

THE FERC ADJUSTMENTS PROCESS UNDER SECTION 502(c) OF THE NATURAL GAS POLICY ACT OF 1978

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WHEN POLICIES ARE implemented through broadly applicable rules and orders, the need for generality prevents the policymaker from taking into account and providing for all of the possible situations to which his pronouncements will apply. Inevitably, general rulemaking is accompanied by claims of unique hardships and inequities in individual cases. Thus, the very quality of rulemaking which makes it attractive as a method of policy-making—its generality—is also its major source of criticism. One solution to this problem is to establish a procedure which permits individuals to apply for exceptions or variances from general rules on a case-by-case basis.

Such an “adjustments” procedure is mandated by section 502(c) of the Natural Gas Policy Act of 1978 (“NGPA”) for persons who desire to seek relief from any rule or rule-like order, other than certain emergency orders, issued under the NGPA.¹ This article discusses section 502(c), its historical antecedents, and the implementing regulations issued by the Federal Energy Regulatory Commission (“FERC” or “Commission”).² It also analyzes the nature of the adjustments process and considers several major legal issues that are likely to arise under the statute and the Commission’s regulations.

A. AN EMERGING COMMISSION PROCEDURE

In order to provide for relief in special cases arising under rules and orders having the effect of rules, section 502(c) of the NGPA requires the FERC and other agencies implementing the NGPA to establish procedures “for the making of such adjustments, consistent with the other purposes of this Act, as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens.” The NGPA’s adjustments process encompasses requests for “an interpretation, modification, or rescission of, exception to, or exemption from,” applicable rules or orders promulgated under

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¹15 U.S.C. § 3412(c) (Supp. II, 1978). Section 502(c) is not applicable to orders issued under sections 301, 302, and 303 of the NGPA, 15 U.S.C. §§ 3361-3363 (Supp. II, 1978).

²18 C.F.R. §§ 1.40-1.41. This article focuses on the procedures for adjustments requests initiated under section 1.41 and continuing through review proceedings under section 1.40. It does not extend to the procedures in 18 C.F.R. §§ 1.42 and 1.43 for obtaining interpretations and declaratory orders. We, note, however, that the Commission Staff has discretion to treat an application for an adjustment as a request for an interpretation, in which case the parties will be notified and the adjustment proceeding will be stayed pending issuance of the interpretation and a request by the applicant for reopening. 18 C.F.R. § 1.41(q).

that Act.³ The FERC's rules for considering and granting or denying adjustment requests are contained in sections 1.40-1.41 of the Commission's Rules of Practice and Procedure.⁴

There is nothing new about a decisional structure consisting of general rules subject to individual exceptions. Section 502(c) has its direct antecedents in adjustments procedures implemented by the Office of Hearings and Appeals ("OHA"), a quasi-independent body within the Department of Energy ("DOE"), and by its predecessors in connection with the regulation of the petroleum industry.⁵ Other Federal agencies also have adjustment-type mechanisms for granting individualized exceptions or variances from general rules or standards.⁶ Further, the Commission itself and its predecessor, the Federal Power Commission, have recognized the need for granting extraordinary relief from general curtailment classifications⁷ and for allowing individual applications for rates in excess of area and national rates established by rules.⁸

Nevertheless, for the FERC and for practitioners before that agency, section 502(c) is distinctive in its potential for procedural informality. Section 502(c) states, with respect to procedure, merely that the procedure for reviewing adjustments requests must include "an opportunity for oral presentation of data, views, and arguments." In selecting that language, Congress closely paralleled the Administrative Procedure Act's ("A.P.A.'s") description of informal rulemaking procedures,⁹ and it clearly set the minimum procedural requirements below the level prescribed by the A.P.A. for formal rulemaking and formal adjudication.¹⁰ Indeed, section 502(c) has

³15 U.S.C. § 3412(c) (Supp. II, 1978). A case interpreting similar language in section 7 of the Federal Energy Administration Act of 1974, 15 U.S.C. § 766(i)(1)(D) (1976), states that an "adjustment" is a different form of relief from "an interpretation, modification or rescission of, exception to, or exemption from" a rule or order, *i.e.*, that the statute includes the latter phrase not to define "adjustments" relief, but to add to it. *Delta Refining Co. v. FEA*, 559 F.2d 1190, 1196 (TECA 1977). *Accord New England Petroleum Corp. v. FEA*, 455 F. Supp. 1280, 1289-99 (S.D. N.Y. 1978). Another court, interpreting similar language in section 504 of the Department of Energy Organization Act (DOE Act), 42 U.S.C. § 7194 (Supp. I, 1977), found that the reference to interpretation, modification, etc. constituted a definition of the concept of "adjustments" relief. *Texaco, Inc. v. DOE*, 460 F. Supp. 339 (D.D.C. 1978) *appeal docketed*, Nos. 79-1643, 79-1652 (D.C. Cir. June 26, 1979). For purposes of this article we treat the concept of an adjustment as including interpretations, modifications, rescissions, exemptions, and exceptions.

⁴See footnote 2, *supra*. The Department of Agriculture, which is responsible for defining and certifying essential agricultural uses under title IV of the NGPA, has also issued regulations governing requests for adjustments and interpretations under section 502(c). *See* 7 C.F.R. Part 2901 (1979); 44 Fed. Reg. 55802 (Sept. 28, 1979). In addition, the Economic Regulatory Administration, which is responsible for establishing curtailment priorities under title IV, has proposed regulations to implement section 502(c). 44 Fed. Reg. 27676 (May 11, 1979). However, no final regulations have yet been issued.

⁵See discussion pages 87-90, *infra*.

⁶See, *e.g.*, 30 U.S.C. § 811(c) (Supp. I, 1977), as amended by the Federal Mine Safety and Health Act Amendments of 1977, Pub. L. No. 95-164, § 201, 91 Stat. 1290.

⁷See 18 C.F.R. § 2.78(b).

⁸See, *e.g.*, 18 C.F.R. § 2.56a(g). *See generally Permian Basin Area Rate Cases*, 390 U.S. 747, 770, *rehearing denied* 392 U.S. 917 (1968); *Tenneco Oil Co. v. FERC*, 571 F.2d 834 (5th Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

⁹The Administrative Procedure Act provides that, in rulemakings which are not required to be made on the record after opportunity for hearing, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments, with or without opportunity for oral presentation." 5 U.S.C. § 553(c) (1976).

¹⁰See 5 U.S.C. §§ 554, 556, 557 (1976).

introduced into the Commission's practice and procedures the potential for informal proceedings largely outside of the A.P.A.—*informal adjudications*.¹¹

To parties and practitioners before the FERC, accustomed to resolving individualized cases through the mechanism of formal adjudication, the advent of informal adjudicative proceedings is a far reaching development. Likewise, to an agency whose critics have complained of the slowness and burdensomeness of its formal adjudicatory procedures, section 502(c) presents the opportunity to experiment with less formal and, one hopes, more streamlined procedures for resolving individualized problems arising under the general rules implementing the NGPA.¹² However, the selection of less formal procedures should be viewed as somewhat experimental. To the extent that the adjustments process is characterized as informal adjudication, as opposed to rulemaking or formal adjudication, one moves outside the A.P.A.'s relatively clear procedural requirements, into imperfectly charted procedural territory. In this new field, hybrid procedural guidelines for the Commission's adjustments process may evolve from the decisions of reviewing courts.

It is likely that the section 502(c) adjustments process will become a significant new procedure at the FERC. Given the complexity of the NGPA and the fact that its rules apply broadly to large classes of persons, one can expect many parties to seek adjustments as the process becomes more generally understood. Already these procedures have been extensively used. In the first year of their operation, the FERC docketed over 100 applications for adjustments, and final or interim orders have been issued in many cases. A significant number of pipelines, producers, and distributors have filed applications for adjustments relief from a variety of regulations.¹³ In addition, applications for adjustments from incremental pricing rules under Title II of the NGPA have been filed by several individual end users.¹⁴ Also, end users, whose only recourse from curtailment previously would have been the extraordinary relief procedures under section 2.79 of the Commission's rules, have employed the adjustments process to seek relief from curtailment plans adopted under Title IV of the NGPA.¹⁵ Moreover, some of the adjustments proceedings are becoming adversarial in nature, as parties opposing relief seek to protect their interests.¹⁶ Thus, practitioners before the FERC

¹¹See Byse, *The Department of Energy Organization Act: Structure and Procedure*, 30 *ADMIN. L. REV.* 193, 213-17 (Spring 1978).

Although informal adjudications may be new to the FERC, they are not new to the Government as a whole. It has been estimated that "the phrase 'informal adjudication' describes about 90 percent of what the government does with respect to individuals." Verkuil, *A Study of Informal Adjudication Procedures*, 43 *U. CHI. L. REV.* 739, 741 (Summer 1976).

¹²The extent to which informal adjudicative procedures may be employed under the Natural Gas Act, 15 U.S.C. §§ 717-717w (1976), is beyond the scope of this article. However, the possibility of such a development should not be rejected out of hand. See generally *Second National Natural Gas Rate Case*, 567 F.2d 1016 (D.C. Cir. 1977), cert. denied 435 U.S. 907 (1978).

¹³See, e.g., *Cities Service Gas Co.*, FERC Dkt. No. SA80-30, (curtailments); *Midwestern Gas Transmission Co., et al.*, FERC Dkt. No. SA80-11 (incremental pricing); *Louisiana General Petroleum Corp.*, FERC Dkt. No. SA80-68 (recovery of section 102 prices).

¹⁴See, e.g., *World Color Process, Inc.*, FERC Dkt. No. SA80-65; *The Jim Dandy Co.*, FERC Dkt. No. SA80-66.

¹⁵See, e.g., *Panhandle Eastern Pipe Line Co., (Anchor Hocking Corp.)*, FERC Dkt. No. SA80-41.

¹⁶See, e.g., "Order Granting Petitions to Intervene," *Southern Natural Gas Co.*, FERC Dkt. No. SA80-59 (Jan. 31, 1980); Letter Order Granting Interventions, *Panhandle Eastern Pipe Line Co. (Anchor Hocking Corp.)*, FERC Dkt. No. SA80-41 (Jan. 16, 1980).

are likely to find themselves involved, sooner or later, with this emerging new procedure.

**B. SECTION 502(C) AND THE ADMINISTRATIVE PROCEDURE ACT:
RULEMAKING VS. INFORMAL ADJUDICATION**

Section 502(c) provides limited procedural guidance for the conduct of adjustments proceedings. All that is expressly required is "an opportunity for oral presentation of data, views, and arguments" and provision for review of a denial of an adjustment within the agency. Nothing is said about the other procedural stages that the parties and agency must pass to take an adjustment request from filing to conclusion. No mention is made, for example, of the filing or service of applications, the maintenance of agency records, the testing of evidentiary submissions, the identity of decision-makers, the form of the decision, or the need, if any, for publication of decisions.

The obvious place to look for additional procedural guidance on these issues is the Administrative Procedure Act. However, the A.P.A.'s procedures for rulemaking and formal adjudication do not appear to apply to adjustments proceedings under section 502(c). This is so because, in terms of the A.P.A.'s definitional scheme, the exact classification of section 502(c) "adjustments" is not entirely clear. In light of the A.P.A.'s language and the relevant literature, two broad classifications seem most plausible: the adjustments process could be viewed as (1) informal rulemaking or (2) informal adjudication.¹⁷

If an adjustments proceeding is classified as an informal rulemaking, the applicable administrative procedures follow directly from section 553 of the A.P.A. However, if the proceeding is classified as an informal adjudication, the A.P.A. provides virtually no procedural guidance. With respect to informal agency proceedings other than informal rulemaking, the A.P.A.

¹⁷In the A.P.A.'s definitional scheme, which distinguishes between five forms of action—"rules," "orders," "licenses," "sanctions," and grants of "relief"—, the concept of an adjustment most clearly fits the A.P.A.'s definition of agency "relief." See 5 U.S.C. §§ 551(4)-551(13), 701(b)(2) (1976). "Relief" includes:

the whole or a part of an agency -

- (A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;
- (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or
- (C) taking of other action on the application or petition of, and beneficial to, a person.

5 U.S.C. § 551(11) (1976). However, despite the A.P.A.'s arguable recognition of "relief" as a distinct form of "agency action," detailed administrative procedures are spelled out only for "agency actions" in the nature of "rules," "orders," "licenses," and "sanctions." Further, the cases and literature largely ignore "relief" as a distinct form of action. *But see Samuel B. Franklin & Co. v. SEC*, 290 F.2d 719, 723 n.6 (9th Cir.) (en banc), *cert. denied* 368 U.S. 889 (1961); Senate Comm. on the Judiciary, *Administrative Procedure Act: Legislative History*, 79th Cong., at 197, 254 (1946); Pike & Fisher, *Administrative Law, 2d Series*, Desk Book, statutes at 21, 64-65 (reproducing House and Senate committee reports accompanying the A.P.A.). Given the lack of procedural guidance in the A.P.A. concerning distinct "relief" proceedings, the lack of recognition, judicially and elsewhere, of "relief" as a separate form of proceeding, and the potential availability of other procedural forms owing to overlapping definitions, (see 5 U.S.C. §§ 551(4), 551(6), 551(8), 551(11), 553(d)(1) (1976)), it makes sense to try to fit adjustments within one or more alternative "pigeonholes" within the A.P.A.'s scheme.

In addition to the possibility of classifying adjustments as rulemaking or adjudication, "licensing" is another arguable pigeonhole. See 5 U.S.C. §§ 551(8), 551(9) (1976). However, since a "license" is a form of "order," the distinction between adjudication and "licensing" is unimportant for most purposes. Nevertheless, if one were confronted with a proposal to withdraw or rescind an adjustment, characterizing it as a "license" would, under the A.P.A., add certain additional protections. See 5 U.S.C. § 558(e) (1976). We will leave the appropriateness of that refinement to others.

requires only that rules of procedure shall be published in the Federal Register,¹⁸ that “prompt notice” shall be given of all denials of applications and, “except in affirming a prior denial or when the denial is self-explanatory, such notice shall be accompanied by a brief statement of the grounds for denial,”¹⁹ and that decisions shall be indexed and either published or made available to the public for inspection and copying.²⁰ Once the agency makes its decision, the judicial review provisions of the A.P.A. generally apply to all “agency actions.”²¹ Because the A.P.A. classification is important in determining procedures, a brief discussion is required.

The analysis of the proper A.P.A. classification for adjustments requires distinguishing between “adjustments” in the form of “modifications” or “rescissions” of rules, on the one hand, and “adjustments” in the form of individual “exceptions” or “exemptions” from rules, on the other. Under section 502(c), both classes of relief must be available, but we submit that the procedural classifications and treatment should be different. The principal objection to lumping the various categories of relief under the same procedure is that modifications and rescissions of the rules clearly qualify as “rulemaking” under the A.P.A., which defines rulemaking as the agency process “for formulating, amending, or repealing, a rule.”²² Consequently, while the procedures for individual exceptions and exemptions are not specified in the A.P.A. and may be more flexible than A.P.A.-mandated procedures, it is questionable whether the procedures for modification or rescission of a rule or order can contain fewer safeguards than the procedures under which the rule or order was originally issued. So viewed, proceedings for the issuance of modifications and rescissions of rules would have to comply with sections 502(a) and (b) of the NGPA, which specifically govern NGPA rulemakings, and which incorporate, with additional requirements, the A.P.A.’s informal rulemaking procedures.

The classification of individual adjustments proceedings—*i.e.*, requests for individual exemptions and exceptions—is more problematical. One construction of the A.P.A. might be that even a grant of individual relief from a rule or an order having the effect of a rule is a form of “rulemaking” within the expansive definitions of sections 551(4) and 551(5) of the A.P.A.²³ Viewing the adjustments process as a form of rulemaking has some logic, inasmuch as rules may be statements of “particular applicability” and adjustments arguably are designed to supplement general rules implementing the

¹⁸ 5 U.S.C. § 552(a)(1) (1976).

¹⁹ 5 U.S.C. § 555(e) (1976).

²⁰ 5 U.S.C. § 552(a)(2) (1976).

²¹ 5 U.S.C. §§ 701-706 (1976).

²² 5 U.S.C. § 551(5) (1976).

²³ Rulemaking is the process “for formulating, amending or repealing a rule,” 5 U.S.C. § 551(5), and “rule” is defined by 5 U.S.C. § 551(4) to mean:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

NGPA's policies. However, the fit, while feasible, is not a comfortable one, for several reasons. The most obvious reason is that the adjustments process typically involves individual decisions based on special facts which may have general application only as precedent.²⁴ That is, as in the case of the adjustments procedure under the DOE's petroleum pricing and allocation regulations, the FERC's development and application of the statutory standard for relief (special hardship, inequity or unfair distribution of burdens) is likely to occur on a case-by-case basis, with a gradual building of precedents, not by binding, generally applicable statements of interpretation. This is one of the hallmarks of the adjudicative process. Further, a major characteristic of rulemaking is that it generally refers to actions "for the future,"²⁵ while adjudications apply also to historical events and may lead to retroactive relief. In this regard, there is nothing to suggest that the adjustments contemplated by section 502(c) of the NGPA are limited only to prospective relief.²⁶ Additionally, in this instance, employing the terms "rulemaking" and "adjudication" in their common usage offers a relatively satisfying way out of the A.P.A.'s murky definitions. Thus, while it is true that rules may be of "particular" as well as "general" applicability, the common usage of the terms "adjudication" and "order" typically covers case-by-case decisionmaking applicable to individuals and their special circumstances, as opposed to actions relating to classes and legislative facts. Certainly, the A.P.A.'s definitions of "order"—any "final disposition . . . in a matter other than rulemaking,"²⁷—and of "adjudication"—"the agency process for the formulation of an order,"²⁸—are broad enough to include cases of agency adjustments relief. In sum, while "rulemaking" is an awkward classification from both a textual standpoint and the standpoint of common usage in cases involving individual relief, "adjudication" is a more satisfying classification in both respects.²⁹

Significantly, in construing section 504 of the DOE Organization Act ("DOE Act"),³⁰ which provides for adjustments, subject to FERC review, from DOE regulations issued under various statutes, both the FERC and the OHA have held that the adjustments process is a form of "adjudication," not "rulemaking."³¹ Given the strong similarities between the adjustments process established by the DOE Act and by the NGPA, it would be difficult for the FERC to take a different view of section 502(c) of the NGPA.

²⁴See "Order Adopting Proposed Order of Presiding Officer With Certain Modifications," *Lunday-Thagard Oil Co.*, FERC Dkt. No. RA78-1 (Nov. 16, 1979). See generally *Amtel, Inc. v. FEA*, 536 F.2d 1378, 1382 (TECA 1976).

²⁵See 5 U.S.C. § 551(4) (1976). Exceptions to this generalization exist, of course. See generally K. C. Davis, 1 *Administrative Law Treatise*, 1st Ed. §§ 5.01-5.11 (1958).

²⁶See, e.g., *Bulter Aviation Int'l, Inc.*, 3 FEA ¶80,584 (Feb. 24, 1976); *Austral Oil Co., Inc.*, 3 FEA ¶83,122 (Mar. 8, 1976). [The reports of FEA and DOE decisions to which reference is made herein are published as part of *Energy Management—Federal Energy Guidelines* (CCH)].

²⁷5 U.S.C. § 551(6) (1976) defines "order" to mean:

the whole or a part of any final disposition whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.

²⁸5 U.S.C. 551(7) (1976).

²⁹Informal adjudication is also the classification used by Professor Byse in analyzing the adjustments process under the DOE Act. See Byse, *supra* note 11.

³⁰42 U.S.C. § 7194 (Supp. II, 1978).

³¹See cases cited at note 24, *supra*.

Lastly, the totality of section 502 implies that Congress, too, intended adjustments to be an informal process largely outside the A.P.A.'s procedural scheme (*i.e.*, neither rulemaking nor formal adjudication). In contrast to sections 502(a) and (b), which explicitly direct decisionmakers to employ the A.P.A.'s procedures, section 502(c) states merely that the officer or agency "shall, by rule, establish procedures, including an opportunity for oral presentations . . . for considering requests for adjustments." In other words, it appears that Congress intended adjustments cases to be informal adjudicative proceedings not controlled by the formal adjudication or rule-making schemes of the A.P.A.³²

Upon classifying the procedure for issuance of adjustments as a form of "adjudication," however, one finds little guidance in the procedural provisions of the A.P.A. for how such an adjudication should be conducted. With respect to adjudications, the A.P.A. states that the procedural provisions of sections 554, 556 and 557 apply only in an adjudication "required by statute to be determined on the record after opportunity for an agency hearing." Since the adjustments procedure of section 502(c) of the NGPA is established in terms of a "presentation of data, views, and arguments," it clearly is not an adjudication which is required to be determined "on the record after opportunity for an agency hearing." As noted previously, the only guidance which one can obtain from the A.P.A. with respect to agency procedures for informal adjudications is found in section 552, concerning publicizing decisions and rules, and in section 555(e), which indicates that prompt notice shall be given of the denial of an application and that "except in affirming a prior denial or when the denial is self explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." In other words, in contrast to the procedures spelled out for informal rulemaking by section 553, the A.P.A. provides little guidance for the conduct of proceedings in informal adjudications.

Inasmuch as informal adjudication is outside the major procedural provisions of the A.P.A., one must look to other sources for guidance concerning the procedures to be used in deciding requests for adjustments. The three obvious sources are (1) the words of section 502(c) itself, (2) judicially developed concepts of procedural fairness, and (3) the needs of courts for an adequate record on which to base judicial review.

From section 502(c)'s use of the phrase "opportunity for oral presentation of data, views, and arguments," and from the similarity of that phrase to language in the A.P.A.'s provisions for informal rulemaking, one might reasonably infer that Congress intended decisionmakers *generally* to follow the rulemaking procedures prescribed in section 553, as supplemented by an oral rulemaking type of hearing. This view tends to be supported by

³²While we conclude that individualized adjustments are not to be viewed as rulemakings, it should be noted that classifying the adjustments process as a form of rulemaking under the A.P.A. would nevertheless have the convenient result of providing clear procedural guidance under section 553 of the A.P.A. relating to informal rulemaking. The only qualification to the provisions of section 553 would be that Congress, in section 502(c) of the NGPA, clearly required the opportunity for an oral presentation.

Congress' use of the identical phrase in section 502(b), dealing with rule-making under the NGPA, and its use of the same and similar phrases in connection with proceedings under other statutes that are clearly rulemakings.³³ Nevertheless, such an inference would not be free from doubt, since Congress specifically provided, in section 502(b), that general rules and orders having the effect of rules are to be subject to the A.P.A.'s rulemaking procedures (as supplemented by oral rulemaking hearings with transcripts), but limited the agency's obligation under section 502(c) to establishment of "procedures including an opportunity for oral presentation. . . ." Still, lacking any more specific guidance, this "implied procedures" argument is probably reasonable as a very general, albeit not conclusive, guide. If it is adopted, the agency would have to provide public notice; it would need to afford an opportunity for interested persons, in addition to the applicant, to participate, presumably by written, as well as oral, presentations; and the agency would have to publish its decision accompanied by a concise general statement of its basis and purpose.

While one may infer a general congressional intention to have the agency include those procedural steps, however, one can foreclose neither variations initiated by the agency nor additional procedures required by the courts. The Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*,³⁴ condemning judicial efforts to require procedures in addition to those specified in section 553 of the A.P.A., arguably would not apply where Congress mandated a process outside of the normal categories of the A.P.A. and did not otherwise provide guidance on important procedures.³⁵ This would leave room for a case-by-case development of a procedural fairness doctrine applicable to informal adjudications. At a minimum, one can expect courts to review the agency's choice of procedures under constitutional principles of due process.³⁶ Consequently, meeting the minimum requirement of allowing "oral presentation of data, views, and arguments" may not be sufficient in specific situations. For example, more may be required where there are disputed issues of material fact that can best be resolved by cross-examination.

The third source of potential guidance is the need for a judicially reviewable record and decision. This requires a decisional record which is sufficient to enable a court to determine whether the administrative agency had an adequate factual predicate for its decision, whether the agency considered the relevant factors, whether the agency acted arbitrarily or capriciously,

³³See, e.g., Consumer Product Safety Act, § 9(a)(2), 15 U.S.C. § 2058(a)(2) (Supp. II, 1978).

³⁴435 U.S. 519 (1978).

³⁵Although much of the language in *Vermont Yankee* is very broad, the facts and, thus, the holding of the case involve an informal rulemaking governed by section 553 of the A.P.A. In cases which lack clear congressional guidance on administrative procedures, such as those specified in the A.P.A., it is more reasonable for courts to review an agency's choice of procedure, perhaps under an abuse of discretion standard. In addition, several commentators doubt that the strict holding of *Vermont Yankee* will stand the test of time even in the context of informal rulemaking. They argue that courts inevitably will, and should, require agencies to go beyond the procedural minima of informal rulemaking under the A.P.A. See, e.g., K. C. Davis, 1 *Administrative Law Treatise*, 2d Ed. §§ 6:35-6:37 (1978).

³⁶See U.S. CONST. amend. V. Even the *Vermont Yankee* decision is clear that courts may review agency procedures under the Constitution's due process standard. 435 U.S. at 542.

whether the agency obeyed its own procedures, and whether it acted within its statutory authority. To be sure, as the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*³⁷ illustrates, the need for a judicially reviewable record can be met in many ways, including reconstruction of the record by discovery in a district court, after the fact. However, where, as here, review is by a court of appeals, *post hoc* reconstruction is a less viable method of review; and in any event, it is obviously a last resort.³⁸

An alternative and more appealing method of producing a judicially reviewable record is to mandate administrative procedures that build and preserve such a record. The potential for shaping agency procedures in the name of establishing an adequate foundation for judicial review is illustrated by the decision in *Home Box Office, Inc. v. FCC*.³⁹ In that case, the D.C. Circuit forged new limits on *ex parte* contacts in informal rulemakings, holding that *ex parte* contacts received after notice of rulemaking violated due process (at least if not recorded and placed on the public record) because they inhibited a court's review of the full and true basis for the agency's decision. As *Home Box Office* shows, this line of analysis has considerable potential for regulating agency procedures.

In sum, the FERC adjustments process is clearly rulemaking when it involves generally applicable modifications or rescissions of rules or orders having the effect of rules. When adjustments relate to individual requests for exceptions or exemption, the process arguably may be viewed either as informal rulemaking or as informal adjudication, although the latter classification has more support. Classifying the individual adjustments process as informal adjudication is more consistent with the common understanding of "adjudication," with the individualized nature of the typical adjustments proceeding, and with the FERC's classification of the adjustments process under section 504 of the DOE Act. Classifying adjustments as informal adjudication is likely to result in less procedural certainty and in greater judicial involvement in defining procedural requirements in individual cases. On balance, however, characterizing adjustments as "informal adjudication" seems the most reasonable view.

C. STATUTORY ANTECEDENTS OF SECTION 502(c)

During the 1970's, Congress passed several statutes establishing regulatory controls over major segments of the economy. Because of the sweeping nature of these controls, Congress recognized that it would be impossible to avoid individual inequities and hardships that might result from strict application of the rules. Accordingly, rather than attempting to anticipate all of the possible exceptions that might have to be granted, these statutes typically contained provisions which assigned to the agency responsible for

³⁷401 U.S. 402 (1971).

³⁸Even where it might have been used, this reconstruction approach has been disfavored. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

³⁹But see *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977).

implementing the controls the authority to grant individual exceptions in order to avoid inequities. The adjustments procedure established by section 502(c) has its origins in these statutes.

The first statute in this line was the Economic Stabilization Act of 1970.⁴⁰ This statute authorized the President to institute wage and price controls and specifically provided that any orders or regulations issued by the President "may provide for the making of such adjustments as may be necessary to prevent gross inequities."⁴¹ In accordance with this authority, President Nixon instituted a 90-day freeze on wages and prices in August 1971.⁴² Later that year, in the Economic Stabilization Act Amendments of 1971,⁴³ Congress extended the President's authority to establish wage and price controls and established more detailed criteria and procedures than the original legislation contained. In authorizing the President to issue standards to assist in determining appropriate levels of wages, salaries, prices, rents, etc., Congress directed the President to "provide for the making of such general exceptions and variations as are necessary to foster orderly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits."⁴⁴ In language which is a direct forerunner of section 502(c), the President was also directed to establish "procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, or seeking an exception or exemption from such rules, regulations, and orders."⁴⁵ Under this legislation, regulations were promulgated establishing procedures for obtaining individual exceptions to the rules.⁴⁶

In 1973, Congress enacted the Emergency Petroleum Allocation Act of 1973 ("EPAA")⁴⁷ in response to the 1973 Arab oil embargo. This legislation authorized the establishment of controls over the pricing and allocation of crude oil and petroleum products. The EPAA did not specifically provide for the granting of adjustments or exceptions to rules issued pursuant to the Act. However, it did incorporate the administrative and enforcement procedures established pursuant to the Economic Stabilization Act.⁴⁸ Accordingly, the Federal Energy Office ("FEO"), which was established by the President to implement the EPAA, issued regulations which adopted the adjustments and exceptions process that had been developed by the Cost of Living Council under the Economic Stabilization Act.⁴⁹ A special office—the Office of Exceptions and Appeals, which was the predecessor of the current OHA—was created within the FEO to administer the procedures.⁵⁰

⁴⁰Pub. L. 91-371, Title II, 84 Stat. 796 (Expired 1974).

⁴¹*Id.* § 202.

⁴²Exec. Order No. 11615, 36 Fed. Reg. 12727 (1971).

⁴³Pub. L. 92-210, 85 Stat. 743 (Expired 1974).

⁴⁴*Id.* § 203.

⁴⁵*Id.* § 207(b).

⁴⁶37 Fed. Reg. 3915 (Feb. 25, 1972).

⁴⁷15 U.S.C. § 751 *et seq.* (1976).

⁴⁸15 U.S.C. § 754(a)(1) (1976).

⁴⁹39 Fed. Reg. 1924 (Jan. 15, 1974).

⁵⁰For a review of the Office of Exceptions and Appeals' decisions in 1974, see Cockrell, *Exceptions to Federal Regulations For Management of the Energy Crisis: The Emerging Agency Case Law*, 28 *OKLA. L. REV.* 53 (1975).

In 1974, Congress enacted the Federal Energy Administration Act ("FEA Act"),⁵¹ in which it explicitly conferred on the FEA authority to grant adjustments and exceptions to rules issued by that agency under the EPAA. Section 7(i)(1)(D) of the Act established the standards for granting such adjustments in language that is virtually identical to the language contained in section 502(c) of the NGPA.⁵² This provision was subsequently amended by the Energy Conservation and Production Act ("ECPA") of 1976 to require the FEA to establish criteria and guidelines for evaluating applications for exceptions.⁵³

In 1977, the DOE Act abolished the FEA and transferred its authorities over the pricing and allocation of crude oil and petroleum products to DOE. Section 504 of the DOE Act continued the adjustments and exceptions process prescribed by section 7(i)(1)(D) of the FEA Act, as amended by the ECPA, including the basic standard for granting adjustments: a showing of special hardship, inequity, or an unfair distribution of burdens. In addition, section 504 empowered the FERC to review "a denial of a request for adjustment" by DOE and directed the FERC to establish appropriate procedures, "including a hearing when requested," to carry out this authority. Pursuant to this provision, the Commission has issued regulations prescribing procedures for reviewing decisions of the OHA on applications for adjustments from the petroleum pricing and allocation regulations,⁵⁴ and it is currently undertaking such review in a number of proceedings.⁵⁵

In short, there is considerable statutory precedent for the adjustments process required by section 502(c) of the NGPA. Moreover, a substantial body of administrative and judicial case law has been developed under the statutory antecedents of section 502(c), and it is likely that the Commission and the courts will turn to that case law in considering issues that arise under section 502(c). However, the experience developed under the economic regulatory statutes may not be directly translatable to the section 502(c) adjustments process. For one thing, the FERC is an established, independent regulatory agency, with a tradition of its own and with recognized procedures

⁵¹Pub. Law 93-275, 88 Stat. 96.

⁵²Section 7(i)(1)(D), 15 U.S.C. § 766(b) (Supp. I, 1977), provides:

Any officer or agency authorized to issue the rules, regulations, or orders . . . shall provide for the making of such adjustments, consistent with the other purposes of this Act, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens and shall by rule, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, rescission of, exception to, or exemption from, such rules, regulations, and orders.

⁵³Section 104 of the ECPA, 15 U.S.C. § 766(b) (Supp I, 1977), directed the FEA to:

establish criteria and guidelines by which special hardship, inequity, or unfair distribution of burdens shall be evaluated. Such office or agency shall additionally insure that each decision on any application or petition requesting an adjustment shall specify the standards of hardship, inequity, or unfair distribution of burden by which any disposition was made, and the specific application of any such standards to the facts contained in any such application or petition.

Such criteria have since been established for several categories of exceptions. *See, e.g.*, Energy Management (CCH) ¶80,004-80,046; 41 Fed. Reg. 50856 (Nov. 18, 1976), amended by 43 Fed. Reg. 19446 (May 5, 1978) (General Guidelines for Exceptions); Energy Management (CCH) ¶80,053; 43 Fed. Reg. 58514 (Dec. 14, 1978) (Guidelines for Crude Oil Producer Exceptions); and Energy Management (CCH) ¶80,054; 44 Fed. Reg. 40391 (July 10, 1979) (Guidelines for Motor Gasoline Exceptions).

⁵⁴18 C.F.R. § 1.40.

⁵⁵*See, e.g.*, *San-Ann Service, Inc.*, FERC Dkt. No. RA80-5; *Bayou State Oil Corp.*, FERC Dkt. No. RA78-4.

for dispensing relief, while the agencies created under the economic regulatory statutes were originally established on an emergency basis to deal with short-term problems. For another, the NGPA is a far more detailed statute than much of the economic regulatory legislation, which was often quite general in its terms and had contradictory purposes. As a result, the FERC may have less substantive and procedural latitude in implementing the adjustments procedure than DOE and its predecessors.

D. THE FERC'S INTERIM ADJUSTMENTS RULES

In Order No. 24, issued March 22, 1979, the FERC promulgated an interim regulation implementing section 502(c).⁵⁶ The interim regulation promulgated by Order No. 24 has been modified by two subsequent orders, as of the date this article was written.⁵⁷ As noted above, a significant number of applications for adjustments have been submitted pursuant to the interim regulation.

In general, the interim regulation established by Order No. 24 creates a three-stage administrative process for handling adjustments applications. The first stage involves a proceeding before the Commission's Staff; the second stage a proceeding before a presiding officer appointed by the Commission; and the third stage an appeal to the Commission itself. Because of this multistage process, seeking an adjustment under the interim regulation has the potential for being a lengthy and complicated process.

Under the first stage of the adjustments process, the decisionmaker is the Commission's Staff. After an application for an adjustment is filed with the Commission, the Staff has 150 days in which to reach a decision. If it has not acted within 150 days, the application is deemed to have been denied, unless the Staff has, "for good cause," extended this period.⁵⁸ Order No. 24 is quite general regarding the nature of the proceeding before the Staff, but it contemplates that the proceeding will be "an abbreviated 'paper pleading' procedure by which the problems can be presented to and resolved by the Commission's Staff."⁵⁹ The regulation provides for serving an application on all parties who might be adversely affected if relief is granted, for public notice of an application, and for intervention and submission of comments by parties who may have an interest in the proceeding.⁶⁰ However, there is no requirement that "an opportunity for oral presentation of data, views, and argument" be provided, nor is there any specific procedure that the Staff must follow. The Commission makes it clear in Order No. 24 that, at this stage, the Staff's role is as a decisionmaker, not a party.⁶¹ It is obviously anticipated that most applications for adjustments

⁵⁶Order No. 24, Docket No. RM79-32 (Mar. 22, 1979), 44 Fed. Reg. 18961 (Mar. 30, 1979).

⁵⁷Order No. 24-A, Docket No. RM79-32 (Nov. 27, 1979), 44 Fed. Reg. 69284 (Dec. 3, 1979); Order No. 24-B, Docket No. RM79-32 (Mar. 24, 1980), 45 Fed. Reg. 20785 (Mar. 31, 1980).

⁵⁸18 C.F.R. § 1.41(i)(3).

⁵⁹Order No. 24 at 2.

⁶⁰18 C.F.R. § 1.41(d), (e), (f).

⁶¹Order No. 24 at 6; 18 C.F.R. § 1.41(i). If an application for an adjustment is denied and appealed, the Staff may appear as a party before the presiding officer. 18 C.F.R. § 1.41(f)(1)(ii)(B).

would be resolved by the Staff in an informal manner on the basis of the application and supporting information submitted by the applicant. The staff is empowered to request submission of data, to call a conference, and to employ other procedures—presumably including an informal proceeding with cross-examination to resolve factual disputes—as the Staff deems appropriate.⁶² Generally speaking, however, there is no discovery and no hearing in the Staff proceeding.⁶³ The standard set forth in the interim regulation for final adjustments relief simply tracks the standard contained in section 502(c) of the statute,⁶⁴ while interim relief can be granted by the Staff under criteria which, as discussed below, differ from the statutory standard for permanent relief.⁶⁵

The second stage of the adjustments process under the interim regulation involves the appointment of a presiding officer in accordance with section 1.40 of the Commission's Rules of Practice and Procedure.⁶⁶ As noted above, that section also established the procedure for FERC review of orders issued by the OHA, denying requests for adjustments, pursuant to section 504(a) of the DOE Act. Review of the Staff's determination may be obtained on request by any aggrieved person who participated, or sought and was denied an opportunity to participate, in the proceeding before the Staff; and the Commission, *sua sponte*, may order a section 1.40 proceeding to review the Staff's action.⁶⁷

As in the case of the first stage of the adjustments process, there are few directives governing the nature of the section 1.40 procedure before the presiding officer. However, this stage is apparently intended to be more formal than the proceeding before the Staff. The presiding officer has authority to conduct prehearing conferences and hearings, to require the submission of briefs or the presentation of oral arguments, and to issue a proposed order based upon findings of fact, affirming, modifying, or vacating the Staff's order or directing any other appropriate relief.⁶⁸ Unlike the proceeding before the Staff, a hearing *must* be granted upon the request of any party, although the hearing need not be an evidentiary one.⁶⁹ At the conclusion of the proceeding, a proposed order is issued by the presiding officer.⁷⁰ As of the date this article was written, no applications for adjustments under section 502(c) have been the subject of a decision by a presiding officer pursuant to section 1.40.

The third stage of the adjustments procedure under section 502(c) involves Commission review. Following the service of a proposed order by a presiding officer, the parties have 15 days in which to file written comments with the Commission on the proposed order.⁷¹ There is apparently no pro-

⁶²18 C.F.R. § 1.41(g)(k).

⁶³Order No. 24 at 11.

⁶⁴18 C.F.R. § 1.41(h).

⁶⁵18 C.F.R. § 1.41(m). See pages 96-98, *infra*.

⁶⁶18 C.F.R. § 1.40.

⁶⁷18 C.F.R. § 1.41(j).

⁶⁸18 C.F.R. § 1.40(e), (g), (h), (j).

⁶⁹18 C.F.R. § 1.40(f).

⁷⁰18 C.F.R. § 1.40(j).

⁷¹18 C.F.R. § 1.40(j)(3).

vision for reply comments. Thereafter, the Commission issues a final order affirming, modifying, or vacating the proposed order.⁷²

E. MAJOR ISSUES ARISING UNDER SECTION 502(C) AND THE INTERIM ADJUSTMENTS RULES.

1. *The Scope of the Adjustments Process.*

The scope of relief under section 502(c) is potentially very broad. Indeed, it is so broad that, as noted above, different types of procedures may be required to implement different types of relief. At the same time, specific limitations on potential relief appear in the statute, the rules, and the decisions.

(a) Types of Relief Available.

Section 502(c) indicates that procedures must be made available "for the purpose of seeking an interpretation, modification, or rescission of, exception to, or exemption from" applicable rules or orders issued under the NGPA. Section 1.41(b)(1) of the Commission's adjustments procedures tracks this portion of section 502(c) except for interpretations, which are treated in section 1.42 of the Commission's Rules of Practice and Procedure.⁷³

Nevertheless, there are problems with grouping each of those forms of relief under the same set of procedural rules. As discussed above,⁷⁴ it is better to regard the adjustments process under section 1.41 of the Commission's rules, not as a mechanism to modify or rescind rules and orders but solely as a mechanism to resolve individual hardships via exceptions and exemptions from rules and orders which otherwise retain their validity.⁷⁵ Requests to modify or rescind rules and generally applicable orders should be treated as petitions for rulemakings under the normal rulemaking procedures required by sections 502(a) and (b) of the NGPA, rather than as part of section 1.41 proceedings.⁷⁶

(b) Relief from Statutory Terms.

The potential scope of the adjustments process also appears to be

⁷²18 C.F.R. § 1.40(k).

⁷³18 C.F.R. § 1.42. Although the FERC's rules governing requests for interpretations are beyond the scope of this article, we note that requests for adjustments may be treated as requests for interpretations, 18 C.F.R. § 1.41(q), and that the Commission's rules for interpretations are significantly different from the procedures under section 1.41. For example, the interpretations procedures do not allow the oral presentation of data, views and arguments and merely produce non-binding interpretations from the General Counsel.

⁷⁴See pages 83-85, *supra*.

⁷⁵The Commission Staff has already announced its conclusion that the adjustments procedures are not available to challenge the lawfulness of rules and orders. See "Decision and Order of the Director, OPR Denying Staff Adjustment," *The Stone Oil Corp.*, FERC Docket No. SA79-11 (Dec. 13, 1979). That conclusion suggests a narrow view of adjustments, although it does not foreclose the possibility of an argument that a rule or order should be rescinded or modified because of resulting hardships, inequities, or an unfair distribution of burdens.

⁷⁶Thus, for example, requests for relief from a rule on behalf of a significant class of persons should be subject to rulemaking procedures to the extent that granting the relief would effectively modify or rescind the rule. An illustration of this would be a request for relief from curtailment on behalf of all natural gas distributors with annual sales below a certain level. It should be noted, however, that the OHA frequently entertains requests for class exception relief under the DOE adjustments procedure. See, e.g., *Class Exception—Retroactive Application of Subpart K*, 2 FEA ¶84,901 (Aug. 29, 1975); *County of San Diego*, 1 FEA ¶20,667 (September 17, 1974); and *Small Business Administration*, 1 FEA ¶21,102 (May 10, 1974).

limited so as not to permit exceptions or exemptions from statutory terms. Section 502(c) restricts adjustments to relief "consistent with the other purposes of the Act" and states that it is available for relief "from . . . applicable rules or orders" issued under the NGPA. That is, read as a whole, the language of section 502(c) indicates that adjustments relief can be obtained from rules and orders issued under the NGPA, but not from restrictions imposed by the statute itself. For example, section 2(11) of the NGPA defines the term "new contract" to include only contracts entered into on or after the date of the NGPA's enactment.⁷⁷ As a result, the Commission cannot grant an adjustment to treat a pre-NGPA contract as a "new contract," regardless of the special hardship which might otherwise befall a party to a preexisting contract.⁷⁸

On the other hand, when the statutory provision permits discretionary Commission action, the Commission may operate within that statutory language to grant adjustments to avoid special hardship, inequity, or an unfair distribution of burdens. For example, Title IV of the NGPA prescribes certain interstate curtailment priorities that are to be followed "to the maximum extent practicable."⁷⁹ Given congressional recognition of the potential need to deviate from the statutory priorities, granting adjustments to pipelines fits within the bounds of section 502(c).⁸⁰

The Commission's Staff has recently recognized the agency's lack of authority to grant adjustments from restrictions in the statute, as distinguished from rules and orders.⁸¹

(c) Exclusion of Specific Classes of Requests
from Section 1.41 Adjustments Procedures

Orders issued under sections 301, 302 and 303 of the NGPA are explicitly excepted by section 502(c) from the adjustments procedures required by the NGPA. The adjustments procedures adopted by the Commission, therefore, plainly do not apply to such emergency orders, although officers implementing sections 301-303 may be able to adopt adjustments procedures as a matter of discretion.

In addition to that statutory provision, the Commission has excluded from the scope of its interim regulations under section 502(c) requests for "just and reasonable" rates in excess of statutory prices set by sections 104, 106 and 109 of the NGPA.⁸² To deal with "just and reasonable" rate claims arising under these sections of the NGPA, the Commission is in the process of establishing separate "special relief" procedures.⁸³ Under these

⁷⁷15 U.S.C. § 3301(11) (Supp. II, 1978).

⁷⁸See NGPA § 501(b), 15 U.S.C. § 3411(b) (Supp. II, 1978) (FERC authority to define statutory terms).

⁷⁹See NGPA § 401(a), 15 U.S.C. 3391(a) (Supp. II, 1978).

⁸⁰See, e.g., "Order of the Director of OPRR Granting Adjustment," *Lawrenceburg Gas Transmission Corp.*, FERC Dkt. No. SA80-15 (Feb. 26, 1980).

⁸¹See "Order of the Director of OPRR Dismissing Application for Adjustment," *M. H. Marr*, FERC Dkt. No. SA80-3 (Mar. 3, 1980).

⁸²*Id.*; 18 C.F.R. § 1.41(b)(1).

⁸³See "Notice of Proposed Rulemaking," Docket No. RM79-67 (Aug. 14, 1979), 44 Fed. Reg. 49468 (Aug. 23, 1979); "Notice of Request for Public Comments and Notice of Public Discussion," Docket No. RM79-67 (Jan. 16, 1980), 45 Fed. Reg. 5321 (Jan. 23, 1980).

special relief procedures, first sellers of natural gas would be able to seek permission to charge rates in excess of those specified in sections 104, 106 and 109 of the NGPA, if the proposed rates are "just and reasonable" within the meaning of the Natural Gas Act. The purpose of the special relief procedures is to carry out statutory objectives of allowing "just and reasonable rates" in excess of the statutory maximums on a case-by-case basis.

It is questionable, however, whether the proposed special relief procedures for setting just and reasonable rates can adequately supplant the opportunity to apply for adjustments. As proposed, the special relief procedures would do more than provide a procedural mechanism for securing "just and reasonable" rates in excess of the statutory levels. The proposed rule would also prescribe many of the substantive elements of a grant of special relief. For example, as described in the January 16, 1980 version of the proposal, applicants may be limited, by rule, to a 15% yield on investment. In other words, unlike the adjustments mechanism established under section 502(c) of the NGPA, the special relief mechanism proposed to implement sections 104, 106 and 109 imposes both substantive rules and procedural rules. Without entering into an exhaustive debate, we suggest that the substantive elements in the special relief rules proposed in Docket No. RM79-67 would constitute precisely the sort of "rule or order" for which the adjustments mechanism of section 502(c) must be made available. In other words, while it is clearly permissible for the Commission to issue a general rule which defines a reasonable return on investment, section 502(c) indicates that parties must be able to seek exceptions to that level of return upon a showing that a different rate of return would be consistent with the other purposes of the Act and is necessary to avoid special hardship, inequity or an unfair distribution of burdens.

In addition to the foregoing existing and proposed limitations on the adjustments process, the Commission has held, more generally, that the adjustments procedures of section 1.41 should not be used to obtain relief if other procedures have been established to deal with the specific type of problem presented. In *Delhi Gas Pipeline Corporation*, the Commission dismissed an application for an adjustment, stating that "adjustment relief is inappropriate since Subpart E of Part 284 of the regulations provides a procedure whereby Delhi could obtain the requested authority," and that the applicant for adjustment "sets forth no reason why it should not seek assignment authority" pursuant to the provisions specifically addressed to assignment proposals.⁸⁴ The latter qualification suggests that if alternative relief procedures are inadequate for some reason, resort may be had to the adjustments process.⁸⁵

⁸⁴"Order Authorizing Assignment," *Delhi Gas Pipeline Corp.*, FERC Dkt. No. ST80-133 (Mar. 7, 1980) (slip op. at 3).

⁸⁵This qualification might be used to justify requests for adjustments from the proposed rules governing requests for just and reasonable rates under Sections 104, 106 and 109 of the NGPA.

2. *The Substantive Standard for Relief.*

Section 502(c) does not explain the meaning of the statutory standard for obtaining adjustments relief—“special hardship, inequity, or an unfair distribution of burdens”—and no accompanying congressional reports or debates spell out its meaning. Instead, Congress left it to the FERC and the courts to develop the standard’s meaning.

To date, the FERC Staff has developed the standard’s meaning by applying it on a case-by-case basis,⁸⁶ and it is too early to draw general conclusions about the FERC’s interpretation of the phrase “special hardship, inequity or an unfair distribution of burdens.” The standard will doubtless develop substance only over time. However, a few observations can be made at this time, particularly concerning section 1.41 of the Commission’s Rules of Practice and Procedure which, in implementing section 502(c), departs from the substantive statutory standard for relief in certain significant respects.

A key qualification in section 502(c) of the NGPA is that relief from a rule or order may be granted only if “consistent with the other purposes of this Act.” That is, adjustments may not be granted if doing so would frustrate any of the terms or underlying purposes of the NGPA. This qualification sets a crucial boundary on the granting of relief: not only must the Commission determine that strictly applying a rule or order issued under the NGPA would cause a petitioner to suffer “special hardship, inequity, or an unfair distribution of burdens,” it must also be satisfied that granting relief does not conflict with the general or specific policies of the NGPA.⁸⁷ This factor is important because it clearly indicates that individual relief proceedings may not be viewed in isolation. In every case in which relief is granted, the Commission must consider the full implications of the precedent it is setting, including the size of the class of similarly situated persons and the policy implications of extending relief to the entire class.

The remainder of section 502(c)’s adjustments standard—special hardship, inequity or an unfair distribution of burdens—has little intrinsic meaning. Nevertheless, it can be meshed with the statute’s policy objectives to suggest a conceptual approach to applying the statutory standard for relief. Viewing the standard as a whole, it appears that the necessary showing of hardship, inequity or burden in individual cases should depend, in part, upon the degree to which proper implementation of the NGPA requires application of the rule from which relief is sought to the petitioner and those in a similar position. If application of the rule to the petitioner and similarly situated persons is largely irrelevant to fulfilling the policies of the NGPA (*e.g.*, the rule is overbroad), only a limited hardship, inequity or

⁸⁶This is not the only possible way to flesh out the standards for granting adjustments. As noted above, note 53, *supra*, the OHA has published extensive guidelines describing its criteria for implementing the adjustments standards.

⁸⁷In this regard, we note that section 1.41(h) of the Commission’s interim rules, which identifies the criteria to be applied by the Staff in ruling on an adjustment, omits any reference to the requirement that the requested relief be consistent with the policies of the NGPA. Presumably, the Staff will incorporate this policy qualification without specific direction to do so, although a clarification in the regulations would be desirable.

burden would need to be shown to secure relief. On the other hand, if exempting the petitioner and those like him from the rule would utterly frustrate the purposes of the Act, then perhaps no level of hardship, inequity or burden could justify relief, since, in such instances, a grant of relief would *pro tanto* repeal the statute by implication. This suggests that the analysis of claims of "special hardship, inequity, or an unfair distribution of burdens" should consider the class to which the rule must apply in order to be effective and should be tested upon the hypothesis that all similarly situated persons apply for relief. The lesson is that an application for adjustment cannot be viewed in isolation. It must be judged in the overall context in which it arises.

An additional substantive criterion for granting adjustments relief is causation. The applicant should be required to prove that the special hardship, inequity or unfair distribution of burdens is caused by the objectionable rule. More particularly, relief should not be made available merely because adherence to the particular rule would compound the applicant's unrelated financial or competitive problems. Granting adjustments in a fashion that merely subsidizes marginal operations would be unfair to efficiently operated companies in competition with the applicant and could lead to hopeless economic distortions over the long term. This concept is generally followed in the precedents under the petroleum regulations, where adjustment relief is typically denied unless the applicant can demonstrate that the specific hardship or inequity is attributable to the DOE rules, rather than to discretionary business decisions of the applicant.⁸⁸

Another important point is that section 502(c) is a limited provision that only governs procedures for granting relief in cases of "special hardship, inequity, or an unfair distribution of burdens." Section 502(c) does not address requests for adjustments based on any other alleged justifications, such as promoting independent policy objectives.⁸⁹ Not surprisingly, the Commission's regulations implementing section 502(c) provide that permanent adjustments relief may be granted only if the applicant satisfies the standard for relief in section 502(c).

However, in contrast to section 502(c)'s standard for relief, the Commission's rules governing interim adjustments relief plainly depart from the statutory criteria, as well as from the Commission's standards for permanent

⁸⁸See, e.g., *Twin City Barge & Towing Corp. v. Schlesinger*, 603 F.2d 197, 201, 206 (TECA 1979). The cases also support the proposition that adjustments relief is not available as a guarantee of profitability. *Id.* Nevertheless, the issue of causation is not easily resolved, as the cited case illustrates. See also *Texas City Refining, Inc.*, 2 DOE ¶82,033 (Oct. 17, 1978); *Sentry Refining Company*, 1 DOE ¶80,178 (Dec. 12, 1977); and *Omega Oil Company*, 5 FEA ¶80,635 (May 16, 1977).

⁸⁹The issue of granting adjustments based on other justifications has arisen at the Office of Hearings and Appeals, where the agency has affirmatively used the adjustments process to promote independent policy objectives. See, e.g., *Midwest Solvents Co.*, —DOE ¶—— (Case No. DEE-7741, Mar. 12, 1980) (to encourage the development of gasohol); *Commonwealth Oil Refining Company*, 2 DOE ¶82,523 (July 20, 1978) (to encourage the refining of high sulfur California crude oil).

relief.⁹⁰ Specifically, section 1.41(m) of the interim rules provides extra-statutory standards for granting interim adjustments relief:

- (2) The grounds for granting interim relief are:
- (i)(A) a showing that irreparable injury will result in the event the interim relief is denied; and (B) a showing that denial of the interim relief requested will result in a more immediate special hardship or inequity to the person requesting the interim relief than the consequences that would result to other persons if the interim relief were granted; or
 - (ii) a showing that it would be in the public interest to grant the interim relief.⁹¹

As described in the Commission's rules, therefore, interim relief is available either under a comparative harm standard or a public interest standard. Neither test seems consistent with section 502(c) or the interim regulation's test for permanent relief, since neither is tied to even a *prima facie* showing of likelihood of success on the merits with respect to the statutory standard. The first, two-part, test incorporates the irreparable injury concept, which is a common prerequisite for interim relief,⁹² but does not explicitly apply the statutory standard of "special hardship, inequity, or an unfair distribution of burdens." To be sure, the term "special hardship" is used, but its meaning is obviously different from its meaning in the permanent relief context—otherwise, there would be no reason not to grant permanent relief at the outset. So viewed, it appears that the first test for interim relief could arguably be satisfied whenever the applicant for relief would suffer irreparable injury and the harm to applicant of denying relief is likely to be greater than the harm to others of granting relief. In many cases, however, literal application of such a test could produce anomalous results. For example, to the extent an applicant for adjustment seeks to be relieved of a fractional share of substantial pooled costs that would otherwise be borne by a large class of similarly situated persons, the applicant could always show that requiring it to sustain its share of the costs would cause it injury greater than the harm that would befall any other member of the class from reallocating the applicant's share, *pro rata*, to the rest of the class.⁹³ Yet, obviously, such burden-shifting would itself be inequitable. For this reason, anomalous results may be produced unless the applicant for relief is also required to make a showing of probability of success on the merits.

The Commission's alternative test for interim relief—"a showing that it would be in the public interest to grant the interim relief"—departs from the statutory provisions even more clearly. In the view of particular decision-

⁹⁰The Commission may have inherent authority to grant individual exceptions to general regulations in cases in which it is shown that the governing statutory policies will be served by the exception. For example, individual exceptions to area producer rates have been permitted when the proposed higher rates were shown to be "just and reasonable" within the meaning of the Natural Gas Act. *Permian Basin Area Rate Cases*, 390 U.S. 747, 770, *rehearing denied* 382 U.S. 917 (1968); 18 C.F.R. § 2.56a(g). However, to the extent relief is based on standards other than those set forth in section 502(c), the Commission may have to look to other provisions of the NGPA and the Natural Gas Act for procedural guidance. The informal adjudicative process permitted by section 502(c) may not be adequate.

⁹¹18 C.F.R. § 1.41(m)(2) (1979).

⁹²See *Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

⁹³This is illustrated in the incremental pricing area, where exempting any individual industrial boiler fuel user from incremental pricing would relieve it from an immediate and substantial hardship but might not significantly impact any other individual ratepayers.

makers, it may be in the "public interest" to encourage the production of gasohol or hospital beds or domestic television sets, but such considerations are irrelevant to section 502(c)'s standard of "special hardship, inequity, or an unfair distribution of burdens" which the Commission's regulations employ for granting permanent relief. Other justifications for granting relief, such as general public interest considerations, should be left to general rulemakings in which the public is more fully alerted to the agency's policymaking initiatives.

In sum, the Commission's regulations deviate from section 502(c)'s standards for relief. The fact that the relief is labeled "interim" cannot justify the departure from the statutory adjustments standards, inasmuch as the statute draws no distinction between interim and permanent relief orders. Moreover, as all Commission practitioners are fully aware, the label "interim" can be misleading, since such orders may remain in effect for many years.⁹⁴

In keeping with more traditional standards for interim relief, we suggest that interim relief should be granted only if there is a *prima facie* showing (1) of special hardship, inequity or an unfair distribution of burdens sufficient to establish the probability of ultimate success or the merits, (2) that the applicant will suffer irreparable injury if relief is delayed, (3) that the harm to others of granting relief will not outweigh the benefits of allowing relief, and (4) that the public interest will be served by granting relief on an interim basis.⁹⁵ Significantly, the Commission has adopted this more stringent interim relief standard in connection with its review of orders denying adjustments under the DOE Act.⁹⁶

3. *The FERC's Interim Procedural Structure*

Examination of the FERC's interim procedural rules governing adjustments applications reveals a number of possible issues that might be explored. Obvious questions concern Staff organization to implement the adjustments procedures, separation of functions, *ex parte* communications, the boundaries of the decisional record, the manner in which hearings and conferences will be conducted, and the appropriate treatment of confidentiality claims. However, exploration of all of those issues is not feasible here, and, in any event, limited experience precludes the drawing of conclusions. We will restrict ourselves, therefore, to a few general observations about the overall structure of the adjustments process as now constituted.

Viewing the interim regulation as a whole, perhaps the most startling procedural characteristic is the number of layers of decisionmaking. Rather than streamlining the decisional process, the Commission has added a new

⁹⁴The curtailment cases present prime examples of this proposition, with some "interim" plans remaining in effect for several years. See, e.g., *El Paso Natural Gas Co.*, RP72-6. Indeed, the "interim regulations" governing adjustments have already been in effect for more than one year.

⁹⁵See note 92, *supra*.

⁹⁶"Order Granting Temporary Stay, Designating Presiding Officer, and Requiring Filings" (Feb. 7, 1980) and "Order of Presiding Officer Denying Stay of Contested Decision and Order," (Feb. 22, 1980), *San-Ann Service, Inc.*, FERC Dkt. No. RA80-5.

layer of decisionmaking to the traditional model of going first to hearings, next to the Commission, and then to court. Under the interim regulation, an applicant for an adjustment is faced with going, first, to the Staff; second, to hearings before a presiding officer; third, to the Commission; and fourth, to a court. Presumably, a rehearing stage is also required between the Commission decision and court review.⁹⁷ Because the proceeding before the presiding officer would appear to meet the statutory procedural requirements, it is not clear why the additional step of a proceeding before the Staff was added. Although each stage in the process is arguably useful, we question whether it is appropriate to require persons, who believe they are suffering a "special hardship, inequity, or unfair distribution of burdens," to go through so many different decisionmakers in pursuit of relief. To be sure, experience with the present structure may eventually show that decisions in relief cases are processed with adequate rapidity under the interim rules. Still, it seems likely that the process could be accelerated without losing either accuracy or procedural flexibility by compressing two of the administrative stages into one.

If the layers of decisionmaking were to be reduced, the most obvious alternative procedural structure would be to eliminate the Staff decision and to go directly to the hearing before a presiding officer. In such a process, the Staff would play its traditional role of independent evaluator, advisor, and sometime adversary.⁹⁸ This would permit the Staff to continue to assure that the issues are fully aired, an important role. That role is very different from the decisionmaker's role and is often important in shaping longer term policy and in informing the public of the facts and issues involved.

A second possibility would be to dispense with separate presiding officers and let the Staff play evaluator, critic, hearing officer (opportunity for oral presentation is required), and judge, with appeals directly to the Commission. This approach might foster efficiency, more expert decisionmaking, and more consistent policy implementation. However, employing such procedures could well lead, over time, to serious public objections based on perceptions of unfairness. Objections would arise, in part, because the Staff also plays the role of adversary, investigator, and enforcer in other areas, and, in part, because parties naturally are less likely to suspect improper influence when faced with an insulated decisionmaker. Experience under the statutory antecedents to section 502(c), where there were claims of partiality, *ex parte* contacts, and other improper influences,

⁹⁷See section 506(a) of the NGPA, 15 U.S.C. § 3416(a) (Supp. II, 1978).

⁹⁸One possible variation on the traditional model would be to make the Staff responsible for most prehearing matters, including scheduling and conducting conferences to discuss settlements, factual issues and stipulations, and definition of legal issues. For example, it could work with the applicant and others to investigate and evaluate the proposal and prepare a recommendation to the decisionmaker, defining any disputed issues to be resolved in a proceeding before the decisionmaker. On the other hand, if exigencies require, the matter might go directly to hearing before the decisionmaker with the Staff playing the role of adversary.

illustrates this problem.⁹⁹ At DOE, the structural responses to these criticisms have been the development of the OHA as a quasi-independent review body within the DOE and Congressional action to superimpose the FERC as an additional tier of independent agency review of remedial and adjustment orders. Of course, one could deal with this problem by establishing a separate section of Staff members, like the OHA, which has decisionmaking as its only job and which is otherwise independent of the rest of the Staff.

A third possibility, of course, would be to return to the Commission's traditional model and use the Administrative Law Judges, an existing corps of independent decisionmakers. Presumably, the Commission shied away from this option on the ground that its adoption would undermine efforts to reduce formality. Nevertheless, while it might take some experience to reduce procedural formality in keeping with the opportunities presented by informal adjudications, the ultimate result might be very salutary. The ALJ's are experienced decisionmakers and have demonstrated their ability to manage adjudicatory proceedings. Further, their status as independent decisional officers within the agency is already well established. Assuming that the ALJ's and the lawyers before them can adapt to less formal adjudicatory procedures, it may make more sense to tap the existing Office of Administrative Law Judges than to create a new parallel corps of presiding officers.

No effort will be made here to recommend a choice among these possible options. Determining whether any one of them should be adopted would require more analysis than space permits and, in any event, should perhaps await further experience with the present rules.

4. *Judicial Review.*

The principal issue arising with respect to judicial review of orders issued under section 502(c) is whether review may be obtained of orders *granting* adjustments. The question arises because of a peculiarity in the language of section 502(c), which leaves no doubt that *denials* of adjustments are subject to judicial review. After requiring that procedures be established for considering adjustment requests, section 502(c) states:

If any person is aggrieved or adversely affected by the denial of a request for adjustment under the preceding sentence, such person may request a review of such denial by the officer or agency and may obtain judicial review in accordance with section 506 when such denial becomes final.

Reasoning by negative implication, one inference from Congress' explicit authorization of judicial review of *denials* of adjustments requests is that Congress did not contemplate judicial review of *grants* of adjustments.

⁹⁹See generally Note, "Phase V: The Cost of Living Council Reconsidered," 62 *GEO. L.J.* 1663 (July 1974). Under the Commission's interim adjustments procedures, the Staff is apparently not subject to the FERC's *ex parte* rules, although it is expected to play the role of decisionmaker and advisor to the Commission in the same case. See Order No. 24-B at 5; 18 C.F.R. § 1.41(j)(3). In addition, individual members of the Staff may serve as adversaries in the review proceedings before the presiding officer. *Id.* This mix of Staff functions may lead to complaints of unfairness in the future. There is also potential for complaint concerning the presiding officers' independence, since they are members of the Office of Opinions and Review, which works directly with and advises the Commissioners.

Indeed, if section 502(c)'s use of the word "denial" were taken literally, then one would not even have a right to Commission review of Staff orders granting relief, although, ostensibly as a matter of discretion, the FERC's interim rules permit such internal appeals from grants of relief.¹⁰⁰ However, because persons can be as severely impacted by grants of adjustments as by denials (e.g., where an adjustment order raises a seller's price or otherwise shifts costs or natural gas supplies between persons), the notion that only one side may appeal from the Commission's adjustments orders is troubling, to say the least. In addition, when one recalls that the adjustments process is defined to include modifications and rescissions of rules and orders, it would be difficult to conclude that Congress intended grants of adjustments to be unreviewable.

A similar issue has arisen under the adjustments procedure set forth in section 504 of the DOE Act. In *Texaco, Inc. v. DOE*,¹⁰¹ the court was presented with the question whether the FERC has jurisdiction to review grants of adjustments by the OHA.¹⁰² Because section 504(b)(2) of the DOE Act provides that "[t]he Commission shall, by rule, establish appropriate procedures . . . for review of a denial [of a request for adjustment]," the FERC had refused to consider petitions for review of grants of adjustments.¹⁰³ This position was rejected by the U.S. District Court for the District of Columbia, which held that, as the definition of an "adjustment" includes "exceptions" to orders, the grant of an adjustment to one party over another party's objection constituted the denial of an "adjustment" to the objector, thereby authorizing FERC review.

The "definitional" reasoning of the district court in *Texaco*, if applied in a suit seeking review of a section 502(c) adjustment, would certainly resolve the judicial review question under discussion here. In our view, however, one need not apply a strained definition of "adjustment" to hold that judicial review is available to persons aggrieved by grants of adjustments, as well as those injured by denials. There is a well established, strong presumption in favor of judicial review of agency action. Only two exceptions to this presumption are recognized by the A.P.A.: (1) cases in which a statute precludes judicial review and (2) agency actions committed to agency discretion by law.¹⁰⁴

The Supreme Court has stated that, in the absence of an express prohibition, demonstrating that a statute precludes judicial review requires one

¹⁰⁰In Order No. 24, adopting the interim rules, the Commission clearly stated that it did not believe that it is required by section 502(c) to permit internal review of Staff decisions granting relief. (Slip op. at 3). This is consistent with its view that it has no jurisdiction to review OHA grants of adjustments under section 504 of the DOE Act. See *Texaco, Inc. v. DOE*, *supra*, 460 F. Supp. at 339. Although the Commission was not presented with the need to discuss judicial review in Order No. 24, the logical extension of the FERC's reasoning would be to preclude judicial review of grants of adjustments.

¹⁰¹Note 3, *supra*.

¹⁰²Interestingly, a brief filed by the FERC's Solicitor conceded that direct judicial review of grants of relief by the OHA could be obtained without an intervening appeal to the FERC; but, the issue of direct judicial review was not presented in that case. Also, we note that grants of adjustments under the FEA Act have been reviewed without discussion of this issue. See, e.g., *New England Petroleum Corp. v. FEA*, *supra*, 455 F. Supp. at 1295-1300 (S.D.N.Y. 1978).

¹⁰³18 C.F.R. § 1.40.

¹⁰⁴5 U.S.C. § 701 (1976).

to bear "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [the agency's] decision."¹⁰⁵

The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved party will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.¹⁰⁶

The Court has stated also that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."¹⁰⁷ Consistent with this approach, the Court—citing Professor Jaffe's assertion that "[t]he mere fact that some acts are made reviewable [by a statute] should not suffice to support an implication of exclusion as to others,"¹⁰⁸—has declared that, when a statute specifically provides for judicial review of some but not all agency actions, one must

inquire whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review.¹⁰⁹

Applying that analysis to the NGPA, the appropriate question is whether, in the overall context of the NGPA, section 502(c)'s assertion that judicial review may be obtained by a person aggrieved by the denial of a request for adjustment implies a congressional purpose to forbid judicial review of grants of adjustments. Examination of the statute and legislative history reveals nothing, apart from the negative pregnant in the language of section 502(c), which suggests a congressional intent to foreclose persons injured by grants of adjustments from obtaining judicial review. There is certainly no imaginable policy justification for allowing aggrieved persons to obtain judicial review of denials of adjustments but not grants of adjustments. As noted previously, in many instances the injury from a grant of adjustment may be as great as the harm from a denial, and the scope of an adjustment decision may be as broadly applicable as a new regulation or a modification of an existing one.

If anything, the language of section 506(a) of the NGPA, which governs judicial review of "any order within the meaning of section 551(6) of title 5, United States Code,"¹¹⁰ except civil penalty orders under section 504(6) and emergency orders under sections 302 or 303, evinces a congressional purpose to make judicial review broadly available. Although it contains several explicit exceptions, section 506 makes no mention of orders granting adjustments. In fact, if an order is not within one of the specific exceptions noted above, the language of section 506(a) assumes that the order is sub-

¹⁰⁵*Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

¹⁰⁶*Id.*, quoting from *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

¹⁰⁷*Dunlop v. Bachowski*, *supra*, 421 U.S. at 567, quoting from *Abbott Laboratories v. Gardner*, *supra*, 387 U.S. at 141. *But see* K. C. Davis, *Administrative Law of the Seventies* § 28.09, at 256-57 (1980 Supp.).

¹⁰⁸L. Jaffe, *Judicial Control of Administrative Action* at 387 (1965).

¹⁰⁹*Abbott Laboratories v. Gardner*, *supra*, 387 U.S. at 141. The specific issue presented in *Abbott Laboratories* related to the availability of pre-enforcement judicial review. Nevertheless, the analysis by the Court extends more broadly to judicial review of any final agency action.

¹¹⁰*See* discussion page 84, *supra*.

ject to review upon suit by any aggrieved party.¹¹¹ Thus, the NGPA does not explicitly prohibit judicial review, and nothing in the regulatory scheme implies a need or intent to foreclose review of grants of adjustments.

The A.P.A.'s recognition that certain "agency actions" can be "committed to agency discretion" is also inapplicable here.¹¹² The committed to agency discretion exception is a very narrow one and applies only "in those rare instances 'where statutes are drawn in such broad terms that in a given case there is no law to apply.'"¹¹³ As discussed above, there obviously is law to be applied to the adjustments process. In addition, if there is sufficient law to apply to permit review of denials, then, logically, there must be a basis in law for reviewing grants of adjustments.

In sum, it appears that the language in section 502(c), asserting that judicial review is available for denials of adjustments, should not be read to imply a congressional intent to foreclose review of orders granting adjustments. At most, section 502(c) is ambiguous, and the NGPA as a whole evinces a broad intent to allow judicial review. In all likelihood, Congress did not focus on this issue of reviewing grants of adjustments and merely carried forward language from earlier statutes. Therefore, we conclude that judicial review should be available to persons aggrieved by grants, as well as those aggrieved by denials. No other result can adequately assure both preservation of the rights of the parties and the FERC's adherence to the purposes of the NGPA.

As to the procedures and standards applicable to judicial review, section 506(a) of the NGPA, supplemented as needed by the judicial review provision of the A.P.A., should control.¹¹⁴ Since section 506(a) of the NGPA essentially corresponds to section 19(b) of the Natural Gas Act,¹¹⁵ judicial review of adjustments should be similar in most respects to judicial review under the Natural Gas Act.

F. CONCLUSION

In conclusion, we suggest that the introduction of the adjustments procedure under section 502(c) of the NGPA is a significant development. It will be an increasingly important element of practice before the FERC and will give rise to many legal issues as parties and the Commission adapt to the new procedural framework. At the same time, if the shift to less formal procedures is undertaken cautiously and with sensitivity to the needs of the parties, the informal procedures offer opportunities for rapid resolution of issues in many cases. In this regard, we suggest that in adopting and implementing informal adjudicatory procedures, the Commission should carefully

¹¹¹Section 506(a)(4), 15 U.S.C. §3416(a)(4) (Supp. II, 1978), for example, states in part:

Any person who is a party to a proceeding under this Act aggrieved by any final order issued by the Commission in such proceeding may obtain judicial review of such order in the United States Court of Appeals for any circuit in which the party to which such order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit.

¹¹²5 U.S.C. § 701(a) (1976).

¹¹³*Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 413.

¹¹⁴15 U.S.C. § 3416 (Supp. II, 1978); 5 U.S.C. §§ 701-706 (1976).

¹¹⁵15 U.S.C. § 717r(b) (1976).

consider not only whether the procedures will, in fact, operate efficiently to produce fair and accurate results, but also whether the parties and the public will perceive the process as producing fair and accurate results. Justice is not well dispensed if the parties perceive the process as arbitrary or unfair. If for no other reason than this, the Commission should proceed cautiously in moving away from traditional Commission procedures.