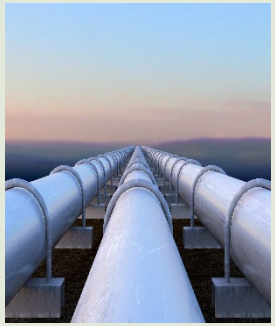




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# Expert witness training: considerations for preparation and effective execution during public utility regulatory hearings and proceedings.

***Prepared on the behalf of the National Association of State Utility Consumer Advocates, Accounting and Finance Subcommittee***

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## Take-aways

Recognize the **considerable degree of effort** that will be required before getting engaged in offering an expert opinion – it's not just the written testimony or the hearing process alone.

**Preparation is the key to being successful** – every aspect of the process will require its own unique sets of preparation.

Once you are on the stand, remember:

- Tell the truth
- Be credible
- Be prepared but remember, it's not a memory game.
- You are an expert, not an advocate
- You don't have to "win" the case/issue/proceeding.
- Don't guess:  if you don't know something, say "I don't know"
- Respect the process
- Respect the people in the process

## Legal caveat.

Today's lecture is being offered based **primarily on experience of a non-lawyer**. **Nothing here is intended to imply a legal opinion** or to be followed as legal practices. This is not a legal opinion on being an expert witness.

**Always consult with an attorney on these issues** – every attorney approaches expert testimony and witnesses differently and will likely have their own opinions.

# Understanding and Processing the Initial Utility Filing

## The "evidentiary record."

The **regulatory process** is often characterized as being both **"legislative"** and **"judicial"** in nature. The **bias is often towards the "judicial"** in most states, particularly those with appointed as opposed to elected commissioners.

Thus, the process is **driven by legal standards and procedures**. A preeminent process issue is establishing an **"evidentiary record."**

**Evidentiary record: means all documents, including evidence and submissions, filed in connection with a proceeding whether filed prior to, or during, the proceeding.**

Note that this can include **confidential** and non-confidential information and that this record is what has been **officially authorized and developed by the commission or an administrative law judge ("ALJ")**.

**Courts/commissions are usually prohibited in making decisions that are beyond or outside of the scope of the official administrative record. So having a solid, clean, and efficient evidentiary record is important for administrative law decisions.**

## Why offer expert testimony?

Usually, to **"fill out" the anticipated evidentiary record**. In other words, to **fill in an evidentiary gap by providing the finder of fact (commission) information they should know and should consider in evaluating the issue at hand**. Note, that the basis rests on the **"anticipated" evidentiary record** a **large part of which will be the utility's case-in-chief** which rests on its pre-filed testimony and exhibits.

The **anticipated** record **can also be a function of other stakeholder groups** and the positions taken in their intervention petitions, other filings, etc. For instance, environmental groups, trade associations, other consumer groups, etc.

For a consumer advocate, **the rationale for providing testimony is filling out the evidentiary record to highlight various aspects of the filing, or other parties' positions, that could prejudice ratepayers and/or be inconsistent with statutory charges (setting fair, just and reasonable rates).**

## Areas of concern that could lead to testimony.

Number or reasons **why testimony should be filed**, most of which is contingent upon the initial filed case provided by the utility.

- Differences in **how certain rate case information has been filed** (projected versus historic test year; post test year adjustments; whether requests fall without or outside of a test year)
- Differences in **how certain case information has been estimated** (load forecasts, billing determinants, normalization estimates, class cost of service, cost of capital, depreciation).
- Differences in how, and whether, **certain costs should be recovered.**
- **Policy differences** in how costs are recovered (revenue distribution, rate design, other general policy questions like decoupling, tracker requests, other issues).
- **General education issues** on how certain policies negatively impact retail customers, particularly residential customers – **affordability** is increasingly becoming important aspect of this process.

## How do you "size" up an issue?

A **number of basic questions** to ask yourself in thinking about preparing testimony and how your testimony should be set up:

(1) How **meaningful is the issue** from policy or empirical position?

(2) How does the issue square up with your **professional training**?

(3) How does the issue square up with **prior consumer positions and what are the ratepayer implications**?

(4) How does the issue square up with your **Commission's prior precedent**?

(5) How have **other regulatory commissions** addressed the issue?

(6) Any **academic, professional, or trade association** insights?

(7) Other **government executive agency** research, analysis, or positions that are supportive?

## How do you research the issue?

Conducting research, and preparing an expert position is often the culmination of an extensive, multi-pronged effort.

(1) **General research** – academic, trade, professional literature.

(2) **Empirical research** – does the topic lend itself to an empirical examination? What publicly-available information is available, what commercially-available information is available, will this be entirely regulated to the use of utility-specific data?

(3) **Policy legal research** – other think tanks, research groups, use caution here to avoid getting pulled into traps of opinion on the expertise of others/other organizations.

(4) **Case/utility-specific inquiries** – discovery responses, other materials such as annual reports, prior proceedings, investor presentations, etc.

Note – **not uncommon for a proceeding statement to be offered in written testimony or a report stating what evidence you conducted, or sources you consulted in preparing your opinion**. Think about how you will answer this as you prepare your positions.

# Discovery and Other Research Requirements

## Why discovery?

Discovery is one of the **more important tools** that a potential witness can use in preparing his/her expert positions:

- May be the **only way you can attain supporting information** from Company's filing (assuming no required minimum filing requirements).
- **Workpaper access** will provide greater detail on inputs, assumptions calculations – presence of **estimation errors**; presence of **errors of omission**.
- Can facilitate more **detailed understanding** of Company position/proposals.
  - Internal justification
  - Identify company understanding of prior commission policies
  - Other influencing factors.
- Can lead to **discovering how utility positions are formulated/justification** – or may show the alternative (there is no support). Often want to show what has not been done as well as what has been – **"create a box."**

## How should you construct discovery? What do you ask for?

- **Workpapers, inputs, assumptions and supporting documentation**.
- All information in **native format** with **formulas and links** intact.
- **Prior commission decisions** or other state regulatory commission decisions
- Other **utilities making similar proposals** or using similar methods.
- **Academic, trade, or industry** support. Identification of **authoritative support**.
- Differences in **confidential** and **copyrighted** information.
- **Clarifying and probative questions** about the rationale for an individual position, the support (or lack of support) for a position, data or other support including professional materials.

***Note: whatever you ask for, be prepared to respond to on your own at a future date as an expert witness.***

## Is discovery the only research tool you should use?

No, there are a **variety of other sources** that can be, and in many instances should be considered in conducting research that supports testimony.

- **Publicly-available sources** of information like annual reports, other regulatory filings (state and federal), other research reports, commercial data.
- **Federal government executive agency data** and research lab information.
- **Private sector information**, common for financial analysis, subscription services, etc.
- **Trade press** and business press information.
- **Academic and trade association** (EPRI, EEI, AGA, INGAA, etc.) research and data sources.

# Preparing Written Direct and Rebuttal Testimony

## Considerations for written testimony preparation.

Your written direct testimony is **your opportunity to lay out your opinion** to the Commission and other parties.

Make sure you have **appropriate backing and support** for all positions – **stay in your box**.

Make sure you have appropriate citations, documentation and backup **consistent with professional standards in your discipline**. Make sure these are clearly provided in your testimony t**hrough the use of footnotes, references, or other lists**.

Make sure the **testimony is well organized, concise, and well written** and **supplemented with appropriate exhibits and schedules**.

Make sure it is **written in a neutral, objective tone and tenor**.

Clearly **state the purpose of your testimony** at the onset, make sure you **summarize your opinions and recommendations** at the beginning.

Make sure **workpapers and supporting documents** are ready to be submitted with testimony, even if this is not required.

Include your **complete professional resume/academic vita**.

## Exhibits and workpapers.

Make sure **exhibits and schedules support and help explain** your positions or points.

Make sure they are **professionally and clearly prepared – consistency is good too. Note: formatting and professionalism is often a "signal" of credibility/quality of work.**

Make sure they are **clearly marked and sourced** and include **appropriate notations and formats for numbers**, explain all abbreviations and acronyms.

Include **discovery used in testimony preparation** where required (get this prepared early in the process).

Make sure **corner headings and markings** are consistent with ALJ or Commission instructions in the pre-hearing order or Commission rules.

Be **mindful of confidentiality and confidential materials** in exhibits, discovery responses, and references that are included in testimony. Follow the guidelines outlined by your ALJ/Commission. **When in doubt, get advances clearance through your counsel.**

## Testimony and exhibits: peer and administrative review.

Having a **second set of eyes on your testimony is always helpful**.

However, if you want to have a complete review, **you need to prepare the testimony and exhibits well in advance** to facilitate that review.

Most agencies have **internal requirements** that they will have to follow – **familiarize yourself** with these as soon as you and your counsel agree that you will prepare testimony.

**Working closely with your counsel is a must**, as well as other staff members/colleagues.

Having **outside peers review your work is not uncommon** – while this is considered acceptable, **consult with outside counsel** before doing this – make **sure the peer is also clear about what is being asked of him/her** and potential disclosure problems.

It is a **must to have counsel review and have an active part in the process** – note, **this is YOUR testimony, not your attorney's** – their input is important since it is their case in chief, but it's your expert opinion, and your reputation on the line.

## What about rebuttal/surrebuttal and other testimonies?

This is often **included as part of the procedural schedule**. Important to recognize early on if you **will have this opportunity or not**, since it could influence how you prepare your direct testimony.

Cross answering testimony of other parties **should be approached much like your direct** – what is at issue, do you agree or disagree, and why?

**Important you directly address other parties positions** – assists the ALJ and Commission in understanding issues, **minimizes attempts to strike your testimony** as not being directly responsive.

You **cannot and should not attempt to use rebuttal/cross answering/surrebuttal as an opportunity to bring up new information and new analyses** unless they directly responsive of other parties' direct.

Should also **avoid "friendly" rebuttal where possible**. In some instances, agreeing with positions but clarifying or offering differing justifications can be acceptable.

Confer with counsel on **scope and responsiveness issues**.

# Responding to Discovery: Written and Oral (Deposition)

## What's discoverable?

Answer: **just about everything** – or at least you should treat it that way.

Everything, everything? Like .... **drafts, initial workpapers, opinions not considered, preliminary findings, emails, position memos, proposals, prior work and publications, speeches/presentations ... You name it...**

There **may be some exceptions** depending on jurisdictions and prior agreements, but as **you declare and prepare to file testimony as an expert you should treat all of your materials and correspondence as discoverable**.

Your **positions will also be fully explored in discovery** so be prepared for this as you draft your written testimonies (including rebuttals).

## How do you respond to discovery?

Treat discovery just like you would cross examination: the first priority is to answer **honestly and completely**. Also, like cross examination, **answer only the question asked** – use discovery as **an opportunity to expand/clarify your positions** and note that **response my very well find itself in front of you in cross examination in a hearing.**

What if you **discover a mistake or new information** becomes available after you have answered a response?

You can often **supplement discovery at later date** if additional information becomes available. Make sure to **review your discovery responses before hearing to see if any late released information has changed your opinion**.

What if there is an **error in your testimony**?

Multiple options that span from **updating/providing revised testimonyor exhibit or clarifying in discovery and errata** – the correct answer depends on **scope of the change** – anything **extensive will likely need to be revised and refiled.**

## Oral discovery – depositions.

Depositions are a **form of "oral discovery"** – gives opposing counsel to **size you up and directly ask questions about the scope of your testimony and opinion and the basis for your positions, including your background**.

Very **common in civil proceedings**, not super common in regulation but does arise in some states. Since allowed under rules of civil procedure, it **could happen in any proceeding at any time**, even in states that do not commonly employ depositions.

Will **force a witness to be prepared usually much earlier than for hearing**. Can be **good "test run"** for hearing. However, purpose will at hearing will be to **use as much of deposition for impeachment as possible**.

If deposed, **make sure to not waive your rights to review and sign transcripts.**

Get **transcripts and review closely** – if you need to change an opinion, get with counsel about how to make those changes. Review closely prior to hearing.

# Hearing Preparation

## Hearing preparation.

Preparation is the **single most important thing** that can be done for live testimony and/or deposition.

This process should **start immediately after filing the direct testimony/report** and continue through additional phases of testimony/reports (i.e., rebuttal, surrebuttal, etc.)

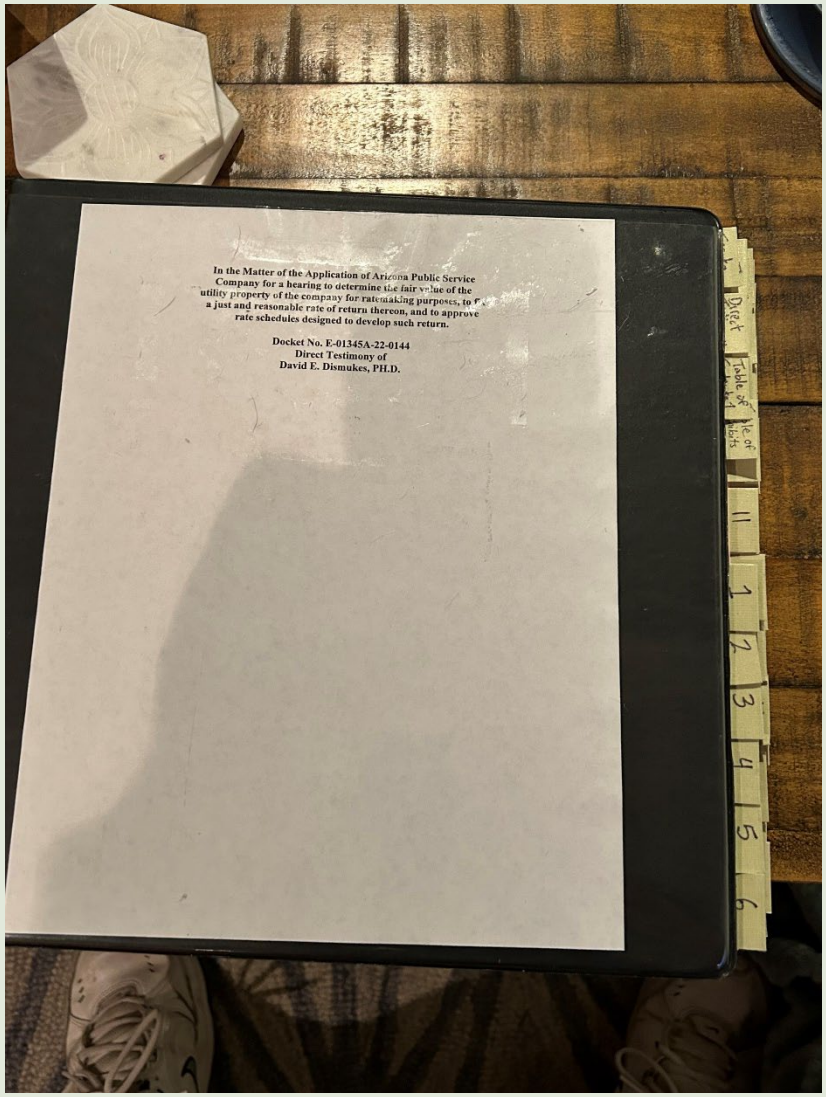
The process is **not too dissimilar to preparing for an oral examination** in college. So, treat it that way.

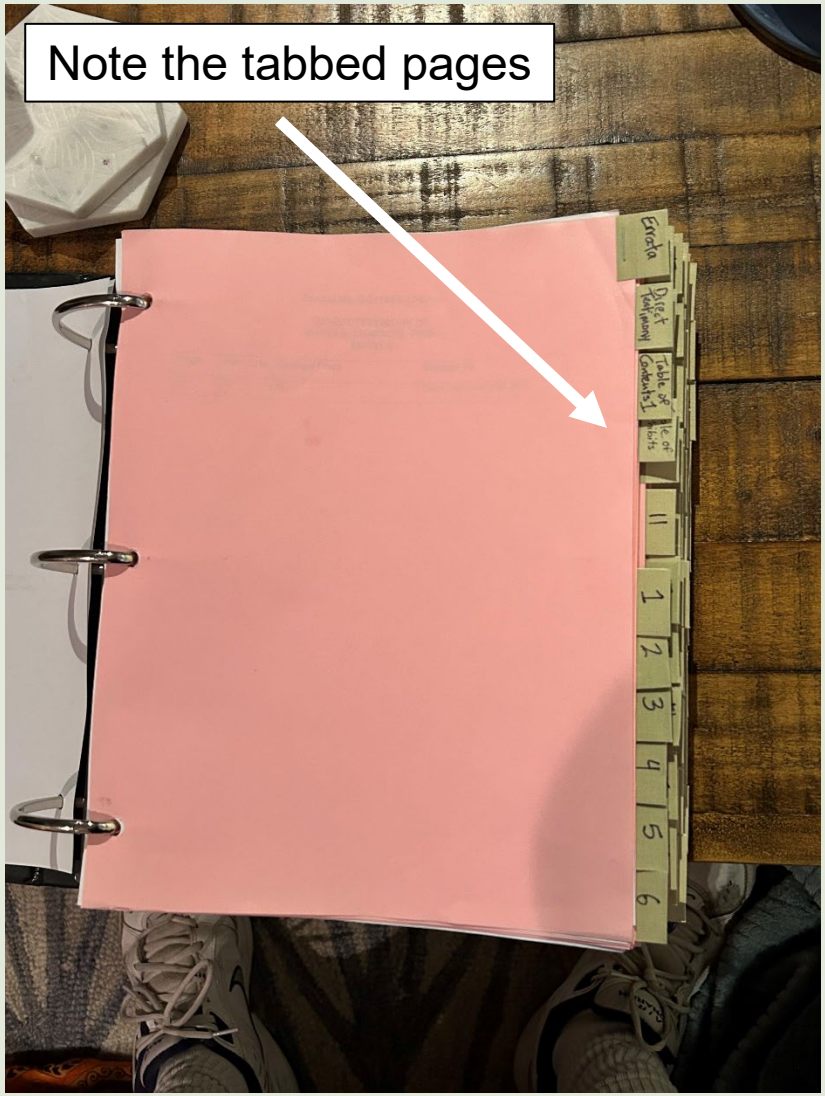
A witness **needs to develop a set of tools** that will help facilitate an efficiency preparation process.

A **"hearing book"** is often used by many witnesses for both preparation purposes and support during the hearing itself (note, hearing books would not usually be allowed for civil proceedings).

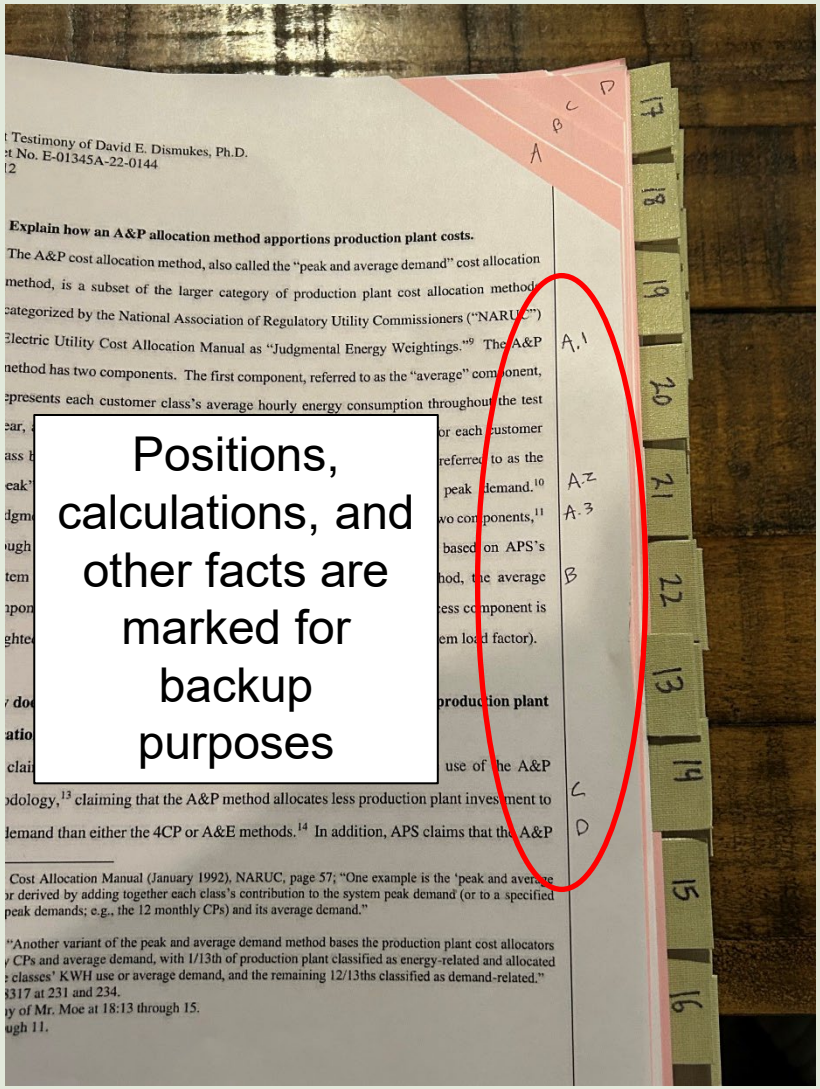
A **hearing book is composite source of information** that has back up and supporting material for the written testimony/report.

## Hearing Book – Set Up

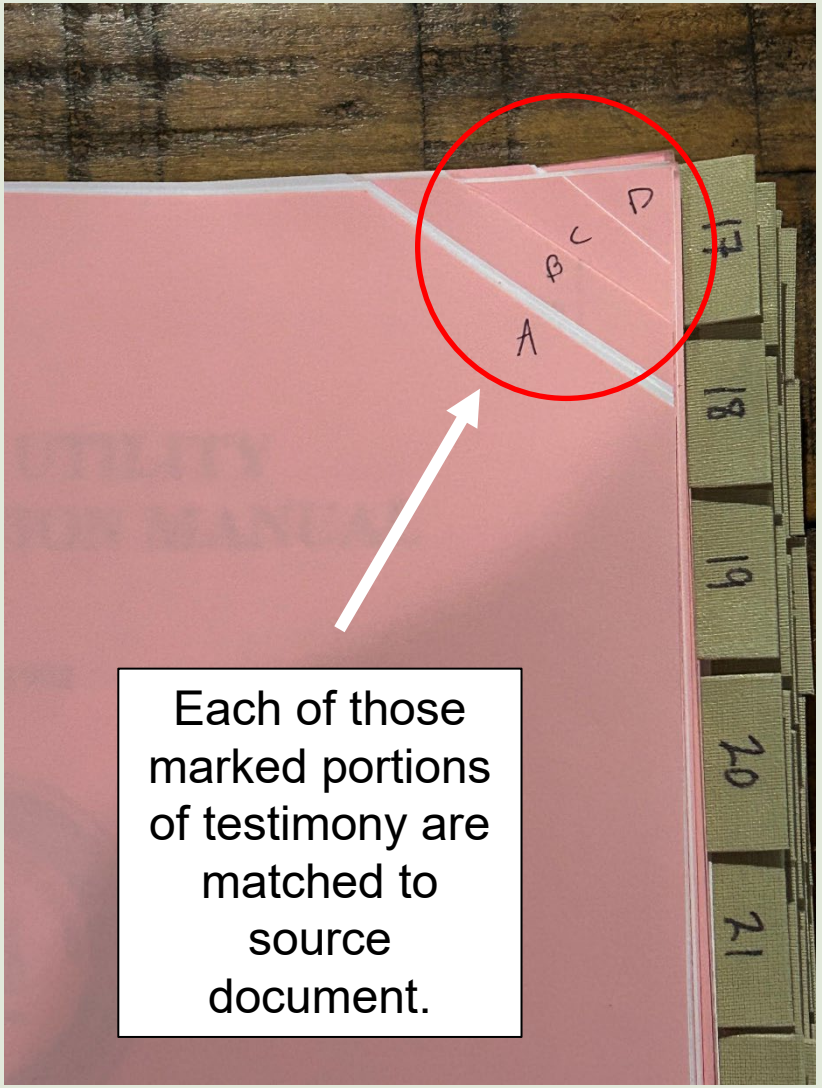


# Hearing book -- Pagination



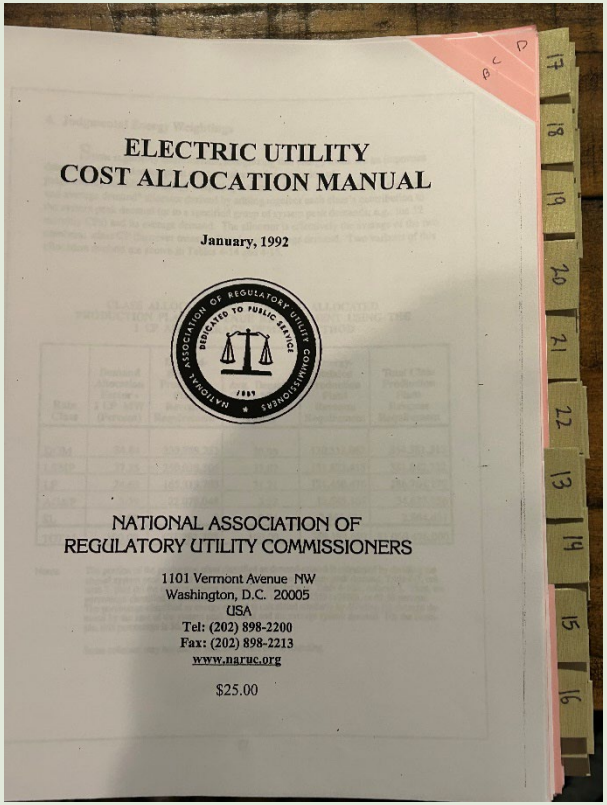

Positions, calculations, and other facts are marked for backup purposes




Each of those marked portions of testimony are matched to source document.

# Hearing Book - Sourcing

In this example, the **sources include portions of the NARUC cost allocation manual** and a **prior commission order** (on right hand side).



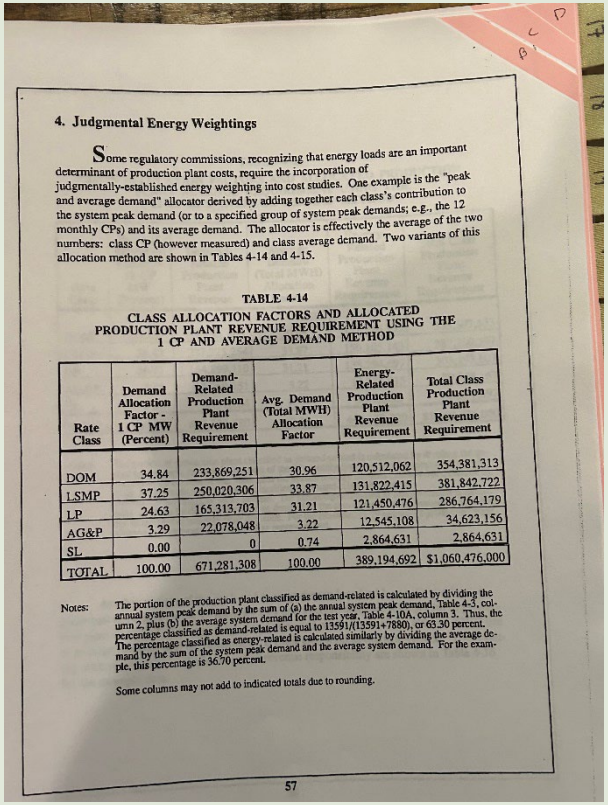
ELECTRIC UTILITY
COST ALLOCATION MANUAL

January, 1992

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS

1101 Vermont Avenue NW
Washington, D.C. 20005
USA
Tel: (202) 898-2200
Fax: (202) 898-2213
www.naruc.org

$25.00



**4. Judgmental Energy Weightings**

Some regulatory commissions, recognizing that energy loads are an important determinant of production plant costs, require the incorporation of judgmentally-established energy weighting into cost studies. One example is the "peak and average demand" allocator derived by adding together each class's contribution to the system peak demand (or to a specified group of system peak demands; e.g., the 12 monthly CPs) and its average demand. The allocator is effectively the average of the two numbers: class CP (however measured) and class average demand. Two variants of this allocation method are shown in Tables 4-14 and 4-15.

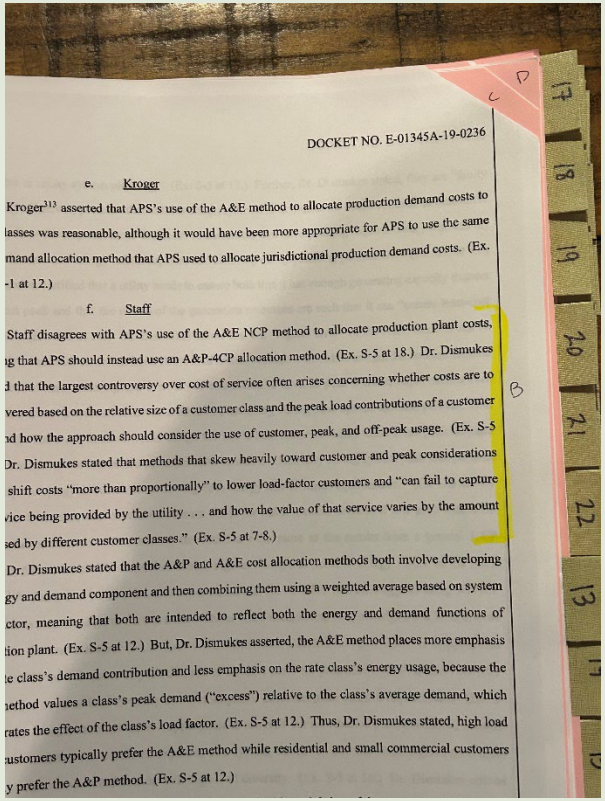
TABLE 4-14
CLASS ALLOCATION FACTORS AND ALLOCATED PRODUCTION PLANT REVENUE REQUIREMENT USING THE 1 CP AND AVERAGE DEMAND METHOD

| Rate Class | Demand Allocation Factor - 1 CP MW (Percent) | Demand-Related Production Plant Revenue Requirement | Avg. Demand (Total MWH) Allocation Factor | Energy-Related Production Plant Revenue Requirement | Total Class Production Plant Revenue Requirement |
|---|---|---|---|---|---|
| DOM | 34.84 | 233,869,251 | 30.96 | 120,512,062 | 354,381,313 |
| LSMP | 37.25 | 250,020,306 | 33.87 | 131,822,415 | 381,842,722 |
| LP | 24.63 | 165,313,703 | 31.21 | 121,450,476 | 286,764,179 |
| AG&P | 3.29 | 22,078,048 | 3.22 | 12,545,108 | 34,623,156 |
| SL | 0.00 | 0 | 0.74 | 2,864,631 | 2,864,631 |
| TOTAL | 100.00 | 671,281,308 | 100.00 | 389,194,692 | $1,060,476,000 |

Notes: The portion of the production plant classified as demand-related is calculated by dividing the annual system peak demand by the sum of (a) the annual system peak demand, Table 4-3, column 2, plus (b) the average system demand for the test year, Table 4-10A, column 3. Thus, the percentage classified as demand-related is equal to 13591/(13591+7880), or 63.30 percent. The percentage classified as energy-related is calculated similarly by dividing the average demand by the sum of the system peak demand and the average system demand. For the example, this percentage is 36.70 percent.

Some columns may not add to indicated totals due to rounding.

57



DOCKET NO. E-01345A-19-0236

e. Kroger

Kroger[313] asserted that APS's use of the A&E method to allocate production demand costs to
lasses was reasonable, although it would have been more appropriate for APS to use the same
mand allocation method that APS used to allocate jurisdictional production demand costs. (Ex.
-1 at 12.)

f. Staff

Staff disagrees with APS's use of the A&E NCP method to allocate production plant costs,
g that APS should instead use an A&P-4CP allocation method. (Ex. S-5 at 18.) Dr. Dismukes
d that the largest controversy over cost of service often arises concerning whether costs are to
vered based on the relative size of a customer class and the peak load contributions of a customer
d how the approach should consider the use of customer, peak, and off-peak usage. (Ex. S-5
Dr. Dismukes stated that methods that skew heavily toward customer and peak considerations
shift costs "more than proportionally" to lower load-factor customers and "can fail to capture
vice being provided by the utility . . . and how the value of that service varies by the amount
ed by different customer classes." (Ex. S-5 at 7-8.)
Dr. Dismukes stated that the A&P and A&E cost allocation methods both involve developing
gy and demand component and then combining them using a weighted average based on system
ctor, meaning that both are intended to reflect both the energy and demand functions of
lion plant. (Ex. S-5 at 12.) But, Dr. Dismukes asserted, the A&E method places more emphasis
e class's demand contribution and less emphasis on the rate class's energy usage, because the
ethod values a class's peak demand ("excess") relative to the class's average demand, which
rates the effect of the class's load factor. (Ex. S-5 at 12.) Thus, Dr. Dismukes stated, high load
ustomers typically prefer the A&E method while residential and small commercial customers
y prefer the A&P method. (Ex. S-5 at 12.)

## Preparing for cross examination

The opportunity for you to be **cross-examined by the utility, and other parties,** is part of the hearing process. It **allows them to challenge you and your proposed evidence and recommendations**.

While **reviewing your material is important**, you must also **prepare in a way that anticipates what the opposing side will ask you**.

Remember, **studying your hearing book is an important** part of the process, but do not continue to focus effort and attention on "**what you already know.**"

You can often **be your harshest critic/inquisitor**. So developing a set of questions, or topical areas, where you think you will be questioned is particularly good to do.

As a guide, **examine the discovery questions** asked by parties to you – examine the **rebuttal testimony** as well. These **telegraph their positions**. There could be **additional things "lurking"** out there, think about those, but they are usually small relative to those two areas.

Have your **colleagues prepare you as well**, if possible.

## Other preparation advice

Make sure to **review your direct and other testimonies** several times prior to hearing.

Prepare **notes or note cards** with your recommendations, key findings, and **"talking points."**

Be prepared to clearly articulate: (a) the **purpose** of your testimony; (b) your **opinion and recommendations**; (c) the **methods** you utilized and **resources you relied upon** in reaching your opinions; (d) a general command of the types of **materials you relied** upon in formulating your opinion; (e) your **expertise and experience** in offering this opinion.

Try to know **key facts and positions of other witnesses** – having a "cheat sheet" or "summary" of this is helpful and something that should be done well in advance of hearing – something that can be, should be part of hearing book.

However, if push comes to shove, **your job is to know your opinion, not everyone else's** (with the exception of how your position is informed or influenced by another expert).

# Cross Examination and Commissioner Questions

## Voir dire

Being **challenged on your credentials** is probably one of the more nerve-racking parts of the process – **assuming this challenge even arises**.

This is usually **a counter productive move** on the behalf of opposing counsel and often it should be seen as a complement, not an attack.

Important as far back as the testimony preparation phase to assure you are **"in your box" relative to scope, your experience, and expertise**.

This rarely happens, but you need to **be prepared with canned responses that educate the commission or hearing officer why you – and your opinion – have merit.**

Emphasize things in your **education** that make you and your opinion relevant, your **professional experience,** any **extra-professional things** you have done (additional training, committee work, etc.), presentations, articles, working papers, reports, etc. that **show expertise**.

## Other considerations for cross.

You want to **be prepared for cross, but it's not your job to prepare the opposing attorney for cross either**. Opposing counsel needs to familiarize themselves with your testimony, exhibits, and workpapers, don't do that work for them.

If the **opposing attorney cannot point directly to a page and line number, discovery response, or specific point in a workpaper, it does not put you in position of being forced to "guess"** or recall every specific aspect of all the work you have done.

**It's not a memory game** –if you can't remember, but are certain a particular issue was explored or examined, and it's in your workpapers provided in discovery, reference that in your response "**I don't recall at the current time, but I am certain these were included in the workpapers I provided in discovery."**

**Be familiar with these workpapers**, since there have been instances where a laptop gets put in front of you to have you indicate where certain pieces of information are, or to walk through calculations.

## Example 1: Attorney gamesmanship/common tactics.

**Mischaracterizing your background?**

Q: "You are not an engineer are you Mr. Smith?"

N: "No, but I was not asked to give an engineering opinion in this proceeding but instead offer policy advice on reliability standards for ratemaing purposes."

**The repeated question**

Q: "Sure, I understand, but you are not an engineer, right?"

N: "No, but I am not offering an engineering opinion, but I do have expertise in having examined policy issues used in utility regulation."

**Purpose?**

The goal with these tactics is to get you to provide the answer they want – your goal is to answer with the truth, but you can

In the end, **don't get combative or defensive** – you always have opportunities for **re-cross from your counsel if needed**. In a civil proceeding, you might want to expose a little more backbone.

## Example 2: Attorney gamesmanship/common tactics.

**Attempting to undermine your analysis**

Q: "Isn't it true that in response to Utility Data Request 30-2 you indicated that you did not examine how Florida uses test years for ratemaking purposes?"

N: "Yes, that is correct, but as I indicated in the response, that was not necessary since Florida uses forecast test years, whereas Massachusetts uses historical test years. Thus, the use of Florida as a regulatory example is not useful here."

**The repeated question**

Q: "Sure, I understand, but you still didn't look at Florida's policies, did you?"

N: "No, I did not, and as I indicated earlier, Florida's policies are not relevant to the issue here and would not have changed my expert opinion."

## Things to be mindful of on the stand.

You are under oath: **tell the truth**. Be mindful of this when asked **"hypotheticals."**

**Listen** to the question – pause – then **answer** the question. **Answer "yes" or "no" and then explain**, you are always entitled to an explanation if not during cross, then redirect. If you **don't understand the question, don't guess**, ask to explain or repeat. The "pause" is to give your counsel time to object.

**If you don't know, say you don't know.**

**It's not a memory game**.

It's not your responsibility to **"win the case"** or **"win the issue."** Remember, **it's a give and take** – expect that they will win a few, being reasonable is not a bad thing.

**Respect the process**. Honest, integrity and credibility are the cornerstones of the process. Compete with the better evidence, not cheating.

**Respect the participants.** Opposing attorneys are officers of the court, respect that regardless of how they treat you.

## Commissioner/ ALJ questions

Commissioners and ALJ questions can always a wild card – recognize they have **different perspectives and interests**, particularly elected commissioners. **Answer questions in clear fashion and help them understand what you are trying impress upon them**. Again, what's missing from the record they need to know in making their decision.

Note – some professionals draw parallels between **providing expert testifying and teaching or providing instruction**. Not a bad analogy, and good to remember when addressing questions from the bench (commissioner or ALJ).

## Re-direct examination.

Many witnesses find **redirect to be more difficult** than cross from opposing counsel.

**Redirect is the opportunity afforded to your counsel** to ask you questions to clarify the record regarding answers you provided opposing counsel.

**Redirect is the chance to "straighten things out."**

In regulatory work, **you can often get a break before conducting re-cross.** If possible, **make notes of things where you think the record was not clear, or where questions/positions were taken out of context to make a point.**

If you have time, **preparing potential "contingency" recross** for your counsel and going through that with him or her may help make the recross process more productive.

Note, **that in many jurisdictions, opposing counsel may get a re-cross opportunity.**

## Other considerations for hearing.

It's like a test – **if you wait until the last minute to prepare, you likely will not do well.** Prepare well in advance, it is the best form of confidence building.

**Get a good night's sleep and be well rested for the hearing**. Being in good shape mentally and physically is often better than a few hours of extra studying.

**Look good** – wear your best business suit/outfit, make sure it is clean, pressed and professional looking.

**Sit up straight, speak clearly. Try not to speak quickly**.

**Do not shake your head up and down, speak loud enough** for the court reporter to hear you, as well as opposing counsel and the Commission.

**Don't get ruffled** – everyone in this process has a job to do – you will run into the occasion "difficult person" – however, this is usually the exception rather than the rule in regulatory work. **Depersonalize** everything you do. **Be serious and professional**.

# Conclusions

## Conclusions.

Serving as an expert witness is a **serious and time intensive** process. Make sure you are **committed** if you decide you want to serve in this role.

Having an expert is usually the better way of assuring that **alternative positions and important evidence is included in the record** and available for commission review.

Following the **"basics" are key to success**: (1) strong analysis and reasoning and (2) preparation.

Also recognize that, even if you are the witness, it is often a **team process**, and you will need to rely on your colleagues and in-house counsel extensively.

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## Questions, Comments & Discussion

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