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An Advocacy Model for Representation of Low-Income Intervenor in State Public Utility Proceedings

Stefan H. Krieger*

I. INTRODUCTION

In the past sixteen years, the number of proceedings before state public utility commissions has soared. Prior to the early 1970s, the price of energy actually decreased,¹ and public utilities were involved in few formal regulatory proceedings.² In the early 1970s, however, this situation changed radically as energy prices began to climb. The economies of scale and other technological advances, which had resulted in lower electric prices after World War II, largely had been achieved.³ At the same time, the rate of inflation skyrocketed, and interest rates

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1. Anderson, *State Regulation of Electric Utilities*, in *THE POLITICS OF REGULATION* 3, 18-19 (J. Wilson ed. 1980) (from 1951 to 1971, the real price of energy fell 43 percent).

2. Joskow, *Inflation and Environmental Concern: Structural Change in the Process of Public Utility Price Regulation*, 17 J.L. & ECON. 291, 307 (1974). Joskow collected data concerning the number of general rate of return reviews of private gas, electric, and combination gas and electric utilities processed by state commissions between 1949 and 1972. He found two periods of rather substantial regulatory activity of electric utilities (1949 to 1952 and 1969 to 1972); one period of moderate activity (1957 to 1960); and the remaining years, especially 1962 to 1968, little formal regulatory activity. *Id.* at 305-06. He found two periods of extensive rate of return review activity of the gas industry (1957 to 1962 and 1968 to 1972). *Id.* at 306.

Although public utilities commissions often regulate other industries in addition to gas and electric utilities, see NATIONAL ASSOCIATION OF REGULATORY COMMISSIONERS, 1987 ANNUAL REPORT ON UTILITY AND CARRIER REGULATION 754-56 (1988) (Table 165) [hereinafter NARUC REPORT], this article focuses primarily on gas, electric, and telecommunication utilities. Most regulatory activity that has a significant impact on low-income families arises in the context of those utilities.

3. D. ANDERSON, *REGULATORY POLITICS AND ELECTRIC UTILITIES* 70 (1981); W. GORMLEY, *POLITICS OF PUBLIC UTILITY REGULATION* 8 (1983).

climbed steeply.⁴ Then, in October 1973, the country was hit by the Arab oil embargo. In reaction to the embargo, electric utilities embarked on new nuclear construction programs, and gas utilities sought alternative sources of fuel.⁵

As a result of rising fuel costs, utilities sought rate relief in formal proceedings before public utility commissions. In 1963, nationwide, commissions reviewed only three electric utility rate cases. By 1969, the number had increased to nineteen, and by 1975, it had grown to 114.⁶ Nationally, electric rates rose ninety percent in the five years after 1970.⁷ Unlike the sleepy days of the 1950s and 1960s, commission review of rates became a continuing process, with utility requests for interim rate relief (pending final rate orders), proposals for the use of purchased gas and fuel adjustment clauses, and filings of new rate cases immediately after termination of the previous cases.⁸

4. Joskow, *supra* note 2, at 312-13. With the rise in inflation and interest rates, utility construction costs soared. From 1972 to 1975, for example, the cost per kilowatt of new nuclear capacity rose 80%, and the cost of new coal-fired plants doubled. D. ANDERSON, *supra* note 3, at 70. As a result of these increased costs, the standing of public utilities in the financial community diminished. From 1974 through June 1977, Moody's and Standard and Poors made 184 changes in the ratings of electric utilities. While 35 issues were upgraded, 150 were downgraded. *Id.* at 73.

5. See R. VIETOR, ENERGY POLICY IN AMERICA SINCE 1945 292-303 (1984).

6. D. ANDERSON, *supra* note 3, at 70; see also D. WELBORN & A. BROWN, REGULATORY POLICY AND PROCESSES: THE PUBLIC SERVICE COMMISSIONS IN TENNESSEE, KENTUCKY & GEORGIA 105-06 (1980) (increase in rate proceedings in three states for period 1973 to 1977); Joskow, *supra* note 2, at 305-07. Nationwide, in 1987, there were 168 electric utility rate cases and 125 gas utility rate cases pending before state public utility commissions. See NARUC REPORT, *supra* note 2, at 322-41.

7. D. ANDERSON, *supra* note 3, at 69. In some states, the increase was even greater. In New York, for example, some consumers paid nearly twice as much per kilowatt-hour in 1974 as they had in 1972. *Id.*

8. See D. ANDERSON, *supra* note 3, at 70-71; Joskow, *supra* note 2, at 315-16. Utilities also sought to use future test years as a basis for proposed rate schedules to enlarge the amounts of their rate increases. *Id.* at 316.

Interim rate relief, purchased gas and fuel adjustment clauses, and future test years are all used by utilities to obtain rate relief that could not be acquired under the traditional ratemaking process. Under standard procedures, a utility files proposed schedules for a rate increase, and the commission suspends the increase (usually for a period of six to 12 months) pending the outcome of formal evidentiary hearings. See, e.g., ILL. REV. STAT., ch. 111 2/3, para. 9-201 (1987); NARUC REPORT, *supra* note 2, at 763-66 (Table 167) (table of suspension limitations in each state). Beginning in the early 1970s, however, utilities, concerned about the "regulatory lag" between the filing for a rate increase and the final commission order, sought to obtain rate relief without the necessity of the full hearing process.

Under interim rate increase procedures, a utility can file for full rate relief but seek immediate approval of a partial increase, usually subject to a refund at the end of the case. This allows utilities to meet immediate revenue requirements pending the "permanent" order at the end of the suspension period. See, e.g., Commonwealth Edison Co., Application for A Proposed General Increase for Electric Service, No. 59359 (Ill. Commerce Comm'n Feb. 14, 1975) (LEXIS, Utility

Moreover, under public pressure caused by rate increases, commissions themselves began to institute proceedings to address problems raised by the "energy crisis." In response to the Public Utility Regulatory Policies Act of 1978 ("PURPA"),⁹ commissions opened generic

library, Allpuc file) (granting \$113 million annualized interim rate increase when utility alleged that "it ha[d] experienced a sharp decline in its earnings which must be arrested and reversed in order to provide investors with creditable assurance that it will strengthen its financial stature"); New England Tel. & Tel. Co., 41 Pub. Util. Rep. 4th (PUR) 121, 126 (Mass. Dep't Pub. Util. 1980) (granting interim relief and adopting liberalized interim relief standard "to combat the effects of regulatory lag on petitions for rate relief"); Detroit Edison Co., 47 Pub. Util. Rep. 4th (PUR) 363, 371, 383-84 (Mich. Pub. Serv. Comm'n 1982) (commission granted \$145 million interim rate increase, recognizing the magnitude of the utility's revenue deficiency and the significant lag for the utility in obtaining final relief).

Purchased gas adjustment clauses (for gas companies) and fuel adjustment clauses (for electric companies) allow utilities to adjust their rates automatically, whenever their fuel costs change, without the necessity of a full rate hearing. See Uniform Fuel Adjustment Clauses, 45 Pub. Util. Rep. 4th (PUR) 1, 5 (Ill. Commerce Comm'n 1981) (approving a uniform fuel adjustment clause for state's electric utilities, holding that "[i]n a highly inflationary period, a comprehensive fuel adjustment clause is essential"); Standard Purchased Gas Adjustment, 40 Pub. Util. Rep. 4th (PUR) 619, 622-24 (N.M. Pub. Serv. Comm'n 1980). To avoid the requirements of the formal ratemaking process, other utilities have sought commission approval for automatic adjustment clauses for non-fuel costs. See, e.g., Attorney Gen. v. Public Serv. Comm'n, 349 N.W.2d 539, 543-44 (1984) (affirming commission order affirming "indexing" of certain operation and maintenance expenses to the Consumer Price Index).

Although traditionally the method for deciding rate cases involves examining a utility's rate base, expenses, and revenues based on a historic "test year," the use of a future "test year" allows a utility to base its request for rate relief on estimated costs in the coming year. In an inflationary period, use of a future test year allows the utility to enlarge its rate request substantially. See Mohave Elec. Coop., 48 Pub. Util. Rep. 4th (PUR) 85, 88 (Ariz. Corp. Comm'n 1982) (although previous practice was to use historic test year, commission used future test year because otherwise utility would be seeking additional relief by the end of the year); Virginia Elec. & Power Co., 11 Pub. Util. Rep. 4th (PUR) 115, 121 (N.C. Util. Comm'n 1975) (commission using future test year because of inflationary conditions); Cleveland Elec. Illuminating Co., 46 Pub. Util. Rep. 4th (PUR) 63, 85-87 (Ohio Pub. Util. Comm'n 1982) (commission using future test year because the company was "particularly susceptible to inflation and to high interest rates").

9. See 16 U.S.C. §§ 2601-2645 (1988). PURPA required state commissions to make "determinations" whether or not to adopt certain ratemaking and regulatory standards for electric utilities. See *id.* §§ 2621-2627. In response to PURPA, commissions opened rulemaking or investigation cases, applicable to all electric utilities under their jurisdiction ("generic dockets"), to decide whether or not to adopt the PURPA standards. See PURPA Rate Design Standards, 45 Pub. Util. Rep. 4th (PUR) 24, 26-27 (Ala. Pub. Serv. Comm'n 1981); Public Util. Regulatory Policies Act Standards., 46 Pub. Util. Rep. 4th (PUR) 39, 42 (Alaska Pub. Util. Comm'n 1981); Generic Hearings Concerning Elec. Rate Structure, 36 Pub. Util. Rep. 4th (PUR) 6, 32-33 (Colo. Pub. Util. Comm'n 1979); Consideration of Lifeline Rates, 43 Pub. Util. Rep. 4th (PUR) 355, 355-56 (Fla. Pub. Serv. Comm'n 1981); Peak-Load Pricing for Elec. Util., 36 Pub. Util. Rep. 4th (PUR) 413, 415-16, 419 (Fla. Pub. Serv. Comm'n 1980); Interruptible Rate & Load Management Standards, 43 Pub. Util. Rep. 4th (PUR) 163, 166 (Iowa State Commerce Comm'n 1981); Time-of-day & Seasonal Elec. Rates, 42 Pub. Util. Rep. 4th (PUR) 494, 496-97 (Iowa State Commerce Comm'n 1981); Lifeline Rates for Elec. Serv., 73 Md. P.S.C. 702 (Nov. 22, 1982) (LEXIS, Utility library, Allpuc file); Proceedings to Consider Elec. Rate-making Standards., 35

dockets to investigate various energy-related issues, including marginal cost pricing methods,¹⁰ declining block rates,¹¹ peakload and time-of-day pricing,¹² and lifeline rates.¹³ In reaction to higher consumer bills, many commissions instituted rulemaking proceedings to modify utility credit and collection practices and to investigate utility-supported conservation programs.¹⁴ As utility nuclear construction programs bur-

Pub. Util. Rep. 4th (PUR) 339, 344 (Mich. Pub. Serv. Comm'n 1980); Department of Pub. Serv., 37 Pub. Util. Rep. 4th (PUR) 497, 514-15 (Minn. Pub. Serv. Comm'n 1980); Investigation Into Rate Structures of Elec. Util., 38 Pub. Util. Rep. 4th (PUR) 409, 410-11 (Or. Pub. Util. Comm'n 1980); Cost-of-service Rate-making Standards, 44 Pub. Util. Rep. 4th (PUR) 33, 45 (Tex. Pub. Serv. Comm'n 1981); Generic Investigation on the Comm'n's Own Motion, No. 05-UR-9, 1-AC-10, 1-AC-14 (Wis. Pub. Serv. Comm'n Mar. 3, 1981) (LEXIS, Utility library, Allpuc file).

Also, under the National Energy Conservation Act of 1978, Pub. L. No. 95-619, 92 Stat. 3206, Congress required state commissions to adopt residential conservation plans consistent with certain federal standards. See 42 U.S.C. §§ 8201-8235i (1988). In response to this statute, commissions opened generic residential conservation dockets. See, e.g., Residential Conservation Serv. Program, 42 Pub. Util. Rep. 4th (PUR) 652, 653 (Ark. Pub. Serv. Comm'n 1981); Residential Conservation Serv. Program, 35 Pub. Util. Rep. 4th (PUR) 515, 534 (Conn. Div. Pub. Util. Control 1980).

10. Marginal cost pricing bases the cost of utility service on the avoidable cost the utility must incur to produce one more unit of its product at a given level of output. See E. GELLHORN & R. PIERCE, *REGULATED INDUSTRIES IN A NUTSHELL* 195-96 (2d ed. 1987). "If the price of a product is determined by its marginal cost," the theory goes, "consumers confront a price that reflects the amount and value of the resources required to produce the last, or marginal, unit of that product." *Id.* at 196.

Addressing the issue of marginal cost pricing, PURPA required state regulators to set "cost of service" standards that took into account the extent to which total costs to an electric utility are likely to change if "additional capacity is added to meet peak demand relative to base demand." 16 U.S.C. § 2625(a)(2)(A) (1988).

11. Under a declining block rate structure, a utility charges less per unit of energy as consumption increases. Under PURPA standards, declining block rates are prohibited "except to the extent that [the] utility demonstrates that the costs to such utility of providing service to such class, which costs are attributable to such energy component, decrease as such consumption increases during such period." 16 U.S.C. § 2621(d)(2) (1988).

12. Peakload rates charge more to a class of customers for usage during seasons of the year when the utility experiences high demand. E. GELLHORN & R. PIERCE, *supra* note 10, at 221. Under time-of-day rates, the price for usage varies depending on the time of the day when the unit of service is provided. *Id.* at 226. PURPA standards strongly recommend both of these types of rates. 16 U.S.C. § 2621(d)(3), (4) (1988).

13. In the broadest sense of the term, "lifeline rates" are special low-cost rates established for the purpose of protecting low-income or elderly consumers. See C. PHILLIPS, *THE REGULATION OF PUBLIC UTILITIES* 398-401 (1984). There are two general approaches to establishing such rates: (1) adoption of particular schedules allowing protected classes of customers to pay lower rates than other similarly situated customers and (2) adoption of schedules that give all consumers a reduced rate for a certain volume of usage (e.g., the first 200 to 500 kilowatt-hours of usage a month). D. ANDERSON, *supra* note 3, at 146-47. The assumption underlying the second approach is that most low-income or elderly customers are low-volume users of utility service. See *id.* at 147.

Under PURPA, state regulators are required to determine whether or not to adopt lower lifeline rates for residential customers. 16 U.S.C. § 2624(b) (1988).

14. For examples of credit and collection cases, see generally Rules Governing Customer

geoned, commissions began inquiries into the prudence of these programs and their management.¹⁵ And as large customers began to seek alternative sources of energy, proposals were presented to give companies incentives to stay on the utility system.¹⁶

In response to utility requests for rate increases and to the rise in commission proceedings, consumer organizations sought to intervene in these cases.¹⁷ Some groups developed from neighborhood and civic organizations, many of whose members were low-income and whose pocketbooks were directly affected by the rate increases.¹⁸ Other groups addressed particular issues that they identified as important to the

Deposits of Elec. Utils., 6 Pub. Util. Rep. 4th (PUR) 151 (Fla. Pub. Serv. Comm'n 1974); Service Deposit & Termination Practices of Communication Util., 34 Pub. Util. Rep. 4th (PUR) 512 (Idaho Pub. Util. Comm'n 1980); Late Payment Charges & Sec. Deposits, 69 Md. Pub. Serv. Comm'n 121 (1978) (LEXIS, Utility library, Allpuc file). For examples of cases addressing restrictions on disconnection of utility service, see generally Rules Regulating Serv. of Elec. Utils., 35 Pub. Util. Rep. 4th (PUR) 365 (Colo. Pub. Util. Comm'n 1980); Cold Weather Serv. Termination Procedures, 52 Pa. Pub. Util. Comm'n 727 (1978) (LEXIS, Utility library, Allpuc file); Rules & Regulations Governing the Disconnection of Util. Serv., 2 Pub. Util. Rep. 4th (PUR) 209 (Vt. Pub. Serv. Bd. 1973). For an example of a case concerning a utility-supported conservation program, see generally Conservation Fin., 47 Pub. Util. Rep. 4th (PUR) 443 (Wis. Pub. Serv. Comm'n 1982) (requiring weatherization financing programs to benefit low-income ratepayers). And for examples of cases addressing utility problems of the poor, see *In re Regulations Governing Termination of Gas or Elec. Serv. to Low-Income Residential Customers During the Heating Season*, 79 Md. Pub. Serv. Comm'n 83 (1988) (LEXIS, Utility library, Allpuc file); *In re Investigation of Gas & Elec. Serv. in Winter Emergencies*, No. 83-303-GE-COI (Pub. Util. Comm'n of Ohio Nov. 23, 1983) (LEXIS, Utility library, Allpuc file).

15. See, e.g., Nine Mile Point 2 Nuclear Generating Facility, 78 Pub. Util. Rep. 4th (PUR) 23, 25-27 (N.Y. Pub. Serv. Comm'n 1986); Long Island Lighting Co., 71 Pub. Util. Rep. 4th (PUR) 262, 264-66 (N.Y. Pub. Serv. Comm'n 1985); *In re Investigation into the Perry Nuclear Power Station*, (1989) (LEXIS, Ohio library, Ohpuc file).

16. See, eg., Commonwealth Edison Co., 61 Pub. Util. Rep. 4th (PUR) 1, 50-51 (Ill. Commerce Comm'n 1984) (commission rejecting electric company's proposal for economic development rider as too speculative, but noting that it was not opposed to the concept of such a rider); Northern Ind. Pub. Serv. Co., 96 Pub. Util. Rep. 4th (PUR) 267, 268-70 (Ind. Util. Reg. Comm'n 1988); Detroit Edison, 68 Pub. Util. Rep. 4th (PUR) 241, 283 (Mich. Pub. Serv. Comm'n 1985); Incentive Rates for Elec. Serv., 82 Pub. Util. Rep. 4th (PUR) 624, 625-26 (Or. Pub. Util. Comm'n 1987) (setting criteria for discounted rates); Narragansett Elec. Co., 57 Pub. Util. Rep. 4th (PUR) 120, 128-34 (R.I. Pub. Util. Comm'n 1983).

17. W. GORMLEY, *supra* note 3, at 34; Anderson, *supra* note 1, at 23-24.

18. Gormley calls these groups "grassroots advocacy" groups, private organizations that promote interests unrelated to the occupations of its members. W. GORMLEY, *supra* note 3, at 43; see also Gormley, *Public Advocacy in Public Utility Commission Proceedings*, 17 J. APPLIED BEHAVIORAL SCI. 446, 448 (1981). Gormley identifies four different types of grassroots advocacy groups: 1) environmental groups (such as the Environmental Defense Fund, the Natural Resources Defense Council, the Sierra Club, and Friends of the Earth), 2) antinuclear groups (such as the Clamshell Alliance in New England), 3) consumer groups (such as the Illinois Public Action Council and the Michigan Citizens Lobby), and 4) low-income groups (such as South Austin Coalition Community Council in Chicago and the New Jersey Federation of Senior Citizens). W. GORMLEY, *supra* note 3, at 44-49 (table listing grassroots advocacy groups by category).

collective good, for example, commission meetings open to the public.¹⁹ Finally, state legislatures, attorneys general, and governors began to develop offices of public counsel and to hire attorneys to intervene on behalf of consumers in commission proceedings.²⁰

In the last two decades, much has been written supporting the rights of citizen group intervenors in administrative proceedings, particularly in public utility commission cases. Commentators stress the right of all affected interests to participate in the administrative process and assert that public participation helps to assure responsible decisionmaking and public support for resulting policies.²¹ They applaud the development of liberalized standing rules for intervenors in administrative proceedings²²

19. See Gormley, *supra* note 18, at 448; see also J. BERRY, LOBBYING FOR THE PEOPLE 7 (1977) (definition of public interest group as "one that seeks a collective good, the achievement of which will not selectively and materially benefit the membership or activists of the organization").

20. W. GORMLEY, *supra* note 3, at 50-53. Gormley calls these official intervenors "proxy advocates"—"governmental organization[s] that [represent] all or most residents of a particular jurisdiction before another governmental organization." *Id.* at 49. For a state-by-state listing of proxy advocacy groups, see NARUC REPORT, *supra* note 2, at 846-48 (Table 193).

21. As Gellhorn noted:

There are a number of potential social advantages to public participation in administrative hearings. Public intervention can provide agencies with another dimension useful in assuring responsive and responsible decisions; it can serve as a safety valve allowing interested persons and groups to express their views before policies are announced and implemented; it can ease the enforcement of administrative programs relying upon public cooperation; and it can satisfy judicial demands that agencies observe the highest procedural standards.

Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361 (1972); see also Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 529-30 (1972); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1712 (1975) ("Implicit in this development is the assumption that there is no ascertainable, transcendent 'public interest,' but only the distinct interests of various individuals and groups in society.").

Not all commentators accept this assumption: "[T]he zeal of pluralism for the group and its belief in a natural harmony of group competition tend[s] to break down the very ethic of government by reducing the essential conception of government to nothing more than another set of mere interest groups." T. LOWI, THE END OF LIBERALISM 48 (1969). "*Interest-group liberalism as public philosophy corrupts democratic government because it deranges and confuses expectations about democratic institutions. . . . It derogates from democratic rights . . . by assuming they are being exercised when access is provided.*" *Id.* at 288. Lowi concludes that liberal jurisprudence is policy without law. *Id.* at 125-27.

This article does not enter the debate over the merits of interest-group liberalism. It takes the pluralistic jurisprudence system as given and discusses the ways that lawyers can work within it for the benefit of their clients.

22. See, e.g., Gellhorn, *supra* note 21, at 363-66. Gellhorn refers approvingly to the decision in *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), in which the court held that parties with aesthetic, conservation, and recreation interests had standing to seek judicial review of an agency order, and the opinion in

and urge agencies to afford "public interest" intervenors full participatory rights in agency proceedings.²³

Several writers have proposed methods for funding "public interest" intervention in public utility commission proceedings. Some have recommended statutory authorization of the award of attorney's fees to prevailing intervenors in these cases.²⁴ Others have suggested legislative support to fund intervenor advocates before public utility commissions.²⁵ And still others have proposed the establishment of publicly-funded groups to represent the rights of consumers in public utility cases.²⁶

Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1965), in which the court held that the listening public's interest in programming content conferred standing to intervene in an FCC case. Relying on these and similar cases, state commissions and courts have adopted liberalized standing requirements for commission cases and for judicial review of commission orders. See, e.g., *In re Chesapeake & Potomac Tel. Co.*, 96 Pub. Util. Rep. 3d (PUR) 373, 382-83 (D.C. Pub. Serv. Comm'n 1972) (relying on *United Church of Christ*, commission allowed intervention of consumer group); *In re Hawaiian Elec. Co.*, 56 Haw. 260, 265 n.1, 535 P.2d 1102, 1105-06 n.1 (1975) (in allowing appeal of commission order by environmental group, the court noted, "the trend in American jurisprudence . . . has been to broaden the class of persons that have standing to challenge agency action"); *Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm'n*, 347 N.W.2d 423, 426-27 (Iowa 1984) (holding that consumer organization had standing to seek judicial review of rate order); *In re Green Mountain Power Corp.*, 98 Pub. Util. Rep. 3d (PUR) 291, 293-95 (Vt. Pub. Serv. Bd. 1973) (allowing individual to intervene in commission proceeding on his own behalf, but not on behalf of a class of all customers, because he did not sufficiently specify issues he would raise, as had the intervenor in *Scenic Hudson*).

23. Gellhorn, *supra* note 21, at 383-88.

24. *Cf. id.* at 395-97 (proposing awards of fees to prevailing parties in federal administrative cases). Although a few courts and commissions have held that public utility commissions have inherent authority to award attorney's fees and expert witness expenses to prevailing intervenors, see *Mountain States Tel. & Tel. Co. v. Public Utils. Comm'n*, 195 Colo. 130, 133-36, 576 P.2d 544, 546-48 (1978) (holding that constitutionally-created commission has inherent authority to award attorney's fees and witness expenses to intervenor municipal league); *Wisconsin's Envtl. Decade, Inc. v. Wisconsin Pub. Serv. Comm'n*, 49 Pub. Util. Rep. 4th (PUR) 320, 322 (Wis. Cir. Ct. 1982) (holding that commission had implied authority to award expert witness fees), the prevailing view is that commissions have no such power. See *Idaho Power Co. v. Idaho Pub. Util. Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981) (holding that even though PURPA provides for awards of fees in proceedings under the act, commission cannot award fees if legislature has not explicitly given it such authority); *cf. Senior Citizens Coalition v. Minnesota Pub. Util. Comm'n*, 355 N.W.2d 295, 301-04 (Minn. 1984) (holding that even if commission had inherent authority to award fees, it could not exercise that authority without adoption of rules by commission).

25. W. GORMLEY, *supra* note 3, at 187-88. For an example of an intervenor funding program, see MICH. COMP. LAWS ANN. §§ 460.6-1 to 460.6m (West Supp. 1989) (creation of utility consumer representation fund, financed by utilities).

26. W. GORMLEY, *supra* note 3, at 186-87 (proposal for establishment of Citizens Utility Board); Leflar & Rogol, *Consumer Participation in the Regulation of Public Utilities: A Model Act*, 13 HARV. J. ON LEGIS. 235, 266-97 (1976) (model statute for establishing the Residential Utility Consumer Action Group); *cf. Bonfield, Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 530 (1969) (proposing the creation of an office of independent poor

Although the literature is replete with calls for the expansion of intervenor rights and increased intervenor funding, little examination has been made of the quality of advocacy by intervenor groups. The focus has been solely on the procedural rights of intervenors,²⁷ models for formalizing representation of "consumer" interests in commission proceedings,²⁸ and methods for funding attorney and expert witness support in these cases.²⁹ While there is some evidence of a correlation between participation by citizens' groups in public utility commission proceedings and the size of residential electric and gas rates,³⁰ little is known about the relative effectiveness of different methods of consumer representation.³¹ As Ethridge notes, "a common conclusion [of the literature] is that procedures designed to encourage citizen involvement lead to more effective and aggressive policy implementation. . . . However, these beliefs may be based more on normative preferences for democratic forms or vague expectations than on empirical evidence."³²

Little study has been made of the effectiveness of consumer intervenor groups in commission cases for several reasons. First, because many of these groups lack systems of accountability, the staff and attorneys for these organizations have little incentive to reflect on the quality of representation. Many "public interest" attorneys are not responsible to any definable constituency and exercise broad discretion in defining their clients' interests and the mode of representation.³³ These attorneys have less motivation to evaluate their advocacy methods than a lawyer representing an individual client or for-profit corporation. Second, many of these organizations have rationalized ineffective advocacy as the result of a system which cannot be beaten. Because the utilities have

peoples' counsel in federal administrative cases); Gellhorn, *supra* note 21, at 397. For examples of Citizens Utility Boards ("CUBs"), see ILL. ANN. STAT. ch. 111 2/3, para. 901-21 (Smith-Hurd 1988 & Supp. 1990); OR. REV. STAT. §§ 774.010-774.990 (1989); WIS. STAT. ANN. §§ 199.01-199.18 (West Supp. 1989). CUBs are funded by voluntary ratepayer contributions and are operated by boards elected by the contributors.

27. See generally Cramton, *supra* note 21; Gellhorn, *supra* note 21.

28. W. GORMLEY, *supra* note 3, at 182-88.

29. *Id.*

30. Gormley, *Nonelectoral Participation as a Response to Issue-Specific Conditions: The Case of Public Utility Regulation*, 62 Soc. Sci. Q. 527, 532 (1981).

31. R. Mayer, J. Burton & C. Zick, *Consumer Representation and Local Telephone Rates 2* (June 1988) (presented at the 34th Conference of American Council on Consumer Interest) [hereinafter Mayer].

32. Ethridge, *The Policy Impact of Citizen Participation Procedures: A Comparative State Study*, 10 AM. POL. Q. 489, 491-92 (1982).

33. Leflar & Rogol, *supra* note 26, at 247; see W. GORMLEY, *supra* note 3, at 37-38; Gormley, *Statewide Remedies for Public Underrepresentation in Regulatory Proceedings*, 41 PUB. ADMIN. REV. 454, 457-58 (1981); Stewart, *supra* note 21, at 1765-67.

all the resources and high-powered attorneys, the argument goes, even partial victories are triumphs.³⁴ Third, many advocates, especially in the 1970s, focused their attention on formal procedural reforms in the agency.³⁵ They concerned themselves with traditional doctrines of due process, often without evaluating the real impact of these issues on utility performance.³⁶

Finally, there is a bias in the traditional law review and social science literature against discussions of practice and advocacy skills. While there is abundant examination of intervenor rights in public utility commission proceedings and methods for funding consumer representation in these cases, the commentators are virtually silent on the subject of what constitutes quality advocacy once the intervenor is allowed through the commission's door.³⁷

Implicit in the existing literature is the assumption that, once intervenor groups have the necessary financial and professional resources, they will be well represented, or at least as well represented as most clients. Commentators presume that lawyers know what to do once they have the necessary resources. Armed with their legal research skills and their expert witnesses, the argument goes, the same trial advocacy skills used in court cases can be applied in public utility commission proceedings.

The problem with this assumption is that commission proceedings are quite different from most court cases. Most court cases concern the applicability of substantive law to "historical facts."³⁸ Most com-

34. Cf. J. CHUBB, *INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY* 111 (1983) (quoting a lawyer for an environmentalist group in regard to Nuclear Regulatory Commission proceedings: "You can't be successful at a regulatory agency unless you have the financial resources to sue their asses off."). This reaction to administrative proceedings is similar to the response of lobbyists to defeats in the legislative setting. See J. BERRY, *supra* note 19, at 275-78 (quoting public interest lobbyist: "I've always believed that public interest lobbying is a very ineffective thing. You can't point to something and say 'We did that.' But if you didn't do the work, it would be so much the worse.").

35. For examples of advocates who focused primarily on procedural issues, see generally COMMON CAUSE, *MONEY, SECRECY AND STATE UTILITY REGULATION* (1976) and Levin, *Illinois Public Utility Law and the Consumer: A Proposal To Redress the Imbalance*, 26 DE PAUL L. REV. 259 (1977).

36. In the long run, however, a lawyer's success in obtaining procedural reforms may not necessarily mean getting what her client wants. See Stewart, *supra* note 21, at 1777-81. On remand from a court, the agency can remedy the procedural defects but keep the same substantive holding.

37. But see generally DeLong, *How to Convince An Agency: A Handbook for Policy Advocates*, 6 REG. 27 (Sept.-Oct. 1982) (describing helpful techniques for advocacy before regulatory bodies).

38. D. BINDER & P. BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* 4 (1984). Binder and Bergman distinguish between three categories of fact-finding: 1) "historical fact-finding," which involves the factfinder's determination about what happened in the past; 2)

mission cases, on the other hand, do not focus merely on evidence of specific events. Rather, "[s]ubstantive issues are at stake which embody highly controversial political and social values."³⁹ Commission decision-making is an inherently political process in which commissioners must choose between demands of conflicting interest groups.⁴⁰ Issues such as rate of return, rate design, allocation of costs of cancelled nuclear plants, low-income payment plans, and economic incentive rates, by their very nature require balancing of different political, social, and economic interests.⁴¹ A commission's "findings of fact" in a case may be merely hooks upon which the commission can hang its policy decision.⁴²

Because proceedings in public utility commissions are essentially political in nature, traditional methods of trial advocacy are not always applicable and may even be harmful.⁴³ There is more to a commission

"normative fact-finding," which involves the factfinder's evaluation of what happened according to his or her perception of a community standard of reasonableness; and 3) "legislative fact-finding," which involves the factfinder's decision that a change in substantive law will or will not have certain social consequences. *Id.* at 4-8. In the public utility regulatory context, some decisions concern "normative facts" (e.g., reasonableness of rate of return) and most major decisions involve "legislative facts" (e.g., decisions about the economic, social, and political consequences of the cancellation of a nuclear plant). Very few decisions concern solely "historical facts." In the area of advocacy on behalf of low-income clients, the best example of a "historical fact" case is a complaint case raising the issue of whether notice was given to a customer before disconnection of utility service.

39. Nelkin & Pollak, *Public Participation in Technological Decisions: Reality or Grand Illusion?*, 81 *TECH. REV.*, Aug.-Sept. 1979, at 54, 64.

40. Primeaux & Mann, *Regulator Selection Methods and Electricity Prices*, 62 *LAND ECON.* 1, 12 (1986). Although commissions were created to take regulation out of politics, "[r]egulation is and always will be an intensely political process." M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 73, 183 (1955).

Recent studies have shown that public utility commission decisions are based in large part on policy considerations, rather than the mere application of established legal doctrine to an evidentiary record. See Joskow, *supra* note 2, at 312-25; Leflar & Rogol, *supra* note 26, at 251 ("Decisions of utility commissions are based on considerations of the interests of the parties before it, not on mechanical formulas dictated by the data presented to it."); Pelsoci, *Organizational Correlates of Utility Rates*, in *ENERGY AND ENVIRONMENTAL ISSUES: THE MAKING AND IMPLEMENTATION OF PUBLIC POLICY* 101, 113 (M. Steinman ed. 1979).

41. Bernstein has noted that the "American regulatory experience has been accompanied by a naive view of the political process." M. BERNSTEIN, *supra* note 40, at 128. While politics is seen as something to be avoided, it is inevitable when a commission is addressing matters of social and economic consequence. See *id.* at 129 ("The genius of democracy is in politics, not in sterilization of politics.").

42. As Joskow, for example, found in his longitudinal study of rate of return regulation in state public utility commissions, "[t]he essence of public utility price regulation is not the rate of return constraint. The rate of return aspect of regulation is merely a method by which a regulatory commission justifies its approval of price increases or major changes in rate structures." Joskow, *supra* note 2, at 325.

43. "[T]he principles of legal advocacy are only partially applicable to policy advocacy, and

proceeding than the presentation of a *prima facie* case on the elements of a cause of action and a persuasive factual theory of the case. The advocate must also address the economic, social, political, and institutional concerns of the commission. Otherwise, a beautifully crafted legal argument may have no effect whatsoever.

The purpose of this article is to analyze how the political system of public utility regulation operates and to develop a model of advocacy for quality representation of low-income consumer groups in these proceedings.⁴⁴ My focus will not be on specific techniques for persuading regulators in particular situations,⁴⁵ but rather will be on analytic methods for planning a persuasive presentation to a commission.

My model is based on political science studies describing the decision-making process in public utility commissions. After reviewing the political science literature concerning theories of regulation, I will examine particular empirical studies of the public utility regulatory process. Based on those studies, I will develop a model for preparation of a public utility commission case. Specifically, I will recommend that an attorney in such a proceeding should consider four factors in planning her case:

- 1) the composition of the commission audience;
- 2) the capabilities of her client;
- 3) the configuration of the regulatory environment; and
- 4) the nature of the issues in a particular case.

This article develops a framework for case planning; it does not craft a trial plan for every possible public utility commission case. It is impossible to predict with certainty how a particular commission is going to rule in a specific case. Even within the same commission, there may be differences from one regulatory context to another or in the commission's treatment of one utility compared to another.⁴⁶ Be-

in places where they are not applicable they can be misleading and downright harmful." DeLong, *supra* note 37, at 27.

44. I have taken the approach recently followed by other commentators in the trial advocacy area who have shifted from merely "how to" literature for the performance of discrete trial skills to the development of models for approaching the litigation process. *See generally* G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); P. BERGMAN, *TRIAL ADVOCACY IN A NUTSHELL* (1979); D. BINDER & P. BERGMAN, *supra* note 38. Bergman, for example, has developed a credibility model that an attorney can use in planning her entire case: voir dire, opening statement, direct examination, cross examination, and closing argument. P. BERGMAN, *supra*, at 30-57.

45. See DeLong, *supra* note 37, for an example of a "how-to" approach to advocacy before regulatory commissions.

46. See D. WELBORN & A. BROWN, *supra* note 6, at 69.

cause the focus of this article is on general methods for preparing a case, an attorney will have to adapt this model to the particular circumstances of a case.

This article does not attempt to minimize the need for financial and expert resources by consumer intervenors in commission cases. Such intervenors naturally are constrained by the limits of their resources.⁴⁷ Utilities and many industrial and commercial intervenors have substantially greater funding sources than consumer groups. At the same time, however, many consumer groups enter public utility proceedings with no long-term plans but merely "gut" feelings that they are being "ripped off."⁴⁸ The purpose of this article is to assist these groups by suggesting means to make the best possible use of limited resources.

For a number of reasons, I have chosen to concentrate on issues faced by lawyers for low-income consumer groups. Although high energy costs affect all utility customer classes, they especially impact the poor. Although the poor generally consume less energy than other utility customers, they spend a larger percentage of their budgets on energy bills.⁴⁹ At the same time, they face substantial obstacles to their participation in the regulatory process. While all consumer intervenors encounter financial barriers in utility proceedings,⁵⁰ low-income intervenors must overcome severe funding constraints. Many government-funded attorneys who represent consumers in commission proceedings⁵¹ have large budgets and staffs.⁵² Most low-income advocates, however, lack financial and expert resources.⁵³ Moreover, in the last eight years,

47. Proceedings before public utility commissions can be quite costly affairs. Over a decade ago, Leflar and Rogol estimated that a full-fledged contest to a major rate increase could cost as much as \$100,000 for expert witnesses, attorney's fees, and transcripts. Leflar & Rogol, *supra* note 26, at 246; cf. Cramton, *supra* note 21, at 538-41 (addressing the problems of cost in federal administrative cases); Gellhorn, *supra* note 21, at 389-98 (same); Stewart, *supra* note 21, at 1764 (same).

48. See W. GORMLEY, *supra* note 3, at 149; *infra* notes 77-78 and accompanying text.

49. W. GORMLEY, *supra* note 3, at 13; NATIONAL CONSUMER LAW CENTER, ENERGY AND THE POOR—THE FORGOTTEN CRISIS 1 (1989) (low-income households on average expend 11% of their household income on home energy, three to four times the percent for the typical American household); see also Berry, *Utility Regulation in the States: The Policy Effects of Professionalism and Salience to the Consumer*, 23 AM. J. POL. SCI. 263, 267-68 (1979).

50. See *supra* note 47 and accompanying text.

51. Gormley refers to these intervenors as "proxy advocates." W. GORMLEY, *supra* note 3, at 49-53.

52. Gormley, *supra* note 33, at 458-59.

53. Gormley, *supra* note 18, at 448-49. Many citizen groups active in public utility commission proceedings have annual budgets of \$20,000 or less. Gormley, *supra* note 33, at 458. Many of these organizations are involved with other issues besides public utility matters (e.g., housing rehabilitation, crime, and neighborhood services) and cannot commit their entire budget to utility issues.

the Legal Services Corporation's ("L.S.C.") restrictions on representation of community organizations and advocacy before administrative bodies have limited the abilities of legal services attorneys to represent low-income intervenors adequately in commission proceedings.⁵⁴

Given these constraints on lawyers for low-income intervenors, a model of advocacy for these attorneys is especially useful. Many of these attorneys merely fly by the seat of their pants in commission proceedings, with no consideration of long-term planning or strategy. As a result, many regulators consider low-income advocates "ill-informed, irresponsible, and obstructionist."⁵⁵ Hopefully, this model will assist lawyers and other advocates for low-income intervenors with limited resources in their choice of issues, development of strategies, and overall planning in public utility commission proceedings.⁵⁶

II. THEORIES OF REGULATION

The underlying premise for this article is that a lawyer must understand the decision-making process of a particular forum in order to prepare her case adequately. The basis for the proposed advocacy model is a description of the decision-making process in public utility commissions. This description is founded on various theories of the regulatory process developed by political scientists and economists and on empirical studies of that process.

A. Capture Model

Stated simply, the capture model of the regulatory process focuses on the domination of the regulatory process by the regulated industries.⁵⁷ There are really two variants of the capture model: the "natural life cycle" version, which uses the analogy of youth and old age to describe

54. See 45 C.F.R. § 1611.5(c) (1989) (providing that L.S.C. recipients may represent an organization or association only if it is "primarily composed of persons eligible for legal assistance under the [Legal Services Corporation Act of 1974] and if it provides information showing that it lacks, and has no practical means of obtaining, funds to retain private counsel"); *id.* § 1612.5(b) (restricting administrative advocacy by L.S.C. recipients in rulemaking proceedings to "a particular application, claim or case directly involving the client's legal rights or responsibilities").

55. Gormley, *supra* note 18, at 449.

56. More effective advocacy on behalf of low-income groups will not only help indigent individuals but also will be beneficial to the community at large. As Bonfield has noted, "[t]he administration of government undoubtedly suffers as a whole from the inability of the economically underprivileged segment of our society to represent adequately its group interests in the rulemaking process." Bonfield, *supra* note 26, at 512.

57. Gormley, *Alternative Models of the Regulatory Process: Public Utility Regulation in the States*, 35 W. POL. Q. 297, 297-98 (1982).

the gradual takeover of agencies by the companies they regulate; and the "economic" version, which stresses the economic inevitability that these companies will dominate the regulators.

The "natural life cycle" variant was set forth by Marvin Bernstein in his classic study, *Regulating Business by Independent Commission*.⁵⁸ In that work, Bernstein reviewed the history of several federal regulatory agencies and concluded that agencies pass through four phases of existence on their way to domination by the regulated companies. During phase one, "gestation," an activist public lobbies the legislature for many years for the creation of a commission to reform a certain industry. Because of the long struggle to get the statute adopted, it is usually obsolete by the time it is passed.⁵⁹ In phase two, "youth," the commission still feels the political pressures that brought it into existence and attempts to bring about reforms. But the public and the legislature lose interest in the commission, tiring after the long struggle to get the statute passed and assuming that the creation of the agency, by itself, is all that is needed.⁶⁰ At the same time, the regulated industries test the commission's powers in court, and the commission begins to operate in a technical environment, outside the public's purview. As Bernstein notes, a subtle relationship develops between the regulated and the regulator, "in which the mores, attitudes, and thinking of those regulated come to prevail in the approach and thinking of many commissioners."⁶¹

Phase three, "maturity," is the process of devitalization. During this period, the commission attempts to adjust to conflicts among the parties by becoming less of a policeman and more of a manager. The commission becomes highly judicialized and eventually surrenders to the regulated companies.⁶² Finally, in phase four, "old age," the commission becomes totally passive and looks for safety in all its decisions. It expects that it will be blamed if any company goes under, and its chief

58. M. BERNSTEIN, *supra* note 40, at 74-102.

59. *Id.* at 74-77.

60. *Id.* at 79-84. According to capture theorists, capture is a direct result of the independence of regulatory commissions. Because the chief executive lacks authority over regulatory commissions, she quickly loses interest in them. Without her leadership, the legislative branch also loses interest. W. GORMLEY, *supra* note 3, at 134.

61. M. BERNSTEIN, *supra* note 40, at 83.

62. *Id.* at 86-90. As agencies mature, an imbalance develops in the representation process: The regulated companies have information that the staff and the commission can rely on, and agency resources are limited. Over an extended period of time, agencies begin to view the industries as helpful in accomplishing their mission. On the other hand, opposing groups are diffuse, have small individual stakes in the outcome of the case, and cannot provide the commission with needed information. See Stewart, *supra* note 21, at 1713-14.

goal becomes the maintenance of the status quo in the industry.⁶³

The "economic" school of capture theorists views regulation as being "purchased" by the industry primarily for its own advantage.⁶⁴ Under the cruder version of this theory, professional employment interests give regulators the economic incentive to rule in favor of industry interests. Regulators are overly sympathetic to the regulated industries, either because they previously worked for the companies or because they hope for future employment at the end of their tenures at the agency.⁶⁵

The more sophisticated version of this theory maintains that industry is able to control the regulatory process because the voting public is usually uninformed as to specific regulatory issues and is generally not organized to present unified policy preferences to its representatives. The regulated companies, on the other hand, are well-organized and have well-defined political interests. Accordingly, they buy power from political parties that have votes and financial resources.⁶⁶ Rationally self-interested government officials strive to maximize their votes and wealth and adopt policies consistent with the interests of the regulated companies.⁶⁷

Both versions of the capture theory have been challenged on a number of grounds. Commentators have attacked the "natural life cycle" theory as inconsistent with historic fact and empirical evidence. They have shown that, contrary to the assertions of the life cycle theorists, some regulatory agencies were in fact created with the support of the regulated industries, not after heated political battles between reformers and the industry.⁶⁸ They also have demonstrated that, in certain regulatory contexts, agency officials have had the power to halt their agencies' capture.⁶⁹ And finally, they have described in detail how, inconsistent

63. M. BERNSTEIN, *supra* note 40, at 91-95.

64. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

65. For a review of the studies of the "revolving door" phenomenon in the federal context, see P. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 143-45 (1981).

66. Stigler, *supra* note 64, at 11-12.

67. *Id.* at 12.

68. Anderson, *supra* note 1, at 4-16. Anderson shows that activist reformers were not the only motivating force behind state regulation of the electric industry. In fact, leaders in that industry supported such regulation as an alternative to municipal ownership of electric utilities. See also Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION*, *supra* note 1, at 357, 365 (In summarizing studies of various state and federal agencies, the author concludes, "[w]hat is striking about the origins of the regulatory programs studied in this book is that in almost every case, the initial law was supported by a rather broadly based coalition. Sometimes industry was eagerly and happily part of the coalition.").

69. See Plumlee & Meir, *Capture and Rigidity in Regulatory Administration: An Empirical*

with the life cycle theory, agencies in their "mature phase" have adopted policies that are not beneficial to the regulated industries.⁷⁰ These commentators conclude that patterns of agency behavior are more flexible, varied, and complex than the life cycle theorists suggest. Although the life cycle model remains a useful conceptual and pedagogical metaphor, it falls short as an historical predictor of actual agency behavior.⁷¹

Similarly, other studies have challenged the "economic" capture theory.⁷² Anderson, for example, questions the focus on the control of regulators by political parties in light of the contemporary decline of the political party and the rise of entrepreneurial politics.⁷³ While conceding that regulators have their own personal interests, Wilson argues that the economic capture theory disregards three important differences between politics and economics. First, politics concerns preferences that do not always have a common monetary measuring rod. In the political arena, unlike the marketplace, it is not always possible to put a monetary value on competing preferences. Second, political action requires assembling majority coalitions to make decisions that bind everyone—whether or not they are members of the coalition. Third, whereas economics is based on the assumption that preferences are given, politics must take into account efforts to change preferences.⁷⁴

Given these differences, a number of commentators conclude that the marketplace analogy of the capture theorists is too simplistic to describe completely the regulatory process.

B. Non-Capture Models

Recognizing the limitations of the capture theory, political scientists have developed other theories to describe the regulatory process. The major alternative theory is the interest group or pluralist model. This

Assessment, in THE POLICY CYCLE 215, 216, 222-23 (J. May & A. Wildavsky eds. 1978) (describing the development of the CAB, FCC, FPC, NLRB, FAA, OSHA and the Packers and Stockyards Administration); see generally Sabatier, *Social Movements and Regulatory Agencies: Toward a More Adequate—and Less Pessimistic—Theory of "Clientele Capture,"* 6 POL'Y SCI. 301 (1975) (study of National Air Pollution Control Administration and Chicago Clean Air Coordinating Committee showing that officials can halt the decay in constituency support for aggressive regulation and that decline of a supportive constituency is not inevitable).

70. D. ANDERSON, *supra* note 3, at 7-8, 168-70.

71. Plumlee & Meir, *supra* note 69, at 231.

72. For a study challenging the "revolving door" capture theory—that regulators have an incentive to decide in favor of industry because of past employment or possibility of future work with the industry—see P. QUIRK, *supra* note 65, at 143-74.

73. D. ANDERSON, *supra* note 3, at 177-78.

74. Wilson, *supra* note 68, at 361-63.

model views regulatory agencies as the targets of competing pressure groups that have conflicting objectives and demands.⁷⁵ Under this theory, policy change is seen as the product of a power struggle between groups with different resources and interests. A variant of this theory is the surrogate representation model, which views regulatory agencies as the targets of professional reformers who champion underrepresented interests from a government niche outside of the regulatory agency.⁷⁶ These "proxy advocates" attempt to provide agencies with views other than those of the regulated industry.

The major problem with the interest group model is that, while it may describe political activity in a given agency, it does not provide an explanation for the relative influence or lack of influence of each interest group in the decision-making process.⁷⁷ As Gormley argues in his description of the public utility regulatory process, "[t]he interest group model errs by blurring the distinction between activity and influence. Grassroots activists . . . [in public utility proceedings] are more active than effective. . . . In public utility regulatory policy, the central problem facing grassroots advocates is not a lack of incentives but a lack of resources."⁷⁸

Another model of the regulatory process highlights the role of the bureaucracy in the regulatory process. Proponents of this "organizational model" criticize the capture and pluralist theorists for ignoring the role of agency staff in educating and influencing regulators.⁷⁹ In the public utility commission context, these theorists point to regulator reliance on staff in considering accounting, economics, finance, engineering, and legal issues. The influence of a powerful company or of intervenor groups, they argue, may be offset by strong staff positions.

75. W. GORMLEY, *supra* note 3, at 134. Interest groups develop when both costs and benefits of a proposed regulatory policy are narrowly concentrated. When costs and benefits are widely distributed, "[i]nterest groups have little incentive to form around such issues because no small, definable segment of society . . . can expect to capture a disproportionate share of the benefits or avoid a disproportionate share of the burdens." Wilson, *supra* note 68, at 367.

76. W. GORMLEY, *supra* note 3, at 135.

77. Much of the jurisprudence providing for expansion of procedural rights in the regulatory setting is based on an interest group model of regulation. See Stewart, *supra* note 21, at 1712, 1716. Just giving groups access to the regulatory process, however, does not mean that they will be effective and have influence.

78. W. GORMLEY, *supra* note 3, at 149. "The capture model, in contrast, errs by blurring the distinction between influence and control. Utility companies are very influential, but they do not control the public utility regulatory process." *Id.*

79. *Id.* at 134-35; Gormley, *supra* note 57, at 299, 302; Sabatier & Pelkey, *Incorporating Multiple Actors and Guidance Instruments into Models of Regulatory Policymaking: An Advocacy Coalition Framework*, 19 ADMIN. & SOC. 236, 240 (1987).

Still another proposed theory is the "sovereign overseer" model. This model focuses on the ability of the legislative, executive, and judicial branches to influence policy through control of legal authority, budget, and political appointees.⁸⁰ Under this theory, the interaction of regulators with the other branches of government is the field of political battle.

C. Multi-Variant Model

These traditional models of regulation have several limitations. First, all these models tend to emphasize the importance of a single type of actor in the regulatory process—the industry, the intervenor groups, the bureaucracy—rather than focus on the interaction of the different actors.⁸¹ Second, the models neglect the importance of the wider socio-economic environment in which regulators operate.⁸² Third, the models fail to address the efficacy of various legal and political mechanisms that are used by the various players in the regulatory process.⁸³ Finally, the models do not take into account the regulators' professional values and the agency's own bureaucratic norms.⁸⁴

Given the limitations of traditional regulatory models, several commentators have suggested the use of a "multi-variant" model, which takes into account the interaction of the various players in the regulatory process, the regulators' and bureaucracy's own interests, the regulatory environment, and the different legal and political methods available to participants in the process.⁸⁵ This article adopts such an approach, recognizing the importance of all the players in public utility commission proceedings: public utilities, intervenors, regulators, and staff. It also will consider other influences in the regulatory environment: the technological and economic setting; the influence of the legislative, executive, and judicial authorities in the state; and the regulatory history in the state. Finally, this article will examine the various political and legal tools available to players in the process and explain how an advocate can use these tools in developing a strategy.

III. AN ADVOCACY MODEL

In the past decade, political scientists and economists have conducted a number of empirical studies of the public utility decision-making

80. Sabatier & Pelkey, *supra* note 79, at 239.

81. *Id.* at 237.

82. *Id.*

83. *Id.*

84. See Gormley, *Regulatory Issue Networks in a Federal System*, 18 *POLITY* 595, 597 (1986).

85. Gormley, *supra* note 57, at 315; Sabatier & Pelkey, *supra* note 79, at 237.

process.⁸⁶ The findings of these studies clearly support a multi-variant

86. This research includes case studies, field studies, and statistical correlation research examining the regulatory process in commissions. The model proposed in this article is based on these studies.

The case study approach has been used by Douglas Anderson in describing the decision-making process in the public utility commission setting. In two works, D. ANDERSON, *supra* note 3 and Anderson, *supra* note 1, at 26-41, he describes the process in the mid-1970s that led to the approval of lifeline rates in California and the adoption of marginal cost pricing by Alfred Kahn's New York Public Service Commission. Anderson contrasts the political organizing methods used by community groups to obtain lifeline rates in California with the professional values approach used by Kahn to secure the support of commission staff in New York. D. ANDERSON, *supra* note 3, at 167-77. For a description of these two types of ratemaking, see *supra* notes 10 and 13.

Several political scientists also have conducted field studies of different state public utility commissions. William Gormley, Jr. has undertaken the most extensive studies of this nature. In *POLITICS OF PUBLIC UTILITY REGULATION*, *supra* note 3, and related articles; Gormley, *The Representation Revolution: Reforming State Regulation Through Public Representation*, 18 ADMIN. & SOC'Y 179 (1986) [hereinafter, Gormley, *The Representation Revolution*]; Gormley, *supra* note 84; Gormley, *Policy, Politics and Public Utility Regulation*, 27 AM. J. POL. SCI. 86 (1983) [hereinafter Gormley, *Policy and Politics*]; Gormley, *supra* note 57; Gormley, *supra* note 30; Gormley, *supra* note 33; Gormley, *supra* note 18, has presented his findings of a questionnaire survey of commissioners from all 50 states and the District of Columbia, as well as in-depth surveys and interviews of commissioners, staff members, utility representatives, and intervenors in 12 states (California, Illinois, Wisconsin, Florida, Georgia, New Jersey, Massachusetts, Michigan, New York, Mississippi, North Dakota, and Wyoming). In evaluating these findings, Gormley used three methods: 1) the "concurrence method," analyzing the extent of concurrence between commissioners, staff, grassroots advocates, and proxy advocates on issue priorities, value priorities, and policy preferences, W. GORMLEY, *supra* note 3, at 102-31; 2) the "perceptual method," examining the different parties' assessment of their respective influence in the regulatory process, *id.* at 132-51; 3) and the "behavioral method," analyzing the relationship between the extent of political activity in a state and regulatory behavior, *id.* at 152-77.

A number of similar field studies—although not on the scale of Gormley's—have been undertaken in different states. Weschler and Backoff examined findings of a 1983 to 1984 study of Ohio state agencies, including the Public Utilities Commission of Ohio. See generally Wechsler & Backoff, *Policy Making and Administration in State Agencies: Strategic Management Approaches*, 46 PUB. ADMIN. REV. 321 (1986). That study, based on intensive, unstructured interviews with agency members, staff, and the different constituencies involved in the regulatory process, focused on the relative influence of the different players in the process. Mitnick also has reviewed a 1977 study concerning the employment backgrounds of commissioners in different states. See generally B. MITNICK, *THE POLITICAL ECONOMY OF REGULATION* (1980). And Welborn and Brown have presented their survey based on field interviews with commissioners, key staff personnel, utility representatives, and intervenors in Tennessee, Kentucky, and Georgia. See generally D. WELBORN & A. BROWN, *supra* note 6.

A final group of studies of state public utility commissions involves statistical correlation analyses, examining the effect of regulatory environment and commission composition on utility rates. The classic study in this area is Joskow's research on the effect of inflationary conditions and environmental concerns on utility rate of returns. See generally Joskow, *supra* note 2. Hagerman and Ratchford conducted a similar study examining the effect of different economic and political variables on electric utility rates of return. See generally Hagerman & Ratchford, *Some Determinants of Allowed Rates of Return on Equity to Electric Utilities*, 9 BELL J. ECON. 46 (1978). Pelsoci has examined the correlation between different types of commissions and the average price of electricity charged to residential consumers. Pelsoci, *supra* note 40, at 101. Berry

theory of regulation. They show that differences in commission members, commission staff, intervenor groups, regulatory environment, and issue context all affect the outcome of a public utility commission proceeding.⁸⁷ The purpose of my advocacy model is to help the attorneys for low-income intervenors in their consideration of these different factors in the preparation of a case. These are:

- A. The Audience
 - 1. Individual Staff and Commission Members
 - 2. The Bureaucracy
 - 3. Interactions of Commission Personnel
- B. The Client
 - 1. Ability To Monitor Commission Activities
 - 2. Ability To Provide Expert Intervention
 - 3. Ability To Mobilize Political Pressure
- C. Configuration of the Regulatory Environment
 - 1. Regulatory History and Political Culture
 - 2. Economic and Technological Environment
 - 3. Regulatory Community
 - a. Utilities
 - b. Other Intervenors
 - c. Other Government Bodies
 - 4. Implications of the Regulatory Environment
- D. The Issues
 - 1. Salience and Complexity
 - 2. Time Dimension of Regulatory Issues
 - 3. Implications of Issue Context

has analyzed the relationship of commission professionalism and consumer intervention to electric utility rate structure. Berry, *supra* note 49, at 101. And in the area of telephone regulation, Mayer and his colleagues have analyzed the effects of commission composition and different types of consumer advocacy on telephone rates. See generally Mayer, *supra* note 31.

In addition to these studies directly related to the public utility area, I have also examined research on the regulatory process in other subject matter areas in the development of my advocacy model. The major works on which I rely are Wilson's analysis of the politics of regulation in both state and federal agencies, see generally Wilson, *supra* note 68; Quirk's examination of industry influence in four federal agencies, see generally P. QUIRK, *supra* note 65; and Sabatier's theories of regulatory decision-making, see generally Sabatier & Pelkey, *supra* note 79; Sabatier, *Knowledge, Policy-Oriented Learning and Policy Change*, 8 KNOWLEDGE 649 (1987); Sabatier, *supra* note 69. Although these studies concern agencies which regulate companies that are not public utilities and that may operate in a different political context, they provide useful models for examination of advocacy before any regulatory body.

87. These findings are also applicable to other areas of consumer protection regulation. See Meier, *The Political Economy of Consumer Protection Legislation: An Examination of State Legislation*, 40 W. POL. Q. 343, 344-48 (1987).

A. *The Audience*

In any type of advocacy, the lawyer, of course, must know her audience.⁸⁸ The advocate before a public utility commission faces an especially complex job in framing arguments for an audience. First, the particular audience within the commission may vary over a period of time. For a day-to-day routine commission activity, the lawyer's audience most likely will be low-level staff members; in formal hearings, the audience probably will be more senior staff members and hearing examiners or administrative law judges; in the final stages of the decision-making process, the audience will be the commission members themselves and their staffs.⁸⁹ Each of those staff and commission members has individual interests that must be addressed. Second, besides these individual interests, the advocate must be aware of the interests of the bureaucracy itself. Even though differences may exist between the interests of particular staff and agency members, common interests of the agency exist, and the bureaucracy itself must be considered an audience. Finally, an advocate must consider intra-agency politics. Within a particular agency, interests of staff and commission members may differ radically, and in preparing her case, the lawyer must take these conflicts into account.

1. Individual Staff and Commission Members as the Audience

In a regulatory agency, there are usually three identifiable kinds of commission employees and members: careerists, who identify their careers and rewards with the agency; professionals, who receive rewards in status from organized members of similar occupations elsewhere; and politicians, who see themselves as having a future in elective or appointive politics outside the agency.⁹⁰ Obviously, the interests of each of these kinds of persons are different. Although almost every agency consists of all three types of individuals, an advocate must identify the interests of the particular staff member or commissioner who comprises the audience at a particular stage in a proceeding.

Careerists view their positions with the commission as occupational commitments.⁹¹ Because most commissions are not in danger of budget

88. See G. BELLOW & B. MOULTON, *supra* note 44, at 855-71 (distinction between appellate court, trial court, and jury as audience for argument).

89. See D. ANDERSON, *supra* note 3, at 62 (describing three phases of regulatory process).

90. Wilson, *supra* note 68, at 374. Wilson's model is based on a review of different state and federal regulatory agencies, including state public utility commissions.

91. Gormley's studies show that commissioners themselves usually do not join commissions

cuts, few commission employees fear for their jobs or their salaries. Their positions and career prospects with the commission may be threatened, however, by a scandal or a crisis.⁹² The interest of the careerist then is to avoid such catastrophes. The maintenance of the agency and their positions in it are the primary concerns of careerists.⁹³

Professionals, unlike careerists, are motivated by concerns outside the agency.

[They] may hope to move on to better jobs elsewhere, but access to those jobs depends on their display of professionally approved behavior and technical competence. They may also be content to remain in the agency, but they value the continued approval of fellow professionals outside the agency, or the self-respect that comes from behaving in accordance with internalized professional norms. *The maintenance of this professional esteem is of major importance to these employees.*⁹⁴

Professionals are likely to share a world view and a sense of the place of their profession within it. They have common ways of perceiving and structuring problems and of attacking and solving them; they often share specialized techniques, skills, knowledge, and vocabulary.⁹⁵ The degree to which a particular staff member or commissioner acts like a professional, rather than a careerist, however, may depend upon the extent of the rewards offered by other professionals outside of the commission.⁹⁶

In public utility commissions, the key professional players are lawyers, economists, engineers, and accountants.⁹⁷ Generally, within the commission professionals, lawyers are particularly concerned with issues of

for career commitment. W. GORMLEY, *supra* note 3, at 68 (Table 10) (most commissioners join commissions because of the "interesting work" or a personal request from the appointer). On the other hand, most staff members join commissions for career advancement. *Id.* at 69. Staff members also stay at commissions longer than commissioners. *Id.* at 70.

92. Wilson, *supra* note 68, at 375.

93. *Id.* at 374. A good example of the careerist's attitude is the statement of the hearing examiner in the California lifeline case, who was personally opposed to the lifeline concept: "I was more or less the reporter when it came to what [the commissioners'] wishes were in explaining and rationalizing the decision. They never asked my view and I didn't give it." D. ANDERSON, *supra* note 3, at 161-62.

94. Wilson, *supra* note 68, at 374 (emphasis added).

95. Mosher, *Professions in Public Service*, 38 PUB. ADMIN. REV. 144, 147 (1978). Certainly, not all professionals will view a problem the same way. A lawyer/politician, for example, may approach an issue from a different perspective than a lawyer/practitioner. There are, however, some common methods of problem-solving which most attorneys—whatever their type—will use.

96. Wilson, *supra* note 68, at 379.

97. W. GORMLEY, *supra* note 3, at 71 (Table 11); see also NARUC REPORT, *supra* note 2, at 767 (Table 168) (commissioners' principal previous occupation or profession).

procedural fairness and adherence to statutory and judicial authority;⁹⁸ economists are interested in issues of economic efficiency;⁹⁹ engineers are concerned about technical efficiency in the production of energy and reliability of service;¹⁰⁰ and accountants are concerned with adherence to generally accepted accounting standards.¹⁰¹ Although on any given particular issue a commissioner or staff member—whatever her profession—may deviate from these professional norms, she is more likely than not to view an issue, at least in the first instance, from the perspective of her profession's world view.¹⁰²

The interplay of different commission professionals is well-illustrated in Anderson's study of the adoption by the New York Public Service Commission ("PSC") of marginal cost-based electric rates in the 1970s.¹⁰³ The principal force behind this decision was the chairman of the PSC, Alfred E. Kahn, who, as an economist, strongly supported the use of marginal cost principles to guide pricing decisions.¹⁰⁴ When Kahn was appointed to the commission in July 1974, he faced a staff that had to be convinced of the value of marginal cost-based rates.¹⁰⁵ He instituted a generic investigation on rate design and departed from the traditional formal legal format of utility rate proceedings. Instead of the usual courtroom style of witness examinations, he instituted a "seminar" format, organizing witness panels composed of individuals of divergent views. Attorneys asked questions to the panelists, and

98. See W. GORMLEY, *supra* note 3, at 76-77, 80-81 (Table 13). Lawyers, for example, are more likely to believe that citizens' groups should be reimbursed for the costs of their participation in public utility commission proceedings and are more sympathetic to various underrepresented interests, including consumers in general. *Id.* at 76. See generally Wollan, *Lawyers in Government—"The Most Serviceable Instruments of Authority"*, 38 PUB. ADMIN. REV. 105 (1978).

99. See, e.g., D. ANDERSON, *supra* note 3, at 90 (describing Alfred Kahn's approach to regulation); cf. Stalon, *Due Process for Regulated but Weak, Natural Monopolies*, A.B.A. UTIL. SEC. NEWSL., Jan. 1989, at 2 (economist and former state commissioner bemoans the negative effect of procedural rules and government in Sunshine Laws on ability of regulators to assure economic efficiency). See generally Rhoads, *Economists and Policy Analysis*, 38 PUB. ADMIN. REV. 112 (1978).

100. See D. ANDERSON, *supra* note 3, at 100-01 (professional norms of engineers in New York commission's marginal cost pricing proceeding). See generally Schott, *The Professions and Government: Engineering as a Case in Point*, 38 PUB. ADMIN. REV. 126 (1978).

101. See generally Morse, *Professional Accountants in Government: Roles and Dilemmas*, 38 PUB. ADMIN. REV. 120 (1978).

102. The importance of professional norms depends somewhat on the issue involved. See *infra* notes 286-322 and accompanying text.

103. D. ANDERSON, *supra* note 3, at 89-134; see Rate Design for Elec. Corps., 15 Pub. Util. Rep. 4th (PUR) 434, 453-54 (N.Y. Pub. Serv. Comm'n 1976) (decision adopting marginal cost pricing principles). For a description of marginal cost pricing, see *supra* note 10.

104. D. ANDERSON, *supra* note 3, at 89-90.

105. *Id.* at 96.

other participants were encouraged to interrupt examinations to ask clarifying questions.¹⁰⁶ Although this format quite understandably was opposed by some attorneys,¹⁰⁷ Kahn maintained that he did not view his role as that of a passive judge.¹⁰⁸

On substantive issues, Kahn faced opposition from staff engineers. Because the engineers defined their goal as ensuring technical efficiency for the production of electricity, they favored volume discounts for large users to achieve economies of scale or to avoid excess capacity by discouraging large users from going off the system and generating their own electricity.¹⁰⁹ While the engineers became convinced of the efficacy of time-of-day rates, they still believed those rates should be calculated with an embedded cost methodology.¹¹⁰ Kahn eventually persuaded PSC engineers to support marginal cost pricing by focusing on their profession's norm that rates should be based on costs.¹¹¹

106. *Id.* at 98.

107. *Id.* Anderson describes the reaction of a group of industrial consumers to this format: [They] filed a formal motion with the commission to recuse Kahn for his 'preconceived notions regarding the appropriate elements of rate design for electric service'; for having 'departed from his quasi-judicial role as a regulator'; for having 'indulged in extensive cross-examination,' having made 'extensive extrajudicial comments on the record,' and having 'clearly indicated impatience with views [he] considers unacceptable'; and for having showed a 'propensity to inject testimony.'

Id.

108. Kahn responded to the attorneys' protests:

I have adjured all parties to look upon at least the theoretical phase of the proceedings as an intellectual exercise, to treat it in the nature of a running seminar, in which our purpose was essentially to explore certain academic ideas. . . . I have never pretended to play the role of a passive receiver of evidence.

Id. (emphasis omitted). In its order in the case, the commission itself responded to the objections to format:

[T]he contentions by some of the parties about denial of due process are totally devoid of merit. While it might be questioned whether our examination of the general issues of rate structure revision required evidentiary hearings at all, the fact remains that the procedures adopted in this proceeding have been designed to ensure the most searching examination of those issues, and all parties have had the broadest latitude in the presentation and cross-examination of testimony.

Rate Design for Elec. Corps., 15 Pub. Util. Rep. 4th (PUR) 434, 447 (N.Y. Pub. Serv. Comm'n 1976).

109. D. ANDERSON, *supra* note 3, at 100.

110. *Id.* at 100-01. Rates based on "embedded costs" are calculated using average historical costs of the utility. C. PHILLIPS, *supra* note 13, at 388.

111. One of Kahn's economists on the staff noted:

One of the very appealing things [Kahn] used effectively over and over again in dealing with engineers who had developed [their] ratemaking formula to precision was the question: 'Do you want to be precisely wrong or approximately right?' One of the problems, of course, was that they spoke a different language from us. But he was successful [with the engineering staff], I think, because of the power of his

Regardless of the type of professionals in a given public utility commission, the degree of professionalism in the commission in and of itself apparently affects the decision-making process. One study of public utility commission professionalism¹¹² found that the cost of producing electricity is substantially more important in determining price in commissions with higher professionalism than in commissions with low professionalism.¹¹³ He found also that the higher the commission's professionalism, the more likely that the commission will be responsive to efforts of consumer intervenors to hold down the price of electricity.¹¹⁴

Both these findings indicate that a more "professional" commission—whatever the particular composition—is more likely to base its decisions on objective standards and to be more open to information provided by nonutility participants.¹¹⁵

The third and final type of commission employee or member is the politician. In the political arena, these "political entrepreneurs" seek to develop reputations as advocates for certain interests with the hope of securing future appointive or elective government positions.¹¹⁶ Except for law, politics may be the most frequent former occupation of commissioners.¹¹⁷

The California Public Utilities Commission ("PUC") in its adoption of lifeline rates is a good example of the efforts of political entrepre-

intellect and his continual appeal to the notion of getting price in line with costs.

D. ANDERSON, *supra* note 3, at 101 (emphasis omitted).

As Anderson describes it, Kahn persuaded the engineers to accept marginal cost pricing principles by showing how this methodology solved the "rate erosion" issue. That issue concerns the situation in which increased sales do not provide enough increased revenue to avoid further rate increases. The engineering staff began to perceive that revenue erosion occurred because of the excessive demand in the tail block of utilities' declining block rate structures—one of the outgrowths of embedded cost pricing methodology. Unlike embedded cost pricing, marginal cost pricing set the rate for each block at the cost of providing service in that block. *Id.* at 101-02.

112. Berry, *An Alternative to the Capture Theory of Regulation: The Case of State Public Utility Commissions*, 28 AM. J. POL. SCI. 524, 544 (1984). Berry does not consider the particular professional composition of commissions but instead looks at particular factors that would indicate professionalism at a commission: the operating resources of the commission, method of selection of commissioners, extent of job training for incoming staff, and degree of employee job protection. *Id.*

113. *Id.* at 548-50.

114. *Id.* at 547.

115. Some commentators, however, have severely criticized the effect of professionalism on commission decision-making. Bernstein, for example, argues that professionalism lessens the opportunity for the administrative generalist to counterbalance the narrow views of the professional. M. BERNSTEIN, *supra* note 40, at 118-25.

116. Wilson, *supra* note 68, at 374, 378-79; see D. ANDERSON, *supra* note 3, at 24-25.

117. B. MITNICK, *supra* note 86, at 233, 236 (asserting that political considerations are important in both elected and appointed commissions).

neurs.¹¹⁸ In the late 1960s and early 1970s, Ronald Reagan's appointees controlled the PUC and took a markedly pro-utility stance.¹¹⁹ The President of the Commission sought to reduce regulatory lag in the ratemaking process by imposing strict procedural limitations on consumer groups and by reorganizing the staff.¹²⁰ When these changes met with uniform resistance from the staff,¹²¹ the PUC attempted to bypass the staff by relying on fuel adjustment clauses for rate increases.¹²² By early 1974, rate increases in electricity and gas under these clauses were coming almost monthly. At the same time, Pacific Gas and Electric Company ("PG&E") sought a \$223 million general rate increase—then the largest increase in California history.¹²³ In response, community groups began to organize for the adoption of lifeline rates.¹²⁴

Onto this stage in 1975 came Leonard Ross, newly-elected Governor Brown's appointment to the PUC. Some of his acquaintances characterized him as politically ambitious and said that he aspired to be state treasurer, and eventually a United States Senator. Ross made energy rate structure reform and the "openness" of the process two of his objectives.¹²⁵ Once on the commission, he quickly began to speak publicly in favor of lifeline rates and openly lobbied the California legislature for a bill enabling the PUC to adopt such rates.¹²⁶ Once the

118. D. ANDERSON, *supra* note 3, at 135-65.

119. *Id.* at 138.

120. *Id.* at 140-41.

121. This is a good example of the importance of professional norms to professionals. Anderson quotes one staff member as complaining, "[w]hen [the president of the Commission] started screwing around with the ground rules all hell broke loose, and this brought us into disrepute." *Id.* at 141.

122. *Id.* at 142-43. For a description of fuel adjustment clauses, see *supra* note 8.

123. D. ANDERSON, *supra* note 3, at 143.

124. *Id.* at 144-56. For a discussion of the campaign for lifeline rates in California, see *infra* text accompanying notes 189-94.

125. D. ANDERSON, *supra* note 3, at 158.

126. The lifeline statute that the California legislature adopted reads, in relevant part:

(a) The commission shall designate a lifeline volume of gas and a lifeline quantity of electricity which is necessary to supply the minimum energy needs of the average residential user for the following end uses: space and water heating, lighting, cooking and food refrigerating, provided that in estimating such volumes and quantities the commission shall take into account differentials in energy needs between utility customers whose residential energy needs are supplied by electricity and gas. The commission shall also take into account differentials in energy needs caused by geographic difference, by differences in severity of climate, and by season.

(b) The commission shall require that every electrical and gas corporation file a schedule of rates and charges providing a lifeline rate. The lifeline rate shall not be greater than the rates in effect on January 1, 1976. The commission shall authorize no increase in the lifeline rate until the average system rate in cents per kilowatt-

bill was passed, Ross successfully pushed for the approval of lifeline rates in the PG&E case. While most of the PUC staff objected to the concept of lifeline rates, the PUC basically ignored staff objections and sided with Ross.¹²⁷

Ross's tenure at the California PUC demonstrates that the political entrepreneur excels in a particular kind of environment. Ross was successful because his appointment came in a politically charged atmosphere (protests against large rate hikes) in which consumer activists had proposed a clear alternative—lifeline rates.¹²⁸ He effectively used the media to campaign for that alternative. As one of the lifeline activists noted, Ross's style was "regulation by press release."¹²⁹ The PUC's task was simply to make a single choice between competing values and, for a time, it could ignore its own staff's professional assessment of rate structure issues.¹³⁰ Commentators suggest, however, that a political entrepreneur, such as Ross, can prevail over the commission staff for only a short while; eventually, the staff will become so disillusioned with the politicization of the process that the maintenance of the agency itself may be placed in jeopardy.¹³¹

Because of the different concerns of the various types of commissioners and staff members, an advocate in a public utility commission case must fashion her argument differently, depending upon the type of individual(s) she is trying to persuade. Because careerists are the consummate bureaucrats, an advocate is not going to change their position on an issue unless she can show them that the commission's reputation will be severely damaged by their position and that the injury may be attributed to them. Although public demonstrations and campaigns against a careerist may shake him up, not all issues lend themselves to such tactics. Accordingly, in most instances, the best way to persuade (or at least neutralize the effect of) a careerist is to show that a proposal is consistent with past practices of the commission and does not amount to a radical change in commission policy.¹³²

hour or cents per therm increased 25% over the January 1, 1976 level. Miller-Warren Energy Lifeline Act, ch. 110, 1975 Cal. Stat. 1010(3) (codified as CAL. PUB. UTIL. CODE § 739(a)-(b) (West 1975)).

127. D. ANDERSON, *supra* note 3, at 161-62. Anderson quotes the hearing examiner in the case: "[W]hen you're a bureaucrat you do what the political appointees want." *Id.* at 162.

128. *See id.* at 168-69.

129. *Id.* at 162.

130. *See id.* at 176.

131. *Id.* at 177. In fact, Ross left the PUC after two years to become an undersecretary of state. *Id.*

132. Creative legal arguments will usually not persuade a careerist. The advocate, therefore, should frame legal arguments to these types of regulators in terms of common sense readings of a statute or prior commission decision.

When attempting to persuade a professional, the advocate should, if possible, frame her argument in terms of the norms of that particular individual's profession.¹³³ For the most part, a lawyer is going to be concerned with statutory and case authority, an economist with economic efficiency, an engineer with issues of technical efficiency, and an accountant with generally accepted accounting standards.¹³⁴ Although legal arguments may be very important in preserving an issue for review, an advocate is not going to win in the commission if she ignores the policy issues important to the different commission professionals.¹³⁵

In addressing the political entrepreneur, the primary focus should be the politician's career or that of his patron, e.g., the Governor who has appointed him or the commissioner to whom he is responsible. The advocate should examine the "political market" in framing her argument, considering whether or not the particular issue can be used by the politician to advance his career. Regardless of what position the politician takes, the advocate must be aware of the kinds of compromises the politician might be willing to make to develop the largest possible constituency.

For most issues, of course, the advocate's audience will consist of a number of individuals. Either the decision-making will be a group process,¹³⁶ or, before a final decision is rendered, issues will be considered on a number of levels of the commission hierarchy. Accordingly, in most cases, the attorney must attempt to persuade more than one type of regulator. As with appellate advocacy, the attorney must count

133. As DeLong has noted: "There is little point in arguing law to the economists, economics to the scientists, and so on." DeLong, *supra* note 37, at 28.

134. Of course, professional perspective is not monolithic. An advocate should discover—either through examinations of prior decisions or discussions with others who have been advocates before a particular individual—any experiences with the particular professional in regard to similar issues.

135. *Id.* at 32. DeLong suggests that the best approach is to explain first why your position makes sound policy and, only second, why and how the law not only allows but compels acceptance of it. *Id.*

136. In an informal consumer complaint case, for example, the intake staff member at the commission's consumer affairs division will collect information about the complaint and will then probably consult with her supervisor. If the complaint is not routine, the supervisor may consult more senior staff members or attorneys on the commission's legal staff. By the time a decision is made on the complaint, four or five persons may have had input into the decision.

In a rulemaking or ratemaking case, the number of individuals involved in the decision-making increases substantially. While a hearing examiner may consider the case in the first instance, she may be assisted by staff assistants. The hearing examiner usually reports to the entire commission, and the commission is advised by its staff assistants. Frequently, the commission will call upon senior staff members or legal counsel for help in shaping the final order. At times, the commission may even return the whole case to the hearing examiner for further hearings.

her votes and frame her argument to persuade as many members of the audience as possible.

From the start, in developing a theory of the case, the advocate for a low-income group should identify those individuals in the commission whom she wants to persuade and then fashion alternative arguments directed to each of them. In urging special rate consideration for low-income utility customers, for example, an argument based solely on the "fundamental right" of citizens to utility service probably will not be very successful with most lawyers or economists,¹³⁷ but it may be effective with some political entrepreneurs. A stronger argument to an attorney might be based on the commission's enabling legislation concerning protection of the public health and safety;¹³⁸ argument to an economist might be grounded on the cost-effectiveness of such a program; argument to a careerist might be based on the serious challenge to the commission's reputation if poor people are dying without utility service.¹³⁹ The task for the advocate is to weave these arguments into a cohesive theory from the very beginning of a case.

2. The Bureaucracy as the Audience

Besides the interests of individual staff members and commissioners, political scientists have identified what can be termed "bureaucratic interests" in the regulatory process: fundamental concerns that infuse most agency decision-making.¹⁴⁰ Although careerists are especially concerned about these interests, the other types of regulators also may take them into account. All commissioners and staff members are part of an ongoing group decision-making process, and over the long term the interests of the group cannot be ignored. For this reason, the advocate

137. For arguments against "social-cost" theories of ratemaking, see J. BONBRIGHT, A. DANIELSON & D. KAMERSCHEN, *PRINCIPLES OF PUBLIC UTILITY RATES* 164-78 (2d ed. 1988) [hereinafter J. BONBRIGHT].

138. See, e.g., ILL. REV. STAT. ch. 111 2/3, para. 8-101 (1987) ("Every public utility shall . . . provide and maintain . . . facilities as shall promote the safety, health, comfort and convenience of its patrons . . .").

139. See *In re Investigation into Long-Term Solutions Concerning Disconnection of Gas & Elec. Serv. in Winter Emergencies*, No. 83-303-GE-COI (Ohio Pub. Util. Comm'n Nov. 23, 1983) (adopting special low-income payment plan program in response to serious threat to poor persons from lack of utility service).

The advocate should also identify which regulators are the "leaders" on the commission and consider focusing their arguments on these commissioners' concerns. Cf. Meier, *supra* note 87, at 345-46 (reviewing general studies on the effect on policy of leadership qualities of individual regulators). If there is a "friendly" commissioner on the commission, the advocate should consider what arguments will help that commissioner persuade her colleagues.

140. See Wilson, *supra* note 68, at 377-78.

in a public utility commission proceeding must be aware of these interests in planning her case.¹⁴¹

The first of these bureaucratic interests is risk aversion. As Wilson writes:

Government agencies are more risk averse than imperialistic. They prefer security to rapid growth, autonomy to competition, stability to change. . . . In short, agencies quickly learn what forces in their environment are capable of using catastrophe or absurdity as effective political weapons, and they work hard to minimize the chances that they will be vulnerable to such attacks.¹⁴²

Although most public utility commissions are not likely to be totally defunded, they still are subject to statutory limitations on their power, legislative investigations, and attacks on their budgets.¹⁴³ To ward off these risks, agencies attempt to avoid scandal and maintain sufficient political support so that they can function effectively.¹⁴⁴ This requires agencies to appear as if they are balancing the interests of all the parties before them, even if they are not.¹⁴⁵

As a consequence of this risk aversion instinct, agencies tend to promulgate rules covering all possible contingencies.¹⁴⁶ They then can defend themselves from charges that they have ignored a particular problem. At the same time, however, regulators are reluctant to engage in serious long-term planning that might have substantial consequences

141. As with the description of the types of individual regulators, these descriptions of bureaucratic interests are generalizations that are not always applicable but may be helpful in the initial preparation of the case.

142. Wilson, *supra* note 68, at 376-77.

143. Many commissions in fact are not supported by general tax funds but by taxes and fees specifically levied on utilities. See NARUC REPORT, *supra* note 2, at 807 (Table 176).

144. Berry, *supra* note 112, at 528-29. This survival instinct is the basis for Bernstein's capture theory. See M. BERNSTEIN, *supra* note 40, at 155-56 ("Lacking effective and continuing political support and faced with organized opposition of the parties in interest, a commission finds its survival as a regulating body dependent heavily on its facility in reaching a *modus operandi* with the regulated groups."); see also Anderson, *supra* note 1, at 16-17 (for most of the period of regulation, utilities have been free to make virtually all the important decisions).

145. Empirical studies of public utility commissions support this view. See Wechsler & Backoff, *supra* note 86, at 325 (study of Public Utilities Commission of Ohio shows that as a result of the "energy crisis" in the early 1970s, the commission began to employ a regulatory strategy of balancing the interests of the utilities and consumers; when negative consumer reaction did not abate, the commission's "decisions retained a rhetorical commitment to the concept of balancing competing interests" but produced pro-consumer results); cf. J. CHUBB, *supra* note 34, at 49-50 (in federal context, agencies seek support from various different constituencies). But see D. WELBORN & A. BROWN, *supra* note 6, at 138-43 (elected Tennessee commission goes out of its way to build consumer support).

146. Wilson, *supra* note 68, at 377.

for one of their constituencies.¹⁴⁷ In many of those situations, the political stakes are just too high.

The second bureaucratic interest is legitimacy. Especially in states in which commissioners are appointed, regulators seek expert legitimacy to support their position as "independent commissioners."¹⁴⁸ Even in states with elected commissions, however, regulators may want to give the appearance of an objective basis to their decision-making.¹⁴⁹ Regardless of the method of commissioner selection, to gain legitimacy regulators need technical information—either from within the agency itself or from participants in the process—on which to ground their decision.¹⁵⁰

The final bureaucratic interest can be described as "commission status" in relation to the commissions of other states. Studies of public utility commissions have shown that commissions can be classified as either leaders or followers.¹⁵¹ Some states, such as New York, Wisconsin, and California, have commissions with large staffs and resources; they are the first to try new innovations and procedures.¹⁵² Other state commissions prefer to wait and see how these new programs fare in operation and how the courts in the leader states rule on their legality.¹⁵³ Although commission status as a leader or follower is difficult to quantify, certainly the way that regulators view their agencies in comparison with other commissions affects their definition of the agency's role and, consequently, the decision-making process.

The bureaucratic concerns of commission employees and members have a number of implications for the advocate representing low-income participants in commission proceedings. First, in planning a theory of the case and developing strategy in the case, the attorney should consider the risk aversion interest of the agency. In some cases, this means demonstrating to the commission that rejection of the advocate's po-

147. See Gormley, *supra* note 84, at 618; M. BERNSTEIN, *supra* note 40, at 177.

148. D. ANDERSON, *supra* note 3, at 12.

149. See D. WELBORN & A. BROWN, *supra* note 6, at 110-11 (example of elected commission—Tennessee Public Service Commission—that developed a systematic approach to evaluation of rate proposals).

150. Cf. Friedman, *Representation in Regulatory Decision Making: Scientific, Industrial, and Consumer Inputs to the F.D.A.*, 38 PUB. ADMIN. REV. 205, 210 (1978) (in FDA context, agency staff members were unanimous in finding technical advisory committees important in providing legitimacy to decision-making).

151. Joskow, *supra* note 2, at 324-25; Wilson, *supra* note 68, at 397 n.49.

152. See, e.g., Madison Gas & Elec. Co., 5 Pub. Util. Rep. 4th (PUR) 28, 34-36 (Wis. Pub. Serv. Comm'n 1974) (first state commission to implement rates based on estimated marginal costs).

153. Joskow, *supra* note 2, at 324-25; Wilson, *supra* note 68, at 397 n.49.

sition will seriously affect the commission's mission. To persuade the agency, an advocate must concentrate on the agency's problem, not her own. She should try to show, for example, how a utility's proposed rate increase or policy change damages the interests of the commission itself, how it fails to promote the agency's mission, and how it inhibits attainment of its goals and damages its purpose.¹⁵⁴

Accordingly, when arguing to a commission staff member against a utility's inadequate notice practices before disconnections, an attorney will want to emphasize not just the rights of the clients to service but also the role of the commission, as a neutral arbiter, in safeguarding procedural protections for all parties. Likewise, when proposing new rate design methodologies to the commission, the focus should be on the benefits of the proposal for long-term regulatory stability in the state, not solely the advantages to a particular class of customers.¹⁵⁵ And in those cases in which it is possible to bring legislative, executive, or judicial pressure to bear on a commission's bureaucratic concerns, such as funding, staffing, and legislative oversight,¹⁵⁶ the advocate's threat to use these forces may be very effective in bringing about commission action.¹⁵⁷

Another method of addressing the risk aversion interest is to frame a new proposal as a "balancing of interests." Research shows that regulators attempt to accommodate as many interests as possible.¹⁵⁸ Accordingly, an advocate should attempt to show that the proposal takes into account the interests of not only her client but also the utilities and other ratepayers. For example, in proposing special rates for low-income persons, the advocate might show that by keeping those persons on the system and lowering uncollectibles, her proposal relieves the utility and other ratepayers from the burdens of the present rate structure. Moreover, the advocate should seek to build coalitions with other groups on particular proposals—e.g., industrial, commercial, or

154. See DeLong, *supra* note 37, at 28.

155. Reflecting the bureaucratic interests of maintaining regulatory stability and appearing legitimate, commissions have applied five criteria in evaluating proposed rate structures: economic efficiency, effectiveness in yielding revenue requirement, lack of price discrimination, practicality, and rate stability. See Environmental Impact Statement on Elec. Util. Tariffs, No. 1-AC-10 at 47 (Wis. Pub. Serv. Comm'n June 1, 1977). See generally J. BONBRIGHT, *supra* note 137, at 382-84. In preparing a rate design case, the advocate should attempt to develop arguments within this framework.

156. See *infra* text accompanying notes 260-73.

157. In California, for example, lifeline proponents developed a multi-prong campaign for adoption of lifeline: simultaneous pressure on the public utility, the commission, and the legislature. See *infra* notes 191-94 and accompanying text.

158. See *supra* notes 144-45 and accompanying text.

other consumer intervenors—to show the commission the widespread political support for the change.¹⁵⁹

The advocate should consider also the agency's interest in legitimacy. Although rhetoric can be very useful in drumming up support for a proposal and putting political pressure on a commission, most regulators need a rationale for their decision-making. Regulators want and need information to feel they are doing their job.¹⁶⁰ The advocate's role should be to provide this needed information. In some circumstances, the information can come from expert witnesses, company documents, or cross-examination of company witnesses. In other cases, however, the advocate for low-income intervenors can rely on her own clients. To show abuse in the credit and collection department of a particular utility, for example, the advocate can rely on complaints of clients who have experienced problems.¹⁶¹ To show the effect of the present rate design on housing in low-income areas, the advocate can utilize community organizers in those neighborhoods.

Finally, an advocate must take into account whether or not she is practicing in a "leader" or "follower" state. In a leader state, her proposal can be presented to the commission as another example of "cutting edge" regulation. In a follower state, in developing a theory of the case, the attorney should look to the leader states for direction, compile data on programs in those states, examine any court decisions in regard to those programs, and, in any formal proceeding, bring in expert witnesses who can testify about the operations of those programs.¹⁶²

3. Interactions of Commission Personnel

Research on public utility commissions shows that the decision-making process is affected not only by the individual interests of commissioners and staff and the bureaucratic interests of the agency but also by the interaction of the different agency players. Within each

159. Cf. DeLong, *supra* note 37, at 31 (suggesting that for unpopular industry groups, the best solution is to "[f]ind other independent groups that have taken [a similar position]—academic analysts, independent think-tanks, public interest groups, labor organizations, other agencies, foreign governments—and emphasize that the agency should adopt the position of these groups").

160. D. ANDERSON, *supra* note 3, at 12.

161. See D. WELBORN & A. BROWN, *supra* note 6, at 120-21 (complaint channel as mechanism for expressing public concern about utilities).

162. Testimony of Marsha Ryan in South Austin Coalition Community Council, Petition for Rulemaking, No. 84-0262 (Ill. Commerce Comm'n) (in Illinois proceeding for adoption of special payment plan for the poor, Deputy Director of Ohio Consumers' Counsel testified concerning similar plan in Ohio).

commission, there is usually a chairperson, anywhere from two to eight additional commissioners, staff department heads, senior staff members, and lower-level staff employees.¹⁶³ The commission also may have an executive director who oversees the operations of the staff.¹⁶⁴ Because of this organizational hierarchy, commission decision-making, unlike the judicial process, is fragmented both horizontally and vertically.¹⁶⁵ At each stage of a proceeding, several persons at each level will consider the issues; by the time a final decision is rendered, the issue may have been considered at a number of levels—from lower-level staff, to senior staff, to the commission, and back to the staff.¹⁶⁶ By the end of a case, the formal hearing process may play only a very insignificant role in the adoption of the order.¹⁶⁷

In this interactive process, commissioners regularly show great deference to their staff. The staff may be more influential than any outside participant or even than any particular commissioner.¹⁶⁸ The reason for this influence is fairly obvious: Staff members are a ready source of data about the particular issue involved and of information about complex issues that may be far outside the commissioners' own disciplines.¹⁶⁹

163. NARUC REPORT, *supra* note 2, at 758-61 (Table 166).

164. *Id.* at 779-98 (Table 173).

165. See DeLong, *supra* note 37, at 28. See generally M. BERNSTEIN, *supra* note 40, at 172-73 (criticizing fragmented decision-making process because it is usually accompanied by splintered management in commissions).

166. See *supra* note 136.

167. DeLong, *supra* note 37, at 29 (asserting that "the main function of a hearing will often be to test information, not to unveil it"); see Leflar & Rogol, *supra* note 26, at 242. This phenomenon is similar to the situation in the legislative setting in which testimony before committee hearings usually plays a minor role in the legislative process. See J. BERRY, *supra* note 19, at 223-24.

168. In Gormley's study of 12 state commissions, he found that staff is perceived as more influential than any other outside participant. W. GORMLEY, *supra* note 3, at 138-40 (Table 23). In nine of the twelve states, the survey participants perceived staff as having the greatest influence of all the parties in public utility commission proceedings; in two of the states, staff was perceived as having the most influence after the utility companies; and in one state, staff and the utilities were both perceived as having the greatest influence. *Id.* In fact, in Welborn and Brown's study of the Georgia, Kentucky, and Tennessee commissions, they found that the staff had greater influence on commissioners than other commissioners. D. WELBORN & A. BROWN, *supra* note 6, at 86-88. They also found little influence of executive directors on the substantive work of the staff; their major areas of responsibility were administrative: budgeting and personnel. *Id.* at 90.

169. As one commissioner told Gormley:

We make the decisions. However, we have a very large staff. The staff is rather competent, and so the commission looks to the staff, particularly the senior staff, quite heavily for information and opinions with respect to matters that come before us. Since we have such a variety and large number of things which we can't always

The studies also suggest, however, that conflicts regularly occur within the commission's group decision-making process over both substantive¹⁷⁰ and internal organizational issues.¹⁷¹ As with any organization, power struggles develop; the fragmented decision-making structure accentuates these problems.

This research demonstrates that an advocate must view the audience not only as a single individual, or one cohesive agency, but as a group involved in an interactive process. While some generalizations can be made about group dynamics within commissions, the most significant implication of the research is that before planning any case an advocate should investigate the workings of her particular commission to determine its internal politics. Key questions that should be considered are:

- 1) the relation of the chairperson to the other commissioners and the commissioners to the executive director;
- 2) the identity of the senior staff members who wield the most authority;
- 3) the role of the commission's legal counsel; and
- 4) the commissioners and staff members to whom others will defer on particular issues.¹⁷²

Thus, when "counting votes" of individual commissioners and staff members, the advocate should consider the impact of the internal politics.

Moreover, the advocate needs to examine the relative power and limitations of the commission players on each bureaucratic level. Obviously, a lower-level staff member is not going to be able unilaterally to order a change in a utility's credit and collection practices. By the

investigate ourselves, we are very often . . . dependent on the staff.

W. GORMLEY, *supra* note 3, at 138, 140. Gormley, however, cautions against exaggerating the influence of staff. He notes that staff members can be silenced by commissioners if they become outspoken and suggests that the ability of the staff to influence commissioners may be diminished if there are alternative suppliers of information. *Id.* at 140.

170. In his study of the California and New York commissions, Anderson found serious conflicts between commission chairmen and senior staff. D. ANDERSON, *supra* note 3, at 101 (in New York marginal cost pricing proceeding, conflict existed between Kahn and engineering staff); *id.* at 177 (in California lifeline proceedings, staff was bitter about Ross's "regulation by press release style"); cf. DeLong, *supra* note 37, at 29 (asserting that in general, in regulatory process, there are intra-agency conflicts).

171. D. ANDERSON, *supra* note 3, at 139-42 (describing struggle in California commission between commission president and staff in regard to plan to rotate staff members between divisions).

172. Particular commissioners may serve on specialized committees of the National Association of Regulatory Utility Commissioners or regional commissioner associations. In regard to issues relevant to the work of those committees, other commissioners may defer to a commissioner serving on one of those committees.

same token, most commissioners will not, on their own, engage in an investigation of alleged utility misconduct. Accordingly, the attorney should fashion her argument to take into account the limitations of that bureaucratic level. Additionally, as a general rule, the higher one goes in the bureaucracy, the less time and attention the players will give to the matter, and the advocate needs to adjust her arguments accordingly.¹⁷³ The advocate constantly should be refashioning her argument as she finds her way through the bureaucratic maze.

Research also shows the importance of attempting to work with the staff. Because, on most issues, the advocate's initial contact with the commission will be the staff, and because of commissioner deference to the staff, an advocate should try in the first instance to persuade key staff members.¹⁷⁴ Being aggressive without offending or insulting the staff may pose a particular problem for the advocate of low-income persons. Staff members usually have regular communications with utility officials and employees and infrequent contacts with low-income groups. Moreover, many low-level staff members are careerists who do not want to "rock the boat." Accordingly, it may be quite difficult to persuade a particular staff member to agree with an unknown group's position. To neutralize the influence of such a staff member, it may be necessary to attack his credibility or expert opinion. If the advocate takes this approach, however, she has to deal with the problem of commissioner deference. An astute advocate can use existing intra-agency conflicts to her advantage, for example, by appealing to the superior knowledge and understanding of a senior staff member or commissioner. Antagonizing any particular staff member is dangerous, but it may be the only way of overcoming intransigent staff.

Research further demonstrates the importance of making a written record within the commission. In an informal credit and collection complaint, for example, the advocate should memorialize her discussions with commission staff and submit this writing to the commission. If the advocate later files a formal complaint, a record exists, apart from the staff's own version, as to the actions it has taken. Even in a small case, a number of individuals within the commission will be involved in the decision-making process.¹⁷⁵ Although oral presentations are im-

173. DeLong, *supra* note 37, at 29-30 (suggesting that an advocate broaden her presentation as she goes up the bureaucratic ladder).

174. Indeed, DeLong recommends that an advocate in a regulatory agency should never insult staff: "[A]n insulting approach actually makes it more difficult for superiors to reverse the staff decision that has been the target of the comment. . . . [T]he major effect of the insult will be to cause the agency to close ranks against you." *Id.* at 31.

175. See *supra* note 136.

portant in that process, unless other agency members are aware of what has occurred previously, the ultimate decision may be based on faulty and incomplete information about a decision made on a different level in the process.¹⁷⁶ An advocate, therefore, should create a "paper trail" in the commission files throughout a proceeding.

Finally, an advocate should not stake her case solely on the formal hearing stage of the proceedings. One of the problems with attorneys in these proceedings is that they usually feel more at home in formal evidentiary hearings than in informal negotiations outside the hearing room. The research shows, however, that group decision-making entails more than the review of an evidentiary record. The commission will try to draft its written findings grounded on the record; that is the legal requirement. But in most instances the interplay between commissioners, within the staff, and between the commissioners and the staff, is the true basis for the decision underlying those findings.¹⁷⁷ The attorney, therefore, cannot ignore the extra-hearing decision-making processes; she must become a participant in them. She should, for example, maintain regular contact with staff counsel, and, if ethically allowed, along with staff witnesses, argue her position on the case. Hearing recesses are excellent opportunities for such discussions. Further, the advocate should attend local or regional energy and utility conferences or utility bar section meetings where commissioners and the staff tend to gather. Although prohibitions on *ex parte* communications may bar discussions of issues in particular cases, these gatherings, which usually are frequented only by utility and industrial representatives, give the advocate the opportunity to present alternative views on general policy issues.

B. The Client

The second factor the advocate should consider in planning a case in a public utility commission is the ability of her client to pursue the

176. See DeLong, *supra* note 37, at 29. DeLong identifies two problems with reliance on oral discussions with regulators. First, because the commission decision-making process is diffused, the relevant decision-makers are seldom all in one place at the time of the decision. Second, most government processes work slowly, and by the time of the final decision, decision-makers may have forgotten oral presentations.

On the other hand, regulators must confront large mounds of paper each day. If an advocate inundates a commission with documents—especially technical legal documents—the commission and staff may ignore the papers.

177. Even in states with strict prohibitions of *ex parte* communications and rigorous sunshine laws, staff has impact. If the staff cannot lobby commissioners behind closed doors, it can still attempt to influence commissioners at open commission meetings.

case effectively. This factor is the flip side of the composition of the audience. A keen understanding of the personnel and internal dynamics of a commission is useless unless the advocate's client can provide the support needed to win the case before that particular commission. Studies on commission decision-making demonstrate the importance of considering both the power and limitations of the client in developing an effective case.

Political science literature contains several significant findings in regard to the effectiveness of consumer intervenors in public utility commission proceedings. One finding is that groups are almost always more influential than individual citizens in commission proceedings.¹⁷⁸ This is true not only because agencies are interested in averting risk and responding to political pressure,¹⁷⁹ but also because groups have greater ability to persist and follow through than do individuals. Organizations can stimulate awareness of common problems among their members, increase levels of community participation, and help generate a sense of collective purpose around which a program can be developed.¹⁸⁰

Research also has shown that groups are effective only if they can perform three functions.¹⁸¹ First, they must be able to monitor the agency's activities over a period of time. Regulation is an ongoing, open-ended project, and groups must have the staying power for the long haul.¹⁸² Research on staff resources for proxy and grassroots advocates supports this proposition; those organizations with more full-time staff who can monitor the activities of the commission are more effective in commission proceedings than those with less staff support. Proxy advocates spend more money, have more full-time staff, and have greater technical expertise than grassroots groups.¹⁸³ Not surpris-

178. W. GORMLEY, *supra* note 3, at 142-43. In his study of commissions in 12 states, Gormley found that with the sole exception of Mississippi, where individual citizens communicated with commissioners, groups have greater influence than individuals.

179. See *supra* text accompanying notes 142-47.

180. W. GORMLEY, *supra* note 3, at 143 (quoting B. CHECKOWAY & J. VAN TIL, *CITIZEN PARTICIPATION IN AMERICA* 33-34 (1978)).

181. Sabatier, *supra* note 69, at 318-19.

182. *Id.* at 318.

183. See W. GORMLEY, *supra* note 3, at 132-51; Gormley, *supra* note 18, at 449-56. For definitions of grassroots and proxy advocates, see *supra* notes 18 and 20.

In his study, Gormley found that 64.3% of grassroots groups spend less than \$25,000 a year on utilities issues while all the proxy organizations spent more than \$250,000 a year on such issues. Gormley, *supra* note 18, at 450-51. In terms of staff, only 10.3% of the grassroots organizations, compared to 100% of the proxy advocates, had three or more full-time staff members working on utility issues. *Id.* at 451. And in terms of technical expertise, only 44% of the grassroots advocates had special training in utilities issues, compared to 85.7% of the proxy advocates. *Id.*

ingly, interviews with public utility commissioners and staff members, grassroots advocates, proxy advocates, and utility executives suggest that proxy advocates are more effectual than grassroots advocates.¹⁸⁴

Second, to be effective, groups regularly must provide expert information to the agency to counterbalance the influence of the industry.¹⁸⁵ Again, data with regard to consumer group budget size and technical expertise are consistent with this contention.¹⁸⁶ Organizations that provide information are more influential not only because they provide specific data to regulators for a particular decision, but also because they establish a general reputation over a period of time in working with regulators to resolve problems.¹⁸⁷

Finally, effective groups are able to mobilize their members periodically and form coalitions with other community groups to bring political pressure to bear on the commission.¹⁸⁸ For example, the consumer groups in the California lifeline campaign succeeded by building a coalition involving senior citizen groups, labor unions, and environmental organizations.¹⁸⁹ Originally, the organizers wanted to stop all rate hikes, but they decided on the lifeline alternative because they felt that PG&E was more vulnerable to an issue framed as protection of the poor and the elderly.¹⁹⁰

184. Gormley, *supra* note 18, at 452-56. In Gormley's study of 12 commissions, he found that proxy advocates were judged highly influential in the process in three states; in one state they fell between highly and moderately influential; in two states they were judged moderately influential. *Id.* at 453-54 (Table 2). In six of the states, he did not identify any proxy advocates. *Id.* at 453. For the grassroots advocates, the interviews disclosed moderate influence in six states and low influence in six states. *Id.* at 454-55 (Table 2).

From this study, Gormley concluded that staff resources, budget, and technical expertise have an important effect on the influence of consumer groups in commission proceedings. *Id.* at 455-56; see also Gormley, *supra* note 33, at 459. There are some holes in Gormley's reasoning. First, he does not control for the type of issue that is being litigated by the different kinds of consumer advocates. Proxy advocates, for example, may chose politically easier issues upon which to concentrate. See *infra* text accompanying notes 247-48. Second, his study is based upon a reputational interviewing method, which depends for its reliability on the subjective judgment of the participants. See W. GORMLEY, *supra* note 3, at 136.

His findings, however, appear intuitively sound. As a general proposition, the larger the organization's resources, the greater the relative influence of the group.

185. Sabatier, *supra* note 69, at 318.

186. See *supra* note 184.

187. See Miller, *State Administrator Perceptions of the Policy Influence of Other Actors: Is Less Better?* 47 PUB. ADMIN. REV. 239, 241-42 (1987) (study found that on the whole, state administrators want more input from the public).

188. Sabatier, *supra* note 69, at 319.

189. D. ANDERSON, *supra* note 3, at 151-53; Anderson, *supra* note 1, at 28. Although the PG&E rate increases burdened the poor and those on fixed incomes the greatest, the coalition chose to propose a universal lifeline, see *supra* note 126, to expand its political base for the campaign. D. ANDERSON, *supra* note 3, at 151.

190. D. ANDERSON, *supra* note 3, at 151.

Having built the coalition, the leaders settled on three strategies: (1) direct confrontation with PG&E (demonstrations at the utility's corporate headquarters); (2) direct action aimed at the Public Utilities Commission (actions at rate hearings); and (3) lobbying in the legislature.¹⁹¹ Concomitant with these actions, other groups presented expert testimony to the commission in support of rate relief for residential customers.¹⁹² These efforts resulted in the adoption by the California legislature of a lifeline bill¹⁹³ and the eventual adoption of lifeline rates by the California commission.¹⁹⁴

Once a group is victorious, continuing political presence is necessary, not only to safeguard any gains that are won, but also to persuade regulators of the group's determination.

The varying effectiveness of different groups in public utility commission proceedings has a number of implications for the advocate of low-income intervenors. That budgetary and staff resources greatly affect the ability of groups to influence regulators is not very astonishing to advocates of the poor who already are very well aware of their clients' financial limitations. The research, however, is helpful because it also indicates specifically why these resources are important. Those findings can help an advocate work with her client in developing a strategy to overcome its limited abilities and resources.

1. Ability To Monitor Commission Activities

First, because of the long-term nature of the public utility regulatory process, the advocate and client must establish monitoring capability. Participation in one rate case, for example, usually will not have much effect for a low-income intervenor. The ratemaking process is fluid—consideration of issues in the present case will commence from where the commission ended in the last case, and, by the time the final order in the present case is rendered, some of those issues may still remain for consideration in the next case or some collateral proceeding. At the other extreme, intervention in every case relating to a particular utility or to all utilities in a particular locale—telephone, gas, and electric—is unrealistic. With limited resources, the advocate does not have the time and ability to participate in each of those cases. Spread too thin, an

191. *Id.* at 153-55.

192. *Id.* at 151, 154.

193. *See supra* note 126.

194. In contrast to their counterparts in California, supporters of lifeline in New York were unable to create a coalition of environmental, consumer, and labor groups. D. ANDERSON, *supra* note 3, at 171.

advocate and her client will have little effect except to see their names on multiple service lists.

Early in her representation, the advocate and her client should research and identify particular issues about which they are concerned and select the utility or utilities upon which they are going to focus. Taking into account the client's limited resources, they should develop a long-term strategy (for three or four years), with specific goals throughout that period.¹⁹⁵ Most intervenors are too reactive in the commission process; they involve themselves in commission cases in response to rate and other utility filings or commission-initiated rule-makings or generic proceedings.¹⁹⁶ In contrast, as part of a long-term plan, the advocate and client should consider affirmative actions that can be brought to address the issues identified by the client.

Although some flexibility is necessary, the advocate and client should participate in the commission process on only those issues that they have identified. The client's staff should become thoroughly acquainted with those issues, and the advocate and the client should not become diverted by the latest utility issues as identified by the media or by other consumer groups. The monitoring of commission work¹⁹⁷ thus should be limited to those issues that are part of the long-term strategy.

2. Ability To Provide Expert Intervention

Limitation of issues also assists advocates in enlisting expert intervention.¹⁹⁸ With restricted resources, most low-income consumer groups are unable to provide commissions with effective technical assistance.¹⁹⁹ With a limited agenda, however, groups can give some expert advice to commissions. On issues relevant to the low-income community—such as the effect of utility rates and credit and collection practices on the poor and on low-income housing and neighborhoods—staff organizers and community leaders can provide important firsthand infor-

195. Examples of long-term goals are the adoption of particular rate design methodologies, percentage of income payment plans for low-income customers (prohibiting utility disconnection if the customer pays a certain percentage of her income for her utility service), or opposition to special incentive rates for industrial customers.

196. See *infra* text accompanying note 334.

197. The advocate should get on the mailing list for commission releases, should regularly check the state administrative register for proposed administrative action by the commission, and should seek out friendly staff members who can keep her informed about important developments on key issues.

198. See *supra* text accompanying 185-87.

199. See *supra* note 183.

mation.²⁰⁰ Moreover, in developing the strategic plan, the advocate and client should identify resources in the community that might provide expert assistance, such as pro bono services of accountants, academics with access to university computer facilities, and professionals at social service agencies.²⁰¹ Although some of these individuals may not have the extensive credentials of the utility's experts, they provide friendly commissioners and staff with information that they can use to persuade their colleagues. More importantly, they enhance the credibility of the client. The organization is not just a bunch of protesters: It is a group willing to make a serious effort over a period of time to confront an issue.

3. Ability To Mobilize Political Pressure

The final factor for the effectiveness of interest groups is the ability to mobilize political pressure. An advocate without the backing of a political constituency will make little headway in significant commission proceedings. Individual clients are usually not going to be able to have the perseverance or the votes to exert the same kind of political influence as community groups.²⁰² Thus, the advocate should represent a group, not just individuals.

For much the same reasons, the advocate should be representing her client's *identifiable* interests in the commission proceeding. Commentators note the problems of legitimacy of representation in regulatory proceedings.²⁰³ Regulators are rightly skeptical of groups who appear to have no constituency or attorneys who represent faceless clients.²⁰⁴ Leaving aside the serious ethical issues of litigating a case without

200. Even in contested cases, such testimony is probably admissible as expert opinion in commission proceedings. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 10(1) (1961) ("In contested cases . . . [t]he rules of evidence as applied in civil cases shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under these rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.").

201. Many community-wide social service agencies, for example, employ policy analysts who study specific problems in the community (e.g., housing, neighborhood services, welfare benefits). These individuals can be helpful in examining the effects of energy policy on the poor.

202. Employees of Legal Services Corporation recipients, however, are limited in their representation of community groups in administrative proceedings. See *supra* note 54 and accompanying text.

203. Cupps, *Emerging Problems of Citizen Participation*, 37 PUB. ADMIN. REV. 478, 480-83 (1977); Stewart, *supra* note 21, at 1765-67; cf. J. BERRY, *supra* note 19, at 188, 194-95 (similar problem in the area of public interest legislative lobbying).

204. This problem can be avoided in part by assuring that members of the community organization—who are knowledgeable about the case—are present at all hearings and commission meetings on the case.

authority from the client,²⁰⁵ the political effectiveness of an attorney for an active and vocal group is much greater than that of an attorney for some phantom organization with an unknown membership. Regulators need to know that a public interest or legal services lawyer is not on some ideological crusade but represents concrete interests of a constituency.

Moreover, the political impact on the commission is going to be far greater if the issues addressed arise clearly from the individual interests of the group's membership. For example, in a rate case, a low-income group generally is more effective if it focuses on rate design issues rather than technical engineering and accounting revenue requirement issues. Although the commission knows that the group's members do not comprehend all the intricacies of pricing methodology, it is still possible for the commission to understand why an advocate is litigating a rate design issue for that client. Further, it is more likely that a client can devise a political strategy on that issue.

In the initial planning stages of a case, then, the advocate should work with the client to develop a legal-political strategy. Because effectiveness of a group is dependent in part on its ability to use political pressure, the attorney and client cannot merely decide which issues to pursue and leave it to the attorney to litigate the case. Depending on the abilities of the group, it should devise its own strategy: letter-writing, demonstrations, press conferences, coalition building, lobbying legislators. Ideally, these actions will complement the litigation process; for instance, at the time of the oral argument in the case, the group can hold a demonstration; when an expert witness is being presented, a press conference can be held. Most importantly, this political pressure must be continued throughout the case. While commissioners and their staffs are accustomed to demonstrations at the initial hearings, they are not accustomed to follow-through by intervenor groups.

C. Configuration of the Regulatory Environment

The third factor the advocate for low-income intervenors should consider in planning her case is the regulatory environment in that

205. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980) ("[T]he authority to make decisions is exclusively that of the client . . ."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) ("A lawyer shall abide by a client's decision concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.").

particular state at that time. A commission does not operate in a timeless vacuum. Policy analysis requires consideration of the temporal development of "policy subsystems"²⁰⁶ within governmental institutions, that is, actors from a variety of public and private organizations who are actively concerned with a policy issue.²⁰⁷ Accordingly, a public utility advocate should consider not only her audience and the abilities and limitations of her client but also the regulatory environment in which the commission and her client operate.

A number of environmental factors affect the regulatory process in commissions.²⁰⁸ These factors include regulatory history and political culture, technological and economic context, and the other private and governmental actors in the environment.

1. Regulatory History and Political Culture

Historical context and political culture are often crucial in commission decision-making. The passage of lifeline rates in California and the failure of lifeline in New York are good examples of the importance of historical context. In California, in reaction to the "energy crisis" of the early 1970s, Governor Reagan's Public Utilities Commission fought to protect utilities from regulatory lag. In the process, it alienated both its own staff and the public. By the time Governor Brown was elected, the situation was ripe for "conflict maximization."²⁰⁹ Because of the public uproar, the regulators were freed from bureaucratic restraints, and the battle became one between the interest groups and the utilities. Leonard Ross, a political entrepreneur appointed by Brown, was very successful in such an environment.²¹⁰

In New York on the other hand, after rate increases in the late 1960s, Governor Rockefeller attempted to make the commission more professional. He took steps to strengthen the position of the commission chairperson by naming Charles Swidler, former Chairman of the Federal

206. Sabatier, *supra* note 86, at 651-52. Sabatier asserts that "understanding the role of policy analysis in public policymaking requires a time perspective of a decade or more." *Id.* at 651. The history of the last two decades in public utility regulation bears out this assertion. See *supra* notes 1-20 and accompanying text.

207. Sabatier, *supra* note 86, at 651-52. Sabatier states that he wants to get away from examining only the "iron triangles" of administrative agencies, legislative committees, and interest groups at a single level of government and wants to survey actors participating in the policy formulation process at various levels of government—for example, journalists and researchers. *Id.*

208. See Wilson, *supra* note 68, at 383-84.

209. D. ANDERSON, *supra* note 3, at 137-45. For a description of the conflict maximization mode (entrepreneurial mode) of regulation, see *id.* at 23-25.

210. See *supra* text accompanying notes 125-29.

Power Commission, to fill the office.²¹¹ Swidler made a number of changes at the New York commission, including the introduction of systems planning and the initiation of a fully-allocated cost study to be used for setting utility rate designs.²¹² When Swidler left the commission in 1974, he had developed a professional staff.²¹³ At that point, Alfred Kahn became chairman and continued Swidler's efforts, eventually persuading the staff and the commission to adopt marginal-cost based pricing.²¹⁴ In this context, efforts for lifeline rates failed.²¹⁵

These opposite results may have been due in part to the different historical context in New York and California. Although the New York Commission before Kahn's appointment had public relations problems, it did not appear to be as pro-business as the Reagan Public Utilities Commission in California. For this reason, grassroots organizing was more difficult in New York than in California, where the commission became a "lightning rod for opposition from left liberal political entrepreneurs" in the gubernatorial campaign.²¹⁶

"Political culture" also may be crucial in commission decision-making. At least one study shows that lifeline rates and bans on late payment penalties are less likely to be adopted in states where political elites tend to make decisions and more likely to be passed in states with strong citizen participation.²¹⁷ On more complex issues, however,

211. D. ANDERSON, *supra* note 3, at 93.

212. *Id.*

213. *Id.* at 96.

214. See *supra* text accompanying notes 103-11.

215. D. ANDERSON, *supra* note 3, at 170. In 1978, the New York commission entered an order rejecting most proposals for lifeline, but approved an experimental program to study the efficacy of a proposal to rebate to low-income customers excess utility revenue. *In re Rate Design for Elec. Corps.*, 26 Pub. Util. Rep. 4th (PUR) 280, 297-98 (N.Y. Pub. Serv. Comm'n 1978).

216. D. ANDERSON, *supra* note 3, at 170-71.

217. Gormley, *Policy and Politics*, *supra* note 86, at 96-99. Gormley concludes:

[T]he effects of political culture are greater when technical complexity is low. As the need for expertise diminishes, the search for correct solutions recedes, the quest for political acceptability proceeds, and underlying belief systems become more important. Under these conditions, a 'moralistic' political culture encourages both innovation and responsiveness.

Id. at 103.

In his study, Gormley uses Elazar's classification of states as moralistic (citizen participation is considered a duty) or traditionalistic (political elites make decisions) to compare policy decisions in different states. See D. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 114-22 (3d ed. 1984). Besides the traditionalist and moralistic categories, Elazar has a third category: individualistic political culture in which the democratic order is conceived as a marketplace and the central focus is private concerns. *Id.* at 115-17.

Some examples of Elazar's categorization of states include: 1) traditionalistic: Arkansas, Louisiana, Mississippi, Alabama, Georgia; 2) moralistic: Minnesota, Wisconsin, Michigan, Colorado; 3) individualistic: Pennsylvania, New Jersey, Indiana, and Nevada. *Id.* at 135-36 (fig. 5.4).

such as rate differentials between residential and industrial customers, the study found less difference between the two kinds of states.²¹⁸

2. Economic and Technological Environment

The economic and technological environment also has a direct impact on the regulatory process in public utility commissions.²¹⁹ For instance, under the economic and technological environment in the 1960s and early 1970s, utilities did not seek rate of return review, and regulatory commissions sat by passively. From 1961 to 1968, there was almost no regulatory activity nationally, and from 1958 to 1972, companies had rather limited contacts with the formal regulatory process.²²⁰ During that period, electric companies experienced substantial scale economies and technological improvements, and they were able to maintain or reduce nominal average production costs.²²¹ Gas company cost increases were taken care of through purchased gas adjustment clauses.²²²

But events of the late 1960s and 1970s abruptly ended this tranquility. In that period, inflation began to rise rapidly, energy shortages occurred, and environmentalists became more vocal. In response to these events, formal regulatory proceedings became more frequent. Rate of return reviews became an almost continual occurrence, and, to deal with the situation, commissions developed new techniques or refined old ones: temporary rate increases, automatic fuel adjustment mechanisms, and the use of the future test year in rate cases.²²³ Moreover, while previously commissions usually had not focused on rate structure questions, leaving this task to the utilities themselves, commissions now began to address these issues.²²⁴

Examining these events, commentators have concluded that regulators react to the economic and technological changes around them.²²⁵ Utilities

218. Gormley, *Policy and Politics*, *supra* note 86, at 100-02.

219. See generally Joskow, *supra* note 2.

220. *Id.* at 307.

221. *Id.* at 312.

222. *Id.*; see *supra* note 8.

223. Joskow, *supra* note 2, at 314-16; see *supra* note 8.

224. Joskow, *supra* note 2, at 317.

225. *Id.* at 298. Joskow states:

Contrary to the popular view, it *does not* appear that regulatory agencies have been concerned with regulating rates of return per se. The primary concern of regulatory commissions has been to keep *nominal prices from increasing*. . . . *Formal regulatory action in the form of rate of return review is primarily triggered by firms attempting to raise the level of their rates or to make major changes in the structure of their rates.*

This regulatory process is . . . extremely passive. . . . [I]t is the firms themselves which trigger a regulatory rate of return review.

Id.

will not seek affirmative relief in the formal regulatory process unless economic or technological change forces such action.

3. Regulatory Community

The regulatory community—composed of other players, both private and governmental—also has an impact on commission decision-making.²²⁶ This community includes the utilities themselves, intervenor groups, the media, and a whole array of governmental participants: other state agencies, the governor, the attorney general, the legislature, the judiciary, and, at times, federal agencies. Despite this diversity, the community is a small group of parties focused on discrete sets of issues in which their memberships are interested.²²⁷ There are at least three reasons for this phenomenon: the continuity of the individual actors in the regulatory process, the ability of staff to become familiar with representatives of the utilities, and the small number and high visibility of the principal actors in the process.²²⁸

a. Utilities

In terms of particular members of the community, one of the principal participants, of course, is the utility. Studies show, however, that it is impossible to generalize about the role of “the utilities” in the regulatory process.²²⁹ Rather, the influence of utilities differs from regulatory sector to regulatory sector²³⁰ and, within each sector, from utility to utility.²³¹ Nevertheless, on the whole, players in the process perceive utilities as having more power than any other outside participant.²³²

226. D. WELBORN & A. BROWN, *supra* note 6, at 54-61.

227. *Id.* at 61.

228. *Id.*

229. *See id.* at 69 (comparing the cooperative relationship between motor carriers and the commissions studied with the more adversarial relationship between the commissions and gas, electric, and communications utilities).

230. *Id.*

231. *Id.* at 69-70. Welborn and Brown found that smaller utilities had a more adversarial relationship with the commissions studied than large utilities. This phenomenon may be the result of the fact that larger utilities usually have more political muscle than smaller utilities. Also, larger utilities usually can call upon more technical expertise in dealing with commissions than can smaller companies. *See* Hagerman & Ratchford, *supra* note 86, at 53-54.

232. W. GORMLEY, *supra* note 3, at 132-51. In Gormley's study of commissions in 12 states, when asked to assess the influence of each type of participant, commissioners, staff members, grassroots advocates, proxy advocates, and utility executives in nine out of the twelve states perceived that utility companies were the most influential outside participants in commission proceedings. *Id.* at 139 (Table 23).

As Gormley acknowledges, there are weaknesses in his methodology of relying on perceived

This perceived influence may be attributed to a number of factors. First, utilities control the timing of rate increases and thus determine the "tempo of regulatory proceedings."²³³ Second, utilities control the flow of information to commissions. They are the participants that are most intimately familiar with their operations.²³⁴ Moreover, because of the routine supervision of utility operations by commission staff, close and informal ties develop between the utilities and staff.²³⁵ Third, as monopolies, utilities are difficult to evaluate on the basis of acceptable performance standards, and a presumption of managerial efficiency often exists.²³⁶ Finally, most utilities have abundant money and personnel to devote to regulatory proceedings.²³⁷

Research also shows, however, that even with this perceived power (or perhaps more precisely, in order to maintain this power), utilities seek conflict minimization.²³⁸ Utilities generally attempt to reach mutually satisfactory accommodations with their commissions.²³⁹

b. Other Intervenors

Other intervenors in the regulatory process form a second set of participants in the community. This group includes labor and environmental groups, sometimes stockholder groups, and, most significantly, commercial intervenors, industrial intervenors, and proxy advocates.

levels of influence. *See supra* note 184. Gormley's concurrence study, however, supports his findings of substantial utility influence in the regulatory process. In that study, Gormley examined the concurrence between commissioners and other participants in the regulatory process on priorities of regulatory issues and policy preferences. He found that in terms of issue priorities, commissioners agree with grassroots advocates more than utility executives, but in regard to policy preferences they agree more with utility executives. W. GORMLEY, *supra* note 3, at 129. In other words, commissioners are likely to concur with grassroots advocates on the ranking of importance of particular issues (e.g., sufficient energy supply, energy conservation), but are more likely to agree with utility executives as to positions on those issues.

233. W. GORMLEY, *supra* note 3, at 140.

234. D. ANDERSON, *supra* note 3, at 12; W. GORMLEY, *supra* note 3, at 140-41.

235. D. WELBORN & A. BROWN, *supra* note 6, at 66.

236. W. GORMLEY, *supra* note 3, at 141. In fact, this presumption has been formalized in some jurisdictions into legal doctrine. *See, e.g., City of Chicago v. Illinois Commerce Comm'n*, 133 Ill. App. 3d 435, 442, 478 N.E.2d 1369, 1375 (1985) ("Once a utility makes a showing of the costs necessary to provide service under its proposed rates, it has established a *prima facie* case, and the burden then shifts to others to show that the costs incurred by the utility are unreasonable because of inefficiency or bad faith.").

237. W. GORMLEY, *supra* note 3, at 141.

238. Welborn and Brown conclude in their study of three commissions, "[i]f a general characterization may be applied to the quality of relationships between the commissions and the regulated in [these commissions], it is that they are on the whole cooperative." D. WELBORN & A. BROWN, *supra* note 6, at 68; *see also* Joskow, *supra* note 2, at 296-97.

239. D. WELBORN & A. BROWN, *supra* note 6, at 68.

Although very little research has been conducted in regard to the role of commercial and industrial intervenors,²⁴⁰ the role of proxy advocates has been examined.

Proxy advocates are governmental organizations that are empowered to represent the interests of all consumers or a segment of the consumer class in a particular jurisdiction.²⁴¹ These advocates are governmental employees who usually represent residential and small business interests from outside the regulatory agency.²⁴² They influence commission proceedings, albeit on a narrow range of issues.²⁴³ Not only are proxy advocates perceived as powerful by other players, but states with such advocates grant utilities smaller percentages of requested rate increases than those without such advocates.²⁴⁴ At least one commentator attributes this influence to the availability of resources to proxy advocates²⁴⁵ for addressing highly complex regulatory issues.²⁴⁶

Proxy advocates' effectiveness is limited, however, to a narrow band of issues related to revenue requirements.²⁴⁷ This may be because proxy advocates are either required to represent²⁴⁸ or make the political choice to represent different classes of utility consumers, from low-income customers to small businesses. From a political perspective, proxy advocates shy away from challenges to business groups because these groups, and their chamber of commerce allies, often have influence with key legislators who control the agency's budget.²⁴⁹ Moreover, proxy advocates generally are less influential in states with more experienced commission staffs.²⁵⁰

240. But see D. ANDERSON, *supra* note 3, at 122-23 (describing industrial intervenors' challenge to marginal-cost pricing in New York commission).

241. See *supra* note 20.

242. W. GORMLEY, *supra* note 3, at 135.

243. In Gormley's study of perceptions of influence, he found that in all six states in which proxy advocates participated in commission proceedings, they were perceived as either moderately influential or very influential. *Id.* at 139 (Table 23), 143-44.

244. Gormley, *Policy and Politics*, *supra* note 86, at 94; see also Mayer, *supra* note 31, at 17 (effect of proxy advocates on telephone rate increases).

245. See *supra* notes 183-84 and accompanying text.

246. W. GORMLEY, *supra* note 3, at 163.

247. Gormley, *supra* note 33, at 459.

248. See, e.g., ILL. REV. STAT. ch. 111 2/3, para. 11-201 (1988) (Public Counsel is required to promote and protect all Illinois citizens and classes of utility customers and users); MD. ANN. CODE art. 78, § 15 (1988) (Office of People's Counsel represents residential and noncommercial customers); OR. REV. STAT. §§ 774.010(2), 774.180(1) (1987) (Citizens Utility Board represents rights of all natural persons over the age of 18).

249. Gormley, *Policy and Politics*, *supra* note 86, at 102.

250. Gormley, *supra* note 18, at 453.

c. Other Governmental Bodies

The third group of actors in the regulatory community are governmental bodies: the Governor, the legislature, the judiciary, and other state and federal agencies. Each of these bodies wields a varying degree of influence in the public utility regulatory process.

In states with appointed commissions, the governor's primary power is in the choice of commissioners. Because most state commissioners have staggered terms, however, this power is limited; a governor can "stack" a commission only over a period of time.²⁵¹ The studies also show, moreover, that governors do not have much political incentive to become involved in the regulatory process.²⁵² The political consequences of alienating an important constituency—whether the utilities, industrial customers, or residential consumers—can be avoided by saying, "[i]t's in the hands of the independent commissioners."²⁵³

This is not to say, however, that governors never become participants in the public utility regulatory process, especially if the political stakes (or benefits) are high enough. Both Governors Reagan and Brown, for instance, used the appointment process in California to respond to pressure from their political constituencies,²⁵⁴ and in Kentucky, rising public and legislative concern over higher utility rates prompted gubernatorial initiatives for reform.²⁵⁵

A good recent example of gubernatorial intervention for high political stakes is Governor Cuomo's intervention in the Shoreham nuclear plant controversy. When he first ran for Governor in 1982, Mario Cuomo took a classical gubernatorial position, refusing to take a stand on Shoreham, saying that a safety study should first be made.²⁵⁶ But after he took office, anti-Shoreham sentiment on Long Island began to soar. In response, Governor Cuomo recognized the political stakes involved, changed his position, and publicly opposed the plant.²⁵⁷ His aides challenged the licensing of Shoreham in court; the new members he

251. W. GORMLEY, *supra* note 3, at 83.

252. *Id.* at 84.

253. *Id.* at 88 ("Public utility commissioners remain independent not because politicians respect their integrity but because they recognize a political liability when they see one.").

254. D. ANDERSON, *supra* note 3, at 138, 158.

255. D. WELBORN & A. BROWN, *supra* note 6, at 73-74. This is similar to the situation in the federal system; the president becomes involved only when there has been a scandal or widespread negative publicity. J. CHUBB, *supra* note 34, at 52; *see also* Miller, *supra* note 187, at 242 (study found that state agency heads wanted more gubernatorial influence in major policy decisions).

256. Schmalz, *Plant Closing: A Key Cuomo Victory*, N.Y. Times, May 27, 1988, at B3, col. 1 (city ed.).

257. *Id.*

named to the Public Service Commission rejected rate increases for Long Island Lighting Company ("LILCO"), and he pushed a bill through the legislature, creating a public authority to take over the public utility.²⁵⁸ Continually putting public relations pressure on LILCO, he forced LILCO into a negotiated settlement.²⁵⁹

Like governors, legislators usually attempt to avoid the political liabilities of interference in the regulatory process. Theoretically, legislatures have a number of powers over commissions: budgetary review, statutory change, and committee review. Studies, however, show very little exercise of that power. Most commissions are funded by special fees or charges on utilities and consequently are more independent of the legislature than other agencies supported by general revenue funds.²⁶⁰

Legislators also are "more talk than action" when it comes to statutory change and committee review. As one commentator observes, "[p]oliticians are attracted by salience; repelled by complexity."²⁶¹ They want to address issues that affect a large number of people in a significant way and issues that raise factual questions not easily answered by lay persons.²⁶² Thus, when faced with a public utility issue that is both highly complex and salient, legislators respond in two ways. First, they introduce numerous bills to address the problem, which they then allow to die.²⁶³ This allows legislators publicly to act as if they are addressing issues of concern but does not require them to tackle seriously the highly complex issues involved. Second, they approve bills providing for procedural changes in commission proceedings.²⁶⁴ They thus can appear to address the problem in a way that is understandable to the public, but they do not have to confront the actual substantive problem.²⁶⁵

258. *Id.* ("Mr. Cuomo's position on a Shoreham agreement shifted over the last year—'a dramatic change' in the words of Paul L. Gioia, whom Mr. Cuomo removed as head of the Public Service Commission two years ago, in part because he believed Mr. Gioia was being too favorable to utilities.").

259. *Id.*

260. W. GORMLEY, *supra* note 3, at 87; *see supra* note 143. Indeed, if consumer advocates wanted to encourage more aggressive regulation, the best tactic would be to support an increase in an agency's budget. *See* P. QUIRK, *supra* note 65, at 124 (FDA commissioner joked that if agency needed a budget increase, all they needed to do was "screw something up").

261. Gormley, *supra* note 84, at 603. For a full description of the concepts of salience and complexity, *see infra* notes 289-92 and accompanying text.

262. Gormley, *supra* note 84, at 598.

263. W. GORMLEY, *supra* note 3, at 24, 86; Gormley, *supra* note 84, at 603.

264. Gormley, *supra* note 84, at 603, 613.

265. *See* Miller, *supra* note 187, at 242 (study shows regulators view legislators as having too much influence on the regulatory process).

Like governors, however, legislatures may be compelled to tackle highly salient, complex issues when the political liability for ignoring an issue is very high. Recently, for example, under pressure from anti-nuclear and consumer groups, legislatures have addressed the issue of the application of the "used and useful" standard²⁶⁶ for inclusion of construction costs, especially nuclear plant costs, in a utility's rate base.²⁶⁷ This legislative activity, however, usually has occurred only after years of high rate increases, failed attempts by commissions to address the problem, and intense lobbying by consumer groups.²⁶⁸

Because of the incentives for the political branches of government generally to refrain from interference in the regulatory process, the judicial branch recently has become a more active participant in the regulatory community.²⁶⁹ Appeals of major utility rate cases increased substantially from 1974 to 1979: from 28.6% of the decisions in 1974, to 46.4% of the decisions in 1979.²⁷⁰ Although no clear trend has appeared in the reversal rate, commissions are more likely to be affirmed than reversed,²⁷¹ perhaps because reversal is more likely in highly complex, rather than highly salient, cases.²⁷² In a highly salient case, there is usually more connection between legislative and administrative substantive policy. On the other hand, as the legislature responds to highly complex issues by imposing procedural constraints on the commission, the judiciary sees its role as enforcing those restrictions.²⁷³

266. Under the "used and useful" standard, a utility cannot include an asset in its rate base for ratemaking purposes until it is actually in use and contributes to the process of making utility service available. E. GELLHORN & R. PIERCE, *supra* note 10, at 112. With the lengthy time span for construction of nuclear plants and with problems of cost overruns and plant cancellations, issues have arisen in a number of states concerning the inclusion of all or part of construction costs for these plants in rate base. See *id.* at 112-25.

267. See, e.g., CONN. GEN. STAT. § 16-19s (1988); IDAHO CODE § 61-502A (Supp. 1990); ILL. ANN. STAT. ch. 111 2/3, para. 9-212 (Smith-Hurd 1988); KAN. STAT. ANN. § 66-128 (1985); N.H. REV. STAT. ANN. § 378:30a (1984); N.Y. PUB. SERV. LAW § 66(24) (McKinney 1989); OHIO REV. CODE ANN. § 4909.15(A)(1) (Anderson Supp. 1989); 66 PA. CONS. STAT. ANN. § 1315 (Purdon Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 1446c, § 41(a) (Vernon Supp. 1990).

268. See, e.g., New York Used and Useful Act of 1986, ch. 518, 1986 N.Y. Laws 1170 (codified at N.Y. PUB. SERV. LAW § 66(24) (McKinney 1989)). This Act was specifically aimed at foreclosing the inclusion of the Shoreham nuclear plant in Long Island Lighting Co.'s rate base. See Note, *Lights Out for LILCO: A Look at New York's Takeover Plan*, 53 BROOKLYN L. REV. 723, 735 (1987). A federal district court has found that the Act violates the equal protection rights of the utility. *Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 425 (N.D.N.Y. 1987).

269. Wilson, *supra* note 68, at 390.

270. W. GORMLEY, *supra* note 3, at 94 (Table 15).

271. *Id.* at 95-96. Gormley also found that it was more likely that public utilities, rather than consumer groups, will win. *Id.* at 96.

272. Gormley, *supra* note 84, at 604.

273. *Id.*

The final governmental participants in the regulatory process are other state and federal agencies. These agencies may include state energy offices,²⁷⁴ attorneys general, energy assistance administrators,²⁷⁵ and the Federal Energy Regulatory Commission.²⁷⁶ Very little research has been conducted in regard to public utility commission relationships with these other agencies. The one study that considered this issue concluded that inter-agency relationships tend to be marked by "cautious cooperation" and that in recent years agencies have moved toward increasing inter-dependence.²⁷⁷

4. Implications of the Regulatory Environment

The regulatory environment is significant in several ways to the advocate in public utility commission proceedings. First, the advocate needs to understand that certain aspects of this environment cannot be changed. The commission history in dealing with certain kinds of issues, the political culture of the state, and the technological and economic environment are givens. All things being equal, the advocate for a low-income payment program, for example, will have a more difficult time in a state where a power elite traditionally makes regulatory decisions. This does not mean that the advocate in such a state should advise her client that all efforts to obtain such a program are futile; but she and her client should understand the obstacles they will face.

The advocate therefore should thoroughly research the regulatory environment in which she is operating. She should know the financial condition of utilities in the commission's jurisdiction and any concerns that the agency has recently expressed in that regard.²⁷⁸ She also should

274. See NARUC REPORT, *supra* note 2, at 849-51 (Table 194).

275. Under the Low-Income Home Energy Assistance Program, for example, the federal government allots funds to the states for energy needs of the poor. 42 U.S.C. §§ 8621-8629 (1988). This program is administered by a designated state agency and local administrative agencies. *Id.* § 8624(b)(6).

276. See Kretschmer & Ballonoff, *State Intervention at the FERC: Is it Worth the Cost, Risk and Effort?*, PUB. UTIL. FORT., Oct. 27, 1988, at 17.

277. D. WELBORN & A. BROWN, *supra* note 6, at 71, 136. These researchers concluded:

The character of interaction in state program context is mixed. There are elements of formalism, but more pronounced is informality and communication within a framework of established personal familiarity and relationships. The quality of interaction probably can be described best as marked by cautious cooperation. . . . [B]itter ongoing rivalries . . . do not seem to be present.

Id. at 71.

278. The advocate should acquire the commission's meeting agenda and obtain copies of orders that appear to be relevant to the issues on which she is working. She should also frequently attend commission meetings to discover the general attitude of commissioners and senior staff members in regard to particular utilities. Finally, the advocate should regularly read the business section of local newspapers or local business magazines to learn what the utility public relations people are saying to the media about the company.

keep abreast of technological breakthroughs.²⁷⁹ Further, she should obtain copies of all recent commission decisions concerning a particular utility and issue.²⁸⁰ Moreover, she should familiarize herself with any legislative or executive efforts in the area and with the other state and federal agencies that may be considering that issue. Finally, she should research the extent of judicial deference to the commission in the jurisdiction to determine the likelihood of judicial review as a remedy. With this information, the advocate should be able to gauge the limits of advocacy in that particular commission on the specific issue of interest to the client.

Beyond these efforts, however, there are methods for changing the regulatory environment. The substantial influence of utilities in commission proceedings may be offset in several ways. One tactic is to attempt to take the power of timing away from utilities. The advocate should consider methods for seeking formal commission action before a utility files for relief and for anticipating a utility's filing so she can begin preparation of the case months in advance.²⁸¹ A second method is to counter vigorously the utility influence on staff. By focusing on particular, narrow issues, an advocate and her client may be able to counterbalance the company's sway on those issues.²⁸² A third method is to address the utility's interest in conflict minimization to reach a negotiated resolution of a case. At times, a utility may consider agreeing to a compromise on a particular low-income issue if it will get community groups "off its back."

Still another method for changing the environment is the building of coalitions. Research shows proxy advocates can significantly influence commission decision-making. Although such advocates usually address very narrow issues that affect all ratepayers or all residential consumers, if the lawyer and her client can persuade these advocates of the benefits of a given proposal to all classes of customers, she can use their expert resources in developing her own case. Some of the most significant accomplishments in the area of low-income utility protections have

279. A good source for this information is the periodical, *PUBLIC UTILITIES FORTNIGHTLY*.

280. If the commission has its own official reporter, the advocate should, of course, keep abreast of its recent decisions. If opinions are not published, the advocate should seek to have a friendly staff member or proxy advocate provide her with opinions regarding utilities in her client's jurisdiction.

281. In regard to rate structure issues, for example, the advocate should consider filing a complaint case against the utility alleging that certain aspects of a utility's rate design violate statutory requirements. In this way, an advocate may be able to maintain more control over the case than in a full-blown rate case brought by the utility. The "downside" of such an approach, however, is that a complainant assumes the burden of proof in a case.

282. See *supra* text accompanying notes 195-96.

come from joint efforts of low-income and proxy advocate groups.²⁸³

The final implication of research on regulatory environment is the limitation of using other branches of government to influence the commission. Unless the issue is in the public eye—or the client can politicize the issue²⁸⁴—and a strong political coalition can be developed, the legislature and executive branches probably will do nothing more than propose legislation that will go nowhere; the governor or the bill's sponsor will have a press conference, but the bill will die in committee. Studies indicate that the most profitable use of legislative pressure is to develop legislative reform in the areas of procedural fairness. If the commission does not abide by these procedural requirements, the advocate has a basis for judicial review in an area in which the courts are likely to intervene.²⁸⁵ The advocate can at least temporarily delay a negative commission ruling, whether or not she substantially affects the ultimate decision.

D. The Issues

Up to this point, I have focused on the effect of various types of political factors—the composition of the commission and its staff, the identity of the client, and the regulatory environment—on commission decision-making in regard to particular issues. Issues themselves, however, can determine politics.²⁸⁶ In other words, commission decision-making—and the concomitant political process—may vary depending upon the type of issue before the commission.²⁸⁷ Accordingly, in developing a theory of the case, the advocate should consider the effect of the particular issues involved on her ability to persuade the commission.

1. Salience and Complexity of Issues²⁸⁸

Different issue patterns faced by regulatory bodies set different political mechanisms into gear depending on an issue's salience and

283. The Illinois Energy Assistance Act, ILL. ANN. STAT. ch. 111 2/3, para. 1301-08 (Smith-Hurd 1988 & Supp. 1990), was passed after extensive advocacy efforts of a coalition composed of grassroots advocates, proxy advocates, and social service organizations. See Record in South Austin Coalition Community Council, Petition for Rulemaking No. 84-0262 (Ill. Commerce Comm'n).

284. See *infra* text accompanying notes 286-322.

285. See, e.g., *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 117 Ill. 2d 120, 136-41 510 N.E.2d 865, 872-74 (1987) (reversing a rate order based on the misinterpretation of a statute adopted at the behest of consumer groups and modifying the burden of proof requirement for inclusion of new electric utility generating plant in rate base).

286. W. GORMLEY, *supra* note 3, at 152.

287. *Id.* at 152-53; see D. ANDERSON, *supra* note 3, at 19-20 (regulatory politics depends on the task that the commission is facing).

288. I have based this description of the type of regulatory issues on William Gormley's model

complexity. A highly salient issue is one that significantly affects a large number of people. As a result, the scope of conflict over a salient issue is broad, and the intensity of the conflict is great.²⁸⁹ Regulation may be salient, for example, when a necessity is imperiled, when there is a threat to the American dream, when the issue concerns working conditions and terms of employment, and when there is a challenge to community values.²⁹⁰

Highly complex issues, on the other hand, are those that raise factual questions that cannot be answered by a generalist or a lay person.²⁹¹ Regulatory issues generally are more technically complex when they concern regulation of a monopoly rather than competitive firms, larger rather than smaller firms, emerging technology rather than an established one, and the regulation of products rather than people.²⁹²

Both within and outside the agency, the players and their tactics change—and consequently the brand of politics changes—depending on the salience and complexity of the issue being considered.²⁹³ Different

for describing different issue patterns faced by regulatory bodies and the kind of politics associated with each pattern. See generally Gormley, *supra* note 84. For the research on public utility commissions underlying this study, see W. GORMLEY, *supra* note 3, at 152-77.

289. Gormley, *supra* note 84, at 598.

290. *Id.* at 600-01. Gormley asserts that energy, environment, employment, health, safety, and quality of life issues are salient, while transportation, commerce, finance, and communication issues have low salience. *Id.* Of course, salience of a particular issue will change over a period of time. For example, energy only became a salient issue in the late 1960s and early 1970s. See *supra* notes 1-8 and accompanying text.

291. Gormley, *supra* note 84, at 598.

An economic regulatory issue may be highly salient to a given regulated industry but not to the general public. If so, it is low in public salience. An intergovernmental regulatory issue may be complex from an administrative standpoint but not from a technical perspective. If so, it is low in technical complexity.

Id. at 598-99.

292. *Id.* at 601-02. Gormley contends that environmental, energy, transportation, and finance issues tend to be high in complexity while employment, consumer protection, commerce, and housing issues tend to be low in complexity. "Health and communications issues vary." *Id.* at 602.

293. *Id.* at 603.

In regulatory politics, as in baseball, there are "regular" and "irregular" participants. Visit a ballpark and you will see all of the regulars, barring injuries, of course. But you will see the irregulars—those in the bullpen and those on the bench—only on special occasions (close games, important games, extra-inning games, etc.). Visit a regulatory proceeding and you can count on seeing bureaucrats and regulated industry officials. These are the regulars. The irregulars—politicians, citizens, journalists, judges, professionals—participate only under certain circumstances. In regulatory politics, as in baseball, the participants vary from game to game. The big difference between regulatory politics and baseball is that, in regulatory politics, the irregulars are usually more interesting to watch.

Id. at 602-03.

combinations of salience and complexity can result in at least four different arenas of regulatory politics: hearing room, board room, street-level, and operating room.²⁹⁴

These four categories are quite helpful in examining the impact of the issue on public utility commission decision-making. "Hearing room" politics are most likely when the issues are highly salient but not very complex.²⁹⁵ These issues have broad public significance but are not perceived to be highly technical. As a result, citizens have the incentive to mobilize and participate in the decision-making process,²⁹⁶ journalists are attracted to the controversy,²⁹⁷ and politicians may want to get into the fray.²⁹⁸ On the other hand, because the public perceives the issue as significant and relatively simple, the regulated companies, business groups, and staff bureaucrats may not wield much influence in hearing room politics.²⁹⁹

In the public utilities area, grassroots advocates can very effectively influence hearing room politics.³⁰⁰ In the California lifeline battle, for example, the supporters of lifeline framed their campaign to make the issue highly salient.³⁰¹ To build popular support, the lifeline coalition chose to fight for a universal lifeline plan that would apply to all residential consumers rather than to the special needs of the poor.³⁰² To deflect the argument that lifeline was an income redistribution measure, pro-lifeline commissioners defined the issue as protection of "a basic human right."³⁰³ To make the issue more salient, the coalition demonstrated at the commission and utility headquarters to gain wide

294. *Id.* at 606-15.

295. *Id.* at 608.

296. *Id.*

297. *Id.* at 604.

298. *Id.* at 603. Politicians, however, usually make news with introduction of bills, not with on-going scrutiny of the regulatory process. See *supra* text accompanying notes 251-68. Gormley contends that the pathology of hearing room politics is that the hearing room becomes ripe for demagoguery "with an amazing amount of mudslinging, vilification and hyperbole." Gormley, *supra* note 84, at 617.

299. Gormley, *supra* note 84, at 604-05.

300. In addition to Anderson's study of lifeline in California, see also W. GORMLEY, *supra* note 3, at 165 (Table 28) (more grassroots activity, more chance of adoption of lifeline rates); Berry, *supra* note 49, at 275 (the greater the salience of regulatory policy to the "have-not" consumer, the less the degree of commission capture by the industry).

301. D. ANDERSON, *supra* note 3, at 171. Anderson notes that both the California commission and PG&E had their headquarters in San Francisco, the media center of northern California and the home of many of the poor and elderly who composed the lifeline coalition. This made it very easy to develop lifeline into a salient issue. In New York, on the other hand, the commission was located in Albany, which probably insulated it from intense consumer activity.

302. *Id.* at 151.

303. Anderson, *supra* note 1, at 30.

media attention and called upon the legislature for support of the program.³⁰⁴ Consistent with the approach that the issue was a simple one of basic human rights, the major participants in the coalition also rejected the strategy of intervention in any technical rate hearings.³⁰⁵

Because the issue was framed as salient and noncomplex, the California commission was faced with intense public and legislative pressure and adopted lifeline rates. This was a "point decision"; as framed by its proponents, it was an unambiguous policy decision with significant public impact that only could be voted up or down.³⁰⁶ If, however, the issue had developed as a technical problem requiring detailed expert analysis, it is unclear whether lifeline would have passed.³⁰⁷ The issue could have been deferred to the staff, thereby leaving the realm of hearing room politics and entering the domain of board room politics.

"Board room" political issues are technically complex and not very salient.³⁰⁸ In these situations, policy-making is usually in the hands of high-level bureaucrats and professionals in the agency and the regulated companies.³⁰⁹ As a result, board room politics resemble the model of regulation described by the capture theorists.³¹⁰

The percentage of a utility company's rate hike request actually granted by the commission usually is decided in the context of board room politics.³¹¹ Although particular rate base or expense items occasionally will draw the public's attention in a rate case,³¹² usually specific accounting and finance issues concerning a utility's revenue requirement are left to utility representatives, commission staff, and the commissioners themselves.³¹³ While proxy advocates have influence on these kinds of issues, grassroots advocates, with limited resources to tackle the technical questions involved, are not very successful.³¹⁴

304. D. ANDERSON, *supra* note 3, at 154-56.

305. *Id.* at 154.

306. *See id.* at 169.

307. *Id.* at 169-70.

308. Gormley, *supra* note 84, at 606.

309. *Id.* at 606-08.

310. *Id.* at 616.

311. W. GORMLEY, *supra* note 3, at 162; *see* Gormley, *Policy and Politics*, *supra* note 86, at 94.

312. An example of such an issue is the inclusion of new nuclear plants in rate base.

313. W. GORMLEY, *supra* note 3, at 162.

314. *Id.* at 162-63 (Table 27). In fact, Gormley found a positive correlation between grassroots advocacy and rate hikes. *Id.* He conjectures that this could be the result of his inclusion of environmentalists in the category of grassroots advocates. *Id.* at 164. Environmentalists often will not fight rate hikes if increases will result in a halt in the excessive consumption of energy. *Id.*

The third type of politics, "street-level" politics, concerns issues that have both low salience and low complexity.³¹⁵ In this context, there is little pressure for either accountability or expertise.³¹⁶ Utility commission regulations concerning late payment charges on bills are a good example of policies decided by street-level politics.³¹⁷ Other illustrations are the day-to-day auditing and inspection of utility operations by commission staff, routine approvals of issuances of utility securities, and individual consumer complaint proceedings against utilities. In all of these proceedings, the decisions are generally made by low-level bureaucrats (staff members or hearing examiners), and the policy-making process is usually nothing more than a series of ad hoc decisions.³¹⁸

Finally, "operating room" politics occur when issues are both salient and complex.³¹⁹ In this situation, the agency is under pressure both to be accountable to the public and to render an expert decision that is technically and legally sound. These are the issues ultimately left to the upper-level bureaucrats and the commissioners themselves.³²⁰

Studies of public utility commissions indicate that grassroots advocates are not very successful in the operating room arena. Grassroots, as well as proxy advocates, for example, often have negligible impact on the allocation of costs between industrial and consumer customers in rate cases.³²¹ The large resources of other parties significantly inflate their influence. The adoption of marginal cost pricing in New York is a good illustration of how the chairman of a commission can take charge of a highly salient and complex case and win over his staff in almost complete disregard of powerful intervenor groups.³²²

2. Time Dimension of Regulatory Issues

Besides different types of issue areas, there is also a significant difference between regulatory issues and traditional trial advocacy issues. In a trial, the finder of fact usually examines issues of historic

315. Gormley, *supra* note 84, at 610.

316. *See id.* at 610, 617.

317. W. GORMLEY, *supra* note 3, at 166-67; Gormley, *Policy and Politics*, *supra* note 86, at 98 (grassroots advocates are successful in obtaining bans on late payment charges).

318. Gormley, *supra* note 84, at 610, 617.

319. *Id.* at 611.

320. *Id.* at 613-14.

321. W. GORMLEY, *supra* note 3, at 169. One commissioner told him, "[a]ll they know is the end result. They don't know how to get there." *Id.* Grassroots advocates with resources (e.g., the Environmental Defense Fund), however, have had some success with highly complex issues. *Id.* at 173.

322. *See supra* text accompanying notes 103-11.

fact to render a final decision that defines with some certainty the relative rights of the parties. Decisions in the regulatory context, however, are much more amorphous.³²³ Regulators are not as much concerned with historic fact and determinations of specific rights as they are with forecasts of the future.³²⁴ By their very nature, such predictions are uncertain.³²⁵ Regulation is an ongoing process, and regulators consider any decision to be subject to reexamination and further consideration.³²⁶ Thus, even winning and losing may be "ambiguous concepts in policy advocacy."³²⁷

3. Implications of Issue Context

The type of issue involved in public utility commission proceedings is highly significant for the advocate of low-income intervenors. First, the advocate should recognize the importance of issue type in developing her case. The particular kind of issue in question can affect the politics of the proceedings as much as the political environment can influence the policy determination on an issue. If an issue, for example, is perceived as highly complex with low salience, board room politics will probably prevail, and the advocate must decide whether or not she can become a serious participant in the discussions on the technical issues involved.

Second, and more importantly, the studies show the importance of *perception* of issue type on the politics of the proceeding. In other words, the salience and complexity of an issue area are not fixed in stone and can be changed, within limits, by the advocate.³²⁸ Also, the advocate and her client may be able to redefine a high complexity/low salience issue and mobilize the public to take the issue out of the board room and bring it into the hearing room. Lifeline rate decisions, for example, are not per se salient issues. The issue can be considered welfare legislation in disguise, merely addressing the interests of the poor. An advocate, however, following the tactics of the lifeline campaign in California, can frame the issue as significant for the whole consuming public (utility service as a "basic human right" for all consumers) rather than as a subsidy for the poor (regulation as income redistribution). The issue then may be perceived as salient.

323. DeLong, *supra* note 37, at 33-35.

324. *Id.* at 34.

325. *Id.*

326. *Id.*; see Sabatier, *supra* note 86, at 650.

327. DeLong, *supra* note 37, at 36.

328. W. GORMLEY, *supra* note 3, at 170; Gormley, *supra* note 84, at 599.

Although perception of the complexity of an issue is less malleable than its salience, it too can be changed.³²⁹ New technology, for example, can create new policy options;³³⁰ changes in competition can change the need for certain kinds of regulation.³³¹ Moreover, highly political issues are too often defined as technical so that regulators can avoid making difficult political choices.³³² Even if an advocate cannot point to changes in technology or competitive environment, she can attempt to demonstrate that the "emperor has no clothes"—that what is perceived as a highly complex issue is in fact nothing but a very ambiguous political choice. Rate of return methodology, for example, can either be considered a highly complex finance issue or a hocus pocus process.³³³ The advocate's goal then can be to demystify the technical complexity of a particular issue.

Third, highly salient/highly complex operating room politics present serious problems for grassroots advocates. In large rate cases, for example, the stakes both for the utility and large industrial customers are so high, and the principal issues may be so complex, that grassroots advocates are very likely to get lost. Even with moderate resources, their case may very well be overshadowed by the political power and expert resources of their opponents. In a case concerning the inclusion of a nuclear plant in a rate base, for example, the commissioners may consider rate design issues as insignificant and defer the decision on that part of the case to low-level bureaucrats. A low-income group focusing on rate design may become a forgotten party in the proceeding.

Accordingly, depending on the particular issue involved, an advocate for low-income clients might want to consider alternatives to intervention. She may want to contemplate the possibility of a complaint or investigation case against the utility in which to address a particular issue. Or, if an issue is applicable to a number of utilities, she may

329. Gormley, *supra* note 84, at 599.

330. *Id.* Changes in metering technology, for example, can greatly affect such issues as time-of-day rates or estimated billing. See Duda, *The Evolution of Automatic Meter Reading*, PUB. UTIL. FORT., June 23, 1988, at 20, 21.

331. Gormley, *supra* note 84, at 599. "Wheeling" of electricity, for example, can substantially affect electricity rates. See, e.g., Rosso, *Transmission Access—A Crucial Issue for an Industry*, PUB. UTIL. FORT., February 16, 1989, at 18.

332. Nelkin & Pollak, *supra* note 39, at 64 ("Recent disputes have taught us a lesson—that decisions about risk are not simply matters of sufficient technical evidence or adequate information. Substantive issues are at stake which embody highly controversial political and social values. Thus, the resolution of conflict is not always possible, and seeking consensus [on technical issues] . . . is hardly a feasible goal.").

333. See generally Joskow, *supra* note 2.

want to petition for a rulemaking.³³⁴ At least in those cases, the advocate can control the timing of the case, can attempt to control the issues that are considered, and can try to narrow the focus of the inquiry.

Finally, the research on issue type shows how the advocate may be able to use the uncertainty of the regulatory process to her benefit in litigating a case.³³⁵ Commissioners have broad discretion to reexamine or reopen issues,³³⁶ and often they will render a decision that leaves an issue open for consideration in the next rate case or other future proceeding.³³⁷ Although this option is often used for the benefit of utilities,³³⁸ it can also be applied for the benefit of low-income intervenors. The advocate for such groups can propose, for example, a sunset provision for a low-income payment plan or a pilot program for rate relief.³³⁹ By focusing on the experimental nature of such projects, the advocate can give the regulator an option that is both reasonable³⁴⁰ and consistent with the commissioners' view of the uncertain nature of regulation.

IV. CONCLUSION

The goal of any advocate is to persuade a decision-maker. While in the trial advocacy context, the lawyer's task is to maximize the credi-

334. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 6 (1961) ("Any interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule.").

335. Public utility regulation is an ongoing process. *See supra* text accompanying note 182.

336. *See, e.g.,* ILL. REV. STAT. ch. 111 2/3, para. 10-113 (1988); N.C. GEN. STAT. § 62-80 (1989).

337. *See, e.g.,* Commonwealth Edison Co., 71 Pub. Util. Rep. 4th (PUR) 81, 123 (Ill. Commerce Comm'n 1985) (deferring to next rate case issue of methodology for calculating marginal customer costs); Central Hudson Gas & Elec. Corp., 86 Pub. Util. Rep. 4th (PUR) 394, 435 (N.Y. Pub. Serv. Comm'n 1987) (directing staff and company to address in next rate case issue of proper allocation of utility's production plant between energy and demand costs); Brooklyn Union Gas, 39 Pub. Util. Rep. 4th (PUR) 388, 421-22 (N.Y. Pub. Serv. Comm'n 1980) (ordering utility to consider in its next rate case "seasonal rate differentials in light of the marginal cost of serving different customers at different times of the year"); Southwestern Bell Tel. Co., 34 Pub. Util. Rep. 4th (PUR) 224, 251 (Tex. Pub. Util. Comm'n 1979) (deferring to next rate case the issue whether or not directory assistance service should receive increases in rates); Wisconsin Elec. Power Co., 65 Pub. Util. Rep. 4th (PUR) 151, 159-60 (Wis. Pub. Serv. Comm'n 1985) (directing utility in its next rate case to revise its calculation of labor rates for extension of service and other customer requested work).

338. *See, e.g.,* Commonwealth Edison Co., 71 Pub. Util. Rep. 4th (PUR) at 121-23 (acknowledging validity of low-income intervenor's analysis of customer charge issue but deferring issue to next case).

339. *See, e.g.,* American Hoechst Corp. v. Department of Pub. Util., 379 Mass. 408, 399 N.E.2d 1, 4 (1980) (affirming commission order instituting experimental special rate for elderly poor).

340. Commentators note the importance of a positive, rather than negative, strategy. *See* D. ANDERSON, *supra* note 3, at 110-12 (decision of Environmental Defense Fund rejecting position of always intervening from a purely negative stance—just attacking the building of plants).

bility of her evidence,³⁴¹ the challenge to an advocate in a public utility commission proceeding is somewhat different. An attorney can present a highly credible expert and a sound technical theory of the case but still lose. As the political science studies show, regulatory decision-making is a highly political process. Far too often lawyers—especially representatives of consumer intervenors—believe that if they are able to retain an expert witness with a credible theory, the agency will automatically buy their case or at least seriously consider it. The research on commission decision-making demonstrates, however, that presentation of a sound technical case is only a small part of an advocate's job.

The overall goal of an advocate in a public utility commission proceeding should be to consider the relevant factors that affect commission decision-making—the nature of the audience, the particular client, the regulatory environment and issue context—and to develop a persuasive *political* story for the commission. After examining each of the four factors, the advocate should develop a strategy that addresses the various political interests involved in the case. “[P]olitical action is often dominantly about . . . the creation of communities, shared references, commonsensical stories that help shape and order an amorphous world.”³⁴² In addressing most commissions and their staffs, the task is not to win over a captured agency whose members decide issues solely based on their own self-interests, nor is the aim to present a technically perfect economic, finance, or legal theory. Rather, the goal should be the presentation of a story that, in the political context of a particular commission, helps the commission make sense of the “amorphous world” of public utility regulation.

341. P. BERGMAN, *supra* note 44, at 3.

342. Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 270 (1988).

