1972

Administrative Law and Procedure: Final Examination (Fall 1972)

William & Mary Law School
NOTE: Limit answers to three (3) single space exam book pages.

QUESTION 1:

The National Environmental Policy Act (NEPA) has the broad goal of restoring and maintaining environmental quality. The heart of the statute and the section which has been the source of almost all NEPA litigation is Section 102 which requires that "all agencies of the Federal Government shall ... include in every recommendation or report on ... major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official ..." on the environmental impact of the proposed action.

In the landmark NEPA case, Calvert Cliffs' Coordinating Commission v. AEC, 449 F.2d 1109 (D.C. Cir. 1971, the Circuit Court of Appeals for the District of Columbia Circuit found that the AEC had breached a judicially enforceable duty in that, while the AEC regulations did require that a detailed environmental statement be prepared prior to the hearing conducted by the Atomic Safety and Licensing Board in its review of the proposed project, the regulations did not require the board to consider the detailed statement at the hearing. Instead the Commission believed that it could carry out its NEPA responsibilities entirely outside the hearing process. The court stated that the Commission’s "crabbed interpretation" of NEPA made "a mockery of the Act." If the detailed statement were to serve any purpose, hearing boards could not be left free to ignore the contents of the statement and still satisfy the "congressional intent that environmental factors, as compiled in the 'detailed statement' be considered through agency review processes." Thus, the Calvert Cliffs' holding (that a detailed statement must be submitted prior to any agency formal hearing on a proposed federal action that affects the environment.) meant the NEPA statement must be included in the formal hearing issues. Having so ruled the Court remanded the record to A.E.C. for hearings and decision on the NEPA statement and issues.

In that posture of the matter one of the parties to the proceeding (Coalition for Safe Nuclear Power and Living "In A Finer Environment") filed a motion with A.E.C. requesting that A.E.C. suspend the license previously issued to the Baltimore Gas & Electric Co authorizing commencement of construction of the Calvert Cliffs nuclear electric generating plant. No hearing was requested.
A.E.C. denied the motion and declined to issue an order suspending the construction permit pending the hearings on the N.E.P.A. issues.

A.E.C. regulations provided for hearing procedures for any party other than the licensee, who objected to a determination of the Commission on the question of suspension of a construction permit pending full N.E.P.A. review. These A.E.C. regulations also provided that the Commission could prescribe the time within which the hearing procedures should be completed.

The Commission had set forth in its regulations promulgated pursuant to Calvert Cliffs' three factors to be considered and weighed in the determination of the question of suspension of a construction permit pending completion of a full N.E.P.A. review:

1. In making the determination called for in paragraph 1, the Commission will consider and balance the following factors:

   (a) Whether it is likely that continued construction or operation during the prospective review period will give rise to a significant adverse impact on the environment; the nature and extent of such impact, if any; and whether redress of any such adverse environmental impact can reasonably be effected should modification, suspension or termination of the permit or license result from the ongoing NEPA environmental review.

   (b) Whether continued construction or operation during the prospective review period would foreclose subsequent adoption of alternatives in facility design or operation of the type that could result from the ongoing NEPA environmental review.

   (c) The effect of delay in facility construction or operation upon the public interest. Of primary importance under this criterion are the power needs to be served by the facility; the availability of alternative sources, if any, to meet those needs on a timely basis; and delay costs to the licensee and to consumers."

Without availing themselves of this hearing procedure because of the delay involved, the Coalitions for Safe Nuclear Power sought an interlocutory injunction in the Federal Court staying construction until the Court could hear and adjudicate their claims that AEC had not taken into account appropriate environmental concerns in refusing to suspend the construction permit.

State the question (or questions) presented. How should the Court rule on the petition for an interlocutory injunction?
Question 2:

The instant litigation was precipitated by a press release on November 10, 1971, of the Virgin Islands Water and Power Authority announcing an electric rate increase approximating 20%. Following this press release very informal and perfunctory town meeting type public hearings were held on the several major islands beginning on November 16, 1971. On December 3, 1971, Governing Board of the Authority heard the report on the public hearings and voted to place the new rate schedule into effect. These proceeding substantially complied with the statute of the Virgin Islands Legislature which statute contained no provision for judicial review.

In the same day, December 3, 1971, an action for an injunction against the Authority was brought in the United States District Court of the Virgin Islands by the Virgin Islands Hotel Association, Inc., a nonprofit corporation whose membership consists of most of the hotels located in the Virgin Islands. The Association was not a customer of the Authority. It conducted no business in the Virgin Islands and paid no taxes there. Its office was in New York.

In its injunction suit the Association sought a decree enjoining the collection of power charges under the new rates for a period of ten months. During the ten month period, the Authority would be required, under the requested injunction decree, to conduct new hearings and make a new rate study in order to redetermine the propriety of its proposed rates. If the current increases were determined to be reasonable, they would be continued. If reductions were required in these rates, the consumers would be reimbursed or credited with the difference between the current rates and whatever rates were determined, to be computed from December 1, 1971. If it was determined that certain rates would require even a greater increase than was announced on November 10, 1971, then such rates become effective pursuant to the statutory procedure for setting new rates. The Authority filed a motion to dismiss the petitions for the injunction.

What should be the ground, or grounds, of the motion to dismiss? How should the Court rule on the motion to dismiss, and why?
These consolidated petitions for review seek to set aside the revised schedule of fees of the Federal Communications Commission which became effective August 1, 1970. The petitioners are representatives of the broadcasting and cable television industries and include several individuals and corporations which have interests in particular broadcast properties. While the contentions of the several parties vary widely the petitioners collectively present a broad challenge to the Commission’s authority to promulgate and make effective its rule instituting the broad revisions in its fee schedule, under the rule making procedures followed by FCC.

These fees were imposed by FCC on all its commercial licensees for the purpose of recovering both the direct and indirect costs of regulating the broadcast industry.


On February 18, 1970, the Commission issued a Notice of Proposed Rule Making looking towards the broad revision of its fee schedule and invited the filing of written comments. Schedule of Fees, Docket No. 18802, 21 F.C.C.2d 502, 35 Fed.Reg. 3815 (1970). The Commission noted that Congress had urged that the activities of the Commission become more nearly self-sustaining and proposed a new schedule of fees which would generate estimated fees approximating the Commission’s budgetary request for fiscal year 1971. These fees included increases in those areas which were already subject to at least nominal fees and proposed new fees in areas where the Commission had only recently exercised jurisdiction to regulate community antenna television (CATV) and radio frequency equipment testing and approval.

After receiving a large number of written comments from interested parties, the Commission adopted the revised schedule of Fees on July 1, 1970.
The document was officially released on July 2, 1970, Schedule of Fees, 23 FCC 2d 880, and was printed in the July 8, 1970 issue of the Federal Register, 35 Fed. Reg. 10988.

The new schedule was to be effective August 1, 1970 on all grants made on or after that date. The Commission, however, excepted from the grant fees those applications filed prior to July 1, 1970, the date of the adoption of the new schedule. The Commission levied an annual fee on CATV systems equal to $0.30 multiplied by the number of subscribers of the system.

Thereafter a number of petitions for reconsideration were filed with the Commission concerning various aspects of its fee schedule. These petitions, insofar as they are material to this case, were subsequently denied, 28 FCC 2d 139 (1971) All petitions for review of the Commission's fee schedule rulings, filed pursuant to 47 U.S.C. § 402(a) in this and other Circuits, here transferred to the Court of Appeals for the Fifth Circuit and consolidated in this case.

What question, or questions, are presented as to the rule making procedures followed by FCC in adopting this fee schedule rule. How should the Court rule on the petitions for review with respect to these rule making procedures.

Question 4:

This class action was brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, on behalf of all recipients of public aid in Illinois who are members of a family unit of two or more which pays more than $90.00 per month residence rental but receives $90.00 or less per month as a shelter allowance from the Illinois and the Cook County, Illinois, Departments of Public Aid. Defendants are the respective directors of the departments and are charged by law with the enforcement of the Illinois Public Aid Code.

Section 12-4.11 of the Illinois Public Aid Code, Ill. Rev. Stat. 1967, ch. 23, §12-4.11, deals with public assistance shelter allowances and provides, in relevant part: "[T]he shelter standard for any recipient, exclusive of household furnishings and utilities shall not exceed $90.00 per month, except for adjustments made in the manner authorized by § 12-14." Section 12-14, Ill. Rev. Stat. 1967, ch. 23, §12-14, provides that the Illinois Department of Public Aid may, after consultation with the Legislative Advisory Committee on Public Aid, authorize "deviations" from the $90.00 per month limitation.
Plaintiffs filed their original complaint without requesting any exceptions as to them of the statutory $90.00 maximum, challenging only the constitutionality of these statutory provisions on their face.

On November 12, 1968, a three judge court issued its opinion finding the statute constitutional on its face Metcalf v. Swank, 293 F.Supp.268 (N.D. Ill. 1968). The court found that "the arbitrary nature of a flat maximum" was avoided in the statute by its provision for exceptions to the $90.00 maximum, and by the statutory provisions for administrative hearing procedures on requested exceptions to the $90.00 maximum, as well as the statutory provisions for administrative appeals within the Public Aid Department. The court further construed the statute to require the granting of such exceptions whenever necessary to "provide a livelihood compatible with health and well-being," as stated in section 12-4.11. Having reached this conclusion, the three judge court remanded the case to a single Federal Judge for resolution of any factual questions that might remain.

Plaintiffs did not appeal the decision of the three judge court but rather filed an amended complaint before the single Federal district judge. Count I of the amended complaint renewed the challenge to the statute on its face. Count I was dismissed because previously decided by the three judge court.

In Count II of the Amended Complaint the Plaintiffs undertook for the first time to challenge the application of the statutory $90.00 maximum to them. The defendants moved the district judge to strike Count II.

What question, or questions, are presented by Count II of the Amended Complaint and the motion to strike? How should the district court judge rule on the motion to strike, and why?

Question 5:

Armed Services Procurement Regulations (ASPR) provide for suspension of contractors, bidders or offerors without hearing, as follows:

ASPR § 1.605-1

The Secretary or his authorized representative (see § 1.600(b)) may, in the interest of the Government, suspend a firm or individual:

(a) Suspected, upon adequate evidence, of-

(1) Commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract;

(2) Violation of the Federal antitrust statutes arising out of the submission of bids and proposals; or
(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty, which seriously and directly affects the question of present responsibility as a Government contractor; or

(b) For other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the Secretary of the Department concerned to justify suspension. Suspension of a firm or individual by the Secretary or his authorized representative shall operate to suspend such firm or individual throughout the Department of Defense.

ASPR § 1.605 provides in part:

Suspension of a contractor, bidder or offeror is a drastic action which must be based upon adequate evidence rather than mere accusation. In assessing adequate evidence, consideration should be given to how much credible information is available, its reasonableness in view of surrounding circumstances, corroboration or lack thereof as to important allegations, and inferences which may be drawn from the existence or absence of affirmative facts. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence.

ASPR § 1.605-2 provides in pertinent part:

(a) Period of Suspension. All suspensions shall be for a temporary period pending the completion of investigation and such legal proceedings as may ensue. In the event prosecutive action is not initiated by the Department of Justice within 12 months from the date of the notice of suspension, the suspension shall be terminated unless an Assistant Attorney General requests continuance of the suspension. If such a request is received, the suspension may be continued for an additional six months. Notice of the proposed removal of the suspension shall be given to the Department of Justice 30 days prior to the expiration of the 12 month period. In no event will a suspension continue beyond 18 months unless prosecutive action has been initiated within that period. When prosecutive action is initiated, the suspension may continue until the legal proceedings are completed. Upon removal of a suspension, consideration may be given to debarment in accordance with § 1.604.

Horne Brothers, Inc., was suspended under these regulations in December, 1971, as a bidder on Department of Defense contracts. Soon thereafter Horne brought an action alleging that the Secretaries of Defense and Navy had acted in violation of law by issuing the suspension and by refusing to award to Horne a repair contract on the naval vessel U.S.S. Francis Marion. Horne's Complaint requested, among other things, that the Secretaries of Defense and Navy be enjoined from thus suspending Horne as a bidder, and that the Secretaries be temporarily restrained from permitting any other bidder to proceed with the repair work on a contract award. The Secretaries filed a motion to dismiss the Complaint of Horne.

What question, or questions, are presented by the Complaint and motion to dismiss? How should the Court rule on the motion to dismiss and on the requested temporary restraining order, and why?