

Michigan Law Review

Volume 70 | Issue 1

1971

Interlocutory Appeal Procedures in Administrative Hearings

Ernest Gellhorn
University of Virginia

Paul B. Larsen
Department of Transportation

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Administrative Law Commons](#)

Recommended Citation

Ernest Gellhorn & Paul B. Larsen, *Interlocutory Appeal Procedures in Administrative Hearings*, 70 MICH. L. REV. 109 (1971).

Available at: <https://repository.law.umich.edu/mlr/vol70/iss1/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

INTERLOCUTORY APPEAL PROCEDURES IN ADMINISTRATIVE HEARINGS

*Ernest Gellhorn** and *Paul B. Larsen***

I. INTRODUCTION

SINCE administrative hearings take many forms, agency rules of practice necessarily vary. One of the original justifications for creating administrative agencies was to promote the development of individual procedural responses to particular regulatory needs. Obviously, the procedures in an unfair labor practice case have little in common with those in utility rate proceedings. Hence, it would be counterproductive to straight-jacket the proceedings of one with the rules of the other. Nevertheless, comparable agency problems may lend themselves to a uniform response. Interlocutory appeal practices for reviewing a hearing examiner's interim rulings fall into this category.¹

The advantages of immediate agency review of an examiner's interlocutory rulings are manifold. It avoids the manifest waste of time and money that results from the parties being forced to await the examiner's initial decision and then having the challenged ruling, which was made at the outset of the proceeding, reversed. Even if a rehearing is not ordered, the cost of the unnecessary trial is obvious. Moreover, interlocutory review assures that trial rulings are correct. It affords examiners guidance on procedural questions when most needed—especially since procedural issues tend to be buried in the final appeal. In other words, an interlocutory appeal may satisfy the demands of fairness prior to the final appeal.

However, the costs of interlocutory appeal may readily offset its gains. An interim appeal can either immediately delay the proceeding or ultimately have a delaying effect. The appeal interrupts the proceeding, interferes with the examiner's control of the case, wastes

* Professor of Law, University of Virginia. B.A. 1956, LL.B. 1962, University of Minnesota.—Ed.

** Attorney, Department of Transportation. A.B. 1953, Wilmington College; LL.B. 1960, University of Cincinnati; LL.M. 1962, New York University; LL.M. 1965, McGill University.—Ed.

The opinions expressed in this Article are those of the authors and do not necessarily represent those of the Department of Transportation.

This Article is based upon recommendations and a report prepared for the Committee on Agency Organization and Procedure of the Administrative Conference of the United States. The Conference has not evaluated or approved this Article. The recommendations adopted by the Administrative Conference are reprinted in pt. IV. *infra*.

1. This study and its recommendations deal only with formal administrative adjudications or other trial-type proceedings presided over by a hearing examiner.

time and money if the only consequence of the appeal is to affirm the examiner's ruling, and distracts the review authority from more important policy functions. Even worse, a costly interlocutory appeal may be unnecessary if the challenged issue becomes moot or non-prejudicial as a result of the initial decision. Not only might single appeals from the initial decision be more economical, but the review authority may also be unable to review interlocutory issues adequately if the question is premature.

There are, therefore, substantial arguments for and against permitting interlocutory review of an examiner's rulings. With so even a balance in principle, factual analysis of agency practices becomes critical. This study measures agency practice against the standard that hearing procedures must be fair, and unnecessary delay is as unfair to the parties and the public as are arbitrary and erroneous interlocutory rulings.

II. INTERLOCUTORY REVIEW BY ADMINISTRATIVE AGENCIES

A. *Scope and Methodology*

With these considerations in mind, we reviewed the interlocutory appeal case records and rules of six federal agencies. Of the major independent agencies, the study covered all except the Interstate Commerce Commission (ICC), which was omitted because it does not maintain separate interlocutory review records.² The ICC's position is not as unusual as this comment might suggest. Even though interlocutory appeals are frequent in many agencies, only the Federal Communications Commission maintains summary statistics identifying the number of appeals, the delay (if any) that they cause, and the decisions of the reviewing authority. Consequently, we had to develop most of the data reported here from the agencies' records. The data collected are not precisely comparable since the agencies' methods of maintaining their files and case records differ. Nevertheless, we were able to gather sufficient information to present a description of the operation of each agency's interlocutory review procedure.

This study covers agency performance during three fiscal years, beginning with 1968. In addition to examining each agency's rules of practice, we reviewed the records of those agency hearings presided

2. After a brief sampling of the Interstate Commerce Commission's [hereinafter ICC] case records, we recognized that we could not obtain a worthwhile representative sampling of its massive caseload without inordinate effort—nor could we fill the information gap by conducting individual interviews or by making a selective review of the ICC's records,

over by a hearing examiner in which the examiner's ruling was subjected to interlocutory review. Initially, we concentrated on basic statistics, such as the number of hearings, the frequency of interlocutory review, the delays caused, and the review authority's decisions on appeal. The collection of follow-up data depended upon the pattern that the basic data disclosed. To these quantitative measures, we added qualitative impressions garnered from interviews with review authorities, hearing examiners, staff attorneys, and private practitioners. Our primary objective was to measure the impact of different procedures on interlocutory review. We recognized, of course, that other variables (*e.g.*, the type of hearing, the quality of agency personnel, the importance of the ultimate decision to the parties) have a bearing on each agency's performance. We identified these variables and sought to assess their individual impact.

B. Current Interlocutory Review Procedures and Their Impact

1. Federal Communications Commission

Trial-type hearings at the Federal Communications Commission (FCC) usually involve broadcast applications, renewals, or transfers. These are essentially licensing proceedings, with disputed issues arising when more than one applicant seeks the same license or when either the staff or another licensee objects or, as happens occasionally, when a representative of the community opposes the application.³ However, many FCC hearings are almost indistinguishable from complaint cases. The latter are primarily disciplinary actions seeking to revoke a station's operating license. Here delay usually favors the challenged party since the license continues until the proceeding is concluded.

Until November 1970, the FCC freely allowed interlocutory appeals from examiner rulings through an intermediate appellate review board.⁴ The Commission's experience with this liberal practice was remarkable. Hearings were not inordinately disrupted or delayed, nor was the time of agency members unnecessarily consumed. Nevertheless, FCC interlocutory appeals as a matter of right are now restricted to a few particularly sensitive questions and interlocutory review by the Review Board is primarily within the examiner's dis-

3. Federal Communications Commission [hereinafter FCC] examiners also preside over other types of rate and licensing hearings.

4. For a careful analysis of the FCC's review board, see Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969).

cretion. The Board also issues interlocutory rulings on questions beyond the examiner's authority. These rulings on direct petition, as well as the Board's rulings on appeal from interlocutory orders issued by examiners, are appealable to the Commission. Serious delay or disruption has not occurred under this revised procedure.

During the three fiscal years under study, the FCC's rules governing appeals from an examiner's interlocutory rulings provided that "[a]ny party to a hearing proceeding may file an appeal from an adverse ruling . . . [to] the Review Board."⁵ Review Board decisions were appealable to the Commission under the same standard. The only formal restriction imposed on interlocutory appeals appeared in a Commission note (appended to the rules) urging parties to defer appeals unless the ruling "is fundamental and affects the conduct of the entire case."⁶ Consequently, the failure to appeal would delay but not waive any objections except those objections that become moot if not pressed immediately. The rules made no provision for postponing the hearing pending the interlocutory appeal, although they did allow the presiding officer and the Review Board discretion to stay an order.⁷ As a matter of practice, examiners generally have not postponed hearings pending an interlocutory appeal. However, this result may have followed from the fact that discovery or post-hearing questions constituted a significant portion of the FCC's interlocutory appeals and the hearings were not then in session. The FCC Review Board's time has been consumed more by direct petitions on interlocutory matters outside the examiners' province than by appeals from examiner rulings. "[P]etitions to amend, modify, enlarge, or delete the issues in cases of adjudications" are for the Review Board and not the examiner.⁸

The statistics on interlocutory appeals relating to the scope or conduct of adjudicatory hearings at the FCC during the three fiscal years studied are shown in Table I. These statistics require some explanation. On the one hand, the number of interlocutory rulings by examiners shown in Table I is inflated because it includes routine matters that are never appealed (*e.g.*, the Chief Examiner's designa-

5. 47 C.F.R. § 1.301(a) (1970), *as amended*, FCC Report & Order 70-1193 (1970), 47 C.F.R. § 1.301(a) (1971).

6. 47 C.F.R. § 1.301, Note (1970), *as amended*, FCC Report & Order 70-1193, 35 Fed. Reg. 17333 (1970).

7. 47 C.F.R. § 1.301(e) (1970), *as amended*, FCC Report & Order 70-1193 (1970), 47 C.F.R. § 1.301(c) (1971). *Cf.* 47 C.F.R. § 1.115(h) (1971).

8. 47 C.F.R. § 1.291(a)(2) (1971). The Board acts on numerous other interlocutory matters (*e.g.*, petitions to extend time, to reconsider, to correct the transcript) unrelated to the conduct of the adjudicatory hearing before the examiner. *Id.* These rulings are not considered here.

TABLE 10
INTERLOCUTORY APPEALS IN FCC HEARINGS

	Fiscal Year		
	1968	1969	1970
Interlocutory rulings by examiners	1856	1690	1914
Interlocutory appeals from examiner rulings (to Review Board)	41	26	48
Direct interlocutory petitions (to Review Board)	179	133	128
Interlocutory appeals to FCC	30	33	23
Adjudications disposed of by hearing	131	110	113
Adjudications pending at end of fiscal year	134	147	168
Adjudications docketed	206	134	128

tion of examiners). On the other hand, many controversial interlocutory rulings issued by an examiner are not reflected because the ruling was not formalized or no interim appeal was sought (*e.g.*, rulings to admit or reject evidence during a hearing). Moreover, it is not true that every hearing involves at least one interlocutory interruption (as might be concluded from this table), since there often is more than one appeal in a proceeding.

Even when adjusted, the number of direct petitions and interlocutory appeals does not adequately reflect the actual situation. Direct petitions, of which there are relatively many, seldom impede adjudicatory hearings. Hearings usually are not postponed pending the Board's decision, and most petitions (*e.g.*, to add or amend issues to be determined) are filed shortly after the case is first assigned to the examiner; thus they seldom occasion serious delay. Although more apt to cause delay, interlocutory appeals from examiner rulings do not appear excessive. Of the 48 appeals filed in fiscal 1970, the Review Board reversed the examiner in 20% of the cases. The benefits of these appeals appear substantial.¹⁰ The parties are assured a fairer hearing—one tried in accordance with the Commission's rules and policies. Moreover, the cost of these appeals does not seem very high. In over 90% of the FCC's hearings, no delay or expense is incurred because no interlocutory appeal is filed.¹¹ It has not been

9. These statistics were supplied by the Review Board and the Chief Hearing Examiner. We have excluded—even from "direct interlocutory petitions"—requests made directly to the Review Board that do not directly affect the adjudication (*e.g.*, petitions for extensions of time on appeal to the Review Board, petitions to reopen the record, and petitions to reconsider the Board's decision).

10. *See, e.g.*, Harrison Radio, Inc., 22 F.C.C.2d 283 (1970); Citizens Cable Co., 19 F.C.C.2d 907 (1969); East St. Louis Broadcasting Co., 9 F.C.C.2d 212 (1967).

11. In connection with the November 1970 rule change, the chairman of the FCC Review Board made a detailed analysis of interlocutory appeals during the second half of fiscal 1970. While 22 appeals were processed by the Board, they involved only 15 proceedings. During this time approximately 200 docket proceedings were assigned to the FCC's examiners. Thus, less than 8% of all adjudications assigned to examiners during this period were subject to interlocutory interference.

suggested that unsuccessful appeals are frivolous or undesirable; indeed, an affirmation of the examiner's decision may enhance his standing and performance. The delay resulting from an unsuccessful interlocutory appeal is unlikely to be significant since the hearing generally is not postponed and the Review Board usually decides the question within 60 days.¹² Moreover, as the statistics demonstrate, the Commission seldom interferes with the Board's disposition of interlocutory questions.¹³

Despite this successful record, the FCC did amend its rules of practice to restrict interlocutory review of examiner rulings. Except for sensitive orders rejecting claims of privilege, making confidential records available, or terminating a person's right to participate in a hearing, interlocutory appeals can now be heard by the Review Board only if allowed by the examiner.¹⁴ In the awkward phrasing of the FCC's rule, the examiner shall permit an appeal if it "presents an important question of law or policy as to which there is substantial ground for difference of opinion and . . . the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception."¹⁵ Questions subject to discretionary review can still be postponed and raised on a party's appeal from the examiner's initial decision.¹⁶ However, if the appeal exists as a matter of right, the issue is waived unless pressed immediately.¹⁷

This rule amendment is curious in view of the FCC's experience with interlocutory review. If any problem existed, it was with discovery appeals, which occasionally seemed unworthy of review,¹⁸ and with the procedure that allowed the parties to by-pass the examiner on many questions. The new rule, however, goes beyond appeals from discovery rulings, and it does not require that all interlocutory issues be considered first by the examiner. The FCC justifies the amendment on the grounds that it expedites hearings "by strengthening the position of the presiding officer, by cutting down on hearing delays occasioned by consideration of appeals which should be deferred pending action on the merits, and by freeing the Review

12. The average time between the filing of an interlocutory appeal and the Review Board's decision during 1968 was 54 days, during 1969, 54.5 days, and during 1970, 58.5 days.

13. During the eight-year history of the Review Board (Aug. 1, 1962-June 30, 1970), the FCC granted only 36 petitions for review—and this figure includes several matters beyond the scope of what we have included in interlocutory review.

14. 47 C.F.R. § 1.301 (1971).

15. 47 C.F.R. § 1.301(b) (1971).

16. 47 C.F.R. § 1.301(b)(1) (1971).

17. 47 C.F.R. § 1.301(a) (1971).

18. *E.g.*, *Chronicle Broadcasting Co.*, 23 F.C.C.2d 162 (1970).

Board to spend its resources" elsewhere.¹⁹ Staff proponents readily concede that the arguments for eliminating needless hearing delays and for reallocating Review Board resources are make-weights—as is indicated by the relatively trouble-free operation of the open appeal procedure. The main justification, then, for surrendering the benefits of Board supervision (at least when the examiner refuses the appeal request) and restricting appeals much in the manner of the federal courts is to enhance the position, power, and prestige of the Commission's hearing officers. That there are some grounds for this rationale cannot be gainsaid. Although such evaluations are necessarily subjective, most observers concede that, as the FCC has granted additional authority to its examiners, their self-respect, professional stature, and performance have improved. Whether the power to deny interlocutory appeals from most evidentiary and procedural rulings will further enhance the examiners' status is less clear. Currently, examiners are upheld in 80% of all interlocutory appeals.²⁰ The effect of such approbation would appear to be substantial. Indeed, it is not clear that examiners would relinquish such approval by denying interlocutory requests. It is possible under the new discretionary review procedure for the examiner to certify only those rulings that he believes (and probably knows) will be upheld and to deny permission to appeal from questionable rulings that might be reversed.

On the other hand, the record does not justify any assumption that examiners will use their new powers, either consciously or unconsciously, in so deceptive a manner. Experience with the new rule will ultimately provide an answer. For the present, an educated guess suggests that the impact of the new rule will be minimal, especially since the parties retain the right to appeal or to by-pass the examiner on the most important interlocutory questions.²¹ This point was underscored by the Federal Communications Bar, which reluctantly supported the rule change after it was modified to expand the automatic review provisions for claims of privilege, because "in extraordinary circumstances involving obvious and serious error, parties could petition the Commission for waiver of thr [sic] rule"²²

19. FCC Report & Order 70-1193, ¶ 6, 35 Fed. Reg. 17333 (1970).

20. During fiscal 1970, the Review Board reversed examiners on 9 out of 48 interlocutory appeals.

21. See note 14 *supra* and accompanying text.

22. FCC Preliminary Report & Order 3 (submitted Oct. 7, 1970), on file with the *Michigan Law Review*. This justification, interestingly enough, was deleted from the

Despite this expansion of the examiner's authority, the FCC's rules are still overly restrictive. On the one hand, the examiner is not authorized to rule on all interlocutory questions once the matter is assigned to him despite the fact that he is most familiar with the case. His views should be obtained before the Review Board acts on the appeal. Moreover, a ruling by the examiner may avoid unnecessary appeals to the Review Board. On the other hand, if applied strictly, the new standard for determining whether an interlocutory appeal should be allowed may be unfair. The standard requires a three-step test: the issue must (a) involve an important question in the mind of the examiner, (b) be unresolved under Commission precedent, and (c) result in prejudicial error if incorrectly decided.²³ The standard seemingly excludes equally important questions deserving Review Board consideration. For example, consider a question that will become moot by the time the Review Board hearing is held (and thus remand is unlikely). Or consider rulings that, while not rising to the level of prejudicial error, are of substantial importance to the aggrieved party. We suspect that examiners are likely to certify these and other questions despite the rule language. If our estimate is accurate, practical accommodations would not forestall the rewriting of these awkward rules.

2. Federal Power Commission

Viewed superficially, Federal Power Commission (FPC) hearings appear similar to those of the FCC. Thus, it seems surprising that substantially fewer interlocutory appeals are filed at the FPC. In both agencies, hearings involve either license applications or rate requests. Each agency operates with approximately 15 examiners, whose decisions often determine the future positions of the participating businesses. Yet the FPC holds fewer than half the number of hearings the FCC does.²⁴ And the FPC seldom allows interlocutory appeals from examiner rulings, whereas, until last November, the FCC allowed appeals as a matter of right.

The difference is not attributable to the personnel or to the rules of each agency, even though they differ. It lies, rather, in their basic work. Rate requests are the most frequently contested type of FPC

FCC's final report even though the Commission discussed the Federal Communications Bar Association Committee's support in its order. 35 Fed. Reg. 17332-33 (1970).

23. 47 C.F.R. § 1.301(b) (1971).

24. See SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROC., SENATE COMM. ON THE JUDICIARY, 88th CONG., 2d SESS., STATISTICAL DATA RELATED TO ADMINISTRATIVE PROCEEDINGS 27-30, 35-38 (Comm. Print 1964) (Part II of the "Statistical Greenbook").

hearings—at least when measured by hearing days. These hearings tend to be complex, extended affairs concentrating on the economic condition of the parties and the industry and usually involve technical evidence. Little attention is paid to the personal histories of the company officers, and issues of credibility are rare. FPC hearings frequently involve expert evaluation, which makes it difficult for a reviewing authority to obtain an adequate grasp of the context in which the examiner issued his ruling without inordinate study of the record. Discovery is not significant in FPC practice and individual rulings are less likely to require remand or retrial of the entire case. In essence, the issues and evidence at FPC hearings discourage interlocutory review.²⁵

Even though FPC hearings are not subject to significant interlocutory appeal and the Commission keeps no statistics on interlocutory review, its rules are worth noting. Interlocutory appeals to the Commission are authorized only “in extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest.”²⁶ The examiner determines whether “extraordinary circumstances” exist.²⁷ Certification by the examiner neither assures the appealing party that review will be granted nor substantially delays the proceeding since the interlocutory petition “shall be deemed to have been denied” unless the FPC acts upon it within 30 days.²⁸ The FPC’s protest rule, which allows anyone to file a protest “to alert the Commission and the parties to a proceeding of the fact and nature of the protestant’s objection,”²⁹ can be used to seek direct interlocutory relief from the Commission if an examiner

25. FCC hearings, on the contrary, usually present a different situation. Except for common carrier rate hearings (which are basically indistinguishable from Federal Power Commission [hereinafter FPC] rate requests), most contested FCC hearings involve competing applications for a broadcast license, even in renewal or revocation hearings. Only occasional attention is given to industry conditions or economic evidence in broadcast hearings, other than consideration of the soundness of the applicant’s financial condition. Instead, the hearings concentrate on the applicant’s past record or prospect and frequently include a review of individual actions over several years. That is, the evidence presented in most FCC hearings is less complex and voluminous than that adduced before FPC examiners.

26. 18 C.F.R. § 1.28(a) (1971). Until November 1968, this strict limitation was not applicable to appeals from an examiner’s ruling at a prehearing conference. FPC Order 141, 12 Fed. Reg. 8480 (1947), *as amended*, FPC Order 217, 24 Fed. Reg. 9473 (1959). The FPC abolished this distinction, however, so that all interlocutory appeals are now subject to Rule 1.28(a) without regard to whether the examiner’s ruling was made during the hearing or at a prehearing conference. FPC Order 373, 33 Fed. Reg. 17174 (1968).

27. 18 C.F.R. § 1.28(a) (1971).

28. 18 C.F.R. § 1.28(c) (1971).

29. 18 C.F.R. § 1.10(b) (1971).

unreasonably refuses to certify a question. Direct appeals, however, are exceedingly rare.

While FPC hearings may not provoke as many interlocutory questions as do the proceedings of other agencies, staff attorneys and practitioners concede that questions of discovery or evidence can raise serious objections. The practice, however, is to rely upon the appeals from the examiner's final decision to present any objections that might have been raised on interlocutory review. The FPC Bar, which assisted in drafting the FPC rules, is a relatively small group; thus most practitioners appearing before an examiner have, or expect to have, other cases before the Commission. Consequently, it is difficult to penetrate the resulting consensus toward postponing appeals. It appeared to us that FPC examiners and the FPC Bar have reached a practical (if unacknowledged) accommodation on the procedures for deciding interlocutory questions.

3. *Civil Aeronautics Board*

Civil Aeronautics Board (CAB) hearings fall primarily into two areas, licensing (route applications) and rate-making (tariff filings). Board proceedings are often lengthy and complex. Economic evidence is predominant and voluminous. Hence, CAB hearings parallel FPC proceedings, with the exception that the topics differ. The former relate solely to air transportation, while the latter regulate the supply of electric and gas energy. It is not surprising, therefore, that the CAB's procedure for interlocutory review of examiner rulings is similar to the FPC's approach. The only significant difference between the two is that, although the FPC still hears an occasional appeal, the CAB, as a matter of practice, hears none.

While the CAB's rules continue to authorize interlocutory review, they do so only "in extraordinary circumstances and with the consent of the examiner."³⁰ Even then the appeal will be disallowed unless the examiner finds that interlocutory review "is necessary to prevent substantial detriment to the public interest or undue prejudice to any party."³¹ Not surprisingly, examiners do not find that their challenged rulings will cause substantial detriment to the public or will unduly prejudice one of the parties.³² Even if the examiners were to become more critical of their own rulings, the

30. 14 C.F.R. § 302.18(f) (1971).

31. 14 C.F.R. § 302.18(f) (1971).

32. The examiner's authority to set the time for filing interlocutory appeal briefs (when he consents to a review) also reflects his position in the CAB. 14 C.F.R. § 302.18(f) (1971).

CAB has made it clear that interlocutory review is exceptional and is merited only when the examiner agrees that his ruling should be reviewed and finds that the appeal is necessary.³³ As the Board admonished in *Southwestern Area Local-Service Case*,³⁴ "Rule 18(f) is designed to discourage and avoid interlocutory appeals except in extraordinary circumstances and in strict conformity to its provisions."³⁵

The CAB maintains no index of interlocutory appeals. If a party requests an interlocutory review, that request is made orally to the examiner and will be denied without a written order; however, the request is preserved in the hearing record. The CAB's examiners and staff, as well as the private bar, generally assert that objections to interlocutory rulings are adequately considered in the review of the examiner's recommended decision by the Board. Private practitioners, however, confidentially note that they are subject to considerable restraint in seeking interlocutory review. Because relatively few attorneys practice before the CAB, their relationship with the examiners must be a continuing one. Route determinations are sophisticated questions, in the resolution of which the examiner exercises wide discretion. As a result, private attorneys practicing before the CAB evidence a reluctance to press procedural objections in the face of the examiners' expressed dislike for interlocutory review. On the other hand, these same practitioners concede that discovery is not a significant problem in CAB hearings.³⁶ Because of extensive reporting requirements, information is readily available, and discovery is normally granted if additional information is needed from other parties or from the Board's files. Thus, many of the critical procedural rulings often challenged by interlocutory appeal in other agencies are simply not present in CAB hearings. The situation, in other words, parallels our view of FPC practices.

4. Securities and Exchange Commission

Although the Securities and Exchange Commission's (SEC) attention focuses primarily on the regulation by informal means of the issuance and trading of securities, two types of formal administrative

33. In addition to imposing strict tests for reviewability, the rules provide that the interlocutory review shall not include oral argument unless the CAB so directs, and that the review does not automatically postpone the hearing. 14 C.F.R. §§ 302.18(f), (g) (1971).

34. 32 C.A.B. 1375 (1961).

35. 32 C.A.B. at 1375.

36. Maurer, *Use of Discovery Procedures Before the C.A.B.*, 18 AD. L. REV. 157 (1966).

hearings do arise under the SEC statutes. The first resembles a licensing procedure and involves an application by a person otherwise subject to this Commission's jurisdiction for exemption from (or approval pursuant to) specific regulatory requirements. Typical examples are applications under section 17(b) of the Investment Company Act of 1940³⁷ for permission to effect transactions between "certain affiliated persons,"³⁸ or for declarations concerning the issuance of securities under section 7 of the Public Utility Holding Company Act of 1935.³⁹

The second type of proceeding before the SEC is a complaint hearing instituted by the Commission's allegation that the respondent failed to abide by one of the securities acts or regulations. The most frequent of these involve disciplinary action against a broker-dealer and associated individuals under sections 15(b)(5) and (7) of the Securities Exchange Act of 1934.⁴⁰ Another example of this type of SEC hearing is a stop-order proceeding under the Securities Act of 1933.⁴¹ The licensing procedure is frequently adversary in nature, but the complaint proceeding more closely resembles a judicial trial. Interlocutory review of examiner rulings is occasionally sought in each.

The history of the SEC hearing examiner's position in the conduct of adjudicatory proceedings—and in the making of interlocutory rulings—reflects the increasing authority given presiding officers in most federal agencies as well as the increasing delegation of authority to employee boards or individuals below the commission level. Since the SEC's experience has been successful, and since it supports the experience of other well-managed agencies, we have spelled out the procedural changes in some detail with the design that the SEC's record might encourage other agencies to follow its lead.

Initially, the examiner's authority at the SEC was limited.⁴² Parties frequently sought an interlocutory ruling from the Commission because the question was beyond the scope of the examiner's power to rule. Then, in 1960, the SEC expanded the hearing officer's authority to rule on motions made during the course of a hearing. Motions were to be addressed to the examiner, not the Commission,

37. 15 U.S.C. § 80-a17(b) (1964).

38. 15 U.S.C. § 80-a17 (1964).

39. 15 U.S.C. § 79g (1964). Also included among the licensing type hearings would be applications for the extension of unlisted trading privileges under § 12(f) of the Securities Exchange Act of 1934, 15 U.S.C. § 78l(f) (1934).

40. 15 U.S.C. §§ 78o(b)(5), (7) (1964).

41. 15 U.S.C. §§ 77h(b), (d) (1964).

42. See generally 3 L. LOSS, SECURITIES REGULATION 1910-11 (2d ed. 1961).

and he was to rule upon them.⁴³ When a party excepted to a ruling by the examiner during the hearing, the examiner was to certify the challenge as requested to the Commission if he found "(1) that there [was] at issue a privilege not to answer questions posed; or (2) that a subsequent reversal of the ruling by the Commission would unduly delay or prolong the proceeding or cause undue inconvenience to the parties, taking into consideration the probability of such reversal."⁴⁴ If the examiner determined that the test for certification was not met, a party could apply to the Commission for review, or the Commission could direct, on its own motion, that the matter be submitted to it. In any event, the hearing was to continue unless the examiner ordered otherwise.⁴⁵

The rules were further amended in 1964 to authorize hearing officers to consider and rule on not only all motions made during the course of the hearing but also most prehearing motions.⁴⁶ More importantly, the Commission gave greater effect to interlocutory rulings by examiners by prescribing more restrictive conditions for appeals.⁴⁷ Objections generally have to be made first to the hearing examiner. In addition, the examiner is not to certify a ruling for interlocutory review unless (a) a party so requests and (b) the examiner finds that a subsequent reversal of this ruling would cause "unusual delay or expense" or that the ruling would compel disclosure of confidential SEC files or testimony from Commission personnel.⁴⁸ Furthermore, the Director of the Office of Opinions and Review (the SEC's counterpart of the Review Boards utilized by the ICC and FCC) was delegated authority to affirm interlocutory rulings by the examiner.⁴⁹ Only the SEC can reverse an examiner's interlocutory ruling, but it does not receive the matter until the Director indicates that he will not affirm the examiner. There are a few items beyond the examiner's authority that must be presented directly to

43. SEC Rule XII(a), 25 Fed. Reg. 6731-32 (1960), as amended, 17 C.F.R. § 201.12 (1971).

44. *Id.*

45. *Id.*

46. Securities Act Release No. 33-4674 (March 20, 1964), 17 C.F.R. § 201.12(a) (1971).

47. 17 C.F.R. § 201.12(a) (1971).

48. 17 C.F.R. § 201.12(a) (1971). The overriding standard is established in the first sentence of the Commission's current rules: "The Commission will not review a ruling of the hearing officer prior to its consideration of the entire proceeding in the absence of extraordinary circumstances." *Id.*

49. 17 C.F.R. §§ 200.30-6(a)(1)(i)-(ii) (1971), pursuant to Act of Aug. 20, 1962, Pub. L. No. 87-592, §§ 1-2, 76 Stat. 394-95, codified at 15 U.S.C. §§ 78d-1, d-2 (1964). See S. REP. No. 776, 87th Cong., 1st Sess. (1961); H.R. REP. No. 2045, 87th Cong., 2d Sess. (1962). If he finds it appropriate, the Director may submit a case to the Commission even though he would affirm the examiner's ruling.

the Commission (*e.g.*, applications to intervene and requests to add or delete issues).⁵⁰ In line with these developments, the SEC has liberalized its discovery rules.⁵¹

The statistics on SEC hearings and interlocutory appeals are shown in Table II. As Table II indicates, despite a substantial case-load, there are few interlocutory appeals in SEC proceedings.

TABLE II
INTERLOCUTORY APPEALS IN SEC HEARINGS

	Fiscal Year		
	1968	1969	1970
Interlocutory appeals from examiner rulings	4	4	8
Direct interlocutory action (to SEC only)	4	4	4
Adjudications pending (workload)	147	225	300
Adjudications disposed of			
without hearing	53	64	107
after hearing	21	19	44
Adjudications docketed	58	152	158

Because the number of interlocutory appeals was so small and the SEC's records were carefully indexed, we were able to review the record in each case. The pertinent summary of the records in the 16 cases in which interlocutory review of hearing examiner rulings was pursued appears in Table III. The interval between the filing by the parties of their request for certification or petition for review

TABLE III
SUMMARY OF RECORDS IN INTERLOCUTORY APPEALS

Nature of examiner ruling		
Evidentiary	6	
Discovery	5	
Procedural	8	
Bias	2	
	<u>21*</u>	
Examiner ruling on review request		
Certified	5	
Not certified	11	
	<u>16</u>	
Ruling of review authority	Director, O & R	SEC
Affirming	10	3
Reversing/Modifying		7
	<u>10*</u>	<u>10*</u>

* Several interlocutory appeals involved more than one ruling or issue; consequently, the totals vary.

50. 17 C.F.R. §§ 201.11, .12(b) (1971).

51. See Frankhauser & Bellman, *The Right to Information in the Administrative Process: A Look at the Securities and Exchange Commission*, 18 AD. L. REV. 101 (1969).

and the disposition of the matter by the Commission or by the Director averaged 25 days, with a fourth of this time consumed by briefing and oral argument. In every instance, the hearing delay resulting from interlocutory review was inconsequential, for in *none* of the proceedings in which an appeal was prosecuted during the hearing was the trial postponed. It is less clear, however, whether the prehearing appeals affected the time schedule. Interlocutory appeals are usually sought by respondents. The Commission and the Director have not been reluctant to reverse the examiners (although the examiners were upheld in a majority of appeals).⁵² However, in general, parties have been deterred from pressing interlocutory appeals. The picture with respect to direct interlocutory actions to the Commission during these three fiscal years (1968-1970) is similar to that of interlocutory appeals. None of the actions—which involved questions beyond the examiner's authority and, therefore, had not been ruled upon by him—directly contributed to delay. Most were prehearing motions (usually to alter the scope of the hearing) and the others (procedural complaints or third-party attempts to intervene) did not cause the hearing to be postponed.⁵³ On the other hand, it seems likely that hearings might have been scheduled earlier had no interlocutory appeal been taken or had the issue been ruled upon by the examiner.

The sum and substance of this analysis, therefore, is that interlocutory review of examiner rulings has been handled sensibly and expeditiously by the SEC. At first glance, it might seem inconsistent to require examiner certification before an interlocutory review can be pressed, and then to allow appeals to be presented when the examiner finds that the requirements of certification are not met; but the deterrent impact of the examiner's decision not to certify must be noted. It may well be concluded from the relatively few appeals (in comparison with the number of administrative proceedings before examiners) that an SEC examiner's refusal to certify discourages most appeals. The Commission's delegation of authority to the Director of Opinions and Review to affirm, but not to reverse, the examiners' rulings encourages consistent, well-reasoned decisions. The rules are still vague on precisely what matters are beyond the examiner's authority and must be presented directly to the Commission.⁵⁴ There does not appear to be any justification for retention of

52. See Table III *supra*.

53. However, one quarter (four) of the appeals were filed in one proceeding, in which an applicant sought approval of its acquisition of an electric utility under the Public Utility Holding Company Act. See American Elec. Power Co., SEC Docket 3-1476.

54. 17 C.F.R. §§ 201.11(e), .12(b) (1971).

this separate procedure, which, at one time, governed all interlocutory appeals. In other words, we think that the Commission's procedures have operated so successfully that they should be pursued to their next logical conclusion and that all questions should be ruled upon by the examiner, certified or denied certification by the examiner, and decided on interlocutory appeal by the Director.

5. Federal Trade Commission

"Problems of delay have vexed the FTC ever since it was established, and some of the most notorious examples of protracted administrative proceedings have occurred in that agency."⁵⁵ Even with a declining caseload, the Federal Trade Commission's (FTC) ponderous investigative and adjudicative proceedings "continue to produce decisions based on stale and unreliable evidence and to undermine effective enforcement."⁵⁶ This harsh judgment by the American Bar Association's FTC Study Commission is not a new one. The FTC's internal operations, including its hearing procedures, have been thoroughly analyzed and castigated by authorities almost since the agency's birth.⁵⁷ It is surprising then, if our recollection is accurate, that except for former Commissioner Elman's critique, none of these studies examine the FTC's promiscuous interlocutory practice or suggest that it contributes substantially to adjudicative delay.⁵⁸

FTC adjudications are complaint cases; that is, the hearing is held to determine whether a charged respondent has violated federal laws proscribing restraints of trade, deceptive practices, or misleading labels.⁵⁹ Although the Commission has authority in many cases to

55. ABA COMM. TO STUDY THE FTC, REPORT 28 (1969) [hereinafter ABA REPORT].

56. *Id.* at 32. See, e.g., *Columbia Broadcasting Sys., Inc. v. FTC*, 414 F.2d 974 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970).

57. See, e.g., ABA REPORT, *supra* note 55; T. BLAISDELL, *THE FTC: AN EXPERIMENT IN THE CONTROL OF BUSINESS* (1924); E. COX, R. FELLMETH & J. SCHULZ, *THE NADAR REPORT ON THE FEDERAL TRADE COMMISSION* (1969); COMM. ON EXECUTIVE ORG., TASK FORCE ON REGULATORY COMMISSIONS app. N (1949); G. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* (1924); ROBERT HELLER & ASSOCIATES, INC., *FTC MANAGEMENT SURVEY REPORT* (1954); SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., *LANDIS REPORT ON THE REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (Comm. Print 1960); U.S. CIVIL SERV. COMM., *EVALUATION OF PERSONNEL MANAGEMENT, FEDERAL TRADE COMMISSION* (1965); Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383 (1964); Elman, *Administrative Reform: The Federal Trade Commission*, in SENATE COMM. ON THE JUDICIARY, 91ST CONG., 1ST SESS., *RESPONSES TO QUESTIONNAIRE ON CITIZEN INVOLVEMENT AND RESPONSIVE DECISION-MAKING* 122 (Comm. Print 1969); Elman, *A Modest Proposal for Radical Reform*, 56 A.B.A.J. 1045 (1970).

58. See authorities cited in note 57 *supra*.

59. For a current list of the statutes that the FTC has been assigned to enforce, see ABA REPORT, *supra* note 55, at 6-7.

seek preliminary injunctive relief, it seldom does so.⁶⁰ Consequently, a challenged practice is not directly affected by the adjudicative hearing until a final order is issued and implemented; and then the sanction consists of only a proscriptive cease-and-desist order. In other words, respondents have strong incentives to delay the hearing.

At one time, the FTC's rules placed no restriction on interlocutory appeals from examiner rulings.⁶¹ As examiners were delegated greater authority, the right to appeal was limited—at least in theory. For the past few years, interlocutory review has been at the Commission's discretion; the examiner has had no control over it. A cumbersome, two-step procedure must be invoked.⁶² First, within five days after notice of the examiner's interlocutory ruling, the complaining party must file a request of not more than ten pages for *permission* to appeal.⁶³ "Permission will not be granted except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice."⁶⁴ Although the rules are silent in this regard, responsive briefs opposing requests to appeal may be filed.⁶⁵ Once permission is granted, the second step becomes the actual appeal. The appellants are directed to file briefs of not over 30 pages within five days after permission has been granted; the appellees, within five days after the appeal brief is served.⁶⁶ On occasion, the entire Commission has heard oral argument during this second stage, even though the rules again make no provision for it.⁶⁷ The rules do provide that "[t]he appeal shall not operate to suspend the hearings unless otherwise ordered by the hearing examiner or the Commis-

60. In fact, the FTC recently used this power for the first time in eight years. *Medi-Hair Intl.*, 3 CCH TRADE REG. REP. ¶ 19,442 (FTC 1971). See BNA, ATRR No. 500, at A-13 (Feb. 16, 1971).

61. See 16 C.F.R. § 3.20(b)(1) (1960).

62. 16 C.F.R. § 3.23 (1971).

63. 16 C.F.R. § 3.23(a) (1971).

64. 16 C.F.R. § 3.23(a) (1971). This language was adopted in fiscal 1968. 33 Fed. Reg. 7032 (1968). The previous test limited permission to appeal to a showing of "extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest." 16 C.F.R. § 3.20(a) (1967). The rule change apparently was designed to articulate the factors previously applied under the public interest test.

65. See, e.g., *Koppers Co., Inc.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 16,879, at 21,023 (FTC 1969).

66. 16 C.F.R. § 3.23(b) (1971).

67. See, e.g., *Suburban Propane Gas Corp.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 17,965, at 20,336 (FTC 1967).

sion."⁶⁸ The routine practice, however, is for the examiner to postpone the proceeding pending interlocutory review.

There are two exceptions to this discretionary review system. First, the FTC's permission is not required to appeal rulings on requests for admissions or rulings on compulsory processes.⁶⁹ On the other hand, these appeals will be "entertained" by the FTC only when the aggrieved party makes the "showing" required for other interlocutory appeals.⁷⁰ Apparently the first step—that is, the petition-to-appeal stage—is dispensed with and the decision whether to entertain the appeal and whether to grant or deny it is accomplished on reading the appeal briefs. When this exception was brought to the attention of staff attorneys and FTC practitioners, they vaguely recalled it but conceded that they relied upon the two-step approach in making such appeals.⁷¹ In other words, the Commission's experience here is at variance with its rules. The second exception involves examiner orders to disclose confidential information within the Commission's files or an examiner's suspension of an attorney.⁷² Interlocutory review of these sensitive rulings is automatically allowed; in fact, the decision to release confidential FTC files may be reviewed on the Commission's own motion if no party complains.⁷³

These rules were adopted to restrict interlocutory appeals. Review by the FTC is not a right. On the contrary, it is to be granted only when a stringent test is met—when failure to review is likely to cause greater delay or unnecessary and substantial harm.⁷⁴ Moreover, the Commission, rather than the parties or the examiner, determines whether this test is met. Compliance with its rules, therefore, would seem simple to assure.

If ever a gap existed between rule and reality, the FTC procedures and practices illustrate it. The number of interlocutory appeals, especially when compared to the number of adjudicative hearings on the docket, is astonishing. The statistics for three fiscal years are shown in Table IV. Once again, however, these statistics do not tell the whole story. An interlocutory order issues even when no appeal from an examiner's ruling is allowed because the Commission must, in every case, rule on the petition to appeal.

68. 16 C.F.R. § 3.23(b) (1971).

69. 16 C.F.R. § 3.35(b) (1971).

70. 16 C.F.R. § 3.35(b) (1971).

71. See, e.g., *United States Steel Corp.*, 3 TRADE REG. REP. ¶ 19,545 (FTC 1971).

72. 16 C.F.R. §§ 3.36(d)-(e), .42(d) (1971).

73. 16 C.F.R. § 3.36(e) (1971).

74. 16 C.F.R. § 3.23(a) (1971).

TABLE IV⁷⁵
INTERLOCUTORY APPEALS IN FTC HEARINGS

	Fiscal Year		
	1968	1969	1970
Interlocutory appeals from examiner rulings	80	81	116
Adjudications pending (workload)	61	51	60
Adjudications disposed of by examiners	35	24	22
Adjudications docketed (complaints issued)	23	23	35

These orders are not reflected in Table IV when the petition to appeal is granted. The two-step process means that two orders are commonly issued when an appeal is allowed. (However, the two exceptions permitting appeals as a matter of right result in only one FTC order per interlocutory appeal.) Of course, this does not mean that all interlocutory orders are equal or that they consume the same amount of Commission or hearing-examiner time.

There are other more significant aspects to these figures. First, the FTC's recordkeeping renders all its statistics suspect. A check of the listing of interlocutory orders by dates supplied by the Commission staff revealed several errors. Orders were listed when the Commission issued no order in that docket on that date; other orders were omitted. These errors could not be corrected since the FTC maintains no separate record of interlocutory orders and opinions. These errors in themselves, however, probably do not pose a serious problem for our study since it does not seem likely that they would be weighted in one direction; in fact they probably cancel each other. More importantly, the thrust of this study is a qualitative, as well as a quantitative, analysis of the Commission's interlocutory review practice, so that the particular accuracy of any one number is of little significance. Second, and of more serious consequence, is the probable substantial overstatement of the number of interlocutory appeals that interfere with adjudicative hearings before an examiner. Many appeals involve questions of discovery; hence they do not always delay the proceeding substantially. Even more relate to post-hearing questions (*e.g.*, requests by the examiner for additional time to prepare his initial decision or requests by the parties relating to their appeal from the initial decision). These routine requests invariably involve no delay, are decided by the "motions" Commissioner without coming before the full Commission, and neither postpone the hearing nor affect the examiner's direction of it. Therefore, as a check on these statistics, we made an intensive

⁷⁵ These figures were supplied by the Office of General Counsel of the FTC. They cannot be reconciled with the FTC's annual reports, however. *See, e.g.*, FTC ANNUAL REPORT 57 (1970).

study of all interlocutory appeals decided in the second half of fiscal 1970. Of the 53 interlocutory appeals decided during this interval, 40% did not involve interlocutory review of examiner rulings. Since this period is probably representative, we think that the number of interlocutory appeals for these three fiscal years is closer to 160 than to the 277 reported. Our analysis, therefore, is based upon this discounted figure.

This downward adjustment of figures representing the FTC's interlocutory interference with adjudicative hearings still leaves an inordinate number of appeals in comparison with the Commission's limited adjudicative caseload. Using fiscal 1970 as a baseline, there were 70 (discounted) interlocutory appeals from examiner rulings in the 60 cases then pending. Yet these statistics substantially understate the role of interlocutory appeals at the FTC, for of the 60 pending cases, 22 were disposed of by the examiner during the year (and thus were not subject to interlocutory appeal for part of the period) and 35 involved newly issued complaints (with no opportunity often for either party to have obtained interlocutory relief). Consequently, there were 70 appeals in the approximately 35 active cases before FTC examiners in fiscal 1970—an average of two appeals per active case. This conclusion is supported by a staff study of interlocutory appeals for fiscal years 1966 to 1969, which determined that 72% of the 172 active cases in that period had at least one interlocutory appeal or certification interrupting the proceeding and that many hearings were subject to multiple interlocutory action.⁷⁶ The significance of these figures and the extraordinary scope of FTC review of interlocutory rulings is further emphasized when the FTC statistics are compared with those supplied by other agencies.

Because interlocutory appeals are so numerous and so common, they cause a significant interruption in FTC adjudications, especially since hearings are routinely postponed and pretrial activity delayed pending the Commission's decision.⁷⁷ We sought to document this interference. We discovered that the average delay resulting from FTC interlocutory appeals during the last half of fiscal 1970 was only 18 days—that is, the FTC's interlocutory order was filed, on the average, 18 days after review was first sought. It was found that 15% of these appeals were decided within a week, and only one required more than two months to decide. Thus, individual appeals are seldom responsible for delaying the proceeding, although several

76. Memorandum from Joseph J. Gercke, Chairman of the FTC Administrative Proc. & Rules Comm., to FTC, March 25, 1970, on file with the *Michigan Law Review*.

77. See, e.g., cases cited in notes 78-80 *infra*.

proceedings in which the delay was substantial were encountered.⁷⁸ The delay and unwarranted interference that staff attorneys and hearing examiners, as well as most practitioners, complain about is due, therefore, to the excessive number of appeals in single cases and the cumulative delay that results. For example, one of the 15 cases with interlocutory appeals decided in the second half of fiscal 1970 was interrupted by 7 interlocutory orders during that period and by a total of 26 interlocutory orders over a 1½ year period.⁷⁹ The case is not *sui generis*—over half of the cases interrupted in this six-month period were subject to 2 or more interlocutory orders.⁸⁰

Perhaps the Commission's frequent interlocutory review would be justified if the appeals expedited proceedings by avoiding prejudicial error and ultimate remand, or if the salutary effects of close supervision of examiner performance outweighed the costs involved. Yet such benefits are not apparent from the record. Although almost one quarter of the interlocutory appeals (7 of 30) decided during the period of January to June 1970 resulted in a reversal of the examiner's ruling, few involved supervision of the examiner's conduct of the hearing. Only four granted discovery to respondent (and two of these were automatically appealable requests for discovery from FTC personnel). Of the other decisions, two modified the confidential protection given sensitive materials, and one allowed a pleading to be amended. On the other hand, examiners were upheld in almost two thirds of the appeals (19 of 30), most of which sought additional discovery or reversal of an examiner's refusal to dismiss a complaint. These latter appeals were often patently frivolous or dilatory. In other cases the Commission continued its

78. In *Suburban Propane Gas Corp.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 17,965, at 20,336 (FTC 1967), the FTC required 15 months to decide which party had the burden of proof on one critical issue. Because of this and other interlocutory appeals, a lapse of almost 3 years occurred between issuance of the complaint and the beginning of the hearing—which was ultimately dismissed. More recently, the Commission delayed a false advertising hearing for 4½ months, only to deny interlocutory review of an examiner's decision rejecting cross-motions for summary decision. *Union Carbide Corp.*, FTC Docket 8811 (March 12, 1971) (interlocutory order). Thus, even after this inordinate delay, neither the examiners nor the parties were advised of the standards that examiners should apply in ruling upon motions for summary decision. See also *Lehigh Portland Cement Co.*, 3 TRADE REG. REP. ¶ 19,455 (FTC 1971) (interlocutory order).

79. *Koppers Co., Inc.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 16,879, at 21,023 (FTC 1969).

80. *Koppers Co., Inc.*, FTC Docket 8804; *Diener's, Inc.*, FTC Docket 8804; *OKC Corp.*, FTC Docket 8802; *Verranzano Trading Corp.*, FTC Docket 8801; *American Brands, Inc.*, FTC Docket 8799; *Sterling Drug, Inc.*, FTC Docket 8797; *Hollywood Credit Clothing Co.*, FTC Docket 8796; *Eastern Detective Academy, Inc.*, FTC Docket 8793; *Kennecott Copper Corp.*, FTC Docket 8765.

restrictive approach to discovery of information from its files. The remaining appeals (4 of 30) involved disputes over housekeeping items (*e.g.*, additional time to seek interlocutory relief) or matters beyond the examiner's authority (*e.g.*, preliminary injunction in a merger proceeding).

We strongly concur, therefore, with the judgment of all FTC examiners, and of most staff or private attorneys, that a rule revision severely restricting interlocutory review would be a step toward improving the operation of FTC hearings. Interlocutory appeals in FTC adjudications are today generally unsuccessful; they seldom involve particularly important matters when they are allowed. A selective right of appeal would furnish adequate protection in particularly sensitive areas, and a reduction in the number of the FTC's redundant interlocutory opinions would prove no loss. But it must be noted that interlocutory appeal procedures themselves are of little significance in the whole picture of FTC adjudications. The major cause of adjudicative delay at the FTC does not stem from the interlocutory procedure, but rather is caused by the Commission's unwillingness to open its files for discovery, its uncertainty with respect to protection of confidential information made available for trial purposes, and its reluctance either to remove incentives for delay (*i.e.*, to obtain preliminary injunctive relief) or to punish delaying tactics.⁸¹

6. *National Labor Relations Board*

Most adversary hearings before the National Labor Relations Board (NLRB) concern complaint cases involving unfair labor practice charges.⁸² Relief may include reinstatement of an employee with back pay (and interest), prohibition of future misconduct, or similar action designed to neutralize the impact of past abuses.⁸³ As

81. Former FTC Commissioner Elman's trenchant summary is, typically, indicative and accurate: "[B]y its penchant for secrecy, its refusal to grant respondents adequate discovery, its intrusion in areas better handled by the hearing examiner, and by its failure to plan its docket, the [Federal Trade] Commission has vitiated and degraded its quasi-judicial power." Elman, *Administrative Reform: The Federal Trade Commission*, *supra* note 57, at 160.

82. Representation cases are not included in this study because as a matter of practice the parties generally do not seek interlocutory review of examiner rulings. Several reasons are offered in explanation: representation hearings are not truly adversary; they are investigative; and, most importantly, the regional director's decision is only the predicate for an election, which may then be challenged to the Board. The Board's rules, however, do make provision for review of interlocutory rulings by examiners in representation cases. 29 C.F.R. § 102.65(c) (1971).

83. 29 U.S.C. § 160(c) (1964). Although the statute does not provide for interest on back pay, cases do in fact allow it. *See, e.g.*, *Winn-Dixie Stores, Inc. v. NLRB*, 413 F.2d 1008 (5th Cir. 1969); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

with many agencies, the NLRB maintains no separate record of interlocutory appeals; so our report is necessarily fragmentary. Nevertheless, we believe that from the data we collected a representative picture can be presented.

The NLRB's caseload is heavy. There were, for example, 18,651 unfair labor practice complaints in fiscal 1969.⁸⁴ However, 92% of these complaints were disposed of prior to a formal hearing by dismissal, voluntary withdrawal, or settlement of the charge.⁸⁵ In recent years, trial examiners have annually issued over 900 initial decisions in unfair labor practice controversies; and their workload has exceeded 1,400 cases per year.⁸⁶ To be sure, the hearings are short, generally lasting no more than three or four days, and the amount in controversy is usually quite limited; that is, the costs of the hearing and the economic stake in each case are small compared with those of other agencies (*e.g.*, FCC, FPC, and FTC), although the hearing is, of course, important to the particular employee and is usually of concern to his employer or union. In addition, there is no urge, in most cases, to delay the proceeding. When back pay is in issue and interest is to be assessed, there would seem to be some inducement for expedition on the part of the employer. On the other hand, the Board's orders carry no immediate sanction and enforcement is secured only by petitioning a federal court of appeals.⁸⁷ Occasionally the Board asks a district court, under section 10(j) of the National Labor Relations Act,⁸⁸ for temporary injunctive relief to stop the challenged practice pending a hearing.

Despite the NLRB's caseload, only an average of approximately 30 interlocutory appeals from examiner rulings in unfair labor practice cases are filed annually—although the number increased to 45 during the first nine months of 1970.⁸⁹ From this information

84. NLRB ANNUAL REPORT 1 (1969).

85. *Id.* at 4.

86. *Id.* at 9-10, 17.

87. 29 U.S.C. § 160(e) (1964). See Recommendation 10 of the Administrative Conference of the United States, *Judicial Enforcement of Orders of the National Labor Relations Board*, in AD. CONF. 1969 ANNUAL REPORT 41 (1970); Recommendation 18 of the Administrative Conference of the United States (1961-1962), S. Doc. No. 24, 88th Cong., 1st Sess. 50 (1963).

88. 29 U.S.C. § 160(j) (1964). See NLRB ANNUAL REPORT 160-64, 238 (1969).

89. Information on interlocutory appeals from examiner rulings in unfair labor practice cases was obtained by searching the daily log and docket files maintained in the Solicitor's Office, the only record on interlocutory appeals kept by the NLRB. Since the log begins with January 1, 1968, our information covers only the 2¼ years between that date and the time the record was made available to us.

The log book, moreover, is not wholly accurate. Before investigating the files we counted 21 interlocutory appeals in the 2¼ year period. On closer examination, it

one might expect that the Board's rules or practices strictly limit the right to seek interlocutory review. In fact, however, they resemble the FTC's two-step method. The NLRB rules provide that an examiner's interlocutory orders "shall not be appealed directly to the Board except by special permission of the Board."⁹⁰ Permission is sought by filing a request with the Board "promptly, in writing, and . . . briefly stat[ing] the grounds relied on."⁹¹ Thus, the examiner plays no role in determining whether interlocutory review will be granted. The rules imply that the Board will first decide whether review shall be granted and, once permission is granted, will then consider the appeal.

As a practical matter, the Board's interlocutory appeal procedure involves but one step and is handled informally. If interlocutory review is sought during the hearing, one of the parties will send its request by telegram to the Board. The information available to the Board at this stage is scanty; it has only the complaining party's request, the examiner's ruling, and occasionally an opposing party's reply. The complaint and other papers are often located elsewhere since the Board is located in Washington and hearings are held throughout the country. The Solicitor's Office advises the Board whether, in its opinion, the request should be allowed. Interlocutory appeals are decided by a panel of three—not by the entire five-member Board. At least one Board member is present when the appeal is discussed; the other two generally send a representative from their legal staff who exercises a proxy vote and later advises his Board member of the decision. The Board's decision is reached quickly (usually by accepting the Solicitor's advice), and the parties are usually advised of the ruling the day after the appeal is received. This informal system operates efficiently, as it must if the brief unfair labor practice hearing is not to be delayed. Few interlocutory appeals cause a hearing to be interrupted, although in our review of the record we found two cases that delayed proceedings for several months. Only a very few cases are subjected to more than one interlocutory appeal.

We studied the interlocutory appeals to the Board for one 12-

was clear that many did not involve interlocutory review of examiner rulings. Our findings, then, by calendar year, were that the Board heard 32 interlocutory appeals from examiner rulings in 1968, 33 in 1969, and 45 during the first 9 months of 1970.

90. 29 C.F.R. § 102.26 (1971).

91. 29 C.F.R. § 102.26 (1971).

month period (calendar year 1969) more intensively. There were 33 appeals in this period. From the records in these cases, which were often incomplete, we collected the data shown in Table V. The delay

TABLE V
ANALYSIS OF INTERLOCUTORY APPEALS IN 1969

Complaint charged violation by	
Employer	24
Union	10
Other	2
	<hr/>
	36*
Interlocutory appeal sought by	
General Counsel-NLRB	12
Employer	8
	<hr/>
	20**
Board action on interlocutory appeal	
Granted	13
Denied	20
	<hr/>
	33
Board action sustained position of	
General Counsel-NLRB	14
Employer	6
	<hr/>
	20**
Subject matter of interlocutory appeal	
Evidentiary ruling	17
Discovery	3
Procedural	13
	<hr/>
	33

* Three cases involved charges against both employers and unions.

** Only 20 of the 33 records contained information on these points.

occasioned by interlocutory appeals during this 12-month period averaged 7 days. This figure, however, is distorted by 2 protracted appeals; hence, the usual delay appeared to be less than 2 days. The appeals from procedural rulings were disparate and could not be otherwise categorized.

NLRB examiners, staff attorneys, and private practitioners we contacted were generally satisfied with the Board's interlocutory appeal procedure. Proceedings are not inordinately interrupted as a consequence of this procedure, yet a safety valve is available. The competency and experience of the Solicitor's Office is critical; it is ably staffed. The willingness of the Board to rely upon the decision of one member and two proxies is considered an essential feature, although it seems questionable whether the number of interlocutory

appeals supports this assertion and whether this informal delegation does not in fact exceed congressional authorization.⁹² The significance of interlocutory review is reduced by NLRB rule provisions explicitly permitting review of an examiner's interlocutory rulings "if exception to the ruling or order is included in the statement of exceptions filed with the Board."⁹³ The cost of remand and retrial, which such procedure might necessitate, is less significant when the entire proceeding consumes less than a week of trial time. The most important—and most limiting—feature of the Board's interlocutory appeal practice, however, is the restricted scope of the subject matter. Interlocutory questions appealed in the usual manner to the Board seldom involve complex or novel questions. Decisions are made without briefs and upon a sparse synopsis of the case. Consequently, the adaptability of the NLRB's procedure to agencies with more complex proceedings is questionable. Nevertheless, its consideration by agencies with substantial caseloads and relatively simple hearings seems advisable.

7. *Summary*

This survey of six agencies suggests that interlocutory appeals have not, in themselves, substantially contributed to delay of administrative proceedings. The possible exception is the FTC where, although individual appeals are handled expeditiously in most cases, the number of appeals is so overwhelming that the cumulative delay is substantial. It may be, however, that self-selection has operated to minimize the impact of interlocutory appeals within the agencies we studied. First, this study concentrated on the independent regulatory agencies, whose procedures tend to be the most sophisticated. What is true of their interlocutory procedures may not follow in other agencies. Second, our study was limited. It sought to measure the impact of interlocutory review from the available records, which were seldom complete. A true measure of interlocutory appeals should not stop with a review of selected representative cases and qualitative interviews with agency personnel and practitioners. The

92. Authority to delegate review functions to an employee board has been granted to the ICC (49 U.S.C. § 17 (1964)); to the FCC (47 U.S.C. § 155(d)(1) (1964)); to the CAB (49 U.S.C. § 1324 (1964)); to the FTC (Reorg. Plan No. 4 of 1961, 75 Stat. 838, following 15 U.S.C. § 41 (1964)); to the Federal Maritime Comm. (46 U.S.C. § 1111 (1964)); and to the SEC (15 U.S.C. § 78d-1 (1964)).

93. 29 C.F.R. § 102.26 (1971).

cost of a more extended study, however, did not appear to be worth the likely gain.

Even if the interlocutory appeal procedures of most agencies are tolerable, useful recommendations can still be offered. The FCC and SEC, whose interlocutory appeal procedures appear sound and sensible in most respects, frequently deny their examiners authority to rule initially on interlocutory questions, even though they are already familiar with the issues being raised. These agencies also permit the parties to reargue interlocutory motions in each case by briefs to the review authority, thus permitting unnecessary delay. The FPC and CAB have virtually eliminated interlocutory appeals, but perhaps at too high a cost to a free adversary exchange. The FTC's procedures are overly complex and are apparently ignored in actual practice. Despite formally restrictive procedures, interlocutory review by the FTC is almost automatic. The NLRB's informal methods do not seem adaptable to agencies with more complex cases.

On the other hand, the experience of these six agencies indicates that they are increasingly delegating to their hearing examiners additional authority to decide initially all questions and to control (in most cases) the availability of interlocutory review. Consequently, fewer matters are being appealed to review authorities during initial agency proceedings. When kept within reasonable limits, this development has improved the level of agency hearings. Although there are exceptions, it seems clear that this process should be encouraged and extended.

III. THE JUDICIAL EXPERIENCE WITH INTERLOCUTORY REVIEW

The direction of federal court experience with interlocutory appeals contrasts with that of the agencies. The tendency in the courts has been to broaden rather than narrow the opportunity for interlocutory review. However, the independence of federal district judges has never been in doubt, and any change expanding appellate review of interlocutory rulings is narrowly curtailed by strict standards and by the discretion of both the trial and appellate courts.

The starting point for understanding the judicial analogue is the final judgment rule, which provides that an appeal may be taken only from a final decision and not from an interlocutory ruling.⁹⁴

94. *E.g.*, 6 MOORE'S FEDERAL PRACTICE 1-292 (2d ed. 1966); C. WRIGHT, FEDERAL

This rule not only seeks to prohibit interim appeals that a final decision may make moot, but also reflects a basic decision regarding the proper relationship between trial and appellate courts. The trial judge is independent and most of his decisions are not subject to check and reconsideration.⁹⁵ "Appeal gives the upper court a power to review, not one of intervention."⁹⁶

The final judgment rule has always been subject to exceptions. On the one hand, there are the prerogative writs—prohibition and mandamus.⁹⁷ These writs are designed primarily to control a trial court's abuse of its jurisdiction.⁹⁸ On the other hand, there are several statutory exceptions that authorize an immediate challenge to "orders of serious, perhaps irreparable consequence."⁹⁹ The traditional interlocutory order freely subject to immediate appellate review (by statutory directive) is the ruling on a party's request for preliminary injunctive relief. Neither procedure, however, is closely related to most interim rulings by agency hearing examiners. The agency initially determines the scope of its jurisdiction when the case is docketed, and in any event the issue of jurisdiction is seldom within the examiner's province.¹⁰⁰ Similarly, administrative agencies apparently do not have a trial court's power to issue peremptory interlocutory orders.¹⁰¹

There is one limitation on the final judgment rule that does relate to agency review of interlocutory orders issued by a trial examiner. Congress modified the final judgment rule by enacting the Interlocutory Appeals Act of 1958.¹⁰² This Act empowers any

COURTS §§ 101-02, at 452-63 (1970); Crick, *The Final Judgment As a Basis for Appeal*, 41 YALE L.J. 539 (1932); Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292 (1966); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961). While a few states, notably New York, depart from the final judgment rule and generally allow appeals from interlocutory orders, they do not allow appeals during the course of a trial. See F. JAMES, CIVIL PROCEDURE 50 (1965).

95. See Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292, 1302 (1970).

96. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

97. See, e.g., *C. Wright*, *supra* note 94, § 102, at 461-62.

98. *Id.*

99. *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955). See 28 U.S.C. § 1292(a) (1964); 11 U.S.C. §§ 47-48 (1964).

100. E.g., 47 C.F.R. § 1.291(a)(2) (1971).

101. See *ICC v. Brimson*, 154 U.S. 447, 485 (1894) (dictum). See generally 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.11, at 212-15 (1958); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 610-11 (4th ed. 1960).

102. 28 U.S.C. § 1292(b) (1964). See Bourdeaux, *Federal Interlocutory Appeals Act—A Five Year View*, 35 MISS. L.J. 55 (1963); Wright, *The Interlocutory Appeals Act of*

district judge to certify for immediate appeal an order "not otherwise appealable" if in his opinion the order involves a "controlling question of law as to which there is substantial ground for difference of opinion and [in which] an immediate appeal . . . may materially advance the ultimate termination of the litigation."¹⁰³ The grant of permission to appeal—even though certified by the district court—is further subject to the discretion of the court of appeals.¹⁰⁴ District courts understandably have not been overly sympathetic to claims of error. Neither have they been easily persuaded that the order involves a "controlling question of law" or that immediate appeal will speed the final determination.¹⁰⁵ It is not surprising, then, that this exception has not been of much importance. Indeed, in only about 1/10 of 1% of all cases filed in the district courts do trial judges certify an interlocutory ruling to the court of appeals.¹⁰⁶ It is, at most, a crack in the otherwise impenetrable wall insulating trial court procedures from appellate review.

Even with these exceptions, the practical effect of the final judgment rule is that many (probably most) areas of procedure are largely the domain of trial court law. This is true of the law governing pre-trial procedures as well as that concerning the conduct of the trial. This fact puts great responsibility on the trial courts in these areas; the consensus is that "in the federal system, at any rate, this is probably not misplaced."¹⁰⁷

IV. OBSERVATIONS AND RECOMMENDATIONS

The overriding lesson from this study is that agencies have been unnecessarily reluctant to delegate sufficient authority to their examiners. Immediate reconsideration of discovery orders and review

1958, 23 F.R.D. 199 (1959); Note, *Section 1292 (b): Eight Years of Undefined Discretion*, 54 GEO. L.J. 940 (1966).

103. 28 U.S.C. 1292(b) (1964). The court of appeals is not required to accept the appeal. Section 1292(b) provides, rather, that after the appeal is certified the court of appeals "may . . . in its discretion . . . permit" it to be taken.

104. 9 MOORE'S FEDERAL PRACTICE ¶ 110.22[4], at 264-65 (2d ed. 1970).

105. *E.g.*, *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 443 (2d Cir. 1966). See ABA SPECIAL COMM. ON FED. RULES OF PROC., REPORT, 38 F.R.D. 95, 104 (1965).

106. Out of over 80,000 civil cases pending in the district courts during fiscal 1969, only 101 interlocutory appeals were certified, and the courts of appeal allowed the challenge to the trial court's ruling in only 64 of these cases. By contrast, over 10,000 appeals from final judgments were taken to the courts of appeal in this same period. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT 1969, at 108; *id.*, 1970, at 117, 195.

107. F. JAMES, *supra* note 94, at 53.

of trial rulings are not exceptional and when such frequent interruptions are permitted, the results are not impressive. Hearings are not expedited; irreparable harm is not necessarily avoided; and uniformity of hearing practices is not ensured. However, when hearing examiners are granted authority to rule on all interlocutory questions and to control the general availability of interlocutory review, hearings are expedited and fairness is usually preserved. Occasional exceptions exist, of course. The NLRB's informal yet freely available interlocutory review is a prime example of a successful deviation from this model.¹⁰⁸ Application of the NLRB's approach to other agencies seems unlikely because of its dependence on an exceptionally experienced and able solicitor, delegation of decision authority by proxy to the members' staffs, relatively simple cases, and the pressure of time. Hence, unless an agency's hearing structure and personnel present circumstances comparable to those of the NLRB, the formalized procedures of other agencies are likely to be a better guide. As our recommendations illustrate, we think there are features in almost every agency's rules worth emulating. On the other hand, the rules of no one agency embody all our recommendations.

If the past is prologue, the central features of an agency's interlocutory appeal practice should incorporate two principles: broad delegation of authority to the presiding officer to decide initially all interlocutory questions and final authority in the presiding officer, except in extraordinary cases, to control whether interlocutory appeal shall be available. Exceptions to these principles should be narrowly identified in the rules. Also important is agency adoption of a general practice of not postponing the hearing pending review, of deciding the appeal on the record made before the examiner, and, when authorized, of delegating authority to its staff to confirm the examiner's ruling. Our recommendations seek to implement these conclusions.

Several additional suggestions should also be considered.¹⁰⁹ First, there is little reason for an agency to follow a different interlocutory procedure because of the subject of the appeal. Different techniques within one agency can seldom be justified. The uses by the FTC of

108. See pt. II. B. 6. *supra*. The FCC's record shows that only limited restraints on interlocutory appeals may be applied by other means. Its recent move allowing hearing examiners to control most interlocutory appeals suggests, however, that this alternative is unnecessarily costly.

109. They did not warrant inclusion in the official recommendations of the Administrative Conference, however.

a two-step process for most appeals and a one-step procedure for others¹¹⁰ (especially when the practice is to treat them identically) cannot be rationally justified. Confusion without any corresponding benefit is the result. Moreover, special procedures are usually buried within the practice rule relating to the subject of the appeal rather than included in other interlocutory appeal rules. Sound management suggests that an agency separate its appellate rules, whether interlocutory or final, from other practice rules, and that one section contain all rules governing appeal procedures.¹¹¹

Second, many agencies do not maintain adequate records of interlocutory appeals. For example, the ICC simply has no knowledge of how many interlocutory appeals are sought or decided annually, and, consequently, no knowledge of whether interim review constitutes a serious or immaterial interference in a substantial number of its hearings. Likewise, it does not have any information on what subjects, if any, are the current sore spots causing most of the intermediate appeals. If administrative procedures are to remain abreast of continuing developments, some mechanism needs to be developed for determining where the problems are and what they cost. To date, recordkeeping is the only viable solution.¹¹² It is not suggested that agencies establish massive record retention or information retrieval systems solely for measuring the impact of interlocutory review. Where these systems do exist, they should include information on interlocutory appeals. Otherwise, a simple index of all interlocutory appeals, cross-referenced by subject matter, case title, and docket number, should prove adequate. If possible, other information should also be recorded. For instance, obtaining data for this study would have been relatively simple if agencies had maintained

110. See text accompanying notes 62-73 *supra*.

111. The Conference is not totally blameless in this connection. Its summary decision and discovery recommendations suggest three separate tests. Recommendation 20 of the Administrative Conference of the United States, *Summary Decision in Agency Adjudication* § 5, in AD. CONF. 1970 ANNUAL REPORT 42 (1971); Recommendation 21 of the Administrative Conference of the United States, *Discovery in Administrative Adjudication* ¶¶ 2(6), 7(b), in *id.* at 44. This inconsistency was pointed out to the Conference but to no effect. *Proceedings of the Administrative Conference of the United States, Fourth Plenary Session* 89 (June 2, 1970). See also Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612, 629 n.88 (1971).

112. Senator Edward V. Long, one of the authors of the act establishing the Administrative Conference, did suggest an "ombudsman" role for the Conference, but this suggestion has not been implemented. Long, *Public Defender*, N.Y. Times, Nov. 27, 1966, § 7, at 54 (Book Review). In any case, it would be a costly alternative when agencies could monitor their own procedures.

records showing what delay or time-saving resulted from the interim appeal, which party sought the appeal, and whether the examiner's interlocutory ruling was affirmed. This suggestion is consistent with (and arguably required by) amended section 3 of the Administrative Procedure Act,¹¹³ and probably would be unnecessary if agencies complied with another recommendation of the Administrative Conference.¹¹⁴

Finally, these records should be used by agencies to monitor their procedures. Periodic self-analysis by the agency, if possible with the assistance of interested and informed outsiders, is probably the only way an agency can be certain that its rules of practice respond to current needs.¹¹⁵ Many agencies have already taken this tack.¹¹⁶

The Administrative Conference of the United States made the following recommendation at its Fifth Plenary Session:

Recommendation: Interlocutory Appeal Procedures

Interlocutory appeal procedures for agency review of rulings by presiding officers must balance the advantages derived from immediate correction of an erroneous ruling against interruption of the hearing process and other costs of piecemeal review. Striking an appropriate balance between these competing concerns requires that the exercise of discretion in individual cases be carefully circumscribed. Procedures that delegate the responsibility for allowing interlocutory appeals to presiding officers, with a reserved power in the agency to handle exceptional situations, have proven most satisfactory.

RECOMMENDATION¹¹⁷

Each agency which handles a substantial volume of cases that

113. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. 5 U.S.C. § 552(a)(2) (Supp. V, 1965-1969).

114. Recommendation 14 of the Administrative Conference of the United States, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*, in AD. CONF. 1969 ANNUAL REPORT 43-44 (1970).

115. See Recommendation 14, *supra* note 114, § 5, at 44.

116. See FTC Advisory Council on Rules of Practice, 36 Fed. Reg. 4728 (March 11, 1971).

117. AD. CONF. 1970 ANNUAL REPORT 50-51 (1971). This recommendation supersedes § 5 of Recommendation 20 and ¶¶ 2(6) and 7(b) of Recommendation 21, adopted June 2-3, 1970, insofar as they deal with interlocutory appeals. See note 111 *supra* and accompanying text.

are decided on the basis of a record should adopt interlocutory appeal procedures based on the following principles:

1. Presiding officers should be authorized to rule initially on all questions raised in the proceedings. A ruling by the presiding officer, supported by a reasoned statement, usually should precede interlocutory review of the question raised.

2. In general, interlocutory appeal from a ruling of the presiding officer should be allowed only when the presiding officer certifies that (a) the ruling involves an important question of law or policy concerning which there is substantial ground for difference of opinion; and (b) an immediate appeal from the ruling will materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy.

3. Allowance of an interlocutory appeal should not stay the proceeding unless the presiding officer determines the extraordinary circumstances require a postponement. A stay of more than 30 days must be approved by the review authority.

4. If the number of interlocutory appeals in an agency is substantial, the authority to affirm, modify, or reverse the presiding officer's interlocutory ruling should be delegated, to the extent permitted by law, to a review authority designated by the agency.

5. Unless the review authority orders otherwise in the particular case, the review authority should decide the interlocutory appeal on the record and briefs or oral argument. The review authority should summarily dismiss an interlocutory appeal whenever it determines that the presiding officer's certification was improvidently granted or that consideration of the appeal is unnecessary. If the review authority does not specify otherwise within 30 days after the certification or allowance of the interlocutory appeal, leave to appeal from the presiding officer's interlocutory ruling should be deemed to be denied.

6. Interlocutory review by petition to the review authority without certification by the presiding officer should be restricted to exceptional situations in which (a) vital public or private interests might otherwise be seriously impaired, and (b) the review authority has not had an opportunity to develop standards which the presiding officer can apply in determining whether interlocutory review is appropriate.

The first recommendation, that *all* interlocutory questions be ruled upon first by the presiding officer, is a necessary predicate of sound trial management. The examiner must be in control of the proceeding assigned to him. It is inconsistent, at best, to deny an examiner the authority to rule on interlocutory issues yet, at the same time, expect him to direct discovery and expedite the hearing. He is in the best position to know the case fully, to appreciate

whether the ruling effectively implements the agency's purpose, and to ensure that the ruling meets the requirements of fairness and expedition at the trial level. This does not mean that only the examiner can provide such guidance and that, therefore, he should be the final authority. On the other hand, it does seem myopic to pass interlocutory questions to a higher authority without first obtaining the views of the presiding officer. Although agencies generally have reserved some questions for their exclusive consideration, we can see no justification for denying initial consideration by the examiner as long as the case is assigned to him.¹¹⁸ The slight costs of delegation of authority to the examiner are the following: (1) the arguments the parties would otherwise address to the review authority are made to the examiner (but the arguments, briefs, and the examiner's ruling are included in the record if the appeal is certified); and (2) requiring the examiner's ruling will take additional time. The substantial benefits from this recommended procedure are the following: (1) the examiner is in a position to develop consistent, informed decisions since he is likely to be expert on the procedural questions that dominate interlocutory review;¹¹⁹ (2) the examiner's ruling will avoid many appeals and dissuade others; (3) the review authority's time is freed for consideration of more significant policy questions; and (4) the review authority has the benefit of the examiner's guidance on the questions that are appealed.

The second recommendation—that interlocutory appeals generally be limited to questions certified to the review authority by the examiner—is the core of this proposal. Not surprisingly, hearing examiners uniformly urge that they be delegated this authority. Their argument is not persuasive, however. In their frank desire to emulate the position and prestige of federal district court judges, they contend that they must be given commensurate power. If reliance is placed upon a principle at the opposite pole of Lord Acton's famous dictum,¹²⁰ it is undoubtedly true that at some point the failure to delegate authority to a hearing examiner will impair his performance. Where this minimum authority level is remains un-

118. Before the matter is assigned to an examiner, or once the case is no longer on the examiner's docket, "interlocutory questions" (e.g., extensions of time for filing appeal briefs) should be addressed to the review authority.

119. It is not uncommon for an agency to be unaware of its prior interlocutory rulings. See, e.g., Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: The Hearing*, 116 U. PA. L. REV. 401, 429 n.153 (1968).

120. "Power tends to corrupt; absolute power corrupts absolutely." Letter to Bishop Mandell Creighton (1887).

clear, but authority to control access to intermediate appeals hardly appears to be the cut off point.¹²¹ In any event, this recommendation rests upon another, more persuasive argument. The recommendation's primary justification is experience. Agencies relying upon their examiners to limit access to interlocutory review have, in general, suffered fewer hearing interruptions and have benefited from speedier hearings. The examiner is in charge; he controls the scope of discovery and the direction of the trial.

The standard for certification of interlocutory rulings by the examiner—the focus of the Administrative Conference's second recommendation—is unexceptional. With two major modifications, it hews closely to the judicial standard set forth in section 1292(b).¹²² The more restrictive judicial standard of a "controlling question of law" is expanded to include important questions of both policy and law.¹²³ This change reflects the policy function of an agency hearing and suggests that policy questions may deserve interim agency guidance. On the other hand, the basic standard contemplates three types of rulings that are also covered by the judicial analogue: (1) those which are novel or without precedent and about which there could be a difference of opinion; (2) those which take a position contrary to prior agency authority; and (3) those which conform with a prior agency position but might now be challenged on a new ground.¹²⁴ The other significant alteration we suggest to the judicial standard is to authorize immediate review when subsequent consideration by the review authority would be an inadequate remedy, even though immediate review would not necessarily advance the ultimate termination of the litigation. This modification is designed to reach important interlocutory questions that would become moot if immediate appeal is not available or that otherwise would not constitute prejudicial error.¹²⁵

The third recommendation seeks to assure that, even when allowed, interlocutory review will not delay agency hearings. The purpose here is to minimize delay. In line with other provisions in these recommendations, we suggest that primary authority for

121. The FCC's successful experience with freely available appeals to its Review Board is the most obvious rebuttal case in point. *See* pt. II. B. 1 *supra*.

122. 28 U.S.C. § 1292(b) (1964). *See* text accompanying notes 102-06 *supra*.

123. *See* text following note 117 *supra*.

124. *See* Note, *supra* note 102, at 948.

125. *E.g.*, orders authorizing discovery, disclosing confidential information, denying a privilege, or setting the time and place of hearing.

staying the proceeding for 30 days should be delegated to the presiding officer. If a further extension is warranted, not only the examiner's but also the review authority's approval must be obtained.¹²⁶ This provision eliminates inadvertent delay. Delay will occur only when the agency consciously accepts it. A corollary requirement, which all agencies appear to have satisfied (and therefore is not included in this recommendation), is that a time limit be specified within which the objecting party must file its interlocutory appeal from the challenging ruling.

The fourth recommendation is suggested by the Administrative Conference's earlier alternative recommendation that agencies with a substantial adjudicative caseload should delegate review authority to an employee board.¹²⁷ The experience of the FCC and SEC supports this proposal. Its effect is to enhance the examiner's position and yet to provide, insofar as structure can, a method for expediting most appeals. A review board also insulates the adjudicative process from commission interference until the final appeal, and frees the commissioners (at least in part) from adjudicative restrictions until the case is before them. On balance, we prefer the FCC approach of delegating to the Review Board the power both to affirm and to reverse the examiner. This approach leaves the agency free of all interim adjudicative responsibility. The Review Board is better equipped to render consistent, soundly reasoned opinions on the technical procedural questions that dominate interlocutory appeals. The alternative SEC approach of limiting the employee board to affirming the examiner's ruling is satisfactory, however, and is logically consistent with the Conference's prior "certiorari" review recommendation.¹²⁸

126. This requirement limiting the examiner's authority to delay the proceeding is not inconsistent with our earlier recommendation increasing the examiner's decisional power. Here the restriction is designed to focus the review authority's attention on the delay resulting from the interlocutory appeal. Moreover, this requirement dovetails with ¶ 5 of the recommendation that permission to appeal from the examiner's decision is automatically denied after 30 days unless the review authority specifically rules otherwise. See text following note 117 *supra*.

127. See Recommendation 6 of the Administrative Conference of the United States, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, in AD. CONF. 1969 ANNUAL REPORT 38-39 (1970); Freedman, *supra* note 4.

128. See Recommendation 6, *supra* note 127. See also Recommendation 9 of the Administrative Conference of the United States (1961-1962), S. Doc. No. 24, 88th Cong., 1st Sess. 153-63 (1963); Auerbach, *Scope of Authority of Federal Administrative Agencies To Delegate Decision Making to Hearing Examiners*, 48 MINN. L. REV. 823 (1964). For another variant, which would delegate authority to affirm to the chief examiner, see Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 182-83 (1968).

The fifth recommendation deals with simple housekeeping rules of practice that only a few agencies currently apply.¹²⁹ Briefly stated, it generally requires the parties to make their only argument to the examiner—and to stand by that argument—and imposes a time limit on interlocutory interruptions. It sacrifices a party's opportunity to respond to the examiner's ruling; however, the impact of this proposal can cut in both directions, since it likewise prevents the appellee from shoring up an examiner's erroneous justification. The time saved by this procedure, in addition to the fact that each party has an opportunity during review of the examiner's initial decision to challenge the interlocutory ruling, further justifies this approach. Finally, this recommendation incorporates the double-discretion standard governing interlocutory appeals in the federal courts. Under this approach, an interlocutory appeal is subject to the discretion of both the presiding officer and the review authority; either can deny or grant permission to appeal, except that the review authority, of course, has the final word.

Since power needs restraint, the sixth recommendation incorporates a safety-valve procedure by allowing the review authority, in exceptional circumstances, to accept interlocutory appeals that an examiner refuses to certify. In implementing this recommendation, each agency should carefully spell out these categorical exceptions. Otherwise, they can become the exceptions that destroy this proposal.

V. CONCLUSION

If adopted, these recommendations will alter the relationship between some agencies and their hearing examiners. The Administrative Procedure Act (APA) seeks to assure that an examiner is independent, that his initial decision will be based on the facts in the record, and that the hearing—at least if required to be decided on the record—will maintain the basic fairness markings of a judicial trial. The APA's structural protections are unnecessarily burdensome, however, unless the examiner is in complete charge of the proceeding assigned to him. If the agency may freely interrupt and review every move he makes, the statutory mandate is duplicative. Unrestricted interlocutory review creates a dual system of hearings, with little independence or discretion left to the hearing officer. If, on the other hand, interlocutory review is sensitively restrained, the trial exam-

129. This proposal is patterned, in part, after two CAB and FPC rules. 14 C.F.R. § 302.18(f) (1971); 18 C.F.R. § 1.28(a) (1971).

iner can shape and determine the conduct of the proceeding without impairing the fairness of the hearing. That, in essence, is the object of this proposal.