

# Notice-and-Comment Rulemaking Comes to China

By Jeffrey S. Lubbers\*

A recent newspaper article contained the following quote that everyone in the ABA Administrative Law Section could readily agree with:

*The work of law-making must be professional and precise. But to invite public suggestions into the law-making process shows an open, scientific and democratic attitude. Thus the process to solicit public opinion is a process of education, a process to foster and improve democratic awareness, as well as a process to promote democratic and legal construction.*

This was not an American or EU commentary; it was an excerpt from the Chinese *Worker's Daily*. The quote was carried in the April 18, 2006 edition of the English-language *China Daily*<sup>1</sup> in an article that mentioned that the National People's Congress had received over 320,000 "opinions" on a draft labor contract law.

While the National Legislation Law of 2000 does not expressly mandate such public participation, the idea of written public comments, public hearings, and other forms of public participation is beginning to catch on, especially in local government rulemaking, as I learned in a trip to China this July.

Neil Eisner (former Section Chair and Assistant General Counsel for Regulation and Enforcement at the U.S. Department of Transportation) and I were invited by the Yale Law School's China Law Center, to discuss rulemaking developments in China along with the Center's Deputy Director Jamie Horsley, Associate Director Jeffrey Prescott, and an affiliated scholar, Professor and Associate Dean Wang Xixin of Beijing University Law School. We had all attended a Beijing

workshop on U.S.-style rulemaking in 2003 and now had the opportunity to see just how far things had come.

The focal point of our trip was the City of Guangzhou (population around 10 million), which had just completed its first venture into notice-and-comment rulemaking, with the advice and counsel of the Yale advisers. The Director of the Guangzhou Office of Legislative Affairs (OLA), Chen Licheng, pronounced it a big success—so much so that the city had immediately thereafter enacted an ordinance (the "Measures on Public Participation in Formulating Rules") mandating that, starting in 2007, all future municipal rules must be issued according to a sophisticated and open system of public participation.

The pilot Guangzhou rulemaking concerned the regulation of commodity trade markets in the city. It underwent two phases of public participation.<sup>2</sup> In the pre-proposal stage (what we would call an "advance notice of proposed rule-making"), public notice of a 30-day comment period was posted on November 30, 2005 on the bulletin boards of 1630 commodity transaction markets, 176 grass-roots commercial offices, the websites of the city government and the OLA, and several newspapers. Twelve comments containing 30 recommendations were received. In addition the OLA invited 15 market representatives and 12 wholesalers to a meeting to discuss the proposal on December 26, 2005. In a significant first step for China,<sup>3</sup> a

summary of all of the inputs with an OLA response to the comments was posted on the OLA website on February 9, 2006.<sup>4</sup>

To give one example, a customer of a meat and vegetable market, Mr. Huang, commented that in such markets the public scales are often not open on holidays and weekends and sellers change their scales and hurt consumers. He suggested that management of scales be standardized and that such manipulations be punishable by fines. The OLA's response indicated that this kind of situation will be dealt with in the new regulation.<sup>5</sup>

OLA then formulated a discussion draft text and announced a second round of notice and comment, this time on the full draft text, with a 35-day comment period. An extensive outreach was undertaken, including the distribution of 5000 booklets of the draft distributed in 1630 markets. In addition the OLA conducted on-site mini-conferences in two major markets and held "open debates" jointly with the wholesaler's "chamber of commerce." Through this outreach the OLA received 109 comments including 21 in writing. The final rule was then submitted for approval to the Guangzhou Municipal Government in early June and approved on July 3. Although we did not have the final text at the time of our meeting, the OLA representatives said it had been revised according to the public comments and the electronic docket and that the final text, the entire set of comments, and OLA responses would be posted soon on its website. The Guangzhou newspapers

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<sup>1</sup> Public Input on Law Important, *China Daily* (Apr. 18, 2006), available at <http://www.china.org.cn/english/GS-e/165887.htm>.

<sup>2</sup> The following description is based on the discussions at the Guangzhou meeting and a paper disseminated at that meeting by Jamie Horsley, "Administrative Rulemaking in Guangzhou" (July 4, 2006) (on file with author).

<sup>3</sup> It is not typical for the National People's Congress (NPC) to respond to comments such as those made to the draft labor contract law, discussed above. However, in 2005, the NPC did publish a response to 24 major issues it identified in the 11,543 responses it received to a draft of the Property Law. See *id.*, at 7, n.4

<sup>4</sup> These summaries were provided at the Guangzhou meeting (on file with author).

<sup>5</sup> The draft of the final rule submitted by the OLA for approval, provided to us at the meeting, indeed did contain an article (28) that required market organizers to maintain, verify, and provide consumers with necessary measuring instruments.

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provided extensive coverage of this process.<sup>6</sup>

Interestingly, after the close of the second comment period, the OLA's Research Center undertook a formal survey of about 100 members of the commodity market community to ascertain its awareness of the rulemaking and the opportunities for public participation. The survey results (also provided to us in advance of the meeting) indicated that the relatively low level of participation was due to inexperience with such procedures and a lack of confidence among the public in the process of public participation. The OLA hopes to overcome this through more education and publicity concerning the government's responsiveness to the public comments.

Based on this pilot rulemaking, and while it was going on, the Guangzhou OLA began drafting a policy on future rulemakings. The Yale team was able to make suggestions on these "Measures" during the drafting process and the final version that emerged in July 2006 (effective for all Guangzhou rulemaking after January 1, 2007) was quite comprehensive and progressive.<sup>7</sup> The 34 articles of the Measures contain numerous laudable provisions, including:

- The public is given the right to propose rules, which triggers a requirement for an agency response that will be made public within 45 days.
- OLA should solicit, and respond to the public's opinions<sup>8</sup> on its overall work agenda.
- Drafting agencies should offer a 30-day comment period on all rules contained in the rulemaking work agenda, through a series of listed methods for seeking such written comments (including

e-mail). Such comments shall be publicly posted within 5 working days.

- Drafting agencies should also use public forums, and where appropriate, some combination of open meetings, expert meetings and formal hearings, to solicit public opinions, before submitting their drafts to the OLA.
- When the OLA has received (and possibly revised) a drafting agency's draft rule, it shall afford the public a 15-day comment period on the OLA's proposed draft rule.
- Within 30 days of the rule's promulgation, the OLA shall publish the text of the final rule on its website, along with an "Explanation of the Circumstances of Public Participation," including how public opinions were solicited and the "circumstances regarding accepting" these opinions.
- The OLA shall establish an electronic docket, with specified contents, for each rulemaking.
- Members of the public whose comments are accepted may be honored by the OLA with commendations or honorary certificates.

While there are few provisions that we might quarrel with—for example a provision creating an exception from the public release of opinions which "violate the norms of morality" or which the agency "has reasonable grounds to believe are not suitable to be made public"—the Guangzhou Rulemaking Measures are a sophisticated set of rulemaking provisions and deserve accolades from anyone interested in public participation and increased openness of the regulatory process.

Clearly, Guangzhou is ahead of the curve in rulemaking in China with its menu of public participation alternatives and its electronic docket, but there have been experiments in other parts of country as well. A representative from the Beijing Municipal OLA described the capital city's experience with public participation, including website solicitation of opinions, in the regulation of firecrackers and fireworks and on regulating development (e.g., bars, restaurants, and stadiums) in "densely" populated areas. Representatives of Shenzhen and Shanghai also indicated great interest in increasing public participation though

they admitted that their efforts had not gone as far as Guangzhou's.

As for the national government, several leaders met with us and the Guangzhou OLA representatives in a later meeting at the Beijing National School of Administration. At that meeting there was a frank discussion of the potential benefits of more public participation on the national level. The meeting included a judge on the Administrative Tribunal of the Supreme Court who was very complimentary of Guangzhou's efforts and even raised the possibility of judicial remedies for violations of such procedures if and when they are enshrined in national law. Other participants from the National State Council sounded a more cautionary note, suggesting that the process must be demonstrated to work well without unduly interfering with the government's discretion and expertise.

Thus, while a national law (or amendment of the National Legislation Law) requiring the same sort of process as will be required in Guangzhou is not currently on the table, the experience of large municipalities can be seen as China's version of our "50 state laboratories" for reforms. It is still far too early to be confident that the implementation of the new Guangzhou Measures will be successful, but the city's willingness to at least listen to the public is to be applauded. If the Measures are successful, then I believe that other municipalities, provinces, and eventually the national government will also move forward with similar types of reforms.

It is hard not to be impressed on such a visit with China's overall dynamism—large-scale projects are completed on a scale and in a time-frame that we Americans envy now. However, such development has a downside in terms of environmental degradation and social displacement that must also be dealt with. The people want to be heard on such matters and the government is showing signs that it wants to hear them. The rapid growth of the Internet provides a potentially low-cost way for governments at all levels to hear directly from the people. But this too must be administered in a regularized way, and the U.S. approach of notice-and-comment rulemaking seems in many ways to be a good fit for this in China. ○

<sup>6</sup> A major Guangzhou newspaper also covered our meeting, specifically quoting Mr. Eisner's comments about the benefits of an electronic rulemaking docket.

<sup>7</sup> These Measures build upon a set of Rulemaking Measures, promulgated by Guangzhou in 2002, which also called for public participation, but was much less specific about the methods to be used. Guangdong Province (of which Guangzhou is the capital) also issued an Open Government Affairs Regulation, effective October 2005, which also contains the concept of "advance disclosure" of important decisions. See Horsley, note 2, *supra*, at 5, n. 2.

<sup>8</sup> The text of the draft uses the term "opinions," more widely used in China, instead of the term "comments."