

Georgetown University Law Center
Regulatory Agency Litigation: Roles, Skills and Strategies
Mondays, 9–11 a.m. | Room 342

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Syllabus (23 Feb. 2016)

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... [T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 620 (2d Cir. 1965).

Overview

Regulatory litigation covers a diverse terrain: from mergers of telecommunications monopolies to benefits for the disabled; from market manipulation by banks to Medicaid fraud by physicians. It occurs at hundreds of administrative agencies, federal and state. Lawyers' roles are equally diverse. They shape regulatory proceedings, draft requests for agency actions, organize proceedings, shape and draft expert testimony, conduct discovery, present and cross-examine expert witnesses, write briefs, draft opinions, defend or attack commission decisions on judicial review, and bring or defend enforcement actions.

Despite this diversity, all regulatory litigation should have the same outcome: an agency decision that **serves the public interest** and **holds up in court**. This practicum course aims to help students become effective participants in regulatory litigation, in the two major roles: as advocates for parties and as advisors to decisionmakers. We will address two major questions: (1) What **skills** do effective lawyers acquire? and (2) How do effective lawyers **shape the litigation process to serve the public interest** rather than parties' narrow private interests?

Objectives: The course thus has two main objectives. The first objective is to expose students to the **steps, skills and strategies** involved in organizing and participating in agency adjudication: framing and organizing regulatory hearings, conducting discovery, preparing and defending expert testimony, appearing at hearings to present and cross-examine expert witnesses, negotiating settlements, filing briefs with the agency, advising decisionmakers during deliberations, drafting orders, and challenging or defending agency decisions in court. The second objective is to have students appreciate **how the quality of regulatory decisions is affected** by (a) an agency's choice of procedures, (b) how lawyers practicing inside and before the agency use those procedures and (c) how any agency organizes its personnel and departments to make best use of its resources. Effective lawyers develop a mental habit of asking "What does the agency need to make the best decision?" rather than "How do I win this case?"

Case study: We will explore these questions by studying proceeding before the **D.C. Public Service Commission**, involving a merger of six electric utility monopolies. The holding company **Exelon** (which owns Baltimore Gas & Electric and two other utilities in Illinois and Pennsylvania) is proposing to acquire the holding company **PHI Holdings** (which owns our local utility Pepco and two other utilities). During 2015 the parties submitted expert witness testimony and stood for cross-examination at evidentiary hearings. (I was a witness opposing the transaction—for a local citizen group in the D.C. proceeding and for the Maryland Office of People's Counsel in proceeding before the Maryland Public Service Commission.) The hearings are completed; the Commission will issue a decision sometime during our semester together. The proximity of the participants will give us real-world exposure to each phase of litigation that we will be studying. Using the record in that case, each week we will study a different phase of regulatory litigation.

I recognize that students in the class are not necessarily planning careers in mergers or utility regulation. However, the litigation phases we will study and experience are common to

most formal adjudicatory procedures. Furthermore, we will spend one week with substantive materials on utility mergers so that students can understand the substantive issues. Mastery of those substantive issues in one week is neither expected nor possible, but basic familiarity will give more meaning to the various phases of the litigation.

Seminar and practicum components: This five-credit practicum course has two components: (a) a two-hour weekly seminar presenting the principles of effective regulatory litigation (enriched by weekly student submissions); and (b) a semester research project for an external client, addressing a frontier topic in agency litigation. The semester research project is discussed further below.

Three limitations: First, this course is not a substitute for learning administrative law—either the general statutory and constitutional principles or a specific agency's rules of practice and procedure. The focus is on litigation practice, not casebook analysis. Second, due to time constraints, we cannot study every type of agency action. We therefore will focus on adjudication rather than rulemaking (although we will discuss the role of rulemaking in setting the boundaries for adjudication). Finally, skills mastery takes years, not weeks. Our emphasis will be on (a) learning the sequence of steps that lead to mastery, (b) developing the ability to distinguish high-quality from low-quality performance, and, from that foundation, (c) enabling students to fashion a plan for professional growth.

Required Readings

Most of the readings come directly from the D.C. PSC case. Instead of reading appellate opinions (which is the normal reading in law school classes), you'll be reading the actual record before the Commission—the record that may later become the subject of an appellate opinion. These readings therefore will be more representative of the real-world documents you'll encounter in legal practice than what you usually see in your courses. That means the readings are more technical and messier, often lacking the clarity of context that a well-written appellate opinion provides. So read slowly, get into the flesh of the topic, and be sure to ask questions of me at any time.

The readings are all on TWEN, in the folder for the specific week in which the assignment occurs. Among the readings are notes from interviews with practitioners, conducted by my Spring 2014 students. While you need only skim these interview notes, be sure to glean anything useful that can assist your understanding of litigation practice. The TWEN materials also include my personal notes that I used in 2014 for class. These personal notes are unpolished, but they have the main points I hope for you to absorb in class. I post them so that during our weekly classes you can engage directly with me and your colleagues, rather than type furiously to capture dialogue verbatim. And every class is recorded, with student access automatic.

Since the point of regulatory litigation is to help the regulator make good decisions, effective lawyers understand how regulators make those decisions. I therefore have assigned readings from my *Preside or Lead? The Attributes and Actions of Effective Regulators* (2d ed.

2013), available from the GULC bookstore. The book's essays explore the many influences on regulatory decisionmaking. To get as complete as possible a picture, we will read the entire book, not always in sequence. A particular week's readings in *Preside or Lead?* will not necessarily correspond to that week's topic.

The sizes of weekly reading assignments are uneven. In weeks with shorter reading assignments, consider reading ahead.

Class participation: For each class, I will have identified 1 or 2 students to be the initial discussants. This approach ensures that everyone gets crucial practice thinking on their feet and articulating orally. But: ***The remaining students are not off-duty.*** Everyone comes to class prepared, anyone can ask a question at any time, and anyone can be questioned at any time. Attendance and participation are mandatory and will affect grades. Punctuality is also essential; effective litigators always get to court early.

Three Types of Assignments

1. Weekly reading and writing

For most weeks, there is both a reading assignment and a writing assignment. Always do the readings before the writing assignment. Unless marked optional, all readings are mandatory (some are marked "skim" but the skim is still mandatory). Your weekly written submission should be around 750 words (unless the assignment states otherwise) and professional: clear writing, well-organized, and proofread. At the beginning of the semester, read closely the "Writing Guidelines" document in the Assets for Excellence folder in the TWEN course materials. That document identifies many writing problems observed in prior student papers. The fewer problems with your writing, the more readily I can focus on your substance.

Logistics for weekly assignments: Use this filename format: lastname.week2.doc (i.e., Hempling.week2.doc), in Word.¹ Unless otherwise noted or revised by me in class, **all weekly assignments are due in the appropriate assignment box on TWEN by 3 p.m. the Saturday afternoon before class, including any non-Monday class.** Absent emergencies that you could not anticipate or address, lateness will draw penalties, as it inconveniences classmates and professors. If you do have to submit something late, post on TWEN *and* email to me; otherwise post only to TWEN.

I will insert detailed comments on your weekly submissions via Word's "comment" feature. By **5 p.m. on the Sunday before class**, I will post on TWEN (in the folder containing that week's reading materials) a single file containing all the submissions (with author names removed), accompanied by my marginal comments.

¹ In this course, take care to heed each mechanical instruction as if it were a commission or court procedural rule. Doing so saves me, my assistant and your classmates time and effort, and creates a disciplined atmosphere akin to actual regulatory practice.

TWEN will notify you when I've posted this document. Your careful review of this entire file—not just your paper but all the papers—before class is mandatory. The combination of my comments and your advance review gives you a distinct, detailed dialogue prior to class, thus allowing for a deeper class discussion. (Note: To see my marginal comments, you need to download the document as a Word file. The HTML version produced by TWEN will not display my comments.)

2. **Practicum assignment, culminating in semester paper and presentation to client**

Effective regulatory litigations not only know the litigation skills; they also understand how regulatory agencies work internally. Working with regulatory colleagues throughout the country, I have collected a set of frontier research projects relating to internal agency procedures. Common to most of these projects is an unprecedented opportunity we will have to assist the new Comisión de Energía de Puerto Rico (Puerto Rico Energy Commission, known there as CEPR) in creating its own procedures, methods and culture.

A document summarizing these projects will be on TWEN in the Practicum folder, by January 10. Be sure to study the entire document, since we will be discussing all the projects throughout the semester. I will announce assignments among the students no later than the second class (after add/drop).

On February 1, separate from our class, I will meet individually with each student to discuss your research project. I'll explain any necessary background and provide any additional sources and advice. Come prepared with questions. After that February 8 meeting, you will contact the client, share your understanding of the project, ask any additional questions; *i.e.*, do what is necessary to ensure that you and the client have a common understanding of the assignment. You will be working with a senior staff person or Commissioner. Prior to that contact, you should send the client the project description, which you will extract from the complete Practicum Assignments document. In your initial dialogue with the client, be sure to establish the form of the final work product, and any interim and final deadlines. (Making and meeting deadlines builds trust. You never want a client waking in the morning, wondering "Where's my stuff?") You should do this step in writing, in the form of an assignment memorandum submitted to the client and to TWEN per the deadline stated under Key Dates below.

The practicum will conclude in April with your submitting a written product ***to the client and to TWEN***. It could be a memorandum to the agency's commissioners or general counsel, an organized summary of data gathered, or some other product that you design with the client, subject to my oversight. It will describe the problem, present options, describe criteria for assessing the options, apply those criteria to the options, and make a recommendation. The paper will be **15-20 pages double-spaced**. For some students, depending on the nature of the client assignment, their semester paper will be a document distinct from the submission to the client. The steps to completion (each of which is identified under "Key Dates" below) are as follows:

- a. Client and I approve the assignment memorandum. This memorandum serves as a draft abstract for your semester paper.
- b. You submit to me a detailed outline of your semester paper. The outline should display a logical structure, along with sources. It is customary for the outline to change during the research and writing process, but starting with an outline helps guide those steps. The Assets for Excellence folder in the TWEN course materials has examples of successful abstracts and outlines from my fall public utility seminar, along with a document entitled "Suggestions for Producing a High-Quality Paper." During the research and writing process, you are welcome to submit non-casual thoughts or questions for my reaction. The earlier you seek this type of guidance, the likelier your final paper will succeed. I will not review full drafts, however; timing differences among student workloads from other courses would give some an unfair advantage.
- c. You submit the final semester paper in Word to (i) the client, (ii) the TWEN assignment box, and (iii) the registrar. Use proper Bluebook form. Margins should be about 1 inch (top, bottom, left, right), the paper should be double-spaced (except for footnotes), and the typeface should be 12-point Times New Roman (including footnotes). Filename: lastname.finalpaper.doc.

I have placed a document entitled "Suggestions for producing a high-quality paper" on TWEN in the folder called "Assets for Excellence." For the highest-quality papers, ***I will recommend publication*** and/or circulation by my regulatory colleagues throughout North America. One of my fall 2011 students and one of my fall 2013 students had their papers published in prominent industry journals.

Communications with the client: Most relationships will be physically remote. This reflects the reality of a national law practice in regulation. Remoteness requires special effort. You should have at least three direct (*i.e.*, phone or in-person) contacts with the client: to discuss the initial assignment, to give an interim update, and to present your findings orally after submitting the written assignment. These events are listed under Key Dates. You can and should have more contacts (email, oral or in-person), if useful to the client. Be conservative with your client's time. Avoid sending multiple emails; better to schedule a phone call if there is going to be more than a single exchange at a time. And please note: These clients are high-level people. They are enthusiastic about your project but will always have competing priorities. Assume there will be delays in their responses, so stay well ahead of your schedule. And alert me, without hesitation if you sense a communication breakdown.

Hours commitment: There is frequently confusion in clinics and practicums about hours commitment. I like simple. The faculty guideline for all Georgetown courses say that one credit should equal 3.5 hours of work each week (including class time). Five credits means 17.5 hours of work each week, or 227.5 hours over the 13 weeks. There is no use trying to divide these 227.5 hours, in some official way, between the "seminar" component and the "practicum" component. Everything is integrated: Your seminar work will help you serve the client, your client work will help your seminar work, and everyone will be helping each other's

client work through class discussions and through the pairings discussed in the next paragraph. So plan on averaging 17.5 hours a week, but aim to work extra early in the semester to avoid end-of-semester crunches.

Pairing with student colleague: While each student will have a distinct project, I will create pairs of students who work on different projects. Each member of a pair will be the other member's colleague—available to discuss, debate, devil-advocate, and advise. This approach helps each student master his/her own topic by having to explain it to someone else, while diversifying and deepening each student's exposure to current topics. Each pair should find a way to meet or talk at least once a week, for at least 30 minutes, to discuss each other's progress. This weekly, 30-minute interaction is mandatory. In the law practice world, no one ever works alone.

3. Oral presentation to class

Each student will make an oral presentation of his or her semester paper in class during Weeks 11 and 12. Each student will be a member of a pair: one member presenting (10 minutes), the other acting as commentator (5 minutes), then reversing roles. Depending on the number of students and our pace during the semester, I may revise the format and timing of these presentations. See TWEN, Assets for Excellence, for recommendations on making effective oral presentations.

Key Dates

(Some of these dates are "complete by" dates, as opposed to "do it on this date." Also, the dates listed below do not include the weekly assignments set forth elsewhere in this Syllabus.)

- | | |
|----------|---|
| Jan. 25: | First day of class. You receive client assignments from me (to be posted on TWEN) |
| Feb. 1: | You meet with me to discuss client assignment and semester paper. |
| Feb. 8: | By this date you contact client to discuss assignment. |
| Feb. 12: | You submit assignment memorandum to the client and post on TWEN. |
| Feb. 26: | You submit to TWEN your abstract and outline of the semester paper. |
| Feb. 29: | You meet with me to discuss abstract and outline. |
| Mar. 9: | You give interim report to client (including revised abstract and outline). |
| May 17: | You submit final product to client (combined with final paper in some circumstances). |

- May 17: By this date, you make oral presentation to client.
- May 17: You submit final seminar paper to TWEN and to the registrar. *If you are a graduating student, please say so on the cover page.*

Client Confidentiality

Treat all client communications as confidential. Do, however, explain to the client that we will be using the projects they have assigned, and information and insights we have learned in the interviews, as part of our compendia that will become public, but we will not attribute anything to any particular individual or organization.

Communicating with Me

Each student will meet individually with me twice times: (1) to scope out, initially, the student's topic for the semester paper; and (2) to review your abstract and outline of that paper. Other meetings are possible on request.

There is no need to cc me on communications with your client. But do feel free to email me separately with questions about the client work. Research always involves drilling dry holes before hitting a gusher, but there is no reason to spend 10 hours digging when I can save you nine hours with a three-minute email. You can also contact me about anything else: the course, the readings, or other matters of school or career interest. I am here to help you develop. For email dialogue, email me directly at shempling@scotthemplinglaw.com. For phone conferences, schedule by email via Andrea Ralph at aralph@scotthemplinglaw.com (no cc to me). Always give Andrea several time options; she will select one and let you know when and how to call me.

I usually arrive at the classroom Mondays by 8.15 a.m. for informal discussion. In past years, students have made productive use of this time by arriving early with thoughtful questions. Informal discussion does not require an appointment. However, at times I will have used this slot for a specific student appointment, and will let you know.

Grading

Seminar component: Weekly writing assignments (45%), class participation and presentations (15%).

Practicum component: semester paper (40%).

Attendance

Attendance at all classes is mandatory, except for illnesses, unavoidable interviews and unavoidable work conflicts. If you miss a class, be sure to get the class recording. Punctuality is also mandatory, as lateness disrupts. Treat each class as you would a job interview or a court appearance. Effective litigators always arrive early.

School closing or delayed opening: We will use Zoom. Follow these instructions:

Please begin this process **15 minutes before class** so that we can address glitches and start on time. I will be online at 8.30a. You are welcome to connect early and talk with me informally.

1. To join the class:

By **computer** (preferred, because we can all see each other): Go to our class url: <https://georgetown.zoom.us/j/3017543869>. Then follow the instructions below. I am told this url should work for PC, Mac, Linux, iOS or Android.

If your internet is not working, join the **class by phone**: +1 646 568 7788 (US Toll) or +1 415 762 9988 (US Toll). (For the phone call you need the meeting ID: 301-754-3869. For phone callers, the remaining instructions do not apply.

2. Once you've clicked on the meeting url, it will ask you to "test computer audio." Do so (testing the audio and the speaker).
3. Join the meeting.
4. Close your email program so that it does not beep during class.
5. I will mute everyone to reduce background noise.
6. If you wish to talk, go to "Participants" (bottom center of your screen) and then click "raise hand." I will call on you. Then **unmute** yourself. Be sure to mute yourself again after you finish talking.

* * *

You can become familiar with the Zoom program by going to <http://uis.georgetown.edu/zoom>. (Use this url only for becoming familiar. For our class use the url identified in Note 1 above. Our class url is available only for our class.)

If you have questions or difficulties about Zoom between now through Sunday, you can contact Christopher Ballantyne of the school's technology office. Email him at ballantc@law.georgetown.edu to request a meeting. His Zoom meeting place is: <https://georgetown.zoom.us/j/2026629796>. (And if you learn anything that helpfully amends this note, please share with me and the others.)

Weekly Readings and Assignments

Week 1: Regulatory Litigation: What Are Its Purposes? [Jan. 25]

Welcome to regulatory litigation. Perceptions of its purposes vary with perspective: The agency's perspective differs from the litigants' perspective; and litigants' perspectives differ from each other. Effective regulatory lawyers help their clients understand the agency's perspective. Rather than viewing the agency as a supermarket where the client shops to satisfy its self-interest, effective regulatory lawyers view the agency as statutorily obligated to serve the public interest. That public interest is bounded by the agency's enabling statute, as informed by the agency's experience and vision.

Pending before the D.C. Public Service Commission is the proposed acquisition of Pepco (and two affiliated utilities) by Exelon, a holding company that owns three other utilities. We will use this pending (soon to be decided) case to illustrate all the steps in regulatory litigation.

Readings for Week 1

At the District of Columbia Public Service Commission's web site, skim the case history for Formal Case 1119 (FC 1119), the proposed acquisition by Exelon of PHI Holdings. How? Go to www.dcpsc.org. Find box (upper left hand corner) for "eDocket System." Then hit button for "Search current dockets." Then at "Select Case Number," type "FC1119".) Chronology begins at p.71 (lower right hand corner) at bottom of page. (That page might be a higher number by the time you look. You're looking for the very last page, because that is where the docket starts chronologically). Page backwards, to get a feel for the steps and sequence. No need to any of the listed docs. Readings required in future weeks will be on TWEN.)

"Administrative Litigation at the FTC" (pp. 319-325)

Hempling, *Energy Law Journal* article, "Litigation Adversaries and Public Interest Partners" – This article the main guide to the course. Read Introduction closely; skim the full piece to get an overview of the course subjects. We will read the entire piece during the semester.

Hempling, Hearing Preparation Thoughts (read in full)

Hempling, *Preside or Lead: The Attributes and Actions of Effective Regulators* (available at Gtown bookstore): Preface, Chapters 1–4, 11–12, 17, 26–28

Read entire syllabus (available on TWEN by Dec. 28. Email any clarifying questions to me by Sat. 3p before first class)

Skim Exelon-Pepco Application (you will read in detail for Week 2)

Review all practicum project options (to be posted on TWEN by Jan. 10)

Assignment for Week 1

[by Saturday 23 Jan. 3p] Post resumes on TWEN (Assignment Box for Week 1) , and circulate to the full class.

Week 2: Substantive Focus: Mergers of Public Utility Monopolies [Feb. 1]

Since 1985, there have been dozens of utility mergers, involving litigation at the Federal Energy Regulatory Commission, the Federal Communications Commission and state utility commissions. Most of these cases have involved full-blown hearings comprising all phases of administrative litigation and producing a range of outcomes: settlements, agency approvals, agency disapprovals, judicial affirmance and judicial reversal. This week's class will provide an overview of merger substance and vocabulary so that students will have a substantive context for the litigation steps we will address. I do not expect you to master technical details but you should develop in your mind a "table of contents" to merger issues, including the areas of likely disagreement among parties—since disagreement is why we have litigation. Think about the tensions among (a) the merger applicants' goals, (b) various parties' interests and (c) the regulator's statutory obligations. In short – What does the litigation process need to air and resolve?

Also assigned are two short handouts on oral presentations and writing skills. Since you will be doing much speaking and writing for the next 12 weeks, I'm sharing ideas I've compiled from observing past student efforts. Applying the basic "dos and don'ts" from these documents will give you a good foundation from which you can grow your skills.

Readings for Week 2

Hempling, "Corp Structure and Mergers":² Read the Overview and these sections: 12.A, 12.B, 12.C.5; 13.A, 13.B.2, 13.B.3, 13.C (but skip 13.C.2) , 13.D.1, 13.D.6 [Disregard cross-references to other book chapters]

Hempling Testimony in the Exelon-PHI Case, section I.A only (re legal standards)

Re-read Exelon-PHI merger application, this time closely. Be prepared to discuss which of the concerns described in the draft Hempling chapters apply to the application—and which therefore should be explored in the litigation

Review the four diagrams (corp structure general, Exelon-Constellation, Exelon-PHI, corp. structure regulation options), to understand the types of issues that arise in utility merger cases

² These are draft chapters to the second volume of my treatise on public utility law. The first volume, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* was published by the American Bar Association in 2013.

Fitch Ratings report on merger (optional)

Preside or Lead, Chapters 5–10

Oral presentation guidelines (on TWEN in Assets for Excellence folder)

Writing guidelines (on TWEN in Assets for Excellence folder)

Assignment for Week 2

Submit analytical paper: Write anything about the merger readings that stimulated you. Examples: Concepts that surprised you and why; questions about merger law or policy for us to discuss in class (the more questions the better; do not worry if you don't understand a concept; worry only if you don't understand and don't ask about it); issues presented by the Exelon-PHI Application that you think should be explored at hearing. Be sure you understand enough about merger issues to identify and address issues for litigation.

Week 3: Framing the Proceeding, Organizing the Hearings [Feb. 8]

Any regulatory proceeding begins with an initiating document. If initiated by a private party, it could be that entity's application for approval of some action, or that entity's complaint against some other entity. If initiated by the agency, the document could be a proposal for a new rule or a draft policy statement. This initiating document is the initiator's opportunity to frame the proceeding.

Framing determines the relative emphases given to private interests and the public interest. Regulation always involves the interaction of these two things: the private interests of the applicant and intervenors, and the public interest as defined by the applicable statute and applied by the agency and the courts. The purpose of a regulatory proceeding, like the purpose of regulation, should be to align the private interests with the public interest. Two key steps in achieving alignment are framing the proceeding and organizing the hearings. Agencies differ in how, and how well, they achieve this alignment.

For a regulatory agency, framing a proceeding involves identifying the problems it wishes to solve, and therefore the questions it needs to explore. For an *agency*, framing means placing at the center of the case these questions: What are the public interests at stake in this proceeding? How do the parties' private interests diverge from the public interest? What actions must we, the agency, induce the parties to take so that they pursue the public interests we have identified? For the *private parties* that initiate or intervene in the proceeding, framing means something different, something blunter: How do we get this government agency to give us what we want?

So an agency proceeding typically begins with a struggle: Whose framing will prevail? Is the purpose of this proceeding to give the applicants what they want, or is the purpose to advance the public interest as defined by statute? If the agency sets for hearing only the

applicant's request and the applicant's arguments, it risks subordinating public interest to private interest. If, on the other hand, the agency turns every application into a forum on the industry's future, it becomes difficult for applicants to achieve legitimate business objectives timely.

Separate from framing the case is organizing the hearings. Some agencies organize hearings around parties, each party presenting its witness for cross-examination. Other agencies organize hearings around issues, where multiple parties' witnesses appear simultaneously to dispute their positions. Another organizational dimension is who leads the questioning. Most agencies leave the questioning to the parties' lawyers; in other agencies, the commissioners or hearing examiners lead the questioning. These different approaches produce different kinds of evidentiary records and lead to different types of decisions.

In this week's readings, consider first the parties' competing efforts to frame the case: Exelon and PHI utilities through their application to the Commission (assigned last week) and their CEOs' testimony, the intervenors through their issue filing. Then see the Commission's response: the "hearing order" that frames the case.

Readings for Week 3

Framing section in Hempling, "Litigation Adversaries and Public Interest Partners"

Skim again the Exelon-PHI application assigned last week.

Crane Testimony **or** Rigby Testimony. (These are the CEOs of the merging companies. Their testimony reflects how they wish the case to be framed.)

Exh. 5 Applicant commitments (These are the offerings Applicants made initially; they are part of the Applicants' strategy for framing the case in terms of benefits rather than risks)

WV PSC Order instituting General Investigation of chemicals in water; excellent example of concise framing. Skim all, focus on highlighted 2 pages.

GRID2.0 Issue Filing (This is how my client sought to frame the case.)

DC PSC Order on Scope (This is how the Commission framed the case) Skim through para. 68 to get a sense of what the various parties see as the issues; *read closely* paras. 87-89, and 115-125 to see the Commission's decision on scope of issues).

Montana PSC: October 2004 *Statement of Factors For Evaluating Proposals To Acquire NorthWestern Energy*. (A contrasting example of how a regulatory agency framed a merger case)

Framing Interviews (skim)

WSJ article (optional)

<http://www.andrewskurth.com/pressroom-publications-FERCCasesRequireKnowledgeofFactsandPolicy.html> (Optional: short article on FERC litigation practice)

http://www.nytimes.com/2014/01/20/opinion/fixing-disability-courts.html?_r=0
(Optional: Interesting article on admin litigation at the Social Security Administration:

Preside or Lead, Chapters 26–28, 41–42, 55–56, 59

Assignment for Week 3

Analytical paper: Choose one or more of these topics, alone or in combination:

Given what you know about merger issues, do the utilities' application and CEO testimony frame the proceeding effectively—from their perspective?

If you intended to oppose the acquisition, or were worried about its effects, how would you attempt to reframe the case so as to influence how the Commission frames the case?

What is your evaluation of how well the DC PSC framed the case? If you were the Commission, how would you have framed the case differently?

How might the PSC's framing of the case affect the subsequent steps in the litigation? (You can only guess about this now, but by the end of the semester you'll be able to give a detailed answer.)

Week 4: Pre-Filed Expert Testimony [Feb. 18 *This is a Thursday*]

In most agency adjudications, the most important part of the evidentiary record is the expert testimony. Usually experts submit their testimony prior to the hearing, in written, question-and-answer format. The in-person hearing then consists of primarily of cross-examination on the pre-filed testimony (once the witness's lawyer introduces the witness and moves the pre-filed testimony into the record as if all the written questions had been asked orally and all the written answers had been given orally). Despite all the drama around oral hearings and cross-examination, the pre-filed testimony is the core of any party's case. It is the main evidence on which a party relies to advance its position.

Although the official author of expert testimony is the expert witness, the lawyer leads the preparation. There is a simple legal equation:

Agency decision = law plus facts plus judgment

The lawyer, knowing the law, ensures that the expert witness offers the facts and judgment that, when fitted to the law, produces the desired agency decision. The lawyer also works as editor

and strategist, (a) ensuring that the witness's judgments are sound and based on facts in the record, and (b) anticipating all vulnerabilities likely to emerge on cross-examination. The lawyer also uses discovery to help the witness gather the facts necessary to support her testimony. A solid working relationship between expert and lawyer is essential to success in regulatory litigation. This week explores the facets of that relationship.

The pre-filed testimony phase can have sequential rounds: direct, answering, rebuttal, surrebuttal, even sur-surrebuttal. Intervenor testimony is written after initial discovery, but then there is discovery on the testimony.

Readings for Week 4

You already encountered pre-filed testimony, from the two Applicants' CEOs, in Week 3. For this Week 4, the assigned readings include other Applicant testimonies, plus testimonies from two intervenor witnesses: myself and Richard E. Morgan. (Morgan is a former Commissioner on the DC PSC, here testifying for the DC Office of People's Counsel.) Also pick one of the Applicant rebuttal testimonies. (There is no surrebuttal in DC, so the Applicants have the last word.) In these readings, don't worry about any technical discussion you can't understand. Focus on grasping how testimony serves the forum's needs, and how the facts and opinions in the testimony interact with the law to make a case.

Testimony section in Hempling, "Litigation Adversaries and Public Interest Partners"

Federal Energy Regulatory Commission, "Expert Witness Briefing Book" (handout) 1-11, 43-62, 64-70

Hempling, Exelon-PHI Testimony (Read all of Intro subpart B (Overview), all of Part I, plus all of any other single roman numeral part; skim the remainder; purpose is to get a full picture of all issues)

For other Direct Testimony on TWEN (Smith, Wilson, Alden, Khouzami, Lapson, O'Brien, Solomon, Morgan): Pick one to read closely, and two others to skim.

Exelon Rebuttal Testimony (Crane or Rigby) Pick one to read closely, one other to skim.

Testimony interviews (skim)

Preside or Lead, Chapters 42–46

Assignment for Week 4

Analytical paper: Pick an intervenor witness testimony and the rebuttal to it. Assess: What elements were effective or ineffective? If you were the witness's lawyer, what would you have changed? Where is there vulnerability on cross-examination?

Week 5: Discovery [Feb. 22]

Discovery is how the parties gather information about each other's positions. If handled efficiently, discovery saves time by allowing the actual hearing to consist of truth-testing and policy-probing, rather than information-gathering. Discovery finds the facts and insights that are necessary to support the final agency action. This week explores the following questions: (1) What are lawyers' techniques for gathering the necessary information? (2) How do lawyers tame their questions and organize the responses to avoid drowning in information? (3) How do lawyers work with their own experts to gather information from opposing experts? (4) How forthrightly do experts respond to discovery requests? (5) What are the legal boundaries on appropriate discovery? (6) What behaviors obstruct discovery? (7) What actions can agencies take to simplify and speed discovery? (8) When are protective orders and confidentiality appropriate—or put another way, when is it appropriate for the agency and the parties to agree to keep information secret from the public?

Lawyers can ask discovery questions (commonly called "discovery requests" or "DRs") based on the proceeding's initiating document (e.g., the application or the complaint), pre-filed testimony, documents submitted by parties to other agencies (such as the Securities and Exchange Commission), press reports, witness resumes or any other source.

Information gathered through discovery is not officially "evidence" (i.e., the agency cannot rely on it in rendering its decision) until the agency admits the information into the official record. Agencies vary in the paths by which information enters the record. Some commissions place all discovery responses into the record automatically (unless excluded based on objections). An example is the "MT Stipulation to enter DRs into the record" in your readings. Other agencies require parties to put specific discovery responses into the record as exhibits accompanying pre-filed testimony, or as exhibits used by lawyers to cross-examine witnesses.

Readings for Week 5

Discovery section in Hempling, "Litigation Adversaries and Public Interest Partners"

Federal Energy Regulatory Commission, "Expert Witness Briefing Book" pp 11-24

Grid2.0's response to Joint Applicants' data requests (DRs) (skim entire doc; read closely at least 8 questions/answers that you select)

Responses to GRID2.0 DRs (skim entire doc; read closely at least 8 questions/answers)

Examples of objections to discovery requests

Hempling responses to DRs to OPC in Maryland (optional)

Discovery matrix (look at closely and be prepared to discuss in class)

Montana Stipulation to enter DRs into the record (example of one path by which discovery materials enter the evidentiary record)

Confidentiality Agreement (skim)

MT PSC Protective order (skim)

Media Objection to Protective Order (skim)

Great Falls opinion (optional: it's about protective orders)

ALJ Glazer discovery plan (skim)

Discovery Interviews (skim)

Preside or Lead, Chapters 50–56

Assignment for Week 5

In the Week 5 materials, there are four testimonies submitted by witnesses for the Applicants: Khouzami, Gould, Lapson and O'Brien. Pick one witness, and draft 1–2 single-spaced pages of discovery requests. What do you want to know from this witness, in advance of the hearing, so that you can ask good questions at hearing (and prepare rebuttal testimony, if you are an opponent)? When asking a question about a specific witness statement, always begin the question with a reference to the specific source (witness, page, line). No need to quote the passage you are asking about.

Be prepared to discuss in class: Of the DRs and responses that you read in the DC PSC, which questions and answers were more effective than others? Why?

Week 6: The Formal Hearing: Cross-Examination [Feb. 29]

The main purpose of the formal adjudicatory hearing is to hear from the live witnesses. Since they have pre-filed their testimony in writing, the hearing consists mostly of cross-examination. The typical approach is for each party, beginning with the applicant or complainant, to present each of its witnesses before the next party presents each of its witnesses. (We will discuss the pros and cons of this approach in class.) In federal agencies, the formal hearing is almost always before an administrative law judge (ALJ, sometimes called a hearing examiner), rather than the commissioners. Some state agencies use administrative law judges; others hold their hearings in front of the commissioners (especially in large, prominent cases). Some agencies allow opening and closing statements by the lawyers, and/or opening statements by the witnesses. But most of the hearing consists of examination of the witnesses, by opposing parties and by the commissioners and/or ALJ.

In regulatory litigation, the purpose of cross-examination is not to stun a jury into granting a verdict; the purpose is to gather facts and admissions to put in one's brief. When playing offense, the cross-examiner aims for infield singles, not home runs. When playing defense, the cross-examiner aims to narrow a witness's testimony, to reduce the witness's persuasiveness. Because the witness usually knows her issue better than does the cross-examiner, knockouts are rarely sought and even more rarely achieved.

Cross-examination is easy to do poorly, exceedingly difficult to do well. It requires subject mastery, time management, paper management, articulateness, poise under pressure, and the combination of confidence and humility that tells one it is time to stop. In my experience, it takes 10 hours of preparation for one hour of cross (assuming I have already mastered the case). This week will address principles of good cross-examination, focusing on both preparation and conduct.

Readings for Week 6

Cross-examination section in Hempling, "Litigation Adversaries and Public Interest Partners"

Federal Energy Regulatory Commission, "Expert Witness Briefing Book" (handout), 31-42, 62-64

Witness Intro script

Cross ex guidance

Cross ex plan: create your own version of this spreadsheet

Re-read Hempling hearing prep thoughts (In Week 1 materials)

Read at least one-half day of a transcript from the MD PSC's hearing on the merger (posted on TWEN in Week 6 materials). Day 3 (beginning p.619) and Day 4 have the cross of Crane and Rigby. Cross of Rigby starts on Day 4 at p.1055.

Hearing interviews (skim)

Preside or Lead, Chapters 13–15

Assignment for Week 6

[All students do all three assignments. Submit #1 as a single doc to TWEN by the Sat. 3p deadline. For #2 and #3, make your own notes but do not submit to TWEN]

1. For any one of the Exelon witnesses whose testimony was included in prior weeks' material: Draft 2 pages of cross-examination questions, across 2-4 separate topics. (Caution: Drafting cross questions is high-precision work. Imagine building a watch from scratch—that kind of precision. Always begin the question with the page and line number of the passage you are addressing.) On the doc be sure to state your purpose for each line of questions.

2. Prepare to cross-examine former Comm. Richard Morgan, who appeared as a witness for the DC Office of People's Counsel in the DC PSC case. Address his direct and supplemental testimony (both included on TWEN in the Week 6 materials). Each student will have 7 minutes. Aim to achieve as much as possible.

3. Prepare at least three informal questions to ask of Comm. Morgan in the second hour of class. Ask anything about regulatory litigation: running hearings, being a witness, being a Commissioner, internal deliberations, settlements, anything relating to the course subjects.

Overview of Weeks 7-10

The current debate over the Exelon-PHI merger gives us a real-time opportunity to address the remaining course topics. This 2 March version of the syllabus therefore modifies the readings and assignments for each of Weeks 7, 8, 9 and 10. The roles and subjects for the assignments appear on an Excel spreadsheet separately posted to the main Course Materials page on TWEN. I have reduced the readings previously on the syllabus, while assigning substantial new readings from the two commission orders

The Excel has the plan. It has the required readings from the two PSC orders, as well as the roles assigned for each week. The specific assignments are described below under the appropriate week. We will focus on 6 subjects. Everyone will study all 6 subjects, will do all the same reading, then will play different roles.

The organization of these four weeks is complex but should not be confusing, if you study the syllabus and the Excel carefully. Please—any questions send to me soon so I can clarify things.

All students will read all the identified paras in the two DC orders (Aug 2015 and Feb. 2016), both of which are re-posted to the main Course Materials page on TWEN. (The fact that some paras are highlighted and some are not is irrelevant.) In the Feb. 2016 order be sure to keep track of who is writing. There is a majority decision (Kane and Fort), then three separate opinions by each Commissioner. I assigned nothing from Comm. Phillips because his opinion does not go to the subjects we are addressing.

Quick explanation of the two PSC orders: The August 2015 order rejected the merger 2-1. Chair Kane and Comm. Fort voted to reject; Comm. Phillips voted to approve. Then the companies persuaded most of the intervenors to agree to something called the NSA (non-unanimous settlement agreement). That NSA came to the Commission for special hearing in December. Then on Feb. 26, 2016, the Commission voted 2-1 to reject the merger as modified by the new settlement agreement. But the voting now is very different. Comm. Phillips continues to support the merger with the new NSA. Chair Kane opposes the merger, period. Comm. Fort voted with Kane to reject, but has offered "benefits" which if accepted by the companies would cause her to vote for the merger. So while the Feb. 2016 order looks is technically a 2-1 rejection, it is actually a 2-1 in favor if the parties make some kind of deal acceptable to Comms. Fort and Phillips.

In addition to carrying out these four assignments, each student will watch two hours of hearings, at some point prior to the last class of the year. The urls for these hearings are on a separate doc on the main Course Materials page on TWEN. The sooner you watch them the more it will help you with other assignments. Try to watch different segments on different days, to see different styles. Keep track if possible of who is doing the talking so it can inform our discussion. I will ask you to share in class your impressions, focusing on these questions: Concerning the attorneys and witnesses, what performances were effective and ineffective, and why? Concerning the conduct of the proceeding by the PSC, what was effective and ineffective, and why? All are in the DC PSC case, except for the last one, which is my witness appearance in Hawaii in January.

Week 7: Settlements [Mar. 14]

In cases that are susceptible to settlement, parties frequently begin settlement talks once the expert testimony has been filed, then continuing those talks during the hearing weeks. (This reality makes hearing days very long and emphasizes the need for completing your preparation well before the hearing. Effective lawyers do not prepare their cross the night before; they

prepare it weeks before and then review it the night before.) There are different schools of thoughts on the appropriateness of settlements. One school views settlements as unambiguously positive, arguing that they save resources and encourage amicability. Another school views the term "settlement" as a misnomer because parties cannot "settle" an administrative case; only an agency decision can dispose of an agency case. This view holds that when agencies accept settlements, they risk delegating public decisions to private parties. This week, we will explore these different ideas, as well as the relationship between litigation strategy and settlement strategy.

Readings for Week 7

Settlement section in Hempling, "Litigation Adversaries and Public Interest Partners"

Littlechild on settlements (pick any one of four articles). Littlechild was appointed the chief regulator of the United Kingdom's electric industry in the 1990s. In past years he has been available by email to comment respond to questions about his articles.

Owen Fiss, "Against Settlements" (skip footnotes)

Preside or Lead, Chapters 48, 50–52

Assignment for Week 7

There will be three sets of negotiations. The subjects and role-players are on the Excel. Each set of subject negotiations will be conducted by a pair of students, for 15 minutes. The other four students will observe and evaluate. After the 45 minutes are complete, we will offer our observations, and also discuss the assigned readings.

Writing assignment due 3p Saturday before class: Prepare a 1-2 page outline of the points you will seek to achieve (or avoid) in the negotiations. Post to TWEN. Your negotiating partner will not see your doc beforehand; but if you wish you can bring a copy and provide it to your partner to help guide the negotiations. You can use the whiteboard also.

Week 8: Briefing to the Agency [Mar. 21]

The purpose of briefing is to present to the decisionmaker a party's solution to the proceeding's legal equation: the *facts plus law plus judgment* that produce a desired decision. The brief represents the culmination of all the work involved in framing, hearing organization, discovery, expert testimony and cross-examination. Briefing occurs when there is no settlement (although sometimes an agency requires briefs in support of the settlement, especially if some parties oppose the settlement – which is why, in my view, we should not call them "settlements.") Most proceedings allow an initial brief and a reply brief; sometimes filed by the parties simultaneously, sometimes sequentially. Each type of brief involves different strategic thinking. This week will discuss the elements of persuasive and unpersuasive briefs, particularly from the perspective of the decisionmaker.

Readings for Week 8

Read briefing section in Hempling, "Litigation Adversaries and Public Interest Partners"

Read one of two briefs (both would be better, if you have time): Applicants' brief in the Maryland PSC proceeding on Exelon-PHI; State of Maryland's brief in the Maryland PSC proceeding on Exelon-PHI. These two briefs are both comprehensive, high-quality jobs. Your careful reading will show you how the authors have integrated every step we've studied—statute, hearing order, discovery, pre-filed testimony and cross-ex results—into arguments for and against the merger. From Table of Contents to Conclusion, both briefs exemplify the professionalism you will want to achieve in your careers.

Assignment for Week 8

Due 3p Sat. before class: Each student will write a 750-1000 word brief to the agency, taking on the subject and role assigned by the Excel. Be sure to apply facts, law, and judgment. Don't worry about introductory material; just write persuasively about your assigned topic.

Week 9: Deliberations and Orders [Mar. 28]

A regulatory proceeding culminates in a commission order. A successful order achieves the relevant statute's objectives by applying law to facts, using reasoned judgment where the facts allow for multiple possible outcomes. Regulatory orders can be narrow or broad; they can dispose only of the unique matters at issue, or they can declare policies that set precedents. This week we will study the MD PSC order in the prior Exelon merger case, identifying its strengths and weaknesses. We will also discuss the types of deliberative processes that take place inside agencies.

Readings for Week 9

Deliberations section in Hempling, "Litigation Adversaries and Public Interest Partners"

Preside or Lead, Chapters 11–12 (re-read), 18–25

Assignment for Week 9

Assignment due 3p Saturday before class: Each student will write a 750-1000 word agency opinion on the subject assigned by the Excel. Skip all the introductory background; assume the facts have been set out earlier in the order. So, discuss the facts only as necessary to reach a solution. Use what you know from the orders and testimony you have read. If there is a gap in your knowledge of the issue, tell me early and I will connect you with the relevant materials. But the Commission's August order pretty well sets out all the arguments everyone made. Be sure to apply the law and protect yourself from appellate review.

Week 10: Judicial Review; Institutional Organization [Apr. 4]

Judicial review ensures that agencies act consistently with their enabling statutes, exercise discretion rationally, and treat parties fairly. By design, appellate review does not usually assess the wisdom of agency actions, as long as those actions are lawful. The line between unwise and irrational can be thin, however; and many agencies, many times, have crossed it. This week, we will look at examples of how courts view agency decisions, as well as discuss the role of the lawyer in defending and attacking agency decisions.

Readings for Week 10

Judicial review section in Hempling, "Litigation Adversaries and Public Interest Partners"

Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.

City of Arlington v. Federal Communications Commission.

Preside or Lead, Chapters 33–35, 59

Assignment for Week 10

Students will present oral appellate argument on each of the six issues, with the sequence and assignments stated on the Excel. You are challenging or defending an agency opinion. Each person-subject will have 7 minutes. We will go subject by subject, alternating between Applicant and Opponent. For example: We will start with Merger benefits. Andreas will argue for the Applicants (7 minutes); then Megan will argue for the opponents. Then we will go to the next subject.

What agency opinion will you be challenging or defending on judicial review? The opinion written by your peer. So, as shown on the Excel, Andreas and Megan will be arguing about Jen's order on merger benefits. Who will go first, as between Andreas and Megan, will depend on which side Jen's opinion favored. Etc.

So: The people who write orders must, prior to this week, send their orders to those who will argue about them. No written assignment; but preparation is critical to success. Arrive at class 10 minutes early to prepare; silence in the room.

Weeks 11 and 12: Student presentations [Apr. 11, Apr. 18]

Students will present to the class their recommendations on ways to improve the regulatory litigation process. Students will present in pairs: one offering her recommendations, the other asking questions and commenting, then reversing roles. The presentation will be 10 minutes; the questions and comments 5 minutes. See suggestions on oral presentations in the Assets for Excellence folder.

Week 13: Effective Regulatory Litigation: Recommendations for Change [Apr. 25]

We will close as we began, by now answering these questions: What constitutes excellence in regulatory litigators, litigation procedures and institutional decisionmaking? What career paths and self-education steps will help each student become known as the person in the hearing room and at the agency most committed to "getting it right?"

Readings for Week 13

Preside or Lead, Chapters 53–57, 59. No written assignment.