Some Modest Suggestions for Improving Public Utility Rate Proceedings

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SOME MODEST SUGGESTIONS FOR IMPROVING PUBLIC UTILITY RATE PROCEEDINGS†

Roger C. Cramton∗

The agencies regulating public utilities are under attack as ineffective and inefficient. Professor Cramton here discusses the procedural impediments to efficient and coherent regulation on both the state and federal levels. To improve administrative procedure in this area, Professor Cramton recommends retention of the adversary form of rate proceedings as a useful truth testing device, wider use of hearing examiners, adoption of a system of written presentation of evidence, and placing greater personal decisional responsibility on agency heads.

INTRODUCTION

In recent years there has been widespread dissatisfaction with the regulatory process. Public utility commissions, it is charged, have failed to do an effective job of regulating the electric, telephone and gas utilities.† The transportation agencies have failed—depending on the bias of the critic—to suppress “destructive competition” or to unleash the “dynamic forces” of free competition.‡ And all of the critics appear to be unhappy with the state of the world as viewed from the listener’s end of a radio or television set.§ In short, skepticism concerning the extent to which regulation is effective in achieving its goals is widespread.

† This Article borrows heavily from the draft of a report which the author prepared for the Committee on Rulemaking of the Administrative Conference of the United States. Although the final report of the Committee on Rulemaking has been published, Improvements in the Conduct of Federal Rate Proceedings: A Report of the Committee on Rulemaking, in Administrative Conference of the United States, Selected Reports, Sen. Doc. No. 24, 88th Cong., 1st Sess. 75-114 (1963), it is not readily available to the bar.

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See Freedom and Responsibility in Broadcasting (Coons ed. 1961); Minow, Equal Time—The Private Broadcaster and the Public Interest (1964).
Much of this criticism has taken a procedural turn. Three major weaknesses of public utility regulation have been emphasized: (1) delay in the disposition of business,\(^4\) (2) uneven quality of decisions,\(^5\) and (3) lack of coherence and direction.\(^6\) Regulatory commissions take too long in disposing of contested rate filings or license applications. Lengthy proceedings exhaust the participants and run the risk of being irrelevant by the time they are concluded. If the decision rendered at the end of the road is poorly reasoned, it gives slight solace to the losing party. If that decision lacks clarity, either because it is ambiguously phrased or because important considerations have been deliberately omitted, it provides little guidance to the affected industry.

The interrelationship of these alleged weaknesses adds to the sharpness of the attack. Because individual adjudications are lengthy, uncoordinated, and \textit{ad hoc} in character, the agency devotes most of its efforts to the flood of complaints, applications, and filings that are received. It loses control of its workload and is deprived of initiative and choice. The reliance on adjudicatory techniques also tends to create a passive frame of mind on the part of the agency heads, who attempt to retain flexibility by limiting the scope of individual decisions. This, in turn, fails to provide guidance to those subject to the regulation, resulting in useless applications and proceedings, which then contribute to the mounting backlogs and increasing delays. And so on, in the usual pattern of the vicious circle.

Thoughtful readers will recognize the caricature as well as the truth that is inherent in this graphic portrayal of the regulatory process. The reply that the charges are overdrawn (which they are) or that they are inapplicable to a particular agency (which may well be so) is insufficient. Methods must be found to improve the speed and effectiveness with which public utility commissions perform their responsibilities. This Article, largely confined to the handling of formal rate proceedings, attempts to outline some modest suggestions for improving the fairness and efficiency of public utility regulation.

State and federal statutes empowering regulatory commissions to determine the lawfulness of rates of public utilities have many common elements.\(^7\) Public utilities are invariably required to file and publish

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\(^7\) The description that follows summarizes the major features of statutory rate
their rate schedules in accordance with statutory procedures or rules prescribed by the particular commission. It is made unlawful to charge any rate other than the published rate. The initiative in filing initial or changed rates, however, is retained by the utilities, but the statutes require them to give a stated notice (usually thirty days) to the commission and the public of any change in rates. After publication of the rate, informal statements asserting its illegality (“protests”) may be filed within a limited period by competitors or consumer interests. The commission then has the remainder of the statutory notice period in which to determine whether to suspend the effectiveness of the proposed rate pending an investigation of its lawfulness.

In general, the suspension determination is a summary administrative decision made without a hearing and not subject to judicial review. In most commissions the staff investigates the proposed rate in the light of the protests and other submitted material, and makes a recommendation to the agency heads as to whether the rate should be suspended or allowed to become effective. If the commission does not suspend the rate, no hearing is held and the rate becomes effective subject to possible future complaint and hearing at the request of competitors or other affected persons. Under some statutes, however, rate increases cannot be allowed to become effective without a full hearing. If the rate is suspended, its effectiveness is postponed for a period which varies in different statutes, but is designed to allow the lawfulness of the rate to be fully determined before the rate becomes effective. During this suspension period a formal rate proceeding, with a decision on the basis of a record after an evidentiary hearing, considers the lawfulness of the suspended rate. In this proceeding, which arises when the rate is suspended, the proponent of the rate ordinarily has the burden of proving that the rate is lawful.

Other formal rate proceedings arise by complaint rather than by suspension. The commission, on its own motion or on complaint of competitors, consumer interests, or public bodies, may initiate a formal proceeding to determine the lawfulness of existing rates. In these cases the burden of proving that the rate is unlawful usually falls on the complainant or the agency staff. While in a suspension case the commission may be limited to disallowing the proposed rate or leaving the existing rate in effect, in a complaint case the commission must

itself fix a lawful rate for the future if it finds the existing rate unlawful. Authority to compel higher rates (minimum rate authority) may or may not be given to the particular commission; but lower rates may always be ordered if existing rates are found to be excessive.

Rate questions may also arise and be litigated in licensing cases involving the certification of new authority or new facilities. The nature and lawfulness of the rates that an applicant plans to charge may be an important factor in determining whether it is in the public interest to grant his application.

In general, the substantive standard for existing and proposed rates is that they be “just and reasonable.” In addition, most statutes prohibit discriminatory rates of various types. Methods for determining when a rate is “just and reasonable,” or whether an “unjust discrimination” is involved, ordinarily are not prescribed in detail, although the statute may list factors to be considered. In practice, such certainty as is to be found must be discovered in the gradual accretion of regulatory decisions and rules, punctuated by occasional judicial decisions or statutory amendments. The zone of “reasonableness” is usually sufficiently broad so that the agency has a broad discretion to fix the rate at any point within certain limits.

Although many rate proceedings have common elements, they often differ from one another in important respects. One variable with procedural implications concerns the number of rates and parties which are involved. If a single rate of a single company is involved, the scope of the proceeding is likely to be limited. When the rates of a related group of companies are at issue, the case has larger dimensions and more parties. The extreme case is a massive proceeding involving the entire rate structure of a group of companies or throughout a substantial area. Rulemaking techniques of investigation and consultation may properly be substituted for adjudicatory hearings as the issues become more general and industry-wide.

The availability of an adjudicatory hearing may also be affected by the circumstance of whether the utility is being ordered to reduce or to increase its rates. In regulation of maximum rates, as in traditional public utility regulation of natural monopolies in the electric, gas, and telephone fields, the regulatory agency places a ceiling on higher rates or orders a decrease in existing rates. In minimum rate regulation, on the other hand, the rate agency establishes a floor below which rates cannot gravitate. Rate proceedings in the transportation field usually are of this type.

Individualized determinations on the basis of a record after a hearing having many adjudicatory characteristics have in the past been thought to be required when an agency was fixing maximum rates, since a rate set at too low a level would result in confiscation of private prop-
Although it is customary for statutes to provide for the same type of hearing in cases involving minimum rates, this constitutional argument is inapplicable. Losses resulting from competitive forces are not entitled to constitutional protection;[8] their prevention must rest on statutory grounds. The desirability of trial-type hearings in minimum rate cases stems from the importance of providing protection and participation to the interests that are adversely affected by orders establishing rate floors—the desire of competitors to engage in vigorous competition and of consumers to pay a lower rate.

Another variable which affects the handling of rate cases is the volume of cases and the relative urgency of prompt decision. Procedures which may be appropriate in handling the rates filed by one major telephone system (the American Telephone & Telegraph Co. and its various subsidiaries) or by eleven trunkline air carriers may not operate with the same efficiency when applied to the thousands of tariffs filed by hundreds of motor carriers in a given jurisdiction. Some commissions have a trickle of major rate cases; others are required to process an enormous volume of proceedings, large and small. The demands of the environment may shape as well as strain the procedures which are adopted.

I. "Judicialization" vs. Summary Administrative Determination

What kind of a hearing should be provided in rate cases? Exploration of this question is desirable at the outset. Assumptions concerning the reliability of various truth-seeking techniques, as well as value judgments concerning the degree of public participation that is desirable, stand revealed when this question is debated.

At one extreme is the position that rate determinations should be made through the use of highly judicialized procedures on the prototype of the common-law trial. The difficulty with this view is that it neglects the important differences between common-law trials and rate cases. The common-law trial is an acceptable method of resolving a private dispute between two persons. The drama and formality of the proceeding provide greater assurance that the result will be accepted by the participants and the general community. The issue in a common-law trial usually turns on an evaluation of witnesses' recollections of a non-recurring past event (such as an automobile accident). The techniques of proof, especially the hearsay rule and the use of cross-examination, are designed to overcome the inexperience of the trier of
fact—the lay jury—in passing upon demeanor and credibility. The element of citizen participation through the lay jury functions well in simple situations and embodies the additional values of community participation in law-making.

Most rate cases differ so substantially from those for which the methods of the common-law trial were devised that a degree of departure from trial-type procedures is warranted. Among the major differences are the following: First, the essentially public nature of most rate cases makes it undesirable that the outcome should turn solely on the private desires and interests of the parties. Second, the typical rate case does not involve controverted questions of fact on which credibility of witnesses is important. Rather, the decider is required to apply an often vague judgment having policy implications to conclusions drawn from a mass of factual data (the data itself, as distinguished from the conclusions drawn from it, is unlikely to be in dispute). Third, the number of parties and issues is generally much larger and the parties' interest in the proceeding varies considerably. Staff participation in the hearing may be required in order to assure that all facets of the problem, not merely those favoring the groups participating in the hearing, are brought out. Finally, the heavy volume of cases and the limited attention which the ultimate deciders—the agency heads—can give an individual case may require further departures from judicialized procedures. Procedures must be designed to present the case in an intelligible and manageable form to the agency heads. In the preparation of final decisions, the agency heads may be required to place extensive reliance on subordinates.

At the other extreme, it is sometimes suggested that the type of managerial discretion involved in rate fixing, and the elusiveness of the factors entering into this judgment, call for the exercise of summary discretionary power. The process of determining the lawfulness of rates, under this approach, would be handled in much the same manner as the agencies presently handle the determination of whether a newly filed rate should be suspended: an administrative determination made in expeditious and summary fashion on the basis of written materials submitted by the parties and without a hearing, without issuance of an opinion purporting to state the reasons for decision, and without opportunity for further administrative or any judicial review. "Ratemaking by fiat," however, is unrealistic as well as unwise. Party participation contributes to an accurate and informed disposition of rate cases. Judicial review, although occasionally abused, supplies a broader perspective as a counterpoint to the often narrow jurisdiction and outlook of the agency. In any event, statutes almost universally require a determination on the basis of a record in contested rate proceedings. Indeed, the abolition of such a hearing in
maximum rate cases would raise serious constitutional questions.

More modest proposals for enhancing administrative discretion and reducing "overjudicialization" must be taken more seriously. It is arguable that better results would be achieved in complicated rate proceedings if party participation was limited and the open hearing presided over by an independent hearing examiner was eliminated. Under this approach, the private parties would submit written materials in response to an agency request, followed by an ex parte investigation by the agency staff. The staff would then draft a tentative decision for the agency, based not only upon such written materials but also upon any other data and information gathered by the staff. Following the issuance of this tentative decision, the parties would be provided with a limited opportunity for rebuttal of "noticed facts" and for cross-examination. Thereafter, briefs would be submitted to the agency heads, who would then issue their final decision.

Several elements of this procedural package, particularly the reliance on written materials, will be considered favorably at a later point. The basic issue here is whether it is desirable, on balance, to adhere to and improve the hearing examiner system as developed under the Federal Administrative Procedure Act,\(^\text{10}\) or whether instead there should be a shift to a different approach, in which party participation would be more limited and the agency staff would dominate the process.

The arguments advanced in favor of reliance on the staff to gather the relevant information and to formulate proposals for final decision by agency heads stress the following views: (1) that a staff of experts, reflecting different types of specialized knowledge or expertise, can do a more effective and a more expeditious job in complex and technical cases than an individual hearing examiner; (2) that staff-formulated initial decisions are more likely to be responsive to agency policy and to be internally consistent; and (3) that the use of judicialized procedures, with emphasis on the oral testimonial process, is not geared to the needs of complicated cases involving the application of law and policy to a mass of economic and social data.

As an abstract proposition, there is much to be said for this line of argument. Procedural institutions, however, cannot be evaluated apart from the social and political processes of which they are a part. Prospects for improvement in the handling of rate cases would seem to be greater with continued adherence to the hearing examiner system. Some of the considerations influencing this judgment deserve separate statement.

First, at some point before a commission signs and issues a final

decision in a major contested rate case, a job must be done somewhere in the agency (whether by one person or a combination of persons) of preparing a comprehensive and useful analysis of the substantial issues in the case, based upon a careful study of the record and briefs. An independent hearing examiner, who has lived with the case from the beginning, is likely to be the most qualified person to perform this job. If it is well done, the case will have been reduced to more manageable proportions before the agency heads are required to rule on it.

Second, the important contribution which can be made by staff experts should be made through positions taken in open hearing, where their views are made known to all the parties and are subject to testing and evaluation on the same terms as the positions advanced by private parties. The correct answers to the problems of a case are not locked somewhere in the minds and experience of staff personnel. The attempt to state the staff position persuasively in a public hearing may in fact assist in the formulation of a supportable position. In addition, where the open hearing is dispensed with, the agency does not have the benefit of the full contribution which the interested parties can make to the resolution of the case. The interplay of private parties and staff in open hearing, each having a different role to perform, usually produces useful and desirable results in the better marshalling of data and better informed decisions.

Third, the basic reasons which supported the emphasis in the Federal Administrative Procedure Act of 1946 on the role of the hearing examiner in agency decisions remain important today. Procedures which allow staff members to conduct ex parte investigations, render tentative decisions, and then advise the agency heads with respect to the final decision tend to be arbitrary in fact as well as appearance. Use of an independent hearing examiner protects against one-sided, biased, or arbitrary staff determinations, eliminating the appearance or actuality of unfairness. A more limited role for the staff at the hearing stage also makes it easier to justify staff advice to agency heads at the decisional stage, where staff assistance is more essential.

Finally, the long-run possibilities of improving the average caliber and performance of hearing examiners are substantially greater than would appear to be possible at the staff level. Recruitment and retention problems tend to be much less severe with hearing examiners than with the professional staff personnel, and the gap is likely to widen in the future. A greater emphasis on staff control cannot be justified solely on the ground that, if administered by wise and able people, it would produce beneficent results; procedures must be designed to do the job with the men of average parts who are likely to

be available. A really able staff will find ample leeway within present procedures to make a major contribution to the proper resolution of litigated rate cases. Moreover, the occasional difficulties of case-by-case adjudication may be avoided by imaginative use of rulemaking authority or aggressive use of discretionary powers to initiate proceedings or to suspend rate filings.

II. CONTINUOUS HEARING VS. TRIAL BY INTERLUDES

A defect which has contributed to delay and ineffectiveness in the hearing of major rate cases is the widespread practice of trial by stages, with the direct evidence and cross-examination of each party presented in separate phases, each followed by a lengthy recess. At the beginning of the hearing, for example, a rate applicant might present his direct testimony and exhibits; and then the hearing would be recessed for a lengthy period to allow staff and other parties to prepare for cross-examination. Substantial recesses would also take place between each subsequent shift from one party to another or from direct to cross-examination. Even though the total days of actual hearing are relatively few in number, a "hearing by interludes" usually extends over the better part of a year or longer.

The discontinuous hearing has a number of advantages. It prevents surprise; it allows each party to prepare as he goes along; and it may result in a well-organized and complete record. Commonly, however, these virtues are either lacking or are outweighed by the deficiencies of such a leisurely approach. Often the critical issues are not identified at the outset. The availability of time in the future is apt to lead to inadequate advance preparation. If the case is not organized to resolve the critical issues quickly and accurately, an aimless and diffused hearing will produce a record that, despite its bulk, fails to provide an adequate basis for an informed decision.

At this point in time a move away from the "hearing by interludes" approach is desirable. In cases of smaller dimension the hearing should be continuous; in cases of larger scale, a few recesses may be called for. This is feasible as well as desirable if combined with other measures that have proved their efficacy in the expedition of rate hearings.

The early submission in written form of the direct case for the party having the burden of proof is a vital step. There is no reason why the rate applicant in a suspension case, for example, cannot distribute the prepared testimony and exhibits in support of his filing at an early date. The rate should not have been filed without some assurance that it could be justified if protested. The relevant information is in the control of the rate applicant, and submission in written form is not troublesome because the witnesses' testimony must be prepared by the
lawyer in any event. Most of the witnesses are professionals or experts testifying on the inferences to be drawn from generally undisputed facts.

The other parties to the case, including the staff, should also submit their direct testimony and exhibits in written form in advance of the date set for the beginning of the hearing. In simpler types of cases it is desirable that all of the parties exchange their direct testimony on the same date; in more complicated cases the party having the burden of proof should precede the other parties by a period of from thirty to ninety days.

The advance exchange of written evidence provides the basis not only for negotiated settlement but for effective use of conference techniques. Special procedural arrangements, full exchange of relevant information, stipulation of facts, identification of contested issues for hearing, and the like, should be completed prior to hearing under the supervision of the hearing examiner assigned to the case. Early assignment of a hearing examiner, and an opportunity on his part to address his attention to the case, are also required.

The hearing itself should be devoted to cross-examination and re-direct. Advance exchange of written evidence makes it possible for the parties to be prepared for a session limited largely to cross-examination. Since the issues are clearer, a more adequate record results and the hearing may be shorter. Of course, careful control must be exercised to assure adequate preparation by the parties and to prevent the submission of direct evidence under the guise of re-direct.

III. Oral Testimony vs. Written Evidence

The practice of preparing direct testimony and exhibits in written form and distributing them in advance of the hearing is fortunately becoming more and more common. Several federal agencies, especially the Civil Aeronautics Board and the Federal Power Commission, have led the way, and state agencies are beginning to follow suit. In some instances the advance preparation of written evidence is limited to the direct case of the party having the burden of proof; in others it is extended to staff and opposing parties.

Rate cases by their nature are well suited to the use of written procedures. The testimony and exhibits which constitute the bulk of the record in rate proceedings consist of the views and opinions of expert and professional witnesses. The underlying facts are placed in the record in the form of detailed exhibits, with an expert testifying concerning the manner of preparation of the exhibit, the supporting rationale, and the inferences which he believes should be drawn from it. While there may be factual disputes, their resolution is likely to
rest on the acceptance of one expert's judgment rather than that of another. Credibility in the usual sense of conflicting stories as to factual occurrences is rarely involved. Although cross-examination of expert witnesses is often helpful or necessary, it is virtually impossible for one party to establish his own direct case by cross-examination of another party's witnesses. An expert witness will occasionally admit specific weaknesses in his analysis, or qualify his conclusions, but he will shortly be out of a job if he fails to stick to the story which, in cooperation with counsel, he has prepared in advance. The major purpose of cross-examination in such proceedings is not to reduce a witness to a shattered hulk by the admission of error, but to explore all of the considerations entering into what must remain a matter of judgment.

Effective participation in a case of this nature requires that attorneys for staff and for private parties prepare their witnesses and exhibits in advance. The requirement that an expert's story be put in written form prior to hearing is an insignificant burden and results in more precise and informative testimony. Attorneys dislike the idea largely because the procedure is unfamiliar or because it reduces the element of surprise which they traditionally regard as an important tool-of-trade in adversary proceedings. Even in court proceedings, however, the current trend is to reduce the factor of surprise through discovery and other pre-trial devices. In rate proceedings before a regulatory body the element of surprise has no proper place and its elimination is in the public interest.

Exchange of written evidence in advance of hearing has many benefits. One of the most obvious is that it facilitates a negotiated settlement. Most important, it sharpens the issues at the hearing and results in a more effective record. In a substantial number of cases, particularly those of less moment, the parties may be satisfied with their written presentations and an oral hearing becomes unnecessary. Properly handled, written procedures result in a more adequate record being produced in a shorter space of time.

Objections to the use of written evidence take several forms. Attorneys who are unfamiliar with the technique initially object, but their hostility usually melts as they acquire familiarity. Today a substantial number of practitioners advocate greater reliance on prepared testimony. Another objection, the danger that the written submissions may become obsolete or the affiants unavailable, has force when the hearing date is significantly delayed. The solution is to hold the hearing shortly after the exchange of written evidence has been completed.

Other objections stem not from the technique itself but from a failure to manage it properly. Some attorneys, for example, will attempt to hold back major elements of their case in order to surprise their
opponents on re-direct. To the extent that spineless rulings by a hearing examiner permit them to do so, the utility of written procedures is destroyed. A related abuse, the tendency of attorneys to “can” testimony in an overly general or argumentative manner, may also be controlled by prudent rulings of the presiding examiner.

Maximum use of written evidence should be encouraged. There has now been sufficient experience with the technique to justify a further shift away from the live testimonial process. Potential difficulties of written procedures may be controlled or eliminated by careful handling; and the original hostility to them of some attorneys and examiners has diminished as experience with their use has been acquired. This does not mean that oral hearing will atrophy—cross-examination will still be required in most cases. But it does mean that trial by surprise will vanish from rate proceedings, that the oral hearing will be shorter and more useful, and that “hearing by interludes” will cease to be customary. The normal pattern should be a hearing with limited or no recesses that is largely devoted to cross-examination of materials exchanged in advance.

IV. PERSONAL VS. INSTITUTIONAL DECISIONS

It is possible to take the position that agency procedures should be designed to allow the professional staff of an agency to dominate the decisional process. The justification for such a position would be that the staff comprises the only group in the agency with specialized knowledge and interest in regulatory problems, as against an uninformed, often lazy, and peripatetic group of men who temporarily occupy chairs as commissioners. In rejecting this position, I start with the premise that the executive and the legislature have placed reliance on the integrity and judgment of the agency heads. If procedures are adequately designed, the commissioners can inform themselves concerning the matters which they must decide. The attitudes and experience which they bring from the outside (which are “political” in the larger and finer sense of the word) are a proper means of democratic control over the otherwise headless fourth branch.

It cannot be expected that a busy agency head can regularly give his personal attention to the massive records in the rate cases which reach him for decision. In many regulatory commissions the demands on the commissioner’s time are much too formidable to permit anything more than an occasional contact with the record in a case of special interest or importance. His knowledge of the case must be obtained from sources which are more succinct and manageable.

In most rate agencies, five major sources of information may be available: (1) initial decision of the hearing examiner; (2) exceptions
and briefs of staff and parties; (3) oral argument; (4) personalized staff assistance by the commissioner’s subordinates; and (5) staff assistance which is available to the commissioners as a group. Whatever the particular pattern, the mass of material resulting from all of the earlier stages must be presented to the commissioners in a form that is intelligible and useful to them. Otherwise, all that has gone before will prove to be an elaborate charade, unrelated to the actual grounds of decision. The objective should be to provide agency heads with the information they need to reach satisfactory conclusions on both factual and policy issues, without flooding them with more than they can usefully handle.

A much debated issue concerns the extent to which agency heads should be permitted to consult with staff members during the decisional stage. In most state agencies a substantial amount of consultation with the heads of various operating bureaus is customary. In the federal agencies, on the other hand, the trend is away from consultation. Both positions have their problems and the choice must be made on pragmatic grounds.

Critics of consultation on the part of agency heads should face the implications of their position. One alternative is to deny agency heads any expert assistance whatever, limiting them to the adversary presentation in the briefs and oral argument. The danger here is that uninformed decisions will be the result. Instead of providing protection to the various interests involved, this approach may magnify the danger of extraneous considerations governing the decision. If agency heads are not free to fully inform themselves of the facts and issues, they may decide the case on grounds outside the record.

A second alternative would be to provide each agency head, or the agency heads as a group, with a set of independent specialists isolated from the rest of the staff. This would satisfy the most fastidious notions of separation of functions, but would present other problems. A multiplication of specialized staffs, each doing the same work on the same case independently of one another, is costly and time-consuming. Fragmentation of the independent regulatory agency into separate staffs, respectively serving the bureau heads, the hearings examiners, and the agency heads, is neither desirable in itself nor required by abuses arising out of present practice.

Determining the proper extent of consultation on the part of agency heads with staff members requires the balancing of conflicting considerations. On the one hand, it would be naive to assume that staff advice during the final decisional stage will be totally disinterested or without influence on the outcome of cases. Staff officials who played a key role in formulating the staff position will be hesitant to disown the product of their labors or to criticize their subordinates. The
views of agency heads may be affected by the articulate presentation of staff views at this stage.

On the other hand, the agency heads need informed advice and assistance in order to effectuate their own policies in agency decisions. The myriad details on which advice may be needed make it cumbersome or impossible for all of their inquiries to be placed in the public record. It is cheaper and perhaps better to have one staff rather than two or three. And it is unwise to wall off the agency heads from the most accessible and effective assistance which is likely to be available to them.

Here, as elsewhere, a balance must be struck. Different people, different states, will strike it at a somewhat different point. One line that can be defended is a distinction between consultation with staff who participated at the hearing and those who did not. Participants in the proceeding are likely to be influenced by the heat of battle and less able to detach themselves from their prior involvement in the case. Staff members who did not participate in the case, and particularly those at the higher levels, can be expected to take a broader and more objective view when asked for their advice. They are more apt to put themselves in the desired role of being helpful to the agency heads who are asking the questions.

The nature of the consultation and its setting are important factors. There is little reason why a commissioner who desires information concerning material in the record should not address specific queries to the hearing examiner who was involved in the case. Unlike the individuals involved in the final decisional process, such as personal assistants or opinion writers, the hearing examiner is thoroughly familiar with the raw data in the record. An exaggerated concern for the form of propriety rather than its substance should not persuade agency heads to disregard the hearing examiner's notes or memory as if they did not exist. Similarly, when the agency heads are contemplating an approach to a policy issue different from that taken by the hearing examiner, it may be important that the implications of the proposed action be fully explored with knowledgeable members of the staff.

A related issue affecting the informed participation by agency heads in the decisional process is whether decisions should issue under the name of individual commissioners. Experience thus far indicates that signed opinions are no solution to the opinion-writing deficiencies of regulatory agencies, although they may be of some value in highlighting the importance of personal consideration by the deciders. Individualized opinions encourage commissioners to take a greater interest in the process of working out a rationalization for a decision.
Limitations of time, however, make it impossible for a commissioner to actually write an opinion in most instances. The addition of personal touches to a decision entirely thought out and prepared by someone else is not in itself a great advance in administrative procedure. Yet the signed opinion is desirable because it focuses the attention of agency heads on the importance of their written product.

Conclusion

There are no simple answers to the problems of delay, poor quality, and lack of direction which characterize some public utility regulation. The problem of delay is illustrative. It is tempting to search for a scapegoat. The human mind responds eagerly to the notion that something or someone is at fault. Further study, however, reveals that delay is not the result of a limited number of specific causes, much less wrongdoing, but of the slow accretion of numerous pressures, many of them closely related to the complexities of the functions that are being performed. Some of them are inevitable in the sense that the bulk of cases, or their individual intricacy, is such that they cannot be handled with dispatch without a large increase in appropriations or staff of the regulatory body, or a slighting of procedural safeguards.

The variety of public utility rate proceedings suggests a cautious approach to the problem of procedural reform. Across-the-board remedies are likely to be productive of more mischief than solace unless their probable effects are carefully studied in advance. Uniformity and change for their own sake are of little or no value; they should be encouraged only when it is apparent that common problems would be amenable to a common solution. Any evaluation of administrative procedures must rest on a judgment which balances the advantages and disadvantages of each proposal.

Finally, suggestions for change, such as those advanced in this Article, must be evaluated in terms of the conditions under which the rate process must operate and the needs which it must fulfill. Existing substantive policies under each regulatory statute should not be inadvertently or intentionally distorted by procedural changes. The environment in which public utility regulation takes place should not be overlooked. The dependence upon private capital and initiative requires that regulation maintain a high degree of continuity and stability.

Our regulatory pattern constitutes a middle way between public ownership and private monopoly. It must be expected that the processes of decision will be surrounded by procedural safeguards which would not be used in private decision-making. Party participation in
regulation, where public decisions so importantly affect private rights, may well extend beyond the point of mere efficiency. In our tradition the greater acceptability of techniques which provide ample participation to affected interests is itself an important value.