Agency Adjudication: Efforts at Excellence

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At Georgetown University Law Center, I teach a fall class on public utility law and a spring class on regulatory litigation. Both are "practicum" classes, where we supplement the weekly seminars with student projects carried out for regulatory agencies. Each July and December I cast a net among commission colleagues, asking about substantive and procedural challenges for the students to solve. With thanks to my contributing colleagues, here are excerpts from the spring 2015 list, organized according to three distinct roles regulatory agencies play. If you have local examples of these issues to share with us, or will be interested in the solutions we come up with, or have other ideas for projects, don't hesitate to let me know.

Agency as Policy Leader

Setting the agenda: How does an agency set agendas for the parties, rather than the other way around? Agencies can be leaders, presiders, followers or a combination. Some agencies focus on guiding parties toward public interest solutions; otherwise wait for parties' proposals, and then say "yes," "no," "yes, if" or "no, unless." Most do some combination, emphasizing one or the other approach at different times. Useful examples of leadership: The Hawaii Commission's actions to reduce fossil fuel dependency (since 2004 and continuing); and the New York Commission's efforts to explore new market structures in the distribution space (especially if the Commission continues to ask the question, "If we still need a monopoly provider of something, how do we find the best provider, rather than allow inertia to favor the incumbent?")

Managing inter-governmental relations: No agency operates in an economic, societal, legal or bureaucratic vacuum. Its decisions influence, and are influenced by, other government actors: Governor, legislature, executive departments (e.g., commerce, antitrust, zoning), courts. An agency needs a "foreign relations" manual: principles for establishing and exploiting opportunities for cross-fertilizing expertise so that solutions don't slip between departmental gaps.

Engaging the public: Candor requires an admission: The lay citizenry's views do not count as "substantial evidence," required by courts to sustain agency orders. Does that fact make public hearings (i.e., the non-technical hearings) shams? If not, then what is the value of public participation? What are ways to create that value, at reasonable cost? Traditionally, agencies announced public hearings in the newspaper's "legal notices." How useful is that approach today? What are an agency's responsibilities to educate the public and seek its views?

Agency as Manager of Its Internal Capacity

Organizing the agency's divisions: Some agencies are organized by professional discipline (economics, accounting, law, finance, engineering). Others organize by industry (electricity, gas, telecommunications, water, transportation). Each approach has its merits. Is there a third way and, if so, to what end? What does internal organization seek to accomplish? How should success be measured?

Enriching the litigation-advisory relationship: Most agencies have two distinct staffs: the litigation staff (which acts as a litigating party before the agency, representing the public interest); and the commissioners' staff (known as the "advisory" staff, assisting in deliberations and drafting orders). What are the options, and the pros, and cons, for types of relationships between these two staffs? For example: Can/should the two functions be performed by the same individuals in the same case, or should the two staffs be legally separated? Should staff rotate between the functions, so that litigators understand what opinion-writers need from the record, and opinion-writers learn what efforts it takes to make a record?

Deliberating effectively: States differ in whether and how they allow commissioners to communicate with each other in reaching their decisions. Some states have strict "Sunshine Act" laws that prohibit conversation among Commissioners, except in public meetings. In these situations, the staff must meet individually with Commissioners, taking drafts around the office as they search for consensus. In other states, commissioners can meet together in private to deliberate, determine outcomes, even to negotiate sentence structure. (I've worked in both settings; the latter is a lot easier.) Each approach has its proponents and opponents. Often statutory language is not clear as to what is allowed.

Agency as Manager of Hearing Procedures

Admitting intervenors: Who has a right to intervene, in adjudicative and rulemaking proceedings? Some argue for openness: the more parties, the more perspectives, the richer the record, the more informed the decision. Others argue for limits: the more parties the more complicated and lengthy the proceeding, the less likely consensus will emerge, and the more difficulty discerning the relevant facts amidst the static of stakeholder clamor. In one state, if 10 months pass without a decision the agency loses jurisdiction, creating incentives for oppositional parties to drag things out. So there is a tradeoff between access and expedition. Are there workable principles for resolving these tensions?

Addressing "confidential" material: The 2005 repeal of the Public Utility Holding Company Act eliminated any federal bar to the mixing of regulated and unregulated businesses in the same corporate family. (States are free to limit this mixing but few have done so.) A rising result of this mixing is utility claims of confidentiality for internal documents that are relevant to regulatory decisionmaking. These claims cause regulators to keep, literally, two sets of books, as witnesses submit confidential testimony and "redacted" versions, and occasionally even clear the hearing room of non-parties so that secrets can be discussed.

It is worth asking questions about the reflexes with which (a) applicants for government approvals claim confidential treatment, and (b) regulators allow it. What standards should apply to resolve the tension between a private company's interest in secrecy and the public's interest in knowing what facts are influencing regulatory decisionmakers? By what procedures should we make these judgments? In most jurisdictions, once the utility insists on confidential treatment the burden is on an opponent to justify lifting the veil. What behaviors has this practice caused, and are those the behaviors that best serve the public? How does a commission write an order, reviewable by the courts and credible with the public, when a factual basis for the order is kept secret? Are all claims of equal merit, or is it possible to define certain categories of materials, where the burden to justify disclosure or non-disclosure varies with the category?

Insisting on professionalism: The quality of commission decisions depends on the quality of the evidentiary record. The record, in turn, depends on the quality of expert witnesses and the attorneys who prepare them and cross-examine them. What actions can commissions take to ensure that expert testimony, both pre-filed and oral, meets the highest professional standards? Which attorney practices raise the quality and efficiency of adjudicatory hearings, and which practices undermine those goals? What actions can commissions take to reward those who contribute and discipline those who do not?

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The foregoing list is a sampling of questions the regulatory community is struggling with. I look forward to your reactions and additions.