preparation of their opinions. They also resort to theories, predictions, and intuitions that are inherently incapable of exact proof. See pp. 119–121

supra. Properly speaking, however, these evaluations and insights are not within the concept of official notice. Rather, official notice comes into play when an agency that *could* have documented one of its factual premises on the record chooses to avoid that process for efficiency reasons.

Because of its breadth, official notice has the potential to interfere with the due process right to a fair administrative hearing. The main way in which the law addresses this concern is by imposing procedural safeguards. First, the noticed material must be specifically identified. The agency cannot rest on a vague claim that it is an expert; it must explain with particularity the sources of its information. Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937); Air Prods. & Chems., Inc. v. FERC, 650 F.2d 687 (5th Cir. 1981). Second, it must give the opposing party a meaningful chance to rebut the information or to present additional arguments that would put the noticed facts into a more favorable light. United States v. Abilene &

Southern Ry., 265 U.S. 274 (1924). This latter requirement is codified in the APA: "When an agency decision rests on official notice of a material fact . . . a party is entitled, on timely request, to an opportunity to show the contrary." 5 U.S.C. § 556(e). In practice, the APA obligation need not be burdensome. Most courts hold that an agency may even cite officially noticed facts for the first time in its final opinion, so long as it allows the opposing party to rebut these facts by filing a petition for rehearing. *Market Street Ry.*, supra. But see *Castillo-Villagra*, supra (requiring pre-decision warning that

official notice will be taken; court thought petition for rehearing was inadequate protection because alien might be deported while waiting for agency to act on it).

The right of rebuttal has also been held to encompass a right to have one's effort to "show the contrary" either accepted or appropriately refuted. Thus, in Union Electric Co. v. FERC, 890 F.2d 1193 (D.C. Cir. 1989), the Commission took official notice of recent changes in the rates of return on Treasury bonds, using this data as a rough measure of a utility's reduced cost of equity capital. Although the agency allowed the

company to contest this inference in a petition for rehearing, it gave no persuasive reason for rejecting the company's argument. The court held that this cursory response violated § 556(e). This aspect of official notice procedure seems to overlap with the agency's overall duty of reasoned decisionmaking, and the scope of that duty is somewhat indeterminate. Indeed, on similar facts, another court upheld the agency because it found that the agency's inference *had* been reasonable. Boston Edison Co. v. FERC, 885 F.2d 962 (1st Cir. 1989).

Judging from the small number of reported cases, the doctrine of official notice has apparently not been used extensively or creatively by many agencies. This reluctance may be partly a result of uncertainties in the applicable legal standards; without clear tests indicating when official notice is proper, agencies may be unwilling to risk reversal by taking notice of nonrecord facts. It remains a potentially useful device for simplifying and expediting hearings.