IN RE NEW ENGLAND TELEPHONE & TELEGRAPH CO.: THE SCOPE OF AUTHORITY OF COUNSEL FOR THE PUBLIC IN UTILITY RATE CASES

INTRODUCTION

In the recent case of *In re New England Telephone & Telegraph Co.*,[1] *(NET)*, the Vermont Supreme Court stated that Counsel for the Public[2] (Counsel) does not have the authority to stipulate and agree to substantive issues in a rate case.[3] Although under the Vermont statutory scheme contested cases[4] considered by the Vermont Public Service Board (Board) may be settled by stipulation,[5] the court distinguished a rate case from other contested cases, describing ratemaking as a legislative function.[6] The court also suggested that because the public, by its nature, cannot give consent to acts

---

1. 135 Vt. 527, 382 A.2d 826 (1977), *motion for reargument denied mem.*, ___ Vt. ___, 383 A.2d 271 (1978).

2. Counsel for the Public is the colloquial name for legal counsel employed by the Vermont Public Service Board [hereinafter Board] under VT. STAT. ANN. tit. 30, § 20(a) (Cum. Supp. 1978) to represent the public in utility rate cases. For a description of his function, see text accompanying notes 21-44 *infra*.

3. 135 Vt. at 540, 382 A.2d at 836.

4. VT. STAT. ANN. tit. 3, § 801(2) (1972) states in full: " 'contested case' means a proceeding, including but not restricted to ratemaking, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing."

5. VT. STAT. ANN. tit. 3, § 809(d) (1972) states in full: "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default." This statute states only that contested cases before the Board may be concluded by these procedures. It does not require the Board to act in accordance with any of these procedures even where all the parties agree. *But cf.* Gloss v. Delaware & Hudson R.R., 135 Vt. 419, 420, 378 A.2d 507, 508 (1977) (where the parties to a contested case involving a railroad's failure to maintain a fence agreed to discontinue the proceeding, the Vermont Supreme Court stated that the discontinuance becomes effective if all the parties who are competent to stipulate, agree to the discontinuance).

6. 135 Vt. at 540, 382 A.2d at 835. The court's characterization of ratemaking is misleading. The REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1961), adopted in part with changes in Vermont, VT. STAT. ANN. tit. 3, §§ 801-814 (1972), divides administrative agency functions into certain categories including contested case proceedings and rulemaking. *See* VT. STAT. ANN. tit. 3, § 801(2)-(7) (1972). The contested case has been described as an adjudicatory or judicial function and rulemaking as a legislative function. 2 F. COOPER, STATE ADMINISTRATIVE LAW 668-69 (1965). Ratemaking in Vermont is accomplished through the contested case or adjudicatory proceeding. *See* VT. STAT. ANN. tit. 3, § 801(2) (1972). The court in *In re* New England Telephone & Telegraph Co. [hereinafter *NET*] might have been referring to ratemaking as a legislative function because it was delegated by the legislature to the Board. *See* 1908 Acts No. 116, § 10 (codified at VT. STAT. ANN. tit. 30, § 218 (1970)).

by Counsel for the Public, Counsel has authority to stipulate and agree only to procedural matters.[7] As a result, the court held that it was error for Counsel for the Public to enter into a stipulation and agreement on substantive issues and stated that the Board should not have accepted it.[8]

The court's reasoning and conclusion in *NET* can be evaluated by examining two areas: (1) the special nature and function of Counsel for the Public, and (2) the scope of an attorney's authority to act without the client's consent in traditional situations where the client is able to employ and control the attorney. Analysis of an attorney's authority in this traditional context is termed conventional attorney-client analysis.[9] This note concludes that the *NET* court inappropriately imposed conventional attorney-client analysis on Counsel for the Public. The court failed to recognize crucial differences between the situation of Counsel for the Public and that of an attorney representing a conventional client. By prohibiting Counsel from entering into substantive stipulations, the court eliminated an important device for reducing the time and expense of rate cases. This note suggests that, contrary to the holding in *NET*, Counsel for the Public should be able to stipulate and agree whenever the various interests of the public can be equitably resolved and the Board, after a hearing, should be able to accept the stipulation.

A short history of the events leading up to the court's decision provides a background for understanding the stipulation and agreement signed by Counsel for the Public. On January 21, 1974, New England Telephone & Telegraph Company (Company) petitioned the Board for a twenty-three percent increase in its intrastate rates.[10] Counsel for the Public was appointed by the Board on Feb-

7. 135 Vt. at 540, 382 A.2d at 836.

8. *Id.*

9. This conventional attorney-client analysis can be contrasted with analysis appropriate to situations where the client is unable to employ and control the attorney. This note treats Counsel for the Public as an example of the latter class of situations. See text accompanying notes 45-88 *infra*. For a similar treatment of the nature of the client, *cf.* Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1119-33 (1970) where the obligations of an attorney representing a diverse constituency are discussed. Although the obligations of the class action lawyer discussed in that comment are somewhat analogous to those of Counsel for the Public, it is beyond the scope of this note to evaluate the scope of authority of an attorney involved in a class action.

10. Advanced Copy of Tariffs, issued January 21, 1974, to be effective February 20, 1974.

ruary 21, 1974.[11] Company petitioned on June 24, 1975, for an additional increase of seventeen percent.[12] On March 16, 1976, the Company and Counsel for the Public signed a stipulation and agreement[13] which stated, *inter alia,* that rates agreed upon by the Company and Counsel were, as required by statute,[14] reasonable and not unjustly discriminatory.[15] The document also stated that the Com-

---

Tariffs are schedules filed by a regulated utility that set forth rates and conditions for service. The Vermont Supreme Court stated in Jones v. Montpelier & Barre Light & Power Co., 96 Vt. 397, 120 A. 103 (1923) that "the rate appearing in such schedule when so filed, unless protested, becomes, by implication of law, the lawful rate which the producer may charge and which the consumer must pay, and continues to be the rate governing both producer and consumer until changed in the manner prescribed by statute." *Id.* at 402, 120 A. at 105.

The Board suspended the effectiveness of the proposed rates pending an investigation. New England Tel. & Tel. Co., No. 3806 (Feb. 8, 1974). The Board's action was authorized under VT. STAT. ANN. tit. 30, § 226(a) (1970) which states in part: "At least six days before the date on which such new or changed rate . . . is to become effective, the board, on its own motion, may order an investigation and hearing on the justness and reasonableness of such change. . . ."

11. State of Vermont, Request for Approval of Position (Feb. 21, 1974), New England Tel. & Tel. Co., No. 3806. Subsequently, the Vermont Public Interest Research Group, the Vermont Low Income Advocacy Council, the Vermont Welfare Rights Organization and the Vermont Hotel-Motel-Restaurant Organization were allowed to intervene. *See* New England Tel. & Tel. Co., No. 3806, 13 PUR 4th 268 (1976). The Attorney General entered an appearance on September 5, 1974, pursuant to VT. STAT. ANN. tit. 30, § 217 (1970). Notice of Appearance and Motion for Service of Documents (filed Sept. 5, 1974). On September 11, 1974, New England Telephone and Telegraph Co. [hereinafter Company] began collecting the petitioned rates under bond in accordance with VT. STAT. ANN. tit. 30, § 227(a) (1970). 135 Vt. at 529, 382 A.2d at 829.

12. Advanced Copy of Tariffs issued June 24, 1975, to be effective July 24, 1975.

After holding extensive hearings on the proposed rate increases, the Board issued an order on January 15, 1976, that, *inter alia,* made findings with respect to the Company's cost of service, rate base, rate of return and rate structure. New England Tel. & Tel. Co., No. 3806, 13 PUR 4th 268 (1976). It also consolidated the two rate increase petitions, requested additional evidence, including new tariffs, based upon an updated test year and scheduled a hearing for March 23, 1976, to consider the additional evidence. No. 3806 at 22-23. Pursuant to the Board's request, the Company filed new tariffs on February 17, 1976. Proposed Tariff, issued February 16, 1976, to be effective April 1, 1976.

13. The stipulation and agreement requested the Board to find that the Company was entitled to revenues equal to (1) the rates then in effect under bond, (2) $4,986,000 additional yearly revenues and (3) $5,626,000 to be recovered in twenty months and that rates equal to the tariffs filed on February 17, 1976, should be granted. Printed case at 154-55.

14. VT. STAT. ANN. tit. 30, § 219 (1970) states in full: "Each company subject to supervision under this chapter shall be required to furnish reasonably adequate service, accommodation and facilities to the public. The charge made by any such company for any product or service shall be reasonable and without discrimination, except as provided in this chapter."

15. Printed case at 155. None of the intervenors, nor the Attorney General, signed the stipulation and agreement. See note 11 *supra.*

pany agreed not to seek another rate increase for almost a year.[16] After a hearing,[17] the Board issued an order which accepted the stipulation and agreement and granted permanent rates designed to produce revenues equivalent to those proposed in the stipulation and agreement.[18] The Attorney General appealed the order to the Vermont Supreme Court,[19] which rendered its decision on November 8, 1977, denying effect to the stipulation and agreement.[20]

COUNSEL FOR THE PUBLIC

The nature and function of Counsel for the Public is prescribed by statute and subsequent Board interpretations. The statute[21] states that the "board may employ legal counsel . . . regarding matters involved in a hearing" on (1) a rate increase, (2) a proposed

16. Printed case at 156.

17. At the hearing on March 23, 1976, despite the objections on the intervenors, see note 11 *supra*, to consideration of the stipulation and agreement, the Board took evidence on the reasonableness of the rates proposed. *See* New England Tel. & Tel. Co., Nos. 3806 and 4033 (March 24, 1976) at 1-2.

In basing an order for increased rates on a stipulation and agreement that merely reiterates the statutory language of reasonableness without any supporting facts, the Board is required to enter the document into evidence and take testimony on the reasonableness of the rates it proposes. VT. STAT. ANN. tit. 3, § 812 (1972) states in part: "A final decision shall include findings of fact and conclusions of law separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." VT. STAT. ANN. tit. 3, § 809(g) (1972) states in full: "Findings of fact shall be based exclusively on the evidence and on matters officially noticed."

18. New England Tel. & Tel. Co., Nos. 3806 and 4033 (March 24, 1976). As requested by the parties in the stipulation and agreement, the Board postponed consideration of prewiring and subscriber ownership of terminal equipment. *Id.* at 6.

19. VT. STAT. ANN. tit. 30, § 12 (Cum. Supp. 1978) states in part: "A party to a cause who feels himself aggrieved by the final order, judgment or decree of the board may appeal to the supreme court. . . ." The Board certified twelve questions for review by the court pursuant to VT. R.A.P. 13(d). Question nine states in full: "Did the Board err in accepting the stipulation between NET and the attorney for the Public?" Certified Questions, New England Tel. & Tel. Co., Nos. 3806 and 4033 (Nov. 10, 1976).

20. 135 Vt. 527, 382 A.2d 826 (1977). Pursuant to a motion for reargument, the court amended its opinion on a minor substantive matter. 135 Vt. at 543-44, 382 A.2d at 837.

On December 12, 1977, Counsel for the Public and an intervenor moved the court to intervene and reargue. The motion was addressed solely to the court's treatment of the stipulation and agreement. The court denied these motions on January 9, 1978. *In re* New England Tel. & Tel. Co., ___ Vt. ___, 383 A.2d 271 (1978) (*motion for reargument denied mem.*).

21. VT. STAT. ANN. tit. 30, § 20(a) (Cum. Supp. 1978).

utility merger, and (3) an issuance of securities.[22] This statute is the result of a series of legislative enactments. In 1925, the Public Service Commission, as the Board was then called, was given the power to "designate disinterested persons to examine into and testify regarding matters involved in a hearing," on a rate increase or an issuance of securities.[23] The petitioning utility was required to reimburse the Commission for the costs of these expert witnesses.[24] Approval of the Governor was required for their employment in 1931,[25] and in 1941 the Commission was given authority to hire expert witnesses for utility merger hearings.[26] In its 1949 Biennial Report, the Commission requested legislation "to allow the Commission to employ legal counsel to represent the public" in these three types of hearings.[27] The General Assembly responded to this request by amending the statute to nearly its present form.[28] Although no explicit function for counsel so employed was included in the legislative act, in its next Biennial Report the Commission characterized such counsel as "employed in behalf of the public."[29]

The Board's interpretation of the statute gives Counsel for the

---

22. *Id.* VT. STAT. ANN. tit. 30, § 19 (Cum. Supp. 1978) gives the Board the further power to hire staff employees, including legal counsel, and to investigate matters within the Board's jurisdiction.

Other states with statutory provisions for an attorney to represent the public in rate cases other than staff counsel or the Attorney General include: Connecticut, CONN. GEN. STAT. ANN. § 16-2a (West Cum. Supp. 1978); District of Columbia, D.C. CODE § 43-205 (Supp. 1978); Florida, FLA. STAT. ANN. § 350.061 (West Cum. Supp. 1978); Indiana, IND. CODE ANN. § 8-1-1-4 (1973 & Burns Cum. Supp. 1978); Maryland, MD. ANN. CODE art. 78, § 15 (1977 & Cum. Supp. 1978); Missouri, MO. ANN. STAT. § 386.710 (Vernon Cum. Supp. 1978); Montana, MONT. REV. CODES ANN. § 70-707 (Cum. Supp. 1977); New Hampshire N.H. REV. STAT. ANN. § 363-C:9 (Cum. Supp. 1977); New Jersey, N.J. STAT. ANN. § 52:27E-4 (West Cum. Supp. 1978); and Rhode Island, R.I. GEN. LAWS § 42-42-5 (1977).

23. 1925 Vt. Acts No. 85, § 1 (codified at VT. STAT. ANN. tit. 30, § 20(a) (Cum. Supp. 1978)).

24. *Id.* § 2 (codified at VT. STAT. ANN. tit. 30, § 21 (1970)).

25. 1931 Vt. Acts No. 98, § 1 (codified at VT. STAT. ANN. tit. 30, § 20(a) (Cum. Supp. 1978)).

26. 1941 Vt. Acts No. 144, § 3 (codified at VT. STAT. ANN. tit. 30, § 20(a) (Cum. Supp. 1978)).

27. [1946-1948] PUB. SERV. COMM'N BIENNIAL REP., at 7. See text accompanying note 22 *supra.*

28. 1949 Vt. Acts No. 221, § 2 (codified at VT. STAT. ANN. tit. 30, § 20(a) (Cum. Supp. 1978)). This act differs from the present statute in that the commission is now called the Public Service Board and there are minor changes in language.

29. [1948-1950] PUB. SERV. COMM'N BIENNIAL REP., at 5.

Public several functions. General Order No. 54,[30] promulgated by the Board in 1973, states that the functions of Counsel in a rate case include negotiations with the petitioning utility and advocacy on behalf of the public.[31] A recent Board decision also addressed the general scope of the duties of Counsel for the Public:

> Attorneys for the public are retained to represent the interests of all ratepayers by helping to guide the Board to a just decision. In doing so, they must present a case which they have determined is in the best interests of the public and is also within the obligations placed on this Board by law. It is a delicate and difficult task. . . .[32]

Counsel for the Public in the instant rate case was hired by the Board "to represent the interests of the consumers."[33] Therefore, although there is no mention of whom Counsel represents in the statute, the *NET* decision, a Biennial Report, a Board order, a Board decision, and the contract with Counsel for the Public in the rate case all state that Counsel represents some aspect of the public interest.[34]

---

30. PUB. SERV. BD., GEN. ORDER No. 54 (1973).

31. *Id.* at 3. The GENERAL ORDER states:

> In cases involving substantial rate increases or significant and complex issues, the Board shall in its discretion hire counsel and consultants to represent the interests of the public; in all other cases the Board's staff shall provide such representation. In either event such representation shall include among other things the following:
>
> (a) Detailed review of the utility's application and supporting evidence;
>
> (b) Handling correspondence with members of the public concerning the proposed rate increase;
>
> (c) Attendance at and active participation in the conferences scheduled for such case;
>
> (d) Utilization of all available discovery methods;
>
> (e) Conducting negotiations with representatives of the petitioner;
>
> (f) Presentation of the testimony of those members of the public who wish to be heard at the several public hearings scheduled for the case; and
>
> (g) Effective advocacy on behalf of the public at the final hearing before the Board.

32. New England Tel. & Tel. Co., Nos. 3806 and 4033 (May 16, 1978) at 3. This decision denied the Attorney General's motion to remove the attorney acting as Counsel for the Public in the instant rate case.

33. State of Vermont, Request for Approval of Position (Feb. 21, 1974), New England Tel. & Tel. Co., No. 3806.

34. The text accompanying notes 32 & 33 *supra* states that Counsel for the Public

In the abstract, it is a difficult task to define the public interest. The court in *NET* stated that the ratepayers have an interest, in common with the utility, in "adequate service at reasonable rates resulting from an economically viable and efficiently managed enterprise."[35] Yet the interests of the public in adequacy of service and reasonableness of rates are not necessarily identical. First, the public encompasses different classes of ratepayers (such as residential, commercial, and industrial) which are usually charged at different rates. If a ratepayer desires low rates, he may want his rate class to be subsidized by the other rate classes where the revenue requirements of a utility can be met through various proportions of rates. Second, ratepayers might value adequacy of service differently. A wealthy ratepayer might want absolutely pure water from his water company, requiring costly treatment facilities and higher rates. An indigent ratepayer might be willing to drink slightly impure water if it could be provided at low rates.[36] The variety of interests, often potentially conflicting, that exist among members of the public is an important element distinguishing the role of Counsel for the Public from the role of an attorney representing a conventional client.[37]

The methods of representation by Counsel for the Public are also potentially conflicting. The Board has declared at one time that Counsel is an advocate on behalf of the public,[38] and at another that he is also an adviser to the Board.[39] As an advocate, Counsel for the Public presents the public's case before the Board as persuasively as he can,[40] and he may appeal rate increases ordered by the Board.[41]

---

represents the public, the ratepayers and the consumers. None of these groups has a conventional attorney-client relationship with Counsel for the Public. See note 9 *supra*, text accompanying notes 87 & 88 *infra*, and VT. STAT. ANN. tit. 30, § 20(a) (Cum. Supp. 1978). This note uses these three group designations interchangeably.

35. 135 Vt. at 538, 382 A.2d at 834.

36. Interview with Gerald Tarrant, Special Counsel for the Board, in Montpelier (Sept. 14, 1978). Mr. Tarrant has served as Counsel for the Public.

Professor Jaffe characterizes the public interest as "a rather precarious and arbitrary compromise of competing claims." Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 298 (1961). *See also* Barvick, *Public Advocacy Before the Missouri Public Service Commission*, 46 U.M.K.C. L. REV. 181, 183 (1977).

37. See note 103 *infra*.

38. See note 31 *supra*.

39. See text accompanying note 32 *supra*.

40. The function of Counsel for the Public as an advocate is comparable to that of an

As an adviser, it is Counsel's duty to guide the Board to a just decision.[42] The duties of Counsel as an advocate for the public and as an adviser to the Board conflict to the extent that the interests of the public and the duties of the Board conflict. The Board's duty is not solely to the public. In order to grant a rate increase, the Board must find the increased rates just and reasonable.[43] The "fixing of just and reasonable rates involves a balancing of investor and consumer interests."[44] If the interests of the utility and the public are opposed on any component of a rate case, the functions of advocacy and advice conflict because Counsel for the Public is an advocate solely on behalf of the public but an adviser on behalf of both the public and the petitioning utility. Therefore Counsel for the Public is in a position of representing conflicting interests both in his representation of the public and in his dual role of advocate and adviser.

AUTHORITY OF COUNSEL TO STIPULATE AND COMPROMISE

A. *Conventional Attorney-Client Relationship*

The court in *NET* stated that Counsel for the Public may not stipulate and agree to substantive issues because Counsel is unable to obtain authority from the public.[45] Although there is no Vermont case law analyzing the scope of authority of Counsel for the Public,[46] there is case law examining an attorney's authority to act in the

attorney representing a conventional client. In that role, the attorney "presents, as persuasively as he can, the facts that the law of the case as seen from the standpoint of his client's interest." Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1160 (1958).

41. There is no mention in Vt. Stat. Ann. tit. 30, § 20(a) (Cum. Supp. 1978) (the statute granting the Board the authority to employ Counsel for the Public) of whether Counsel has power to appeal a Board order. Nevertheless, there are instances where Counsel has appealed. *See, e.g., In re* Burlington Elec. Light Dep't, 135 Vt. 114, 373 A.2d 514 (1977). *See also* [1950-1952] VT. ATT'Y GEN. BIENNIAL REP., 256-58.

42. See text accompanying note 32 *supra.*

43. See VT. STAT. ANN. tit. 30, § 218 (1970).

44. *In re* New England Tel. & Tel. Co., 115 Vt. 494, 512, 66 A.2d 135, 147 (1949).

45. 135 Vt. at 540, 382 A.2d at 836.

46. Although the Vermont Supreme Court has affirmed rate increases based in part on stipulations entered into by Counsel for the Public, see note 97 *infra,* the court has never before explicitly analyzed the scope of authority of such Counsel.

absence of a conventional client's consent.[47] In the seminal case of *Penniman v. Patchin,*[48] the Vermont Supreme Court stated:

> An attorney is a special agent—His powers are limited to the purpose of his employment, and are such and such only, as are necessary for the accomplishment of that purpose. He may take all necessary measures, for the recovery of the demand . . . but he is not authorised to make any disposition of the demand, or exercise any authority over it, which is not necessarily involved in the discharge of his duty.[49]

This description of the scope of an attorney's authority in the absence of client's consent has been construed in subsequent cases as permitting the attorney to stipulate to a fact in litigation[50] but denying the attorney authority to compromise for less than the amount claimed.[51] A stipulation, which tends to expedite litigation by removing a fact from issue,[52] is considered to be within the attorney's

---

47. Although it is suggested that the tests applied in cases involving conventional attorney-client analysis are inappropriate to the actions of Counsel for the Public, see text accompanying notes 87-88 *infra,* Vermont case law concerning a traditional client offers helpful analysis. The cases involve actions similar to the stipulation and agreement considered by the court in *NET.* Furthermore, there are no Vermont cases analyzing the scope of authority of attorneys in positions similar to Counsel for the Public. Examples of similar positions include staff counsel to an administrative agency obligated to protect the public interest, a public interest lawyer or any other attorney obligated to represent the interests of the public at large. *See* Comment, *The New Public Interest Lawyers,* 79 YALE L.J. 1069 (1970).

48. 5 Vt. 346 (1833). In *Penniman* plaintiff's attorney assigned to the defendant an arbitrators' award for the plaintiff without the plaintiff's consent. In an action by the plaintiff to recover the award from the defendant, the court held that the assignment was no defense.

49. *Id.* at 352.

50. In Vail v. Conant, 15 Vt. 314 (1843), the Vermont Supreme Court stated:

> [Attorneys] have the control of the suit in which they are retained, so far, at least, as to bind their clients by all their agreements in relation to all the circumstance of the trial. He may agree to a continuance; or he may admit a fact on trial, which, otherwise, the opposite party must prove. *Id.* at 320-21.

Accord, Hall v. Fletcher, 100 Vt. 210, 212, 136 A. 388, 389 (1927); United States *ex rel.* Lyman Coal Co. v. United States Fid. & Guar. Co., 83 Vt. 278, 281, 75 A. 280, 281 (1910). *See also* 61 W. VA. L. REV. 326 (1958).

51. The court in *Penniman* stated that an attorney "can not compromise a demand, without special authority for that purpose, nor discharge it without satisfaction." 5 Vt. at 352. *Accord,* Granger v. Batchelder, 54 Vt. 248, 250 (1881); Carter v. Talcott, 10 Vt. 471, 472 (1838). *See also* Annot., 30 A.L.R.2d 944 (1953); Annot. 66 A.L.R. 107 (1930).

52. In Hall v. Fletcher, 100 Vt. 210, 136 A. 388 (1927), the Vermont Supreme Court stated that a judicial admission is made at trial "for the express purpose of dispensing with the formal proof of one of the facts in issue." *Id.* at 212, 136 A. at 389. Wigmore uses the terms

authority to control the suit for which he is retained.[53] By contrast, a compromise, which settles a dispute through an agreement between the parties,[54] is considered to be outside the purpose of employment and is therefore beyond the attorney's authority.[55]

The authority of Counsel for the Public to enter into the stipulation and agreement considered by the court in *NET* is not easily evaluated by the *Penniman* test because the document contains elements of both stipulation and compromise. Like a stipulation the document removed facts from issue.[56] The document differs from a compromise because it did not, strictly speaking, terminate the rate case.[57] Yet like a compromise, the document settled the parties' differences on the major unresolved issues in the rate case.[58] It is also unclear from the language of the document whether the parties intended to stipulate or compromise because both terms were used.[59]

The ABA Code of Professional Responsibility[60] (Code) adopted by the Vermont Supreme Court in 1971[61] formulates a test slightly different from the *Penniman* test. EC 7-7 states:

---

judicial admission and stipulation interchangeably. 9 J. WIGMORE, EVIDENCE § 2588 (3d ed. 1940).

53. *See* text accompanying note 49 *supra*.

54. RESTATEMENT OF THE LAW OF RESTITUTION § 11, Comment c (1937) states that a compromise is "an agreement for the settlement of a real or supposed claim in which each party surrenders something in exchange for a concession by the other."

55. The Vermont Supreme Court in Vail v. Conant, 15 Vt. 314, 321 (1843) stated that "it is most clear that the powers of the attorney are confined to the prosecution or defence of the suit, and that he has no power to compromise and agree upon terms and conditions of settlement."

56. Counsel for the Public agreed to the level of revenues to which the Company was entitled. Printed Case at 154.

57. See note 18 *supra*. These components of the original rate case were docketed for later consideration. New England Tel. & Tel. Co., Nos. 3806 and 4033 (March 24, 1976) at 6.

58. The stipulation and agreement recites that Counsel for the Public and the Company disagreed on the amount of revenues to which the Company was entitled under the January 15, 1976, Board order, and that as a result of conferences between the parties, the differences were compromised. Printed Case at 153-54. All the differences were settled except those relating to prewiring and ownership of terminal equipment. *Id.* at 155. A Board staff member who participated in the negotiations believes that the two unsettled matters constituted a minimal part of the rate case. Interview with Charles Larkin, Staff Telecommunications Engineer, in Montpelier (Sept. 14, 1978).

59. Printed Case at 154 & 156.

60. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1970) [hereinafter CODE].

61. VT. STAT. ANN. tit. 12 app. IX (Cum. Supp. 1978).

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client . . . . [I]t is for the client to decide whether he will accept a settlement offer . . . .[62]

The only pertinent Disciplinary Rule addressing an attorney's authority to make decisions affecting a single client in litigation permits the attorney to agree to "reasonable requests of opposing counsel which do not prejudice the rights of his client."[63] In cases where the attorney represents multiple clients, the test is more precise.

> A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.[64]

Like the *Penniman* test, the Code distinguishes between settlements, or compromises,[65] and other actions of an attorney in representation of a client. Under the Code's test, an attorney does not have the authority to compromise without the client's consent. The authority of the attorney to take other actions depends on whether the action prejudices the client's rights. Application of the Code's test to the stipulation and agreement considered by the court in *NET* requires, first, a determination of whether the document is a compromise.[66] This determination involves the same difficulties as application of the *Penniman* test.[67] If the document is a compromise, the action is beyond the authority of the attorney. Even if it is not, the Code's test further requires a definition of the public's

62. CODE EC 7-7. In another Ethical Consideration, the CODE states that "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for . . . [the lawyer]." *Id.* EC 7-8.

63. *Id.* DR 7-101(A)(1).

64. *Id.* DR 5-106(A).

65. "Settlement" and "compromise" are substantially equivalent terms. See note 54 *supra*.

66. See note 65 *supra*.

67. See text accompanying notes 56-59 *supra*.

rights[68] and a determination of whether the stipulation and agreement prejudiced those rights.

From the analysis of the *Penniman* and Code tests, two aspects of a conventional attorney-client relationship are evident. The client delegates authority to the attorney to act on the client's behalf and the attorney's ability to act is limited by the amount of authority delegated. The court in *Penniman* stated that an attorney is a special agent.[69] "A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service."[70] An agency relationship is created by "manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[71] Through this consent, the client delegates authority to the attorney.

Similarly under conventional analysis, the authority of an attorney to act on the client's behalf is limited to the authority delegated by the client to the attorney. "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."[72] The attorney has, *inter alia,* two distinct bounds to his authority that are prescribed by two distinct types of consent by the client. The fact of employment alone grants the attorney the authority under *Penniman* to stipulate[73] and under the Code to take actions not prejudicing the client's rights.[74] Further consent is required under *Penniman* for the attorney to compromise[75] and to take actions substantially prejudicing the client's rights under the Code.[76] Employment of an attorney and control of his authority through this further consent are therefore two methods by which the client both delegates and limits the attorney's authority.

---

68. Arguably the public has a right to reasonable rates because businesses regulated by the Board must charge reasonable rates and any person may complain to the Board of an unlawful act of a utility. VT. STAT. ANN. tit. 30, §§ 208, 219 (1970).

69. See text accompanying note 49 *supra.*

70. RESTATEMENT (SECOND) OF AGENCY § 3(2) (1958).

71. *Id.* § 1(1).

72. *Id.* § 7.

73. See text accompanying notes 49-53 *supra.*

74. See text accompanying notes 62-63 *supra.*

75. See text accompanying notes 49-55 *supra.*

76. See text accompanying notes 62-63 *supra.*

The court in *NET* adopted a third test of the authority of Counsel for the Public to take certain actions without the consent of the client. The court stated that Counsel for the Public may not stipulate and agree to substantive issues "because from the very nature of the client it is impossible to obtain the authority to enter such stipulations and agreements. Counsel's authority in this regard extends only to procedural matters."[77]

The court gave no explanation why the procedural-substantive distinction follows from the inability of Counsel for the Public to obtain authority from the client.[78] A possible explanation may be found in the discussion by other courts of comparable tests involving conventional analysis of an attorney's authority to stipulate or compromise.[79] The California Supreme Court, for example, stated in *Linsk v. Linsk*[80] that an attorney may bind the client on procedural matters but may not affect the cause of action.[81] The court suggested that this test was based upon a distinction between actions necessary to the management of the suit for which the attorney is

77. 135 Vt. at 540, 382 A.2d at 836.

78. There are other areas of the law in which the procedural-substantive distinction has been applied. The distinction is important in determining whether to apply federal or state law in federal diversity actions. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510-13 (1954). The distinction has also been applied in other conflicts of laws problems. *See, e.g.*, Bournais v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955); Ailes, *Substance and Procedure in Conflicts of Laws*, 39 MICH. L. REV. 392 (1941). The border between substance and procedure is at times difficult to locate. *Id.* The procedural/substantive test is not a perfect indicator of the distinction between actions necessary to the management of the suit and actions relinquishing the client's rights. A stipulation that waives the right to a hearing, for example, deals with a procedural matter but could substantially prejudice the client's rights. Conversely, a stipulation that a certain utility had 500 customers in 1978, arguably substantive, would probably not affect a client's rights.

79. *See, e.g.*, Moulton v. Bowker, 115 Mass. 36 (1874) (remedy but not cause of action); Barbire v. Wry, 75 N.J. Super. 327, 183 A.2d 142 (1962) (matters affecting procedure but not cause of action); Garret v. Hanshue, 53 Ohio St. 482, 42 N.E. 256 (1895) (remedy but not cause of action). *But cf.* Palliser v. Home Tel. Co., 170 Ala. 341, 54 So. 499 (1911) (parties may make agreements affecting substantive rights but may not bargain away the court's control of procedure); Wechsler v. Zen, 2 Mich. App. 438, 140 N.W.2d 581 (1966) (courts may set aside procedural stipulations).

80. 70 Cal.2d 272, 449 P.2d 760, 74 Cal. Rptr. 544 (1969).

81. The court stated that an "attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action but he may not impair the client's substantial rights or the cause of action itself." *Id.* at 276, 449 P.2d at 763-64, 74 Cal. Rptr. at 546.

employed and actions relinquishing substantial rights of the client.[82] This distinction suggests a hybrid between the purpose of employment rationale of *Penniman*[83] and the prejudice of client's rights test of the Code.[84]

The *NET* test, like the *Penniman* and Code tests, seems to be based upon conventional analysis because both elements of that analysis are present.[85] The authority of Counsel for the Public to act depends, first, upon a delegation of authority from the public, and second, upon the nature and extent of the consent involved in that delegation. Counsel for the Public has the authority by virtue of his employment,[86] to stipulate and agree to procedural matters but he must obtain the consent of the client to stipulate and agree to substantive issues.

It is inappropriate to apply this conventional analysis to Counsel for the Public because it fails to accommodate the ways in which Counsel's role differs from that of the attorney in the conventional context. Unlike a conventional client, the public does not employ Counsel for the Public and control his actions. The Board, rather than the public selects Counsel[87] and, as the court in *NET* implied, the public is inherently unable to expressly consent to Counsel's actions.[88] The importance of this distinction is demonstrated by the consequences of applying the *Penniman,* Code and *NET* tests to the actions of Counsel for the Public. Because the consent of the public is inherently unobtainable by Counsel for the Public, the effect of these tests is that Counsel is prohibited absolutely from taking certain actions, such as stipulating and agreeing to substantive issues.

---

82. *Id.* at 277-78, 449 P.2d at 763-64, 74 Cal. Rptr. at 547-48.

83. See text accompanying note 49 *supra.*

84. See text accompanying notes 62-63 *supra.*

85. See text accompanying notes 69-76 *supra.*

86. The court in *NET* did not explain how Counsel for the Public obtains the authority to stipulate and agree to procedural matters, but merely stated that Counsel has this authority. Under the court's analysis, the fact of employment is a likely source of Counsel's authority to stipulate and agree to procedural matters. See text accompanying notes 69-77 *supra.*

87. VT. STAT. ANN. tit. 30, § 20(a) (Cum. Supp. 1978).

88. 135 Vt. at 540, 382 A.2d at 836. The public indirectly controls Counsel for the Public by electing the Governor who appoints Board members with the power to select Counsel. *See* VT. STAT. ANN. tit. 30, §§ 3, 20(a) (1970 & Cum. Supp. 1978). In terms of the ability of the public to consent to a particular action by Counsel, this type of control is insufficient to constitute the control indicative of conventional attorney-client relationships.

In other words the *NET* test does not provide Counsel for the Public with the same scope of authority the conventional attorney enjoys. Unlike the conventional attorney, Counsel may never stipulate and agree to substantive issues. Therefore conventional analysis, as embodied in the *Penniman,* Code and *NET* tests should not be applied in the context of Counsel for the Public, because it mechanically limits his ability to serve the public.

B. *Suggested Analysis for the Scope of Authority of Counsel for the Public*

A different analysis is needed to evaluate the scope of authority of Counsel for the Public because the diverse nature of the general public renders it impossible for Counsel to obtain express consent and, therefore, the identifiable self-interest of a conventional client is missing as an effective guide and constraint. The relevant inquiry, then, concerns what standards should govern the limitation of the authority of Counsel for the Public to stipulate and agree. The *NET* court's determination that it is error for Counsel for the Public to enter a stipulation and agreement to substantive issues presents problems because situations may arise where the public interest is best served by means of such a stipulation, and the *NET* approach would preclude Counsel from representing the public's interests in such a manner.

The benefit to the public interest, when the length of a rate case may be reduced by a stipulation and agreement on substantive issues, may require such action for effective representation of the public. The process of adjudicating rate cases is, as the court in *NET* acknowledged, lengthy, complicated, and expensive.[89] As the Vermont Supreme Court stated in *In re Green Mountain Power Corp.,*[90] "[t]he avoidance or minimizing of rate litigation is usually of benefit to the ratepayers, since the burden of its costs falls upon them."[91] The length and expense of rate cases are due, in large part,

89. 135 Vt. at 537, 382 A.2d at 834. From the beginning of the instant rate case in 1974 through fiscal year 1978, Counsel for the Public and the consultants he retained earned over $220,000. Interview with Raymond Koliander, Board Staff Accountant, in Montpelier (Nov. 9, 1978).

90. 133 Vt. 107, 329 A.2d 372 (1974). In *Green Mountain* the court affirmed a Board-ordered rate increase.

91. *Id.* at 111, 329 A.2d at 375.

to the process of auditing the books of the petitioning utility and presenting and contesting evidence on the reasonableness of proposed rates.[92] This process might be reduced in any given case by permitting Counsel for the Public to stipulate and agree to those substantive components of the petitioning utility's case he finds consistent with the public interest. For example, the parties might agree on the valuation of the utility's rate base or rate of return.[93] Alternatively, the parties might agree on the amount of revenues the utility should earn or the level of rates that is just and reasonable, without agreeing on the subsidiary questions of rate base or rate of return.[94] In either case, if the Board accepts a stipulation and agreement and orders a rate increase based on its terms, the need for lengthy hearing procedures on that component might be obviated.[95]

Therefore to the extent that stipulations and agreements reduce the time and expense of adjudicating rate cases, such actions are, other things being equal, in the public interest.[96] One indication

92. Interview with Raymond Koliander, Board Staff Accountant, in Montpelier (Sept. 21, 1978).

93. Just and reasonable rates are set through an evaluation of, *inter alia*, four factors: rate base, rate of return, cost of service and revenues. *In re* New England Tel. & Tel. Co., 120 Vt. 181, 190, 136 A.2d 357, 364 (1957). The rate base is the value of a utility's property on which a regulatory agency permits a return to be earned. *Id.* The rate of return is somewhat equivalent to the utility's cost of capital. *See* J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES (1961).

The following Board orders accepted stipulations and agreements containing a suggested rate base and rate of return: Continental Tel. Co. of Vt., Nos. 3986, 4008, 4069 (March 31, 1976); Telesystems Corp., No. 3906 (Dec. 16, 1975).

94. The Board in New England Tel. & Tel. Co., Nos. 3806 and 4033 (March 24, 1976) accepted a stipulation and agreement containing suggested revenue requirements and rate levels but containing no reference to rate base or rate of return.

95. *See* Pennsylvania Gas & Water Co. v. Federal Power Comm'n, 463 F.2d 1242 (D.C. Cir. 1972). In affirming the Commission's acceptance of a stipulation and agreement, the court stated that "[t]he whole purpose of the informal settlement provision [5 U.S.C. § 554(c) (1977), similar to VT. STAT. ANN. tit. 3, § 809(d) (1972)] is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest." *Id.* at 1247.

96. The potential benefit of stipulations and agreements does not mean that they should be entered into by the parties and accepted by the Board in every case. For example, the terms of a stipulation might be so detrimental to the public interest that any timesaving benefit is outweighed. Counsel for the Public should scrutinize the terms of any proposed stipulation and agreement and weigh all relevant factors in deciding whether to sign it. The Board should hold a hearing and conduct an independent inquiry, using its staff, in deciding whether to accept it. See text accompanying notes 101-110 *infra*.

that stipulations and agreements to substantive issues are in the public interest is the fact that a large number of such stipulations, including those proposing a certain rate level, have been accepted by the Board.[97] Yet *NET* would rule out this possibility even when Counsel for the Public, and every other participant in a rate case, believes that the stipulation would be the course of action most consistent with the public interest.

There are two basic arguments against allowing Counsel for the Public to stipulate and agree to substantive issues. The first is that the same reduction in the time and expense of rate cases could be achieved through efficient use of prefiled testimony[98] and prehearing conferences.[99] Although these procedures are used at present, rate cases involving stipulations and agreements are still likely to be shorter and less costly than rate cases not involving stipulations and agreements.[100]

---

97. Board orders have accepted stipulations and agreements entered into by Counsel for the Public and have granted rate increases according to their terms. *See, e.g.,* Continental Tel. Co. of Vt., Nos. 3986, 4008, 4069 (March 31, 1976); Vt. Gas Systems, No. 3857 (Dec. 30, 1975); Telesystems Corp., No. 3906 (Dec. 16, 1975). Furthermore, the Vermont Supreme Court explicitly endorsed a stipulation entered into by Counsel and the utility in *Green Mountain.*

> An examination of the record demonstrates that the Board discharged its duties properly and in a manner consistent with the statutes involved. The first temporary rate increase concerns us only momentarily, since it was reached under a stipulation between the utility and the representatives of the public. The Board reviewed the stipulation and approved it. No basis for intervention by this court appears.

133 Vt. at 110, 329 A.2d at 374. In another case, the court affirmed a rate increase based partially on a stipulation signed by Counsel for the Public. *In re* Burlington Elec. Light Dep't, 135 Vt. 114, 373 A.2d 514 (1977).

It is interesting to note that the *NET* court, in its discussion of the authority of Counsel for the Public, did not refer to *Green Mountain.* Furthermore, the issue of the authority of Counsel to stipulate and agree was not addressed in the brief of either party to the appeal. *See* Brief for Appellant at 119-126, Brief for Appellee at 66-68.

98. Prefiled testimony is written testimony of a witness. The party introduces the witness' testimony at the hearing and the witness answers questions, obviating the need to read the testimony into evidence. *See* New England Tel. & Tel. Co., Nos. 3806 and 4033 (March 24, 1976). VT. STAT. ANN. tit. 3, § 810(1) (1972) states that evidence may be received in written form.

99. VT. STAT. ANN. tit. 30, § 11(a)(2) (1970) states in part: "A prehearing conference shall be required in every contested rate case. At such conference, . . . [the Board] may require the state or any person opposing such rate increase to specify what items shown by the filed exhibits are conceded. Further proof of the conceded items shall not be required."

100. Interview with Ennis Gidney, Chief of the Economics Division of the Staff, in Montpelier (Sept. 21, 1978). Mr. Gidney has been a staff member since 1965.

A second argument against allowing Counsel for the Public to stipulate and agree to substantive issues is that the availability of such an action might encourage agreements between the parties that might, in the interest of saving time, subordinate the interests of some or all segments of the public.[101] This danger is due to the difficulty of ascertaining and reconciling the various, often conflicting, elements of the public interest,[102] an inherent problem for Counsel for the Public. He is unable to accommodate competing public interests in ways available to an attorney representing two or more conventional clients.[103] The answer to this argument does not lie, however, in prohibiting Counsel from representing the public interest by stipulating and agreeing to substantive issues. As noted above this would preclude Counsel from stipulating and agreeing even when such an action would allow Counsel to serve the public interest most efficiently. The solution lies, rather, in insuring to the fullest extent practicable that the position taken by Counsel for the Public reflects careful consideration and is an equitable reconciliation of the competing public interests.[104] One means of insuring this

---

101. See text accompanying note 36 *supra* for an examination of the competing interests of the public. The potential for such agreements exists without resort to a stipulation and agreement because a party might decline to contest the opposing party's evidence pursuant to an informal agreement.

102. If a conflict in the public interest appears, Counsel for the Public has basically three options for representation. He may refrain from advocating a position altogether. He may suggest alternative positions which should be considered by the Board, without advocating the acceptance of any one position. Finally, he may decide which interest is most representative of the ratepayers and advocate a position consistent with that interest. *See* Barvick, *Public Advocacy Before the Missouri Public Service Commission*, 46 U.M.K.C. L. REV. 181, 191-92 (1977).

103. An attorney in a conventional attorney-client relationship is able to accommodate competing interests of clients either by obtaining their consent to the representation or by declining employment. CODE DR 5-105(C). Counsel for the Public is unable to obtain such consent from the public and if Counsel were to decline employment whenever competing public interests appeared, there would be administrative problems in arriving at that decision. For example, in every case the varying interests of the public would have to be examined to determine whether a conflict existed sufficient to warrant a termination of employment.

Another state has found an imaginative solution to this problem. MO. ANN. STAT. § 386.710 (Vernon Cum. Supp. 1978) states in part: "If public counsel determines that there are conflicting public interests . . . he may choose to represent one such interest. . . . The director of the department shall select an attorney . . . to represent that segment of the public certified to him by the public counsel as unrepresented." This procedure has not yet been utilized. Telephone interview with Paul W. Phillips, General Counsel for the Missouri Public Service Commission (Dec. 12, 1978).

104. See text accompanying note 36 and note 102 *supra*.

result would be for the Board to hold a hearing before deciding whether to accept a stipulation and agreement to substantive issues.[105] At this hearing, groups that represent the public interest in major rate cases,[106] such as the staff of the Board,[107] various intervenors[108] and the Attorney General,[109] could urge the Board not to accept a stipulation and agreement.[110] Alternatively these groups might

105. It is doubtful that such a hearing would be required under present law. VT. STAT. ANN. tit. 3, § 809(c) (1972) states in full: "Opportunity shall be given to all parties to respond and present evidence and argument on all issues involved [in a contested case]." Yet Vermont Supreme Court cases have held, in situations analogous to the filing of a stipulation and agreement, that a hearing was not required. *See, e.g., In re* Green Mountain Power Corp., 131 Vt. 284, 305 A.2d 571 (1973) where the court, in response to a due process argument, stated that the public was not denied an opportunity to be heard by the Board's acceptance without a hearing of a fuel adjustment clause proposed by the petitioning utility in a rate case. An argument might be made that such a hearing would defeat the timesaving benefits of a stipulation. The length of the hearing would depend, in part, on the positions taken by the participants in the rate case. If none of the participants opposed Board acceptance of the stipulation, the hearing could be short. The danger of a protracted hearing arises where one or more of the participants opposes the stipulation. When such opposition occurs, there is an increased likelihood that the timesaving benefit of the stipulation is outweighed by its inconsistency with the public interest. Therefore the possibility of a long hearing should not militate against holding the hearing because it safeguards the public interest. Furthermore, the potential for a hearing serves as a deterrent against entering into a stipulation and agreement that is inconsistent with the public interest.

106. *See, e.g.*, New England Tel. & Tel. Co., No. 3806 (June 3, 1974).

107. See text accompanying notes 43 & 44 *supra*. The Board can require its staff to investigate the merits of any stipulation and agreement. *See* VT. STAT. ANN. tit. 30, § 19 (Cum. Supp. 1978).

108. Several groups intervened in the instant rate case. See note 11 *supra*. The Vermont Welfare Rights Organization and the Vermont Low Income Advocacy Council contended they represented "low income persons who are (1) deprived of telephone service because of 'present and proposed rates, charges and practices,' or (2) 'customers who will be adversely affected by NET's present and proposed rates, charges and practices.' " New England Tel. & Tel. Co., No. 3806 (June 3, 1974) at 6. The Vermont Public Interest Research Group contended it represented low and middle income consumers. *Id.*

109. There is disagreement on whether the Attorney General represents the public at a rate hearing. The Attorney General implies he represents the public. Brief for Appellant at 126, *In re* New England Tel. & Tel. Co., 135 Vt. 527, 382 A.2d 826 (1977). The Board contends he represents only the state. New England Tel. & Tel. Co., No. 3806/4033 (May 16, 1978) at 3-4. The state's interests are not necessarily consistent with those of the public because the state government is a separate ratepayer—*e.g.*, state office buildings use electricity and water—competing with other rate classes for low rates. See text accompanying note 36 *supra*.

110. In order to contest a stipulation and agreement entered into evidence, groups must have the ability to participate in a rate case. The Attorney General is statutorily authorized to represent the state at any rate increase hearing. VT. STAT. ANN. tit. 30, § 217 (1970). Intervenors need Board permission to participate. For a discussion of the tests for allowing intervention in a rate case, see New England Tel. & Tel. Co., No. 3806 (June 3, 1974) at 3-4.

appeal a Board-ordered rate increase based upon a stipulation and agreement.[111]

Examination of the potential benefits, as well as detriments, of allowing Counsel for the Public to stipulate to substantive issues suggests that providing Counsel with that option may, in certain cases, be necessary to effective representation of the public interest. Such actions should not, therefore, be completely prohibited. Rather Counsel should be able to stipulate and agree and the Board, after a hearing, should be able to accept such a stipulation if it decides, after a careful weighing of the benefits and detriments, that such an action is consistent with the public interest.

CONCLUSION

The court in *NET* held that Counsel for the Public erred in entering into a stipulation and agreement on substantive issues on the ground that he is unable to obtain from his client—the public—the authority to take such an action. An examination of the special nature and function of Counsel for the Public demonstrates that his role is complex and that the interests of the public are not necessarily uniform. Conventional attorney-client analysis, as embodied in the *Penniman,* Code and *NET* tests, is based in part upon the ability of the client to employ the attorney and control his actions. Because these elements are not present where Counsel for the Public is involved, conventional analysis is not very helpful in identifying appropriate guidelines for Counsel's authority. A more appropriate analysis recognizes that, in some cases, it may be in the public's best interest to allow Counsel for the Public to stipulate and

111. A Board-ordered rate increase based on a stipulation and agreement must, as any other Board-ordered rate increase, "include findings of fact and conclusions of law, separately stated." VT. STAT. ANN. tit. 3, § 812 (1972). Findings of fact are accepted unless they are clearly erroneous. VT. STAT. ANN. tit. 30, § 11(b) (Cum. Supp. 1978); *In re* Green Mountain Power Corp., 131 Vt. 284, 305 A.2d 571 (1973). *See* F. COOPER, 2 STATE ADMINISTRATIVE LAW 744-46 (1965). Legal conclusions of the Board, as embodied in its order, are subject to a different test. The Vermont Supreme Court "presumes the actions of an administrative body to be correct, valid and reasonable, with a clear and convincing showing required to overcome the presumption." *In re* Young, 134 Vt. 569, 570-71, 367 A.2d 665, 666 (1976). Therefore, a participant in a rate case could appeal a Board order based on a stipulation and agreement on the grounds that the order contained erroneous findings of fact or conclusions of law.

agree on substantive issues, thereby reducing the time and expense of rate cases. In these cases the Board, after a hearing, should be able to accept a stipulation and agreement on substantive issues entered into by Counsel for the Public.

Peter H. Zamore