Chapter 6. Parties

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6.1 Party Status

The rules governing contested case proceedings promulgated by the Minnesota Office of Administrative Hearings (OAH) define "party" as:

> each person named as a party by the agency in the notice of and order for hearing, or persons granted permission to intervene pursuant to part 1400.6200. The term "party" shall include the agency except when the agency participates in the contested case in a neutral or quasi-judicial capacity only.[1]

The fact that a person receives a notice of hearing does not elevate that recipient to party status.[2] That is because the notice of a contested case hearing may be sent to persons who are not indispensable to the proceeding and whose interests in the case are unknown. Parties must be either named by the agency, allowed to intervene, or added by consolidation. The parties named by the agency are typically identified in the caption of the notice of and order for hearing or other authorized pleading. The contested case rules do not require that parties be identified in the caption, but rules of the agency commencing the contested case

[1] Minn. R. 1400.5100, subp. 7 (2013). This definition is consistent with definitions generally used in administrative law. *E.g., First Nat'l Bank v. Okla. Sav. & Loan Bd.*, 569 P.2d 993, 996 (Okla. 1977) ("A person is a party to an administrative proceeding either by being named as such, becoming a party by applicable statutory law, or if his interest therein is of constitutional proportions."); *Commonwealth Ins. Dep't v. Pa. Coal Mining Ass'n*, 25 Pa. Commw. 3, 358 A.2d 745, 748 (1976) (defining *party* as "one who appears in a proceeding before an administrative agency who has a direct interest in the subject matter"), *rev'd on other grounds*, 471 Pa. 437, 370 A.2d 685 (1977); REVISED MODEL STATE ADMIN. PROCEDURE ACT, art. 1, § 102(24) (2010) (defining *party* as "the agency taking action, the person against which the action is directed, any other person named as a party, or any person permitted to intervene and that does intervene").

[2] This is consistent with the usual holding. *See, e.g., Save the Bay v. Dep't of Pub. Utils.*, 366 Mass. 667, 674, 322 N.E.2d 742, 749 (1975). While receiving notice of a hearing may not be sufficient to grant party status, the Minnesota Court of Appeals has held that where the statutes or regulations defines "party" to include "a member of the public who requests a copy of the decision," such members of the public have party status and may participate in an appeal of the agency action. *Hentges v. Minn. Bd. Water & Soil Res.*, 638 N.W.2d 441, 447 (Minn. Ct. App. 2002)*; see also In re Speed Limit for the Union Pac. R.R.*, 610 N.W.2d 677, 682 (Minn. Ct. App. 2000) (finding denial of a railroad's petition by the Department of Transportation to be a quasi-judicial action reviewable on a writ of certiorari, and as such the railroad company is an "aggrieved party").

may have such a requirement.[3] Additional parties may be added or dropped by an agency's filing of an amended pleading.[4]

An agency is not a party to a contested case if it participates in a neutral or quasi-judicial capacity only. The Minnesota Supreme Court has enumerated the factors to consider when determining whether an agency's actions are quasi-judicial, rather than administrative.[5] These decisions generally hold that an agency acts in a quasi-judicial capacity when it hears a case pending between adverse parties, applies the law to the facts and renders a judgment determining the rights of the parties,[6] or when the agency action involves the exercise of discretion and requires notice and hearing.[7] Under these holdings, an agency acts in a quasi-judicial capacity in most, if not all, contested cases. Although an agency is not a party if its participation is "only" neutral or quasi-judicial, even when acting in an administrative capacity, the agency will attain party status when acting for the public interest.[8] State agencies that represent the interest of the public are not considered neutral, and thus become parties to their contested case proceedings. To determine whether an agency acted in a quasi-judicial capacity only, courts will examine the nature and quality of the agency's acts,[9] the interests the agency was created to represent, and its power to act on its own initiative.[10]

Agencies are usually parties to their contested cases because of their adversarial position and the public interests the agencies are empowered to protect. Thus, when an agency seeks to deny or revoke a license or permit, to discharge an employee,[11] to impose a fine, or to

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[3] *See, e.g.*, Minn. R. 5215.1500, subp. 2 (2013) (requiring parties to an occupational safety and health hearing to be designated in the caption). In the absence of a specific rule, agencies still have a duty to clearly identify the parties to a contested case. *Wis.'s Envtl. Decade v. Pub. Serv. Comm'n*, 69 Wis. 2d 1, 16-17, 230 N.W.2d 243, 251 (1975), *rev'd on other grounds*, *Friends of Black River Forest v. Kohler Co.*, 402 Wis. 2d 587, 614-615, 977 N.W.2d 342, 355 (2022). For the purposes of serving a writ of certiorari under Minn. Stat. § 14.64 (2014), agencies must certify to the petitioner the names and addresses of all parties as disclosed by its records.

[4] This is consistent with typical practice permitting agencies to drop or add parties at their convenience. 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 323 (1965). Amended pleadings are permitted at any time before the close of the hearing under Minn. R. 1400.5600, subp. 5 (2013) ("Amendments sought after the start of the hearing must be approved by the judge.").

[5] *Minn. Bd. of Health v. Governor's Certificate of Need Appeal Bd.*, 304 Minn. 209, 214-15, 230 N.W.2d 176, 179 (1975); *In re Getsug*, 290 Minn. 110, 115-17, 186 N.W.2d 686, 690 (1971); *Minn. Water Res. Bd. v. Traverse Cnty.*, 287 Minn. 130, 132-33, 177 N.W.2d 44, 46 (1970). All these cases pertain to an agency's standing as an "aggrieved" person or party to appeal agency decisions to the courts, and not to an agency's standing as a party to participate in administrative proceedings.

[6] *Getsug*, 290 Minn. at 113-17, 186 N.W.2d at 689-90.

[7] *Minn. Bd. of Health*, 304 Minn. at 213, 230 N.W.2d at 179.

[8] *Minn. Water Res. Bd.*, 287 Minn. at 133-34, 177 N.W.2d at 47-48. The courts have repeatedly recognized the fact that agencies have executive (administrative), legislative, and judicial powers. *See, e.g., Frisk v. Bd. of Educ.*, 246 Minn. 366, 380-82, 75 N.W.2d 504, 514 (1956).

[9] *Getsug*, 290 Minn. at 115-17, 186 N.W.2d at 690.

[10] *Minn. Water Res. Bd.*, 287 Minn. at 135, 177 N.W.2d at 48.

[11] *Whaley v. Anoka-Hennepin Indep. Sch. Dist.*, 325 N.W.2d 128, 130 (Minn. 1982); *State v. Police Civil Serv. Comm'n*, 253 Minn. 62, 63-64, 91 N.W.2d 154, 155-56 (1958). If an agency does not oppose the granting of a license or permit and is holding a hearing on the protest or objection of an interested third party, its participation may be quasi-judicial. For example, if the agency does not take an active part in a hearing to consider the protest to a bank's application to a detached facility under Minn. Stat. § 47.54, subds. 3-4 (2014), the agency should not be considered to be a party. In addition, an agency may be acting in a quasi-judicial

deny a benefit, it is a party, even if the agency does not name itself as one. An agency's participation is neutral or quasi-judicial when it merely decides disputes between others. For example, the Department of Administration acts in a quasi-judicial capacity when resolving disputes between state agencies and members of the public concerning the accuracy and completeness of data maintained on individuals.[12] Likewise, the Department of Veterans Affairs acts in a quasi-judicial capacity when resolving disputes between public employers and employees concerning alleged violations of the Veterans Preference Act.[13] An agency acting only in a neutral or quasi-judicial capacity may nonetheless question witnesses, if permitted by the administrative law judge (ALJ) under Minnesota Rules part 1400.7900 (2013). If the agency desires more extensive participation than the ALJ will allow under that rule, the agency may seek to intervene as a party.[14]

Questions regarding an agency's standing to participate in a contested case as a party, unlike questions regarding an agency's standing to appeal final agency decisions, seldom arise, and the former have less significance. Even if an agency is denied party status in the contested case, agency representatives still may be permitted to ask questions at the hearing to clarify testimony or to develop a complete record. In addition, in cases in which the agency cannot become a party, the agency's staff, or a division of an agency, may be permitted to intervene. The fact that an agency with standing to participate in the contested case as a party may not have standing to appeal reflects the general rule that the interest required to obtain party status in a contested case is different from the interest needed to obtain standing to appeal to seek judicial review.[15] The courts have denied standing to appeal to parties despite their participation in contested cases.[16] On the other hand, participation in the contested case may create appeal rights.[17] Although a party to the contested case may or may not have standing to appeal depending on the circumstances, courts typically hold that a person who did not participate has no standing to appeal unless that opportunity is conferred by statute.[18]

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capacity in some license revocation proceedings instituted by the complaint of a third party. *Getsug*, 290 Minn. at 112 186 N.W.2d at 688.

[12] Minn. Stat. § 13.04, subd. 4 (2014).

[13] *Id.* § 197.481.

[14] Minn. R. 1400.6200, subp. 4 (2013).

[15] *See, e.g., Francis v. Minn. Bd. of Barber Exam'rs*, 256 N.W.2d 521, 524 (Minn. 1977) (holding that the board may not appeal decision of its hearing examiner but may urge district court to affirm it or may urge supreme court to reinstate it); *Minn. Dep't of Hwys. v. Minn. Dep't of Human Rights*, 308 Minn. 158, 165-66, 241 N.W.2d 310, 315 (Minn. 1976).

[16] *See, e.g., Save the Bay v. Dep't of Pub. Utils.*, 366 Mass. 667, 677-78, 322 N.E.2d 742, 751 (1975); *Comm. to Pres. Mill Creek v. Sec'y of Health*, 3 Pa. Cmwlth. 200, 208, 281 A.2d 468, 472 (1971).

[17] *See, e.g.*, *Save the Bay*, 366 Mass. at 677-78, 322 N.E.2d at 751 (appeal to court); *In re Preseault*, 130 Vt. 343, 347, 292 A.2d 832, 834-35 (1972) (de novo administrative review); *cf. In re Implementation of Util. Energy Conservation Improvement Programs*, 368 N.W.2d 308, 312 (Minn. Ct. App. 1985).

[18] *Nader v. Nuclear Regulatory Comm'n*, 513 F.2d 1045, 1054 (D.C. Cir. 1970); *In re Hawaiian Elec.*, 56 Haw. 260, 263, 535 P.2d 1102, 1105 (1975); *Lake Cnty. Contractors' Ass'n v. Pollution Control Bd.*, 54 Ill. 2d 16, 21, 294 N.E.2d 259, 262 (1973); *People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 875 (Minn. 1978) (appeals to Supreme Court). *But see Ramsey Cnty v. Minn. Pub. Utils. Comm'n*, 345 N.W.2d 740, 744 (Minn. 1984) (appeals to appellate court by "aggrieved persons" under Minn. Stat. § 14.63).

When seeking judicial review of a final agency decision, the Administrative Procedures Act (APA) requires that the petition for a writ of certiorari for judicial review under sections 14.63 to 14.68 must be filed with the court of appeals and "served on all parties to the contested case"[19] not more than 30 days after the party receives the final decision and order of the agency.[20] If a person aggrieved by a final decision in a contested case is uncertain which participants are parties to the contested case, then upon request the agency shall certify to the petitioner the names and addresses of all parties as disclosed by its records.[21] The agency's certification "shall be conclusive."[22]

At the initiation of a contested case, the parties named by the agency should include those persons entitled to a hearing under the applicable statutes and rules or as a matter of due process of law.[23] This concept is reflected in the definition of a contested case as a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."[24] Apart from constitutional considerations,[25] the right to a hearing may arise under state laws and rules or federal laws and regulations.

The parties to a contested case generally include the real party in interest and all adverse parties.[26] Parties must be affected by a proposed action on individual grounds and in a different manner than other members of the public.[27] This is implicit in the reference to

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[19] Minn. Stat. § 14.63 (2014).

[20] *Id.*

[21] *Id.* § 14.64.

[22] *Id.*

[23] If a person's interest is protected by due process, that person generally is entitled to a full hearing if disputed adjudicative facts are involved. 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 9.5, at 43 (3d ed. 1994); *see also* ch. 4. If only the proper interpretation of a statute or rule is in dispute, and not the facts, no formal hearing is required. *Codd v. Velger*, 429 U.S. 624, 627 (1977); *Jones v. Minn. State Bd. of Health*, 301 Minn. 481, 483-84, 221 N.W.2d 132, 134-35 (1974). In such a case, however, a person is entitled to present argument, either verbally or in writing. *Mothers' & Childrens' Rights Org. v. Sterrett*, 467 F.2d 797, 800 (7th Cir. 1972) (holding that a reasonable opportunity for argument must be provided even if no facts are in dispute); *see also State Dep't of Pub. Welfare v. Dep't of Hous., Educ., Welfare, Social & Rehab. Servs.*, 448 F.2d 209, 212 (2d Cir. 1971).

[24] Minn. Stat. § 14.02, subd. 3 (2014).

[25] If the governing statute does not afford a hearing, the court of appeals will require the agency to commence a hearing if the person's property interests, good name, reputation, and honor are placed at stake by the agency's action. *Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456, 461 (Minn. Ct. App. 2000)

[26] *Reliance Ins. Co. v. Pub. Serv. Comm'n.*, 250 N.W.2d 918, 926 (N.D. 1977). Determining the real party in interest is a fact question. *Minn. Educ. Ass'n v. Indep. Sch. Dist. No. 404*, 287 N.W.2d 666, 668 (Minn. 1980). It is sometimes held that an unincorporated association cannot become a party, *Save the Bay v. Dep't of Pub. Utils.*, 366 Mass. 667, 675, 322 N.E.2d 742, 750 (1975), or that the unincorporated association must sue in the names of their individual members, *Zak v. Gypsy*, 279 N.W.2d 60, 63 (Minn. 1979). However, organizations can get standing by asserting the interests of their members. *E.g., No Power Line v. Minn. Envtl. Quality Council*, 311 Minn. 330, 334, 250 N.W.2d 158, 160 (1976); *Okla. State AFL-CIO v. State Bd. for Prop. and Cas. Rates*, 463 P.2d 693, 694-95 (Okla. 1970).

[27] *Bragg v. Weaver*, 251 U.S. 57, 58 (1919); *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 380 (1908); *Auclair v. Vt. Elec. Power Co.*, 133 Vt. 22, 26, 329 A.2d 641, 644 (1974). This principle is codified in some rules. *See, e.g.*, Minn. R. 7829.0800, subp. 2 (2013). If a person has no real interest in a proceeding, he or she has no right to a hearing. *Walsh v. City of Brewer*, 315 A.2d 200, 208 (Me. 1974). At least one state has held that

"specific parties" in the definition of a contested case.[28] Where a person is affected in the same manner as other members of the public, that person is not generally entitled to be named as a party in a contested case.[29] Parties must be affected on individual grounds because contested cases resolve adjudicative facts, and only specific facts about specific parties are appropriate for such trial type hearings.[30]

6.1.1 Indispensable, Necessary, and Proper Parties

The APA and the contested case rules do not define indispensable, necessary, and proper parties to contested cases. The APA merely requires that "all parties shall be afforded an opportunity for hearing after reasonable notice."[31] In many cases, the parties that must be named by the agency are obvious or are specified in the applicable statutes and rules. The failure to join parties specified by statute has resulted in the invalidation of agency action.[32]

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participation as a commenter in an agency permitting process differentiates an entity's interests from the interests of members of the general public. *Bd. Cnty. Comm'rs of Sumner Cnty. V. Bremby*, 189 P.3d 494, 505 (Kan. 2008); *see Indianapolis Downs, LLC v. Ind. Horse Racing Comm'n*, 827 N.E.2d 162, 170 (Ind. Ct. App. 2005) ("By virtue of the invitation to comment and acceptance of that invitation by submission of a position statement, we find that Indiana Downs was a party to the agency proceedings that led to the agency action."). Courts in other states have held to the contrary. *E.g., Wood v. Metro. Nashville & Davidson Cnty. Gov't*, 196 S.W.3d 152, 159 (Tenn. Ct. App. 2005) (stating that an individual's attendance and advocacy at public meetings regarding an agency action was insufficient to grant him standing to intervene as a party in the agency's action).

[28] Minn. Stat. § 14.02, subd. 3 (2014).

[29] *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); *Albert v. Pub. Serv. Comm'n*, 209 Md. 27, 38, 120 A.2d 346, 351 (1956). However, if a rate payer or other person becomes a party, he or she is entitled to appeal even though his or her interest is no different than other rate payers. *In re Hawaiian Elec.*, 56 Haw. 260, 264, 535 P.2d 1102, 1105 (1975).

[30] According to Professor Kenneth Culp Davis, contested cases (trial type hearings) are only appropriate to resolve disputed adjudicative facts--that is, facts relating to a particular person. Adjudicative facts are similar to the facts juries decide and pertain to who did what, when, where, how, and why. Davis believes that general facts, unrelated to specific parties, that help an agency decide questions of law, policy, or discretion--that is, legislative facts--are not appropriate for contested case or trial type hearings. *See* DAVIS, *supra* note 23, § 9. However, contested cases are sometimes required by statute even when such legislative facts are involved.

[31] Minn. Stat. § 14.58 (2014). The court of appeals reversed a state agency action when the agency failed to give notice of the opportunity for hearing. *Central Care Ctr. v. Wynia*, 448 N.W.2d 880, 883 (Minn. Ct. App. 1989).

[32] *See Greyhound Corp. v. Mich. Pub. Serv. Comm'n*, 360 Mich. 578, 583, 104 N.W.2d 395, 399 (1960); *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 703 (Minn. 1996) (holding that the failure of an agency to specifically name the owner of restaurant as a respondent in human rights complaint pursuant to Minn. Stat. § 363.06, subd. 1, warranted dismissal of the claim despite owner's notice of charges and opportunity to participate in conciliation.); *Burkhardt v. State*, 77 N.D. 232, 234, 42 N.W.2d 670, 671(1950). Likewise, the failure to give adequate notice to potential participants has resulted in mandatory rehearings. *Mohawk Airlines v. C.A.B.*, 412 F.2d 8, 16 (2d Cir. 1969) (holding that the carrier suffered substantial prejudice from lack of notice of what was in issue in administrative proceeding involving another carrier's route investigation); *In re Wilmarth Line of C U Project*, 299 N.W.2d 731, 736 (Minn. 1980); *Cty. of Dakota v. Blackwell*, 809 N.W. 2d 226, 230-31 (Minn. Ct. App. 2011) (reversing and remanding summary judgment for the county in a paternity action because the district court failed to add the presumptive father as a party as required by Minn. Stat. § 257.55). *But see Asche*

Likewise, the failure to join "indispensable parties" not specified in the governing statutes may invalidate agency action.[33] Agencies themselves can be necessary parties.[34] In cases in which the agency is a necessary party and has not been previously joined, the nature of the case may require agency participation to preserve the balance of power between the executive and judicial branches.[35] Once a person becomes a party, he or she is a necessary party to subsequent proceedings in the matter.[36] One court has held that general civil rules on indispensable, necessary, and proper parties apply to administrative adjudications.[37]

It should be noted that in the absence of statutory or constitutional restrictions, court-made rules of joinder play only a small role in administrative adjudications.[38] Thus, a California court held that an agency was not required to join all charges against a doctor in a single proceeding where separate and unrelated acts were involved.[39] However, where an agency proceeds against a violator in multiple proceedings, the election of remedies doctrine may apply.[40] Since an ALJ in Minnesota may apply the Rules of Civil Procedure for the District Courts,[41] joinder issues may become more important in Minnesota contested cases than they are in other states. It would be particularly appropriate to apply court-made joinder rules in contested cases that parallel state or federal proceedings, such as discrimination actions and occupational safety and health actions. The precedents set in such cases should be followed.[42]

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v. Rosenfield, 405 Ill. 108, 115, 89 N.E. 885, 889 (1950); *First Nat'l Bank v. Okla. Sav. & Loan Bd.*, 569 P.2d 993, 997 (Okla. 1977) (holding that potential intervenors have no right to notice of the proceeding).

[33] *Transp.-Commc'n Emp. Union v. Union P. R.R.*, 385 U.S. 157, 159-60 (1966); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 226 (1938); *Trellsite Foundry & Stamp Co. v. Enter. Foundry*, 365 Mich. 209, 225-26, 112 N.W.2d 476, 484 (1961); *Pirrotta v. Indep. Sch. Dist. No. 347*, 396 N.W.2d 20, 23 (Minn. 1986) (holding that an interested person who is not given notice of a hearing and an opportunity to intervene will not be collaterally estopped by the agency's decision); *Juster Bros. v. Christgau*, 214 Minn. 108, 121-22, 7 N.W.2d 501, 509 (1943); *N.J. Zinc Co. v. Bd. of Review*, 25 N.J. 235, 240, 135 A.2d 496, 299 (1957). *But see Ford Motor Co. v. ICC*, 714 F.2d 1157, 1160-61 (D.C. Cir. 1983) (holding that failure to join an indispensable party is not jurisdictional).

[34] *Unbank Co. v. Merwin Drug Co.*, 677 N.W.2d 105, 108 (Minn. Ct. App. 2004). This was a case in which a licensed currency exchange initiated a declaratory judgment action against a competitor seeking a declaration that the competitor could not be issued a license, and an injunction restraining it from operating a currency exchange. Unbank alleged that Merwin was located within one-half mile of it, contrary to statute. The court of appeals found that the commissioner of commerce, who was not joined, was a necessary party to the case.

[35] *Id.* (observing that if judges undertook to decide administrative licensing issues without the participation of the licensing authority, the coequal branches of government would relinquish a necessary balance).

[36] *Miss. Pub. Serv. Comm'n v. Chambers*, 235 Miss. 133, 140-41, 108 So. 2d 550, 553 (1959).

[37] *Anita Ditch Co. v. Turner*, 389 P.2d 1018, 1021 (Wyo. 1964).

[38] COOPER, *supra* note 4, ch. XI, § 1, at 323.

[39] *Petrucci v. Bd. of Med. Exam'rs*, 45 Cal. App. 3d 83, 87-88, 117 Cal. Rptr. 735, 737 (1975).

[40] *Commonwealth, Dep't of Envtl. Res. v. Leechburg Mining Co.*, 9 Pa. Commw. 297, 304, 305 A.2d 764, 768 (1973).

[41] Minn. R. 1400.6600 (2013).

[42] *See, e.g., Kolosky v. Anchor Hocking Corp.*, 33 F.E.P. 1185, 1185 (W.D. Pa. 1983); *Simon v. Kelso Marine*, 19 F.E.P. 344 (S.D. Tex. 1979) (discussing joinder of successor employers in discrimination cases).

6.1.2 Nonparty Participation

As mentioned above, when an agency participates in a contested case only in a quasi-judicial capacity, agency representatives may be permitted to examine witnesses even though the agency is not a party.[43] Such limited participation does not make the agency a party. A separate rule governs the participation of other nonparties.[44] Under that rule, the ALJ may permit nonparties to present testimony and exhibits and to question witnesses at the hearing. Any person permitted to participate in a contested case hearing in that fashion does not become a party. In administrative hearings that are not held under the rules of the OAH, however, a nonparty who appears and participates in a hearing may gain party status if he or she claims an interest in the subject matter of the proceeding.[45]

Although a person with standing to intervene may be permitted to file a written brief without becoming a party,[46] the contested case rules do not specifically permit briefs from persons having no standing to intervene. However, the ALJ may have the inherent authority to permit them.[47] Since the purposes and benefits of an amicus brief in contested cases would be essentially the same as in civil actions, such briefs should be permitted in an appropriate case, consistent with civil practice. The amicus brief filed by a person without standing to intervene undoubtedly would be more restrictive in scope than the brief from a person with standing. For example, the amicus brief would be limited to advice on doubtful matters of law and would not be permitted to raise issues not raised by the parties.[48] If an amicus brief were to be authorized, the person submitting it would not become a party.[49]

Many contested cases are commenced after the filing of a complaint. The general rule is that the complaining party at whose instigation a proceeding is instituted does not become a party to the proceeding or have any control over it.[50] Moreover, in the absence of a specific law providing otherwise, an agency may commence a contested case even if the person on whose

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[43] Minn. R. 1400.7900 (2013).

[44] *Id*. 1400.6200, subp. 5.

[45] *Morris v. Howard Research & Dev. Corp.*, 278 Md. 417, 423, 365 A.2d 34, 37 (1976); *City of Minneapolis v. Minneapolis Transit Co.*, 270 Minn. 133, 137-38, 133 N.W.2d 364, 368-69 (1965); *Hentges v. Minn. Bd. Water & Soil Res.*, 638 N.W. 2d. 441, 447 (Minn. Ct. App. 2002); see Wood v. Metro. Nashville & Davidson Cnty. Gov't, 196 S.W.3d 152, 159 (Tenn. Ct. App. 2005) (leaving to agency discretion whether to permit intervention of individuals without standing).

[46] Minn. R. 1400.6200, subp. 3(A) (2013).

[47] *Ala.-Tenn. Natural Gas Co. v. FPC*, 359 F.2d 318, 324 (5th Cir. 1966).

[48] *State v. Finley*, 242 Minn. 288, 294-95, 64 N.W.2d 769, 773 (1954); *Blue Earth Cnty. Pork Producers, Inc. v. Cnty. of Blue Earth*, 558 N.W.2d 25, 30 (Minn. Ct. App. 1997) (denying the motion to strike materials in amicus brief of environmental groups regarding description of feedlots and administrative history of MPCA feedlot rules.); *see In re Universal Underwriters Life Ins. Co.*, 685 N.W.2d 44, 45 n.2 (Minn. Ct. App. 2004).

[49] *Int'l Union, United Auto, Aerospace & Agric. Implement Workers, Local 238 v. Scofield*, 382 U.S. 205, 215-16 (1965); *Baird v. City of Williston*, 58 N.D. 478, 490, 226 N.W. 608, 612 (1929); *In re Petition for Referendum to Amend Home Rule Charter*, 69 Pa. Commw. 292, 295, 450 A.2d 802, 803 (1982).

[50] *Amalgamated Util. Workers v. Consol. Edison Co.*, 309 U.S. 261, 266 (1940). Thus, in prosecutorial cases, a complaint can be withdrawn or settled over the objection of a complaining party; *see, e.g., Donovan v. Allied Indus. Workers*, 760 F.2d 783, 785 (7th Cir. 1985) (regarding a settlement agreement); *Marshall v. Occupational Safety & Health Review Comm'n*, 635 F.2d 544, 552 (6th Cir. 1980) (regarding the withdrawal of a citation); *see also* A. Everette MacIntyre & Joachim J. Volhard, *Intervention in Agency Adjudications,* 58 VA. L. REV. 230 (1972).

complaint it acts is not, and cannot become, a party with legal standing.[51] If the complaining party's dispute with a licensee is settled, the agency may proceed with a case even if the complaint is withdrawn.[52] Conversely, a member of the public ordinarily cannot compel an agency to take disciplinary action[53] or appeal the disciplinary action imposed by the agency if deemed to be unsatisfactory.[54]

6.1.3 Class Actions

The APA does not specifically authorize class actions. In the absence of specific statutory authorization, it has been held that an agency may not authorize them.[55] Class actions are specifically authorized under the Minnesota Human Rights Act.[56] Whether class actions are permissible in other proceedings, by virtue of the ALJ's authority to apply the Rules of Civil Procedure for the District Courts in ruling on motions, is an open question.

The rules governing consolidation of contested cases do not limit the number of cases that may be combined by an agency or ALJ.[57] On occasion, an agency may combine contested cases with a common legal issue arising from multiple appeals filed by dozens of similarly situated appellants. The resulting effect is that the combined contested case is akin to a small class action with several dozen parties. Although there are no provisions in the OAH rules that expressly provide for class action representative party status, some degree of judicial efficiency may be achieved if all parties enter into a stipulation of facts and present the legal issue on cross-motions for summary disposition.

6.1.4 Prevailing Party for Attorneys' Fees

Under the Minnesota Equal Access to Justice Act (MEAJA)[58] if a prevailing party in a contested case proceeding demonstrates by application that the position of the state was not substantially justified, the ALJ "shall award "fees and other expenses to the party unless special

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[51] *Ins. Comm'rs v. Mutual Med. Ins.*, 251 Ind. 296, 301, 241 N.E.2d 56, 59 (1968), *superseded on other grounds by statute as stated in Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806 (Ind. 2004).

[52] *Wyo. State Bd. of Accountancy v. Macalister*, 493 P.2d 1268, 1271 (Wyo. 1972).

[53] *Vick v. Bd. of Elec. Exam'rs*, 626 P.2d 90, 95 (Alaska 1981); *cf. Pub. Interest Research Grp. v. N. States Power Co.*, 360 N.W.2d 654, 657-58 (Minn. Ct. App. 1985) (holding that the public utilities commission's dismissal of a complaint alleging overcharges by utility without hearing was upheld where no contested case was required by law and the agency's decision was supported by substantial evidence).

[54] *Eikelberger v. Nev. State Bd. of Accountancy*, 91 Nev. 98, 99-100, 531 P.2d 853, 854 (1975).

[55] *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 936-37, 179 Cal. Rptr. 287, 292 (1981), *overruled in part on other grounds, Noel v. Thrifty Payless, Inc.*, 445 P.3d 626, 640 (Cal. 2019); *Freeport Area Sch. Dist. v. Commonwealth Human Relations Comm'n*, 18 Pa. Commw. 400, 408-10, 335 A.2d 873, 878-79 (1975); *see also State v. State Tax Comm'n*, 651 S.W.2d 130, 133 (Mo. 1983) (holding the use of class actions to be discretionary where authorized).

[56] Minn. Stat. § 363A.28, subd. 6(g) (2014).

[57] Minn. R. 1400.6350 (2013); *see infra* § 6.3.

[58] Minn. Stat. §§ 15.471-.474 (2014).

circumstances make an award unjust."[59] Not all parties who successfully overturn an agency action in a contested case qualify as a "party" under MEAJA.

Under the MEAJA, a "party" means a person named or admitted as a party in a contested case proceeding or court action and who is "an unincorporated business, partnership, corporation, association, or organization, having not more than 500 employees"[60] and "whose annual revenues did not exceed $7,000,000 at the time the contested case proceeding was initiated."[61] The MEAJA limitations on parties make it clear that the parties entitled to recover fees and expenses are small businesses.[62]

The MEAJA excludes from its definition of "party" a "person providing services pursuant to licensure or reimbursement on a cost basis by the Department of Health or the Department of Human Services, when that person is named or admitted or seeking to be admitted as a party in a matter which involves the licensing or reimbursement rates, procedures, or methodology applicable to those services."[63]

6.2 Intervention

6.2.1 Petition

In addition to the persons named as parties in the agency's notice of and order for hearing, other persons may become parties by filing a timely petition for intervention.[64] The petition must contain factual allegations showing that intervention is proper. Mere conclusions will not suffice.[65] A proper showing is one that demonstrates that the petitioner is entitled to intervene. Under the intervention rule, a petition must show how the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case and that the petitioner may be directly affected or that intervention is authorized by statute, rule, or court decision. Also, the petition must cite the statute authorizing intervention, if any, and the grounds and purposes for which intervention is sought. Thus, if the petitioner's rights, duties, and privileges will not be directly affected by the contested case, intervention is allowable only

[59] *Id.* § 15.472(a).

[60] *Id.* § 15.471, subd. 6(a).

[61] *Id.*

[62] *See Donovan Contracting of St. Cloud v. Minn. Dep't of Transp.*, 469 N.W.2d 718, 720 (Minn. Ct. App. 1991); *McMains v. Comm'r of Pub. Safety*, 409 N.W.2d 911, 914 (Minn. Ct. App. 1987). *See also Broadway Child Care Center v. Minn. Dep't of Hum. Serv.*, 955 N.W.2d 626, 637-38 (Minn. Ct. App. 2021) (explaining that childcare centers are not "parties" under the MEAJA because they are "providing services pursuant to licensure" under Minn. Stat. § 15.471, subd. 6(c), and therefore are not entitled to attorney's fees or expenses.) *Id.*

[63] Minn. Stat. § 15.471, subd. 6(c) (2014).

[64] Minn. R. 1400.6200, subp. 1 (2013).

[65] *Noble v. City of Lincoln*, 158 Neb. 457, 471, 63 N.W.2d 475, 484 (1954); *Sewerage Comm'n v. State Dep't of Natural Res.*, 104 Wis. 2d 182, 187, 311 N.W.2d 677, 680 (1981).

if authorized by statute, rule, or court decision. Whether a person's interest is legally sufficient to require intervention is a question of law.[66]

The language of the contested case intervention rule is different from the language of the civil rule governing intervention as a right. The civil rule does not base standing to intervene on a person's legal rights, duties, or privileges. Instead, it authorizes intervention by a person claiming an interest in the property or transaction that is the subject of the action, if the person's ability to protect that interest may be impeded or impaired if intervention is not permitted.[67] However, both rules require a timely application for intervention and condition the right to intervene on the absence of adequate representation by existing parties. Moreover, neither rule requires a showing that the applicant will necessarily gain or lose if intervention is not permitted.[68] Although the civil rule does not require that the interest asserted may be directly affected, some courts require such a showing in civil actions.[69] Since one's interests frequently involve one's rights, duties, and privileges, and since the two rules are similar in other respects, case law under rule 24.01 will be instructive in resolving some issues arising under the contested case rule.[70]

The criteria for standing to intervene in a contested case are different from the criteria for standing to appeal a final agency decision under Minnesota Statutes section 14.63. The statute permits any "person aggrieved" by a final decision to appeal. However, the criteria for standing to intervene in a contested case are similar to the criteria used to determine a person's standing to challenge the validity of a rule under Minnesota Statutes section 14.44 (2014). That statute grants standing to persons whose legal rights or privileges may be interfered with or impaired by the challenged rule. Standing to challenge a rule is accorded to persons who are "injured in fact," absent a discernible legislative intent to the contrary in a given case.[71] Applying the injury-in-fact standard, nonprofit consumer advocate corporations alleging economic injury to their individual members as a result of an agency ban on prescription drug price advertising have standing to challenge a rule in court.[72] In addition, a taxpayer has standing to challenge a rule under which tax monies are expended on the grounds that it was improperly promulgated.[73]

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[66] *Mankato Aglime & Rock Co. v. City of Mankato*, 434 N.W.2d 490, 492 (Minn. Ct. App. 1989) (stating that a person has standing to intervene "if they can show an interest arguably among those intended to be protected by the applicable statute"); *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 545, 334 N.W.2d 252, 256 (1983).

[67] Minn. R. Civ. P. 24.01; *see, e.g., Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986); *Miller v. Astleford Equip.*, 332 N.W.2d 653, 655 (Minn. 1983); *Jerome Faribo Farms. v. Cnty. of Dodge*, 464 N.W.2d 568, 570 (Minn. Ct. App. 1990); *see also Mausolf v. Babbitt*, 85 F.3d 1295, 1299 (8th Cir. 1996).

[68] *Avery v. Campbell*, 279 Minn. 383, 389, 157 N.W.2d 42, 46 (1968); *see also* Minn. R. Civ. P. 24.01 advisory comm. n.1.

[69] *See, e.g., Colman v. Colman Found.*, 199 Neb. 263, 265, 258 N.W.2d 128, 129 (1977).

[70] For example, the courts have held that an intervenor having another remedy may still have a right to intervene. *Avery*, 279 Minn. at 389, 157 N.W.2d at 46. That rule should also apply in contested cases.

[71] *Snyder's Drug Stores v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 32, 221 N.W.2d 162, 165 (1974).

[72] *Id.* The court also held that the district court should have allowed the corporations to intervene.

[73] *McKee v. Likins*, 261 N.W.2d 566, 570 (Minn. 1977); *see Citizens for Rule of Law v. Senate Comm'n on Rules & Admin.*, 770 N.W.2d 169, 175 (Minn. Ct. App. 2009) (citing *McKee*, 261 N.W.2d at 570). *See also Schroeder*

The injury-in-fact test adopted under section 14.44 is consistent with the construction of similar language by courts of other states. A Wisconsin statute granting standing to appeal a final agency decision if it directly affects a person's rights, duties, or privileges was construed in *Wisconsin Environmental Decade v. Public Service Commission*[74] to require two showings: (1) direct injury to the person's interest, and (2) an interest that is protected by law. In that case, the court noted that its test is similar to that adopted in *Data Processing Service Organizations v. Camp.*[75] In effect, the court equated a legal right with a legally recognized interest. Since the law of standing to intervene is closely related to the law of standing to appeal,[76] such cases are instructive on the issue of the nature of the legal rights, duties, and privileges that should be recognized in determining a person's standing (right) to intervene in a contested case.

6.2.2 Objections and Hearing

The petition for intervention must be served on all parties and the agency. Within seven days, those parties objecting to the petition must file a notice of their objection that states the reasons for their objection. The objection must be served on all parties, the petitioner, and the agency. If there is insufficient time to file written objections before the hearing commences, oral objections may be made at the hearing.[77] A hearing on the petition is required only if the ALJ determines that a full record is needed to decide if intervention is appropriate or to determine the permissible scope of intervention.[78] If no hearing is held, these matters are determined on the basis of the filings submitted. In determining whether intervention is permissible, the petitioner is not required to prove his allegations. In the absence of sham or frivolity, the allegations in the petition will be accepted as true.[79]

6.2.3 Adequacy of Existing Representation

If the requisite grounds for intervention exist, the petition must be granted unless the petitioner's interests are adequately represented by an existing party.[80] Generally, the

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v. Simon, 950 N.W.2d 70, 78 (Minn. Ct. App. 2020) (explaining that *McKee* is generally limited to a challenge of "specific disbursements" to warrant taxpayer standing).

[74] 69 Wis. 2d 1, 10, 230 N.W.2d 243, 248 (1975).

[75] 397 U.S. 150, 152-53 (1970). In that case, the United States Supreme Court held that standing requires a showing of injury in fact to an interest arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *But see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 (2014) (clarifying the "zone of interests test" applies only to statutory causes of action and causes of action under the APA). *But see Sierra Club v. Trump*, 963 F.3d 874, 894 (9th Cir. 2020), *vacating as moot*, 142 S. Ct 46, No. 20-138 (July 2, 2021) (explaining the "zone of interest test" may be "superfluous" because "so long as a litigant is asserting an injury in fact to his or her constitutional rights, he has a cause of action."). *Id.* (citing Erwin Chemerinsky, Federal Jurisdiction 112 (7th ed. 2016) (cleaned up).

[76] *See infra* notes 120 and 121 and accompanying text. Some courts have held that the interests are the same. *See, e.g., E. Me. Elec. Co-op. v. Me. Yankee Atomic Power Co.*, 225 A.2d 414, 415 (Me. 1967).

[77] Minn. R. 1400.6200, subp. 2 (2013).

[78] *Id.*, subp. 2a.

[79] *Costley v. Caromin House*, 313 N.W.2d 21, 28 (Minn. 1981); *Snyder's Drug Stores v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 31, 221 N.W.2d 162, 164 (1974).

[80] Minn. R. 1400.6200, subp. 3 (2013).

petitioner must show that existing parties do not adequately represent his or her interests.[81] However, the showing required is minimal,[82] and where the intervenor's interest is similar to, but not identical with, a party's interest, intervention should not be denied unless it is determined that representation by existing parties will, in fact, be adequate.[83] A party's representation generally is considered to be adequate to protect the proposed intervenor's interest if there is no showing of collusion between the representative and the opposing party, if the representative does not represent an interest adverse to that of the petitioner, and if the representative does not fail in the fulfillment of its duty.[84]

Historically, courts have been reluctant to permit taxpayers or other interested persons to intervene in matters involving the public interest when those matters are prosecuted or defended by the proper governmental authority.[85] Where an agency represents the public interest, a strong showing of inadequate representation must be made; it must be shown that collusion, adversities of interest, possible nonfeasance, or incompetence is involved.[86] However, in administrative proceedings, the courts have recognized that agencies may not adequately represent the public interest in all cases[87] and that members of the public should be allowed to intervene in some cases as private attorneys general to vindicate broad public interests. Thus, in *Office of Communication of United Church of Christ v. Federal Communications Commission,*[88] the court granted intervention to members of the listening public in a license renewal proceeding noting, in part, that the agency was unable to monitor thousands of broadcasters to evaluate their service. It is clear that an agency may be unable to adequately represent the public interest for other reasons, such as lack of staff, money, or commitment. Furthermore,

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[81] *State v. Erickson*, 285 N.W.2d 84, 87 (Minn. 1979); *Sewerage Comm'n v. State Dep't of Natural Res.*, 104 Wis. 2d 182, 187, 311 N.W.2d 677, 680 (1981). *Contra In re Vt. Pub. Power Supply Auth.*, 140 Vt. 424, 432-33, 440 A.2d 140, 143 (1981). (explaining under the then-controlling civil procedure rules, the applicants merely needed "to claim an interest relating to the property or transaction") *See In re Green Mountain Power Co.*, 208 Vt. 349, 357-58 (2019).

[82] *Citizens Coordinating Comm. on Friendship Heights v. TKU Assocs.*, 276 Md. 705, 713, 351 A.2d 133, 138-39 (1976) (stating that the applicant need only show a serious possibility that his or her interests may not be adequately represented); *see also Dudkin v. Mich. Civil Serv. Comm'n*, 127 Mich. App. 397, 404, 339 N.W.2d 190, 194 (1983), *superseded on other grounds by statute as stated in Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Green*, 302 Mich. App. 246, 268-69 n.3, 839 N.W.2d 1, 12-13 n.3 (2013), *overruled on other grounds by statute as stated in United Auto., Aerospace & Agr. Implement Workers of Am. v. Green*, 498 Mich. 282, 294 (2015).

[83] *Costley v. Caromin House*, 313 N.W.2d 21, 28 (Minn. 1981). This principle is consistent with the spirit of the civil rules. The courts have repeatedly stated that Minn. R. Civ. P. 24.01 should be liberally applied to encourage all legitimate interventions. *E.g., Gruman v. Hendrickson*, 416 N.W.2d 497, 500 (Minn. Ct. App. 1987).

[84] *Sewerage Comm'n v. State Dep't of Natural Res.*, 104 Wis. 2d 182, 187, 311 N.W.2d 677, 680 (1981).

[85] *Mankato Aglime & Rock Co. v. City of Mankato*, 434 N.W.2d 490, 493 (Minn. Ct. App. 1989) (holding that a construction company does not have standing to challenge an agency order staying a competitor's debarment on the grounds that it is a taxpayer and has a right to challenge illegal conduct by a public official; therefore, the company's request that the agency be ordered to hold a contested case hearing so that it could intervene is denied); *see also Denver Chapter of Colo. Motel Ass'n v. City & Cnty. of Denver*, 150 Colo. 524, 527, 374 P.2d 494, 496 (1962); *Noble v. City of Lincoln*, 158 Neb. 457, 470, 63 N.W.2d 475, 484 (1954); *Williamson v. Bethlehem Steel Corp.*, Civ-1971-487, 1978 WL 13955, at *1-2 (W.D.N.Y. Sep. 12, 1978).

[86] *Williamson*, 1978 WL 13955, at *2.

[87] *Scenic Hudson Pres. Conf. v. FPC*, 354 F.2d 608, 624 (2d Cir. 1965).

[88] 359 F.2d 994, 1003 (D.C. Cir. 1966).

there may be no single public interest to represent, but competing public interests that cannot be effectively represented by the agency alone.[89] A private citizen may also have standing to assert broad public rights if the state has adopted a public trust doctrine[90] or if such a standing is authorized by statute. For example, in Minnesota citizens have standing to intervene in all administrative proceedings having an adverse environmental impact.[91]

6.2.4 Intervention as a Right or Privilege

Most rules of civil procedure recognize two types of intervention: intervention of right and permissive intervention that is discretionary with the court.[92] A person allowed to intervene under either alternative becomes a party to the case with nearly all the rights of an original party.[93] The intervention rule for contested cases is structured in a different fashion. In contested cases, the ALJ does not have discretionary authority to allow permissive intervention as a party. If a proper showing is not made, permissive intervention is not available under the rule. Instead, the ALJ may permit the unsuccessful applicant to engage in limited participation at the hearing.[94] Such "permissive participation," which is available to any person, is discretionary with the ALJ and is limited to entering an appearance, presenting testimony and exhibits, and questioning witnesses.[95] Persons who are allowed limited participation in the hearing do not become parties to the contested case and do not enjoy the rights available to parties.[96]

Although permissive intervention as a party is not available under the contested case rule, such permissive intervention may be available under a statute, a court decision, or a rule of the agency that orders the hearing. Some agency statutes[97] and rules[98] specifically address intervention in contested cases.

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[89] 3 KENNETH C. Davis, ADMINISTRATIVE LAW TREATISE § 16.11, at 68 (3d ed. 1994)

[90] *See, e.g., Muench v. Pub. Serv. Comm'n*, 261 Wis. 492, 514, 53 N.W.2d 514, 524 (1952) (recognizing the legal right of citizens to enjoy navigable streams for recreational purposes, including scenic beauty, hunting, and fishing, under public trust doctrine).

[91] Minnesota Environmental Rights Law, Minn. Stat. § 116B.09 (2014). The right to intervene in administrative proceedings has been described as the most valuable right conferred by the act. David P. Bryden, *Environmental Rights in Theory and Practice,* 62 MINN. L. REV. 163, 218 n.379 (1978).

[92] *See, e.g.*, Minn. R. Civ. P. 24.01, .02.

[93] Thus, a limited intervenor has been held to have the right to appeal issues on which intervention was not permitted. *In re Portland Gen. Elec. Co.*, 277 Or. 447, 454, 561 P.2d 154, 160 (1977).

[94] Minn. R. 1400.6200, subp. 3 (2013).

[95] *Id.*, subp. 5.

[96] *Id.*

[97] Minn. Stat. §§ 72A.22, .25 (intervention by any person in contested case hearings regarding unfair competition and unfair or deceptive insurance acts or practices), 116B.09 (intervention in administrative hearings by any person residing in state asserting environmental impairment or pollution), 182.661, subd. 3 (employee intervention in occupational safety and health hearings) (2014); *see also id.* § 47.54 (regarding appearances by persons protesting bank's application for detached facility).

[98] Minn. R. 7000.1750, subp. 4 (Pollution Control Agency), 7829.0800 (Public Utilities Commission) (2013).

6.2.5 Time for Intervention

Intervention is available after a contested case has been initiated by the agency's service of the notice of and order for hearing. There is; however, no provision for intervention at an earlier time, even though the agency may be engaged in negotiations with a potential party. Intervention is not available in informal negotiations undertaken by an agency before the commencement of a contested case proceeding.[99]

Once a contested case is initiated, there are no stated time limitations for filing intervention petitions in contested cases. Where good reasons exist; however, an agency may specify the final date for the submission of such petitions in its notice of and order for hearing, if it obtains the prior approval of the ALJ.[100] In addition, the ALJ may set intervention deadlines in a prehearing order. In all other cases, timeliness is determined by the ALJ based on the circumstances at the time of filing.[101] The criteria for determining the timeliness of intervention petitions in the courts are applicable in contested cases.[102] They include how far the case has progressed at the time the intervention petition is filed, the reasons for the delay, and the possible prejudice to existing parties caused by the delay.[103] In addition, the purpose of the intervention should be considered.[104] Where the right to intervene is otherwise proper, that right cannot be impaired. Therefore, an intervenor's rights cannot be prejudiced by an agency's settlement procedures,[105] and if a late-filed petition for intervention is caused by a defective or inadequate notice, the petition must be granted.[106] Likewise, if the denial of an intervenor's

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[99] *Action on Safety & Health v. FTC*, 498 F.2d 757, 762 (D.C. Cir. 1974) (holding that intervention is not available in precomplaint consent negotiations). Even when a proceeding has commenced, the courts have denied intervenors the right to participate in settlement negotiations. *Nat'l Welfare Rights Org. v. Finch*, 429 F.2d 725, 739 (D.C. Cir. 1970). In that case, the intervenor was denied participation in informal conferences between a federal agency and a state that were held after a conformity hearing commenced. Moreover, an intervenor is not necessarily entitled to insist on a hearing on issues other parties have resolved. *Citizens for Allegan County v. FPC*, 414 F.2d 1125, 1134 (D.C. Cir. 1969). Thus, employees have no standing to object to the withdrawal of an OSHA citation or elect party status to prosecute a citation the agency has withdrawn. *Marshall v. Occupational Safety & Health Review Comm'n*, 635 F.2d 544, 547-48 (6th Cir. 1980). However, they may object to the reasonableness of the abatement period for the correction of violations agreed to by the agency and the employer. *Donovan v. Allied Indus. Workers*, 760 F.2d 783, 784 (7th Cir. 1985). Under Minn. Stat. § 182.661 (2014), the permissible scope of an employee's participation in contested cases regarding occupational safety and health violations is much broader than the permissible scope of an employee's participation in occupational safety and health cases under federal law.

[100] Minn. R. 1400.6200, subp. 1 (2013).

[101] *Id.* This is the rule generally followed by the courts. *SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 230 (Minn. 1979).

[102] *In re Union Carbide Corp.*, 308 N.W.2d 753, 759 (S.D. 1981).

[103] *SST*, 288 N.W.2d at 230; *Engelrup v. Potter*, 302 Minn. 157, 165, 224 N.W.2d 484, 489 (1974).

[104] *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977); *Sewerage Comm'n v. State Dep't of Natural Res.*, 104 Wis. 2d 182, 192-93, 311 N.W.2d 677, 682 (1981) (Bablitch, J., concurring in part, dissenting in part).

[105] *Brooks v. A.M.F., Inc.*, 278 N.W.2d 310, 313 (Minn. 1979) (applying this concept to workers' compensation).

[106] *S.C. Loveland Co. v. United States*, 534 F.2d 958, 963 (D.C. Cir. 1976); *In re Wilmarth Line of C U Project*, 299 N.W.2d 731, 734-35 (Minn. 1980); *Minn. Loan & Thrift v. Commerce Comm'n*, 278 N.W.2d 522, 526-27 (Minn. 1979).

request for a continuance would effectively preclude the right to intervene, a continuance must be granted.[107] Where the intervenor fails to show diligence in seeking to intervene, his or her petition may be denied,[108] and his or her requests for a continuance may be refused.[109] Any order denying intervention as a right is appealable.[110]

Once the ALJ has issued a report, the ALJ loses jurisdiction is over the contested case, unless the agency that ordered the hearing is bound by ALJ's decision.[111] Therefore, where recommended decisions are involved, no intervention petitions should be filed with the ALJ after the judge's report is issued. They should be filed instead with the agency having final decision-making authority. If the judge's report is binding on the agency, any petition filed after it is issued should be filed with the ALJ.

As a general rule, however, the courts are reluctant to permit intervention after a case has been decided[112] unless the petitioner's only concern is in the remedial aspects of a case.[113] Thus, where the proposed intervenor failed to participate in the administrative hearing or in the initial appeal from the agency's decision, intervention was denied in the subsequent appeal to the Minnesota Supreme Court and in administrative proceedings held pursuant to the court's remand order.[114]

6.2.6 Who May Intervene

The persons who may intervene in an agency proceeding are those specified in the relevant statutes and agency rules, those who would be injured in fact by an adverse agency decision, and other persons with a direct interest in the proceeding. Intervention in contested

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[107] *In re St. Joseph Lead Co.*, 352 S.W.2d 656, 664 (Mo. 1961).

[108] *Easton Util. Comm'n v. Atomic Energy Comm'n*, 424 F.2d 847, 851-52 (D.C. Cir. 1970); *SST*, 288 N.W.2d at 230; *State v. Erickson*, 285 N.W.2d 84, 87 (Minn. 1979).

[109] *First Nat'l Bank v. Okla. Sav. & Loan Bd.*, 569 P.2d 993, 997 (Okla. 1977) (holding due diligence to be required); *see also Minn. Loan & Thrift v. Commerce Comm'n*, 278 N.W.2d 522, 526 (Minn. 1979).

[110] *Engelrup v. Potter*, 302 Minn. 157, 159, 224 N.W.2d 484, 485-86 (1974). However, such orders cannot be certified to the agency if they involve the meaning of the contested case rules. Minn. R. 1400.7600 (2013) (stating appeals in such cases would have to be taken directly to court without prior agency consideration). Other cases hold that orders denying motions to intervene as of right are appealable. *E.g., Norman v. Refsland*, 383 N.W.2d 673, 675-76 (Minn. 1986); *Tierney v. Am. Group Benefit Servs.*, 406 N.W.2d 579, 580 (Minn. Ct. App. 1987); *Koski v. Chicago & Nw. Transp. Co.*, 386 N.W.2d 282, 283-84 (Minn. Ct. App. 1986). Orders denying permissive intervention, on the other hand, are not appealable. *Husfeldt v. Willmsen*, 434 N.W.2d 480, 482 (Minn. Ct. App. 1989).

[111] Minn. R. 1400.8300 (2013).

[112] *Sewerage Comm'n v. State Dep't of Natural Res.*, 104 Wis. 2d 182, 187, 311 N.W.2d 677, 680 (1981). *But see Erickson v. Bennett*, 409 N.W.2d 884, 888 (Minn. Ct. App. 1987) (ruling that default judgment does not preclude intervention by interested person whose interests were not represented).

[113] *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 129 (D.C. Cir. 1972); *SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 231 (Minn. 1979) (discussing intervention to challenge proposed settlement agreement); *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 546-47, 334 N.W.2d 252, 256-57 (1983) (discussing intervention to challenge proposed settlement agreement).

[114] *People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 875 (Minn. 1978).

cases is closely related to the law of standing to challenge administrative action in court.[115] Agencies typically permit intervention by any person who would have standing to challenge their final decisions in court.[116] One rationale for permitting these persons to intervene is that an individual's right of judicial review is not effective unless he or she is permitted to participate in the agency hearing.[117] Based on a similar concept, a person with standing to bring a private damage action for anticompetitive practices has standing before an agency to object to such practices,[118] and the interest required for intervention is the same as that required to become a complainant.[119]

Under Minnesota Statutes section 14.63 (2014), any person "aggrieved" by the final decision in a contested case may seek judicial review in the court of appeals. For purposes of the statute, an aggrieved person is one who is "injured in fact" or whose interests are arguably within the zone of interests the statute was enacted to protect.[120] Otherwise stated, one is aggrieved or injuriously and adversely affected by an agency decision in a contested case when it operates on one's property rights or directly on one's personal interests.[121]

In a unanimous decision, the U.S. Supreme Court held that persons whose economic interests are affected by environmental restrictions placed on land and water use for the purposes of protecting endangered species have standing under the zone of interests test to seek judicial review of an agency's "biological opinion" under the Endangered Species Act.[122] In reinstating a lawsuit by a group of Oregon ranchers and irrigation districts seeking to block proposed environmental regulations limiting the release of water from an irrigation project, the Court stated that there was no basis for concluding that the citizen suit provision of the

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[115] *Nat'l Welfare Rights Org. v. Finch*, 429 F.2d 725, 732 (D.C. Cir. 1970); *Office of Commc'n of United Church of Christ v. FCC*, 359 F.2d 994, 1000 n.8 (D.C. Cir. 1966); *In re Portland Gen. Elec. Co.*, 277 Or. 447, 456-57, 561 P.2d 154, 161 (1977); DAVIS, *supra* note 89, § 16.10, at 65-67.

[116] DAVIS, *supra* note 89 § 16.11, at 67; *see also Koniag v. Andrus*, 580 F.2d 601, 605 (D.C. Cir. 1978); *Nat'l Welfare Rights Org. v. Finch*, 429 F.2d 725, 734-35 (D.C. Cir. 1970); *Fort Pierce Util. Auth. v. Dep't of Energy*, 503 F. Supp. 1014, 1022 (D. D.C. 1980).

[117] *Am. Communications Ass'n v. United States*, 298 F.2d 648, 650 (2d Cir. 1962). Professor Cooper supports this practice. 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 327 (1965).

[118] *Martin-Trigona v. Fed. Reserve Bd.*, 509 F.2d 363, 366 (D.C. Cir. 1974).

[119] *State ex rel. Consumers Pub. Serv. Co. v. Pub. Serv. Comm'n*, 352 Mo. 905, 920-21, 180 S.W.2d 40, 46 (1944).

[120] *McKee v. Likins*, 261 N.W.2d 566, 570 (Minn. 1977) (describing "injury in fact"); *Snyder's Drug Stores v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 32, 221 N.W.2d 162, 165 (1974); *see also Twin Ports Convalescent, Inc. v. State Bd. of Health*, 257 N.W.2d 343, 346 (Minn. 1977) (reiterating view that basic purpose of standing doctrine is to guarantee that there is sufficient case or controversy between parties to assure competent and proper presentation of issues to court). Professor Davis is critical of the latter test. *See* DAVIS, *supra* note 89, § 16.3, at 13. The "zone test" was established in *Ass'n of Data Processing Serv. Org. v. Camp,* 397 U.S. 150, 154 (1970) and *Barlow v. Collins,* 397 U.S. 159, 164 (1970). The zone test has been applied in determining whether a person is aggrieved. *Bank of Belton v. State Banking Bd.*, 554 S.W.2d 451, 453 (Mo. Ct. App. 1977). One court held that *aggrieved* means more than being dissatisfied with an agency order but is distinct from being adversely affected by it and includes persons allowed to intervene. *In re Portland Gen. Elec. Co.*, 277 Or. 447, 456-57, 561 P.2d 154, 161 (1977).

[121] *In re Getsug*, 290 Minn. 110, 114, 186 N.W.2d 686, 689 (1971). The law pertaining to a person's standing to appeal is discussed more fully in chapter 13.

[122] *Bennet v. Spear*, 520 U.S. 154, 166 (1997) (discussing 16 U.S.C. § 1533).

Endangered Species Act applied only to "under enforcement" by the government and not "over enforcement".

Although persons with standing to challenge an adverse agency decision usually are entitled to intervene, such standing is not required for intervention. The two doctrines standing in court and standing before an agency are similar, but different considerations are involved, and standing to intervene in agency proceedings is generally more liberally granted.[123]

The interest justifying intervention is often an economic one. Thus, as a general rule, competitors[124] or persons with a special economic interest are entitled to intervene in licensing proceedings or to challenge licenses issued in court.[125] An economic interest is sufficient if it involves only a potential competitor[126] or a potential applicant who desires to avoid an unfavorable legal precedent.[127] The economic interests of ratepayers normally have been regarded as sufficient to provide standing in proceedings to establish or challenge utility rates,[128] utility programs,[129] transit rates,[130] insurance rates,[131] and minimum coal prices.[132]

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[123] DAVIS, *supra* note 89, § 16.11, at 67; *see, e.g., Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) (stating that, to intervene in federal court, a party must satisfy the requirements of Rule 24 and have Article III case or controversy standing).

[124] *Interstate Broad. Co. v. FCC*, 285 F.2d 270, 272 (D.C. Cir. 1960); *Kirkby v. Mich. Pub. Serv. Comm'n*, 320 Mich. 608, 611, 32 N.W.2d 1, 2 (1948); *Minn. Loan & Thrift v. Commerce Comm'n*, 278 N.W.2d 522, 527 (Minn. 1979); *Nat'l Bank v. Patterson*, 442 Pa. 289, 297-98, 275 A.2d 6, 10-11 (1971); *Valley State Bank v. Farmers State Bank*, 87 S.D. 614, 621, 213 N.W.2d 459, 463 (1973). *But see Wis. Power & Light Co. v. Pub. Serv. Comm'n*, 45 Wis. 2d 253, 259, 172 N.W.2d 639, 642 (1969) (finding that an electric supplier that had built facilities to provide emergency services to city had no legal right, duty, or privilege that was directly affected by city's decision to build its own facilities or enter into contract with another supplier); *Milwaukee v. Pub. Serv. Comm'n*, 11 Wis. 2d 111, 121-22, 104 N.W.2d 167, 173 (1960).

[125] *FCC v. Nat'l Broad. Co.*, 319 U.S. 239, 263 (1943); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 471 (1940); *Nat'l Welfare Rights Org. v. Finch*, 429 F.2d 725, 736 (D.C. Cir. 1970) (holding that interest in welfare payments may give standing to seek review); *cf. Lodi Tel. Co. v. Pub. Serv. Comm'n*, 262 Wis. 416, 422, 55 N.W.2d 379, 382 (1952) (discussing a situation where a telephone company was aggrieved by users' petition for service by another telephone company).

[126] *Marine Space Enclosures v. Fed. Mar. Comm'n*, 420 F.2d 577, 590-91 (D.C. Cir. 1969) (discussing a situation where a potential competitor claimed undue restraint on competition).

[127] *Nat'l Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978) (holding that a potential licensee can intervene in a proceeding to determine if a mining licensee must prepare an environmental impact statement).

[128] *Tel. Users Ass'n v. FCC*, 375 F.2d 923, 923 (1967) (regarding telephone rates); *United States v. Pub. Util. Comm'n*, 151 F.2d 609, 613-14 (D.C. Cir. 1945); *Ex parte Ala. Textile Mfrs. Ass'n*, 283 Ala. 228, 230, 215 So. 2d 443, 445 (1968) (regarding electric rates); *In re Hawaiian Elec.*, 56 Haw. 260, 264, 535 P.2d 1102, 1105 (1975); *Cent. Me. Power Co. v. Me. Pub. Util. Comm'n*, 405 A.2d 153, 162 (Me. 1979); *Nev. Power Co. v. Pub. Serv. Comm'n*, 91 Nev. 816, 820-21, 544 P.2d 428, 432 (1975).

[129] *In re Implementation of Util. Energy Conservation Improvement Programs*, 368 N.W.2d 308, 313-14 (Minn. Ct. App. 1985) (holding that industrial utility customer has standing to appeal conservation improvement programs public utility commission ordered utility to adopt; fact that customer participated in administrative hearings was cited as relevant factor in determining customer's standing to appeal).

[130] *Bebchick v. Pub. Util. Comm'n*, 287 F.2d 337, 338 (D.C. Cir. 1961) (regarding public transit).

[131] *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 460, 468, 269 S.E.2d 538, 543-44 (1980); *Okla. State AFL-CIO v. State Bd. for Prop. & Cas. Rates*, 463 P.2d 693, 694 (Okla. 1970).

[132] *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (noting parties were acting as private attorneys general), *vacated*, 320 U.S. 707 (1943).

Ratepayers may be denied intervention if their interests are adequately represented by an agency[133] or if the court determines that intervention is discretionary with the agency.[134] Consumers other than rate payers also have been permitted to intervene if they vindicate broad public interests[135] or if their views would otherwise go without representation.[136] Yet, the interest or injury entitling a person to intervene in a contested case is not required to be economic. It also can be aesthetic, conservational, or recreational.[137] The interest may be one relating to health,[138] housing,[139] employment,[140] liberty,[141] or property.[142]

However, there is little precedent for permitting intervention in enforcement proceedings, license revocations, and other similar adjudications involving a respondent's violation of settled law and policy.[143] In such cases, the agency may adequately represent the

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[133] *Stuyvesant Town Corp. v. Impelliteri*, 280 A.D. 788, 788, 113 N.Y.S.2d 593, 593 (1952) (rent-fixing proceeding).

[134] *Compare Smith v. Pub. Serv. Comm'n*, 336 S.W.2d 491, 495 (Mo. 1960), *with State ex rel. Dyer v. Pub. Serv. Comm'n*, 341 S.W.2d 795, 797 (Mo. 1960) (leaving intervention by rate payers to agency discretion because interest alleged by intervenors was no different from that of general public).

[135] *Office of Commc'n of United Church of Christ v. FCC*, 359 F.2d 994, 1006 (1966). The status of the listeners was held to be that of private attorneys general who represented public interests, and not personal ones.

[136] *Snyder's Drug Stores v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 36, 221 N.W.2d 162, 166-67 (1974).

[137] *United States v. SCRAP*, 412 U.S. 669, 686-87 (1973); *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153-54 (1970); *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 615 (2d Cir. 1965); *cf. Wis. Envtl. Decade v. Pub. Serv. Comm'n*, 69 Wis. 2d 1, 10, 230 N.W.2d 243, 248 (1975). Persons alleging environmental damage have broad rights of intervention in administrative proceedings under Minn. Stat. § 116B.09 (2014).

[138] *Cf.* Minn. Pub. Interest Research Grp. v. Minn. Dep't of Labor & Indus., 311 Minn. 65, 68-69, 249 N.W.2d 437, 439 (1976) (standard-making proceeding); *Minn. State Bd. of Health v. City of Brainerd*, 308 Minn. 24, 37, 241 N.W.2d 624, 631 (1976) (statutory challenge).

[139] *Cf. Costley v. Caromin House*, 313 N.W.2d 21, 28 (Minn. 1981).

[140] *Pirrotta v. Indep. Sch. Dist. No. 347*, 396 N.W.2d 20, 22 (Minn. 1986) (finding in a school district proceeding held to lay off its least senior teacher who asserts greater seniority than another teacher, the other teacher may intervene); *Underwood v. State*, No. 78 Civ. 4382-CSH, 1979 WL 271, at *1 (S.D.N.Y. July 9, 1979) (intervention by persons receiving provisional appointments from eligibility list challenged as discriminatory); *Vulcan Soc'y v. Fire Dep't White Plains*, 79 F.R.D. 437, 441 (S.D.N.Y. 1978) (union intervention in discrimination case against employer).

[141] *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986) (intervention by newspaper to challenge order sealing portions of a court file pertaining to settlement); *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 546, 334 N.W.2d 252, 256 (1983) (intervention by newspaper to challenge settlement agreement that called for sealing of records of case).

[142] *No Power Line, Inc. v. Minn. Envtl. Quality Council*, 311 Minn. 330, 334, 250 N.W.2d 158, 160 (1976); *Comm. to Pres. Mill Creek v. Secr'y of Health*, 3 Pa. Cmwlth. 200, 207, 281 A.2d 468, 472 (1971); *cf. Ashwaubenon v. State Hwy. Comm'n*, 17 Wis. 2d 120, 128, 115 N.W.2d 498, 502-03 (1962) (city affected by change in location of highway has standing to appeal).

[143] *See* Joachim J. Volhard, *Intervention in Agency Adjudications*, 58 Va. L. Rev. 230 (1972) (discussing intervention problems in Federal Trade Commission proceedings); *see also* John P. Luddington, *Intervention in Federal Trade Commission Adjudicative Proceedings*, 19 A.L.R. Fed. 696 (1974 & Supp. 1997).

public interest, or the intervenor may not be considered to have a sufficient interest.[144] Some agency rules; however, permit intervention by specific parties in enforcement proceedings.[145]

In the absence of a statute or rule providing otherwise, intervention usually rests within the reasonable discretion of the ALJ.[146] That discretion must be exercised consistently with the rights and interests of the proposed intervenor and the plain language and intent of the underlying statutes and rules. Thus, if only one of two adverse interests is a party to the proceeding, the other should be permitted to intervene.[147] If the number of potential parties is substantial, the ALJ may order a reduction in order to ease the obvious burdens involved.[148] Likewise, when several persons represent the same interests, the ALJ must exercise reasonable discretion in determining which of them should be allowed to intervene in order to represent that interest.[149]

A narrow construction of the contested case intervention rule would run counter to current administrative trends and court decisions on standing to challenge agency rules and decisions. Agencies normally have discretion to permit intervention by persons who do not have a specific legal right, duty, or privilege, and the courts routinely recognize that such persons have standing. Consequently, a narrow construction of the contested case rule should not be adopted in determining whether a petitioner has a legal right, duty, or privilege that may be directly affected by a contested case. Rather, the right to intervene should be determined by the nature of the interest claimed, the purpose for intervention, the policies of the underlying statutes and rules, and relevant court decisions.

No simple rule exists for determining whether intervention is proper. This is due in large part to the fact that agencies are not fungible for intervention purposes.[150] They are subject to

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[144] *See, e.g., Baltimore Bldg. & Constr. Trade Council v. Barnes*, 290 Md. 9, 10 , 427 A.2d 979, 980 (Md. Ct. App. 1981) (holding labor union council did not have sufficient interest in prevailing wage complaint proceeding against nonunion contractor who allegedly violated wage rates required to be paid on public works projects). *But see W.J. Dillner Transfer Co. v. Pennsylvania Pub. Util. Comm'n*, 175 Pa. Super. 461, 470-71, 107 A.2d 159, 164 (1954) (allowing carrier to intervene on question of whether competitor was carrying goods in excess of authority); *Wood v. Metro. Nashville & Davidson Cnty. Gov't*, 196 S.W. 3d 152, 159 (Tenn. Ct. App. 2005).

[145] In enforcement proceedings under the Minnesota Occupational Safety and Health Act, employees may intervene. Minn. Stat. § 182.661, subd. 3 (2014); Minn. R. 5215.0200, subp. 16, .1400 (2013).

[146] *Gary Transit v. Pub. Serv. Comm'n*, 161 Ind. App. 7, 13, 314 N.E.2d 88, 91 (1974); *Boston Edison Co. v. Dep't of Pub. Util.*, 375 Mass. 1, 45, 375 N.E.2d 305, 332 (1978); *In re White*, 171 N.J. Super. 493, 499, 410 A.2d 66, 69 (1979). *But see St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 312 Minn. 250, 256-57, 251 N.W.2d 350, 355 (1977) (finding commercial and noncommercial users entitled to intervene in rate-making proceeding where rate structures discriminated against them); *Snyder's Drug Stores v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 34, 221 N.W.2d 162, 166 (1974) (finding public interest not represented).

[147] *Snyder's Drug Stores*, 301 Minn. at 34, 221 N.W.2d at 166.

[148] *City of San Antonio v. CAB*, 374 F.2d 326, 332 (D.C. Cir. 1967) (upholding agency order reducing number of parties from seventy-two to twenty-five in view of burdens seventy-two parties would create; noting that interest required for participation is greater where so many parties are involved).

[149] *See Office of Commc'n of United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir 1966) (discussing factors agency should consider in selecting intervenors from among members of listening public); *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 642-43 (Minn. 2012) (denying motion by nonprofit social welfare corporation to intervene because the nonprofit's position is substantially the same as position advanced by other intervenors).

[150] *Local 283, U.A.W. v. Scofield*, 382 U.S. 205, 210 (1965).

different statutes and rules and are created for a wide variety of purposes. The contested cases they commence may have a substantial effect on the general public and matters of public interest or may affect only a few specific persons. In agency hearings, an agency may act quasi-judicially, quasi-legislatively, adversarially, or in some combination of these three capacities. Also, the effect of intervention will vary substantially from case to case, as will the interests of the public and other third parties. A contested case involving an employee's discharge is a substantially different matter than one held to fix a utility's rate, just as the licensure of a solid waste dump is different from an action to fine an employer for unsafe working conditions or an action to revoke a doctor's license. All these factors will impact on the propriety of intervention in a given case.

Although the contested case rule should be given a liberal and practical construction, intervention may be denied when the petitioner's interests are not directly affected by the contested case. Thus, although an insurer who erroneously paid a debtor's medical expenses can intervene in the debtor's workers' compensation hearing, a general creditor cannot;[151] a citizens' group concerned with flood plain preservation cannot intervene in a contested case held to approve a septic system for a swimming pool, but an adjacent landowner can;[152] and a utility's competitor cannot intervene in a rate case for the purpose of showing unfair competition,[153] but the same competitor can intervene in the rate case as a ratepayer for the purpose of challenging the utility's rates.[154] An injury that is remote in time or that will occur only as the end result of a sequence of events set in motion by an agency's action may be sufficiently direct to confer standing.[155] However, intervention may be denied when the purpose of intervention is unrelated to the purpose of the hearing or the agency's authority. Thus, intervention by creditors was denied in a Transportation Regulation Board proceeding regarding the requested transfer of a regular route common carrier certificate and courier services permit where the purpose of the Board's hearing was to provide the public with adequate transportation services and not to protect the interests of private creditors.[156] Likewise, intervention in a utility rate hearing for the purpose of inquiring into the utility's hiring practices may be denied,[157] and a borough cannot intervene in a contested case hearing on a utility's proposal to transfer land, for the purpose of showing environmental harm by the grantees' proposed use of the land, if the grantee is not subject to the agency's jurisdiction.[158]

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[151] *Lemmer v. Batzli Elec. Co.*, 267 Minn. 8, 12-13, 125 N.W.2d 434, 438 (1963). It has also been held that the owner of licensed premises used by a lessee as a liquor store has no right to intervene in a disciplinary action against the lessee's license. *In re Franklin v. State Liquor Auth.*, 17 A.D.2d 1027, 1027, 235 N.Y.S.2d 273, 274 (1962); *accord Commonwealth v. Penelope Club*, 136 Pa. Super. 505, 513, 7 A.2d 558, 562 (1939) (surety on liquor licensee's bond).

[152] *Comm. to Pres. Mill Creek v. Sec'y of Health*, 3 Pa. Cmwlth. 200, 206, 281 A.2d 468, 471-42 (1971).

[153] *Cent. Me. Power Co. v. Me. Pub. Util. Comm'n*, 382 A.2d 302, 312 (Me. 1978).

[154] *Cent. Me. Power Co. v. Me. Pub. Util. Comm'n*, 405 A.2d 153, 162 (Me. 1979).

[155] *Wis. Envtl. Decade v. Pub. Serv. Comm'n*, 69 Wis. 2d 1, 14, 230 N.W.2d 243, 250 (1975).

[156] *In re Rochester Exp. Limousine Serv., Inc.*, 508 N.W.2d 788, 790 (Minn. Ct. App. 1993).

[157] *NAACP v. Penn. Pub. Util. Comm'n*, 5 Pa. Commw. 312, 326-27, 290 A.2d 704, 711-12 (1972).

[158] *Borough of Moosic v. Penn.*, 59 Pa. Commw. 338, 342-43, 429 A.2d 1237, 1240 (1981).

6.2.7 Scope of Intervention

In the courts, there is conflicting authority regarding the right of one party to assert another's rights or interests.[159] However, in contested cases, intervenors acting as "private attorneys general" may raise issues not personal to them.[160] The scope of an intervenor's participation, however, may be limited to those issues on which timely intervention was sought,[161] to those issues involved in the underlying case,[162] or to those issues in which he or she has a sufficient interest. It follows that the procedural rights of the intervenor to cross-examine witnesses, to present evidence, to engage in discovery, or to exercise the other rights of a party may be limited[163] as long as the intervenor has a meaningful opportunity for a hearing[164] and a right to introduce testimony and other evidence on those issues affecting his substantial rights.[165] In each case, the extent of the intervention permitted should be designed to balance the benefits of full intervention against the burdens created by prolonged cross-examination and the addition of new issues.[166] Particularly where public intervenors are involved, the scope of permitted intervention should depend on the extent to which they are affected by the proceeding (their stake in the outcome), the relevancy of their evidence to existing issues, and their ability to represent the interests they claim to represent.[167]

The contested case rule expressly authorizes the ALJ to specify the extent of participation permitted the intervenor in the order allowing intervention. The order must state the reasons for any limitations imposed. An intervenor may be allowed to file a written brief without acquiring the status of a party, to intervene as a party with all the rights of a party, or to intervene as a party but be limited to specific issues and to the means necessary to present and develop those issues.[168] Where more than one petitioner represents the same interests, the

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[159] Davis, supra note 89, §§ 16.11, at 68, 16.13, at 74.

[160] *Associated Indus. v. Ickes*, 134 F.2d 694, 705 (2d Cir. 1943), vacated, 320 U.S. 707 (1943).

[161] *Minn. Loan & Thrift v. Commerce Comm'n*, 278 N.W.2d 522, 526-27 (Minn. 1979); I*n re Portland Gen. Elec. Co.*, 25 Or. App. 469, 475, 550 P.2d 465, 469 (1976).

[162] An intervenor is generally not permitted to enlarge the issues in a case or to alter its nature. *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 494 (1944); *Fireman Fund Ins. Co. v. Gerlach*, 56 Cal. App. 3d 299, 302-03, 128 Cal. Rptr. 396, 398 (1976); *Mondale v. Comm'r of Taxation*, 263 Minn. 121, 125, 116 N.W.2d 82, 85 (1962); *Marshfield Cmty, Bank v. State Banking Bd.*, 496 S.W.2d 17, 24 (Mo. Ct. App. 1973).

[163] *Nat'l Welfare Rights Org. v. Finch*, 429 F.2d 725, 739 (D.C. Cir. 1970), *abrogated on other grounds as recognized in Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 78-79 (D.C. Cir. 1999).

[164] *Citizens for Allegan Cnty. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1965).

[165] *Garner Pub. Sch. Dist. No. 10 v. Golden Valley Cmty. Comm. for Reorganization of Sch. Dist.*, 334 N.W.2d 665, 673 (N.D. 1983).

[166] *See, e.g., Cent. Me. Power Co. v. Me. Pub. Util. Comm'n*, 382 A.2d 302 (Me. 1978). Because of these problems, courts will examine and comment on intervention that agencies have permitted. *Boston Edison Co. v. Dep't of Pub. Util.*, 375 Mass. 1, 35, 375 N.E.2d 305, 327 (1978) (criticizing allowance of individual to intervene in rate case); *People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 875 (Minn. 1978); *McGinley v. Wheat Belt Pub. Power Dist.*, 214 Neb. 178, 182-83, 332 N.W.2d 915, 918 (1983).

[167] Bernard R. Adams, *State Administrative Procedure: The Rule of Intervention and Discovery in Adjudicatory Hearings*, 7 NW. U.L. REV. 854, 866-91 (1980). The Minnesota Supreme Court has considered a party's stake in the outcome as an important aspect of standing. *See, e.g., Twin Ports Convalescent, Inc. v. Minn. State Bd. of Health*, 257 N.W.2d 343, 346 (Minn. 1977).

[168] Minn. R. 1400.6200, subp. 3 (2013).

ALJ may determine which of them will be permitted to intervene or require their cooperation in the case.

If an agency is in a neutral, quasi-judicial position with respect to a contested case, agency staff may intervene.[169] However, in such a case, the administrator with final decision-making authority must take steps to ensure that he is not prejudiced by staff participation.[170]

6.2.8 Participation without Intervention

In the absence of a petition for intervention, interested persons may, without becoming parties, enter an appearance, offer testimony and exhibits, and question witnesses at a contested case hearing.[171] The extent of such participation is discretionary with the ALJ and is most commonly permitted when the proceeding involves questions of legislative fact and important policy issues. The parties normally are entitled to question any persons offering testimony or exhibits under this rule. If the agency is not a party to the contested case and is acting in a quasi-judicial capacity only, the ALJ may permit an agency representative to question witnesses.[172] This enables the agency staff to clarify or complete the record.

6.2.9 Failure to Intervene

A person who fails to intervene or who withdraws as a party to a contested case does not waive his or her right to testify and may be called as a witness by another party.[173]

6.2.10 Appeal from Denial of Intervention

An order denying intervention of right in a civil action is directly appealable because that order is final as to the attempted intervenor.[174] In contrast, the court of appeals has held that an order denying intervention in a contested case is not final as to the attempted intervenor, who may seek review of the decision if aggrieved by the final order of the contested case.[175]

6.3 Consolidation and Bifurcation

6.3.1 Consolidation

In the absence of a statute to the contrary, two or more contested cases may be consolidated for hearing if they present substantially the same issues of law and fact, a holding

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[169] *Id.*, subp. 4.

[170] *Urban Council on Mobility v. Minn. Dep't of Natural Res.*, 289 N.W.2d 729, 736 (Minn. 1980).

[171] Minn. R. 1400.6200, subp. 5 (2013).

[172] *Id.* 1400.7900.

[173] *N. Messenger, Inc. v. Airport Couriers*, 359 N.W.2d 302, 304 (Minn. Ct. App. 1984).

[174] *Norman v. Refsland*, 383 N.W.2d 673, 675 (Minn. 1986).

[175] *In re Application by the City of Rochester*, 524 N.W.2d 540, 541-42 (Minn. Ct. App. 1994) (citing *Cnty. of Ramsey v. Minn. Pub. Utils. Comm'n*, 345 N.W.2d 740, 744 (Minn. 1984)).

in one case would affect the rights of parties in another, consolidation would save time and costs, and consolidation would not prejudice any party.[176] Consolidation may occur by agency action or order, by agreement of the parties, or by order of the ALJ issued either on the petition of a party or on the judge's own motion. An agency's authority to consolidate contested cases must be exercised before any of them are referred to the OAH.[177] A referral occurs when the agency requests the assignment of an ALJ.[178] Agency consolidations are reviewable by the ALJ on the filing of a petition for severance.[179] Contested cases may also be consolidated on the agreement of all parties. To obtain a consolidation order, the parties must file a written stipulation for consolidation signed by all of them.[180]

The ALJ may order the consolidation of contested cases on his own motion[181] or on the petition of a party.[182] However, *sua sponte* consolidation orders are limited to cases that are pending before the same judge.[183] If the cases to be consolidated are pending before different judges, consolidation must be obtained by agreement or by petition. Since a consolidation order issued by the judge on his or her own motion may be reviewed by a petition for severance, ex parte orders are permissible. The contested case rule does not authorize the ALJ to consolidate a contested case that has been commenced by the agency with a matter that has not been commenced as a contested case.

Petitions for consolidation must be served on all parties to the cases to be consolidated and on the agency if it is not a party. The original petition, with proof of service, must be filed with the ALJ. Any party objecting to the petition must serve and file its objections within ten calendar days following service of the petition.[184] Where more than one judge is assigned to the cases that are the subject of a petition for consolidation, the ALJ assigned to the first case submitted to the office will make the determination.[185] That determination may be made with or without a hearing. Consequently, the petition and any objections to the petition should contain the factual allegations the parties are relying on to support their positions. The order granting or denying consolidation must be made by a written order containing a description of

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[176] Minn. R. 1400.6350, subp. 1 (2013).

[177] *Id.*, subp. 2.

[178] *Id.* 1400.5300. The rule requires an agency to file its proposed notice of and order for hearing together with a request for the assignment of an ALJ before a contested case is commenced under Minn. R. 1400.5600, subp. 1 (2013). Since this is the initial referral of a contested case to the OAH, and since the word *referral* rather than *commenced* or *filed* is used, the request for an ALJ under part 14.00.5300 must be the referral contemplated in the consolidation rule. Such a construction is consistent with part 1400.7600, which prohibits an agency from deciding any motions after a judge has been assigned to a contested case. The initial referral of a contested case is frequently made by telephone. Where that is done, the date of the telephone call would be the operative date by which the agency may consolidate cases.

[179] *Id.* 1400.6350, subp. 2.

[180] *Id.*, subp. 6.

[181] *Id.*

[182] *Id.*, subp. 3.

[183] *Id.*, subp. 6.

[184] *Id.*

[185] *Id.*, subp. 4. It is unclear when a contested case is submitted. It could mean when filed, commenced, or referred.

the cases, the reasons for the order, and notification of a consolidated prehearing conference if one is to be scheduled.[186]

Any party may file a petition for severance following the receipt of a notice of, or order for, consolidation.[187] The severance procedure is designed to provide parties with an opportunity to object to consolidation made by an agency or ordered on the ALJ's own motion. It is not designed to reconsider the objections previously considered in connection with a petition for consolidation. The severance petition should contain the factual averments necessary to establish that consolidation is prejudicial to the petitioner, and it must be served on all parties and the agency at least seven business days before the first scheduled hearing date.[188] Parties objecting to severance should promptly file their objections with the ALJ and serve copies of their objections on the petitioner, the agency, and other parties.[189] The ALJ may order a hearing on the severance petition or make a determination on the basis of the filings made. If the ALJ finds that consolidation will be prejudicial to the petitioner, the ALJ may order severance or other relief that will prevent the prejudice from occurring.[190]

Normally, consolidation is a matter of administrative discretion.[191] It is designed to avoid a multiplicity of parties and the duplication of effort,[192] or to permit consideration of the component parts of the same problem.[193] Fairness and convenience may require the consolidation of two or more contested cases.[194] Thus, under the so-called *Ashbacker* doctrine,[195] consolidated or comparative hearings will be required to consider applications for mutually exclusive authority.[196] Under the *Ashbacker* doctrine, the party seeking consolidation

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[186] *Id.*, subp. 5.

[187] *Id.*, subp. 7.

[188] Normally this should be the hearing date originally noticed by the agency, and not the first actual day of hearing. If the hearing is continued, the time for filing a severance petition should not be changed. Severance petitions should be resolved promptly so that unnecessary delays and expenses, such as those concomitant with discovery, can be avoided.

[189] The rule does not mention objections to severance petitions, but parties would have a right to file them. The whole purpose of the severance petition process is to review prior ex parte consolidation decisions and provide the parties with an opportunity to address them.

[190] Minn. R. 1400.6350, subp. 7 (2013).

[191] *Am. Trucking Ass'n v. United States*, 326 U.S. 77, 83 (1945); *Bostick v. Martin*, 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322, 324 (1966); *Bayron v. N.Y. State Dep't of Motor Vehicles*, 284 N.Y.S.2d 187, 187, 28 A.D.2d 993, 993, (1967).

[192] *Wales v. United States*, 108 F. Supp. 928, 932 (N.D. Tex. 1952).

[193] *Chi. B. & Q. R.R.*, 154 Neb. 281, 287, 47 N.W.2d 577, 581 (1951).

[194] *Great W. Packers Express, Inc. v. United States*, 263 F. Supp. 347, 350 (D. Colo. 1966).

[195] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1946).

[196] *REA Express, Inc. v. United States*, 568 F.2d 940, 950 (2d Cir. 1977); *Delta Airlines v. CAB*, 228 F.2d 17, 21 (D.C. Cir. 1955). The doctrine is not limited to the transportation or communications fields. *See, e.g., Bio-Medical Applications of Clearwater v. Dep't of Health*, 370 So. 2d 19, 20 (Fla. Dist. Ct. App. 1979) (discussing the licensure of a kidney dialysis center); *Bay State Harness Horse Racing & Breeding Ass'n v. State Racing Comm'n*, 342 Mass. 694, 702, 175 N.E.2d 244, 250 (1961) (discussing mutually exclusive horse racing licenses); *Huron Valley Hosp. v. Mich. State Health Facility Comm'n*, 110 Mich. App. 236, 248, 312 N.W.2d 422, 427 (1981) (hospital certificate of need).

must show the mutual exclusivity of two bona fide applications.[197] Intervention is not an acceptable substitute for consolidation under the *Ashbacker* doctrine.[198]

6.3.2 Bifurcation of Issues

The issues in the contested case are sometimes bifurcated between liability and money or damage issues. This is done when the methodology for making numerical calculations or other legal issues are in dispute but the actual calculations themselves will not likely be disputed. In such cases, establishing the alternative dollar amounts would be a waste of time. As a result, those calculations are omitted. An agency is also permitted to bifurcate proceedings between jurisdictional issues and the merits.[199] Likewise, in discrimination cases, liability and damage issues are frequently bifurcated in class actions so that the damages payable to a large number of persons are not considered before liability is established. In many cases, however, bifurcation of the issues may not save time because interlocutory appeals from a resolution of one of the liability issues may not be available.[200]

[197] *Midw. Gas Transmission Co. v. Fed. Energy Regulatory Comm'n*, 589 F.2d 603, 621 (D.C. Cir. 1978).

[198] *See, e.g., Bio-Medical Applications*, 370 So. 2d at 23.

[199] *Hentges v. Minn. Bd. Water & Soil Res.*, 638 N.W.2d 441, 448-49 (Minn. Ct. App. 2002).

[200] *In re Commodore Hotel Fire & Explosion Case*, 318 N.W. 2d 244, 246 (Minn. 1982). *In State v. Sports & Health Club*, 370 N.W.2d 844, 848 (Minn. 1985), the court held that discretionary review of liability and class certifications in human rights cases is available in an appropriate case.