

THE INCONSTANT LADY: DISCOVERY IN ADMINISTRATIVE ADJUDICATIONS AND THE EVIDENTIARY USE OF ITS FRUITS

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I. THE CURRENT DEBATE OVER DISCOVERY

Lawyers who obtained their educations in the afterglow of adoption of the Federal Rules of Civil Procedure learned as an article of faith that ample and relatively unlimited discovery in civil proceedings was a blessing.¹ It was seen as an integral part of the modernization of civil practice, bringing an end to the evils of “trial by ambush” and sharply truncating the time required for trial of an action.² Heeding the rosy summons to procedural progress and improvement, administrative agencies that conducted trial-type hearings were quick to embrace the cause of liberal discovery and adopt rules modeled upon — and in some instances directly copied from — the discovery provisions of the Federal Rules of Civil Procedure.³

Today, there are many who maintain that the trend to liberal discovery, especially in complex administrative proceedings, was a mistake.⁴ Excessive discovery — by which they mean virtually all discovery by adverse parties — is said to be a principal cause of the burgeoning expense and protracted duration of administrative hearings. Recent discussions of discovery have raised the claim that it is often used to harass the opposition and to render the expense and burden of trial so great as to prompt surrender of valid positions, rather than as a legitimate tool for gathering information needed to prepare for the hearing.⁵ These voices argue for a radical change in the course administrative agencies have been following and, consequently, for significant restrictions upon, if not abolition of, all rights of discovery in administrative adjudications.

Without in the least denying the sincerity of these views, it must be recognized that they tend to reflect to some extent a rather traditional conflict between adverse economic interests. Vociferous opposition to discovery has more often than not been voiced in advocacy on behalf of regulated industries and as a part of an attack on Government regulation in general.⁶ Defenders of the institution, on the other hand, have tended to be found in the ranks of those whose business it is to use regulatory agencies as forums for attacking the rates, products, and practices of members of

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¹Fed. R. Civ. P. 26-37.

²See *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958); *Hickman v. Taylor*, 329 U.S. 495 (1947).

³See e.g., Rules 60-65 of the Interstate Commerce Commission's General Rules of Practice, 49 C.F.R. 1100.60-1100.65.

⁴See P. Kissell and L. Roscher, *Availability and Use of Discovery at the Federal Energy Regulatory Commission: the Need for Modernization*, 2 Energy L.J. 79 (1981).

⁵See *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (concurring opinion of Powell, J.). See also W. I. Lunquist, *In Search of Discovery Reform*, 66 A.B.A.J. 1071 (1980).

⁶Adjudicative proceedings before agencies such as the Federal Trade Commission, the Occupational Safety and Health Review Commission, and the Federal Mine Safety and Health Review Commission seem to evoke views on discovery that are markedly different from those held by parties to FERC proceedings. Representatives of business who appear before so-called “enforcement” agencies tend to be firm advocates of extensive discovery under agency rules, because of their desire to learn the details of the Government's case against their clients in advance of the hearing. See J. L. McConn, Jr., *Discovery in the Federal Administrative Process*, 5 Litigation 28, 47 (Spring 1979). At the same time, there is great trepidation about the agency's “broad powers of discovery through its general subpoena power.” *Id.* at 28-29.

those same industries. The debate over the scope and future of discovery in administrative proceedings is part of the incessant and eternal combat between the "haves" and "have-nots" in our society. It is well to bear this in mind when assessing the virtues of the arguments for both sides.

There is, clearly, a core of merit to each side of the controversy. Administrative cases have become entirely too cumbersome, prolix, and expensive. In public utility proceedings, they tend to have many parties and to produce enormously lengthy records.⁷ Since a primary purpose of authorizing administrative agencies to conduct adjudicative hearings was to dispense with the formalism and expense of judicial trials,⁸ we are obligated to find a cure for these dysfunctions and to do so promptly. If discovery is a cause of the problem, it ought to be critically examined, and the rules should be changed if necessary.

It must also be recognized that the regulation of complex industrial and business activities cannot feasibly be conducted — or cannot be conducted well — unless agencies possess and utilize authority to secure information from members of regulated industries in circumstances where the companies will not voluntarily disclose it. The problem is particularly acute for public utility regulatory agencies which are charged with determining the lawfulness of rates.⁹ Without access to internal company financial information and other data, it would simply be impossible for the agency to do its job. The decision of the Supreme Court in *FPC v. Conway Corp.*,¹⁰ fastening a substantial antitrust jurisdiction on an unwilling public utility regulatory agency, has exacerbated the need to have viable discovery procedures in place as a matter of first priority.

So the challenge, at least in the short run, is to ensure that the availability and employment of liberal discovery does not result in irremediable damage to vital interests — interests that have far more social importance than the transient convenience of persons engaged in the trial of administrative cases. Until we have the time and inclination to undertake a considerable rethinking of discovery — as well as other procedural elements of the administrative process — we shall have to be content with a process of continual, short-term pragmatic adjustments under the aegis of administrative law judges.

II. THE "PAPER HEARING" PROPOSAL

We can begin a discussion of the subject of making evidentiary use of materials secured during discovery by noting that there is, of course, no reason why materials

⁷See *Initial Decision on Competing Applications for an Alaskan Natural Gas Transportation Project*, 58 F.P.C. 1127, 1137 (1977). The record involved in this decision consisted of 253 volumes of transcript, embracing almost 45,000 pages, about 1,000 exhibits (some such as environmental impact statements were almost 1,000 pages each), and innumerable references. See also *Trans-Alaska Pipeline System*, Docket No. OR78-1, "Initial Decision Phase I Issues", 10 FERC ¶ 63,026 (1980). The record in this case consisted of 131 volumes of transcript, containing 24,275 pages of transcript. In addition, 825 exhibits were admitted into evidence with 95 either withdrawn or rejected.

⁸See A. A. Gladstone, *The Adjudicative Process in Administrative Law*, 31 Ad. L. Rev. 237 (1979).

⁹See e.g., §§ 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d.

¹⁰426 U.S. 271 (1976). *FPC v. Conway Corp.* held that the Federal Power Commission's jurisdiction to review a public utility's wholesale electric rate increase permits consideration of the utility's alleged use of its wholesale rates to forestall its customers from competing with it at retail. In order for the agency to consider such a matter competently, it is necessary for the agency to have the power to compel the production of internal company financial data and other relevant information. See also *Illinois Cities of Bethany v. FERC*, 670 F.2d 187 (D.C. Cir. 1981).

of that nature *must* be made part of the evidentiary record.¹¹ In the usual case, discovery materials are used to develop direct evidence and cross-examination, rather than as the case-in-chief of the party who secured those materials. There have been efforts to change the usual practice, however.

Institutionalizing the routine use of discovery materials as evidence, in lieu of the traditional record of a trial-type hearing (combining both documentary submissions and oral examination of the witnesses), has in fact been seriously considered by the FERC. In its Notice of Proposed Rulemaking of March 9, 1981, proposing a general revision of its Rules of Practice and Procedure, the Commission solicited comments on a proposal to authorize "paper hearings" under the revised Rules of Practice and Procedure.¹² Under the "paper hearing" proposal, witnesses whose prepared direct testimony is filed would thereafter be required to file written answers to questions propounded to them in writing by the lawyers for the adverse parties. In some versions of the rule, a second round of written follow-up questions and answers would be authorized. Then the written testimony, together with the questions to, and answers of, the witness ("or other discovery") would be placed in the record in lieu of oral cross-examination.¹³

The proposal was greeted with considerable criticism in comments upon the proposed revision of the procedural rules.¹⁴ In response, the Commission did not adopt an authorization to hold a "paper hearing" in lieu of the traditional oral examination when it promulgated the new procedural rules.¹⁵ However, the agency did not entirely abandon the idea. It said only that it wanted to give additional consideration to the notion of the "paper hearing."¹⁶

The "paper hearing," in which depositions on written interrogatories would be substituted for oral examination in a formal, trial-type hearing, is a concept that should have been allowed to die an unmourned death. The substitution of written interrogatories for a trial-type hearing would not improve the timeliness or efficiency of the hearing process and would destroy many of the benefits that that process provides to the agency and the public.

In the first place, the "paper hearing" would tend to load the hearing record with a great volume of irrelevant material. Many of the questions put to an expert witness during discovery are definitional in character. Particularly when the subject of the testimony is a complete thesis of accounting, engineering, or economics, a good deal of the examination consists of asking, in substance, "What do you mean by that?" While these inquiries are certainly helpful to the attorneys who represent adverse parties in devious lines of examination designed to point out the weaknesses in the witness' thesis, a great deal of them simply clarify the testimony, and eliminate misunderstanding of the testimony or develop blind alleys, into which exploration will be unhelpful. There is no good reason to burden the record with

¹¹ As we all know there are many reasons to permit access to documents and testimony other than to allow admissible evidence to be secured. The doctrine embodied in Rule 26(b)(1) of the Federal Rules of Civil Procedure, that material may be discoverable even if it is inadmissible itself, so long as its disclosure is calculated to lead to the discovery of admissible evidence, applies equally in administrative proceedings, just as it does in civil actions in the courts. Further, it is well established that a party may conduct discovery for the purpose of determining the existence of discoverable materials or for the purpose of finding areas where efforts to present evidence would be futile.

¹² The proposal was drafted as Rule 506(d) of the proposed new Rules, intended for codification at 18 C.F.R. § 385.506(d). *See* 46 Fed. Reg. 17023 (1981).

¹³ *Id.*

¹⁴ *See* the preamble to the Commission's rulemaking action, adopting the revised Rules, 47 Fed. Reg. 19014, 19019 (1982).

¹⁵ *Id.*

¹⁶ The Commission said that the "paper hearing" "will be examined in a future rulemaking." *Id.* That future rulemaking has yet to take place.

written questions and answers of this character merely because the questions were asked and the answers were given. The material is not useful to the agency and tends to generate a paper jungle in which useful information is lost to view.

One of the chief virtues of oral cross-examination is the opportunity that the cross-examining attorney has to ask follow-up questions based upon the witness' prior answer. This opportunity is lost if examination is limited to written interrogatories. Faced with such a restriction, the lawyer preparing the examination is forced to devise lines of follow-up questions based upon every response the witness could conceivably give to the prior question. This problem is especially acute in the case of an expert witness, whose testimony is not about a specific historical event but rather concerns opinions, value-judgments, and predictions about the future. By limiting the examiner to written interrogatories, therefore, one virtually compels the posing of a substantial volume of needless inquiries, the responses to which are unlikely to be of very much use to anyone.

Finally, reliance on a "paper hearing" would deprive the agency and the public of one of the quintessential benefits of adjudication as a decision-making method: the appearance of justice and fair treatment for all parties.¹⁷ The hearing room is thought of as a place to decide important and controversial questions. Many believe that a Government in which the citizen or his representative has the opportunity to state his views face-to-face with the decisionmaker is a fairer and juster Government. There is distrust for decisions made entirely on the basis of documentary submissions. There is also distrust for institutional decisions, rendered by faceless and anonymous functionaries. In all of the administrative process, the trial-type adjudicative hearing is, with few and sporadic exceptions,¹⁸ the only occasion on which the process of government decision-making takes place in open view and with the opportunity on the part of all interested persons to come face-to-face with the one who will decide. If we substitute a "paper-hearing" for the kind of administrative adjudication we now have, something that seems fair and just about the way our Government functions will have been lost. The confidence of our citizens in their Government will be diminished.

III. DISCOVERY MATERIALS AS EVIDENCE

Assuming that agency rules do not foreclose the issue, and that counsel for a party that has secured discovery materials wishes to introduce them, or their contents, at the administrative hearing, there are essentially three ways to do so. By far the best technique — and indeed the best way to prove anything in an administrative hearing — is to have one of the proponent's witnesses proffer the materials as an exhibit to that witness' direct testimony or rebuttal testimony. This technique is preferable for several reasons. In complex administrative hearings involving issues of rates or public utility practices, virtually all of the witnesses are expert witnesses. Evidentiary materials have more impact when they are sponsored by an expert in his field as probative of a fact in issue. Further, the expert is available

¹⁷See K. C. Davis, *The Requirement of a Trial-type Hearing*, 70 Harv. L. Rev. 193 (1956). See also B. Schwartz, *Some Recent Administrative Law Trends: Delegations & Judicial Review*, 1982 Wis. L. Rev. 208 (1982).

¹⁸A member of a regulatory agency, or a group of agency members, will occasionally preside over an informal hearing at which interested persons are invited to state their views on a matter, usually a rulemaking proposal, pending before the agency. These sessions are relatively infrequent, however. From the standpoint of an agency member, they appear to be relatively inefficient proceedings in terms of conveying information. (Perhaps they are; transmission of information with maximum efficiency is not the purpose of a hearing of any sort). Hence, it is rare for an agency member, after once having tried the task of presiding over an informal hearing, voluntarily to undertake that task again.

to the forum to explain and illuminate the significance of, and inferences reasonably to be drawn from, the discovered materials. Any other mode of presentation merely provides the raw materials themselves without the patina of explanation and elucidation. In addition, as virtually any experienced administrative law judge will concede if asked, the case-in-chief evidence of the parties tends to be consulted more often, and given more weight, than their cross-examination when the initial or recommended decision is prepared. The reasons for this lie in the inherent risks and difficulties involved in attempting meaningful cross-examination of professional expert witnesses.¹⁹

A second technique for securing admission of discovery materials is to seek to use them as exhibits during cross-examination. Of course, the examiner must find a witness to whose direct testimony the discovered document is relevant in order to employ this technique. It is also essential to be able to secure from the witness or his counsel an acknowledgement that the document is authentic and authoritative on the subject-matter of the direct testimony. The task of securing such an acknowledgement is facilitated if, when discovery is undertaken, counsel is careful to ensure that responsibility for the responses is clearly placed upon some individual on the other side of the case. There is no more helpless feeling for counsel than to confront a witness with a document during the course of cross-examination only to have the witness repudiate it, both as to authenticity and reliability, leaving counsel with no other peg on which to hang his motion for admission of the document.

A third method of placing discovery materials in the record is by stipulation. Under the procedural rules of many agencies, including the FERC,²⁰ a party may propose stipulations of fact. If adverse parties reject the offer to stipulate and the fact is proven by evidence, the presiding judge is authorized, upon finding that the refusal was wrongful and not made in good faith, to order the assessment of costs of proving the fact against the party who refused the offer to stipulate.²¹ Assuming that a document obtained on discovery is relevant on its face, its authenticity is as much a matter subject to this rule as any other matter of fact. In addition, if the agency's rules permit a party to direct requests for admission at another party the authenticity of a document obtained on discovery, as well as the correctness of its contents, can be elicited by filing such a request. Assuming that the issues of relevance, authenticity, and correctness are moved out of the way by the proper orchestration of discovery devices, there would seem to be little ground for valid objection to admission of the material. The hearsay exclusionary rule, of course, does not apply to documents authored by the party seeking to invoke the rule.²²

IV. DEPOSITIONS

The subject of depositions deserves separate discussion. Administrative practice is unlike civil court practice in that an application to the agency must be made for authorization to take a deposition under the aegis of the agency's procedural rules.²³ There are no "hip pocket" depositions,²⁴ as we have under the

¹⁹I. Benkin, *Is it Bigger than a Breadbox?: An Administrative Law Judge Looks At Cross-Examination of Experts*, 21 A.F.L. Rev. 364 (1979).

²⁰See 18 C.F.R. § 385.508(3)(e) (1983).

²¹See 18 C.F.R. § 385.604(a) (1983).

²²See Fed. R. Evid. 801(d)(2) which states that a statement is not hearsay if "the statement is offered against a party and is (A) his own statement, in either his individual or representative capacity"

²³See 18 C.F.R. § 385.1906(a) (1983).

²⁴See Fed. R. Civ. P. 30(a) which provides that "leave of court . . . must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant." See also Rule 30(a) of the United States Claims Court.

Federal Rules, in the Federal administrative agency practice.

One can quarrel about the value of the requirement that advance authorization for a deposition must be obtained.²⁵ In my view, however, the requirement serves an important and useful purpose in that it tends to preclude abuse of the deposition process.²⁶ There was, for example, a case in which a public utility sought to take the depositions of the managers of the electrical departments of six small towns that purchased wholesale power from the utility and that had intervened in opposition to the utility's rate increase request. There is nothing inherently suspect about such discovery. However, the notices of deposition specified that the location of the six depositions would be the utility's headquarters building. Because of the requirement for advance authorization, the administrative law judge was able to modify the notices to require the depositions to be taken at locations more convenient to the individuals involved.²⁷ This sort of routine surveillance tends to reduce the potential for discovery to become an instrument of harassment, an omnipresent danger in large and complex cases and a matter of great concern to an agency that, like FERC, is empowered to issue process on a nationwide basis.²⁸

As a generic matter, there are three types of depositions upon oral interrogatories. They are the deposition to preserve testimony, the formal deposition taken for discovery purposes, and the informal, investigatory deposition. In general, the character of the deposition will largely depend on the authorization sought and obtained in advance of taking it.

A deposition to preserve testimony is taken when there are grounds to believe that a needed witness will not be available to testify at the hearing.²⁹ The party seeking authority to take the deposition must indicate in the application that the object is to preserve testimony and must include justification for using a deposition in lieu of the witness' personal appearance at the hearing. Frequently, the judge will preside over the taking of the deposition in order to observe the demeanor of the witness and to be available to rule immediately on motions relating to the oral examination. A deposition to preserve testimony will usually be received as part of the record without much formality, particularly when the witness is not actually available to testify at the hearing.

At the other end of the spectrum is the investigatory or informal deposition.³⁰ This is little more than an interview with the witness, in question-and-answer form, conducted under oath and in the presence of a stenographic reporter who records the questions and the answers. Counsel for parties other than the one conducting the deposition may or may not have the right to be present, but they are not

²⁵See 3A Barron & Holtzoff, *Federal Practice and Procedure* 455-56 (Wright ed. 1958), arguing that the only valid purpose of requiring leave of court to take a deposition is to protect "a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit."

²⁶As one commenter has noted, "unlike the practice at the FERC, most discovery under the Federal Rules is to be undertaken without the involvement of the court itself. This is perhaps the single greatest contributor to the discovery abuse which occurs at the federal court level and is in marked contrast to the discovery scheme established at the Commission, where approval must first be obtained." P. Kissell and L. Roscher, *supra* n. 4 at 92.

²⁷*Potomac Edison Company*, Docket No. ER76-221, "Presiding Administrative Law Judge's Order Modifying Prehearing Conference Order and Establishing Procedural Dates," issued July 21, 1976 (unpublished).

²⁸Natural Gas Act § 14(c), 15 U.S.C. § 717m(c). Federal Power Act § 307(b), 16 U.S.C. § 825f(b).

²⁹See Fed. R. Civ. P. 32(a)(3). In practice, such depositions have been authorized in FERC proceedings under the general supervisory powers of administrative law judges, 18 C.F.R. § 385.504(b)(8), (19).

³⁰Investigatory depositions have been taken in adjudicative proceedings more by inadvertance than by design. See n. 43, *infra*. They are a well-organized feature of non-adjudicative investigations. See FERC Rules Relating to Investigations § 1b.12, 18 C.F.R. § 1b.12 (1983).

permitted to examine the witness. The administrative law judge is absent. The critical feature about the informal or investigatory deposition is that it will not normally be received as part of the administrative record except for the purpose of impeachment of the testimony of the person whose deposition was taken, in the event that person becomes a witness at the hearing.

Finally, we have our traditional discovery deposition.³¹ It may or may not be conducted in the administrative law judge's presence. Its hallmark is that parties other than the one conducting the deposition are given notice and the opportunity to cross-examine the person whose deposition is taken. There is no general rule prohibiting evidentiary use of the discovery deposition, and, indeed, the procedural rules of the FERC seem to contemplate at least occasional admission of depositions as part of the hearing record. Rule 1906 of the Commission's procedural rules gives administrative law judges presiding over hearings discretion to receive discovery depositions as evidence in the record.³² In light of the statutory inapplicability of hearsay strictures to administrative proceedings³³ and because the opportunity to cross-examine during a deposition would seem to satisfy the statutory right to "such cross-examination as may be necessary for a full and true disclosure of the facts,"³⁴ there appears to be no statutory barrier to use of discovery depositions as evidence.

Nevertheless, most administrative law judges would admit a tendered deposition only after a showing of some special justification for doing so. There are several reasons for this attitude. First, counsel is free on deposition to inquire into areas that would be deemed irrelevant for purposes of the evidentiary record. One of the administrative law judge's duties is to manage the hearing so as to exclude from the record irrelevant matter.³⁵ Consequently, judges are loath to admit entire depositions without having had the opportunity to cull irrelevant material. A second reason for reluctance to receive depositions is that objections to questions are handled differently on deposition than they are in the hearing room. Except in the rare case where a judge presides, the witness is obligated to respond to a question on deposition notwithstanding counsel's objection to it. Both the objection and the answer remain in the transcript. When admission of the deposition is sought, the judge is faced with a Hobson's Choice between ruling on a host of objections or receiving into the record inadmissible matter. Finally, there is the natural tendency of a judge in a large and complex case to want to be present when the evidence that he or she is required to explicate is adduced. There is more to this than simply the presence or absence of the opportunity to observe the demeanor of the witness, though that of course is part of it. The desire of a craftsman charged with turning out a product to participate in the development of the raw material — the "laying-on of hands" phenomenon, — is undeniable even if ineffable. Use of depositions in lieu of "live" testimony simply is not a "neat" way to build a hearing record.

V. AN INSTRUCTIVE EXAMPLE

A recent and ongoing proceeding at FERC contains an instructive example of

³¹See Fed. R. Civ. P. 30(a)(b)(c); 18 C.F.R. § 385.1906 (1983).

³²The Rule states:

No part of a deposition will constitute part of the record in the proceeding, unless received in evidence by the Commission or presiding officer. 18 C.F.R. § 385.1906(h) (1983).

³³"Any oral or documentary evidence may be received but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d).

³⁴*Id.*

³⁵See 18 C.F.R. § 385.509(a) (1983).

the use of a deposition as evidence. The proceeding is the massive *TAPS* case,³⁶ in which an adjudicative hearing was ordered to determine whether and to what extent the rates for transportation of oil via the Trans Alaska Pipeline System are just, reasonable, and otherwise lawful under the Interstate Commerce Act. One of the most hotly contested issues in the proceeding is whether some part of the \$9.2 billion spent constructing the pipeline should be deleted from the rate base on the ground that it represents imprudent expenditure on the part of the pipeline owners. Several protestants, including the State of Alaska and the FERC Staff, have charged the owners with imprudent management of the construction project.

Early in the case, it became clear that, in resolving the dispute surrounding this issue, the testimony of Edward L. Patton would be critical.³⁷ Patton had served as Chairman and Chief Executive Officer of Alyeska Pipeline Service Company, the owners' agent for management of the construction project, while the pipeline was being built. By early 1982, five and a half years after the project was completed, Patton was dying of cancer.

Because the hearing of their case-in-chief testimony on cost-of-construction issues was not scheduled to begin for more than a year, the respondent pipeline owners secured authorization for a deposition to preserve Patton's testimony to be conducted on February 3, 1982 in the Seattle hospital where he was a patient. In accordance with FERC practice, Patton's direct testimony had been written out, sworn to, and filed in the proceeding.³⁸ The announced purpose of the deposition was to permit him to be cross-examined by the protestants. Patton's physical condition deteriorated markedly as the date for the deposition neared. The respondents' counsel advised counsel for the protestants that Patton, though lucid, could not be examined for more than two or three hours a day, cumulatively, and would require periodic, lengthy rest breaks. Faced with these restrictions and the expense of a lengthy deposition a continent away from the hearing site, counsel for the protestants decided not to attend the deposition.

It turned out to be a brief, *pro forma* session with only Patton, counsel for the respondents, and the reporter present. At the deposition, Patton adopted the prepared direct testimony filed in his name. After Patton's death, several protestants moved to strike his prepared testimony. The presiding administrative law judges³⁹ issued an order, denying the motion.⁴⁰ They rejected the protestants' contention that the restrictions on the deposition of Patton amounted, as a practical matter, to denial of the right of cross-examination guaranteed by the Administrative Procedure Act. The order held:

³⁶*Trans Alaska Pipeline System*, FERC Docket No. 0178-1. Aspects of the proceeding have been before the United States Supreme Court in the *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978).

³⁷See *Trans Alaska Pipeline System*, Docket No. OR78-1-011, "Presiding Administrative Judges' Order Denying Motions to Strike Testimony" issued December 15, 1982 (unpublished). The judges' order noted that Patton's testimony was "a highly desirable, if not essential" source of information for an agency "seeking to render an informed decision." *supra* at 1.

³⁸This is the general method prescribed for presenting case-in-chief testimony in a FERC hearing. See FERC Rules of Practice and Procedure 506(a) and 507, 18 C.F.R. §§ 385.506(a), 385.507 (1983).

³⁹There were two FERC administrative law judges designated to preside over the *Taps* case (See *Trans Alaska Pipeline System*, 21 FERC ¶ 63,033 (1982)) — a testimony to the massive size of the proceeding. It is possible that the *TAPS* case is the largest and most complex case currently being tried in any type of adjudicative forum, court or agency, anywhere in the United States.

⁴⁰*Trans Alaska Pipeline System*, "Presiding Administrative Law Judges' Order Denying Motions to Strike Testimony," *supra* n. 37. The judges' order also denied a motion to strike the prepared written testimony of Frank P. Moolin, a second former Alyeska executive who had also died before the hearing. Unlike Patton, however, Moolin had not been the subject of a deposition to preserve testimony. The Commission affirmed the refusal to strike Moolin's testimony, See *Trans Alaska Pipeline System*, 22 FERC ¶ 61,096 (1983), but did not review the administrative law judges' ruling on the Patton material.

The failure of counsel for the protestants and the FERC Staff to appear and cross-examine Mr. Patton constituted, in our judgment, a knowing and effective waiver of the opportunity for cross-examination. Although counsel now say that the information given to them about the physical condition of Mr. Patton made it clear that his health would not permit effective exercise of their rights to cross-examine him, this is disputed by the respondents, and the record does not support the position that there could not have been effective cross-examination. At least, the protestants and the FERC Staff were obliged to attempt to participate in the deposition session before they can be heard to complain that it did not afford them the opportunity to vindicate their rights. In a case of this size, wherein extremely large sums are at stake, the FERC Staff's statement that budgetary considerations justified boycotting the deposition session has a hollow ring and does not constitute a meritorious argument.⁴¹

So Patton's prepared direct testimony was received in evidence based upon his adoption of it at a deposition to preserve testimony, notwithstanding the absence of cross-examination on its contents.

Would the same result have followed if the deposition had been announced as a discovery deposition rather than a deposition to preserve testimony? The same result probably would have obtained, because the nature of the ruling was more of a pragmatic judgment than a theoretical one. The driving element behind the decision to receive Patton's prepared testimony was, as the judges said in their order, the conviction that

In a case which one of the principal issues is the prudence of the expenditures Alyeska incurred to construct TAPS, the testimony of [Patton] . . . would clearly be highly desirable, if not essential, sources of information for an agency seeking to render an informed decision.⁴²

This ruling in *TAPS* suggests that in dealing with discovery questions, particularly the evidentiary use of discovery material, administrative law judges are not animated by any grand or arcane theory. Rather, they are trying to achieve two practical objectives. The first is to make sure that all parties adhere to the essential rules of civil litigation, so that all participants will receive fair treatment and a fair hearing. The second is to compile a record that will contain all of the information the agency must have to reach an informed decision that will be sustained — at least as far as the substantial-evidence rule is concerned — upon judicial review. Sometimes these two goals may appear to conflict, and the judge must navigate between the shoals of that conflict. In the case of the Patton testimony in the *TAPS* proceeding, the balance weighed in favor of completeness of the record, and appeals to the technical "neatness" of the opportunity for unlimited cross-examination had to give way.⁴³

⁴¹*Trans Alaska Pipeline System*, "Presiding Administrative Law Judges' Order Denying Motions to Strike Testimony" *supra* n. 37 at 2.

⁴²*Id.*

⁴³But it is not always thus. In June 1979, a FERC administrative law judge was faced with an incident in which a Commission Staff lawyer, taking the deposition of some witnesses, had refused to permit cross-examination by counsel for the respondents in the enforcement proceeding. Ruling that the resultant depositions had "no status except as the record of interviews conducted under oath," the judge held that the inadmissibility of the depositions as part of the evidentiary record was "axiomatic" and was mandated by the Administrative Procedure Act. Here was an instance where, in the absence of a countervailing reason to rule otherwise, the administrative law judge required strict compliance with the procedural requirements for taking depositions. The remedy for noncompliance, it was held, was refusal to permit the party who took the depositions to make them part of the evidentiary record. *Black Marlin Pipeline Co.*, "Presiding Administrative Law Judge's Order Dismissing Motion to Strike Depositions or for Alternative and Additional Relief," Docket No. CP75-93 (Remand), issued November 9, 1979, p. 4 (unpublished).

VI. A GREAT ENGINE OF TRUTH

Like the inconstant lady in the torch song whose lover complains that he “can’t live with her and can’t live without her,” the institution of discovery in administrative hearings often presents a frustrating and inconsistent picture. We are currently in a time of re-evaluation and change, so far as the administrative process is concerned. Teaching the general public, as well as agency members and their staffs, to discern the virtues of the adjudicative process as we now know it is difficult. The tendency to view informal rulemaking or “paper hearings” as some kind of universal panacea for the ills that afflict administrative agencies is strong. The passions of *soi distant* reformers for radical surgery on the discovery rules run hot. It is up to the legal community that understands the administrative process for what it is — a great engine of truth — to keep our heads amid all of this sound and fury. Proposals for the drastic revision of discovery in administrative adjudications constitute a subject on which a little reflection and a lot of contemplation will produce manifold benefits.