formal agency proceeding.

(13) Informal negotiations between the FCC and the broadcast networks—as in the case of the “family viewing” hour—in lieu of official agency proceedings, resulted in circumventing the notification and

public participation requirements of the Administrative Procedure Act. Such practices make effective public participation impossible.

PUBLIC COUNSEL OFFICE (CHAPTER 6)

(14) The effectiveness of both the CAB Office of Consumer Advocate and the ICC Office of Rail Public Counsel has been limited by the lack of full statutory independence from direction and control by the parent regulatory agency.

(15) Congressional intent in establishing the Office of Rail Public Counsel in the Interstate Commerce Commission has been thwarted by the failure of the President to nominate a Director of that Office.

(16) The Office of Consumer Advocate at the Civil Aeronautics Board has been more successful in promoting consumer interests in such areas as overbooking and baggage handling, than in relation to fundamental economic questions, particularly fare increases. The Office of Consumer Advocate has stopped short of full advocacy of consumer interests in deregulation and lower fares.

(17) The outreach program of the current Public Counsel office in the Interstate Commerce Commission has been highly successful in enabling communities to participate in rail reorganization planning.

DIRECT COMPENSATION OF INTERVENORS (CHAPTER 7)

(18) The Federal Trade Commission's program, pursuant to the FTC Improvement Act, of providing compensation to certain participants in rulemaking proceedings, has allowed for the presentation of diverse viewpoints and information that otherwise would not have been presented.

(19) There is no evidence that the encouragement of participation through a compensation program would, by itself, lead to delay of agency proceedings, unless additional participants raise new issues which should be considered.

COMPLAINT HANDLING (CHAPTER 9)

(20) Most regulatory agencies do not sufficiently utilize the complaints they receive from the public in agency policymaking, particularly in rulemaking.

(21) Most regulatory agencies do not use complaints they receive from the public to inform the public about the performance of regulated industries and potentially dangerous products.

ADVISORY COMMITTEES (CHAPTER 10)

(22) Although a much higher proportion of regulatory agency advisory committee meetings are open than is the case for other Government agencies, there have been important and unwarranted instances when meetings have been closed.

(23) Nearly all regulatory agency advisory committees do not have a balanced representation of viewpoints in that they seriously lack representation of consumer and other broad public interests.

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PUBLIC UNDERSTANDING OF AGENCY REGULATIONS (CHAPTER 11)

(24) Citizen participation in the regulatory process cannot be effective unless the general public is able to comprehend agency action. Agency rules and regulations are frequently obsolete, conflicting, confusing, or obscure. For years, Federal agencies have issued rules without systematic, periodic evaluation of those already on the books. Also persons involved in drafting regulations are too often ill-equipped and untrained for that responsibility.

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