SUMMARY OF COMMENTS

The District of Columbia Circuit Court of Appeals has proposed an amendment to its local rule 19(b). As amended, the Court will permit parties who participated in administrative proceedings below to intervene in an appeal challenging the administrative action without filing a formal motion to intervene. The "automatic" intervention could be challenged by filing a motion to strike. Parties who did not participate below must file a formal motion for leave to intervene.

The Court Rules Committee does not object to the proposed new rule. It offers a procedural mechanism for avoiding delays associated with the intervention of parties who have exhibited an interest in the proceeding below and who thereby are likely candidates for intervention. At the same time, the right to intervene is not "automatic" in any substantive sense. The Committee notes that the Rule provides for the filing of motions to strike, and the Committee assumes that would-be intervenors who do not satisfy standing or case-or-controversy requirements will not be permitted to intervene in an appeal.

COMMENTS OF THE RULES COMMITTEE OF DIVISION IV OF THE D.C. BAR CONCERNING PROPOSED LOCAL RULE 19 OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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We are writing to submit the comments of the Division IV Committee on Court Rules concerning the proposed amendments to Local Rule 19 regarding intervention.

Proposed Local Rules 19(b)(1) and (2) provide:

> (b) <u>Intervention</u>
> (1) <u>By a Party to the Administrative Agency Proceedings</u>. A party a to federal administrative agency, board or commission proceeding may intervene in this Court in an appeal from, or a review of, an order entered in such proceedings by filing with the Clerk of this Court a notice of intervention in the docket assigned to that appeal or petition for review. The notice shall state whether the intervenor favors the petition who objects to the order or the respondent who supports the order. A notice of intervention shall confer intervenor status only in that appeal or review proceeding in which the notice is filed and shall not automatically confer intervenor status in any other cases with which that appeal or review proceedings may be consolidated. Any motion to strike a notice of intervention shall be filed within 10 days of service.
> (2) <u>By a Non-Party</u>. A person, company or association not a party to a federal administrative agency, board or commission proceeding desiring to intervene in this Court in an appeal from, or a review of, an order entered in such proceeding shall file with the Clerk of the Court, and serve upon all parties to the proceeding, a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party, the grounds upon which intervention is sought, and a statement why the interest asserted is not adequately protected by existing parties. Any opposition to a motion shall be filed within 10 days of service.

The Rules Committee understands that Proposed Rules 19(b)(1) and (2), which are based on the Fifth Circuit's Local Rules 11.3.1 and 11.3.2,[1] have been proposed to deal with the delays

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1/ Many statutes provide for intervention by the mere filing of a notice to intervene (see Notes of Advisory Committee on Appellate Rules accompanying Rule 15 of the Federal Rules of Appellate Procedure), and the general rules of the District of Columbia Court of Appeals so provide. See D.C.C.A. Rule 15(f) (effective January 1, 1985).

that accompany consideration of motions for intervention filed by individuals who participated in agency proceedings and then seek to participate in proceedings initiated in this Court to review an order of an agency, board or commission. Apparently, motions to intervene are almost always granted and rarely reconsidered. However, review of such motions and the failure of many of the motions to provide an adequate statement of the interest of the moving party,2/ has unnecessarily delayed the scheduling of cases for briefing and argument.

With respect to Proposed Local Rule 19(b)(1), the Committee initially notes that, unlike (b)(2), the subsection does not provide that notices of intervention shall be served on "all parties to the proceeding". The lack of such a requirement, the Committee believes, may make "[a]ny motion to strike * * * within 10 days of service" meaningless, and ruling on such a motion in the initial stages of appellate proceedings unlikely. Therefore, the Rules Committee suggests that a provision requiring service on all parties should also be contained in Proposed Local Rule 19(b)(1).3/

With regard to Proposed Rule 19(b)(1)'s operative provision, which automatically provides intervenor status4/ in an appeal to

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2/ But see Rule 15(d) of the Federal Rules of Appellate Procedure which requires such a statement.

3/ The Committee also notes that the word "petition" in the second sentence of Proposed Rule 19(b)(1) should read "petitioner". This would be consistent with the use of "respondent" in that sentence and the fact that the "who" cannot relate back to a "petition".

4/ The rule does not address whether an intervenor will receive full party status in appellate proceedings. Compare Shapiro, Some Thoughts On Intervention Before Courts, Agencies, and
(footnote continued)

anyone who was a "party" to an administrative proceeding below, some members of the Rules Committee are concerned that this provision will not always accord with constitutional case-or-controversy requirements or standing principles. Because administrative agencies apply non-constitutional standards in allowing participation as a party to proceedings before them, "parties" for administrative agency purposes may not qualify as "parties" in this Court.

In most cases, however, it is recognized that those who participate in administrative proceedings will have an adequate interest in the case to qualify as a party on appeal. Thus, the Rules Committee believes that "automatic" intervenor status is appropriate for those who were parties to a federal administrative agency, board or commission proceeding. This is consistent with the decision in UAW v. Scofield, 382 U.S. 205 (1965). See also Canadian Tarpoly Co. v. U.S. International Trade Commission, 649 F.2d 855, 856-857 (Cust. & Pat. App. 1981); N.L.R.B. v. Oil, Chemical and Atomic Workers International Union, 476 F.2d 1031, 1034 (1st Cir. 1973).

(footnote continued from previous page)
Arbitrators, 81 Harv. L. Rev. 721, 727, 754 (1968)(intervenors do not necessarily have all the rights of a party) with ECEE, Inc. v. Federal Energy Regulatory Commission, 645 F.2d 339, 351 (5th Cir. 1981)(intervenor treated as if an original party). Some governing statutes provide for a more comprehensive role for intervenors than do the federal rules of appellate procedure. See 15 U.S.C. §3416(a)(4); 28 U.S.C. §2348.

In view of the strong interests in expediting the appellate briefing and scheduling process, and Rules Committee supports the rationale behind Proposed Rule 19(b)(1), even though the rule may result in an occasional case in which automatic intervenor status is confirmed on a person who otherwise could not establish standing or requisite case-or-controversy. The proposed rule provides recourse in such a case by permitting the filing of a motion to strike.5/

The Committee has no objection to proposed Rule 19(b)(2).

5/ We note, however, that the proposed rule appears to be inconsistent with F.R.A.P. Rule 15(d). That rule permits intervention without filing a motion <u>only</u> when a statute explicitly permits such a practice. <u>See</u> 9 Moore's, <u>Federal Practice</u> ¶15-15. We know of no statute which provides for intervention as a matter of right in all cases. We note, in particular, that the Fifth Circuit's rule on this subject (on which this rule is based) apparently is limited to certain energy cases for which automatic intervention is permitted by statute. Thus, the Fifth Circuit's rule appears to be consistent with F.R.A.F Rule 19(d) while this Circuit's proposed rule may not be.