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Any Disclosure of FOIA-Exempt Information without Weighing Benefit to the Agency, Harm to the Public, and the Possibility of Compromise Is an Abuse of Discretion.

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CASE NOTES

ADMINISTRATIVE LAW—Abuse of Discretion—Agency Disclosure Under FOIA—Any Disclosure of FOIA-Exempt Information Without Weighing Benefit to the Agency, Harm to the Public, and the Possibility of Compromise Is an Abuse of Discretion

Pennzoil Co. v. FPC,
534 F.2d 627 (5th Cir. 1976).

The Federal Power Commission ordered the petitioners, natural gas producers, to provide detailed reserve information and stated that all responses would be a matter of public record.[1] The producers objected to public disclosure contending that the data was a valuable trade secret, which provided them with a means of predicting productivity of nearby unleased tracts. On rehearing the Commission replied to this objection by stating that the value to the public of this information outweighed the admitted harm to the private interests of the producers. The producers petitioned the Court of Appeals for the Fifth Circuit to review the Commission order on two primary grounds: first, that disclosure was barred because the reserve data fell within two exceptions of the Freedom of Information Act[2] (FOIA); and second, that release of this information would constitute an abuse of discretion by the Commission.[3] Held—*Remanded.* The FOIA is not an absolute bar to FPC disclosure of previously exempt information, but any disclosure of such information without weighing factors such as benefit to the agency, harm to the public, and the possibility of compromise is an abuse of discretion.[4]

1. Data requested besides the reserve data included " '[a]ll background data . . . including workpapers . . . any calculated data . . . plus any temperature decline, production decline, or material balance method data useful in making a reserve estimate.' " Pennzoil Co. v. FPC, 534 F.2d 627, 629 (5th Cir. 1976).

2. 5 U.S.C. § 552 (Supp. IV 1974), *amending* 5 U.S.C. § 552 (1970), provides in pertinent part: "This section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . geological and geophysical information and data, including maps concerning wells."

3. Petitioners also contended that disclosure would constitute a taking of property for public use without just compensation in violation of the fifth amendment. U.S. CONST. amend. V; Joint Initial Brief of Petitioners and Intervenors at 11, Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976). The court failed to make any reference at all to this constitutional question.

4. Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976).

There are nine statutory exceptions to the FOIA[5] and considerable controversy has arisen over the question of whether these exceptions are permissive or mandatory.[6] The United States Supreme Court recently resolved this controversy in *EPA v. Mink*[7] by holding that the statute distinguishes between information that the agencies *must* disclose and information which they *may*, in their discretion, withhold from the public.[8]

Disclosure of reserve data, like any administrative action, is subject to judicial review[9] and can only be upheld for the reason stated in the record.[10] Consequently, an agency must clearly articulate the basis for its decision.[11] Situations in which the court lacked essential findings to support the agency's order fall within the clear articulation requirement.[12] As a corollary to these rules, courts have stated that where the basis for the decision is not sufficiently clear they will not choose between inferences.[13] It is sufficient, however, if the path taken by the agency can be discerned.[14] Whenever an administrative decision is inconsistent with prior decisions, judicial review will be particularly circumspect.[15]

5. 5 U.S.C. § 552(b) (Supp. IV 1974), *amending* 5 U.S.C. § 552(b) (1970). The Act imposes a general requirement that each agency shall make information available to the public. *Id.* § 552(a) (Supp. IV 1974), *amending id.* § 552(a) (1970). However, material included in the enumerated exceptions is not required to be disclosed. *Id.* § 552(b) (Supp. IV 1974), *amending id.* § 552(b) (1970).

6. *E.g.*, Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 941 (D.C. Cir. 1975); Moore-McCormack Lines, Inc. v. ITO Corp., 508 F.2d 945, 950 (4th Cir. 1974); Lamorte v. Mansfield, 438 F.2d 448, 451 (2d Cir. 1971).

7. 410 U.S. 73 (1973).

8. *Id.* at 79; *accord*, cases cited note 6 *supra*; *see* Administrator, FAA v. Robertson, 422 U.S. 255, 261-62 (1975). *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.5, at 122 (Supp. 1970); Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 766 (1967).

9. Administrative Procedure Act, 5 U.S.C. § 702 (1970) (right of review); *id.* § 704 (action reviewable); *id.* § 706 (scope of review).

10. *E.g.*, Camp v. Pitts, 411 U.S. 138, 142 (1973) (existing record is focal point of review); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962) (order must be upheld if at all on the basis articulated by the agency); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (propriety of administrative action must be judged solely on ground invoked by agency).

11. *E.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941); Beaumont, S.L. & W. Ry. v. United States, 282 U.S. 74, 86-87 (1930); Radio Station KFH Co. v. FCC, 247 F.2d 570, 572 (D.C. Cir. 1957).

12. *See, e.g.*, Baltimore & O.R.R. v. Aberdeen & R.R.R., 393 U.S. 87, 92 (1968); United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 488-89 (1942); Florida v. United States, 282 U.S. 194, 215 (1931).

13. *E.g.*, Atchison, T., & S.F. Ry. v. United States, 295 U.S. 193, 201-02 (1935); United States v. Chicago, M., St. P. & P.R.R., 294 U.S. 499, 505, 510-11 (1935); Northeast Airlines, Inc. v. CAB, 331 F.2d 579, 586 (1st Cir. 1964).

14. *E.g.*, Atchison, T., & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 809 (1973); Colorado Interstate Co. v. FPC, 324 U.S. 581, 595 (1945); Morton v. Dow, 525 F.2d 1302, 1307 (10th Cir. 1975).

15. *E.g.*, Secretary of Agriculture v. United States, 347 U.S. 645, 652-54 (1954); UAW v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972); FTC v. Crowther, 430 F.2d 510, 513-14 (D.C. Cir. 1970).

The standards applicable to judicial review of administrative decisions remain unclear as a result of the 1971 Supreme Court decision in *Citizens to Preserve Overton Park, Inc. v. Volpe.*[16] The traditional standard of review prior to *Overton Park* required that the findings be supported by substantial evidence,[17] while the standard announced by *Overton Park* requires that the decision not be " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .' "[18] The basis for judicial review of such a finding must be that the agency has considered all relevant factors and has not made a clear error of judgment.[19] The ultimate standard of review must be narrow; the court must not substitute its judgment for that of the agency.[20] Although stating that the abritrary or capricious test applies to all situations while the substantial evidence test is limited to certain specified situations, the Supreme Court unfortunately failed to distinguish between the two tests.[21]

As a result of the ambiguity of the review standards established in *Overton Park*, judicial interpretation of the opinion varies greatly. Some decisions refer to a relationship between arbitrary or capricious and a failure to consider all relevant factors.[22] Several courts have interpreted the substitution-of-judgment language to mean that the court may not review the agency's substantive decision, but may only consider whether the agency's actions, findings, and conclusions were based on proper procedure.[23] Some have not applied the arbitrary or capricious test at all,[24] and one has found the standard of review to be immaterial.[25] One noted commentator has recognized that no less than four different views have some support on the question of the distinction between the arbitrary or capricious test and the substantial evi-

16. 401 U.S. 402 (1971).

17. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.00, at 646 (1976). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); *see* Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1970); Natural Gas Act, 15 U.S.C. § 717r (1970).

18. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971); *see* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970).

19. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

20. *Id.* at 416.

21. *Id.* at 414.

22. Amoco Oil Co. v. EPA, 501 F.2d 722, 746 n.63 (D.C. Cir. 1974); Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973).

23. Sabin v. Butz, 515 F.2d 1061, 1066-67 (10th Cir. 1975) (court's function is exhausted where a rational basis is found for agency action); Daly v. Volpe, 514 F.2d 1106, 1108-09 (9th Cir. 1975) (review is limited to question whether legally required procedure was followed); *see* Pennsylvania v. EPA, 500 F.2d 246, 250 (3d Cir. 1974) (applying *Overton Park* standard).

24. Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1257-63 (D.C. Cir. 1973) (applying substantial evidence test); *see* Monroe M. Tapper & Assocs. v. United States, 514 F.2d 1003, 1009-10 (Ct. Cl. 1975) (apparently applying substantial evidence test).

25. Hanly v. Mitchell, 460 F.2d 640, 648 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

dence test[26] and has stated that "the question which of the four views *is* the law seems unanswerable except by saying that the law is not only unclear but quite confused . . . ."[27]

Pennzoil v. FPC[28] contributes to the confusion concerning the standard of review of administrative action. The court first concluded that the FOIA exceptions are permissive only and not mandatory so that disclosure of the reserve data was not statutorily barred.[29] The Fifth Circuit then attempted to deal with the problem of discretionary disclosure.[30] It based its resolution of the problem on the application of the arbitrary or capricious test,[31] and as such, is one of the first Fifth Circuit cases to apply the *Overton Park* formula.[32]

The precise language of the opinion gives strong indication of the Fifth Circuit's position on the distinction between the arbitrary or capricious and substantial evidence tests. The court noted that review of an administrative decision will be particularly searching when the decision is a departure from prior agency practice.[33] It further stated: "Considering the more exacting standard of review, the court, in determining whether the agency's action has been arbitrary, capricious, or an abuse of discretion, must consider whether the decision was based on a consideration of the relevant factors."[34] This statement presumes that there is a distinction between the two tests and that the arbitrary or capricious test is the stricter test. The clear implication is that in some cases only substantial evidence review is required.[35] Unfortu-

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26. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.00, at 649 (1976). The four views enumerated are: (1) the substantial evidence test means "more generous" review than the arbitrary or capricious test; (2) the substantial evidence test means "less generous" review than the arbitrary or capricious test; (3) the two tests become equivalents; and (4) refined differences in the two tests do not matter, since the degree of intensity of review depends far more on other factors than on fine distinctions in formulas. *Id.*

27. *Id.* § 29.00, at 652.

28. 534 F.2d 627 (5th Cir. 1976).

29. *Id.* at 630. The conclusion rests on solid ground; it finds considerable case and textual support. See notes 6-8 *supra* and accompanying text.

30. Pennzoil v. FPC, 534 F.2d 627, 631 (5th Cir. 1976).

31. *Id.* at 631.

32. Only a few other Fifth Circuit cases have referred to *Overton Park*. *E.g.*, Sierra Club v. Lynn, 502 F.2d 43, 51-52 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975); Texas v. EPA, 499 F.2d 289, 296-97 (5th Cir. 1974), *appeal for stay of mandate denied sub nom.* Exxon Corp. v. EPA, 421 U.S. 945 (1975); Bank of Commerce v. City Nat'l Bank, 484 F.2d 284, 288 (5th Cir. 1973), *cert. denied*, 416 U.S. 905 (1974). These cases do not give any explanation or interpretation of the arbitrary or capricious standard announced in *Overton Park*.

33. Pennzoil v. FPC, 534 F.2d 627, 631 (5th Cir. 1976).

34. *Id.* at 631.

35. This view is in accord with that taken in another Fifth Circuit case in which the court stated that a more penetrating inquiry than the substantial evidence test ought to be applied under the particular circumstances of that case. Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973).

nately, the opinion gave no indication of the precise difference between the tests or of the circumstances to which each would apply.

Insight as to why the arbitrary or capricious test applies to the situation involved in *Pennzoil* is found in the court's heavy reliance on the fact that the agency's decision to make the reserve data public was a departure from normal agency practice.[36] *Pennzoil* implies that the arbitrary or capricious test was applied because the order departed from prior norms.[37] One can only speculate whether the same standard of review would have been applied had this element of departure from past decisions not been present. Consequently, *Pennzoil* has done little to sort out the confusion surrounding the standard of review to be used by courts in reviewing administrative decisions.

More significant, though, is the manner in which the Fifth Circuit applied the requirement that all relevant factors be considered.[38] Noting that agency action can only be upheld for the reasons stated in the record, the court concluded that the Commission's bare statement that the public interest outweighed the private harm was an inadequate articulation of their finding.[39] No further support for the court's conclusion was stated in the opinion, although certainly such support was present.[40]

The significance of this conclusion, though unexplained, cannot be doubted. It gives a clear indication of the degree of specificity required in the explanation of an administrative decision—broad, general statements are insufficient. The implication is that the government must identify the authorization under which it purports to act.[41]

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36. Pennzoil v. FPC, 534 F.2d 627, 631 (5th Cir. 1976). The court mentioned a Commission order, rule, and form as evidence that the FPC's decision was a departure from its prior position. *Id.* at 631.

37. *See id.* at 631.

38. *Id.* at 631-32. The requirement that all relevant factors be considered is also based on the *Overton Park* decision. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

39. Pennzoil v. FPC, 534 F.2d 627, 631-32 (5th Cir. 1976).

40. The need for full and careful indication of the methods by which and purposes for which the FPC has acted, none of which were contained in the Commission's order, has been strongly emphasized in the past. Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968). The need for such clarity is particularly pronounced when the agency action is a modification or reversal of past policies. Marine Space Enclosures, Inc. v. Federal Maritime Comm'n, 420 F.2d 577, 585 (D.C. Cir. 1969) (confidence of court that modification was legally made is not enhanced when matter is lightly brushed over without treating prior precedents). Accordingly, the courts have recognized a requirement that an agency reversing its course must supply an analysis indicating that the standard is being changed and not ignored. Columbia Broadcasting Sys., Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971); New Castle County Airport Comm'n v. CAB, 371 F.2d 733, 734-35 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 930 (1967). The FPC order analyzed in *Pennzoil* lacked any clear explanation of the reason for the FPC's departure from prior norms. Despite this wealth of support for its conclusion the court failed to state the basis for its decision, the very fault it found in the Commission's order. *See* Pennzoil v. FPC, 534 F.2d 627, 631-32 (5th Cir. 1976).

41. *See* Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 79

The *Pennzoil* case is noteworthy primarily for its delineation of the relevant factors which the FPC must consider. Prior to *Pennzoil* this area of the law had remained unexplored.[42] The Commission must first consider whether disclosure of this detailed reserve data would significantly aid it in fulfilling its functions, including whether natural gas consumers would be able to use this information in participating in Commission ratemaking proceedings.[43] There is little doubt that the consumer has an interest in gas company regulation, though the extent of this interest is uncertain.[44] Specifically, it is unsettled whether the public has a right to know the background data from which the Commission determines gas rates.[45]

Just one year ago the Fifth Circuit in *Continental Oil Co. v. FPC*[46] held under similar facts that public disclosure of the reserve information must be limited to composite disclosure with all identifying characteristics deleted.[47] The *Pennzoil* opinion attempted to distinguish *Continental* by stating that in the latter case the record clearly showed that identification of the parties could serve no legitimate purpose while in the principal case the Commission might find it necessary to release information that would clearly identify the location and owner of individual wells.[48] This distinction is tenuous at

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(1975); Van Dusen, *Some Brief Observations on Expediting Agency Hearings and Preserving an Adequate Record*, 7 RUT.-CAM. L.J. 419, 420 (1976).

42. Apparently, only one other case has dealt with the underlying issues on which the Commission should make a finding in order to support its decision. Capital Transit Co. v. Public Util. Comm'n, 213 F.2d 176, 186 (D.C. Cir. 1953), *cert. denied*, 348 U.S. 816 (1954).

43. Pennzoil v. FPC, 534 F.2d 627, 632 (5th Cir. 1976).

44. The Natural Gas Act explicitly states that such regulation is necessary to the public interest. 15 U.S.C. § 717(a) (1970).

45. The Supreme Court has held that the method and purpose of the Commission action must be carefully stated since such indication is necessary for judicial review. Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968). This rationale is consistent with that offered in most cases discussing the necessity for clear articulation of findings. *E.g.*, NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 442-43 (1965); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962); Automatic Canteen Co. v. FTC, 346 U.S. 61, 81 (1953). The Supreme Court has said nothing concerning a public right to know all underlying data, and only a few cases have recognized a public right to an explanation of an administrative order. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 612 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); Texaco, Inc. v. FTC, 336 F.2d 754, 766 (D.C. Cir. 1964) (Washington, J., concurring in part, dissenting in part), *vacated and remanded*, 381 U.S. 739 (1965). In discussing this situation, one commentator has stated: "It seems clear that public participants can contribute to ratemaking decisions, primarily on broad policy issues . . . . The only serious questions involve the extent of public participation." Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 370-71 (1972). *See generally* Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 704 (1972).

46. 519 F.2d 31 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 2168 (1976).

47. *Id.* at 36.

48. Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976). This distinction

best.[49] There is enough controversy over the extent of the consumer's right to this reserve data to require careful consideration of whether its disclosure will significantly aid the Commission.

The FPC must also consider the harm to the public if this information is released.[50] Such a consideration would necessarily include a determination of the possible detrimental effect of disclosure on future exploration.[51]

When these two factors are combined, insight is gained into the precise meaning of these requirements. The court is apparently requiring that the Commission engage in a cost-benefit analysis to determine the net effect disclosure will have on the public.[52] This position is in accord with the legislative history of the FOIA which reveals a Congressional attempt to balance the public right to information against an equally important right to privacy.[53]

Finally, it is most important that the Commission consider alternatives that will provide consumers with adequate knowledge while protecting the producers' interests.[54] This factor is based on common sense and is particularly salient since the present controversy was resolved after remand by means of a compromise that resulted from a consideration of various alternatives.[55]

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raises the further question of the timeliness of the suit as the court is attempting to consider the propriety of an administrative action before the agency has determined what its course of action will be.

49. One year hardly creates a greater public interest in knowing the information in raw form with individual wells identified. The only possible effect this time difference could have had is to lead to judicial recognition of the increasing public skepticism concerning utility supplies. *E.g.*, Sherill, *The National Gas Swindle*, 222 THE NATION 69 (1976); Nordlinger, *Taking the Lid Off Natural Gas*, THE PROGRESSIVE, March 1974, at 23.

50. Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976).

51. *Id.* at 632. Since this detrimental effect was the basis of petitioner's argument it must be considered.

52. *See* Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976). A prerequisite to such a balancing is an estimation of these effects, an application of the requirement that essential underlying findings be identified. *See, e.g.*, Baltimore & O.R.R. v. Aberdeen & R.R.R., 393 U.S. 87, 92 (1968); United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 488-89 (1942); Florida v. United States, 282 U.S. 194, 215 (1931).

53. SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY: FREEDOM OF INFORMATION ACT SOURCE BOOK, S. DOC. No. 93-82, 93d Cong., 2d Sess. 27, 38 (1974). The courts have repeatedly recognized this basic purpose of the Act. *E.g.*, Department of the Air Force v. Rose, — U.S. —, —, 96 S. Ct. 1592, 1599, 48 L. Ed. 2d 11, 21-22 (1976); EPA v. Mink, 410 U.S. 73, 80 (1973); National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974).

54. Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976).

55. Following remand, the FPC issued an opinion dealing with national rates for the sale of natural gas. In this opinion the Commission announced a decision that "release of the base data is not presently contemplated, inasmuch as the purposes of the 31-lease investigation have been largely accomplished [without public disclosure]." FPC OPIN. No. 770 (1976).