

Operations in an Agency Not Subject to the APA: Public Utilities Commission

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Through constitution and statute the California Public Utilities Commission enjoys an extraordinary sweep of substantive powers. Regulation may be comprehensive, as in the case of most categories of utility operation where the commission dominates the economic scene through certification for entrance into the field, rate-fixing, rate-enforcing, supervision over financing methods and accounting, supervision over property transfers, and surveillance over service and safety requirements.¹ Or it may consist of some lesser control, as with "permitted carrier" operations where entrance into the field is governed largely through ministerial action, rate-making is confined to the imposition of minimum rates, financing is left to the judgment of others, and service likewise depends to a large extent upon the desires of the operator.² The range of commission functioning generally encompasses on a local plane what the Interstate Commerce Commission, the Federal Power Commission, the Federal Communications Commission, and in a limited way what the Civil Aeronautics Board encompass on the federal. This sweep of powers derives particular strength from the 1911 constitutional amendments³ which have enabled the Commission to function unfettered by the doctrine of the separation of powers and the theories about unwarranted delegation of legislative or judicial power⁴ which so long plagued federal administrative agencies under former interpretations of the Federal Constitution⁵ and which continue to affect California agencies born under a less generous star.⁶

Our concern is with the role of the hearing officer in this intense, diverse, and many-faceted governmental activity. It is true that the hearing officer as such plays no part in that large share of the commission's de facto regulation accomplished, in the absence of formal proceedings, through discussion and suggestion across the table or in the field, through answers,

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¹ CAL. PUB. UT. CODE §§ 201-2113 (Cal. Stats. 1951, c. 764, as amended).

² CAL. PUB. UT. CODE §§ 3501-4149 (Cal. Stats. 1951, c. 764, as amended).

³ CAL. CONST. art. XII, §§ 20-22 (1943).

⁴ See *Live Oak W. U. Ass'n v. Railroad Comm'n*, 192 Cal. 132, 219 Pac. 65 (1923); *Pacific Tel. and Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119 (1913).

⁵ For a discussion of the separation of powers concept, see DAVIS, *ADMINISTRATIVE LAW* § 7 (1951); for a discussion of delegation and subdelegation of powers, see *id.* c. 2.

⁶ See KUCHMAN, *CALIFORNIA ADMINISTRATIVE LAW AND PROCEDURE*, c. 1 (1953), for an interesting discussion of these problems in California.

oral or written, in response to inquiries, through commission letters of suggestion or direction, informal arbitration of disputes between utilities and their customers, and commission action by resolution. There remains, however, that large field of activity having more certain statutory sanction, in which formal proceedings resulting in formal opinions and decisions, whether upon hearing or *ex parte* consideration, afford the appropriate medium for action. The Commission each year issues well over 1500 formal decisions and in the vast majority of them a hearing officer has had a part.

Initially one must bear in mind that the Commission has developed its body of hearing officers and its procedures for their functioning independently of detailed legislation and, in particular, of the California Administrative Procedure Act,⁷ from which the Commission is exempt except in the matter of publication of rules of procedure. As will be noted in detail, the system developed by the Commission on its own initiative and with only the barest statutory guide, derived from the Public Utilities Act,⁸ differs significantly from both the California and the Federal Administrative Procedure Acts, in that it does not attempt to set up a special examining procedure for particular substantive phases of activity, but applies a more or less uniform though flexible procedure for all of its substantive activities, whether falling in the category of quasi-legislative, quasi-judicial, rule-making, adjudication, or some other designation.

I

CONSTITUTIONAL AND STATUTORY BASIS

The 1911 constitutional provisions creating the Commission in its present form appeared to contemplate an absence of the hearing officer function except in the commissioners themselves by providing that "The act of a majority of the commissioners when in session as a board shall be deemed to be the act of the commission; but any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for the purpose by the commission and every order made by a commissioner so designated, pursuant to such inquiry, investigation or hearing, when approved or confirmed by the commission and ordered filed in its office, shall be deemed to be the order of the commission."⁹ The Public Utilities Act, approved in 1911,¹⁰ followed this language closely. However, the legislature was given

⁷ CAL. GOVT. CODE §§ 11370-11529.

⁸ The PUBLIC UTILITIES ACT was first enacted in 1911 (Stats. 1911 (Ex. Sess.), c. 14), and was reenacted in 1915 (Stats. 1915, c. 91). It is now contained, as amended, in the CAL. PUB. UT. CODE §§ 201-2113.

⁹ CAL. CONST. art. XII, § 22 (1943).

¹⁰ See note 8 *supra*.

plenary power by the constitution to confer upon the Commission "additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the . . . Commission in this Constitution,"¹¹ and the legislature in reenacting the Public Utilities Act in 1915¹² provided for examiners in language the substance of which has remained unchanged to this day. Such Act provided that:¹³

The commission shall have power to employ, during its pleasure, examiners who shall have power to administer oaths, examine witnesses, issue subpoenas and receive evidence, under such rules and regulations as the commission may adopt

And it further provided that:¹⁴

The evidence in any investigation, inquiry, or hearing may be taken by the commissioner or commissioners to whom such investigation, inquiry or hearing has been assigned or, in his or their behalf, by an examiner designated for that purpose. Every finding, opinion and order made by the commissioner or commissioners so designated, pursuant to such investigation, inquiry or hearing, when approved or confirmed by the commission and ordered filed in its office, shall be deemed to be the finding, opinion and order of the commission.

These were the only statutory provisions specifically referring to examiners in the 1915 Public Utilities Act, and none have been added since. Certain other provisions in the Act, and remaining substantially unchanged, were in terms confined to "the commission and each commissioner."¹⁵ They have to do with the issuance of writs of summons, subpoenas, warrants of attachment and commitment, process in proceedings for contempt, the administering of oaths, the ordering of depositions, and the examination under oath of utility officers, agents or employees. A general provision was enacted in the 1911 Act, was somewhat modified in the 1915 Act to give recognition to the examiner function, and has remained intact since, to the effect that:¹⁶

All hearings, investigations and proceedings shall be governed by this act and by rules of practice and procedure to be adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission.

¹¹ CAL. CONST. art. XII, § 22 (1943).

¹² See note 8 *supra*.

¹³ Cal. Stats. 1915, c. 91, § 6; now contained in CAL. PUB. UT. CODE §§ 309, 311.

¹⁴ Cal. Stats. 1915, c. 91, § 9; now contained in CAL. PUB. UT. CODE § 310.

¹⁵ PUBLIC UTILITIES ACT §§ 54, 55, 58; now contained in CAL. PUB. UT. CODE §§ 312, 311, 314, respectively.

¹⁶ PUBLIC UTILITIES ACT § 53; now contained in CAL. PUB. UT. CODE § 1701.

There was also a provision, still intact, specifically providing that orders be in writing if they pertain to certain specified subjects.¹⁷

The foregoing constitute the only constitutional or statutory clues to the hearing officer function in the Commission.

One might suppose that rules of procedure adopted by the Commission pursuant to the statutory authority set out above would afford a substantial guide to the place of the hearing officer, but here again a multitude of questions remain unanswered. It is true that the Commission adopted rules of procedure almost immediately after the Public Utilities Act became effective in 1912,¹⁸ that such rules stood virtually unaltered until 1950, that a thorough-going revision became effective in that year,¹⁹ and that such revised rules obtain today, subject to certain amendments. These rules, however, were designed primarily for the parties and other interests appearing before the Commission, and one searches in vain for many of the internal procedures which have grown up.

It will be useful to explore briefly the historical development of this subject because of its bearing upon the methods now employed by the Commission and upon methods which might be employed in the future.

II

HISTORICAL BACKGROUND

In the beginning, and until the 1915 statutory provisions alluded to, the Commission was not concerned with the examiner concept and normally designated for each proceeding an individual commissioner who presided over the hearing, received evidence, ruled on such matters as admissibility of evidence and conduct of hearing, prepared an opinion by his own efforts and submitted it to the other commissioners for approval. In the opinion forming process the designated commissioner presumably felt little or no constraint in utilizing the skills of the staff engineers, rate experts, accountants and lawyers, and in calling upon any of them, including those who may have presented evidence or been responsible therefor, for their views as to the proper disposition of the issues at hand. The decision finally rendered was designated as that of commissioner so-and-so, who had

¹⁷ PUBLIC UTILITIES ACT § 56(b); now contained in CAL. PUB. UT. CODE § 1902. It seems anomalous that the statute requires written orders only where certain specified subjects are involved. The Commission has in fact issued written decisions in all formal proceedings, both under the Public Utilities Act and subsequent statutes affecting its jurisdiction.

¹⁸ The rules as they existed from 1912 to 1950, with minor variations, may be found in PUBLIC UTILITY REGULATION CALIFORNIA RAILROAD COMMISSION, Appendix 101-129 (1927).

¹⁹ These rules are printed in 49 Cal. P.U.C. 536 (1950); they were amended in 1952 by Decision No. 47081 printed in 51 Cal. P.U.C. 651 (1952), and by Decision No. 48072 printed in 52 Cal. P.U.C. 322 (1952). For a discussion of the rules in effect prior to 1950 see Rowell, *Practice Before the Railroad Commission*, 18 CALIF. S.B.J. 364, 367, 368 (1943).

heard the evidence, and a statement of adoption by the Commission appeared at the end. It is not unlikely that generally commissioners conceived their duty as done for cases other than those to which they were designated or assigned, when they had read the decision prepared by a colleague and had concluded upon the basis of that single document, together with whatever inquiries and discussion they felt pertinent, whether to approve or disapprove.

It was not long before the grist of formal matters made it impossible even for an assigned commissioner personally to conduct the hearing and write the opinion in every case, and shortly after the 1915 amendments the practice started of employing a few full-time examiners.²⁰ These men were usually though not necessarily lawyers, were not organized into a separate examining department but rather were responsible directly to the Commission. They conducted hearings on their own in much the manner an assigned commissioner would do, and prepared an opinion which, if approved by a majority of the commissioners, became the decision, being designated in the reports as "By the Commission."

There were, of course, from the beginning many formal matters which could properly be handled *ex parte*, and the decisions in such cases were usually prepared by a member of the technical staff. When approved by a majority of the Commission, such decisions were referred to in the reports in the same way as examiners' approved opinions, as "By the Commission."

It was about 1930 that the practice first began of occasionally employing, even in proceedings requiring hearing, some member of the technical staff as examiner. These men were responsible to the departments in which they were employed and the decisions which they prepared for Commission adoption could be expected to reflect the position their departments had advocated on the record. As this practice progressed of employing technical members of the staff as part-time hearing officers, the full-time examiners with allegiance only to the Commission became fewer and fewer. Indeed, some of these men while continuing on as full-time examiners lost their free-lance status by becoming employees in a particular department.

One noteworthy effect of the advent of examiners in the commission's processes, whether full-time or part-time and whether owing allegiance to a particular department or being free therefrom, was that not even a commissioner assigned to the case would be present to receive evidence where an examiner was likewise assigned. Such commissioner would find himself in a position comparable to that of his colleagues, and the ultimate decision was normally based even in his case upon an examination confined to a study of the examiner's proposed opinion, together with whatever addi-

²⁰ The first volume of the Commission's reports in which examiners are listed is 11 C.R.C., relating to the year 1916, showing three names.

tional inquiry or discussion was deemed pertinent. It must not be concluded, however, that commissioners made it a universal practice to be content with the proposed decisions handed them by examiners. At least in cases having a far-reaching effect it may be assumed that commissioners conscientiously pursued the record whether or not they were the assigned commissioner in the particular proceeding.

About 1938 a new practice came into being which is noteworthy because it has been perpetuated in the commission's procedures ever since. In cases considered to have particular import, attended with many technical problems, the assigned commissioner would sit at hearing but would be joined on the bench by an examiner to assist him. The result of such practice was, of course, that the assigned commissioner became as familiar with the record as the examiner, and the decision presented to the Commission for adoption became the joint effort of these two men.

There were obvious weaknesses in the system outlined, and charges of unfairness and lack of due process could be advanced on several fronts. For one thing, the Commission staff was accorded a peculiar advantage in being able not only to present the staff view at hearing but in being able, at least where the hearing officer was a member of a department, to exert real influence, even if unintentional, over the form of the proposed decision, and ultimately to influence the Commission's thinking as a result of the staff advisory capacity when the decision came up for final approval. Was this not an unwarranted advocate-judge combination or at the very least an unfair hearing procedure according unequal advocacy privileges and the possibility of the introduction of considerations outside the record? For another thing, was there not serious question in some instances whether the assigned commissioner was discharging the obligation imposed upon him by constitution and statute to "undertake or hold" the investigation, inquiry or hearing? Finally, was there not serious reason in some cases to doubt that the Commission itself, having the deciding function, had "heard" the evidence in such a way as to meet the requirements of due process of law?

Increasing awareness of the deficiencies in formal hearing procedures developed after the first *Morgan* decision in 1936.²¹ Since that case could be construed to require as a matter of due process that those who decide must personally examine the record, it became at least the goal for commissioners to familiarize themselves with the records in all cases.

It remained, however, for the post-war period to develop substantial changes in the examiner function itself. Undoubtedly influenced by the widespread interest in administrative reform and the adoption of both the

²¹ *Morgan v. United States*, 298 U.S. 468 (1936).

Federal and California Administrative Procedure Acts,²² the Commission in 1947 initiated steps toward the creation of an independent examiner group within the framework of the Commission. While the blanketing in of Commission personnel under civil service in 1944²³ had destroyed much of the earlier freedom in prescribing internal organization changes, the Commission in 1947 designated one of its experienced and highly-qualified full-time examiner-attorneys in the Transportation Department as chief examiner.

It was the intent that he become independent of any departmental allegiance and owe responsibility only to the Commission itself. It was the further intent that whenever a member of the Commission staff acted as examiner in a given case, whether he be a full-time or part-time examiner, such person should become divorced for the time being from allegiance to the department in which he was employed and become answerable directly to the chief examiner. It became the obligation of the chief examiner to supervise the work of examiners, guiding them when necessary in the conduct of their hearings, and scrutinizing their proposed decisions to make sure that established legal principles and Commission policies were followed.

Obviously this was but an initial step. In practice examiners were loathe to cast off, even for the time being, allegiance to the departments in which they were employed; the views of department heads were bound to carry peculiar weight in the decision-writing process regardless of such head's honest enjoinder that the examiner exercise an independent judgment; and the chief examiner's position was not firmly enough established to enable him to enforce the desired examiner independence.

Finally in 1948 the State Personnel Board was prevailed upon to give sanction to the office of the chief examiner as an independent branch of the Commission staff. In a relatively short time thereafter, a corps of full-time examiners was established in such office owing allegiance to no other department (or division as departments are now called). *To a degree* the plan was to put into the hands of such independent corps the hearing work which had been scattered among the part-time and full-time examiners employed in the various departments. *To a degree* is here emphasized because, surprising as it may seem, the Commission did not wholly give up the concept that under appropriate circumstances certain staff members in one of the departments or divisions outside the chief examiner's might be designated as an examiner for a particular proceeding or for particular types of proceedings. It was written into the specifications for the director of the

²² Federal ADMINISTRATIVE PROCEDURE ACT, 60 STAT. 237-244 (1946), 5 U.S.C. §§ 1001-1011 (1952); California ADMINISTRATIVE PROCEDURE ACT, CAL. GOVT. CODE, §§ 11370-11529.

²³ This was pursuant to Cal. Stats. 1943, c. 1045.

Utility Finance and Accounts Division and for the assistant chief counsel that examining duties were encompassed. Presumably it was intended that in the performance of such duties the staff member would be temporarily answerable to the chief examiner's office, though in practice it could not be expected that the latter would be able to exert the same degree of influence as with those directly under him.

It should be noted parenthetically that the plan for an independent examiner corps as thus outlined was intended to reach only those proceedings which actually go to hearing, and not those handled *ex parte*. In the latter cases, it remains the practice for certain members of the technical staff in particular divisions to act as examiners in the sense of preparing *ex parte* decisions for Commission approval.

With this background of the more significant aspects of the historical development, we may turn to a detailed discussion of how the system works today.

III

QUALIFICATIONS AND COMPENSATION OF EXAMINERS

Consideration here will be given to the qualifications and compensation of the chief examiner and of the full-time examiners, all the latter of whom are employed in the chief's office.

It has already been noted that the Commission assigned a highly qualified attorney as the first chief examiner. The requirements of his office, now given sanction by the State Personnel Board, include membership in the California Bar, a broad and extensive experience in the practice of law covering a span of over five years, at least three of which have been in the field of public utility regulation, or in the alternative two years' experience as a legal examiner or experience as assistant chief counsel for the Commission. His salary is higher than any other in his division, ranging from \$1000 to \$1100 per month.^{23a}

As to the full-time examiners under the chief, there was considerable debate at the time when their positions were organized in a separate office, whether training as a lawyer should be a prerequisite. The proponents urged that the hearing officer function, having characteristics comparable to that of a judge's, necessitates a grounding in fundamental legal concepts, including the rules of evidence, and the ability to weigh and analyze which comes from education in the law. There was ready support for such a view in many quarters. On the federal scene the Interstate Commerce Commission after the adoption of the Federal Administrative Procedure Act in

^{23a} The salaries referred to in this article are as of April, 1956. Certain increases will become effective July 1, 1956.

1946 worked toward the elimination of the non-legal hearing examiner, and it is understood that, through the retirement process, it has accomplished that goal. The Federal Power Commission has long employed only lawyers as hearing examiners though the statutes do not seem so to require. The California Administrative Procedure Act expressly requires that hearing officers be admitted to practice law in the state though there are grandfather provisions exempting those having performed functions similar to that of a hearing officer prior to the act.²⁴ On the other hand, it was argued that the technical nature of much of the Commission's work justifies the employment of engineers, rate experts and accountants as examiners, presumably upon the theory that attorneys might find undue difficulty in technical fields. While every lawyer would no doubt rise to champion the ability of the legal profession to master the most esoteric subject of human knowledge sufficiently to perform the hearing and judging function, and would point to the long tradition of the judiciary in that respect, practical considerations of incumbency and historical precedent proved the deciding factor. Several non-lawyers who are technically trained men with previous experience in examining were blanketed into the office of the chief examiner.²⁵

Today there are seventeen full-time examiners in addition to the chief, ten of them attorneys; three, engineers; and four, rate experts. No one can deny that the technically trained examiners have performed with credit and have carried their share of the load, in some cases considerably more. Whether their positions will one day be supplanted by legally trained examiners remains for consideration at some future date. Of the ten attorneys, nine are on the same level, with a salary range of \$745 to \$905 per month.²⁶ These legal examiners are required, in addition to their membership in the bar, to have had at least five years' experience in the practice of the law, with at least two years in the public utility or administrative field, or to have had certain lower positions with the Commission. As to the technically trained examiners, those who are engineers must have a college degree or its equivalent, certification as a civil or professional engineer and at least six years' experience in the utility field. Their salary range is the same as that of the nine legal examiners. As to the rate expert examiners there are

²⁴ CAL. GOVT. CODE § 11502.

²⁵ For a discussion of the efforts, after section 11 of the Federal Administrative Procedure Act became effective on June 11, 1947, to improve the caliber of hearing officers by disqualifying certain incumbents, and of the retreat from those efforts, see Fuchs, *The Hearing Examiner Fiasco under the Administrative Procedure Act*, 63 HARV. L. REV. 737 (1950). See also Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431 (1950).

²⁶ The position of the tenth legal examiner is considered as an apprenticeship for the higher level. It calls for only two years' experience comparable to that of a junior counsel in the California Public Utilities Commission or three years' practice in the law, and carries a salary of \$505 to \$613 per month.

two gradations, the higher having a salary range of \$710 to \$862 per month, the lowest \$613 to \$745 per month. Their basic requirement is admission to practice before the Interstate Commerce Commission, a college degree or its equivalent and certain experience in rate work.²⁷

IV

ASSIGNMENT OF PROCEEDINGS

If it be assumed that the examiner's influence upon the outcome of a proceeding is significant, then the applicant, complainant, respondent or other party, knowing that reasonable minds may draw differing conclusions from the same facts, might well wish that he had the opportunity to request the assignment of an examiner considered sympathetic to his cause. Having no opportunity to choose between commissions in the way that it is sometimes possible to choose between courts, the next best thing might seem to be to have a choice of examiners. Under the internal procedures of the California Public Utilities Commission, that is not possible. However, the outcome of a Commission proceeding is probably much less influenced by the presence or absence of a particular examiner than in agencies like the Federal Power Commission where the examiner remains aloof from the technical staff.

When applications or complaints or orders of investigation have been docketed, a preliminary examination is made to determine whether hearing is required or justified. A large number of matters are of routine character involving little or no dispute of facts, and may properly be handled *ex parte*; they are usually assigned to one of the staff members outside the chief examiner's office authorized to handle *ex parte* matters, though there is a tendency to turn *ex parte* transportation matters over to one of the full-time legal examiners in the chief examiner's office.

²⁷ An important proposal of the Attorney General's Committee on Administrative Procedure for strengthening the caliber of federal examiners was the substantial increasing of salaries. See REP. ATT'Y GEN. COMM. AD. PROC. (1941).

In the way of salary even the top grades of the commission's examiners, comprising twelve out of the seventeen positions under the chief, fall below comparable positions in the federal agencies. Thus the Federal Power Commission's hearing officers, all eleven of whom are in the same range, receive even at the lowest level some \$750 more per year than the top level of the California Commission's examiners. If it be true that the federal examining function still needs strengthening by a requirement of salaries approaching those of the judiciary, the same argument may appropriately be advanced with even greater force for the full-time examiners in the Public Utilities Commission.

The basic requirement for the hearing officers in the independent Division of Administrative Procedure as provided for in the California Administrative Procedure Act, calls for admission to practice law in the state for at least five years immediately preceding appointment together with what ever additional qualifications the State Personnel Board may impose. CAL. GOV. CODE § 11502. A provision first enacted in 1945 requires that salaries shall be not less than \$4800 per year. With the changing value of the dollar that figure can scarcely be looked upon as an effective minimum to attract men of particular capacity. The Personnel Board has in fact placed their salaries higher, and there are now three ranges, \$950 to \$1050 per month for the chief, \$745 to \$905 for the next grade, and \$644 to \$782 for the lowest.

For those matters determined to justify or require hearing, certain practices have grown up which guide the selection of an examiner. Interestingly enough practically all matters involving financing, security issues, mergers and related subjects where a public utility is involved are turned over to the head of the Utility Finance and Accounts Division for hearing. The reason for this is largely historical, though it is probably rooted in the practical consideration that such proceedings rarely involve substantial controversy. Similarly, matters of considerable importance which seem to involve almost exclusively an application of legal principles may be assigned to the assistant chief counsel as examiner. Such assignment is, however, quite rare. Utility rate proceedings, at least where major utilities are involved, have almost invariably been assigned to one of the three full-time examiners trained as engineers. Transportation rate matters, especially where minimum rate questions are involved, are usually turned over to one of the four full-time examiners trained in rate work. Whatever is left falls to the lot of the full-time examiners trained in the law or to the chief himself. These cases may be complaints of one character or another, reparation proceedings, certificate applications, commission orders of investigation, petitions for restoration of service, and the like.

To some extent these guides for selection of an examiner are responsive to practical administration but in some respects they are the anachronistic remains of a bygone past. It was thought, for instance, and quite properly, when the chief examiner's office was set up, that the legal examiners, some of whom were new-comers to the Commission, might have difficulty without a period of indoctrination in handling a complicated rate proceeding involving a major non-transportation utility. Accordingly such matters were assigned to the engineering examiners, whose training with the Commission had qualified them to understand the problems involved. The period of indoctrination has long since passed, but the practice persists of assigning only engineering examiners in the major cases of this character. The essential problems in such a proceeding involve little that may be described as engineering in the academic sense, and in any event should be well within the range of a legal examiner's capabilities. Curiously, in the transportation field, where rate problems are comparable and of at least equal difficulty, there has been much less tendency to shy away from the legal examiners, and some of the major cases in that field now go to them.

The Federal Administrative Procedure Act directs that all examiners "shall be assigned to cases in rotation so far as practicable."²⁸ It is understood that the rotation problem was in mind when the Federal Power Commission determined to place all of its eleven examiners on the same plane,

²⁸Federal ADMINISTRATIVE PROCEDURE ACT § 11, 60 STAT. 244 (1946), 5 U.S.C. § 1010 (1952).

and thereby simplify the rotation process. The Interstate Commerce Commission employs a much larger number of examiners. Inquiry at both these agencies reveals that cases are as much as possible assigned in rotation, subject to such considerations as the length of experience and the difficulty of the case. The Interstate Commerce Commission, whose examiners conduct a large number of proceedings away from Washington, keeps in mind too the economic factor of travel and may assign an examiner out of rotation to a hearing in a city to which he has already gone in connection with another case.

The California Administrative Procedure Act, unlike its federal counterpart, makes no mention of the manner in which hearing officers are to be assigned. It is simply provided that upon request from any agency the director of the Department of Professional and Vocational Standards "shall assign a hearing officer,"²⁹ and there is the further significant provision that "Any agency requiring full-time hearing officers for the purposes of this act has power to appoint them for the particular agency."³⁰ Since there are only five examiners in the Division of Administrative Procedure, aside from the chief, and since such men are assigned to district offices, two in San Francisco, one in Sacramento, and one in Los Angeles, there is little rotation problem.

Under the internal procedures of the Public Utilities Commission, assignment of an examiner, aside from the guides alluded to above, may depend upon varied considerations—past experience with problems of the particular utility, work load and calendar commitments, or even the personal preference of the commissioner to whom the case has been assigned. It is the desire of the chief examiner to distribute the work of the examiners as evenly as possible, consistent with all the considerations noted.

It is well at this juncture to refer to what may be the more significant assignment act, that of assigning a commissioner to the proceeding. It will be recalled that the law contemplates the "designation" or "assignment" of one or more commissioners "to undertake or hold" an investigation, inquiry or hearing in lieu of the whole Commission if the latter so determines.³¹ It is only on the rarest occasion that the Commission does not designate or assign one of its five members for a matter to be heard. Thus proceedings normally have an assigned commissioner and an assigned examiner.

Just as with the assignment of an examiner any steps by a party to suggest a particular commissioner would be looked upon as an impropriety. The selection is made in the light of a number of factors, among them the

²⁹ CAL. BUS. & PROF. CODE § 110.5.

³⁰ CAL. GOVT. CODE § 11502.

³¹ See text at notes 9, 10, 14 *supra*.

predilections of each commissioner for certain types of proceedings, the knowledge a particular commissioner may have of a certain area or of a particular problem, and the objective of achieving a reasonable distribution of the pending cases. The influence of the assigned commissioner upon the final determination may be substantial for he shares in ultimate policy determinations and is afforded a unique opportunity to impress upon his brethren his views respecting the application of policy to the particular case.³²

V

CONDUCT OF THE HEARING

In no case in recent years has the entire Commission undertaken to be present all through the hearing process, but rather has confined its full presence to the oral argument stage, and even then only in cases of particular moment or difficulty. The usual situation is to find either the examiner sitting on the bench alone or the assigned commissioner and examiner sitting together. In the latter instance the commissioner takes the lead, determining whether a prehearing conference should be held for such purposes as the formulation and simplification of issues and the exchange of exhibits, conducting such conference if held, determining dates for hearing, directing the issuance of subpoenas, determining the order of presentation at hearing, administering oaths, ruling on the scope of the issues and on questions of evidence, ruling on motions which do not involve final determination of the proceeding, receiving offers of proof, hearing argument, and fixing the time for the filing of briefs where briefs appear warranted. In thus acting the commissioner normally confers with and solicits the opinions of the examiner along the way. When the examiner sits alone, he takes over these same duties.³³

It not infrequently occurs during the course of a hearing that some question arises respecting the proper disposition of a motion or the receipt of evidence on which the examiner may entertain some doubt. He is free to call upon and often does confer with the chief examiner who undertakes to assist in the resolution of the doubt.³⁴ It should be noted that neither the

³² It was held in *Southern California Edison Co. v. Railroad Comm'n*, 6 Cal.2d 737, 59 P.2d 808 (1936), that the Commission's approval of the assigned commissioner's decision satisfied due process of law where there was no showing that the "commissioners failed to exercise their power in the authorized manner . . ." *Id.* at 759, 59 P.2d at 818.

³³ The duties of a federal hearing officer are similar. See *FEDERAL ADMINISTRATIVE PROCEDURE ACT* § 7(b), 60 STAT. 241 (1946), 5 U.S.C. § 1006(b) (1952).

³⁴ It is understood that a similar practice is followed in the Federal Power Commission. A rule of that commission provides: "Rulings of presiding officers may not be appealed from during the course of hearings except in extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest. In such instance the matter shall be referred forthwith by the presiding officer to the Commission for determination." *FPC RULES OF PRAC. AND PROC.*, 18 C.F.R. § 1.28 (1949).

assigned commissioner nor examiner has authority to rule on any motion involving a final determination. Thus, if a party moves to dismiss, that motion must be referred to the Commission itself.³⁵

This is not the appropriate place to discuss at any length the Commission's practice respecting the receipt of evidence. However, it may be noted that whereas the statute provides that "the technical rules of evidence need not be applied" and that "No informality . . . in the manner of taking testimony shall invalidate any order . . .,"³⁶ there is a tendency to try to observe the rules of evidence developed in the courts. When the presiding officer is not a lawyer, one may occasionally encounter weird results in terms of the technical basis for the ruling. While this may illustrate that "a little learning is a dangerous thing," a common-sense approach toward the receipt of evidence may usually be expected regardless of the technical reasons assigned. The fundamental tendencies before the California Commission are, as elsewhere, "(1) to replace rules with discretion, (2) to admit all evidence that seems relevant and useful, and (3) to rely in making findings upon 'the kind of evidence on which responsible persons are accustomed to rely in serious affairs'."³⁷

VI

THE DECISION PROCESS

It is in the decision process that the true measure of the significance of the examining function is revealed. It is here that the interplay of forces must be studied minutely if one is to draw any satisfactory conclusions about the degree of independence which is or should be accorded the work of the examiner.

Whereas the Federal Administrative Procedure Act contains rather intricate provisions for "initial" and "tentative" and "recommended" decisions, and for the method of accomplishing final decision,³⁸ as well as for the relations of the hearing officer with others during the decision process for certain types of cases,³⁹ and whereas the California Administrative Procedure Act contains provisions for "proposed decisions" and the method of reaching final decision,⁴⁰ one finds nothing in the Public Utilities Act relating either to the preparation of decisions by an examiner or to his relation-

³⁵ A similar rule has been adopted by the Interstate Commerce Commission. ICC RULES OF PRAC., 49 C.F.R. § 1.70 (1949).

³⁶ See note 16 *supra*.

³⁷ DAVIS, ADMINISTRATIVE LAW 448 (1951). Compare the evidence provisions in the Federal ADMINISTRATIVE PROCEDURE ACT § 7(c), 60 STAT. 241 (1946), 5 U.S.C. 1006(c) (1952).

³⁸ Federal ADMINISTRATIVE PROCEDURE ACT § 8, 60 STAT. 242 (1946), 5 U.S.C. § 1007 (1952).

³⁹ *Id.* § 5(c), 60 STAT. 239, 5 U.S.C. 1004(c).

⁴⁰ CAL. GOVT. CODE § 11517(b), (c).

ships with others. Indeed, the act seems hardly to recognize his participation beyond the hearing stage.

The commission's Rules of Procedure are equally silent except on the subject of a "proposed report."⁴¹ Unlike the provisions under the Federal Administrative Procedure Act which contemplate publicly filed intermediate decisions as the rule rather than the exception, with opportunity to file exceptions thereto, and unlike the provisions of the California Administrative Procedure Act which contemplate a proposed hearing officer's decision, with opportunity to present argument in the event the agency does not adopt the examiner's proposed decision, the commission's Rules of Procedure contemplate an *absence* of any publicly filed examiner's proposed report except under special circumstances. It is provided that a party may file a petition in writing for a proposed report prior to the conclusion of hearing, stating "why it is believed that issuance of such a proposed report will promote the administration of justice and will not cause unreasonable delay in the final determination." Objections may be filed by other parties, and it is only thereafter "upon direction by the commission" that the presiding officer shall prepare and file a proposed report, containing recommended findings, conclusions and order. Parties may serve and file exceptions to the proposed report within twenty days after service and propose substitute findings and conclusions. Replies may be filed within fifteen days after service of such exceptions. Thereafter, the Commission may render its decision.

The result of these provisions has been to discourage parties from seeking proposed reports, and the Commission has authorized them only in four or five instances.

We may turn to a consideration of the manner in which the examiner goes about his task in the deciding process in the usual case where there is no publicly filed proposed decision, and where he is one of the full-time hearing officers from the chief examiner's division.

Upon the conclusion of the evidence and the receipt of oral argument and briefs, if any, it is customary in those instances where the assigned commissioner attended the hearings for the examiner to sit down with such commissioner to discuss the issues, the findings which the record seems to justify, and the questions of policy which are involved.

Based upon such conferences the examiner proceeds to write an initial draft of a decision. In the course thereof he is at liberty to confer with anybody on the commission staff with the single exception of the member of the legal division who acted as staff counsel in the proceeding. This exception is based upon an internal rule adopted in the early part of 1952 when

⁴¹ P.U.C. RULES OF PRAC. AND PROC., Rules 69-72, 51 Cal. P.U.C. 652, 670, 671 (1952).

the staff-counsel program was greatly enlarged to provide an attorney to represent the staff in all major rate cases as well as in investigatory proceedings and other proceedings deemed of sufficient importance. Since even in rate proceedings there is usually an adversary, judicial aspect despite the fondness of commentators to label them legislative in nature, it was felt that the staff attorney, having presented and advocated the view of the staff on the record, should be proscribed from later pursuing his advocacy behind closed doors with those engaged in the deciding function. Accordingly he was forbidden, upon the submission of a proceeding, including a rate proceeding, to advise either the examiner or a commissioner or the Commission itself respecting that matter. The rule was designed to give recognition to a concept of fair play perhaps going beyond the minimum requirements of due process, that not even the Commission staff representing the public interest should be accorded an advantage not available to other parties. The rule was further based upon the desire of the Commission to achieve a measure of separation between the advocacy or prosecuting function and the deciding function.

The anomaly in this is that the desired road was pursued, insofar as rules are concerned, so short a distance of the way. Normally in proceedings of any importance a technical expert of the staff is assigned to join forces with the staff counsel, to be present at the hearing with him, and even to file an appearance. The technical expert is the representative of the commission division most vitally interested in the outcome of the proceeding, and he assists the staff counsel in making sure that the staff view on controverted issues is presented in the record. Yet there is no rule to forbid the examiner from conferring with such staff representative during the course of the decision-writing stage, nor is there any rule which forbids such expert from advising a commissioner or the Commission itself respecting the proceeding. As often as not, having become immersed in the technical problems involved and having had a hand in determining what position to take on the record, such expert is a more intent advocate for a particular view than the attorney himself.⁴² It is true that such staff representative is forbidden to appear as a witness in the proceeding, but that proscription hardly reduces his effectiveness as an advocate.⁴³

It should not be concluded, however, that there is in practice a violation of the concept of fair play in the decision-writing process. Rules are only as good as the men subject to them, and by the same token men with a

⁴² "A lawyer assigned the task of assuring that all significant facts on both sides are developed on the record may or may not be an advocate; if his purpose is to let the chips fall where they will, he may not be an advocate even though unequal representation on the two sides may force him to develop the materials on only one side." DAVIS, *ADMINISTRATIVE LAW* 392 (1951). See also that author's comments at p. 420.

⁴³ The prohibition is pursuant to an internal rule of the commission.

working sense of fairness do not need rigid rules to govern their conduct. It may be said with some assurance that the technical experts assigned as the staff representative to appear with the staff attorney at hearings, are conscious of the advocacy-judge problem and seek to confine their relationship with the examiner to assistance in explaining objectively the technical aspect of questions addressed to them after conclusion of the hearing. Any other approach would meet with quick resentment on the part of examiners who guard their independence jealously. Furthermore, examiners in practice avoid conferring with the staff representative unless answers to their queries are not otherwise available.

The examiner may see fit during the decision-writing process to address questions even to members of the staff who appeared as witnesses, but here again an effort is made to avoid such contact where the answer can be obtained from a staff member who did not participate in the proceeding.

Upon the completion of the draft by the examiner it is circulated among those on the commission staff who have an interest, including the interested division heads and the chief counsel, but normally not to personnel who appeared as witnesses. Each of these interested people may express his reactions and suggest changes or modifications. Thereafter the examiner undertakes to prepare a second draft, incorporating or not, as he sees fit, the suggestions which have been made.

It occasionally occurs at this stage that an interested staff division head disagrees with the opinion as written. This circumstance precipitates a conference with the assigned commissioner who studies the matter to satisfy himself whether the examiner's opinion is substantiated by the record and properly reflects positions of policy. In this conference process the chief examiner is usually called in to express his views on whether the opinion as written follows the record. If the assigned commissioner is satisfied with the proposed decision, it proceeds on its way to consideration by the Commission itself.

This latter process consists of having the proposed decision placed in the hands of each commissioner two weeks prior to the date set for final consideration at a conference of the full Commission. During that interval each commissioner studies the decision, and if not satisfied with some particular portion of it, may call for at least part of the transcript, exhibits and briefs. If agreeable to the assigned commissioner, changes in language may be incorporated during this period.

When the proposed decision finally comes up for consideration at commission conference, the division head or heads concerned are present in the conference room. Usually the examiner is not, though he may be called in to explain his views. If a division head disagrees with the opinion he has the opportunity to state his reasons. Upon the completion of discussion,

often characterized by the expression of various conflicting views, the final decision is reached, representing at least the majority position of those commissioners present.

The most noteworthy aspect of this whole process of decision-writing and decision-making is the considerable participation of the commission technical staff. The product finally presented to the Commission does in a real sense represent the independent judgment of the hearing officer who heard the case, but it likewise represents the technical assistance of the staff in the preliminary stages of decision-writing and it represents at least a consideration of changes suggested by that staff and, indeed, by individual commissioners at a later stage. To a degree, everyone in the Commission who might be concerned other than staff counsel has had a hand in the product submitted to the Commission, but that product retains the essential quality of being the examiner's proposed decision, unaltered by considerations of subjection to the dictates of a superior.⁴⁴

Notwithstanding this relative degree of independence, it would be in error to conclude that the examiner in presenting his final product to the Commission enjoys a freedom akin to that of a judge. A discovery under which examiners sooner or later chafe is that they are not free to determine policies or approaches of their own choice. Their function in the last analysis is a fact-finding one. In that realm their conclusions are rarely disturbed, but in the broad and indefinable realm of policy they can do little more than suggest. The exciting adventures of the judicial process into fields of statesmanship and political philosophy, which act as leaven to painstaking work, are only indirectly theirs to enjoy.

It may be well to repeat that the procedures for the examiner's role apply quite uniformly for the various types of matters which come before the Commission, whether the case be a rate increase application, a certificate matter, a complaint seeking reparation, an order of investigation, or some other type of proceeding coming within the Commission's cognizance. It is true, of course, that variations may be applied, depending not upon the labels of "quasi-judicial" or "quasi-legislative" or "quasi-administrative," but rather upon the degree to which an adversary aspect may be present.⁴⁵ If there is little of that element, as in certain instances where

⁴⁴ For a penetrating study of the "institutional decision" in administrative practice, see DAVIS, *ADMINISTRATIVE LAW* 330-64 (1951).

⁴⁵ That governmental action cannot be neatly pigeon-holed by label was recognized by Justice Holmes, dissenting in *Springer v. Philippine Islands*, 277 U.S. 189, 211 (1928): "It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments . . ." Often lawyers declare that rate-fixing for the future is "legislative" and they cite *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). But the New York Court of Appeals a year after the *Prentis*

the Commission issues an order of investigation looking toward the adoption of general rules governing a particular field of utility conduct, the examiner is under no constraint in discussing the problem freely on and off the record with anyone who might be able to make a contribution. In such cases the purpose of a hearing and a record is clearly not primarily to insure procedural due process, but rather to provide a fair opportunity for all to express their views. A similar example would be an investigatory order looking toward an interpretative opinion for a new statute, the investigation being undertaken so that persons affected by the statute can know how the Commission will administer it. While the Commission has no authority to issue a declaratory decision in the usual sense,⁴⁶ it has on occasion issued such an opinion.⁴⁷ Here again a relaxing of the usual examiner procedures would be appropriate.

Having described in some detail the examining and deciding processes we may turn to an appraisal of them.

DOES THE COMMISSION ACHIEVE FAIR ADMINISTRATION?

A

The absence of a publicly filed intermediate decision

Perhaps the chief criticism which some might lodge against the Commission's practice is that parties are not furnished as a matter of right with a proposed decision or report of the examiner (or of the assigned commissioner in those cases where that officer is present at the hearing), with the opportunity to file exceptions or at least to present argument.

The first *Morgan* case described the proposed decision practice as of "great value" though not essential to the validity of a hearing.⁴⁸ The second *Morgan* case seemed to increase the emphasis by declaring that "those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."⁴⁹ However, what the Court apparently had in mind was an underlying requirement that parties are en-

case said rate-fixing for the future is "judicial." *People ex rel. Central Park, N. & E. R.R. v. Willcox*, 194 N.Y. 383, 87 N.E. 517 (1919). And the Supreme Court in the first *Morgan* case held that a "quasi-judicial" hearing is required when an agency fixes rates for the future. *Morgan v. United States*, 298 U.S. 468, 480 (1936).

⁴⁶ The Federal ADMINISTRATIVE PROCEDURE ACT affirmatively grants to agencies authority to issue declaratory orders. ADMINISTRATIVE PROCEDURE ACT § 5(d), 60 STAT. 239 (1946), 5 U.S.C. § 1004(d) (1952). For a discussion of the limitations of this section, see DAVIS, ADMINISTRATIVE LAW 169-76 (1951).

⁴⁷ Illustrative is Household Goods Carriers Act Interpretation, 51 Cal. P.U.C. 333 (1951).

⁴⁸ *Morgan v. United States*, 298 U.S. 468, 478 (1936).

⁴⁹ *Morgan v. United States*, 304 U.S. 1, 18-19 (1938).

titled to a reasonable opportunity to know the claims against them and to meet them, and subsequent cases have made clear that if that requirement is otherwise met the lack of an intermediate report does not render the hearing unfair.⁵⁰ The requirement is met if the issues and the contentions in the proceeding are clearly defined. Since in matters before the California Commission the practice is uniform to the effect that the issues and contentions of all parties must be clearly drawn, it is most unlikely that any claim of unfairness could be sustained before the courts on the ground that a proposed report was denied.

It is interesting to observe that while the Federal Administrative Procedure Act was designed to enhance the importance of the examiner function by providing that the presiding officer "shall initially decide the case," a number of alternatives were provided in the same breath which in practice have substantially defeated the objective.⁵¹ Furthermore, with some types of cases such as those involving rates for the future and initial licensing, the whole intricate pattern to provide some kind of intermediate decision can be circumvented, and the parties furnished only with a final decision, merely upon a finding by the agency "upon the record that due and timely execution of its functions imperatively and unavoidably so requires."⁵² It is understood that the Federal Power Commission during the last two or three years has availed itself of this exception in an effort to speed up the disposition of cases before it.⁵³

The quoted language points to what many would consider the primary objection to an intermediate decision procedure. Timely execution of the regulatory function is the ever-present, ineradicable concern of nearly all administrative agencies and of the parties regulated by them. If fair deciding can be found in all other respects, then it seems highly questionable whether the additional time-consuming procedures incident to the intermediate decision should be indulged. Undoubtedly the California Commission was thinking in that direction when it provided in its rules for proposed reports only under special circumstances.

If a purpose of the intermediate decision is to afford parties the opportunity to point out ill-considered findings of fact before they get to the agency for fear the agency itself may not catch them, is not that danger largely removed in California Commission practice through the system of

⁵⁰ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

⁵¹ Federal ADMINISTRATIVE PROCEDURE ACT § 8(a), 60 STAT. 242 (1946), 5 U.S.C. § 1007(a) (1952). See DAVIS, *ADMINISTRATIVE LAW* 315 (1951).

⁵² Federal ADMINISTRATIVE PROCEDURE ACT § 8(a), 60 STAT. 242 (1946), 5 U.S.C. § 1007(a) (1952).

⁵³ The author has been advised that omission of intermediate decision procedure has not produced the time-saving the Federal Power Commission had hoped for, and that a restoration of that procedure is being effected.

circulating examiners' drafts of decisions twice among the staff technical experts and chief counsel before the product is finally presented to the Commission itself?

It is submitted that fair deciding is accomplished by the California Commission not only because of this draft-circulating procedure but because of the degree of independence of the examiner, which will be considered hereinafter, and because of the additional protection afforded by the rehearing process. When parties petition for rehearing, which is a matter of right,⁵⁴ an independent study of the record is made by a Commission attorney who previously had nothing to do with the case, to determine not only whether the decision under attack has necessary evidentiary support but to determine whether the broader concerns of fairness and impartiality have been met, and his recommendations to the Commission are usually controlling.⁵⁵

Before leaving this subject reference should be made to the procedure under the California Administrative Procedure Act. While a proposed hearing officer's decision must be filed as a public record, there is no provision enabling parties to file exceptions or argue at that point in the event the agency decides to adopt the proposed decision. However, if the agency does not adopt it, the parties are given a right of argument before final disposition.⁵⁶ This procedure appears to represent a concession to the intermediate decision concept without accepting it in full.

B

The independence of Commission examiners

The experience of the California Commission in the use of an examining corps, set up internally but with no allegiance except to the Commission itself, affords an interesting pragmatic answer to those who advocate the creation of an independent agency for the examining function.⁵⁷ It is submitted that this experience has proven that adequate examiner independence can be achieved without creating a wholly separated body, and that distinct advantages accrue from having examiners incorporated in the agency.

As to the first of these propositions, it is a phenomenon readily discernible to anyone associated with the Commission's internal functioning that

⁵⁴ CAL. PUB. UT. CODE §§ 1731-1736.

⁵⁵ For rehearings in other agencies see DAVIS, ADMINISTRATIVE LAW 322-24 (1951).

⁵⁶ CAL. GOVT. CODE § 11517(b), (c).

⁵⁷ See COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, LEGAL SERVICES AND PROCEDURES (March 1955) and the critique of the Chairman of the Interstate Commerce Commission in Arpaia, *The Independent Agency—A Necessary Instrument of Democratic Government*, 69 HARV. L. REV. 483 (1956).

whatever their preconceptions or earlier loyalties, examiners develop a psychological attitude of imperviousness to those influences within the agency which outside parties might regard as detrimental. When the present system came into being, no one was quite sure how it would work, especially because some of the examiners had been employed in other divisions of the Commission and quite properly had demonstrated their loyalty accordingly. Certainly there was a period of groping, but today no room exists to doubt the jealously-protected mental approach of the examiners to function as free agents within their assigned sphere.

The Federal Power Commission system appears to represent a somewhat comparable experience. There too the examiners are employees of the Commission but organized in a separate department. It is understood that they maintain an attitude of judicial distance as a matter of course. With them such feeling is fostered by the internal practice, even where not required by the separation provisions of the Federal Administrative Procedure Act,⁵⁸ of studiously avoiding, except at hearing, any member of the staff who had anything to do with the proceeding. If in the decision-drafting stage the examiner desires technical assistance, he seeks out some neutral person on the staff though admittedly it would be easier to consult an expert associated with the case. A similar practice and attitude of aloofness is understood to prevail in the Interstate Commerce Commission. The humorous appellation of "untouchables" applied to these examiners is not without significance.

Certain distinct advantages accrue from the system of having the examiners employed within the agency. It is necessary to approach this problem being mindful that the administrative process operates in terms of regulation, with an allied need for continuous policy-making. The passivity of a court is replaced by sua sponte investigation. Policy-making plays so vital a role even where the particular problems of a particular entity are involved, that fact-finding must be regarded as a somewhat incidental though important function. It is believed that where examiners are employed within the agency, there is much less tendency for the examiner to encroach upon policy-making functions. The result is that the agency is able to exercise a much firmer control in that province which is peculiarly its own. By the same token the examiner is in a far better position to know and to recognize the principles which should govern his work, without giving up the independence which properly attaches to his fact-finding function.

In an agency like the California Public Utilities Commission, where the aspects of regulation are manifold and policy-making reaches out in so many directions, the foregoing views seem to deserve particular recognition.

⁵⁸ Federal ADMINISTRATIVE PROCEDURE ACT § 5(c), 60 STAT. 239 (1946), 5 U.S.C. § 1004(c) (1952).

It may be otherwise with the agencies under the California Administrative Procedure Act. The problems of those agencies are on the whole far less complex, and the examiner is far less concerned with the need to ascertain and adhere to policies which have been established. Being organized in a wholly separated governmental body does not reduce his effectiveness or make for difficulties in his functioning.

Another distinct advantage in having examiners organized within the agency is that the technical skills of the agency staff may be utilized to the full. Under the California practice, the commission's examiners are free to draw upon those skills, and it is believed that the resulting decisions are much less subject to error.

Finally it should be pointed out that under the California practice of drafting of decisions, with review by staff members and individual commissioners before the product is finally submitted to the Commission itself, a valuable system of internal checks and balances is achieved which would hardly be possible if the examiner were not part of the Commission organization.⁵⁹

C

The weight given examiners proposed decisions

It matters not, of course, how independent an examiner may be in the conduct of the hearing and the preparation of a proposed decision unless the agency ultimately ascribes real weight to his performance. The practice of the Commission is reassuring in this regard. It recognizes its obligation to make and to be responsible for the final decision, not only on matters of policy but on findings of fact. However, with respect to the latter the conclusions of the examiner are disturbed only in those instances where a staff member or an individual commissioner has raised a doubt and where the Commission has satisfied itself that the doubt is justified after examination of the record by one or more of its members. Certainly the requirements of fairness seem fully to be met by this practice.

CONCLUSION

Of necessity many questions related to the hearing officer's function have gone unanswered in this exposition of the practice before the California Public Utilities Commission. For instance, one would like to explore further the degree to which fairness requires personal consideration of records by the individual commissioners, and one might wish to examine in greater detail the influence upon the examiner's function of the practice

⁵⁹ For comment on this aspect of the institutional decision see DAVIS, *ADMINISTRATIVE LAW* 354-56 (1951).

of assigning an individual commissioner to each proceeding. Enough has been said, however, to demonstrate that the Commission has, by the internal changes of recent years, taken a long step toward the achievement of fairness in its hearing and deciding processes. Experience may one day suggest the need for further changes, but it is believed that the greater part of the work is done.