SURVEY ARTICLES

Administrative Law

by Karl M. Rice*

I. INTRODUCTION

In 1981, there were over one hundred opinions of the Fifth Circuit concerning some thirty-one administrative agencies.[1] This survey will focus on the cases in which questions of general administrative law were considered by the court and will not discuss holdings relevant only to a particular agency.

---

* Assistant Professor of Law, Mercer University School of Law. Cornell University (A.B., 1970); Syracuse University (J.D., 1976). Member of the State Bars of Georgia and New York.

1. Amtrak; Army Corps of Engineers; Bureau of Prisons; Consumer Product Safety Commission; Department of Argiculture; Department of Health, Education, and Welfare; Department of Housing and Urban Development; Department of Interior; Department of Labor; Environmental Protection Agency; Farmers Home Administration; Federal Aviation Administration; Federal Deposit Insurance Corporation; Federal Energy Regulatory Commission; Federal Home Loan Bank Board; Federal Housing Administration; Federal Reserve Board; Federal Trade Commission; Food and Drug Administration; Immigration and Naturalization Service; Internal Revenue Service; Interstate Commerce Commission; Law Enforcement Assistance Administration; Merit Systems Protection Board; National Telecommunications and Information Administration; Occupational Safety and Health Administration; Office of Workers' Compensation Programs; Securities and Exchange Commission; Social Security Administration; United States Parol Commission.

II. RULE MAKING

A. *What is a Rule?*

In *American Trucking Associations, Inc. v. ICC*,[2] the court considered whether a Restriction Removal Statement[3] issued by the Interstate Commerce Commission was merely a guideline stating commission policy, or whether it was a regulatory rule. The Administrative Procedure Act (APA) draws a distinction between the two by requiring agencies to follow specific procedures in adopting regulatory rules, but excepting "interpretative rules" and "general statements of policy" from these requirements.[4] Unfortunately, in drawing this distinction between guidelines and regulatory rules the APA did not describe the characteristics of each. Indeed, the distinction "is enshrouded in considerable smog."[5]

The Fifth Circuit followed the test enunciated by the District of Columbia Circuit in *American Bus Association v. United States*[6] to determine whether the Restriction Removal Statements were rules or policy statements. The test states that a so-called policy statement "is in reality a bending norm (a rule) unless 1) it acts only prospectively, and 2) it 'genuinely leaves the agency and its decision makers free to exercise discretion.' "[7] The Fifth Circuit decided that although the Restriction Removal Statements in question were denominated as policy statements by the ICC, they did not leave decision makers the necessary discretion. The court pointed out that although "decorated with words that appear to be carefully chosen to avert classification as rules,"[8] the guidelines were indeed normative rules and must be evaluated as such.[9]

In *Pennzoil Co. v. FERC* (*Pennzoil I*),[10] the court was careful to note that an agency generally has the discretion to choose the enforcement methods it believes to be the most appropriate—rule making, adjudica-

---

2. 659 F.2d 452 (5th Cir. 1981).

3. Restriction Removal Statements deal with the removal of operating restrictions concerning what commodities carriers may carry and the territory that a carrier may serve. They are governed by The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

4. 5 U.S.C. § 553(b)(3)(A) (1976).

5. Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975). Also, "[t]he problem is baffling. The statute is unclear, and its legislative history helps hardly at all." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:5 (2d ed. 1979).

6. 627 F.2d 525 (D.C. Cir. 1980).

7. 659 F.2d at 463 (quoting American Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980)).

8. 659 F.2d at 463 (footnotes omitted).

9. *Id.* at 464.

10. 645 F.2d 360 (5th Cir. 1981)[hereinafter referred to as *Pennzoil I*](appeal pending).

tion, or compensation.[11] The court's decision in *American Trucking*, however, serves to demonstrate that when rule making is chosen, regardless of what the rule is called, the agency must follow procedures of inquiry before the rule is promulgated.[12] In *American Trucking*, the court did stress that agencies will be afforded wide latitude in choosing procedures of inquiry, absent constitutional constraints or extremely compelling circumstances. Upon examining the ICC procedures in question, the court held that they were acceptable, although some of the regulations promulgated exceeded statutory bounds.[13]

B. Notice and Comment

The Fifth Circuit also had an opportunity to consider when the notice and comment procedures required by the APA[14] were triggered. In *Pennzoil I*,[15] the Federal Energy Regulatory Commission (FERC) had issued a Notice of Proposed Rulemaking concerning a proposed rule that stated area rate clauses[16] in existing interstate gas purchase contracts would not serve to escalate the control price to the maximum lawful price set by the Natural Gas Policy Act of 1978.[17] It became clear, however, after extensive comments were submitted, that most interstate pipeline companies were of the opinion that the area rate clauses were sufficient contractual authority for producers to collect escalation prices. Accordingly, the FERC reversed its position and issued a rule that the clauses were sufficient authority for escalation. Petitioners filed for review.[18]

The court found that the sharp change in the agency's position was not arbitrary. Rather, it concluded, the change demonstrated that the administrative process was working. The court held that the adoption of a rule different from the proposed rule did not require a new notice and com-

---

11. *Id.* at 393.

12. 659 F.2d at 461. *See also* Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

13. 659 F.2d at 461.

14. 5 U.S.C. § 553(b) (1976).

15. 645 F.2d at 360.

16. An area rate clause is a price escalation provision in a natural gas purchase and sales contract between a producer and interstate pipeline company. It authorizes an escalation in the contract price whenever there is an increase in the applicable "just and reasonable" wellhead ceiling price for the category of gas involved.

17. 15 U.S.C. §§ 3301-3432 (Supp. IV 1980).

18. *Pennzoil I*, 645 F.2d at 368. Three groups of petitioners filed petitions in several circuits. The court held that Pennzoil had won the race to the court house, thus venue vested in the Fifth Circuit and all cases were consolidated there. *Id.* at 371. This spectacle led to the court amending its local rules on review of FERC orders on February 1, 1980. *See* 5TH CIR. R. 11 and 5TH CIR. R. 11.5.

ment procedure[19] because the purpose of that procedure is to educate the agency and thus assure fairness and mature consideration of rules having a substantial impact on the parties regulated. All that is required by the APA is that "the notice . . . [include] the terms or substance of the proposed rule or a description of the subjects and issues involved."[20] When the notice of the involved issues and subjects provides ample opportunity for all interested persons to present their views, it is not necessary to specify the precise proposal ultimately chosen. Apparently a rule that is absolutely contrary to that proposed may be adopted.

III. AGENCY ADJUDICATION

A. *What is Adjudication?*

In 1981, the Fifth Circuit had occasion to grapple with the question of whether an agency, in the guise of adjudication, was really engaged in rule making. In *McDonald v. Watt*,[21] the court entertained a claim by a mineral lease filing service and two of its customers. Plaintiffs maintained that a decision of the Interior Board of Land Appeals on entitlement to mineral leases of government land was rule making rather than adjudication because in its decision the Department had reversed a well established agency practice.[22]

The court noted that there was no bright line between rule making and adjudication, but added that "[t]he existence of a dispute concerning particular individuals is a distinguishing characteristic of adjudication."[23] The application of an existing regulation to a particular set of facts does not convert the adjudication into an exercise in rule making[24] and thereby trigger the notice and comment procedures in the APA.[25] The court was

19. 5 U.S.C. § 553(b) (1976).

20. *Pennzoil I*, 645 F.2d at 371.

21. 653 F.2d 1035 (5th Cir. 1981).

22. The case concerned the question of whether a lease offer to which the signature of the offeror had been affixed by a lease filing service rather than by the offeror had to be accompanied by certain statements of interest. The regulation in question requires such a statement of interest when the offer "is signed by an attorney in fact or agent." 43 C.F.R. § 3102.6-1(a)(2) (1979). A lease filing service had affixed to the offer in question a facsimile signature of its customer, as was the common practice. Its customer's offer was drawn first. Subsequently, the Interior Board of Land Appeals held that absent the statement of interest, the offer did not qualify. The lease was awarded to the offeror whose offer had been drawn second. The lease filing service customer filed suit and the offeror whose offer had been drawn second intervened.

23. 653 F.2d at 1042.

24. *Id.*

25. 5 U.S.C. §§ 552, 553 (1976).

careful to point out, however, that while the decision was inconsistent with prior practice and, arguably, with prior decisions, the agency did not specifically overrule any prior decision. Thus, while an agency may be engaged in rule making when it actually overturns a prior decision, some degree of inconsistency is nonetheless allowed before the court will hold that the agency is engaged in rule making.

The court also addressed agency inconsistency in *Mississippi Valley Gas Co. v. FERC*.[26] The court recognized that agency inconsistency is allowed, but asserted that an agency must either conform to prior rulings or explain the reasons for its departure.[27]

As discussed below,[28] the court did provide relief to the *McDonald* plaintiffs by allowing only prospective application of the new agency position. The court noted that plaintiffs' interpretation of the regulation and reliance upon prior practice was reasonable.

B. Jurisdiction to Adjudicate

The Fifth Circuit also considered the jurisdiction of an agency to adjudicate a controversy. In *ECEE, Inc. v. FERC*,[29] petitioners challenged the FERC practice of allowing "any person" to file a protest to a jurisdictional agency[30] determination. The court held that administrative agency adjudications are not limited by the jurisdictional standards applicable to Article III proceedings.[31] Since they are not held to "either the 'case or controversy' or prudential standing requirements . . . within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court."[32] The court upheld the agency policy in question, noting with approval that the policy was followed to "avoid the danger that all relevant views and information would not be presented."[33]

In *McDonald*, discussed above, the court also considered the question of jurisdiction to adjudicate.[34] Although the lawsuit was brought by a private party against an agency, the actual dispute was between two private parties who both sought a particular lease. The Fifth Circuit noted that

---

26. 659 F.2d 488 (5th Cir. 1981).
27. *Id.* at 506.
28. *See* text accompanying notes 65-68 *infra*.
29. 645 F.2d 339 (5th Cir. 1981).
30. A "jurisdictional agency" is a state or federal agency that has regulatory jurisdiction over the production of gas and determines if a particular well or gas is eligible for incentive pricing. 15 U.S.C. § 3413 (Supp. IV 1980).
31. U.S. CONST. art. III.
32. 645 F.2d at 349.
33. *Id.*
34. 653 F.2d at 1041-42.

agencies had jurisdiction to adjudicate private party disputes of this type.[35]

C. *The Process of Adjudication*

Pleadings. The Fifth Circuit considered several procedural matters concerning agency jurisdiction in 1981. The liberal amendments to pleading rules were discussed in *Mineral Industries & Heavy Construction Group v. Occupational Safety & Health Review Commission.*[36] In that case, an administrative law judge (ALJ) had found that plaintiffs had violated a safety regulation[37] on May 14, 1975. A fatal accident had followed the violation. On appeal, the Occupational Safey and Health Review Commission (OSHRC) concluded that there was insufficient evidence to establish a violation on the date in question. However, after determining that there was sufficient evidence to establish a violation on several occasions before May 14th and that these violations had been fully and fairly litigated, OSHRC amended its pleadings to allege a violation on or before May 14th. OSHRC then affirmed the decision of the ALJ based on these amended pleadings.[38]

The Fifth Circuit affirmed on two grounds. First, the court noted that Federal Rule of Civil Procedure 15(b), which applies to OSHRC proceedings,[39] would justify the amendment. The court noted that rule 15(b) "is designed to ensure that poor foresight on the part of scriveners is not converted into tunnelvision on the part of judges."[40] The court noted its general policy of liberally allowing amendments to pleadings. Second, the court went beyond rule 15(b) and pointed out that administrative agencies generally "must be afforded some leeway to discover—by virtue of the evidence presented at [the] hearing—the precise nature and scope of the violations."[41] The court thus announced a policy that would seem to allow very liberal amendments even when rule 15(b) does not apply.

The court did note that limits exist to this liberality. Amendments should be allowed "only when evidence relevant to an unpleaded issue has been introduced at trial, without objection, from which consent . . . can be implied."[42] The court also noted that an implied amendment may not be used to deny a party a fair opportunity to present evidence on the

35. *Id.*.
36. 639 F.2d 1289 (5th Cir. 1981).
37. The violation in question involved failure to provide audible alarms on earthmoving equipment used in reverse gear. 29 C.F.R. 1926.602(a)(9)(ii) (1980).
38. 639 F.2d at 1292.
39. OSHRC Rules of Procedure 15(b), 29 C.F.R. 2002.2(b) (1980).
40. 639 F.2d at 1292.
41. *Id.* at 1293.
42. *Id.*

new issues. In *Mineral Industries*, however, plaintiffs had not objected on relevance grounds to the proof of the earlier violations, nor had they moved before OSHRC for a reconsideration or removal based on any evidence they wished to submit concerning the prior violations.

Subpoenas. In *SEC v. ESM Government Securities, Inc.*,[43] the court considered whether fraud, trickery, and deceit were grounds for denying enforcement of an administrative subpoena. An investigator for the SEC had visited defendant's offices and claimed to be investigating another firm. He asked for a basic education in the government securities market. Defendant, apparently suspecting nothing, gave him a complete tour of its operations and explained its procedures. The SEC then ordered an investigation of defendant, but rather than issue a subpoena, the SEC had the investigator return with another staff attorney and request a further tour and further education. Defendant complied and provided documents for the investigators to review. After the investigators returned two more times, defendant grew suspicious and asked them to leave. The SEC then issued a subpoena. Defendant argued that fraud and trickery were a basis for denial of enforcement of the subpoena.

The court first rejected the SEC argument that *United States v. Calandra*[44] controlled. The court found that neither of the reasons stated by the United States Supreme Court in *Calandra*, the historic role of the grand jury and the unlikelihood of deterring police misconduct, applied to agency investigations.[45] The court then reviewed two abuse of process cases[46] which held that the subpoena was unenforceable if it was an abuse of process. The court, in examining the nature of the relationship between the government agent and the private citizen, stated that "a private person has the right to expect that the government, when acting in its own name, will behave honorably. . . . When that government agency then invokes the power of a court to gather the fruits of the deception, we hold that there is an abuse of process."[47] The court quoted four paragraphs of Justice Brandeis' oft-cited dissent in *Olmstead v. United States*,[48] including the now famous line, "[i]f the government becomes a lawbreaker, it breeds contempt for law. . . . "[49] Having decided that fraudulent and deceptive activity by an agency could constitute an abuse

43. 645 F.2d 310 (5th Cir. 1981).

44. 414 U.S. 338 (1974). In *Calandra*, the Court held that the fourth amendment exclusionary rule does not apply to grand jury testimony. *Id.* at 348.

45. 645 F.2d at 313.

46. United States v. Tweel, 550 F.2d 297 (5th Cir. 1977); Stuart v. United States, 416 F.2d 459 (5th Cir. 1969).

47. 645 F.2d at 316.

48. 277 U.S. 438 (1928).

49. *Id.* at 485 (Brandeis, J., dissenting).

of process, the Fifth Circuit then remanded to the district court to determine whether the SEC intentionally or knowingly misled defendant, whether defendant was, in fact, misled, and whether the subpoena resulted from improper access to defendant's records.

The Fifth Circuit's holding in *ESM Government Securities* can be criticized for undue reliance on *Olmstead*. The Supreme Court in *Olmstead* spoke of lawbreaking, anarchy, and crimes. Such language should not be applicable to the question of abuse of process by an agency. The court does not state, nor does it appear, that the SEC broke the law in any way. In its reference to the "government, when acting in its own name,"[50] the court seems to imply that the investigator's subterfuge would have been acceptable had the SEC inspector been acting under cover, as for example, a business student writing a paper. The logic of such a distinction escapes this writer.

Procedural Objections. A third adjudication question arose in *Pigrenet v. Boland Marine & Manufacturing Co.*[51] Plaintiff's claim for workers' compensation benefits had been heard by an ALJ who decided the claim without making findings on one particular issue. After an administrative appeal, the case was remanded for findings concerning that issue. However, the original ALJ had died. The new judge offered the parties an opportunity to augment the record, which they declined. He then decided the issue against plaintiff, based on a review of the previously constituted record. Plaintiff brought suit, raising the argument, *inter alia*, that the decision, which depended on the credibility of witnesses, was invalid since the new judge had not heard those witnesses.

A divided panel of the Fifth Circuit first held that an ALJ may not decide a credibility question on a cold record when credibility is outcome determinative.[52] After reconsideration en banc, however, the court reversed itself, basing its decisions on plaintiff's failure to augment the record when afforded the opportunity. The court held that plaintiff's objection was procedural and pointed to the general rule that "[p]rocedural objections to the action of an administrative agency . . . must be timely made to give the tribunal an opportunity to correct the error, if error there be."[53]

---

50. 645 F.2d at 316.

51. 656 F.2d 1091 (5th Cir. 1981). At issue were compensation benefits under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1976).

52. 656 F.2d at 1094.

53. *Id.* at 1095 (quoting Brotherhood of R.R. Trainmen v. Central of Ga. Ry., 415 F.2d 403, 417 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970)).

D. Standards for Adjudication

Arbitrary and Capricious. In *Watkins Motor Lines, Inc. v. ICC*,[54] the court considered the standards for agency determination set forth in the APA.[55] The case concerned a petition to set aside an ICC order granting a carrier authority to transport commodities between a city and several states. Petitioner claimed that the order was not only arbitrary and capricious, but also that it was not based on substantial evidence.

The court held that "[i]f an agency considers the relevant factors and articulates a rational connection between the facts found and the choice made, the decision is not arbitrary or capricious."[56] The court considered whether the agency's actions met the "public necessity" test.[57] The court concluded that the agency considered the proper factors pertaining to the "public necessity" standard and articulated a reasonable choice. Therefore, the agency's decision was not arbitrary and capricious.[58]

Substantial Evidence. In *Watkins*, the court also had the opportunity to consider the "substantial evidence" standard. In this case, petitioner argued that assuming a prima facie case of public necessity had been shown, the harm to other carriers (if the authority to transport were granted) outweighed the benefit. The Fifth Circuit pointed out that the

---

54. 641 F.2d 1183 (5th Cir. 1981).

55. 5 U.S.C. § 706 (1976). Section 706 provides in pertinent part:

> The reviewing court shall—
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;. . . .
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute. . . .

56. 641 F.2d at 1188.

57. Public necessity was the standard set forth under 49 U.S.C. § 10922(a) (Supp. III 1979)(amended by Motor Carrier Act, Pub. L. No. 96-296, 94 Stat. 793 (1980)). The factors used in *Watkins* to evaluate public necessity were taken from Sherron Motor Lines, Inc. v. United States, 633 F.2d 1115 (5th Cir. 1981)(quoting Pan Am. Bus Lines Operation, 1 MCC 190, 203 (1936)). They are:

> 1) [w]hether the new operation or service will serve a useful public purpose, [responsive] to public demand or need; 2) whether this purpose can and will be served by existing lines or carriers; and 3) whether [this purpose can and will be served by applicant with the new operation or service proposed] without endangering or impairing the operations of existing carriers contrary to the public interest.

641 F.2d 1189. These factors have since been changed somewhat by *Ex Parte* No. MC-121, Policy Statement on Motor Carrier Regulations. The new standard has only prospective application, however, and did not effect the outcome of this case.

58. 641 F.2d at 1191.

possibility of two inconsistent conclusions being supported by the evidence did not prevent a finding that the one chosen was supported by substantial evidence. The court noted that "the decision need not be supported by the weight of the evidence. . . . "[59] Therefore, the ICC could reasonably conclude that the benefits outweighed the harm in this particular case. The court thus declined to set aside the order.

In 1981, the Fifth Circuit also provided some guidance about what materials would be considered in evaluating substantial evidence. In *Mississippi Valley Gas Co. v. FERC*,[60] the court held that everything in the record that detracts from the finding must be considered.[61] This rather sweeping statement might invoke visions of the court pouring over thousands of pages of documents in search of material contrary to the findings of an agency. Two weeks after *Mississippi Valley Gas*, however, the court limited its task. In *American Petroleum Institute v. EPA*,[62] the court was faced with a record which hardly deserved that appellation. Lacking testimony or factual findings, it consisted of 23,243 pages of charts, graphs, tables, computer printouts, and scientific slides helpful only in that many contradicted one another.[63] The court declined to perform this task unaided by the parties and, relying upon *Citizens to Preserve Overton Park v. Volpe*,[64] held that it was limited in its review to the parties' specific citations.

Prospective and Retroactive Findings. In *McDonald v. Watt*,[65] discussed above,[66] the court had an opportunity to consider whether an agency's findings should be limited to prospective application. In *McDonald*, the Interior Board of Land Appeals (IBLA) decided that a lease offer on which a facsimile of the offeror's signature had been affixed by a filing service must have an accompanying statement of interest. Although this was inconsistent with prior practice of the Bureau of Land Management and, arguably, inconsistent with the reasoning of prior decisions, it did not actually overrule any previous decision. The IBLA announced that the decision would be retroactive.

The court disagreed. Although an adjudication generally operates retroactively, the court pointed out that even though the IBLA decision did not overrule a prior decision, it was "unquestionably 'an abrupt departure

59. *Id.* at 1188.
60. 659 F.2d at 488.
61. *Id.* at 504.
62. 661 F.2d 340 (5th Cir. 1981).
63. *Id.* at 349.
64. 401 U.S. 402 (1971).
65. 653 F.2d at 1035.
66. *See* text accompanying notes 21-28 *supra*.

from [a] well established practice' of the agency."[67] Such a departure, reasoned the Fifth Circuit, required an examination of the reasonableness of any reliance upon that well established practice. The court held that frustration of the expectations of those who have justifiably relied on prior practice is the major ill effect of retroactivity. In addition, the court found that the justifiable reliance of the lease offeror on the prior practice of accepting signature facsimilies without accompanying statements was substantial. Finding the lease offeror to have been unfairly and unnecessarily injured, the court then balanced this injury against the harm which might emanate from limiting the new decision to prospective application. Finding no such harm,[68] the court held that the ruling would be limited to prospective application only.

IV. JUDICIAL REVIEW

A. Limits to Judicial Jurisdiction

Agency Discretion Doctrine. Although the court in *Environmental Defense Fund v. Marsh*[69] held that agency jurisdiction to adjudicate was broad and sweeping,[70] the court reaffirmed its adherence to the traditional jurisdictional limits of the courts. However, the court held that the agency discretion doctrine,[71] which prohibits the courts from considering matters committed by law to agency discretion, was a rare exception and could be "limited to those situations where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[72] It should be noted that despite its decision in this case, the court showed no such inclination to reduce the application of other doctrines that limit judicial review.

Exhaustion and its Exceptions. *Hudson v. Farmers Home Administration*[73] provided the court with an opportunity to review the exhaus-

---

67. 653 F.2d at 1045 (quoting Retail, Wholesale & Dept. Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972)).

68. The court found that retroactive application would actually be contrary to the statutory purpose. 653 F.2d at 1044.

69. 651 F.2d 983 (5th Cir. 1981).

70. *See* text accompanying notes 29-35 *supra*.

71. 5 U.S.C. § 701(a)(2) (1976). This section of the APA reads: "(a) This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

72. 651 F.2d at 1002 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971)). In *Environmental Defense Fund*, the Fifth Circuit held that the "agency discretion doctrine" does not apply to review of "satisfactory assurances" required by the Water Resources Development Act of 1974, § 80(b), 42 U.S.C. § 1962d-17b.

73. 654 F.2d 334 (5th Cir. 1981).

tion of administrative remedies doctrine. Since *Hudson* was a mixed case of both unexhausted and, arguably, exhausted claims, the court examined both the exhaustion exceptions and the mixed claim doctrine.

An exception to the exhaustion doctrine arises when an agency's actions are clearly in contradiction to specific statutory language. The exception, however, is rare and only applicable to the most clear and egregious error. No such error was found in *Hudson*.[74] The case also gave the court an opportunity to review the futility exception to the exhaustion doctrine. In *Hudson*, plaintiffs were black farmers in Mississippi challenging denial of loans from the Farmers Home Administration. One of the farmers directly challenged in the district court the Administration's failure to follow certain procedures requiring the Administration to provide a higher degree of special help and supervisory assistance[75] to "limited resource applicants."[76] Plaintiff claimed that since he did not know he was entitled to special assistance he could not make an administrative complaint about the Administration's failure to provide it.

The Fifth Circuit was unimpressed. The exception, it held, was limited to inadequacies or disabilities in the administrative process itself.[77] The court indicated that the futility exception would be especially inappropriate when, as in *Hudson*, the plaintiff had been represented by counsel during the administrative process.[78]

Turning to the question of mixed exhausted and unexhausted claims,[79] the court applied the general rule announced in *Galtieri v. Wainwright*.[80]

---

74. The Court reviewed the case that gave rise to the "clearly at odds" exception, Leedom v. Kyne, 358 U.S. 184 (1958) and contrasted that case of clear defiance of a statute to the ambiguous error, if any, in *Hudson*.

75. *E.g.*, 7 C.F.R. § 1910.3(c) (1981).

76. 7 C.F.R. § 1941.4(g) (1981).

77. Examples cited by the court were: when the agency is moribund, when it lacks power to grant an effective remedy, when the agency is bound by an adverse rule it cannot alter, or when settled adverse decisions all but guarantee another. 654 F.2d at 337.

78. [A]ppellant cites us no authority, and we have found none, for the proposition that failure by a participant—especially a participant represented by an attorney, as Mr. Hudson was during this administrative process—to advance whatever claims he might derive from public laws and regulations open to the eyes of everyone is a basis for declaring the administrative process a futile one.

654 F.2d at 337.

79. The entire discussion of mixed claims in *Hudson* may be mere dicta. The court was not convinced that any of the plaintiffs claims were exhausted, saying "that this is so is far from certain, and the lower court's conclusion that they have not been [exhausted] is arguably correct." 654 F.2d at 337.

80. 582 F.2d 348 (5th Cir. 1978)(en banc). *Galtieri* concerned a petition for federal habeas corpus. The analogy is imperfect, as habeas corpus involves judicial exhaustion whereas *Hudson* involved administrative exhaustion. However, the court is correct in noting that the context is related and the analogy is useful, if only because federal habeas corpus relief so frequently raises the problem of mixed claims.

This rule states that when exhausted and unexhausted claims are mixed, it is proper for the court to dismiss all claims without prejudice regarding their reinstatement after administrative exhaustion. The court reviewed the available alternatives[81] and concluded that, generally,[82] dismissal without prejudice gives effect to many positive values: "the avoidance of piecemeal litigation, the husbanding of limited judicial resources, [and] the consideration of all claims in context by each tribunal at one time."[83] The court also drew an analogy to the deference, "perhaps cognate with comity, . . . due the special competence, if not the status, of administrative bodies."[84]

Standing. The Fifth Circuit also addressed standing requirements in 1981. In *Environmental Defense Fund v. Marsh*,[85] the court considered a challenge by a railroad (among other plaintiffs) to the planning and construction of a major water project. Although the issue of standing was raised in district court and was found to exist, the issue was not raised on appeal. Nonetheless, the Fifth Circuit considered the issue, indicating that standing will be closely scrutinized even when not raised by the parties.

The court reviewed the two standing requirements in the APA.[86] First, plaintiffs must allege some injury in fact, and second, they must allege that the injury is arguably within the zone of interest to be protected or regulated.[87] The injury in fact alleged by the plaintiff railroad was indirect economic injury. The railroad claimed that the construction project would divert substantial amounts of coal traffic from their railroad to the new waterway. Relying upon *Association of Data Processing Service Organizations, Inc. v. Camp*,[88] the court held that this sort of indirect injury arising from business competition, created as an indirect consequence of agency actions, can serve as the required injury in fact.

The court then turned to the second element of standing—the zone of

---

81. (1) entertaining all claims advanced, (2) entertaining only the exhausted claims, and (3) dismissing all claims without prejudice in order to permit full exhaustion. 654 F.2d at 337-38.

82. The court, in dicta, carefully acknowledged that exceptions to the general rule might be imagined. 654 F.2d at 338 n.7.

83. 654 F.2d at 338. This is the standard analysis used in review of mixed claims in petitions for federal habeas corpus.

84. *Id.*

85. 651 F.2d at 983.

86. The construction project was governed by the Water Resources Development Act of 1974, 42 U.S.C. § 1962 (1976). That statute, however, has no standing provision. Thus, the court relied on the Administrative Procedure Act, 5 U.S.C. § 702 (1976), for a standing provision.

87. *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

88. 397 U.S. 150 (1970).

interest. The court pointed out that the Water Resources Development Act of 1974 specifically referred to the statement of objectives[89] adopted in the Flood Control Act of 1970[90] and further, that the statement included considerations of local economic development.[91] Finding that economic development of the plaintiff railroad would be part of such local economic development, the court held that the plaintiff railroad had standing.

Ripeness. The final jurisdictional element discussed by the Fifth Circuit in 1981 was ripeness. The court twice made reference to the fact that ripeness was required before the courts could review administrative decisions and held that the ripeness requirement specifically applied to the FERC.[92] In *Pennzoil Co. v. FERC* (*Pennzoil II*),[93] the court noted that while an agency characterization of a determination as interlocutory was entitled to some deference on the issue of ripeness, it was not dispositive. Rather, the court will undertake its own inquiry by reviewing four factors:

> (1) whether the issues presented are purely legal; (2) whether the challenged agency action constitutes "final agency action," within the meaning of section 10 of the Administrative Procedure Act . . . ;[94] (3) whether the challenged agency action has or will have a direct and immediate impact upon the petitioners; and (4) whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency.[95]

B. Judicial Deference to Agency Discretion

As it does each year, the Fifth Circuit made many references to deference to agency discretion. Agency regulations are to be interpreted broadly to effectuate the regulatory purpose.[96] There will be a general presumption of agency regularity.[97] Great deference will be given to an

---

89. 42 U.S.C. § 1962-2 (1976).

90. Flood Control Act of 1970, tit. II, 84 Stat. 1824 (codified in scattered sections of 5, 10, 16, 33, 42, 43 U.S.C.).

91. This may be stretching the objectives of the Flood Control Act of 1970, as the statement of intent in question refers to regional and national, but not local economic intent.

92. Mississippi Valley Gas Co. v. FERC, 659 F.2d 488, 497 (5th Cir. 1981); Pennzoil Co. v. FERC, 645 F.2d 394, 398 (5th Cir. 1981)[hereinafter referred to as *Pennzoil II*].

93. 645 F.2d at 394 (5th Cir. 1981).

94. 5 U.S.C. § 704 (1976).

95. *Pennzoil II*, 645 F.2d at 398. The test was enunciated by the United States Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

96. Columbia Gas Dev. Corp. v. FERC, 651 F.2d 1146 (5th Cir. 1981); *Pennzoil II*, 645 F.2d at 394.

97. Florida Power & Light Co. v. Costle, 650 F.2d 579 (5th Cir. 1981).

agency in its operations.[98]

All of this really says very little. Perhaps the best example of how ephemeral the application of these rules really is can be found when the court attempted to explain the limits of deference to agency discretion. In *American Petroleum Institute v. EPA*,[99] the court stated:

> In summary, we must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further; and its decision need not be ideal or even, perhaps, correct so long as not "arbitrary" or "capricious" and so long as the agency gave at least minimal consideration to the relevant facts as contained in the record.[100]

This attempt to define the limits of deference, perhaps made tongue-in-cheek, serves to show how unclear the deference rule is. Beyond emphasizing how it will not defer to agency inconsistency,[101] the court, in its decision on the subject, failed to clarify the limits of deference. The court simply recited legal gems such as: Courts should defer to an agency's interpretation of the statutes it enforces,[102] to an agency's characterization of an order as interlocutory,[103] and, to an agency's interpretation of its own regulations[104] and conditions.[105]

The lack of clarity is due in part, no doubt, to the sensitive balance of power between the three branches of government. The Fifth Circuit generally relies upon *Citizens to Preserve Overton Park v. Volpe*[106] and *Udall v. Tallman*[107] as authority for the deference rule. One can sympathize with the Fifth Circuit's lack of precision since neither of these Supreme Court pronouncements provide much in the way of concrete guidance of how the general rule should be applied to specific cases.

---

98. American Petroleum Inst. v. EPA, 661 F.2d 340 (5th Cir. 1981); B.B. v. Schweiker, 643 F.2d 1069 (5th Cir. 1981); PPG Indus. v. Harrison, 660 F.2d 628 (5th Cir. 1981); United States v. DeFelice, 641 F.2d 1169 (5th Cir. 1981)(appeal pending); *Pennzoil I*, 645 F.2d at 360; *Pennzoil II*, 645 F.2d at 394; *McDonald*, 653 F.2d at 1035.

99. 661 F.2d 340 (5th Cir. 1981).

100. *Id.* at 349.

101. *See* 660 F.2d at 628. *See also* text accompanying notes 65-68 *supra*.

102. 643 F.2d at 1069.

103. *Pennzoil II*, 645 F.2d at 394.

104. Florida Power & Light Co. v. Costle, 650 F.2d at 579 (5th Cir. 1981); PPG Indus. v. Harrison, 660 F.2d at 628 (5th Cir. 1981); United States v. DeFelice, 641 F.2d at 1169 (5th Cir. 1981); *Pennzoil I*, 645 F.2d at 360.

105. 651 F.2d at 1146.

106. 401 U.S. at 402.

107. 380 U.S. 1 (1965).

C. Basis for the Decision

The Fifth Circuit had several opportunities to consider the necessary basis that an agency must recite in order for its decision to be reviewable by the courts. In *Air Products & Chemicals, Inc. v. FERC*,[108] the court held that an agency may base its decision on materials outside the record and need not ignore material in its files or in the public knowledge. This must not prevent parties from having an opportunity to rebut, however. Accordingly, the agency must disclose any such extra-record material used. If the agency fails to disclose, however, the decision will not be reversed without a showing of substantial prejudice to the complaining party.[109]

This holding is in line with the general rule relied on by the court in *Mitchell Energy Corp. v. FERC*.[110] In *Mitchell*, the court held that the basis for the decision must be clear, and that upon review the court must review the decision solely on the grounds invoked by the agency. "[P]ost hoc rationalizations"[111] of counsel on appeal will not be accepted as justification for agency decisions and, therefore, those cases will be remanded.[112]

The court appears to have strayed from this rule in one case, *Piedmont Heights Civic Club, Inc. v. Moreland*.[113] In a split decision, a three judge panel upheld a lower court's reliance on the justification by state officials of their decision regarding the scope of environmental impact statements (EIS) for a segmented highway project. Although reaffirming the "*post hoc* rationalization" rule, the Fifth Circuit said that a court may consider testimony to determine whether a project was improperly segmented. The court based its opinion on the fact that not every conceivable detail of every challenge to a decision can be contemplated in an EIS. The court pointed out that even though individual projects were prepared at separate times by the government agency, the overall scheme was planned by an independent planning agency. Thus, the court decided, reasons offered are not necessarily "*post hoc* rationalizations." The distinction escapes this writer.

D. Role of the Courts

The role of the courts in reviewing administrative decisions was well

---

108. 650 F.2d 687 (5th Cir. 1981).
109. *Id.* at 697.
110. 651 F.2d 414 (5th Cir. 1981).
111. *Id.* at 419 (quoting FPC v. Texaco, 417 U.S. 380, 397 (1974)).
112. The Fifth Circuit had said the same thing earlier in Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1260 (5th Cir. 1980).
113. 637 F.2d 430 (5th Cir. 1981).

expressed in *Presbyterian Hospital v. Harris*.[114] In that case, the plaintiff hospital sought review of a final decision of HEW denying medicare reimbursement for two sorts of expenses.[115] The district court granted summary judgment for the hospital for both types of expenses. On appeal, the Fifth Circuit noted that, concerning one type of expense, the record lacked certain facts necessary for a review of the agency determination. Therefore, the court reversed the judgment on that expense and directed the district court to remand to the agency for further fact finding. The court expressly rejected the alternative of allowing the district court to determine the facts de novo.

In doing so, the court correctly noted that fact finding by the district court would only be authorized if the agency fact finding procedures (rather than the results) were inadequate. De novo fact finding by courts might render agency proceedings meaningless because parties would rely on judicial fact finding to back up inadequate administrative fact finding. Parties might be encouraged to withhold facts deliberately at the agency level. The Fifth Circuit quoted the United States Supreme Court's statement that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration."[116]

The above holding is consistent with the court's holding in *Mitchell Energy Corp. v. FERC*[117] that the reviewing court must base its decision on the grounds stated by the agency.[118] If the court is not to accept "*post hoc* rationalizations" by counsel on appeal, a fortiori it should not allow *post hoc* proof of facts once the agency has made its decision. The line between the judicial role and that of the agency is drawn in both cases.

The Fifth Circuit also considered its own role in agency review. In *Savier University v. National Telecommunications*,[119] the court was faced with an attempt by petitioner to obtain direct review in the circuit court of a grant awarded by the Department of Commerce to a radio station. Pointing out that United States Circuit Courts of Appeal are courts of limited jurisdiction, the Fifth Circuit found that no statute vests the circuit courts with jurisdiction to review these grants. The court rejected petitioner's claim that the act establishing the Federal Communications

---

114. 638 F.2d 1381 (5th Cir. 1981)(appeal pending).

115. The expenses involved were: (1) for television and telephone service to medicare patients and (2) expenses incurred in providing free medical care to indigents under the Hill-Burton Act, 42 U.S.C. §§ 1395f(b), 1395x(v)(1)(A) (1976). It was on the issue of Hill-Burton reimbursement that the Fifth Circuit reversed; summary judgment for the hospital on television and telephone service expenses was affirmed. 638 F.2d at 1389.

116. FPC v. Idaho Power Co., 344 U.S. 1720 (1952).

117. 651 F.2d 414 (5th Cir. 1981).

118. *See* text accompanying notes 108-13 *supra*.

119. 658 F.2d 306 (5th Cir. 1981).

Commission (FCC),[120] which grants direct circuit court review for order of the FCC, created similar review of orders of the Secretary of Commerce.[121] The court also rejected petitioner's claim that the APA[122] provided any implied grant of subject matter jurisdiction to the circuit court of appeal. The court relied on the United States Supreme Court holding in *Califano v. Sanders*,[123] in which that court rejected a similar argument concerning review of a social security matter.

Florida Power & Light v. Costle[124] also provided the Fifth Circuit with an opportunity to comment on its own role. In that case, the Fifth Circuit was faced with an agency determination which, although arguably correct at the time made, was contrary to regulations promulgated after the agency decision but before the case reached the Fifth Circuit. Relying in part on an 1801 opinion by Chief Justice Marshall,[125] the court invoked its equity powers in the choice of remedy and ordered the matter remanded for reconsideration in light of the new regulations.

---

120. The Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in 47 U.S.C. § 151 (1976)).

121. The Communications Act of 1964 does provide for direct circuit court review of orders of the Federal Communications Commission, 47 U.S.C. § 402(a) (1976). Petitioner argued that since the grant in question was made by the Secretary of Commerce through the National Telecommunications and Information Administration, provided for by the Communications Act of 1934, the Communications Act of 1934 impliedly provided for direct review of NTIA grants. The argument is ingenious, even if, as the court held, it seriously misinterprets the Communications act.

122. 5 U.S.C. §§ 701-06 (1976).

123. 430 U.S. 99 (1977).

124. 650 F.2d at 579.

125. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).