Recommendation 72-4

Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies

(Adopted June 9, 1972)

The determinations of the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, and Interstate Commerce Commission, whether to exercise or refrain from exercising their power to suspend and investigate newly filed rate proposals, are of great importance to regulated companies, their customers, and the general public. Although a decision not to suspend does not preclude an agency investigation at a later date (either *sua sponte* or upon complaint), inertia then plays a significant role. Moreover, once a tariff change is effectuated, in most cases the burdens of dislodging an existing rate rest upon its challenger. Since suspension of a rate initiates a proceeding that is likely to be protracted and costly, a decision to suspend is also an important action. The procedures by which rate proposals are suspended, including the various forms of private negotiation that often accompany the suspension process, can and should be improved.

Recommendation

A. *Suspension of Rate Proposals*

1. *Statement of reasons for suspension*.—A rate-making agency in exercising its statutory power to suspend rate proposals should state the reasons for suspension to the extent practicable. Identification by the agency of the limits and sources of its concern, and not merely a recital of statutory criteria, will enable the proponent of the rate to make a more informed decision whether to withdraw the proposal, modify it or persist in it, and will also serve to focus the areas of controversy in the event that the regulated company stands on its proposal and the matter goes to hearing.

2. "*Speaking" orders of suspension*.—Rate-making agencies, which are not authorized to prescribe rates without public proceedings, should not provide in suspending a rate a detailed statement of a substitute proposal that the agency would allow to go into permanent effect without suspension. The expression of detailed agency views concerning an acceptable rate should not be used as a means of prescribing a rate without allowing interested persons an opportunity to participate.

B. *Negotiation Between the Agency and the Regulated Company*

A rate-making agency should not rely on a pattern of regulation consisting largely or solely of informal negotiation by the members of the agency with regulated companies in order to influence, shape or pre-audit rate proposals to be filed in the future. In the short run negotiation may appear efficient because it avoids the burden of complex public proceedings. In the long run, however, over-reliance on negotiation may inhibit the development of an adequate staff, compromise the independence of the agency in passing on protests and complaints against negotiated rates, delay the development of an adequate methodology of regulation, and result in a failure to formulate visible and predictable standards. The development of such standards is critical to expeditious disposition of rate proceedings. Since negotiation with respect to rates could preclude effective participation by others who have a direct interest in the outcome, any negotiation undertaken should, to the extent practicable, be conducted in proceedings open to them.

C. *Authorization of Temporary and Partial Increases*

Regulatory statutes should be amended, to the extent that existing authority is lacking, to authorize rate-making agencies, as an adjunct to their power to suspend, to allow temporary rate increases, including partial increases, subject to appropriate conditions (including, where practicable, provision for refund if the interim increase is ultimately found unjustified). A temporary increase should be authorized only when 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. Exercise of authority to grant temporary increases, rather than suspending a proposed increase in full or allowing it to go into effect without suspension, would mitigate the effects of regulatory lag. Similar authority to allow temporary and partial rate reductions, or other temporary changes, should also be sought where appropriate.

D. *Settlement of Rate Proceedings*

1. *Settlement by agreement of the parties*.—Settlement of rate proceedings by agreement among the parties, either before or after an evidentiary hearing, is appropriate and desirable if the agency, on the basis of the available record and any further written submissions, is in a position to determine that the disposition is in the public interest.

2. *Settlement in the absence of agreement*.—Disposition of a rate proceeding on the basis of a proposed settlement, in the absence of full agreement by the parties, should turn upon the nature of the issues involved in the proceeding and the appropriateness of an evidentiary hearing for a fair, accurate, and efficient decision of those issues. The degree of consensus among the parties and the nature of the interests represented by any objecting parties are factors which the agency may consider in determining whether a settlement is in the public interest. In situations in which a participant who is objecting to a proposed disposition does not show that a genuine issue of material fact is involved, an agency may dispose of a rate proceeding on the basis of written submissions without holding an evidentiary hearing for purposes of cross-examination. The Administrative Procedure Act requires cross-examination only insofar as it is required "for a full and true disclosure of the facts," 5 U.S.C. § 556(d).

E. *Screening of Tariff Adjustments by the Interstate Commerce Commission Staff*

The disposition of rate matters by the Interstate Commerce Commission presents special problems because of the enormous volume of tariff adjustments, given the existing regulatory scheme, which it receives from a very large number of companies performing a wide variety of transportation services. The Commission, largely because of limitations of manpower, now relies almost entirely upon the self-interest of competitive carriers and of shippers to alert it by the filing of protests to matters warranting its serious consideration. To the extent that resources and priorities permit, the Commission should assume a greater burden of screening tariff adjustments on its own initiative.

Citations:

38 FR 19791 (July 23, 1973)

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Separate Statement of Max D. Paglin

I support the objectives of this recommendation. However, I do not believe that informal negotiation on rate proposals between an agency and a regulated company, when

carried on with appropriate procedural safeguards, would have the negative effects on agency performance which are indicated in Section B of the Recommendation. Moreover, I am of the opinion that, although the Recommendation was improved by the amendments adopted during the debates at the Plenary Session, Section B still fails to recognize a practical and critical distinction between negotiated settlements involving rate increases and rate decreases. In the latter situation, the speedy implementation of rate reductions for the benefit of the rate paying public is a highly desirable objective. To the extent that the last sentence of the Recommendation (regarding participation in such negotiations by "others" who have an interest in the outcome), would have the effect of delaying the institution of rate reductions, I would be opposed to any requirement which goes beyond a statement leaving such matters to the agency's discretion, to be exercised in the circumstances of the particular case.