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Written Evidence in Administrative Proceedings: A Plea for Less Talk

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WRITTEN EVIDENCE IN ADMINISTRATIVE PROCEEDINGS: A PLEA FOR LESS TALK

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> They never taste who always drink; They always talk, who never think. Matthew Prior, Upon His Passage in the Scaligeriana

THE notion that talk is the absence of thought is more poetry than analysis. Nevertheless, lawyers know that all talk is not thought and that there is at least a grain of truth in the poet's logic. Some of the same logic may mercifully be applied to the proceedings of administrative agencies to test whether all the talk in such proceedings is necessary to a rational result and sound implementation of public policy.

The thesis here is that administrative agencies resort far too often to the talk of oral hearings when written evidence would suffice. Indeed, such evidence would in many cases lead to better results with reduced workload.

The recent travail of the Civil Aeronautics Board in its attempt to increase air fares and thereby rescue financially undernourished air carriers from inadequate revenues will set the stage for this discussion. It started in 1969 when the domestic earnings of all certificated route air carriers precipitously dropped, as of June 30, 1969, to $10,467,000 from $178,561,000 the year before.[1] The decline was escalating rapidly as evidenced by the fact that for the twelve months ending June 30, 1970, the industry sustained an across-the-board *loss* of $42,160,000.[2] The Board was presented with near crisis.

The carriers commenced filing air fare increases in August.[3] The Board was confronted with strong pleas of the carriers to allow the increases to become effective as published. Equally strong resistance

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1 CAB AIR CARRIER FINANCIAL STATISTICS, (June 1969) (figures are net income after special items).

2 *Id.* (June 1970). At the end of 1970 the loss had grown to $183,688,000 for the calendar year. *Id.* (Dec. 1970).

3 *See* CAB Order 69-8-108 (Aug. 19, 1969).

came from consumer representatives who urged suspension of the tariffs setting forth the increases and their investigation plus a general fare investigation to determine the reasonableness of the fare structure.[4]

The last general fare investigation had taken some four and one-half years to complete.[5] The Board was reluctant to repeat that performance, except as a last resort, and said so.[6] It adopted a less time-consuming and less formal procedure by holding informal conferences between representatives of the carriers and the Board and by ordering oral argument.[7] The argument was to be preceded by the filing of complaints or statements of position by the parties.[8] Thirty-two Congressmen, led by the Honorable John E. Moss (California), who had sought a general fare investigation and complained that they were excluded from the meetings between the carriers and the Board, refused to take part in the argument on the ground that the Board had already made its decision. The argument was held nonetheless and the Board issued its decision eight days thereafter.[9]

Outdoing critics who complain of a lack of standards in its decisions,[10] the Board concluded to allow an increase in fares of about 6 per cent and then stated in detail the fare formula that it would approve.[11] The carriers were invited to file tariffs conforming to the Board's decision. They did so. The complaining Congressmen were

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[4] *See* CAB Order 69-9-68 (Sept. 12, 1969).

[5] General Passenger-Fare Investigation, 32 C.A.B. 291 (1960).

[6] On a subsequent occasion the Board explained that:

> [W]e are cognizant of the fact that the *General Passenger Fare Investigation*, Docket 8008, in which the Board issued its decision in 1960, was an extremely lengthy and complex investigation, and we have been reluctant to embark on a second such investigation unless it appeared that there was no reasonable alternative.

CAB Order 70-1-147 (Jan. 29, 1970) at 2.

[7] *See* CAB Order 69-8-108 (Aug. 19, 1969).

[8] *Id.*

[9] CAB Order 69-9-68 (Sept. 12, 1969).

[10] Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055, 1072-97 (1962).

[11] CAB Order 69-9-68 (Sept. 12, 1969). The Board first held that the proposed tariffs then on file "may be unjust, unreasonable, unjustly discriminatory, unduly preferential or unduly prejudicial, or otherwise unlawful and should be investigated." *Id.* at 3. It employed the powers granted it by Section 1002(g) of the Federal Aviation Act, 49 U.S.C. § 1482(g) (1970), to suspend the proposed tariffs. The Board then stated the increase and the fare structure it would approve.

not to be so easily put down and they sought review in the United States Court of Appeals for the District of Columbia Circuit.[12]

The principal issue in court was whether the fares published pursuant to the Board's order were made by the Board or the carriers. If they were made by the Board, the provisions of Section 1002(d) of the Federal Aviation Act,[13] requiring notice and hearing, were applicable. If they were made by the carriers, the only question would be whether the predecessor tariffs were properly suspended by the Board and this question is not open to judicial review.[14]

The court held that "[e]ven a cursory reading of the order makes it clear that the Board told the carriers what rates to file; it set forth a step-by-step formula requiring major changes in rate-making practices and in rates which it expected the carriers to adopt." [15] Thus concluding that the fares were Board-made, the court said:

> [T]he Board concededly took this action after closed sessions with carrier representatives, [and] without statutory public hearings . . . .[16]

This, the court found, "is contrary to the statutory rate-making plan in that it fences the public out of the rate-making process and tends to frustrate judicial review." [17] The case was remanded to the Board for further proceedings.[18]

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12 Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970).

13 49 U.S.C. § 1482(d) (1970).

14 *Cf.* Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963). Although this case arises under the Interstate Commerce Act, it would govern application of the Federal Aviation Act because of the similarity of language of the two statutes.

15 Moss v. CAB, 430 F.2d 891, 899-900 (D.C. Cir. 1970).

16 *Id.* at 900.

17 *Id.* at 893.

18 The court held that the "order is invalid and the tariffs filed by the carriers based thereon are unlawful." *Id.* at 902. The unlawful tariffs were purged when the Board vacated the offending portions of its illegal order and allowed the carriers to file tariffs "free of any compulsion" in the prior order, the new tariffs to be effective October 15, 1970. CAB Order 70-7-128 (July 28, 1970). A predictable aftermath of the court order was the filing of a spate of lawsuits by passengers seeking refund of overcharges resulting from the unlawful fares despite the fact that reparations are not authorized by the Federal Aviation Act as they are by the Interstate Commerce Act. *See* Weidberg v. American Airlines, Inc., Civil No. 70C-1879 (N.D. Ill. 1971). In addition, Congressman Moss and his colleagues requested the Board to institute an "adjudicatory proceeding" to determine appropriate relief for the alleged overcharges. The Board has responded by ordering an investigation into the reasonableness of the fares in effect during the term of the order declared unlawful by the court. *See* CAB Order 71-2-109 (Feb. 25, 1971). If the fares are found reasonable, notwithstanding the fact they

The Board had argued in effect, that to require it to go through the statutory hearing process would prevent it from taking timely action to provide the carriers with needed revenues in times of rapidly rising costs. The petitioners responded that:

> [T]he Board appears to be confusing *a general passenger fare investigation* . . . with the *hearing* that Petitioners urge *is always necessary* under Section 1002(d) whenever the Board undertakes to prescribe or approve rates.[19]

The court did not specify the type of hearing required but saw "no inconsistency between adhering to the statutory plan and awarding a speedy increase in carrier revenues." [20] It added that:

> The statute does not require a complete, time-consuming, scholarly and theoretical review of *all* aspects of rate-making before the Board passes upon proposals which are submitted. The Board is expected to use its experience gleaned from ongoing studies and investigations in its day-to-day activities, and it can act with reasonable speed as long as it affords public notice, holds a proper hearing, and takes the statutory factors into account when it determines rates.[21]

Thus, a little over a year after the Board first addressed itself to the critical revenue needs of the carriers, it was back where it started. There remained to the Board its traditional discretion to suspend or not to suspend new tariff filings (with its immunity from judicial review) and its power to prescribe new rates under conventional notice and hearing procedures. It employed both powers. It declined to suspend tariffs filed by the carriers to replace those declared unlawful, insofar as such new tariffs were similar to the latter.[22] In addition, it proceeded with

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were procedurally unlawful under the court order, the refund of overcharges would presumably not be required. The Board proceeding is a trial type hearing to take place in Feburary of 1972.

19 430 F.2d at 901 n.39.

20 430 F.2d at 901.

21 *Id.*

22 The Board said:

> We recognize that the fares we are permitting to continue in effect beyond October 15, 1970, utilize the same fare structure embodied in the Board's order that the Court in the Moss case found invalid for procedural reasons. We cannot accept the contention, however, that these fares are unlawful for that reason. As noted previously, our Order 70-7-128 expressly freed the carriers of any compulsion of the invalid order. The carriers were free to file tariffs based upon any fare structure they saw fit, and did so. It is true that, with a few exceptions, the tariffs filed embodied fare structures bearing some similarity to the current

the general fare investigation which it had previously instituted, using conventional hearing techniques.[23]

To speed up decision, the general fare case was separated into nine separate phases to be moved along contemporaneously as nearly as practicable.[24] The first three related to aircraft depreciation, leased aircraft,[25] and deferred federal income taxes.[26] These three phases were handled in rule-making proceedings. The other six involved joint fares,[27] discount fares, load factor and seating configurations,[28] fare level, rate of return and fare structure. In all six of these phases, trial type hearings before Hearing Examiners were conducted. Decisions in all phases were rendered within one year except for the fare structure phase which was still in hearing before an examiner in late 1971.

An effort was made in the early stages of the investigation to avoid trial-type hearings. American Airlines moved for adoption of a procedure based on written evidence and oral argument for the last six phases.[29] This was opposed by a number of parties, including the Con-

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structure. However, this reflects the carriers' own choice in the matter, rather than the Board's.

CAB Order 70-9-123 (Sept. 24, 1970) at 11-12. Sticking to its guns the Board suspended new tariffs of those independently minded carriers who strayed from the general structure embodied in the tariffs declared unlawful by the court. *Id.*

23 CAB Order 70-1-147 (Jan. 29, 1970).

24 CAB Order 70-2-121 (Feb. 26, 1970).

25 The issue to be dealt with was whether rental charges should be treated as an expense or whether the value of the aircraft should be included in the investment base as a constructed figure and a constructive depreciation expense allowed. *Id.* at 3.

26 The issue was whether accruals for deferred income taxed under accelerated depreciation should be included in the investment base and whether actual or normalized income taxes should be recognized as an expense. *Id.* at 3.

27 Joint fares cover through service by two or more carriers. The issues in this phase related to the reasonableness of joint fares, whether additional joint fares should be published and the reasonableness of the divisions of joint fares among participating carriers. *Id.* at 3-4.

28 This phase was later separated into two additional phases, one dealing with load factor standards and the other seating configurations. CAB Order 70-11-91 (Nov. 19, 1970).

29 The proposed procedure was outlined by American as follows:

a) Bureau Counsel's proposed statement of issues, request for information, statement with respect to procedural matters, and proposed procedural dates.
b) Motions by carriers and/or comments on Bureau Counsel's submission.
c) Conference between Examiner and parties.
d) Response to information requests.
e) Written statements of position and proposed findings and conclusions of each party, including exhibits and argument in support thereof.
f) Examiner's recommended decision (unless record is certified to the Board for

gressmen who had requested a general fare investigation, on the ground that it would deprive the parties of "the fundamental right to cross-examination." Unfortunately, the issue hardly reached the light of day when American withdrew its motion less than two weeks after it was filed.[30]

The ghost of judicial hearings haunts these proceedings. It is less than clear, however, that such hearings are either necessary or desirable. Only a feeble glow was cast by the court in the *Moss* case on the question of what would suffice for a proper hearing. Yet its recognition of the need for an early decision and its expressed willingness to accept at least an interim decision "on the basis of incomplete data," suggests that something less than a full trial-type hearing would be lawful.[31] The Board might have proceeded on the basis of written evidence and oral argument. This would surely have been sufficient to enable it to satisfy the court's requirement that a determination that the need for prompt action requires an interim decision on rates subject to revision "once more complete information is obtained," is a "conclusion [that] is reasonable and based upon substantial evidence." [32] Even in the case of the *Domestic Passenger-Fare Investigation*,[33] where a final decision on fares was to be rendered, the Board might have accepted American's proposal for the use of written evidence and oral argument. Granted that the right of cross-examination must not be denied in a proper case, a full-dress hearing is not necessary for this purpose.[34]

I. The Advantages of Written Evidence in Administrative Proceedings

It should be emphasized that the suggestion here for greater use of written evidence is not simply to urge that evidence be reduced to writing before it becomes a part of the record. The major federal regu-

tentative decision without issuance of an Examiner's recommended decision).

g) Exceptions to Examiner's recommended decision (or tentative decision of the Board).

h) Briefs.

i) Oral Argument.

30 CAB Order 70-4-26 (April 7, 1970).

31 Moss v. CAB, 430 F.2d 891, 901-02 (D.C. Cir. 1970).

32 *Id.*

33 *See* pp. 200-01 *supra.*

34 It is subsequently suggested in this article that any hearing could be limited to cross-examination and to matters genuinely in dispute which are specifically identified.

latory agencies require prehearing circulation among the parties of statistical studies, financial projections and statements of witnesses according to a schedule fixed, usually at, or as a result of, prehearing conferences supervised by the Hearing Examiner.[35] All agencies could well adopt the practice. Otherwise hearings on complex economic, scientific and other technical subjects can become a useless formality at one extreme, or an unmanageable exchange among largely uninformed combatants at the other.

The proposal here goes beyond such practice. It is to substitute written evidence for oral hearing in all cases except where it is shown to be impracticable or unlawful. The Attorney General's Committee on Administrative Procedure saw advantage in both techniques. Referring to the substitution of written evidence for oral hearing, which it called "shortened procedure" after the practice of the Department of Agriculture and the Interstate Commerce Commission, the Committee said:

> The Committee believes that expedition and simplification of formal administrative proceedings can further be achieved by substitution, in appropriate situations, of written evidence for oral evidence. . . . The Committee sees great promise in the shortened procedure as a method of augmenting accuracy, economy, and convenience. It is commended to all administrative agencies.[36]

The Committee then referred to written evidence for oral hearings, as follows:

> In types of litigation where the entire case is not susceptible to the shortened procedure, some of the facts may nevertheless be presented better in writing than orally. Where the matter in dispute is technical or dependent upon records (*e.g.*, the labor cost or volume of production of a plant), it would seem helpful to reduce the material to writing in advance of the hearing, distribute it to the parties and require the author to appear at the hearing for clarification or cross-

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[35] It is an unwritten practice of the Federal Power Commission. It is observed by the Federal Communications Commission, especially in broadcast proceedings. *See* 47 C.F.R. § 1.253(d) (1971). It is encouraged by the Interstate Commerce Commission but observed only sporadically. *See* 49 C.F.R. § 1100.84(a) (1971). It is expressly prescribed in the rules of the Civil Aeronautics Board:

> Evidence shall be presented in written form by all parties wherever feasible, as the examiner may direct. 14 C.F.R. § 302.24(b) (1971).

[36] 1941 FINAL REP. OF THE ATT'Y GEN. COMM. ON ADMINISTRATIVE P. 69 [hereinafter cited as ATT'Y GEN. REP.].

> examination if it were desired. Lengthy testimony of a complex character is not easy to comprehend in the hearing room nor can satisfactory cross-examination follow immediately upon its conclusion. A far better understanding of the evidence and a great saving of time and expense would be attained if the method above described were employed.[37]

Except for the reference to "clarification or cross-examination if it were desired," the advantages cited by the Committee for written evidence in oral hearings apply equally to the use of written evidence without oral hearings. It is the oral examination of written evidence that can unnecessarily prolong a proceeding, add expense for the parties and the agency, and unduly complicate the decisional process. This was recognized by the late James Landis when he reported to President-elect Kennedy on the Civil Aeronautics Board among other regulatory agencies:

> The inordinate delay in [the Civil Aeronautics Board's] disposition of pending cases and the complexity of these proceedings arises out of the procedures it applies to them. . . . The disposition of these matters [applications for route extensions, new routes and new services] pursues no pattern or plan. . . . All the issues in such a proceeding are handled by the lengthy process of examining and cross-examining witnesses. This is a wasteful manner of establishing many of the basic facts.[38]

Dean Landis' comments are certainly applicable to complex statistical or scientific data prepared by the expert. The usual functions of cross-examination to test the witness' memory, veracity or ability to observe matters about which testimony is given have little or no significance in this situation. Other reasons assigned for cross-examination of experts can be served by written procedure in the usual case.[39]

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[37] *Id.* at 69-70.

[38] LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 41 (printed for the use of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. 1960) [hereinafter cited as LANDIS REPORT].

[39] In 1 COMM'RS REP. ON ADMINISTRATIVE ADJUDICATION IN THE STATE OF N.Y. 194-95 (1942) [hereinafter cited as COMM'RS REP.], it is said:

> Where expert testimony is concerned, cross-examination serves also to test the basis of the expert's opinion. Such tests are of obvious value in any attempt to arrive at the truth in accurate detail, even assuming a purpose on the part of the witness to tell the truth. Besides assisting in this way in the accurate decision of

The objection most frequently made in litigated cases to the use of written evidence without oral hearing is that it denies a "fundamental right of cross-examination." Then, too, many administrative practitioners feel that the mere threat of cross-examination is enough to discipline the witness against placing a higher value on advocacy than the truth. There is justification for this feeling. That is not to say, however, that cross-examination should be placed among rights that are so fundamental that they become ends in themselves.

Cross-examination is simply a tool for arriving at the truth. Rebuttal is another such tool. The use of disinterested experts under the aegis of the agency may serve the same purpose. The point is that cross-examination is not the only means of arriving at a full and true disclosure of the facts or a *sine qua non* to a fair hearing. It should not be accorded such importance as to prevent substitution of written evidence for oral hearing. Whether it, in fact, has such importance in the legal scale of values is a question explored next.

II. The Right of Cross-Examination in Administrative Proceedings

Nearly thirty years ago a comprehensive and knowledgeable study of administrative law posed the question—

> In what circumstances is it legally necessary to afford an opportunity to cross-examine a person who has furnished to an administrative tribunal, otherwise than by his own testimony, evidence which the tribunal takes into account in its determination (such evidence having been furnished, *e.g.*, in the form of an affidavit or a letter or a report, or through the hearsay testimony of another)?[40]

The author concluded that this is a question "to which the decided cases do not supply a clear answer . . . ." [41]

Since that study was published, the Administrative Procedure Act[42]

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controverted issues of fact, cross-examination may elicit from a witness concessions that will in effect remove disputed issues from the case.

It is submitted that these considerations can be met as well by written rebuttal, written interrogatories to the expert and statements of the parties in most cases. In other cases, cross-examination limited to specific matters could be allowed, as discussed *infra*.

[40] Comm'rs Rep. 196.

[41] *Id.*

[42] 5 U.S.C. §§ 551-59 (1970).

has become law and court decisions have multiplied on the matter of rights to a hearing. These should and do offer at least some clarification to the answer sought in the New York study.[43]

A two-step inquiry is involved. First, is there a hearing requirement? There can be no claim to a right of cross-examination without such a requirement. Second, what is the nature of the hearing required? The principal sources of light for these questions are the due process clauses of the fifth and fourteenth amendments to the United States Constitution, and governing statutes. The latter may be the Administrative Procedure Act or the enabling act for the administrative agency, or both.

The authorities demonstrate that, even where a hearing is required, there is no "fundamental right to cross-examination" in the constitutional sense. Whether such a right exists at all in a given case, in the absence of express statutory command, depends upon the nature of the issue presented.

A. *The Due Process Cases*

There has always been an elusive quality about the meaning of procedural "due process of law." In an early case, the Supreme Court proclaimed that "[i]n all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case. . . ." [44] Sixty-six years later, the Court was saying essentially the same thing:

> [D]ue process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, *Londoner v. Denver* 210 U.S. 373, in others that argument submitted in writing is sufficient. *Morgan v. United States,* 298 U.S. 468, 481.[45]

The "situations" considered by the Court have included orders pursuant to the Emergency Price Control Act of World War II for the fixing of maximum prices and rents, under which final orders could be issued without hearing and before protests were filed.[46] In *Yakus v.*

[43] *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 407-512 (1958).

[44] *Ex parte* Wall, 107 U.S. 265, 289 (1882).

[45] FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 275-76 (1949).

[46] Yakus v. United States, 321 U.S. 414 (1944); Bowles v. Willingham, 321 U.S. 503 (1944).

United States[47] the defendant in a criminal prosecution for violation of a pricing order had not filed a protest after the order was issued and entered the defense that the protest procedures were a denial of due process. The Court rejected the defense, saying:

> While the hearing on a protest may be restricted to the presentation of documentary evidence, affidavits and briefs, the Act contemplates, and the Administrator's regulations provide for, a full oral hearing upon a showing that written evidence and briefs "will not permit the fair and expeditious disposition of the protest." . . . In advance of application to the Administrator for such a hearing, we cannot well say whether its denial in any particular case would be a denial of due process.[48]

The factual situation in *Bowles v. Willingham*[49] was somewhat different in that instead of an order of general applicability for the future the Regional Rent Director issued an order reducing Mrs. Willingham's rents after notice and the filing by her of objections accompanied by supporting affidavits.[50] The Court held that the right of judicial review in the Emergency Court of Appeals "satisfies the requirements of due process" even though the rent order became effective without any prior hearing.[51]

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47 321 U.S. 414 (1944).

48 *Id.* at 436.

49 321 U.S. 503 (1944).

50 The Court held in Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) that an order of general applicability increasing the valuation of taxable property in Denver is legislative in character and requires no hearing. The Court cited the case in *Willingham* and did not consider Londoner v. Denver, 210 U.S. 373, 386 (1908) in which it held that an order for an assessment for street improvement was particular or adjudicatory in nature, entitling the assessed party to "the right to support his allegations by argument, however brief, and, if need be, by proof, however informal." However, in *Londoner* the complaining party was given no oral hearing of any kind whereas in *Willingham* there was a right to appeal to the Emergency Court of Appeals after the rent order was issued. *Cf.* 150 East 47th Street Corp. v. Creedon, 162 F.2d 206, 210 (Emer. Ct. App. 1947) where the court held that a rent reduction order is quasi-judicial requiring "an opportunity for a hearing—not necessarily formal in character—before the reduction order becomes effective." The court's reference to procedure "not necessarily formal" would appear not to require an oral hearing of the trial type.

51 Bowles v. Willingham, 321 U.S. 503, 520-21 (1944). In Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 152-53 (1941) the Court held that due process does not require a hearing before a statutory committee which made minimum wage recommendations to the Administrator where there was a full hearing before the Administrator who merely approved or disapproved, but had no power to revise the recommendations of the Committee. In *Willingham*, the Court appears to go one step further by

In these decisions, the Court made no distinctions based on the fact that one involved a general order and the other (*Willingham*) a specific order addressed to an identified person on individual grounds. In *Londoner v. Denver* and *Bi-Metallic Investment Co. v. State Board of Equalization* these distinctions were made.[52] It is arguable that the overriding policy of wartime price and wage controls is an underlying premise in *Yakus* and *Willingham*.[53] Still, taken at face value, the decisions appear to mean that an oral hearing before an administrative agency is not a requisite of due process where there are other opportunities to be heard. Without a right to an oral hearing, of course, there can be no right of cross-examination.

An important exception to the rule of these decisions is the unusual situation in which the issues involve interests of a private litigant which are deemed to outweigh the public interest. Thus, the Court has held that a welfare recipient presumably dependent upon benefits for a living is entitled to an evidentiary hearing, with the right to confront and cross-examine witnesses, before termination of such benefits.[54]

It is significant that even when the Court finds violation of due process requirements for an opportunity to be heard, it does not mention cross-examination in the usual case.[55] There is nevertheless enough latitude in the holdings of the Court to allow for a requirement of cross-examination where there is a showing that this is essential to a fair hearing under the circumstances.

Such circumstances may have been presented in *Philadelphia Co. v. SEC*.[56] In that case, Pittsburgh Railways Company, a subsidiary of a public utility subject to the Public Utility Holding Company Act was

holding that the review proceeding in the Emergency Court of Appeals is enough to comply with due process despite the absence of a hearing before the agency.

52 *See* note 50 *supra*.

53 *See* Yakus v. United States, 321 U.S. 414, 459-60 (1944) (Roberts, J., dissenting).

54 Goldberg v. Kelly, 397 U.S. 254, 263-64, 270 (1970).

55 *See* Ohio Bell Tel. Co. v. PUC, 301 U.S. 292 (1937), where the use of extra-record facts in an administrative determination of rates for a utility without prior notice to the parties and without opportunity for rebuttal was held to deny due process rights. *Cf.* Morgan v. United States, 298 U.S. 468 (1936), in which the Court said:

> Argument may be oral or written. The requirements are not technical. *Id.* at 481.

ICC v. Louisville & N.R.R., 227 U.S. 88, 93 (1913) where the Court does refer to a right of cross-examination, is not a due process case. Goldberg v. Kelly, 397 U.S. 254 (1970) is also distinguishable as involving the unusual personal interest of the welfare recipient.

56 175 F.2d 808 (D.C. Cir. 1948).

exempt from such Act by reason of being a non-utility. It was in reorganization and its securities were guaranteed by the parent company.

The plan of reorganization was approved by the Pennsylvania Public Utilities Commission in a proceeding in which the Securities and Exchange Commission appeared and opposed the plan. The Commission's opposition, however, could not be made effective because the reorganization court had exclusive control so long as the exemption continued. If the exemption were removed the court would lose its jurisdiction.

Unfurling its banner, the Commission issued a notice of rule-making for revocation of exemptions for subsidiaries of Public Utility Holding Act companies whose securities were guaranteed by the parent. The effect was to revoke the exemption only for Pittsburgh Railways Company. In fact the Commission said in a letter that the proposed rule would "be primarily applicable to Pittsburgh Railways Company."

In its notice the Commission declared that there were "situations" in which security structures of holding companies and subsidiaries were so "entangled" as to require regulation. It said further that its "experience" suggested that continued exemption would not be in the public interest.

The Commission notice called for a written evidence proceeding *i.e.*, one for comments, views, and written data to be followed by oral argument. The holding company reacted vigorously by *inter alia*, requesting an oral hearing with the cross-examination of Commission personnel in regard to the "situations" and "experience" alleged in the notice of rule-making. When this was denied it submitted an offer of proof which described the Commission's participation in the proceeding before the Pennsylvania Public Utilities Commission. It apparently also pointed out that another holding company structure was in reorganization but would not be affected because the parent had not guaranteed the securities of the subsidiary.

On appeal, the court held that the action was "particular and immediate," making it adjudicatory in nature and requiring a trial-type hearing. The court said:

> It is elementary also in our system of law that adjudictory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in

> his own behalf, and to make argument. *This is a requirement of the due process clause* of the Fifth Amendment of the Constitution (emphasis added).[57]

There certainly appeared to be issues of fact which warranted the court's decision. For example, if the holding company could show that its financial structure was not essentially different from other holding companies unaffected by the proposed rule, it would be difficult for the Commission to justify the rule. The decision is nevertheless suspect because the court's views of due process at the time appear to have been out of harmony with those of the United States Supreme Court.[58] In addition, it is not apparent from the decision that the court based its ruling on the existence of questions of fact requiring oral hearing. As previously shown, the fact that the agency rule was based on individual grounds is not enough to require hearing. Thus the contest between the Commission and the holding company which preceded the notice of rule-making and the letter stating that the rule was primarily applicable to Pittsburgh Railways did not mean a hearing was necessary.

In *United States v. Nugent*,[59] the Supreme Court held that the hearing prescribed by the Selective Service Act for persons claiming conscientious objector status did not entitle such a person to a copy of the FBI report with a right to confront witnesses quoted or named in the report. To the contention that these rights were guaranteed by the fifth amendment, the Court said, "We cannot agree." [60] Here was certainly a

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[57] *Id.* at 817.

[58] In that same year the court said in L.B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir. 1948) that due process hearing requirements apply even to a question of law and added:

> Due process requires not only opportunity for the presentation of evidence and cross-examination of witnesses but also opportunity for argument. *Id.* at 805.

Such views are at odds with FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949) in which the Supreme Court held that due process does not require oral argument "particularly upon questions of law."

[59] 346 U.S. 1 (1953).

[60] *Id.* at 9. The Court relied upon its prior decisions in Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294 (1933) and Williams v. New York, 337 U.S. 241 (1949). In the former, the Court held that a Norwegian importer was not entitled to cross-examine an American importer on its costs in a proceeding before the Tariff Commission fixing import duties; in the latter, a convicted murderer denied access to a probation report and other information relied upon by the sentencing court was held not to have been denied due process. These cases involve discretionary action of decision makers and other special circumstances in which a trial-type hearing is not required. The Court's reliance upon them seems to indicate no more than the fact that

case of individualized fact-finding and yet a trial-type hearing with a right of cross-examination was denied. Thus, the language of the *Philadelphia Co.* decision does not square with the prevailing law of due process although there were issues of fact which brought the result into harmony with due process standards.

In *Sinclair Oil Corp. v. Smith*,[61] an action to enjoin the Secretary of the Interior from granting applications for oil imports, the court found no vice in a limited hearing, saying:

> [I]t is far from clear that failure to grant a trial-type hearing is necessarily a denial of due process.[62]

As understatement, this is not an inaccurate summary of the law. Due process, as applied by the courts, simply means a fair opportunity to be heard in the light of the circumstances. The results do not vary according to whether the administrative action entails individualized fact-finding or legislative prescription and language in early decisions to the contrary appears to have no effect in later decisions. Cross-examination has not been elevated to a fundamental right of due process. On the other hand, the behavior of the courts in this field is flexible enough to suggest that if the circumstances were such that a party could show that the opportunity to be heard would be denied without cross-examination, cross-examination could be considered a right of due process.

B. *The Statutory Cases*

Before the adoption of the Administrative Procedure Act the courts tended to equate administrative hearings with judicial proceedings. There was nevertheless a seeming metamorphosis of view regarding cross-examination. At first it was rigidly insisted upon, then it was not mentioned at all, or it was held not to be required.

Thus, in 1913 the Supreme Court declared in *ICC v. Louisville & Nashville Railroad Co.*,[63] that a rate-making statute prescribing a "full hearing" meant that—

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the circumstances determine what kind of hearing is necessary for due process. A similar result has been reached in United States v. Watson, 442 F.2d 1273 (8th Cir. 1971).

61 293 F. Supp. 1111 (S.D.N.Y. 1968).

62 *Id.* at 1114. *Cf.* FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 275-76 (1949); Yakus v. United States, 321 U.S. 414, 436 (1944).

63 227 U.S. 88 (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 no other way can a party maintain its rights or make its defense.[64]

Later, in *Morgan v. United States*,[65] the Court held that a "full hearing" statute has "regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." [66] Nowhere does the Court refer to cross-examination.[67] This omission was presaged by the decision in *Norwegian Nitrogen Products Co. v. United States*,[68] in which it was held that the statutory right to "hearing" before the Tariff Commission did not include the right to cross-examination.[69]

With the advent of the Administrative Procedure Act in 1946[70] there was greater certainty as to the meaning of the right of cross-examination. Section 7(c) of that Act provides that—

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.[71]

Written evidence is expressly sanctioned in the same section:

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[64] *Id.* at 93. The Court was responding to the discredited contention that the Interstate Commerce Commission need not confine itself to the record because "having been given legislative power to make rates it can act, as could Congress" on information *de hors* the record. In 1937 the Court held that use of extra record facts by a state commission is a denial of due process when the parties are given no prior notice or opportunity for rebuttal and no mention was made of a right to cross-examination. Ohio Bell Tel. Co. v. PUC, 301 U.S. 292 (1937). *See* cases cited note 55 *supra.*

[65] 304 U.S. 1 (1938).

[66] *Id.* at 19. Comparable language appears in the first *Morgan* case, Morgan v. United States, 298 U.S. 468, 480 (1936). In the first case the Court emphasized the non-technical nature of the requirement, saying:

> Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. 298 U.S. at 481.

[67] *Cf.* Gonzales v. United States, 348 U.S. 407, 415 (1955) (in Selective Service case conscientious objector entitled to review of Department of Justice findings before ruling by Appeals Board—no mention of cross-examination).

[68] 288 U.S. 294 (1933). *See* note 60 *supra.*

[69] *Id.* at 318-19.

[70] 5 U.S.C. §§ 551-59 (1970).

[71] *Id.* § 556(d).

> In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.[72]

Noting the difference in language in the two provisions the Attorney General's Manual states:

> It is concluded that [the first] provision is intended to emphasize the right of parties in cases of adjudication (other than determining claims for money or benefits or applications for initial licenses) to present their evidence orally, and in addition to present such "documentary evidence" as would be admissible in judicial proceedings, such as writings and records made in regular course of business. As here used "documentary evidence" does not mean affidavits and written evidence of any kind. Such a construction would flood agency proceedings with hearsay evidence. In the last sentence of the subsection, there appears the phrase "evidence in written form," thus indicating that the Congress distinguished between "written evidence" and "documentary evidence." [73]

This seeming endorsement of oral hearings is followed by the explanation that it does not preclude use of written evidence in adjudicatory proceedings and that cross-examination may properly be restricted to that which is necessary "for a full and true disclosure of the facts." [74] It is acknowledged that "technical and statistical data may be introduced in convenient and written form subject to adequate opportunity for cross-examination and rebuttal." [75]

The Manual further notes that the Act does not confer a "right of so-called 'unlimited' cross-examination." [76] It adds that "the test is—as the section states—whether it is required 'for a full and true disclosure of the facts.' " [77]

The Manual then turns to legislative history on rule-making, saying:

> In many rule-making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties

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[72] *Id.*

[73] 1947 ATT'Y GEN. MANUAL ON THE ADMINISTRATIVE P. ACT 77.

[74] *Id.* at 77-78.

[75] *Id.*

[76] *Id.* at 78.

[77] *Id.*

> or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings.[78]

Continuing on the subject of rule-making (*i.e.*, rate-making, licensing, and determinations of claims for money or benefits) it is said that agencies may require that "the mass" of extensive technical or statistical data shall be submitted in writing.[79] Since "the veracity and demeanor of witnesses are not important" in such a situation, "it is difficult to see how any party's interests would be prejudiced by such procedures where sufficient opportunity for rebuttal exists." [80] Nevertheless, "to the extent that cross-examination is necessary to bring out the truth, the party should have it." [81]

The Manual thus recognizes that written evidence may be substituted for oral hearing subject to a demonstrated need for a "full and true disclosure of the facts." Moreover, although a distinction is made between adjudicatory proceedings and rule-making, the rule on cross-examination is not significantly different in either case. If cross-examination is shown to be necessary to get at the truth, it would be afforded regardless of the underlying classification of the case.

Decisions by the courts reflect principles stated in the Attorney General's Manual. The dichotomy of adjudication and rule-making is recognized and given substance.[82] Any difference in the right of cross-examination accorded in the two situations, however, is not discernible. In both types of cases, the courts have held that cross-examination may be limited,[83] waived[84] and eliminated altogether.[85] It is further held in

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[78] *Id.* [quoting H.R. REP. No. 1980, 79th Cong., 2d Sess. 37 (1946) and S. Doc. No. 248, 79th Cong., 2d Sess. 271 (1946)].

[79] *Id.*

[80] *Id.*

[81] *Id.* [quoting H.R. REP. No. 1980, 79th Cong., 2d Sess. 37 (1946) and S. REP. No. 752, 79th Cong., 1st Sess. 23 (1945)].

[82] *See* Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 692-95 (9th Cir), *cert. denied*, 338 U.S. 860 (1949).

[83] Illinois Cent. R.R. v. Norfolk & W. Ry., 385 U.S. 57 (1966) (adjudication holding there is no right to cross-examine on amended agreement when there was cross-examination on original); Williams v. Zuckert, 371 U.S. 531 (1963) (adjudicatory case in which regulation limiting cross-examination to witnesses appearing pursuant to prehearing arrangements approved over dissent of Justice Douglas who felt due process issue was presented); Wilson & Co. v. United States, 335 F.2d 788 (7th Cir. 1964) (in rule-making proceeding to review rate order of Federal Communications Commission,

both adjudication and rule-making that hearsay evidence depriving parties of an opportunity to cross-examine is proper "so long as the evidence upon which an order is ultimately based is both substantial and has probative value." [86] The capstone of these authorities is the Supreme Court's recent decision that written hearsay evidence conflicting with live testimony can itself satisfy the substantial evidence test in a case of adjudication.[87]

The contrasting cases are those in which it has been demonstrated that cross-examination is the only satisfactory means of obtaining a full and true disclosure of the facts. An example is *Wirtz v. Baldor Electric*

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late filing intervenors properly excluded from cross-examination of earlier appearing witnesses).

[84] Williams v. Zuckert, 371 U.S. 531 (1963); NLRB v. Carlton Wood Prod. Co., 201 F.2d 863 (9th Cir. 1953) (adjudication for refusal to bargain in which right to hearing waived); Freight Consol. Coop., Inc. v. United States, 230 F. Supp. 692 (S.D.N.Y. 1964) (adjudicatory action for cease and desist order against illegal freight forwarder operations in which opportunity for cross-examination not taken up and later claim of unfair hearing rejected).

[85] United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956) (under "full hearing" statute Federal Communications Commission need not hold hearing if applicant makes insufficient prehearing showing); NLRB v. Air Control Prod. of St. Petersburg, Inc., 335 F.2d 245, 249 (5th Cir. 1964) (adjudication of unfair labor practice in which it was held that the claimed issue of fact showed no basis for hearing); Vapor Blast Independent Shop Workers Ass'n v. Simon, 305 F.2d 717 (7th Cir. 1962) (adjudication: NLRB back pay awards do not require hearing for the affected employee).

[86] Montana Power Co. v. FPC, 185 F.2d 491, 498 (D.C. Cir. 1950) (licensing by Federal Power Commission which the Administrative Procedure Act, 5 U.S.C. § 551(6), (7) (1970) declares to be adjudication); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 690 (9th Cir. 1949) (rule-making).

[87] Richardson v. Perales, 402 U.S. 389 (1971). The case involved an adjudication of a claim for disability under the Social Security Act, 42 U.S.C. §§ 416(i)(1) and 423(d)(1) (1970). It was held that written reports of doctors, not subject to cross-examination and in conflict with medical evidence offered at an oral hearing, constitute substantial evidence despite their hearsay character. The claimant had failed to take advantage of the opportunity to subpoena for cross-examination the doctors who submitted the written reports. The Court said:

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician. 402 U.S. at 402.

Co.,[88] where the Secretary of Labor based a Walsh-Healey Act[89] minimum wage order on the tabulated summary of a confidential survey of wages paid in the electrical motors and generators industry. The tabulation was admitted into the record of a hearing before the Department of Labor over the objections of Baldor Electric, which had been refused an opportunity to inspect the data underlying the survey and had presented evidence in affidavit form showing that persons queried in the survey had given inaccurate or misunderstood information. On appeal, the United States Court of Appeals for the District of Columbia Circuit held that under these circumstances the order was not supported by "reliable, probative and substantial evidence" as required by the Administrative Procedure Act.[90] Pointing to the fact that amendment of the Walsh-Healey Act required determinations under the statute to be "made on the record after opportunity for a hearing," [91] the court concluded that Section 7(c) of the Administrative Procedure Act was applicable, allowing the parties "to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." [92] The court added that the fact the proceeding was rule-making in nature was irrelevant where the determination must be "made on the record after opportunity for an agency hearing" because such language requires adjudicatory procedure.[93] Baldor Electric was entitled to cross-examination and rebuttal, the court held, and these were effectively denied when it was refused access to the data underlying the survey tabulation.[94] Disclosure of the data was not compelled, however, where the Government desired confidentiality; instead the order was declared invalid and in the future the Government could either run the risk of an invalid order or make proper disclosure for cross-examination.[95]

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88 337 F.2d 518 (D.C. Cir. 1963). *See also* Southern Stevedoring Co. v. Voris, 190 F.2d 275 (5th Cir. 1951) (compensation for injury subject to Longshoremen's and Harbor Workers' Compensation Act determined on basis of letters from medical doctors, rejecting sworn testimony of other doctors. Held, "the right of cross-examination was effectively denied appellants upon a crucial issue." *Id.* at 277).

89 41 U.S.C. §§ 35-45 (1970).

90 See Sections 7(c) and 10(e) of the Act, 5 U.S.C. §§ 556, 706 (1970).

91 337 F.2d at 521. Section 5 of the Administrative Procedure Act treats such statutes as requiring an adjudicatory proceeding. 5 U.S.C. § 554 (1970).

92 337 F.2d at 521.

93 *Id.* at 521 n.4.

94 *Id.* at 529.

95 *Id.* at 528; *accord*, J.D. Hedin Constr. Co., v. United States, 408 F.2d 424 (Ct. Cl.

The court emphasized that Baldor Electric had "mounted a strong attack on the reliability of the survey" and had demonstrated meaningful errors.[96] These were special circumstances. It was not, the court said, deciding what disclosures would be necessary in other cases involving confidential surveys.[97]

Baldor was rule-making converted to adjudication by statute. While the existence of the statutory conversion is significant in that without it there would have been no right to a hearing,[98] it is not significant in determining whether the right of cross-examination is any different in rule-making than it is in adjudication. This is indicated by the decision in *Powhatan Mining Co. v. Ickes*,[99] a rule-making proceeding antedating the Administrative Procedure Act. In prescribing minimum prices for coal under the Bituminous Coal Act of 1937, the Secretary of the Interior relied upon a tabulation of coal prices allegedly in competition with Powhatan, among other parties. The parties sought decoding of the tabulation for purposes of cross-examination claiming, *inter alia*, that some of the prices could have been the result of distress sales, and therefore, not probative of established minimum prices. The request was denied and judicial review was sought. The case was remanded for rehearing on the ground that petitioners were denied a fair hearing by the exclusion of cross-examination.[100]

1969), involving use by the Veterans Administration of statements of witnesses not subject to cross-examination. The court held that the findings were not supported by substantial evidence because the procedure robs the "administrative findings of the weight to which they would be entitled if there had been a true adversary process and the findings had been grounded in oral testimony subject to cross-examination (or on true documentary evidence subject to close scrutiny)." *Id.* at 428. The language of the court suggests an adversary written procedure may have been acceptable.

96 337 F.2d at 529.

97 *Id.* at 530-31.

98 *See* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). The Walsh-Healey Act provides for the setting of minimum wages for Government contractors only. It provides one of the conditions under which the Government will make purchases. Accordingly, there would be no standing, as *Perkins* held, to challenge orders under the Act unless such standing was conferred by statute as it was by the time the *Baldor* case arose.

99 118 F.2d 105 (6th Cir. 1941).

100 The statute required a hearing and the *Powhatan* court interpreted this to mean a "full hearing," citing ICC v. Louisville & N.R.R., 227 U.S. 88 (1913) as well as the first Morgan v. United States, 298 U.S. 468 (1936). It held that a full hearing "includes the right to cross-examine." 118 F.2d at 109. Under the circumstances of the case, the court's holding is in accord with what is here contended is the correct rule.

Both *Baldor* and *Powhatan* involved information of crucial importance to a decision which was credibly challenged. This was not the case in *Red Star Manufacturing Co. v. Grimes.*[101] There the Wage-Hour Administrator had established minimum wages for the Puerto Rican pearl button and buckle industry and denied disclosure of the names of two unidentified mainland firms whose production costs were contained in a statistical report included in the record. Petitioning Puerto Rican manufacturers contended on judicial review that this deprived them of a fair hearing by limiting cross-examination. The court held that the relevant section of the Fair Labor Standards Act[102] was designed "for the protection of mainland industry, and was not intended to confer rights upon industrial firms in Puerto Rico." [103] For this reason, the petitioners were held not to be prejudiced by the limitation of cross-examination.[104] Although the court referred to the legislative character of the proceeding and cited *Norwegian Nitrogen Products Co. v. United States,*[105] the actual basis for the decision was the court's final statement that—

> [T]he information in question was not of substantial importance in this proceeding.[106]

C. *The Rule Established by the Cases*

In the universe of cross-examination the concepts of due process, rule-making and adjudication are the moons, not the suns. The light they emit and their visible character are reflections of their surroundings. Whether the right of cross-examination exists in any particular case depends upon the importance of the issue, the believability of the challenge to asserted facts and the necessity of cross-examination to arrive at a full and true disclosure of the facts. The verbalization of the right may be in terms of due process or the nature of the administrative proceeding, but the motivating considerations are the circumstances in which the right is claimed. What the courts appear to be doing is assuring an opportunity to be heard by a fair hearing likely to lead to a just result.

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101 221 F.2d 524 (D.C. Cir. 1954).
102 29 U.S.C. §§ 201-19 (1970).
103 221 F.2d at 530.
104 *Id.*
105 288 U.S. 294 (1933). *See* note 60 *supra.*
106 221 F.2d at 530.

This may or may not require cross-examination. It is, in any case, not inconsistent with the substitution of written evidence for oral hearing except to the extent that cross-examination is shown to be necessary.[107]

The burden rests upon the proponent of cross-examination to demonstrate its necessity.[108] When the burden is met, resort to written evidence must be suspended to the extent of the disputed facts.

III. A Proposed Rule for Substitution of Written Evidence for Oral Hearings

The pioneers in this field have been the Department of Agriculture and the Interstate Commerce Commission. The Department applied its rules for "shortened procedure" to reparation proceedings. For claims under $500 the shortened procedure was automatically invoked unless Department officers determined otherwise *sua sponte* or upon application of one of the parties "setting forth the peculiar facts making such hearing necessary for a proper presentation of the case."[109] The procedure was available for larger claims if consent of the parties was obtained.[110] At the Interstate Commerce Commission, which initiated shortened procedure as early as 1923, hearing officers initially invoked the procedure on notice to the parties.[111] If any party objected, however, the procedure would not be employed.[112]

Today the Interstate Commerce Commission, which calls the no hearing technique "modified procedure," does not depend upon consent of the parties. Applicants for licenses from the Commission can request handling without oral hearing.[113] On the basis of the pleadings,

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107 *See* Yakus v. United States, 321 U.S. 414 (1944). In Gonzales v. United States, 348 U.S. 407 (1955) the Court held a conscientious objector under the Selective Service Act is entitled to a copy of Department of Justice findings before a ruling by the Appeals Board.

> We refused to compel "an all-out collateral attack at the [Department of Justice] hearing on the testimony obtained in its prehearing investigation." Here all that is involved is the mailing of a copy of the Department's recommendation to the registrant and permitting a reply to the Appeal Board. *Id.* at 414.

This is simply another way of saying that a trial type of hearing will not be allowed and that written procedure is adequate.

108 *Cf.* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

109 See Att'y Gen. Rep. 405.

110 *Id.*

111 *Id.* at 406.

112 *Id.*

113 ICC Rules of Practice, 49 C.F.R. § 1100.247(b)(3) (1971).

hearing officers will decide in license application proceedings, as well as others, whether the procedure is to be ordered.[114] If it is ordered, the parties thereafter file verified statements and argument in sequence.[115] The verified statements are given by persons who have knowledge of the facts and who would appear as witnesses if the oral hearing were held.[116] Any party desiring cross-examination must identify the witness, state the subject matter and show the reason for the request.[117] The request must be included in the response to the verified statement on which cross-examination is desired.[118] If cross-examination is approved there is an oral hearing limited to the scope of the approval.[119]

The pertinent rule states:

> (a) *Request for cross-examination or other hearing.* If cross-examination of any witness is desired the name of the witness and the subject matter of the desired cross-examination shall, together with any other request for oral hearing, including the basis therefor, be stated at the end of defendant's statement or complainant's statement in reply as the case may be. Unless material facts are in dispute, oral hearing will not be held for the sole purpose of cross-examination.[120]

While expressing reluctance to do so, the Commission has denied cross-examination under this rule.[121] It is not enough to object to receipt of written evidence and request oral hearing; material facts must be placed in issue.[122]

A model rule, based upon the Commission's rule, could be framed as follows:

> If cross-examination of any witness is desired, the name of the witness and the subject matter of the desired cross-examination shall, together with a statement of why cross-examination is necessary, be set forth at the end of the statement, exhibit or other response to the written testimony of the witness as to whom cross-examination is requested.

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114 *Id.* § 1100.45.

115 *Id.* § 1100.49.

116 *Id.* § 1100.50.

117 *Id.* § 1100.53(a).

118 *Id.*

119 *Id.* § 1100.53(b).

120 *Id.* § 1100.53(a).

121 *See, e.g.*, Steel, Inc. v. Chicago B. & Q.R.R., 323 I.C.C. 509 (1964); Foodstuffs from Hudson, N.Y. to Chicago, Ill., 315 I.C.C. 184 (1961).

122 Steel, Inc. v. Chicago B. & Q.R.R., 323 I.C.C. 509, 516 (1964).

> Cross-examination will not be ordered unless it is shown to relate to a material issue and to be necessary for a full and true disclosure of the facts.[123]

It would not be sufficient under this rule merely to object to a witness' written testimony and supporting exhibits. The proponent of cross-examination would be required to show necessity. The first requisite would be a showing that the written testimony for which cross-examination is desired relates to a material issue. Whether it is necessary for a full and true disclosure of the facts would depend on showing that the written testimony (1) conflicts with other probative evidence in the case, (2) omits material facts, (3) is inaccurate or (4) is otherwise questionable. A substitute for that kind of showing could be a demonstration that facts in dispute are peculiarly within the knowledge of the witness and the only means of obtaining a full and true disclosure is cross-examination.[124] The proponent should further be required to show that other means of achieving a full and true disclosure are not reasonably available. If, for example, the information needed is available in public documents, the cross-examination should not be ordered.[125]

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123 This proposal is similar to that contained in the 1955 FINAL REP. OF THE PRES. CONF. ON ADMINISTRATIVE P. 38-41 except that it puts a greater burden on the proponent to show the necessity for cross-examination. The Conference recommendation appears to have express judicial approval. *See* Chicago Bd. of Trade v. United States, 223 F.2d 348, 354 (D.C. Cir. 1955).

124 Special emphasis needs to be placed on cross-examination in cases in which there is no separation of functions in the decisional process. There is wide-spread criticism of the practice. *See* AT&T v. FCC, Civil No. 35845 (2d Cir., July 22, 1971); ADMINISTRATIVE CONF. OF THE UNITED STATES, COMM. ON RULE MAKING, IMPROVEMENTS IN THE CONDUCT OF FED. RATE PROCEEDINGS (Recommendation No. 19), S. Doc. No. 24, 88th Cong., 1st Sess. 69-114 (1963); Ross, *Current ABA Proposals for Amendment of the Administrative Procedure Act*, 23 ADM. L. REV. 67 (1970). It is nevertheless followed in some rate-making and initial licensing. The Federal Communications Commission does not separate functions in many rate-making cases. *Compare In re* AT&T Charges For Domestic Telephone Service, 27 F.C.C.2d 151, 167 (1971), [and] *In re* Communications Satellite Corporation, 27 F.C.C.2d 927 (1971), *with In re* AT&T Private-Line Services, (F.C.C. 71-1063, 1971). Under this procedure, the staff of the agency participates as a party in the hearing and prepares the recommended decision. The principal difficulty is the lack of disclosure of the trial staff's positions on key issues until the appearance of the recommended decision, after it is too late for cross-examination or rebuttal. In the absence of a full disclosure by the staff of the positions it will take in the preparation of the recommended decision, other parties need to cross-examine staff witnesses if they are to have the same opportunity as the staff to meet the material issues.

125 Much information about competitors is readily available in the public document

The burdens this would place on the proponent are not unusual. They are not unlike burdens assumed for years by persons seeking trial material, including production of documents, in litigated cases.[126]

The proposed rule should be made applicable to all proceedings (route, rate, acquisitions and so forth) where detailed economic, scientific and other statistical data are a major part of the evidence. Exceptions would be appropriate for enforcement proceedings and others of a similar nature involving facts, the accuracy of which turns on the witness' veracity, memory and ability or capacity to observe.

Proposals have been made by distinguished observers and participants in the administrative scene for use of written evidence on the basis of other criteria, such as the nature of the issue[127] or the character of the fact in dispute.[128] These criteria are useful in determining when a formal hearing with cross-examination should be allowed. The courts and

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rooms of federal, as well as state, agencies. This has always been a prolific source of material for cross-examination and rebuttal in administrative proceedings.

126 The rule is directed to procedure in lieu of trial. It is not prehearing discovery. Therefore, the liberal procedures for discovery under the Federal Rules of Civil Procedure which place little burden on one seeking pretrial information are not applicable. A better analogy is the procedure for showing "good cause" under Rules 33, 34, and 45 of the Federal Rules. *See, e.g.*, 4A J. MOORE, FEDERAL PRACTICE ¶ 34.08 (2d ed. 1971); 5A J. MOORE, FEDERAL PRACTICE ¶ 45.05 (2d ed. 1971).

127 The late Dean Landis proposed a division of route proceedings before the CAB into route and carrier selection phases. The latter would be handled in trial-type proceedings, the former in a kind of informal rule-making. He said:

> Routes that in the public interest should be flown are capable of being determined without resort to proceedings of this character (*i.e.*, trial-type) but as a result of staff studies carried on in a less formal manner. Evidence now being presented in a formal manner as to the needs of various communities for service, as to the community of interest between communities, as to the desirability for increased competition or the existence of sufficient adequate surface transportation, as to the type of service required and the potentiality of generating a sufficient quantum of air traffic, can all be determined beforehand by less legalistic and reasonably scientific methods, leaving for a "judicialized" hearing only the issue as to which of the conflicting carriers is to be selected for certification on any particular route. If necessary, hearings could be held on the staff study itself, which could also be of a less formal type.

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128 Professor Davis proposed a distinction between adjudicatory facts and legislative facts. Written evidence would be sufficient for the latter but not the former. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 413 (1958). He defines these terms as follows:

> Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

Congress (in the Administrative Procedure Act), however, have approached the problem in other terms, using fair hearing and full and true disclosure standards. Shaping a rule after those standards should lead to less controversy and fewer diversions with greater efficiency.[129]

Under the proposed rule only two procedures would be added to the practice followed by most administrative agencies at the present time. One would be written interrogatories or requested admissions by parties desiring clarification or written cross-examination of testimony in writing. The other would be the request for oral cross-examination, if any.

The Final Report of the Attorney General's Committee on Administrative Procedure refers to a "hearing for clarification or cross-examination if it were desired." [130] There will, of course, be instances where clarification is needed to prepare rebuttal to any testimony, written or oral. The responses, however, do not bring in question the credibility of the witness and an oral hearing is not necessary. The time honored technique of written interrogatories would serve the purpose as well or even better. In respect to cross-examination which goes beyond clarification, there will be many instances where requests for admissions or written interrogatories will satisfy the needs of the parties.[131] These opportunities should be available to the parties in conjunction with a rule for use of written evidence.

With these additions, the usual procedure of most administrative agencies would be as follows under the proposed rule:

1. Notice or other institution of proceeding.
2. Prehearing conference, including prehearing motions and comments of parties.
3. Exchange of exhibits, including statistical data, and related testimony under oath.
4. Written interrogatories for clarification or requested admissions plus written interrogatories in lieu of cross-examination.

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[129] The proposal of Dean Landis for route and carrier selection phases in route proceedings does not eliminate the question of cross-examination in the former and could lead to two oral proceedings instead of one. The distinctions proposed by Professor Davis lend themselves to the rule proposed herein as aids in defining the right of cross-examination. However, they pose a risk of differing from court and congressional standards which many litigating parties and agencies would seek to avoid. For this reason, the rule should not be anchored to such distinctions.

[130] ATT'Y GEN. REP. 69.

[131] For procedure on requested admissions, see FED. R. CIV. P. 36; U.S. CT. CL. R. 42.

5. Exchange of rebuttal exhibits and related testimony under oath.
6. Requests for cross-examination in oral hearing, if any.
7. Order for oral hearing, if any.
8. Oral hearing.
9. Briefs (if not included in items 3 and 5).
10. Decision by hearing examiner.
11. Exceptions to report of hearing examiner and supporting briefs.
12. Oral argument.
13. Decision by agency.

The added steps are items 4 and 6. In exhange for this, the oral hearing may be eliminated or limited to cross-examination. The savings in oral hearing, will, in the usual case, more than offset time and effort devoted to the added procedures.

IV. Conclusion

Hearing procedures are notoriously time-consuming and they are often the least effective means of arriving at the facts. Simply setting the date of hearings frequently involves considerable time because of the need to accommodate the schedules of the hearing officer, counsel and the witnesses. The hearing itself takes additional time. After the hearing the parties and the decision-maker are confronted with another bulky reference, *i.e.*, the transcript of the hearing, in marshalling the facts and applying law or policy. This prolongs the briefing and decision time in the case. It may also introduce confusion which leads to error.

In this age of technology and change, proceedings are becoming more complicated rather than simpler. This is compounding the problems with oral hearings. There should be a more efficient way of dealing with the masses of material and facts necessary to decision of complex matters.

The substitution of written evidence for oral hearing is a reasonable approach to time savings and simplification of procedure which has already been successfully employed by two federal agencies. It requires no changes in law and is based upon techniques familiar to the courts, the agencies and persons appearing regularly before them. It is surely an idea whose time has come.