

**UKRAINE**

**REQUIREMENTS AND METHODOLOGY FOR  
PUBLIC PARTICIPATION**

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## CHAPTER 1

### REQUIREMENTS FOR PUBLIC PARTICIPATION

#### INDEPENDENCE OF THE COMMISSION

The independence of the Commission is a primary requirement for meaningful public participation in the regulatory process. The independence of the regulator must be recognized, maintained and communicated. Public participation is an important part of the regulatory process, this requires confidence by the public that its voice will be heard and considered by an independent body. Without independence in its decision making the efforts of the Commission to broaden public participation and to maintain a transparent process will be seriously hampered.

The appointment of Commission members to terms for a definite period of time, for example, six years, with removal from office only for cause is essential. This provides greater assurance that a Commissioner will not make decisions based on short term considerations but will exercise independent judgment and will make decisions which are based on the facts and circumstances of the particular case, the overall public interest and the long term future of Ukraine. Involuntary removal of a Commissioner by the appointing authority should only occur in instances of unlawful or improper conduct. The Commissioner should be afforded an opportunity to answer any charges in an open forum.

In order for the Commission to be an independent decision maker it must also be the sole decision maker in matters subject to its jurisdiction. The Commission is the forum, to the exclusion of all others, in which an action must be commenced because no other forum has, or should have, the jurisdiction to consider the matter and reach a decision. The Commission must not be required to share the decision making with another government entity or have its decisions subject to a second opinion or the veto of another government entity. Its jurisdiction must be exclusive. The opinions and input of other government bodies should certainly be taken into account, but the Commission must make the decision and the public must know this.

The decisions of the Commission must be subject to appeal to the designated authority or court. This ensures accountability. The Commissioners should be independent, but they should also be accountable, the appeal process is a necessary check or restraint. Further, the Commission must have the authority to institute legal proceedings, and the Commission must be subject to legal action in the appropriate forum for abuse of process, misapplication of law or misinterpretation or misstatement of facts.

Independent decision making also requires that there be no real or apparent conflict of interest with regard to the Commissioners who make the decisions. The decision maker must not have any interest, direct or indirect, or engage in any business, transaction or professional activity which is in conflict with the proper discharge of duty. The public must have confidence on this point, and the Commission should consider adopting a Code of Ethics. If decisions may be improperly influenced in one direction they can also be influenced in another direction or decided on extraneous grounds or considerations. The credibility of the Commission and public confidence would suffer as would the integrity and the reasonable predictability of the regulatory process. Potential investors in the electric sector in Ukraine would recognize this.

Independent decision making is also compromised by a communication between a Commissioner and a party(s) to a disputed proceeding which takes place outside the hearing room when all parties are not present. Such communications should occur only when all parties are present.

Transparency (openness) is the supporting structure of independent decision making. It is critical to public participation and the regulatory process. Elements of transparency include the integrity of the decision makers, the openness of the process and the reasoning and logic of the Commission's decisions.

## **PUBLIC ACCESS**

### **Communication Access**

Public participation requires that certain Commission practices and procedures be established. The Commission needs to make appropriate measures to provide for public access to the Commission and to make NERC more "friendly" to outsiders.

It is important that the Commission create a Reception area where visitors, including the public, can obtain information and can be referred to. The Reception area should be a contact point to handle outside phone calls. The receptionist(s) should be able to direct calls and requests to an appropriate person/department in the NERC. It is also important that the receptionist is always informed who is not available in the Commission and who could talk to the caller instead.

We believe that it is essential that the receptionist(s) be able to transfer phone calls to the appropriate persons or departments rather than just giving phone numbers of the appropriate departments or divisions. It is also important that the receptionist(s) takes messages and makes sure that the person gets the messages.

The Commission needs to install a special communication system to handle phone calls more effectively. Meanwhile, it is important to ensure that the department and division staff pays careful attention to every request, inquiry or complaint call.

Currently, the function of receptionist is partially performed by the secretary of the Chairman. The secretary receives most of the outside phone calls and addresses them to appropriate departments or divisions in the Commission. Unfortunately, the secretary is not able to transfer phone calls, take and pass all messages.

Two things would ease the communication public access problem. First, the Commission should create a reception area. Hopefully, the Executive Director(s) will make this arrangement in the new NERC building where Commission is moving this year. Second, it is important to re-design and issue a new NERC Contact Reference Book. The "Information" reference should be added, so most of the phone calls would go to the reception rather than to the Chairman secretary.

The current Contact Book contains names of the Commissioners and staff positions, department and division names, and the phone numbers. This information gives little to the person who calls the Commission for the first time. For instance, it is not clear from the Book who should be contacted in order to submit a license application.

If for some reason the Commission does not want to create the reception, it may still improve its Contact Reference Book by adding major areas of responsibility information. The public should know who to talk with as to the complaint matter, information request, or license application.

Another issue of public access relates to the physical access to the Commission. After a visitor passes the security, he/she should be greeted by the receptionist and directed to the appropriate person if there is an appointment. Clear indicators should be placed in the Commission so that the visitor could easily find department, division or person in the building. This is especially important while the Commission does not have the receptionist. Currently a visitor would not find an area plan at the entrance to the NERC. The only information available is room numbers and the department names attached to the doors.

#### **Access to Files**

An important condition for public participation is public access to the Commission files and documents which relate to the matter being considered. The documents filed by a party or parties in a proceeding, except those designated "confidential" pursuant to Commission procedures, should be available for examination by the public at the Commission's offices during reasonable hours and under reasonable conditions. These records, the "official"

records of the Commission, should be maintained in the Secretariat and indexed in a functional system

The US regulatory agencies follow the Right-to-Know Law that provides for an open access to the public record. The Right-to-Know Law promotes the concept of transparency that is so important for a democratic state. We believe that the Commission should start thinking about the public access to information as a next step of making Commission's role more clear and transparent.

### **Clearness of Commission Documents**

Another important aspect of public access to the Commission relates to the documents issued by the NERC. It is obvious that the Resolutions issued by the NERC are not always clear to the common public.

Let's examine an ordinary NERC Resolution #1019 of July 31, 1998 On Setting Tariff for Electricity Purchased in the Electricity Wholesale Market of Ukraine. It says that "In accordance with the Decree #335 of the President of Ukraine 'Issues for the National Electricity Regulatory Commission' dated April 21, 1998, the National Electricity Regulatory Commission of Ukraine orders to set tariff for electricity purchased in the Electricity Wholesale Market of Ukraine by the state share holding energy supply company Chernihivoblenergo in the amount of US \$24.5 per 1 MWh for August 1998." The Resolution signed by the Chairman.

The document was designed in accordance with the official norms adopted in the governmental sector of Ukraine. The roots of these standards are coming from the Soviet times when the state decisions were not aimed to explain to the common public the essence of the documents. This tradition, unfortunately, remained in Ukraine.

The primary problem with this order is that it is utterly unclear. Chernihivoblenergo's tariff was set at \$24.5/MWh rather than \$23/MWh or \$26/MWh. There is a reason for this price, and that reason should be explained.

What lacks is a clear explanation of the document. It is essential that the common public directly or indirectly affected by the Commission resolutions understand regulated licensee and how the Commission's policy may influence on their life. We may recommend that the NERC attach explanation notes to each resolution or change the format of the resolution to make it clear.

### Confidentiality

Public access and an open records policy must recognize the necessity for the control and security of Commission documents, therefore, the Commission should have a specific location or desk where the public may examine a document(s). A Secretariat employee should be responsible for the security of Commission records. No defacement of documents should be permitted. A member of the public may make notes or request that a copy(s) be supplied at a reasonable cost. Further, the assigned Commission Staff, within reasonable time limits, should respond to questions asked by the public. The Staff should not, however, respond to questions which relate to the merits of a pending contested proceeding. With experience, assistance for those examining documents can be facilitated. The impact of the Commission's actions and policies will, over time, increase public awareness and contacts with the public will occur more frequently. Guidelines concerning accessibility and examination should be posted and/or published in a brochure.

In the context of public participation and the availability of information and documentation the "confidentiality" of documents should be considered. There should be a strong presumption that documents are available for public examination.

A licensee should be allowed to submit an Application or Petition in letter form to exempt certain commercial information from public disclosure (this is apart from any proceeding). To qualify for such exemption and, therefore, keep the information confidential, a party must establish that disclosure of the information would permit an unfair advantage to competitors of the party seeking confidentiality if openly disclosed. The party must demonstrate actual competition and a likelihood of competitive injury if the information is disclosed.

The Commission should review the information and make a determination whether it is entitled to the protection requested and should be withheld from public inspection. In the event the Commission denies the petition for confidential treatment the licensee may request that the Commission schedule a formal hearing to consider the petition.

A party may also contend that certain material is "confidential" during the course of a disputed case. That party should have the "burden of proof", that is, the responsibility of demonstrating why a document should be treated as confidential. An example of a confidential document may be one that contains "trade secrets". With respect to the Commission, examples of internal confidential documents may be those which relate to an investigation being contemplated by the Commission and Commission Staff Reports which include recommendations of the Staff.

Should the Commission decide that a portion of a document should be accorded confidential treatment, this does not mean that the entire document should be considered confidential. The public should have access to other portions of the document. Also, the Commission may establish rules whereby parties in a proceeding may examine a document which has been

accorded confidential treatment

The Commission can protect the rights of all parties where confidentiality is justified. However, the regulatory process including meaningful public participation is seriously weakened without the presumption of open records and public access.

## **PUBLIC NOTICE**

A third requirement for public participation is reasonable public notice. This includes public notice of tariff formation, changes in prices and other matters. Public notice should be given sufficiently in advance of the Effective Date of changes in prices in order to provide a meaningful opportunity for the public to participate in any hearing scheduled by the Commission (in the event the Commission decides to schedule a hearing) or a meaningful opportunity for the public to provide input.

### **The Commission - Hearings/Meetings and Notice**

The Licenses issued by NERC are concerned with the obligations of the Licensee. Licenses are silent about the Commission and public notice. Therefore, this should be a matter of Commission policy and its Rules and Procedures.

In the event the Commission decides to schedule a hearing there are several alternatives. It should consider the nature of the case, the effect a decision in the case may have on the public (the public in a particular area and the public in the country at large) and, also, whether the subject matter of the case is of sufficient importance that the Commission should provide public notice and conduct a hearing which will include public participation and will provide a meaningful opportunity for the public to be heard - to provide input. In making these determinations the Commission should consider the difficulties of transportation and communication for the people in Ukraine at this time. In some instances public participation may be provided by a hearing or a supplemental hearing held in the locality and conducted by Local Office personnel.

In all proceedings (hearings) scheduled by the Commission there should be public notice of the matter by publication in a newspaper or newspapers of general circulation in the oblast(s) affected by the outcome of the proceeding. The notice should include the date, time, place and purpose of the hearing. If a specific licensee(s) or other party(s) is the focus of a proceeding, that party should be notified by direct mail. All notices should provide persons, organizations and entities a reasonable opportunity to provide meaningful input.

In most instances hearings will probably be held at the Commission's offices in Kiev. The

Commission provides public notice of its hearings now. The Commission, as stated, could schedule a supplemental local hearing, for example, when a particularly difficult service question is involved. Hearings concerning consumer complaints, it would seem, should be held in the locality by Local Office personnel. Many complaints may be resolved by unassisted negotiations between or among the parties (encouraged by the Local Office Staff) and through mediation by the Staff. Public participation in these instances maybe limited to those directly affected, however, some complaints may involve many people and require a different approach with regard to public participation (hearing)

In some cases the Commission may decide to convene a hearing in Kiev and also a local hearing conducted by the Local Office, the latter for the purpose of public participation

Another alternative would be for the Commission to schedule Regional Hearings (perhaps four). These hearings would be scheduled in cases of primary importance which have a significant effect on the public at large. A Commission policy could be stated as follows

"When there is a matter of wide application, such as power sector reform and its competitive and incentive aspects, or when there is a matter of demonstrated general public interest and concern which affects or may affect a large segment of the population or when, in the judgment of the Commission, there is an issue(s) of overriding importance in a matter pending before the Commission or being considered by the Commission, the Commission, in its discretion, may schedule Regional Hearings at centrally located sites within the Region. The hearing may be conducted by the full Commission, a Commissioner or a Designated Hearing Representative. The Commission Staff may participate in the hearing in a manner considered appropriate by the Commission. A representative of the Licensee may be requested to attend. The Commission should give reasonable notice of the hearing and encourage public participation."

## **PUBLIC INPUT HEARINGS/MEETINGS**

Public Input hearings/meetings enhance the credibility of the Commission and the transparency of its process. They provide a forum for the public to present its views on important matters that will directly affect them. As the Commission must consider the overall public interest, the Public Input hearing/meeting is a natural and a necessary procedure.

Public Input hearings/meetings are intended to provide a meaningful opportunity for the public to be heard and also for the Commission to obtain information, to learn what the public is thinking, the issues which they consider to be overriding and important and their suggestions and recommended actions. It enables the public to comment and to ask questions about Commission proceedings, an investigation concerning a specific matter or a generic

inquiry They provide an opportunity for the Commissioners to obtain constructive ideas which can be applied to regulatory actions A representative(s) of the licensee should be invited to attend

Public Input Meetings would not be intended as a substitute for hearings to consider applications of licensees or disputes and conflict situations which are normally held at the Commission's offices in Kiev

The Public Input Meeting would provide an opportunity for the public to participate in the regulatory process, to express opinions and concerns about a variety of matters- a Commission proceeding, investigation, a generic inquiry or policy and to make general statements, comments, recommendations, etc Topics may include the power restructuring program in Ukraine, its competitive features and incentives The Meeting also provides an opportunity for the public to ask questions of Commission representatives In order for the Commission to obtain public support there must be public understanding of the reforms in the electric sector, a vital part of the economy

The Meeting should be held at a suitable location in the local oblast and would usually be conducted by the Local Office Staff An agenda may be established, however flexibility is necessary Public Notice should be given and media notified The public should be encouraged to attend

Public Input may also be included as part of the formal hearing held at the Commission's offices in Kiev This occurs now Should public interest in the Commission's activities warrant, the Commission may want to set aside a certain amount of time for this purpose

## **ROLF OF THE LOCAL OFFICES**

An important function of the Local Office concerns public participation in informal meetings conferences and seminars The purpose of such forums is to provide an opportunity for personnel of the Local Office to meet in an informal setting with local officials, members of civic organizations, the general public and media representatives The topics of these forums can be the activities of the Local Office, the interaction of the Local Office with the Commission in Kiev, how to access the regulatory process and power sector reform

Public Notice of these functions would normally be given in the print and electronic media Some functions could be held on a fairly systematic basis The Notice should include a specific statement - as is the case with the Public Input Meetings - that the public is encouraged to attend From time to time Local Office personnel may meet with smaller groups to discuss a matter of public concern These forums would supplement and would not replace Public Input Meetings The Director of the Local Office and the Staff are familiar

with local conditions and would be able to address matters of local concern, they would also be able to provide a local perspective to the role of the Commission. Representatives of licensees may also participate.

The Local Offices will be concerned with technical matters, but the Office should be the eyes and ears of the Commission. The Offices have a significant role to play in educating the public with respect to energy reform and demonstrating that the Commission intends to listen to the concerns of the public, to seek its cooperation and support.

The Local Offices should work closely in these matters with the Department of Local Offices, Consumer Affairs Division, and the Department of Public Relations in Kiev. We also recommend that the Department of Local Offices become a Division of the Department of Licensing and Pricing.

## **WORKING WITH CONSUMERS**

### **Public Letters, Inquiries and Complaints**

Over time, many letters and inquiries from consumers will probably be received by the Local Offices. The processes of the Commission should be accessible and the public must be aware of them. Therefore, the Local Offices (or the Commission in Kiev) should consider preparing a brochure concerning the procedures for submitting a consumer inquiry or complaint. Although these direct contacts with the Commission through the Local Office or the Kiev office are very important, the importance of such contacts is often overlooked. This may be the only contact which a member of the public, a consumer with a problem or someone seeking information will have with the Commission. Prompt and fair attention to their concerns will enhance the reputation and the credibility of the Commission.

Informal complaints may be resolved quickly, sometimes by a telephone call. A consumer complaint may be the result of a misunderstanding. An interpretation of a Commission Rule may be required. Most western regulatory commissions attempt to resolve disputes - fairly and expeditiously - by telephone. This is recommended. Unless there is an emergency or unusual circumstances consumer complaints should first be taken up with the licensee. This is recommended. If the problem cannot be resolved then the complaint should be brought to the attention of the Local Office. The presence of a Local Office in each oblast enables the Commission to interact with the public and consumers in resolving problems. In performing this function the Local Office Staff may need the assistance of the Commission's expert Staff in Kiev.

The Commission should also provide public access and public participation in processes which consider contested consumer complaints - disputes which are not readily resolved. The

Local Office Staff should encourage the parties to attempt to settle disputes by negotiations, unassisted by the Staff. Should this be unsuccessful the Staff may perform a more active role - mediation. Mediation would involve the Staff in discussions with the parties in an effort to assist them in reaching a common ground and thereby establish a basis for an agreed settlement.

In appeals and referrals from the Local Office the Commission would make a determination whether the complaint should be decided on the basis of written reports submitted by the Local Office and the parties. The Commission Staff in Kiev could also submit a memorandum to the Commission concerning the matter. The Commission would then make a decision or, in its discretion, schedule a hearing at its offices or another location.

The above are various ways the public can participate in the regulatory process when a complaint or controversy occurs. Consistent with the responsibility of the Commission in all of its endeavors, the Local Office should perform these tasks in a fair and balanced manner.

### **CONSUMER AFFAIRS DIVISION**

With the focus on public participation and consumer protection at the Local Offices the question may be asked as to why a Consumer Affairs Division is necessary at the Commission's offices in Kiev. One important reason is to gather and compile nationwide information concerning consumer participation and trends in the kinds of complaints considered in the process - and their resolution.

The handling of consumer disputes at the local level will require consultative and expert assistance in some situations and this may be channeled through the Consumer Affairs Division. A Consumer Affairs Division would monitor consistency in applying Commission policy in consumer matters while recognizing local conditions and circumstances.

The Division would process some consumer complaints and disputes where referral to a Local Office may simply be inappropriate and unnecessary. The Division would also expedite referrals and appeals from the Local Offices, and it would advise the Commission generally on consumer matters and provide national visibility for the public participatory process. Finally, it is important that a complaint process be in place in the Kiev office and that the process not be bypassed.

### **COMMISSION VOTING AND NON-VOTING MEETINGS**

Public participation is an important aspect of Commission Meetings which are held to consider pending cases and other matters. These Meetings are the Commission's Voting Meetings and Non-Voting Meetings.

Public Notice of the Voting Meetings is given by the Commission. This may be done by publication and through the electronic media. The date, time, place and agenda should be included in the Notice. The Commission is providing this Notice now. If possible, direct notice of items to be discussed and voted on should be provided to those who were participants in a proceeding which is included on the agenda. The Notice given should include a statement that the Meeting is open to the public.

Notice of a Commission Voting Meeting should be given as far ahead of the event as practical. Notice should also be posted in a conspicuous location at the offices of the Commission and the Local Offices.

The purpose of the Voting Meeting is to ensure that decisions are made in an open forum and that those immediately affected and the general public have a reasonable opportunity to attend, comment and ask relevant questions. The Department and Division Directors should be present at the Meetings and provide information as required. The Public Voting Meeting enhances public participation.

The Non - Voting Meetings between the Commission and its Staff should be scheduled at the convenience of the Commission - perhaps on the same day and at the same time each week - to the extent that the Commissioner's schedules permit. Whether these meetings are open to the public is a matter to be determined by the Commission. The agenda may include a discussion of substantive matters (formal cases, policies, etc.,) pending before the Commission, internal administrative topics and other items. Examples: sensitive personnel matters, matters affecting personal safety and security, strategy discussions with the Commission's attorneys concerning litigation and contemplated investigations. Many Commissions consider these "deliberations" between the Commission and Staff to be privileged communications, they are held in private.

## **SETTLEMENT CONFERENCES AND WORKSHOPS**

Settlement Conferences and Workshops may be used in formal disputed proceedings, including those with public interveners. They, too, are participatory processes and, in a less formal setting, enable parties, including public interveners (perhaps a community organization) to participate in a setting which is more informal. A Commission Designated Representative will keep the discussion focused on the matters in dispute. It may not be possible to resolve all of the issues in a settlement conference but some issues may be settled and a better understanding with regard to the position of the parties on the remaining issues may result from the discussions. A settlement of all issues may be achieved with a saving of time and resources.

A Workshop, also an informal conference, is an effort to define, better understand and narrow the issues - hopefully the workshop will result in a better understanding of the issues, the

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points of agreement and disagreement This is an informal approach to disputes with the goal of eliminating or lessening the differences between or among the parties This process also enhances public participation

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## CHAPTER 2

### METHODOLOGY FOR PUBLIC PARTICIPATION

#### LICENSE HEARINGS

The public hearing process in Ukraine, at this point and even at later stages, need not be overly litigious. However, the Commission should establish procedures which are applicable to uncontested hearings and those necessary when dispute or conflict situations occur. At this point most of the Commission's hearings have concerned the issuance of licenses. Following is a brief review of the present procedure.

The Chairman or presiding Commissioner announces the opening of the session and recognizes the other Commissioners present. The representative of the Office of the Secretariat is requested to announce the schedule of hearings and the names of the licensee representatives. Hearings are recorded and notes are taken by the Secretariat.

The Chairman may give a brief opening statement. He then recognizes the representative of the applicant licensee (the applicant is not represented by an attorney) for the purpose of stating the position of the applicant. The statement usually contains basic information about the licensee and its activities and the system of payments or transactions which require the licensee to obtain an Independent Supplier License from the Commission. Note: The Secretariat prepares a "fact sheet" which is available prior to the hearing which contains basic information concerning each applicant whose case is to be heard that day.

The Chairman and Commissioners frequently ask questions of the representative spokesperson of the licensee. The Commission Staff, when recognized by the Chairman, questions the representative, responds to questions from the Chairman and Commissioners and occasionally from the representative. The Staff is not represented by an attorney, although the Head of the Legal Department or the Deputy Head participates. The Legal Staff representative is often asked by the Commission to respond to a legal issue or to do subsequent research on an issue raised at the hearing.

The Applicant's representative may give a "closing" statement. The Chairman then asks the Staff to state its position. The Staff discusses the information presented by the applicant prior to and during the hearing and gives its analysis and recommendation.

The Commissioners vote and the Chairman announces the decision. In some instances a decision may be postponed. The Commission may decide to schedule another hearing (where a relatively minor matter is involved, the Commission may indicate to applicant's representative that he/she need not be present). The Commission may postpone a decision and instruct the appropriate department to investigate matters brought out at the hearing or certain documentation contained in the case record (e.g. the financial condition of the applicant).

The hearing procedure is flexible. There are exchanges between the Commissioners and the licensee representative and the Staff which may not be in sequence. This is often seen in other regulatory bodies. The hearing is generally structured - the applicant gives a direct statement (testimony) and is subject to questions (cross examination) by the Commissioners and the Staff. However, Commissioners do ask questions and the structure does not preclude this. The Chairman or presiding Commissioner will provide an opportunity for those present in the audience to ask questions or to make comments. Members of the public may participate.

The Chairman will often give a general closing statement at the conclusion of all of the scheduled hearings. The closing statement usually relates to one or all of the cases heard that day. It addresses matters common to all or many of the cases and provides perspective. The remarks often relate to persistent problems in the energy sector as brought out in the day's hearings and emphasizes that solutions must and will be found.

Commission hearings often demonstrate the critical issues in the electric power sector - shortage of cash, barter transactions, financial stability of the applicant and other matters. While the Commission has for the most part considered applications for the IES License it has developed a hearing process, recognized the principle of public participation and provided public hearing experience for the Staff.

## **PUBLIC HEARING PROCESS IN THE UNITED STATES**

The public hearing process in the west has been justly criticized for being too complex, involving an excessive amount of detail, requiring a large amount of paper work and being unduly long and expensive. Part of the blame can be assigned to the nature of the process and part may be due to a lack of control by presiding officers who are reluctant to make a determination that certain information is redundant or that the questioning of a witness (speaker) has become repetitious. However, Commission decisions are subject to appeal and a presiding officer may tend to be cautious. Changes are occurring in western practice and alternative procedures (some discussed above) are being employed.

The hearing process in the United States should not be replicated in Ukraine. In the US hearings can be extremely lengthy. A large amount of extraneous material is received. The

case "record" may be quite voluminous, this is a problem for those who must review the record in detail. Another weakness of the US system is that requests for additional information by the parties and the Commission Staff can be unduly burdensome.

The procedure in the United States does have strengths. Unnecessary detail and paper work, repetitive and cumulative questions and answers can be avoided. The main strength of the US system is that, in a disputed hearing, witnesses are subject to fair but rigorous cross examination. Close scrutiny of documentary evidence assists the Commission in making decisions. Opinions vary in many of the matters being considered in a hearing and the Commission must exercise judgment. The hearing process at its best develops a complete record which will facilitate the work of the Commission and Staff and will support the decision made by the Commission.

The advent of competition in some operations of electric licensees and in telecommunications is significantly changing the regulatory process in the US. However, as noted by the California Commission, a Commission which has been in the forefront of deregulation and which has a power pool similar to that in Ukraine, the decreased emphasis on traditional rate regulation and the increase in competition requires that the Commission (California) increase the emphasis on consumer protection issues.

The above represent some of the weaknesses and strengths of the process in the United States. The Commission may want to consider adopting some of these procedures. Other procedures may be adapted for use in Ukraine.

## **COMMISSION PUBLIC HEARING PROCESS - DISPUTES/CONFLICT HEARINGS**

The following is the Disputes/Conflict Hearings process outline:

### **Preliminary**

The Chairman would announce that the hearing is in session, recognize the other Members of the Commission and request the representative of the Office of the Secretariat to announce the names and affiliation of those present. The Secretariat records the hearing and also takes notes.

The Chairman would then request the participating Commission Staff to give their appearance, i.e. name and position. Should the Commission, at some point, determine that a representative of the Legal Department should represent the Staff in disputed cases or other matters, the Staff Attorney could state the appearances of Staff personnel.

The Chairman would briefly summarize the general purpose of the hearing and the general procedure including the order of participation (sequence) by the parties. Questions of participants should be directed only to matters included in their direct testimony (statement).

### **Proof - Moving Party**

The party (individual or entity) with the burden of proof (responsibility of proving the case), that is, the moving party, would proceed first and provide a detailed statement of position, including supporting arguments and references to supporting documents.

Any supporting documentation concerning an Application, Complaint or Investigation should be in the case record - the case file - and the Commissioners and Staff should have copies in their files. The "record" will be augmented as the case unfolds and the hearing proceeds. Participants in hearings will refer to documents and the Commission may be required to make a ruling on the relevance of certain documents to the proceeding being heard, documents which participants would file at the hearing (with approval of the Commission).

Disputed hearings at the Commission may not be replete with "motions" and "objections" as is the situation in the US, but, looking ahead, if a matter is not settled and a disputed hearing results, the hearing will likely include references to additional information or documentation which is not part of the original filing and is not included in any requests for information or responses which were submitted prior to the hearing. There may be a question (objection) by another party, or by the Commission Staff, with regard to the use of a document at the hearing for the purpose of questioning a representative or spokesperson of another party about matters contained in the document. The Commission will have to decide (rule) on this question, and it may want to hear oral discussion (argument) by each of the parties concerning the matter. Should the Commission decide that the document or portion of the document is relevant to the issues being considered, it (the document) should be made a part of the official record, appropriately at the request (motion) of the party using it for the purpose of questioning a witness or possibly contradicting the statement of a witness.

Attempting to envision the disputed/conflict hearing it would seem that questions like that described in the preceding paragraph will arise - disputes within the subject of the hearing - procedural disputes - and that the Commission would want a procedure in place as to how those situations will be handled. The above is a discussion and the Commission could simply handle it in that way - hearing the positions of the parties - but having a procedure in place may be useful for the purpose of having a coherent, logical record to support its decision.

Thus, there could be a structured "discussion" at the hearing probably with different positions enunciated as to the relevance of certain documentary material. A party using a document not

previously Filed or submitted to the Commission would first identify the document, show it to the other party(s) or provide a copy. Copies would also be given to the Commission and the Secretariat.

The "moving party" - applicant, complainant or Staff - if the moving party is a complainant, the initial statement would include details of the complaint (not simply a quick summary) with supporting documentation, if any. If the moving party is an applicant licensee seeking an adjustment in prices, the burden would rest with the licensee and the representative would give a detailed statement providing the reasons for the request.

Should the Commission, through its Staff, initiate a proceeding following an investigation (and Staff Report), the Staff would be the moving party, make the initial statement and have the burden of proof. During the proceeding the Commission, by order, may direct a licensee, for example, to respond to a Staff report. This would not change the burden of proof, which still remains with the Commission. It would change the burden of "going forward" from the Staff to the Licensee.

Another way to look at it is that, while the "burden of persuasion" never shifts, the "burden of going forward with the evidence" may shift back and forth between the parties any number of times as the hearing progresses. In this example, the Commission still must prove its case.

### **Complaint Case**

The Complainant has the burden of proof and would therefore give a detailed statement of his/her position. The representative of the licensee would then question the complainant(s). The Commission Staff follows with their questions of the complainant.

The licensee would give a detailed statement of position in response to the complaint. The complainant and the Staff, in turn, would then question the licensee representative.

The Commission Staff may or may not, according to Commission policy and procedure, advocate a particular position with regard to the controversy. Should the Staff make a statement advocating that the Commission decide the matter in a particular way and explaining the reasons for that position, the Staff member(s) should be subject to questioning by the complainant and the licensee.

### **Application of a Licensee**

The applicant has the burden of proof and would give the initial statement of position and supporting reasons. When the application concerns an adjustment in prices an intervener(s) with standing (one who would be affected by the result and has been granted permission to

intervene by the Commission) would then question the representative of the licensee. The Commission Staff would then ask questions of the licensee.

The intervener(s) would then state his position and would be subject to questioning by the representative of the licensee and the Commission Staff.

As in the Complaint Case, should the Commission Staff advocate a position with regard to the prices proposed by the licensee or the proposed design of the prices, a member(s) of the Staff would make a detailed statement and be subject to questioning by the applicant licensee and the intervener(s).

### **Investigation by the Commission Concerning Prices, Service or Other Matters**

In an investigation initiated by the Commission concerning prices, an alleged service deficiency or other matter, the Commission, as indicated, would have the burden of proof. The Commission Staff Report, which has presumably (according to Commission practice) been distributed to the licensee and any intervener, would provide an account of the investigation conducted by Staff member(s) and the findings, conclusions and recommendations. It would probably be the initial focus of the discussion.

The Staff would make an affirmative statement(s) summarizing the contents of the Report and would provide additional information that it may consider pertinent to the case. The Staff Report would be made part of the official record of the case. Staff would then be subject to questioning by the licensee and any intervener(s) with standing, concerning matters contained in the Report and other relevant matters. The Staff representative(s) would probably be the individual(s) who conducted the investigation - should this not be the case, the Staff person who gives the statement and responds to questions must be familiar with the Report and "adopt" its conclusions and recommendations.

As stated, the Staff person would then be subject to questioning by the licensee and any other party(s). In essence the Staff would be required to defend its Report. The Chairman and Commissioners probably will have questions to ask the Staff.

Following the presentation (and questioning) by Staff, the representative of the licensee would give his/her statement and be questioned by the Staff and intervener(s). Presumably, in a hearing based on a Staff investigation the licensee would seek to refute at least some aspects of the Report. Were this not the case the licensee would have acknowledged that the conclusions were correct, that the situation would be remedied within a period of time specified by the Commission, and, therefore, a hearing would not have been necessary.

Finally, interveners with standing would give any statement(s) concerning the subject of the hearing and, specifically, matters contained in the Staff Report. The Staff and licensee would follow with questions directed to the Intervener.

#### **Additional Statements by the Parties**

At the conclusion of the statements and questioning the Commission may allow the party with the burden of proof (complainant, licensee, Staff) to make an additional statement in response to the positions advocated by the other party(s). The Commission could also allow a second "round" of questioning by all parties in the same sequence as the initial "round".

The Commission may also provide an opportunity for all parties to make closing statements summarizing their position. If the role of the Commission Staff is that of a "party" a Staff person would also be given an opportunity to make a closing statement (it does this now, but this would probably be more detailed in that it would also be responsive to the positions taken by the other party(s). The party with the burden of proof should give the final statement (or make the concluding argument).

#### **Role of the Commission Staff**

The role of the Commission may vary on a case by case basis. The Staff may assume an advocacy role, that of a "party", in a proceeding which concerns an adjustment of prices of a licensee, an investigation relating to service or a consumer complaint. In the role of a "party" the Staff would advocate a position, and attempt to persuade the Commission, in open hearing, that it should adopt the Staff position.

The Staff may assume a different role. By questioning the parties the responsibility of the Staff will be to ensure that all relevant facts are brought out in order that the Commission will have as much information as possible and a complete record as it makes its decision. In this instance the Staff would not be a party but would participate in the questioning of representatives of the other parties.

The Commission, in determining how the Staff will participate, may consider that the Staff submit a written Staff Report (discussed above). The application requesting approval of an increase in prices will involve subject matter which is technical, information submitted to the Commission pursuant to its filing requirements. The filing will be analyzed by the Staff and an alternative is to include this analysis along with recommendations in a Report, copies of which will be supplied to the applicant licensee and other parties in advance of a public hearing.

The initial low voltage fee and regulated tariff supply fee were determined by the Commission following extensive examination of data submitted to the Commission over a period of time. In the future a licensee should submit a far more detailed application that has been the case up to now when it wants to change its Low Voltage Network Operator and Regulated Tariff Supplier fees. A public hearing process may be more productive and complete if the Staff, by written Report, offers its analysis and recommendations.

The applicant licensee will have the burden of demonstrating the reasonableness of the proposed changes (burden of proof). The Commission Staff Report, adopted by the Staff and made a part of the record would be supplied to the Applicant Licensee and other parties sufficiently in advance of the public hearing. At the hearing the Staff would briefly summarize the contents of the report, provide supplemental comments, if any, and be questioned in the sequence set forth above.

A Staff Report would allow public participants more time to consider the analysis and the position of the Staff (in this kind of proceeding the Commission may consider having the Applicant Licensee submit a similar Report in advance of the public hearing stating its position in detail). A hearing to consider licensee prices will involve technical material, and advance submissions will be beneficial to the Commissioners and all participants including the public.

As noted, the Commission Staff role could consist of developing information by questioning representatives of the licensee, clarifying points and making certain that essential matters are examined and a record established on which a decision can be based. The Staff Report would be a more affirmative participation and would place the Staff "on record". The Commission could select the "Staff Report" procedure for certain cases only for example cases which, directly or indirectly, have an impact on prices charged by regulated entities.

Should the Staff submit a Report, the Staff, for all intents and purposes, would be a "party" and this raises the question of possible ex parte communications between the participating Staff (in an advocacy role in a disputed case) and the Commission.

#### **Commission Staff in Contested Cases Ex Parte Considerations**

Ex parte (one side only) is an important western legal concept. It can be considered as part of the broader western concept of "due process". In the US "due process of law" is a fundamental part of the Constitution. We do not advocate that all of the elements of this concept be replicated in Ukraine. However, with regard to public hearings and ex parte considerations we believe the following statement about "due process" is valid and adaptable for the purposes of the Commission and its interest in a fair and transparent process.

"A fundamental requisite of 'due process' is the opportunity to be heard, to be aware that a

matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision-making body the reasons for such choice. Aside from all else 'due process' means fundamental fairness and substantial justice." Black's Law Dictionary

This idea was previously presented to the Commission in the context of matters requiring an open hearing and matters which could be decided "privately", that is "within" the Commission. The idea is applicable here in developing or adopting a policy concerning "ex parte" which is fair and which meets the standard of substantial justice.

In the west ex parte rules are required by procedural due process in most states because if a communication with the decision-maker occurs out of the presence of the other parties, the other parties have no notice of the communication and are denied an opportunity to be heard concerning the communication. The essence of procedural due process is notice and an opportunity to be heard.

The position of the participating Staff is set forth in the Staff Report. It has been amplified and tested during the hearing process. While the participating Staff may no longer communicate with the Commission without all parties being present, clarifying information could be provided.

Should the participating Staff provide the Commission with additional analysis subsequent to a hearing the question becomes more difficult. Further analysis could be provided to the Commission by another Staff person. Strict adherence to ex parte considerations also requires that the participating Staff should have no communication about the case with another Staff person who will act in an advisory role to the Commission.

### **Intervention**

"Intervener", discussed above, can be defined as one (or more) individuals who wish to become a party in a proceeding, that is, intervene and participate in a hearing. A private organization or government entity may also be an intervener. The individual, organization or entity would file a motion (request) with the Commission and provide copies to other parties. The motion should include the name and address of the person(s) or entity and how they may be affected by the outcome of the proceeding. A motion-request to intervene should be submitted to the Commission sufficiently in advance of the hearing to allow other parties to comment and give the Commission time to consider the request.

### **Closing**

The Chairman would conclude the hearing with remarks that he/she considers necessary and appropriate and advise the participants that the case will be taken under consideration by the

Commission There may be unfinished or incomplete matters, for example, issues which came up at the hearing which require that additional information be submitted Therefore, the case may be "submitted" to the Commission for decision subject to the information being furnished

## CONCLUSION

The responsibilities of the Commission include virtually every aspect of the power sector reform program Its oversight role broadened after the Commission was assigned tasks to regulate oil and gas energy sectors Its decisions and policies concerning licensee prices and service will have an impact throughout Ukraine Its role is critical to the nation's economy

Public participation is important from the standpoint of the public and the Commission The public can provide important input into matters being considered by the Commission The Commission will have an opportunity to explain its mission and the actions it is taking It can seek public understanding and support for actions which may be controversial The public may not always agree with the Commission, but if it has confidence that the Commission is making a strong effort to solve difficult problems, public support, essential in virtually every public endeavor, can be obtained