

The Public's Role in Regulatory Affairs

State Is Urged to Compensate Citizen Groups for Cost of Participation

BY ANTONIO ROSSMANN

State and federal administrative agencies regulate some of the most crucial aspects of our lives—from the types of foods and drugs that we consume, to the rates we pay for utilities, to the uses to which our land and our neighbor's land may be put. Yet, in recent years, regulatory agencies have been called on increasingly to make significant decisions—such as where or whether nuclear power plants should be built—which cannot be resolved fairly unless the parties before such agencies engage extremely expensive experts and attorneys.

Few persons today question the need for public participation in the administrative process. Indeed, within the past two decades, legislative and judicial decisions have broken many of the archaic barriers to such participation. Now the public must be given notice of meetings, business must be conducted in public and, generally speaking, any interested citizen or group of citizens may take part in the proceedings.

However, as regulatory agencies have become involved in more complicated cases, which are often those of greatest concern to the public, merely letting individual citizens into the hearing room to speak hardly guarantees the public its right to effective participation.

The time has come to give the public a full and fair opportunity to challenge the positions of regulated industries. For years those industries have enjoyed a complete and important role in the regulatory process. California's public utilities, for example, expend significant sums in seeking rate increases or permits for new power plants, knowing that they will be permitted to include such costs in the rates charged to each customer.

If members of the public are to enjoy an effective voice in the administrative process, the state must take action to compensate them for the cost of participating. The state, in allowing utilities to pass their regulation costs on to ratepayers, forces each consumer to subsidize a utility's case. Fairness suggests that competent citizen groups that disagree with a utility on the public's need for, say, a new power plant be permitted to make a case of equal stature and be compensated by the public whom they expect to benefit.

But more than fairness argues for compensation of public participants in the regulatory process. The strongest argument is that such involvement dramatically improves the quality of the final decision, and really does benefit each consumer affected by it.

The potency of effective public participation became evident in one of the most significant recent decisions of the Public Utilities Commission: its Sept. 16 order implementing "lifeline" rates for the Pacific Gas & Electric Co. In its landmark decision, the PUC commended the dedication and sincerity of a handful of public participants, whose efforts

prompted the commission and its staff to adopt these special rates for minimal service to residences of the poor and elderly.

That valuable public participation did not come cheaply. One consumer group was present at more than 80 full days of hearings over a two-year period. As might be expected, the effort left the group in severe danger of not being able to join in future cases, unless it receives compensation for its effort.

A handful of federal regulatory agencies have recognized this dilemma, and in the last few years have instituted modest programs to involve the public more significantly in their proceedings. Two years ago the Interstate Commerce Commission engaged a public counsel to assist the public in rail-service hearings. This year the Federal Trade Commission has set aside \$1 million to compensate its public participants. Now the Nuclear Regulatory Commission is considering a similar program.

To date the state has not responded as it should to the needs of public participants. In the PG&E case, while commending the public participants for their efforts, the PUC insensitively rejected their claims that they be compensated out of a tiny fraction of the rate in-

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crease. In rendering this judgment, the PUC leaned on the tired notion that the commission itself should represent the public interest. (This premise was expressly rejected by then-Judge Warren Burger in his 1966 Church of Christ appeals-court decision. The church was seeking approval of its right to take part in FCC proceedings.)

Recently the California Supreme Court has shown encouraging signs of recognizing the need for awarding attorney's fees to public-interest litigants in court cases. Let us hope it will vacate the PUC's decision denying participation costs and order its reconsideration.

Meanwhile, another state agency—my own—has the opportunity to establish a pilot program that would compensate citizen groups for their much-needed participation in the state's regulatory business.

Indeed, the energy commission presents the ideal forum in which the state could launch such a program. The Legislature provided an unprecedented mandate for effective public participation when it established the procedures under which the energy commission operates.

As part of this mandate, the Legislature created the post I now hold—administrative adviser (soon to be known as public adviser)—and commanded the appointee to work directly with members of the public who wish to participate in commission proceedings. In

addition, the adviser is required to counsel the commission itself on additional measures needed to insure public participation.

As adviser I do not think I should represent individual members of the public to the necessary exclusion of others; such a course would require that I presumptuously select those members of the public representing the "public interest" when, in truth, a variety of participants may sincerely claim that status. Yet the energy commission needs to hear a variety of viewpoints, and compensation should be provided groups that lack the financial resources to pay their own way to full participation.

After reviewing the initial experiences of federal agencies and those in other states, I have proposed that the energy commission meet the costs of qualified public participants with cash drawn from the fund to which each California consumer now contributes through monthly electricity surcharges.

To qualify for compensation, a citizen group would have to demonstrate that its interests are not adequately represented in a proceeding; that representation of its interests is necessary for a fair determination; that without compensation the group cannot effectively represent its interests, and that the group will make good use of its compensation.

This plan would enable a variety of citizens—consumers, low-income groups, environmentalists, officials of small municipalities—to enjoy access to the expertise and data necessary to make their cases. The commission will hold a hearing on the plan in Los Angeles Nov. 26.

Everyone—including the regulated industries—would benefit if such a compensation program was adopted by all state regulatory agencies with lengthy technical agendas. The alternative of continuing business as usual is too expensive for society to afford.

It now takes up to two years for an agency to process a utility rate change request, and up to three years to evaluate an application for a new power plant site. This is often followed by judicial reversal of a decision, and then a regulatory agency's second look at the issue.

Today, with energy supplies and vast sums of capital in the balance, we can no longer afford the luxury of delays inherent in judicial reversal, not to mention that second look. Competing participants in the regulatory process should devote their efforts not so much to the courts but to the regulatory agencies themselves, which will then have a better chance to decide correctly the first time around.

If this process is to work and bring about attendant savings of both public and private resources, citizen groups require fair access to the regulatory process. The goal can only be attained by compensating them for the costs that participation entails.

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