

ADMINISTRATIVE PROCEDURES
FOR PROACTIVE REGULATION

Robert E. Burns, Esq.
Senior Research Associate

THE NATIONAL REGULATORY RESEARCH INSTITUTE
1080 Carmack Road
Columbus, Ohio 43210

March 1988

This report was prepared by The National Regulatory Research Institute (NRRI) with funding provided by participating member commissions of the National Association of Regulatory Utility Commissioners (NARUC). The views and opinions of the author do not necessarily state or reflect the views, opinions, or policies of the NRRI, the NARUC, or NARUC member commissions.

EXECUTIVE SUMMARY

This study treats two types of alternative procedures that might be used by state public utility commissions in place of trial-type, adjudicatory administrative procedures. These are procedures that can lead to more efficient determination of routine commission decisions and procedures that can be used to consider forward-looking economic, financial, and other regulatory policy issues. Since the inception of administrative law, state public utility commissions have used trial-type, adjudicatory procedures for setting rates. However, the commissions have recently been faced with complex, prospective policy issues that cannot be easily considered using adjudication. Also, many of these issues have a large number of potential solutions and any one solution will affect many of the interested parties. Indeed, the use of adjudicatory procedures when a state public utility commission deals with complex prospective policy issues may well be counterproductive. These trial-type procedures can lead to a less accurate policy decision because the procedure is inappropriate. In particular, use of a trial-type procedure creates the potential for the decision-maker to get incomplete information on an issue. Trial-type procedures remain appropriate for the routine rate case, where most of the main determinations to be made are factual.

Some early suggestions for innovations in the administrative process were made by Landis in 1939 in his landmark book, The Administrative Process. The compelling strength of Landis' ideas led to the eventual enactment of the Administrative Procedures Act of 1946, which codified existing adjudicatory administrative procedures and created what is now known as notice-and-comment rulemaking. Today, notice-and-comment rulemaking is a commonly accepted part of the administrative process. It is considered to be a more appropriate procedure than a formal adjudicatory procedure when an administrative agency is considering an industry-wide issue. About half of the state public utility commissions are subject to the Model State Administrative Procedures Act, a uniform state law that provides state administrative agencies with the option of using a notice-and-comment rulemaking procedure.

Like trial-type procedures, bare bones notice-and-comment rulemaking, unsupplemented by other procedures, leaves much to be desired. Notice-and-comment rulemaking does not provide the decision-maker an opportunity to delve deeply into the reasons why the written comments and testimony of the various parties responding during the notice period differ. Minimal notice-and-comment rulemaking often does not provide the decision-maker with an opportunity to gain an adequate understanding of the positions taken by the parties. Nor does it give the decision-maker an opportunity either to build a consensus or to gain a better understanding of the areas of agreement and disagreement among the parties. Because much of the policy formulation at an agency occurs before the notice of proposed rulemaking and the public comment period, there is no assurance in a minimal notice-and-comment rulemaking that interested parties will have early and effective participation in the agency's policy formulation. Finally, this type of rulemaking does not provide the decision-maker with an adequate forum to determine what might be the best of plausible alternative solutions to a policy problem. Because of dissatisfaction with both trial-type procedures

and minimal notice-and-comment rulemaking, more innovative procedural approaches are now sought for use with prospective policy issues, that is for proactive regulation.

One commentator, Cramton, suggested that any new procedural systems be judged by three criteria: accuracy, efficiency, and acceptability. Accuracy means that the procedural process should incorporate rational aspects of a decision-making process for the ascertainment of the truth, or as close an approximation of an optimal result as possible. Efficiency concerns the time, effort, and expense necessary to implement the procedure. Acceptability means that the procedure is considered to be fair, not only by those interested parties who are directly affected by the outcome, but also by the general public. One key attribute of fairness is the opportunity for early and effective participation in the agency's policy formulation process.

Some alternative procedures have greater commission efficiency as their goal. Other procedures are meant to lead to a more accurate outcome, and hence be more acceptable. Several agencies have experimented with streamlining techniques to achieve greater efficiency. Such techniques have the desirable effect of freeing up more time for the commissioner to consider the difficult, prospective policy issues that face commissions today. However, some streamlining techniques do not necessarily lead to a more accurate (or better quality) result. Streamlining techniques can be divided into two major categories: procedural and substantive.

Procedural streamlining techniques are those that change procedures in a fundamental way so as to speed up the agency's decision-making process. There are many examples of state and federal agencies experimenting with these techniques. Four broad categories may be defined: arbitration, mediation-arbitration, mediation, and summary proceedings. Arbitration is the most familiar of the streamlining procedures because of its prevalent use in labor disputes. In arbitration, two (or more) parties agree to be bound by the decision of a third party, the arbitrator, who listens to each side's case. Often, but not always, the arbitrator is chosen jointly by the two parties. Alternatively, there may be a panel of three arbitrators where the two parties each name an arbitrator and these two select a third arbitrator. Mediation-arbitration is used by only a few agencies. The procedure works like this: a neutral party (the mediator/arbitrator) is given the authority both to mediate a dispute toward a settlement and to arbitrate any remaining issues that cannot be resolved through mediation. The method of procedural streamlining used most widely by both the Federal Energy Regulatory Commission (FERC) and the state public utility commissions to reach settlements and stipulations is perhaps mediation. While there are many ways of mediating, the use of a special settlement judge, as both the FERC and the New York Public Service Commission do, appears to be particularly promising. A separate settlement judge assures the parties that they can deal openly and not have to worry about whether the judge who will hear the case on any unresolved issues will be biased by any statements made during negotiations in a settlement conference. Summary proceedings, the fourth type of procedural technique, can take several forms, such as proceedings relying solely on written submissions, paper hearings where no oral arguments are heard, and other abbreviated or abridged hearings.

Substantive streamlining, on the other hand, actually speeds up agency processes by changing the substance of what the commission is determining. There are several examples of state utility commissions and the FERC engaging in substantive streamlining to achieve efficiency. The best known example is the use of a fuel adjustment clause, which effectively takes fuel costs out of a rate case and allows automatic recovery of fuel expenses, often subject to a truing-up hearing. Other significant examples of substantive streamlining include the generic benchmark rate of return on common equity in use at the FERC, the attrition rate adjustment and electric rate case adjustment mechanism in use at the California Public Utilities Commission, the New York Public Service Commission's experiment with third-stage rate cases, the Alabama Public Service Commission's Rate Stabilization Program, and the Mississippi Public Service Commission's Performance Evaluation Plan.

Greater commission efficiency is the principal purpose of the procedural and substantive streamlining techniques just identified. Commissions might use the time freed up by this efficiency to deal with the complex policy issues facing them today with greater accuracy and acceptability. To consider difficult policy issues, commissions might find helpful other new procedures that are different from both adjudicatory, trial-type procedures and notice-and-comment rulemaking as well as from the streamlining procedures. Such new procedures could allow commissions to become more involved in proactive regulation by giving them other means by which they can examine prospective policy issues in a coherent, thorough, complete, efficient, and fair manner. Such procedures would allow the expertise of the commission to come to the forefront.

Several such procedures have been used by federal agencies and state public utility commissions to improve the quality and accuracy of regulatory planning that takes place when commissions make decisions on prospective policy issues. The procedures that have been used include negotiated rulemaking, commission workshops, technical conferences, commission task forces, consumer or scientific advisory committees, and scientific panels or boards of inquiry.

There are, of course, risks to implementing any new procedure, particularly the risk that the new procedure may not withstand judicial review. Several procedural guidelines have been developed to help minimize the risk.

There are eight such procedural guidelines. The first five of these guidelines concern the alternative procedure itself. They should be met to assure that the alternative procedure is itself fair and an improvement over existing trial-type or minimal notice-and-comment rulemaking procedures when considering prospective policy issues and will lead to a better and more accurate result. The first five guidelines are as follows: **first**, the procedure chosen should lend itself to a rational formulation of commission policy by being well suited for its purpose, whether that be consensus building, joint problem solving, determining a scientific fact, or considering polycentric policy issues; **second**, procedural due process should be guaranteed by giving public notice of the alternative procedure; **third**, all interested parties should be represented during the policy formulation stage of the procedure, possibly through a constituency organization;

fourth, the procedure should provide for collection of the information and data necessary for consideration of the policy issue; **fifth**, the procedure should provide for an advisory report to the commission or a record that summarizes what occurred, and has a discussion of the recommendations to the commission, including a review of all plausible alternatives to the recommendations that were considered and rejected. The next three guidelines do not concern the alternative procedure itself. Rather, they concern the administrative process that occurs after the alternative procedure. Fulfilling the last three guidelines enhances the chances that the alternative procedure will be able to withstand judicial review. The last three guidelines are as follows: **sixth**, public notice should be given that the commission is considering the advisory report or record, and there should be some opportunity for the general public to be heard before the commission makes its final policy determination; **seventh**, the commissioners must be the ultimate decision-makers, responsible for making a policy determination that is in the public interest and is consistent with applicable law; and **eighth**, the commission should announce its policy determination with a contemporaneous explanation in the form of a commission order or decision. If a commission were to follow the last three guidelines, the alternative procedure is combined with a more traditional procedure so that a procedure such as a workshop-rulemaking or a task force-abbreviated trial might result. The last three guidelines will be met automatically by conducting an adjudicatory proceeding or a rulemaking. This is required in states where the commission follows the Model State Administrative Procedures Act.

The various administrative procedures identified, namely negotiated rulemaking, workshops, technical conferences, advisory committees, task forces, and scientific panels, can be designed to meet some or all of the procedural guidelines set out above. To the extent that the procedural guidelines are fulfilled, these procedures can lead to a better, more accurate result without sacrificing the inherent quality of fairness that allows the procedure to withstand judicial review. The key to making these procedures inherently fair is to make certain that notice of the procedure is given and that at some point in the procedure all parties are given an opportunity to be heard. To the extent that early and effective public participation can be provided, the procedure becomes more fair. Also, it is important that the commission make certain that it retains the ultimate decision-making role. New procedures can be designed so as to be consistent with the Model State Administrative Procedures Act.

State public utility commissions can experiment with the alternative procedures identified and designed in this report by using them to consider current prospective policy issues. The alternative procedure chosen by a commission when considering any particular policy issue should be a match for what the commission is seeking to accomplish with the procedure. Negotiated rulemaking holds great promise for handling prospective policy issues when there is a limited number of negotiators to represent the interested parties and where there are enough issues to be decided so that the parties can engage in the give and take necessary for successful bargaining. State commissions can experiment with workshops for joint problem-solving when the policy issue calls for solutions that are more in the nature of forecasting or planning. A technical conference can be useful in those circumstances where the commission wants to obtain early technical

information on a topic of interest. Commission task forces can be particularly useful in handling large complex policy issues that have aspects calling for both negotiations and joint problem solving. Although they do not fulfill all of the procedural guidelines, both scientific panels and advisory committees can be useful in some limited circumstances. A scientific panel can be useful when there is a significant issue of scientific uncertainty at stake on which the determination of a prospective policy hinges. An advisory committee can sometimes be useful because of its informality and limited costs.

TABLE OF CONTENTS

| | |
|----------------------------|------|
| FOREWORD | xi |
| ACKNOWLEDGEMENTS | xiii |

| Chapter | | Page |
|---------|---|------|
| 1 | HOW ADMINISTRATIVE AGENCIES ACT | 1 |
| | A Brief History and Current Assessment. | 1 |
| | The Need for Alternatives | 5 |
| | Organization of the Report | 8 |
| 2 | THE LEGAL LITERATURE ON ALTERNATIVE ADMINISTRATIVE PROCEDURES | 11 |
| | Genesis of the Modern Administrative Process | 11 |
| | The Call for Innovative Procedures | 15 |
| | Two Responses: Negotiated Rulemaking and Scientific Boards of Inquiry | 22 |
| 3 | ALTERNATIVE ADMINISTRATIVE PROCEDURES NOW IN USE. | 35 |
| | Streamlining Techniques | 35 |
| | Procedures to Improve the Quality of Regulatory Policy Making. | 62 |
| | Other Legislative- and Executive-Type Procedures | 81 |
| 4 | GUIDELINES FOR DESIGNING ALTERNATIVE PROCEDURES | 85 |
| | Critique of Current Procedures. | 86 |
| | Guidelines for Alternative Procedures | 93 |
| | Design of Alternative Procedures | 106 |
| 5 | ILLUSTRATIONS OF THE USE OF INNOVATIVE ADMINISTRATIVE PROCEDURES | 115 |
| | An Electric Workshop Example. | 116 |
| | A Gas Technical Conference Example. | 120 |
| | Concluding Remarks. | 121 |

TABLE OF CONTENTS (continued)

| Appendix | | Page |
|----------|--|------|
| A | EXAMPLES OF STIPULATED OR NEGOTIATED SETTLEMENTS BY STATE PUBLIC SERVICE COMMISSIONS | 125 |
| B | SAMPLE SETTLEMENT RULES | 129 |
| | Settlement Rules for the Federal Energy Regulatory Commission | 130 |
| | State of New York Public Service Commission Procedural Guidelines for Settlements and Stipulations | 136 |

FOREWORD

The quest for finding workable alternatives to ponderous trial-type adjudicatory procedures has been a long and elusive one. We join in it with this report. The current occasion is the fact that commissions increasingly face complex prospective policy issues in all utility sectors that cannot be easily treated in a rate case trial-type setting. This report considers two kinds of alternatives, those of the streamlining variety and those of the forward-looking policy setting variety. We hope you find some useful ideas and information in it.

Douglas N. Jones
Director
Columbus, Ohio

March 1, 1988

ACKNOWLEDGEMENTS

The author wishes to thank Philip Harter, Chairman of the Dispute Resolution Committee of the American Bar Association's Section of Administrative Law, and Professor Nancy Rogers of the Ohio State University College of Law for their early encouragement on this project and for several leads that they gave concerning research sources. The author especially wishes to thank Dr. Kevin Kelly for pointing out the gaps, weaknesses, and ambiguities contained in the initial drafts and for suggesting how the analysis could be improved. The author also wishes to thank David Silverstone, Esq. for his several useful comments, which helped to improve the quality of this report. Finally, the author wishes to thank Peter Nagler, Graduate Research Associate, for his time and efforts in helping to proofread this report and Patricia Bower and Evelyn Shacklett for typing the final revisions of this report.

CHAPTER 1

HOW ADMINISTRATIVE AGENCIES ACT

By administrative procedures, we mean the ways by which administrative agencies do their jobs. This study treats two types of alternatives to trial-type administrative procedures. These are alternatives that can be used by state public utility commissions to streamline administrative proceedings and alternatives that they can use to consider forward-looking economic, financial, and other regulatory policies. The second set of alternatives, those that can be used to consider forward-looking economic, financial, and other regulatory policies, are not meant to replace the adversarial adjudicatory process in every context.

Trial-type procedures are often appropriate. They are well suited for procedures in which the principal purpose is to determine facts. This is certainly so in the ordinary rate case, where major prospective policy issues are not typically considered. However, trial-type proceedings are ill suited for considering prospective policies. The use of the second set of alternative procedures is certainly not without some risks. Yet, it is the author's contention that, properly approached, the rewards associated with the alternative--a better prospective policy decision--outweigh the risks that the innovative procedure may not be judicially sustainable.

This first chapter begins with a brief history of administrative procedures, followed by a brief overview of the problems associated with the trial-type procedures and the typical rulemaking approach, and ending with a description of the organization of this report.

A Brief History and Current Assessment

The year 1987 was significant federally not only because it was the bicentennial of the United States Constitution. It was also significant because it was the centennial of federal regulatory and administrative law. In 1887, the Congress enacted the Act to Regulate Commerce, establishing the Interstate Commerce Commission to regulate the rates of interstate rail

commerce. The Interstate Commerce Commission became the prototype regulatory agency. (Beginning in 1871, several states had enacted so called "Granger Laws," which created strong state regulatory commissions to set the maximum rates that could be charged by the railroads within the state. Congress established the Interstate Commerce Commission in reaction to a decision of the United States Supreme Court holding that commerce originating or ending outside of a state cannot be regulated by that state even though the federal government did not regulate such commerce.¹)

Since 1887, most state and federal regulatory commissions have been modeled after the Interstate Commerce Commission. Rates were set by state and federal commissions in adjudicatory (trial-type) proceedings. The basic elements of a trial-type proceeding as used for rate setting typically include the filing of a rate request (including a minimum or standard filing requirement); discovery, sometimes a prehearing conference, oral or written direct testimony, cross-examination, oral or written rebuttal testimony, possibly an administrative law judge's opinion, and the commission decision or order. For most state commissions this procedure still remains the principal means of policy decision-making.

A major change in administrative and regulatory law occurred in 1946 when Congress enacted the Administrative Procedures Act (APA). This act provided for fair adjudicatory hearings and also created the rulemaking option of generic, industry-wide policy-making. The rulemaking option under the APA was a major innovation in its time. It provides for a notice-and-comment procedure that allows a commission to set industry-wide policy based on a notice of proposed rulemaking and comments received (usually written comments) in response to that notice. The National Conference of Commissioners on Uniform State Laws subsequently in 1946 promulgated a Model State Administrative Procedures Act (MSAPA) based on the APA. The MSAPA was revised in 1961. Some version of the MSAPA was enacted in most states. However, about half of the state public utility commissions responding to an

¹ Wabash, St. Louis and Pacific Railroad Company v. Illinois, 118 U.S. 557 (1886).

TABLE 1-1

SURVEY RESULTS ON THE PREVALENCE AND USE OF
THE MODEL STATE ADMINISTRATIVE PROCEDURES ACT
AT STATE PUBLIC UTILITY COMMISSIONS¹

| | Are state agencies subject to a version of the Model State APA? | If yes, is the state public utility commission required to comply or is it exempt? | Is the ultimate source of commis- sion authority statutory or constitutional |
|--------------------|---|--|--|
| Alabama PSC | Yes | Exempt | Statutory |
| Alaska PUC | Yes | Exempt ² | Statutory |
| Arkansas PSC | No | Exempt | Statutory |
| Colorado PUC | Yes | Comply ³ | Constitutional |
| Connecticut DPUC | Yes | Comply | Statutory |
| Delaware PSC | Yes | Comply | Statutory |
| Hawaii PUC | Yes | Comply | Statutory |
| Idaho PUC | Yes | Unclear | Statutory |
| Illinois CC | Yes | Comply | Statutory |
| Indiana PSC | Yes | Exempt | Statutory |
| Iowa PUC | Yes | Comply | Statutory |
| Kentucky PSC | No | N/A | Statutory |
| Louisiana PSC | Yes | Exempt | Constitutional |
| Maine PUC | Yes | Comply | Statutory |
| Maryland PSC | Yes | Exempt | Statutory |
| Massachusetts DPU | No | N/A | Statutory |
| Michigan PSC | Yes | Comply | Statutory |
| Minnesota PUC | Yes | Comply | Statutory |
| Missouri PSC | Yes | Comply | Statutory |
| Montana PUC | Yes | Comply | Statutory |
| Nebraska PSC | Yes | Partially Exempt ⁵ | Constitutional |
| Nevada PSC | Yes | Comply | Statutory |
| New Hampshire PUC | Yes ⁶ | Comply | Statutory |
| New Jersey BPU | Yes | Comply | Statutory |
| New Mexico PSC | Uncertain ⁷ | Exempt | Constitutional |
| New York PSC | Yes | Comply | Statutory |
| North Carolina UC | Uncertain ⁷ | Exempt | Statutory |
| North Dakota PSC | No | N/A | Constitutional |
| Ohio PUC | No | N/A | Statutory |
| Oklahoma CC | Yes | Exempt | Constitutional |
| Oregon PUC | Yes | Exempt | Statutory |
| South Carolina PSC | Yes | Comply | Statutory & Constitutional |

TABLE 1-1 (continued)

SURVEY RESULTS ON THE PREVALENCE AND USE OF THE
MODEL STATE ADMINISTRATIVE PROCEDURES ACT
AT STATE PUBLIC UTILITY COMMISSIONS¹

| | Are state agencies subject to a version of the Model State APA? | If yes, is the state public utility commission required to comply or is it exempt? | Is the ultimate source of commission authority statutory or constitutional |
|------------------|---|--|--|
| South Dakota PUC | Yes | Comply | Statutory |
| Utah PSC | Yes | Comply | Statutory |
| Virginia SCC | Yes | Exempt | Statutory & Constitutional |
| Washington UTC | Yes | Comply | Statutory |
| Wyoming PSC | Yes | Comply | Statutory |

Source: Author's survey, May 1987.

N/A means not applicable.

- ¹ The Arizona CC, California PUC, District of Columbia PSC, Florida PSC, Georgia PSC, Kansas SCC, Mississippi PSC, Pennsylvania PUC, Rhode Island PUC, Tennessee PSC, Texas PUC, Texas RC, Vermont PSC, West Virginia PSC, and Wisconsin PSC did not respond.
- ² Exempt for adjudicatory proceedings, but required to comply in adoption of regulations. See A.S. 42.05.161.
- ³ Unless there is a specific statutory provision covering the subject matter in articles 1 to 13 of title 40 section 40-6-101, C.R.S.
- ⁴ The Idaho PUC has its own procedural code.
- ⁵ It is required to comply with some parts and is exempt from some parts.
- ⁶ Although the Model State APA provided the inspiration for portions of the New Hampshire APA, the New Hampshire APA has substantial deviations from the MSAPA.
- ⁷ The state does have an Administrative Procedures Act, but the respondents do not know whether it is based on the Model State APA.

NRRI survey stated that they are exempt from the provisions of their states' MSAPA. The survey results are in table 1-1.

The principal elements of rulemaking under the 1981 (most recent version of the) MSAPA are as follows: detailed public notice including a statement of the purpose of the rule, the specific legal authority of the commission to issue the rule, and the full text of the proposed rule; written testimony or, in some cases, oral testimony; in some cases, a detailed cost-benefit analysis of the likely effect of the proposed rule; and issuance of the rule. However, most state commissions do not regularly use a rulemaking process to make major industry-wide policy decisions.

The Need for Alternatives

Many state public utility commissions still rely heavily on adjudicatory procedures to make industry-wide policy decisions. The reason for this is mainly historical. State public service commissions were among the very first regulatory agencies set up by the states, and they were for the most part modeled after the early Granger commissions and the Interstate Commerce Commission. These early state commissions used these trial-type proceedings for ratemaking and related matters. This was and still is quite appropriate. Most state commissions determine a revenue requirement that is based on a historical test year. Those states that use a future or partially-projected test year to determine the revenue requirement actually use a historical test year as the basis of this projection. Because of the prominent role of a historical test year, a rate case is based mainly on a retrospective determination of facts, and adjudicatory procedures have proven themselves to be well suited for a retrospective determination of facts.

The problem today is that many of the issues that face state commissions are basic, industry-wide policy issues that implicitly or explicitly require the commissions to make economic and financial decisions about future events and conditions and to engage in regulatory planning or policy making based on their conclusions. As stated by Commissioner Charles Stalon of the Federal Energy Regulatory Commission (FERC), public utility commissions should become more "forward-looking economic regulatory and planning bodies" geared toward promoting efficient pricing policies as well as having America's energy

industry fit into the broader economic system.² It is, however, cumbersome at best to attempt to address these forward-looking policy issues using an adjudicatory procedure. Also, because the commission must limit its decision in a trial-type procedure to the record as presented by the parties, certain innovative ideas and solutions might not be brought to the commission's attention. Commissioners may be restricted from using their own best judgements and ideas because of an inadequate record, yet the adjudicatory format can preclude the opportunity for commissioners, acting as judges, to introduce their own expert opinions. This may not lead to the best resolution of the issues.

An adjudicatory procedure does not lend itself to a commission engaging in proactive regulation. As stated by Commissioner Stalon, when addressing the failure of the FERC to deal with the issue of defining undue discrimination, "it is not too surprising that an agency that has taken its role to be passive, to respond to pressure by others, never carved out one of the very important tools to exercise its power. The reason goes to the very heart of this organization and many other regulatory bodies.... There is this tendency to be judicial. To adjudicate disputes. To be passive."³

In fact, the reason adjudicatory procedures are often so long, tortuous, and hard to bring to a clear resolution is the use of the direct testimony/cross-examination/rebuttal format. While this procedure at least has the appearance of fairness, it is limited in its ability to produce informed determinations regarding the forward-looking policy issues now being raised in public utility hearings. For example, it would be difficult to imagine how a typical trial-type procedure would provide for adequate public participation in the least cost or integrated resource planning process currently being tried in several states. The policy choices facing the commission in such a case would require the best possible knowledge about

² "Commissioner Stalon: A Natural in FERC's Economic Regulatory Mission," FERC Monitor, June 13, 1985, pp. 1, 10.

³ "Without Block Billing, Discrimination 'Club' Has Big Role, Says Stalon," Inside F.E.R.C., August 25, 1986, p. 4a. However, the author does not wish to impugn the current experiments in innovative administrative procedures now being undertaken at the FERC. Rather, this quotation exemplifies how commission decision-makers can be placed in a reactive mode by a procedural process.

state-of-the-art demand/load forecasting, existing and on-the-horizon supply options, available load management techniques, available conservation measures, risk assessment data and techniques, and a myriad of other financial, economic, and engineering issues, to produce a reasonable result.

Consider too a commission attempting to establish a gas transportation rate design policy and a natural gas procurement review policy. Without some type of proceeding that would link these two areas of policy-making and make certain that economic and financial assumptions about future conditions are consistent and realistic, and take due account for risk, the commission may not develop the best resolution of the policy issues it faces. The difficulty for a commission is to get the information that it needs in a coherent fashion through an adjudicatory proceeding. Further, it is not clear that the typical notice-and-comment rulemaking can solicit the type or quality of information needed to engage in either of these activities.

The need for new, more innovative forms of administrative procedures for regulatory planning has also been recognized by some state public utility commissioners. Former Wisconsin PSC Commissioner Branko Terzic, for example, stated,

"Many utility managers are too concerned with legalistic form. (As are many commissioners, I should add.) Rate cases are not the only way of providing information to the commission. Nor are they the best. Indeed there are far superior methods of educating the commission as to a utility's operations. A utility needs to develop methods for providing information about the industry, its service territory, its customers, and new developments in financial and technological areas. The rate case should not be used to convey this kind of information.... Too much of the record is used up in redundant or unnecessary testimony."⁴

The problem was summed up by Thomas K. McCraw, author of the book Prophets of Regulation, who stated,

"On balance...it seems clear that the concern about the legal process has controlled the outcome of regulation more often than has the concern about the substance of economic efficiency. In economists' language, this means the concern for equity has generally triumphed over the quest for efficiency. In lawyers' terms, it means that in regulation the judicial model has usually triumphed over the legislative and

⁴ Branko Terzic, "Reflections on the Regulatory Process," Public Utilities Fortnightly, December 25, 1986, p. 12.

administrative model[s]."⁵

It should also be pointed out that a notice-and-comment rulemaking procedure as presently provided for in the APA and the MSAPA does not, in and of itself, provide an opportunity to probe deeply into the reasons for differences in the written comments and testimony of the various parties in response to a notice of proposed rulemaking. A rulemaking procedure does not necessarily provide an opportunity to probe the assumptions behind the comments, nor does it necessarily provide a forum for the decision-makers to use their expertise to consider and determine what might be the best resolution of the policy issue under consideration. Building a consensus among the interested parties and gaining a better understanding of the areas of agreement and disagreement among the parties through the use of a dialogue with the commission decision-makers as experts are difficult to achieve in rulemaking.

Other forms of administrative procedure (other than adjudication or rulemaking) need to be examined to see if they can be used to consider these forward-looking policy issues in a manner that is conducive to a coherent, thorough, and complete analysis before a policy determination, while still meeting the legal requirements of procedural due process and fairness. State commissions might consider procedures, such as those used by a legislative committee or gubernatorial task force, that are legally available.

Organization of the Report

In order to examine what other forms of administrative procedure might be available to commissions, the legal literature is reviewed to identify the various forms of administrative procedures used to deal with forward-looking policy issues. The strengths and weaknesses of these procedures are also considered. These are presented in chapter 2.

Next, in chapter 3, selected examples of innovative administrative procedures currently in use at state and federal utility commissions and, to

⁵ Thomas K. McCraw, Prophets of Regulation (Cambridge, Mass.: Harvard Univ. Press, 1984), p. 302.

the extent that they are relevant, other state and federal agencies are developed. The now popular types of alternative administrative procedures are distinguished: those that are meant to streamline the ratemaking process and those that are meant to provide better quality (more accurate) determinations in regulatory policy making--with the latter being the main topic of this report. Streamlining procedures, which expedite the ratemaking process, are of course germane to regulatory reform. Without such streamlining techniques, regulators might well find themselves without the time needed to engage in proactive regulatory planning. The examples of current innovative practices of state and federal commissions illustrate the nature of these innovative administrative procedures and how well they are working. In addition, those procedures used by the legislative and executive branches of government are reviewed and suggestions are made on how legislative-style hearings and investigations and commission panels of inquiry or task forces might be used to help make determinations on policy issues involving future developments and complex technologies.

In the fourth chapter, suggestions are made on how commissions can develop alternative procedures to arrive at fair, accurate, judicially sustainable decisions on prospective policy issues. Guidelines are presented for designing alternative procedures. The procedural elements of various forms of administrative process are identified and analyzed. Alternative procedures that would be useful in considering prospective policy issues, such as regulatory planning, are associated with procedural elements that are consistent with the guidelines just mentioned.

In the fifth and final chapter, a recommendation is made about using certain of the alternative procedures to consider current electric and gas prospective policy issues. The author first identifies these issues and then discusses how they might be good candidates for the innovative procedures. How these innovative administrative procedures might work with two of the policy issues is discussed.

CHAPTER 2

THE LEGAL LITERATURE ON ALTERNATIVE ADMINISTRATIVE PROCEDURES

Genesis of the Modern Administrative Process

As mentioned in chapter 1, federal administrative law began in 1887 with the regulation of the railroads. For the most part, administrative procedure followed trial-type, adjudicatory procedures, for the first fifty years from 1887 through 1937. James M. Landis helped change this. An academic lawyer, who began his career as the clerk to Justice Brandeis, Landis was one of the original commissioners of the Securities and Exchange Commission. Shortly after leaving that commission to become Dean of the Harvard University Law School, Landis delivered a series of lectures on jurisprudence concerning the administrative process.¹ These lectures were subsequently published in 1938 by the Yale University Press in the landmark book called The Administrative Process.² In that book, Landis criticized the use of adjudication in an administrative setting. He stated,

...The test of the judicial process, traditionally, is not the fair disposition of the controversy; it is the fair disposition of the controversy upon the record as made by the parties. True, there are collateral sources of information which often affect judicial determinations. There is the more or less limited discretion under the doctrine of judicial notice; and there is the inarticulated but nonetheless substantial power to choose between competing premises based upon off-the-record considerations. But, in strictness, the judge must not know of the events of the controversy except as these may have been presented to him, in due form, by the parties. Although the power to summon witnesses upon his own initiatives in certain cases

¹ See Thomas K. McCraw, Prophets of Regulation (Cambridge, Mass.: Harvard University Press, 1984), pp. 152-209.

² James M. Landis, The Administrative Process (New Haven: Yale University Press, 1938).

may theoretically be possessed by him, yet as a matter of fact it is not exercised. The very organization of his office prevents him from doing so.... Nor is he permitted to conduct an investigation to determine what policy is best adapted to the demands of time and place, even though he is aware that sooner or later he will be confronted with the necessity, through the processes of judicial decision, of shaping policy in that particular field. Nor is it, traditionally at least, part of his judicial office to bring to the attention of other departments of government the shortcomings of the law that he feels himself bound to apply.³

Thus, Landis made the now obvious, but then innovative observation that adjudicatory procedures are ill suited for industry-wide policy making.

Landis then went on to observe that

[o]n the other hand, these characteristics, conspicuously absent from the judicial process, do attend the administrative process. For that process to be successful in a particular field, it is imperative that controversies be decided as "rightly" as possible, independently of the formal record the parties themselves produce. The ultimate test of the administrative [process] is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making.⁴

In other words, administrative procedures should be designed so that the administrative agency can produce a result that serves the public interest and accomplishes its charge from Congress. Landis proposed that administrative agencies engage in independent explorations as a prelude to formulation of policy and that agencies should conduct a series of conferences preceding the promulgation of regulations.⁵

Landis' thesis is that the problems of a modern industrialized country are so urgent and complex that they threaten to overwhelm the legislative, the executive, and the judicial branches of government. The rise of administrative agencies with quasi-judicial, quasi-legislative, and quasi-executive powers is a natural outgrowth of the critical need to address these problems. Landis called for greater specialization and expertise of regulators in order to solve complex technical issues that arise, and he based many of his arguments in favor of more administrative agencies with flexible administrative procedures on the assumption that agencies would be

³ Ibid., p. 38.

⁴ Ibid., pp. 38-39.

⁵ Ibid., at pp. 41.

headed and staffed by regulators with such expertise. Landis argued further that the checks and balances system of government that is the essence of the separation of powers doctrine would not be violated by his proposals because there would still be judicial review of administrative agency decisions to ensure that they are consistent with the rule of law.⁶

The response from the American Bar Association to Landis was swift. The ABA issued a report denouncing the "Marxist ideas" behind administrative procedure as described by Landis and others and demanding that all agency decisions return to trial-type procedures to protect the American people from the possibility of administrative agencies destroying their freedom and liberties. The ABA report called for a rejection of the administrative process as proposed by Landis and a return to the adjudicatory model of decision-making.⁷ The Walter-Logan bill was sponsored by the American Bar Association and would have required administrative procedure to follow an adjudicatory process. The bill passed Congress but was vetoed by the President.

Thereafter, a compromise on administrative procedure was reached. The Attorney General's Committee on Administrative Procedure, which was conducting its study while the Walter-Logan bill was being considered, issued its report in 1941. That report contained twenty-seven monographs, the work of Walter Gellhorn and Kenneth Culp Davis, that detailed the operations and procedures used by many federal agencies. It also contained majority and minority reports, which proposed legislation. Work continued on these bills during World War II, and then in 1946 a compromise bill was enacted. The bill unanimously passed both houses of Congress and was signed by the President.

The compromise bill was the Administrative Procedures Act of 1946 (APA). The greatest innovation in the APA was the codification and hence standardization of notice-and-comment rulemaking. In particular, the minimal requirements of notice-and-comment rulemaking are that an agency

⁶ McCraw, pp. 213-216.

⁷ See 63 A.B.A.R. 331 (1938). See also, Kenneth Culp Davis, Administrative Law Text, 3d. ed. (St. Paul: West Publishing, 1972) pp. 8-9; Kenneth Culp Davis and Walter Gellhorn, "Present at the Creation: Regulatory Reform Before 1946," 38 Ad. L. Rev. 507, 512 (1986).

should publish a proposed rule and receive comments before a final rule is issued. Although notice-and-comment rulemaking might be supplemented by other procedures, when the term is used throughout the rest of this report it is used to mean the minimal requirements of notice-and-comment rulemaking. Today, notice-and-comment rulemaking is considered a normal part of administrative process, and the preferred procedure to use instead of adjudication when an administrative agency is considering an industry-wide issue.⁸

While much has been written about the administrative process since the passage of the APA, most of the effort was spent clarifying the vague or ambiguous provisions of the law. One significant work during this period was done by Kenneth Culp Davis, who wrote the Administrative Law Treatise in 1958. In the treatise and an earlier article, Professor Davis made the now famous distinction between adjudicative and legislative facts. Adjudicative facts are those that concern the parties, their activities, businesses, and properties, while legislative facts do not directly concern the immediate parties but are facts that help the decision-maker decide questions of law, policy, and discretion. In particular, one is determining legislative facts when determining an issue that involves expert opinions, forecasts, and uncertainty, which cannot be decisively resolved by testimony. Facts that concern the general characteristics or structure of an industry rather than the peculiar situation of the individual parties are legislative. It is Professor Davis' view that the determination of legislative facts does not require a full evidentiary hearing, while the determination of adjudicative facts does. Instead, legislative facts can best be determined by administrative agencies in notice-and-comment rulemaking proceedings. In most instances, the courts have accepted Professor Davis' distinction and rationale.⁹

Beginning in the mid-1960s, several court decisions were issued and new statutes enacted that required certain federal agencies to augment the notice-and-comment process with substantial evidence on the record to

⁸ Kenneth Culp Davis and Walter Gellhorn, p. 522.

⁹ See Davis, "An Approach to Problems of Evidence in the Administrative Process," 55 Harv. L. Rev. 364, 402 (1942); 1 K. Davis, Administrative Law Treatise Sec. 7.02 (1958), at 413.

support a rule. For the most part, this trend represented a widely held disenchantment with the degree and effectiveness of participation in the rulemaking process. The solution that was first mandated by the courts and then by Congress was to require that the notice-and-comment rulemaking take on some of the attributes of a formal, adjudicative-style rulemaking. This effectively forced administrative agencies that were subject to these court decisions and statutes to engage in what has become known as hybrid rulemaking.

This so called hybrid rulemaking combines the original notice-and-comment rulemaking requirements with some of the procedural elements of a full evidentiary hearing. The hybrid rulemaking procedures were imposed first by the courts,¹⁰ and then by Congress.¹¹ The concept of hybrid rulemaking is itself a bit fuzzy. However, the additional procedures required usually include an oral hearing, with or without cross-examination; requirements that an administrative agency fully explain the factual basis, methodology, and reasoning used to make a decision based on the record; and a more stringent judicial review.

The Call for Innovative Procedures

While some commentators tout the hybrid rulemaking development,¹² the recent consensus among more sober-minded commentators identifies this

¹⁰ Beginning with *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966) and continuing until *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc.*, 435 U.S. 519 (1978). In *Vermont Yankee*, the Supreme Court held that due process did not require procedures more rigorous than those imposed by Congress. However, the *Vermont Yankee* decision has been read to allow the courts to require that the record in a notice-and-comment rulemaking support the agency's decision.

¹¹ The best known examples are the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1974, 5 U.S.C. sec. 57a; the Environmental Protection Agency's Toxic Substances Control Act, 15 U.S.C. sec. 2605; the Occupational Safety and Health Act of 1970, 15 U.S.C. sec. 655; the Consumer Product Safety Act of 1976, 15 U.S.C. sec. 2605; and the Clean Air Act Amendments of 1977, 42 U.S.C. sec. 7607.

¹² See, for example, Clagett, "Informal Action, Adjudication, Rulemaking: Some Recent Developments in Federal Administrative Law," 51 Duke L.J. 51 (1971); and Dixon, "Rulemaking and the Myth of Cross-Examination", 34 Ad. L. Rev. 389 (1982).

procedure for what it is--a tendency to judicialize again the administrative process, even when the determinations that are to be made are determinations of legislative facts. Commentators point out that the hybrid rulemaking process is not conducive or necessary for the determination of legislative facts. Indeed, one commentator goes to great lengths to show that procedures less onerous than a hearing with cross-examination, while not required, are available. Specifically, then-Professor Stephen Williams states that an agency (1) could provide a written statement of methodology to rulemaking participants, (2) could conduct an on- or off-the-record inquiry conference (resembling the technical conferences described later in chapter 3) aimed at assisting the agency in making policy determinations in a broader sense, and (3) could allow the participants in a rulemaking to send interrogatories to the agency to help them to get a better idea of the commission's thought process. (Here Williams suggests that the use of a conference would be a better alternative than interrogatories, which, unlike a conference, do not allow for a quick exchange of ideas.)

Professor Williams also calls for new innovative, flexible procedural devices that would help to assure that participants in an notice-and-comment rulemaking would have timely access to the critical reasoning process of agencies engaged in formulating policy. In particular he suggests the use of double rounds of notice and comment, conferences with varying degrees of formality, and interrogatories to agencies. Williams points out that such procedures might be overkill in some rulemakings, but might be extremely useful in others, particularly those where decisions of dramatic economic or social impact are at stake. He concludes by stating that it is doubtful that courts should ever mandate the use of any such procedural device. Rather, agencies should be able to work out the detailed procedures most suitable for each specific task on their own.¹³

Other commentators also call for a reexamination of the administrative process in search of alternatives to trial-type administrative hearings. Roger Cramton, then-Chairman of the Administrative Conference of the United States (ACUS), notes that one of the more curious aspects of the (1970s)

¹³ Williams, "'Hybrid Rulemaking' under the Administrative Procedure Act: A Legal and Empirical Analysis," 42 Univ. Chi. L. Rev. 401, 448-456 (1975).

contemporary scene was that the use of formal evidentiary hearings in the administrative process was rapidly expanding in some fields while simultaneously coming under attack in others. Cramton notes that trial-type procedures are becoming more commonplace in welfare and entitlement disputes, while the heavy reliance on formal adjudicatory processes are being criticized when used by some of the older regulatory agencies. In particular, the use of trial-type proceedings is argued to be not well adapted to broad investigations of social, economic, and scientific fact. Trial-type procedures are also thought inappropriate for formulating policies involving rate-setting, involving a determination of the degree of competitiveness in regulated industries, requiring oversight of the introduction of new technologies in those industries, and requiring the protection of the public from unsafe products or harmful commercial practices.¹⁴

Cramton asserts that three matters are deserving of serious consideration when discussing the use of trial-type proceedings. First, we should consider whether formal trial-type hearings are really essential for the type of governmental decisions to which these requirements are now applied. Second, we should consider whether agencies can remove many of the issues from adjudicatory proceedings and sometimes (or oftentimes) eliminate the need for hearings by clearly articulating policies and standards and by promulgating rules. Third, we should consider adopting policies and procedures that encourage agencies and the interested parties to settle controversies early before the start of the trial-type hearings.¹⁵ This is particularly important since the bulk of time spent in most administrative hearings is in the preparatory stages prior to the actual hearings.

Cramton points out that trial-type procedures work well in situations that have four essential characteristics. They are (1) the controversy is two-sided in nature, with the adversaries taking opposite positions on the issues, (2) the facts generally are within the control or knowledge of the parties and arise out of nonrecurring past events, (3) the issues are

¹⁴ Cramton, "A Comment on Trial-Type Hearings in Nuclear Power Plant Siting," 58 Va. L. Rev. 585, 585-586 (1972).

¹⁵ Cramton, "Causes and Cures of Administrative Delay," 58 A.B.A. J. 937, 939-940 (1972).

bipolar in that they call for a "yes" or "no" answer, and (4) the court is impartial and is called upon to decide a limited number of questions that are usually within the common understanding of the average judge.¹⁶ The regulatory planning-type issues that are the subject of this report do not fit these four characteristics.

Cramton examines existing criteria for evaluating the appropriateness of procedural systems. First, he states that procedures are, for the most part, a means to an end: the accomplishment of social purposes. Cramton then rejects the usual legal criteria of fairness and due process and the like, because the terms are subjective and value-laden generalities with meanings that shift from time to time and person to person. Cramton also rejects the distinction between adjudicative facts and legislative facts because the identification of facts as adjudicative or legislative is subjective and too flexible. He asserts that that distinction can be reduced to the basic democratic notion that private persons should have a real opportunity to participate in an adjudicatory setting in governmental decisions that affect them directly, if the decision is based on individual rather than society-wide considerations.¹⁷

Cramton suggests instead three criteria for evaluating the appropriateness of procedural systems. They are accuracy, efficiency, and acceptability. By accuracy, Cramton means that the procedural process should incorporate the rational aspects of a decision-making process for the ascertainment of truth or, more realistically, as close an approximation of reality as is humanly possible given uncertainties. Cramton also notes that accurate and consistent results in a large number of cases may sometimes be more important than justice in an individual case. The second criterion,

¹⁶ Cramton, "A Comment on Trial-Type Hearings in Nuclear Power Plant Siting," at 591.

¹⁷ *Id.*, at p. 591. Although, Cramton notes that the degree of participation due to affected persons and the extent to which a full trial-type procedure must be used because of due process must be weighed in each circumstance. The test was laid out in *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held "the extent to which procedural due process must be afforded [to an affected individual] is influenced by the extent to which he may be 'condemned to suffer grievous loss,' ... and depends upon whether the [affected individual's] interest in avoiding that loss outweighs the governmental interest in summary adjudication." 397 U.S. at 262-63.

efficiency, means the time, effort, and expense of a suggested procedure. The third criterion is acceptability, which means that the procedure is considered to be fair by those who are affected by its outcome as well as by the general public. This translates into what Cramton calls "meaningful participation in the decision-making process," that is, early access to the agency's reasoning and policy formulation process.¹⁸ Cramton also notes that if a procedure is deemed acceptable by this definition then it is also more likely to lead to an accurate result. He ends with a call for procedures that reach accurate results, are efficient, and are acceptable to those affected and the general public.¹⁹

One additional commentator, Barry B. Boyer, then an attorney adviser in the Office of Legal Counsel of the United States Department of Justice who prepared a staff report to the Chairman of the the Administrative Conference of the United States, focuses on the concept of the polycentric (literally, many-centered) problem. A polycentric problem is characterized by the large number of potential results and by the fact that many interest groups will be affected by any one of the solutions adopted. Thus each potential solution has complex and unique ramifications.²⁰ Boyer likens a polycentric problem to a spider web, where a pull on one strand will distribute tensions in a complicated pattern throughout the web as a whole, with each crossing of strands as a distinct center for distributing tension. According to Boyer, polycentric problems can be thought of as being essentially economic since they involve trade-offs affecting the allocation of scarce resources. Because polycentric problems require prediction and/or planning to be solved, the decision-making process should allow for scientists and experts with the appropriate backgrounds to provide information about forecasts of

¹⁸ Id., at pp. 592-593.

¹⁹ Id., at p. 599.

²⁰ Boyer, "Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues," 71 Mich. L. Rev. 111, 116-117 (1972). The polycentric problem was first discussed by Fuller, "The Forms and Limits of Adjudication" 36 (1959) (unpublished article prepared for the Roundtable on Jurisprudence, Association of American Law Schools), on file with the Michigan Law Review.

future events (including their uncertainty) and about the relevant multi-variable trade-offs. This would allow the decision-maker to make an optimal, or at least an acceptable, solution.²¹

Next, Boyer discusses attributes of adjudication and the related procedures of mediation and investigation within a trial-type context, and he measures the appropriateness of these procedures to solve polycentric problems, using the criteria suggested by Cramton. Boyer finds these procedures to be less than ideal.²²

Boyer then suggests that two classes of procedures that are alternatives to adjudicatory procedures might be worthy of further study. The first class is based on the managerial model. Within the managerial model Boyer classifies four alternative types of procedures. The first is the business management model, which would have an agency administrator act like a business manager in fulfilling the agency's charge from its legislature, whether it be Congress or a state legislature. Boyer faults this approach as being vague and as having no checks against abuse. (Business managements are checked against bad decisions by the competitive market.)²³

The second managerial alternative is technological assessment, which is an approach to deal with the kinds of social, economic, and physical changes that can be caused by the introduction of new technologies, together with a decision-making apparatus to allow the government to assess and to direct those changes from the earliest possible moment. An example of an agency using this type of approach is the Office of Technology Assessment. Boyer finds this concept to have some potentially useful applications, but criticizes the process because the use of interim decisions with monitoring may foreclose alternative options.²⁴

²¹ Id., at pp. 117-119.

²² Id., at pp. 120-149. Indeed, Boyer goes so far as to suggest that the use of trial type procedures might simply be verbal legal magic akin to the use of trials in the Middle Ages for relief from pestilence rats, toads, and witches. His point is that the resort to familiar and comforting rituals of trial-type procedures may reflect the transformation of a wish that adjudication can solve polycentric problems into a belief that trial-type procedures actually do so. Id., at p. 149.

²³ Id., at pp. 151-156.

²⁴ Id., at pp. 156-158.

Boyer's third management approach is the use of decision theory to solve polycentric problems. He recognizes that this approach is likely to produce some useful insights into modern management techniques for resolving polycentric problems. Decision theory seeks to provide scientific methods for dealing with uncertainty by building upon the subjective theory of probability, as assigned by a knowledgeable decision-maker. In particular, decision theory allows the decision-maker to assign a probability and a utility value to alternatives in a decision-tree when data are uncertain. The decision-maker can then assess the desirability of various approaches.²⁵ Boyer finds several problems with this approach. First, there is the problem that one must arbitrarily determine the threshold probability for action; next there is the problem of assigning probabilities one way or another; third there is the tendency to ignore or discount "soft variables"; and fourth the calculus involved with a truly polycentric problem can quickly make the method unworkable.²⁶

A fourth and final managerial approach discussed by Boyer is systems analysis, in particular the heuristic approach to system design. This is a decision-making method that uses principles to provide guides for action, even in unanticipated situations. Boyer finds that this approach might be useful, but that it too has inherent problems. Specifically, heuristic approaches are based on the development of goals and subgoals, which are the result of using a pyramidal systems-analysis approach. At the base of the pyramid there are small, discrete subproblems for each of which an optimal answer is possible without reference to or impact on another subproblem. However, in polycentric problems there is an indivisible, synergistic relationship among factors, which resists division into discrete subproblems.

Boyer's second major class of procedures consists of consensual models. However, the major consensual system he examines is the use of a referendum process, representative committees, and a "true bargaining approach." Boyer

²⁵ For examples of how a decision theory approach can be used in public utility regulation, see, Luc Anselin and J. Stephen Henderson, A Decision Support System for Utility Performance Evaluation (Columbus, Ohio: NRRI, 1985); and Robert K. Koger et al., Occasional Paper No. 9: Decision Analysis Applied to Electric Utility Rate Design (Columbus, Ohio: NRRI, 1985).

²⁶ Boyer, at 159-160.

criticizes the referendum approach as being too subjective, particularly when used to solve polycentric problems. He faults the idea of representative committees because the committees are likely to be unrepresentative of the actual groups that will be affected by the regulation, unless the representatives self-select themselves after a notice. The true bargaining approach where each of the self-selected affected parties tries to reach an optimal solution with the agency requires the agency or some subdivision of it to act as a surrogate for that segment of the affected public that did not send a representative. Boyer fears that the agency will be an ineffective bargainer, or will be perceived as ineffective thus weakening the acceptability of the agency decision.²⁷

What all these commentators have in common is a recognition that a trial-type proceeding is not appropriate for deciding complex issues, whether they are labelled as legislative or polycentric, and that some alternatives to trial-type proceedings are needed. These commentators also express dissatisfaction with notice-and-comment rulemaking and call for administrative agencies to experiment with innovative forms of procedure for accurate, efficient, and acceptable agency decision-making.

Two Responses: Negotiated Rulemaking and Scientific Boards of Inquiry

The legal literature shows that the response to the call for innovative forms of administrative procedures includes the development of at least two new administrative procedures that are now in use, negotiated rulemaking and the use of scientific boards of inquiry. These partially fulfill the need for procedures that would make possible accurate, acceptable, and sometimes efficient agency decision-making.

Negotiated Rulemaking

The Harvard Negotiation Project published a book, entitled Getting to Yes,²⁸ in 1981 that set forth three principles to facilitate a successful

²⁷ Id., at pp. 164-168.

²⁸ Roger Fisher and William Ury, Getting to Yes (Boston: Houghton Mifflin, 1981).

negotiation process. These principles are to (1) focus on the respective interests, not the initial positions,²⁹ (2) seek options that allow mutual gain,³⁰ and (3) define objective criteria.³¹ With these three deceptively simple principles, the Harvard Negotiation Project created what it called principled negotiations, and a new area of the law was developed called alternative dispute resolution. Alternative dispute resolution has already given administrative law one new innovative administrative procedure that is now much discussed in the legal literature, namely negotiated rulemaking. Very shortly after the publication of Getting to Yes, Philip Harter who became a Council member of the Administrative Law Section of the American Bar Association, wrote an article suggesting that the negotiation process can be applied to rulemaking.³² The Administrative Conference of the United States (ACUS) in turn recommended that federal agencies consider the use of negotiations to produce rules that will satisfy the needs of the affected parties.³³ This quick action in identifying and implementing the concept of negotiated rulemaking can be traced back to dissatisfaction with both notice-and-comment rulemaking and hybrid rulemaking.

There are three excellent law journal articles on the topic of negotiated rulemaking. The first, the seminal work by Philip Harter, distinguishes the concept of negotiated rulemaking from the current regulatory negotiation process where an administrative agency speaks first to one party and then another, but the interested parties do not sit down and address the issues together. What Harter proposed was that complex problems be negotiated with all the parties present when several conditions are met: (1) the existence of countervailing power, that is, the various interests have sufficient power so that no single party could achieve its will without dealing with the others; (2) a limited number of participants, that is, no more than 15; (3) issues to be resolved are ripe for decision, that is, the issues have crystallized sufficiently to permit resolution; (4)

²⁹ Ibid., at 41-57.

³⁰ Ibid., at 58-83.

³¹ Ibid., at 84-98.

³² Harter, "Negotiating Regulations: A Cure for Malaise," 71 Geo. L. J. 1 (1982).

³³ ACUS Recommendation 82-4, 47 Fed. Reg. 20708 (Jul. 15, 1982, codified at 1 C.F.R. sec. 305.82-4 (1984)).

the inevitability or imminence of a decision, that is, if the parties fail to reach an agreement someone else will make the decision for them; (5) an opportunity for all parties to gain from a decision, that is, the negotiations are aimed toward creating a win/win situation as opposed to a zero sum game; (6) a fundamental value of some party is not at stake, that is, if the issue is too basic for compromise among the parties, an alternative forum is required; (7) more than one issue with a binary solution, so that the parties negotiate multiple issues; (8) one party does not control all of the information; and (9) implementation of the agreement by the agency is likely.³⁴

Harter discusses how to determine who the appropriate participants in a negotiated rulemaking would be. It is essential that sufficiently diverse interests are represented to ensure that all the critical issues are raised and that all parties are provided with an opportunity to make their interests known. An ad hoc determination should be made to identify all parties whose interests are so central to the regulation that it could not be developed without their participation. Those interested parties should be invited to take part in the negotiations. Parties with more remote interests should be limited to written comments.³⁵ Senior officials and leaders from trade associations and other similar organizations and groups should be named as representatives of parties with like interests.³⁶ The agency should be included in the negotiated rulemaking as an interested party, with an appropriate senior representative. However, it should be made clear that, even though the agency representative is a full participant in the negotiated rulemaking process, the agency is still sovereign and the agency alone makes the final decision.³⁷

Harter also makes seven suggestions for the negotiations process. First, the ground rules for the negotiations must be established up front, so that the parties do not assume adversarial roles. Next, the parties should be reminded periodically that their purpose is to reach a mutually acceptable solution when possible, not to seek victory for their position.

³⁴ Harter, at 42-52.

³⁵ Id., at 52-53.

³⁶ Id., at 54-55.

³⁷ Id., at 59-67.

Third, the degree to which the negotiations are confidential must be made clear to the parties at the outset. To facilitate the negotiations, the traditional rule of evidence that forbids the subsequent use of settlement offers in a settlement negotiation should be applied to negotiated rulemakings. Fourth, the negotiations should follow the three principles of principled negotiations of the Harvard Negotiations Project that were discussed earlier.

Fifth, a single text procedure should be used to reach an agreement. The negotiators would engage in an initial brainstorming session where they develop an all-inclusive laundry list of issues involved and potential solutions, with the goal of developing as many ideas as possible in a single text document. Then, the parties would weed out inappropriate issues, raise new ones, try to pinpoint areas of disagreement, and focus on the reasons for the disagreements.

Sixth, the parties themselves should decide both what information is reasonably necessary to enable them to make a responsible judgment and how to obtain the information. One of three approaches can be used to obtain the necessary information: common research, that is, research undertaken in common by the parties or by a research group funded by the parties; review and comment, that is, the parties exchange information, review it, and comment on it with an emphasis not on challenging the validity of the data, but on finding and filling the gaps in what is known; or data mediation, that is, where a third party would help to mediate on the validity of the parties' data. Seventh, the parties should be reminded and urged to keep in touch with their constituents throughout the negotiation process to assure that their constituents are being represented.³⁸

The following observations are made about reaching a consensus and reporting the outcome. First, the negotiating parties should attempt to reach a unanimous agreement, although that may be impractical. If the parties fail to reach a unanimous consensus, they must determine whether it is nonetheless worthwhile to report their areas of agreement and disagreement to the administrative agency. If a consensus is reached, the parties should prepare a document setting forth both the consensus reached

³⁸ Id., at 82-92.

and the specific language that the parties propose that the agency adopt as a regulation. The document would also include a preamble to the regulation setting out its basis and purpose, and a description of the negotiations process because the legitimacy of the proposed regulation would be based on the agreement of the parties.³⁹

The agency would then review the consensus document submitted by the regulatory negotiating group as it would a briefing package by agency staff, particularly if a senior agency staff member was included in the process. The agency should review the proposed rule and the accompanying document for consistency with applicable statutes and agency policy. If modifications are necessary, which should rarely be the case if the negotiations were thorough, the agency should follow one of three courses: modify the proposed rule, reject the proposed rule and send it back to the negotiating group, or reject the proposed rule altogether and initiate a more traditional notice-and-comment rulemaking. Harter makes the point that while there can be legitimate reasons to reject or modify an agreement, an agency should not second guess its negotiators or try to gain extra concessions at the review stage. If the agency modifies the negotiating group's proposed rules, both the negotiating group's and the agency's proposed rule should be published for comments. While one would anticipate no or few surprises in the comments because all parties with a significant interest would be represented in the negotiations, Harter proposes that the agency share any comments received with the negotiating group and that the negotiating group be allowed to decide how to respond to the comments. The agency would then receive the negotiating group's new recommendations and review them before issuing a final regulation.⁴⁰

Harter also discusses how the courts are likely to treat a negotiated rulemaking. The possible due process concerns that a party's interest was not addressed could be answered in the same manner as the question of whether a class action should be maintained, namely whether the representative parties will fairly and adequately protect the interests of the class. If the court were to determine that a party's interests were not

³⁹ Id., at 92-99.

⁴⁰ Id., at 97-102.

represented during the negotiations, it must determine whether the party failed to participate after an adequate preliminary notice was given of the negotiated rulemaking process. If the party had applied for inclusion in the process but was rejected, then the court would have to determine whether the party had failed to exhaust its administrative remedies. The party must demonstrate that it had raised its contentions during the rulemaking comment period or for some other reason it was impractical or impossible to raise its contentions before the end of the comment period. If the party challenging the rule took all these actions and still was not represented in the negotiations, the normal standard of judicial review should follow.⁴¹

Harter raises a significant constitutional issue that might block negotiated rulemaking: the rarely utilized, but still alive, nondelegation doctrine. As first pronounced by the United States Supreme Court in Carter v. Carter Coal Co.,⁴² the nondelegation doctrine states that the power to regulate an industry cannot be delegated to a private group because the authority to regulate is necessarily a government function. Negotiated rulemaking need not violate the nondelegation doctrine, however, if the final authority to determine what goes into a proposed and final rule still rests with the agency.⁴³

Harter sees benefits from a negotiated rulemaking process beyond the mere agreement reached. First, the process will produce efficiency by streamlining the regulatory process. Also, by allowing decision-makers to focus on true issues and interests in dispute, it should lead to more accurate and acceptable results because the parties are dealing with their true interests. Three possible adverse consequences are (1) the co-option of agency senior staff participating in the negotiation process, (2) the possibility of the agency staff lacking sufficient expertise in the negotiations, (3) the serious possibility that the process would be abused or misused so as to result in regulatory delay instead of streamlining. The potential problem of staff co-option can be held in check by agency review. The problem of staff lacking expertise may not occur if experienced senior staff are the negotiators. The potential that negotiated rulemaking

⁴¹ Id., at 102-107.

⁴² Carter v. Carter Coal Co., 298 U.S. 238 (1936).

⁴³ Id., at 107-109.

might become a source of delay is a serious concern; the process relies on the good faith of the parties. While Harter concedes that these concerns are legitimate, he concludes that negotiated rulemaking is worth a try.⁴⁴

In another excellent article, written by Henry Perritt, Professor of Law at Villanova University,⁴⁵ there is a further examination of the dynamics of negotiated rulemaking. Perritt notes that negotiations succeed only when parties able to use alternative processes have an incentive to participate in the negotiations and to reach an agreement. Specifically, parties will not participate in a negotiation if the "best alternative to a negotiated agreement" (sometimes called BATNA) is superior to what they can obtain in a negotiated settlement.⁴⁶ Also, a party to a negotiation will not agree to any outcome that is worse than that available from their BATNA. The BATNA is determined exogenously and in part by the party's perceptions not only about unilateral agency action in the absence of the negotiation but also the possibility of legislative action.⁴⁷

Perritt notes that the relations within constituency groups that are represented at a negotiated rulemaking complicate the dynamics. Each negotiator must reach an intra-party agreement with his or her constituents, and that agreement may be more difficult to reach than the agreement among negotiators. Perritt points out that intra-constituency disputes often arise because the interest groups are rarely monolithic. He contends that it is therefore important that representatives, mediators, and agency personnel be adroit at recognizing intra-constituency problems and at facilitating solutions.⁴⁸

Perritt also discusses the possibility that the prohibition against ex parte communications may constrain negotiated rulemaking. The D.C. Circuit Court case of Home Box Office, Inc. v. F.C.C. applies the prohibition against ex parte communications in the context of a notice-and-comment

⁴⁴ Id., at 110-113.

⁴⁵ Perritt, "Negotiated Rulemaking and Administrative Law," 38 Ad. L. Rev. 471 (1986).

⁴⁶ The concept of BATNA was developed by Professors Fisher and Ury in Getting to Yes.

⁴⁷ Perritt, pp. 476-477.

⁴⁸ Id.

rulemaking.⁴⁹ The prohibition against ex parte communications forbids off the record communications with decision-makers that occur out of the presence of other parties. A negotiated rulemaking could involve off the record communications with decision-makers that may be out of the presence of some potential parties who are not represented in the negotiation process. However, the Home Box Office decision has been criticized by the ACUS as well as by many commentators and has been questioned by the D.C. Circuit court itself in Sierra Club v. Costle.⁵⁰ Also, the Home Box Office rule against ex parte communication might be limited to contacts after a notice of proposed rulemaking is issued, which is well after much, if not all, of the negotiated rulemaking process would have taken place.⁵¹ Perritt sets out some guidelines to be used to minimize the potential of ex parte communication problems in a negotiated rulemaking setting.⁵²

Perritt also points out that, for federal agencies, the negotiated rulemaking process is "threatened" by the Federal Advisory Committee Act,⁵³ which requires that meetings of advisory committees be open to the public except under certain very limited circumstances. A regulatory negotiating group would probably be an advisory committee and thus subject to the Act's provisions. It is unclear whether the open meeting requirement would also apply to meetings of subgroups and caucuses. Conventional wisdom holds that an open meeting requirement would hinder the negotiation process. However, such hindering has not yet happened. But, as Perritt points out, the negotiated rulemaking process has not yet been applied to any highly controversial issues where the desirability of open meetings is likely to be tested.⁵⁴

A third article, written by Lawrence Susskind and Gerard McMahon of the Harvard Law School's Program on Negotiations, concerns judicial review of negotiated rulemaking.⁵⁵ After examining several examples of negotiated

⁴⁹ Home Box Office v. F.C.C., 567 F.2d 9 (D.C.Cir. 1977), cert. denied 434 U.S. 829 (1978).

⁵⁰ 657 F.2d 298 (D.C. Cir. 1981).

⁵¹ Id., at 487, note 70.

⁵² Id., at 488.

⁵³ 5 U.S.C. App. II (1982).

⁵⁴ Id., at 491-496.

⁵⁵ Susskind and McMahon, "The Theory and Practice of Negotiated Rulemaking," 3 Yale J. on Reg. 133 (1985):

rulemaking that follow both the suggested guidelines of Harter and the BATNA principle, the authors conclude that negotiated rulemaking clearly results in an outcome that is superior to the conventional notice-and-hearing rulemaking. Based on that conclusion, Susskind and McMahon contend that the courts should not apply a stringent "hard look" review to negotiated rulemaking such as they would for a conventional rulemaking.

The "hard look" review used in conventional rulemaking is meant to assure that the agency has a reasonable analytical justification for its final rules. Susskind and McMahon suggest that such a hard look is unnecessary for negotiated rules because the rationale for this type of review would be satisfied if the negotiated rulemaking meets eight key conditions: (1) adequate notice of the negotiations, (2) available financial resources to allow disadvantaged groups to participate on an equal footing, (3) a reasonable record of formal meetings, (4) ample opportunity for the parties to discuss the final draft rules, (5) an opportunity for all parties to discuss the review and comment process, (6) a chance for all interested parties to shape the negotiations agenda, to agree upon a facilitator, and to have access to information they request, (7) a clear explanation by the agency of its obligation to the negotiating committee, and (8) an opportunity for all parties to "sign off on" the final agreement.

According to Susskind and McMahon, if these eight conditions are met, the parties will themselves ensure that the agency addresses their concerns, conducts adequate research, and carefully analyzes all alternative proposals. Thus, the authors contend, a judicial "hard look" would be redundant and could undermine the prospects for negotiated rulemaking to enhance the efficiency and acceptability of the administrative process.⁵⁶

It is also worth noting that Harter has written recently about the use of other forms of alternative dispute resolution techniques that can be used in administrative proceedings, such as arbitration, mediation, and fact finding.⁵⁷ However, these other techniques seem to be better suited for

⁵⁶ Id., at 164-165.

⁵⁷ Harter, "Points on a Continuum: Dispute Resolution Procedures and the Administrative Process" (Report to the ACUS, Jul. 16, 1986).

dealing with what Perritt terms "rights disputes" as opposed to resolving "interest disputes," that is, polycentric problems.⁵⁸

Scientific Boards of Inquiry

Professor Sidney Shapiro, Professor of Law at the University of Kansas, recently wrote about another innovative administrative procedure, a scientific board of inquiry to resolve scientific issues in dispute. This technique was recently utilized by the Food and Drug Administration (FDA).⁵⁹ As noted by Shapiro, the idea of a "science court" as a panel to which administrative agencies could refer scientific disputes for resolution by experts was initially proposed in the 1960s and has the support of many scientists and others.⁶⁰ Those in favor of a science court idea argue that scientists are better qualified than laymen to understand and evaluate scientific evidence, to distinguish between scientific and policy judgments, and to explain their decisions.

Although the initial interest of the 1960s in the science court idea waned, administrative agencies, such as the FDA, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission, began to use scientific advisory committees to obtain specific scientific input into the regulatory

⁵⁸ Perritt, at p. 473. The author notes that the dichotomies set up by various scholars between legislative and adjudicative facts and between interest disputes and rights disputes are aimed at a common goal and that is to determine when notice-and-comment rulemaking or a formal, adjudicative process is appropriate. This author finds the idea that polycentric problems are best handled by an informal rulemaking to be useful, but does not reject the distinctions made by others.

⁵⁹ Shapiro, "Scientific Issues and the Function of Hearing Procedures: Evaluating the FDA's Public Board of Inquiry," 1986 Duke L.J. 288 (1986).

⁶⁰ The idea was first proposed by Dr. Arthur Kantrowitz in 1967. See Kantrowitz, "Proposal for an Institution for Scientific Judgment," 156 Science 763 (1967). Since then, this theme has been advocated by others. See for example, Ramo, "The Regulation of Technological Activities: A New Approach," 67 A.B.A.J. 1456, 1461-62 (1980); and Carro & Nyhart, Law and Science in Collaboration: Resolving Regulatory Issues of Science and Technology (1983).

process.⁶¹ The FDA then went one step further. It set up a scientific board of inquiry to assist the agency in making scientific determinations. The scientific board of inquiry is manned by scientists with expertise in the field. The procedure used by the board of inquiry also varies greatly from the typically, trial-type procedure. Instead, the procedure has more closely resembled a scientific seminar in at least one of the two proceedings by the FDA using this procedure.⁶²

After examining the scientific board of inquiry procedure as utilized by the FDA, Shapiro concludes that it shows promise in increasing the accuracy and acceptability of the outcome, but does not necessarily lead to greater efficiency because the process can be time-consuming.⁶³ Overall, Shapiro lauds the process because it permits broad scientific participation and allows for a model scientific debate, with the issues sharply divided. The principal problems with the process were related to its informality. However, the procedure was judged to be useful if its objective is not to supplant the decision-maker. Rather, the board should produce a hearing record that fully and completely delineates the issues to be decided, and contributes to the decision-making process by giving the decision-maker a better appreciation of the scientific issues involved.⁶⁴

The scientific board of inquiry varies from other methods of obtaining scientific evidence in three ways: (1) unlike an advisory committee, a scientific board has decision-making responsibilities (although the final decision-making authority rests with the agency), (2) the members of the board of inquiry are scientists, with the greatest expertise in the field, not necessarily agency employees, and (3) the board can use an informal hearing process that is similar to a scientific seminar. Shapiro notes that, because the scientific board of inquiry process as used to date was not more efficient than current procedures, it should be used only to resolve significant issues of scientific judgment. Also, integrating a scientific seminar into the current administrative process remains troublesome. Nonetheless, the scientific board of inquiry appears to be a

⁶¹ Shapiro, at 301-305.

⁶² Id., at 307-313.

⁶³ Id., at 318.

⁶⁴ Id., at 330-341.

useful compromise that would allow scientists to provide input in an effective manner without altering the ultimate method of agency decision-making.⁶⁵

⁶⁵ Id., at 345.

CHAPTER 3

ALTERNATIVE ADMINISTRATIVE PROCEDURES NOW IN USE

This chapter contains examples of alternative administrative practices currently in use at state and federal utility commissions, and also (to the extent they are pertinent) other federal agencies. There are two major categories of alternative procedures and practices that are now popular. In the first are the procedures that are meant primarily to streamline the regulatory process. Their principal advantage is that they lead to a more efficient use of commission resources and thus free up commission time and resources to deal with the more difficult issues in regulatory planning that face state commissions today. These procedures are presented in the first section of this chapter. The second section has selected examples from the second major category, current practices of state and federal government that are aimed toward improving the quality of regulatory policy making. Specifically, the section treats how these commissions are examining forward-looking financial and economic policy issues in a new way and how well these administrative procedures are working. The third section contains a review of some procedures regularly used by the legislative and executive branches of government and suggestions on how legislative-style hearings and investigations and executive-style panels of inquiry and task forces could be models for public utility commission determinations of policy issues involving future developments and complex technologies.

Streamlining Techniques

The call for streamlining the regulatory process is not a new one. Indeed, one can easily find calls for streamlining of the regulatory process

that go back at least to the 1960s.¹ Recent calls for streamlining the regulatory process have come from many quarters, including spokesmen of the utilities.²

There are several streamlining procedures that have been used by federal and state commissions. These fall into two basic categories of streamlining techniques: procedural and substantive. Procedural streamlining techniques are those that change the procedure of a proceeding in a fundamental way to speed up the decision-making process,³ but do not necessarily result in a substantive change in what is being decided. A substantive change on the other hand can sometimes speed up the process by changing what it is that is being decided. A negotiated or stipulated settlement in a rate case proceeding is an example of a procedural streamlining technique, because it leads to greater efficiency by changing the procedure of a proceeding without necessarily changing what is being decided. Setting a generic rate of return on an industry-wide basis is a substantive streamlining technique, because it changes what is being decided, that is, instead of the utility's own rate of return being at issue, the industry-wide rate of return becomes the issue. Both procedural and substantive streamlining techniques are discussed below.

Procedural Streamlining

There are several examples of procedural streamlining techniques used by both federal and state agencies. These techniques fall into four broad

¹ Landis, Report on Regulatory Agencies to the President-Elect, U.S. Senate, Committee on the Judiciary, 86th Cong., 2nd sess. (Washington, D.C.: GPO, 1960).

² For an example of a call for streamlining from a utility spokesman, see John V. Thornton, "Expediting Regulatory Decision Making," Public Utilities Fortnightly, February 28, 1980, pp. 9-14.

³ Procedure is the prescribed method of enforcement of rights or obtaining redress. Substantive law, on the other hand, creates rights, duties, and obligations. Most statutes have both procedural and substantive aspects--changes in either can streamline the processing of cases. For example, you can just as effectively shorten cases by removing an issue from a case substantively, as you could by speeding up the process of reaching a decision procedurally. However, the effect is vastly different.

categories: arbitration, mediation-arbitration, mediation, and summary proceedings.⁴ Each is described and examples given.

Arbitration

Arbitration is perhaps the most familiar of the streamlining techniques, because it is the normal process used in labor relations disputes by the Federal Labor Relations Authority and by the National Labor Relations Board. Arbitration is of course the process by which two or more parties agree to be bound by the decisions of a third party, the arbitrator, after the arbitrator has heard each side present its case. Often, but not always, the arbitrator is chosen together by the two parties, or a panel of arbitrators is chosen by a process where the two parties each name one arbitrator, who in turn names a third. Other possibilities include arbitration boards named in an initial contract among the parties.

In the cases of the Federal Labor Relations Authority and the National Labor Relations Board, arbitration is commonly used as a means of solving a collective bargaining agreement impasse and resolving labor grievance disputes. Another example of a federal agency using arbitration in labor dispute situations is the Merit Systems Protection Board's use of an arbitration process in its appeals program. If a federal employee, who is not in a government unit with a recognized labor union but is covered by the Civil Service Reform Act, appeals a routine personnel action dispute, an arbitration procedure is possible if both the appellant and the affected agency both agree to its use. Both parties waive full discovery rights and limit agency review in an arbitration proceeding. In arbitration, an

⁴ Most of the examples of procedural streamlining by federal agencies reported here are based on research done in Philip J. Harter, "Status Report on 'The Use of Alternative Dispute Resolution in the Administrative Process,'" November 19, 1984 (mimeo); Harter, Philip J., "Points on a Continuum: Dispute Resolution Procedures and the Administrative Process," 1986 ACUS 165; and Pou, Charles, Jr., "Governmental Uses of Alternative Dispute Resolution," 9 Urb., St. and Local L. Newsletter 1 (1986). Also see, the recently published Margurite Millhauser and Charles Pou, Sourcebook on Federal Agency Use of Alternative Means of Dispute Resolution, GPO 052-003-01070-4 (Washington, DC: GPO/Administrative Conference of the United States, 1987).

initial decision is issued within sixty days of the filing of the appeal and the decision does not set a precedent.

Another example was the Civil Aeronautics Board's use of arbitration to resolve disputes arising out of the labor protection provisions imposed by the CAB to prevent undue economic injury to airline employees as a result of airline mergers or acquisitions. The disputes were subject to binding arbitration with the right to appeal to the CAB. Other examples of federal agencies using arbitration in a labor context exist.

There are also several instances where federal agencies use the arbitration process in a non-labor dispute context. The Commodities Futures Trading Commission uses a voluntary arbitration program in its reparations claims. The use of arbitration is specifically encouraged under the Commodity Exchange Act and the CFTC's rules.⁵ Indeed, the Commodity Exchange Act encourages certain contract markets and registered future exchanges to provide for a voluntary, equitable procedure, through private-sector arbitration or otherwise, to settle customer claims and grievances. Similarly, the Securities and Exchange Commission has encouraged the securities industry to adopt a uniform code of arbitration as a part of its self-regulation. The arbitration process allows for resolution of disputes between brokers or dealers and their customers. The CFTC also has rules that provide for voluntary arbitration of reparation disputes between individual parties. In such cases, the dispute is heard by a CFTC judgment officer, who has the power to regulate discovery (the legal process of gathering information from an opposing party in a dispute), to rule on submissions of proof, to render decisions, and to dismiss non-meritorious complaints. The procedure would provide for oral examination only where the issue of the credibility of a witness becomes crucial to the outcome. Decisions are not subject to appeal.

The Environmental Protection Agency has, by statute, two instances where arbitration is allowed. The first provides that any claim for compensation made under "the Superfund" that is rejected by the President can then be heard by a member of the American Board of Arbitrators. The

⁵ See Commodity Exchange Act, 7 U.S.C. sec. 7A(11), 21(b)(10) and 17 C.F.R. sec. 170.8, 180.2.

arbitrator's decision can be appealed to a federal District Court, but can be overturned only if the decision is found to be arbitrary and capricious.⁶ Also, the Federal Insecticide, Fungicide, and Rodenticide Act provides for arbitration to determine the fee due from an applicant for the EPA data used in the application.⁷

Finally, the Federal Trade Commission allows the use of private-sector dispute resolution mechanisms, including most commonly arbitration, for warranty disputes under the Magnuson-Moss Warranty Act. Also, private sector dispute resolution mechanisms are used for the administration of unfair competition and trade practices orders under Section 5 of the Federal Trade Commission Act. These private sector mechanisms are voluntary and are established at the sole discretion of the businesses covered by the Act. However, in the case of warranty disputes, the dispute resolution mechanisms must meet certain minimum FTC guidelines to allow the dispute resolution technique to satisfy the requirements of the Act.

The author found no examples of state public utility commissions using arbitration as a means of procedural streamlining, though no thorough survey was made in this regard. If arbitration were in use, it most likely would be found in situations where a commission decides routine disputes between two private parties. For example, arbitration might be used in customer service complaint proceedings or in disputes between a qualifying facility and a utility concerning what the avoided cost and other provisions should be in a qualifying facility contract.

Mediation-Arbitration

In some instances, federal agencies have used a procedure that has been termed mediation-arbitration. The procedure works like this: a neutral party (the mediator/arbitrator) is given the authority both to mediate a dispute toward a settlement among the parties and to arbitrate any remaining issue that is not resolved during mediations. This procedure has been used effectively by two federal agencies in labor dispute situations, namely the

⁶ See 42 U.S.C. sec. 9612.

⁷ Federal Insecticide, Fungicide and Rodenticide Act 7 U.S.C. sec. 136(a).

Federal Service Impasse Panel of the Federal Labor Relations Authority and the National Mediation Board.⁸ The mediation-arbitration approach has been variously described as friendly arbitration or as mediation with teeth.

Mediation

The procedural streamlining method most widely utilized by federal and state public utility commissions is mediation. We deal with three topics. The first is federal non-utility agency examples of mediation. The second is the use of settlement procedures by the Federal Energy Regulatory Commission. The third is state public utility commission experiences with mediation.

Federal Agency Examples

There are many examples of the use of mediation by federal agencies. Here are a few. The Environmental Protection Agency has been known to use mediation to develop conditions for new source permits under the Clean Air Act. The Department of Health and Human Services regularly uses a mediation program as a part of its Grant Appeals Board process. Under its own rules, the Grants Appeal Board may suggest mediation and will provide or assist in selecting a mediator. Provided the dispute is not then pending before the Board itself, the Board can provide trained mediators. The mediator is empowered to take any steps agreed to by the parties to clarify the issues or resolve the dispute. The parties are not bound by the results of the mediation unless they agree to be so bound in writing.

Another example of a federal agency using mediation on a regular basis involves the U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA). The Coastal Zone Management Act authorizes the Secretary of Commerce to mediate disputes that may arise between the NOAA and a coastal state concerning coastal management programs, and it

⁸ The Railway Labor Act, 41 U.S.C. sec. 151, et seq., created the National Mediation Board to settle railroad-employee disputes. See also 45 U.S.C. sec. 157.

authorizes the NOAA's Office of Ocean and Coastal Resource Management to mediate where a state agency intends to object to a federally licensed activity.⁹ In the latter case, if mediation fails, the parties still have recourse to the courts or may in the alternative take a formal appeal to the Secretary of Commerce.

The Use of Settlement Procedures by the Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission (FERC) resolves approximately 80 percent of its cases through the use of a negotiated settlement without the appointment of an Administrative Law Judge. Even so, the FERC has a procedure to encourage further settlements if informal settlement discussions are not successful. The FERC procedure provides that any party can request the appointment of a special settlement judge to preside over the negotiations at the conference. The settlement judge will not preside over any evidentiary hearing should the settlement conference be unsuccessful. The use of a separate settlement judge viewed as neutral allows the parties to engage in frank and open bargaining without fear of jeopardizing their case before the judge who ultimately hears the case on any unresolved issues. The settlement judge, however, does evaluate and report the status of the negotiation process and the settlement prospects to the Chief Administrative Law Judge or to the Commission itself.¹⁰ In a study of the Federal Power Commission (the predecessor agency to the FERC) from 1975 to 1977, Thomas D. Morgan found that the FERC's settlement procedure reduced the average rate case processing time by nine months or more in electric and gas rate cases.¹¹ However, it is worth noting that the FERC has allowed the use of its settlement procedure in non-routine cases as well as in rate cases. For example, the FERC approved a settlement

⁹ See the Coastal Zone Management Act, 16 U.S.C. 1451, et seq. and its accompanying regulations at 15 C.F.R. part 930, subpart G and 15 C.F.R. 930.124.

¹⁰ 18 C.F.R. Secs. 385.601 to 385.604.

¹¹ Morgan, "Towards a Revised Strategy for Ratemaking," U. Ill. L. Forum 21, 24-26, 42 (1978), 1978 ACUS 23; see also ACUS Recommendation 78-1: "Reduction in Delay in Ratemaking Cases," 1 C.F.R. Sec 305.78-1.

agreement reached between Columbia Gas Transmission Company and agencies representing customers in the District of Columbia, Maryland, Ohio, Pennsylvania, Virginia, and West Virginia. The case stems not only from a rate case, but from challenges to Columbia Gas Transmission's fuel procurement policies that were raised in the context of a purchase gas adjustment proceeding.¹² Indeed, the use of the settlement procedure now routinely occurs in nearly all of the FERC's case-by-case proceedings, including cases where the interest of the general public in having a more competitive market may not be well represented. In such situations, the FERC might occasionally find itself in the awkward position of needing to reject an uncontested settlement. This situation, at one time, seemed likely in the context of FERC Order 436, the FERC's open access rule, particularly when a pipeline entered into settlements with its wholesale customers that would have the actual effect of foreclosing potential competition. However, under FERC Order 500, it is as yet unclear whether such a situation could arise.

Several State Commission Examples

Negotiated and stipulated settlements in a judicial proceeding are used at many, but not all, state public utility commissions. As noted in a 1985 NRRI article on the subject,¹³ negotiated settlements have been used by many state commissions in a variety of circumstances. These stipulated or negotiated settlements were used in a wide variety of cases and issues, including the effects of Tax Reform Act, water rate cases, fuel adjustment clause cases, prudence reviews, the treatment of overcapacity, competition

¹² "FERC Approves Multi-Million Dollar Settlement Proposed by Columbia Gas Transmission Corporation," NARUC Bulletin, July 1, 1985, pp. 11-14; and "FERC Approves Gas Cost Reduction Program in Ohio," NARUC Bulletin, July 8, 1987, pp. 2-3.

¹³ See Robert C. Petrulis, "NRRI Report: Commissions Use Negotiated Settlements to Expedite Regulatory Process," NRRI Quarterly Bulletin, October 1985, pp. 379-390. That report is based in large part on the initial research performed for this report. The most salient points to be made about negotiated and stipulated settlements in an adjudicatory setting are dealt with herein. The reader is referred to the original NRRI report for more detail.

in the telecommunications industry, customer service rule complaints, new telecommunications service offerings, the treatment of cancelled plant, the removal and deregulation of a plant from rate base, and the sale of an electric plant. (A list of examples of state commissions using stipulated or negotiated settlements is contained in appendix A.)

The New York Experience

The experiences of two state commissions that have entered into negotiated or stipulated settlements, the New York Public Service Commission and the Washington Utilities and Transportation Commission, warrant further discussion.

The New York experience with negotiated and mediated settlements was discussed by Chief Administrative Law Judge William Cowan at the Ninety-Eighth Annual Convention and Regulatory Symposium of NARUC in 1986. According to Judge Cowan, these alternative dispute resolution techniques have been used in three contexts in New York: rate and environmental cases, consumer complaint disputes, and rulemaking.¹⁴ The first two of these contexts fall under our category of procedural streamlining. Here is how the technique has worked in a typical rate case: first the staff conducts its detailed engineering and accounting audit of the utility, which is necessary to consider the utility's request for a rate increase. Settlement discussions are considered to be an option only after the staff has done its detailed analysis of the utility's rate request and is in a position to protect the public civil interest. Then, in more complex cases, staff completes discovery and cross-examination of the utility's direct testimony before commencement of settlement discussions. The staff can then comfortably proceed, without compromising the public interest, knowing it has complete information and has tested the validity of the utility's

¹⁴ "Remarks by the Honorable William J. Cowan," Proceedings of the Ninety-Eighth Annual Convention and Regulatory Symposium of the National Association of Regulatory Utility Commissioners, ed. Paul Rodgers (Washington, D.C.: NARUC, 1987), p. 85. Also see, "Federal Report Praises New York Commission's Innovative Program to Resolve Consumer Complaints," NARUC Bulletin, July 21, 1986, pp. 4-5.

testimony. In less complex cases, settlement discussions begin after discovery, because the information supplied in discovery is felt to be sufficient and valid.¹⁵ (In other states, a settlement conference might occur during the prehearing conference stage of the case, either before or after discovery or the filing of a comprehensive standard filing requirement. This is particularly true at commissions that follow some form of the Rules of Civil Procedure.¹⁶)

The New York Public Service Commission, like the FERC, allows the use of separate judges in its settlement procedure.¹⁷ The New York Public Service Commission's settlement judges are specially trained in the use of negotiation and mediation. A settlement judge can be assigned to a case to help the parties resolve as many issues as possible outside the context of an evidentiary hearing. Once again, the use of a separate settlement judge has the advantage of allowing the parties to negotiate their positions fully before the settlement judge, without feeling that they have compromised their positions before the administrative law judge who will hear their complaints.

The New York Public Service Commission has guidelines to ensure the fairness and openness of its settlement process.¹⁸ The guidelines provide for notice to parties of the settlement conferences or meetings to all interested, requires that the initial Administrative Law Judge and later the Commission itself review the reasonableness of any settlement proposal, and permits parties not participating in the settlement to develop their own positions before the Administrative Law Judge and the Commission and to oppose the settlement on the record. According to Judge Cowan, use of these procedural streamlining techniques serves consumer groups well because they probably have a better chance of influencing the result of a negotiated rate settlement than of prevailing on the issues in a contested rate case. It

¹⁵ Ibid.

¹⁶ See, for example, Federal Civil Procedure Rule 16.

¹⁷ Ibid. See also, "New York PSC Tests New Ratemaking Procedure in New Rochelle Water Company Rate Case," NARUC Bulletin, April 16, 1984, pp. 15-16. Also see the model settlement rules material in appendix B for material on the settlement rules and guidelines used by the FERC and the New York Public Service Commission.

¹⁸ Ibid., at pp. 85-86.

also has the administrative advantage of avoiding agency staff attempts at reconciling the interests of the parties without any assurance that the interests of parties are even understood.¹⁹

Judge Cowan cautions, however, that the settlement process should not be viewed as a means of avoiding the difficulties that are part and parcel of regulatory oversight. It is not a substitute for substantive staff analysis. Indeed, unless the staff thoroughly prepares before a negotiation settlement, it will be at a disadvantage and the public interest will not be served.²⁰

The key innovations of the New York Service Commission, however, are the use of administrative law judges who are specially trained as mediators at this stage of the process, and guidelines to ensure the fairness and openness of the settlement process.

The State of Washington Experience

Another case worth examining is the experience of the Washington Utilities and Transportation Commission with its "United Experiment".²¹ In 1983, the Washington Utilities and Transportation Commission experimented with the use of principled negotiations, sometimes called conceptual bargaining, as an alternative to the trial-type rate case process. (Recall that the concept of principled negotiations was discussed earlier.²²) Specifically, the commission was seeking to investigate alternative ways to process a utility rate case without lessening the openness, fairness, or the

¹⁹ Ibid., at pp. 86-87.

²⁰ Ibid., at p. 87.

²¹ Much of this discussion is from Richard Finnigan, "The Use of Mediation and Negotiation Techniques in Utility Rate Cases as an Alternative to the Contested Case Model," Proceedings of the Fourth NARUC Biennial Regulatory Information Conference, ed. Raymond Lawton (Columbus: National Regulatory Research Institute, 1984) pp. 1293-1341. Also see, Mary D. Hall, Douglas N. Owens, David D. King, and Leonard Helman, "The Negotiated Rate Case: An Alternative to the Adversarial Process," Proceedings of the Ninety-Fifth Annual Convention and Regulatory Symposium of the National Association of Regulatory Utility Commissioners (Washington, D.C.: NARUC, 1984) pp. 253-271.

²² Roger Fisher and William Ury, Getting to Yes (Houghton Mifflin: Boston, 1981), which was discussed supra, chapter 2, ftnts. 28-31.

critical evaluation that characterizes a contested rate case. The commission approached the United Telephone Company of the Northwest, which was requesting its first rate increase in nearly twenty years, about participating in a new process and the company agreed.²³

The experimental design involved setting up a committee consisting of two teams, one representing the company and one representing the commission staff. The committee would be assisted by subcommittees consisting of persons with particular expertise in particular subjects and the negotiation process would be aided by a mediator/facilitator (who in turn was aided by a consultant with an expertise in negotiation).²⁴

An effort was made to include a representative from the State Attorney General's Office in the negotiation process, as counsel for the public; however, the Attorney General's Office chose not to participate at that stage of the process. This Office cited the following reasons for not participating in the negotiation process: a lack of staff and resources, an unfamiliarity with the negotiation process when compared to the contested rate case, a legal or practical inability to commit to accepting regulatory principles before there was an opportunity to be heard, and a lack of a legal record upon which to base an appeal. Consumer groups also refused to participate in the negotiation process, because they were mainly interested in knowing what the proposed rate increase would be before getting involved.²⁵

The experiment progressed like this. First, the committee met to agree on the ground rules and procedures to be followed in the experiment. Next, it identified the regulatory issues to be resolved by applying principles developed in negotiation. When initially identifying the issues, the committee members avoided taking positions on the principles to be applied. The committee then developed an outline from which members could negotiate the principles to be applied. The issues were viewed as an integrated whole, recognizing their interdependence, and an integrated solution was sought. Committee members negotiated the regulatory principles to be

²³ Richard Finnigan, pp. 1299-1300.

²⁴ Ibid., at p. 1300.

²⁵ Ibid., pp. 1302, 1307.

applied, addressing issues such as whether rates should be based on a historical or a future test year and how the rate of return on equity should be set. The committee then identified the data needed to get numerical results from the experiment.²⁶

The final step in the process was another effort to have public participation. The Commission held two rounds of public hearings in the utility's service territory. The first hearing was about the principled negotiations process itself, and the second was about the proposed rates. The Commissioners themselves became directly involved in the process for the first time at the second round of public meetings. Here, the public was able to ask questions of the Commissioners. Subsequent to the second round of public meetings, the Commission approved the rate filing.²⁷

The "United Experiment" can be judged to be a limited success because the experiment (1) produced a rate filing under which the utility received a modest rate increase under regulatory principles that were negotiated and agreed upon by the utility and the commission staff and (2) demonstrated that principled negotiations can be used as a rate regulation tool. However, the principled negotiation process was very time-consuming, no doubt in part because regulatory ratemaking principles were developed "from scratch" instead of being taken as a given. Also, there were problems with identifying, obtaining, and using the data that were to be applied to the regulatory principles developed in the negotiation process. Another limitation was the inability to get public participation during the negotiation process itself.²⁸

Summary Proceedings

The use of summary proceedings by federal or state agencies is not uncommon. These proceedings have taken several forms. Most have to do with streamlined filing requirements, truncated hearings, or no oral hearing at

²⁶ Ibid., pp. 1300-1302.

²⁷ Ibid., pp. 1302-1303.

²⁸ Ibid., pp. 1303-1306.

all. Instead, a decision is based solely on the written filings. Mini-trials are a procedure closely related but somewhat different from a summary proceeding. The idea behind a mini-trial is to conduct a short version of the hearing before the actual hearing in order to encourage settlement by the parties. Mini-trials have rarely been used by federal or state agencies.

Some Federal Examples

Three federal utility regulatory agencies use summary proceedings on a regular basis. Today, the Interstate Commerce Commission--the original regulatory agency upon which most federal and state regulatory agencies model their adjudicatory proceedings--decides most of its cases using a modified procedure under the APA that relies solely on written submissions. The ICC's Office of Proceedings prepares these "modified procedure decisions."

The Federal Communications Commission also has the authority to make extensive use of summary proceedings through both paper hearings and expedited hearings. The FCC may conduct paper hearings to decide cases when there are competing applications for low power television service licenses.²⁹ Such a paper hearing involves having all of the pleadings, the direct testimony, and cross-examination testimony submitted in a written form, with no oral hearing. However, if the Commission cannot resolve the controversy using a paper hearing, it conducts a regular trial-type hearing. It may also conduct expedited hearings concerning competing applications for licensing of cellular radio telephone facilities. An expedited hearing involves strict adherence to a hearing schedule.³⁰

The FERC also now provides for optional expedited certification and abandonment procedures for those natural gas pipelines that declare themselves open access carriers under FERC Order 436 and that wish to provide new service, so long as in the filing the pipeline assumes the risk of undertaking the new venture and agrees to certain conditions governing

²⁹ 47 C.F.R. sec. 1.2412a

³⁰ 47 C.F.R. sec. 22.916, 22.917.

the proposed service. If the applicant is an open access pipeline and complies with the certificate filing requirements, there is a rebuttable presumption created in favor of issuing a non-exclusive certificate for new service. Unless a protest or petition to intervene that raises a genuine issue of material fact about the certificate is filed, the FERC will grant it. Even then, the certificate will still be granted unless the protestor or intervenor overcomes the presumptions that the certificate would comply with the Natural Gas Act and be in the public interest. While it is true that this optional expedited certification procedure is in part a deliberate regulatory incentive to encourage pipelines to become open access carriers, it also promises to streamline FERC's certification process.

Also, the Federal Maritime Commission uses a summary procedure before an Administrative Law Judge when both parties consent. The summary proceeding involves the use of a written submission of memoranda, facts, and arguments. Also, the Maritime Commission can use a non-adjudicatory fact finding investigation that is conducted by agency personnel.³¹

The Nuclear Regulatory Commission also has an informal summary procedure available for use in its licensing proceedings. Specifically, the Chairman of the Atomic Safety and Licensing Board Panel may select a member of the panel to act as a presiding officer over a proceeding. Although the presiding officer may allow the parties to submit oral arguments at his or her discretion, he may also make a decision based upon written submissions. The Commission may then issue an order based on this decision.³²

The use of summary proceedings by other federal agencies is also common. For example, the Commodities Futures Trading Commission's current reparation rules provide for one type of summary proceeding. For matters where the damages claimed are less than \$5,000, the summary proceeding hearing is a paper hearing where written pleadings, evidence, and arguments are submitted but no oral hearing is held. Instead, a hearing officer makes an initial decision based on the written submissions. The initial decision is appealable to the Commission. One-third of the CFTC's reparation cases

³¹ 46 C.F.R. sec. 502.281.

³² 42 U.S.C. sec. 2239.

in 1981 and 1982 employed the use of summary proceedings.³³ The CFTC also has proposed new rules that feature two additional summary proceedings. Where the amount in controversy is greater than \$5,000 and where the parties agree to its use, a reparations complaint will be handled through the use of a voluntary decisional procedure, where direct oral testimony and cross-examination take place only where the credibility of a witness becomes crucial to the outcome. The final decision would be made by a CFTC fact-finder called a judgment officer and would contain a briefly stated conclusion of law without any findings of fact. The decision would not be appealable. Where the amount in controversy is less than \$10,000 and the parties do not agree to the voluntary procedure, a summary decisional procedure would be available. Here too there would only be an oral hearing if the credibility of a witness is crucial to the outcome of the decision; but the initial decision by the judgment officer would contain a statement of facts and would be appealable.

Two federal agencies use a summary proceeding when dealing with labor grievances. First, the Equal Employment Opportunity Commission has a summary grievance procedure for its non-bargaining unit employees. The procedure uses a special grievance examiner who holds an inquiry on the grievance. During that inquiry, the grievance examiner may require documentary evidence, and/or conduct personal or group interviews to collect evidence, instead of holding a hearing. In 80% of the grievance cases during 1983 no hearing was held.³⁴ Second, the Federal Service Impasses Panel, an entity within the Federal Labor Relations Authority (mentioned previously) is authorized to fashion dispute resolution procedures and apply them on a case-by-case basis. The most widely used of these procedures is the summary proceeding using written submissions. Instead of a hearing, the parties exchange written statements of position together with supporting evidence, and perhaps rebuttal statements. The Federal Service Impasses Panel considers the written submissions and either makes a recommendation for settlement or issues a binding decision.

³³ See 17 C.F.R. sec. 12.3(o), 12.31, 12.91-12.95.

³⁴ See Equal Employment Opportunity Order No. 571.

The Department of Housing and Urban Development uses a summary procedure to decide bid protests. The procedure involves written submissions by both the protestor and the procuring agent to the HUD Board of Contract Appeals. It is followed for all bid protests involving contracts covered by the National Housing Act.³⁵

The Department of Defense is not bound to conduct its proceedings under the APA. Its Armed Services Board of Contract Appeals (ASBCA) uses summary proceedings on a regular basis. Specifically, the ASBCA allows the parties to submit their cases in writing, and a decision may be reached without a hearing.³⁶ Also, if the amount in controversy is \$50,000 or less, then a truncated proceeding will take place to further expedite the process.³⁷

One instance was found of a federal agency using a mini-trial. The National Aeronautics and Space Administration once used the procedure to resolve a complex procurement dispute.

State Examples³⁸

State public utility commissions have also been actively using summary proceedings to streamline the procedural process. However, the author found no example of a state commission using a mini-trial procedure for procedural streamlining. Nonetheless, mini-trials have been used by federal courts in public utility cases that deal with issues that affect state regulation of public utilities. An important example is the settlement reached between General Electric Company and Cincinnati Gas & Electric Company, Dayton Power & Light Company, and Columbus & Southern Power Company in a billion dollar lawsuit concerning the alleged safety and design defects in the partially constructed Zimmer nuclear power plant. In that case, a United States

³⁵ National Housing Act Contracts, 12 U.S.C. sec. 1701, et seq., 42 U.S.C. 3535(d); 24 C.F.R. Part 20, Subpart C.

³⁶ See Armed Services Board of Contract Appeals Rule 11.

³⁷ See Armed Services Board of Contract Appeals Rule 12.

³⁸ With one exception, the examples here are of state public utility commissions, not all state administrative agencies using summary proceedings.

District Court judge held a summary jury trial in private, where a jury heard the evidence that each side was prepared to present in the case. The jury, in a non-binding verdict, ruled unanimously that the General Electric Company was not liable. After the summary jury verdict, the parties settled the case, with General Electric paying the utilities \$78.3 million as against the \$1.2 billion sought. The General Electric Company chose to settle rather than risk a more costly and time-consuming trial, with a different jury that could reach a different verdict.³⁹

The use of summary proceedings by state public utility commissions occurs most often in the context of small water utility rate cases, cases dealing with regulated cooperatives, cases dealing with consumer complaints, small telephone companies cases, and rate reduction hearings. In a 1983 report, the National Regulatory Research Institute found that twenty-six of the state public utility commissions were then using stipulated proceedings in their regulation of water utilities, eighteen commissions had simplified or shortened forms for rate case filing, and twenty-two commissions had simplified the the rate case procedures.⁴⁰ Within the twenty-two commissions with simplified procedures, there are four groups. Several of these commissions either do not require a formal hearing before a rate increase or provide that a formal hearing is not required unless consumers request a hearing. In several of the state commissions the commission staff assists the water utility with its rate case or even its rate filing. Since then, at least two other state commissions have streamlined the procedures of the rate hearing process for small water utilities. The Nevada Public Service Commission revised its regulations concerning small water and sewer companies by giving the Commission greater authority to approve or disapprove the construction of utility facilities before they are built. (Previously the Commission only regulated small water companies after they

³⁹ "GE to pay \$78 Million over Zimmer," The Plain Dealer 21 November 1987, pp. 1, 11a; "GE, 3 Utilities Settle Lawsuit Over Plant," Wall Street Journal, Midwest Ed., 23 November 1987, p. 30.

⁴⁰ Raymond Lawton and Vivian Davis, Commission Regulation of Small Water Utilities: Some Issues and Solutions (Columbus, Ohio: NRRI, 1983), pp. 31-63.

achieved 25 hook-ups or \$5,000 in gross revenues. Unfortunately, many of these small companies were poorly or inadequately designed.) The Commission also simplified the annual report filing and rate case procedures. In addition, the Commission is encouraging settlements at pre-hearing conferences.⁴¹ The Arizona Corporation Commission also issued new rules that streamline the rate adjustment process for water companies with annual revenues under \$50,000. These new rules affect approximately 300 of the 385 water companies regulated by the Arizona Commission. The simplified procedure, which avoids a full hearing, is optional for the Commission because the Commission is still empowered to require a full hearing in the event that consumer complaints warrant it. The Commission staff also developed a short form to assist the owners and operators of small water companies in providing the information required to process the rate adjustment request.⁴²

The Arizona, Arkansas, Oklahoma, and Kansas commissions have recently taken steps to simplify the rate proceedings for electric cooperatives in their states. The Arizona Corporation Commission directed its staff to prepare new rules and regulations to simplify the rate proceedings concerning electric cooperatives, including faster internal procedures regarding financing costs, streamlined filing requirements for rate reviews, and generic hearings on distribution cooperatives' financial management plans (as opposed to taking those issues up at a rate case).⁴³ Both the Oklahoma Corporation Commission and the Arkansas General Assembly have recently simplified the rate procedures for cooperatives. In Arkansas, the legislature passed a law that allows a cooperative to implement rate increases of up to 10 percent unless 15 percent of the cooperative's members file an objection. In Oklahoma, the commission promulgated a rule that sets

⁴¹ "Nevada PSC Improves Regulation of Water and Sewer Companies," NARUC Bulletin, August 24, 1984, p. 12

⁴² "New Arizona CC Water Rules Aimed at Saving Money," NARUC Bulletin, April 19, 1985, p. 13.

⁴³ "Arizona Co-op Regulation to be Simplified," Public Utilities Fortnightly, April 3, 1986, p. 50; "Arizona Electric Cooperative Get Streamlined Treatment," NARUC Bulletin, August 3, 1987, pp. 25-26.

out well-defined procedures to simplify the rate proceeding.⁴⁴

The Kansas Corporation Commission has also proposed the adoption of an expedited rate case procedure for routine rate cases by small distribution cooperatives. The procedure would cut the rate processing time from 240 days to 80 days. It would require a cooperative to notify the Commission of the cooperative's intention to file between 30 to 90 days before the filing of an application for an expedited rate case, to hold a pre-application meeting with its members to explain the proposal, and to meet with the staff within 10 days after filing the application. The staff would prepare its audit of the application within 60 days of the filing. Then, the applicant has 5 days to review the staff findings and to prepare written comments. Then the staff findings together with all written comments are forwarded to the Commission, which has 14 days to make a decision. An interim order must be issued within 10 days of the decision, which then becomes final in another 60 days. This procedure must still be approved by the Commission Secretary of Administration and the Attorney General.⁴⁵

Other examples of procedural simplification include the informal consumer complaint dispute-resolution processes of the Arizona Corporation Commission⁴⁶ and the New York State Public Service Commission;⁴⁷ the reduced regulation of small telephone utilities by the Oregon Public Utility Commission and the Iowa Utility Board;⁴⁸ and the expedited treatment of rate reduction requests from intrastate interLATA providers by the Missouri

⁴⁴ "Arkansas Lawmakers Approve Limited Co-op Deregulation," Electric Utility Week, May 25, 1987, p. 10; "Oklahoma Regulators Okay Streamlined Procedures for Co-op Cases," Electric Utility Week, June 22, 1987, pp. 6-7. A precursor to the current Oklahoma streamlining procedure was the debt service clause for rural electric cooperatives that was in effect in Oklahoma beginning in 1985. See "Oklahoma Commission Develops Debt Service Adjustment Clause for Co-Op," Electric Utility Week, May 13, 1985, p. 11.

⁴⁵ "Expedited Rate Case Proceedings for Co-ops Okayed by Kansas Regulators," Electric Utility Week, November 16, 1987, p. 9.

⁴⁶ "Arizona CC Gives Consumers New Help," NARUC Bulletin, August 19, 1985, pp. 8-9.

⁴⁷ "Federal Report Praises New York Commission's Innovative Program to Resolve Consumer Complaints," NARUC Bulletin, July 21, 1986, pp. 4-5.

⁴⁸ "Rates Deregulated for Small Oregon Telephone Companies in Oregon," NARUC Bulletin, October 19, 1987, p. 4.

Substantive Streamlining

Many state commissions and the FERC have engaged in substantive streamlining to speed up or simplify the regulatory process. Substantive streamlining, as opposed to procedural streamlining, involves actual changes in the substantive law concerning what is decided. Perhaps the best known example of substantive streamlining is the automatic fuel adjustment clause and its associated hearings. The operation of a fuel adjustment clause actually changes the substance of what is decided in a rate case by effectively taking fuel costs out of the rate case and allowing automatic recovery of fuel expenses that are, in most states, subject only to a truing-up hearing. Substantive streamlining has both its critics and advocates.⁵⁰

The most significant recent example of substantive streamlining by the FERC is the generic benchmark rate of return on common equity. The generic benchmark rate of return is determined by a formula that is based on the discounted cash flow method of calculating return on equity. Once determined, the generic benchmark rate of return creates a rebuttable presumption that it is the proper rate of return for a utility that files a rate case before the FERC when that particular benchmark rate of return is in effect. It is hoped that the benchmark rate of return on equity would eliminate a very contentious portion of a rate case.⁵¹

⁴⁹ "Missouri PSC Approves Long Distance Rate Reduction for MCI," and "Missouri PSC Approves Long Distance Rate Reduction for AT&T," NARUC Bulletin, September 23, 1985, pp. 13 and 14, respectively.

⁵⁰ An example of a proponent is Joskow and Schmalensee, "Incentive Regulation for Electric Utilities" 4 Yale J. on Reg. 1 (1986). A principal opponent is Douglas N. Jones, "A Defense of Rate Regulation in the Classic Style," Public Utilities Fortnightly, June 19, 1980, p. 4, et seq.

⁵¹ See generally FERC Order Nos. 420, 422, and 461. See also, "FERC Seeks Greater Consideration of Benchmark Rate of Return in Rate Cases," Electric Utility Week, September 14, 1987, pp. 13-14, where it is reported that the FERC is issuing a new notice of proposed rulemaking that would allow all the parties in a rate case to evaluate the reasonableness of the applicable benchmark rate of return and submit evidence on the special circumstances of the particular utility which might justify departure from the benchmark.

There are also several examples of state commissions engaging in substantive streamlining. For example, the California Public Utilities Commission has both an attrition rate adjustment (ARA) and an electric rate adjustment mechanism (ERAM), in addition to the typical energy adjustment clause (ECAC). The idea behind the ARA is this. The California utilities are on a three-year cycle for general rate cases. Rates for the first year of the decision are based on forecasts approved in the general rate case decision. However, because the rates are in effect for three years, the utility could suffer an attrition of earnings because of inflationary pressures and system growth during the second and third years. To protect the utility from such attrition and to make more frequent general rate cases unnecessary, the Commission allows an ARA, which incorporates labor and non-labor indices, a revision of rate base based on plant additions, and a review of the authorized rate of return. The ERAM allows for a rate adjustment when actual sales are above or below the forecasted level. Specifically, the ERAM provides that, when sales are above the amount projected to produce a set amount of revenues, the excess revenues are banked in an ERAM account and used to reduce rates. But when sales are below expectations, the shortfall is temporarily "banked," which ultimately leads to higher rates. Recently, the California Commission considered eliminating the ARA and the ERAM, but decided to take a more limited approach. In order to try to prevent bypass and to create more competitive conditions, the Commission eliminated the ARA and ERAM only for electric customers in the large light and power service class.⁵²

The New York Public Service Commission also experimented with a similar process that was aimed at decreasing the frequency of rate cases. In particular, the NYPSA allowed, on an experimental basis, a third-stage filing by the Orange and Rockland Utilities Company that permitted the

⁵² See "California Eyes Ending Automatic Rate Adjustments as Earnings, Economy Improve," Electric Utility Week, December 23, 1984, p. 5; "California Sets Accord with Four Electric Utilities on Cost of Capital Levels," Electric Utility Week, August 25, 1986, pp. 5-6; Re Pacific Gas and Electric Co., 77 PUR4th 166 (Cal.PUC 1986); Re Electric Utility Rate-Making Mechanisms, 85 PUR4th 26 (Cal.PUC 1987); and "California to Try Averting Bypass by Ending Rate Adjustments for Big Users," Electric Utility Week, June 22, 1987, pp. 9-11.

utility to recover an adjustment for labor cost increases, forecasted increases in non-fuel operation and maintenance costs, known increases in property taxes, and the addition of a new corporate divisional headquarters in rate base. (Normally, a second-stage rate filing is permitted to allow the utility to recover increased labor costs and increased property taxes a few months immediately after a rate order is issued.) The experiment was meant to provide stable rates and to avoid the expense of conducting a rate case for an additional eleven month period.⁵³

The Alabama Public Service Commission has a "Rate Stabilization Program" (RSE) in operation that was first initiated on an experimental basis in 1982. Since then, the RSE has been made permanent for electric utilities and is, according to the Commission, "a proven and practical ratemaking technique."⁵⁴ The RSE was extended to the major Alabama gas utility through October 1, 1987 while the Commission considered whether to extend the RSE another four years.⁵⁵ Further, the Alabama Commission has extended the use of its RSE to telephone utilities.⁵⁶ Here is how the RSE works: the Commission allows the rate of return on common equity and the revenue requirement to fluctuate within a range of reasonableness set by the Commission. In turn, the utility adjusted its rates on a quarterly basis so that it will earn the common equity return that is the mid-point of the

⁵³ "O&R '3rd-Stage Filing' Aimed at Deferring Rate Cases Okayed by N.Y. PSC," Electric Utility Week, October 1, 1984, p. 5; and "New York PSC Approves Modified Orange & Rockland Rate Filing, Assures Stability for at Least 11 Months," NARUC Bulletin, October 8, 1984, pp. 5-6.

⁵⁴ See Re Alabama Power Co., Order, Docket Nos. 18117 and 18416 (AlabPSC Dec. 20, 1985); "Alabama to Continue its Automatic Rate Adjustment Mechanisms," Public Utilities Fortnightly, February 7, 1985, pp. 56-57; Re Alabama Power Co., Opinion and Order, Docket Nos. 18117 and 18416 (Alab.PSC June 5, 1985); "Rate Stabilization Program Given Permanent Status," Public Utilities Fortnightly, July 11, 1985, p. 57; and "Alabama Supreme Court Affirms Automatic Rate-Setting Plans," Public Utilities Fortnightly, February 19, 1987, pp. 74-75, citing *Airco, Inc. v. Alabama Pub. Serv. Comm.*, 496 So.2d 21 (Ala. 1986).

⁵⁵ Re Alabama Gas Corporation, 67 PUR4th 149 (Alab.PSC 1985); "Rate Stabilization Program Extended in Alabama," Public Utilities Fortnightly, August 6, 1987, p. 47; Re Alabama Gas Corp., Order, Dockets 18046 and 18329 (Alab.PSC June 24, 1987).

⁵⁶ Re South Central Bell Telephone Company, 78 PUR4th 299 (Alab. PSC 1986); "Alabama Expands its Flexible Rate System to Cover Telephone Utilities," Public Utilities Fortnightly, December 25, 1986, p. 51.

range. The Commission also allows a "Certified New Plant" (CNP) adjustment that allows bills to be automatically adjusted during the month following a new plant being brought into service.⁵⁷ A similar RSE procedure is in effect in New Mexico. However, a RSE proposal was rejected by the Rhode Island Public Utilities Commission. While acknowledging that the RSE would promote regulatory efficiency, the Commission was concerned that the RSE procedure would fail to provide sufficient cost control incentives and could compromise the Commission's integrity in carrying out its statutory authority to ensure that rates are just and reasonable.⁵⁸

The Mississippi Public Service Commission has adopted a "Performance Evaluation Plan" (PEP) on an experimental basis for the Mississippi Power Company. It adjusts rates quarterly based on how well the utility meets its performance standards as well as how its equity return compares to other utilities with the same credit rating. Under the PEP, the Commission adopts a benchmark rate of return that is an average of the required cost of equity for utilities in Value Line that have the same Standard & Poor's bond rating as the utility in question. The required return on equity of each utility would be determined by a discounted cash flow formula, which includes the dividends paid by the utility for the past four quarters, its stock price over the most recent ten days of the evaluation period, and its most current dividend growth rate forecast. If the utility's actual earned return equals the benchmark return, there would be no quarterly change in rates. Otherwise, rates go up or down depending on both the gap between the actual earned return and the benchmark return, and also how well the utility did on the "PEP Matrix."⁵⁹

⁵⁷ "Alabama Supreme Court Affirms Automatic Rate-Setting Plans," Public Utilities Fortnightly, February 19, 1987, pp. 74-75.

⁵⁸ "Rhode Island Rejects Automatic Rate Stabilization Plan," Public Utilities Fortnightly, July 5, 1984, p. 56.

⁵⁹ The PEP matrix is based on weighted performance ratings on a scale of 0 to 10 for seven performance areas. The seven performance areas and their associated weights are residential cost compared to other southern utilities (.20); equivalent plant availability (.16); service reliability (.16);

(Footnote continues on next page)

According to the then Vice-Chairman of the Mississippi Public Service Commission, the PEP "will reduce the tremendous cost of rate proceedings, speed up the lag in litigating cases, and keep the company in a balanced financial condition." The complex PEP system is as far as any Commission

(Footnote continued from previous page)

customer satisfaction (.15); safety (.11); contribution to load factor (.11); and construction performance (.11). The utility is given a performance rating between 0 and 10 in each area, according to criteria set out by the Commission. The performance rating for each area is given its appropriate weight, and the resulting weighted performance ratings are summed to reach an overall performance rating for the utility. For example, if the performance rating were 3 for a performance area and the weight for that same performance area were .20, then the weighted performance area rating would be 3 times .20, or .6. To get an overall performance rating one would simply sum the seven weighted performance area ratings. The overall performance rating for the utility will necessarily be between 0 and 10. The benchmark return and the utility's actual equity return are then plotted on the PEP matrix in one of five categories, depending on the overall performance rating. If the overall performance rating is between 0.0 and 2.0, the returns are plotted in Category I of the PEP Matrix; from 2.0+ to 4.0, the returns are plotted in Category II of the matrix; from 4.0+ to 6.0, the returns are plotted in Category III of the matrix; from 6.0+ to 8.0, the returns are plotted in Category IV of the matrix; and from 8.0+ to 10.0, the returns are plotted in Category V of the matrix. There is a 2 percent dead-band zone for each of these categories, where no rate cut or rate increase is necessary, if the actual equity rate of return falls within the dead-band zone. However, the placement of the dead-band zone varies according to which Category the the matrix the utility's performance rating is in. If the utility performed poorly (Category I) of the matrix, the 2 percent dead-band zone is between 0 and 2 percent below the benchmark return. For example, if the benchmark return were 13 percent, the utility's actual return were 11 percent, and the utility's overall performance placed it within Category I of the matrix, the utility would not receive either a rate increase or decrease. Assuming the same data, if the utility's actual return were 10 percent, it would receive a rate increase, but if the utility's actual return were 14 percent, the commission would decrease rates. The location of the 2 percent dead-band increases against the benchmark return in one-half percent increments, until in Category V, the dead-band is from 0 to 2 percent above the benchmark return. Thus, for Category III, the dead-band zone ranges from 1 percent below the benchmark return to 1 percent above the benchmark return.

has gone toward replacing rate cases with an incentive performance approach.⁶⁰

Several other state commissions have also engaged in substantive streamlining including various forms of flexible rates, where a utility can charge rates within a commission approved ceiling and floor. Examples include the "zone of freedom" rate regulation being considered by the West Virginia Public Service Commission,⁶¹ flexible rates and/or revenue requirements for telephone carriers in Missouri and Maryland,⁶² and flexible gas rates that have been approved by numerous state commissions.⁶³

One final effort at implementing substantive streamlining is worthy of mention. The Federal Communications Commission has proposed replacing cost-of-service regulation with a form of price cap regulation based on a so-called social contract theory.⁶⁴ It would replace cost-plus-rate regulation with a cap on the price of service tied to increases in the Consumer Price Index. (The FCC is considering whether the cap should include adjustments that would reflect industry-wide or nationwide

⁶⁰ "Miss. PSC May Replace Rate Case Method with Plan Tying Prices to Performance," Electric Utility Week, March 31, 1986, p. 1, 4-5; "PSC to Link Mississippi Power's Rates to 'Benchmark' Return, Performance," Electric Utility Week, August 18, 1986, p. 1, 10-11; "Miss. Power Performance Plan Indicates 2% Rate Hike--So PSC Suspends It," Electric Utility Week, September 8, 1986, p. 7; "Miss. Power Performance Plan Okayed After PSC Trims Hike for Residentials," Electric Utility Week, September 29, 1986, pp. 3-4; and "No Rate Change Seen under Mississippi Power 'Performance Evaluation Plan'," Electric Utility Week, February 16, 1987, pp. 7-8. For a critique of nonperformance-based cost of service indexing, see Alvin Kaufman and Russell Profozich, The New Mexico Cost of Service Index: An Effort in Regulatory Innovation (Columbus, Ohio: NRRI, 1979).

⁶¹ "West Virginia PSC Considers 'Zone of Reasonableness' for Motor Carrier Rates," NARUC Bulletin, October 22, 1984, p. 9; and "West Virginia PSC ALJ Recommends Zone of Rate Freedom for Motor Carriers," NARUC Bulletin, February 2, 1987.

⁶² "Missouri PSC Establishes Policy which Allows Missouri Long-Distance Provider Flexibility," NARUC Bulletin, July 22, 1985, p. 10; and "Flexible Rates Upheld for Telephone Utility," Public Utilities Fortnightly, January 22, 1987, p. 48.

⁶³ See appendix C of J. Stephen Henderson et al., Natural Gas Rate Design and Transportation Policy Under Deregulation and Market Uncertainty (Columbus, Ohio: NRRI, January 1986), at pp. 153-166.

⁶⁴ Fowler, Halprin, and Schlichting, "'Back to the Future': A Model for Telecommunications," Fed. Communications L. J. 145 (1986).

productivity increases.) One of the principal reasons cited by the FCC for considering this form of regulation is that the divestiture of AT&T no longer makes cost-of-service regulation a legal obligation, particularly if another form of regulation can lead to just and reasonable results. Further, cost-of-service regulation is time-consuming and imposes significant costs on the regulated entities and hence their customers as well as the regulating agency and hence the taxpayers. The thrust is that the social contract form of regulation is less time-consuming and less expensive to implement.⁶⁵ This effort at streamlining involves fundamental substantive changes in the methods used to determine just and reasonable rates.⁶⁶

These examples of both procedural and substantive streamlining in use by federal administrative agencies and state public utility commissions are techniques that any state commission might use if greater administrative efficiency can be achieved without jeopardizing the quality of the ultimate decision reached or compromising due process in reaching the result. No judgments are made about the substantive streamlining methods noted above. However, substantive streamlining should only be considered with great caution because the substance of what is being decided is actually being changed. Would-be reformers carry a heavy burden of showing that substantive changes for the sake of streamlining the process actually result in improvements in the regulatory process, without compromising the accuracy of the result or the fairness of the process.

Judicious use of the procedural and substantive streamlining techniques described above can free up commission time and resources, making it

⁶⁵ See "FCC Proposes Replacing Rate-of-Return Regulation for Dominant Carriers with 'Price Caps' Regulation for Interstate Services," NARUC Bulletin, August 10, 1987, pp. 20-23.

⁶⁶ A similar indexing effort was attempted in New Mexico, but was rejected because it resulted in large profits for the utility which appeared to have no relationship to the utility's holding down of costs. However, the New Mexico effort concerned electric utility services where there were no competitors to force prices downward. See generally Alvin Kaufman and Russell Profozich, The New Mexico Cost of Service Index: An Effort in Regulatory Innovation (Columbus, Ohio: NRRI, 1979).

possible for a commission to become more involved in dealing with the complex prospective policy issues that commissions face today.

Procedures to Improve the Quality of Regulatory Policy Making

Turn now to a discussion of examples of innovative administrative procedures for regulatory planning that are in use at federal agencies and state public utility commissions. These procedures would allow commission decision-makers to become more involved in the formulation of prospective policy. (The decision-makers may be the commissioners themselves, or administrative law judges, or senior staff who have been delegated the role of making an initial advisory decision for the commissioners' consideration.) The procedures would allow the decision-maker to consider prospective policy issues in a more complete, thorough, and coherent fashion than the typical trial-type or notice-and-comment rulemaking procedure. The procedures vary from both the typical trial-type proceeding and the typical notice-and-comment rulemaking process, although some of these procedures supplement rather than supplant existing rulemaking or trial-type procedures, that is, some alternative procedures can be used early in the administrative process in combination with rulemaking or an abbreviated adjudicatory hearing. One example would be a negotiated rulemaking, where a negotiation process is followed by the more traditional notice-and-comment rulemaking. Other combinations are possible. What these procedures have in common is that they are not used simply to expedite or to streamline the regulatory process. Rather, these procedures can be useful in actually improving the quality of regulation, particularly forward-looking regulation that concerns regulatory policy making. These procedures have an important aspect in common, namely, they help the policy decision-maker to gather, organize, and consider pertinent and complete information that is necessary for proactive regulatory policy making in a more organized and rational fashion than current procedures. Some of these procedures allow the decision-maker to use his or her expertise and to engage in in-depth discussions or full and wide-ranging inquiries on prospective policy issue.

There are several procedures that have been used by federal agencies and state public utility commissions to improve the quality of regulatory planning. The procedures discussed here include negotiated rulemaking,

workshops in rulemaking and discovery contexts, technical conferences, commission task forces, consumers' or scientific advisory committees, and scientific panels. Examples of each procedure are given.

Negotiated Rulemaking

The United States Environmental Protection Agency has made the most extensive use of negotiated rulemaking. As noted earlier, the typical rulemaking process may begin with a notice of inquiry, which states that a federal agency is interested in gathering opinions and information that address certain issues on a particular topic. Interested parties are given a chance to respond either in writing or in person. Once an agency has a better idea of exactly what it wants to do, it issues a notice of proposed rulemaking, which gives interested parties a notice of the agency's proposed rule and an opportunity to comment. Once the agency takes into consideration the comments made in the rulemaking record, it can issue a final rule. However, if the rule changes substantially in unforeseen ways due to the comments or if the record does not support a revised rule, the agency must issue another notice of proposed rulemaking. A negotiated rulemaking differs from the process just described: the agency attempts to get representatives of the interested parties to negotiate what ought to be in the proposed rule before the notice of proposed rulemaking is issued.

The EPA began using the negotiated rulemaking process in 1983. Since then, the EPA initiated seven major rulemakings through the negotiation process. These include rulemakings on nonconformance regulations for major truck manufacturers, emergency pesticide exemption regulations, farm worker protection standards, wood-burning stoves regulations, regulations concerning minor permit modifications for hazardous waste facilities, regulations concerning the underground injection of hazardous wastes, and regulations concerning asbestos control in schools. Three of these rulemaking proceedings resulted in final rules.⁶⁷

⁶⁷ Lee M. Thomas, "The Successful Use of Regulatory Negotiation by EPA," Administrative Law News, Fall 1987, pp. 1, 3-4.

Here is how the negotiated rulemaking process has worked in two of the EPA rulemakings.⁶⁸ The first EPA experience with negotiated rulemaking involved the nonconformance penalty required by section 206(g) of the Clean Air Act, which allows the EPA to issue certificates of conformity to truck manufacturers whose trucks exceed the allowable emissions level if the manufacturer pays the nonconformity penalty. It was originally intended that the nonconformity penalty would be set high enough so that it would be greater than the cost of actually complying with the emissions standard.⁶⁹

After engaging a consulting firm that specialized in natural resource dispute resolution and had a great deal of experience in mediation as a negotiations facilitator, the EPA found that all the significant interested parties were interested in conducting a negotiated rulemaking on the topic.⁷⁰ The EPA formally initiated the process by issuing a "Notice of Intent to Form an Advisory Committee" in the Federal Register in April 1984, and by holding a ground rules meeting with interested parties to determine how to proceed.⁷¹ The negotiations began on June 14, 1984 with the negotiation facilitator asking all of the parties to develop a list of issues that reflect their concerns. These lists were reduced to a composite list of ten issues, and three working groups were formed to deal with these issues. The negotiations continued with four additional one-day negotiating

⁶⁸ Much of this discussion on the EPA's experience with negotiated rulemaking is based on Susskind and McMahon, "The Theory and Practice of Negotiated Rulemaking," 3 Yale J. on Reg. 133, 143-150 (1985).

⁶⁹ *Id.*, at p. 143.

⁷⁰ *Id.*, at pp. 144-146.

⁷¹ Although there is some uncertainty, the "Notice" was required to be published in the Federal Register because any negotiating committee, including a rulemaking committee, would appear to fall under Federal Advisory Committee Act (FACA). The FACA requires that a negotiating committee (1) be advisory to the agency and chartered by the General Services Administration, (2) have meetings that are open to the public and are controlled by the agency, (3) have its formation and meeting schedule announced in the Federal Register, and (4) have detailed minutes kept of its meetings. The Administrative Conference of the United States has determined that uncertainty about the application of the FACA has discouraged negotiated rulemaking. See *Id.*, at p. 145. In reaction, legislation was recently introduced in Congress to address the applicability of the FACA to negotiated rulemaking and to encourage negotiated rulemaking. See S. 1504, 133 Cong. Rec. S. 10209 (July 17, 1987), and its companion bill H.R. 3052 (July 29, 1987).

sessions and numerous work group sessions to work on the technical issues. The facilitator's role was to make possible a general agreement on detailed agenda, to organize work groups, to prepare the work group minutes and drafts, and to convene the full negotiating group to review the working group drafts. The facilitator also initiated caucuses to encourage the groups to reach a consensus, and he actively intervened when necessary to encourage a consensus.⁷² The final negotiating session was on October 12, 1984. At that session all the tentative issues were resolved, and a four-member subcommittee was delegated the responsibility of drafting a consensus document, which was circulated in mid-October. After receiving comments, several conference calls were made to get an agreement on language for the final consensus document, which was signed by all the participants in December 1984.⁷³ The EPA published its notice of proposed rulemaking, which reflected the consensus agreement of the parties, on March 6, 1985. All the comments received by the EPA during the comment period were in support of the proposed rule.⁷⁴ The final rule was issued on August 30, 1985.⁷⁵

The second experience of the EPA with negotiated rulemaking concerns the regulations issued to implement section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).⁷⁶ Section 18 allows the EPA Administrator to exempt state or federal agencies from provisions of the FIFRA requiring that applications for new pesticides must include information demonstrating the risk they pose to human health if the Administrator determines an emergency condition exists requiring the exemption.⁷⁷ However, it could take up to four years to develop the data needed to demonstrate the potential health risks that a new pesticide might pose. The problem was that section 18 was increasingly being used to circumvent the data and risk control requirements for applications to

⁷² Id. at p. 146.

⁷³ Id.

⁷⁴ 50 Fed. Reg. 9204 (1984).

⁷⁵ 50 Fed. Reg. 35,374 (1985).

⁷⁶ Federal, Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. sec. 136a (1982).

⁷⁷ 40 C.F.R. Sec. 166 (1985).

register new pesticides. After three public meetings on the subject, the EPA published a notice of its intent to form an advisory committee to negotiate the development of new section 18 regulations.⁷⁸

The EPA proceeded very much like it had in the previous negotiated rulemaking except that a consultant was hired as a convener and an EPA staff member was selected as a facilitator/mediator. The convener made initial contacts and identified sixteen likely participants to the negotiations. Six additional parties were added after they expressed interest in participating. The convener held an initial introductory meeting on August 16, 1984 and, with the assistance of the convener and the facilitator, the group agreed on ground rules, formed groups to work on issues, and identified technical data needed to start the negotiations. The EPA representative at the negotiations (not the facilitator) provided the advisory committee with a draft regulation at the initial meeting. This provided some structure to the negotiations. There were six formal negotiating sessions, with the first on September 28, 1984 and the last on January 16, 1985. Three of the sessions lasted two days; three lasted one. The work groups met on their own. A final consensus was reached at the final negotiating session, and a consensus agreement was signed.⁷⁹ The consensus agreement was published as a proposed rulemaking on April 8, 1985.⁸⁰ Nineteen comments were received during the comment period. Most suggested minor technical revisions. The final rule was issued in 1986.⁸¹

Several other federal agencies either have experimented or are now experimenting with negotiated regulations including the Federal Aviation Administration,⁸² the Occupational Safety and Health Administration,⁸³ the Nuclear Regulatory Commission,⁸⁴ the Federal Trade Commission,⁸⁵ the

⁷⁸ 49 Fed. Reg. 31,145 (August 3, 1984).

⁷⁹ Susskind and McMahon, at pp. 146-150.

⁸⁰ 50 Fed. Reg. 13,944 (1985).

⁸¹ 51 Fed. Reg. 1,896 (January 15, 1986).

⁸² See H. Perritt, "Negotiated Rulemaking in Administrative Law," 38 Ad. L. Rev. 471 (1986); H. Perritt, "Negotiated Rulemaking : An Evaluation," 74 Geo. L.J. 1625 (1986).

⁸³ Id.; 52 Fed. Reg. 26776 (July 16, 1987).

⁸⁴ 52 Fed. Reg. 29024 (Aug. 5, 1987).

⁸⁵ 51 Fed. Reg. 29666 (Aug. 20, 1986).

Department of Transportation,⁸⁶ and the Federal Communications Commission.⁸⁷

While the author was not able to find any instances of negotiated rulemaking in use by the state commissions, the possibility of using such a system has been discussed.⁸⁸ Indeed, the Illinois Commerce Commission's Electric Policy Committee considered the possibility of having a negotiated rulemaking concerning billing formats. The idea was rejected as being too expensive for this particular topic because of the cost of hiring trained third-party mediators to assist in the negotiation process. Instead, the Electric Policy Committee recommended that the Commission staff draft a report concerning the staff's intention to draft a rulemaking about billing format and send the report to all potentially interested parties for general comments together with a cover letter requesting specific responses to staff inquiries about the costs and benefits of implementation. The Commission staff received numerous comments, which in all but two instances contained constructive suggestions on how the current rule could be improved. Several issues were raised in the comments which the staff incorporated into its proposed rulemaking.⁸⁹

Workshops in Rulemaking and Discovery Contexts

One state public utility commission has recently experimented extensively with workshops as a means of gathering and organizing information as well as a means of reaching a consensus about regulatory

⁸⁶ 52 Fed. Reg. 19881 (May 28, 1987).

⁸⁷ Communications with Raymand Lawton, the NRRI Associate Director of Telecommunications Research.

⁸⁸ It is also worth noting that the National Association of Regulatory Utility Commissioners has implicitly endorsed the idea of negotiated rulemaking, at least by federal agencies, in its "Resolution Regarding the Determination of the Defense Waste Fee Allocation Formula under the Nuclear Waste Policy Act of 1982." In that resolution NARUC urges the United States Department of Energy to follow procedures for a negotiated rulemaking on the determination of defense wasted fee allocation formula. See NARUC Bulletin, August 11, 1986, pp. 10-11.

⁸⁹ Constance R. Tripp, "Toward More Cooperative Rulemaking: An Illinois Experience," Proceedings of the Fifth NARUC Biennial Regulatory Information Conference, ed. Robert E. Burns (Columbus, Ohio: NRRI, 1986), pp. 27-30.

planning. The best example is the experience of the Nevada Public Service Commission with its statewide integrated utility resource plan.⁹⁰

The workshop approach was originally proposed by then-Commissioner Renee Haman-Guild.⁹¹ The Nevada Public Service Commission first used workshops in the context of a rulemaking on integrated resource planning. The Commission invited all parties to submit proposed rules for Commission consideration and also proposed that a series of three workshops be held covering over fifty subject areas that concern load forecasting methods, quantification of demand-side options (for example, conservation and load management techniques), supply-side forecast, and integration of the supply forecast with the demand forecast.

The workshops were held informally and off the record to allow the parties to exchange information freely about the types of planning activities currently taking place at the utilities. It also allowed the parties to develop a thorough understanding of what an integrated resource planning process entailed as well as the range of subject areas needed to be addressed in the Commission's regulations. The three workshops allowed the utilities an opportunity to provide background information about and justification for the planning methods that they used. It also provided an opportunity for the expert witnesses of the Consumer Advocate and the Commission staff to make suggestions in a more cooperative, less adversarial environment concerning how the planning process could be improved.

The workshop format had the side-benefit of providing the utilities with an incentive to collect and develop the data and information that would be required in the filing of an integrated resource plan. A more important side-benefit was that the cooperative interaction among the parties actually allowed resource planning to occur. In fact, the workshop format was so successful that the Nevada Commission ordered its continued use.

⁹⁰ For a good general description and discussion about Nevada's planning process see Jon B. Wellinghoff and Cythia K. Mitchell, "A Model for Statewide Integrated Utility Resource Planning," Public Utilities Fortnightly, August 8, 1985, pp. 19-26.

⁹¹ The discussion about the Nevada Public Service Commission's use of workshops in the integrated resource planning context is based mainly on Renee Haman-Guild, "State Involvement in Utility Resource Planning: Towards Partnership," Public Utilities Fortnightly, April 18, 1985, pp. 22-28.

Other good examples of the Nevada Public Service Commission's continued use of workshops are the seven workshops planned as a first step to draft regulations concerning liquified petroleum gas systems serving ten or more customers. Once again, the workshops will be informal and will allow the Commission to get customer and distribution system comments on price, engineering, safety, and service standard issues that must be dealt with in the regulations.⁹²

Technical Conferences

The Federal Energy Regulatory Commission, the Wisconsin Public Service Commission, and the Kansas State Corporation Commission have each used technical conferences as a means of collecting and organizing information for the policy decision-maker.⁹³ Of these organizations, the Federal Energy Regulatory Commission has the most experience with the use of technical conferences. Here is how a technical conference worked in at least one instance. The Federal Energy Regulatory Commission issued its "Phase I" Notice of Inquiry on regulation of electricity sales-for-resale and transmission service and announced that there would be a conference for the exchange of views.⁹⁴ The issues that the Commission wanted interested parties to address were listed in the notice of inquiry. The main purpose

⁹² "Nevada PSC to Assume Jurisdiction over Liquified Petroleum Gas Systems," NARUC Bulletin, November 2, 1987, p. 9.

⁹³ "Kansas CC Sets Procedural Schedule for Sunflower Debt Restructuring Proceedings," NARUC Bulletin, November 16, 1987, pp. 4-5. Also, in one very unusual situation, the Utah Power & Light Company has initiated technical conferences with intervenors in the case before the Utah Public Service Commission concerning the proposed merger of Utah Power & Light Company into PacifiCorp. The spokesman for Utah Power & Light Company stated that it was holding the technical conferences to answer any questions the intervenors may have on models used in the calculations in its testimony, in the hope that by answering those questions before the hearing that the hearings might be less adversarial and might move along more quickly. See "Four Utah Coal Producers to Oppose Jointly UP&L/PacificCorp Merger Plan," Electric Utility Week, October 26, 1987, p. 12.

⁹⁴ The description of the Technical Conference on the Phase I Notice of Inquiry on Regulation of Electricity Sale-for-Resale and Transmission Service is based on a debriefing conversation with Dr. Kevin Kelly of the National Regulatory Research Institute.

of the technical conference was to inform the Commissioners, before any notice of proposed rulemaking or order is issued, on both the technical issues involved and the concerns of interested parties. Interested parties submitted pre-filed written comments and, if they so chose, appeared before the Commissioners. The witnesses appeared on panels, which allowed the Commissioners to hear directly contrasting views on the issues. Each witness was provided a very limited time span, perhaps about ten minutes, to present their views. While the Commissioners felt free to ask questions of the witnesses, there is no real effort at formal cross-examination. Many of the questions asked dealt with hypothetical technical situations, which attorneys on the panels were unable to ask or answer, although the technical experts on the panels could. Many of the utilities sent their technical experts as witnesses. At times the Commissioners encouraged the members of a panel of witness to comment on each other's comments or answers to questions, to clarify areas of agreement and disagreement. However, witnesses were not permitted to directly debate each other.

Recently, the Federal Energy Regulatory Commission has conducted technical conferences in other contexts, some of which concern industry-wide restructuring issues, and others of which concern technical aspects in individual cases. One example of a technical conference addressing an industry-wide issue is the recent technical conference on the role that independent power producers could assume in a competitive bidding scheme with qualifying facilities under the Public Utility Policies Act of 1978.⁹⁵ An example of a technical conference being held on issues raised in a case involving an individual pipeline is the technical conference concerning the discriminatory potential of twenty-five natural gas transportation applications filed by the Southern Natural Gas Company pursuant to section 7(c) of the Natural Gas Act.⁹⁶

⁹⁵ "Hesse Sees Two Rules for Generation Bidding; IPP Conference Set," Inside F.E.R.C., September 14, 1987, pp. 1, 6; "FERC Staff: 'Stringent' Rules Needed if Utilities Allowed to Bid as IPPs," Inside F.E.R.C., September 21, 1987, pp. 9-10.

⁹⁶ See Re Southern Natural Gas Co., FERC Docket CP86-277 et al.

Commission Task Forces

Several state public utility commissions have lately used task forces as a means of collecting information and forming a proposal about regulatory planning issues. The critical characteristic of a task force is that it brings representatives from all the major interested parties and groups together to recommend a potential solution to a problem. The recommendations of a task force are advisory to the commission, but often represent a consensus of all or most of the significant groups.

One of the first commissions to utilize a task force to study and to recommend a solution to a regulatory problem was the New Mexico Public Service Commission (NMPSC). The NMPSC set up a task force led by the Commission's Executive Director, to come up with a solution to the anticipated problem that the Palo Verde plant would be excess capacity when it was placed in service. The Commission task force was composed of representatives of the NMPSC staff, the utility involved, the state Attorney General's Office, a utility that was a major purchaser from the utility involved, the City of Albuquerque, a consortium of large industrial customers called the New Mexico Industrial Energy Consumers (NMIEC), and the United States Executive Agencies. The task force devised an ingenious solution to handle the overcapacity problem, called "inventoried capacity." The inventoried capacity solution basically shares the risks of paying for overcapacity. Capacity which is determined to be overcapacity is not placed in rate base, but is inventoried so that the utility continues to earn AFUDC on the asset until it becomes used and useful and comes into rate base. The utility is given an incentive to make off-system sales to sell its excess capacity.⁹⁷ After an abbreviated trial-type proceeding, which was limited to a submission of written direct testimony and an opportunity for the one party that opposed the task force report to cross-examine witnesses, the commission issued its order implementing the task force report. The NMPSC

⁹⁷ For more detailed information, see Leonard A. Helman, "Inventoried Capacity: An Innovative Approach to Ratemaking," The Proceedings of the Fourth NARUC Biennial Regulatory Information Conference, ed. Raymond Lawton (Columbus, Ohio: NRRRI, 1984), pp. 1233-1244.

experience is significant, not only because it represents the one of the first use of a task force proceeding by a state public service commission to solve a forward-looking policy problem, but also because the experience resulted in an appeal to the New Mexico Supreme Court challenging the constitutionality of a task force procedure. The NMIEC challenged the inventory capacity method developed by the task force and accepted by the NMPSC on three grounds: (1) that the inventoried capacity procedure was contrary to law, (2) that there was not substantial evidence to support the commission's decision on inventoried capacity, and (3) that the task force deliberation procedure was a violation of due process. The New Mexico Supreme Court upheld the NMPSC on all three grounds. Significantly, the New Mexico Supreme Court held that the task force deliberations were not a violation of procedural due process, but instead commended the NMPSC for creating and implementing a new proactive process for dealing with complex problems.⁹⁸

Several other state commissions have recently utilized task forces to help the commission find solutions to forward-looking policy problems. In particular, the Virginia State Corporation Commission, the Rhode Island Public Utilities Commission, and the Texas Public Utility Commission have used task forces to deal with problems that flow out of PURPA section 210 implementation. Specifically, both the Texas Public Utility Commission and the Virginia State Corporation Commission have used task forces to identify the proper methodology for calculating avoided costs. The Texas Public Utility Commission sponsored its task force in 1980. The task force included representatives of over fifty industrial customers and utilities. The task force recommended that cogenerators and small power producers who offered non-firm power be paid on the basis of avoided energy costs. Those who offered firm power would be paid by a negotiated rate that is based on another method of calculating avoided costs (the so-called differential

⁹⁸ New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission, 725 P.2d 244 (N.M. 1986); "PS New Mexico's 'Inventorying' of Excess Capacity Upheld by State Supreme Court," Electric Utility Week, September 15, 1987, p. 7.

revenue requirement).⁹⁹ The Virginia State Corporation Commission task force was comprised of ten members, including members of the Commission staff, and representatives of cogenerators, small power producers, industrial customers, and the Attorney General's Office on behalf of residential consumers. The task force recommended the use of two methods of calculating avoided costs: a differential revenue requirement method for firm power, and a marginal cost of energy production method for non-firm power. The Commission has scheduled public hearings to consider the task force recommendations.¹⁰⁰ The Rhode Island Public Utilities Commission's Task Force is chaired by the Deputy Director of Policy and Planning for the Governor's Office of Energy Assistance and includes representatives of all the state's electric and gas utilities, owners and developers of cogeneration and small power production projects, bankers, and others. The Task Force met and recommended that (1) buy-back rates for independent power be based on the highest-cost demand- or supply-side option being considered in the utility's 10-year supply plan, (2) utilities purchase at least 1 percent of their peak load of the last year from independent producers, and (3) that there be four different types of standard contracts reflecting the differing risks of various cogeneration and small power production technologies. The Commission issued an order, without a formal hearing, adopting the Task Force's recommendations in February 1986.¹⁰¹ Since then the Task Force has met to examine the utilities' proposed rates and contracts filed under the Commission's order. The Task Force has reported to the Commission that the proposed rates and contracts comply with the

⁹⁹ See Robert E. Burns et al., The Appropriateness and Feasibility of Various Methods of Calculating Avoided Costs (Columbus, Ohio: NRRI, 1982), pp. 20-21.

¹⁰⁰ "Virginia SCC Task Force Identifies Method for Calculating Ceiling Payments for Future Cogeneration Contracts," NARUC Bulletin, October 19, 1987, pp. 8-9; "Virginia Power Delays Solicitation as Agency Opens Probe," Electric Utility Week, October 26, 1987, p. 14; "Virginia SCC Hearing Set on Methods for Calculating Ceiling Payments for Future Cogeneration Contracts," NARUC Bulletin, November 2, 1987, pp. 24-25.

¹⁰¹ "R.I. Buyback Rates to Be Based on Highest-Cost Utility Supply Options," Electric Utility Week, April 6, 1987, p. 16.

Commission's order implementing the Task Force's earlier report.¹⁰²

The Texas Public Utility Commission created a task force to determine the need for a least cost planning rule and to draft such a rule if the task force determines that one is needed. The task force includes members of the Commission staff, and representatives of public interest and consumer groups, the electric utilities, other governmental agencies, and consulting firms.¹⁰³ At the task force's second meeting, it found that the existing commission rules need to be reviewed and revised so that the commission's rules are simplified, standardized, and clarified in a manner that would provide the Commission with the type of information needed to evaluate effectively the utilities' current planning process and to assure the implementation of least cost plans.¹⁰⁴ As of this writing the task force is continuing its monthly meetings.

An example of a task force that addressed the substantive aspects of least cost planning options was the Michigan Electric Options Study Group. Michigan's Governor Blanchard proposed in January 1985 that a study be completed of least cost electricity options for Michigan. The Michigan Electricity Options Study Group was established in the Spring of 1985 as a cooperative effort under the auspices of the Michigan Department of Commerce through both its Energy Administration and the Michigan Public Service Commission. (The Michigan Public Service Commission is a part of the Michigan Department of Commerce for administrative purposes.) The task force, called the Michigan Electricity Options Study Project (MEOS), included over 200 participants from more than 90 organizations, including the electric utilities themselves, commercial and industrial customers, business associations, residential consumer groups, environmental

¹⁰² "Rhode Island PUC Receives Cogeneration Report," NARUC Bulletin, November 16, 1987, pp. 18-19.

¹⁰³ See "Texas PUC Creates Task Force on Least Cost Energy Planning," NARUC Bulletin, February 2, 1987, pp. 14-15. It is worth noting that one Commissioner dissented from the order setting up the task force because she felt that the need for a least cost planning rule had already been established and formulation of a rule would have been expedited by publishing a preliminary rule drafted by the staff for public comment.

¹⁰⁴ Lori A. Burkhart, "Least Cost Planning: A State Survey," Public Utilities Fortnightly, May 14, 1987, at pp. 40-41.

organizations, universities, government agencies, other special interest groups, and, of course, the Commission staff. The MEOS had three major goals, which in turn gave rise to six specific objectives. The three major goals were (1) to establish a cooperative process for integrated resource planning, (2) to conduct basic research to develop essential data and models required to make a useful analytical framework, and (3) to demonstrate the usefulness of the integrative process, data, and models in the planning of Michigan's future electricity resource options. The six specific objectives of MEOS are (1) to assess Michigan's current electricity usage, existing power supply system, and forecasts of future electricity demand, (2) to analyze the costs and other characteristics of resource options now available to Michigan, (3) to develop a least-cost approach to resource assessment, (4) to examine the trade-offs between minimizing costs and meeting other important planning objectives, (5) to address the uncertainties and risks associated with alternative planning decisions, and (6) to make information and tools developed by MEOS available to parties interested in the utility planning process.¹⁰⁵

The MEOS structure consisted of a project Director, who had oversight authority for MEOS and chaired the advisory committee; an advisory committee made up of 21 officials representing the various MEOS participants; a project manager, who was in charge of daily management of MEOS; and six working groups, each composed of representatives of the various organizations. The project director was the Director of the Office of Energy Planning of the Michigan Public Service Commission. The working groups were formed to collect data, assemble information, and conduct analysis of least cost resource options to meet Michigan's electricity demand for the next twenty years. Each working group was chaired by a coordinator, who was a senior staff member of the Michigan Public Service

¹⁰⁵ See Michel L. Hiser and Michael A. Fielek, "Electricity Options Planning," The Proceedings of the Fifth NARUC Biennial Regulatory Information Conference, ed. Robert E. Burns (Columbus, Ohio: NRRI, 1986), pp. 2111-2136; and Michigan Department of Commerce, Executive Summary: Michigan Electricity Options Study: Electricity Options for the State of Michigan: Results from the MEOS Project (Lansing, Michigan: Michigan Department of Commerce, September 1987).

Commission. The role of the working group coordinator was to facilitate the efforts of the working group, including setting agendas, organizing and maintaining project schedules, and ensuring that the working group's product satisfied the overall needs of the task force. The six MEOS working groups were: working group #1--existing power supply system; working group #2--demand-side resource options; working group #3--non-utility supply options; working group #4--new utility power plants; working group #5--current electricity usage and projected demand; and working group #6--assumptions and integrating analysis.

It is worth noting that Working Groups #1 through #4 were responsible for generating the data and information necessary to evaluate the electric resource options, while Working Group #5 was responsible for the demand forecasting scenarios for use by the other Working Groups, and Working Group #6 was responsible for integrating the work of the first five Working Groups and for recommending scenarios to be evaluated. The work of MEOS spanned a two and one-half year period and was completed in Autumn 1987.

The Michigan Public Service Commission has commended the work of the MEOS task force, with Commission Chairman William E. Long calling the report "an important milestone in the development of comprehensive utility planning in Michigan.... [which] should provide utility planners, regulatory staff and state policy makers with a good foundation for evaluating energy resource alternatives...[by providing] new information on options..., new analytical tools developed for statewide planning, and the new cooperative process for working on issues vital to the state's energy future."¹⁰⁶ The Michigan Public Service Commission is now beginning to follow up on the task force's work.

Another major task force has recently been set up by the Maryland Public Service Commission to assist the Commission in dealing with issues connected with telephone deregulation. On August 28, 1987, the Maryland Public Service Commission announced that it would set up a task force to assist the Commission in considering and reviewing the proposal of the C&P Telephone Company to permit the Company to engage in a three-year trial

¹⁰⁶ "Michigan PSC Commends Cooperation on State Electricity Options Study," NARUC Bulletin, November 2, 1987, pp. 17-18.

period during which the Company would be allowed to set market prices for competitive services. During the three-year trial period there would be continued regulatory oversight or a rate freeze for monopoly services to residential and small commercial customers. Although the task force will be only advisory and not have any decision-making authority, it will serve as a forum for informal review and discussion of the proposed experiment. In particular, the task force is charged with attempting to achieve a consensus about (1) the need for and the merits of changes in regulatory oversight of competitive telecommunication services; (2) the effect, usefulness, and appropriateness of the proposed experiment; and (3) modifications or alternatives to the proposed experiment. The task force is to have seven representatives, including the Chief Hearing Examiner, who is to act as Chairman and as a neutral facilitator. Other members of the task force are to include a representative each from the Commission Staff, the Office of the Maryland's Peoples Counsel, the C&P Telephone Company of Maryland, interexchange carriers authorized to provide service in Maryland, business customers of C&P Telephone Company, and the Maryland Department of Economic and Employment Development. Public notices of the task force meetings are to be given in advance, and the meetings are to be open to the public. The task force will also provide opportunities for interested parties to provide oral or written comments or to respond to questions. It was planned that the task force was to provide a report to the Commission, concerning the proposed experiment by December 31, 1987. The Commission planned to take appropriate follow-on actions at that time, based in part on the task force's report.¹⁰⁷

There are also several other state public utility commissions that have been using task forces to assist them in considering regulatory policy issues. The Texas Railroad Commission has, for example, a blue-ribbon committee that has been studying every phase of the gas industry from the wellhead to the burner-tip.¹⁰⁸ In March 1986, the Public Utilities

¹⁰⁷ "Maryland PSC Responds to Washington Post Article on Possible Deregulation of C&P," NARUC Bulletin, September 7, 1987, pp. 6-7.

¹⁰⁸ "Several States Stand Poised on the Threshold of New Regulatory Schemes," Inside F.E.R.C., November 17, 1986, pp. 1-2.

Commission of Ohio set up a task force, chaired by Commissioner William Brooks, with representatives from all segments of the trucking industry. This task force would assist the Commission in dealing with problems confronting the companies regarding insurance, rate structures and discounts, safety, and the overall health of the trucking industry.¹⁰⁹ In the Spring of 1981, the New Jersey Board of Public Utilities created a Select Management Committee to deal with issues concerning water shortages faced by customers in the service area of the Hackensack Water Company. The Select Management Committee was composed of the Director of Rates and Accounts, a deputy public advocate with the New Jersey Department of Public Advocates, and the Vice President-Treasurer of the Hackensack Water Company. The Select Management Committee worked together and negotiated a solution that allowed a new major water facility to be financed through a gradual increase of rates over the facility's construction period through use of construction work in progress.¹¹⁰

One state commission made use of a task force that it called a consumers' advisory committee. Specifically, the Texas Public Utility Commission has a twelve member task force made up of representatives from all major interested groups, namely, the large telephoned companies, small telephone committees, communities that have petitioned the Commission concerning Extended Area Service, public members, including consumer group representatives, and representatives from the Texas House of Representatives. The task force was established pursuant to legislation requiring the Commission to establish such a committee. The committee's mission is to make recommendations to the Commission concerning requests for Extended Area Service.¹¹¹

¹⁰⁹ "Ohio PUC Forms Transportation Task Force," NARUC Bulletin, April 14, 1986, pp. 6-7.

¹¹⁰ Donald L. Correll, Stephen B. Genzer, and Anthony J. Zarillo, "Financing a Major Water Facility: A Case Study in Cooperation," Public Utilities Fortnightly, June 26, 1986, pp. 21-25.

¹¹¹ "Texas PUC Appoints EAS Advisory Committee," NARUC Bulletin, August 31, 1987, pp. 20-21.

Consumers' and Scientific Advisory Committees

The FERC, at least one state public utility commission, and one state environmental agency have used or are using advisory committees to assist the commission in regulatory policy making. Task forces and advisory committees are similar but, for our purposes, distinct. Both task forces and advisory committees are advisory. But a task force is composed of representatives from all major interested groups and parties, while an advisory committee tends to have representatives from only one specialty group or interest. Also, the structure of advisory committees tends to be less formal than that of a task force.

FERC Chairwoman, Martha Hesse, for example, has called for the establishment of a private task force of top-level executives appointed by the Interstate Gas Association of America to suggest to FERC ways to redesign rates so that pipelines can increase rates to reflect the value of service and to increase pipeline profits to reward pipelines for efficiency and productivity gains. As the term is used here, this task force is actually an advisory committee, because it does not encompass all interested parties and groups. The Interstate Gas Association of America has begun working on setting up such a task force.¹¹²

The Public Utilities Commission of Ohio has established a citizens' advisory council to assist the Commission with nuclear safety issues, specifically to provide the Commission and the Ohio Disaster Services Agency with input about the appropriate safety oversight that should be given to the Perry and Davis-Besse nuclear plants, concerning the design, operations, and emergency planning. There were no utility representatives named to the core group of the council. According to the Commission, the Consumers' Advisory Council was established because the NRC's lack of appropriate safety oversight has prompted the state government to explore ways to

¹¹² "Settlements Key to Order 500 Implementation, Hesse Tells Pipelines," Inside F.E.R.C., October 5, 1987, pp. 1, 4.

address safety issues of concern to Ohioans.¹¹³

Also, the Public Utilities Commission of Ohio has established two advisory committees on integrated resource planning. One advisory committee has broad based consumer and public interest group representation; the other is composed of representatives of the state's major electric utilities. Both groups have been providing advice to the commission staff. The commission staff plans to bring both groups together.¹¹⁴ It is as yet unknown whether the staff intends to create a task force out of the two groups.

Perhaps the most notable recent example of an advisory committee is the use of a panel of scientists by the Florida Department of Environmental Regulation. That state agency recently received a report concerning the effects on human health from exposure to electric and magnetic fields from high-voltage transmission lines. The report came from a scientific advisory committee composed of a panel of five Florida scientists from state universities. The panel, called the Florida Electric and Magnetic Fields Advisory Panel, was appointed by the former Governor Robert Graham in June 1986. The panel found that there was not then any conclusive evidence of human health problems caused by high-voltage lines, but nevertheless recommended that certain interim regulations be adopted by the state to protect the public from potential harm, while also recommending that increased research be done to study potential health problems from high-voltage lines. The panel provided useful technical input to the agency which might not have been otherwise available.¹¹⁵

Scientific Panels as an Alternative to a Hearing

The United States Food and Drug Administration (FDA) has an innovative alternative to formal hearings before an Administrative Law Judge. A scientific panel, called the Public Board of Inquiry, is available when the

¹¹³ "Ohio PUC Establishes Citizens' Advisory Council on Nuclear Safety," NARUC Bulletin, September 14, 1987, p. 7.

¹¹⁴ Author's personal knowledge.

¹¹⁵ "Florida Panel Finds No Power Line Health Threat, But Urges More Rules," Electric Utility Week, November 2, 1987, p. 17.

issues in contention involve scientific uncertainty. Specifically, the Public Board of Inquiry is composed of a panel of scientists who hear the scientific evidence to be presented in the case and make an appropriate determination of scientific fact, which is then submitted to the Commission. The scientific panel has been used at least twice by the FDA. In the first instance, the panel convened in 1980 to decide whether Aspartame should be approved as a food additive. A second panel met in 1983 to consider whether Dpo Proveno, a contraceptive, should be approved for use in the United States. The Administrative Conference of the United States has adopted a statement urging that federal agencies with scientific determinations consider the experimental use of scientific panels similar to that of the FDA as a voluntary alternative to more formal type administrative proceedings.¹¹⁶ The same rationale for this recommendation can be applied to state public utility commissions considering regulatory planning.

Other Legislative- and Executive-Type Procedures

There are also a few other examples of procedures used by the legislative and executive branches of the government that a state public utility commission might consider as an alternative to typical trial-type procedures, particularly when dealing with issues that involve regulatory planning. The use of legislative-type procedures might be particularly useful because a state public utility commission is essentially acting as a quasi-legislative body when it is addressing issues that concern industry structure or other industry-wide issues that are appropriate for regulatory planning. The purpose of the hearing process is itself two-fold: it allows the legislator to gather extensive factual information quickly and receive a broad spectrum of viewpoints, while giving interested parties an opportunity to be heard on public policy issues.

One example of such a legislative-type procedure is the use of a legislative hearing procedure. Legislative hearings usually occur after notice and are open to the general public. Witnesses pre-file testimony

¹¹⁶ 50 Fed. Reg. 52,893 (Dec. 27, 1985).

that addresses their concerns with the proposed bill or action, and then appear before the legislative committee for questioning. The witnesses then present short oral presentations that are brief summaries of their position. The witnesses are sometimes heard without questions, but are sometimes questioned closely or cross-examined by individual members of the legislative committee.

In many ways, a legislative hearing is similar to the technical conference procedure in use by the FERC. However, the primary difference between the two procedures is that FERC's technical conference often arranges witnesses in panels, which allows for greater interaction between the commissioners and the witnesses.

Another legislative process that a state public utility commission might find to be useful is the legislative investigation. Legislatures have an inherent power to investigate, as is necessary incident to their legislative powers. This power to investigate is independent and separate from the other branches of government and is both an essential part of the checks and balances system of government and an important means of obtaining information. It is this latter function of obtaining information that may be useful to state public utility commissions. Because state public utility commissions inherently exercise legislative power in setting rates and making prospective policy determinations, this legislative investigatory function would tend to carry over and be available to state public utility commissions.

Typically, a legislature that initiates an investigation has many of the same powers of a court, namely, it can compel the testimony of witnesses through use of a subpoena and it can compel the production of documents and records through use of a subpoena duces tecum. A refusal to testify or to produce documents is punishable as contempt of court. Of course, any legislative investigation is limited by the Fifth Amendment guarantee that a witness cannot be forced to testify if the testimony may result in or be used in a criminal proceeding against him. Otherwise, an investigation would follow procedural rules passed by the legislature itself.

State public utility commissions may find a legislative investigation a useful form of procedure for obtaining information that may be necessary for deciding policy about industry structure. Most state commissions already have and some use the power to investigate sua sponte, that is, on their own

initiative, to obtain information and formulate regulatory policies. Indeed, several state commissions use investigations to obtain information on industry-wide issues and sometimes those investigations lead directly to orders. For example, the California Public Utility Commission, the Public Utilities Commission of Ohio, and the Arkansas Public Service Commission have each initiated investigations concerning intrastate gas transportation policies.¹¹⁷ At least in the cases of the California and Ohio commissions, the investigations resulted in an interim order and issuance of guidelines. What is not clear from any of the information that the author was able to receive was how closely the commission investigations followed the legislative model, including the use of subpoenas to compel the production of documents and testimony of witnesses. It would be rare, however, that parties with an interest in industry-wide issues would refuse to testify.

The method often used by the executive branch to gather information about complex problems which would be similar to the type of regulatory policy issues facing commissions today is the use of "blue-ribbon" panels or task forces. These blue-ribbon panels and task forces are sometimes empowered with the inherent investigatory powers of the executive branch, including the power to subpoena witnesses and documents. As has been noted above, several state commissions are already using this procedure as a means of gathering and organizing information, and advising the commission on plausible solutions about complex problems. While statutory law is for the most part silent on the use of commissions and task forces by administrative agencies (other than the Federal Advisory Committee Act previously mentioned), the use of task forces, blue-ribbon panels, and other executive-style means of collecting information was undoubtedly contemplated as being permitted so long as those staff members involved in the commission investigation did not take part in the commission decision-making, what has become known as a separation of functions.¹¹⁸ To help maintain a separation of the investigatory and the decision-making functions, a commission using

¹¹⁷ See 7 NRRI Quarterly Bulletin 285-286; and Re Transportation, Bypass, and Standby Service in the Natural Gas Industry, 84 PUR4h 646 (ArkPSC 1987).

¹¹⁸ See Kenneth Culp Davis, Administrative Law Text 3d. ed. (St. Paul: 1972), pp. 254-270.

the task force procedure might choose to supplement rather than supplant its more formalistic administrative procedural options of adjudication or notice-and-comment rulemaking.¹¹⁹

As can be seen, from the descriptions of activities above, many state public utility commissions are already experimenting and using forms of innovative administrative procedures to solve regulatory planning problems. Part of the challenge for state commissions today is to be able to look at the array of procedures currently available and to pick a procedure that allows the commission to collect, organize, and analyze information about regulatory policy issues, without sacrificing either due process or the public interest.

¹¹⁹ Recall that notice-and-comment rulemaking is a minimal requirement for legal sufficiency. It does not necessarily foreclose the use of alternative procedures that would supplement rather than supplant notice-and-comment rulemaking. The use of conferences and other mechanisms was anticipated by Landis and others.

CHAPTER 4

GUIDELINES FOR DESIGNING ALTERNATIVE PROCEDURES

In this chapter, the procedural elements of various administrative processes are identified. By procedural elements, we mean the steps needed to carry out the procedure, that is, the individual procedural components that, taken together, constitute the procedure. The main objective of this chapter is to present commissions with suggestions on how to implement good alternative procedures properly in order to arrive at fair, accurate, judicially sustainable decisions. An administrative procedure typically results in a commission order or rule, although it is also possible that a commission will decide to issue a general policy statement or an interpretative rule that a commission will use an administrative procedure to educate itself, or that the administrative procedure results in a decision to take no action. In this chapter, we concern ourselves only with the situations where an administrative proceeding results in a rule or order.

In the first section, the elements of trial-type procedures and minimal notice-and-comment rulemaking are isolated and analyzed in order to identify what it is about them that makes them fair and sustainable--other than their precedential value. This enables us, in the second section, to develop eight guidelines that permit the design of fair and judicially sustainable alternative procedures that could be used for certain cases, such as the determination of prospective policies. The first five of the eight guidelines concern the alternative procedure itself. The sixth, seventh, and eighth guidelines suggest that the alternative procedure be followed by a notice-and-comment rulemaking or an abbreviated trial-type proceeding to enhance the judicial sustainability of the rule or order that results. It is also demonstrated that alternative procedures are consistent with most state versions of the Model State Administrative Procedures Act and that fulfilling the requirements of the MSAPA automatically satisfies the sixth, seventh, and eighth guidelines. In the third section, specific procedures that could be useful in considering prospective policy issues, such as

regulatory planning, are designed. These alternative procedures are designed with elements that are consistent with the suggested procedural guidelines.

Critique of Current Procedures

All procedures that are judicially sustainable have procedural elements that can be grouped together according to function. Some elements specifically satisfy the requirements of procedural due process, that is, the requirements of adequate notice and an opportunity to be heard in a decision-making process before an actual decision is reached. Other procedural elements concern the gathering of information and data necessary to make the decision. Still other elements concern the method by which information is presented to the decision-maker. Some procedural elements concern how the decision-maker actually reaches and makes known his or her decision. Finally, other procedural elements make possible judicial review of agency decisions. However, not all sustainable procedures operate well in every context.

First, the procedural elements used in a trial-type proceeding are set out. These trial-type procedural elements do not always lead to a coherent determination of polycentric or complex policy issues. Next, the procedural elements of the minimal requirements of notice-and-comment rulemaking are examined. These procedural elements, while an improvement over trial-type proceedings, do not go far enough in two respects. They do not adequately provide interested members of the public an opportunity for early and effective participation in the decision-making process. Nor do they provide decision-makers an opportunity to engage in a full and far ranging inquiry during the initial policy formulation.

Trial-Type Procedures

Trial-type procedures are ill suited for resolving industry-wide problems, particularly those that concern prospective policy issues that are polycentric in nature because their elements are ill suited for this purpose. In a trial-type procedure as usually practiced at the state public utility commissions, the process begins with a notice of the hearing to be

held. When dealing with the types of issues that normally arise in a typical rate case, assuming that the notice is timely and meets all of the legal forms, the notice is likely to inform adequately the potential parties and intervenors of the issues that will be introduced at the hearing. This is especially true of those commissions that provide that actual notice be sent to intervenors in recent commission decisions. However, if a trial-type procedure were to deal with a complex policy issue, it might be difficult for the commission to draft the notice broadly enough so that all possible considerations and solutions would have been covered by the notice and yet narrowly enough so that the commission is not inviting irrelevant testimony. Drafting a notice for prospective policy issues that is adequate while not being overly broad is probably an art form, but one with which commission staff are not unfamiliar.

Trial-type proceedings start to become most troublesome at the stage of the proceeding where the parties are gathering information for the trial, that is, during the discovery stage. Here the parties use discovery techniques such as written interrogatories, oral deposition, requests for the production of documents and the like, to gather information that is pertinent to their own and the other party's case.¹ Discovery only extends to matters that are not privileged and that are relevant to the subject matter of the pending case.² Material used in the preparation of one's own

¹ The author makes a key assumption here concerning the standard filing requirements, which many commissions have. A utility filing a rate case is required, pursuant to a standard filing requirement, to file information that is needed. Such information is either not applicable or not useful for the determination of forward-looking policies, because the information and data required in a standard filing is limited. The standard filing requirement is itself simply an efficient vehicle that prevents the parties from having discovery disputes on the information needed to conduct a routine rate case. When nonroutine issues are raised, as would be the case when a commission is determining industry-wide prospective policy issues, a standard filing requirement probably would not address the needs of the parties. The author also assumes that the discovery practices of the agency in question are governed by the Federal Rules of Civil Procedure, or a set of rules based on or closely resembling those rules. It is worth noting that some agencies have promulgated their own discovery rules, which may vary from those described here. Recall that discovery is the legal process for gathering information in an adjudicatory civil case.

² Fed. R. Civ. Proc. 26(b)(1).

case is considered to be work product, which is privileged material not subject to public disclosure through discovery. Sometimes, depending on the attorneys involved, a party will abuse the discovery process and claim that vital data and information that is necessary to all the parties for there to be any real presentation of alternatives to the decision-maker is work product. Other times, discovery requests are refused because the party having the information does not consider the information to be relevant to the case. Also, it should be noted that the facts and opinions held by experts are only subject to discovery through the use of written interrogatories. And then, the party need only identify each person whom he or she expects to call as an expert, state the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.³ Also, a party can ask for a protective order from discovery to protect himself or herself from annoyance, embarrassment, oppression, or undue burden or expense. In particular, a protective order might be sought for information that the party claims is proprietary or constitutes confidential commercial information. The party would likely seek a protective order that such information be revealed only under seal.⁴ If a party refuses to provide information, an order can be sought to compel discovery and to seek sanctions.⁵

The point being made here is that the rules of discovery are very structured. They comprise the legal process whereby the courts, or in this case the administrative agency, decide what information is necessary for resolution of the conflict. The discovery rules were written to deal with the exchange of information in an adversary process. Delaying tactics and refusals to supply information based on technical arguments that the information is not relevant, is work product, or is confidential can be expected to be raised frequently in the context of deciding broad-based industry-wide policy issues. While a prehearing conference can go a long

³ Fed. R. Civ. Proc. 26(b)(4)(A)(i)

⁴ Fed. R. Civ. Proc. 26(c)

⁵ Fed. R. Civ. Proc. 37

way toward smoothing out discovery problems before they occur,⁶ the potential for delay and abuse is still there.

The next element of a trial-type procedure is the filing of written direct testimony. Efficiency is the principal reason for testimony to be filed rather than given orally. This is the primary vehicle for a party to present its views to the decision-maker. The filing of written direct testimony allows each party to present the case in favor of its position. The testimony is usually quite coherent, that is, clearly articulated and easily understood. However it is often incomplete from a decision-maker's standpoint because it presents only the views of those parties interested enough to present testimony and it presents only data and information that supports their views. Other parties that might be affected by the commission's actions or other valid data or information are unlikely to be brought to the attention of the decision-maker, unless the commission staff does so. As noted by Landis, the inherent incompleteness of written direct testimony has the consequence of limiting the decision-maker's options to those supported by the information presented to him on the record by the parties. Other issues, as well as other information, that should become a part of the record in complex litigation concerning complex or industry-wide policy issues may not be presented. This is a serious defect since the decision-maker is limited to the testimony on the record in making the decision.

The next element of a trial-type procedure, cross-examination, has provoked the greatest controversy when applied in the administrative process. During cross-examination, attorneys have an opportunity to probe whether a witness has a flaw or bias in his direct testimony. However, cross-examination, while a useful device to minimize or discredit a witness's testimony, is not suitable for drawing out the full depth of knowledge and range of concerns of experts on policy matters. As a result, cross-examination does not help to provide the decision-maker with guidance concerning how the issues before him or her should be properly resolved.

⁶ Fed. R. Civ. Proc. 16

This is particularly the case when the issues before the decision-maker involve prospective industry-wide policy questions that are not subject to simple yes-no answers. Cross-examination is useful for determining the facts of a historical event, but it is not so useful in considering prospective policy. To consider prospective policy, a decision-maker needs a broad range of economic and financial information about how various policy alternatives can lead to different results depending on how future events transpire. While rebuttal and surrebuttal may give an attorney a chance to "rehabilitate" his or her witness's written direct testimony, it rarely can be used to move much beyond that direct testimony. Cross-examination cannot be used to supplement the record. Thus, the decision-maker usually must make a policy determination with incomplete information.

The decision-making process itself is troublesome in a trial-type proceeding, because the decision-maker is restricted to "the four corners of the record." If the record is inadequate, as it is likely to be after a trial-type procedure is used to decide an industry-wide issue, the decision will not produce an accurate result. By accurate, we mean accurate in the same sense as discussed by Cramton in chapter 2.⁷ However, the decision reached in a trial-type procedure usually is the result of a well documented record that is easily susceptible to judicial review. Because the record is easy to review, a trial-type procedure itself is always upheld by the courts, provided no procedural irregularity occurs. However, the decision reached by means of a trial-type procedure is sometimes reversed because the decision itself is judged to be arbitrary and capricious. This occurs because the courts are not satisfied that the decision reached in the trial-type proceeding is accurate or minimally rational. In short, a trial-type procedure, which might be upheld by the courts, can lead to an inaccurate result that might be reversed by the courts.

Trial-type proceedings still have a place at state public utility commissions, of course. They still play a prominent role in the determination of rate cases. This is so even though a rate case might

⁷ Cramton, supra, ftnt. 18 in chapter 2.

involve complex issues and determines a rate that is set prospectively, because a rate case principally involves a determination of historical facts. If we were to measure a rate case against Cramton's four criteria of the appropriate uses of a trial-type procedure, we would find that, while a rate case is not simply two-sided in nature with adversaries necessarily taking opposite positions, the issues can be defined and the positions of the parties can often be identified as two-sided on particular issues. In a rate case, the facts are generally known or within the control of the parties, although they do not necessarily involve nonrecurring past events. Past events that lead to rate cases recur on a regular basis. The concept of a historical test year, or a future test year that is based on projected changes from a historical test year, makes a rate case essentially a fact-finding proceeding. A trial-type procedure is still appropriate for such a fact-finding proceeding. While not all the issues to be decided in a rate case are bipolar, calling for a yes or no answer, many are. Finally, administrative law judges have proven to be impartial initial decision-makers who have helped to ease the commissioners' burden of deciding rate cases. While a typical rate case is certainly beyond the understanding of the usual generalist judge, it is not beyond the understanding of a specialized cadre of administrative law judges such as exists at state public utility commissions. Thus, while trial-type procedures are ill suited for the determination of prospective industry-wide policy decisions, they are well suited for routine rate cases where mainly there are facts to be determined.

Notice-and-Comment Rulemaking: An Improvement?

Recall that the minimal requirements of notice-and-comment rulemaking are quite simple. They include the provision of an adequate notice of proposed rulemaking, a comment period for submission of written comments, and issuance of a final rule.

It is the very simplicity of these minimal requirements that have at times caused some problems with notice-and-comment rulemaking. There are two interrelated problems. First, while the notification of a proposed rulemaking gives the interested parties sufficient notice of what an agency

is planning to do, it does not necessarily mean that interested parties have had an opportunity for effective participation during the initial policy formulation process that result in the proposed rule. Effective participation, many would contend, would require the agency to gather information and opinions from the interested parties well before any notice of proposed rulemaking is issued. Second, there is no formal procedural process for the decision-maker to engage in a full and far-ranging inquiry with the parties during the initial policy formulation process. While it is not required, a one-to-one exchange of information with some subset of the major known interested parties usually does occur before the issuance of a notice of proposed rulemaking. This informal dialog often results in a proposed rule. However, there is no formal mechanism that allows the decision-maker to conduct a full and far-ranging inquiry with groups of the interested parties. Sometimes, however, agencies such as the Federal Energy Regulatory Commission have issued a notice of inquiry, which notifies all interested parties that the agency is collecting data, information, and opinions in an area that is the subject of a possible future rulemaking. Such notice of inquiry is not a requirement of a notice-and-comment rulemaking.

The period for submitting written comments comes relatively late in the agency's decision-making process. While nothing has been formally decided at that point, the agency's staff has already formulated a position based on off the record comments that it has received from some subset of the interested parties. The problem that many have had with the written comment period is that it comes too late in the policy-formulation process to be truly effective. Because the written comment period comes so late, many of the parties submitting comments are doing so merely to preserve their legal right to appeal the agency's rule, that is, they are merely exhausting their administrative remedies before appealing to the courts. Nonetheless, the written comments can be extremely helpful to the agency. Not only do the comments bring out a party's position, but they force the agency to consider the party's objections and its suggested alternative to the agency's rules. The agency must state why it rejected comments made by various parties to its proposed rule if it is to avoid the risk of having its actions overruled by a court as failing to consider all of the relevant matters presented and

thus having arbitrarily failed to adopt an alternative solution to the problem addressed in the rulemaking.⁸

As has just been suggested, the commission in reaching its decision in a notice-and-comment rulemaking must consider all plausible alternatives presented in the written comments during the comment period. In issuing its final rule, the commission must issue the rule itself as well as a brief and concise general statement of the general basis and purpose of the rule. The agency would also do well to provide a contemporaneous rationale for its decision and to discuss the positions and respond to the arguments of the parties that took part in the proceeding.⁹

Even though the minimal requirements of a notice-and-comment rulemaking would result in agency efficiency and could lead to a better, more accurate result, the rulemaking may not provide the parties with an effective opportunity to influence the agency decision-making process early in the initial policy formulation, and may not provide the decision-maker an opportunity to engage in a full and far reaching inquiry on the policy issues.

Guidelines for Alternative Procedures

The examples of the innovative administrative procedures presented in chapter 3 suggest that there are other procedural elements that can lead to a coherent, thorough, efficient, and fair consideration of prospective policy issues. Our purpose here is first to identify certain minimal guidelines that a new procedure should measure up to in order for it not only to be able to withstand judicial review, especially with regard to the minimal requirements of due process, but also to lead to a better, more accurate result.

As noted earlier, all judicially sustainable administrative procedures have certain groups of procedural elements in common. They have procedural

⁸ See APA sec. 553 (c); "A Restatement of Scope-of-Review Doctrine," 38 Ad. L. Rev. 235, at (b)(7), hereinafter "Restatement"; and Levin, "Scope-of-Review Doctrine Restated: An Administrative Law Section Report," 38 Ad. L. Rev. 239, 258-259 (1986), hereinafter Levin.

⁹ Restatement at (c), (d), and (e); Levin, at 261-167.

elements that satisfy the two key, Constitutionally-mandated requirements of procedural due process--notice and an opportunity to be heard;¹⁰ they have procedural elements for the purpose of gathering the information and data necessary to formulate agency policy; they have procedural elements that lead to a rational formulation of agency policy; they have procedural elements that provide that the commission is the ultimate decision-maker of agency policy; and they have procedural elements that provide for a record that allows judicial review, should there be an appeal of the agency decision.

Eight procedural guidelines are developed for designing alternative administrative procedures that would lead to a fair, judicially sustainable, and more accurate result. An alternative administrative procedure should meet all or most of these guidelines to be an improvement over existing trial-type or notice-and-comment rulemaking procedures in the context of determining prospective policy. These eight guidelines, which are listed in table 4-1, should also be met so that the alternative procedure has a better chance of withstanding judicial review.¹¹

Rationale for the Guidelines

The first five guidelines apply to the alternative procedure itself, which is completed with the submission of a record or an advisory report to the commission. The first guideline for a proactive procedure that can be used to make prospective policy decisions is that the commission or agency

¹⁰ Due process is a Constitutional requirement that is not well defined. See chapter 2, at ftnt. 17. In discussing due process here, we always mean the two key requirements mentioned above.

¹¹ For an up-to-date discussion of judicial review of federal administrative agency actions, see Levin, "Scope-of-Review Doctrine: Restatement and Commentary," 38 Ad. L. Rev. 233 (1986). No similar restatement exists for state court review of state agency actions, although the restatement and commentary by Levin should apply in most of these cases too. An alternative procedure should nonetheless meet due process requirements under both the Federal and the state constitutions. Meeting the due process requirements under a state constitution may sometimes require more procedural safeguards than would be necessary under the Federal constitution.

TABLE 4-1
EIGHT GUIDELINES FOR PROACTIVE REGULATION

-
1. Have a Rational Choice of Procedure
 2. Issue an Initial Notice
 3. Provide for Representation of All Interested Parties
 4. Have the Necessary Data
 5. Have a Record or Advisory Report
 6. Issue a Final Notice and Provide an Opportunity to Be Heard
 7. Be the Ultimate Decision Maker
 8. Announce the Policy Determination
-

Source: Author

make a rational choice of procedure from the alternatives available. The procedure chosen should lend itself to a rational formulation of commission policy concerning the prospective policy issue. Further, the alternative procedure should be well suited for its purpose, whether that be consensus building, joint problem solving, determining a scientific fact, or consideration of a polycentric policy issue. The second guideline is that one element of procedural due process should be guaranteed by giving public notice of the alternative procedure. Third, all interested parties (parties that may be directly affected by the policy determination) should be represented during the policy formulation stage of the alternative procedure, possibly through a constituency organization. Fourth, the procedure should provide for the collection of information and data necessary for the consideration of the prospective policy issue. Fifth, the alternative procedure should provide for a record or advisory report to the commission that summarizes what occurred, and should include a discussion of the recommendations to the commission for the prospective policy determination, including a review of all plausible alternatives to the recommendations that were considered and rejected.

The last three (the sixth, seventh, and eighth) guidelines are necessary to enhance the chance that the alternative procedure is judicially sustainable. The sixth guideline is that public notice should be given that the commission is considering the advisory report and will be making a determination on the prospective policy issue. There should also be some

opportunity for the general public or its representatives to be heard. Seventh, the commissioners must be the ultimate decision-makers. The commissioners should treat the advisory report from the alternative procedure as advice to be taken seriously. Nonetheless, it is the commissioners' ultimate responsibility to make a determination on the prospective policy issue and to make certain that the determination is in the public interest and is consistent with applicable law. Eighth, the commission should announce its policy determination with a contemporaneous explanation in the form of a commission order or decision. Reference should be made to the alternative procedure used and to the plausible alternative policy determinations that were considered. This commission order or decision will likely be the starting point of judicial review of the commissions' policy determination.

Recall from chapter 1 that about half of the state public utility commissions are subject to some form of the Model State Administrative Procedures Act (MSAPA). For those state commissions subject to the MSAPA, some concern naturally arises concerning whether alternative procedures that are consistent with the first five guidelines are consistent with the MSAPA. The general provisions of the 1981 version of the MSAPA state that the aim of the model law is a uniform minimum procedural code for all state agencies, rather than a uniform maximum procedural code.¹² This minimal procedural code requires that commission proceedings that result in a rule or order be either an adjudicatory hearing or a notice-and-comment rulemaking.¹³ The essential elements of a MSAPA rulemaking, like those of an APA rulemaking, are notice of the proposed rules, a comment period, and

¹² Bonfield, "An Introduction to the 1981 Model State Administrative Procedure Act, Part I: General Provisions, Access to Agency Law and Policy, Rulemaking, and Review of Rules," 34 Ad. L. Rev. 1, 4 (1982).

¹³ Under the 1981 MSAPA, there are four types of possible adjudicatory proceedings. They are formal adjudicatory hearings, conference adjudicatory proceedings, emergency adjudicatory proceedings, and summary adjudicatory proceedings. These are described in Levinson, "An Introduction to the 1981 Model State Administrative Procedure Act, Part II: Adjudication, Judicial Review, and Civil Enforcement," 34 Ad. L. Rev. 13 (1982). Also, the 1981 MSAPA allows for the conversion of one type of proceeding into another. Of course, an interpretative rule need only be published and is not subject to a notice-and-comment rulemaking.

issuance of the final rule. However, the details of the MSAPA vary from the APA. (Recall that the MSAPA's notice-and-comment rulemaking procedure is briefly described in chapter 1.) State legislators that have adopted a version of the MSAPA often modify it. However, these state variations, while important, do not affect our analysis. Indeed, the 1981 MSAPA provides that the rights created by it are in addition to those created and imposed by all other statutes, and that the MSAPA does not diminish the authority of an agency to confer additional procedural rights.¹⁴ Other than that statement, the MSAPA does not provide guidance on whether or not these innovative administrative procedures would be considered consistent with its provisions.

Given this limited guidance, one might consider that the alternative procedures are consistent with the MSAPA as long as they are considered to be procedural rights granted in addition to those conferred by the MSAPA. In other words, extreme care must be taken by those state commissions that are subject to the MSAPA that their use of the innovative administrative procedures described herein are additional procedural rights conferred upon the parties and in no way abridge the rights granted under the MSAPA, which are the right to either an adjudicatory hearing or a notice-and-comment rulemaking. These procedures can supplement the procedures of the MSAPA, but cannot supplant them. Thus, a commission subject to the MSAPA must still proceed with either an adjudicatory proceeding or a notice-and-comment rulemaking after fulfilling the initial steps of the innovative procedures described in more detail below. In other words, when the final notice is given here that the commission is considering the advice or record generated by the alternative procedure, the notice should be either a notice of a proposed rulemaking or of a narrowly defined adjudicatory hearing. From that point on, the process should follow the MSAPA notice-and-comment rulemaking or formal trial-type procedure. By following the MSAPA, the alternative procedure fulfills the sixth, seventh, and eighth guidelines, because both a MSAPA rulemaking and a MSAPA adjudicatory proceeding provide for a final notice and opportunity to be heard, designate the commission as

¹⁴ 1981 MSAPA sec. 1-103(b), (c).

the ultimate decision-maker, and provide for an announcement of the policy determination.

In states where commissions are not required to follow the MSAPA, a commission might wish follow the last three guidelines, even though the guidelines do not directly concern the alternative procedure itself. This would enhance the chance that the procedure would be judicially sustainable. As just noted, the author implicitly assumes that the alternative procedures will be used early in the regulatory process. This is so that the commission will be exposed to a coherent and thorough presentation of the various parties' concerns, positions, and potential solutions to problems as early in the process as possible. As Cramton suggested (see chapter 2) the essence of due process is the opportunity for effective participation. Only by allowing the interested parties early access to the regulatory formulation process can participation truly be effective. Of course, the due process requirements of notice and opportunity to be heard must be extended to all parties.

Because a traditional trial-type hearing or a notice-and-comment rulemaking or something closely akin to it would follow an alternative procedure, it might be useful to think of alternative procedures in combinations, such as a negotiated rulemaking, a workshop-rulemaking, or a technical conference-trial. Certain of these combinations might be better suited (recall our earlier guideline) for different purposes. One can speculate about the situations in which each combination would be best, such as when a workshop-rulemaking might work better than a workshop-trial. The author does so for two such alternative procedures in the next chapter.

It might also be possible to engage in an alternative procedure and a traditional trial-type procedure in parallel, particularly if a rate case had enveloped in it the type of prospective policy issues that these alternative procedures are better adapted at addressing. In such a situation, the commission would separate out the policy issue to be decided by the alternative procedure and use the procedure to determine policy. In the meantime, the rate case proceeds with its fact-finding determination. When the prospective policy has been determined, it could be subject to limited cross-examination. From that point on the rate case would continue normally.

For the commission that chooses not to follow the last three guidelines, an argument can be made that the parties had adequate notice and an opportunity to be heard in the alternative procedure. However, the author was not able to find case law either to support or to oppose the proposition that an alternative procedure, unsupplemented by either a notice-or-comment rulemaking or an abbreviated trial-type proceeding would withstand judicial review. A detailed discussion of each of the eight guidelines follows.

The Guidelines in Detail

A Rational Choice of Procedure

What certain of the alternative administrative procedures presented in chapter 3 have in common is that they focus on the methods that would lead to a rational determination of prospective policy issues and thus lead to a better, more accurate result. Neither an executive agency, a legislative agency, nor a business would attempt to determine prospective policy by means of a trial-type procedure. Nor would the type of procedure provided for by the minimal requirements of a notice-and-comment rulemaking be sufficient. Instead, a rational determination of prospective policy issues calls for procedures that are suited to the prospective policy issues in question. If the issues to be determined concern forecasting, then the procedure used should be one that is appropriate for forecasts, for example, a workshop where expert forecasters that represent the interests of each of the major parties would be present. If the policy concerns a matter for which there are only a few extremely interested parties or groups of parties, then it might be appropriate for those parties to negotiate a solution and to present their agreement to the commission for its consideration. If the prospective issue hinges on a scientific matter about which there is some degree of uncertainty, then it might be appropriate for the commission to form a scientific panel or board of inquiry to make a determination concerning the scientific fact at issue. If a commission is simply trying to gather both technical information and a sense of where the various parties stand on an issue, then a technical conference might be a useful means of gathering that information. An advisory committee might be

the method to use if a commission is seeking to get constituency group or to get scientific advice. If a commission wants to draw together numerous interests to solve a difficult, polycentric problem, then a task force might be the mechanism employed. Some of these procedures lead to greater commission efficiency immediately, while others may trade off efficiency for a more accurate or correct result.

The state commission must make some commitment to rely on the procedure to achieve a substantive result. The decision-maker must be willing to give due weight to the result obtained with the alternative procedure for it to be credible. Otherwise, interested parties would have no reason to participate.

The Initial Notice

For an alternative procedure to be judicially sustainable, it is of course necessary to meet the minimal requirements of procedural due process. There must be notice and an opportunity to be heard in any administrative proceeding. This is no less the case when a commission uses an alternative procedure. The initial notice to be given should be stated in such a manner that it describes the prospective policy issue to be considered and describes the alternative procedure that is to be used. Since commission policy on the prospective policy issue has not yet been formulated, the notice should be stated in a manner that is general enough not to foreclose commission options, but specific enough that all potentially interested parties would be notified. If, in addition to the more general public notice, it is the commission's practice to notify individually identifiable interested parties, they should be so notified.

Representation of All Interested Parties

To increase the chance of judicial sustainability, all parties that are likely to be interested parties should be represented in the alternative procedure. Interested parties include anyone who is likely to be directly affected by the commission decision. While one could argue that every individual directly affected should take part in the proceeding, it may be sufficient to have several groups with similar interests be represented by

one organization or a named person. For example, one would expect that a residential consumers' advocate exists or could be named to represent the interests of residential consumers. It might be necessary to have a special convenor to contact identifiable interested parties in order to encourage them to participate in the alternative procedure.

By getting all of the interested parties to be represented in the alternative procedure, the agency has provided those parties with an opportunity to be heard. That opportunity at this early stage of commission policy formulation should guarantee that all interested parties have an early and effective means of influencing commission policy.¹⁵

Collection of Necessary Data and Information

Any administrative procedure must have some mechanism to collect the information and data necessary for a rational decision and a better, more accurate result. For several of these alternative forms of administrative procedure, little has been said about the method by which information and data are collected. Yet, it is impossible to consider certain prospective policy issues without complete information. It is, therefore, necessary for any alternative administrative procedure to provide for a means, whether voluntary or not, of collecting the necessary data and information.

How might this be done? Several of the alternative procedures rely on the good faith of the parties to supply the necessary data and information. This is true for those procedures that are essentially consensual or cooperative in nature, such as negotiated rulemaking, commission workshops, and task forces. Another procedure, the technical conference, simply invites interested parties to supply the commission with the necessary technical information necessary to make a complex policy decision. In the case of a scientific board of inquiry, the scientists themselves would provide the necessary data and information. If the necessary data and information were not forthcoming, a commission might have to fall back on

¹⁵ Depending on how due process is interpreted under the applicable state constitution, it may be necessary to supply certain groups with sufficient funding, so that they can effectively pay for their representatives.

either its discovery rules or its inherent subpoena powers to obtain the information that it needs. However, the use of a subpoena or a discovery method might be at odds with those forms of alternative procedure that are consensual or cooperative in nature.

Record or Advisory Report

Alternatives to the trial-type or notice-and-comment rulemaking procedures should provide for a thorough, coherent, and complete formulation of the policy issues being considered. For an alternative procedure to lead to a more accurate result, the commissioners should receive the results of this analysis in the form of a record of the proceeding or an advisory report. For certain of the innovative procedures, a complete record of what occurred during the proceeding is probably best. For example, with a technical conference a record of the conference proceedings would probably be most useful to the commissioners, particularly if the commissioners themselves took part in the procedure. The record would show the full dialog between commissioners and expert witnesses and should provide a good base of technical information which the commissioners can rely on to make their decisions. An advisory report would be more appropriate for those innovative procedures where the commissioners themselves did not directly participate in the earlier stages of the alternative procedure. Of course, an advisory report need not repeat every word uttered during the alternative proceeding. Indeed, for some of the alternative procedures it is important that negotiations occurring among the interested parties be confidential for the procedure to work well. However, the advisory report should be a complete and thorough report to the commissioners concerning what the preferred policy determination would be, including a rationale and all relevant data. It should also state what other plausible options were considered and why they were rejected.

An advisory report is not like an interim decision of an administrative law judge, which may become the commission's final opinion, subject only to exceptions and appeals to the commission and the commissioners final approval. Instead, the report to the commission should be advisory only because the ultimate decision-making authority should remain with the commission itself. Nonetheless, an interesting parallel can be drawn

between a record or an advisory report and an administrative law judge's opinion. Both are the result of a process that has provided all parties with notice, an opportunity to be heard, and the data necessary to make the decision. Also, an argument could be made that an alternative procedure in and of itself fulfills the minimal requirements of due process, and that a commission can make a decision solely on the basis of the record or the advisory report that is the outcome of the alternative procedure that meets the first five guidelines discussed above. However, the author is aware of no cases supporting the above contentions. It is therefore suggested that the three remaining guidelines be followed to "guarantee" that use of an alternative procedure be judicially sustainable.

A Final Notice and Opportunity to Be Heard

A commission using an alternative procedure has up to this point followed the steps necessary for the execution of the alternative procedure. From this point forward the commission might find it useful to consider the option of following something akin to the more traditional trial-type or notice-and-comment rulemaking to help assure that the procedure meets the requirements of due process, is fair, and judicially sustainable.

Alternative procedures are more "fair" and hence better able to withstand judicial scrutiny if a final notice is given and another opportunity to be heard is provided to challenge the advice given in the advisory report or the record that is presented to the ultimate decision-maker, the commission. Before making its ultimate decision on the prospective policy issue, the commission should provide notice that it is considering making a determination based on the policy formulation in the advisory report or on the technical information provided in the record.

The commission should provide all interested parties who might be affected by its policy determination an opportunity to be heard. This can take several forms. The notice can be one of a proposed rulemaking, with the opportunity to be heard being the opportunity to submit written comments. Because all interested parties have already taken part in an alternative procedure that led to the proposed rule, few, if any, adverse comments should be submitted. The follow-on rulemaking should progress quickly to an issuance of a final rule.

Alternatively, the notice could be of a well focussed hearing that allows opponents to the proposed policy formulation to raise their objections to the advisory report and to engage in an equally well focussed cross-examination of the proponents of the advisory report. The trick here is to allow parties opposing the task force recommendations an opportunity to raise their objections, without creating a "full-blown trial" on the issue. If the realm of cross-examination is not appropriately narrowed, the commission will find that its proceeding has become duplicative of the task force's work. Therefore, it is suggested that the commission permit opponents to the advisory report or record to cross-examine the proponents of the advisory report or record on the policy recommendations found therein. By permitting the proponents of the advisory report to defend the policies that they have recommended, the commission has protected the rights of the proponents of an advisory report as well as its opponents. Due process has probably been fulfilled, even if the commission decides to adopt a policy other than that suggested in the advisory report so long as the policy the commission adopts was discussed (even if it was rejected) in the advisory report. If the commission desires to adopt a policy that is not addressed as an alternative in the advisory report then the commission might need to issue another notice and conduct another hearing to adequately assure that all parties have notice and an opportunity to be heard on the new proposed policy. Other interim means of providing notice and an opportunity to be heard might also be possible, as long as the commission assures that the minimum requirements of procedural due process of its state are met.

The Commission as Ultimate Decision-Maker

The commission is the ultimate decision-maker on prospective policy issues. It cannot delegate away this role without violating the nondelegation doctrine. While the nondelegation doctrine is a federal constitutional doctrine, it is likely that state courts would also not allow commissions to delegate away their authority. It is unlikely, however, that commissioners would willingly abandon their role as the ultimate decision-maker, and it would not be good public policy for a commission to do so.

The responsibility for making the ultimate decision is placed squarely on the shoulders of commissioners by enabling statutes or by constitutional provisions.

The commission as the ultimate decision-maker must consider and determine policy concerning the prospective issues before it. The commission can, however, take full advantage of the information or policy formulation that it finds in the record or advisory report. It must treat an advisory report as a serious policy proposal that cannot be rejected out of hand. The report is nonetheless only advisory. After allowing opponents to the recommendations in the advisory report an opportunity to be heard, the commission must decide for itself whether the proposed policy suggested in the report serves the public interest and is consistent with the law.

The major advantage of alternative procedures, therefore, is not that they replace the commissioners as the ultimate decision-makers or that they make the commissioners less involved as streamlining procedures do. Instead, the procedures present the commissioners with a more complete, thorough, and coherent initial assessment of policy alternatives, thus allowing commissioners to become more effective and involved decision-makers.

Announcement of the Policy Determination

Once a commission has made its determination concerning a prospective policy, it needs to announce its determination in a rule, order, or decision. In order to have a better chance of being judicially sustainable, the rule, order, or decision would include a finding of facts (even if they were based on a forecast of future expectations), the commission's rationale for reaching its policy determination, a review of the applicable law, and the commission's conclusions. The commission's rule, order, or decision would describe and discuss the alternative administrative procedure that was used, including why it was used, what the procedural steps were, and how the procedure provided notice and an opportunity to be heard, that is, procedural due process. The rule, order, or decision should discuss the contents of the advisory report, including the plausible alternative policy

determinations that were not recommended. The commission's rule, order, or decision would cite those parts of the record or advisory report that it accepts and those parts, if any, it rejects. It would also state why portions of the advisory report are accepted or rejected.

In sum, the commission rule, order, or decision would make it clear that the alternative procedure gave the commission a complete, thorough, and coherent presentation concerning the prospective policy issue, and that the alternative procedure was inherently fair. If the rule, order, or decision serves this purpose as well as the normal discussion of the commission's policy determination, it has a better chance of withstanding judicial review.

Design of Alternative Procedures

With the exception of negotiated rulemaking, the elements of the innovative procedures that could improve the quality of commission regulation are ill defined. (The essential elements of procedure and considerations concerning when the negotiated rulemaking procedure is appropriate were developed by Harter and Perritt and are also contained in Administrative Conference of the United States Recommendations 82-4 and 85-5.¹⁶) The procedural elements of negotiated rulemaking, workshops, technical conferences, advisory committees, task forces, and scientific panels or boards of inquiry are set out below. (While a notice of inquiry might be considered an alternative procedure because it fulfills some of the guidelines and provides the commission with useful information before a notice-and-comment rulemaking, it is not discussed here because it is already a familiar, and hence not innovative, procedure.) To the extent that it is feasible, each of the alternative procedures is designed with elements that fulfill the first five guidelines just discussed.

¹⁶ Harter, "Negotiating Regulations: A Cure for Malaise," 71 Geo. L.J. 1 (1982); Perritt, "Negotiated Rulemaking and Administrative Law," 38 Ad. L. Rev. 471 (1986); ACUS 82-4, 1 C.F.R. sec. 305.82-4; ACUS 85-5, 1 C.F.R. sec. 305.85-5.

Negotiated Rulemaking

The procedural elements of a negotiated rulemaking as described by Harter, Ferritt, and the Administrative Conference of the United States are as follows: (1) conducting preliminary agency inquiries (either self-inquiries or inquiries of interested parties) concerning whether a negotiated rulemaking process is appropriate, (2) assembling the negotiators, sometimes by using a convenor, (3) selecting a mediator or facilitator for the negotiations, (4) issuing a notice of the negotiated rulemaking process, (5) establishing the ground rules and scope of the negotiations, (6) holding a brainstorming session to scope out the issues, (7) developing a factual base, (8) bargaining, (9) reaching a consensus, to the extent possible, (10) reporting the agreement, including specific language of the negotiated rule, to the agency, (11) conducting agency review of the agreement, (12) filing of a notice of proposed rulemaking, (13) having the comment period, (14) making a commission determination concerning a final rule, and (15) issuing of the final rule.

The procedural elements just described meet the procedural guidelines. In particular, a negotiated rulemaking is appropriate where a commission is interested in building a consensus on the proper solution to a prospective policy issue. By building a consensus the agency can better gauge what the true interests of the parties are and can more easily write a rule that will be satisfactory to all interested parties. A negotiated rulemaking procedure does, however, have certain limitations. As noted by Harter, a negotiated rulemaking works best when there is a limited number (not more than 15) of negotiators representing the interested parties. It might therefore be difficult to make certain that all the parties that would be directly affected by the policy determination are represented. Alternatively, if interested parties are grouped together, the ability of a representative to represent one individual party's interest might be diluted. Also, because there is a natural tendency of negotiators to shift costs and burdens onto those not represented at the negotiations, it is important that the commission review closely the results of any negotiated rulemaking to make certain that the proposed and then the final rule are in the general public interest.

Workshop

Commission workshops would have some elements in common with those of a negotiated rulemaking, but the purpose of the proceeding is joint problem solving, not negotiations. A well suited joint problem solving procedure can best be achieved by having technical experts representing each of the major interested parties tackle a problem jointly. If the experts cannot come to a common resolution of the problem, which may be the case when there are two or more major methods, then their role is to clarify the areas of disagreement so that the commission will be presented with sharper, better defined issues. The experts identify the potential weaknesses and biases of each method in a thorough, and coherent fashion, providing a clear statement of the areas of agreement and range of solutions.

The elements of a workshop are as follow: (1) preliminary inquiries about whether the prospective policy issue is one which would lend itself to a joint problem-solving workshop approach, (2) a convenor who contacts the representatives of the major interested parties and asks them to send an assigned technical expert to the workshop, (3) notice of the joint problem-solving workshop, (4) assignment of a facilitator to run the workshop, (5) at the first workshop session, laying out the ground rules, format, and problem to be solved, (6) development of a common data base from which to solve the problem, (7) joint problem solving, which uses all recognized major methods, and (8) an advisory report to the commission showing the solution or range of solutions from the workshop.

The above procedure fulfills our procedural guidelines. However, it is possible that the collection of data and information for a common data base might be troublesome, particularly if one party possesses most of the data (usually a utility). If independent sources of data are not available and the one party in possession of the data refuses to cooperate, the procedure is likely to fail. However, a party might be more willing to share its data for use in a common data base if the alternative procedure to a workshop might lead to a less satisfactory policy determination, which would not be in either the utility's or the general public's best interest.

If one were to include the steps necessary to fulfill the last three guidelines, there would also be a notice that the commission is considering the workshop's advisory report, commission consideration of the report,

including an opportunity for opponents of the report to be heard, and a commission decision or order. The commission would consider the report of the workshop either in a rulemaking or adjudicatory context. The trick here is to make certain that the rulemaking or trial-type procedure remains focussed. If there is a trial-type proceeding, it should be limited to a cross-examination of those submitting the report by parties that either were not asked to participate in the workshop or who did not join in the report.

Technical Conference

The technical conference is perhaps one of the newest of the innovative administrative procedures now in use by the federal agencies and state commissions. As noted above, a technical conference has proven to be useful when a prospective policy issue has technical aspects and when an agency wants an early preview of the positions of various parties in such a policy dispute. A technical conference is well suited for these purposes. This procedure also has the advantage of allowing the commission decision-makers (either senior staff or the commissioners themselves) to interact with the technical experts early on during the initial stage of policy formulation.

The elements of a technical conference necessary to fulfill our procedural guidelines are as follows: (1) the issuance of a notice of inquiry to provide a commission with written comments concerning some subject area about which the commission is considering regulatory action; (2) the issuance of a notice of a technical conference where the interested parties are invited to send representatives, especially technical experts, to address the commission concerning the inquiries; (3) a coordinator who helps to plan the technical conference; (4) the formation of witness panels either around parties of similar interests or around issues to be addressed; (5) oral presentation by witnesses at the conference, with questioning by the decision-makers chairing the conference; (6) witness commentary on the positions taken by other witnesses in answer to questions from the decision-makers; and (7) commission consideration of the conference record. After consideration of the conference record, the commission decides whether any further action should be taken and if so, what it should be, such as initiation of a rulemaking proceeding, some type of trial-type proceeding, or no action at all.

The procedure just described fulfills the procedural guidelines. Note that the major way that it varies from the other procedures is that there is no advisory report to the commission. Instead, there is a record kept of the technical conference, which serves the same purpose as an advisory report. While that record may be somewhat less coherent than an advisory report, it is likely to be more satisfying to the commission decision-makers because this procedure allows them to interact directly with the technical experts representing the parties.

Task Force

The idea of using task forces to assist commissions in solving some of their prospective policy issues is now becoming widespread. Task forces are particularly well suited for solving thorny prospective policy issues that are of a polycentric nature. The size of a commission task force would depend on the number of interested parties that need to be represented and the complexity of the issues involved. To some degree, a commission task force provides the opportunity for parties to engage in negotiation and joint problem solving as necessary to come up with a solution to the prospective policy issue. While still an informal advisory committee to the commission, a task force usually carries more clout because of the resources brought to bear toward solving the policy question at hand. Because of the amount of commission staff and private party resources that a task force consumes, a task force should not be undertaken lightly. Used appropriately, however, a task force may be the most efficient way a commission can tackle certain complex problems.

The procedural elements of a commission task force are as follows: (1) an initial inquiry as to whether a task force would be useful and worth the expenditure of resources to address a particular issue; (2) a convenor to contact potential task force members, (3) notice of the establishment of a commission task force and its charge, (4) the appointment of one or more facilitators to help to organize the task force around the key issues to be addressed, (5) the laying out of ground rules for the task force's efforts, (6) the establishment of task force subgroups to address particular groups or subgroups of problems, (7) the establishment of a common data base for the use of the commission task force groups and subgroups, (8) problem

solving or bargaining as necessary, (9) submission of a task force report, with a majority view and minority views as necessary.

The task force procedure just set out would meet the procedural guidelines. The sixth, seventh, and eighth guideline would be commission notice that it is considering the task force's report with some opportunity for opponents of the report's recommendations to be heard, commission consideration of the task force report, and a commission order or decision stating the commission's policy determination. The commission's consideration of the task force's report, implicitly involves a decision about whether to take action and, if so, how to proceed. While it would probably behoove a commission to take action on a task force recommendation if a great deal of resources were spent on the task force, there undoubtedly will be those circumstances where the commission will choose not to act. This is entirely appropriate since the task force report is advisory in nature. If the commission chooses to take action, then the question again comes down to whether to proceed according to a notice-and-comment rulemaking or whether to proceed with the recommendation of the task force and allow the parties that do not agree an opportunity to be heard in a trial-type proceeding.

The major advantage of a task force procedure is that it provides the commission with a thorough and coherent presentation of the options available on prospective issues. As noted above, the task force can also be an efficient device when a commission is faced with a complex polycentric prospective policy issue. The use of a task force to solve simple problems is probably inefficient and is likely to be "overkill."

Advisory Committee

This alternative procedure is useful when a commission wants to get informal advice from a narrow range of interests, and it is well suited for that purpose. The procedure is extremely informal, in that the commission (1) issues notice that it is forming an advisory committee, (2) selects the advisory committee members from those interests that it wants represented, (3) appoints a facilitator, a staff member, a commissioner, or one of the members of the advisory committee, to chair the advisory committee, (4) conducts the occasional meetings (open meetings for those advisory

committees covered by the Federal Advisory Committees Act and certain state Sunshine Laws); and (5) receives the committee's advice. Once again, the commission may choose to act or not to act on the advice presented. If it chooses to act it might consider proceeding by an adjudicatory or a notice-and-comment rulemaking process.

Because of the informality involved in the use of an advisory committee, the procedure would not necessarily meet the procedural guidelines. For example, there is no requirement that all interested parties be represented on the committee. Indeed, if the commission is seeking advice from parties representing one particular point of view, it might be counterproductive to include representatives of all interested parties. Also, an advisory committee would probably not have a mechanism for the collection of data and information. Finally, while the advice of the committee would probably be in the form of an advisory report, there is no requirement that the commission issue notice and provide an opportunity to be heard concerning that advice. Indeed, the commission may take no action on the advice or may take the advice into consideration in a more formal setting. While an advisory committee does not have all the requisite elements necessary to meet the procedural guidelines, it nonetheless might be a useful procedure in some circumstances because of its informality.

Scientific Panel or Board of Inquiry

The innovative administrative procedure that has been utilized least frequently, but which nonetheless holds some merit, is the use of scientific panels or boards of inquiry to address issues of scientific uncertainty. As noted in chapter 2, this form of innovative administrative procedure grew out of the "science court" idea. The procedure looks promising and well suited in those limited, but important, circumstances where there is an issue of scientific uncertainty on which the prospective policy issue at hand hinges.

The elements of the scientific panel proceeding are likely to be as follows: (1) make an initial inquiry as to whether a scientific panel is appropriate to solve a matter of scientific uncertainty, (2) issue a notice that the scientific panel will be established to advise the commission on a matter of scientific uncertainty, (3) appoint a convenor to invite

scientists with expertise in the appropriate field or fields to take part, (4) hold the scientific board of inquiry, using a scientific seminar approach to determine scientific fact or to translate the degree of scientific uncertainty into terms that the commission decision-maker can comprehend, and (5) report the conclusions of the panel to the commission, including a record of the seminar.

While the scientific panel procedure fulfills most of the procedural guidelines, it does not fulfill them all. It would run counter to its purpose to have all interested parties involved in the procedure. Indeed, a key element for a scientific panel to work well is to allow the scientists with expertise in a particular field to make their determination in a manner in which they feel comfortable, that is, the scientific seminar. In such a forum, experts can challenge each other's findings in a quest to find what is currently known about an issue about which there is uncertainty. The commission action, if any, after the report of the panel should allow parties an opportunity to be heard on all issues, including those addressed by the scientific panel. However, for the sake of efficiency and accuracy, parties challenging the findings of the scientific panel should be required to raise well defined, substantive objections and not be allowed to engage in a "unsubstantiated potshooting."

Because there is little case law in this area, commissions adopting innovative administrative procedures must be cautious and be certain that the procedures that they devise are indeed fair. Commission concerns about the possibility and appropriateness of ex parte contacts and about whether staff, separate from the decision-making staff, should handle these procedures (a type of separation of functions) might not be misplaced.

CHAPTER 5

ILLUSTRATIONS OF THE USE OF INNOVATIVE ADMINISTRATIVE PROCEDURES

Many current prospective policy issues facing state public utility commissions in the electric, gas, and telephone sectors are of sufficient complexity to be good candidates for the use of an innovative administrative procedure. Some of these policy issues in the electric sector include whether and how to implement integrated resource or least cost planning, including how to evaluate the effectiveness of demand-side management, how to incorporate externalities in least cost planning, and how to account for uncertainties and risks; whether and how to implement a competitive bidding scheme that would include cogenerators and perhaps also independent power producers; how to calculate avoided cost capacity charges; whether and how to implement state mandated access to transmission lines for intrastate wheeling; how to calculate and to finance nuclear power plant decommissioning costs; how to deal with electric utilities considering setting up holding companies or nonutility subsidiaries, and associated diversification issues; state commission policies concerning economic incentive rates, including considerations concerning when such rates constitute undue discrimination; and power plant and transmission line siting issues, including the health effects of electromagnetic fields.

There are also several current issues in the natural gas sector that could be readily examined by use of an innovative administrative procedure. These issues include commission treatment of a local gas distribution company's direct gas purchasing practices, including issues concerning what makes up a prudent gas purchase portfolio and how to factor in the uncertainty of the spot market and the need for a reliable long-term supply; the state commission's policy concerning gas transportation, including such issues as whether to permit or forbid the bypass of local distribution companies, how to price the local distribution company's gas transportation services, whether there should be a reservation charge to those customers

who avail themselves of gas transportation opportunities, and whether the commission will allow any shift of revenue requirements from core to non-core customers; and the impact of recent FERC Orders concerning the recovery of take-or-pay obligations on local gas distribution companies.

What these electric and gas issues have in common is they are prospective policy issues, often involving complex financial and economic concerns. Because these policy issues are prospective in nature, trial-type procedures would be ill suited for their consideration. The minimum requirements of notice-and-comment rulemaking do not afford the decision-maker an opportunity for a full examination of the complex considerations that go into the determination of each issue. Commission decision-makers might find instead that some of the innovative administrative procedures would go a long distance toward providing the decision-makers with the coherent, complete, and efficient means of making a policy determination with these issues.

In this chapter are examples of how two innovative administrative procedures might work when applied to current prospective energy policy issues.

An Electric Workshop Example

One example of how an innovative administrative procedure might be used by a state commission is a commission workshop for integrated resource planning. A commission workshop for integrate resource planning would be an appropriate procedure, because integrated resource planning is essentially a planning exercise which calls for problem solving. Commission workshops are well suited for such problem solving.

If the workshop were to have the procedural elements set out in chapter 4, this is how it might work. First, a commission that has decided to implement integrated resource planning would engage in a self-inquiry to determine whether the issues likely to be raised about an integrated resource plan would be appropriate for a workshop, in particular whether those issues would require joint problem solving. Because integrated resource planning can involve forecasting future demand and determining an optimal mix of supply-side and demand-side options to meet the projected

demand, joint problem solving techniques would seem to be a well suited procedural approach.

Next, the commission would appoint a convenor to contact the major interested parties and request that they assign appropriate experts to send to the commission workshop. The convenor's job is difficult in that he or she must make certain that all the major interested groups are represented, while balancing that need against the need to keep the workshop from becoming so large that the procedure becomes unwieldy. There should be technical representatives from each of the major electric utilities, as well as from the commission staff, the consumer advocate, if any, and from organizations representing major consumers groups that might otherwise be unrepresented, for example, industrial and commercial customers. If there is a customer of sufficient size that its load pattern affects the system load of any of the utilities, that customer probably ought to be represented.

Then, a notice about the workshop should be issued, just as there would be notice of a proposed rulemaking. The notice should state that the workshop participants will engage in joint problem solving, with the expected outcome being a statewide integrated resource plan that will have as its goal providing adequate and reliable energy services to ratepayers at the lowest possible costs. The notice should also say that the workshop will include forecasting of future loads, and a determination of the least cost mix of demand-side and supply-side resource options to meet that projected demand. The notice should also make clear that the workshop is intended for technical representatives of interested parties. The issuance of the notice provides some opportunity for interested parties, not initially included by the convenor, to express an interest in participating in the workshop. However, this should rarely occur. If some party selects itself as an interested party, that party should be encouraged to name a technical representative to participate in the workshop.

Next, the commission would assign a facilitator to run the workshop. The facilitator can be a staff member or other person brought in from the outside with some experience dealing with the parties and with expertise in load forecasting, optimal capacity expansion planning, and demand-side management options. The facilitator would then have the difficult job of running the first workshop meeting. At that meeting, he or she should lay

out the ground rules, suggest an agenda and a time table, and make it clear to participants that they are engaging in joint problem solving that will result in an advisory report to the commission. The facilitator should also tell participants whether what is said during the workshop will be held confidential. Confidentiality might lead to a full and fair exchange of views concerning problem solving techniques. Whether or not the workshop exchanges are confidential, a thorough write-up of the conclusions reached will be reported to the commission and become a part of the record of any subsequent proceeding before the commission.

The facilitator must also lay out the format of the problem. With integrated resource planning, he or she might suggest an approach, for example, which would focus initially on getting an accurate and detailed load forecast. The next step would be resolving what the cost of capacity and of energy to meet the projected demand would be for new capacity from either the utility itself, cogenerators, or alternative suppliers. These costs of capacity and energy could then be used as benchmarks against which demand-side options can be measured. Then, the workshop might look to demand-side options that could serve the same services at a lower cost than building capacity. Once the members of the workshop have this information, they can then discuss how to integrate the demand-side and supply-side options, taking into account uncertainties and risks associated with the various technologies, the risks associated with assuming a particular consumer reaction and consumer acceptability of the demand-side options, and whether and how to incorporate externalities. Of course, other ways of approaching integrated resource planning are also possible. The approach suggested here is only for the purpose of demonstrating one good method of conducting a commission workshop for problem solving.

The key to being able to conduct joint problem solving is the development of a common data base from which all parties can work. Since the utilities have most of the data necessary to conduct load forecasting, the facilitator would need the utility representatives to supply that data in a form that can be used by all the parties. To the extent that any other party has other relevant data, say on electric appliance saturation and demographic data, it too should be made available. Also, a common data base about the cost of building and operating planned capacity is of course needed for capacity expansion planning. Data on the amount of cogeneration

forecasted to be available at various avoided cost-based rates would also be useful. Finally, some type of data base concerning the costs and effectiveness of various types of demand-side management options would also be helpful. The facilitator would need to head up a major effort to collect this data.

Once a sufficiently detailed common data base is in place, the facilitator would lead the technical representatives in problem solving. Presumably, the parties would begin by engaging in load forecasting. Here, the use of a common data base will assist the participants in distinguishing the type of forecasting results that one gets from the different major forecast methodologies, that is, econometric, end-use, and hybrid load forecasts. The parties would also want to engage in sensitivity analysis to establish high, low, and medium load forecasts for each methodology. Once a range of load forecasts is agreed to, the parties might wish to use an optimal capacity expansion planning model to estimate a cost per kilowatt of capacity and a production costing model to estimate a cost per kilowatt-hour. With these benchmarks in hand, the representatives can examine whether any of the demands for service could be met at a lower cost through the use of load management or other demand-side options. Then, the parties might want to iterate the process until the supply-side options and demand-side options become fully integrated, using criteria concerning supplying energy services at the least cost. Also, incorporation of other criteria such as accounting for uncertainties and risks, the cost of outages, and other externalities would be appropriate.

Finally, the workshop participants should be required to submit a written report of their results to the commission. The report should include both areas of agreement and disagreement, as necessary, and discuss the strengths and weaknesses of different approaches when they lead to differing solutions. Whether the report contains one solution or more, it should contain a thorough and coherent discussion of the steps and process the workshop group went through to reach its integrated resource plan.

At this point, the commission must consider whether to take action on the workshop's report, since it is only advisory in nature. If the commission decides to proceed, it would have to follow the procedures of the Model State Administrative Procedures Act in those states where the commission is subject to it. The commission might do well to begin with a

notice of proposed rulemaking, and continue with the traditional notice-and-comment rulemaking procedure. Those commissions not required to follow the MSAPA might also find it useful to follow a similar notice-and-comment rulemaking procedure to guarantee the due process rights of those not participating in the workshop.

A Gas Technical Conference Example

Consider a state determining what its policy ought to be toward gas transportation by local distribution companies. Because the issues here are complex and polycentric, with many different parties having conflicting interests, the commission might choose to have a technical conference on the subject to get useful technical information about how different gas transportation policies are likely to affect the various parties. In particular, the commission might seek detailed economic information about the demand elasticities of various customers as well as information about what additional costs, if any, customers that cannot take advantage of the transportation policy might be asked to bear.

If the procedure were to contain the elements set out in chapter 4, the commission would begin by issuing a notice of inquiry requesting interested parties to answer pertinent questions and provide pertinent economic information concerning what the commission's state gas transportation policy ought to be. The notice of inquiry might ask, for instance: should there be a state commission mandated open access, nondiscriminatory transportation policy for local gas distribution companies (LDCs)? Should LDCs in a state gas transportation program have the authority to auction available capacity? Should gas transportation rates be based on gross margin, simple margin, or cost of service? If gas transportation were allowed, should there be a difference between firm and interruptible gas transportation services? Would the LDC provide back-up service to transportation only customers during supply shortages? What storage capacity does the LDC have? What are the LDC's core and non-core markets? Is there any policy on the part of the LDC to deny gas transportation for certain end-uses (for example, cogenerators)? Issuance of a notice of inquiry gives interested parties a chance to submit written comments to the commission about their concerns.

Next the commission would issue a notice concerning the time, date, place, and subject matter to be covered at the technical conference. The commission should name a conference coordinator in the notice. The conference coordinator must be very familiar with the issues to be discussed in the conference, since he or she is responsible for arranging group witnesses according to either the positions represented or the issues addressed by the parties. It is likely that large industrial customers, consumer advocates, utility representatives, commission staff, invited experts, economist, professors, and others will all wish to present their oral testimony to the commissioners.

The conference coordinator might do well to form witness panels around sets of issues that the parties are asked to address. For example, one panel might address the different methods by which transportation rates can be set. Another panel of witnesses could address whether bypass of the LDC should be permitted or forbidden. A third panel could address issues concerning how the existence of a gas transportation program might result in either a shifting of revenue requirements from non-core to core customers or, alternatively might lead to revenue erosion for the LDC.

The witnesses would make oral presentations at the technical conference. Then, the decision-makers (likely the commissioners themselves) would question the witnesses concerning not only the positions that they had taken, but also the positions that others had taken on their panel. All of the answers and commentary of the participants would be on the record and would provide the commission with a good quick means of gathering information on a complex, polycentric issue.

From that point on, just as in the electric workshop example, the commission must first consider whether to take any action, and, if so, what. Again, commissions subject to the requirements of the MSAPA might begin with the notice-and-comment rulemaking procedure, while those commissions not subject to the MSAPA might find a similar procedure to be useful in meeting due process concerns.

Concluding Remarks

Although two particular administrative procedures were matched up with prospective policy issues here, other procedures might be utilized to

address these same issues. For example, a task force might be used to tackle the questions of gas transportation policy. The point is that the innovative administrative procedure that a commission chooses when considering any particular policy issue should be appropriate for what the commission is seeking to accomplish with the procedure.

The negotiated rulemaking procedure holds great promise for handling prospective policy issues that have a limited number of parties, and where there are enough issues to be decided so that the parties can engage in give and take. Harter's and the ACUS guidelines, discussed in chapter 2, concerning when a negotiated rulemaking is appropriate, should be helpful to state commissions. Commissions can experiment with workshops for joint problem-solving when the nature of the issue calls for solutions that rely on projections and assumptions about future conditions as is the case in forecasting or planning. Likewise, a technical conference can be useful in those circumstances where the commission wants to obtain early technical information on a topic of interest. Commission task forces can be particularly productive in handling the large complex issues that have inherent aspects of both negotiation and problem-solving. Also, in very limited circumstances where there is a significant issue of scientific uncertainty upon which a prospective policy issue hinges, state commissions might find a scientific panel or board of inquiry to be useful and might wish to experiment with the procedure. A procedure that might have limited usefulness, the advisory committee, has value because of its informality and relative low expense.

Many of these procedures call for skills that are not normally found at today's state public utility commissions. For example, only a few state commissions have trained mediators. State commissions wishing to use these procedures effectively may want to obtain training in mediation, joint problem solving, and other like skills for their staffs.

One modest recommendation is that state public utility commissions continue to experiment with several of the new administrative procedures identified in this report. Four of the alternative procedures, negotiated rulemaking, commission workshops, technical conferences, and commission task forces, fulfill all the procedural guidelines mentioned in chapter 4, and would probably withstand the scrutiny of judicial review. Even though it did not fulfill every procedural guideline, the use of a scientific panel or

board of inquiry might be appropriate when a significant scientific fact is at issue. Also, when informality is valued and the views of one particular group are sought, an advisory committee may have some limited usefulness. As state commissions gain more experience with these procedures, both the legal pitfalls and the potential benefits associated with them will become better identified.

APPENDIX A
EXAMPLES OF STIPULATED OR NEGOTIATED SETTLEMENTS
BY STATE PUBLIC SERVICE COMMISSIONS

References to the examples of stipulated or negotiated settlements by state public service commissions, referred to in chapter 3, follow.

"New York PSC Tests New Ratemaking Procedure in New Rochelle Water Company Rate Case," NARUC Bulletin, April 16, 1984, pp. 15-16.

"Indiana Electric Rate Concession Agreement Reached," Public Utilities Fortnightly, August 30, 1984, p. 49.

"West Virginia PSC Approves Rate Increase for Appalachian Power," NARUC Bulletin, October 8, 1984, pp. 20-21.

Toledo Edison Co., Case No. 83-1450-EL-AIR, 6 NRRI Quarterly Bulletin 65 (OhioPUC, Sept. 17, 1984).

"Michigan PSC Approves Rate Settlement," NARUC Bulletin, October 15, 1984, pp. 21-22.

Commonwealth Water Co., BPU Docket No. 842-100, 6 NRRI Quarterly Bulletin 107 (NJBPU, Oct. 26, 1984).

Middlesex Water Co., BPU Docket No. 845-402 (NJBPU, Nov. 7, 1984).

Cincinnati Gas & Electric Co., Case Nos. 83-1528 & -1529, 6 NRRI Quarterly Bulletin 354-6 (OhioPUC, Nov. 20, 1984).

Southwestern Bell Telephone Co., Case No. TC-84-233, 6 NRRI Quarterly Bulletin (MoPSC, Nov. 20, 1984).

Northwestern Public Service Co., Docket No. F-3498, 6 NRRI Quarterly Bulletin (SDPUC, Dec. 20, 1984).

Alascom Inc. and Pacific Telecom Cable, Inc., Docket Nos. U-83-55 & U-83-76, Orders Nos. 15 & 16, 6 NRRI Quarterly Bulletin 325 (AlaskaPUC, Jan. 1, 1985).

"Missouri PSC Reaches Decision on Non-Callaway Portion of Union Electric Rate Case," NARUC Bulletin, January 21, 1985, p. 3.

"Texas PUC Examiner Recommends Rate Increase for Houston Lighting and Power," NARUC Bulletin, January 28, 1985.

"South Carolina PSC Orders Reduction of Residential Gas Rates of South Carolina Electric and Gas," NARUC Bulletin, February 18, 1985.

"Ohio PUC Approves Rate Increase for Toledo Edison," NARUC Bulletin, February 25, 1985.

Pacific Gas & Electric Co., Decision No. 85-03-021, 6 NRRI Quarterly Bulletin (CalPUC, March 6, 1985).

Northwestern Bell Telephone Co., Docket No. RPU-84-53, 6 NRRI Quarterly Bulletin 311 (IASCC, March 8, 1984).

"The Pennsylvania Public Utility Commission Approved a Settlement Agreement," Electric Utility Week, March 25, 1985.

"Northern Gas Purchasing Case Settled in Minnesota," April 8, 1985, NARUC Bulletin, pp. 15-16.

Union Electric Co., Case Nos. EO-85-17 & ER-85-160, 6 NRRI Quarterly Bulletin 333-5 (MoPSC, April 9, 1985).

"Virginia SCC Resolves Differences on Power Line Construction Issue," NARUC Bulletin, April 29, 1985.

New Jersey Telephone Co., BPU Docket No. 848-856, 6 NRRI Quarterly Bulletin 108 (NJBPUC, May 1, 1985).

Columbia Gas Co. of Ohio, Case No. 84-67-GA-AIR, 6 NRRI Quarterly Bulletin 478 (OhioPUC, May 21, 1984).

Central Maine Power Co., Docket Nos. 84-120, 84-146, & 85-43, 6 NRRI Quarterly Bulletin 422 (MePUC, June 3, 1985).

"KCP&L, Industrials, Government Agree on Lower Rates for Huge Armco Plant," Electric Utility Week, June 17, 1985, pp. 1-2.

"Missouri PSC Reduces Arkansas Power and Light Rate Request," NARUC Bulletin, June 17, 1985, p. 17.

"Montana Power and Tribes Win FERC Approval of 180-MW Kerr Dam Settlement," Electric Utility Week, July 22, 1985, p. 9.

"PS Oklahoma, Attorney General Reach Settlement on Black Fox Cancellation," Electric Utility Week, August 5, 1985, pp. 7-8.

"Ohio PUC Sets Meeting to Discuss Zimmer Settlement," NARUC Bulletin, August 15, 1985, pp. 13-14.

"Montana Power, PSC Set Agreement on Colstrip; PSC to Forego Court Appeal," Electric Utility Week, August 26, 1985, pp. 3-4.

"Columbia Gas to Contribute to Weatherproofing and Pay Fine in Pennsylvania," NARUC Bulletin, September 16, 1985, p. 24.

Re Cincinnati Gas & Electric Company, 71 PUR4th 140 (PUCO, Nov. 26, 1985).

"California PUC Authorizes PG&E Accounting Procedure for Diablo Nuclear Plant," NARUC Bulletin, February 3, 1986, pp. 20-21.

Proposed Increase in Rates, slip op., No. 85-212 (Me.PUC, July 9, 1986).

"Michigan PSC Authorizes Gas Rate Reduction for Consumers Power," NARUC Bulletin, August 25, 1986, pp. 9-10.

"Commission May Approve Phase-In in Advance of Rate Case," Public Utilities Fortnightly, September 4, 1986, p. 47.

"Missouri PSC Approves Stipulated Agreement which Reduces Missouri Public Service Company Electric Rates," NARUC Bulletin, September 22, 1986, p. 24.

"Utilicorp Buying Spree Draws Mo. PSC Staff Look, Has Role in Rate Cut," Electric Utility Week, September 22, 1986, p. 13.

"Oregon PUC Approves Revised Idaho Power Rate Proposal: Increase to Be Less Than Originally Requested," NARUC Bulletin, September 29, 1986, pp. 14-15.

"California Settlement Permits Return Rate Adjustment During Attrition Year," Public Utility Fortnightly, October 30, 1986, p. 50.

"Ohio PUC Approves Rate Increase for East Ohio Gas," NARUC Bulletin, January 12, 1987, p. 2.

"C&P Cutting Virginia and D.C. Rates," NARUC Bulletin, February 16, 1987, p. 2.

"Washington Nuclear Project Settlement Reached," Public Utilities Fortnightly, February 19, 1987, p. 67.

"Nevada PSC Resolves Statewide Telephone Rate Case and Abolishes the Statewide Pool," NARUC Bulletin, March 23, 1987, pp. 6-7.

"El Paso Accepts 200-MW Rate Exclusion; Sets Aggressive Plan to Eat Up Excess," Electric Utility Week, March 23, 1987, pp. 1-2.

"Missouri PSC Approves Stipulated Agreement in GTE Complaint Case," NARUC Bulletin, March 30, 1987, pp. 14-15.

"Settlement Approved for 'Whoops' Plant No. 3," Public Utilities Fortnightly, April 16, 1987, p. 46.

"California Judge Recommends Stipulated Rate Settlement," Public Utilities Fortnightly, May 14, 1987, p. 36.

"NOPSIS Offers Cash and Concession if City Drops Takeover Try for Next 25 Years," Electric Utility Week, July 20, 1987, pp. 3-4.

"RG&E Rate Hike Cut by One-Time Credits Against Nuclear Power Plant Recovery," Electric Utility Week, July 27, 1987, pp. 11-12.

"Settlement Set on In-Service Criteria for Illinois Powers' Clinton Unit," Electric Utility Week, August 3, 1987, pp. 4-5.

Mark Bender and Warren Wendling, "Fort St. Vrain: The Rate Treatment of A Troubled Nuclear Power Plant," Public Utilities Fortnightly, August 6, 1987, pp. 19-23.

"California Ratepayers to Benefit from Proposed Natural Gas Agreement," Public Utilities Fortnightly, August 6, 1987, p. 36.

"Indiana URC Permits Certain PSI Customers to Save \$2 Million," NARUC Bulletin, August 10, 1987, p. 16.

"New York PSC Cuts Central Hudson Gas Rates by \$2.9 Million, Sets Further Review of Settlement," NARUC Bulletin, August 31, 1987, p. 25.

"Nevada PSC Lowers Nevada Power Rates by \$15 Million," NARUC Bulletin, September 28, 1987, pp. 4-5.

"Nevada Power Accepts an Across-the-Board 4% Rate Cut in Settlement," Electric Utility Week, October 12, 1987, p. 10.

"Deferred Tax Credits to Augment Non-Operating Income," Public Utilities Fortnightly, October 29, 1987, p. 46.

"Michigan PSC Approves Rate Refund by Michigan Bell," NARUC Bulletin, November 16, 1987, p. 15.

APPENDIX B

SAMPLE SETTLEMENT RULES

What follows are the settlement rules of the Federal Energy Regulatory Commission and the Procedural Guidelines for Settlement and Stipulations of the New York State Public Service Commission, referred to in chapter 3. Also the NARUC Staff Subcommittee of Administrative Law Judges has undertaken a project to draft a set of model settlement rules or guidelines for state public utility commissions.

SETTLEMENT RULES FOR THE FEDERAL ENERGY REGULATORY COMMISSION

SUBPART F - CONFERENCES, SETTLEMENTS, AND STIPULATIONS

Sec. 385.601 Conferences (Rule 601)

(a) Convening. The Commission or the decisional authority, upon motion or otherwise, may convene a conference of the participants in a proceeding at any time for any purpose related to the conduct or disposition of the proceeding, including submission and consideration of offers of settlement.

(b) General requirements. (1) The participants in a proceeding must be given due notice of the time and place of a conference under paragraph (a) of this section and of the matters to be addressed at the conference. Participants attending the conference must be prepared to discuss the matters to be addressed at the conference, unless there is good cause for a failure to be prepared.

(2) Any person appearing at the conference in a representative capacity must be authorized to act on behalf of that person's principal with respect to matters to be addressed at the conference.

(3) If any party fails to attend the conference such failure will constitute a waiver of all objections to any order or ruling arising out of, or any agreement reached at, the conference.

(c) Powers of decisional authority at conference.

(1) The decisional authority, before which the conference is held or to which the conference reports, may dispose, during a conference, of any procedural matter on which the decisional authority is authorized to rule and which may appropriately and usefully be disposed of at that time.

(2) If, in a proceeding set for hearing under Subpart E, the presiding officer determines that the proceeding would be substantially expedited by distribution of proposed exhibits, including written prepared testimony and other documents, reasonably in advance of the hearing session, the presiding officer may, with due regard for the convenience of the participants, direct advance distribution of the exhibits by a prescribed date. The presiding officer may also direct the preparation and distribution of any briefs and

other documents which the presiding officer determines will substantially expedite the proceeding.

Sec. 385.602 Submission of settlement offers. (Rule 602)

(a) Applicability. This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under Subpart E. For purposes of this section, the term "offer of settlement" includes any written proposal to modify an offer of settlement.

(b) Submission of offer. (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transit the offer to:

(i) the presiding officer, if the offer is filed after a hearing has been ordered under Subpart I of this part and before the presiding officer certifies the record to the Commission; or

(ii) the Commission.

(c) Contents of offer.

(1) An offer of settlement must include:

(i) the settlement offer;

(ii) a separate explanatory statement;

(iii) copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(iv) a separate proposed Commission order approving the settlement, including the following statement: "The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding".

(3) If an offer of settlement pertains to a tariff or rate filing. The offer must include any proposed change in a form suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type of issue in the proceeding.

(d) Service. (1) A participant offering settlement under this section must serve a copy of the offer of settlement:

(i) on every participant in accordance with Rule 2010;

(ii) on any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) Use of non-approved offers of settlement as evidence.

(1) An offer of settlement that is not approved by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer or settlement that is not approved by the Commission is not subject to discovery or admissible in evidence against any participant who objects to its admission.

(f) Comments. (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(g) Uncontested offers of settlement. (1) if comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) Contested offers of settlement.

(1) (i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the commission finds that the record lacks substantial evidence or that the contested issues can not be served from the offer of settlement, the Commission will:

(A) establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) take other action which the Commission determines to be appropriate.

(iii) If contested issues are severable, the uncontested portions may be severed and decided in accordance with paragraph (g) of this section.

(2) (i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h)(2)(ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the officer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the commission, if:

(A) the parties concur on a motion for omission of the initial decision as provided in Rule 710;

(B) the presiding officer determines that the record contains substantial evidence from which the commission may reach a reasoned decision on the merits of the contested issues; and

(C) the parties have an opportunity to avail themselves of their rights with respect to the presentation of evidence and cross-examination of opposing witnesses.

(iv) If any contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the commission for decision, as provided in paragraph (g) of this section.

(i) Reservation of rights. Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.

Sec. 385.603 Settlement negotiations before a settlement judge.

(Rule 603)

(a) Applicability. This section applies to any proceeding set for hearing under Subpart E of this part and to any other proceeding in which the Commission has ordered the appointment of a settlement judge.

(b) Definitions. For purposes of this section, "settlement judge" means the administrative law judge appointed by the Chief Administrative Law Judge to conduct settlement negotiations under this section.

(c) Requests for appointment of settlement judges.

(1) Any participant may file a motion requesting the appointment of a settlement judge with the presiding officer, or, if there is no presiding officer for the proceeding, with the Commission.

(2) A presiding officer may request the Chief Administrative Law Judge to appoint a settlement judge.

(3) A motion under paragraph (c)(1) of this section may be acted upon at any time, and the time limitations on answers in Rule 213(d) do not apply.

(4) Any answer or objection filed after a motion has been acted upon will not be considered.

(d) Commission order directing appointment of settlement judge. The Commission may, on motion or otherwise, order the Chief Administrative Law Judge to appoint a settlement judge.

(e) Appointment of settlement judge by Chief Administrative Law Judge. The Chief Administrative Law Judge may appoint a settlement judge for any

proceeding, if requested by the presiding officer under paragraph (c)(2) of this section or if the presiding officer concurs in a motion made under paragraph (c)(1) of this section.

(f) Order appointing settlement judge. The Chief Administrative Law Judge will appoint a settlement judge by an order, which specifies whether, and to what extent, the proceeding is suspended pending termination of settlement negotiations conducted in accordance with this section. the order may confine the scope of any settlement negotiations to specified issues.

(g) Powers and duties of settlement judge. (1) A settlement judge will convene and preside over conferences and settlement negotiations between the participants and assess the practicalities of a potential settlement.

(2) (i) A settlement judge will a report to the chief Administrative Law Judge or the Commission, as appropriate, describing the status of the settlement negotiations and evaluating settlement prospects.

(ii) In any such report, the settlement judge may recommend the termination or continuation of settlement negotiations conducted under this section.

(iii) The first report by the settlement judge will be made not later than 30 days after the appointment of the settlement judge. The Commission or the Chief Administrative Law Judge may order additional reports at any time.

(h) Termination of settlement negotiations before a settlement judge. Unless an order of the Commission directing the appointment of a settlement judge provides otherwise, settlement negotiations conducted under this section will terminate upon the order of the Chief Administrative Law Judge issued after consultation with the settlement judge.

(i) Non-reviewability. Any decision concerning the appointment of a settlement judge or the termination of any settlement negotiations is not subject to review by, appeal to, or rehearing by the presiding officer, Chief Administrative Law Judge, or the Commission.

(j) Multiple settlement negotiations. If settlement negotiations are terminated under paragraph (h) of this section, the Chief Administrative Law Judge may subsequently appoint a settlement judge in the same proceeding to conduct settlement negotiations in accordance with this section.

Sec. 385.604 Refusal to make admissions or stipulations. (Rule 604)

(a) If any party in a proceeding set for hearing under Subpart E of this part refuses to admit or stipulate to the genuineness of a document or the truth of a matter of fact and, if the party requesting the admission or stipulation proves the genuineness of the document or the truth of the matters of fact to which stipulation is requested, the party who made the proof may apply to the presiding officer for any order requiring the other party to pay any reasonable expenses incurred in making the proof, including reasonable attorney's fees.

(b) Unless the presiding officer finds either good reason for the refusal by a party to admit or stipulate or that the admission or stipulation sought is of no substantial importance, the presiding officer will order payment of expenses under paragraph (a) of this section.

(c) A presiding officer must grant immediately any motion under Rule 715(b) to permit an interlocutory appeal to the Commission from a ruling of the presiding officer under this section.

(d) If any party does not comply with an order under this section after the order is final, the Commission may strike all or any part of that party's pleadings or limit or deny further participation by the party.

(e) Any proposed stipulation not agreed to is not admissible in evidence against any participant objecting to admission of the stipulation.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

PROCEDURAL GUIDELINES FOR
SETTLEMENTS AND STIPULATIONS

In several of our recent cases, the active parties have initiated efforts during the course of hearings to eliminate unnecessary litigation, and to save time, money and resources, by reaching agreement among themselves on a mutually acceptable resolution of some or all of the contested issues. The parties in these cases have typically presented to the Administrative Law Judge a stipulation agreement setting forth an agreed-upon resolution of issues or additional revenue requirement and other conditions negotiated in meetings of affected parties. The Judge in each of these cases has reviewed the stipulation agreement entered into by the parties to test its reasonableness in light of the record developed in the proceeding and has advised us whether, in his or her judgment, the proposed resolution of the case is in the public interest. We have in each such case reviewed the record, the stipulation agreement and the Judge's recommendations. In every case to date, we have found the proposed settlements reasonable and have ratified them.

The general procedure that has been followed seems to us a commendable one for it holds the promise of reducing the time and expense required to complete the administrative process in those cases susceptible to more expedient review, without compromising the opportunity for interested parties to participate fully in our proceedings. Moreover, the settlement process can lead to more aggressive and effective litigation of issues involving major policy considerations or those with significant monetary impact. This process can, therefore, save valuable time and resources, as well as improve the efficiency of our administrative hearing process. Thus, with reasonable guidelines designed to safeguard the opportunity of staff and other parties to actively litigate any issue, we believe the settlement and stipulation process is in the public interest. We set forth below guidelines for stipulation and settlement agreements among parties in

Commission proceedings that propose a specific resolution of issues. We encourage parties to pursue negotiated settlements of individual issues or even of entire cases where such action seems in public interest.

In cases that follow this procedural path, we shall expect the Administrative Law Judge, in the first instance, to test the propriety of a proposed stipulation and settlement in light of the record developed in the proceeding and pertinent Commission policy and precedent. And, of course, we shall reserve final judgment on the question of the reasonableness of the particular proposal and its compatibility with the public interest. Accordingly, it should be understood that stipulation or settlement agreements among parties in Commission proceedings will have no decisional consequence unless ratified by the Commission.

As we mentioned above, we are also concerned that the rights of interested parties to participate fully in our proceedings be protected in those instances where early settlement of issues among the major parties is likely. Accordingly, we set forth the following guidelines which should be adhered to in proceedings likely to lead to formal stipulation of issues among major parties, full settlement of a case or some indication of our normal administrative process.

First, we think it absolutely necessary that all parties be apprised of conferences or meetings scheduled for the specific purpose of negotiating or settling issues in the case.¹ Such conferences may be scheduled by formal notice to the parties. In those instances where such formal notice is not practicable, the Administrative Law Judge should require that any proposed settlement or stipulation agreement contain an affidavit or affirmation attesting that each active party received reasonable notification of the time and place of all meetings or conferences scheduled by the parties for the specific purpose of resolving issues in a case. It is not necessary, in our view, that each party attend and participate in such meetings; but we

¹. We do not intend to include in this category those discussions that our staff routinely has with company personnel during field audits and examinations, which sometimes lead to informal resolution of disputed issues. Only conferences or meetings scheduled for the specific purpose of reaching a formal stipulation or settlement need be so noticed.

deem actual notice to all parties of negotiation sessions a prerequisite for acceptance by the Commission of a stipulation or settlement agreement.

We also deem it necessary to have available for review in each of our cases as complete a record as is feasible, setting forth the positions of each major party including, of course, staff of the Department of Public Service. Settlement agreements reached at a very early stage in a proceeding may present more difficult problems in this regard. In those cases, the Administrative Law Judge should require a proponent of a proposed settlement to place into the record the details of the agreement, which should contain its underlying rationale. Parties not participating in such settlements should then be given an opportunity to offer evidence in opposition to the proposed settlement and, where appropriate, to cross-examine a proponent on the settlement.

It is also worth emphasizing that each party has a right to participate in our proceedings by developing fully the issues and positions it wishes to advocate. Moreover, we will not allow that privilege to be abridged by an arrangement among other parties to stipulate or settle issues between themselves. The Administrative Law Judge must, therefore, take requisite action to ensure that all parties have a full and fair opportunity to develop issues and advocate positions by cross-examination of utility and staff witnesses and by introduction of affirmative testimony, even if some parties have agreed to stipulate or settle their differences on those issues.

When settlement agreements are effectuated after the hearing record is closed, all parties, including those who are not participants in any stipulation or settlement agreement, should be permitted to develop their positions fully in briefs to the Administrative Law Judge. The Judge should then prepare a recommended decision taking full account of the issues and arguments raised by those parties who choose not to participate in the stipulation or settlement.

We believe that these guidelines have generally been followed in recent cases where stipulations or settlement agreements have been proposed. And we are persuaded that continued adherence to them will ensure that our administrative process remains efficient and fair to all parties.

In conclusion, we wish to emphasize that this document is provided for the guidance of the parties and presiding officers in our proceedings.

while it is not intended to provide answers to all specific problems that might arise in individual cases, it does provide the framework within which individual decisions should be made. When confronted with issues of interpretation that might arise in individual cases, the presiding officers should resolve disputes in a manner consistent with our overriding concern expressed herein that all parties have a full and fair opportunity to participate in our proceedings. We shall, of course, continue to monitor closely experience with the settlement and stipulation process and we stand ready to review and modify these guidelines as may be necessary after some experience has been gained with them.