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Administrative Law—Judicial Review of Administrative Decisions—Requirement of Hybrid Procedures in Informal Rule-Making—Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976)

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ADMINISTRATIVE LAW—JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS—REQUIREMENT OF HYBRID PROCEDURES IN INFORMAL RULEMAKING—*Union Oil Co. v. FPC*, 542 F.2d 1036 (9th Cir. 1976).

In *Union Oil Co. v. FPC*[1] the Ninth Circuit provided bite to the "substantial evidence" test used to review the factual premises upon which an administrative agency's decision is based. A rule and order of the Federal Power Commission (FPC or Commission) were set aside because the evidence in the record compiled in the rulemaking procedures was judged inadequate. This decision portends increasing scrutiny of the factual basis of an agency's decisions under informal rulemaking. Furthermore, the court's demand for a complete record may require utilization of more elaborate rulemaking procedures.

I. FACTS OF THE CASE

On April 15, 1974, the FPC issued a "Notice of Proposed Rulemaking,"[2] stating that the Commission proposed to amend its General Rules by creating a requirement that every natural gas company submit data annually on a new form, Form 40, relating to the company's natural gas reserves.[3] In accordance with the requirements of the Administrative Procedure Act (APA)[4] for informal rulemaking,[5] the FPC accepted written comments from over sixty natural gas producers. These companies objected to the new rule on the grounds that it would place a severe economic burden upon them to gather and submit this data, it was duplicative because the necessary information could be obtained from other agencies, and because the Commission had no regulatory need for the data.[6] At the request of the natural gas producers, the FPC held an oral hearing attended by representatives of the industry,

1. 542 F.2d 1036 (9th Cir. 1976).

2. *Id.* at 1037, *citing* 39 Fed. Reg. 14233 (1974).

3. 542 F.2d at 1037. The Commission's new rule requiring the filing of a new Form 40 consists of three schedules containing natural gas reserve data on three bases:

(a) Schedule A—estimates of proven reserves for the reporting company;
(b) Schedule B—estimates of proven reserves on a "by field and by reservoir" basis; and
(c) Schedule C—estimates of annual changes in proven reserves.

Id.

4. Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970) [hereinafter cited as APA].

5. 5 U.S.C. § 553(c) (Supp. IV, 1974); *see* text accompanying notes 22-25 *infra.*

6. 542 F.2d at 1037, 1042.

where they once again strenuously objected to the proposed rule.[7]

Following the oral hearing, the Commission, by a vote of 3-2, issued Order Number 526, thereby adopting the rule. After negotiations with the General Accounting Office (GAO),[8] the FPC eliminated some of the features to which the GAO objected and issued Order Number 526-A, which made the rule effective.[9] The Commission denied a rehearing and the gas producers filed numerous petitions for review, which were consolidated in this action.

The record on appeal consisted of the gas producers' written comments, a transcript of the oral hearing, and written statements of the majority and dissent of the Commission.[10] The majority of the Commission gave cursory attention to the various factual contentions of the companies concerning the burden the rule would place upon them and the duplication of efforts involved in collecting the data. The majority felt that: (1) because the same information was submitted to the Internal Revenue Service under the tax regulations, it was available and not a burden to collect; (2) it was the function of the GAO, not the FPC to consider the economic burden; (3) the producers had not shown that any information possessed by the other agencies would satisfy the data requirements of the FPC; and (4) the information was needed to conduct company audits to determine interstate rates.[11]

The gas companies sought review of the orders on the ground, *inter alia*, that the Commission's adoption of Form 40 was "arbitrary and capricious."[12] The court held that the factual premises upon which the orders rested were not supported by "substantial evidence" and therefore failed to satisfy the standard of review[13] embodied in the Natural

7. *Id.*

8. 44 U.S.C. § 3512 (Supp. IV, 1974) requires the Comptroller General to review the collection of information by independent regulatory agencies to assure that this collection imposes only a minimum burden upon business and does not result in a duplication of effort.

9. 542 F.2d at 1038.

10. *Id.* at 1037.

11. *Id.* at 1037-38.

12. It is important to note that the difference between the two standards, "arbitrary and capricious" and "substantial evidence," is confined to a judicial review of factual determination. Informal rulemaking is a mechanism for determining agency policy and is reviewed solely under the arbitrary and capricious standard. The substantial evidence standard, which is applied in adjudications, *formal* rulemaking, and the Natural Gas Act among other statutes, merely examines whether the factual conclusions upon which the agency bases its policy choice are supported by substantial evidence. Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750, 1751 (1975) [hereinafter cited as *Judicial Review*].

13. 15 U.S.C. § 717r(b) (1970). The pertinent section of the statute reads: "The

Gas Act (NGA).[14] The orders adopting and implementing the rule were set aside and the cases remanded to the FPC for further proceedings.

II. Administrative Procedure and Informal Rulemaking

An administrative agency's task of regulating may be undertaken by either rulemaking or adjudication. Adjudication is a quasi-judicial procedure because of its similarities with a typical courtroom trial.[15] When engaged in adjudication, the agency is required to follow the trial-type procedures of sections 554, 556, and 557 of the APA. These sections provide for an evidentiary hearing,[16] in which witnesses may be called and extensively cross-examined,[17] and they provide for an "exclusive record" to be compiled.[18]

An agency may also proceed by formal or informal rulemaking. With a few exceptions,[19] formal rulemaking is procedurally similar to adjudication.[20] Like adjudication, cross-examination and compilation of a record are required. Formal rulemaking is triggered when the substantive statute requires a "hearing on the record."[21]

In contrast to adjudication and formal rulemaking, minimal statutory requirements exist for informal rulemaking. Commonly labeled as a "notice and comment" procedure, informal rulemaking is guided by section 553 of the APA, which requires that the "terms of substance of the proposed rule or a description of the subjects and issues involved" be

finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." *Id.*

14. *Id.* § 717 *et seq.*

15. *See* 1 K. Davis, Administrative Law Treatise § 5.01 (1958).

16. 5 U.S.C. §§ 554(b)-(d), 556(d) (1970).

17. *Id.* § 556(d).

18. *Id.* § 556(e).

19. Formal rulemaking and adjudication differ in two ways. First, *ex parte* communication with the agency official conducting the hearing is prohibited in adjudication but not in formal rulemaking. *Id.* § 554(d)(2)(B). Second, unlike adjudication, the agency may omit the initial decision by the presiding official in formal rulemaking if necessary. *Id.* § 557(b)(2).

20. Like adjudication, formal rulemaking proceeds according to the requirements of sections 556 and 557 of the APA. *Id.* § 553(c) (Supp. IV, 1974). These sections provide for a formal hearing under oath; witnesses called and cross-examined; depositions, if necessary; and an exclusive record containing the ruling on each "finding, conclusion, or exception presented." *Id.* §§ 556(c)-(e), 557(c) (1970).

21. In United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), the Court held that the formal procedures of sections 556 and 557 of the APA must be followed only when the authorizing statute requires a "hearing on the record." This test was reiterated in United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

published in the *Federal Register*[22] so as to provide advance notice to interested parties, who may then submit oral or written comments.[23] When finally issued, the rules are published[24] and must include a "concise general statement of their basis and purpose."[25] The record compiled during informal rulemaking procedures generally consists of the notice in the *Federal Register*, any comments submitted to the agency and other data collected by the agency, as well as the opinion of the members of the rulemaking Commission.[26]

Informal rulemaking provides an agency with the advantages of efficiency, flexibility, and broad participation in developing administrative policies.[27] As a result, many agencies have turned to rulemaking rather than adjudication to perform their regulatory functions. This trend has found encouragement in a number of cases approving rulemaking procedures.[28]

The courts have had numerous occasions in recent years to decide whether the FPC could use informal rulemaking in ratemaking.[29] In *Union Oil*, the FPC sought to gather data which, it was argued, would assist them in determining policy and setting rates. A number of sections of the NGA[30] were posited as sources of authority for the rule

22. 5 U.S.C. § 553(b) (Supp. IV, 1974).

23. *Id.* § 553(c). The language of the statute reads:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, [or] [sic] arguments with or without opportunity for oral presentation.

Id.

24. *Id.* § 553(d) (1970).

25. *Id.* § 553(c) (Supp. IV, 1974).

26. *Id. See also* Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 205 (1974) [hereinafter cited as Verkuil]; *Judicial Review, supra* note 12, at 1758 n.41.

27. *See* Verkuil, *supra* note 26, at 187; *Judicial Review, supra* note 12, at 1752; Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782 (1974) [hereinafter cited as *Judicial Role*].

28. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 624-25 (1973); United States v. Storer Broadcasting Co., 351 U.S. 192, 202-03 (1956); SEC v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. Beech-Nut Life Savers, Inc., 406 F.2d 253 (2d Cir. 1968), *cert. denied*, 394 U.S. 1012 (1969); WBEN, Inc. v. United States, 396 F.2d 601 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

29. *In re* Permian Basin Area Rate Cases, 390 U.S. 747 (1968); FPC v. Texaco, Inc., 377 U.S. 33 (1964); Consumer Fed'n of America v. FPC, 515 F.2d 347 (D.C. Cir.), *cert. denied*, 423 U.S. 906 (1975); American Public Gas Ass'n v. FPC, 498 F.2d 718 (D.C. Cir. 1974); Municipal Intervenors Group v. FPC, 473 F.2d 84 (D.C. Cir. 1972); Alabama-Tennessee Natural Gas Co. v. FPC, 359 F.2d 318 (5th Cir.), *cert. denied*, 385 U.S. 847 (1966).

30. 15 U.S.C. §§ 717g, 717i, 717m, 717o (1970).

which created Form 40, and the court recognized that the FPC has broad authority "to obtain information and to require reports."[31] However, the proffered sections lent no assistance in determining whether formal or informal rulemaking was proper.[32] The court concluded that the full panoply of formal adjudicatory-type procedures was inappropriate,[33] and "[b]ecause the Natural Gas Act does not require a trial type hearing for rulemaking, the Administrative Procedure Act does not."[34] What this latter phrase evidently means is that the NGA does not mandate a "hearing on the record," which is the touchstone phrase that triggers formal rulemaking under the APA.[35]

III. Reviewing Standards and the Role of a Record

The APA provides two alternative standards which serve as a basis for judicial review of agency determinations of fact: the "arbitrary and capricious" and "substantial evidence" tests.[36] Which test will be used depends on the type of agency proceeding and the accompanying standard established by the APA. In addition, any special standard of review may be supplied by the particular regulatory act. Unless the substantive statute provides otherwise, the arbitrary and capricious test is generally used to review the factual basis of informal rulemaking;[37]

31. 542 F.2d at 1039 (footnote omitted).

32. Although the Natural Gas Act provides that "[t]he Commission shall have the power . . . to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate . . . ." (15 U.S.C. § 717*o* (1970)), it does not prescribe the specific procedure to be used in any given circumstances. The APA, on the other hand, defines the terms "rule," "rule making," "order," and "adjudication," and describes when each is to be used by an agency. 5 U.S.C. §§ 551(4)-(7) (1970), *as amended*, 5 U.S.C. §§ 551(4)-(7) (Supp. IV, 1974).

33. 542 F.2d at 1039-40.

34. *Id.*

35. *See* note 21 *supra.*

36. 5 U.S.C. § 706(2) (1970). The pertinent sections of the statute read as follows:

> The reviewing court shall—
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.
>
> . . . .
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [adjudications] or otherwise reviewed on the record of an agency hearing provided by statute . . . .

Id.

37. *See, e.g.*, Chrysler Corp. v. Department of Transp., 472 F.2d 659, 667-70 (6th Cir. 1972); Ashland Oil & Ref. Co. v. FPC, 421 F.2d 17, 23 (6th Cir. 1970); California Citizen's Band Ass'n v. United States, 375 F.2d 43 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967). *See also* Verkuil, *supra* note 26, at 185, 205-06; *Judicial Review, supra* note 12, at 1750, 1751.

the substantial evidence test typically serves as the standard for adjudication and formal rulemaking.[38]

The NGA, however, expressly provides that the "finding of the [Federal Power] Commission as to the facts, if supported by *substantial evidence*, shall be conclusive."[39] In *Union Oil*, then, the court was applying to informal rulemaking a test normally reserved for adjudication and formal rulemaking.[40]

The courts have experienced confusion in such a situation largely because of the conflict between the type of record produced by an informal rulemaking procedure and the scrutiny required by a substantial evidence standard of review.[41] The less elaborate procedures of informal rulemaking are well-suited to concise and efficient regulating of an industry. However, the procedures that permit an agency to proceed with celerity and flexibility also limit that agency's ability to make a complete record.

In adjudication and formal rulemaking, cross-examination of witnesses and the requirement that the agency decision must be based on the record compiled at the hearing[42] affords reviewing courts a complete record. These formal records facilitate judicial review by allowing the courts to judge whether the agency's decision is adequately supported by the evidence before it. But the less formal procedures of informal rulemaking do not encompass confrontation and cross-exam-

38. *See* National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2nd Cir. 1975); DiVosta Rentals, Inc. v. Lee, 488 F.2d 674 (5th Cir. 1973), *cert. denied*, 416 U.S. 984 (1974). *See also* Verkuil, *supra* note 26, at 205-06.

39. 15 U.S.C. § 717r(b) (1970) (emphasis added).

40. The problem faced by the court is epitomized in one sentence:

> Thus we are reviewing, under authority of the Natural Gas Act, an order adopting and effectuating a rule or regulation as authorized under that Act, in a proceeding prescribed under the Administrative Procedure Act, but under a standard embodied in the Natural Gas Act.

542 F.2d at 1040.

The cause of this problem is the interplay between the APA and the enabling statutes of the various administrative agencies. The implication of section 706(2)(E) of the APA is that the standard to be applied to informal rule-making is the arbitrary and capricious test since the substantial evidence test is only made applicable to adjudications and formal rulemaking. The confusion arises when Congress takes the substantial evidence language from section 706(2)(E) and places it in a statute such as the Natural Gas Act to be the standard for all proceedings under that Act.

41. Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976); Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973); Papercraft Corp. v. FTC, 472 F.2d 927 (7th Cir. 1973); Chrysler Corp. v. Department of Transp., 472 F.2d 659 (6th Cir. 1972); Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

42. 5 U.S.C. § 556(e) (1970). *See* Northern Cal. Power Agency v. Morton, 396 F. Supp. 1187 (D.D.C. 1975).

ination, which are usually required by reviewing courts as a basis for fact-finding. Moreover, the substantial evidence standard of review has come to mean a rigorous and searching inquiry into agency action.[43] Thus, the courts reviewing agency actions under the NGA may be faced with the difficult task of making a careful examination of an incomplete and unfocused record.

IV. Reasoning of the Court

In *Union Oil*, the court first interpreted the "substantial evidence" language in the NGA to require a greater degree of judicial scrutiny. Secondly, the court reasoned that this stricter standard could only be satisfied by a record which provides sufficient evidence to support the action taken by the agency. Finally, the court examined the record and concluded that it did not contain any evidence to sustain the factual premises upon which the Commission had based its decision.

A. The Substantial Evidence Test Requires Greater Scrutiny

In stating that "Congress expected greater scrutiny when the enabling statute contains a substantial evidence test,"[44] the *Union Oil* court relied on neither legislative history nor judicial interpretation to determine what Congress intended by including the substantial evidence test in the NGA. It merely rejected the conclusion of some courts[45] that the differences between arbitrary and capricious and substantial evidence standards in the context of reviewing informal rulemaking were minimal.[46] The Ninth Circuit objected to the suggestion of these courts that little or no evidence is necessary to support an agency's factual determination under *either* standard of review.

B. The Substantial Evidence Test Requires a More Extensive Record

Although the creation and implementation of Form 40 fulfilled all requirements for informal rulemaking,[47] the court felt that the cumulative record was inadequate.

> We tend to consider such less formal records as somehow suspect, because the evidence has not been presented under adversary type pro-

43. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 143 (1967); Verkuil, *supra* note 26, at 214.

44. 542 F.2d at 1041.

45. *See* Associated Indus., Inc. v. Department of Labor, 487 F.2d 342, 347-50 (2d Cir. 1973); Phillips Petroleum Co. v. FPC, 475 F.2d 842 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

46. 542 F.2d at 1040-41.

47. *Id.*; *see* 5 U.S.C. § 553 (1970).

> ceedings, and so has not received the rigorous testing by confrontation and cross-examination that we usually demand as a basis for fact-finding. . . . Such records tend to make courts nervous, even though the proceeding does comply with § 553.[48]

Still, the court did not want to eliminate the "time and cost saving advantages" of informal rulemaking. Thus, it sought to fashion a flexible, middle ground. The court concluded that the record need not be as complete as that compiled in adjudication, but "must contain sufficient factual data, however informally presented, to provide substantial evidentiary support for the action taken."[49]

C. Sufficiency of the Evidence Test

In light of the Ninth Circuit's interpretation of the substantial evidence standard of review, the FPC's superficial treatment of the gas producers' claims was clearly inadequate. The record presented to the court contained little evidence to support the factual premises underlying the Commission's decision. It was not surprising, therefore, that the *Union Oil* court found the agency's conclusion to be unsupported by substantial evidence.

In reply to the gas companies' first objection, that Form 40 would impose a severe economic burden, the FPC asserted that the natural gas industry was already required to furnish the same information to the Internal Revenue Service. Thus, it would impose no burden on the companies to supply the data to the FPC as well. The court rejected this contention as inaccurate on the grounds that the tax regulations required the companies to submit data based upon "ownership, lease, or working interests, not on a reservoir basis as the Commission requires in Form 40. . . ."[50] This claim was the sole support offered by the Commission. When rejected by the court, it became clear that the Commission had failed to support the factual premise with substantial evidence.

The gas companies' second objection to Form 40 was that it was duplicative and the needs of the FPC could be amply satisfied by data supplied on a more commonly recorded basis than the reservoir basis. The Commission answered with the terse statement that information provided on this basis was unreliable. Once again, the *Union Oil* court rebuked the FPC for failing to furnish any evidence to support its conclusion. Even if valid grounds existed for such a conclusion, as the

48. 542 F.2d at 1040 (footnote omitted).
49. *Id.* at 1041.
50. *Id.* at 1042 (emphasis added).

court suggests, it reasoned that the agency, not a reviewing court, must support an agency's findings.[51]

The last objection raised by the gas producers was that all of the information sought by the FPC was available from other federal agencies. The Commission's reply to this challenge was that this data was confidential[52] and could not be obtained from other agencies. The court chided the Commission for taking such a stand. Indeed, the FPC's position was somewhat absurd in view of the Commission's plans to make Form 40 information available for public inspection. In addition, as the court pointed out, those parties whose confidential interests the FPC sought to protect were the same parties seeking disclosure of the data. Thus, the *Union Oil* court concluded, not only did the Commission's support fall short of the substantial evidence test, it ignored the directive of Congress in the NGA that the FPC utilize the resources of other agencies in performing its regulatory function.[53]

V. The Implications of the Union Oil Decision

A. *Interpretation of the "Substantial Evidence" Standard of Review*

In *Union Oil*, the Ninth Circuit sought to achieve a compromise be-

51. *Id.* at 1043, *citing* Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528, 539 (D.C. Cir. 1972).

52. The natural gas producers appealed the FPC's decision to place the data in schedules B and C submitted by the companies on public record. *See* note 3 *supra.* The FPC had intended to put schedule A data on public file. Schedule B and C data would remain confidential unless the FPC otherwise ordered.

Trade secrets are exempt from the mandatory disclosure provisions of the Freedom of Information Act. See 5 U.S.C. § 552(b)(4) (1970). The Ninth Circuit panel held that the data required by Form 40 constituted a trade secret and, as such, had to remain confidential under the exemption provision. 542 F.2d at 1045. Subsequently, however, the court withdrew its holding as "premature" and left open the issue of whether the producers had a right, enforceable against the FPC, to prevent disclosure of information. *Id.*

The court also held that the FPC's rule which makes such information a matter of public record failed to meet the arbitrary and capricious standard of review. 5 U.S.C. § 706(2)(A) (1970); *see* note 12 *supra.* It reasoned that a rule which gave the Commission "unfettered discretion" to make the data available, without any procedures to consider the likely harm to the producers, was without a rational basis. 542 F.2d at 1045, 1046.

53. 542 F.2d at 1043-44. In section 11(c) of the Natural Gas Act, 15 U.S.C. § 717j(c) (1970), Congress ordered:

> In carrying out the purposes of this chapter, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government[,] and the President may, from time to time, direct that such services and facilities be made available to the Commission.

Id.

tween the advantages of informal rulemaking and the rigorous judicial review the court concluded was expected under the substantial evidence test. The compromise reached by the court was to require a more complete record than that normally produced by informal rulemaking procedures. However, the end result of the *Union Oil* court's compromise may be the introduction of the "hybrid procedures" advocated by the District of Columbia Circuit in *Mobil Oil Corp. v. FPC*.[54] These hybrid procedures incorporate some, but not all, of the features of a trial-type hearing normally reserved for adjudication and formal rulemaking.

The underpinning of the Ninth Circuit's result is its conclusion that the substantial evidence test mandates a more rigorous judicial review than the arbitrary and capricious test. This is by no means a foregone conclusion. As the court indicated, there was authority to the contrary. In *Associated Industries v. Department of Labor*,[55] Judge Friendly of the Second Circuit stated that the two standards "tend to converge" when courts review informal rulemaking on a "notice and comment" record.[56] Moreover, the Ninth Circuit itself, in reviewing FPC rulemaking, had earlier stated:

> [I]n determining the propriety of rules of general application, only a legal question is presented—whether on the factual premise upon which the Commission acted, the rule promulgated is unreasonable . . . arbitrary, capricious or discriminatory. If the factual premise itself were open to review, then it would be necessary . . . for all general rulemaking to include a trial-like hearing.[57]

The court held that insofar as the Commission had a "reasonable basis" for promulgating its rule, it was not subject to attack on review.[58] This reasonable basis test applied by the court in *Superior Oil Co. v. FPC*[59] differs little from the arbitrary and capricious test normally reserved for review of the factual premises of informal rulemaking.

Another case which reaches an opposite conclusion as to the amount of judicial scrutiny required by the substantial evidence test is *Phil-*

54. 483 F.2d 1238, 1259 (D.C. Cir. 1973).

55. 487 F.2d 342 (2d Cir. 1973).

56. *Id.* at 350.

57. Superior Oil Co. v. FPC, 322 F.2d 601, 619 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964). *See also* Southern Cal. Edison Co. v. FPC, 387 F.2d 619 (3d Cir.), *cert. denied*, 392 U.S. 909 (1967).

58. Superior Oil Co. v. FPC, 322 F.2d 601, 619 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964).

59. Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975); Carlisle Paper Box Co. v. NLRB, 398 F.2d 1 (3d Cir. 1968); AFL-CIO v. Brennan, 390 F. Supp. 972 (D.D.C. 1975).

lips Petroleum Corp. v. FPC[60] wherein the Tenth Circuit gave a narrow reading to the substantial evidence test. In *Phillips*, the court concluded that the FPC had been granted broad discretion in formulating rules[61] and rejected a contention that this discretion was limited by the "need for an adequate record on review."[62]

This view that the substantial evidence test is no more demanding than the arbitrary and capricious test in the context of informal rulemaking has been rejected by other authorities. Notably, in *Mobil Oil*, the District of Columbia Circuit explicitly rejected the narrow reading given the substantial evidence test by the court in *Phillips*.[63] The *Mobil Oil* court concluded that the substantial evidence test "imposes a considerable burden on the agency and limits its discretion in arriving at a factual predicate."[64] This position is supported by Supreme Court cases[65] and commentators,[66] who have concluded that a substantial evidence test connotes active judicial review while the arbitrary and capricious standard implies a "soft" or "cursory" judicial review.

In *Union Oil*, the Ninth Circuit agreed with the *Mobil Oil* view of the significance of the substantial evidence test in the Natural Gas Act. The *Union Oil* court simply stated: "We think, however, that Congress expected greater scrutiny when the enabling statute contains a substantial evidence test."[67] The court reached this result in a conclusory fashion, relying on neither legislative history nor judicial interpretation. This failure on the part of the *Union Oil* court to support its proposition with any authority reinforces the conclusion that the Ninth Circuit is in agreement with the *Mobil Oil* court's reading of the substantial evidence test. The *Mobil Oil* court also failed to support its conclusion with authority. Moreover, both the *Mobil Oil* and *Union Oil* courts drew the conclusion from their interpretation of the substantial evidence test that

60. 475 F.2d 842 (10th Cir. 1973).
61. *Id.* at 852.
62. *Id.* at 850.
63. 483 F.2d at 1262.
64. *Id.* at 1258 (footnote omitted).
65. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 143 (1967); Universal Camera Corp. v. NLRB, 340 U.S. 474, 481 (1951).
66. Verkuil, *supra* note 26, at 185, 214; *Judicial Review, supra* note 12, at 1750, 1752. *See also* Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 391 (1974). "'Arbitrary and capricious' review thus came to be considered 'soft' or cursory, while substantial evidence implied more searching review of agency action." *Judicial Review, supra* note 12, at 1752.
67. 542 F.2d at 1041.

something more is required of the agency than mere informal rulemaking.

Despite the failure of both *Mobil Oil* and *Union Oil* to support their initial premise, there is authority to justify this position. As noted above, it has generally been recognized that the substantial evidence standard of judicial review is more demanding than the arbitrary and capricious test. The APA itself provides for both of these standards of review. Unless the use of "substantial evidence" merely reflects a choice of language on the part of Congress, clearly there was intended a difference between the types of review. Two Supreme Court cases reflect that difference. In *Universal Camera Corp. v. NLRB*,[68] the Supreme Court interpreted the substantial evidence test as requiring that the reviewing court examine the "whole record" of the agency proceedings, not just that evidence favorable to the agency's decision.[69] Thus the test was construed to require greater support for the agency action than a mere rational basis required under the arbitrary and capricious test. In *Abbott Laboratories v. Gardner*,[70] Justice Harlan, in discussing judicial review of an anti-injunction act, defined the difference between the two tests. He noted that the substantial evidence test provides for "a considerably more generous judicial review than the 'arbitrary and capricious' test . . . ."[71] In view of these arguments, it would appear that the position of the *Union Oil* and *Mobil Oil* courts is logically consistent and better supported.

B. Limitations on Procedure and Record

In *Mobil Oil*, the District of Columbia Circuit reasoned that the substantial evidence test and the degree of evidentiary support required to buttress an agency's decision determined the type of procedures the agency is required to follow in promulgating rules.[72] In short, the substantial evidence test acted as a limitation upon informal rulemaking procedures. The *Mobil Oil* court required "some sort of adversary, adjudicative-type procedures . . . ."[73] Although they need not rise to the level of adjudication, cross-examination of witnesses, or some other method of interrogation, must be utilized. Only through such

68. 340 U.S. 474 (1951).
69. *Judicial Review, supra* note 12, at 1751.
70. 387 U.S. 136 (1967).
71. *Id.* at 143.
72. 483 F.2d at 1258-59.
73. *Id.* at 1259.

procedures would a court be provided with a complete record for effective review.

On its face, the Ninth Circuit's opinion in *Union Oil* does not reach the same result. The court does not specifically direct itself to the *type of procedures* that are required by its stricter reading of the substantial evidence test. Its result is framed in terms of the *type of record* required to meet this rigorous standard of review. As the court puts it, the reviewing court must be provided "with a record upon which it can determine whether the factual findings are supported by substantial evidence."[74] Thus, the court held that while the type of record required need not be the thorough record compiled by formal rulemaking and adjudication, the mere "notice and comment" record of informal rulemaking was not sufficient.[75]

Although the *Union Oil* court conceded that the District of Columbia Circuit had adopted a "similar approach" in *Mobil Oil*,[76] the court was careful to point out that it did not require "an adjudicative hearing, or, for that matter, any oral hearing."[77] Arguably, however, the Ninth Circuit did arrive at the same result as *Mobil Oil* but took a different route. In speaking of the need for a more complete record, the Ninth Circuit indicated that the additional procedures required by the District of Columbia Circuit may be necessary to satisfy the record requirement imposed on the FPC. The *Union Oil* court noted that "[d]ifferent issues may lend themselves to varying types of procedures."[78] It cited the *Mobil Oil* court to the effect that "the Commission should 'realistically tailor the proceedings to fit the issues before it.' "[79] The court seemed to acknowledge that while its holding spoke in terms of the record required, the substance and effect of its decision went to the *type of procedures* necessary to compile a proper record for review.

A comparison of the reasoning of the *Union Oil* court with the *Mobil Oil* court further indicates that the Ninth Circuit is using a different approach to impose hybrid procedures. In *Mobil Oil*, the court used the need for an adequate record as an additional argument to buttress its position that more elaborate procedures are required.

74. 542 F.2d at 1041.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id., citing* Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1252 (D.C. Cir. 1973), *citing* Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

In *Union Oil*, the Ninth Circuit reasoned that the substantial evidence test alone compelled a more complete record. In essence, the *Union Oil* court has borrowed one premise of *Mobil Oil* and used it to impliedly achieve the same result. The only substantial difference is that the *Union Oil* court has not explicitly extended its reasoning to its furthest point by suggesting certain procedures the FPC might take to comply with its decision, as the court did in *Mobil Oil*.[80]

One further reason for suggesting that the end result of this decision is the same as *Mobil Oil* is the practical considerations involved. Although the *Union Oil* court does not specifically mandate hybrid procedures, realistically the type of record required cannot be compiled without the use of some element of a trial-type hearing. Where the factual premises upon which the agency bases its decision are somehow suspect, it is difficult to see how the court will be able to determine their validity unless they are tested by confrontation and cross-examination. Perhaps "substantial" evidence can be illuminated only by certain trial-type procedures.[81] The *Union Oil* court itself intimates that the type of record required cannot be developed without some kind of "adversary type proceedings."[82]

If the *Union Oil* decision does indeed impose hybrid procedures upon informal rulemaking, the results will be harsh. The calling and cross-examination of witnesses will deprive informal rulemaking of its time and cost-saving advantages. Although all proceedings will not require a full trial-type hearing, the FPC will definitely be hampered in its efforts to effectively deal with the myriad of problems that arise in the natural gas industry.

VI. CONCLUSION

The fact that the *Union Oil* court chose to adopt the reasoning of the District of Columbia Circuit in *Mobil Oil*, rather than simply remanding the case to the FPC to compile a further record as other courts have

80. Realistically, the court in *Mobil Oil* did not extend its reasoning to the furthest point. One commentator has suggested that the "ultimate conclusion" of the court's "substantial evidence argument" is "informal rulemaking." *See* Verkuil, *supra* note 26, at 223.

81. In *Mobil Oil*, the court suggested a number of alternatives which might comply with the procedures required by the substantial evidence test. Some of these were: Oral cross-examination, "written questions and responses in the nature of interrogatories and evidence incorporated . . . from other proceedings." 483 F.2d at 1263. The *Union Oil* court, however, refused to elaborate upon the type of procedures it thought might produce the required record.

82. 542 F.2d 1040-41.

done,[83] indicates that the Ninth Circuit will require hybrid procedures in informal rulemaking. At a minimum, other courts will be able to rely on the decision as precedent if they seek to require confrontation and additional trial-type procedures when an administrative agency issues rules. In a larger context, the case indicates that agency regulation will be subject to greater scrutiny in the Ninth Circuit. The *Union Oil* court's interpretation of the substantial evidence test is a large step away from the maximum deference often paid to agency decisions.[84] In the future, the Ninth Circuit will demand greater justification from administrative bodies before permitting interference with the private sector.

Thomas J. Masenga

83. Rhode Island Consumers' Council v. FPC, 504 F.2d 203, 210 (D.C. Cir. 1974); Columbia LNG Corp. v. FPC, 491 F.2d 651, 654-55 (5th Cir. 1974); Skelley Oil Co. v. FPC, 375 F.2d 6, 35 (10th Cir. 1967).

84. *Cf.* Superior Oil Co. v. FPC, 322 F.2d 601 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964). *See also* Shell Oil Co. v. FPC, 520 F.2d 1061, 1071-72 (5th Cir. 1975); Memphis Light, Gas & Water v. FPC, 500 F.2d 798, 800-01 (D.C. Cir. 1974); Shell Oil Co. v. FPC, 491 F.2d 82, 85 (5th Cir. 1974); Southern La. Area Rate Cases v. FPC, 428 F.2d 407, 418 (5th Cir. 1970).