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Recommended Citation

58 N.Y. St. B.J. 58 (1983)

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ADMINISTRATIVE PROCEDURES FOR RESOLVING COMPLEX POLICY QUESTIONS: A PROPOSAL FOR PROOF DISSECTION

Harold I. Abramson*

Many commentaries have charged that the use of conventional trial procedures in the administrative process fails to provide an effective means for resolving complex policy questions.¹ In particular, the excessive use of cross-examination has been cited as needlessly impairing the economy and efficiency of administrative proceedings.² Excessive and redundant use of such procedures has also been criticized as undermining the accuracy of results by allowing unfettered attack on adversaries' witnesses.³ Clearly, current opinion of the adversary system is that it "rates truth too low among values that insti-

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The author expresses his special appreciation to Thomas Willemain, Associate Professor of Public Policy, Harvard University for his help in formulating the recommendations in this Article. The author, who team-taught a course on "Advocacy Modeling" at Harvard University in the Fall of 1982, also expresses his appreciation to his students for providing him the opportunity to experiment in class with some of the ideas in this Article.

¹ Professor Davis has challenged the assumption that "the best way to untangle a jumble of disputed facts, confused law, and undetermined policy is to conduct a huge trial, allowing witnesses to argue about policy, permitting anyone to cross-examine any witness, and then purporting to decide what to do on the basis of the record of thousands or tens of thousands of pages." 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 14.1, at 3 (2d ed. 1980). See also Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and, Social Issues*, 71 MICH. L. REV. 111 (1972); Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585 (1972); Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132 (1972).

² See 1 & 3 K. Davis, *supra* note 1, §§ 6:38, at 617, 14:3, at 10. In his study of the United States Food and Drug Administration rulemaking, Professor Hamilton charged "excessive, redundant, and unrewarding cross-examination" with the major responsibility for protracted hearings. Hamilton, *supra* note 1, at 1167. The claim that cross-examination was useful was rejected; it was "doubtful" whether the facts developed on cross-examination affected the outcome of the proceedings. *Id.*

³ Professor Williams agrees that cross-examination presents an opportunity for delaying a case, and may even intimidate witnesses from testifying. Williams, *Hybrid Rulemaking Under the APA: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 443-44 (1975). Additionally, cross-examination of an unseasoned witness may permit the scoring of debating points "whose value is more apparent than real." *Id.* at 444. Finally, because of the additional time added to the proceeding, cross-examination discourages high-level agency decisionmakers from participating in cases. *Id.*

tutions of justice are meant to serve."⁴

The problems surrounding the use of trial procedures by administrative agencies has lead some critics to conclude that these procedures should be reformed. This Article examines recent criticism and outlines various methods intended to increase the effectiveness of the fact finding process.^{4,1} Section I focuses on several recent administrative trials which suggest the ineffectiveness of conventional procedures where agencies are faced with complex policy questions.⁵ In section II, various proposals offered by commentators are examined to determine their usefulness in this area.⁶ Finally, Section III proposes a procedure for the dissection of proof which modifies existing procedures in order to increase the efficiency and accuracy of agency action.⁷

I. A STUDY OF PROCEDURAL EFFECTIVENESS IN GENERIC CASES

During the 1970s, the New York State Public Service Commission (PSC) faced complex and controversial problems that called for major policy initiatives.⁸ In resolving these problems, the PSC used four methods for developing policy. First, the PSC promulgated conventional rules and regulations to cover predominantly procedural mat-

⁴ Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975). Judge Frankel complains that the "techniques for developing evidence feature devices for blocking and limiting such unqualified revelations [as the whole truth]." *Id.* at 1038. With regard to cross-examination techniques, Chief Justice Burger asserts that the adversary artist is "engaged in the destruction of adverse witnesses or undermining damaging evidence" without concern for whether the adverse witnesses are truthful. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 236 (1973).

^{4,1} Professors Boyer and Cramton recommend the use of three criteria against which to measure the effectiveness of administrative procedures. First, the procedures should produce accurate decisions and an adequate record on which to base them. Second, the procedures should achieve their truth seeking functions efficiently. This means producing timely decisions at the least possible cost. Third, the mix of accuracy and efficiency should be publicly acceptable. This focuses on whether the procedures are perceived to be fair. In this article, any procedures that satisfy all three of these criteria are characterized as "effective." See Boyer, *supra* note 1, at 111, 137-50; Cramton, *supra* note 1, at 591-93

⁵ See *infra* notes 12-40 and accompanying text.

⁶ See *infra* notes 41-60 and accompanying text.

⁷ See *infra* notes 61-95 and accompanying text.

⁸ During the 1970s, the environment for the regulation of utilities underwent a dramatic and substantial transformation. The placid and problem-free era of the fifties and sixties was abruptly disrupted by a series of rate increases, service failures, and legislative investigations followed by the oil embargo, continued increases in inflation, and intense interest in environmental preservation. D. ANDERSON, *REGULATORY POLITICS AND ELECTRIC UTILITIES* 92-96 (1981).

ters and other matters specifically required by statute.⁹ The Commission also issued policy statements on narrow, and primarily nonfactual, topics such as advertising expenses.¹⁰ In addition, rate cases were used as a vehicle for announcing new policies.¹¹ Finally, the PSC examined its most complicated policy questions in what became known as the generic cases.

A. *Three Generic Cases*

A generic case is functionally equivalent to a rulemaking proceeding and is conducted through the use of full trial procedures.¹² Any party with an interest in the proceeding can participate. Parties have the opportunity to file direct and rebuttal testimony, to cross-examine witnesses, and to file briefs and petitions.¹³ The PSC also compiles a record on which its decision is based.

This discussion focuses on three generic cases in which the PSC examined broad and complex areas of policy.¹⁴ They involved the determinations of fuel costs,¹⁵ the financing of utility construction programs,¹⁶ and utility rate design¹⁷. These issues, which affect utilities throughout New York State, comprise a major part of the policy framework through which utilities are regulated.

⁹ See 16 N.Y.C.R.R. 1.1-689.3 (1983).

¹⁰ See, e.g., Statement of Policy on Advertising and Promotional Practices of Public Utilities, 17 N.Y. PUB. SERV. COMM'N 1-R (Feb. 25, 1977).

¹¹ See, e.g., Orange and Rockland Utilities Inc., N.Y. Pub. Serv. Comm'n Case 26238, Op. No. 73-5 (Feb. 12, 1973).

¹² While a generic case serves the same function as a rulemaking proceeding, the decision in a generic case is not technically a rule. The generic decision does not meet the legal requirements of a rulemaking proceeding. See N.Y. A.P.A. §§ 202-03 (McKinney Pamphlet 1982); N.Y. EXEC. LAW §§ 101-a, 102 (McKinney 1982); N.Y. CONST. art. 4, § 8. Additionally, policy determinations are not set forth in a self-continued rule; instead, they must be culled from the decision.

¹³ See 16 N.Y.C.R.R. 2.1-8 (1983).

¹⁴ The observations regarding these generic cases are based on an examination of the decisions issued by the PSC and the recommended decisions issued by the administrative law judges.

¹⁵ Proceeding on Motion of the Comm'n to Investigate Fuel Adjustment Clauses of Elec. Utils., Opinion and Order Concerning Elec. Fuel Adjustment Clauses, N.Y. Pub. Serv. Comm'n Case 27137, Op. No. 80-24 (June 18, 1980).

¹⁶ Proceeding on Motion of the Comm'n to Investigate the Fin. Plans for Major New York Gas and Elec. Cos., Opinion and Order Concerning Fin. Policies N.Y. Pub. Serv. Comm'n Case 27679, Op. No. 82-22 (Oct. 18, 1982).

¹⁷ Proceeding on Motion of the Comm'n as to Rate Design for Elec. Corps., Opinion and Order Determining Relevance of Marginal Costs to Elec. Rate Structures, N.Y. Pub. Serv. Comm'n Case 26806, Op. No. 76-15 (Aug. 10, 1976).

1. Investigation of the Fuel Adjustment Clause

In 1977, the PSC initiated a generic proceeding to investigate the fuel adjustment clauses (FAC) of electric utilities.¹⁸ Through the use of these clauses, electric utilities automatically recover from consumers any increases in the cost of fuel used to generate electricity. The FAC also provides for the prompt pass-through to consumers of any savings if fuel prices decline.¹⁹ The use of the fuel adjustment clause has generated substantial controversy. By permitting fuel cost to be recovered automatically, it had become apparent that the clause "may have diminished the incentive utilities previously had to minimize fuel costs both from the standpoint of not bargaining hard enough in the procurement of fuel and of being indifferent to the need for optimization of their generation mix."²⁰ As a result, the PSC initiated the generic proceeding to determine whether the fuel adjustment clause should be modified.

Three years after the initiation of the proceeding, the PSC issued its decision on the thirteen issues and proposals presented in the generic case. The decision followed an extensive trial during which the parties filed testimony, cross-examined expert witnesses, and submitted two sets of briefs. After the trial, hearing officers issued a recommended decision and the PSC reviewed and deliberated over the entire record. Despite this effort by both the Commission and the participants, three issues were resolved on the basis of an inadequate record.²¹ Moreover, it appears that four other issues could have been

¹⁸ Proceeding on Motion of the Comm'n to Investigate Fuel Adjustment Clauses of Elec. Utils., Order Establishing Generic Proceeding to Investigate Fuel Adjustment Clauses of Elec. Utils., N.Y. Pub. Serv. Comm'n Case 27137 (Feb. 23, 1977).

¹⁹ Proceeding on Motion of the Comm'n to Investigate Fuel Adjustment Clauses of Elec. Utils., Recommended Decision by Comm'r H. Jerry, Jr. & Admin. Law Judge D. Schechter, N.Y. Pub. Serv. Comm'n Case 27137, at 2 (Aug. 30, 1982).

²⁰ Proceeding on Motion of the Comm'n to Investigate Fuel Adjustment Clauses of Elec. Utils., Order Establishing Generic Proceeding to Investigate Fuel Adjustment Clauses of Elec. Utils., N.Y. Pub. Serv. Comm'n Case 27137, at 3 (Feb. 23, 1977).

²¹ The PSC disposed of three issues or proposals in part by deciding to wait for more information to be developed in a subsequent proceeding or by relying on information that was not developed in the record in the generic proceeding.

The PSC deferred a final decision on a part of the hearing officers' recommendations "'to enhance regulatory and consumer surveillance of utility fuel costs.'" Proceeding on Motion of the Comm'n to Investigate Fuel Adjustment Clauses of Elec. Utils., Opinion and Order Concerning Elec. Fuel Adjustment Clauses, N.Y. Pub. Serv. Comm'n Case 27137, Op. No. 80-24, at 36 (June 18, 1980). The hearing officers had recommended that additional reporting requirements be adopted. Even though the PSC found adequate the current procedures for providing an opportunity for public participation and scrutiny of fuel costs, the PSC did not reject the hearing officers' recommendations. Instead the PSC decided to wait until after its investigation of the FAC in individual proceedings before deciding whether the reporting requirements

resolved more efficiently in a non-trial proceeding.²²

2. Investigation of Financing Policies

Three years after the fuel adjustment case was commenced, the PSC began a generic proceeding to determine "whether changes in our ratemaking policies or in the financing policies of the [utility]

should be modified. *Id.* at 36-37.

Based on a problem never examined in the case, the PSC revised its policy to allow utilities to retain a portion of profits from their sales of electricity to other utilities as an incentive to make the sales. The PSC decided to require all the profits from these sales to be flowed through to consumers. The PSC revised the policy because it concluded that utilities had the potential to abuse the old policy of sharing the profits between ratepayers and shareholders. The PSC emphasized, however, that it did not mean to imply any wrongdoing. In fact, the PSC noted the issue was not even examined in the case. The PSC indicated that any utility is free to make a case for returning to the old policy by persuading the PSC that the proposal contains some procedural assurances that sales to other utilities will not be abused. *Id.* at 27-28.

Based mostly on information from outside the record, the PSC resolved the question "whether the existing fuel adjustment clause should be modified in view of the emergence of rates based on marginal running costs." *Id.* at 3. Because marginal costs based-rates were in their early stages of development when this case was initiated, the PSC indicated that information about how the rates operated was unavailable to the parties in this case. *Id.* at 6-7. Therefore, based on the record developed in recent electric rate design cases, the PSC was persuaded that its policy to move toward marginal cost pricing is "not distorted in any substantial way by the use of an FAC." *Id.* at 39. But, "for reasons that were not fully developed in this case," *id.*, the PSC believed that the use of an FAC may reduce the incentive of utilities to price electricity efficiently — at its marginal cost. Nevertheless, because the record was inadequate, the PSC did not modify the FAC. *Id.* at 41. The PSC was "disappointed by the specific proposals offered in this case." *Id.* at 40. Instead of modifying the FAC, the PSC encouraged the parties "to continue to examine alternatives that may eliminate or minimize the temptation for unfair pricing that now appears inherent in the use of an FAC." *Id.* at 41.

²² In view of the nature of the evidentiary conflict, four proposals appear that could have been more efficiently resolved through the use of non-trial procedures. Two proposals that the PSC asked to be examined in the generic proceeding were examined through the use of trial procedures even though none of the parties supported either of the proposals. The PSC deferred a decision on a proposal to set efficiency targets (heat rates) for each plant or the entire generating system. The hearing officers had concluded that "under the present state of the art," the proposal could not be implemented; no party disputed this. *Id.* at 30-31. The PSC also rejected a proposal for partial recovery of fuel costs under the FAC. After exploring this alternative, the parties "unanimously agreed that it should not be implemented at least on a generic basis." *Id.* at 34.

Based on simple factual determinations, the PSC rejected two other proposals. The PSC rejected the hearing officers' recommendation that utilities be permitted to credit or charge customers for the over or undercollection of revenues through the FAC. The hearings officers thought the annual reconciliation is "necessary to maintain the clause's integrity." *Id.* at 28. The PSC saw little reason to require annual reconciliation since only small amounts of fuel costs were involved. *Id.* at 24. The PSC also rejected a proposed alternative to the fuel adjustment clause because the time constraints within which fuels cost would be examined in public hearings were unrealistic and the PSC staff resources were inadequate to implement the proposal. *Id.* at 15-17.

companies should be made to facilitate the financing of needed capital investment projects or reduce financing costs.”²³ Two and a half years later, after the parties had undergone an extensive trial, and after the administrative law judge issued a 254 page Recommended Decision,²⁴ the Commission issued a decision that basically affirmed its existing financial policies.

The most significant accomplishment in this generic proceeding is that it established “financial-standards that the utilities — and our [PSC] policies — should strive for as a means of minimizing long-run financial costs.”²⁵ Nevertheless, of the six policy options examined in the proceeding,²⁶ four were resolved on the basis of an inadequate record,²⁷ and it is likely that the other two could have been dealt with

²³ Proceeding on Motion of the Comm’n to Investigate the Fin. Plans for Major N.Y. Combination Elec. and Gas Cos., Order Instituting Proceeding, N.Y. Pub. Serv. Comm’n Case 27679, at 2 (Dec. 31, 1979). The proceeding was commenced “to determine the optimal set of policies that minimizes the financial costs, or rate of return, that consumers must bear.” Proceeding on Motion of the Comm’n to Investigate the Fin. Plans for Major N.Y. Gas and Elec. Cos., Opinion and Order Concerning Fin. Policies, N.Y. Pub. Serv. Comm’n Case 27679, Op. No. 82-22, at 5 (Oct. 18, 1982). This was obviously a very ambitious and broad agenda for the generic proceeding.

²⁴ Proceeding on Motion of the Comm’n to Investigate the Fin. Plans for Major N.Y. Combination Elec. and Gas Cos., Recommended Decision by Admin. Law Judge J. Harrison, N.Y. Pub. Serv. Comm’n Case 27679 (Feb. 1, 1982).

²⁵ Proceeding on Motion of the Comm’n to Investigate the Fin. Plans for Major N.Y. Gas and Elec. Cos., Opinion and Order Concerning Fin. Policies, N.Y. Pub. Serv. Comm’n Case 27679, at 5 (Oct. 18, 1982).

²⁶ A proposal to change the PSC policy concerning the normalization of taxes was substantially narrowed in scope as a result of the enactment of the Economic Recovery Tax Act during the proceeding. As a result, it is difficult to assess the utility of the procedures used in considering the policy.

²⁷ The PSC either deferred a decision on or rejected each of the four policy options that were inadequately developed in the record of the generic proceeding. The PSC rejected the recommendation of the administrative law judge to include all construction work in rate base. The PSC concluded that the economic justification for the change was based on a low discount rate that had no support in the record. Even though a lengthy record had been developed on this policy question, the PSC emphasized that “the record includes no evidence on the issue of consumer discount rates, an essential ingredient for any definitive present value analysis.” Proceeding on Motion of the Comm’n to Investigate the Fin. Plans for Major N.Y. Gas and Elec. Cos., Opinion and Order Concerning Fin. Policies, N.Y. Pub. Serv. Comm’n Case 27679, Op. No. 82-22, at 40 (Oct. 18, 1982).

The PSC rejected a proposal to adopt a revenue adjustment clause because the agency was not satisfied that the implications of the proposal were adequately analyzed in the record. Neither the testimony nor comments responded to the three shortcomings in the proposal that were identified by the administrative law judge. *Id.* at 21-24. The PSC deferred a decision on a proposal to replace current methods of depreciation with the use of economic depreciation. Problems with the proposal were inadequately examined in the proceeding. *Id.* at 49-50.

The PSC deferred a generic decision on a proposal for third-stage filings which would permit the recovery of cost increases that might occur beyond the rate year when the cost increases are known and quantifiable by the end of the rate year. *Id.* at 17-18. Instead, the PSC invited

in a non-trial setting.²⁸

3. Investigation of Relevancy of Marginal Costs

Although the financing policies and fuel adjustment cases rely on the use of conventional trial procedures by the PSC, the Commission has had experience with innovative trial methods.²⁹ In 1975, the PSC started a generic proceeding "to inquire into the merits of, and to develop principles and methodology for, the revision of electric rate schedules."³⁰ Traditionally, the Commission had designed electric rates on the basis of historical or embedded costs. Recent developments, however, had "made it increasingly apparent that traditional rate designs [did] not sufficiently serve the interrelated purposes of economic efficiency, environmental preservation, conservation, and protection of the consumers in the aggregate."³¹ The PSC thus initiated the generic case to explore alternative approaches that were designed to achieve greater economic efficiency.

In the first phase of the case, the Commission isolated and examined the threshold issue of "whether marginal cost provided a rea-

utilities to prepare specific proposals for consideration in individual rate proceedings. *Id.* at 17-19.

²⁸ In view of the nature of the evidentiary conflict, it also appears that two of the policy options could have been more efficiently examined through the use of less formal procedures than full trial procedures. Based on the record in the proceeding, the PSC held that "exotic financings are generally more costly and should be employed only where they are shown to be cost-effective or conventional financing is unavailable." *Id.* at 27. Even though the PSC staff and the utilities might have had different positions at the beginning of the case, it seems that both parties were close to an agreement by the end of the case. *Id.* at 24-27. See D. ANDERSON, *supra* note 8, at 123-33.

The PSC rejected proposals to make it easier for utilities to obtain temporary rate increases. Proceeding on Motion of the Comm'n to Investigate the Fin. Plans for Major N.Y. Gas and Elec. Cos., N.Y. Pub. Serv. Comm'n Case 27679, Op. No. 82-22, at 19-21 (Oct. 18, 1982). The decision does not even appear to be based on facts developed in the record; instead, the decision appears to be based on a policy determination that could have been resolved in a less formal proceeding.

²⁹ Even though the more recent financing policies and fuel adjustment cases relied on the use of conventional trial procedures, it should be noted that the PSC is starting to experiment with innovative procedures on a systematic basis. See Remarks of William J. Cowan, Chief Administrative Law Judge, New York Public Service Commission and Remarks of J. Michael Harrison, Administrative Law Judge, New York State Public Service Commission Before the New York State Bar Association (Apr. 29, 1982).

³⁰ Proceeding on Motion of the Comm'n as to Rate Design for Elec. Corp., Order Instituting Proceeding, N.Y. Pub. Serv. Comm'n Case 26806, at 7 (Jan. 29, 1975).

³¹ Proceeding on Motion of the Comm'n as to Rate Design for Elec. Corps., Opinion and Order Determining Relevance of Marginal Costs to Elec. Rate Structures, N.Y. Pub. Serv. Comm'n Case 26806, Op. No. 76-15, at 16 (Aug. 10, 1976).

sonable basis upon which to design rates.”³² In dealing with this issue, the scope of the proceeding was narrowly defined and the PSC used innovative procedures that effectively focused the development of the record. For example, the Commission’s chairman

organized witnesses in panels, with each panel composed of individuals with divergent views. All of the attorneys sat facing the panel and took turns asking questions seriatim, after the witnesses had offered their testimony. Persons were encouraged to break in and ask clarifying questions whenever they wished to do so.³³

Furthermore, the PSC expedited the proceeding by ordering the examiners to certify the record directly to the commission.³⁴ This was designed to save the time usually spent by hearing examiners to prepare a recommended decision and used by the parties to prepare briefs on exceptions to that decision. Here, the parties were ordered to file their initial briefs directly with the PSC.

Just over a year and a half after initiating the generic case, in contrast to the two and one-half and three year periods in the two previous cases, the PSC ruled decisively on the threshold question. At the outset of its analysis, the PSC rejected any contention that the record was inadequate to permit a determination of the threshold issue.

³² See D. Anderson, *supra* note 8, at 114.

³³ *Id.* at 98. In response to a motion to recuse, PSC Chairman Kahn explained the purpose of this departure from the traditional format:

I have adjured all parties to look upon at least the theoretical phase of the proceedings as an intellectual exercise, to treat it in the nature of a running seminar, in which our purpose was essentially to explore certain academic ideas. That is the spirit in which I have behaved whenever I have presided. I have never pretended to play the role of a passive receiver of evidence. I made clear from the beginning my intention to participate actively in the process of exploration. It was for this reason that I joined in ruling that witnesses be grouped in panels . . . so that they might evaluate one another’s ideas, respond to one another and to me, to provide us with different opinions and ways of looking at questions as they arose. I intervened freely — attempting, however, not to interrupt the train of a lawyer’s cross-examination — to make certain that I understood what a witness was saying and what he was not saying, to test his ideas, to offer hypotheses of my own in order to get his reaction. In all cases, I invited all members of the panels to partake freely, to comment on my comments and on each others’. I urged them to volunteer reactions, promising to recognize them at any point, consistent merely with orderly progress. I propounded problems — questions of whose answers I was myself uncertain; and when the witness was uncertain about the answer I asked him, and all the others, to think about it. No witness, of whatever point of view, was ever denied an opportunity to express his opinion, as fully as he wished.

Id. at 99 (quoting Decision of Chairman Kahn on Motion to Recuse, N.Y. Pub. Serv. Comm’n Case 26806).

³⁴ Proceeding on Motion of the Comm’n as to Rate Design for Elec. Corps., Order Certifying Record and Establishing Briefing Schedule, N.Y. Pub. Serv. Comm’n Case 26806, at 5-6 (Jan. 27, 1976).

In contrast to the previous two cases, the PSC concluded that "[t]he extensive testimony and cross-examination of numerous expert witnesses reflecting differing viewpoints has clearly established a record fully sufficient to provide the basis for a reasoned conclusion on this issue."³⁵

B. Differences Among the Three Cases

Two distinguishing features help to explain the differences in result between the marginal pricing case and the other generic cases. First, the PSC formulated a narrow and specific issue for resolution in the initial phase of the marginal cost case. The PSC limited itself to deciding whether the use of marginal costs should be considered in individual rate cases. The problems of implementing marginal cost pricing were deferred for examination in later rate cases.³⁶ In contrast, the PSC formulated much broader and complex issues for resolution in the financing and fuel adjustment cases. In the financing case, the PSC wanted to determine the "optimal set of policies that minimize financial costs."³⁷ In the fuel adjustment case, the PSC wanted to determine whether the fuel adjustment clause procedures provided an adequate opportunity for public participation, whether the procedures provided an adequate incentive for utilities to minimize fuel costs, whether there was a need to provide incentives for utilities to efficiently operate production facilities, and whether the fuel adjustment clause should have been modified in view of the use of marginal cost pricing.³⁸

The second distinguishing characteristic was the use of innovative administrative procedures in the first phase of the marginal cost case. The hearing officers organized witness panels and conducted the proceeding like a "running seminar." The officers also certified the record directly to the PSC.³⁹ In contrast, conventional trial procedures were used in the other generic cases. Thus, it appears that the marginal pricing case was more efficiently managed, and produced more

³⁵ *Id.* at 19. See Anderson, *supra* note 8, at 89-91.

³⁶ Proceeding on Motion of the Comm'n as to Rate Design for Elec. Corps., Opinion and Order Determining Relevance of Marginal Costs to Elec. Rate Structures, N.Y. Pub. Serv. Comm'n Case 26806, Op. No. 76-15, at 19 (Aug. 10, 1976).

³⁷ Proceeding on Motion of the Comm'n to Investigate the Fin. Plans for Major N.Y. Gas and Elec. Cos., N.Y. Pub. Serv. Comm'n Case 27679, Op. No. 82-22, at 5 (Oct. 18, 1982).

³⁸ Proceeding on Motion of the Comm'n to Investigate Fuel Adjustment Clauses of Elec. Utils., Order Establishing Generic Proceeding to Investigate Fuel Adjustment Clauses of Elec. Utils., N.Y. Pub. Serv. Comm'n Case 27137, at 3 (Feb. 23, 1977).

³⁹ See *supra* notes 33-34 and accompanying text.

accurate results, due in part to its use of creative procedures.⁴⁰

II. VARIOUS PROPOSALS FOR RESOLVING COMPLEX POLICY QUESTIONS

The study of decisions by the PSC underscores the importance of effective methods for eliciting and evaluating facts.⁴¹ It is therefore necessary to determine what procedures will produce effective results. Commentators have recommended various proposals that are implicitly designed to produce accurate results in a fair and efficient manner. The following recommendations are grouped into two categories: proposals to improve the use of trial procedures and proposals to adopt alternatives to those procedures.

A. *Proposals to Improve Trial Procedures*

Despite the continuing controversy over the value of trial procedures, "[t]o say categorically that general policy questions or 'legislative facts' cannot fruitfully be explored by testimonial procedures and cross-examination is to generalize to an extent which can only obscure analysis."⁴² For instance, the centerpiece of conventional trial procedures, the opportunity to cross-examine witnesses, can be a very effective tool when used properly.⁴³ Judge Leventhal pointed out that the "right of cross-examination . . . might well extend to particular cases of need, on *critical points* where the general procedure

⁴⁰ It is plausible that factors other than the method of issue formulation and the type of procedures used affected the efficiency of the proceedings and the quality of the records produced in each. For example, the proposal for economic depreciation might have been too experimental to have been fully developed in a regulatory proceeding. The proposal to revise the policy on the use of construction work in progress might have been politically too controversial. Finding a deficient record might have been a convenient excuse for rejecting the proposal. In contrast, the marginal pricing proposal might have been effectively managed because it was the PSC chairman's highest personal priority. See D. ANDERSON, *supra* note 8, at 89-134. But even though other factors might have affected the results in each of the cases, improved procedures to refine the issues and to evaluate the evidence would have produced improved results in the financing and fuel adjustment cases.

⁴¹ For example, even though the use of extensive trial procedures in the financing case may have produced an inadequate record to resolve four of the policy options, the use of more refined procedures might have generated the necessary information.

⁴² Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 521 (1970).

⁴³ See Kestenbaum, *Rulemaking Beyond APA: Criteria For Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679, 691-93 (1976); Robinson, *supra* note 42, at 519-22; Verkeil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 306-09 (1978); Williams, *supra* note 3, at 407-08.

proved inadequate to probe 'soft' and sensitive subjects and witnesses."⁴⁴ A problem remains, however, in identifying the "critical points." To solve this problem, several solutions have been advanced.

1. The Davis Solution

An understanding of the nature of facts is essential to the design of administrative procedures. To accomplish this end, Professor Davis, in a series of recommendations, sets forth a method for dissecting factual evidence. In 1942, Professor Davis formulated his well known distinction between legislative facts and adjudicative facts. According to Davis:

Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.⁴⁵

The final step in Davis' initial proposal was to apply non-trial procedures to the legislative fact-finding process, while retaining conventional trial methods for determining adjudicative facts.

In conjunction with this categorization, Professor Davis faced the practical problem of applying the distinction between adjudicative and legislative facts, acknowledging that the line separating the two types of facts "is sometimes difficult or impossible to draw, and . . . in the borderland the distinction often has little or no utility."⁴⁶ Nevertheless, he emphasized that this is a problem with most legal classi-

⁴⁴ *United States v. Marr*, 428 F.2d 61, 63 (D.C. Cir. 1973).

⁴⁵ 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.02, at 413 (1st ed. 1958). Davis suggested: Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Yet people who are not necessarily parties, frequently the agencies and their staff, may often be the masters of legislative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative facts.

Id.

⁴⁶ *Id.* at 414.

fications and that his distinction "is a useful one and often even seems to be an essential one."⁴⁷ Professor Davis' defense of his categorization, however, was not accepted by all commentators. Soon after Davis' 1958 treatise was published, Professor Nathanson remarked: "Apart from the rather circular nature of this distinction . . . in actual application it is as elusive as all the other magic keys which have been offered for the solution of the right to hearing problems."⁴⁸

In more recent publications, Professor Davis has responded to these criticisms by refining his recommendations for designing procedures based on the distinction between adjudicative and legislative facts. As a first step, Davis subdivides legislative facts into general and specific legislative facts. He then recommends against the use of full trial procedures where agencies are faced with general legislative facts. One weakness in this categorization scheme is that it remains unclear which procedures should be used when examining specific legislative facts. Instead of making a recommendation, Professor Davis suggests that more experimentation is needed.⁴⁹

Several commentators have analyzed Davis' approach and discussed problems inherent in its use. In his extensive study of rulemaking by the Federal Trade Commission (FTC), Professor Boyer highlighted some of the difficulties in applying the distinction between general and specific facts. He pointed out that much of the testimony in the rulemaking proceedings concerned matters of general fact, "but it can be (and often is) challenged on a variety of specific grounds relating to the process by which the proponent derived these general facts or conclusions."⁵⁰ Professor Hamilton's highly

⁴⁷ *Id.* See also Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 200 (1956).

⁴⁸ Nathanson, Book Review, 70 YALE L.J. 1210, 1211 (1961) (reviewing K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1st ed. 1958)). Professor Robinson also challenged Professor Davis' factual characterization, concluding:

Challenges to the suitability of adjudicative methods (particularly the reliance on testimonial evidence and cross-examination) where the issues involve policy planning, appear to rest in large part on the notion that "policy," or, to use Professor Davis' phrase, "legislative fact," is something pure, uncontaminated by particular data and questions, assumptions, opinions and biases which have been regarded as properly the subject of such methods in other contexts. But a judgment on policy or "legislative fact" invariably involves an admixture of particular facts, opinions, and biases, some of which may and some of which may not be appropriate for exploration by testimony and cross-examination.

Robinson, *supra* note 42, at 521. See also Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1978); Kestenbaum, *supra* note 43, at 691-93.

⁴⁹ See 3 K. DAVIS, *supra* note 1, § 14:3, at 10-18.

⁵⁰ B. BOYER, *TRADE REGULATION RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMIS-*

critical study of Federal Drug Administration rulemaking revealed that it is the type of cross-examination which Davis wants to discourage that is the most useful.⁵¹ From these studies it appears that Davis' refined dissection of fact models does not provide clear guidance on how to select the most efficient procedures for evaluating facts. Nonetheless, in his recent comments on the FTC study, Davis recommended an expanded definition of the types of facts appropriate for cross-examination. He opined that cross-examination should only be permitted on

disputed issues of specific facts it is necessary to resolve, defining "disputed issues" as those on which procedures short of trial-type procedures have been sufficiently used without resolving the issues, defining "specific fact" so narrowly that cross-examination by private parties when an agency is making rules of general applicability will be very rare and will not be allowed at all in most proceedings, and defining "issues . . . it is necessary to resolve" as issues susceptible of proof with evidence and whose resolution is essential to the formulation of the rule.⁵²

2. Other Proposals Retaining the Use of Trial Procedures

Other proposals have sought to narrow factual issues to the point where cross-examination would be used only as a last resort; that is, in cases where it is most helpful. Although these proposals would promote the use of cross-examination in circumstances analogous to Davis' specific legislative facts category, they do not retain the distinction between general and specific facts.

Professor Hamilton has suggested the following procedures. In its notice of hearing, an agency should delineate in detail the issues to be examined in the proceeding. In addition, hearing officers should more effectively use prehearing conferences to delineate issues. They

SION, ch. IV, at 15 (1979) (report prepared for consideration by the Committee on Rulemaking and Public Information of the Administrative Conference of the United States).

⁵¹ See Hamilton, *supra* note 1, at 1168. In the study, Hamilton found cross-examination of a consumer attitude study to be helpful. He commented: "the way the sample was obtained, the types of questions asked, and the tabulation of responses—helped place the survey in its proper perspective as evidence." *Id.* In contrast, Davis has found survey cross-examination ineffective. For example, he concluded that "statistics on the portion of the population who are deficient in vitamin A are general facts, and so are answers to specific questions about qualifications of collectors of the statistics and the particular methods they used in gathering facts." 2 K. DAVIS, *supra* note 1, § 12:8, at 442.

⁵² REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 80-1 (1980) (separate statement of K. Davis, at 2).

should require participants to disclose both the positions they will take in the proceeding and the subject matter of the testimony of each of their witnesses. Based on this information, the hearing officers should prepare a statement setting forth the areas of disagreement, and should allow each of the participants to comment. Cross-examination should then be limited to those areas where the parties fail to agree. Hearing officers could further restrict cross-examination by imposing time limitations, by grouping participants with similar interest, and by eliminating repetitious, irrelevant, immaterial, and cumulative testimony and cross-examination.⁵³

Where regression models must be used in a proceeding, specialized procedures have been recommended to narrow and focus the parties' dispute over the use of the models. Michael Finkelstein has proposed the use of four "protocols" in administrative proceedings, three of which are described here:

- (1) A decisionmaker should specify the data that he finds relevant and important, and which he decides merits representation in the mode. Parties should begin their analysis with this data and then incorporate other data on a separate basis only where such incorporation would increase accuracy.
- (2) A party objecting to an econometric model introduced by another party should, whenever possible, demonstrate the significance of his objection through the use of numerical evidence. A party disputing the validity of a model introduced by a decisionmaker should produce a superior model for use in the proceeding.
- (3) In cases where the decisionmaker resorts to econometric findings to reach a resolution, he should select the model that most usefully describes the data. Findings should be based on that model and not on a compromise of competing models.⁵⁴

Finally, Professor Gellhorn has recommended a combination of cooperative and adversary procedures for the development and evaluation of surveys in false advertising cases initiated by the Federal Trade Commission. He recommends that the hearing examiner be given the discretion to "order that a survey be taken by an independent expert, with the costs being assessed against the losing party or

⁵³ See Hamilton, *supra* note 1, at 1163-70. See also Kestenbaum, *supra* note 43, at 702-05; Verkeil, *supra* note 43, at 322-27; Williams, *supra* note 2, at 445.

⁵⁴ M. FINKELSTEIN, *QUANTITATIVE METHODS IN LAW* 211-48 (1978). The fourth protocol is excluded because it requires a highly technical explanation and is not crucial for the purposes of this article.

shared by the FTC and respondent."⁵⁵ The examiner would oversee the development of the survey questionnaire and the sample selection. To protect individual interests, the parties would be extensively consulted throughout the design of the survey, and their objections would be ruled on before the survey was conducted. After the survey was completed, if the parties were unable to agree that it be admitted into the record, the surveyor would be made available for cross-examination in an adversary proceeding.⁵⁶

B. Alternatives to Trial Procedures

In contrast to proposals that attempt to promote the efficient use of cross-examination, other proposals have been developed which offer alternatives to the cross-examination of witnesses. For example, the Environmental Protection Agency (EPA) has instituted procedures that are less onerous than cross-examination. Under these procedures, the agency furnished the parties with written statements of its methodologies, and uses off-the-record conferences to examine them.⁵⁷ Instead of permitting participants to conduct cross-examination, the members of an EPA panel administer the questioning. Termed an "inquiry conference," speakers deliver statements after which anyone present can submit written questions to the agency. The agency panel screens the questions, prepares inquiries of its own, and then questions the speakers.⁵⁸

Two other proposals refine the use of the basic notice and comment procedure. According to one proposal, interested parties would be provided the opportunity to negotiate a proposed rule which would then be issued for comment.⁵⁹ In another proposal, instead of holding hearings where participants appear together, the agency would hold a "paper hearing." Two notice and comment periods would be used under this approach: first, in response to the proposed rule and supporting documentation and second, in response to the comments of other participants and any new information developed by the agency.⁶⁰

⁵⁵ Gellhorn, *Proof of Consumer Deception before the Federal Trade Commission*, 17 KAN. L. REV. 559, 568 (1968).

⁵⁶ *Id.* at 568-70.

⁵⁷ See Williams, *supra* note 3, at 448-51.

⁵⁸ *Id.* at 451-54.

⁵⁹ Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871 (1981).

⁶⁰ Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L.

III. A PROPOSAL FOR PROOF DISSECTION

A. *Proof Dissection Stages*

Based on these various proposals and the lessons learned from the different studies, a composite proposal for effectively resolving complex policy questions can be developed. This proposal has three stages. In the first two stages, the procedures concentrate on identifying and narrowing the issues-in-dispute. In the third stage, the proof is dissected, categorized, and matched with procedures that promote the effective evaluation of different components of proof.

1. Matching Proof with Issues-in-Dispute

In the first stage, the issues in the case are identified and then the proposed proof offered by each of the parties is matched with the issues to determine which issues are in dispute. There are different ways to accomplish this depending on how the rulemaking proceeding is structured. For example, when initiating the three generic cases, the PSC identified the general issues it wanted examined. Under these circumstances, the following approach might have proven effective. Each party could have indicated the specific issues it thought should be examined in the proceeding and could have disclosed its position and proof on each issue.⁶¹ Then, through the use of prehearing conferences, exchanges of position papers, and the other related proposals,⁶² the administrative law judge could have identified and narrowed the issues-in-dispute.

Through the use of this procedure, it is possible that, in the generic financing case, the administrative law judge would have identified the evidence the PSC needed to rule on the four proposals that were ultimately disposed of based on an inadequate record. By matching proof with issues, it might have become obvious that to evaluate the PSC's policy on construction work in the rate base, testimony was needed on the discount rate.⁶³ Also, the shortcomings in the proposal for a revenue adjustment clause might have timely emerged.⁶⁴ Simi-

REV. 1805, 1813-14 (1978).

⁶¹ See Hamilton, *supra* note 1, at 1163-70; Kestenbaum, *supra* note 43, at 701; Verkeil, *supra* note 43, at 322-27; Williams, *supra* note 3, at 445.

⁶² For examples of several such proposals, see Hamilton, *supra* note 1, at 1163-70; Williams, *supra* note 3, at 448-51; Note, *supra* note 59, at 1876-80.

⁶³ See *supra* note 27 and accompanying text.

⁶⁴ See *supra* note 27 and accompanying text.

larly, in the fuel adjustment case, the matching of proof with issues might have revealed to all the parties that they were in agreement on how the PSC should rule on the proposals to set efficiency targets and on the proposal for partial recovery of fuel costs under the FAC.⁶⁶ This might have eliminated the need for expert testimony on the subjects.

This process of matching proof with issues would promote the development of an accurate and efficient record on which to base a decision. Discussions during the pretrial conference would help determine what proof is needed to settle specific issues, and thus would improve the efficiency of a proceeding by narrowing and clarifying the issues-in-dispute. Such discussion would also highlight any missing evidence that needs to be developed in the record. Finally, this process should improve an administrative law judge's understanding of a case, thereby improving his control over the relevancy of direct testimony and cross-examination.⁶⁶

2. Separating Policy Questions and Questions of Law from Questions of Fact

Once the first stage of matching proof with issues is complete, policy issues and questions of law will emerge. Due to the fact that these controversies are inherently incapable of being settled in a trial, they should be set aside and resolved through the use of non-trial procedures. This would simplify the trial by allowing it to focus solely on issues whose resolution depends on factual determinations.⁶⁷

Unlike issues of law, policy questions may be framed through the use of proof at trial. Judge Bazelon has provided a pointed example of the critical distinction between a policy question and factual issues. In deciding whether to ban fluorocarbon propellants from aerosol cans, Judge Bazelon identified the policy question as a choice "between present, well-documented economic dislocation [from closing fluorocarbon plants] on the one hand, and future, probabilistic harm to human health [from the fluorocarbons] on the other."⁶⁸ To frame this policy question, he suggested that two factual issues needed to

⁶⁶ See *supra* note 22 and accompanying text.

⁶⁶ See B. BOYER, *supra* note 50, ch. IV, at 42.

⁶⁷ See 3 K. DAVIS, *supra* note 1, § 14:2 at 5-10; Hamilton, *supra* note 1, at 1157-70.

⁶⁸ Bazelon, *Coping With Technology Through The Legal Process*, 62 CORNELL L. REV. 817, 821-22 (1977).

be resolved: (1) the level of economic dislocation, and (2) the potential danger to humans.⁶⁹

Answers to these two factual questions do not provide the answer to the policy question. Nevertheless, the resolution of these factual issues inform the decisionmaker of the alternative consequences of his decision. The agency can then ask the parties to direct their arguments to the policy question itself. In this manner, the agency can shape its procedures to produce the most effective presentation of these arguments. With the benefit of focused arguments, the agency could make its decision openly. This open decisionmaking may also make the decision more acceptable to the public and produce better decisions.⁷⁰

3. Dissecting and Categorizing Proof and Designing Procedures

By the time an administrative judge reaches the third stage of this proposal, the issues-in-dispute, and the corresponding proofs should be clear to both the judge and the parties. The purpose of this final stage is to design the procedures that most effectively evaluate this proof, and thus resolve the disputed issues.

The procedures should be adapted to the practical needs of the likely "evidentiary content of the issues."⁷¹ The choice of procedure should depend on a "pragmatic determination whether, and to what extent, particular procedures . . . are appropriate to the resolution of the issue in a particular type of case, both in terms of effective resolution of the policy issues and of fairness to parties."⁷² To accomplish this, the analysis of the proof must go beyond Professor Davis' distinction between general and specific legislative facts. The analysis must delve into the different types of evidence that will be introduced.

Facts can be categorized in a variety of ways and from a variety of perspectives.⁷³ Although the categories may differ depending on the

⁶⁹ *Id.* at 822.

⁷⁰ *Id.* at 823-25.

⁷¹ See Kestenbaum, *supra* note 43, at 701.

⁷² See Robinson, *supra* note 42, at 504.

⁷³ Professor Davis divides facts into adjudicative and legislative facts and further subdivides legislative facts into general legislative facts and specific legislative facts. See *supra* notes 45-49 and accompanying text. Professor Boyer characterizes evidence in four ways: anecdotal testimony, testimony based on condensed or general experience, expert or scientific testimony, and survey research. B. BOYER, *supra* note 50, ch. IV, at 67-86. Professor Gellhorn points to seven methods of proving consumer understanding in FTC false advertising cases: intuitive, diction-

subject matter of the rulemaking proceeding, the components of proof can be usefully grouped into three broad categories: empirical evidence, opinion evidence, and theoretical evidence.⁷⁴ The key to this third stage is the evaluation of each component of proof through the use of custom designed procedures. An examination of procedures for the evaluation of two types of empirical evidence will illustrate the operation of this stage. These procedures combine the use of trial procedures with less adversarial methods.

B. A Customized Procedure for the Evaluation of Adopted Methodologies

Adopted methodologies are those types of analyses that an agency has had experience with, has evaluated, and has decided are appropriate for use as a basis for its decisions. Nonetheless, the fact that a methodology has been adopted by an agency does not mean that the agency will automatically rely on the results generated by its use. The details of the particular empirical model may still need to be examined to determine whether the model should form the basis for the agency's decision.

In two recent utility rate cases heard before the New York State Public Service Commission, some evidence can be found of the ineffectiveness of conventional trial procedures for examining an adopted methodology. In both cases, the utility and the PSC staff each presented a short-term sales forecast for natural gas based on a regression model. After the expert witnesses for each party testified and were cross-examined, the record in each case was so confused that the administrative law judges could not use any of the sales forecasts. Instead, each judge recommended a compromise sales figure that averaged the sales forecast of each party.⁷⁵ In one case, even though the judge thought that both models were "reasonable efforts," he still concluded that "it is almost impossible to compare the [two models] because of the differing data bases, variables, and regression

ary definitions, trade understandings, individual consumer complaints, official notice, partisan surveys, and nonpartisan surveys. See Gellhorn, *supra* note 55, at 565-67.

⁷⁴ This characterization was first suggested in *Aqua Slide 'N' Dive Corp. v Consumer Prod. Safety Comm'n*, 569 F.2d 831 (5th Cir. 1978), in both the majority, *see id.* at 838-44, and concurring opinions, *see id.* at 844-45 (Wisdom, J., concurring). See also DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 296-97 (1979).

⁷⁵ Proceeding on Motion of the Comm'n as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corp. for Elec. Serv., Recommended Decision by Admin. Law Judge W. Moynihan, N.Y. Pub. Serv. Comm'n Cases 27984, 27985, 27986, at 31 (Dec. 11, 1981).

analyses.”⁷⁶ In the second case, the record was clear enough for the judge to conclude that “[w]hat we are left with then is a choice between two forecasts, neither one of which appears to represent a very reasonable prediction of rate year sales.”⁷⁷ This confusion, and resulting waste of agency resources, indicates the need for a customized procedure that would produce a clear record while protecting the interests of both parties.

The following recommendations are shaped from the perspective that trial procedures are not the most effective method for evaluating empirical evidence generated by adopted methodologies. Because empirical models are always vulnerable to attack, they can be too easily undermined in a traditional adversary proceeding.⁷⁸ The proposed procedures should protect against such attack by promoting the cooperative development of models.⁷⁹

(1) As a result of the first two stages in the proof dissection, the issues-in-dispute and alternative proofs for resolving them should be clear to both the administrative law judge and the parties. At this point, it should be determined, either by agreement or by order of the judge, whether empirical evidence is needed to resolve any of the issues. If empirical evidence is needed, the parties, or the judge, should set forth both the issue to be resolved and the type of empirical evidence to be developed.

(2) The parties should work together to design the empirical model or to re-evaluate an existing one. Assuming that the use of a regression model is ordered, the parties should discuss in off-the-record conferences what data and explanatory variables should be used and what functional (mathematical) relationships are appropriate. Also, the parties should probe the underlying assumptions of the model such as whether it meets assumptions about independence, homoscedasticity,

⁷⁶ *Id.*

⁷⁷ Proceeding on Motion of the Comm’n as to the Rates, Charges, Rules and Regulations of National Fuel Gas Distribution Corp. for Gas Service, Recommended Decision by Admin. Law Judge P. Downing, N.Y. Pub. Serv. Comm’n Case 28158, at 22 (Sept. 22, 1982).

⁷⁸ See Finkelstein, *supra* note 54, at 213.

⁷⁹ The core of these procedures is similar to the core of Gellhorn’s recommendations concerning the use of consumer surveys in FTC proceedings. The proposals are similar in that they suggest that the parties cooperate in the development of the evidence, with specific disagreements to be settled by the hearing examiner. In addition, they both recommend that the final work product be the potential subject of cross-examination in an adversary proceeding. They differ, however, in at least two respects. First, while Gellhorn recommends that the primary responsibility for developing evidence to be placed with the hearing officer, this proposal suggests that it should be left with the parties themselves. Second, Gellhorn chooses to rely on conventional trial proceedings. In contrast, this proposal opts for the more tailored procedures suggested by Finkelstein. See Gellhorn, *supra* note 55, at 567-70. See also *supra* note 49 and accompanying text (discussing Finkelstein’s protocols).

zero mean throughout the range, and a normal shape of data.⁸⁰ Any agreements on these matters should be reduced to a stipulation for the benefit of the administrative law judge.

(3) Disagreements that cannot be settled in the informal discussions should be taken to the administrative law judge. For example, parties might not be able to agree on the appropriate data base or all the explanatory variables that should be included in an empirical model. If this occurs, the parties should each present their arguments to the administrative law judge. At this point, the proceeding will become more adversarial. Nevertheless, the issues will have been narrowed; that is, they will be limited to the specific differences in approaching the empirical analysis. After argument, the administrative law judge should issue an order that either resolves the narrow dispute or authorizes the use of alternative models.

(4) After the model has been designed, and the results generated, the parties should each analyze the output. If the parties can agree on the significance of the results, the parties should so stipulate. If they cannot agree, then each party can file testimony and resort to trial procedures for the evaluation of the completed model.

(5) Once the empirical analysis is converted into testimony and made available for cross-examination, the differences among the parties should be clear to both the parties and the administrative law judge. As a result, the parties should be able to focus their testimonies and cross-examination on the points in dispute. To facilitate the development of an orderly record, Finkelstein's protocols should be used to insure that the parties directly address the disputed issues.⁸¹ Based on this five-step systematic development of the specific differences among the parties, the judge should be able to rule on the significance and usefulness of the empirical study.

The centerpiece of these procedures is the cooperative development of an empirical model. Clearly, the success of this approach hinges on the ability of the parties to work together in constructing this model. Unfortunately, at least two obstacles hinder cooperation among the parties: the ignorant party problem and the model skeptic problem.

1. The Problem of Ignorant Parties

As a matter of general principle, parties who are ignorant of the

⁸⁰ J. KMENTA, *ECONOMETRICS* (1971).

⁸¹ See Finkelstein, *supra* note 54; *supra* note 54 and accompanying text.

results of a model may be unwilling to cooperate in building a model. Under step two of this proposal, parties are encouraged to stipulate to the accuracy of parts of a model, such as the data base or some of the explanatory variables. An adversary, with his own theory of a case, may not want to cooperate when unsure of whether the study will prove detrimental to his interests.

Although the adversarial system is not conducive to cooperation, several incentives to cooperate exist. Once it is determined under step one that empirical research is needed, the parties may have a mutual interest in conducting the research. This depends on the type of case. For example, if the issue is whether an agency should adopt a new regulatory policy, and it is unclear whether the policy will increase or decrease a company's cost of capital, an empirical study may be desirable to measure the impact of the prospective policy on capital costs. No party will want the agency to adopt a policy that will inadvertently increase the cost of capital. Under these circumstances, the parties will have substantially similar interests and thus should have an incentive to cooperate.

Cooperation among the parties may also be enhanced by the effects of unilateral action. If only one party does the research, the other parties run the risk that an adverse study will be adopted because no alternative evidence is in the record.⁸² In contrast, the party developing the study runs the risk that the evidence will be rejected after being attacked during cross-examination. Therefore, where the parties have a mutual interest in determining the effect of the proposed policy, the parties may have a mutual incentive to cooperate. While this will not always be the case, the process of negotiating and presenting specific disputes to the administrative law judge should still produce a more coherent development and evaluation of the model than that which is accomplished under traditional trial procedures.

Another aspect of the ignorant party problem relates to the limited resources of some parties. A party without sufficient resources to do an in-depth analysis may only be able to acquire enough expertise to understand and participate in discussions about building a model. For example, such parties may be able to discuss what explanatory variables they want tested in the model, but will not be able to read all the literature on the subject or conduct any independent runs of

⁸² As Finklestein suggests, if a party makes an argument without presenting his own model, "it compels him to bear the risk that should the decision maker decide that a description of the past is an appropriate basis for prediction, it is his opponent's description which will be adopted." Finklestein, *supra* note 54, at 239-40.

the model. Moreover, some parties may not even have the resources for this minimal level of cooperation; they may only have sufficient resources to attack the other party's research through cross-examination.⁸³ As a result, parties with limited resources may be reluctant to cooperate in building an empirical model because they may feel they are at a significant disadvantage when negotiating with parties who have the resources to learn in advance the consequences of any agreements.

Although the problem of limited resources may be a major obstacle to cooperation, the result achieved is probably no worse than when conventional trial procedures are being used to evaluate empirical research. In an adversary proceeding, a party with resources will know in advance the implications of using some of the variables or data. The ignorant parties will have to cope with this difficulty whether they are negotiating with an informed party or cross-examining its expert witnesses. Consequently, the procedures for the cooperative construction of an empirical model may not put the ignorant parties in a poorer position than they are under conventional trial procedures. In fact, the cooperative procedures may even assist the ignorant parties. During the building of the model, the ignorant parties may become better educated so that they can contribute to the formation of an improved model while protecting their own interests.

Finally, there are two possible solutions to help the parties without resources. The obvious answer is for the agency to provide funds to needy parties so they can effectively participate in the informal conferences.⁸⁴ An alternative, but less satisfactory answer, would be to structure the cooperative arrangement so that parties with limited resources need only provide an expert in the substantive area who is familiar with the type of analysis being used. These parties would not need to supply a computer programmer, a computer, or data collectors.

2. The Problem of Model Skeptics

The other fundamental obstacle to cooperation is raised by the model skeptics — parties that are reluctant to rely on the use of

⁸³ Professor Boyer asserts that "lack of financial support for full litigation may dictate a strategy of exposing fallacies in another party's position through vigorous cross-examination. B. BOYER, *supra* note 50, ch. IV at 129.

⁸⁴ For an example of an agency expense-reimbursement program, see 15 U.S.C. § 57a(h)(1) (1976).

models for decisionmaking. Such parties question the reliability of the results of any simplified description of the real world. The model skeptic, however, should feel comfortable working cooperately because he still has the opportunity to argue against the use of the results of the model in step five. Despite this safeguard, if a party opposes, in principle, the use of models for decisionmaking, then neither the use of these suggestions nor conventional trial procedures will satisfy the party. Cooperation will, therefore, be difficult to achieve.

In order for these procedures to work, not only is it desirable for the parties to make an effort towards cooperation, but the administrative law judge must have the expertise to understand and resolve disagreements that arise under step two during the cooperative effort to build a model. Under this proposal the judge will be asked to resolve disputes over the selection of explanatory variables, data bases, and so forth. Without a background in statistics, the administrative law judge will have great difficulty sorting out these technical disputes.

If the New York State Public Service Commission, one of the most sophisticated state utility regulatory agencies in the country, is representative of the level of statistical expertise present at regulatory agencies, then a serious problem exists. When each of the administrative law judges at the New York State Public Service Commission was asked to evaluate his/her proficiency in understanding mathematical modeling, only one administrative law judge out of fourteen considered himself as "highly proficient," and only four thought that they had a "good basic working knowledge." Seven of the administrative law judges thought they possessed only "some understanding" of mathematical modeling and two declared that they had "little or no understanding."⁸⁵

The obvious solution to this problem is to upgrade the expertise of administrative law judges. Administrative agencies were created to serve as experts in the subject matter under their jurisdiction.⁸⁶ As such, agency personnel should develop whatever expertise is needed for the agency to function as experts. As a practical matter, however, this may not be a realistic, short-term solution. Some judges may not be inclined to become experts in empirical modeling or may be too busy with pending cases to have the time to become educated. More-

⁸⁵ Survey of Administrative Law Judges, New York Public Service Commission, Conducted by Harold I. Abramson (Dec. 1982) (on file with Albany Law Review).

⁸⁶ See 1 K. DAVIS, *supra* note 1, § 3:3, at 152-57.

over, the hiring of new judges with the expertise may be limited by the rate of attrition in a particular agency and the willingness of the legislature to appropriate the necessary funds. Another solution would be to hire "scientific law clerks" to assist the administrative law judges in understanding statistical conflicts.⁸⁷ The proposal could be quickly implemented by hiring one or two "scientific law clerks" to work on those cases that call for specific expertise.

C. A Customized Procedure for the Evaluation of Unadopted Methodologies

Unadopted methodologies are those types of empirical analyses that are unfamiliar to an agency, or are familiar but have not yet been accepted for use in the decisionmaking process. In contrast to an adopted methodology, an unadopted methodology needs to be fully examined to assess its underlying theory and its feasibility. In short, the agency and parties must educate themselves about the new methodology before it can be accepted.

The generic financing case provides some evidence of the ineffectiveness of trial procedure for evaluating unadopted methodologies. In that case, the parties disagreed over the method utilities should use to finance their construction programs. The PSC staff and the utilities argued that the solution was to issue more stocks. An intervenor argued that the utilities should issue more bonds. In support of this position, the intervenor prepared two empirical studies, each of which was based on a different unadopted methodology.

In one study, the intervenor employed a model known as a multi-criteria optimization model.⁸⁸ The administrative law judge took the initiative of educating himself and the parties about the model. In conjunction with the traditional cross-examination of the expert witness in a formal hearing, the judge requested the intervenor to prepare a plain language description of the model. Although none of the parties in the proceeding took issue with the intervenor's approach, the PSC staff and utility companies disputed the specifications of the

⁸⁷ For a discussion of the advantages and disadvantages of using "scientific law clerks," see Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 546-54 (1973). But see Bazelon, *supra* note 68, at 828. While PSC Administrative Law Judges are assisted by "engineering staff assistants," the judges do not have assistants with expertise in empirical modeling.

⁸⁸ For a description of the model, see Proceeding on Motion of the Comm'n to Investigate the Fin. Plans for Major N.Y. Combination Elec. and Gas Cos., Recommended Decision by Admin. Law Judge J. Harrison, N.Y. Pub. Serv. Comm'n Case 27679, at 83 (Feb. 1, 1982).

model.⁸⁹ The judge, in rejecting the results of the model, concluded that "multi-criteria optimization is potentially a valuable tool in financial planning" and encouraged the other parties to cooperate with the intervenor to further develop the usefulness of the model.⁹⁰ Even the intervenor candidly acknowledged that the model needed additional refinement, and recommended further collaborative work among the parties.⁹¹ Despite these constructive proposals, the model was eventually rejected by the PSC. More importantly, the case failed to establish any procedures that would have provided a means for refining the model.⁹²

This example serves to highlight the limitations of trial procedures for evaluating unadopted methodologies. In placing the entire burden of proof on the intervenor, the agency compelled the party to demonstrate that the application of a new methodology satisfied everyone else's vision of how realistic the model must be to be useful for decisionmaking. The only task assigned to the other parties was to demonstrate the weakness of the model through cross-examination. In contrast to the controversy discussed in the adopted methodology section, the adverse parties never presented a version of the model that they thought was sufficient to resolve the issue. Although the parties made specific criticisms, they were never required to cooperate with the intervenor to determine whether the model could become a useful decisionmaking tool.

While it is not suggested that the model in question should have been relied on, it is clear that the use of trial procedures is not conducive to evaluating an unadopted methodology. What is needed is a non-adversarial approach that would look more favorably upon the use of unadopted methodologies in making regulatory decisions. The procedures should promote a mutual, nonpartisan understanding of the unadopted methodology. Although there are many ways for the educational process to take place, the following proposal is suggested as a method which would fulfill this purpose:

- (1) When a party wishes to introduce an unadopted methodology, the party should petition the agency to examine the proposed model. The petitioner should have the initial burden of showing that the methodology has been sufficiently developed for consideration in regulatory proceedings. This burden should not be difficult to meet; for example,

⁸⁹ *Id.* at 85.

⁹⁰ *Id.* at 91.

⁹¹ *Id.* at 73.

⁹² Proceeding on Motion of the Comm'n to Investigate the Fin. Plans for Major N.Y. Gas and Elec. Cos., N.Y. Pub. Serv. Comm'n Case 27679, Op. No. 82-22, at 52 (Oct. 18, 1982).

a "showing . . . sufficient to require reasonable minds to inquire further" may be all that is necessary.⁹³ This initial burden should only be used to screen out methods whose theoretical underpinnings are still in need of refinement.

(2) After the agency has decided that the initial showing has been made, the agency should form a committee of agency staff, intervenors, and company representatives for the purpose of studying the methodology. The agency should also establish a timetable for the committee's activities. The members of the committee should conduct a thorough literature search, consult outside experts, and try to conform the methodology to the agency's needs. For example, if a committee had been assigned to study the multi-criteria optimization model, the committee members could have evaluated different objectives and structural constraints for the model. Based on this cooperative research, a recommendation should be made to the agency suggesting that either the method be applied to a particular case, or that it be subject to further study according to a proposed timetable. If the committee recommends that the method be applied, the report of the committee should contain guidelines for its application. Therefore, instead of the methodology appearing unexpectedly in a case, the methodology would appear after the agency and the parties, have had an opportunity to study it in a non-adversarial setting.

(3) If the committee recommends that the methodology be utilized in a particular case, the unadopted model should then be evaluated through the use of the suggested procedures for adopted methodologies. To reiterate, the methodology should be specified in an informal conference, specific disagreements should be settled by the administrative law judge, and each party should be permitted to submit testimony based on its own evaluation of the model's results.

(4) After experimenting with an unadopted methodology, the agency should review the results achieved to determine its utility in resolving future conflicts. At this juncture, the agency has three options. It can declare the model "adopted" and make it available as a decisionmaking tool. Alternatively, the agency can refer the model back to the committee for further study or suspend research until the state of the art becomes more sophisticated.

Through the use of these procedures, a methodology may be of utility to a proceeding despite its initial unfamiliarity. Moreover, by evaluating the methodology in a non-adversarial setting, the model might be less threatening to parties. As a result, parties might be

⁹³ See DeLong, *supra* note 74, at 299 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554 (1978)).

more inclined to cooperate in determining whether the methodology might be useful for decisionmaking.

The remaining problem in this proposal is distinguishing between adopted and unadopted methodologies. When adverse parties propose to use the same methodology for a purpose that has already been used by the agency, as occurred in the two sales forecast cases, the procedures for adopted methodologies should apply. Conversely, when only one party proposes the use of a methodology, and the methodology has never before been presented to the agency, it is obvious that the proposed procedures for evaluating an unadopted methodology should be utilized.

It is, of course, the borderline cases that present the problems. For example, how should a methodology be characterized if a party proposes to employ a methodology that has been used by the agency but has never been applied in that particular context? For these type of cases, guidelines need to be developed, in order to avoid the abuse of procedures by the agency and the parties. The risk is that the procedure for dealing with unadopted methodologies might offer a convenient way to avoid the inconvenience of learning and evaluating new decisionmaking tools. This could occur if the agency is permitted to assign the proposal to a committee where the proposal might remain interminably. Therefore, in developing guidelines, the presumption should be in favor of classifying a methodology as "adopted" unless strong arguments can be made that the procedures for an unadopted methodology are applicable. With experience, more detailed guidelines should be developed concerning when to use each of the proposed procedures.

Several potential benefits emerge from the process of dissecting and categorizing proof and designing procedures to most efficiently reach conclusions. First, the process of categorizing components of proof should promote the development of an adequate record by highlighting the most reliable evidence. This will occur because the formation of a hierarchy of evidence is implicit in the dissection of proof. It has been suggested as a rough principle "that empirical studies are preferred, that well-buttressed expert opinion is acceptable if empirical studies are unavailable, and that theoretical analyses unsupported by empirical data might be adequate under some circumstances."⁹⁴ This perspective on the relative quality of dissected proof should aid an administrative law judge in weighing the evi-

⁹⁴ *Id.* at 297.

dence and should also disclose where additional evidence is needed.⁹⁵ Second, the cooperative development of empirical models should also improve the record by encouraging parties to accept the responsibility of deciding when a model is accurate enough for use in the decisionmaking process. This would be a substantial improvement over the current practice where the parties' only task is to attack the reliability of their adversary's methodology. Finally, the stage three process of matching procedures with evidence should promote the selection of effective procedures for evaluating evidence.

IV. CONCLUSION

Serious charges have been leveled against the use of conventional trial procedures for resolving complex policy questions, with the use of cross-examination receiving the brunt of the criticism. The right to cross-examination, however, is so engrained in our system of regulation⁹⁶ that it is unrealistic to suggest that it be eliminated. Moreover, when used properly, the opportunity to cross-examine witnesses can be a valuable tool for evaluating evidence and developing a record on

⁹⁵ The marginal cost decision, *see supra* notes 29-35 and accompanying text, provides several examples of this aspect of proof dissection. In discussing the nature of the proof appropriate for the case, the PSC stated it "contemplated a discussion extending beyond the mere question of the soundness of marginal cost theory as a theory; but not so far as to attempt to resolve questions about how specifically to measure marginal costs, [or] how precisely to reflect them in rates." Proceeding on Motion of the Comm'n as to Rate Design for Elec. Corps., Opinion and Order Determining Relevance of Marginal Costs to Elec. Rate Structures, N.Y. Pub. Serv. Comm'n (Aug. 10, 1976).

Consistent with this hierarchy of proof, the PSC began its analysis of the record by recognizing "nearly unanimous agreement among the parties that marginal cost pricing is, in the abstract and given the assumptions of the underlying theory, sound and unobjectionable." *Id.* at 16. The PSC then proceeded to address the practical problems raised in the case.

One of the practical problems concerned the problem of second best:

The theory of second best . . . involves the question of the extent to which all other prices in the economy besides electricity deviate from marginal costs. Without knowledge and assessment of such deviations, the opponents maintain, there can be no certainty that the use of marginal costs in electric rate structures alone will in fact make for the more efficient allocation of society's resources that marginal cost theory contemplates, since it is the prices of various goods and services relative to one another that is pertinent in affecting buyer decisions.

Id. at 14-15. In a ruling, the hearing examiners pointed out that witnesses supporting marginal cost pricing have concluded that second-best considerations do not diminish the superiority of marginal cost-based rates for electricity over the present pricing structure. Aside from the use of theoretical assertions, the examiners afforded parties the opportunity to rebut this evidence. Because no party submitted such testimony, the PSC relied on "the only affirmative non-hypothetical testimony" to reject the second-best problem. *Id.* at 28.

⁹⁶ *See* B. BOYER, *supra* note 50, ch. IV, at 19-20.

which to base a decision. Therefore, rather than propose absolute alternatives to the use of trial procedures, it is more practical to determine how agencies can modify existing procedures in order to become both more efficient and more accurate.

In this proposal for proof dissection, many suggestions have been incorporated that should help an administrative law judge to narrow the issues-in-dispute. Proof should be matched with, and the policy issues and questions of law should be separated from, the issues subject to proof. The proof should then be dissected and procedures designed to effectively evaluate the components of proof. Through this process, an administrative law judge should be able to restrict and focus the opportunity for the cross-examination of witnesses. It is unrealistic, however, to expect that all the proof in large cases can be dissected and the procedures designed in the detail suggested here. It would take too much time and the procedural structure of the cases would become unmanageable. Realistically, this last stage for resolving complex policy questions should be utilized for the most important and complicated evidence in a large case.

Finally, the details of these recommendations for dissecting proof are not critical to this proposal. The details will undoubtedly need to be modified and refined in practice. They are provided only to convey an overall scheme of how proof dissection can work. It is the underlying concept that is important: the concept of narrowing the issues in dispute and matching procedures with the components of proof.

Albany Law Review

Volume 47

Summer 1983

Number 4

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