LIABILITY FOR ATTORNEYS' FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT—*RATON GAS TRANSMISSION CO. v. FERC*

I. INTRODUCTION

On December 8, 1989 the United States Court of Appeals for the District of Columbia Circuit decided *Raton Gas Transmission Co. v. FERC* (*Raton II*).[1] The court held that Raton had prevailed sufficiently in a previous action[2] (*Raton I*) against the Federal Energy Regulatory Commission (FERC or the Commission) and the Commission was not substantially justified in defending the suit. Raton, therefore, was entitled to recover attorneys' fees expended in preparing for and during the course of litigation with the agency. The court, however, disallowed any recovery of court costs because of provisions of the Natural Gas Act[3] (NGA) that bar such recovery. The question of whether a party prevailing against a federal agency such as the FERC can recover costs expended during litigation is answered and put to rest by *Hirschey v. FERC*.[4] On the other hand, the recovery of attorneys' fees is permitted by the Equal Access to Justice Act (EAJA).[5]

To obtain such recovery, the party requesting attorneys' fees must satisfy three conditions. First, it must be the prevailing party in the underlying litigation. Second, the agency must not have been substantially justified in its position. Finally, there must not exist any circumstances that would make an award of attorneys' fees unjust.[6]

Because it is no longer contended that the taxation of court costs is statutorily barred,[7] the common underlying issues in litigation against a federal

---

1. Raton Gas Transmission Co. v. FERC, 891 F.2d 323 (D.C. Cir. 1989).

2. Raton Gas Transmission Co. v. FERC, 852 F.2d 612 (D.C. Cir. 1988).

3. Natural Gas Act § 22, 15 U.S.C. § 717(u) (1988). This provision provides that "[n]o costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter."

4. Hirschey v. FERC, 760 F.2d 305 (D.C. Cir. 1985). Here petitioner was the prevailing party in a case against the United States Government arising out of the Federal Power Act; however, despite being the prevailing party in the underlying litigation, the petitioner's claim for costs were denied. The court deemed the costs to be barred by FPA § 317, 16 U.S.C. § 825(p) (1982). The language of this section states in pertinent part: "No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter." *Id.* This language of the Federal Power Act is identical, in respect to the awarding of costs, to the language found in NGA § 717(u) and therefore provides the court with a basis of denying Raton costs under the provisions of the Natural Gas Act.

5. Equal Access to Justice Act, § 204(a), 28 U.S.C. § 2412(b), (d)(1)(A) (1988).

6. *Id.*

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any [taxable] costs . . . , incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought . . . against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

7. *Raton II*, 891 F.2d at 324.

agency for the purpose of recovering attorneys' fees are usually: (1) Did the requesting party prevail in the action? (2) Was the Commission's position substantially justified? (3) Were there any special circumstances present that would make the award of attorneys' fees unjust? These issues track the EAJA[8] as it sets forth the conditions that must be satisfied before a party prevailing against a federal agency will be awarded attorneys' fees.[9]

Despite the seemingly clear language of the EAJA, Congress and the Supreme Court have never agreed as to what precise standard a federal agency should be held to in defending a particular regulation. This note details the background of attorneys' fees and how *Raton II* provides some clarification in the area of attorneys' fees awarded to parties who prevail against federal agencies.

II. THE *RATON* CASE

A. Background

Raton brought suit for taxation of costs and the recovery of attorneys' fees against the FERC,[10] that were incurred as a result of an earlier lawsuit between Raton and the FERC. Events leading up to the first suit against the FERC began in 1986 when Raton requested the Commission to allow it to pass a decrease in the cost of gas to its customers by means of a "Purchased Gas Adjustment" (PGA). The PGA processing fees were set in Order No. 361,[11] and Raton forwarded to the Commission a check for $2,300 to satisfy the fee requirement. When notified by the Commission that the fee had been increased to $4,000, Raton paid the balance under protest. When remittance and a rehearing were denied, Raton brought the matter to the Untied States Court of Appeals for the D.C. Circuit.[12]

Raton first contended that no fee should be charged "since its filing would merely enable it to lower the price of its gas, and would not result in any special benefit."[13] This attack on Order No. 361 was rejected by the court since it was made after the expiration of the 60-day period of judicial review. However, the court found merit in Raton's second contention that the fee was not commensurate with the cost to the Commission of processing Raton's six-page filing.[14] This second contention did not implicate Order No. 361 but focused instead "on the increase announced only a month prior to Raton's motion for relief."[15] Therefore, the court in *Raton I* found the petition for review of the Commission's decision to be timely. It thus vacated the Commission's order and remanded the case for reconsideration of the reasonableness of the $4,000 fee. After successfully resolving this issue with the FERC,[16]

8. § 204(a), 28 U.S.C. § 2412(b), (d)(1)(A) (1988).
9. *Id.*
10. *Raton II*, 891 F.2d at 324.
11. Order No. 361, 18 C.F.R. pts. 154, 381 (1987).
12. *Raton I*, 852 F.2d at 612.
13. *Raton II*, 891 F.2d at 324.
14. *Raton I*, 852 F.2d at 617.
15. *Id.*
16. *Id.* at 619.

Raton then sought recovery of attorneys' fees.

Raton argued that because it was the prevailing party in the original action, it was entitled to tax costs and recover attorneys' fees under the EAJA. Raton further asserted that the FERC was not substantially justified in its position and therefore, not entitled to protection under the EAJA.[17] After the Commission objected to the request for costs as impermissible under section 22 of the NGA,[18] Raton withdrew the request. The parties stipulated that Raton was, in fact, a prevailing party.[19] However, the FERC stated that it was substantially justified in its position and thus not required to pay attorneys' fees.[20] Hence, the only substantial issue before the court was whether Raton could recover attorneys' fees under the EAJA.[21]

B. Decision of the Case

The D.C. Circuit Court of Appeals prohibited Raton under the plain language of the NGA from recovering court costs from the FERC; however, an award of attorneys' fees was permitted under the EAJA. The court stated that: "Raton prevailed sufficiently to qualify for recovery of attorneys' fees in some amount, and that the Commission was not substantially justified in advancing the defenses we found lacking."[22]

The first issue concerned the amount of recovery allowed per hour for the service of a legal clerk.[23] The second contested issue was whether Raton could recover the expenses associated in responding the Commission's motion to dismiss.[24] Finally, the court focussed on the number of issues raised by Raton and the number ultimately decided in Raton's favor. This allowed the court to use Raton's successful grounds as a means of computing the number of hours that should be deemed reimbursable.[25] Raton asserted that a 15% reduction in fees would be appropriate because it did not prevail on all four issues; however, the court did not accept this figure. Because Raton prevailed on the two claims it spent most of its time on, a reduction of less than 50% was in order.

Because Raton did not provided the court with an adequate description of how much time was spent on each issue, the court was unable to "determine with a high degree of certainty that the hours billed were reasonable."[26] The

17. 28 U.S.C. § 2412 (1988).

18. 15 U.S.C. § 717(u) (1988).

19. *Raton II*, 891 F.2d at 324.

20. *Id.* at 328.

21. § 204(a), 28 U.S.C. § 2412(b), (d)(1)(A) (1988).

22. *Raton II*, 891 F.2d at 324.

23. The court found that $40 per hour for an associate's work was reasonable and allowed that amount. Legal assistants such as paralegals, law clerks and recent law graduates are to be compensated at their respective market rates. Missouri v. Jenkins, 109 S. Ct. 2463, 2470-72 (1989).

24. Because the Commission's motion was clearly justified, Raton's request for the ten hours spent responding to the motion was disallowed.

25. The court held that, "Raton pressed four major contentions and it succeeded on two—timeliness of its assault on the fee increase, and absence of a showing of cost-justification and fairness thereof." *Raton II*, 891 F.2d at 330.

26. *Id.* at 331.

court ultimately decided to cut by 25% the total amount in fees requested by Raton. The court again used its discretion and cut by 50% the twelve hours requested for the time spent in preparing the application for fees. In the end, Raton was awarded $12,268 for attorneys' fees[27] including allowable fees and expenses[28] expended in litigation.

III. *RATON* IN HISTORICAL PROSPECTIVE

Cases and statutes prior to the D.C. District Court of Appeals' decision in *Raton II* illustrate the problems that exist within the area of attorneys' fees. In cases preceding *Raton II*, concepts such as substantial justification and prevailing party were never clearly defined by Congress or consistently applied by the Supreme Court. Because of congressional and judicial discord, these essential concepts have been indiscriminately applied.

A. Doctrine of Sovereign Immunity: Court Costs

The doctrine of sovereign immunity prohibits an award of costs and attorneys' fees against the United States unless Congress expressly authorizes such an award.[29] Congress in 1966 amended the EAJA to expressly eliminate the need for numerous specific exceptions to assess such costs.[30] The amendment empowered a court with adequate jurisdiction to award judgment for costs against the United States unless otherwise specifically provided for by statute.[31] The NGA is one such statutory prohibition against the assessment

---

27. *Id.* Appendix Court's Fee Calculations:

Amounts Requested:	
Attorney (110 hours x $95.83 per hour)	$10,541
Associate (155 hours x $40 per hour)	6,200
Preparation for reply (10 hours x $95.83 per hour)	958
Subtotal	$17,699
REDUCTIONS:	
On fee application (6 hours)	$-575
On Reply (10 hours)	-958
25% overall reduction of time spent in underlying litigation:	
25% x ($16,741 - $1,150 = $15,591)	$-3,898
Fee Award	$12,268

Id.

28. 34 C.F.R. § 21.33 (1989) sets forth allowable fees and expenses and is to be utilized by the courts in making such a determination. Subsection (c) provides:

> Allowable fees and expenses include the following, as applicable: (1) An award of fees based on rates customarily charged by attorneys, agents, and expert witnesses. (2) An award for the reasonable expenses of the attorney, agent, or expert witness as a separate item if the attorney, agent, or expert witness ordinary charges clients separately for those expenses. (3) The cost of any study, analysis, report, test, or project related to the preparation of the applicant's case in the adversary adjudication.

Id.

29. Natural Resources Defense Council Inc. v. EPA, 512 F.2d 1351 (1975) citing United States v. Chem. Found., Inc., 272 U.S. 1, 20 (1926).

30. Equal Access to Justice Act of 1966, Pub. L. No. 89-507, § 1, 80 Stat. 308 (1966).

31. *Id.*

of court costs.[32]

The NGA prohibits an assessment of costs against the FERC in any judicial proceeding arising under the NGA.[33] Private parties challenging governmental agencies in this arena are unable to recover costs despite the 1966 amendment to the EAJA, which authorized the award of cost. However, recent decisions have interpreted the plain language of the NGA as prohibiting parties only from recovering costs against federal agencies and not attorneys' fees.[34] To better understand when parties are entitled to costs and attorneys' fees against federal agencies, a historical perspective is necessary.

B. The American Rule: Common Law Treatment of Attorneys' Fees

The predominant rule of law governing attorneys' fees is the common law rule referred to as the "American Rule."[35] Under this rule, litigants in an action, regardless of outcome, are responsible for their own attorneys' fees.[36] This rule is still the dominant rule today.[37] As with any rule of law, however, the American Rule has its exceptions.[38]

One such exception that recognized the need for costs and fees to be awarded to a party who prevailed against a federal agency was the "private attorney general doctrine." To Congress, the private attorney general doctrine was fundamental to the recovery of attorneys' fees.[39] The doctrine is founded upon the notion that private enforcement is essential to the judicial process.[40] To further promote this doctrine, the appellate court in *Alyeska Pipeline Service Co. v. Wilderness Society*[41] allowed a party to recover attorneys' fees against a federal agency despite the fact that there did not exist an expressed statutory authorization of such, and the Supreme Court reversed.[42]

The rejection by the Supreme Court of the private attorney general doctrine generated great concern within Congress. In direct response to the Supreme Court decision in *Alyeska*, Congress enacted several reforms to counter the reaffirmation of the American Rule. The first of these reforms was the Civil Rights Act of 1964 Attorneys' Fee Amendment of 1976.[43] By enact-

---

32. 15 U.S.C. 717(u) (1988).

33. *Id.*

34. *See infra* note 65.

35. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). *See also*, R. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1981) [hereinafter Larson].

36. *Alyeska*, 421 U.S. at 247. The Court stated that "[I]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." *Id.*

37. *Id.* at 247. The Court states that "[I]n 1796, this Court appears to have ruled that the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorney's fees in federal courts." *Id.*

38. *Id.* at 245. *See also*, Larson, *supra* note 34, at 4.

39. S. REP. NO. 1011, 94th Cong., *reprinted in* 1976 U.S. CODE & CONG. NEWS, 5908.

40. *Id.* at 5910. "[A]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."

41. *Alyeska*, 421 U.S. at 240. *See also*, Larson, *supra* note 34.

42. *Id.*

43. 42 U.S.C. § 1988 (1976) provides:

ing this amendment,[44] Congress for the first time attempted to solidify the concept of concurring a benefit on a class through the legislative history.[45] In fact, Congress was so eager to establish the private attorney general doctrine as a legitimate exception to the American Rule, that the legislative history went so far as to state that this amendment was created to offset the decision in *Alyeska*.[46] Another Congressional response to the *Alyeska* decision came in the form of the EAJA.[47] This statute furthered the idea of private enforcement that began in the 1976 Civil Rights Amendment.[48]

C. *Equal Access to Justice Act*

The EAJA provides for the award of court costs and attorneys' fees to litigants who prevail against the United States Government.[49] "Prior to the enactment of EAJA, costs could generally be awarded against the United States but fees were barred. EAJA removed the bar to fee awards by making them available 'in addition to . . . costs . . . .' "[50] Furthermore, after considering the congressional intent of the enactment, the plain language of the NGA prohibiting the recovery of costs against the Commission has no bearing whatsoever in regard to the recovery of attorneys' fees under the EAJA.[51]

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the Untied States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

44. *Id.*

45. S. REP. No. 1011, 94th Cong., at 5908 *supra* note 38.

46. *Id.* at 5909. The Legislative History states that the purpose of this Amendment "is to remedy anomalous gaps in our civil rights as created by . . . *Alyeska Pipeline*."

47. 28 U.S.C. § 2412(d)(1)(a) (1988) provides:

> [E]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Id.

48. 42 U.S.C. § 1988 (1988).

49. *See infra* note 49.

50. Tulalip Tribes of Washington v. FERC, 749 F.2d 1367, 1369 (9th Cir. 1984).

51. The purpose of the bill extending and amending the EAJA is set forth in the Legislative History of P.L. 99-80 and is as follows:

> The purpose of the 'Equal Access to Justice Act,' as originally enacted in 1980, was to expand the liability of the Untied States for Attorneys' fees and other expenses in certain administrative proceedings and civil actions. The primary purpose of the act was to ensure that certain individuals, partnerships, corporations, businesses, associations, or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights.

H. REP. NO. 120, 99th Cong. *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS, 132-33.

D. Equal Access: Substantial Justification

The primary purpose of the EAJA is to assure that the costs involved in litigation do not deter private individuals from pursuing legal action stemming from unjustified government actions.[52] A major issue arising out of the EAJA[53] is the concept of "substantial justification."[54] Although an agency may have lost a suit brought against it, if that agency was justified in its position, then the prevailing party could not recover. It became clear, however, that a precise definition of substantial justification could not be reached between the Supreme Court and Congress. Both sought to define substantial justification within the context of attorneys' fees awards.[55] Congress did so through the legislative history of the EAJA[56] which described the difficulty that has surrounded the definition of substantial justification.[57] Despite the difficulty, Congress did define it and concluded that substantial justification was just that: substantial.[58]

The Supreme Court was not swayed by Congress's action and clung to the idea of a reasonableness standard for substantial justification. This standard was set forth in *Pierce v. Underwood*.[59] The Court stated that an agency is substantially justified if it is "justified to a degree that could satisfy a reasonable person."[60] With this pronouncement, the Court stated that it was not bound by the language of the EAJA, "since only the clearest indication of congressional command would persuade us to adopt a test so out of accord with prior usage, and so unadministerable, as 'more than mere reasonableness.' "[61]

E. Costs and Fees: Separate Components

Attorneys' fees and costs are two separate and distinct components of expense. The court in *Hirschey v. FERC*[62] addressed this issue. The petitioner sought attorneys' fees and costs after prevailing against the government in an action arising out of the Federal Power Act. The court awarded attorneys' fees under the EAJA and held that:

> (1) petitioner's claim for costs was barred by provision of the Federal Power Act stating that "no costs shall be assessed against the Commission in any judicial

---

52. *Id.*

53. 28 U.S.C. § 2412(d)(1)(a) (1988).

54. *Id.*

55. *See* Hill, *infra* note 73.

56. 28 U.S.C. § 2412(d)(a)(a) (1988).

57. *See* H.R. REP. NO. 120, *supra* note 50. The history states that "courts have been divided on the meaning of 'substantial justification' . . . . [B]ecause in 1980 Congress rejected the standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness." *Id.* at 9.

58. *Id.*

59. 487 U.S. 552 (1988).

60. *Id.* at 565. The court goes on to state in n.2, however, that "our analysis does not convert the statutory term 'substantially justified' into 'reasonably justified,' . . . but a position can be justified even though it is not correct, and we believe it can be substantially (for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.*

61. *Id.* at 566.

62. Hirschey v. FERC, 760 F.2d 305 (D.C. Cir. 1985).

> proceeding by or against the Commission under this Chapter"; (2) Equal Access to Justice Act does not condition award of attorney fees upon an award of costs; (3) petitioner was entitled to an award of attorney fees under EAJA for counsel time expended in pursuit of her claim . . . .[63]

The government had argued a "linkage theory" contending that the award of fees was prohibited where costs were disallowed under a separate statute.[64] The court promptly rejected this argument. A trend toward awarding attorneys fees under the EAJA despite the language of the NGA is evident by decisions in the Eighth, Third and Fifth Circuits.[65]

IV. SUMMARY OF RESOLUTION OF ISSUES

The court in *Raton II* addressed two major issues. The first issue was whether Raton could recover the taxation of costs incurred in litigation as a result of the FERC filing fee increase. The court denied Raton recovery of costs citing section 717(u) of the NGA which prohibits the assessment of any costs against the FERC. The second issue, whether Raton could recover attorneys' fees under the EAJA, required more than just a statutory interpretation explained in one paragraph of the court's opinion.

In addressing this second and more complex issue, the court was first concerned with determining whether Raton was the prevailing party in the underlying litigation. According to the Supreme Court in *Hensley v. Eckehart*,[66] "plaintiffs may be considered prevailing parties for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit." As a result of Raton's litigation, the fees imposed on Raton and many other small pipelines were drastically reduced.[67] Since Raton argued that the filing fee was unreasonably

---

63. *Id.*

64. *Id.* at 307.

> The Government urge[d] [the court] to adopt [a] theory of "linkage" between costs and fees on the ground that the language in subsection 2412(d)(1)(A) of EAJA, which permits the prevailing party to recover attorney's fees "in addition to any costs awarded pursuant to subsection (a)," somehow precludes an award of fees when the later cannot be *added* to an award of costs. In our view, this "linkage" argument is based on patently flawed premises and a wholly untenable reading of EAJA.

Id.

65. United States v. 341.45 Acres of Land, St. Louis County, Minnesota, 751 F.2d 924, 934 (8th Cir. 1984) ("we do not read § 2412(d)(1)(A) to condition an award of attorney's fees and other expenses upon an award of costs"); Washington Urban League v. FERC, 743 F.2d 166, 167 n.1 (3rd Cir. 1984) (same); United States v. 329.73 Acres, Grenada and Yalobusha Counties, 704 F.2d 800, 808 (5th Cir. 1983).

> If there is an anomaly in the matter of *court costs*, either intentionally or through inadvertence, the anomaly was created by Congress. Such anomaly, if indeed it is one, does not justify our failure as a court to ignore Congress' plainly expressed intention that *attorneys' fees* and *litigation expenses* may be awarded in condemnation cases unreasonably litigated by the government (emphasis original).

Hirschey, 760 F.2d at 309.

66. Hensley v. Eckerhart, 461 U.S. 424 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).

67. Upon the court's remand the Commission modified its regulation reducing the PGA filing fee to $1,800 for "nonmajor" natural gas companies situated similarly to Raton. Order No. 506, 18 C.F.R. pt. 381 (1990) as amended by Order No. 506-A, 18 C.F.R. pts. 201, 381 (1990).

high, and subsequently the Commission reduced the fee, Raton was the prevailing party for the purpose of the Supreme Court's definition. Recognizing this, the Commission did not argue that it was the prevailing party in the underlying litigation, but instead, argued that because it was substantially justified in the underlying litigation, no fees should be awarded under the EAJA.[68]

The court next determined that the Commission was not substantially justified in defending Raton's challenge to the filing fee. Substantially justified has been defined by the Supreme Court as "justified in substance or in main," rather than "justified to a high degree."[69] Under this standard, the Court held that "[a]t no time [has the Commission's] arguments been 'justified [either] in substance or in main.' "[70] The court held that because Raton's challenge was not a direct challenge to the Commission's power to set fees, but rather went to the reasonableness of a certain fee, the challenge did not implicate order No. 361. Because the new fee was nearly twice the amount of the original fee and the Commission failed to give the methods of recalculation in its order, the FERC fell short of meeting a reasonableness standard.[71] Hence, the FERC was not substantially justified in the underlying litigation.

Finally, the court in *Raton II* reasoned that because no special circumstances, that would make the award of attorneys' fees unjust, were voiced by the parties or perceived by the court, attorneys' fees were in order.

V. CONCLUSION

The court in *Raton II* simply followed recent decisions addressing the recovery of attorneys' fees in accordance with the EAJA.[72] The current practice is to allow a party prevailing against a federal agency to recover attorneys' fees and expenses associated with the cost of litigation unless the agency was substantially justified in its position or such an award would be simply unjust. The ancient, but still authoritative, language of the NGA not allowing the recovery of costs has no present bearing on the issue of whether attorneys' fees should be awarded in accordance with the EAJA. By enacting the EAJA, "Congress made the recovery of fees and expenses available in almost all administrative and judicial proceedings involving the federal government to otherwise eligible prevailing parties."[73] Recent amendments to the EAJA have broadened its scope in several respects. The 1985 amendments add the following language to EAJA:

> Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which

68. *Raton II*, 891 F.2d at 324.

69. *Pierce*, 487 U.S. at 566.

70. *Raton II*, 891 F.2d at 328.

71. *Id.* at 329.

72. This trend is clearly found in decisions reported in the Third, Fifth, and Eighth Circuits. *See supra* note 65.

73. Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 ARIZ. ST. L.J. 229, 259 (1987).

is made in the civil action for which fees and other expenses are sought.[74]

Review of an agency's action or inaction is no longer solely based on its litigation position. This language prevents the government from calling its position justified when its pre-trial actions leading up to the litigation were unreasonable. The amendments indicate a willingness by Congress to hold agencies liable for their actions by imposing the attorneys' fees necessitated by proceedings that federal agencies had no business initiating or defending. The language of the NGA cannot be read so narrowly as to ignore the clear congressional intent of the EAJA. The NGA's bar against costs simply has no bearing on the court's authority to award attorneys' fees under the EAJA. In short, if a party prevails against a federal agency and the court determines that the agency was not substantially justified in its litigation position, attorneys' fees should be awarded.

However, despite congressional intent to make it easier for prevailing parties to recover attorneys' fees, the Supreme Court defined substantially justified in terms most favorable to federal agencies. The court in *Raton II* rejects the congressional intent of the EAJA and chooses to accept the Supreme Court's definition of substantial justification. According to the court in *Raton II*, the standard to be applied in determining whether a federal agency is justified in its position is the reasonableness standard.[75] Nowhere in the decision does the *Raton* court mention the idea of the private attorney general doctrine.[76] Although this idea is fundamental in the legislative history of the EAJA,[77] the court goes to great lengths to adhere to the holdings of the Supreme Court.

It would seem that the language of the *Pierce* decision rings loud and true in the ears of the D.C. District Court of Appeals, "only the clearest indication of congressional command would persuade us."[78] As a result, the actions of the FERC did not pass the test of reasonableness, and thus the actions of the FERC were not substantially justified.[79]

Even though Raton prevailed against the FERC, future litigation against federal agencies by companies may not be as successful because the court in *Raton II* applied the reasonableness standard to substantial justification. Since the FERC only has to demonstrate that its litigation position was reasonable, the company bringing suit must meet a higher standard in showing that an agency was unreasonable in defending an action. Furthermore, Congress's attempt to establish the private attorney general doctrine as a method of recovery is destroyed. Therefore, by increasing the burden upon the compa-

74. *Id.* at 239.

75. *Raton II*, 891 F.2d at 328. The court adopted the test set forth in Pierce v. Underwood, 487 U.S. 552 (1988).

76. *Raton II*, 891 F.2d 323 (D.C. Cir. 1989).

77. *See* H.R. REP. NO. 99-120 *supra* note 51, at 9.

78. *Pierce*, 487 U.S. at 567-568.

79. *Raton II*, 891 F.2d at 329. The Court stated that the "decisional techniques do not survive the test of reasonableness."

nies, the court is stating that absent a showing of gross abuse by the FERC, a company is not going to recover attorneys' fees when it is a prevailing party.

Dwayne R. McClure
and
Mark T. Steele