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PUBLIC UTILITY RATE REGULATION AND THE IOWA ADMINISTRATIVE PROCEDURE ACT—EXTENDING MAXIMUM PROCEDURAL PROTECTION TO PUBLIC UTILITIES AT PUBLIC EXPENSE

Don Charles Uthus† *& Diane McIntire*††*

I. PREFACE

The purpose of this article is to pursue from the standpoint of government regulation of public utilities the search for a proper balance between efficiency and economy in state agency operations and the protection of individual rights. Such a balancing of interests affecting the general public is perceived to be the objective of the Iowa Administrative Procedure Act. And, as is true of the statute prescribing utility rate regulation, the means selected to accomplish that legislative goal were intended to remove disproportionate resources as an element influencing final disposition of public interest controversies. Consequently, the problems discussed do not entail an incompatibility of purpose. Rather, the focus is on the question of whether the terms of the procedural statute when applied to the regulatory statute actually achieve their purpose. The negative answer reached stems mainly from observations that the utility industry has unnecessarily received procedural benefits intended for the individ-

† Commerce Counsel. Appointed under Iowa Code ch. 475 (1977) in 1971, reappointed in 1975. B.A. 1963, George Washington University; J.D. 1967, George Washington University Law School. West Publishing Company Federal Practice Expert and Co-Author of West's *Federal Practice Manual*. Former Supervisory Trial Attorney with the Federal Power Commission. Member of the Iowa Supreme Court Bar, the Bar of the United States Court of Appeals for the District of Columbia Circuit, and the Bar of the United States District Court for the District of Columbia.

†† Legal Intern, Office of Commerce Council; B.A. 1975, Iowa State University; senior at University of Iowa College of Law.

* The authors wish to acknowledge the extensive assistance of Mary Greenwood, former legal intern with the Office of Commerce Counsel, in the preparation of this Article. B.A. 1974, Southern Methodist University; J.D. 1977, Drake University Law School.

ual, and that a continuation of this consequence will economically disadvantage the public contrary to the intent of both the regulatory and procedural enactments.

The particular procedural benefits addressed are those pertaining to the rights of individuals to challenge agency action at the earliest practicable point in time before a local district court, with the option of an appeal to the Iowa Supreme Court left open to either party. Not only is the concept of thereby mitigating the greater relative resources of the agency inapplicable to the utility industry, but also the intended limitation on number of appeals to the supreme court is defeated. Whereas the limited resources of the individual would normally lessen the likelihood of an appeal from the appellate review of a district court, the greater resources of the utility industry almost guarantee the exercise of this opportunity.

Moreover, most of the cost associated with the two-stage appeal process is borne by the individual citizens it was designed to assist. In this regard, the only recognition in the Iowa Administrative Procedure Act of a distinction between the utility industry and the individual litigants is limited to a provision intended to prevent disruptive interlocutory appeals. That provision is viewed as insufficient, and has proved to be ineffective.

It is the incongruous results mentioned, the relationships involved, and the measurements of related public expense, that form the content of this discussion. The solution herein proposed is believed to provide a more equitable procedural framework for all affected interests.

II. The Inapplicability of the Underlying Premises of the Iowa Administrative Procedure Act to Public Utility Rate Regulation

In prescribing a procedural code for agency action affecting the public, the Iowa Administrative Procedure Act[1] (IAPA) did not contemplate a need on the part of the monopoly utility industry for the "greatest possible procedural protection for individuals."[2] Yet public utility companies and individuals fall within the IAPA definition of "person"[3] and are therefore accorded identical procedural rights. The failure of the IAPA to fully recognize a distinction between these two types of persons has meant undue frustration to public utility

1. Iowa Code §§ 17A.1-.23 (1977).

2. Iowa Administrative Procedure Act, Introductory Note, at i (Tent. Draft, Sept. 10, 1973) (drafted by the Iowa State Bar Ass'n Special Comm. on Admin. Law), *quoted in* Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa L. Rev. 731, 751-52 (1975). *See also* Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa L. Rev. 731, 738, 759 (1975) [hereinafter cited as Bonfield]; Des Moines Register, June 30, 1975 at 1, col. 7; *id.*, March 29, 1974 at 16, col. 1; *id.*, Nov. 7, 1973 at 6, col. 1.

3. Iowa Code § 17A.2(6) (1977). " 'Person' means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency." *Id.*

regulation at great cost to the individual as a ratepayer. The impact of this oversight has registered principally in the area of judicial review of Iowa State Commerce Commission (Commerce Commission) action under the "reasonable and just" ratemaking standard of chapter 476 of the Code.[4] Accordingly, since fairness would indicate that individual citizens should not be economically disadvantaged by a sharing of procedural rights intended to belong exclusively to them, this article has been developed to explain the need for a statutory change in judicial review procedure, which would reduce unnecessary public expense in a manner consistent with the purpose of the IAPA.

The common purpose of the IAPA[5] and the public utility rate regulation statute[6] is the protection of the individual rights of average citizens. The remedies prescribed in each enactment were designed to correct the natural inequities resulting when relatively powerless individuals deal with large, powerful organizations.

The means selected for accomplishing the objective of utility rate regulation was the delegation to a state agency (the Iowa State Commerce Commission) of the duty and authority to establish the "reasonable and just" rates to be charged by the various public utilities.[7] The means selected to accomplish the objective of the IAPA was the prescription of explicit procedures that each agency must follow at a minimum in conducting its business and of how those persons its actions affect may challenge those actions.[8]

In short, the regulatory statute seeks to protect the public from monopoly pricing of utility service through the creation of a state agency to act for the citizen—while the procedural statute seeks to give that same individual a break in his dealings with big government through the imposition of procedural limitations on all those entities it defines as agencies. The IAPA definition of "agency"[9] includes the Commerce Commission, and the definition of the object of its protective provisions, designated "person," includes public utility companies.[10] Thus, Commerce Commission procedures and appeals from its actions are controlled by the IAPA and, in the process, the industry regulated by the Commission has been accorded procedural advantages which in concept were intended to benefit the very citizens whose interests the agency itself is charged to protect. It seems axiomatic that the individual will not receive the full benefit of each of these laws if some of the procedural rights intended for him or her are given to an inherently adverse utility industry.

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4. IOWA CODE §§ 476.1-.26 (1977). Chapter 476, Public Utility Regulation, consisting of sections 476.1 to 476.26 was enacted by 1963 Iowa Acts ch. 286, §§ 1-25, 27, 28, effective July 4, 1963.
5. IOWA CODE § 17A.1 (1977).
6. Note, *Current Iowa Public Utility Regulation*, 51 IOWA L. REV. 385 (1966).
7. IOWA CODE § 490A.8 (1975).
8. *Id.* § 17A.1(2).
9. *Id.* § 17A.2(1).
10. *Id.* § 17A.2(6).

Nonetheless, whether the loss involved is of sufficient practical consequence to call for change largely depends upon the capacity of the regulatory agency, under its enabling legislation, to cope with the task of regulating the utility industry on behalf of the ratepaying public. If the resources of the agency were significantly greater than those available to the regulated industry, no correction in the present law would be justified, on the theory that comparatively small private interests also deserve the "individual" protection of the IAPA. However, a completely opposite situation than this exists between the Commerce Commission and the regulated public utilities in Iowa.

Although the State of Iowa has a relatively small population, because of the large number of "public utilities" serving that population, as many rate proceedings are generated as arise in jurisdictions with larger populations.[11] The financial resources drawn upon by the Commerce Commission in processing these cases must come from a fixed budget approved by the General Assembly.[12] The Commission's total proposed budget is currently $2,559,512.[13] Among other responsibilities, this budget must accommodate the prosecution of pending utility proposals presently seeking to increase rates by over $100,000,000 annually.[14] On the other hand, the financial resources available to and the relative size of public utilities in Iowa, measured in terms of the taxable value of their total capital investment, is in excess of $3,200,000,000,[15] greater than that of all other industry in the state combined.[16] Moreover, under chapter 476 of the Code and applicable precedent, all of the litigation expense to the state and much of its cost to the industry associated with the prosecution of rate increase proposals both before the Commission and in the courts, if appeals from agency decisions are taken, will be allowed "above the line," *i.e.*, will be permitted to

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State	Number of Rate Regulated Utilities	Number of Rate Proceedings Filed in 1976
Georgia	53	11
Illinois	93	17
Iowa	109	22
New Jersey	18	13
New York	84	18

Electric, gas and telephone data derived from:

Major Pending Utility Rate Increase Applications (Jan. 25, 1977) (Iowa State Commerce Commission (I.S.C.C.) inter-office memorandum);

Number of Utilities Regulated Under Chapter 490A, Code of Iowa as of Dec. 31, 1976 (I.S.C.C. inter-office memorandum);

Telephone conversations with representatives of other states' commissions (Feb. 18, 1977).

12. IOWA CODE ch. 8 (1977).

13. Des Moines Tribune, Jan. 29, 1977, at 4, col. 1.

14. Major Pending Utility Rate Increase Applications (Jan. 25, 1977) (I.S.C.C. inter-office memorandum).

15. PROPERTY TAX DIVISION, IOWA DEPARTMENT OF REVENUE, 1975 PROPERTY VALUATION REPORT FOR TAXES LEVIED IN 1976 AGAINST THE 1975 ASSESSMENT, Table, Final Adjusted Taxable Values for 1975, Public Utilities Assessed by Department of Revenue, County Totals—Rural & Urban Combined.

16. *Id.*, Table, Final Adjusted Taxable Values for 1975, Real Property Excluding Public Utilities, County Totals—Rural & Urban Combined.

charged by the utility to the customer as a part of the rates he or she pays.[17] ese few facts should be sufficient to show that, as between the Commerce ommission and the utility industry, it is the ratepayer-financed[18] agency which the "little guy," operating on a limited budget and faced with a very heavy ase load generated by an industry which stands as the "big guy" possessed of virtually unlimited resources.

It is worth emphasizing that the premises of the IAPA as to relative resources are not faulty generally, but rather are inapplicable to public utilities and the state agency which regulates their rates. Moreover, it is the IAPA concept of procedural "fairness and justice"[19] which provides the predicate for a more complete extension to the citizen of the economic fairness required by the rate regulatory statute through changing the appellate procedures prescribed by chapter 476. That the IAPA in fact did little to change the status quo[20] in this regard is viewed as no reason to disregard proposed modifications in the law, designed to better achieve overall legislative purpose. Since the appellate process serves as the major procedural means of challenging regulatory action, and therefore tends to reflect in its consequences the tribulations experienced by the agency in its efforts to apply the law on behalf of the public, the following divisions will for the most part focus on the "judicial review" procedure required by the IAPA in conjunction with chapter 476.

III. Judicial Review of Agency Action

A. *Some Misdirected Objectives Have Resulted In Consumer Financing Of Utility Company Appeals*

Section 17A.19 of the present Iowa Administrative Procedure Act, which requires that all appeals from any agency decision first proceed to a district court, and from there—if desired by any one of the parties to the appeal—to the Iowa Supreme Court, is traceable to the fundamental premise of the IAPA. As above noted, it is, in simple terms, a recognition on the part of the legislature of a distinct need for procedural protection of the individual citizen in pursuing his or her interests before government agencies possessed of much greater resources than the individual could personally hope to marshal. Hence, among other efforts at accomplishing a better balance, the legislature chose to

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17. 1 A. Priest, Principles of Public Utility Regulation 67-71 (1969). *See also* Davenport Water Company v. Iowa State Commerce Comm'n, No. U-138, order at 39 (76 P.U.R.3d 209, 233 (I.S.C.C. Sept. 27, 1968)), *aff'd*, No. 50799 (Scott County Iowa D[illegible] (1969)), *aff'd*, 190 N.W.2d 583 (1971); note 18 *infra*.

[illegible]5; § 476.10 (1977). This statute provides that the Commission shall [illegible]DE charges those public utilities to which Commission expenditures are [illegible]ole, and the remainder of total Commission expenditures shall be [illegible]several [illegible] collected utilities in proportion to their revenues. *Id.* § 476.10(2). [illegible] by the unredited to the general fund of the state. *Id.* § 476.10(3). [illegible]onfield, §§ 2, at 756.

[illegible]A Code 19 (1973), *repealed by* 1975 Iowa Acts ch. 1090, § 211 [illegible]y 1, 1975).

allow this hypothetical "little guy" a chance to challenge big government on the little guy's territory—namely in a hometown district court with a hometown lawyer.[21]

It was no doubt believed that if the little guy was ever going to prevail on appeal it would be at the district court level. Big government would assume the expense of traveling to outlying counties and in the event it lost, the agency could appeal to the Iowa Supreme Court—a procedural mechanism helping to balance the scales. Logically, the likelihood of the little guy bearing the expense of a supreme court appeal if he lost in the district court was small.[22] Thus, the rationale was quite practical—the disadvantage of size was mitigated by a local venue for appeal and a self-executing means of limiting the supreme court's docket was also accomplished.

Unfortunately for the general public sought to be protected by this procedural treatment, no distinction was drawn for the regulatory agency, which in representing the little guy against the public utility companies, in effect *is* the little guy. To the consumer the procedural advantages available to utilities means both higher rates because of greater litigation expense and greater delay in recovering refunds ordered by the Commission. Tactically speaking, the industry has the advantage of legalized "forum shopping," *i.e.*, a choice of a number of district courts in which to lodge its initial appeal. Furthermore, if the "home court" advantage actually makes a difference on close questions, the agency must then in those cases appeal to the supreme court, while the utility continues to collect its proposed rates subject to refund.

The large number of district courts available to the utility industry for purposes of lodging appeals from Commission decisions is the consequence of section 476.13 which, after the enactment of the IAPA, reads:

Judicial review. Judicial review of actions of the commission may be sought in accordance with the terms of the Iowa administrative procedure *(sic)* Act. Notwithstanding the terms of said Act, petition for judicial review may be filed in the district court of any county wherein the order of the commission or some part thereof is to take effect.[23]

Rather than being merely a preface to an exception, the "notwithstanding" language is the result of the expressed purpose of the IAPA that "nothing in th[e] Act is meant to abrogate in whole or in part any statute prescribing procedural duties for an agency which are greater than or in addition to those provided

21. IOWA CODE § 17A.19(2) (1977).
22. *Cf.* Bonfield, *supra* note 2, at 806. Speaking of dela... and its procedural advantage to the individual, as compared with ...ocedure procedure, Professor Bonfield observes: "In the first pla... judicial declaration far exceeds the financial resources ...ost. Ct. July ... had previously read:
23. IOWA CODE § 476.13 (19... 7). In Iowa C...
Appeal to district court. Any p...
is aggrieved by an order therein ...
upon the adverse party or parties ...
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here."[24] In turn, language of exception was required,[25] because the IAPA provision on the subject of judicial review accorded lesser rights to the general public:

> Proceedings for judicial review shall be instituted by filing a petition either in Polk County District Court or in the district court for the county in which the petitioner resides or has its principal place of business.[26]

Under the latter provision, it has been held that a corporation is restricted to either Polk County or the county of its principal place of business in filing its petition for review.[27] This holding is based on the reasoning that it would not have been necessary for the legislature to use the term "principal place of business" had it intended both corporations and individuals to be able to file petitions in counties in which they reside.[28] However, in the typical rate increase circumstance, a public utility company filing under section 476.13 has a choice of forum between and among those counties in which it provides service. This is so because Commission decisions prescribing rates will normally "take effect" throughout a regulated company's service territory.

This apparent preference for public utility companies, over the general public to which the IAPA is devoted, is again explained by an underlying premise which does not apply to rate regulation. The premise is that such greater procedural protection as might be found in existing statutes will provide "greater protection for the public than the IAPA."[29] For whatever reason, however, the result of perpetuating the "protection" provided by section 476.13 has been to allow utility company appeals to be initiated in potentially any one of the ninety-nine Iowa district courts, with the probability of appeal to the Iowa Supreme Court in every instance.

As protracted as this procedure is, its description does not indicate all of the procedural hurdles between a final Commission rate order and its final review by the supreme court. Steps other than review by a district court followed by appeal to the supreme court are possible. First, there could be more than one petition for review from a single chapter 476 rate proceeding. Any party to a case before the Commission has the right (if aggrievement is claimed) to petition for review.[30] Second, the creation of the new court of

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24. IOWA CODE § 17A.1(2) (1977).
25. IOWA CODE § 17A.23 (1977).
26. IOWA CODE § 17A.19(2) (1977).
27. Iowa Pub. Serv. Co. v. Iowa State Commerce Comm'n, No. 52945 (Black Hawk County Iowa Dist. Ct. Jan. 8, 1976) (ruling on special appearance and order, at 2-3), *appeal docketed*, No. 2-59150 (Iowa Sup. Ct. Feb. 2, 1976).
28. *Id.*
29. *See* Bonfield, *supra* note 2, at 755.
30. IOWA CODE § 17A.19(1) (1977). For example, in the aftermath of a recent Commerce Commission decision, *Iowa-Illinois Gas & Electric Company*, No. U-483 (I.S.C.C. June 21, 1976) (order on rehearing amending in part and confirming in part prior order denying proposed rate increase), both the Company and the Intervenor, League of Iowa Municipalities, elected to seek review. The Company sought review in Scott County. Iowa-Illinois Gas & Electric Company v. Iowa State Commerce Comm'n, No. 57320 (Scott County Iowa Dist. Ct. filed June 24, 1976). The League sought review in Polk

would amount to $7,560,000.[40] Plainly, if the time involved in this appeal process could be reduced by one-half, the savings to the general public through the elimination of the last two years would be on the order of $4,860,000 per annum in interest cost alone. Adding the fifty percent savings in actual direct cost of appeals, and compounding the interest cost savings, would bring that figure to over $5,000,000. The discussion of direct appeal procedure in the concluding section of this article suggests how these savings might be accomplished.

IV. Procedural Frustration of the Rate Regulatory Process

A. *Some Distinctions With A Difference—Who Represents Whom In Rate Regulation*

It is generally agreed that any proposed departure from a procedural statute founded to a large degree upon an expressed need for consistency, requires a strong showing of relevant distinctions *with* a difference.[41] Some of those distinctions have already been made with respect to the purpose of utility rate regulation, the relative size of the regulated industry, and the inherent advantage of that industry to challenge, at public expense, agency action favoring the ratepayer. An equally relevant and more basic distinction is that, unlike the situation of most other state agencies, the interests of the citizen in contested rate cases are not represented by those private parties who appear before the Commerce Commission, but by persons within state government obligated by law to regulate the Iowa utility industry.

The tendency of the IAPA to lump all agencies together is a common one, which facilitates the development of a uniform law. In defense of such purposeful generalization, it is often observed that the distinctions usually drawn as between respective agency functions are, as far as procedure is concerned, distinctions without a difference.[42] One fundamental distinction, however, not of that category and not specifically mentioned above, is the very basic and procedurally quite relevant difference between the function of so-called executive

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by order issued January 18, 1974, the Company had collected $2,262,105 in such excess revenues.

The District Court decision was appealed by United Telephone to the Iowa Supreme Court on February 4, 1974. The case was finally submitted through oral argument to the Court on December 9, 1976. At that time the amounts collected by United Telephone subject to refund were in excess of $4,000,000. May 1, 1977 marked five years from the date of the Commission decision ordering the initial refunds.

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First year of Court Appeals, $18,000,000 at 6%	$1,080,000
Second year of Court Appeals, $27,000,000 at 6%	1,620,000
Third year of Court Appeals, $36,000,000 at 6%	2,160,000
Fourth year of Court Appeals, $45,000,000 at 6%	2,700,000
	$7,560,000

41. *See* Bonfield, *supra* note 2, at 756.
42. *Id.*

agencies and that of independent regulatory agencies. Professor K. C. Davis has described the proposition quite well:

> Extremely important is the distinction between the typical executive process and a mature administrative process, such as that of some federal regulatory agencies. An example of a typical executive process is a government purchasing agent's decision to buy goods from Company A rather than from Company B. Altogether different is the process by which, say, the National Labor Relations Board issues a cease and desist order: a full hearing is accorded, parties are allowed to present evidence and to cross-examine witnesses, a determination is made on the record, findings of fact are fully stated, the tribunal writes a reasoned opinion in which issues of law and policy are related to the tribunal's own prior decisions, the principle of stare decisis is about as strong as it is in a federal court on a problem of public law, the opinion may be scrutinized and criticized by an active bar, and the decision is subject to judicial review to determine whether the findings are supported by substantial evidence and whether the decision is in accordance with law.[43]

The Commerce Commission functions as an independent regulatory agency, at the state level, in essentially the same manner as do federal regulatory agencies such as the NLRB, at the federal level. This is evident from its enabling legislation.[44] The distinction between the Commission's ratemaking function and the functions of other agencies of Iowa government may be even *greater* than the basic difference described by Davis. While a few other state agencies may fit the general regulatory description,[45] none must contend[46] with either a regulated sector the size of the utility industry, or suffer at public expense the procedural advantage enjoyed by the utility industry in appeals from Commission rate decisions. In this respect, the Commission's operations are truly unique in the State of Iowa.

This dissimilarity has not gone unnoticed in Iowa law. The General Assembly has created, in the Office of Commerce Counsel, an independent office for the prosecution of public utility matters.[47] That office functions not only as counsel to the Commerce Commission, but also to:

> Investigate the legality of all rates, charges, rules, regulations, and practices of all persons under the jurisdiction of the commission, and institute civil proceedings before the commission or any court to correct any illegality on the part of any such person and prosecute the same to final determination.
>
> Appear for the commission or for the state and its citizens and industries in all actions instituted in any state or federal court which

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43. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.08, at 57 (1958) [hereinafter cited as DAVIS].

44. IOWA CODE chs. 474, 476, 476A (1977).

45. *E.g.*, IOWA CODE ch. 307 (1977) (Transportation Regulation Board); *id.* ch. 506 (Commissioner of Insurance).

46. These other regulatory agencies do not in fact regulate the profitability of the industries under their jurisdiction, and therefore do not generate the constant and intensely combative litigation experienced in the process of utility rate regulation.

47. IOWA CODE ch. 475 (1977).

> involves the validity of any rule, regulation, or order of the commission, and prosecute in any state or federal court in the name of the state, all actions necessary to enforce, or to restrain the violation of any rule or order of the commission.[48]

In a provision also applicable to utility regulation, section 476.2 of the Code provides:

> The commission shall employ at rates of compensation consistent with current standards in industry such professionally trained engineers, accountants, attorneys, and skilled examiners and inspectors, secretaries, clerks, and other employees as it may find necessary for the full and efficient discharge of its duties and responsibilities as required by this chapter.[49]

The combination of this provision and the public prosecutor statute has led to a much more defined separation of functions in the accomplishment of Iowa utility rate regulation than exists in the vast majority of states. Actual, as opposed to theoretical, representation of the "individual" in the establishment of "just and reasonable" rates for the "common good" or general public interest[50] is thus realized.

The essential elements in the process of a contested rate increase application constitute: (1) filing of the utility company proposal under Commission rules and regulations; (2) statutory suspension of the proposed effectiveness of the new rates under bond and subject to refund; (3) investigation of the filing by qualified members of the Commission's technical division under the general direction of an attorney assigned from the Office of Commerce Counsel; (4) the filing of prepared written testimony and exhibits by the proponent company under a procedural schedule set by Commission order; (5) the selection of expert witnesses by the Commerce Counsel's prosecuting attorney and the development and filing of prepared testimony in answer to the company's direct case; (6) the filing of other prepared testimony by intervenors, if any; (7) the submission of rebuttal testimony by the proponent company; (8) recorded trial-type hearings devoted to cross-examination of the proffered evidence, with the Commission presiding; (9) written briefs by the parties prepared with citation to the hearing transcript and relevant economic and legal authority; (10) Commission decision and order, often followed by applications for rehearing; and (11) ap-

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48. *Id.* § 475.7(2), (3), *as amended by* 1974 Iowa Acts ch. 1180, § 170 (effective July 1, 1975).

49. Iowa Code § 476.2 (1977).

50. The broad standard or doctrine upon which this type of rate regulation rests remains that expressed by Chief Justice Waite in Munn v. Illinois: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created." Munn v. Illinois, 94 U.S. 113, 126 (1877). An important clarification as to exposure to public utility regulation was added by the United States Supreme Court in its 1934 decision in Nebbia v. New York: "The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue." Nebbia v. New York, 291 U.S. 502, 533-34 (1934).

peals, if any, to a district court and from there to the Iowa Supreme Court. The latter process has been previously described in terms of the pertinent statutory procedure. When it actually transpires, the Commerce Counsel represents the Commission before the courts. At that point in time, the record of the contested case will be formed by thousands of pages of transcript and hundreds of pages of exhibits and briefs.[51]

The import of the outline of functions and procedure is to illustrate that, to the extent the state can regulate utility rates on behalf of the individual citizen, it has done so by specifically delegating that responsibility to specialized agents of government. Obviously, if the individual on his own initiative could accomplish that goal, the delegation to agencies of government would not have been necessary in the first place. Thus, rate regulation is typically discussed as a *substitute* for competition:

> More subtle and, . . . more fundamental, is the inherent consequence of substituting regulation for competition as the prime instrument of social control. When an adminstrative commission is invested with authority over the central economic decisions of an industry, it finds itself invested also with a heavy responsibility. The decision to regulate usually takes for granted the strength and financial health of the industry and seeks to introduce a counterpoise, to control abuses and protect the public.[52]

Understood in its full sense, this characterization of rate regulation serves to place private parties individually petitioning the Commerce Commission for specific rate relief and claiming to represent the "public interest" in one of two possible positions—either they are actually seeking to unnecessarily duplicate the agency's function in conjunction with that of the Office of Commerce Counsel; or they actually represent a special interest, which if fully satisfied would likely harm the general public interest in violation of the purpose and scope of the law. This is not to say that individual parties may not and have not served as catalysts for investigation and resultant agency rate action in the general public interest, because in fact they have done so.[53] Nor is it to say that Commis-

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51. For example, the pending Iowa Power and Light Company rate proceeding in Commission Dockets U-526 and RPU-76-1, as now submitted to the Commission for consideration, forms a record composed of 3118 pages of transcript, 127 exhibits, and 582 pages of briefs filed by the respective parties.

52. 2 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 12 (1971) [hereinafter cited as KAHN].

53. A case in point is that of Citizens United for Responsible Energy v. Iowa Power & Light Co., No. C-5-185 (I.S.C.C. Oct. 10, 1975) (order directing staff investigation and thereby disposing of complaint regarding the use of bill enclosures to disseminate information allegedly in the self-interest of the respondent public utility company). As indicated, the case arose on complaint of a consumer group, challenging the lawfulness of certain bill enclosures. Because of first amendment considerations, the Commission avoided addressing the censorship considerations raised. However, in a precedent setting action, it stated that through staff investigation it would, in pending and future rate cases, see to it that once any part of a bill insert was identified as being improperly included in rates, an apportionment of postage expense would be accomplished by: (1) dividing the total number of basic messages in that particular billing envelope into the amount of the actual postage cost; and (2) requiring, as a result, that the proportionate postage cost thereby allocated to the unnecessary item "be borne by the stockholder." Thus, the Commission pointed out

sion rate regulation is perfect, because perfection in this area of government operations is theoretical only.[54] Rather, the point is that the means for correcting potential Commission departures from the law harmful to Iowans as to the level of rates they pay is not enhanced by maintaining costly and duplicative avenues for appellate review travelled almost exclusively by members of the regulated industry. Instead, it would seem that far greater advantage to the individual as a public utility ratepayer would be achieved through economies in such procedure and reliance on correction, if needed, through executive and legislative surveillance and the constant exposure of the agency to the public eye.

In point of fact, the greatest reform in Commerce Commission operations came as a result of a combined executive and legislative investigation, triggered by newspaper disclosure of "secret agreements" between certain members of the Commission and representatives of rate-regulated utility companies.[55] The investigation and newspaper coverage of its progress spanned the latter half of 1971. The investigation generated resignations,[56] and involved investigations of Commission files and even a "raid" on Commission offices by state investigators.[57] The substantive thrust of the inquiry focused on the need for higher salaries to permit vacant positions to be filled and to allow the attraction of professional personnel to key staff positions.[58]

The latter element of the investigation underscores the principal problem associated with public utility rate regulation—obtaining and retaining the professionally trained personnel required to be employed to permit the proper discharge of agency duties. The very direct competition with the regulated industry and associated firms for such personnel has been a losing battle in the great majority of states.[59]

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that, given a bill mailed together with a bill insert of no benefit to the recipient, the amount of postage cost charged the rate payer would be cut in half.

54. *See, e.g.*, J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 109 et seq. (1961).

55. *See* Des Moines Tribune, July 6, 1971, at 1, col. 7; *id.*, July 7, 1971, at 1, col. 1; Des Moines Register, July 20, 1971, at 3, col. 1; *id.*, Aug. 22, 1971, at 1-2, col. 1; *id.*, Sept. 26, 1971, at 1-A, col. 3; *id.*, Oct. 10, 1971, at 1, col. 7.

56. *See* Des Moines Register, July 10, 1971, at 1, col. 1; Des Moines Tribune, July 13, 1971, at 1, col. 8.

57. *See* Des Moines Register, July 14, 1971, at 1, col. 4; Des Moines Tribune, July 14, 1971, at 1, col. 8; Des Moines Register, July 21, 1971, at 1, col. 1; *id.*, July 22, 1971, at 1, col. 6.

58. *See* Des Moines Register, July 8, 1971, at 1, col. 8; *id.*, July 30, 1971, at 1, col. 4; *id.*, Aug. 21, 1971, at 6, col. 1; Des Moines Tribune, September 13, 1971, at 1, col. 1; Des Moines Register, September 22, 1971, at 1, col. 6; *id.*, Oct. 10, 1971, at 1, col. 7; *id.*, Oct. 16, 1971, at 1, col. 3; Des Moines Tribune, Feb. 15, 1972, at 6, col. 1.

59. Effective resistance of this endemic competitive force depends upon Commission ability to meet the statutory standard calling for "rates of compensation consistent with current standards in industry"—a matter clearly not an issue subject to litigation in rate case proceedings:

> We leave to historians and political scientists the task of deciding to what extent developments such as these are reflections of a tendency for regulatory agents to be "captured" by the industries they were set up to govern. There are certainly many factors that tend to have this effect—the disparity in the quality of personnel and the amount of financial resources available to each side; corruption, including the subtle corruption that may affect administrators whose hope for fu-

The best evidence of the Commerce Commission's performance of its rate case prosecution function is the level of public utility rates in Iowa as compared with the rest of the country. In this regard, published data indicate an approximate relative decline in Iowa electric rates over the past several years from a national ranking of seventh to one of twenty-seventh.[60] Commission records indicate that since 1971 the agency has disallowed an approximate total of $50,000,000 per annum in proposed rate increases.[61] Office surveys of the findings by other state utility commissions on contested rate case issues indicate that if the findings of the Commerce Commission were substituted therefor, the utility rates in possibly all of those other jurisdictions would be lower.

The above remarks should not be taken as an indication that the IAPA totally ignored the dissimilarity of rate regulation and other state agency operations. Indeed, in section 17A.19 on Judicial Review, the very area to which this article is addressed, the IAPA expressly differentiates between them:

> 1. A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter. *When agency action is pursuant to rate regulatory powers over public utilities or common carriers and the aggrievement or adverse effect is to the rates or charges of a public utility or common carrier, the agency action shall not be final until all agency remedies have been exhausted and a decision prescribing rates which satisfy the requirements of those provisions of the Code has been rendered.* A preliminary, procedural or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy. . . .[62]

The first of these three sentences states the basic rule permitting appeal of "final" agency action. The next two sentences seek to define this term: the second, finality in rate case adjudication; and the third, finality in all other cases. The fact that the third sentence uses the term "final" in defining the term "final" has led to litigation over the meaning of this section which has tended to defeat the purpose of excepting rate cases from intermediate or interlocutory appeals. The goal of this exception was in essence to codify the "common law" in this respect[63] and thereby foreclose costly and premature litigation detrimental to the general public. Unfortunately, experience under the IAPA has brought with

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> ture advancement may lie in working for the private companies they are supposed currently to be regulating; the fact that producing interests are typically better organized than consumer interests to exert pressure, either directly on commissions or indirectly on legislatures, when it comes to public policies that bear directly on them. All of these factors have undoubtedly been influential.

KAHN, *supra* note 52, at 11-12 (citation omitted).

60. *See* Des Moines Register, Feb. 29, 1976, at 5, col. 1; *cf. id.*, Apr. 17, 1974, at 4, col. 1.

61. *See* Iowa State Commerce Commission Annual Report for 1975 at 3 (1976).

62. IOWA CODE § 17A.19(1) (1977).

63. The "common law" of such cases as Federal Power Comm'n v. Metropolitan Edison Co., 304 U.S. 375, 383-84 (1938).

it the realization that the exception for a utility ratemaking proceeding has been defeated by the very interlocutory appeals it was designed to prevent.

B. *Counterproductive Application Of The IAPA To Public Utility Rate Regulation—A Few Examples*

Contrary to its announced desires to (1) increase fairness and simplify the interaction between Iowa administrative agencies and the public and (2) maintain the capacity for efficient, economical and effective administrative action,[64] the IAPA, in its application to the Commerce Commission's public utility rate regulatory activities, has undermined both. Made available to the regulated utility industry, the procedural safeguards, definitions and basic structure of the IAPA have operated in practice to frustrate rate regulatory efforts by permitting unnecessary, disruptive appellate proceedings.

Both the Iowa Supreme Court and the General Assembly have recognized that for the Commission to effectively discharge its mandate of regulating the "rates, charges, schedules, service, regulations, or anything done or omitted to be done by any public utility," it must be allowed to gather relevant information and to act, after giving all parties an opportunity to be heard, *before* review is sought in the courts.[65] The court has held that if the Commission's demand for information is not too indefinite and is reasonably related to its broad authority, the information must be surrendered.[66] It has also ruled that the Commission's jurisdiction is exclusive and must be exhausted before resort to the courts.[67] The IAPA contains an attempt to codify this common law principle against interlocutory appeals from Commission rate activities in the second sentence of section 17A.19(1) of the Iowa Code.[68] This legislative recognition of the peculiar nature of public utility regulation, as opposed to the activities of other state administrative agencies, is salutary; but, unfortunately, it has not prevented interlocutory appeals and, in fact, the IAPA itself has unintentionally served to exacerbate the problem.

The emphasis of the IAPA is on providing a simple and knowable means to ensure the fairness of agency decisions and to fight any adverse action taken by the agency. In order to prevent bureaucratic frustration of these rights through any sort of "red tape," "agency action" was defined broadly to cover

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64. IOWA CODE § 17A.1(2) (1977).
65. IOWA CODE § 476.3 (1977); *see* cases cited notes 66-67 *infra*.
66. *In re* Iowa State Commerce Comm'n, 252 Iowa 1237, 110 N.W.2d 390 (1961).
67. State v. Iowa Electric Light & Power Co., 240 N.W.2d 912 (Iowa 1976) (this case arose before the effective date of the IAPA).
68. IOWA CODE § 17A.19(1) (1977). The second sentence of this section reads:
> When agency action is pursuant to rate regulatory powers over public utilities or common carriers and the aggrievement or adverse effect is as to the rates or charges of a public utility or common carrier, the agency action shall not be final until all agency remedies have been exhausted and a decision prescribing rates which satisfy the requirements of those provisions of the Code has been rendered.

anything an agency might do.[69] Furthermore, the third sentence of section 17A.19(1) makes agency action reviewable, even if not "final," to prevent injury from the delay.[70] Assuming that most "contested cases" before Iowa administrative agencies are short and simple affairs, little burden is placed on the efficient operation of the agencies involved.

The third sentence of section 17A.19(1) does not exclude action pursuant to rate regulatory powers, although this is necessarily implied because otherwise the second sentence defining finality in rate cases would be meaningless. Due to this lack of explicit exclusion and the fact that the interests involved have little or nothing to lose, the utilities will try to appeal from Commission action which is not final. In three cases this is precisely what happened.

1. *West Iowa Telephone Company*

The first case arose in a rate reduction proceeding initiated by the Commission and involving West Iowa Telephone Company.[71] In this type of proceeding, a public utility has every incentive to attempt to postpone final action for as long as possible because any reduction will normally not take effect until a final decision is rendered by the Commission. West Iowa asked for a continuance, which the Commission said it would grant if the Company agreed that any final decision ordering a reduction in rates would relate back for a period of time equal to the length of the continuance. West Iowa then petitioned the Polk County District Court for an ex parte stay order, alleging primarily that the Commission acted illegally in putting a condition on a continuance. The stay order was issued, but four days later upon hearing the Commission's position, the district court vacated the stay order and dismissed the petition *sua sponte* at petitioner's costs. It decided that the second sentence of section 17A.19(1) was intended to preclude judicial review of action taken pursuant to rate regulatory power over public utilities, reasoning that at least part of the justification for this sentence was to prevent undue delays during rate reduction proceedings.[72] This opinion may appear to vindicate the Commission's position, but it is a hollow victory in that a delaying tactic proved suc-

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69. IOWA CODE § 17A.2(9) (1977). This subsection reads:
"Agency action" includes the whole or part of an agency rule or other statement of law or policy, order, decision, license, proceeding, investigation, sanction, relief, or the equivalent or a denial thereof, or a failure to act, or any other exercise of agency discretion or failure to do so, or the performance of any agency duty or failure to do so.

70. IOWA CODE § 17A.19(1) (1977). The third sentence of this section reads: "A preliminary, procedural, or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy."

71. West Iowa Tel. Co., No. U-457 (I.S.C.C. June 17, 1976) (order denying motion to modify procedural schedule and rejecting acceptance of condition), *appeal dismissed*, No. CE6-2966 (Polk County Iowa Dist. Ct. June 25, 1976) (ruling on motion to vacate stay order and order).

72. West Iowa Tel. Co. v. Iowa State Commerce Comm'n, No. CE6-2966 (Polk County Iowa Dist. Ct. June 25, 1976) (ruling on motion to vacate stay order and order).

cessful for a short time, the energies of the Commission's legal staff were diverted, and the statutory provision that was to prevent this, did not.

2. *Iowa Public Service Company and Terra Chemicals International, Inc.*

The second case of interest arose when Iowa Public Service Company (IPS) filed a proposed increase in natural gas rates with the Commission. The tariff included a provision that IPS would treat contract rates like all other rates, in accordance with a Commission rule,[73] and thus provided for an increase in rates to be charged to Terra Chemicals, a contract customer of IPS. Terra Chemicals intervened in the proceeding and moved to reject the filing. The Commission overruled this motion without prejudice to its renewal at an appropriate time and allowed the proposed rates to become effective pending a final determination, subject to refund with nine percent interest of any amounts collected in excess of what would be determined to be reasonable.[74] (This is a common practice in rate increase cases.) However, Terra Chemicals, seeking court action that would preempt the Commission's decision on this matter, petitioned the Woodbury County District Court asking that the court reverse the denial of Terra Chemicals' motion. After a hearing and nearly two months of consideration, the district court sustained the Commission's special appearance on the grounds that the second sentence of section 17A.19(1) was controlling and that the court had no jurisdiction "until the proceedings before the Commission have reached a point where an order or orders of a definitive character dealing with the merits of the proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case have been made."[75] Here again, the Commission's position was up-

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73. 250 IOWA AD. CODE § 19.2(5)(c)(8) (1976). This subsection reads in part: "[a]ll tariffs must provide that, notwithstanding any other provision of this tariff or contract with reference thereto, all rates and charges contained in this tariff or contract with reference thereto may be modified at any time by a subsequent filing made pursuant to the provisions of Chapter 490A* of the Code." (*now chapter 476).

74. Iowa Pub. Serv. Co., No. RPU-76-14 (I.S.C.C. Apr. 29, 1976, *filed* March 30, 1976) (order instituting an investigation, suspending TF 6-100, docketing matter as a formal proceeding, consolidating with Docket No. U-548, approving corporate undertaking and granting intervention), *special appearance granted sub nom.*, Terra Chems. Int'l, Inc. v. Iowa State Commerce Comm'n, No. 92296 (Woodbury County Iowa Dist. Ct. Sept. 3, 1976) (ruling on special appearance).

75. Terra Chems. Int'l, Inc. v. Iowa State Commerce Comm'n, No. 92296 (Woodbury County Iowa Dist. Ct. Sept. 3, 1976) (ruling on special appearance at 2).

The court cited Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375 (1938). This case construed section 313(b) of the Federal Power Act: "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals." *Id.* at 383. The Court held that the appeals court had no jurisdiction and rejected the company's construction of the review provisions of the Federal Power Act, which was that they authorized:

> a review of every order that the Commission may make, albeit of a merely procedural character. Such a construction, affording opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions, would do violence to the manifest purpose of the provision.

Federal Power Comm'n v. Metropolitan Edison Co., 304 U.S. 375, 383-84 (1938). Citing

held, but its limited resources had to be directed to protecting its right to decide, instead of making a decision.

3. *Iowa Power & Light Company*

The third case, however, drives home this point with even more force. Not only was an interlocutory appeal taken, but the Commission's special appearance was overruled, a result which may spawn further attempts.

As a preface to discussion of this experience, it is well to mention that the IAPA, although defining agency action broadly,[76] ignores investigation as a distinct regulatory function, confining itself to rulemaking and contested cases. Professor Davis has discovered a similar problem with the Federal Administrative Procedure Act:

> Although the APA tries to limit administrative proceedings to rule making, adjudication, and licensing, the fact remains that many administrative proceedings are investigations—proceedings designed for the purpose of producing information. Investigations are useful for all administrative functions, not only for rule making, adjudication and licensing, but also for prosecuting, for supervising and directing, for determining general policy, for recommending legislation, and for purposes no more specific than illuminating obscure areas to find out what if anything should be done.[77]

The provisions for contested cases are not applicable because investigations are not of a quasi-judicial character. They occur prior to adversary proceedings (if such result); they are not adverse or adjudicative but merely exist to obtain information.[78] It logically follows that, given the Commission's broad investigatory powers, supposedly protected by judicial decision and legislative pronouncement from judicial interference, an investigation should be considered as agency action beyond the purview of the IAPA.[79]

What can happen when this recognition is not made is demonstrated by the history of a proposed investigation of Iowa Power & Light Company.[80]

"persuasive analogies" in the construction of judicial review provisions of other administrative agencies, the Court concluded that "attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration." *Id.* at 384, 385.

76. IOWA CODE § 17A.2(9) (1977). "'Agency action' includes . . . investigation. . . ." *Id.*

77. DAVIS, *supra* note 43, § 3.01, at 159-60.

78. *In re* Iowa State Commerce Comm'n, 152 Iowa 1237, 110 N.W.2d 390 (1961), *accord*, Jordan v. American Eagle Fire Ins. Co., 169 F.2d 281 (D.C. Cir. 1948); Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944); State *ex rel.* Railroad & Warehouse Comm'n v. Mees, 235 Minn. 42, 49 N.W.2d 386 (1951); *see* 73 C.J.S. *Public Administrative Bodies and Procedures* § 78, at 404 (1951).

79. *But see* IOWA CODE § 17A.2(9) (1977). Iowa Code § 17A.13(1) (1977) recognizes that investigation may take place before the commencement of a contested case.

80. Iowa Power & Light Co., No. FCU-76-1 (C-5-254) (I.S.C.C. Jan. 19, 1976) (order initiating investigation, docketing matter as a formal proceeding and consolidating complaint C-5-254 with Docket No. FCU-76-1; *id.* (I.S.C.C. Feb. 26, 1976) (order denying application for rehearing); *id.* (I.S.C.C. Mar. 15, 1976) (order granting in part and denying in part, motion for dismissal, consolidating complaint C-5-272 with Docket No.

that investigation is non-adversarial and designed simply to gather information. If the Commission, once all the information collected was analyzed, decided that it might wish to take some action (in this case including or excluding investment in the proposed nuclear facility when determining rates), it would have commenced a contested case proceeding. The Commission then would have considered any evidence or legal argument that Iowa Power wished to present. However, Iowa Power's legal arguments, contained in its two applications for rehearing, were denied without prejudice because there had not yet been gathered the facts necessary to decide whether to have a hearing at all. Despite these facts, Iowa Power, and apparently the district court, understood the Commission's denial of the applications as a *final* rejection of Iowa Power's legal position.

Another argument made by Iowa Power was that the Commission's action was not pursuant to its rate regulatory powers and so was not within the second sentence of section 17A.19(1), which defines finality in rate proceedings.[90] The Commission stated that it was investigating for rate-making purposes, and that agency action is presumed valid.[91] Specifically, the Commission had stated:

> Iowa Power can proceed and build a nuclear generating plant even if we determine that the investment made therein is imprudent. The power generated in such a facility could be sold to Iowa cooperative electric utilities or sold wholesale in interstate commerce.[92]

The Commission explained the rationale for investigating prior to the plant's construction as being the elimination of the risk of having the investment excluded from rate base at some later date and thereby avoiding any unnecessary increase in capital cost for the project.[93] Nevertheless, Iowa Power, again because of the structure and definitions contained in the IAPA, was successful in overcoming the protective language of the second sentence of section 17A.19(1) by merely alleging that the Commission was not acting pursuant to its rate regulatory powers.

Iowa Power further alleged that its aggrievement was *not* "as to rates," but rather a "chilling effect" on its financing.[94] While public announcement of the intent to investigate the individual citizen sought to be protected by the IAPA might well entail "aggrievement" and "finality," the "chill" spoken of by the regulated utility is inherent in a rate investigation of any kind and, indeed, in the Commission's enabling act which directs it to determine reasonable rates and

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90. IOWA CODE § 490A.27 (1975), *repealed by* Electric Power Generators, H.F. 1470, § 16, 1976 Iowa Acts ch. 1206 (effective July 1, 1976).

91. Buda v. Fulton, 261 Iowa 981, 986, 157 N.W.2d 336, 339 (1968).

92. Iowa Power & Light Co., No. FCU-76-1 (C-5-254) (I.S.C.C. Feb. 26, 1976) (order denying application for rehearing, at 3).

93. Iowa Power & Light Co., No. FCU-76-1 (C-5-254) (I.S.C.C. Jan. 19, 1976) (order initiating investigation, docketing matter as a formal proceeding and consolidating complaint C-5-254 with Docket No. FCU-76-1, at 2).

94. This allegation was made in order to avoid the second sentence of Iowa Code § 17A.19 (1977).

to investigate utility management. Similar arguments against the exercise of agency investigatory power have been considered and rejected by the United States Supreme Court.[95]

The final major area of aggrievements alleged were derived from the IAPA itself. Iowa Power alleged that the Commission was guilty of a great many "legal errors" although not tying these errors to any specific, identifiable injury. In great detail, the Commission argued that the "statement of intent" was not promulgated pursuant to the rulemaking provisions contained in the IAPA and the Commission's rules. Similarly, it was asserted that the investigation was not being conducted pursuant to the contested case provisions.[96] These arguments merely demonstrate that investigations of the type necessarily conducted by the Commission do not fit within the procedural dichotomy (rulemaking/contested cases) by the IAPA.

4. *Terra Chemicals Revisited*

That yet another means of accomplishing the effect of interlocutory appeal has been derived under a concept introduced in Iowa by the IAPA deserves parenthetical mention. The concept is that of "declaratory ruling" and the procedure for its exercise is found in IAPA section 17A.9.[97]

Less than a month after the Woodbury County District Court held that it lacked jurisdiction of the issue of whether Terra Chemicals' motion to reject the IPS tariff filing was properly overruled,[98] Terra Chemicals brought a "Petition for Declaratory Ruling"[99] before the Commission. The IAPA provides that such petitions seek rulings "as to the *applicability* of any statutory provision, rule or other written statement of law or policy, decision, or order of the agency."[100] Terra Chemicals, however, sought a ruling that the Commission rule, providing that tariffs must contain a provision that rate contracts can be changed by subsequent tariffs, was unconstitutional, contrary to chapter 476, inapplicable to Terra Chemicals' contract, and that other procedures should be followed.

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95. *See, e.g.*, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 213 (1946).

96. For example, the Company alleged that by forcing it to divulge records, it was being forced to take the burden of proof of the investigation. A "burden of proof" does not exist in an investigatory context, nor does a party being investigated bear the responsibility for the investigation itself.

97. IOWA CODE § 17A.9 (1977) provides:

> Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision, rule or other written statement of law or policy, decision or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

98. *See* notes 73-75 *supra*.

99. Petition for Declaratory Ruling, Terra Chems. Int'l, Inc., No. DRU-76-4 (I.S.C.C., filed Sept. 24, 1976).

100. IOWA CODE § 17A.9 (1977) (emphasis added).

The Commission's order[101] dismissed this declaratory ruling petition in accordance with its rules.[102] The grounds for dismissal were that the issue was presently a subject of the pending rate case, that the issue was complex, and that the rights of others besides Terra Chemicals were involved.

Although the second sentence of section 17A.19(1) makes provision, in conjunction with the requirement of that section for exhaustion of all agency remedies, to preclude review from the dismissal of rate case/declaratory ruling petitions,[103] Terra Chemicals sought judicial review. Thus, Terra Chemicals' argument is now pending before the Commission and before the Polk County District Court.[104] In the Polk County District Court, Terra Chemicals' position is essentially that it is harmed because of the Commission rule which gave it notice that its contract rights could be subject to change by the Commission. Terra Chemicals claims jeopardy to its contract rights from the adoption of the rule, alleges no agency error whatsoever, and seeks the same declaratory ruling which it requested from the Commission in the form of declaratory judgment from the court—again, without notice, hearing, joinder of all interested parties, or integration with other Iowa Public Service Company rate issues. As these circumstances show, by treating the dismissal of a declaratory ruling petition as the end of the road, parties to Commission rate cases will henceforth seek judicial review in a mode that is essentially different from interlocutory review.[105]

The development and use of such ingenious means of challenging rate regulatory action potentially detrimental to company interests was the basis for IAPA recognition of utility ratemaking as different from other agency activity. It is further proof of this difference that the reason for such a recognition has actually served to defeat its purpose of preventing interlocutory actions. Furthermore, it is viewed as concrete evidence of the need for stronger medicine.

IV. Summary and Recommendation

The intent of the IAPA to remove disproportionate resources as a factor affecting public interest determinations has not been served by the literal application of its terms to public utility rate regulation. Several provisions have frustrated that interest by continuing certain procedural advantages enjoyed by the utility industry. Principally, the use of the protracted appellate process has cost the public directly and indirectly millions of dollars per year. Despite the clear intent of the IAPA, its structure and broad definitions have made possible disruptive interlocutory actions, frustrating the goal of efficient rate regulation.

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101. Terra Chems. Int'l, Inc., No. DRU-76-4 (I.S.C.C. Oct. 21, 1976) (order dismissing declaratory ruling petition).

102. 250 Iowa Ad. Code § 4.6(1), (11), (12) (1976).

103. Iowa Code § 17A.19(1) (1977).

104. Terra Chems. Int'l, Inc. v. Iowa State Commerce Comm'n, No. CE6-3331 (Polk County Iowa Dist. Ct. filed Nov. 15, 1976).

105. *See also* Farmland Indus., Inc., No. DRU-76-5 (I.S.C.C. Oct. 21, 1976) (order dismissing declaratory ruling petition), *petition for review filed*, No. CE6-3349 (Polk County Iowa Dist. Ct. filed Nov. 19, 1976).

Since both the IAPA and utility regulation in Iowa are among the most recent such enactments in the nation, it is not surprising that other jurisdictions have recognized the problem identified, and have adopted more efficient and economical provisions for appeal from final orders of public service commissions. The procedures vary widely, but for purposes of discussion, they may be said to fall into four main categories. The first consists of two-stage appeals as in Iowa, but with venue in the lowest court strictly limited to a specified county. Twelve jurisdictions employ this procedure—Alabama,[106] Arkansas,[107] Georgia,[108] Kentucky,[109] Michigan,[110] Mississippi,[111] Puerto Rico,[112] South Carolina,[113] Tennessee,[114] Texas,[115] Washington,[116] and Wyoming.[117] A second category entails provisions calling for review of final orders commencing in the lowest court of original jurisdiction, with further review being direct to the highest court, skipping some intermediate state court level. Tennessee[118] and Louisiana[119] are the only states in this category. The third alternative approach is that which requires review of final orders to commence at some intermediate state court level. Indiana,[120] New Jersey,[121] New York,[122] and North Carolina,[123] fit this classification. The fourth and most popular of these alternatives to the IAPA "full venue" approach is that of mandatory direct review of final Commission orders in the highest court of the state. Fifteen jurisdictions use such a procedure—California,[124] District of Columbia,[125] Florida,[126] Hawaii,[127] Idaho,[128] Maine,[129] Massachusetts,[130] New Hampshire,[131] Ohio,[132] Oklahoma,[133] Rhode Island,[134] Utah,[135] Vermont,[136] Vir-

106. ALA. CODE tit. 48, § 79 (1958).
107. ARK. STAT. ANN. § 73-133 (1957).
108. GA. CODE ANN. § 3A-120 (Supp. 1976).
109. KY. REV. STAT. § 278.410 (Supp. 1976).
110. MICH. STAT. ANN. § 22.45 (1970).
111. MISS. CODE ANN. § 77-1-45 (1972).
112. P.R. LAWS ANN. tit. 27, §§ 1266(a), 1270 (1966).
113. S.C. CODE § 58-124 (1962).
114. TENN. CODE ANN. §§ 65-220, 65-224, 65-228 (1976).
115. TEX. REV. CIV. STAT. ANN. art. 1446(c) (Vernon Supp. 1975).
116. WASH. REV. CODE ANN. §§ 80.04.170, 80.04.190 (1962).
117. WYO. STAT. §§ 37-45, 37-47 (1957).
118. TENN. CODE ANN. §§ 65-220, 65-224, 65-228 (1976).
119. LA. CONST. art. 6, § 5.
120. IND. CODE ANN. § 8-1-3-1 (Burns 1973).
121. N.J. STAT. ANN. § 48:2-43 (West 1969).
122. N.Y. PUB. SERV. LAW §§ 128, 148, 112 (McKinney Supp. 1976).
123. N.C. GEN. STAT. §§ 62-90(d), 62-93, 62-96 (Supp. 1975).
124. CAL. PUB. UTIL. CODE § 1756 (West 1975).
125. D.C. CODE §§ 43-705, 11-722 (Supp. 1975).
126. FLA. STAT. ANN. § 366.10 (Supp. 1977). *But see id.* § 11.61.
127. HAW. REV. STAT. § 269-16 (Supp. 1975).
128. IDAHO CODE § 61-627 (1976).
129. ME. REV. STAT. tit. 35, § 303 (Supp. 1976).
130. MASS. GEN. LAWS ANN. ch. 25, § 5 (West 1973).
131. N.H. REV. STAT. ANN. §§ 365:20, 541:6, 541:14 (1974).
132. OHIO REV. CODE ANN. § 4903.12 (Page 1954).
133. OKLA. CONST. art. 9, § 20; OKLA. STAT. ANN. tit. 17, § 155 (West 1953).
134. R.I. GEN. LAWS § 39-5-1 *et seq.* (Supp. 1976).
135. UTAH CODE ANN. § 54-7-16 (1953).
136. VT. STAT. ANN. tit. 30, § 12 (Supp. 1976).
137. VA. CODE § 56-8.2 (1950).

ginia,[137] and West Virginia.[138] Aligned with Iowa as differing from the various procedures reflected in the laws of the thirty-two jurisdictions listed above are the remaining nineteen states. For reasons already expressed, this procedure is believed unacceptable.

Because the greater time involved in appeals from Commerce Commission rate determinations, the greater the cost to those actually intended to receive IAPA protection, *i.e.*, the public, the wisest alternative mentioned above is direct appeal from final agency action to the highest court of the state.

An amendment to this effect need not be complicated.[139] A provision for direct appeal to the Iowa Supreme Court confined to rate cases, would eliminate, to the greatest reasonable extent, the costly delay in judicial review of rate matters. Further, the amendment should prevent interlocutory actions more effectively than the IAPA provision which was intended to do this, through flatly prohibiting judicial review of agency action expressly pursuant to rate regulatory powers until all agency remedies have been exhausted and a decision prescribing rates has been rendered. With a projected savings to the public of millions of dollars per year, and posing no infringement on the right of utilities to continue proposed rates during the appeal process, this change in the law would better serve the general public interest consistent with legislative intent.

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138. W. VA. CODE § 24-5-1 (1976).

139. Since section 476.13, providing for judicial review in any county where a commission order takes effect, would lose its meaning under a direct appeal procedure and is unwarranted in any event, it is the most logical provision to amend.