

Designing Concession Contracts and Agreements

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Overview

- Overview:
 - Gather necessary information
 - Factual information
 - Legal information
 - Anticipate and resolve regulatory issues
 - Understand and use a workable negotiating process
 - Ensure that the parties' legal obligations are clear
 - Achieve a comprehensive agreement that covers all necessary issues
- UTC and EFSEC experience

Different Models

- UTC:
 - Parties negotiate
 - Advisory staff, Advocacy staff have different roles
 - Advocacy Staff is often a party
 - Considerable flexibility in result
- EFSEC:
 - Parties negotiate
 - Staff is advisory
 - Independent consultant review (advisory)
 - More precise standards, less flexibility
- Both models: the agency head considers, does not negotiate

Gathering Necessary Information

Identify what information to gather

- Statutes or rules may specify
- Staff, agencies' cooperation, consultants
- Prior experience
- Decide how to gather the information
 - Application or application form
 - Is it simple? Use a form.
 - Is it complex? List topics, identify the detail needed
 - Baseline studies, engineering data,
 - Relevant financial detail

Gathering Information

Ask for the all the information you will need

- Financial, Environmental, Engineering, Personal
- Baseline studies, relevant financial detail

Require an oath that the information is correct

- False information may be a crime
- Incorrect information may invalidate the application

Do not accept the application until it is complete

Is a Hearing (Trial) Needed?

- Use a hearing
 - When the law requires
 - When the law says so
 - When challenged by someone with legal standing
 - To test the applicant's information
 - For practical reasons
 - For visibility
 - To allow expression of different views
 - To respond to concerns from different groups
 - To make a record in case of review
 - Has the applicant has met its burden of showing entitlement?

Hearing Procedure

- Simple hearing
 - Applicant presents evidence, opponents present evidence, hearing takes 30 minutes to 2-3 days
 - Transcript arrives, Administrative law judge decides and writes order, order is final if no challenge
 - If there is a challenge, an ALJ assists with review and agency decides
- Significant or complex hearing
 - EFSEC: follows application review
 - Applicant pre-files its application, testimony, and exhibits

Hearing Procedure, Complex

- Prehearing conference: establish parties, process, schedule
 - Rulings on interventions
 - Other governmental agencies
 - Private parties: opponents (neighbors, environmentalists), competitors, customers
 - Schedule established for discovery, settlement conference, filings, hearings, briefing
- Discovery conducted, discovery disputes resolved

Hearing Procedure (Complex) II

- Other parties file testimony and exhibits
 - Discovery conducted, discovery disputes resolved
- Applicant files rebuttal testimony, exhibits
- Hearing is held: 2 to 40 days in hearing
- Briefing is presented,
- Oral arguments may be heard

Deciding the Issues

- Staff expertise is essential
 - Understand legal, technical requirements
 - Understand evidence
 - Outline issues to resolve, options
 - make recommendations
- Conference with deciders
 - Council/commission decision on each issue

Drafting the Order

- ALJ drafts Commission or Council order
 - Assistance as needed in technical areas
 - Ensures meeting legal requirements
 - Findings of fact, conclusions of law, reasoning
- Commissioners/Council members review
 - Edit as necessary
 - Sign when satisfied

Drafting the Agreement

- Agency document
 - Advisory staff drafts document to reflect decisions on legal, factual issues
 - Agreement attached to order
- Parties' document
 - Agency enters order
 - Directs applicant to draft compliant agreement
 - Reviews on filing, approves or rejects

Legal Obligations

- Know the legal requirements
 - Basic legal obligations are non-negotiable
 - No discretion to violate the law
 - Facts may allow different interpretations, however
 - Discretion in finding that the legal obligations are met
 - Discretion in how the obligations are met
 - » Minor aspects may be discounted or modified if modification achieves the law's purpose
 - » There may be trade-offs for important points
 - A party may waive a legal requirement that is for the party's protection
 - Time lines, exchanges for benefits thought preferable

Settlements

- An agency may consider a settlement proposed by parties to a dispute
 - Is the settlement “consistent with the public interest”
 - Is the settlement “lawful”?
 - The agency has discretion to accept settlements, as long as it understands the basic effects and result of the settlement
 - The agency head cannot delegate discretion

Regulatory Issues

- Ensure that the contract includes all necessary regulatory features
 - Application or checklist requirements met
 - Review statute and rules, verify satisfaction of requirements
- When a requirement is within the agency's regulatory expertise, it has some discretion to decide how the requirement must be met
 - Rules may allow discretion
 - Courts defer to the agency's judgment on facts relating to regulation and consider the agency's judgment on the law relating to regulation.
- Example: EFSEC must issue a clean air permit for a fossil-fuel generation facility.
 - It must issue the permit or the plant cannot be operated.
 - It has some discretion in determining how much of what substances to allow

Enforcement

- A concession agreement must be enforceable and – if the law is silent– must specify how it will be enforced
 - Agency rights are essential
 - Right to inspect facilities, to audit books and records
 - Right to prescribe form of records
 - Right to demand annual and other reports
 - Right to review property transactions, securities issues
 - investigate operations
 - Right to set and collect regulatory fees
 - Right to review and reject affiliated interest transactions
 - Income-regulated companies may attempt to divert revenue to affiliates and to divert costs from unregulated companies to regulated

Enforcement II

- Additional enforcement needs
 - Define rate-fixing power
 - Rates to be fair, just, reasonable and sufficient
 - Define Tariff process, requirements, and effects
 - Define filing requirements
 - Define modification process
 - Require charging published rates
 - Prohibit rate discrimination

Negotiating Process

- Negotiating process varies
 - Depends on law, participants, practice
 - Who is negotiating?
 - Do all parties have authority
 - What is the balance of power among parties
 - Is this a recurring issue, or unique
 - If recurring, increased value in good relationships
 - How do the parties get along?
 - Is there a mediator?

Negotiating Process II

- Process elements include
 - Public notice and opportunity to participate
 - Formal opening session
 - Operations by consensus
 - Selection of mediator or settlement judge
 - Establishment of ground rules
 - Development of agenda
 - Physical setting appropriate

Negotiating Process III

- Establish ground rules for the negotiation
 - List of procedural topics to choose from, when applicable, includes
 - Subject of the negotiation, expected result
 - Roles of participants, role of the agency and staff lawyer
 - Decisions by consensus – *i.e.*, all can accept the decision
 - Whether any negotiators need approval of others
 - How agendas will be set, and timetable for negotiation
 - Whether notes will be taken, and by whom
 - That the result will be expressed in writing
 - That nothing said in negotiations may be used in any litigation or other setting (except public information)
 - That parties will treat each other with courtesy and respect

Negotiating Process IV

- Nature of meetings
 - Group sessions, all participants
 - One-on-one, some participants
 - “Caucus” with disinterested mediator or judge
 - Identify options
 - Evaluate options
 - “Shuttle diplomacy”
 - Meet only or principally with mediator or judge