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THE NEW YORK STATE ADMINISTRATIVE PROCEDURE ACT: SOME REFLECTIONS UPON ITS STRUCTURE AND LEGISLATIVE HISTORY

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The New York State Administrative Procedure Act[1] is a fascinating hybrid containing elements of the Federal Administrative Procedure Act[2] and of the two versions of the Model State Administrative Procedure Act promulgated by the Commissioners on Uniform State Laws.[3] It is also a blend, perhaps successful, of two competing influences. A pressure to adopt a general administrative procedure act applicable to all or most state agencies had been generated by the example and apparent success of the Federal Administrative Procedure Act, by the promulgation of the two versions of the Model Act, and by the enactment of general acts in a rapidly growing number of states.[4] Resisting this pressure was a tradition of cautious reluctance to adopt such an act, a reluctance originally expressed in 1942 by Commissioner Robert Benjamin in his Report on Administrative Adjudication in New York.[5]

This Article examines several of the more important provisions of the New York Act, both substantively and in their historical context. Noting Benjamin's objections to a general administrative procedure act[6] it surveys the events of the decade

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1. N.Y. STATE AD. PROC. ACT (McKinney 1976).

2. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1970).

3. MODEL STATE ADMINISTRATION PROCEDURE ACT (1946) [hereinafter cited as MODEL ACT]; REVISED MODEL STATE ADMINISTRATION PROCEDURE ACT (1961) [hereinafter cited as REVISED MODEL ACT]. In the textual discussion that follows, the 1946 version of the Model State Administrative Procedure Act will be referred to as the "original Model Act" and the 1961 version will be referred to as the "Revised Model Act."

4. Recent collections of state administrative procedure acts can be found, *inter alia*, in W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES & COMMENTS 1160-62 (6th ed. 1974); Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 IOWA L. REV. 731, 745-47 (1975).

5. 1 R. BENJAMIN, ADMINISTRATION AJUDICATION IN THE STATE OF NEW YORK 9-17 (1942).

6. *See* text accompanying note: 114-17 *infra*.

preceding enactment, first because these events are of interest in their own right, and more importantly, because part of that history is relevant to an appreciation of the final form of the New York Act.[7] The basic structure and several major provisions of the New York Act is then analyzed in the light of New York's modifications of the provisions that it has incorporated from these other acts. Finally, the significance of the New York Act is assessed in the light of developments in state administrative law.

The conclusion that emerges from this examination is that the New York Act—in the form in which it emerged from the legislature and in which it was signed into law by the Governor—is a major dissent from the trend towards excessive judicialization[8] in state administrative procedure legislation, a trend that began with the promulgation of the Revised Model Act in 1961.[9] Moreover, the New York Act may point the way towards a new course of development in state administrative procedure, a course which the New York Act itself does not take but which its internal dynamics suggest.[10]

I. Historical Background

Thirty-four years ago Commissioner Robert Benjamin submitted an exhaustive study of state administrative law to then Governor Lehman. The study recommended against New York's adoption of a general administrative procedure act,[11] a recommendation that was respected until 1962, when the legislature, by concurrent resolution,[12] directed the New York Law Revision Commission to study the advisability of providing general standards for administrative agency hearing procedures and rulemaking and of adopting new legislation governing judicial review of administrative action. In 1963 the Commission submitted a preliminary report[13] to the legislature outlining the complexity of the task

7. As the discussion will show, the final form of the New York State Administrative Procedure Act is largely a result of influences generated by the New York Law Revision Commission and the State Public Service Commission. *See* text accompanying notes 11-82 *infra*.

8. "Judicialization," as that term is employed in this article, refers to modeling agency procedure on trial procedure.

9. *See* note 3 *supra*.

10. *See* text accompanying notes 83-113 *infra*.

11. *See* 1 R. Benjamin, *supra*, note 5, at 24-36.

12. S. Res. No. 103 (1962).

13. N.Y. Law Revision Commission, Preliminary Report to the Legislature Relat-

it had been assigned. The legislature responded by concurrent resolution[14] directing the Commission to narrow its focus to the question of judicial review and to the rulemaking procedures of state—as distinguished from local—agencies.

Although the Commission then limited itself to state agencies, it did not confine itself to rulemaking and judicial review. In 1965, it submitted three proposals to the legislature with accompanying research reports.[15] These proposals were contained in: (1) a draft administrative procedure act; (2) a draft rulemaking procedure act, which was an alternative to the draft administrative procedure act; and (3) draft legislation establishing a Division of Administrative Procedure in the Executive Department which would thereafter be concerned with improving administrative procedures. These proposals, with minor modifications, were resubmitted by the Commission in 1966.[16] In 1969, the Commission resubmitted a proposed administrative procedure act and legislation establishing a Division of State Administrative Procedure.[17]

The major problematic aspect of the administrative procedure act bills drafted by the Law Revision Commission was the manner in which the acts would have treated ratemaking and similar types of economic regulatory decisionmaking. It appears that substantial objection to the Commission's proposals lay on the grounds that the bills would have imposed an overly judicialized decisional format upon ratemaking and similar types of economic regulatory decisionmaking. This objection is, of course, also an objection to the Revised Model Act which imposes the same stringent prohibitions upon contact between agency and

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ING TO STUDY OF ADVISABILITY OF LEGISLATION PROVIDING GENERAL STANDARDS FOR HEARING PROCEDURES AND RULE MAKING OF ADMINISTRATIVE AGENCIES AND PROVIDING FOR JUDICIAL REVIEW LEGIS. DOC. NO. 65(A), 186th Sess. (1963).

14. S. Res. No. 9 (1964).

15. N.Y. LAW REVISION COMMISSION, REPORT AND RECOMMENDATIONS RELATING TO AN ADMINISTRATIVE PROCEDURE ACT, AN ADMINISTRATIVE RULE MAKING PROCEDURE ACT, AND A DIVISION OF STATE ADMINISTRATIVE PROCEDURE LAW 19, LEGIS. DOC. NO. 65 (A), 188th Sess. (1965) [hereinafter cited as 1965 N.Y. LAW REVISION COMMISSION REPORT].

16. N.Y. LAW REVISION COMMISSION, REPORT AND RECOMMENDATIONS RELATING TO AN ADMINISTRATIVE PROCEDURE ACT, AN ADMINISTRATIVE RULE MAKING ACT, AND A DIVISION OF STATE ADMINISTRATIVE PROCEDURE LAW 23, LEGIS. DOC. NO. 65 (A), 189th Sess. (1966) [hereinafter cited as 1966 N.Y. LAW REVISION COMMISSION REPORT].

17. N.Y. LAW REVISION COMMISSION REPORT, RECOMMENDATIONS AND STUDY RELATING TO AN ADMINISTRATIVE PROCEDURE ACT AND A DIVISION OF STATE ADMINISTRAIVE PROCEDURE LAW 21, LEGIS. DOC. NO. (65A), 192d Sess. (1969) [hereinafter cited as 1969 N.Y. LAW REVISION COMMISSION REPORT].

staff in ratemaking proceedings as it does in other adjudicatory procedings.[18] It is an objection, however, that the Law Revision Commission had attempted to forestall by incorporating certain modifications into provisions it had taken from the Revised Model Act.[19]

That the Law Revision Commission's proposals were seen as imposing overly judicialized procedures upon ratemaking and some other types of administrative regulatory functioning is evidenced by the course of events during the few years following the Commission's submission of those proposals in 1969. No action was taken on the Commission's bills during the 1969 legislative session. In 1970, the bills were reintroduced, but their sponsors also introduced revisions of those bills which indicated a new sensitivity to the way the proposed State Administrative Procedure Act would affect ratemaking and certain other economic regulatory decisionmaking.[20]

These revised bills borrowed a technique from the Federal Administrative Procedure Act. They recast and enlarged the Law Revision Commission's definition of "rule" so that it embraced ratemaking and other economic regulatory matters. In the federal act "rule" is defined to include ratemaking in order to remove ratemaking proceedings from the full complex of procedures applicable to adjudication.[21] The expanded definition of "rule" in the 1970 revisions of the Law Revision Commission's bills

18. See the critique of the Revised Model Act in K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.04-6 (Supp. 1970). *See also* Bloomenthal, *The Revised Model State Administrative Procedure Act—Reform or Retrogression?* 1963 DUKE L. J. 593, 601, 613-20; Dakin, *The Revised Model State Administrative Procedure Act—Critique and Commentary*, 25 LA. L. REV. 799, 813 (1965); Gifford, *Report on Administrative Law to the Tennessee Law Revision Commission*, 20 VAND. L. REV. 777, 865 (1967).

19. *See* text accompanying notes 159-174 *infra*.

20. In the 1970 legislative session, A. 3930 and S. 7141 embodied the Law Revision Commission proposals of the preceding year. Indeed, those bills bore a note at the end indicating that they were recommended by the Law Revision Commission and citing the Law Revision Commission's 1969 and 1966 reports. The same sponsors also introduced A. 3930-A, A. 3930-B, S. 7141-A and S. 7141-B. These latter bills also bore the note indicating recommendation by the Law Revision Commission. They incorporated language from the Federal Administrative Procedure Act defining ratemaking for the future and other future-oriented economic regulatory proceedings as rulemaking. The redefinition of "rule" in the substitute bills of the 1970 session, however, did not incorporate the federal act's reference to matters of particular as well as general applicability.

21. The federal act essentially divides administrative proceedings into so-called informal rulemaking, adjudications, and formal rulemaking. Informal rulemaking involves

would similarly have prevented the ratemaking covered by the "rule" definition from being subjected to the bills' adjudicatory procedures. Yet it was unclear whether the revised "rule" definition embraced only general ratemaking, or whether it also em-

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notice-and-comment procedure. 15 U.S.C. § 553 (1970). Adjudication for which opportunity for hearing is required by statute involves evidentiary-hearing procedures. Presiding officers, who must be selected according to specific rules, are given certain procedural powers. 5 U.S.C. § 556. The statute also provides for rules of evidence, official notice, and exclusiveness of the record, *id.*, and establishes procedures for preliminary decisions and for internal review of those decisions, *id.* § 557. Furthermore, administrative personnel who are involved in "investigative" or "prosecuting" functions in a case must be segregated from the decisionmaking officials in that case. *Id.* § 554. The third type of procedure established by the federal act is formal rulemaking. Formal rulemaking resembles adjudication in most respects except that it is not controlled by the separation-of-functions provisions. *Id.* §§ 556-557. *See* Gifford, *supra* note 18, at 849 n.333. *See also* Note, *Ratemaking by Informal Rulemaking Under the Natural Gas Act*, 74 COLUM. L. REV. 752, 753 n.16 (1974); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 788-89 (1974).

Proceedings are assigned to informal rulemaking, formal rulemaking, or adjudication procedures in part by the Act's definitions which essentially divide administrative proceedings into two broad categories: rulemaking and adjudication. Adjudication is defined (through the definition of "order") to include "licensing" but otherwise is defined as the non-rulemaking residual class of agency procedings. 5 U.S.C. § 551 (4)-(7) (1970). The classification of proceedings, therefore, hinges on the definition of "rule," which, in the federal act covers not only pronouncements of "general" applicability, but matters of "particular" applicability as well. *Id.* § 551 (4). It also limits the coverage of its "rule" definition to pronouncements of "future" effect. *Id.*

The federal act's rule definition embraces three kinds of agency pronouncements. First, it includes agency pronouncements which would be called rules in ordinary usage, encompassing "the whole or part of an agency statement . . . designed to implement, interpret, or prescribe law or policy . . . ." *Id.* Second, it embraces agency "organization, procedure or practice" requirements. "Rule means the whole or a part of an agency statement of general or particular applicability or future effect . . . describing the organization, procedure, or practice requirements of an agency . . . ." *Id.* The third kind of agency pronouncement, however, is defined by reference to particular kinds of substantive subject matter to which it relates. Thus, in the third part of the definition, "rule" encompasses "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor, or of valuations, costs, or accounting, or practices bearing on any of the foregoing." *Id.* In short, agency pronouncements on economic regulatory matters are defined as "rules," and since "rule" is defined to include matters of particular as well as general applicability, particularized economic regulatory proceedings become classified as "rulemaking." Section 553 of the federal act establishes notice-and-comment procedures for rulemaking, but carves out an exception for "rules required by statute to be made on the record after opportunity for an agency hearing." *Id.* § 553(c) (1970). For the latter type of "rules" the procedures of sections 556 and 557 are made to apply rather than the notice-and-comment procedures of section 553. Thus, as observed above, formal rulemaking is designed largely to conform with the procedural provisions governing "adjudications," with the principal exception that the separation-of-functions provisions of section 554 are inapplicable to them. *See also* Gifford, *supra* note 18, at 849; Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U. L. REV. 1273, 1281 (1955).

braced ratemaking proceedings involving only one or a few named parties.[22]

Several bills embodying this somewhat imprecise definition of "rule" were introduced in the 1971 legislative session; one was passed.[23] Besides containing this definitional deficiency these bills —as did the earlier law Revision Commission proposals and the bills of the 1970 session—also subjected reparations and initial licensing proceedings to ex parte consultation provisions which would have isolated agency members from staff who had played an adversary or investigative role in the proceedings. These bills, accordingly, could have been seen as imposing overly judicialized procedures on reparations and initial licensing proceedings as well as on future ratemaking proceedings. For reasons probably relating to the imprecise definition described above and to its treat-

22. A. 3930-A (1970) and S. 7141-A (1970) defined "rule" as:

> the whole or part of each agency statement of general applicability or regulation or code that implements or applies law, or prescribes the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and the amendment, suspension, repeal, approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing . . . .

If the latter part of the quoted definition, *i.e.*, "and the amendment, suspension, repeal, approval or prescription for the future of rates . . . or practices bearing on any of the foregoing" falls within the scope of the clause introduced by the term "including," then the requirements of generality from the initial parts of the definition would govern the whole definition. If the language "the amendment, suspension, repeal, approval or prescription for the future of rates . . . or practices bearing on any of the foregoing" is read as a clause equal to and independent from the clause, "an agency statement of general applicability or regulation or code," to which it is joined by the conjunction "and," then the latter part of the quoted definition is not subject to the requirements of generality governing the initial portion of the definition. This definition is contained in A. 8261 (1972); S. 7730 (1972); A. 673 (1971); A. 673-A (1971); S. 1558 (1971); S. 1558-A (1971); A. 3930-A (1970); A. 3930-B (1970); S. 7141-A (1970); S. 7141-B (1970).

23. *See* A. 673 (1971); A. 673-A (1971); S. 1558 (1971); S. 1558-A (1971). The legislature passed S. 1558-A, which was subsequently vetoed by Governor Rockefeller. *See* Veto Message No. 303, 1971 N.Y. LEGIS. ANNUAL 674. Although the Governor did not specify the exact ground of his objections to S. 1558-A, he said: "in any measure of this magnitude . . . often major problems are overlooked or improperly dealt with the first time through. This is particularly true when dealing with an organization as complex and diverse as State government." He also said: "the Legislature's approval of this measure has assisted in identifying its problems and bringing them clearly into focus, so that appropriate steps may be taken to resolve them. I have asked my Counsel to study this measure, and to prepare legislation for early introduction next Session . . . ." Since the Governor's proposals introduced at the next session clarified the "rule" definition and exempted reparations and initial licensing proceedings from the ex parte communications provisions, it appears that these matters may have been instrumental in the Governor's veto of S. 1558-A. *See* A. 12275 (1972) and S. 10469 (1972) embodying the Governor's proposals.

ment of reparations and initial licensing, Governor Rockefeller vetoed the bill passed in 1971.[24] Bills drafted by the Governor's office dealing with both problems were subsequently introduced in the 1972 session.[25] In these proposals, that part of the rule definition which referred to ratemaking for the future and other future-oriented economic regulatory matters was expanded expressly to include proceedings of particular applicability. The Rockefeller bills also excepted reparations and initial licensing proceedings from the ex parte communications provisions. Instead of enacting the Rockefeller bills, however, the legislature passed a bill[26] containing a rule definition similar to the imprecise one of the 1970 and 1971 bills and which also subjected reparations and initial licensing proceedings to the entire framework of adjudicatory procedures including limitations upon consultation between agency and staff. This bill further exacerbated the problems of enactment by its incorporation of a revised evidence provision; it thereby lost the endorsement of the Law Revision Commission.[27] As might have been expected, this bill was vetoed by Governor Rockefeller.[28]

In the 1973 session, new versions of the Rockefeller bills were introduced.[29] They again embodied precise rule definitions and exempted reparations and initial licensing proceedings from the ex parte communication provisions. The 1973 version of the Rockefeller bills also modified the declaratory judgment provision from the structure that had been given to it by the Law Revision Commission and had remained unaltered through the maneuver-

24. *See* note 23 *supra.*

25. A. 12275 (1972); S. 10469 (1972).

26. In the 1972 session, bills containing the imprecise "rule" definition and provisions subjecting reparations and initial licensing proceedings to ex parte communications provisions were introduced in each House—A. 8261 (1972); S. 7730 (1972). The legislature passed S. 7730 which was vetoed by Governor Rockefeller. Veto Message No. 98, 1972 N.Y. LEGIS. ANNUAL 449.

27. "No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with a fair preponderance of the evidence." S. 7730, § 306 (1972). Although this provision was objected to by Governor Rockefeller, the Law Revision Commission took no position on it. *See* N.Y. LAW REVISION COMMISSION, REPORT 11 LEGIS. DOC. NO. 65, 197th Sess. (1974); Veto Message No. 98, 1972 N.Y. LEGIS. ANNUAL 449. *See also* Woodby v. Immigration Serv., 385 U.S. 276, 281-82 (1966).

28. *See* notes 26 & 27 *supra.*

29. A. 7330-A (1973); S. 6273-A (1973).

ing of the intervening years. Although the Rockefeller bills of 1973 were not reported out of committee, they were the last major step in the evolution of the structural design of the legislation that was to be enacted two years hence.[30] Later in 1973, the Law Revision Commission undertook a review of the bills that it had submitted in 1966 and 1969 and of the bills submitted by others from 1970 to 1973, with the stated objective of preparing a new bill to be submitted to the legislature.[31]

A bill substantially similar to the substitute bills of the 1973 legislative session was passed by both houses during the 1974 legislative session, but was vetoed by Governor Wilson.[32] In his veto message, the Governor indicated that he was generally in accord with the provisions of the bill, but explained his veto on the ground that the bill before him "had not focused on a few issues" which needed to be resolved, although he did not specify those issues.[33] In the 1975 session, a bill identical to the one vetoed by

30. The major design changes in the State Administrative Procedure Act from that envisioned by the Law Revision Commission in its formal proposals of 1969 are thus: (1) the classification of future-oriented ratemaking and other economic regulatory decisionmaking as "rules" and the removal of the proceedings giving rise to these decisions from the procedural framework surrounding adjudicatory proceedings; (2) the exemption of reparations, initial licensing, and other technically complex proceedings from the ex parte communications provisions of the Act; and (3) the restructuring of the declaratory judgment provisions.

Since 1970, the Law Revision Commission seems to have favored the imprecise rule definition originating with A. 3930-A (1970) and S. 7141-A (1970) and the subjection of reparations and initial licensing to the ex parte communications provisions of the Act. Thus, the Commission seems to have endorsed A. 3930-A, A. 3930-B, S. 7141-A, and S. 7141-B in the 1970 session. In the 1971 legislative session, the Commission backed the vetoed S. 1558-A. In the 1972 session, the Commission apparently did not back the Rockefeller bills, A. 12275 and S. 10469. Moreover, the Commission gave as its only reason for failing to endorse S. 8261 (1972) and S. 7730 (1972) an objection to the evidence provisions of those bills. *See* note 27 *supra*.

31. *See* N.Y. LAW REVISION COMMISSION, REPORT 9, 13, LEGIS. DOC. No. 65, 197th Sess. (1974).

32. A. 9670 (1974). Veto Message No. 185, 1974 N.Y. LEGIS. ANNUAL 368.

33. Governor Wilson said: "[T]he bill before me has not focused on a few issues that I believe need to be resolved (and were resolved by my predecessor's proposal, Senate Bill 6273-A)." 1974 N.Y. LEGIS. ANNUAL 368. The principal differences between the bill vetoed by Governor Wilson, A. 9670 (1974), and S. 6273-A, which he apparently approved of, were the following:

(1) The definition of "agency" in the vetoed bill was broadened to include a state "office" and "council" and "a public benefit corporation or public authority at least one of whose members is appointed by the governor."

(2) S. 6273-A excluded from the bill's "rule" definition—and hence from notice-and-comment procedural requirements and from the bill's publication requirements—"rules relating to construction or supply contract administration." A. 6273-A § 102(2) (b) (vi) (1973).

Governor Wilson was passed by both houses of the legislature, and signed into law by Governor Carey.[34]

II. THE BASIC PROCEDURAL DESIGN OF THE NEW YORK ACT

A. *Rulemaking Procedures Under the New York Act*

In a manner reminiscent of the federal, rather than the model, acts,[35] the New York Act provides for three types of administrative

34. 1975 N.Y. Laws Ch. 167 (McKinney 1975), *as amended by* N.Y. STATE AD. PROC. ACT (McKinney 1976). *See also* Governor's Memoranda No. 14, 1975 N.Y. LEGIS. ANNUAL 421.

35. The basic design of the federal act is summarized in note 21, *supra*. In contrast to the tripartite design of the federal act, the two versions of the Model Act divided administrative proceedings primarily into two categories, rulemaking and contested cases, each of which is provided with its own procedures. *See* MODEL ACT, *supra* note 3, § 1(2), 1(3); REVISED MODEL ACT, *supra* note 3, § 1(2), 1(7). The Acts' definitions of "rule" determine the matters that are governed by their rulemaking provisions. "Rule" is defined in the original Model Act to include "every regulation, standard, or statement of policy or interpretation of general application and future effect . . . adopted by any agency . . . to implement or make specific the law enforced or administered by it . . . ." MODEL ACT, *supra* note 3, § 1(2). The Revised Model Act uses different language to define "rule" in largely the same way, although the Revised Model Act, by dropping the reference to statements of "future" effect, brings within the scope of the rule definition standards designed to be applied retroactively. REVISED MODEL ACT, *supra* note 3, § 1(7). Both Acts, however, limit their scope to standards of "general" application, and, to that extent, their "rule" definitions conform to the ordinary and general usage of that term as a standard governing behavior or by which behavior is evaluated and which applies in an identical manner to all cases having the same characteristics. They exclude from the definition of "rule," and hence from the rulemaking procedures, matters affecting only the "internal management" of the agency and not affecting private rights or procedures, available to the public. MODEL ACT, *supra* note 3, § 1(2); REVISED MODEL ACT, *supra* note 3, § 1(7)(A). The Revised Act expressly excludes declaratory rulings from the definitions of "rule" and the original Act does so by implication. REVISED MODEL ACT, *supra* note 3, § 1(7)(B). Both Acts contain provisions designed to ensure that interested persons are notified of the adoption, amendment or repeal of any rule and that they be given opportunity to submit, for the agency's prior consideration in connection with the contemplated rulemaking action, data, views, or arguments. MODEL ACT, *supra* note 3, § 2(3); REVISED MODEL ACT, *supra* note 3, § 3(a). The Acts provide that the submissions may be accepted by the agency either orally or in writing, but the Revised Act mandates an "oral hearing" if requested by twenty-five persons, a governmental subdivision, or another agency. REVISED MODEL ACT, *supra* note 3, § 3(a)(2).

"Contested case" proceedings under the Model Acts are trial-type proceedings which would properly be described as "adjudicatory" as that term is commonly used. In the original Model Act, "contested case" is defined as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." MODEL ACT, *supra* note 3, § 1(3). The Revised Model Act's definition of "contested case" is similar although it explicitly includes within that definition "ratemaking" and "licensing" proceedings. REVISED MODEL ACT, *supra* note 3, § 1(2). Although both Model Acts contemplate that

procedure[36] through the use of carefully drafted definitions. In effect, the New York Act provides for two types of "rulemaking" procedures and one type of "adjudicatory proceeding." The primary definition of "rule," promulgated in section 102(2)(a),[37] consists of two major parts. The first, clause (i),[38] contains a description of an agency pronouncement which corresponds closely, although not perfectly, with general usage for a substantive rule. Thus, "rule" is defined to include "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law . . . ."[39] This part of the rule definition differs from those of the federal and model acts insofar as it contains no reference to "interpretation" and no reference to administrative "policy."[40] As will be pointed out below,[41] these omissions are not accidental. The clause (i) definition of "rule" also encompasses agency procedure.[42] The second major part of the "rule" definition, clause (ii),[43] contains a description of proceedings involving matters of economic regulation and classifies all such proceedings—including proceedings of "particular applicability"—as "rules." "Rule" is thus defined to include "the amendment, suspension, repeal, approval or prescription for the future

trial-type procedures will be employed in contested cases, the Revised Model Act contains a number of provisions applicable to "contested cases" proceedings which are (1) designed to increase the degree to which agency decisionmakers are insulated from staff personnel and (2) intended generally to increase the degree to which a courtroom model is imposed upon agency adjudicatory proceedings. REVISED MODEL ACT, *supra* note 3, §§ 9(e)(7), 10(4), 13; *see* Bloomenthal, *supra* note 18. These provisions are examined below in the discussion of adjudicatory proceedings under the New York Act. The Model Acts provide for judicial review of contested cases, and for pre-enforcement judicial review of rules, through actions for declaratory judgements. MODEL ACT, *supra* note 3, §§ 6, 12; REVISED MODEL ACT, *supra* note 3, §§ 7, 15.

36. The New York Act establishes procedures for "adjudicatory proceedings" as well as procedures for two defined classes of "rule making." *See* N.Y. STATE AD. PROC. ACT art. 2, § 202(1), (2), art. 3 (McKinney 1976).

37. N.Y. STATE AD. PROC. ACT § 102(2)(a) (McKinney 1976).

38. *Id.* § 102(2)(a)(i).

39. *Id.*

40. The federal act includes statements of policy and interpretation within its definition of "rule." 5 U.S.C. § 551(4) (1970). It requires such statements to be published or made available for public inspection and copying. 5 U.S.C. § 552(a)(1)(D), (2)(B) (1970). It does, however, exempt "interpretative rules" and "general statements of policy" from notice-and-comment procedures. *Id.* § 553(b)(A) (1970).

41. *See* text accompanying notes 118-32 *infra*.

42. "'Rule' means (i) the whole or part of each agency statement, regulation or code of general applicability that . . . proscribes the procedure or practice requirements of any agency . . . ." N.Y. STATE AD. PROC. ACT § 102(2)(a)(i) (McKinney 1976).

43. *Id.* § 102(2)(a)(ii).

of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability."[44] Most of that language was taken substantially verbatim from the latter part of the federal act's "rule" definition.[45]

The New York Act, in section 202,[46] provides for two types of "rulemaking" procedures: the first kind, "subdivision one procedure," governs "the adoption, amendment, suspension or repeal of any rule as to which a hearing is required by any statute";[47] the second, "subdivision two procedure," governs "the adoption, amendment, suspension or repeal of any rule other than those subject to" the subdivision one procedure.[48] It will be observed that the subdivision two procedure is not limited to rules of "general applicability," *i.e.*, rules as commonly understood and as defined in clause (i) of the New York Act's "rule" definition.[49] Subdivision two procedures are essentially notice-and-comment procedures[50] resembling those of section 553 of the federal act, section 3 of the Revised Model Act, and section 2(3) of the original Model Act.[51] Subdivision one procedures, in addition to notice requirements, provide for a "public hearing," although the procedural requirements for the public hearing are left unspecified.[52]

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44. *Id.*

45. 5 U.S.C. § 551(4) (1970). The reference to "security authorizations" in section 102(2) (a) (ii) is not contained in the federal act. On "security authorizations," see 2 R. BENJAMIN, *supra* note 5, at THE DEPARTMENT OF PUBLIC SERVICE 98-110 (1942).

46. N.Y. STATE AD. PROC. ACT § 202 (McKinney 1976).

47. *Id.* § 202(1).

48. *Id.* § 202(2).

49. As originally enacted, the requirements of section 202 (2) were imposed prior to "the adoption, amendment, suspension or repeal of any rule *of general applicability* other than those subject to subdivision one of this section . . . ." 1975 N.Y. Laws, ch. 167, § 202(2) (emphasis added). Section 202(2) has been amended to remove the italicized words. 1976 N.Y. Laws, ch. 935. *See* N.Y. STATE AD. PROC. ACT § 202(2) (McKinney 1976). Subdivision two procedures now apply to all "rules." The 1976 amendment, therefore, would have the effect of imposing notice-and-comment procedures upon those future-oriented economic regulatory decisions for which a hearing is not required by statute.

50. The agency may, in its discretion, hold a "public hearing" in conjunction with subdivision two rulemaking. *See* N.Y. STATE AD. PROC. ACT § 202 (2) (b) (McKinney 1976).

51. 5 U.S.C. § 553 (1970); REVISED MODEL ACT, *supra* note 3, § 3; MODEL ACT, *supra* note 3, § 2(3).

52. It has been noted that the enacted State Administrative Procedure Act is a modification of earlier Law Revision Commission proposals. *See* text accompanying notes 1-3 *supra*. The Law Revision Commission proposals, in the manner of the original and

B. *The Law Revision Commission Treatment of the "Public Hearing" Provision*

The Law Revision Commission had previously described its understanding of the "public hearing" referred to in section 202 as not mandating trial-type procedures. Thus, according to the Commission:

> The proposed bill [§202(3)] makes clear that public hearings held in connection with rulemaking need not comply with the formalities of trial-type hearings such as are held in connection with adjudicatory proceedings. In other words, rulemaking hearings may be of the informal, legislative, and argument type. Hence they need not employ the formalities of sworn testimony, examination and cross-examination of witnesses, except to the extent that an agency may decide that some particular issue is of the sort best resolved through such formal methods. The Commission's proposed bill does not affect such existing procedures.[53]

This understanding comports with the usage that Commissioner Benjamin accorded to the term "public hearing" in his 1942 report.[54] It will be observed that an agency conducting a

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revised Model Acts, divided administrative action primarily into rulemaking proceedings and adjudicatory proceedings. Following the plan of the Model Acts, they provided one set of procedures for trial-type proceedings, but in the case of rulemaking, the Commission proposals provided for two types of procedures. In cases where a statute required a hearing, the Commission bills mandated a "public hearing." In cases where no statute required a hearing, the Commission bills imposed notice-and-comment procedures. Because the Commission bills defined "rule" as involving a matter of general applicability in a manner similar to the definitions of the Model Acts, it was natural to conceive of the "public hearing" mandated under section 202(1) in those bills as a "legislative" or non-trial-type hearing. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 6.05-6.06 (1958). *See also* K. DAVIS, *supra* note 18, at § 7.06. The Commission, accordingly, expressed the view that section 202(1) "public hearings" need not be trial-type proceedings. *See* 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17 at 40; 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 41-42; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 33. Of course, the redefinition of "rule" in the substitute bills to include proceedings of particular applicability changes the assumptions upon which the earlier Law Revision comments on the section 202(1) "public hearings" were made, even though the language of section 202(1) itself has remained largely unchanged.

53. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 40. Virtually identical language is contained in the Commission's 1965 and 1966 Reports. 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 41-42; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 33.

54. Thus, in describing "public hearings" held by the Board of Standards and Appeals in connection with the adoption of Industrial Code rules under the Labor Law, Benjamin said:

> Public hearings are presided over by the full Board; and sometimes members of the advisory committee are also present. The procedure at the hearings is informal, and those who speak are not sworn. What is said may include comment

public hearing pursuant to section 202 retained the freedom, in the Commission's view, to impose trial methods for the resolution of those issues for which it deemed the trial method most appropriate.[55] Under such an interpretation, an agency would be given a broad mandate to shape its rulemaking procedures to match the kinds of issues coming before it. Discretion to interpret or to reinterpret statutory "hearing" requirements in such a way as to harmonize procedures with issues would place major responsibility on the agencies for designing efficient and fair rulemaking procedures.[56]

It appears, however, that the discretion the Commission's bill would have given to agencies to redesign rulemaking procedures was not as large as a reading of section 202 alone might indicate. Section 104 of the Commission's 1969 proposed bill provided (with an exception not relevant here) that the provisions of the proposed bill "shall not be construed to limit or repeal additional requirements imposed by statute or otherwise, or to change existing agency procedures where such procedures meet or exceed the standards of administrative procedure prescribed in this chapter.[57] Section 104 apparently contemplated that when existing statutes imposed more judicialized procedures[58]

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on or criticism of the factual material on which the proposed rules are based, statements of other relevant factual material that may not have been taken into account, questions as to the meaning and application of proposed rules, suggestions for changes in the language of proposed rules (affecting either substance or form), or general approval or disapproval of the rules as a whole. Often there is discussion between those in attendance and members of the Board or members of the advisory committee who are present.

Benjamin also noted that a stenographic record of the proceedings was made and that written comments and suggestions could be submitted within a limited period after the hearings. 1 R. BENJAMIN, *supra* note 5, at 306.

55. Thus, the Law Revision Commission stated that an agency might employ informal procedures in a "public hearing" except to the extent that an agency may decide that some particular issue is of the sort best resolved through . . . formal methods." 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 40. *See* text accompanying note 53 *supra*.

56. An agency conducting a section 202(1) "public hearing"—even under the enacted bill—has discretion to shape its hearing procedures to the subject matter of its inquiries. But it will be constrained by the provisions of section 103(1) to conform to trial-type procedures which have been read into the hearing requirements of the regulatory statute under which the agency is acting.

57. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 48.

58. Although the "additional requirements" phrase is ambiguous, draftsmen of administrative-procedure legislation often tend to perceive their task as imposing judicialized procedures upon agencies which would otherwise be inclined to act in less judicial

than would inhere in the section 202 public hearing, the more judicialized procedures would prevail. Thus, since even the Law Revision Commission referred to its proposal as providing "minimum safeguards,"[59] it is probable that section 104 was intended to allow case law interpreting even succinct statutory "hearing" requirements as imposing some aspects of a judicialized decisional process to prevail over the section 202 procedures.

While New York case law is not rich in detailed guidelines for agency decisionmaking, there may well be sufficient case law to preclude an agency, such as the Public Service Commission, from departing from a basic trial-type format for ratemaking.[60] Nevertheless, New York case law does not appear to impose the strict controls upon the decisional processes of agencies engaged in ratemaking which would have been imposed had the Law Revision Commission proposals been adopted in unmodified form.[61]

C. *The Design of the Law Revision Commission Bills*

The rulemaking provisions of section 202—both the notice-and-comment provisions and the public hearing provisions—were contained in substantially identical form in the Law Revision Commission bills of 1965, 1966 and 1969.[62] In the Law Revision

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ways. Hence "additional requirements" probably was meant to be largely synonymous with more judicialized procedures.

59. *See* 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 38.

60. *Cf.* New York Edison Co. v. Maltbie, 271 N.Y. 103, 2 N.E.2d 277 (1936) (per curiam); Radio Common Carriers v. Public Serv. Comm'n, 79 Misc. 2d 600, 605, 360 N.Y.S.2d 552, 558 (Sup. Ct. 1974), *aff'd mem.*, 48 App. Div. 2d 756, 368 N.Y.S.2d 341 (1975). Compare, however, Benjamin's description of nontrial-type procedure employed by the Insurance Department in generalized rate proceedings. 2 R. BENJAMIN, *supra* note 5, at THE INSURANCE DEPARTMENT 29-31. *Cf.* Dakin, *Ratemaking as Rulemaking—the New Approach at the FPC: Ad Hoc Rulemaking in the Ratemaking Process*, 1973 DUKE L. J. 41, 70-88; Comment, *Ratemaking by Informal Rulemaking Under the Natural Gas Act*, 74 COLUM. L. REV. 752 (1974).

61. New York decisions having some implications for the procedural structure of agency decisional processes include: Wallace v. Murphy, 21 N.Y.2d 433, 235, N.E.2d 759, 288 N.Y.S.2d 613, *modified mem.*, 22 N.Y.2d 879, 239 N.E.2d 922, 293 N.Y.S.2d 339 (1968); Fisher v. Kelly, 17 N.Y.2d 521, 214 N.E.2d 793, 267 N.Y.S.2d 517 (1966) (per curiam); Sorrentino v. State Liquor Auth., 10 N.Y.2d 143, 176 N.E.2d 563, 218 N.Y.S.2d 635 (1961); Kilgus v. Board of Estimate, 308 N.Y. 620, 127 N.E.2d 705 (1955); Weeks v. O'Connell, 304 N.Y. 259, 107 N.E.2d 290 (1952); Cruz v. Lavine, 45 App. Div. 2d 720, 356 N.Y.S.2d 334 (1974) (mem.); Weinberg v. Clarkstown, 78 Misc. 2d 464, 357 N.Y.S. 2d 332 (Sup. Ct. 1973); Marrano Constr. Co. v. State Comm'n for Human Rights, 45 Misc. 2d 1081, 1087, 259 N.Y.S.2d 4, 10 (Sup. Ct. 1965).

62. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 60-61; 1966 N.Y.

Commission bills, the public hearing provision was designed to perform a simpler role than the one to which it now may appear to be assigned. The Law Revision Commission bills were largely modeled on the Revised Model Act, an act which, it will be recalled, divided almost all agency action into two classes: rulemaking and contested cases.[63] The Revised Model Act provided for notice-and-comment procedures to accompany rulemaking (with an oral hearing at the agency's discretion); it also provided that an agency would be required to hold an oral hearing when one was requested by twenty-five persons, an association of twenty-five or more members, or another agency or governmental subdivision.[64] The New York Law Revision Commission followed the approach of the Revised Model Act in mandating notice-and-comment procedures but it rejected the mandatory oral hearing requirements of the Revised Model Act.[65] Yet the Commission felt that in some cases a mandatory legislative-type oral hearing would be proper. The Commission also noted that some statutes might themselves require a hearing prior to rulemaking. Accordingly, the Commission provided for two types of rulemaking procedures in section 202. One type was notice-and-comment procedure which

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LAW REVISION COMMISSION REPORT, *supra* note 16, at 62-63; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 56-58.

63. REVISED MODEL ACT, *supra* note 3, § 1 (2), (7). *See* note 35 *supra*. Declaratory rulings by agencies do not seem to fit into either category, although for purposes of judicial review they are given "the same status as agency decisions or orders in contested cases." REVISED MODEL ACT, *supra* note 3, § 8.

64. REVISED MODEL ACT, *supra* note 3, § 3 (a) (2).

65. The Commission explained its position as follows:

> An important choice in connection with rulemaking procedures is between requiring a hearing in connection with the adoption of all or of certain categories of rules . . . and leaving agencies free to employ either written or oral procedures at their discretion. The Revised Model Act, as well as the administrative procedure statutes of [certain named states] . . . are among those requiring hearings in some or all instances. The Federal Administrative Procedure Act and the Model State Administrative Procedure Act, as well as the administrative procedure statutes of [certain named states] . . . permit agencies to employ written or oral procedures at their discretion.
>
> The Commission concluded that a third choice was proper. This would reaffirm judgments previously made by the Legislature. The proposed bill therefore requires a hearing procedure only where another statute requires a hearing prior to the adoption of a rule.

1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 39. *See* also 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 41; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 32.

was made mandatory by the bill.[66] The second type of procedure involved a "public hearing," by which the Commission meant a "legislative" type of oral hearing.[67] But the public hearing procedure would have become operational only in those cases in which the governing substantive regulatory statute conferring rulemaking power on the agency imposed a hearing requirement.[68] And since a statutory "hearing" requirement in connection with rulemaking (understood in the ordinary sense of the term) would generally contemplate a legislative hearing, the Law Revision Commission bills were in a sense redundant.[69] They provided for a public hearing only when such a hearing was required by the relevant independent substantive regulatory statute, and hence no "public hearing" requirement was imposed that did not otherwise exist.

D. *The Design of the Enacted State Administrative Procedure Act*

The series of substitute bills[70] that culminated in the present Act were offered as modifications of the Law Revision Commission bills to solve the problems raised by the application of the Commission bills to the ratemaking process.[71] The substitute bills solved that problem by incorporating in the "rule" definition much of the language of the federal act's "rule" definition.[72] This more complex definition treated ratemaking as rulemaking and thus removed it from adjudicatory procedures.[73]

66. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 60-61; 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 62; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 57.

67. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 40. *See also* 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 41-42; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 33. *See also* note 51 *supra*.

68. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 39; 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 41; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 32.

69. Indeed, the Commission stated that section 202(1) of its bills "would reaffirm judgments previously exercised by the Legislature." 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 39; 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 41; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 32.

70. S. 1236 (1975); A. 2251 (1975); A. 9670 (1974); A. 7330-A (1973); S. 6273-A (1973).

71. *See* text accompanying notes 159-74 *infra*.

72. 5 U.S.C. § 551(4) (1970). *See* text accompanying notes 46-52 *supra*.

73. N.Y. STATE AD. PROC. ACT § 102(2)(a)(ii) (McKinney 1976).

The result is that ratemaking and possibly other particularized economic regulatory proceedings now fall under section 202. And since ratemaking statutes generally impose a "hearing" requirement,[74] the public hearing provisions of section 202 now become applicable to those proceedings. But a difficulty seems to arise because the legislative history of the Law Revision Commission bills indicates that the public hearing requirement of section 202 contemplates a legislative hearing,[75] while ratemaking—at least before the Public Service Commission[76]—has traditionally been handled through trial-type procedures.[77] Actually, this might be an opportunity rather than a difficulty, because the Law Revision Commission had construed the public hearing provision as contemplating legislative-type hearing procedures as a minimum requirement[78] and as allowing an agency to impose more judicialized procedures whenever the issues could, in the agency's judgment, be better handled through judicialized procedures.[79] Under this approach, the Public Service Commission would be given significant authority to redesign ratemaking procedures as and when necessary to produce an optimum combination of efficiency and fairness.

But the enacted legislation contains a shortened form of the "construction" provisions contained in section 104 of the 1969 version of the Commission bill.[80] Section 103 of the act provides that the provisions of that act "shall not be construed to limit or repeal additional requirements imposed by statute or otherwise."[81] The result, therefore, may be to limit the power under section 202

74. N.Y. TRANSP. LAW §§ 119, 142(11), 171(4), 173 (McKinney 1975); N.Y. PUB. SERV. LAW §§ 72, 97 (McKinney 1955); *See also* N.Y. PUB. SERV. LAW §§ 66(2), 92(2) (McKinney Supp. 1976-1977).

75. *See* text accompanying notes 66-69 *supra*.

76. *See, e.g.*, 1 R. BENJAMIN, *supra* note 5, at 67-68.

77. *Id.*

78. See the statement of the Law Revision Commission at note 54 *supra*. The Commission employed the permissive forms "may be" and "need not" to describe the kind of procedure that was contemplated by the "public hearing" language in section 202 and to describe procedural devices which that language did not mandate.

79. Thus "public hearings," according to the Commission, "need not employ the formalities of sworn testimony, examination and cross-examination of witnesses, *except to the extent an agency may decide that some particular issue is of the sort best resolved through such formal methods.*" 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 40 (emphasis added). *See* text accompanying note 54 *supra*.

80. *See* 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 59.

81. N.Y. STATE AD. PROC. ACT § 103(3) (McKinney 1976).

which the Public Service Commission or any other economic regulatory agency has to redesign its procedures.[82]

E. *An Analogy Between the Design of the New York Act and the Florida East Coast Railway Case*

In *United States v. Florida East Coast Railway*,[83] the Supreme Court construed the "hearing" requirement of section 1(14) (a) of the Interstate Commerce Act.[84] That section provides in relevant part: "The Commission may, after hearing, . . . establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad . . . including the compensation to be paid . . . for the use of any locomotive, car, or other vehicle not owned by the carrier using it . . . ."[85]

The controversy in *Florida East Coast* involved an Interstate Commerce Commission order establishing so-called incentive per diem rates chargeable to a railroad for that period in which it had the use of a freight car owned by another railroad.[86] Although it had been widely assumed that the "hearing" requirement in section 1(14)(a) meant an evidentiary or trial-type hearing,[87] the Court held that a notice-and-comment proceeding conforming to section 553 of the Federal Administrative Procedure Act was a type of "hearing"[88] and that this type of hearing would satisfy the requirements of section 1(14) (a).[89] Implicit in the Court's decision is the possibility that "hearing" requirements under many other statutes which had been widely believed to mandate trial-type hearings might be open to similar constructions.[90]

Florida East Coast is in many ways a praiseworthy decision.

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82. Thus, as the Law Revision Commission itself stated in connection with the public hearing requirement contained in its own proposed bills, the Act seems to "reaffirm judgments previously made by the Legislature." 1969 LAW REVISION COMMISSION REPORT, supra note 17, at 39. In a similar vein, section 103 (1) of the Act, which required imposing a judicial mode of decisionmaking, had previously been construed into statutes mandating hearings. And the Act does not prevent agencies from imposing judicialization requirements in addition to those imposed by statute. N.Y. STATE AD. PROC. ACT § 103 (1) (McKinney 1976); *see* 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 38.

83. 410 U.S. 224 (1973).

84. 49 U.S.C. § 1 (14) (a) (1970).

85. *Id.*

86. 337 I.C.C. 217 (1970) Incentive Per Diem Charges—1968.

87. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1307-10 (1975).

88. 410 U.S. at 226-28, 240-41.

89. *Id.*

90. Friendly, *supra* note 87, at 1308-09.

The administrative action there involved was patently general: it established a set of per diem rates which were applicable to all railroads.[91] Accordingly, the Supreme Court freed the Interstate Commerce Commission from the need to resort to trial-type procedures in a context in which they were unduly cumbersome.[92] As such, *Florida East Coast* is one of a number of recent judicial decisions that have encouraged wider use of rulemaking and of rulemaking procedures by agencies.[93]

For present purposes, the interesting aspect of the decision is that it altered widely held beliefs about the legal effect of statutory requirements for "hearings."[94] Before then, statutory requirements for "hearings" prior to administrative action had been widely thought to mandate trial-type hearings,[95] and, in addition, to trigger the references in sections 553 and 554 of the Federal Administrative Procedure Act to decisions required by statute to be made on the record after opportunity for an agency hearing.[96] In the *Florida East Coast* context, for example, the order there—since it involved the regulation of common carriers—was known to fall within the Federal Administrative Procedure Act's "rule" definition,[97] and, upon the basis of the Interstate Commerce Act's "hearing" requirement,[98] section 553 was widely thought to impose the formal rulemaking procedure of sections 556 and 557 upon the administrative decisional process.[99]

As a result of that decision, however, statutory requirements for "hearings" are less likely to be construed in these manners. Indeed, it is probably not inaccurate to describe *Florida East Coast* as imposing a profound change upon the state of the law. It seems

91. *See* 410 U.S. at 244-46.

92. Friendly, *supra* note 87, at 1306-07.

93. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 619-21 (1973); FPC v. Texaco, Inc., 377 U.S. 33 (1964); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974); WBEN, Inc. v. United States, 396 F.2d 601 (2d Cir.), *cert. denied* 393 U.S. 914 (1968); California Citizens Band Ass'n v. United States, 375 F.2d 43, 49-53 (9th Cir.), *cert. denied,* 389 U.S. 844 (1967); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), *cert. denied,* 385 U.S. 843 (1966); Air Lines Pilots Ass'n v. Quesada, 276 F.2d 892 (2d Cir. 1960). *Compare* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) *with* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

94. Friendly, *supra* note 87.

95. *Id.* at 1307.

96. 5 U.S.C. §§ 553 (c), 554 (c) (2) (1970).

97. 5 U.S.C. § 551(4) (1970).

98. 49 U.S.C. § 1 (14) (a) (1970).

99. *See* Long Island R.R. v. United States, 318 F. Supp. 490, 495-98 (E.D.N.Y. 1970); Friendly, *supra* note 87, at 1305-06.

probable that when Congress first enacted the hearing requirement of the Interstate Commerce Act, it contemplated an evidentiary hearing.[100] And the state of the law at any given time can plausibly be described as widely-held expectations of the way in which judges will decide.[101] *Florida East Coast,* then, changed the state of the law both from that which was originally contemplated by Congress and from previously widely held expectations.[102] In short, the effective meaning of the hearing requirements[103] of many previously enacted statutes has been drastically changed—perhaps for the better—by Supreme Court decision.

There is an analogy here to the potential of an act like the New York State Administrative Procedure Act to reform administrative law by redefining hearing requirements contained in existing economic regulatory statutes. To the extent that existing statutes have been understood to impose judicialized procedures on decisional processes which could be better performed without them, an administrative procedure act along the basic lines of the New York Act could redefine those hearing requirements to mandate a minimum of non-trial-type shortened procedures,[104] but with discretion in the supervising agency to employ trial procedures where the agency thinks appropriate.[105]

Admittedly, the extent to which this potential inheres in the New York Act is unclear. As previously noted,[106] section 103 provides that the Act "shall not be construed to limit or repeal additional requirements imposed by statute or otherwise,'[107] but when the governing statute merely mandates a "hearing," how

100. *See* Long Island R.R. v. United States, 318 F. Supp. 490, 497 (E.D.N.Y. 1970).

101. *See* Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 458 (1897). *See also,* J. GRAY, THE NATURE AND SOURCES OF THE LAW 107 (2d ed. 1921).

102. Friendly, *supra note* 87, at 1307.

103. The effective meaning of these statutory hearing requirements is determined by the way in which courts would apply them.

104. Reorienting the extent of the Public Service Commission's reliance on trial-type hearings was recommended in Comment, *Utility Rates, Consumers, and the New York State Public Service Commission,* 39 ALBANY L. REV. 707, 767-69 (1975).

105. The Law Revision Commission was willing to vest agencies with power to impose trial-type hearings where they decided that "some particular issue is of the sort best resolved through such formal methods." 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 40; 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 42; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 40.

106. *See* note 56 *supra.*

107. N.Y. STATE AD. PROC. ACT § 103(1) (McKinney 1976).

will the New York Act work? The initial reference is, of course, to the independent regulatory statute which mandates a hearing. But since the term "hearing" is ambiguous, meaning must be attributed to that term. Reference, in that case, could be made to prior case law construing the statutory "hearing" reference or, if there was no prior case law, to the State Administrative Procedure Act's casting of the "hearing" requirement into a nontrial mode. Section 103, however, seems to contemplate that sources external to the State Administrative Procedure Act[108] will control the content of a section 202 public hearing, and consequently that the "hearing" provision of the governing independent statute must first be construed before reference is made to section 202.[109] The construction of "hearing" in that independent statute then would govern the meaning attributed to the section 202 "public hearing."[110]

It will be observed that on this interpretation the "public hearing" provision in section 202 is meaningless.[111] The somewhat complex structure of the Act which defines ratemaking as rulemaking and which then apparently mandates a "public hearing" when an independent statute requires a "hearing," neither increases nor detracts from the agency's procedural obligations under the independent statute.[112] The New York Act, then, in these provisions probably does not convey to ratemaking and other economic regulatory agencies a mandate to streamline their procedures. But it may demonstrate a way in which a procedurally more ambitious state might convey such a mandate to its agencies through the mechanism of an administrative procedure act.[113]

108. These sources would seem to include the regulatory statute conferring decisional power on the agency in question, the judicial decisions construing that statute, and agency-imposed procedural requirements of a judicialized nature. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 38.

109. This approach seems consistent with the original intention of the Law Revision Commission to "reaffirm judgments previously made by the Legislature." 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 39; 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 41; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 32.

110. N.Y. STATE AD. PROC. ACT § 202 (McKinney 1976).

111. *See* note 82 *supra*.

112. *Id.*

113. It is possible that the Law Revision Commission thought that section 202 (1) of its bill would permit agencies which had previously conducted trial-type hearings for rulemaking to replace those hearings with legislative hearings. Thus, the Commission noted:

F. *Benjamin vindicated*

Despite the conclusions of the last section, the New York Act has accomplished a great deal in the area of economic regulatory decisionmaking procedures. It has both imposed strict procedural controls over the noneconomic—and more accusatory—administrative proceedings[114] and avoided imposing inflexible procedural controls upon a class of particularized administrative proceedings, *i.e.*, the class composed of ratemaking and other future-oriented economic regulatory proceedings.[115] By so doing, the Act allows present variations in procedures governing these matters to con-

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There is at present considerable variety in the procedures used in connection with the adoption of rules. They range from no hearings or other formal consultation procedures whatever, through informal consultation, consultation with formally established advisory bodies, and hearings of a legislative type, to formal trial-type hearings.

Thereafter, it asserted:

The proposed bill (§ 202 (3)) makes clear that public hearings held in connection with rulemaking need not comply with the formalities of trial-type hearings such as are held in connection with adjudicatory proceedings. In other words, rulemaking hearings may be of the informal, legislative, and argument type. Hence they need not employ the formalities of sworn testimony, examination and cross-examination of witnesses, except to the extent that an agency may decide that some particular issue is of the sort best resolved through such formal methods.

1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 39, 40. To the extent that the Commission believed that its proposed bill would have so permitted the replacement of trial-type hearings with legislative-type hearings, then the Commission must have believed that the "construction" provisions contained in section 104 of its bill (part of which are in section 103 of the Act) would not have conflicted with that permission. But if section 104 of the Commission bill would not have conflicted with the permission contained in section 202 to convert trial-type hearings into legislative-type hearings, section 103 of the Act may not (of itself) conflict with an implicit permission contained in present section 202 (1) to decide particularized "rule making" proceedings without a trial-type hearing. One response to such an argument would be that section 104 of the Commission bill was consistent with the provision for legislative-type hearings in section 202, because the previously employed trial-type rulemaking hearings to which the Commission made reference were not required by statute to be in that trial-type form. Accordingly, whenever an independent statute requires a hearing and when that hearing requirement is judicially construed to mandate a trial-type hearing, neither the Commission bill nor the present act would change the result.

In another provision, however, the Act does attempt to approve agency efforts to streamline procedures consistent with fairness to parties. Thus, the Act provides that in adjudicatory proceedings "an agency may, for the purpose of expediting hearings, and when the interests of parties will not be substantially prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." N.Y. STATE AD. PROC. ACT § 306 (1) (McKinney 1976).

114. In such proceedings, the judicial model is widely believed to afford an appropriate basis for the design of administrative procedures. *See* H. R. REP. No. 1980, 79th Cong., 2d Sess. 30 (1946); S. REP. No. 752, 79th Cong., 1st Sess. 18 (1945); Gifford, *supra* note 18, at 851-52; Jaffe, *supra* note 21, at 1281.

115. *See* text accompanying notes 74-82 *supra*.

tinue and it avoids freezing existing case law concepts in a statutory codification.[116] Benjamin's reluctance to impose uniform procedures on the various state agencies thus remains alive. And his penchant to avoid interfering with an evolutionary development of procedures over time is followed for ratemaking and other economic regulatory decisionmaking.[117]

III. INTERPRETATIONS AND GENERAL POLICY STATEMENTS UNDER THE NEW YORK ACT

A. *Filing and Publication Requirements*

The New York Constitution in article 4, section 8 provides that:

> No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations, by appropriate laws.[118]

Section 203 of the State Administrative Procedure Act precludes any rule from taking effect until it is filed with the secretary of state.[119] Section 202 requires the state bulletin—established by the New York Legislature at the same time that it enacted the State Administrative Procedure Act[120]—to carry the text of all rules of general applicability and the text of all "rules" for which a hearing is required by statute or else to specify the place where the terms of such rules may be found.[121]

116. *See* 1 R. BENJAMIN, *supra* note 5, at 37. "There is weight in the consideration that administrative regulations can, more readily than statutory provisions, be changed to meet changing conditions or to correct procedures that prove to be unworkable." *Id.*

117. *See id,* at 25, 35, 37.

118. N.Y. CONST. art. 4, § 8 (McKinney 1969).

119. N.Y. STATE AD. PROC. ACT § 203 (McKinney 1976). As originally enacted, the filing requirement of section 203 applied only to rules of general applicability. 1975 N.Y. Laws. ch. 167, § 203 (McKinney 1975).

120. N.Y. EXEC. LAW § 160 (McKinney Supp. 1976-1977). *See* 1975 N.Y. LAWS, ch. 167 § 203 (McKinney 1975).

121. N.Y. STATE AD. PROC. ACT § 202(1)(e), 202(2)(d) (McKinney 1976). Notice of proposed rulemaking must also be given, *inter alia,* through the state bulletin. *Id.* § 202(1)(b), 202(2)(a)(1) (McKinney 1976).

The Act, however, exempts from the "rule" definition "interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory."[122] It also exempts "rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public."[123] Thus interpretations and "internal management" matters are freed from the Act's filing and publication requirements.[124]

Prior New York decisions had exempted interpretations and policy statements from the requirements of Article 4, section 8 of the constitution.[125] The constitutional filing and publication requirement, the courts have held, is in effect limited to so-called "legislative" rules. [126] Litigation under the constitutional provision has also accorded a rather wide scope to the internal management exception incorporated in that provision.[127] The New York State Administrative Procedure Act has followed this judicial lead and has refrained from imposing a filing and publication requirement upon agency interpretative statements, regardless of the degree of generality in which they are made.[128] In addition, the Act has not accompanied its internal management exception with any language designed to limit the scope of that exception more narrowly than would otherwise be indicated by prior case law.[129]

122. N.Y. STATE AD. PROC. ACT § 102(2)(b)(iv) (McKinney 1976). While the Law Revision Commission bills defined "rule" as "the whole or part of each agency statement of general applicability or regulation or code that implements, interprets or applies law or policy," those bills also specifically excluded "interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory." *See* 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 57-58; 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 59-60. Substantially identical language is also employed in 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 45-46.

123. N.Y. STATE AD. PROC. ACT § 102(2)(b)(i) (McKinney 1976).

124. Since the publication and filing requirements of section 202 and section 203 are made applicable only to "rules," they are inapplicable to agency actions not falling within section 102(2)'s definition of "rule."

125. People v. Widelitz, 39 Misc. 2d 51, 239 N.Y.S.2d 707 (Sup. Ct. 1963).

126. *Id. See also* People v. Cull, 10 NY.2d 123, 176 N.E.2d 497, 218 N.Y.S.2d 38 (1961).

127. People v. Fogerty, 18 N.Y.2d 664, 219 N.E.2d 801, 273 N.Y.2d 343 (1966).

128. While it may be impractical to require interpretive statements to be filed and published, interpretive statements of general applicability may be of an equal practical importance to many legislative rules to which the filing and publication requirements apply.

129. N.Y. STATE AD. PROC. ACT § 102(2)(b)(i) (McKinney 1976).

B. *Exemption from Notice-and-Comment Procedures*

These exceptions to the "rule" definition also remove interpretations and general policy statements from the notice-and-comment rulemaking requirements to which "legislative" rules are subjected.[130] The Revised Model Act, unlike the federal act, literally requires interpretations and policy statements of general effect to be issued pursuant to rulemaking procedures.[131] It is doubtful, however, whether this mandate of the Revised Model Act is enforceable. When the United States Supreme Court has attempted to force federal agencies to issue new policies through notice-and-comment rulemaking procedures, it has been remarkably unsuccessful.[132] Perhaps, the New York Legislature has realistically refrained from requiring the unenforceable.

IV. ADJUDICATORY PROCEEDINGS

A. *Definition*

An adjudicatory proceeding is defined as a proceeding "in which a determination of the legal rights, duties or privileges of named parties . . . is required by law to be made only on a record and after an opportunity for a hearing."[133] That definition is similar to the definition of "contested case" in the original and Revised Model Acts.[134] But unlike the two Model Acts, the New York Act further excludes from the definition of "adjudicatory proceeding" all "rulemaking" proceedings.[135] Since the second major part of the rule definition included proceedings of particular applicability which concerned specified economic regulatory matters,[136] it will be observed that the rulemaking exclusion encompasses many proceedings which would otherwise be defined as "contested cases"

130. *Id.* § 202 (2).

131. The Revised Model Act's notice-and-comment procedures in section 3 are stated as applicable to "any rule," and rule is defined in section 1 (7) to mean "each agency statement of general applicability that . . . interprets, or prescribes law or policy. . . ." The federal act provides an exception for these matters. 5 U.S.C. § 553 (b) (A) (1970).

132. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

133. N.Y. STATE AD. PROC. ACT § 102(3) (McKinney 1976).

134. MODEL ACT, *supra* note 3, § 1 (3); REVISED MODEL ACT, *supra* note 3, § 1 (2).

135. N.Y. STATE AD. PROC. ACT § 102 (3) (McKinney 1976).

136. *Id.* § 202 (2) (a) (ii).

under the Revised Model Act.[137] The "adjudicatory proceeding" definition also excludes "an employee disciplinary action before an agency" and certain traffic infraction proceedings.[138] On the other hand, licensing decisions that are required by statute to be preceded by notice and opportunity for hearing are made subject to the provisions of the Act governing adjudicatory proceedings.[139]

B. *The Approach of the New York Act to Adjudicatory Proceedings*

The Act's most elaborate procedural provisions surround adjudicatory proceedings. Since the Act is largely based upon the Revised Model Act, it will be enlightening to compare the approach of the New York draftsmen with that of the Commissioners on Uniform State Laws.

The Revised Model Act imposed a heavily judicialized structure upon agency trial-type proceedings. As part of this judicializing process, the Commissioners on Uniform State Laws sought to limit extra-record contact between agency and staff members. To further this objective, staff memoranda or data were explicitly required to be included in the record of the administrative proceedings,[140] and agencies that took "official notice" of staff memoranda or data were required to afford parties an opportunity to contest such material.[141] The Commissioners also inserted a section governing ex parte communications.[142] Section 13 of the Revised Model Act forbids members or employees of an agency assigned to decide a contested case from communicating off the record about an "issue of fact" with any person or party and from communicating about an "issue of law" with "any party or his representative."[143] An agency member may nevertheless, "communicate

137. Thus, because the prescription of rates for the future is defined as a "rule" under the New York Act, a proceeding establishing such rates is excluded from the definition of "adjudicatory proceeding." N.Y. STATE AD. PROC. ACT § 102 (2) (a) (ii), 102 (3) (McKinney 1976).

138. As originally enacted, the definition excluded "a disciplinary action before an agency." 1975 N.Y. Laws, ch. 167 § 102 (McKinney 1975). Much of the ambiguity of the exclusion has been removed by the insertion of the adjective "employee." 1976 N.Y. Laws ch. 935, § 1.

139. N.Y. STATE AD. PROC. ACT § 401 (1) (McKinney 1976).

140. REVISED MODEL ACT, *supra* note 3, § 9 (e) (7).

141. *Id.* § 10 (4).

142. *Id.* § 13.

143. *Id. See* Gifford, *Report on Administrative Law to the Tennessee Law Revision Commission*, 20 VAND. L. REV. 777, 843-51 (1967).

with other members of the agency" and "have the aid and advice of one or more personal assistants."[144]

The New York Act imposes significantly less judicialization on agency trial proceedings than does the Revised Model Act. The New York Act omits the Revised Model Act's references to the inclusion of staff memoranda or data in the record and to the explicit treatment of staff memoranda or data as matters subject to official notice procedures.[145] Instead, the New York Act provides, in its exclusiveness-of-the-record provision, that all "records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record."[146] It also expressly requires that parties be given an opportunity, prior to decision, to contest noticed facts. Cast in language partially drawn from the original Model Act, these provisions[147] do not go so far as the Revised Model Act in limiting agency-staff contact.

This same approach is also reflected in section 307(2) of the New York Act,[148] the counterpart of the Revised Model Act's section 13.[149] Section 307(2) incorporates the language of section 13, but differs significantly in its exceptions. Like section 13 the New York Act exempts communications between agency members.[150] But instead of section 13's limited exemption permitting agency members to "have the aid and advice of one or more personal assistants,"[151] the New York Act permits agency members to have the aid and advice of any staff "other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or a factually related case."[152] New York thus imposes a limited ex parte consultation restriction on agency members, but it is one that prohibits internal contact by the deciding agency member only with staff

144. REVISED MODEL ACT, *supra* note 3, § 13(1)-(2).

145. *See* N.Y. STATE AD. PROC. ACT § 306(2), (4). Section 306(2) is based upon original Model Act section 9(2), but it omits the statement in section 9(2) that besides the material contained in the record "no other factual information or evidence shall be considered in the determination of the case."

146. N.Y. STATE AD. PROC. ACT § 306(2) (McKinney 1976).

147. *See* note 145 *supra*.

148. N.Y. STATE AD. PROC. ACT § 307(2) (McKinney 1976).

149. *See* text accompanying notes 140-44 *supra*.

150. N.Y. STATE AD. PROC. ACT § 307(2)(a) (McKinney 1976); REVISED MODEL ACT, *supra* note 3, § 13(1).

151. REVISED MODEL ACT, *supra* note 3, § 13(2).

152. N.Y. STATE AD. PROC. ACT § 307(2)(b) (McKinney 1976).

members actively involved on one side of the case in question or a factually related one.

Finally, section 307(2) does not apply to certain economic regulatory decisions, *i.e.*, "determining applications for initial licenses for public utilities or carriers" and "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers."[153] These latter two exemptions are also found as exemptions from the federal act's separation-of-functions and internal ex parte communication provisions.[154] The objective of both the federal and the New York acts is to facilitate the issuance-of-initial-license decisionmaking by freeing agencies from restrictive procedures while preserving more judicial safeguards in license suspension, revocation, and renewal cases where the issues are apt to be cast in a more "accusatory" framework.[155] The exemption for rates, facilities or practices of public utilities or carriers again is designed to facilitate free agency-staff contact in cases involving little or no accusatory flavor but which may involve technical issues where the agency will require substantial staff assistance.[156] Many agency proceedings involving rates, facilities or practices of public utilities or carriers, of course, will be exempted from adjudicatory procedures because proceedings governing these matters for the future are defined as "rulemaking."[157] The exemption was needed, however, insofar as it was desired to exclude proceedings involving the lawfulness of past rates, facilities and practices of public utilities or carriers from the coverage of the ex parte communications provisions of section 307(2).[158]

C. *The Law Revision Commission Bills: A Comparison*

In the Law Revision Commission bills,[159] section 307(2) excluded neither applications for initial licenses for public utilities or carriers nor proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers. The

153. *Id.* § 307 (2).
154. 5 U.S.C. § 554 (d) (A), (B) (1970).
155. *See* text accompanying notes 209-11 *infra.*
156. Gifford, *supra* note 18, at 851-52; Jaffe, *supra* note 21, at 1281.
157. N.Y. STATE AD. PROC. ACT § 102 (2) (a) (ii) (McKinney 1976).
158. *See also* Gifford, *supra* note 143, at 849, 851-52.
159. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 66; 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 65; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 52.

Law Revision Commission bills' only modification of section 13 was the broadening of section 13's exemption for personal assistants to include agency staff other than investigative and prosecuting staff.[160]

In the Law Revision Commission bills, ratemaking was not defined as rulemaking and therefore probably fell within the definition of adjudicatory proceeding.[161] As such it would fall under the coverage of section 307(2) of the New York Act.[162] The modifications that the Law Revision Commission incorporated in its version of the Revised Model Act's ex parte consultation provisions are consistent with its general approach to the treatment of ratemaking and other complex economic regulatory proceedings. The Commission apparently believed that these proceedings could be subjected to adjudicatory procedures if the adjudicatory procedures were structured so as not to interfere unduly with agency-staff contact.[163] Accordingly, it expanded the Revised Model

160. *See* note 193 *supra*. The Law Revision Commission's broadening of the "personal assistants" exemption to include all non-investigative and non-prosecuting staff is included in the enacted statute. N.Y. STATE AD. PROC. ACT § 307 (2) (b) (McKinney 1976).

161. The definition of "adjudicatory proceeding" in the Commission bills seems broad enough to include ratemaking. In particular, "adjudicatory proceeding" was defined in the Commission's 1969 proposal as "any proceeding before an agency in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for hearing." 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 58.

162. In the Law Revision Commission bills, section 307 (2) applied to all "adjudicatory proceedings," without exception.

163. Thus the Law Revision Commission believed that the Revised Model Act unduly inhibited such contact. Accordingly, it modified the provisions of the Revised Model Act which it considered too restrictive. On the unduly restrictive nature of the Revised Model Act upon agency-staff contact, see Bloomenthal, *supra* note 18, at 616-19. The Commission proposal maintained a prohibition on contact between the agency and staff which had been involved in investigative or prosecuting functions in the case being decided or a factually related case. The Law Revision Commission proposal is similar, in this respect, to Professor Davis' approach and to that of Commissioner Benjamin. *See* K. DAVIS, *supra* note 18, § 1.04-6 at 23; 1 R. BENJAMIN, *supra* note 5, at 244-45; note 164 *infra*. In drafting its proposal in 1965, the Law Revision Commission may have been influenced by Professor Peck's then-recent expression of the view that contact between federal agency members and investigative or prosecutory staff members would be prohibited by the due process clause of the fifth amendment. Peck, *Regulation and Control of Ex Parte Communications With Administrative Agencies*, 76 HARV. L. REV. 233, 258-60 (1962). The Law Revision Commission may have believed that the due process clause of the fourteenth amendment would effect a similar prohibition on contact between state agency members and their investigative and prosecutory staffs and that the prohibition in the Commission's proposed bill, therefore, merely restated existing law. The Commission, however, did retain the Revised Model Act's prohibition on contact between agency employees acting as hearing officers and all staff, including non-adversary staff. Perhaps the Commission believed that this prohibition was largely innocuous, because

Act's exemption to the ban on ex parte consultation to authorize communication between agency members and all but investigative and prosecuting staff.[164] Elsewhere in its bills, it avoided the Revised Model Act's explicit requirement of introducing staff memoranda into the record.[165]

These modifications of the Revised Model Act, however, apparently did not go far enough to satisfy the Public Service Commission[166] whose view may have been that rate proceedings are falsified by treating them in the judicial mold,[167] even in the limited manner

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Benjamin had reported that most rate cases were heard by a Commissioner. 2 R. BENJAMIN, *supra* note 5 at DEPARTMENT OF PUBLIC SERVICE 64. Davis has objected to the ex parte consultation limitations imposed on hearing officers by the Revised Model Act on the ground that the absorption of relevant information and analyses in the hearing officer's report will facilitate informed argument on agency review. *See* K. DAVIS, *supra* note 18. *See also id.* § 11.14 at 430; 2 K. DAVIS, *supra* note 52, § 11.17 at 109, § 11.14 at 98-99.

164. Compare the following statement by Commissioner Benjamin:

> No member of the staff who has taken a partisan position in the proceeding either as agency counsel or as witness should be permitted to participate in the process of decision, unless his participation takes the form of a brief, a written summary of evidence, proposed findings, or some other writing, and unless such writing is made available to the parties and they are given an opportunity to criticize and refute. The same disqualification should be applied to those members of the staff who in some other capacity (*e.g.*, as investigator) have participated directly in the preparation for or conduct of a hearing. Where participation has been indirect, the problem is more difficult. In some agencies, for example, the senior law officer of the agency is present at conferences of the deciding body at which decisions are made, and may be called on to advise the deciding body on questions of law involved in a decision; the same senior law officer is head of the legal staff, members of which act as agency counsel. It will sometimes happen, therefore, that he will have been consulted by one of his staff (in the course of preparation for a hearing or during the course of the hearing) on a question of law on which he is later consulted by the deciding body. This is a situation which it is desirable to avoid, where it can practically be avoided . . . .

1 R. BENJAMIN, *supra* note 5, at DEPARTMENT OF PUBLIC SERVICE 244-45 (footnote omitted). *See also* 2 *id.* at 189.

165. *See* text accompanying notes 145-50 *supra*.

166. The Public Service Commission objected strongly to the less restrictive preliminary proposal which the Commission promulgated in 1963. *See Hearing on S.I. No. 3827 and A.I. 5728 Before the N.Y. Senate and Assembly Committees on the Judiciary* 123 (May 11, 1965).

167. Benjamin reported, in 1942, that the Public Service Commission often tended to rely upon its staff for advice and consultation without much regard for isolating decisionmakers from those staff which had participated in the proceedings:

> Staff assistance may . . . be sought orally or by intraoffice memorandum, for advice on a subject of particularly specialized knowledge (for example, to explain the mechanics of a cycle-change in an electrical circuit). The person so consulted may or may not have been connected with the proceedings. . . . It is . . . stated . . . that staff experts may be asked to render conclusions privately

adopted by the Law Revision Commission. Agency-staff contact is essential to the ratemaking process and ought not to be hampered by segregating staff members identified as "investigative" or "prosecuting."[168] Indeed, it is probably just such staff members who are most knowledgeable on the issues and technical background and who can, therefore, most aid the Commission.[169] In short, the quasi-judicial model employed by the Law Revision Commission to isolate agency decisionmakers from essentially adversary staff did not, in the Public Service Commission's view, fit the ratemaking process. The incompatibility of this model remained whether the ratemaking was for the future or for the past, as in a reparations proceeding.[170]

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to a Commissioner on technical matters, such as whether the electric service supplied by a respondent utility is adequate, or whether accounting entries reflect properly the transactions questioned, or whether the exclusion of a given element from the rate base is "confiscation," or whether a witness's testimony as to valuation is credible, etc. Naturally, the practices of the various Commissioners vary as to the extent to which they solicit these opinions. Requests for advice are said to be limited solely to explanation of matters in the record. . . . [L]ittle attempt is made to isolate personnel within the Commission's organization. Examiners and Commissioners feel free to discuss accounting and engineering problems with members of the staff, including those who have participated in the case.

2 R. BENJAMIN, *supra* note 5, at DEPARTMENT OF PUBLIC SERVICE 65-66.

Former Chairman Newton Minnow, in describing the ratemaking functioning of the Federal Communications Commission, has stated:

> [T]he Commission maintains a staff of technical experts who, through continuous daily contact with all aspects of the industry, are available to consult with and advise the Commission with regard to all of its ratemaking functions. In formal ratemaking proceedings, it is also the responsibility of this same staff to participate therein in order to ensure that a full and complete record is made so that the ingredients essential to the prescription and approval of rates for the future are fully developed and that the contentions advanced by the parties are thoroughly examined.
>
> To isolate the Commission from its staff of experts at the decisional level would tend to sterilize and hamper the ratemaking processes.

Hearings on H.R. 14 *Before the House Comm. on Interstate and Foreign Commerce,* 87th Cong., 1st Sess. 142-43 (1961). *See* Peck, *supra* note 163, at 256-62.

168. *See* note 167 *supra.*

169. *See* 2 K. DAVIS, *supra* note 52, at § 11.10; Peck, *supra* note 163, at 258. Both Professors Peck and Davis, however, would segregate decisionmaking officials from staff who had performed adversary roles. *See* K. DAVIS, *supra* note 18, at § 13.02; Peck *supra* note 163, at 260. *See also* Davis' discussion of the proper role of the Common Carrier Bureau in a Federal Communications Commission rate investigation, K. DAVIS, *supra* note 18, at § 13.00; Commissioner Benjamin's remarks, *supra* note 198.

170. On reparations, see *e.g.,* 2 R. BENJAMIN, *supra* note 5, at DEPARTMENT OF PUBLIC SERVICE 30-32.

The result of the Public Service Commission's objections to the Law Revision Commission bills was the introduction of substitute bills in the 1973-1975 sessions[171]—and the eventual passage of the 1975 bill[172]—which avoided the imposition of any ex parte consultation restrictions upon initial-license decisionmaking and upon the ratemaking process, whether the ratemaking affected future or past rates. One effect of this resistance of the Public Service Commission to the Law Revision Commission bills is the limitation of the Act's judicial model of decisionmaking to the less technical and more accusatory types of agency proceedings, where the judicial model is widely accepted as most appropriate.[173] Judicialized procedures have been imposed where they will best achieve fairness to an accused without unduly obstructing agency processes. Ratemaking and other technically complex agency decisional processes are left to develop largely outside of the confines of the State Administrative Procedure Act. Benjamin's cautious approach has thus been followed. The Act has avoided imposing a judicial model on decisionmaking where it has not previously been employed, where the public has a large stake in preserving or fostering a high quality of technically complex decisionmaking, where the absence of an accusation of wrongdoing against a respondent minimizes the relevance of the courtroom model of a purely adversary proceeding as a criterion for assessing the fairness of the decisional process, and where no demonstration has been made either that preexisting procedures have been widely resented as unjust by private parties or that further judicialization would be likely to improve the quality of the substantive decisions.[174]

V. LICENSING

The New York Act follows the same cautious approach towards licensing decisional processes. Licensing decisions that are required by statute to be preceded by notice and opportunity for

171. *See* notes 23-34 *supra* & accompanying text.

172. State Administrative Procedure Act, 1975 N.Y. Laws ch. 167. *See* S. 1236 (1975).

173. *See* note 114 *supra* & accompanying text.

174. *See* 1965 LAW REVISION COMMISSION REPORT, *supra* note 15, at 376-79; Statement submitted by the Public Service Commission on October 9, 1964 included in *Hearing on S.I. No. 3827 and A.I. 5728 Before the N.Y. Senate and Assembly Committees on the Judiciary* 123, 125 (May 11, 1965).

hearing are made subject to adjudicatory procedures by section 401(1).[175] Although initial licensing decisions are exempted from section 307(2),[176] license renewal, revocation and suspension decisions are not. This is because decisions not to renew and decisions to revoke or suspend licenses are most frequently made on the ground that the licensee has violated a behavior norm applicable to licensees, and hence such decisions tend to have an accusatory flavor.[177] They are, therefore, thought to be in need of the procedural protections of that section.

In the early 1950's, the New York Court of Appeals began to impose judicialized decisional procedures upon such decisions as the revocation of motor vehicle driver's licenses and taxicab chauffer's licenses.[178] In these cases, the great values of the licenses to their holders were influential in persuading the court to abandon the traditional approach which treated such licenses as "privileges" to which the holder had no "right," and hence as not entitling him to substantial procedural protections. Rather, the courts treated the licenses in these cases as equivalent to "property" subject to constitutional protection.[179] Yet in other areas, such as horse-racing licensing,[180] the court has sanctioned a regulatory scheme based upon the issuance and renewals of one-year owner's licenses where each renewal is subjected to the same tests as the original issuance. In these areas, the court has refused to impose the strict judicial model of decisionmaking that it has imposed upon driver's license revocations. Here the court has reintroduced the right-privilege dichotomy and held, in effect, that judicialized procedures will be imposed only where matters of constitutional "right" are involved, or where a statutory hearing requirement exists.[181]

175. N.Y. STATE AD. PROC. ACT § 401 (1) (McKinney 1976).

176. Section 307 (2) exempts only "applications for initial licenses for public utilities or carriers . . ." N.Y. STATE AD. PROC. ACT § 307 (2) (McKinney 1976). *See* 5 U.S.C. § 554 (d) (A) (1970). *See also* Gifford, *supra* note 18, at 852; Jaffee, *supra* note 21, at 1281.

177. Gifford, *supra* note 143; Jaffe, *supra* note 21.

178. Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954); Wignall v. Fletcher, 303 N.Y. 435, 103 N.E.2d 728 (1952). *Cf.*, Elite Dairy Products, Inc. v. Ten Eyck, 271 N.Y. 488, 3 N.E.2d 606 (1936).

179. 307 N.Y. at 467-68, 121 N.E.2d at 423-24; 303 N.Y. at 441, 103 N.E.2d at 730-31. In *Hecht* the court also relied upon the necessity of the taxicab driver's license to the continuance of the licensee in his occupation as a ground for holding the license to be "property." 307 N.Y. at 468, 121 N.E.2d at 424. *See* Schwartz, *Administrative Law, 1952 Survey of N.Y. Law*, 27 N.Y.U.L. REV. 928, 930 (1952).

180. Fink v. Cole, 1 N.Y.2d 48, 133 N.E.2d 691, 150 N.Y.S.2d 175 (1956).

181. *Id.* at 53, 133 N.E.2d at 693-94, 150 N.Y.S.2d at 178.

The State Administrative Procedure Act has incorporated the court's distinction (as well as that of the Revised Model Act[182]) between licensing decisions that are subjected to a hearing requirement by statute and those that are not.[183] Decisions that are subjected to a statutory hearing requirement are subjected by the Act to the procedures governing adjudicatory proceedings, including (except in the case of initial licensing decisions)[184] the provisions of section 307.[185] The Act, then, does not impose a judicial model upon any licensing decisions that were not previously subjected to that model by a combination of statutory hearing requirements and case law. It does, however, articulate specific procedural requirements[186] in those proceedings requiring a hearing and thus serves a limited function in clarifying perhaps otherwise ambiguous procedural standards.[187]

Again, therefore, the Act proceeds in the cautious way recommended by Benjamin. It has codified the better practice of those licensing agencies that oversee the grant of more-or-less continuing authorizations to pursue an activity or to practice a profession where the qualifications are relatively objective ones and where licenses are revoked or suspended only for serious infractions of pre-existent standards of behavior.[188] But it has at the same time avoided obstructing the operation of those licensing schemes that are designed to operate without trial-type hearings. In this respect, the caution of the New York Act closely resembles the licensing approaches of the federal act and the Revised Model Act.[189] Thus, for example, in the area of horseracing regulation,[190] the legislature has employed a short-term licensing system to enable a regulatory agency to exert continuing supervisory control over the identity of persons active within that industry, but has

182. REVISED MODEL ACT, *supra* note 3, § 14 (a).
183. N.Y. STATE AD. PROC. ACT § 401 (1) (McKinney 1976).
184. *Id.* § 307 (2), 2d para. (a).
185. *Id.* § 307 (2). It is not clear, however, that the procedures governing adjudicatory proceedings apply to licensing proceedings which are required by the Constitution, but not explicitly by statute, to be made after hearing. *Compare* Wong Yang Sung v. McGrath, 339 U.S. 35, 50 (1950) *with* United States v. Florida East Coast Ry., 410 U.S. 224, 234-38 (1973).
186. *See id.* §§ 301-307.
187. *See, e.g.*, Bonfield, *supra* note 4, at 736-40.
188. *See also* Jaffe, *supra* note 21, at 1281.
189. 5 U.S.C. §§ 551 (6), (7), 554 (1970); REVISED MODEL ACT, *supra* note 3, § 14 (a).
190. *See* text accompanying notes 180-81 *supra*.

avoided the imposition of a trial-type hearing requirement incident to the processing of license renewal applications. Apparently this mode of regulation has been adopted as a prophylactic against the infiltration of criminal elements into a sensitive industry.[191] The State Administrative Procedure Act does not attempt to change the decisional processes of the New York State Racing and Wagering Board[192] or other agencies that administer licensing controls where hearings have not been statutorily imposed.

VI. JUDICIAL REVIEW

A. *Judicial Review of Rules*

Section 205 of the New York Act provides for judicial review of rules in an article 78 proceeding or in an action for declaratory judgment.[193] Section 205 is a modification of section 7 of the Revised Model Act[194] which, in turn, is a revision of section 6 of the original Model Act.[195] Section 6 provided for judicial declarations of the validity of a rule in a declaratory judgment action. Standing to obtain such relief was given to any person in any case in which it appeared that "the rule or its threatened application, interferes with or impairs, or threatens to interfere with or impair [his] . . . legal rights or privileges . . . ."[196] Section 6 sought to eliminate a requirement of exhaustion of administrative remedies by enabling the court to render declaratory relief whether or not the petitioner had first requested the agency concerned to pass upon the validity of the rule that he was challenging.[197] In promulgating this provision, the Commissioners on Uniform State Laws probably thought that dispensing with a need for prior recourse to the issuing agency on a question of rule validity was eliminating a useless formality, since the agency would be expected to decide in favor of its

191. *Cf.*, L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 533 n.112 (1965).
192. *See* N.Y. UNCONSOL. LAWS §§ 7907, 7915 (McKinney Supp. 1976-1977).
193. N.Y. STATE AD. PROC. ACT § 205 (McKinney 1976).
194. REVISED MODEL ACT, *supra* note 3, § 7. See discussion of that section in Gifford, *Declaratory Judgments Under the Model State Administrative Procedure Act*, 13 HOUS. L. REV. 825, 841-59 (1976). *See also* Gifford, *supra* note 143, at 818-23.
195. MODEL ACT, *supra* note 3, § 6.
196. *Id.*
197. *Id.*

own creation.[198] But by requiring in section 6 that the agency be made a party to the declaratory judgment proceeding,[199] the court would obtain the benefit of agency views of how the rule operated and why it was needed. Finally, section 6 specified that the rule should be declared invalid if the court found that it "violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures."[200]

Section 7 of the Revised Model Act made two significant changes in these declaratory judgment provisions. It provided for declaratory judgments on the "applicability" as well as on the "validity" of rules,[201] and it omitted any reference to the grounds upon which a rule might be declared invalid. The omission was probably made on the basis that the grounds for judicial declarations of invalidity contained in section 6 no longer quite fit the revised language of section 7, since that language authorized judicial declarations of rule applicability as well as of rule validity.[202] The combination of the provisions authorizing courts to pass on rule applicability in defined pre-enforcement situations with the provision excusing the person challenging the rule's application from making initial recourse to the agency is subject to criticism on the ground that it may encourage courts to invade areas of decisionmaking that ought to belong to administrative bodies.[203] The core tasks of many agencies involve the business of applying rules to varying sets of facts.[204] Section 7 has the potential both to remove such matters from the agencies and to burden the courts with routine administrative tasks.[205] It also contains the potential for transferring to the initial cognizance of the courts policy questions that the legislature may have originally committed to the decisional processes of the agencies.[206]

The New York Act has, in turn, modified the declaratory judgment provisions of the Revised Model Act by requiring plaintiffs to make recourse in the first instance to the agency con-

198. Gifford, *Declaratory Judgments Under the Model State Administrative Procedure Acts*, 13 HOUS. L. REV. 825, 838 (1976).
199. MODEL ACT, *supra* note 3, § 6; REVISED MODEL ACT, *supra* note 3, § 7.
200. MODEL ACT, *supra* note 3, § 6 (2).
201. REVISED MODEL ACT, *supra* note 3, § 7.
202. *See also* Gifford, *supra* note 198, at 841 n.88.
203. *Id.* at 855; Gifford, *supra* note 143, at 818-23.
204. Gifford, *supra* note 198, at 842.
205. *See, e.g., id.* at 845.
206. *Id.* at 843-44.

cerned.[207] To that extent, it alleviates some of the problematic aspects of the Revised Model Act.[208] The Commissioners on Uniform State Laws excepted declaratory judgment plaintiffs from a requirement of initial resort to the agency probably to expedite the resolution of the plaintiff's problem.[209] The New York Act addresses this objective by requiring the agency to act on the plaintiff's request to pass upon the validity or applicability of the rule within thirty days, or else to be treated as having denied the plaintiff's request.[210]

The New York Act also recognizes the potential for judicial intrusion into areas properly belonging to the agencies when it adverts to the standing question. The Law Revision Commission had incorporated the standing language of the Model Acts by authorizing a declaratory judgment action "when it appears that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights, property or privileges of the petitioner."[211] The Commission bills provided that the rule should be declared "invalid or inapplicable" if the court finds "that it violates constitutional provisions or exceeds the statutory authority of the agency."[212] The substitute bills, including the one enacted, omitted both the language governing standing and the language containing the criteria for determining invalidity and inapplicability. Instead, the substitute bills provided that nothing in that section should be construed to grant or deny any person standing to bring an article 78 proceeding or a declaratory judgment action,[213] and said nothing about the grounds upon which the court was to make its decision.

When questions arise about the extent to which pre-enforcement review of agency rules would involve undue judicial

207. N.Y. STATE AD. PROC. ACT § 205 (McKinney 1976).

208. *See* K. DAVIS, *supra* note 18, § 1.04-6, at 18.

209. The declaratory judgment remedy has long been perceived as speedy and efficient. *See also* Borchard, *Declaratory Judgments in Administrative Law,* 11 N.Y.U.L.Q. REV. 139, 140 (1933); Gifford, *supra* note 143, at 822-23.

210. N.Y. STATE AD. PROC. ACT § 205 (McKinney 1976).

211. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 62; 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 75; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 15, at 49.

212. *See* note 245 *infra.* Here, the Commission bills followed the original Model Act section 6 (2). *See* text accompanying notes 200-02 *supra.*

213. *See* N.Y. STATE AD. PROC. ACT § 205 (McKinney 1976). *See also* A. 9670 § 205 (1974); A. 7330-A § 205 (1973); S. 6273-A § 205 (1973).

intrusion into the administrative decision processes, the federal courts have handled these questions largely under the rubric of the so-called ripeness doctrine.[214] Whether a question of rule applicability is or is not ripe depends, under this doctrine, largely upon both a balance of the degree to which administrative policy-making has been completed and the extent of the burden imposed upon the plaintiff if judicial review is denied.[215] I have argued elsewhere that the declaratory judgment section of the Revised Model Act can be construed as incorporating a similar balancing test through an analysis of the Revised Model Act's standing provisions.[216] It would also be possible to construe the Model Acts' standing provisions as delineating a class of persons who may bring suit when the claims they are asserting become ripe.[217] Thus on this view, those provisions would be subject to the satisfaction of an overriding ripeness requirement. These uncertainties about the way the Model Acts' standing provisions would operate may explain their elimination from the substitute bills of the 1973-1975 sessions.[218] They were probably excised because of a fear that they would authorize the courts to accept cases without considering the interest in keeping governmental administration free from premature judicial intrusion, an interest protected by requirements of ripeness.

Although the New York courts also have developed a ripeness doctrine,[219] it seems less developed than the federal ripeness doctrine and is often either stated in terms of the prematurity of suit or absorbed into the question of justiciability.[220] The special concerns manifested in the federal ripeness doctrine probably underlie New York's more fully developed doctrine of exhaustion of administrative remedies.[221] The Law Revision Commission bills

214. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967).

215. *Id.* at 149-54.

216. Gifford, *supra* note 198, at 852-59.

217. *See, e.g.*, Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967) (plaintiff association's suit dismissed on ripeness grounds, despite the association's standing).

218. *See* text accompanying notes 201-03 *supra*.

219. *See* Old Farm Rd., Inc. v. Town of New Castle, 26 N.Y.2d 462, 259 N.E.2d 920, 311 N.Y.S.2d 500 (1970). *See also* County of Orange v. City of Newburgh, 30 Misc. 2d 898, 222 N.Y.S.2d 283 (Sup. Ct. 1961). *But see also* Marthann Realty Co. v. Meade, 59 Misc. 2d 274, 298 N.Y.S. 2d 368 (Supt. Ct. 1969), *aff'd mem.*, 34 App. Div. 2d 735, 311 N.Y.S.2d 837 (1970), *aff'd mem.*, 28 N.Y.2d 778, 269 N.E.2d 920, 321 N.Y.S.2d 378 (1971).

220. *See* note 219 *supra*. *See also* H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE CASES AND OTHER MATERIALS 1219 (2d ed. 1968).

221. *See* YMCA v. Rochester Pure Waters Dist., 37 N.Y.2d 371, 334 N.E.2d 586,

had required declaratory judgment plaintiffs to make an initial resort to the agency in question as a prerequisite to bringing suit in court.[222] The Commission probably thought that by imposing such an exhaustion requirement, it would perhaps avoid the embarrassment of allowing "unripe" suits.[223] The substitute bills similarly imposed a requirement that relief first be requested from the agency, but they imputed to the agency a denial of such a request if it did not act within thirty days.[224] In a situation in which the agency did not respond within the allotted time to a petitioner's request that a rule be declared inapplicable to him, there would remain a possibility that, despite the agency's procrastination, the balance between the harm befalling that petitioner in the event that a declaration was not made and the agency's interest in working out its own policy free from judicial interference would fall heavily in favor of the agency.[225] In order to leave room for courts to apply ripeness criteria and thus to deny relief in such cases, the substitute bills sought to eliminate the potential conflict between the ripeness doctrine and State Administrative Procedure Act's standing provisions. This conflict, of course, would appear only insofar as the standing provisions could be read as conferring an immediate right to relief to persons falling within their coverage.[226]

In the federal system persons with standing may be denied

372 N.Y.S.2d 633 (1975); Wappingers Cent. School Dist. v. New York State P.E.R.B., 77 Misc. 2d 472, 354 N.Y.S.2d 326 (Sup. Ct. 1974); Allstrom v. Lorenz, 198 Misc. 970, 98 N.Y.S.2d 128 (Sup. Ct. 1950).

222. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 62; 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 75; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 58.

223. In its 1969 Report, the Commission stated:

> It was decided . . . to circumscribe this right of judicial review [of rule validity or applicability] by first requiring resort to the agency involved, in accordance with the widely accepted and generally sound requirement of prior exhaustion of administrative remedies. The Commission believes agencies should be given an initial opportunity to pass upon their own alleged errors with the object of correction, when correction is required. This serves to reduce the work load of the courts, and also allows for more informed judicial review.

1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 42. *See also* 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 43; 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 34.

224. *See* note 213 *supra*.

225. *E.g.*, Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

226. Thus, as previously suggested, it would be possible to construe the declaratory-judgment provisions of the Model Acts as authorizing suits when ripeness requirements had been satisfied. *See* text accompanying note 217 *supra*.

pre-enforcement review of agency action because their actions are not ripe.[227] New York has developed something similar to a ripeness doctrine which it has employed under the general declaratory judgment provision.[228] There is no reason why those general ripeness requirements could not be made applicable to judgments on questions of agency-rule applicability, especially now that the explicit language of the Law Revision Commission version of section 205 granting rights to relief has been removed from that section.[229] The drafters of the substitute bills not only removed the standing language of section 205, but they also inserted a provision expressly negating an intention to affect standing by anything in section 205.[230] These modifications suggest that the drafters of the substitute bills thought that conflicts between agency needs to develop policy free from judicial interference and private persons' needs to plan behavior in a context of legal certainty—which the federal courts resolve in the framework of the ripeness doctrine—could be dealt with in New York as matters of standing. The absence of any reference in the revised section 205 to ripeness or to the factors that a court must weigh in resolving a question of ripeness reinforces this suggestion.

It appears, however, that it would be a mistake to look entirely to the New York standing law to resolve these conflicting interests. Even at the time that the substitute bills were being drafted, standing in New York to challenge agency action was undergoing a drastic broadening.[231] The New York courts have apparently adopted[232] the standing tests which the United States Supreme Court announced as applicable to federal court review of agency action in *Association of Data Processing Service Organizations v.*

227. *See, e.g.,* Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

228. N.Y. CIV. PRAC. LAW § 3001 (McKinney 1974). *See* Old Farm Rd., Inc. v. Town of New Castle, 26 N.Y.2d 462, 259 N.E.2d 920, 311 N.Y.S.2d 500 (1970); Park Ave. Clinical Hosp. v. Kramer, 26 App. Div. 2d 613, 271 N.Y.S.2d 747 (1966), *aff'd*, 19 N.Y.2d 958, 228 N.E.2d 411, 281 N.Y.S.2d 359 (1967).

229. *See* text accompanying notes 211-213 *supra*.

230. *See* text accompanying note 213 *supra*.

231. Dairylea Coop. v. Walkley, 38 N.Y.2d 6, 399 N.E.2d 865, 377 N.Y.S.2d 451 (1975); Douglaston Civic Ass'n v. Galvin, 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974); Columbia Gas of N.Y. Inc. v. New York State Elec. & Gas Corp., 28 N.Y.2d 117, 268 N.E.2d 790, 320 N.Y.S.2d 57 (1971).

232. *See* Dairylea Coop. v. Walkley, 38 N.Y.2d 6, 339 N.E.2d 865, 377 N.Y.S.2d 451 (1975); Columbia Gas of N.Y., Inc. v. New York State Elec. & Gas Corp., 28 N.Y.2d 117, 258 N.E.2d 790, 320 N.Y.S.2d 57 (1971).

Camp[233] and *Barlow v. Collins*.[234] These tests are satisfied when the plaintiff asserts that the challenged agency action causes him "injury in fact, economic or otherwise" and when the interest asserted by the plaintiff "arguably" falls "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[235] Unless a statute can be construed to forbid judicial review, these tests tend to vest a right to judicial review in a broad class of affected persons. But this broad, and perhaps relatively unsubtle,[236] standing test is workable in the federal system because the relationship between agency policy development and judicial review is dealt with under the ripeness doctrine. For the New York standing tests to operate satisfactorily in the area of pre-enforcement review, they should also be subjected to an overriding test of ripeness.[237]

B. *The operative effect of section 205*

Section 205 has very little effect on the availability of judicial review.[238] Whereas the Revised Model Act dealt with the question of pre-enforcement review by authorizing it in defined circumstances,[239] the New York Act does not. New York had previously

233. 397 U.S. 150, 152-53 (1970).

234. 397 U.S. 159, 163-64 (1970).

235. 397 U.S. 150, 152-53. *See also* United States v. SCRAP, 412 U.S. 669, 686 (1973); Sierra Club v. Morton, 405 U.S. 727, 733 (1972).

236. The test is unsubtle because it does not obviously contain criteria that bear upon the timeliness of judicial review or criteria that attempt to balance the needs of adversely affected persons for legal certainty with the interest of governmental administration in being free from judicial interference in routine operations.

237. This is not necessarily to endorse the incorporation of the federal doctrine of ripeness into the law of New York, *see* Note, *Developments in the Law—Declaratory Judgments*, 62 HARV. L. REV. 787, 813 (1949), but to suggest that the needs of governmental administration be weighed in determining the appropriate time for judicial review of agency action. *See also, e.g.*, Alfred Eng'r, Inc. v. Illinois F.E.P.C., 19 Ill. App. 3d 592, 312 N.E.2d 61 (1974); Pest Control Comm'n v. Ace Pest Control, Inc., 214 So. 2d 892 (Fla. Dist. Ct. App. 1968). The related New York doctrine of exhaustion of administrative remedies appears to be quite similar to the analogous federal doctrine. *See, e.g.*, Allen v. Kelley, 191 Misc. 762, 77 N.Y.S.2d 879 (Sup. Ct. 1948), *aff'd mem.* 273 App. Div. 963, 79 N.Y.S.2d 312, *appeal dismissed*, 302 N.Y. 601, 96 N.E.2d 896 (1951).

238. Like certain other provisions of the State Administrative Procedure Act, section 205 is largely redundant. *See* note 243 *infra*.

239. That is, the Revised Model Act apparently authorized judicial review of agency rules when they interfered with or impaired or threatened to interfere with or impair the "legal rights or privileges" of the plaintiff. REVISED MODEL ACT, *supra* note 3, § 7.

allowed pre-enforcement review of the validity and applicability of administrative rules in some circumstances.[240] Section 205 now provides that such review will be allowed when it would otherwise be available under the general law of standing.[241] In short, section 205 seems to direct the question of the availability of pre-enforcement review to the general law,[242] thus making section 205 largely redundant on this issue.[243] The operative provisions of section 205, then, may essentially be confined to establishing a requirement of initial resort to the agency concerned as a prerequisite to suit, to giving the agency power to delay a response for thirty days, and to requiring that the agency be made a party to the declaratory judgment action.[244]

C. *A Final Anomaly*

Finally, because of the broad definition of "rule" in section 102(2) (a) (ii),[245] section 205 literally applies to judicial review of future-oriented economic regulatory proceedings involving named parties. This effect seems slightly ironic, because the Law Revision Commission had carefully avoided including a provision for judicial review of trial-type proceedings.[246] In its 1965 report to the legislature, the Law Revision Commission stated that the then-recent revision in the Civil Practice Law and Rules of former article 78 of the Civil Practice Act made it unwise to adopt judicial review legislation without (1) consideration of the developing experience under the new Civil Practice Law and Rules provisions, (2) a study of variously formulated verbal tests for review of evidence, and (3) a survey of specific review statutes providing

240. *See, e.g.*, Goodwill Advertising Co. v. State Liquor Auth., 40 Misc. 2d 886, 889, 892-93, 244 N.Y.S.2d 322, 325, 328-30 (Sup. Ct. 1962), *aff'd*, 19 App. Div. 2d 928, 244 N.Y.S.2d 640 (1963).

241. N.Y. STATE AD. PROC. ACT § 205 (McKinney 1976).

242. That is, the availability of pre-enforcement review is governed by legal sources external to the State Administrative Procedure Act.

243. The partial redundancy of section 205 is thus reminiscent of the intended redundancy of the "public hearing" provisions of section 202 of the Law Revision Commission's proposed bills and the actual irrelevancy of the entire Act to most aspects of ratemaking. *See* text accompanying notes 53-69 *supra*.

244. N.Y. STATE AD. PROC. ACT § 205 (McKinney 1976).

245. *Id.* § 102(2)(a)(ii). *See* text accompanying note 44 *supra*.

246. As a result, the State Administrative Procedure Act, which is a modification of the Law Revision Commission proposals, contains no provision governing judicial review of adjudicatory proceedings analogous to Revised Model Act section 15 or original Model Act section 12.

different review criteria from those in the Civil Practice Law and Rules.[247] The Law Revision Commission, in its 1969 report, again declined to include in its proposed bill a provision for judicial review of trial-type proceedings for the same reasons.[248] By the time the New York Act was enacted the Civil Practice Law and Rules had been providing experience for almost twelve years,[249] making part of the original justification of the Law Revision Commission outdated.[250]

In any event, the combination of the Law Revision Commission's position against a provision authorizing judicial review of trial-type proceedings and the modifications of the Law Revision Commission bills designed to alleviate the problems created by the potential impact of the Commission's bill on ratemaking decisional processes resulted in an act which contains provisions applicable to judicial review of trial-type proceedings involving future-oriented economic regulatory matters, such as ratemaking, and lacks provisions applicable to judicial review of other trial-type proceedings. The Act thus provides for judicial review of those trial-type proceedings whose procedures are not governed by the Act[251] and does not provide for judicial review of those trial-type proceedings whose procedures are governed by the Act.[252] Although a plausible justification for such a distinction in the judicial-review provisions of an administrative procedure act might be constructed on the theory that administrative proceedings not

247. 1965 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 43. *See also* 1966 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 16, at 56.

248. 1969 N.Y. LAW REVISION COMMISSION REPORT, *supra* note 17, at 55-56.

249. The Civil Practice Law and Rules (CPLR) had been enacted in 1962 to become effective on September 1, 1963. *See* 1962 N.Y. Laws, ch. 308, art. 78. Article 78 of the CPLR is a reenactment, with modifications, of Article 78 of the N.Y. Civil Practice Act, which had been enacted in 1937. 1937 N.Y. Laws, ch. 526, art. 78. *See generally* 8 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 7801.01 (rev. 1976).

250. Article 78 of the Civil Practice Act had been enacted in 1937, and experience under that article and its 1962 revision had been accumulating for an extended period.

251. Section 205 provides for judicial review of "rules," and the procedures of those trial-type proceedings which are defined as "rules" are not governed by the State Administrative Procedure Act. *See* text accompanying notes 172-74 *supra*.

252. The Act governs the procedures of those trial-type proceedings that are defined as "adjudicatory proceedings" but since "adjudicatory proceedings" are not "rules," they do not fall within the judicial review provisions of section 205. *See* N.Y. STATE AD. PROC. ACT §§ 102(3), 205, 301-307 (McKinney 1976). *See generally* text accompanying notes 133-39 *supra*.

governed by the act ought to be scrutinized on review,[253] the difference in the applicability of the review provisions of the New York Act appears to be largely an accidental product of the revisions of the Law Revision Commission's proposals in the struggle over enactment. The anomaly in the review provisions, however, appears to bear few practical consequences, because section 205, which authorizes judicial review of economic regulatory matters, actually has so little effect[254] that its application to some trial-type proceedings and its nonapplication to others is unlikely to produce any new differences in the approaches of the courts to judicial review of completed trial-type proceedings.[255]

CONCLUSIONS

The final version of the New York Act applies the full adjudicatory framework to a substantially narrower class of cases than would the bills proposed by the Law Revision Commission in their formal proposals of the late 1960's. This contraction of the coverage of the adjudicatory provisions of the New York Act vindicates, to a significant degree, Commissioner Benjamin's cautions that administrative proceedings are too diverse to be appropriately governed by a uniform set of procedures. This diversity is partially acknowledged in the provision of the Federal Administrative Procedure Act for three major types of proceedings. Yet the Commissioners on Uniform State Laws, perhaps in an effort to simplify, have provided for only two major categories of proceedings. In the initial version of the Model Act, which was promulgated in 1946, the Commissioners limited the provisions governing trial-type

253. *See In re* Larsen, 17 N.J. Super. 564, 577, 86 A.2d 430, 437 (App. Div. 1952) (Brennan, J., concurring). In that case Mr. Justice Brennan, then a judge of the New Jersey Superior Court, asserted that a court, in assessing the question of whether an agency decision was supported by substantial evidence, should take into account the procedures by which the agency decision was made.

254. Section 205 does not set forth judicial-review standards nor does it confer standing of itself. The aspects of section 205 which are not redundant are quite limited. *See* text accompanying notes 238-44 *supra*.

255. Although the courts employ several approaches to the review of agency action, it appears that agency action that is the result of a legally mandated trial-type procedure is generally reviewed in an Article 78 proceeding is in the nature of certiorari. See, for example, the extended discussion of certiorari review in Judge Desmond's dissenting opinion in Staten Island Edison Corp. v. Maltbie, 296 N.Y. 374, 384-95, 73 N.E.2d 705, 709-15 (1947). *See* 1 R. BENJAMIN, *supra* note 5, at 326-51, 359-66. *See also* J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 249, at ¶ 7803.01-15.

procedures to a bare minimum, an approach that was a necessary corollary to its application of those procedural provisions to all trial-type proceedings. But in the 1961 revision, the Commissioners inserted into the Model Act's procedures governing trial-type proceedings a number of more detailed incorporations of a strict courtroom model. At the same time, the coverage of those provisions governing trial-type proceedings was broadened. The result was a highly (and perhaps overly) judicialized framework for much administrative decisionmaking.

The Law Revision Commission recognized the problematic nature of this aspect of the Revised Model Act and modified their proposals for a New York Act accordingly. The progress of the State Administrative Procedure Act through the New York lawmaking process indicates that the Law Revision Commission did not modify the Revised Model Act enough. The lesson to be learned from the inadequacy of the Law Revision Commission's modifications of the Revised Model Act, however, is perhaps not that it did not sufficiently dilute the Revised Model Act's judicialization approach to administrative decisionmaking, but rather that it failed to differentiate sufficiently among the various types of administrative behavior. It perhaps should have differentiated initially among trial-type administrative proceedings in the way the federal act does. Had it done so, the New York Act might have been adopted sooner, and it might have contained procedural provisions suitably adapted to the ratemaking process.

Yet the very struggle over enactment suggests that the insight of Commissioner Benjamin has in part been vindicated. Administrative proceedings, even administrative trial-type proceedings, may not be all of one mold. Perhaps then, the approach finally taken in New York reflects a significant degree of wisdom. The Act imposes a strict courtroom model upon proceedings that carry an accusatory flavor and those that turn on disputes over adjudicative facts while it avoids imposing such strict procedural limitations upon more technical, complex, and less accusatory proceedings, such as ratemaking and initial licensing. Thus, it limits the strict courtroom model to those administrative proceedings where that model is widely recognized as appropriate.

Finally, the structure of the New York Act implicitly suggests that the definitional device is potentially available for wholesale administrative reform at a level not usually undertaken in

administrative procedure acts. Some proceedings which have heretofore been treated in a trial format, because the legislature had required a "hearing" in the substantive statute conferring decisional power upon an agency, could be reallocated to more of a "legislative" type format by this device. Thus, the proceedings requiring a changed decisional format could be identified and then accorded appropriate definitional treatment in an administrative procedure act as a means of routing them to a set of procedural provisions designed especially for them. This method of "reform" is a dangerous one, however, because in a general administrative procedure act it is likely that inadequate attention may be paid to the scope and precision of these definitions and that they may, as a result, be too broadly phrased. Further, the reallocation of identified types of proceedings to different decisional formats may be made with inadequate study of the consequences.