

TOWARD A REVISED STRATEGY FOR RATEMAKING†

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I. INTRODUCTION

A. *The Dilemma Inherent in Regulatory Delay*

A remarkably diverse group of citizens and political leaders,¹ business executives² and consumer advocates,³ economists⁴ and lawyers⁵

† *This article is based on research done under contract for the Administrative Conference of the United States. Recommendations based on the conclusions presented herein will be considered by the Conference in June 1978 and if adopted will be published in the Code of Federal Regulations. The Administrative Conference, however, bears no responsibility for the contents of this article. The author wishes to thank the members of the Committee on Ratemaking and Economic Regulation of the Administrative Conference, and particularly Philip Harter (Administrative Conference), William Lindsay (FPC), Larry Katz (FCC), and David Donley and John Surina (ICC) for their help and counsel during this study.*

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1. President Ford's address to a joint session of Congress initiated the governmental activity. See Address to a Joint Session of Congress on the Economy, 1974 PUB. PAPERS 228, 232 (Oct. 8, 1974). In Congressional hearings in late 1974, Administration spokesmen and others expressed strong views on questions of regulatory reform. E.g., *Hearings on S. 704 Before the Senate Comm. on Government Operations*, 93d Cong., 2d Sess. (1974). See also [1974] ANTITRUST & TRADE REG. REP. (BNA) no. 683, at E-1 (speech of FTC Chairman Lewis Engman before the 1974 Fall Conference of the Financial Analysts Federation, Oct. 7, 1974). President Carter has asserted his own critique with at least equal vigor. See The President's Remarks to Members of the American Textile Manufacturers Institute, 13 WEEKLY COMP. OF PRES. DOC. 173, 174 (Feb. 9, 1977).

2. E.g., Brophy, *The Utility Problem of Regulatory Lag*, PUB. UTIL. FORT., Jan. 30, 1975, at 21. (Mr. Brophy is the president of General Telephone and Electronics Co.).

3. E.g., RALPH NADER'S STUDY GROUP, *THE MONOPOLY MAKERS: REPORT ON REGULATION AND COMPETITION* (M. Green ed. 1973); R. FELLMETH, *THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC* (1970) (The Ralph Nader Study Report on the Interstate Commerce Commission and Transportation).

4. *Report of the Council of Economic Advisors*, in *ECONOMIC REPORT OF THE PRESIDENT 90-117* (1970); M. WEIDENBAUM, *FINANCING THE ELECTRIC UTILITY INDUSTRY* (1974); Joskow & MacAvoy, *Regulation and the Financial Condition of Electric Power Companies in the 1970's*, 65 AM. ECON. REV., Papers & Proceedings 295 (1975); Hyde, *Overcoming Regulatory Lag: The High Cost of a Low Rate of Return*, PUB. UTIL. FORT., Feb. 27, 1975, at 34.

5. E.g., Stanley, *Has the Utility Rate Case Any Future?*, PUB. UTIL. FORT., Nov. 9, 1972, at 17; cf. Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 432 (1960): "I wonder whether law students still are taught, as we were, to contrast the celerity of those Mercury-like and wing-footed messengers, the administrative agencies, with the creeping and cumbersome processes of the courts."

seems to agree on a fundamental point—something is wrong with much of the substance and procedure of regulation. Objections vary considerably, but high on many lists is the complexity of administrative procedure and the sheer time consumed in obtaining action or authorization from an agency.⁶

This regulatory delay reveals a dilemma at the heart of regulation. Delay inhibits a firm's ability to respond flexibly and efficiently to changing market conditions. Any regulatory process, however, necessarily takes some time, and the reaction of firms to changed circumstances must be inhibited for the period needed to make sound regulatory decisions. Paul MacAvoy, in a 1976 speech before the American Bar Association, concluded that the dilemma was very likely insoluble. He contended that modifying procedures sufficiently to permit more effective response to changed economic conditions would require abandoning the regulatory system.⁷

Professor MacAvoy may have been right; complete or partial deregulation is probably desirable in many areas of the economy. But deregulation may not be the only alternative to the sluggishness of the current system. The following analysis considers whether modifications of the regulatory system can significantly reduce regulatory delay. But be forewarned. No previously undiscovered panaceas are prescribed. However, there does seem to be a shift in orientation that can accommodate both the desire for speed and the equally important interests in procedural due process and substantively sound results. The revised strategy proposed here consists of three distinct but interrelated elements: first, increased use of informal rulemaking to establish predictable standards for decision of recurring issues; second, earlier acquisition of data by agencies and increased use of computers to store the data and project its implications; and third, increased reliance on settlements to eliminate the inevitably time-consuming decision and opinion stages of present administrative litigation.

6. According to the results of a questionnaire the Committee [on Governmental Affairs, United States Senate] distributed to about a thousand lawyers who practice regularly before eight major commissions, "undue delay" was found to be among the major problems of Federal regulation. In the case of four agencies—CAB, FCC, FPC and ICC—undue delay was cited by 75 percent or more of those responding. Also, 67 percent of the administrative law judges responding to the committee's questionnaire ranked undue delay as one of the top three problems of regulation.

IV SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95th Cong., 1st Sess., *DELAY IN THE REGULATORY PROCESS, STUDY ON FEDERAL REGULATIONS* (1977).

Roger Cramton, then Chairman of the Administrative Conference, wrote in 1972: "While administrative agencies were created to provide expeditious determinations of matters that courts and legislators could not effectively handle, a continuing course of complaints of delay in the administrative process indicates that the ideal has not yet been achieved." Cramton, *Causes and Cures of Administrative Delay*, 58 A.B.A.J. 937, 937 (1972). See also *Symposium on Regulatory Delay: Hearings Before the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. (1976).

7. MacAvoy, *The Outlook for Regulation*, 45 ANTITRUST L.J. 186, 189 (1976). At the time of his remarks, Professor MacAvoy was a member of the Council of Economic Advisors and had a major role in regulatory reform efforts of the Ford Administration.

B. *The Focus of this Article*

This article concerns itself with delay in a particular context—that of ratemaking by federal agencies. Ratemaking delay is neither more significant, more pervasive, nor even more troublesome than delay in other areas of administrative activity. However, while the causes and consequences of delay may be similar across many kinds of administrative proceedings, procedures are sufficiently different and consequences sufficiently specialized that separate examination of ratemaking has proved useful.

Ratemaking is a responsibility of a number of federal agencies,⁸ but four among them are preeminent and constitute the subject of this article.

1. *The Interstate Commerce Commission* has regulatory responsibility for interstate carriers of people and goods by water, highway, and rail.⁹
2. *The Federal Communications Commission* regulates common carriers engaged in interstate or foreign wire or radio¹⁰ communication including regulation of rates for telephones, telegraph, satellites, coaxial cable, and microwave.
3. *The Civil Aeronautics Board* establishes rates for air transportation, both foreign and domestic.¹¹
4. *The Federal Energy Regulatory Commission*, called the Federal Power Commission at the time of this study,¹² has the responsibility for regulating both the rates at which electric power is sold interstate among electric utilities¹³ and the rates for pipeline transportation of natural gas and now oil.¹⁴

8. In addition to the four agencies discussed in this report, several other federal agencies also set rates. For example, the Federal Maritime Commission establishes rates for common carriers by water in intercoastal commerce, 46 U.S.C. § 845 (1970); the Secretary of Agriculture approves schedules of rates for stockyard services, 7 U.S.C. § 207 (1976); and the Secretary of the Interior establishes rates for the purchase of water purchased from federally-constructed irrigation projects, 16 U.S.C. § 690z-2 (1970).

9. 49 U.S.C. §§ 1(1), 302 (1970).

10. 47 U.S.C. § 151 (1970).

11. 49 U.S.C. § 1373 (1970). Mail rates have traditionally been a separate vehicle for subsidizing airlines, 49 U.S.C. § 1376(b)(3) (1970), and international issues are so intertwined with foreign policy and International Air Transport Association policy as to be sui generis, *see, e.g.*, A. LOWENFELD, *AVIATION LAW* 279-317 (1972). The analysis here thus concentrates on the central CAB rate concerns: domestic passenger and cargo fares.

12. Section 402 of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) transfers the functions of the FPC considered in this report to the independent Federal Energy Regulatory Commission established within the Department of Energy.

13. 16 U.S.C. § 824d (1970). Two important cases defining the FPC's electrical power jurisdiction are *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972), and *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964). The jurisdiction of the FPC has now been transferred to the new Department of Energy, *see note 12 supra*.

14. 15 U.S.C. § 717c (1970). In addition, the Natural Gas Act gave the FPC responsibility for regulating the field prices paid to natural gas producers, but the conditions in that industry and the national or area rulemakings used to set rates are so unique that these will be examined only as a contrast to more traditional proceedings. *See In re Permian Basin*

Assessment of federal administrative procedure is difficult because the ratemaking process is currently undergoing extensive review and adaptation. These changes result not only from an awareness of problems in the procedure itself but at least equally from a general reassessment of the concept of federal regulation of industry. From statutory "revitalization" of the railroad industry¹⁵ to possibly reduced regulation of airlines¹⁶ to creation of the Department of Energy,¹⁷ new techniques have been or are likely to be mandated. The analysis here, however, will proceed on the supposition that, whatever the label of the agency, most of the functional issues will remain constant and past experience should facilitate assessment of any new approaches.

C. Causes of Delay in Ratemaking

Why do regulated firms have to wait a year or two—or three—to get a rate increase to which they are entitled? A superficial answer is that the agency must have planned badly and that more attentive management could solve the problem. If that were true, however, by this time some efficient chairman surely would have caused his or her commission to perform dramatically better and that simply has not happened. The task, it seems, is harder than it initially appears. A more realistic appraisal is that at least four factors contribute to the problem of chronic delay and regulatory lag.¹⁸

The first cause of delay is the complexity of the substantive issues. When questions of fact, law, or policy require reflection and study, the decision should and will take time. When important points of view need to be expressed, sufficient time must be allowed for their expression and consideration. To some extent, then, calling all passage of time "delay" only confuses matters. However, from the standpoint of the regulated firm, delay by any other name hurts just as badly. The objective then,

Area Rate Cases, 390 U.S. 747 (1968); *Shell Oil Co. v. FPC*, 520 F.2d 1061 (5th Cir. 1975), cert. denied sub nom. *California Co. v. FPC*, 426 U.S. 941 (1976). See also Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941 (1973).

15. Accomplished by the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act), Pub. L. No. 94-210, 90 Stat. 31.

16. The two bills pending in the 95th Congress are S. 292, 95th Cong., 1st Sess. (1977) and S. 689, 95th Cong., 1st Sess. (1977). President Carter has endorsed the concept of decreased air regulation, but at this writing, early action does not seem likely. See, e.g., 35 CONG. Q. WEEKLY REP. 1303 (1977).

17. See note 12 *supra*.

18. Although "regulatory lag" is a commonly-used generic term, it is really composed of two parts—one substantive and one procedural. The substantive element is the traditional decision to make future rates turn on past costs. See, e.g., I A. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 54 (1970). That is, because next year's rates are based on past cost data rather than on predicted costs, rates will always trail behind. Although this kind of lag would be relatively easy to overcome by changing the substantive principles applied in determining the proper test year, it reflects an understandable preference for hard evidence over guesses. This article will focus mainly on the problems of procedural delay.

should not be to establish instantaneous decisionmaking; it should be to design a system that will operate at or near that elusive point where the marginal cost of delay equals the marginal benefit of further consideration.

A second cause of delay in one area of an agency's activity may be as mundane a factor as the agency's preoccupation with other matters. Approximately eighty percent of the Federal Communication Commission's business, for example, involves broadcasting.¹⁹ It is not surprising, then, that at times broadcast license cases will be given a higher priority than common carrier rate cases. Under such circumstances delay is not subject to correction without a change of priorities that might create more problems than it would solve.

Third, delay often occurs because some party has an interest in its occurrence. At one time, for example, firms in many regulated industries were improving their productivity at a rate faster than inflation so that as their costs were decreasing their profits were going up. Consequently, during that period, delay was in the interest of regulated firms that sought to avoid rate decreases.²⁰ Now, delay seems to be favored by customers seeking to avoid rate increases,²¹ or by firms seeking to restrain their competitors' attempts to obtain a competitive advantage.²² The predisposition of administrative procedure to allow maximum participation by affected parties, including members of the public, has exacerbated this problem.²³ Whoever the proponent, however, the point is that delay is not perceived as an unmitigated evil by everyone affected by the regulatory process. For some interested parties, delay is the best defense. Consequently, it is not entirely the fault of the administrative agency when some delay creeps into the process. Indeed the recognition by regular participants in the process that under some circumstances delay can be to their benefit may help explain why many condemn delay when it hurts them, but why fundamental procedural change has not yet occurred.

19. Proportions such as this are, of course, far from precise. As of June 30, 1973, the FCC had 214 broadcast cases in hearing status and 12 common carrier cases. At the same time, rulemaking and enforcement proceedings totaled 102 broadcast and 56 common carrier. 39 FCC ANN. REP. 193 (1973).

20. The phenomenon is discussed and supported empirically in Spann, *The Regulatory Cobweb: Inflation, Deflation, Regulatory Lag and the Effects of Alternate Administrative Rules in Public Utilities*, 43 S. ECON. J. 827, 833 (1976) and Joskow, *Inflation and Environmental Concern: Structural Change in the Process of Public Utility Price Regulation*, 17 J.L. & ECON. 291, 305-11 (1974).

21. See, e.g., Joskow, *The Determination of the Allowed Rate of Return in a Formal Regulatory Hearing*, 3 BELL J. ECON. & MGMT. SCI. 632 (1972).

22. It appears that customers are the primary challengers in rate cases at the ICC and FPC while competitors are more active before the FCC and CAB.

23. This is not, however, to say that "public interest" groups are a primary factor in ratemaking delay. Regardless of what may be true in cases such as nuclear plant sitings, the research for this article uncovered no evidence that representatives of the "public" contributed any more to case delay than other intervenors. See text accompanying notes 131-36 *infra*.

A fourth cause of delay, at least in the area of ratemaking, is the conscious use of delay as a regulatory tool. A consistent—some would say chronic—problem in rate-regulated industries is the problem of creating an incentive for efficiency.²⁴ If the firm is guaranteed a particular return, it has no incentive to minimize costs. Moreover, the increases in costs that result may be of a magnitude which counteracts most of the public benefits sought by regulation.²⁵ To the extent that a firm can be forced to bear some or all of the consequences of spending increases, it will be encouraged to economize.²⁶ Delay provides such encouragement because, at least until the next rate increase, the firm must absorb any cost increases. To be sure, at the time of the next increase, the firm will be allowed to raise its rates prospectively, but firms are almost never allowed to make up past cost overruns. Of course, a highly inflationary environment can turn a healthy incentive into a suffocating damper,²⁷ and delay is seen by all as a clumsy tool for regulating a firm's management. But the point is that ratemaking delay need not be approached with the inevitable assumption that only specialized private interests can see any benefit from agency inaction.

II. THE FEDERAL RATEMAKING EXPERIENCE

A. *An Overview of the Process*

The federal regulatory system developed with little overall design. Specific programs were adopted to meet the perceived needs of particular periods and the result is a diverse collection of programs, policies, and agencies pursuing their individual objectives. It might appear, therefore, that few generalities can reasonably be made. Indeed, the agencies tend to perpetuate this impression by having separate admission requirements

24. See, e.g., F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 527-29 (1970).

25. See, e.g., Williamson, *Economics as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

26. Bonbright, writing when costs were still declining, advocated the use of delay to give extra rewards to firms that succeeded in lowering their costs. See J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 11-16, 386-90 (1961). Others, such as Elizabeth Bailey, have advocated intentional delay during periods of rising costs as well. See E. BAILEY, ECONOMIC THEORY OF REGULATORY CONSTRAINT 111-23 (1973); Bailey, *Innovation and Regulation*, 3 J. PUB. ECON. 285 (1974); Bailey & Coleman, *The Effect of Lagged Regulation in an A-J Model*, 2 BELL J. ECON. & MGMT. SCI. 278 (1971); Klevorick, *The Behavior of a Firm Subject to Stochastic Regulatory Review*, 4 BELL J. ECON. & MGMT. SCI. 57 (1973); Myers, *The Application of Finance Theory to Public Utility Rate Cases*, 3 BELL J. ECON. & MGMT. SCI. 58 (1972); Baumol & Klevorick, *Input Choices and Rate-of-Return Regulation: An Overview of the Discussion*, 1 BELL J. ECON. & MGMT. SCI. 162 (1970).

27. E.g., Spann, *supra* note 20. Spann also concludes that the present value to consumers at high rates of inflation of the delay in rate increases caused by regulatory lag is equal to approximately 200% of the total expenditure on electricity. *Id.* at 828. Given that large consumer interest in obtaining regulatory lag, Spann argues that a subsidy to the utilities to relieve the most severe impacts of lag might be a more satisfactory solution than elimination of the lag altogether. *Id.* at 838.

for practice before them²⁸ and by making no apparent attempt to standardize procedures or correlate activities.²⁹

Despite appearances, however, some generalization is possible. Ratemaking is analytically the same process in every agency, and to a great extent the procedures of the different agencies derive from a common source—the standards and procedures established for the Interstate Commerce Commission in 1887.³⁰ The different regulatory systems, therefore, can be viewed as a series of variations on a common theme, the approaches unique to each agency representing experimentation or adaptation to particular conditions. This perspective makes possible conclusions about the desirability of given approaches and their applicability in other contexts.

In each agency, the first step in the ratemaking process is setting the proposed rate. A regulated firm's rates are established by the firm itself rather than by the regulatory agency, at least in the first instance. The firm establishes its own tariff—its schedule of rates and rules—and submits it to the agency for approval.³¹ The standard against which each agency tests the proposed rate is derived from the basic Interstate Commerce Act requirements that all rates be “just and reasonable,”³² and that they avoid “unjust discrimination” in rates or services.³³

28. Compare 14 C.F.R. § 302.11(a) (1977) (CAB), 18 C.F.R. § 1.4(a) (1977) (FPC), 47 C.F.R. § 1.23(a) (1976) (FCC), and 49 C.F.R. § 1100.8(a)(b) (1976) (ICC).

29. Recommendation five of the American Bar Association House of Delegates in August, 1970, called for “providing that in formal adjudication, to the extent practicable, uniform rules governing pleadings, discovery, the admission of evidence, requirements of proof, decisions, and appeals shall be issued by all agencies” *House of Delegates Meets in St. Louis August 10-12*, 56 A.B.A.J. 984, 992 (1970). The report underlying the proposal is set out in *American Bar Association Special Committee on Revision of the Administrative Procedure Act*, 23 AD. L. REV. 68, 75-76 (1970). Responses from 17 members of the Administrative Conference representing 14 agencies “ranged from approval in principle to outright rejection. No member expressing his view of effect on this agency gave outright endorsement to any specific uniform rule.” Administrative Conference, *Statement on ABA Proposals to Amend the Administrative Procedure Act*, 25 AD. L. REV. 419, 441 (1973).

30. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C. §§ 1-27 (1970)).

31. 15 U.S.C. § 717c(c) (1970) (FPC-gas pipeline); 16 U.S.C. § 824d(c) (1970) (FPC-electric); 47 U.S.C. § 203 (1970) (FCC); 49 U.S.C. § 6(1) (1970) (ICC-rail); 49 U.S.C. § 317(a) (1970) (ICC-motor common carriers); 49 U.S.C. § 1373(a) (1970) (CAB).

32. 49 U.S.C. § 1(5) (1970) (ICC-rail). Compare 15 U.S.C. § 717c(a) (1970) (FCC-gas pipeline); 16 U.S.C. § 824d(a) (1970) (FPC-electric); 47 U.S.C. § 201(b) (1970) (FCC); 49 U.S.C. § 316(d) (1970) (ICC-motor common carriers); 49 U.S.C. § 1374(a) (1970) (CAB).

33. 49 U.S.C. §§ 2, 3(1) (1970) (ICC-rail). Compare 15 U.S.C. § 717c(b) (1970) (FCC-gas pipeline); 16 U.S.C. § 824d(b) (1970) (FPC-electric); 47 U.S.C. § 202 (1970) (FCC); 49 U.S.C. § 316(d) (1970) (ICC-motor common carriers); 49 U.S.C. § 1374(b) (1970) (CAB).

Determining whether a rate proposal meets this double standard can be difficult. The “just and reasonable” requirement forces the agency to ask whether the proposed rates allow the firm no more than (and no less than) the amount of revenue necessary to earn a reasonable rate of return on investment. Traditionally, that determination has been made by assessing the cost to the firm of purchased goods and services, the “fair value” of the firm's invested capital or “rate base,” the cost of debt and equity capital to the firm (its proper “rate of return”), the projected income to the firm from the proposed rate schedule, and whether the projected income exceeds the determined costs. These ele-

The most obvious opportunity an agency has to review a rate is when the tariff is initially proposed. Routinely, regulated firms are required to file tariff changes with the agency and to provide at least thirty days notice to the public prior to the effective date of each change. During this notice period, the agency has some opportunity to consider the propriety of each proposal. To make such a determination in every case, however, simply would not be practical. In agencies that are inundated with tariffs, a large proportion of which are routine rule changes that the firms are required by law to put on file,³⁴ agency review is largely limited to determining that filings are in the prescribed form and have no patently illegal requirements.³⁵ Consequently, as Table I illustrates, agencies allow the overwhelming majority of tariff filings to go into effect after no significant scrutiny at all.

The agencies' selection of which tariffs to evaluate seriously is obviously crucial. A few tariffs stand out because of their national impact or because of the unusually large size of the requested increases. Beyond these, selection has been heavily dependent on objections from custom-

ments and the complexity surrounding the proof of each is developed in all standard economics and legal texts on regulation. *E.g.*, 1 A. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 25-54 (1970); T. MORGAN, *CASES AND MATERIALS ON ECONOMIC REGULATION OF BUSINESS* 213-89 (1976). Suffice it to say here that each of these issues—but particularly valuation of the rate base and the proper rate of return to be allowed—are often factually ambiguous and hotly contested.

The prohibition of "unjust discrimination" requires the agency to determine whether the proposed structure of rates allocates the burden of paying for the service, if not equally upon the various customers, then in a legally acceptable way. This analysis can be particularly controversial and extraordinarily important, involving analysis of the long-run marginal cost of serving each customer, determination of the effect of a given rate on particular competitors and customers, and consideration of such general objectives as energy conservation and the desirability of lifeline services for the very poor. *See* 1 A. KAHN, *supra*, at 54-57; T. MORGAN, *supra*, at 368-466; Baumol, *Reasonable Rules for Rate Regulation: Plausible Policies for an Imperfect World*, in *THE CRISIS OF THE REGULATORY COMMISSIONS* 187 (P. MacAvoy ed. 1970).

34. No hard data is available that distinguishes the number of substance-less rule change tariffs from rate changes properly subject to careful scrutiny, but all analysts agree that the proportion of "chaff" is very high.

35. Even if it profoundly disapproved of a rate, the agency probably could not take final action to reject it except for terms which violate a statute or commission rule. For example, an agency does not normally have the power to reject a rate out of hand simply because it believes it is too high. *Associated Press v. FCC*, 448 F.2d 1095, 1104 (D.C. Cir. 1971). Likewise, the courts have held that the FCC could not require that a firm receive prior permission before filing a tariff change. *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865 (2d Cir. 1973). *See also United Gas Pipe Line Co. v. United States*, 551 F.2d 460 (D.C. Cir. 1977).

TABLE I³⁶
 THE NUMBER OF TARIFF FILINGS AT EACH AGENCY AND THE
 NUMBER CONSIDERED FOR SUSPENSION

Agency	Total Tariff Filings in a Recent Year	Total Rejected for Improper Form	Total Seriously Considered for Suspension	Total Allowed to go Into Effect
ICC ³⁷ Rail (FY* 1976)	54,812	126 (<1%)	274 (<1%)	54,412 (99%)
Motor (FY* 1976)	236,553	2,339 (1%)	1,813 (1%)	232,401 (98%)
FCC ³⁸ (1976)	989	10 (1%)	50 (5%)	929 (94%)
CAB ³⁹ (1976)	12,235	979 (8%)	248 (2%)	11,008 (90%)
FPC Elec. ⁴⁰ (FY* 1975)	462	—	134 (29%)	328 (71%)
Gas ⁴¹ (FY* 1975)	317	15 (5%)	69 (19%)	233 (76%)

* Fiscal Year

ers or competitors—called “protests”—against the proposed rate.⁴² Agencies appear to take the position that if proposals do not gore anyone’s ox enough for it to bellow, intervention is not needed.

But even serious review of a tariff does not necessarily mean disapproval. If a tariff is subjected to serious review, the next critical decision all four agencies face is whether to “suspend” the tariff pending

36. The data for Table I was obtained from the sources cited in notes 37-41 *infra*.

37. 90 ICC ANN. REP. 120-22 (1976). This data reflects the period prior to passage of the “4R Act” discussed at note 43 *infra*. Presumably, that statute would tend to make the “automatic approval” rate even higher.

38. This data is not routinely collected and published by the FCC. The data for use in this table was assembled by the Tariffs Division of the Common Carrier Bureau whose help is gratefully acknowledged.

39. The underlying data for this agency is recorded in numbers of tariff “pages.” To get comparability with the other agencies, total pages were divided by 12, the average number of pages per filing as determined by the CAB Bureau of Accounts and Statistics.

40. These figures were derived from personal examination of docket entry sheets, available for public inspection in the Office of Public Information, Federal Power Commission, Wash., D.C., for the 644 electric rate case files opened in fiscal year 1975. The figure 462 was obtained by subtracting the 182 cases dealing with securities issues, service terminations, and other matters not directly related to rates. The figure 134 in the third column is taken from FPC ANN. REP. 22 (1975), a reference only loosely corresponding to the “considered for suspension” category.

A higher proportion of FPC cases are considered for suspension than at the other agencies because electric and gas utilities tend to file their routine changes with state commissions. The FPC filings tend to be major wholesale contracts. See text accompanying notes 91-93 *infra*.

41. The figures on FPC gas tariffs were obtained from data on docket entry sheets available for public inspection in the Office of Public Information, Federal Power Commission.

42. 15 U.S.C. § 717c(e) (1970) (FPC-gas pipeline); 16 U.S.C. § 824d(e) (1970) (FPC-electric); 47 U.S.C. § 204 (1970) (FCC); 49 U.S.C.A. § 15(7) (Cum. Supp. 1977) (ICC-rail); 49 U.S.C. § 316(g) (1970) (ICC-motor carriers); 49 U.S.C. § 1482(g) (1970) (CAB).

further examination.⁴³ Suspension means that for a limited period—seven months at the ICC,⁴⁴ five months at the FPC⁴⁵ and FCC,⁴⁶ and up to 180 days at the CAB⁴⁷—the rate may not go into effect, thus giving the agency time to investigate the reasonableness of the rate and to determine whether the proposal illegally discriminates against any consumers. Alternatively, a protested rate may be investigated but not suspended, or suspended only briefly and followed by an “accounting order” which subjects the increase to possible refund.⁴⁸ More commonly, however, the agency will approve the rate without either suspension or investigation. Table II shows the proportion of seriously considered tariffs which were

TABLE II⁴⁹
PROPORTION OF SERIOUSLY-CONSIDERED SUBSTANTIVE
TARIFFS ACTUALLY SUSPENDED OR INVESTIGATED

Agency		Tariffs Considered Closely	Approved Without Suspension	Withdrawn by Carrier	Suspended or Inves- tigated
ICC	Rail (FY* 1976)	274	160	40	74 (27%)
	Motor (FY* 1976)	1,813	929	305	579 (32%)
FCC	(1976)	50	30	—	20 (40%)
CAB	(1976)	248	165	56	27 (11%)
FPC	Electric (FY* 1975)	134	78	5	51 (38%)
	Gas Pipeline (FY* 1975)	63	24	—	39 (62%)

* Fiscal Year

43. In general, decisions whether or not to suspend rates are not subject to judicial review. The issue of whether a decision is part of the suspension process, however, is reviewable. *See, e.g., Mobil Alaska Pipeline Co. v. United States*, 557 F.2d 775 (5th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3337 (1977).

The Railroad Revitalization and Regulatory Reform Act of 1976 (“4R Act”), Pub. L. No. 94-210, 90 Stat. 31, makes significant changes in the authority of the ICC to suspend rail rates and thus should reduce the frequency of suspensions in such rail cases even more. A rate may not be set aside as too low if it “would contribute to the going concern value” of the railroad (49 U.S.C.A. § 1(5) (Cum. Supp. 1977)), and may be held too high unless the Commission finds the carrier has “market dominance,” defined as an “absence of effective competition.” 49 U.S.C.A. § 1(5)(c)(i) (Cum. Supp. 1977). The Commission thus may not suspend a non-general increase without either a finding of market dominance or a complaint of predatory pricing where the total of rate changes in the last 365 days as to the tariff in question has not been over seven percent up or down, (49 U.S.C.A. § 15(8)(b), (c) (Cum. Supp. 1977)), and may not suspend in any case unless “substantial injury” would otherwise be caused. 49 U.S.C.A. § 15(d)(i) (Cum. Supp. 1977).

44. 49 U.S.C.A. § 15(7) (Cum. Supp. 1977); 49 U.S.C. § 316(9) (1970).

45. 15 U.S.C. § 717c(e) (1970); 16 U.S.C. § 824d(e) (1970).

46. 47 U.S.C.A. § 204 (Cum. Supp. 1977).

47. 49 U.S.C. § 1482(g) (1970). The Board is to begin with a 90-day suspension but it may increase the period to up to 180 days in all.

48. 15 U.S.C. § 717c(e) (1970) (FPC-gas pipeline); 16 U.S.C. § 824d(e) (1970) (FPC-electric); 47 U.S.C.A. § 204(a) (Cum. Supp. 1977) (FCC); 49 U.S.C.A. § 15(8)(e) (Cum. Supp. 1977) (ICC-rail).

49. The data reported in this table was obtained from the sources described in notes

actually suspended, investigated, or both, in each agency during a recent twelve month period.

As noted, the decision whether or not to suspend is one of the most critical in the ratemaking process.⁵⁰ But up to the point of suspension, delay is not a serious issue because protests are made and considered in the statutory period before the rates could have become legally effective. Only when the agency suspends a tariff does delay become significant. Consequently, those cases are the primary focus of this article.

Once a rate is challenged, each of the relevant statutes requires that it be evaluated in a "hearing."⁵¹ As interpreted by the agencies, the basic format of a rate investigation hearing, whether or not pursuant to a suspension, is that of a traditional adversary hearing⁵² in which the proponent has the burden of proof.⁵³ The proponent submits vast amounts of cost data, sometimes at the time the tariff is proposed,⁵⁴ but normally not until the proposal is contested. Then, the proponent's witnesses and those of the objectors testify, often largely in the form of written statements but in any case subject to oral cross-examination.⁵⁵ At most agencies, an administrative law judge renders an initial decision,⁵⁶ which is then subject to review by the entire commission.⁵⁷ This procedure is time consuming. Table III reveals the four agencies' recent experience in reaching decisions in rate cases.

37-41 *supra*. Note that a tariff which is not suspended does not have its effectiveness delayed. Thus the numbers of "suspended or investigated" cases in the fourth column of this table will often be greater than the number of suspended cases analyzed in later tables. See also note 58 *infra*.

50. The issues surrounding this determination were carefully considered by the Administrative Conference in 1972. The Conference recommendations are set forth at 1 C.F.R. § 305.72-4 (1977). Underlying these proposals was an excellent report, published as Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. PA. L. REV. 39 (1971), which goes more deeply into the workings of the process at each agency than has been done here.

51. 15 U.S.C. § 717c(e) (1970) (FPC-gas pipeline); 16 U.S.C. § 824d(e) (1970) (FPC-electric); 47 U.S.C.A. § 204(a) (Cum. Supp. 1977) (FCC); 49 U.S.C.A. § 15(8)(a) (Cum. Supp. 1977) (ICC-rail); 49 U.S.C. § 316(g) (1970) (ICC-motor carriers); 49 U.S.C. § 1482(g) (1970) (CAB).

52. 14 C.F.R. §§ 302.1-.37, .500-.508 (CAB); 18 C.F.R. §§ 1.1-.34 (FPC); 47 C.F.R. §§ 1.201-.363 (1976) (FCC); 49 C.F.R. §§ 1100.1-.250 (1976) (ICC) (Modified Procedure, an important alternative procedural device at the ICC, is discussed *infra* at text accompanying notes 67-74).

53. 15 U.S.C. § 717c(e) (1970) (FPC-gas pipeline); 16 U.S.C. § 824d(e) (1970) (FPC-electric); 47 U.S.C.A. § 204(a) (Cum. Supp. 1977) (FCC); 49 U.S.C.A. § 15(8)(f) (Cum. Supp. 1977) (ICC-rail); 49 U.S.C. § 315(g) (1970) (ICC-motor carriers); 14 C.F.R. § 302.506 (1977).

54. *E.g.*, 49 C.F.R. § 1102.2 (1976) (ICC-rail general increase).

55. 14 C.F.R. §§ 302.23-.24 (1977) (CAB); 18 C.F.R. §§ 1.20-.26 (1977) (FPC); 47 C.F.R. §§ 1.351-.363 (1976) (FCC); 42 Fed. Reg. 23,819-21 (1977) (to be codified in 49 C.F.R. §§ 1100.72-.84) (ICC).

56. 14 C.F.R. § 302.27 (1977) (CAB); 18 C.F.R. § 1.30 (1977) (FPC); 47 C.F.R. § 1.267 (1976) (FCC); 42 Fed. Reg. 23,822 (1977) (to be codified in 49 C.F.R. § 1100.91) (ICC).

57. 14 C.F.R. §§ 302.28-.32, .36 (1977) (CAB); 18 C.F.R. § 1.31 (1977) (FPC); 47 C.F.R. §§ 1.276-.282 (1976); 42 Fed. Reg. 23,822 (1977) (to be codified in 49 C.F.R. §§ 1100.92-.93) (ICC).

TABLE III⁵⁸
 AVERAGE ACTUAL DECISION TIME IN THE FOUR AGENCIES

Agency	Number of Cases	Average Actual Time in Days from Case Filing to Final Decision	Standard Deviation
Rail	41	325	144
ICC			
Motor	50	246	143
FCC	7	1054	464
CAB	9	664	(n/a)
Electric	48	625	219
FPC			
Gas Pipeline	33	747	175

B. *The Experience at Particular Agencies*

Obviously, no agency, except the ICC, has been even coming close to deciding cases in the six to eight months allowed by the suspension process. Although the passage of time is not the only measure of whether undue "delay" is occurring, the periods shown in Table III illustrate why a problem is perceived to exist today. This general analysis, however, only partly explains the extent and causes of delay in federal ratemaking. Each of the agencies has both particular problems with which to deal and experiences generated from the attempts to solve them.

1. *Interstate Commerce Commission*

The ICC has one of the largest dockets of rate cases⁵⁹ and disposes of several kinds of cases faster than any other agency.⁶⁰ More than just the investigation and suspension cases previously discussed come before the ICC. Often, the Commission allows rates to become effective when proposed, and that does not thereby make those rates immune from attack. A competitor or customer who believes that a particular rate is inherently unlawful or unlawful as applied⁶¹ may initiate an alternative

58. These times are calculated summaries of data the derivation of which is described fully in the sections on individual agencies which follow. The number of cases for which the averages are calculated do not wholly track the figures in Table II, partly because the time periods used for analysis sometimes differ. See text accompanying notes 63, 78, 89, 95 *infra*.

59. An extremely thorough study of the process of decision at the ICC, substantially still accurate today, was prepared by Dean Roger C. Cramton, then of the University of Michigan Law School, in his capacity as reporter to the Committee on Rulemaking of the Administrative Conference. See R. Cramton, *The Conduct of Rate Proceedings in the Interstate Commerce Commission* (Dec. 1, 1966) (unpublished paper on file in the offices of the Administrative Conference of the United States).

60. A more complete summary, again showing the relative success of the ICC, is provided in Table VIII, at text accompanying note 100 *infra*.

61. 49 U.S.C. §§ 13(1), 15(1) (1970) (rail); 49 U.S.C. § 316(e) (1970) (motor common carrier).

“complaint” proceeding seeking damages and a new rate. Table IV summarizes the data for ten different combinations of subject matter and procedure before the ICC and divides the information into four case processing stages: (1) the time required to prepare the case prior to hearing or submission of written material for decision,⁶² (2) time taken

TABLE IV⁶³
AVERAGE PROCESSING TIME IN DAYS FOR ICC RATE CASES
CLOSED BETWEEN JULY 1, 1976 AND JUNE 1, 1977

Type of Case	Number of Cases	Time from Filing to Hearing or Submission	Length of Hearing	Period from Hearing to Initial Decision	Period from Initial to Final Decision	Total Days Required	Standard Deviation
1. RAIL—I & S* —Oral Hearing	6	83	9	—	225	317	137
2. —Modified Procedure	35	166	—	—	160	326	147
3. MOTOR—I & S* —Oral Hearing	4	84	51	—	300	435	383
4. —Modified Procedure	46	89	—	—	142	231	96
5. RAIL-Complaint —Oral Hearing	33	310	94	227	344	975	405
6. Modified Procedure with appeal of initial decision	41	141	—	173	231	545	160
7. —Modified Procedure without appeal	24	99	—	135	—	234	118
8. MOTOR-Complaint —Oral Hearing	5	254	26	285	323	889	412
9. —Modified Procedure with appeal of initial decision	15	136	—	133	387	656	298
10. —Modified Procedure without appeal	15	151	—	203	—	354	200

* Investigation and Suspension

The standard format for a complaint case is the same full-scale adversary hearing discussed earlier, except that the burden of proof is placed on the objector. *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 812 (1973). All four agencies provide for a complaint procedure, *see* 15 U.S.C. §§ 717d(a), 717 (1970) (FPC-gas pipelines); 16 U.S.C. §§ 824(c), 825(e) (1970) (FPC-electric rates); 47 U.S.C. § 208 (1970) (FCC); 49 U.S.C. § 1482(a) (1970) (CAB). The procedure, however, is used far more by the ICC than by the other agencies. The greater number of complaint cases at the ICC may be partly a result of the more cursory review that agency gives tariffs when originally filed.

62. Under the modified procedure described later, there is no hearing but there is a time after which no more submissions may be offered and the case is thus in the hands of the decisionmaking body. 42 Fed. Reg. 23,814 (1977) (to be codified in 49 C.F.R. § 1100.49) (ICC).

63. The statistical data on ICC cases here and in the following tables is derived from computerized information obtained from the section of Case Control and Information,

for the hearing, if any, (3) time elapsed between the end of the hearing and the initial decision by the administrative law judge, and (4) time required for review by the Commission itself.

At the outset, one may be struck by the difference in time it takes to decide a complaint case as compared to an I & S case. Looking only at oral hearing cases, the difference is 975 versus 317 days for rail cases and 889 versus 435 days for motor carrier cases. The reason for the difference might be that the issues in investigation and suspension cases are more straightforward. Many proposed tariff changes come to the ICC only after eliminating most controversial provisions. Railroads and motor carriers are organized into rate bureaus—associations of carriers that file consolidated rate requests.⁶⁴ Disagreements among the carriers are normally resolved before the tariff is filed. Protests, as a result, tend to come from shippers who either complain about any increase at all or about the effect of the increase on them.⁶⁵ Objections of the first type usually are doomed, and those of the second type can ordinarily be accommodated.⁶⁶

Office of Proceedings, Interstate Commerce Commission. The help and imagination of Mr. John Surina, Chief of the Section of Case Control and Information, in retrieving the relevant data is gratefully acknowledged. Each case in any kind of open status on July 1, 1976 is stored in a form which the computer can retrieve. The data in these tables was developed by retrieving information on all such rate cases that were closed between July 1, 1976 and June 1, 1977, regardless of when filed. That does not constitute an entire year of cases, but because the universe selected contains a fair share of very old cases as well as cases opened after July 1, 1976, the statistics collected here are properly representative of the experience at the ICC. This data is consistent with both the statistics published in 90 ICC ANN. REP. 113-14 (1976), and ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS 237-53 (1977).

64. "Price-fixing" by regulated railroads was found to be an antitrust violation by the Supreme Court in such cases as *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), and *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). The Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948) (current version at 49 U.S.C. § 5(2)(b) (1970)), however, now expressly authorizes such conduct by both railroads and motor carriers.

The ICC has been sensitive to criticism of rate bureaus as private price-fixing conspiracies and has tried to minimize some of the undesirable elements. For example, it has required rate bureaus to keep formal minutes of all rate committee proceedings, and maintain the minutes for Commission inspection. Bureaus must decide whether or not to bring forward the proposal of an individual carrier within 120 days, absent unusual circumstances, and if the carrier brings forth a proposal on its own, the rate bureau of which it is a member is forbidden to protest it. See *Rate Bureau Investigation*, 349 I.C.C. 811 (1975), *aff'd sub nom. Motor Carriers Traffic Ass'n v. United States*, 559 F.2d 1251 (4th Cir. 1977). The "4R Act" represents enactment of even tougher rules, designed to preserve the right of any given carrier to pursue an independent course. See 49 U.S.C.A. § 5c (Cum. Supp. 1977).

65. In a critique of Spritzer, *supra* note 50, Professor Robinson noted that in 1962 more ICC suspensions involved rate decreases than increases. See Robinson, *The Administrative Conference and Administrative Law Scholarship*, 26 AD. L. REV. 269, 273-75 (1974). The picture seems now to have changed. The data is not routinely assembled, but in a submission to a Subcommittee of the Senate Commerce Committee the Commission determined that in a series of rate cases extending over six years, over twice as many of the suspensions involved customers or the agency challenging rate increases as involved competitors challenging rate decreases. See *Legislation Relating to Rail Passenger Service: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1052-57 (1975).

66. It should come as no surprise, then, that as noted in Table II, at text accompanying note 49 *supra*, over one-third of the tariffs not approved by the Commission are

However, there is really no good reason to expect the issues in a case to be simpler because the case arises earlier rather than later. The time differences are probably better explained by differences among the procedures used in particular kinds of cases. Here Table IV reveals two factors which seem to explain the improved ICC performance. First, alone among the four agencies studied, the ICC relies heavily on a "modified procedure" to process large numbers of cases.⁶⁷ The basic feature of the modified procedure is the elimination of oral hearings unless necessary to decide a specific contested issue of fact.⁶⁸ In addition, the Commission has eliminated trial procedures such as the answer, and the briefs and evidence are filed concurrently.⁶⁹ Table IV(A) documents that the time savings from the modified procedure are often significant. As can be seen, use of the modified procedure saved as much as 430 days in rail complaint cases. Although some differences are greater than others and the numbers of cases in some categories are small, the overall picture seems clear. Heavy use of the modified procedure at the ICC has speeded up its processes.

TABLE IV (A)⁷⁰
TIME SAVED USING THE ICC MODIFIED PROCEDURE

Type of Case	Total Days Using Oral Procedure	Total Days Using Modified Procedure
RAIL		
—I & S	317 (N=6)	326 (N=35)
—Complaint	975 (N=33)	545 (N=41)
MOTOR		
—I & S	435 (N=4)	231 (N=46)
—Complaint	889 (N=5)	656 (N=15)

withdrawn by the carriers instead of being pressed. Such tariffs are frequently refiled with provisions more acceptable to the protestors and consequently attract no further attention. Indeed, about 10 times each year, the Commission itself invites such withdrawals with its "permissive orders"—suspensions of the requested rate increase coupled with an approval of "not more than —%" which the company may put into effect on one day's notice. Such a "compromise" allows the company to litigate its full request if it wishes, or withdraw it and take half a loaf. Not surprisingly, the latter is frequently seen as prudent. The process is discussed in Spritzer, *supra* note 50, at 55 n.68, and compared with the CAB's use of the "speaking order," a more coercive technique that was struck down in *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). See Spritzer, *supra* note 50, at 84.

67. The rules are set forth at 42 Fed. Reg. 23,813-14 (1977) (to be codified in 49 C.F.R. §§ 1100.43-.52) (ICC).

68. *Id.* at 23,814 (to be codified in 49 C.F.R. § 1100.51) (ICC).

69. *Id.* (to be codified in 49 C.F.R. § 1100.49) (ICC):

Within 20 days from the date of service of an order requiring modified procedure, complainant shall serve upon the other parties a statement of all the evidence upon which it relies. Within 30 days thereafter defendant shall serve its statement. Within 20 days thereafter complainant shall serve its statement in reply. No further reply may be made by any party except by permission of the Commission.

70. The data for Table IV(A) was derived from the same source as the data used in Table IV, discussed at note 63 *supra*.

A second significant source of time savings at the ICC is the elimination of steps in the decisionmaking process. Investigation and suspension cases, for example, often skip the initial decision stage. The record is reviewed directly by Division 2 of the Commission, which has final decisionmaking authority.⁷¹ In many other cases, the parties accept and forego appeal of the initial decision.⁷² Such acceptance is not, of course, something the Commission can plan, but these cases give another basis for estimating the time saved by skipping a step. Table IV(B) illustrates that when the basic procedure remains constant, skipping a level of review can cut decision time by as much as a year.

TABLE IV (B)⁷³

TIME SAVED IN DAYS BY ELIMINATION OF A DECISION LEVEL

	Complaint Cases— Modified Procedure with Initial & Final Decision	Complaint Cases— Modified Procedure with Unappealed Initial Decision	I & S Cases— Modified Procedure with no Initial Decision	I & S Cases— Oral Hearing with no Initial Decision
RAIL	550	234	322	317
MOTOR	656	354	231	435

Even oral I & S cases—which add a hearing step but eliminate a decision level—take an average of seven months less than full-scale modified procedure complaint cases. The dramatic differences noted earlier between oral I & S and complaint cases only confirms the point. As Table IV shows, initial decisions not only take considerable time themselves, they do not significantly reduce the time needed for the Commission's own decision.

To summarize, two factors largely peculiar to the ICC seem to speed up the decisionmaking process: the use of "modified procedure" involving large amounts of written evidence, and the elimination of one of the two traditional decision steps. Whether the quality of decision has suf-

71. 42 Fed. Reg. 23,822 (1977) (to be codified in 49 C.F.R. § 1100.92) (ICC). In some cases the decision will come from Review Board 4. The criteria for deciding which cases will get shortened or expedited processing are nowhere spelled out, but if all such cases are seen as "easy" before assignment, this may account for some part of the faster processing times.

72. Of course, modified procedure cases are not the only ones in which initial decisions go unappealed. Numbers of comparable oral hearing cases, however, were so small (two or less) that they made the table more cluttered than clear.

73. Data compiled in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS 237-53 (1977) for cases terminated in fiscal year 1975 are basically consistent with this table. Rail complaint cases with appeal of the initial decision (combining both oral hearings and modified procedure cases) required a total of 638 days. For cases in which the initial decision was not appealed, the average was 331 days. Motor carrier complaint cases with appeal of the initial decision (combining both oral hearing and modified procedure cases) averaged 696 days, but where the initial decision was not appealed, the average was 322 days.

ferred as a result of either or both of these practices is open to speculation, but these insights into where delay occurs should be helpful in formulating a revised strategy for ratemaking.

2. *Federal Communications Commission*

The ICC decides so many cases and uses so many alternative procedures that it generates a wealth of data. The FCC, on the other hand, is the hardest agency on which to develop meaningful statistics.⁷⁴ Everything its Common Carrier Bureau does is so dominated by AT & T matters that there are no typical cases. When AT & T files a tariff for a new rate or service, competitors literally can be wiped out and customers can foresee a significant difference in year-end profits. Affected firms understandably want and need to be heard, and the FCC lets them make their cases. Alternatively, when someone other than AT & T makes a competitive move, AT & T frequently objects, responds, or both.⁷⁵

Although infrequent, FCC rate cases tend to be long. The experience of cases filed in 1974 illustrates the process. Twelve dockets were opened that year,⁷⁶ but there were only five real controversies to litigate—three AT & T proposals and two FCC-initiated investigations. The two FCC investigations remain open and no progress is apparent; the three AT & T proposals, however, have been litigated to completion. But because this is too small a statistical base, statistics used here are based on the seven major cases filed between 1972 and 1974 that have now been completed. Four of these cases were traditional oral hearing cases; three used an “all written” format unusual at the FCC.⁷⁷ The data on each of the cases is presented in Table V.

74. The Spritzer study in 1971 was unable to develop statistics on the FCC. See Spritzer, *supra* note 50, at 62 n.92. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS (1977) also contains no FCC data for reasons of the kind developed in this section.

75. Now that AT & T is in a “competitive” environment and rate cases are highly serious, the Commission has largely abandoned its long-time “continuing surveillance” of AT & T. Thus Bell tariffs are no longer approved informally, during pre-filing negotiations with the Commission staff. For criticism of the former policy, see Spritzer, *supra* note 50, at 62-75.

76. Of these, three were AT & T tariffs (FCC dockets 19919, 19989, and 20288); two dockets were direct Western Union responses to these AT & T tariffs (FCC dockets 20080 and 20069). FCC-initiated investigations into satellite and microwave tariffs constituted two more cases (FCC dockets 20098 and 20198). The final five dockets were complaints filed by competitors of AT & T and were each settled and withdrawn shortly after filing (FCC dockets 19934, 20099, 20183, 20199, and 20304).

77. Apparently the view of the FCC has been that the record produced by all-written submissions is not as issue-directed as the record produced by an oral procedure. That is, much information that can be supplied in a written form does not join issue with opposing positions and consequently is not directly relevant to questions that must be resolved. Oral hearings provide a cause of delay, but under some circumstances, they may produce somewhat better decisions. In any event, the FCC has now discontinued use of its “all written” evidence procedure, at least for the time being.

TABLE V⁷⁸
TOTAL PROCESSING TIME IN DAYS FOR EACH OF
SEVEN MAJOR FCC RATE CASES

Dkt. #	Case Filing to Hearing or Submission	Length of Hearing, if any	Hearing to Initial Decision	Initial to Final Decision	Total Days Required
19129 (2)	837	629	163	224	1,853
19609	84	183	638	644	1,549
19696	268	58	212	81	619
19919	301	—	308 ⁷⁹	128	737
19982	690	—	—	100	790
20084	320	169	162	350	1,001
20288 ⁸⁰	434	—	125	274	833

Trying to draw significant conclusions from such a limited number of cases is precarious; each case is unique and no clear pattern emerges.⁸¹ The data does seem, however, to reconfirm the observation made with reference to ICC cases that “all-paper” proceedings tend to be quicker than oral hearings—in FCC cases, an average of 469 days quicker.⁸² A second general point is that it appears that cases take longer to prepare to try at the FCC than at the ICC. It may be that FCC cases are sufficiently large and complex that simply sorting out the issues and allowing full participation is a bigger task, a fact which, if true, may make this article’s proposals on data management particularly useful to the FCC.

78. The data contained in Table V was derived by personal examination of FCC files in the Docket Control Room, Common Carrier Bureau, Federal Communications Commission, Wash., D.C.

79. In FCC dockets 19919 and 19982, there was no initial decision; the cases went directly to the Commission. But in FCC docket 19919 the Commission itself issued an interim decision. The FCC has now largely abandoned this system of direct Commission review. See 47 C.F.R. § 1.267(a) (1976).

80. FCC docket 20288 is an interesting case in that the FCC originally proposed to decide it within one year. Motions for extensions, however, extended the time needed for decision to somewhat over two years. The decision, on its face, was unfavorable to the AT & T rate proposal, but by the time the FCC reached a decision, the delay so weakened the firm competing with AT & T that for practical purposes AT & T won the war.

81. Although the sample is small, nothing indicates that the data is unrepresentative. In *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975), the court of appeals found the decision-making process at the Commission to be so prolonged that the court took the unprecedented step of ordering the Commission to submit a schedule for the orderly and expeditious resolution of long pending cases. It then required the agency to adhere to the schedule. *Id.* at 207.

82. The quickest processing of a major FCC case that this study revealed was the WATS case, in which the Commission rejected Bell’s tariff even before giving the proposal a formal docket number. AT & T filed its tariff on April 29, 1977 and the Commission adopted its decision on July 21, less than 90 days later. FCC 77-529, Transmittal No. 12745. The author is reliably informed that the case arose when the Common Carrier Bureau did not have other extensive demands on its time, thus enabling it to focus on the one big case.

3. *Civil Aeronautics Board*

The CAB is second only to the ICC in the number of tariffs that it reviews, but it tries only about the same number of cases as the FCC. As Table II indicated, fully two thirds of the eighty-three tariffs not approved by the Board were withdrawn by the carriers.⁸³ The reasons why the carriers switch rather than fight before the CAB are not completely clear, but one reason seems to be that the CAB deals much more aggressively with tariffs than does the ICC. As a result of its Domestic Passenger Fare Investigation (DPFI),⁸⁴ the CAB has developed a formula that can be used, for example, to determine whether a requested across-the-board rate increase would cause the firm to earn more than twelve percent, the pre-determined proper rate of return.⁸⁵ Discount fares also are subject to a pre-announced CAB treatment.⁸⁶ One might speculate, then, that to the extent an agency is willing to make its ultimate positions known in advance, as the CAB has done through the DPFI, firms may test the limits of those positions but ultimately will conform rather than force the issue.⁸⁷

The only available statistics published by the CAB on cases actually litigated are for cases closed in 1971 and 1972; these are shown in Table VI. More recent information indicates that the CAB's performance is not

83. Even this figure understates the phenomenon. The 27 tariffs not withdrawn actually represent only six distinct disputes. Eighteen of the tariffs were routinely suspended and included on a single docket in the on-going Domestic Air Freight Rate Investigation. See CAB docket 22859. Four others involving tariffs on overbooking were also combined, see CAB docket 29641, as were two others involving service to Alaska. See CAB docket 29198. Only three of the 27 tariffs were individual cases. See CAB docket 28829 (UAL tariff for poisonous insects); CAB docket 29139 (Continental Ski Fare, discussed in note 87 *infra*); and CAB docket 30288 (Texas International night coach fare).

84. CAB docket 21866, instituted by Order 70-1-147 (Jan. 29, 1970). A useful background and critique is provided in Douglas & Miller, *The CAB's Domestic Passenger Fare Investigation*, 5 BELL J. ECON. & MGMT. SCI. 205 (1974).

85. Rate of return was determined in Phase 8, Order No. 71-4-58 (Apr. 9, 1971). The general fare increases proposed during fiscal year 1976 are summarized in [1976] CAB ANN. REP. 20 (1977). All cases to which the DPFI was applied were resolved within the 30-day notice period.

86. Phase 5, Order 72-12-18 (Dec. 5, 1972).

87. Another reason that carriers withdrew such a large portion of their tariff proposals may be the length of CAB proceedings as indicated in Table VI. The length of the proceedings has the inevitable effect of making many rate issues moot before the agency reaches a decision. In CAB docket 30115, for example, Continental Airlines proposed a special air fare to ski resort areas; suspension of that case meant that it could not possibly be resolved during the ski season and it was ultimately dismissed as moot. On the other hand, National Airlines' "No Frill" fares were vigorously opposed by its competitors. The Board refused to suspend the fares but did set them for investigation, thus giving attention to the objectors' concerns but not delaying the public benefit of the fares. This investigation continued until National voluntarily canceled the "No Frill" fares. CAB docket 27671, Order 76-6-3 (June 1, 1976).

TABLE VI⁸⁸
 AVERAGE PROCESSING TIME IN DAYS FOR RATE CASES
 COMPLETED AT THE CAB IN 1971-72

Year	Number of Cases	Period from Filing to Prehearing Conference	Period from Prehearing Conf. to Initial Decision	Period from Initial to Final Decision	Total Days Required
1971	3	31	216	214	461
1972	6	114	304	348	766

improving. The three cases reported for 1975⁸⁹ averaged 1,369 days—over three years—from beginning to end, including 967 days before the Board awaiting a final decision. All the cases, including the three reported for 1975, received oral hearings. Again, it is probably unfair to draw serious conclusions from such a small data base. But one thing the data suggest is that the Board itself takes a disproportionate amount of time to reach a final decision in rate cases. If fairly representative of a continuing phenomenon,⁹⁰ this confirms the insight derived from the ICC cases that the most promising place for saving time is the decision stage of the process.

4. *Federal Power Commission*

Rate cases at the FPC (now the Federal Energy Regulatory Commission) differ from those at other agencies in that the subject of review is normally not a tariff published for the world, but a proposed arrangement between two utilities.⁹¹ Objectors to a rate increase are usually either the utilities that buy the power or the ultimate consumers. In the case of

88. Data obtained from the ADVISORY COMMITTEE ON PROCEDURAL REFORM, CIVIL AERONAUTICS BOARD, REPORT, at 6 (1975). The CAB was very reluctant to release data on the length of cases actually tried before it. The Board attributed its reluctance in part to the fact that it had so few cases that none were representative. The CAB bureau primarily responsible for gathering such data is the Bureau of Accounts and Statistics, but the Bureau of Economics and the Office of the General Counsel were also unable or unwilling to provide the data.

Notice that the category for the period from filing to prehearing conference is a different category than that used in the other tables in this report. Data necessary to make the tables comparable was unavailable.

89. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS 108 (1977).

90. Informal conversations with staff members indicate that the data does accurately reflect a current problem. Some members of the Board have allegedly delayed final outcomes by taking several months to write a dissent, for example, thereby postponing an outcome of which they disapproved.

91. The statutes speak in terms of rate "schedules," 15 U.S.C. § 717c (1970) (gas pipelines); 16 U.S.C. § 824d (1970) (electric), and require that the firms sell at the same rates to customers similarly situated. But in reality, utilities do not shop for wholesalers as frequently, or in the same way that airline passengers or motor carrier shippers select their carriers. The FPC's jurisdiction resembles the ICC's contract carrier function more than the ICC's common carrier ratemaking jurisdiction.

wholesale electric rates, for example, frequent objections come from co-ops and municipal systems that believe the utility is overcharging them to disadvantage them in relation to private utilities. As a result, the agency is presented with far fewer total rate issues than the agencies that must receive every minor tariff change. The FPC, however, considers each case far more carefully than comparable submissions elsewhere. The Commission purports to approve none automatically,⁹² though as Table II showed, about eighty-five percent of electric rate agreements and thirty-eight percent of gas pipeline rates are finally approved without suspension.⁹³ Moreover, as Table II showed, few agreements, once filed, are thereafter withdrawn. The net result is a significant litigation caseload, more reminiscent of the ICC than the FCC or CAB.

For cases that reach final adjudication, processing time at the FPC was among the longest of any at the four agencies. Table VII summarizes data on FPC cases filed in fiscal 1975, the most recent period for which a reasonable number of cases has been closed. It shows the processing time for cases closed after full processing or still open as of July 1, 1977.⁹⁴

Why the FPC cases took so long is difficult to explain. One reason may be that the parties tend to be large corporations able to afford

TABLE VII⁹⁵

AVERAGE PROCESSING TIME IN DAYS FOR RATE
CASES FILED AT THE FPC IN FISCAL 1975 AND
DECIDED AFTER FULL PROCEEDINGS

	Number of Cases	Period from Filing to Submis- sion or Hearing	Length of Hearing	Period from Hearing to Initial Dec.	Period from Initial to Final Decisions	Total Days Required
Electric Rate Cases	18	316	22	148	313	799
Gas Pipelines	19	442	5	123	294	864

92. A new docket is opened for each proposed schedule except those reflecting the operation of an automatic adjustment clause.

93. In the case of rate increases pursuant to an automatic adjustment clause, notice of the increase must be filed with the Commission, but these take effect without any formal Commission action, thus increasing the proportion of routine approvals.

94. The data for fiscal year 1975 is included to be as current as possible, but 25% of the litigated electric rate cases opened that year, and almost 50% of the gas pipeline cases, remain open. The figures in Table VII have been calculated assuming that each of the open cases was terminated on July 1, 1977. Because that clearly is not true, the actual average time to reach a final decision in each of these cases will prove to be more than the figures reported here. The figures determined by the Administrative Conference under its Uniform Caseload Accounting System overcome this particular problem by looking at cases closed during fiscal year 1975 regardless of when filed. That yields an average of 919 days to decide an average electric rate case, and 995 days to decide an average pipeline rate case. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS 138 (1977).

95. The information contained in Table VII was derived by personal examination of docket entry sheets which were available for public inspection in the Office of Public Information, Federal Power Commission.

extended litigation. In addition, the issues are complex and decisions by the FPC setting wholesale rates can have important retail effects that the Commission must examine and factor into its decision.⁹⁶ What saved the system from total collapse was the FPC's unique practice of settling large numbers of its cases. Usually just before the hearing, but sometimes shortly after, the FPC had notable success in bringing the parties together and formally accommodating differences in advance of an adjudicated decision. The compromise was forwarded to the Commission, which usually approved the agreement, thereby closing the case.⁹⁷ Table VII(A) compares the processing time for cases that were settled and those that were not.

TABLE VII (A)⁹⁸

TIME SAVINGS IN DAYS RESULTING FROM SETTLEMENT

	Time to Decide Without Settlement	Time to Decide With Settlement
Electric Rate Cases	799 (N=18)(S.D.=212)	521 (N=30)(S.D.=145)
Gas Pipeline Cases	864 (N=19)(S.D.=94)	588 (N=14)(S.D.=126)

A further breakdown of the settled cases reveals the allocation of time among the stages of the process.

TABLE VII (B)⁹⁹

	Electric Rates		Gas Pipelines	
	Number of Cases	Time in Days	Number of Cases	Time in Days
Cases Settled Before Hearing	12	371	7	404
Time to Hearing When Held	18	358	7	416
Time from Hearing to Settlement	18	50	7	5
Time to Approve Settlement	30	113	14	170

The data suggest at least three conclusions about the FPC settlement technique. First, the FPC has achieved dramatic results from the use of settlements; settlement cut average processing time by nine months or more in both electric and gas cases. Second, the reduction occurred in decision time. It takes an irreducible minimum time for all sides to prepare their positions for a hearing. But if the case can then be settled, the time for the hearing and for post-hearing procedures is saved. In this sense, the FPC's use of settlements is the functional equivalent of

96. *FPC v. Conway Corp.*, 426 U.S. 271 (1976). See also Notice of Proposed Rulemaking, End Use Rate Schedules, Docket No. RM 75-19, 40 Fed. Reg. 8,571 (1975).

97. The process is discussed in Spritzer, *supra* note 50, at 89-90.

98. Data derived from the source cited in note 95 *supra*.

99. *Id.*

the ICC's elimination of the initial decision. The third point is that the FPC unfortunately then wasted much of the time saved by taking a long time to approve settlements—an average of nearly four months in electric cases and six months for gas pipeline cases. Needless to say, the time savings from settlement is lost if the savings cannot be maintained by expeditious Commission action.

TABLE VIII¹⁰⁰
SUMMARY AND COMPARISON OF DECISION TIMES OF
LITIGATED RATE CASES AT THE FOUR AGENCIES

		Days From Case Filing to Hearing or Submission for Decision	Days from Start of Hearing to Initial Decision	Days from Initial to Final Decision	Total
less than one year	ICC—Motor—I&S (MP)*	89	—**	142	231
	Rail—I&S (MP)*	166	—**	160	316
one to two years	FPC—Electric—settled	363	—	158	521
	ICC—Rail—Complaint (MP)*	141	173	231	545
	FPC—Gas Pipeline—settled	410	—	178	588
	ICC—Motor—Complaint (MP)*	136	133	387	656
two or more years	FCC—All written submissions	475	145	167	787
	FPC—Electric—Tried	316	170	313	799
	CAB	78	293	470	841
	FPC—Gas Pipeline—Tried	442	128	294	864
	ICC—Motor—Complaint (oral)	254	311	323	889
	Rail—Complaint (oral)	310	321	344	975
	FCC—Oral hearing	379	552	325	1,256

* Modified Procedure: A technique which relies only on written evidence and which frequently skips the initial decision.

** Modified procedure cases in which the initial decision stage was eliminated.

Table VIII combines the data already discussed and provides a means of comparing the agencies. The table demonstrates that the ICC stands almost alone in its ability to decide a case in less than two years. This success is attributable largely to two procedural innovations—the reduction of traditional oral proceedings to a minimum and the partial elimination of traditional decisionmaking steps. The next most successful agency, the FPC, was similarly successful only when it also abridged the decision stage. As noted earlier, time is not the only measure of the efficiency of an agency's decisionmaking process; but this comparative

100. This table contains no information not shown in earlier tables, though some categories in earlier tables have been omitted.

analysis of the way the four agencies process their cases makes some bases for a revised strategy for ratemaking seem to stand out.

III. SOME SOLUTIONS PREVIOUSLY PROPOSED

A. *Adapting Judicial Techniques to Administrative Procedures*

Administrative delay is a continuing and pervasive phenomenon, and proposals to reduce it have been numerous. When the American Bar Association¹⁰¹ and the Administrative Conference of the United States¹⁰² have addressed delay, for example, they have usually called for streamlining administrative proceedings by applying techniques successfully employed in trial courts. Proposals have included increased use of discovery,¹⁰³ more pre-hearing conferences,¹⁰⁴ and provision for summary judgments¹⁰⁵ and interlocutory appeals.¹⁰⁶ But trial court litigation is hardly a model for expeditious dispute resolution, and these techniques would do little to speed the assimilation of quantities of complex information or the process of reaching a reasoned administrative judgment.¹⁰⁷

101. The most complete set of American Bar Association proposals were the 12 resolutions adopted by the House of Delegates in August 1970. These are set forth and discussed in Special Committee on Revision of the Administrative Procedure Act, American Bar Association, *Report*, 23 AD. L. REV. 68 (1970). The Administrative Conference analysis and recommendations on the ABA proposals are reported in Administrative Conference, *Statement on ABA Proposals to Amend the Administrative Procedure Act*, 25 AD. L. REV. 419 (1973). Proposed statutes incorporating the various ABA proposals were introduced in the 94th Congress as S. 796, S. 797, and S. 799, 94th Cong., 1st Sess. (1975). The proposals have been resubmitted in the 95th Congress as H.R. 3563, H.R. 3564, and H.R. 3565, 95th Cong., 1st Sess. (1977). The proposals are discussed in Ross, *ABA Legislative Proposals to Improve Administrative Procedures in Federal Departments and Agencies*, 27 AD. L. REV. 395 (1975).

102. All recommendations of the Administrative Conference of the United States that are of general applicability are set forth in full at 1 C.F.R. §§ 305.68-1 to .76-5 (1977).

103. 1 C.F.R. § 305.70-4 (1977). The underlying report is Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89.

104. Tomlinson, *supra* note 103, at 95-103.

105. 1 C.F.R. § 305.70-3 (1977). The underlying report is Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971).

106. 1 C.F.R. § 305.71-1 (1977). The underlying report is Gellhorn & Larsen, *Interlocutory Appeal Procedures in Administrative Hearings*, 70 MICH. L. REV. 109 (1971).

107. In addition, the docketing process in the four agencies has traditionally been casual to the point of nonexistence. Except at the FPC, it has not been possible to trace a case from filing through suspension to final judgment. This confusion is one reason the Uniform Caseload Accounting System at the Administrative Conference has had difficult birth pangs. Agencies often do not know the steps involved in processing their cases and there is little or no uniformity among agencies. Comparability of steps often must be invented or defined. Recently, however, the ICC, CAB, and FPC have begun to take important steps to monitor their caseloads more efficiently. Each has adopted, independently of the others and with no coordination or consultation, a computer-based system for tracking its cases. The ICC calls its program the "Case Status System." At the CAB, it is "WITS," the Work Item Tracking System. The FPC has "RIS," the Regulatory Information System of which its "case status system" is a part. Each system predicts the path of a case through the agency and, on the basis of past experience, the probable length of each step in the process. Although none of the systems has been in operation long enough for adequate evaluation, it soon should be possible for all three agencies to know when a case runs the risk of falling behind schedule, how many cases are behind schedule, and where bottlenecks have occurred. Even though these systems of case management

B. *Direct Attempts to Reduce Approval Time*

Rather than tinker with procedure, some observers propose a more direct approach. They presuppose that some or all of a proposed rate increase will eventually be approved, and they address directly the task of making that change occur faster.

1. *Automatic Adjustment Clauses*

An increasingly popular device, used particularly by state agencies, is the automatic adjustment clause. These clauses allow regulated firms to raise their rates dollar for dollar to cover increases¹⁰⁸ in particular elements of their costs. The most common application of the principle has been the fuel adjustment clause, which allows electric utilities or providers of transportation to raise their rates as their energy costs increase.¹⁰⁹

Automatic adjustment is easy to justify for a firm facing large, unexpected cost increases that impair its credit and cash flow. For example, during the sharp increase in fuel costs in 1974, a failure to allow automatic adjustment of rates might have wiped out the net income of several large utilities, reduced their earned surplus, and in some cases might have absorbed the entire net cash flow from operations, so that even if no dividends were paid, no cash would have been available for interest payments.¹¹⁰ A question of fairness is also involved. Because some underlying cost increases are imposed upon firms by inflation, boycott, or other forces beyond a firm's control, automatic adjustment clauses may seem just. Nevertheless, automatic adjustment of rates poses a serious problem. Although the concept of adjusting rates to reflect changed costs is the essence of ratemaking, and doing so automatically

and monitoring are far from perfect and as yet have no teeth to enforce their "objectives," they are a good example of a specific attempt to improve the management of case flow and at least marginally to speed up the process.

Perhaps the oldest and most sophisticated computerized tracking technique is that of the NLRB's office of general counsel. Each of the personnel in charge of caseload tracking at the ICC, FCC, and CAB were familiar with the fact that the NLRB had a system, but none of the agencies relied on the experiences of the NLRB to any significant extent.

108. See, e.g., Manus, *Regulated Public Utilities*, 31 PROC. ACAD. POL. SCI. 62 (1975); Trigg, *Escalator Clauses in Public Utility Rate Schedules*, 106 U. PA. L. REV. 964 (1958).

109. The Federal Power Commission amendment of 18 C.F.R. § 35.14 (1977) to allow fuel adjustment clauses in wholesale rate schedules was developed in Docket No. R-479 and issued as Order No. 517, 39 Fed. Reg. 40,582 (1974). The Interstate Commerce Commission procedures for allowing surface carriers to recover increased fuel costs were developed in *Ex parte* no. 311, 350 I.C.C. 563 (1975).

Comprehensive adjustment clauses used in New Jersey and Canada cover a much wider range of increased costs. See, e.g., Backman & Kirsten, *Comprehensive Adjustment Clause for Telephone Companies*, PUB. UTIL. FORT., Mar. 28, 1974, at 21; Manus & Phillips, *Earnings Erosion During Inflation*, PUB. UTIL. FORT., May 8, 1975, at 17.

110. W. Lindsay, *The Case for Automatic Adjustment Clauses as a Means for Improving Regulation 5-6* (Nov. 4, 1976) (papers delivered at the 8th Annual Conference of the Institute of Public Utilities, Graduate School of Business Administration, Michigan State University).

reduces delay to a minimum, automatic adjustment eliminates the need to minimize costs. If a firm knows that it can increase its rates dollar for dollar immediately, it has little or no incentive to bargain vigorously¹¹¹ or to alter its method of providing services—by substituting a cheaper form of energy, for example—to minimize total costs.¹¹²

Proposals to remedy this malady include one that would allow the firm to pass on one-half of any cost increase automatically if its general level of efficiency had not declined over the year. The firm could then pass on the other half if it improved its efficiency at the same rate as it had in the past.¹¹³ Another plan, the New Mexico Public Service Commission's "cost of service index,"¹¹⁴ allows rate increases when the company's experienced rate of return falls below a range of "reasonableness." The firm is encouraged to operate efficiently by allowing it to earn up to the top end of the range of reasonableness without a rate reduction. Both these plans try to build in some of the incentives that are missing when the additional income is truly automatic; but the more issues, such as degree of efficiency, a plan builds into the calculation, the more time will be required to decide them. Automatic adjustment clauses are probably here to stay, but they are not the answer to the dilemma with which this article began. To the extent the clauses are truly automatic, they reduce both the incentive for efficiency and the ability of customers or others to question the rate structure and the impact of increased rates on them. To the extent the clauses include incentives for efficiency, they increase delay and opportunities for dispute. Automatic adjustment clauses are thus a safety valve, not a solution.

2. Authorization of Partial Rate Increases

A second, more direct, attempt to reduce delay was contained in an Administrative Conference proposal¹¹⁵ calling for statutory amendments to allow "temporary rate increases, including partial increases, subject to refund if the rates were later found unjustified."¹¹⁶ If enacted, this

111. The Federal Power Commission has tried to conduct audits of regulated firms to see if the privilege of automatic adjustment is being abused or the efficiency of the companies is declining. Studies to date find no such effect, although there is some question as to the adequacy of the study techniques used. *Id.* at 10.

112. See, e.g., Jones & Winston, *Automatic Adjustment Clauses—Saints or Sinners?*, in A.B.A. SECTION OF PUB. UTIL. L. ANN. REP. 3 (1975).

113. Kendrick, *Efficiency Incentives and Cost Factors in Public Utility Automatic Revenue Adjustment Clauses*, 6 BELL J. ECON. 299 (1975); Latimer, *The Cost and Efficiency Revenue Adjustment Clause*, PUB. UTIL. FORT., Aug. 15, 1974, at 19.

114. *Re Public Serv. Co.*, 8 PUB. U. REP. 4th (PUR) 113 (1975) (case no. 1196). A similar clause was rejected by the Arkansas Public Service Commission in *Re Arkansas Power & Light Co.*, 19 PUB. U. REP. 4th (PUR) 53 (1977) (docket no. U-2762). Indeed, the New Mexico Public Service Commission has recently turned down a request from the gas company of New Mexico for introduction of cost of service indexing into its rates.

115. 1 C.F.R. § 305.72-4 (1977). The underlying report was Spritzer, *supra* note 50. In a 1976 amendment to the Communications Act, the FCC was given this authority. See 47 U.S.C.A. § 204(b) (Cum. Supp. 1977).

116. 1 C.F.R. § 305.72-4, Recommendation C (1977).

proposal could have at least three effects. First, as the Conference suggested, it “would mitigate the effects of regulatory lag”¹¹⁷ by reducing financial pressure on the firm. Second, it could make the agencies more willing to investigate rates, because financial hardship to the firm would be less than that resulting from suspension. Third, the proposal might eliminate some of the issues from the litigated case if the partial increase represented a summary decision on uncontested issues.

Temporary increases, however, are not, in form, partial automatic adjustments, because increases are only allowed if “the agency makes a preliminary judgment, on the basis of a written showing by the regulated company and an opportunity for comment thereon by affected persons, that a proposed increase is justifiable at least in part.”¹¹⁸ Although this procedural safeguard may be desirable, adding steps to a process is not ordinarily a method of reducing delay. At the current state of the tariff review art, such a preliminary proceeding would certainly take more than the current thirty-day pre-suspension notice period. If settlement review is any indication, the period could be ninety days or more.¹¹⁹ Under present procedures, this proposal might reduce the pain of delay but it would almost certainly increase the duration of individual cases, thereby increasing the costs of litigating ratemaking controversies.¹²⁰

3. *Specific Time Limits on Agency Action*

Some observers believe that delay can best be avoided if agencies are required by law to act within specific time limits.¹²¹ Currently, most state commissions and, in certain cases, federal agencies are subject to such constraints. The Railroad Revitalization and Regulatory Reform Act,¹²² for example, requires the ICC to decide within ninety days whether a rail carrier proposing a rate increase has “market dominance.”¹²³ The Act also imposes other specific limits on various stages of the ICC’s review process.¹²⁴ Although specific time limits are inherently procrustean,¹²⁵ they offer a practical way to structure an open-ended

117. *Id.* The Conference was speaking informally when it used the term “lag” to describe the passage of time. More properly, the Conference proposal was directed at the problem of delay.

118. *Id.*

119. See Table VII(B), at text accompanying note 99 *supra*.

120. The “strategy” proposed later in this article could tend to minimize this effect by allowing the amount of the partial award to be determined very quickly.

121. About 75% of the states now impose specific time constraints on their ratemaking commissions. NATIONAL ASS’N OF REGULATORY UTILITY COMMISSIONERS, 1975 ANNUAL REPORT ON UTILITY AND CARRIER REGULATION 610-13 (1976).

122. Pub. L. No. 94-210, 90 Stat. 31 (1976).

123. 49 U.S.C.A. § 15(9) (Cum. Supp. 1977). ICC regulations for determining market dominance are published at 49 C.F.R. § 1109.1 (1976).

124. For example, the Commission has seven months to investigate the lawfulness of a rate, 49 U.S.C.A. § 15(8)(a), (e) (Cum. Supp. 1977); 180 days to complete its hearings after assignment of the case, *id.* § 17(9)(b); 120 days to write an initial decision, *id.*; and 180 days to decide an appeal, *id.* § 17(9)(c).

125. Some analogy may be provided by the “Speedy Trial Act” in federal criminal procedure. 18 U.S.C. §§ 3161-3174 (Supp. V 1975). The time limits imposed by that statute

process.¹²⁶ Files will be less likely to lie in an "In" basket if the agency employee is required by law to get them "Out." Moreover, the harshness of a deadline can be alleviated in an appropriate case if the Commission is given authority to extend the case for an additional limited period,¹²⁷ upon notice to Congress of the reasons for the delay. Such a provision should give the agency an incentive to process cases rapidly, because it will not wish to confess failure, but the approach recognizes both that some cases are more complex than others and that the agency may have more pressing business.

C. *Substantial Simplification of Ratemaking Procedure*

Despite their good intentions and their possible value in eliminating delay, none of the proposals considered to this point has dealt directly with the factors that the data presented earlier suggest are crucial—substantial simplification of ratemaking procedure and elimination of one or more decision steps. But proposals advocating these major modifications are receiving increasing attention.

1. *Increased Authority for Administrative Law Judges and Review Boards*

Two recent proposals would limit the agency's role to that of granting discretionary review. One Administrative Conference proposal, for example, suggested that substantially greater authority be given to the administrative law judge—even making his decision final except for a certiorari-like review by the agency.¹²⁸ This proposal could result in significant time saving, for as Table VIII demonstrated, each level of review can add up to a year to the time necessary for agency decision. An alternative offered by the Conference, modeled on an FCC procedure,¹²⁹

do not go into effect fully until July 1, 1979, but writers are now projecting problems likely to arise such as the tendency to delay certain formal steps until the last minute so as to buy time to be working on the next step. Further, the scope of the statutory excuses for delay and the need to develop some new ones also have their counterparts in problems of regulatory procedure. *See, e.g.*, Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 676-704 (1976).

An analogous time limit imposed earlier in the railroad industry was created by § 207(b) of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 988. That statute required the bankruptcy courts handling the reorganization of the Penn Central and other bankrupt railroads to decide within 180 days of enactment whether the railroads were to be reorganized pursuant to the Act. It was argued that a requirement of the courts rendering decisions within 180 days made the processes unfair and inequitable. The special court created under the Act rejected this contention. *See In re Penn Cent. Transp. Co.*, 384 F. Supp. 895, 932 (Special Court 1974) (Friendly, J.).

126. Some agencies have been advised to create internal time limits of their own. *See, e.g.*, CIVIL AERONAUTICS BOARD ADVISORY COMMITTEE, REPORT ON PROCEDURAL REFORM 5 (1976).

127. 49 U.S.C.A. § 15(8)(a) (Cum. Supp. 1977).

128. 1 C.F.R. § 305.68-6(2)(b) (1977). The underlying report did not deal extensively with this facet of the proposal, but Gilliland, *The Certiorari-Type Review*, 26 AD. L. REV. 53 (1974), discusses the effect of such a system at the CAB.

129. As discussed in Berkemeyer, *Agency Review by Intermediate Boards*, 26 AD. L. REV. 61 (1974). The Board only hears cases not "of general communications importance." It does not hear rate cases.

was the creation of intermediate review boards to provide an agency appeal of initial decisions, again with only certiorari review by the full commission.¹³⁰ Review by such an intermediate entity will necessarily take some time, however, and if further review by the commission is sought—as seems likely if large dollar amounts are at stake—the total time expended may actually be increased.

2. *Decreased Public Participation in Agency Proceedings*

Public intervenors in the rate proceeding have long served as a whipping boy for some critics of ratemaking delay,¹³¹ and elimination or reduction of their role is sometimes touted as a way to conclude cases more quickly.¹³² Unfortunately, ascertaining the effect of intervenors, both on administrative delay and on the quality of administrative decisions, is difficult. With regard to delay, an important distinction must be drawn between rate cases and licensing decisions, particularly nuclear plant sitings. In the latter, various groups have been notorious (or heroic) in their ability to prolong a decision process far beyond normal expectations.¹³³ In the ratemaking area, however, intervenors rarely are allowed such delaying tactics as continuances, and the hearing itself is not what takes the major time in a rate case.¹³⁴ With regard to the quality of administrative decisions, rate cases often turn on complex factual presentations that cannot simply be rebutted by impassioned speeches or general attacks. Nonetheless, some studies suggest that intervenors in rate cases tend to reduce significantly the sums applicant firms recover.¹³⁵

130. 1 C.F.R. § 305.68-6(2)(a) (1977). The report supporting this part of the proposal was published as Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969). See also Note, *Intermediate Appellate Review Boards for Administrative Agencies*, 81 HARV. L. REV. 1325 (1969).

131. Happily, the Administrative Conference has not been among this group. See C.F.R. § 305.69-5 (1977) (Representation of the Poor in Agency Rulemaking of Direct Consequence to Them); *id.* § 305.71-6 (Public Participation in Administrative Hearings). See also Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

132. The General Counsel of AT & T put his view of public participation (in rulemaking) this way: "To paraphrase Churchill, 'never in the course of human conflict have so many hearings been productive of so many rules with so little benefit to so few.'" M. Garlinghouse, *Securing Fairness and Regularity in Administrative Proceedings: Comments on the British and American Papers*, Remarks at the Atlanta Meeting of the American Bar Association, at 2 (Aug. 11, 1976).

133. See, e.g., *Union of Concerned Scientists v. AEC*, 499 F.2d 1069 (D.C. Cir. 1974). For a general discussion of the battle over nuclear power see Palfrey, *Energy and the Environment: The Special Case of Nuclear Power*, 74 COLUM. L. REV. 1375 (1974).

134. See Table IV, at text accompanying note 63 *supra*; Table V, at text accompanying note 78 *supra*; Table VII, at text accompanying note 95 *supra*.

135. E.g., Joskow, *The Determination of the Allowed Rate of Return in a Formal Regulatory Hearing*, 3 BELL J. ECON. & MGMT. SCI. 632 (1972). In the study which Professor Joskow did on New York Public Service Commission regulation of gas and electric industries, he determined that "the presence of an intervenor will vary from no effect to a reduction of .4 percentage points in the allowed rate of return, depending on the degree of conflict between the petitioner and the intervenor." *Id.* at 641.

These studies can be used to argue that intervenors must be providing valuable information. More likely, however, the effect is largely a conciliatory response by the agency in contested cases. Rather than either excluding public intervenors, if one could, or assuming that the present system is satisfactory, the object should be to design a system in which constructive participation by the public can be enhanced without creating inordinate delay.¹³⁶

3. *Increased Reliance on Informal Rulemaking*

If simplification of procedure is the way to reduce delay significantly, a natural conclusion might be that informal rulemaking will produce the greatest gains. If rates could be proposed, subjected to comments (preferably only written), and then declared acceptable by the agency, surely that would save the most time of all.¹³⁷

Of course, the interplay between ratemaking and rulemaking is of long standing. In *Munn v. Illinois*,¹³⁸ for example, the state legislature had unilaterally set the rates that grain elevators in the city of Chicago could charge. The Supreme Court approved, noting extensive British and American precedent for legislating specific rates for firms "affected with a public interest."¹³⁹ Indeed, thirty years after *Munn*, Mr. Justice Holmes found ratemaking to be an inherent legislative power¹⁴⁰—what we now call rulemaking. Holmes reasoned that legislation looks to the future while judicial proceedings look to the past. Because establishing a rate looks to the future, he concluded that the act was legislative, not judicial in kind.¹⁴¹ Even the Administrative Procedure Act treats ratemaking as rulemaking by defining a rule as any "agency statement of general or particular applicability and future effect."¹⁴² The drafters apparently included the words "or particular" largely to treat ratemaking proceedings as rulemaking rather than as adjudication.¹⁴³

136. A sophisticated discussion of the possibilities and problems of public participation in regulatory proceedings is *Symposium, Federal Agencies and the Public Interest: New Directions in Administrative Practice*, 26 AD. L. REV. 377, 385-417, 423-80 (1974). See also Finkelstein & Johnson, *Public Counsel Revisited: The Evolution of a Concept for Promoting Public Participation in Regulatory Decision-Making*, 29 AD. L. REV. 167 (1977); Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 AD. L. REV. 391 (1976).

137. The position has been asserted most forcefully and recently in IV SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., DELAY IN THE REGULATORY PROCESS, STUDY ON FEDERAL REGULATIONS (1977).

138. 94 U.S. 113 (1877).

139. *Id.* at 125-26.

140. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

141. *Id.*

142. 5 U.S.C. § 551(4) (1976) (emphasis added).

143. See Ginnane, "Ruling Making," "Adjudication" and Exemptions Under the Administrative Procedure Act, 95 U. PA. L. REV. 621 (1947). The ABA has proposed eliminating the "or particular" language which would avoid at least the conceptual problems of treating ratemaking as rulemaking. See Ross, *Comment: Current ABA Proposals for Amendment of the Administrative Procedure Act*, 23 AD. L. REV. 67, 71 (1970).

Although the APA plainly contemplates that rates be set by rule, this assumption only begins the analysis. The key question is whether the agency must use the formal hearing described in sections 556 and 557 of the APA¹⁴⁴ or whether it may use the informal notice-and-comment rulemaking procedure of section 553.¹⁴⁵ Substantial recent support for the informal technique comes from the FPC's approach to setting field prices for natural gas. In *Phillips Petroleum Co. v. Wisconsin*¹⁴⁶ the Supreme Court ordered the FPC to set not only the rates for gas pipelines but also the prices at which more than 3000 independent producers sold gas at the wellhead. At first, the Commission attempted to set each firm's prices individually on a traditional cost-of-service basis. This procedure, however, proved to be not only time-consuming but also meaningless, because competition forced producers to sell at what was essentially a market price. Consequently, the Commission established a system of "area rates"—a schedule of permissible charges for firms in a given geographic area.¹⁴⁷ But because area costs could not possibly be based on the actual cost of any individual firm, the Commission relinquished the traditional adjudicative process and utilized informal notice-and-comment rulemaking. The Tenth Circuit found that such procedures were inadequate because producers were not allowed a stay of the general rate order until after litigating their claimed exemptions from it.¹⁴⁸ The Supreme Court disagreed, finding the FPC procedure sufficient. The Court reasoned that

rate-making agencies are . . . permitted, unless their statutory authority otherwise plainly indicates, "to make the pragmatic adjustments which may be called for by particular circumstances." (citation omitted)

. . . The Commission has asserted, and the history of producer regulation has confirmed, that the ultimate achievement of the Commission's regulatory purposes may easily depend upon the contrivance of more expeditious administrative methods. . . . We

The Administrative Conference has "approved in principle" but called for further study. See Administrative Conference, *Statement on ABA Proposals to Amend the Administrative Procedure Act*, 25 AD. L. REV. 419 (1973).

144. 5 U.S.C. §§ 556-557 (1976). These sections require the traditional trial-type procedure. "A party is entitled to present . . . oral evidence . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Id.* § 556(d). However in rulemaking, including ratemaking, the agency may limit evidence to all-written forms "when a party will not be prejudiced thereby." *Id.* These provisions apply whenever "rules are required by statute to be made on the record after opportunity for agency hearing." *Id.* § 553(c).

145. *Id.* § 553. Notice of the proposed substance or issues of the proposed rule must be published in the Federal Register. *Id.* § 553(b). The agency must allow "interested persons an opportunity to participate . . . through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* § 553(c).

146. 347 U.S. 672 (1954).

147. Statement of General Policy No. 61-1, 24 F.P.C. 818 (1960).

148. *Skelly Oil Co. v. FPC*, 375 F.2d 6, 30 (10th Cir. 1967), *aff'd in part, rev'd in part sub nom.* *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted.¹⁴⁹

The decision which did most to trigger interest in the potential of notice-and-comment ratemaking, however, was *United States v. Florida East Coast Railway*.¹⁵⁰ For some time prior to initiating action, the Interstate Commerce Commission had believed that the shortage of available railroad freight cars was caused by the downtime created when one railroad made unproductive use of cars belonging to another line and by the fact that lines were unable to know how many cars would be available at any given time. At first the Commission, after a section 553 notice-and-comment proceeding, simply ordered all railroads to return the freight cars to their owners promptly after use.¹⁵¹ The Supreme Court upheld this use of informal rulemaking.¹⁵² Finding its prior order insufficient, however, the ICC decided to give user railroads a financial incentive to return the cars. "Incentive per diem charges" were adopted across the board for all railroads,¹⁵³ tending to make it cheaper to return a car to its owners than to husband or use it. Some railroads argued that this rule amounted to ratemaking and that the notice-and-comment procedures used were legally insufficient. In *Florida East Coast*, the Supreme Court again upheld the Commission's action, holding that the statutory requirement of a "hearing" did not require oral presentations. Because "[t]he parties had fair notice of exactly what the Commission proposed to do, and were given an opportunity to comment, to object, or to make some other form of written submission,"¹⁵⁴ the Court concluded that the Interstate Commerce Act hearing requirement had been met.

There has been substantial scholarly reaction to *Florida East Coast*, much of it negative.¹⁵⁵ The decision is at least superficially inconsistent with some important earlier Supreme Court decisions. In *Morgan v.*

149. Permian Basin Area Rate Cases, 390 U.S. 747, 776-77 (1968). For more background on the FPC's use of rulemaking in the establishment of field prices for natural gas, see Dakin, *Ratemaking as Rulemaking—The New Approach at the FPC: Ad Hoc Rulemaking in the Ratemaking Process*, 1973 DUKE L.J. 41; Comment, *Ratemaking By Informal Rulemaking Under the Natural Gas Act*, 74 COLUM. L. REV. 752 (1974). The Commission has since approved a national rate for natural gas which was upheld in *Shell Oil Co. v. FPC*, 520 F.2d 1061 (5th Cir. 1975), cert. denied, 426 U.S. 941 (1976).

150. 410 U.S. 224 (1973).

151. Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices, 335 I.C.C. 264 (1969).

152. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

153. Incentive Per Diem Charges-1968, 337 I.C.C. 217 (1970).

154. 410 U.S. at 241. This result was contrary to that reached by Judge Friendly writing for the three judge court in *Long Island R.R. v. United States*, 318 F. Supp. 490 (E.D.N.Y. 1970).

155. See, e.g., Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721 (1975); Judicial Review Committee of the Administrative Law Section, *Report, Recent Developments in Interpretation of the A.P.A.: Florida East Coast and its Progeny*, 28 AD. L. REV. 91 (1976). But see K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 167-240 (1976).

United States,¹⁵⁶ for example, the procedure by which the Secretary of Agriculture had set maximum rates charged by marketing agencies at the Kansas City stockyards was challenged. Although the Secretary's investigation was in the form of a "general inquiry" into the "reasonableness of appellants' rates," the Supreme Court found that "in all substantial respects, the Government . . . was prosecuting the proceeding against the owners of the market agencies."¹⁵⁷ The Court concluded that "[t]hose who are brought into contest with the Government in a quasi-judicial proceeding aimed at control of their activities"¹⁵⁸ were entitled to the "full hearing," including "the right to present evidence . . . [and] a reasonable opportunity to know the claims of the opposing party and to meet them."¹⁵⁹

Some later lower court cases have seemed to some to undercut or even defy *Florida East Coast*. In *Mobil Oil Corp. v. FPC*,¹⁶⁰ for example, the Commission had used notice-and-comment procedures to establish a "general policy" for allocating the cost of transporting liquid hydrocarbons vis-a-vis transporting natural gas. The result of the process was not a "general policy" at all, but a definite minimum rate of \$.02 per Mcf per 100 miles for carrying liquefiabiles and \$.20 for transporting liquids. The court of appeals overturned the rule, finding the Commission's "hearing" procedures inadequate. The fact that a case need not be decided under the procedures of sections 556 and 557,¹⁶¹ the court said, did not mean that the minimum standards of section 553 were sufficient. When judicial review was governed by a "substantial evidence" standard, the procedures employed had to be capable of producing a record that would lend itself to such review. Pure section 553 rulemaking had not provided such a record.¹⁶²

The problems and contradictions in these decisions have been thoroughly explored elsewhere.¹⁶³ It should suffice here to point out that the decisions tend to reinforce the distinctions drawn in ratemaking since

156. 304 U.S. 1 (1938). This is often denominated the "Second *Morgan* case" or simply "*Morgan II*."

157. *Id.* at 20.

158. *Id.* at 18.

159. *Id.* The leading case on the point was *ICC v. Louisville & N.R.R.*, 227 U.S. 88, 93 (1913): "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." In a later case not involving rates, the Court held that the formal procedures required by §§ 556 and 557 apply whenever due process mandates them, not simply when a "statute" does so. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

160. 483 F.2d 1238 (D.C. Cir. 1973).

161. In large part, the case was reversed because the FPC's jurisdiction extended only to transportation of natural gas, not "liquid hydrocarbons." It was the ICC that had jurisdiction over oil. 483 F.2d at 1247.

162. *Id.* at 1257-63. See also *Walter Holm & Co. v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971); cf. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). The approach is analyzed and discussed in Pedersen, *Formal Records and Informal Rulemaking*, 85 *YALE L.J.* 38 (1975).

163. See authorities cited note 155 *supra* and notes 170, 172, and 214 *infra*.

*Londoner v. Denver*¹⁶⁴ and *Bi-Metallic Investment Co. v. State Board of Equalization*.¹⁶⁵ As the law has developed from these early decisions, the nature of the hearing required properly turns on three factors: (1) whether the case primarily involves past or future conduct,¹⁶⁶ (2) whether the results of the case primarily affect one firm or many,¹⁶⁷ and (3) whether the full panoply of trial-type procedure is required to reliably adduce the decisive facts.¹⁶⁸ These tests are hardly talismans, and in a given case, they do not necessarily all point the same way. One can point out, however, that *Morgan* had involved the rates of relatively few firms at only one yard, where costs might differ from other yards and where specific evidence might help resolve the issues. The setting of wellhead natural gas prices, as in *Phillips Petroleum*, on the other hand, relates to many firms (none specifically), focuses more on "fair" prices for the future and the effect of price on future production than on any firm's historic costs, and is unlikely to be affected by cross-examination or the other attributes of trial-type hearings. So, too, the "incentive per diem charges" in *Florida East Coast* were not truly "cost-based" at all; they were a way of putting teeth into a rule which had already been upheld for the future, which affected many firms, and as to which most facts were already well known.¹⁶⁹

The point of these cases for our purposes is direct and simple: sometimes full adjudicative hearings need not be held, but sometimes they must be. The problem with a general call for ratemaking by informal rulemaking is that it cannot apply universally. In countless ratemaking situations the issues turn on the particular cost situation of the firm whose tariff is in question, involving past facts unique to the given firm, over which there is sometimes real dispute. In such cases, a general rule plainly would be no solution.

A response now popular is the adoption of "hybrid" procedures—informal rulemaking with just enough opportunity for oral or specific

164. 210 U.S. 373 (1908). In *Londoner* landowners objecting to a special assessment were entitled to be heard individually because the amount of each person's assessment varied with the benefit of the project to the person's lot.

165. 239 U.S. 441 (1915). In *Bi-Metallic* the state board had "equalized" property assessments, and tax rates of Denver residents rose dramatically. However, individual Denver residents were not entitled to be heard. The action affected large numbers of people and the personal situation of any one was irrelevant to the overall policy.

166. See, e.g., *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). The APA itself reflects this idea. "[R]ule means . . . an agency statement of . . . future effect . . ." 5 U.S.C. § 551(4) (1976).

167. See, e.g., *Superior Oil Co. v. FPC*, 322 F.2d 601 (9th Cir. 1963); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

168. See, e.g., *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.03-.05 (1958).

169. One case stands virtually alone in allowing pure notice-and-comment rulemaking to be used in making a retail utility's rates. *Virgin Islands Hotel Ass'n v. Virgin Islands Water & Power Auth.*, 476 F.2d 1263 (3d Cir. 1973). The kindest comment one can make about this decision is that it "creatively" interprets the applicable precedent and concepts.

written presentations to meet the requirements of due process and to provide the decisionmakers with what they need to know.¹⁷⁰ The practical problem with this approach is that any addition to section 553 procedures is likely to yield a result greatly resembling the ICC's modified procedure.¹⁷¹ Whether one strips down a formal procedure, as the ICC did, or adds to an informal one, as others propose, the result is likely to be much the same. Moving to more informal or "hybrid" ratemaking procedures, then, would seem to accomplish little. The object should not be to provide new labels, but to see what minimum features are necessary to ensure appropriate consideration of the issues and full participation of interested parties without unduly extending the time required to bring cases to a close.¹⁷² Informal rulemaking pursuant to section 553 is unlikely to satisfy these objectives in many kinds of ratemaking situations.

IV. A PROPOSED NEW STRATEGY FOR RATEMAKING

Achieving a quantum leap in the speed of agency decisions without adversely affecting quality will not be easy. What is needed is a new view of the proper role of an agency in the ratemaking process. I believe agencies should be viewed not primarily as decisionmakers in contested cases, but as a means of helping the parties in such cases work out a result that is both mutually acceptable and in the public interest. As a start in the right direction, three specific steps to change the current emphasis in ratemaking procedure seem necessary. First, agencies should make greater use of rulemaking to resolve issues concerning the significance of recurring fact patterns. Second, agencies should collect data on an ongoing basis and employ models to evaluate and project the cost and revenue data of regulated firms. Finally, agencies should place increased emphasis on the parties' settlement of all or parts of rate cases.

A. *Increased Use of Rulemaking Proceedings*

Ratemaking cases, like most others, consist of disputes over the facts and their significance. Factual issues peculiar to particular firms should continue to be resolved in some kind of trial-type setting. Policy issues concerning the significance of particular kinds of fact patterns,

170. The leading articles on this approach are Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972), and Williams, "Hybrid Rulemaking" under the *Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975), which led to Administrative Conference Recommendations 72-5 and 76-3, respectively.

171. For a description of this procedure see text accompanying notes 67-69 *supra*.

172. Hymns to the praise of the new flexibility in administrative procedure are sung in Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Administrative Law*, 1971 DUKE L.J. 51, and Fitzgerald, *Mobil Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act*, 26 AD. L. REV. 287 (1974). The descant may be found in the authorities cited note 155 *supra* and note 210 *infra*.

however, recur again and again in ratemaking cases, and the practice of leaving these issues open to constant relitigation is a waste of time and resources. When such recurring policy issues can be identified, agencies should deal with them directly in non-adjudicative proceedings.

Examples of such issues are legion:

The appropriate treatment of construction work-in-process; for how long a period before it comes on-line should it be included in the rate base?¹⁷³

The appropriate treatment of advertising expenditures, image building and contributions to charity.

Whether tax credits should be passed through to the ratepayers immediately or "normalized" over a number of years?¹⁷⁴

Whether automatic adjustment clauses should be used in the industry?¹⁷⁵

Determining the cost of acquiring capital experienced by firms in the industry and the appropriate rate of return.

Whether residential customers should pay less than business customers? Why? Under what conditions? How much less?

Whether lifeline rates should be made available to poor customers?

Defining the products or services that should be treated as part of the basic service cost and those which should be sorted out for separate payment by those who use the service most.

Determining the responsibilities of the firms in the industry toward the environment¹⁷⁶ and the extent their rates should reflect or encourage environmentally responsible behavior by their customers.¹⁷⁷

173. The FPC's rulemaking proceeding on this point was Docket No. RM 75-13, initiated November 14, 1974, 39 Fed. Reg. 40, 787 (1974), and was published as Order No. 555, 41 Fed. Reg. 51,392 (1976). For discussion of the comparable issues at the state level compare *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 84 N.M. 330, 503 P.2d 310 (1972) with *Re New England Tel. & Tel. Co.*, 10 PUB. U. REP. 4th (PUR) 132 (R.I. 1975) and *Re Kansas City Power & Light Co.*, 6 PUB. U. REP. 4th (PUR) 321 (Kan. 1974).

174. The FPC rulemaking proceeding on this issue was Docket Nos. R-424 and R-446. The final order was published at 41 Fed. Reg. 28,474 (1976).

175. The FPC rulemaking proceeding on this issue was Docket No. R-479, the final order on which was published at 39 Fed. Reg. 40,582 (1974). See 18 C.F.R. § 35.14 (1977).

176. The Supreme Court confirmed in *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 318-19 (1975), that a regulatory agency's decision in rate cases may have a sufficient impact on the environment to require that the agency must weigh the effect of the decision and even that the agency must prepare an environmental impact statement. The Court did not, however, define the circumstances under which particular types of environmental considerations would have to be addressed. Each agency has established regulations with respect to such procedural issues. See 14 C.F.R. §§ 312.1-.20 (1977) (CAB); 18 C.F.R. §§ 2.80-.82 (1977) (FPC); 47 C.F.R. §§ 1.1301-.1319 (1976) (FCC); 49 C.F.R. §§ 1108.1-.20 (1976) (ICC). Now, in addition, the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 204, 90 Stat. 40, requires the Interstate Commerce Commission to investigate whether the existing rate structure unjustly discriminates against recyclable commodities, and if so, to eliminate such unjust discrimination.

177. The Federal Power Commission, for example, attempted, over a four year period, to redesign rates for natural gas pipelines to reduce the incentive for industries to

And finally, whether discount or promotional rates are ever justified in the regulated industry?

Not all of these issues will arise in every rate case, but an agency will have to address some of the matters in a great many cases.¹⁷⁸ Precedent, of course, now enables a firm to speculate on how the agency might resolve the firm's own case. But most firms affected by a given precedent probably did not participate in the case in which it was formulated. Moreover, a firm can always try to change an agency's prior approach to a problem, and when all issues are open, any party seeking to delay can do so more easily.¹⁷⁹

Perhaps the best example of the use of rulemaking to decide basic issues essential to the establishment of rates is the CAB's Domestic Passenger Fare Investigation.¹⁸⁰ The DPFI was a multi-year project in which the CAB attempted to think through most of the major recurring questions in its decisionmaking process. Questions such as the appropri-

use natural gas. A pipeline has high fixed costs that must be spread in some way among users. Under the *Atlantic Seaboard* formula, 11 F.P.C. 43 (1952), 50% of that cost was allocated to the cubic-foot "commodity" charge while 50% was allocated to a "demand" charge to peak load users whose demand at the peak dictated the size of pipe needed. Advocates of peak load pricing criticized that formula as wasteful because it did not do as much as it might to discourage peak use. However, movement toward allocating 100% of the burden to peak customers, *see, e.g.*, *Fuels Research Council v. FPC*, 374 F.2d 842 (7th Cir. 1967), made off-peak use of natural gas by industrial users more attractive. Thus instead of wasting pipeline capacity, now the gas itself was being "wasted." The FPC has since moved to a formula allocating 75% of fixed costs to the "commodity" rate and only 25% to the "demand" rate for peak customers. *United Gas Pipeline Co.*, 50 F.P.C. 1348 (1973), *aff'd sub nom. Consolidated Gas Supply Corp. v. FPC*, 520 F.2d 1176 (D.C. Cir. 1975). *See also* Notice of Proposed Rulemaking, End Use Rate Schedules, Docket No. RM 75-19, 40 Fed. Reg. 8,571 (1975).

A similar issue is the development of standards for deciding how natural gas shall be allocated and devising rate structures to stimulate purchasers to go in the desired way. The FPC proceeding on this point was Docket No. RM 75-19, initiated at 40 Fed. Reg. 8,571 (1975).

178. Of course, many of these issues may be interrelated. For example, the decision on what construction work in process to allow in the rate base may affect a firm's decision to invest in an environmentally desirable conversion from natural gas to some other fuel. The Federal Power Commission has explicitly included construction work in process in the rate base for such conversions but not for most other construction. *See* Order No. 555, 41 Fed. Reg. 51,392 (1976).

179. The arguments in favor of rulemaking are probably familiar to most readers. Others should look to Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970).

180. The DPFI was initiated by Order 70-1-147 (Jan. 29, 1970). Part of the stimulus for undertaking the task was *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). The Board had previously had a practice of issuing "speaking orders"—suspensions of tariffs accompanied by an announcement of what the Board would find acceptable. In *Moss* the Board had suspended the tariffs of several trunkline carriers and offered in its stead a detailed prescription of fare structure, terminal charges, and discount fares. The court reasoned that this practice denied the carriers a chance to have their tariffs fairly considered, because they were in effect compelled to comply. The DPFI proceedings were an effort to give the carriers an opportunity to participate in the basic decisions and to lay the basis for solid policies for the future. The *Moss* case and its background are discussed extensively in Spritzer, *supra* note 50, at 76-87.

ate rate of return,¹⁸¹ the role of discount fares,¹⁸² the appropriate fare taper,¹⁸³ and the relation of coach to first class¹⁸⁴ were systematically addressed, and conclusions were reached. Since the adoption of those rules, the CAB has been able to cut its case-processing time to almost nothing at least for general rate increase requests.¹⁸⁵ The agency attends to fundamental questions, yet routinely reaches a decision within the statutory pre-notice period and thus does not delay the effective date. Although the Kennedy Subcommittee and others who advocate airline deregulation have criticized several of the substantive elements of the DPFI,¹⁸⁶ the CAB's procedural technique seems worthy of emulation.¹⁸⁷

Substantial authority in Supreme Court decisions supports the propriety of increased rulemaking. In *United States v. Storer Broadcasting Co.*,¹⁸⁸ for example, the FCC limited by rule multiple ownership of radio and television stations. When Storer's application for an additional station license was rejected on the basis of the rule, Storer argued that the agency could resolve licensing issues only after an individualized adjudicatory hearing. The Supreme Court disagreed. The Court conceded

181. Phase 8, Order 71-4-58 (Apr. 9, 1971).

182. Phase 5, Order 72-12-18 (Dec. 5, 1972).

183. Phase 9, Order 74-3-82 (Mar. 18, 1974).

184. *Id.*

185. According to interviews with officials in the Bureau of Economics, Civil Aeronautics Board, Wash., D.C.

186. SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. OF THE JUDICIARY, 94TH CONG., 1ST SESS., REPORT ON CIVIL AERONAUTICS BOARD PRACTICES AND PROCEDURES, 109-25 (1975); CIVIL AERONAUTICS BOARD SPECIAL STAFF, REGULATORY REFORM 65-76 (1975); cf. Douglas & Miller, *Quality Competition, Industry Equilibrium and Efficiency in the Price-Constrained Airline Market*, 64 AM. ECON. REV. 657 (1974) (price constraints result in non-price competition among airlines which in turn results in inefficient passenger capacity).

187. Several agencies have already embarked on rulemaking of the sort recommended here. The Interstate Commerce Commission, for example, has been required by the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976), to undertake rulemaking proceedings to establish procedures for making the determinations required by the Act. The results are *Ex parte* No. 319, Investigation of Freight Rates for the Transportation of Recyclable or Recycled Materials; *Ex parte* No. 320, Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act of 1976; *Ex parte* No. 324, Standards and Expeditious Procedures for Establishing Railroad Rates Based on Seasonal, Regional, or Peaked Period-Demand for Rail Service. 90 ICC ANN. REP. 30 n.19 (1976).

In *Ex parte* No. 314, Special Procedures for General Freight Rate Increases Based on Revenue Need, 351 I.C.C. 187 (1975), the ICC earlier considered whether to adopt a rule allowing one general rate increase per year not to exceed five percent. Such increases would have taken effect without suspension, although they could have later been investigated and set aside. In a period of high inflation, such a procedure would have in effect been a form of indexing rates to reflect a general level of increased costs. There was substantial opposition to this proposal, however, from both carriers and shippers, and the Commission decided not to issue the rule.

Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977), transfers responsibility for preparation of general policy such as is proposed here from the Federal Power Commission to the Secretary of the Department of Energy. *Id.* § 301(b). Residual authority to make, amend, and rescind general rules in coordination with the Secretary would be vested in the independent Federal Energy Regulatory Commission established within the Department. See *id.* §§ 403(a), (b), and § 404.

188. 351 U.S. 192 (1956).

that the rule was not an abstraction, and that when made, the rule presently determined rights.¹⁸⁹ But the Court went on to hold that a full hearing was not required for all applications that failed to state a valid basis for a hearing in accordance with rules established by the Commission, provided that the Commission would grant a hearing upon an adequate showing that the rules should be waived.¹⁹⁰ Similarly, in *FPC v. Texaco*,¹⁹¹ the Commission's regulations had made illegal certain pricing provisions in the contracts of independent gasoline producers. The agency automatically rejected all contracts that contained such provisions. When producers challenged the practice of rejecting the contracts without a hearing the Court upheld the procedure, reasoning that the Commission was only "particularizing statutory standards."¹⁹² The firms had been allowed an opportunity to participate in formulating the rule, and their remedy was to "ask for a waiver of the rule complained of."¹⁹³

In the "blocked space" case, *American Airlines, Inc. v. CAB*,¹⁹⁴ the Court of Appeals for the District of Columbia applied the doctrine of *Storer Broadcasting* and *Texaco*. In *American Airlines*, the CAB had established a rule allowing only all-cargo carriers to sell blocks of space to shippers at wholesale rates. American Airlines and others filed "defensive tariffs"—direct responses to the lower fare of the all-cargo carriers—and claimed to be entitled to a hearing. The court concluded that *Storer* was controlling,¹⁹⁵ reasoning that the *Storer* doctrine

rests on a fundamental awareness that rulemaking is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.¹⁹⁶

The court stressed that it was not at the time dealing with

a proceeding that in form is couched as rule making, general in scope and prospective in operation, but in substance and effect is individual in impact and condemnatory in purpose. The proceeding . . . is rule making both in form and effect. There is no individual action here masquerading as a general rule.¹⁹⁷

189. *Id.* at 199.

190. *Id.* at 205.

191. 377 U.S. 33 (1964).

192. *Id.* at 39.

193. *Id.* at 40.

194. 359 F.2d 624 (D.C. Cir. 1966).

195. Judge Leventhal correctly characterized the plaintiffs' thesis as the one "this court accepted ten years ago in the *Storer* case, only to be reversed by the Supreme Court." *Id.* at 628.

196. *Id.* at 629.

197. *Id.* at 631.

Much of the more recent law in this area has resulted from the FCC's attempt to enforce the rules issued in its broad scale *Specialized Common Carrier* case.¹⁹⁸ In that proceeding the FCC had ruled that additional firms had a right to try to compete with AT & T. AT & T did not appeal the rulemaking conclusions but instead waited until the FCC ordered the interconnection of other firms' lines with the Bell system pursuant to section 201(a) of the Communications Act.¹⁹⁹ AT & T then claimed to be entitled to a full adjudicatory hearing on each and every order to interconnect. The FCC argued that its earlier rule decided the issue, and in *Bell Telephone Co. v. FCC*,²⁰⁰ the Third Circuit agreed with the Commission. The court concluded that section 201(a)'s legislative history did not support Bell's contention that the statutory provision guaranteeing an "opportunity for hearing" mandated an evidentiary hearing.²⁰¹ Moreover, the court believed that the FCC's approach to policy making made sense.

First, . . . procedural flexibility can aid the FCC in making the substantive determinations that it is required to make under the Communications Act Second, . . . Congress has . . . [left] to the agency the determination of the type of procedure to be employed in a particular case Third, . . . [n]on-evidentiary rulemaking permits broad participation in the decision-making process and enables an administrative agency to develop integrated plans in important policy areas.²⁰²

The last of these points is particularly important. If we must have regulation, agencies cannot responsibly avoid the task of frontally ad-

198. *In re* Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, 29 F.C.C.2d 870 (1971).

199. 47 U.S.C. § 201(a) (1970).

200. 503 F.2d 1250 (3d Cir. 1974). *See also* Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir. 1975). CAB reliance on the DPFI standards and the application of the industry-wide determinations to particular airlines who argued that they should be treated differently were upheld in *Moss v. CAB*, 521 F.2d 298 (D.C. Cir. 1975). *But see* *Continental Air Lines, Inc. v. CAB*, 551 F.2d 1293 (D.C. Cir. 1977), again upholding the reliance on DPFI, but reversing because of a seeming inconsistency between the Board's position there expressed on economy fares and the view it seemingly later took in its Hawaii Fares Investigation. *Id.* at 1314.

201. 503 F.2d at 1264.

202. *Id.* at 1265. *Cf.* *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973) (FDA must grant hearing on whether company's evidence satisfied threshold burden of providing substantial evidence); *National Petroleum Refiners Ass'n v. FCC*, 482 F.2d 672 (D.C. Cir. 1973) (defendant in enforcement proceeding by the FTC must be given opportunity to demonstrate that special circumstances of his case warrant waiving applicable rule); *GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973) (FCC can make rules and need not grant adjudicatory hearings after actual abuses); *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892 (2d Cir. 1960) (although hearing is required for FAA modification of airmen's certificates, no hearing is required when a general directive in fact modifies airmen's certificates). *But cf.* *Independent Bankers Ass'n v. Board of Governors*, 516 F.2d 1206 (D.C. Cir. 1975) (interested parties have right to hearing to challenge application of regulations); *Hess & Clark v. FDA*, 495 F.2d 975 (D.C. Cir. 1974) (manufacturers entitled to hearing prior to FDA's withdrawal of approval for drugs).

addressing fundamental issues. Although next to impossible in individual cases, such a direct approach is the essence of a rulemaking proceeding. Moreover, rule-making fosters broad-based participation by allowing public interest groups or other intervenors to focus their attention solely on the issues of concern to them. Objectors have intervened in individual CAB cases, for example, alleging that the carrier and the Board have miscalculated the elasticity of demand for air travel. They have always lost and have since asked that a rulemaking proceeding be instituted on the point.²⁰³ If objectors prevailed in rulemaking proceedings, they could be confident that the rules would be applied by the Board in later cases; if they lost, they could seek judicial review or perhaps legislative change. Indeed, this entire proposal is often greeted with the most acceptance by the public interest groups whom some accuse of delay, while the greatest resistance seems to come from regulated firms and the commissions themselves.²⁰⁴

Of course, if rulemaking were such an unmitigated good, one might have expected heavy reliance on it before now. Critics have raised at least four major objections to more extensive use of rulemaking. First, agencies sometimes argue that they would be tied down if required to adhere to particular rules—even rules of their own making. The agencies argue that they must be allowed flexibility to develop creative approaches to new circumstances.²⁰⁵ But rulemaking is flexible; rules, once made,

203. The objectors to the Board's calculations were the Department of Transportation and the Counsel on Wage and Price Stability in Docket No. 27417, dismissed by Order No. 75-6-72 (June 13, 1975), and Order No. 75-8-99 (August 19, 1975), and Congressman John E. Moss in Docket No. 28440, rejected by Order No. 75-11-23 (Nov. 7, 1975).

Two of the agencies under consideration here now do have formal procedures by which a member of the public may petition the agency to institute a rulemaking proceeding and require the agency to respond to that request. See 14 C.F.R. §§ 302.38, 399.70 (1977) (CAB); 18 C.F.R. § 2.1a (1977) (FPC). The Federal Power Commission also imposed an internal management requirement which would require the bureaus and offices of the Commission to report semi-annually on prospective issues and problems which might confront the Commission in the future course of its regulatory activities. Order No. 547, 41 Fed. Reg. 15,003 (1976).

204. Dean Cramton explained the situation this way:

In all probability public interest groups can make a greater contribution in informal rulemaking proceedings than in adjudicative and formal rulemaking proceedings for at least two reasons: First, they are probably better equipped to speak to general propositions than to engage in trial-type proceedings; second, in the quasi-legislative (hence, political) process the group's viewpoint becomes a relevant datum simply because the group holds it. . . .

Thus, an agency's insistence on making decisions case-by-case on the basis of a lengthy evidentiary record may favor the regulated industry at the expense of upholders of the "public" interest because it throws the decision into the forum in which the industry groups are best equipped to compete.

Cramton, *supra* note 131, at 535-36.

205. The Supreme Court in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), of course, spoke of the need for some flexibility, concluding that a "rigid requirement" of rulemaking would "stultify" the process. "Some principles must await their own development" *Id.* at 202. However, one cannot read the Court's opinion without finding an unexpressed preference for rulemaking. There is a tolerance of "flexibility," but no hymn to its praise. *Cf.* *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (company bound by order of adjudicatory proceeding even though NLRB did not follow rulemaking procedures).

can be changed. Furthermore, "flexibility" is often a euphemism for unprincipled decisionmaking.²⁰⁶ Flexibility creates a milieu of ambiguity in which it is difficult for regulated firms to act with confidence. As Judge Friendly has argued: "A prime source of justified dissatisfaction with . . . federal administrative action . . . is the failure to develop standards sufficiently definite that decisions will be fairly predictable and that the reasons for them will be understood"²⁰⁷ The argument that rulemaking impairs flexibility—as the term is meant by most of its proponents—is a point in favor of this proposal rather than against it.

A second, more significant objection to greater use of rulemaking is based on the difficulty of distinguishing policy issues from the circumstances out of which they arise. For example, the FCC, having stated a general policy, must consider the problems of competition in the telecommunications industry during each tariff revision.²⁰⁸ That is, each particular rate change request has distinct implications, making it extremely difficult to decide broad policy questions in a vacuum. The FCC's response has been to try to accommodate both interests by con-

206. Almost two decades ago, Dean Cramton offered a particularly sensitive appraisal of the position of an ICC Commissioner, which applies to any member of a regulatory agency:

Perhaps it is only a myth that commissioners of regulatory agencies want or are able to formulate decisive policy for the future. Recent experience would indicate that there are many commissioners who are reluctant to express a strong or clear view on any policy matter which is seriously contested. The reasons are apparent. Matters which are vigorously contested and have significant economic consequences also have political implications. A hesitance born of caution as well as of doubt as to the proper solution encourages the use of small-scale and often intentionally limited adjudications in a series of cases. At best, with the case-by-case approach, all affected parties can be kept reasonably happy with a succession of minor victories and defeats; at worst, the adoption of the judicial manner may limit criticism.

It is not necessarily suggested that personal motives, such as a desire for reappointment or for other jobs dependent upon political friendships, influence the attitudes of commissioners. Other factors are more important: (1) inexperience with the subject matter being regulated at the time of initial appointment; (2) the real difficulty—if not impossibility—of devising a practical solution to many problems; and (3) a candid recognition that the objectives of regulation are somewhat fuzzy and consequent reluctance to impose a solution in the absence of a more specific legislative mandate. Mr. Dooley commented that the Supreme Court read the election returns; it is not surprising that the Commission, less isolated from political pressures and with a less well-defined task, gives some heed to congressional attitudes as they are revealed during the course of almost continuing investigations of ICC actions. . . . These comments are not intended to be critical of present or past members of the Commission. The same factors would be operative if different people held the same posts. It should be recalled that the ICC has a matchless record among federal agencies for integrity and honesty.

Cramton, *The Conduct of Rate Proceedings in the Interstate Commerce Commission* 104 (1961) (unpublished study conducted by Dean Cramton as reporter for the Committee on Rulemaking, Administrative Conference of the United States, on file at the Administrative Conference).

207. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 867 (1962).

208. For discussion of the *Specialized Common Carrier* sequence see text accompanying notes 198-200 *supra*. See also *MCI Communications Corp. v. Amer. Tel. & Tel. Co.*, 369 F. Supp. 1004 (E.D. Pa. 1974). An earlier example was *Above 890 Mc.*, 27 F.C.C. 359 (1959), to which AT & T responded with TELPAK, a rate which undercut potential competitors. See 23 F.C.C.2d 606 (1970); 37 F.C.C. 1111 (1964).

sidering the broad issues in general docket cases while recognizing that the same issues will arise again in individual cases. Realistically, some degree of duplication is probably unavoidable.

A third argument against greater reliance on rulemaking is that the facts underlying the policy decisions change so frequently that the validity of general principles is short-lived. This kind of concern has been raised about the CAB's Domestic Passenger Fare Investigation. Some have argued that the rate-of-return conclusions are out of date, that the load-factor assumptions were never very good, and that subsequent experience with discount fares has undercut much of the rule which took so long to produce.²⁰⁹ This concern is legitimate, and whether or not the allegations about the DPMI are true, similar charges are probably accurate in many circumstances. An obvious response, however, is that the agency can reopen these kinds of questions on a systematic basis to review the rule's current soundness. Such a system would require significant staff time and very likely would not reduce the total effort spent by the agency in deciding rate-related issues. But rulemaking would focus the commissions' and the participants' attention on specific substantive questions and thus should improve the quality of decisions and reduce the time required to process any particular rate increase request.

The final argument against greater rulemaking is that despite the procedure's efficiency, agency statutes allow parties a "hearing" and a hearing is not a hearing if important issues will not be heard.²¹⁰ The short answer to this, of course, is that the courts have not so held. They have allowed the denial of a hearing altogether in *Storer* and subsequent decisions;²¹¹ a fortiori, they would allow foreclosure of specific issues by a generally applicable agency rule. Moreover, all affected persons had or could have had an opportunity to be heard when the rule was made. To be sure, a party's rights in rulemaking, particularly under section 553,²¹² are not identical to those in adjudication,²¹³ but presumably all views would be entitled to be put before the agency to be factored into the decision. To fully protect all interests, the agency should be particularly sensitive to

209. See, e.g., authorities cited note 186 *supra*. One counter concern is that individual tariff proposals will be suspended and delayed pending resolution of the fundamental issues. For example, at the CAB, the domestic air freight rate investigation, CAB docket 22859, has been underway for several years and the Commission has repeatedly handled individual proposals on a "rule of thumb" basis.

210. The most strident criticism has been led by Professor Nathanson who describes many of the cases relied on here as "statutory misinterpretation in the name of flexibility." Nathanson, *supra* note 155, at 740. See also Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

211. See text accompanying notes 188-202 *supra*.

212. 5 U.S.C. § 553 (1976).

213. Compare *id.* § 553 with *id.* §§ 556-557. Thoughtful discussions of the various issues raised in this section are provided in Robinson, *supra* note 179; Note, *The Use of Agency Rulemaking to Deny Adjudications Apparently Required by Statute*, 54 IOWA L. REV. 1086 (1969); cf. Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study*, 64 CALIF. L. REV. 14 (1976) (FDA use of rulemaking to avoid questions of fact in adjudication).

the need to develop its rulemaking record and to allow full presentations, including cross-examination if appropriate. In *Mobil Oil*, the D.C. Circuit held that the reviewing court must determine whether substantial evidence supports the agency's decision, and the rationale of *Mobil Oil* may require that the underlying rules be so supported as well.²¹⁴

At bottom, however, there is no complete answer to the charge that this proposal for increased use of rulemaking denies a full hearing. The most that can honestly be said is that the proposal accommodates the interests of expeditious decisionmaking and fairness to all parties involved as effectively as any seemingly can—and certainly more effectively than proposals that advocate use of section 553 informal rulemaking procedure for resolving all issues, including factual ones. The questions to be decided in rulemaking deal with the significance of facts but are not usually the ultimate issues in the case. Questions as to the situation of particular firms or particular customers, on the contrary, would continue to be subject to full adjudication.

Determining the savings in time and resources that would accrue from implementation of this proposal alone is extremely difficult. To do so would require detailed study of the whole record in a large sample of each agency's annual cases, a task beyond the scope of this article. Even such a study could not fully determine the extent to which agency precedent had already precluded some issues from being raised. Nor could it evaluate the comparative desirability of generic rulemaking and "common law" development of standards. But almost certainly, the proposal, by itself, would not prove a panacea. Inevitably, a rule, once established, would be continuously eroded by subsequent cases, and eventually another full-scale rulemaking inquiry would be necessary.²¹⁵ For example, even the CAB seems to recognize that despite the detail and intended comprehensiveness of the DPFI, its standards need to be modified in several important respects. The agency has had to consider the effect of decreased aircraft utilization resulting from reduced frequency of flights, the propriety of treating discount fare passengers as if they were full fare passengers, and, most significantly, the appropriate load factor,²¹⁶ although the Board has undertaken no formal rulemaking of a magnitude similar to the original DPFI.

This concession, however, does not weaken the basic proposal. Most issues would not be reexamined often. Resolving more fundamen-

214. See Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 214 (1974); Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750, 1752 (1975). But see Wright, *supra* note 210.

215. There was language in both *Storer* and *Texaco* suggesting that perhaps the right to prove that the rule should be waived in a particular case was crucial to the result in such cases. However, in *Pfizer, Inc. v. Richardson*, 434 F.2d 536 (2d Cir. 1970), the court pointed out that an agency can always decline to apply a rule in a given case so that nothing special turned on making provision therefor.

216. *E.g.*, Dockets No. 27417 and 27947, Order No. 76-6-72 (June 13, 1975), and Order No. 75-8-99 (Aug. 19, 1975).

tal policy questions outside the trial-type ratemaking process would still allow agencies to focus their hearings on the factual situations of the firms before them. When combined with continuous evaluation of cost and revenue data and increased emphasis on settlement, more extensive rulemaking could prove an important element in accelerating individual rate cases.

B. Periodic Submission of Relevant Data

The second major change in approach to ratemaking should be to require agencies to improve significantly their handling of relevant cost, demand, and financial data. Here, too, most regulatory agencies still use the same procedures as trial courts. Agencies take evidence in oral or typewritten form²¹⁷ and basically let the decisionmaker examine it only at or near the time the case must be taken under advisement. For many years, such data was not even filed until the company presented its part of the formal rate case. Now, agencies more commonly require that the data be submitted at or near the time a firm originally files its request for rate change.²¹⁸ But even this earlier submission puts the agency and any objectors in an awkward position by requiring them to decide whether to protest or suspend a rate with only minimal time to assimilate what is frequently an enormous mass of relevant material.

Apart from the rationale that a rate case is like a trial and that evidence therefore need only be submitted after the case has begun, there seems to be no good reason for this practice. Companies generate accounting data throughout the year and presumably they continuously use it to make management decisions. Nothing prevents this data from being supplied to a regulatory commission as it is compiled for company management.²¹⁹ This proposal is not to require additional recordkeeping by firms. It simply urges that firms be made to submit the currently required data sooner rather than later. The longer the time in which the commission and potential intervenors can examine the data before the

217. *E.g.*, 14 C.F.R. § 302.24 (1977) (CAB); 18 C.F.R. §§ 1.22-.26 (1977) (FPC); 47 C.F.R. §§ 1.254-.258 (1976) (FCC); 49 C.F.R. §§ 1100.74-.87 (1976) (ICC).

218. *E.g.*, 18 C.F.R. §§ 35.12-.13 (1977) (FPC); 47 C.F.R. § 61.38(a) (1976) (FCC); 49 C.F.R. § 1102.2 (1976) (ICC rail general increase proceedings); *id.* § 1104.3 (ICC motor carrier revenue increase cases). These provisions generally apply only to relatively large changes. The agencies which only consider a small proportion of the tariffs anyway really do not want to be bothered with more paper.

219. The agencies have periodic reporting requirements now, of course. The FCC, for example, has at least 11 reports that are filed by various firms it regulates. However, none of these forms can be said to provide the kind of detailed information that one would file in support of a rate case or that would allow the kinds of projections and predictions proposed here. The primary use made of these forms is compilation of the industry's statistical data that appears in the FCC's own periodic statistical report. It seems likely, however, that if the proposal made here were adopted, the information presently generated in these 11 forms could be calculated from the data that the companies would be required to file and thus one reporting requirement would be substituted for the present 11.

hearing, the less a case will be delayed while they assimilate the data later.

If firms are required to submit data early, agencies must develop methods for processing the data. If an agency simply files the information away in a drawer without analysis, there is no reason for its early submission. The day is long past, however, when the file cabinet and the human eye were the best tools for assimilating information. The advent of computer technology has made it possible to conveniently absorb and store large quantities of data in a readily accessible form.²²⁰ By using data processing equipment, a commission should be able to spot the need for a rate increase almost as early as the firm itself, to see what services are not paying for themselves, and to determine which firms deliver services most efficiently.²²¹ Most important, better data management could put agencies in a position to rule on tariffs without either undue delay or excessive reliance on a firm's representations of what its data contains.

Lest this all seem futuristic, sophisticated models are now being developed to make precisely these kinds of projections. For example, the "Regulatory Analysis Model" (RAM) developed for the Commerce Department's Experimental Technology Incentives Program (ETIP)²²² provides a structure for projecting capital needs, revenue needs, likely growth of demand, effect on demand of particular changes in rate structure, and so on.²²³ Specific applications of that model are now being tested. A consultant to the FPC²²⁴ has developed a comparable program,

220. The ICC is attempting to put its former Highway Form B into a form that can be stored in a computer. This project is still in its infancy but it is a first step toward the capacity to make the sort of calculations suggested here.

221. Very simple models are even being used today to help teach law students about the process of ratemaking and the consequences of particular decisions. See Maggs & Morgan, *Computer-Based Legal Education at the University of Illinois: A Report of Two Years' Experience*, 27 J. LEGAL EDUC. 138, 152-53 (1975).

Continuous data acquisition and computer modeling also seem particularly suited to making the kind of determination required by *NAACP v. FPC*, 425 U.S. 662 (1976). There, the Supreme Court held that the Commission was entitled to consider alleged discriminatory employment practices only in so far as those practices tended to increase the labor costs and thus the proposed rates of the regulated firm. Only a moment's reflection is needed to realize how difficult that determination could be in any individual case. The kind of data collection contemplated in this proposal, however, should allow quite sophisticated comparisons between the labor cost structure at firms alleged to have engaged in discrimination and those where such allegations have not been made. The problem of assuring that the cases examined are comparable in all other respects will always exist, but without the data for making this kind of comparison, the analysis contemplated by the Court would be difficult to undertake at all. See 41 Fed. Reg. 30,589-90 (1976) for the FPC's attempt to comply with the Court's opinion using traditional procedures.

222. The "ETIP Program" is a function of the National Bureau of Standards. Technical assistance is provided by the Office of Economics of the FPC. The contractor is Temple, Barker & Sloane, Inc., Wellesley Hills, Massachusetts.

223. Temple, Barker & Sloane, Inc., *Regulatory Analysis Model RAM Descriptive Documentation I-6 to -12* (Apr. 1, 1977).

224. The contractor is Planning Research Corporation. This project is managed by the Office of the Executive Director of the FPC. Why the FPC has not stimulated cooperation between the two systems it was developing was never fully explained to this writer.

the Regulatory Information System.²²⁵ To date the FPC project has stressed refining the data required of firms by making forms consistent, relevant, and fewer in number.²²⁶ Once a firm submits information, the agency will compare it with the firm's past data and with data from comparable firms to verify its reliability and to make the desired projections.²²⁷ A project sponsored by the FPC is now under way to develop "canned questions"—answers to which accountants, lawyers and others regularly need—so that the system can be programmed to provide that information quickly in response to simple commands.

If this digression into recent data-modeling developments seems only mildly interesting to lawyers seeking to amend administrative processes, such a reaction misses a crucial point. Increased rulemaking has been advocated in concert with or in contrast to adjudication for at least twenty years but the change has proved difficult to effectuate. Now, however, computer modeling has reached the point, at least in ratemaking, where administrative ideals embodied in rules can more nearly be realized.

Two examples illustrate how data management can help the agencies achieve desired policies. First, in 1972, the Administrative Conference called for the agencies to provide statements of the reasons for suspension by specifying the sources and limits of agency concern.²²⁸ As noted earlier, the primary reason for suspension often is simply that the proposal is subject to protests of some plausible merit. Ongoing use of data supplied by the subject firm and others could improve an agency's ability to specify the reasons for suspension. Sources of agency concern could be detailed, and if erroneous, presumably could be corrected expeditiously. In short, the agency could be on top of its own process and not perpetually waiting for others with more information to prod it into action. Second, expedited data flow could make partial rate adjustments, called for in the same 1972 proposal,²²⁹ more practical. The more data on hand in a manageable form, the more the agency could have confidence "that a proposed increase is justifiable at least in part."²³⁰ Because computers are only as good as their programming and their data, issues concerning the firm's true entitlement would undoubtedly remain. But

225. The project is described at 18 C.F.R. § 2.91 (1977). The more complete policy statement describing the system is reported at 38 Fed. Reg. 27,813 (1973).

226. The redesigning of the forms has permitted the FPC to go from 50 public use forms to 15. The number of schedules filled out by respondents has been reduced from 500 to 330. Address by Joseph N. DiMarino, National Association of Regulatory Utility Commissioners Executive Committee Meeting 12-13 (July 28, 1976). Further, an effort is being made to coordinate information required by the FPC with that required by state agencies, both to reduce the reporting burden on the companies and to allow federal and state agencies to use each others data to perform their respective regulatory function.

227. *Id.* at 23-25.

228. 1 C.F.R. § 305.72-4, Recommendation A.1 (1977). The underlying report was Spritzer, *supra* note 50.

229. 1 C.F.R. § 305.72-4, Recommendation C (1977).

230. *Id.*

awarding a partial adjustment is essentially a process of discovering relatively non-controversial facts, and the increased ability to manage data again seems a way to make the Administrative Conference proposal more attainable.

The developments in data management also promise to enhance the beneficial effect of the other proposals made here. If the data are available, use of computer models can project the likely implications of proposed rules and test their efficacy. For example, if an agency has data and a model for capital investment projections, it can predict with a high degree of reliability the effect on rates of an allowance or disallowance of construction work in progress. Data modeling could likewise project changes in revenue from modifications in the rate structure, or changes in investment if tax benefits are passed through.²³¹

Better data management should also accelerate the process of case settlement proposed next in this article. As seen in the tables on FPC experience,²³² settlements tend to occur just before or just after the hearing, which is consistent with experience in trial practice generally. Parties require time to get their own cases in order and to anticipate their opponents' arguments. Once they have a sense of the whole picture, they can negotiate, but usually they cannot do so earlier. The reporting and modeling proposed here can help give that picture to the parties, as well as to the agency, more quickly than before, and in that way can probably reduce case-processing time to the irreducible minimum. Moreover, it can do so without sacrificing the elements of procedural due process on the altar of dispatch. Proceedings can remain individualized and firms, though subject to comparison with others, need not have the most basic elements of their financial health determined "informally." Additionally, the public would be better able to participate.²³³ Information would be available to all much earlier than before, and the public would not find itself perpetually trying to catch up with what the proponent firm already knows.

Another benefit of early data acquisition is the increased possibility of using estimates of future costs as a basis for ratemaking. As noted earlier, the use of past data inevitably creates regulatory lag because a

231. "Passing through" of tax benefits refers to the practice of reducing rates to reflect extraordinary refunds or deductions. Commonly, for example, a utility could elect accelerated depreciation and reap tax benefits in the early years of an asset's life. Agencies differ over whether rates should be reduced in the early years and raised thereafter or whether ratepayers should receive an equal portion of the benefit in each year of the life of the asset. This distinction can make a significant difference for an expanding firm and there is no reason not to decide the question in a generic rulemaking proceeding.

232. See text accompanying notes 98-99 *supra*, in particular Table VII(B).

233. In a real sense, this proposal also helps implement the Administrative Conference recommendations on discovery. 1 C.F.R. § 305.70-4 (1977). Of course the average person will not be able to take advantage of computerized information, but the average person lacks the expertise to work with what is now available. Anyone with enough interest and financing to participate in today's costly proceedings should be able to afford to hire the technical personnel necessary to take advantage of this information.

given year's rates always trail behind current costs.²³⁴ Previously, this has been considered unavoidable because a regulatory commission's picture of the firm's cost experience is limited to a snapshot taken at the time of particular rate change requests. Although a series of snapshots may reveal that movement has occurred, they do not provide a moving picture. Continuous data acquisition, by providing such a moving picture, could help develop reliable projections of future costs that could be, in whole or in part, the basis for establishing rates.²³⁵

Prior submission of data will not, however, be a panacea. The new process will necessarily be iterative. That is, the data and models will always be subject to improvement as particular limits of the system become evident. Econometric models exist to replicate and predict changes in the American economy, for example, but all agree that they are still in their infancy.²³⁶ For one thing, the data may be bad. Uniform systems of accounts may not now be of sufficient sophistication, for example, to be able to deal with all forms of ratemaking decision. Although cooperation in improving the quality of data has been significant between the National Association of Regulatory Utility Commissioners (NARUC) and the federal agencies over the years,²³⁷ existing data systems will probably prove inadequate in some cases. Nonetheless, modeling a firm's revenue needs is far easier than modeling the economy. Even a crude system should serve as a useful early warning device, and should improve the situation confronting most agencies today.

C. Increasing the Termination of Rate Cases by Settlement

The final element of the "revised strategy" proposed here is that, instead of seeing as its purpose the litigation to a conclusion of each rate case, an agency should mediate disputes and encourage participants to arrive at a negotiated solution. This concept is not shocking when applied in trial courts, nor should it shock here. Indeed, the Administrative Conference has previously adopted a recommendation generally favoring settlements.²³⁸ The significance settlements could have is confirmed by the findings noted earlier.²³⁹ Approximately one-third of the time in a

234. See note 18 *supra*.

235. See 18 C.F.R. § 35.13(b) (1977), which requires the filing of data for 12 consecutive months of actual experience and 12 additional months beginning three months after the expiration of the other 12 month period. The order underlying this requirement was approved in *American Pub. Power Ass'n v. FPC*, 522 F.2d 142 (D.C. Cir. 1975).

236. See, e.g., Clark, *Econometrics Gains Many New Followers, But the Accuracy of Forecasts is Unproven*, Wall St. J., Aug. 2, 1977, at 42, col. 1.

237. NARUC has developed the Uniform System of Accounts used in most state agencies. Both computer-based systems described here have been developed with the knowledge, though not the particularly active participation, of NARUC.

238. 1 C.F.R. § 305.72-4 (1977). The underlying report was again Spritzer, *supra* note 50. The Temporary Administrative Conference of the United States in 1962 also apparently made such a proposal. See Committee on Rulemaking, Improvement in the Conduct of Federal Rate Proceedings (Sept. 17, 1962) (unpublished report in the files of the Administrative Conference of the United States).

239. See text accompanying notes 95-100 *supra*, particularly Table VIII.

typical rate case is spent assembling the facts in presentable form. Fully two-thirds of the time is spent presenting the case to the agency and waiting for the agency to reach a decision and write an opinion.²⁴⁰ Settlement could save part of that last two-thirds. Presumably, the parties would still have to marshal the facts and consider their positions and their chances if litigation were to ensue,²⁴¹ but few administrative agency opinions are so memorable that the resources could not be spent better than in litigating issues to judgment when they could be settled sooner.

Implementation of this last proposal inevitably would have to overcome several objections, some substantive and some procedural. First, some may charge that any result arrived at by settlement is wrong by definition. Such a position assumes that the agency could achieve the correct result only after careful consideration of all the costs and valuations that form the subject of a ratemaking proceeding. To the extent that the settlement departs from the result that full adjudication would have produced, the process could be said to deprive either the companies or the public of something to which they were entitled.²⁴² In essence, the argument is that the public has an interest in the rate level and that allowing private negotiators to determine the price of a regulated firm's product fails to protect that interest.²⁴³

240. Once again, this should not have been new or surprising insight to those who have followed the work of the Administrative Conference. The words of a former chairman are directly on point:

Existing evidence tends to show that the bulk of the time required by most administrative proceedings does not occur in the hearing room itself but during the preparatory stage prior to hearing, during the preparation of an initial decision by a hearing examiner, and in the review of that initial decision by the agency staff and agency members.

Cramton, *Causes and Cures of Administrative Delay*, 58 A.B.A.J. 937, 940 (1972).

241. In an attempt to expedite settlement in its cases, the Federal Power Commission instituted what was called a "top sheet procedure" under which the staff was to pull certain identified items of information into a brief summary form on which the Commission could focus and which could serve as the basis for settlement negotiations. Such top sheets were to be prepared within 90 days of the suspension of a rate. They were not meant to be a thorough analysis of all issues in each case, and one could not suppose that settlements would necessarily follow promptly simply because one was prepared. However, this 90-day figure suggests that at least one agency believes even the most complex task of all—the problem of assimilating the data and arriving at a going in position—might be manageable in well under the approximately one year it has taken to get an FPC case to the hearing stage. See *Top Sheet Procedures in Natural Gas Pipeline and Public Utility Rate Cases*, FPC Administrative Order No. 157 (April 1, 1976). In fact, the agency never met its 90-day target on any regular basis, but it did improve its processing time, and the backlog of pending cases started to decline. W. Lindsay, *Termination of Settlements Task Force* (Jan. 19, 1977) (internal FPC memorandum supplied to this writer by Mr. Lindsay, Chairman of the Task Force).

242. This might be perceived to be a problem particularly at the ICC, where there is more concern about "discrimination" than at the other agencies. That is, the ICC sees it as a prime concern that no shipper pay more or less than another for the same service. Settlements tend to undercut that policy, but the residual responsibility proposed here for the agency should tend to reduce the problem.

243. The argument was articulated well by the General Counsel of the Federal Power Commission in a slightly different context:

The first fallacy in this analysis is the assumption that a rate is correct simply because it was set after full hearing. Ambiguity is an inherent characteristic of the ratemaking process. The determination of actual, experienced costs, for example, is relatively easy, but even there, questions such as the appropriate rate of depreciation can affect the final result enormously. Differences of only a few tenths of one percent in the rate of return can likewise produce a difference of thousands of dollars in rates.²⁴⁴ Similarly, the technique chosen to value the firm's invested capital can greatly affect the rate set. In short, then, the system does not pinpoint a single correct level of earnings for a regulated firm. The most that can be hoped of any process, whether formal or compromised, is that the result will fall within a range of reasonableness.

The second fallacy in the "public interest" argument is its assumption that most rate cases reach the litigation stage as a result of some public concern. Earlier discussion indicated that the vast majority of cases that reach formal adjudication do so because of a private controversy between the firm whose rates are in question and its competitor or customer.²⁴⁵ Because rate cases reach litigation largely because of adversary positions, compromise and conciliation become substantially more rational solutions than traditional rhetoric would indicate.²⁴⁶

There is virtually no doubt that the law permits settlement of rate cases. Section 554(c) of the Administrative Procedure Act requires that agencies give all interested parties the opportunity to submit and consider offers of settlement.²⁴⁷ Of course, section 554(c) purports to apply to "adjudication" and, technically, this may pose a problem. If ratemaking is rulemaking—whether formal, informal, or hybrid—then it is technically not a section 554 "adjudication." Courts, however, have simply

In my judgment, private parties cannot, and should not, be relied upon to protect the "public interest" in enforcement or other matters arising under the Natural Gas Act. Obviously, each management or party may have private interests to protect, and, under general legal concepts prevailing in this country, their spokesmen are obligated to meet those trusts. Public interests may or may not coincide with private interests. As I see it, the Commission and its staff have as their responsibility to protect the public interest.

VI *Regulatory Reform: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. at 770 (1976)* (statement of Drexel D. Journey).

244. The classic debate on this issue is between the "comparable earnings" and the "earnings-price" approaches. Compare Leventhal, *Vitality of the Comparable Earnings Standard for Regulation of Utilities in a Growth Economy*, 74 *YALE L.J.* 989 (1965) with Note, *An Earnings-Price Approach to Fair Rate of Return in Regulated Industries*, 20 *STAN. L. REV.* 287 (1968).

245. See text accompanying notes 36-43 *supra*.

246. In taking this approach, the agency would be borrowing something constructive from the modern trial court. Today, the vast proportion of cases on the docket of a trial judge are settled by the parties. Settlements are arrived at on the basis of some assessment of the result that would be reached if one side were intransigent and the case went to trial. Most cases do not reach that stage, however, not only because the courts are crowded, but also because all sides recognize the expense of litigation and the reality that justice delayed is justice denied.

247. 5 U.S.C. § 554(c) (1976).

refused to be imprisoned by this apparent conundrum and have recognized that rate cases combine elements of both adjudication and rulemaking. As the Fourth Circuit reasoned in *City of Lexington v. FPC*²⁴⁸

No court of law would tolerate for a moment the idea that it would be obliged to try a case that had been assigned for hearing notwithstanding the fact that the parties had reached a settlement of the controversy. Much less should such a contention be considered here with reference to the ruling of an administrative tribunal where liberality of procedure is essential in the interest of the dispatch of business.²⁴⁹

The result seems sensible even if it largely ignores the technical issue.

Settlement is most obviously appropriate in complaint cases, where two parties are clearly arguing that a specific rate was improperly charged in the past. But whether posed by complaint, suspension, or investigation, the issues are basically the same and the wisdom of allowing settlement is equally obvious. The real problem may be guaranteeing that all significantly affected interests are represented in any settlement negotiation. In this connection at least four different kinds of situations need to be distinguished. First is the situation in which both parties to the case are private firms with adverse interests and the agency's role is really analogous to that of a court. The Federal Power Commission's gas pipeline and wholesale electric rate cases are good examples of this situation, and, perhaps not surprisingly, settlement of these cases has been relatively easy.²⁵⁰ Second is the larger group of cases in which the regulated firm is the proponent of change and the regulatory agency is the adversary party. Even here, intervenors and customers with adverse interests are often sufficient foils to make the situation quite analogous to the first.²⁵¹ In the third class of cases where a competitor protests someone else's rate decrease, settlement will pose particular public interest problems. Settlement of these disputes could degenerate into little more than classic price-fixing arrangements.²⁵² Finally, a danger in any cases initiated by only one type of customer is that settlement might simply shift the burden of paying for cost increases to a less articulate or well-organized group. Plainly, the commission and its staff have important roles to play in the settlement process.

248. 295 F.2d 109 (4th Cir. 1961).

249. *Id.* at 121. *Cf.* *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312 (1974) (recognizing the Commission's authority to accept settlements of rate cases).

250. Professor Spritzer has summarized some factors contributing to the FPC's success in obtaining settlements, including clear articulation of standards to be applied, prompt analysis of data by the staff, and the effective use of pre-hearing conferences, all practices consistent with the recommendations made here. *See Spritzer, supra* note 50, at 91-92.

251. S. 270, 95th Cong., 1st Sess. (1977), seeks to stimulate such adversary participation by providing for payment of attorneys' fees for representatives of important interests. *See, e.g., Leventhal, Attorneys' Fees for Public Interest Representation*, 62 A.B.A.J. 1134 (1976).

252. This would be the likely situation in many ICC and CAB cases. In such cases the independent check of the agency advocated below would be particularly crucial.

Four practices could alleviate many of the potential problems presented by greater emphasis on settlements. First, agencies should regularly reexamine their rules to be sure they are reducing areas of real controversy. If all ambiguity about an agency's position in future cases were eliminated, presumably there would be no litigation. Such absolute certainty is not possible and probably not desirable. The agency can and should become aware, however, through its administrative law judges, of the kinds of uncertainty that tend most to prevent settlement. When policies can be formed to reduce these uncertainties, the parties and the process will both benefit.

Second, the agency—specifically the administrative law judge to whom the case is assigned—must move the case inexorably toward a hearing. There is every reason to believe that the courthouse steps are as important to settlement of administrative proceedings as they are in more traditional trial practice. The records of many FPC cases, for example, are punctuated with continuances for the parties to discuss settlement, but the settlements have not materialized. Although rushing to hearing will not be the best course in every case, encouraging settlements is not synonymous with abdicating responsibility. If necessary, agencies should be prepared to resolve the dispute even while they seek to find areas of consensus and grounds for settlement.²⁵³

Third, part of the commission's staff should act as a surrogate for identifiable interests that are not parties to the formal proceeding. If particular large commercial customers were objecting to telephone rates, for example, part of the commission's staff might assume the role of protecting the interests of residential customers. In a particularly large case, the agency might play multiple roles, assigning them to different members of its staff. Admittedly, defining the groups to represent and knowing when represented positions should be "compromised," would present problems. But the problems would be no greater than those of directing the activities of the consumer protection bureaus often used and advocated today.²⁵⁴

253. This mediation function might often be performed particularly well by the more sophisticated factfinders and decisionmakers suggested in Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues*, 71 MICH. L. REV. 111 (1972).

Further, in some cases an authoritative decision may come more quickly than a negotiated settlement. Some ICC modified procedure cases, for example, are already handled expeditiously. Settlement is a means to the end of prompt decision; it is not an end in itself.

254. Several agencies now have internal staffs performing this public representation function. Dean Cramton put the matter bluntly: "The cardinal fact that underlies the demand for broadened public participation is that governmental agencies rarely respond to interests that are not represented in their proceedings." Cramton, *supra* note 131, at 529. A discussion of the history and candid analysis of the problems of such internal consumer agencies is contained in Finkelstein & Johnson, *supra* note 136 (discussing the Interstate Commerce Commission).

Current bills proposing the establishment of a separate consumer agency are S. 1262, 95th Cong., 1st Sess. (1977); H.R. 6805, 95th Cong., 1st Sess. (1977).

Finally, the danger that one or more decisions reached by settlement might be unfair in significant ways is always present. To deal with this problem, the administrative law judge and the commission should have to assume at least the responsibility that a trial judge must assume in class actions²⁵⁵ and in many negotiated guilty plea cases.²⁵⁶ That is to say, the burden of initiating discussions and of defining settlement terms should fall on the affected parties, but the agency should have a significant residual burden of guaranteeing a fair result. The analogy between class action cases, guilty pleas, and the process of proper rate regulation is really quite close. In each instance the details of a resolution can probably best be understood and worked out by the parties themselves, but the court must ensure that the public interest (or the interest of missing class members) does not go unrecognized. Analogizing to class actions, it would seem appropriate for the agency to publish the proposed settlement in the Federal Register and to invite comments from interested persons. The settlement approval process would thus take the form of informal rulemaking. The risk that a settlement could come unglued at this stage is always present, and indeed, a prime objection of FPC practitioners was the agency's delay in approving final settlements. If settlements are to be further encouraged, such delay should be minimized, but some delay is probably inevitable if the settlement review process is to be meaningful.²⁵⁷

Separating the functions of the commission that formally "decides" the case and the part of its staff that "negotiates" the settlement should satisfy both the spirit and the letter of the provisions of the Sunshine Act governing ex parte communications with government employees.²⁵⁸ The Act prohibits ex parte communication with "any member . . . administrative law judge, or other employee who is . . . expected to be *involved in the decisional process* of the proceeding."²⁵⁹ Broadly speaking, a

255. Federal Rule of Civil Procedure 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." The cases suggest that the trial court is not to "decide the merits" of the controversy. See, e.g., *Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975). The review by the administrative agency might have to be somewhat more intense if the adversary character of the parties is less than that in the usual class action.

256. Federal Rule of Criminal Procedure 11 requires the trial judge to ensure both that the defendant's plea is voluntary and that the negotiated sentence is reasonable and acceptable to the court.

257. The FPC statistics for time to approve settlement set forth in Table VII(B), at text accompanying note 99 *supra*, were 113 days for electric rate cases and 170 days for gas pipelines. That seems excessive but it is unlikely a serious agency review with notice and opportunity for comment could be accomplished in substantially under 60 days.

258. 5 U.S.C. § 552b (1976).

259. *Id.* § 557 (d)(1)(A) (emphasis added). An example of the kind of present regulation that would be amended under this proposal is 18 C.F.R. § 1.4d (1977), which prohibits any "ex parte, off-the-record communications" by any party or counsel with "any . . . employee of the Federal Power Commission." The FPC has instituted a rulemaking proceeding, Docket No. 76-24, to consider an amendment to this rule which would

settlement negotiator is "involved in the . . . process," but negotiation is not part of the "decisional" process. As long as the commission itself has a bona fide approval function, and as long as the staff negotiators are "walled off" from the commissioners and their staffs,²⁶⁰ they should no more be barred from ex parte bargaining than an independent consumer agency would be.

A lingering problem, of course, is that even after extensive negotiations, not all parties will reach a consensus on all issues. In large multi-party cases the risk is particularly great that minor differences may destroy the entire settlement effort. The courts have allowed an agency to step in, however, and impose a result reached by settlement—explicitly found to be reasonable—upon one or more unwilling interests. The D.C. Circuit, for example, explained in *Pennsylvania Gas & Water Co. v. FPC*:²⁶¹

[A] court must passively await the appearance of a litigant before it On the other hand, the regulatory agency is charged with a duty to move on its own initiative where and when it deems appropriate; it need await the appearance of no litigant nor the filing of any complaint; once the administrative process is begun it may responsibly exercise its initiative by terminating the proceedings at virtually any stage on such terms as its judgment on the evidence before it deems fair, just, and equitable, provided of course the procedural requirements of the statute are observed. Only by exercising such "summary judgment" or "administrative settlement" procedures when called for can the usual interminable length of regulatory agency proceedings be brought within the bounds of reason and the agencies' competence to deal with them.²⁶²

In *Mobil Oil*, the Supreme Court adopted this concept almost verbatim, stating that "no one seriously doubts the power—indeed, the duty—of FPC to consider the terms of a proposed settlement which fails to receive unanimous support as a decision on the merits."²⁶³

This approach is not without its problems. The Fourth Circuit has suggested that the agency should approve a settlement only when other parties willing to accept the settlement represent the same interest as the holdout.²⁶⁴ In *Mobil Oil*, the Supreme Court was influenced by the fact

explicitly allow discussions with staff counsel of "proposed settlements or proposed agreements for disposition of particular issues." 41 Fed. Reg. 30,688 (1976).

260. Department of Energy Organization Act, Pub. L. No. 95-91, § 406, 91 Stat. 565 (1977), authorizes the Secretary of the Department of Energy to intervene or otherwise participate in any adjudicatory proceeding before the independent Federal Energy Regulatory Commission. This procedure will allow the point of view of the Secretary to be heard and presumably to be represented in settlement negotiations without affecting the Commission's obligation to assure procedural fairness to all participants.

261. 463 F.2d 1242 (D.C. Cir. 1972).

262. *Id.* at 1246.

263. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 313 (1974) (quoting the court below, *Placid Oil Co. v. FPC*, 483 F.2d 880, 893 (5th Cir. 1973)).

264. *City of Lexington, Ky. v. FPC*, 295 F.2d 109, 121 (4th Cir. 1961).

that the FPC had held a hearing on the merits of the *settlement*, thus giving the objectors at least one clear chance to be heard. In 1972, an Administrative Conference recommendation took the position that the lack of unanimous consent should not bar settlement approval, but the Conference also called for giving objectors a chance to demonstrate that a hearing was necessary to resolve material facts that remained at issue.²⁶⁵ The hearing under such circumstances may seem to the objector to be less than wholly objective; he seems in effect forced to prove the others wrong. Assuming the agency has the data well in hand and has previously resolved many of the underlying policies, however, the actual detriment to the objector is relatively slight, while the benefit to the expeditious flow of cases through the agency seems significant indeed.

V. CONCLUSION

Rate cases almost certainly take too long to decide today. The delay is costly both in dollars spent on litigation and in uncertainty over final results. But this situation is not inevitable. Delay can be eliminated, not through patchwork procedural reform, but by changing the ratemaking process to make clear the applicable standards and the relevant facts earlier in the process, and to let the affected interests play a larger role in defining the ultimate outcome. If the proposals made here were adopted, decisions would be made within a more certain framework. A regulated firm would look at the world knowing somewhat better what its allowed rate of return would be or at least what formula would be used to determine it. The firm and its customers would know as nearly as possible how costs and revenues would be measured, and the firm would know better the consequences of spending behavior and could plan accordingly. Additionally, the agency and potential protestors would have a continuing X-ray of the firm's cost experience. When a firm filed a proposed tariff, protestors could challenge the factual assertions made by the firm or the reasonableness of its conduct. Parallel data derived by tracking other firms would help measure both the plausibility and the propriety of the claims. When disagreements remained—as they sometimes inevitably would—they would be subject to compromise and settlement if possible or to trial-type hearing if necessary. The option of an on-site audit would be available, as today, and cases might be wholly or partially settled on condition that the audit verify the data underlying the settlement.

The significance of this “revised strategy” lies in the interrelation of its three elements. Rulemaking is costly and time-consuming but when used as a mechanism for focusing data on relevant issues and simplifying the ultimate decision process through settlement, its potential can be maximized. Data collection under some circumstances could inundate

265. 1 C.F.R. § 305.72-4, Recommendation D.2 (1977).

the regulatory commission, but as proposed here, it can be channeled and directed by rules that define what is relevant. Further, firms may be more willing to comply with data-gathering requirements if they know that this information will be the focus of the settlement negotiation. Finally, settlement could be a hopelessly arbitrary and chaotic process, unless as proposed here it can be structured by the constraints imposed by formal rules relating to the fundamental issues and by a common data base from which all parties can work in forming their positions. The proposal, then, is to substitute an integrated strategy for what has been heretofore a series of makeshift changes.

It may be unrealistic to assume that the revised strategy would be equally valuable in all contexts. At the FCC, for example, many of the cases are truly *sui generis*. An AT & T rate case is so massive and so complex that it is probably unlikely and even undesirable to believe that rules can simplify it significantly or that settlement is likely. At the CAB, too, even with the DPFI, a few cases have simply defied quick solution. No proposal will reduce the number of such cases to zero. The present proposals should work best in state or federal agencies whose workload of cases differs in detail but has many common elements.²⁶⁶ The first two features of the plan give potential parties the information necessary to determine whether a protest would be worthwhile. Settlement is the logical extension of this approach to the resolution of differences. The risk, of course, is that the parties might use negotiation and settlement to reinforce a cartel. The FPC docket generally consists of cases between parties with a somewhat adversary relationship,²⁶⁷ but the ICC and CAB have a greater mix. Unfortunately, in both of the latter agencies, there is so much cartelization inherently present in the regulatory process that this proposal would probably not make matters significantly worse.

There is at least some reason to suppose that these may be ideas whose time has come. Professor Donald Baker has analogized times of change for public policy to the "launch window" of a moon mission.²⁶⁸ Only at certain times is the need perceived, an understanding of the problem available, and the means at hand to deal with it. For ratemaking delay, the present may be such a time. The problem is perceived—at least by the regulated firms—and computer modeling potentially gives us the tools with which to make theories about proper solutions a reality. Parts of each of these proposals are being successfully employed today in

266. Although this article has been directed at the work of federal agencies, the proposals made here should be equally applicable to the work of state public utility commissions. The interplay of experience between the state and federal agencies on these issues should help improve the performance of both.

267. Parties to the contract under FPC review are not always true adversaries. The buying utility can often pass on the price directly. However, there are frequently ultimate customers who appear and guarantee the adversary setting.

268. Cohen, *Federal Policy Shifting in Its View of Economic Regulation*, 7 NAT'L J. REP. 270 (1975) (quoting Professor Baker).

at least one of the agencies, and in large part the task is to get each agency operating as well as the others at their best.

Efficiency is no proof of the inherent worth of an agency, but a lack of efficiency is an indictment even of agencies that are valuable. It seems inevitable that the nation will continue to have agencies engaged in ratemaking, whether at the federal or state level or both, for the indefinite future. The foregoing proposal for a new strategy will not solve all the problems, but it may point some directions toward breaking out of the conceptual and practical prisons in which we have previously placed ourselves.