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**REGULATORY POLICY PAPER
THE USE OF U S ADMINISTRATIVE LAW
CONCEPTS IN GEORGIA**

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REGULATORY POLICY PAPER: THE USE OF U.S. ADMINISTRATIVE LAW CONCEPTS IN GEORGIA

Introduction

Since the dissolution of the Soviet Union in 1991, Georgia has struggled with its efforts to reform to a market economy. An important component of the reform process has been the development of new regulatory institutions, such as the Georgian National Electric Regulatory Commission (GNERC), to regulate the energy sector.

Parliament created GNERC in the Electricity Law of 1997, which established the Commission as a three-member independent regulatory body with comprehensive authority to regulate the rates, terms and conditions of service of the electric sector through a system of licenses and tariffs. The Electricity Law states the Commission's authority and, to a limited extent, identifies the procedures that the Commission is to use in exercising its authority. The Electricity Law appears, however, to be incomplete, in the sense that it fails clearly to define the range of procedures that the Commission may use in promulgating rules and regulations and in making decisions. Georgia has, moreover, neither an Administrative Procedure Act (or equivalent statute) nor a body of court-made law on which GNERC may rely in deciding how to address important regulatory issues or individual cases.

This paper begins with a review of the Electricity Law, to evaluate the Commission's organization, structure, and authority as compared with the model of independent agencies developed in the U.S. It then examines administrative law concepts developed in the United States to analyze whether GNERC may usefully borrow administrative concepts or techniques from the U.S. in the process of regulation.

The Independent Regulatory Agency Model

In the United States, as in Georgia, the power to regulate is vested in the legislative branch. A legislature may delegate the power to regulate to the executive branch, some states in the United States have done just that. For the most part, though, legislatures in the U.S. confer the power to regulate on "independent" agencies, entities that are shielded, but not totally immune, from political pressures, and which are not fully subject to direction by either the executive or the legislative branch. The degree of independence and political accountability vary considerably, and is a function of several factors.

Appointment or election

In some jurisdictions, the executive appoints agency members, with or without the advice and consent of the legislature. In others, agency members are directly elected by voters. Clause 6.1 of the Electricity Law provides that the President appoints the three members of the Commission, review or approval of the President's choices by Parliament is not required.¹

Multiple members

A multi-member agency (usually three, or five, or seven members, always an odd number to prevent tie votes on regulatory issues) promotes independence by making it more difficult to focus political pressure on single individual, by promoting joint responsibility, by sponsoring debate among members, and by extending continuity. The Georgia Commission, of course, consists of three members.

Terms of office

A lengthy term of office tends to promote the independence of individual regulators, with five to seven years being the most common range. Under Clause 6.3 of the Electricity Law, the term of the GNERC commissioners is six years. Clause 40 of the EL staggers the initial terms of office of the commissioners, such that the President may appoint a new commissioner only every two years, which also serves to enhance continuity.

¹ There is perhaps no "right" way to appoint regulatory commissioners, only different ways, with different results. During a regulatory study tour of the United States in July, 1998, the Georgia commissioners visited three state utility regulatory agencies, each with a different method of selecting commissioners, and each with different styles and substances. The Georgia Public Service Commissioners are directly elected by the voters. GNERC visited the Georgia Commission on the day that it held its fortnightly public meeting, which was televised and took place in a room crowded with members of the public and representatives of the regulated industries. The PSC commissioners robustly debated the matters on that day's agenda. The electric rates in Georgia are on the low end of the national scale.

GNERC also visited the Virginia Corporation Commission, where the Virginia legislature selects the commissioners. Although the Corporation Commission has a handsome, well-appointed room for public meetings, the Commission's staff advised that the Commission rarely meets in public and does much of its business behind closed doors. Rates in Virginia are in the mid-range of national rates.

GNERC also visited the New York Public Service Commission, whose members are nominated by the Governor, and must be approved by the legislature. The New York Commissioners are widely perceived to be among the most professional in the country, and meet publicly, like their counterparts at the Georgia PSC. Unlike Georgia, however, electric rates in New York State are the highest in the country, and the PSC had recently decided that competition as the pricing mechanism, not regulation, would best serve the public interest.

Political affiliation

In the United States, statutes generally limit the members who are members of the same political party to a bare majority (e.g., a five-person agency may have a maximum of three Democrats or Republicans). Such a feature precludes the executive from “packing” an agency with members from the same party. In Georgia, the problem of political affiliation is dealt with simply and elegantly, Clause 19 provides:

The members of the Commission shall discontinue the membership in any party. The creation of political or social organizations within the Commission is prohibited.

Removal from office

Perhaps the most important single guarantee of independence is protection against the removal of an agency member from office except for cause. If the Secretary of a federal executive department makes a decision with which the President profoundly disagrees, the President may simply fire that Secretary. Not so the members of independent agencies, as to which the President may be limited to appointing someone else the next time around, if the President is still in office. The Electricity Law (Clause 7) so protects the GNERC commissioners, whom the President may remove from office only in certain limited, and clearly defined, circumstances. Clause 7 also gives a commissioner dismissed by the President the right to appeal the decision to the courts.

In sum, the Georgia Commission compares well with its counterparts in the United States, in terms of the factors relevant to the independence of the agency. To state it differently, the American administrative experience has little to offer GNERC in terms of those parameters. We turn to the agency’s authority under the Electricity Law.

GNERC’s Power to Decide

Independent agencies in the U.S. are often said to represent a fourth branch of government. One of their unique aspects is that they may exercise the powers of the other branches, in particular the legislative and judicial. The administrative analogue of legislation is rulemaking, while the agency adjudication is the analogue of a court trial. Rulemaking, like legislation, produces law or policy for the future. Adjudication involves the evaluation of past conduct. Rules, like statutes, are general in form, addressed to the world, and are prospective in nature. Adjudication involves an existing dispute or matter between particular parties (one of which may be the agency itself), with the resulting order binding only on the participating parties. As discussed below, in the U.S. the rules governing each of these procedures are fairly well-defined, and universally understood by regulators and regulatees alike.

Agencies conduct the bulk of their work in rulemakings and adjudications. The Electricity Law, however, specifies neither of these forms of procedure for the Georgia Commission.

Clause 4 5 of the EL defines the Commission's main functions

- a Set the rules and requirements, grant, modify, discontinue and revoke generation, transmission, dispatch, and distribution licenses * * *
- b Set and regulate wholesale and retail tariffs for electricity generation, transmission, dispatch, distribution, and consumption,
- c Within its competence, resolve disputes between generation, transmission, dispatch, and distribution licensees, and between licensees and consumers,
- d Establish control over the conditions of the licensing, and for violation of the conditions, shall combine the relevant administrative sanctions, which are determined by the existing Georgian legislation

The quoted functions describe what the Commission is to do, but does little to specify how it should do it Clause 5 makes a distinction between rules, which the Commission is to adopt by "resolution," on one hand, and "decisions," on the other "Rules," as delineated in Clause 5 1, include

operational rules and procedures, rules for receipt and review of licensing and tariff applications, rules and requirements for granting, modification, discontinuation, or cancellation of the license and procedures for consideration of the arguments * * *

A "decision," in contrast, seems to be an adjudication, as defined in Clause 5 2 "On each particular issue, considered in the present law, the Commission within its competency makes decisions" Thus, the Electricity Law seems to make the distinction, familiar to U S administrative law, between "rules" and "orders" The problem is that the Law doesn't say what procedure the Commission is to use in adopting rules or issuing decisions² Indeed, Clause 23 of the Law, which addresses licensing, simply provides that the Commission "shall establish procedures necessary to implement the requirements of the present Law" It therefore appears that the Electricity Law gives the Commission the relative freedom to adopt whatever procedures seem best suited to the task of regulation We turn, then to the standards for rulemaking and adjudication, as enunciated in U S administrative law

² The only other instructions in the Electricity Law relevant to procedure appear in Clause 11 1, which requires GNERC to give "careful consideration" to certain national policies, and Clause 11 2, which instructs the Commission to "allow the interests of the consumer to be represented" In tariff cases, as discussed elsewhere in this paper, Clause 37 generally provides that the Commission shall proceed pursuant to procedures that GNERC itself is to adopt Clause 37 does not, however, state what those procedures should be

U.S Administrative Law Principles for Agency Action

As noted, the bulk of administrative agencies' work is conducted in two types of proceedings, rulemaking and adjudication

Notice and comment rulemaking

Notice and comment rulemaking procedure seems ideally suited as a regulatory tool for GNERC, especially at this early stage of its development as an agency. The fundamentals of the procedure are as follows

Public notice The Commission would initiate notice and comment rulemaking by giving public notice of a regulatory initiative. The public notice would

- ▶ If possible, present the text of the regulation or policy proposed for adoption
- ▶ Include a statement of the regulatory problems being addressed and the proposed solutions, as reflected in the proposed regulatory text
- ▶ The Commission might solicit comments on specific questions or issues

The notice would invite anyone interested in the proposed rule to submit comments, no economic interest or other qualification need be shown by a commentor. Rather, the Commission should welcome comments by all. The Commission might, however, send copies of the notice directly to those with the most direct interest in regulatory issues, licensees and interested Ministries

Comment period The notice should provide a reasonable period for comments. There is no standard "reasonable" period for comments, and the selection of the deadline for comments is left to the agency's discretion. In the U.S., many proposed rules seem to have a comment date of sixty days from date of publication, GNERC may select longer or shorter periods, depending on the complexity of the rule and the Commission's assessment of how long it will take the sector, which is for now relatively unsophisticated in regulatory matters,³ to gear up to respond

Contents of comments Parties interested in proposed rules may submit any comments, and any data or other material, that they believe relevant to the subject matter of the rulemaking

³ It has, for example, taken the Commission many months and many iterations to get some of its licensees adequately to respond to requests for cost data, in connection with the first cost-based tariff proceedings. GNERC has had to educate the licensees as to the reasons for the cost data requests, and the meanings of various "cost" categories. The same process may be necessary or appropriate for all regulatory initiatives, at least for a while

Final rule After considering comments on the proposed rule, the Commission may issue a final rule⁴ The final rule should consist of two components the rule or regulation itself, and an explanatory statement In the statement, the Commission should take the opportunity to state the basis and purpose of the rule, and also to respond to the comments that it received on the proposed rule that it deems significant Where a comment has merit, and persuades the Commission that some aspect of the proposed rule should be changed, the Commission should so state, where a comment opposed a feature of the proposed rule but the Commission is not persuaded that it should make a change, it should explain why

Advantages of rulemaking As earlier noted, notice and comment rulemaking appear ideally suited to the initial stages of the Commission's development We believe that the inclusive nature of this procedure will enhance GNERC's stature and legitimacy by promoting the following values of transparency and predictability

Transparency Managers and employees of the Soviet-era electric (or any other) sector experienced the "black box" model of management and control, in which instructions issued from those in charge without explanation, and often without a perceptible rationale Often, decisions could neither be understood, nor were they meant to be For the average worker, and even for a great many managers, the system for decision-making was opaque

In a notice and comment rulemaking, in contrast, the Commission would engage in decision-making in a most public way In the proposed rule, the Commission is called upon to disclose its rationale for the regulatory initiative, and its principal features, in the final rule, the Commission recapitulates its rationale and also responds to significant public comments on the proposed rule The Commission's decision-making process is, in short, there for all the world to see Moreover, anyone may comment on a proposed rule, which will further tend to enhance public confidence and acceptance of the Commission's authority

Predictability One of the qualities that regulated companies most prize in their regulators is predictability It is not that regulated companies want to be able to predict, or to guarantee, the regulator's response to any issue, it is, rather, the confidence that the agency will, in making a decision, fully consider all relevant data and arguments The regulated company (and, often, the consumer as well) wants the assurance, in short, that the regulator does not respond arbitrarily to a given issue Notice and comment rulemaking will, we believe, promote confidence in the predictability of the Commission's process, because its response to argument on all issues presented for decision will be a matter of public record

⁴ We say that the Commission "may" issue a final rule because GNERC may also decide not to issue, or to delay issuing, a final rule Decisions to commence a rulemaking, how to conduct a rulemaking and to conclude a rulemaking are all matters that are, in general, left exclusively to the agency's discretion

Adjudication

If the U S notice and comment procedure seems ideally suited as a tool for GNERC decisions, the American system of administrative adjudication is not

Under the Administrative Procedure Act, an “adjudication” is a proceeding that results in the issuance of an “order.” An order may be affirmative, negative, injunctive, or declaratory. An adjudication involves particular parties and addresses past conduct or existing facts. An adjudicatory decision is made exclusively on the basis of a record composed of evidence introduced by the parties. The adjudicatory decision, the order, must be based on a record that is reliable, probative, and substantial, a standard commonly referred to as the “substantial evidence” test.

Administrative adjudications are commonly conducted in a “trial-type” hearing, even though the only circumstance in which such a proceeding is required is when an adjudication turns on contested issues of material fact. Trial-type hearings are complex and costly, as the description of a typical utility rate case shows.

A utility commences a rate case before the Federal Energy Regulatory Commission by filing written direct testimony, including documentary material, from many witnesses, some employed by the utility, and some from outside the company. These witnesses address many issues in support of the request for a rate increase, such as revenue requirements, rate base, cost allocation, rate design, and the appropriate rate of return on equity. The testimony of these witnesses consists of many volumes and thousands of pages. FERC gives public notice of the rate filing, and invites interested parties to intervene and to participate in the rate proceeding. Ordinarily, wholesale and industrial customers, representatives of the utility’s retail customers, the state in which the utility is located, and neighboring utilities will seek to participate. When FERC sets the case down for hearing, all parties seek “discovery” from the utility, a process in which they inquire as to the basis for representations made in the utility witnesses’ testimony, and require the utility to produce many documents related to the rate increase. When that is done, all the other parties (including FERC staff) file their witnesses’ testimony, again consisting of many thousands of pages of material. The utility then conducts its discovery, and then another round of testimony and discovery ensues. Then, and only then, many months after the utility first filed its rate case, is the proceeding ready for trial. At trial,⁵ each of the parties is represented by a lawyer, or, often, multiple lawyers. Each witness that earlier filed testimony (and some that did not) takes the stand, is sworn, and then is interrogated (“cross-examined”) by the lawyers for the other parties. This process often goes on for weeks. Finally, when all cross-examination is completed, the presiding officer will set a schedule for the parties to file briefs and responsive briefs over a period of weeks or months, after which the officer may issue a decision (although

⁵ Administrative trials are conducted by “Administrative Law Judges,” a specialized group of hearing officers skilled in both the subject-matter of the relevant agency’s proceedings, and the procedures used at trial. By law, these judges are independent, and are may not communicate informally with any party to the proceeding.

there is no explicit time by which a decision is required) When the decision is reached, any party aggrieved by the conclusion on any issue may appeal to the agency itself At this point, months or years have passed and the record consists of tens of thousands of pages of testimony, exhibits, and trial transcript (the written record of cross-examination and other trial proceedings)

We do not believe that GNERC and its licensees are even capable of replicating the U S model, but there is not reason why they should The American administrative process is the end result of more than a hundred years of regulatory experience, during which agencies, like FERC and the Federal Power Commission before it, have added procedures to rate and other proceedings, if only because it seemed appropriate at the time In other respects, administrative procedures may be compelled by law The right to cross-examine witnesses, for example, is deeply rooted in the common law of Anglo-Saxon jurisprudence Georgia labors under no such stricture

Georgia in general, and GNERC and its regulated constituency in particular, lack the resources with which to engage in trial-type hearings Licensees lack the money to invest in administrative proceedings They lack lawyers with experience in administrative cases, and witnesses with experience in testifying GNERC lacks experience in conducting trial-type hearings, and the resources with which to conduct them Furthermore, it is highly uncertain that implementation of the formal adjudicatory procedures common to the U S would yield any return in the form of a better fact-finding process That is especially true so long as the sophistication of licensees remains low, as noted above, many licensees have difficulty with the concept of "cost," as related to their cost of providing service to customers

We believe that the more appropriate course for the Commission, in adjudications such as rate cases, is to adopt a less formal procedure, the goal of which is to build a written record That, indeed, is the approach of Clause 37 of the Electricity Law, which sets minimal requirements for rate proceedings, and leaves it to the Commission to specify detailed procedures

In the process of tariff setting the Commission relies on the following documents

- a Evidentiary requirements for tariff applications, including audited financial information,
- b Time frames for tariff applications and decisions,
- c Procedures for customers and other interested parties to comment on tariff applications,
- d Procedures for the Commission to obtain additional information s necessary to evaluate tariff applications * * *

Consistent with these minimal requirements, we believe the Commission may appropriately proceed as follows in adjudications such as rate cases

Public notice The Commission should provide customers and other parties with a potential interest in the adjudication with notice that a proceeding has commenced with a filing at the Commission. In the U S , public notice is commonly given by publication in a newspaper (for federal agencies, in the *Federal Register*, the official publication of the Executive Branch). Given the poor nature of communications in Georgia, GNERC may require an alternative. It may, for example, require licensees to give actual notice to customers (in a bill insert, for example) when it commences a rate case.

Right to participate The public notice should advise that any person with an interest in the adjudication may participate in the proceeding, and include instructions on the form and timing of participation. The notice should also state that interested persons may inspect the licensee's filing, either at the licensee's place of business or at the Commission's offices. Clause 37 c of the Electricity Law suggests that the Commission is to establish procedures under which customers and others may comment on tariff applications, the Commission might also describe the form such comments should take, and whether they may or should be accompanied by factual material.

The record basis for decision The Commission should provide that it would base its decisions exclusively on the record of the proceeding. Such a provision will implement the strictures of Clause 16 of the Electricity Law, which limits the Commission's communications with parties to a proceeding. The record may consist of the licensee's rate submittal (its statement of costs, in the form specified by the Commission's tariff methodology), the statements, including studies or other documentary evidence, submitted by interested persons such as the licensee's customers, and any analyses of the data by the Commission's staff. If facts are in doubt, the Commission may inquire of the licensee or party as to the basis for a given fact or claim, and require a written response. For now, and for the foreseeable future, such a relatively informal procedure should suffice.

A written, reasoned decision The Commission's decisions should be written, and should explicitly state the facts on which it relies. Those facts, in turn, should be based on the written record. The requirement for a written decision based on the record will compel the Commission to test its results against the record, and will provide licensees and the public with the opportunity to evaluate the Commission's reasoning. The requirement that decisions be written and record-based will also facilitate judicial review, the right to which is specified by Clause 15 of the Electricity Law.

Conclusion

The Georgian National Electric Regulatory Commission comports reasonably well with the model for independent agencies established under U S law. The Commission can and should borrow from the U S model's notice and comment rulemaking procedure, but should take some care in adopting the full measure of procedures in adjudicatory cases.