The Case-in-Chief: Reform as Yet Unfulfilled

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I. INTRODUCTION

Delay is preferable to error.

Thomas Jefferson[1]

It is essential to the triumph of
reform that it should never succeed.

William Hazlitt[2]

Of all the criticisms leveled at federal administrative agencies, perhaps the most persistent and serious has been that of unnecessary delay in the regulatory process.[3] The reason is that administrative agencies were created to produce expeditious determinations of matters that courts and legislatures could not effectively handle. The problem remains relevant

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1. Letter to George Washington, May 16, 1792.

2. 12 W. HAZLITT, WORKS 213.

3. For a sampling, *see* GARDNER, THE ADMINISTRATIVE PROCESS, LEGAL INSTITUTIONS TODAY AND TOMORROW 108 (1950); Fascell, *Complexities and Delays in Administrative Procedures Must Be Eliminated*, 46 A.B.A.J. 49 (1960); Gellhorn & Robinson, *Summary Judgment In Administrative Adjudication,* 84 HARV. L. REV. 612 (1971); Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968); Kaufman, *Have Administrative Agencies Kept Pace With Modern Court-Developed Techniques Against Delay? -A Judge's View*, 12 AD. L. BULL. 103 (1959-60); SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960). For an opposing viewpoint, *see* Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659 (1964).

today. Indeed, since the passage of the Administrative Procedure Act,[4] numerous suggestions for reform of various aspects of the administrative process have been offered.[5] Success, however, has been spotty. The stubborn persistence of the problem, despite repeated attempts to find solutions, indicates that unnecessary delay is not easily remedied. Proposals, either in announced policy shifts or in formal decision-making proceedings, often meet with heavy opposition from persons who feel that their "ox is being gored." Just as often the opposition is institutional, coming from within agencies that are fearful of "tinkering" with procedures.

Quite recently, the Interstate Commerce Commission wrestled with the problem and the result appears to have been a draw. In 1975, the Commission's "Blue Ribbon Staff Panel," an internal staff study committee, concluded that the Commission should take immediate steps to improve case processing. The proposals, published in the *Federal Register* on November 7, 1975,[6] were designed as part of an ongoing process of procedural reform[7] to improve the Commission's operations and to reduce the time required to process applications[8] for authority to conduct operations as common and contract carriers of property and passengers by motor vehicle,[9] as brokers,[10] as water carriers,[11] and as freight forwarders.[12] Foremost among these proposals was the "case-in-chief" proposition, designed to reduce delay by requiring applicants for operating authority to submit all their evidence at the time the application is filed.[13] This article will focus on the issues raised in considering these procedural reforms.

II. BACKGROUND

A. EARLY PROCEDURE

The ICC, the first established federal administrative agency, quickly developed an affinity for administrative oral hearings. The impetus was provided by a succession of statutes[14] conferring rulemaking authority upon

4. 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-559, 701-706 (1970)).

5. *See* Note, *Discovery in Federal Administrative Proceedings*, 16 STAN. L. REV. 1035 nn.5-7 (1964). *See also* S. 796-800 and H.R. 10194, 94th Cong., 1st Sess. (1975) (proposing various amendments to the Administrative Procedure Act).

6. The proposals were enumerated under the title: Ex Parte No. 55 (Sub-No. 14), Revision of Application Forms For Operating Authority and Amendments to General Rules of Practice, 40 Fed. Reg. 52058 (1975).

7. The Commission's General Rules of Practice, 49 C.F.R. § 1100 (1976), are presently the subject of a rulemaking proceeding docketed as Ex Parte No. 55 (Sub-No. 24), Revised Rules of Practice, 41 Fed. Reg. 49282 (1976).

8. Ex Parte No. 55 (Sub-No. 14), Revision of Application Forms OP-OR-9, OP-OR-11, OP-WC-10, OP-WC-20, and OP-FF-10 for Operating Authority and Amendments to Rules 22, 49, 51, 57, 74, and 247 of the General Rules of Practice, 125 M.C.C. 790, 793 (1976).

9. Authority to conduct such operations is required under the Interstate Commerce Act §§ 206, 209, 49 U.S.C. §§ 306, 309 (1970).

10. *Id.* § 211, 49 U.S.C. § 311 (1970).

11. *Id.* §§ 302(e), 303, 309, 49 U.S.C. §§ 902(e), 903, 909 (1970).

12. *Id.* § 410, 49 U.S.C. § 1010 (1970).

13. 125 M.C.C. at 793.

14. *See, e.g.*, Act of March 2, 1903, ch. 976, 32 Stat. 934; Act of April 14, 1910, ch. 160, 36

the Commission but providing that the regulations should issue only "after hearing" or "after full hearing." This was coupled with a lack of more specific Congressional guidance and buttressed by a certain confusion in early judicial pronouncements directed primarily at what were perceived as customary administrative determinations.[15] Despite the fact that the Commission was not required to observe judicial procedure,[16] the courts came to view the trial examiners as jurists who heard and evaluated evidence and arguments.[17] This procedural system worked reasonably well until passage of the Motor Carrier Act of 1935.[18] Thereafter, in steadily rising numbers, the volume of motor carrier applications began to build until, in 1966, they constituted eighty-five percent of the Commission's formal case docket. At that point case filings exceeded dispositions so that the pending docket of this category of applications totaled more than 6,500.

B. Modified Procedure

On May 3, 1966, the ICC radically altered its procedures to reduce the number of applications heard orally[19] by the establishment of a "modified procedure." This procedure was to be followed in proceedings where the issues presented were well defined or where the matters involved were not of sufficient moment or complexity to justify the expense of an oral hearing.[20]

Stat. 298; Act of February 17, 1911, ch. 103, 36 Stat. 914; and Act of May 29, 1917, ch. 23, 40 Stat. 101.

15. "Undoubtedly where life and liberty are involved due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved." Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708 (1884).

"In the comparatively few cases in which [the question of due process in administrative determinations] has arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied. . . ." ICC v. Louisville & N. R.R., 227 U.S. 88, 91 (1913).

The principle that due process requires a "hearing" at some stage (either administrative or judicial) before an administrative order becomes final is inherent in a number of Supreme Court decisions: Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950); Lichter v. United States, 334 U.S. 742 (1948); Inland Empire Council v. Millis, 325 U.S. 697 (1945); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); Bourjois, Inc. v. Chapman, 301 U.S. 183 (1937); Nickey v. Mississippi, 292 U.S. 393 (1934); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); Mount St. Mary's Cemetery v. Mullins, 248 U.S. 501 (1919); Wilson v. Standefer, 184 U.S. 399 (1902); Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526 (1895).

16. *See generally* Smith, *Practice and Procedure Before The Interstate Commerce Commission*, 5 GEO. WASH. L. REV. 404 (1937). *See also* note 44 *infra*.

17. *See* United States v. Chicago, M., St. P. & P. Ry., 294 U.S. 499 (1935).

18. 49 Stat. 543 (1935).

19. *See* General Policy Statement Concerning Motor Carrier Licensing Procedures, 31 Fed. Reg. 6600 (1966). The rationale given for the establishment of the modified procedure was stated succinctly: "For the regulated surface transportation industry to continue to thrive, to grow, and to keep pace with the expanding national economy, the mechanics of regulation must be such that administrative decisions are not only fair and impartial, but are rendered with reasonable dispatch and efficiency." *Id*. The Commission then admitted that operating under its present procedures, it was no longer able to deal promptly and efficiently with motor carrier application proceedings.

20. Theatres Service Co. Extension—Duluth, Ga., 113 M.C.C. 744, 746 (1971). Subsequent to the establishment of the modified procedure the courts recognized the practical necessity of handling many applications for operating authority under that procedure and found

It provided simply for an adversary hearing wherein the parties would be required to submit their evidence in the form of written verified statements without the right (or need) of cross-examination. Approximately eighty-eight percent of all operating rights applications are now handled pursuant to following the modified procedure:

(1) an application for operating authority, filed at the Commission, is published in the *Federal Register*,

(2) within thirty days from such publication, notices of protest to the granting of the authority (normally made by carriers holding authority wholly or partially subsumed by the application) are due,

(3) when the thirty-day period has ended, the application is designated for oral hearing (requiring a notice of the time and place of the hearing), or for modified procedure (requiring a formal designation order),

(4) a designation order is served listing the dates within which the applicant's initial verified statement is due, protestants' verified statements are due, and applicant's rebuttal is due,

(5) the applicant files its verified statement,

(6) protestants file their verified statements,

(7) the applicant files its rebuttal,

(8) the record is closed and the proceeding is submitted to an employee review board for decision,

(9) the review board serves a decision (in the form of an order or a report and order),

(10) thereafter, an appellate procedure may follow.

The filing of verified statements may be delayed because of extensions granted upon sufficiently demonstrated good cause, and various motions may be filed during steps 4 through 8, but essentially all proceedings designated for modified procedure are processed in this way.[21]

As of November 1975, motor carrier applications alone constituted 78.2 percent of the Commission's formal case docket and had increased between 1973 and 1975 from 6,197 new filings to 7,155 new filings. In 1976, there were 6,717 new filings of motor carrier applications constituting 74.5 percent of the Commission's formal case docket leaving a pending motor carrier application case docket of 5,507 proceedings.[22] Actual average processing time of modified procedure cases can be gleaned from charts 1 and 2, *infra*.[23]

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no denial of fundamental fairness in the Commission's application of it. *See* Yellow Forwarding Co. v. ICC, 369 F. Supp. 1040 (D. Kan. 1973); Land Air Delivery, Inc. v. United States, 327 F. Supp. 808 (D. Kan. 1971), *aff'd*, 371 F. Supp. 217 (D. Kan. 1973); Allied Van Lines Co. v. United States, 303 F. Supp. 742 (C.D. Cal. 1969); National Trailer Convoy, Inc. v. United States, 293 F. Supp. 634 (N.D. Okla. 1968).

21. *See* Chart 3, *infra*.

22. Information was supplied by the ICC, Office of Proceedings, Section of Case Control and Information. *See* 40 Fed. Reg. 52058 (1975).

23. All charts are from 125 M.C.C. 790.

Chart 1

Contested modified procedure time survey—to submittal date

(Cases filed after October 1, 1974, and submitted for decision before April 1, 1976)

Date application filed to application published in Federal Register.	14 days		21 days		28 days		35 days		42 days		49 days		56 days	63 days
	4 cases		88 cases		258 cases		133 cases		41 cases		9 cases		3 cases	4 cases
Date designation order entered after days of publication in Federal Register.	15 days		30 days		45 days		60 days		75 days		90 days		105 days	120 days
					2 cases		205 cases		171 cases		94 cases		17 cases	51 cases
Extension request numbers and days granted per request.	0 requests		15-day requests		30-day requests		45-day requests		60-day requests		75-day requests		90-day requests	150-day requests
	168 cases		265 granted		216 granted		4 granted		2 granted					2 granted
Date after application filed that evidence is in and case is ready for decision (submittal date).	5 mos.	6 mos.	7 mos.	8 mos.	9 mos.	10 mos.	11 mos.	12 mos.	13 mos.	14 mos.	15 mos.	16 mos.	17 mos.	
	2 cases	16 cases	120 cases	175 cases	130 cases	64 cases	23 cases	5 cases	1 case	2 cases		1 case	1 case	

Summary of random study

1. Number of cases randomly surveyed 540
2. Average number of days from filing of application to publication in Federal Register 30.3
3. Average number of days from date of publication in Federal Register to entry (not service) date of order designating proceeding for handling under modified procedure 77
4. Service date of such orders 93
5. Number of cases containing extension requests 372
6. Number of extension requests 490
7. Percentage of cases containing extension requests 68.9
8. Average number of days extension in cases with granted extension 22.6
9. Number of months/days for case to be ready for decision (submittal date) 8.41/252

Chart 2

Random contested modified procedure time survey—application to service of initial order

(Cases in which initial order was served during 1975)

Average number of months between filing of application and service of initial order	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
Number of cases	2	10	33	44	56	80	57	63	45	32	23	14	8	6	7

Summary

1. Number of cases randomly surveyed	490
2. Average number of months between filing of application and service of initial order	16.07 (482 days)

III. The Proposals

All of the proposals presented in the ICC case-in-chief proceeding were directed towards the elimination of certain unnecessary delays. Charts 1 and 2 indicate the stages in processing where some of these delays occur. The essence of the proposals was the case-in-chief concept, requiring applicants for operating authority to submit *with their applications* their verified statements containing all the evidence upon which they intend to rely. Under the proposed rules, failure to file such statements at the same time as the application would have resulted in summary dismissal of the application for want of prosecution. This proposed requirement was designed to encourage more diligence in the preparation of applications by compelling the carrier to scrutinize more closely its own capabilities and the actual needs of the public witnesses supporting its proposed operation *before* the carrier initiated any action on the Commission's docket.

Another major proposed change in existing procedures was the mandatory requirement that verified statements submitted by any party to the proceeding be prepared in accordance with a format specifically described in the rules. The proposal required each element of information to be clearly identified, titled, and placed in a separately numbered paragraph.[24] Evidence which was lengthy and susceptible to being listed or similarly compiled could be presented in an appendix clearly identified as such within the statement format. The proposed rule provided that other information not within a category specified in the rules as well as legal argument might appear as final portions of the statement.

24. The requirements for an applicant's initial evidentiary presentation are contained in Novak Contract Carrier Application, 103 M.C.C. 555, 558 (1967). In order for the Commission to rationally fashion a grant of operating authority, those public witnesses supporting the application must identify clearly the commodities they ship or receive, the points to or from which their traffic moves, the volume of freight they would tender to applicant, the transportation services now used for moving their traffic, and any deficiencies in existing service.

Two other proposals dealt with discovery and extensions. The proposal on discovery would exempt application cases designated for handling under the *modified procedure* from the provisions of rules 57-67 of the Commission's General Rules of Practice[25] and would require the filing of a petition to the Commission to gain discovery (upon a showing of good cause) in such cases. The final proposal would tighten the requirements for an extension of time to a showing of "most extraordinary circumstances" (not to include vacations, scheduling problems, and occurrences happening in the normal course of any business).[26]

Case processing under the proposals would have worked as follows:

(1) an application for operating authority (including all of applicant's opening evidence[27]) would be published in the *Federal Register* (including a list of those parties supporting the authority sought),

(2) within thirty days from publication, protests would be due,

(3) within fifteen days of the expiration of the protest period, applicant would be required to serve copies of its verified statements on all protestants,

(4) at the end of this fifteen-day period, the Commission would designate the application for handling under the modified procedure or oral hearing,

(5) protestants would serve their verified statements on applicant within the time fixed by the designation order,

(6) applicant's rebuttal would be served on protestants within the time fixed by the designation order, and the procedure would thereafter remain unchanged.

IV. The Issues

The overwhelming volume of comment received by the ICC in the proceeding amending the General Rules of Practice dealt with the case-in-chief proposition, and the responses received were virtually united in condemnation.[28] Two basic lines of attack were employed. The first was a legal argument—the case-in-chief proposal was criticized as a denial of fundamental procedural due process; second was an administrative argument—the comments denounced the proposal as infeasible. Due process, it was claimed, under section 17(3) of the Interstate Commerce Act,[29] requires

25. 49 C.F.R. § 1100.57-.67 (1976).

26. A tightening of the requirements for a grant of an extension request was suggested as far back as 1960, Zoll, *Are Practitioners Responsible For Avoidable Delays In Commission Proceedings*?, 28 ICC Prac. J. 16 (1960), and was implemented by Notice of General Policy-Operating Rights-Extensions of Time, 41 Fed. Reg. 8454 (1976).

27. *See* note 24 *supra*.

28. Comments received by the ICC from various motor carriers, shippers, and carrier legal representatives are discussed in more detail in Ex Parte No. 55 (Sub-No. 14), 125 M.C.C. 790 (1976).

29. 49 U.S.C. § 17(3) (1970).

conformity with rules applicable in courts of the United States with respect to the general rules and orders of the Commission and should, by implication and precedent, require conformity to Commission proceedings themselves. Consequently, the inability of an applicant in its initial presentation to refute allegations made by a protestant in its notice of protest was said to constitute a denial of procedural due process[30] contrary to the fundamental judicial policy of not compelling a party to present its evidence and be bound thereby before the issues are joined.[31] Further, it was argued, section 554 of the Administrative Procedure Act requires that "prompt notice of issues controverted in fact or law" be given an applicant,[32] which would not be possible where an applicant's entire affirmative presentation had to be made before potential opposition was known.

The thrust of the comments concerning the feasibility of the case-in-chief revolved around a question:[33] How can an applicant, in light of the proposed procedural revision, existing application requirements, and the practical limitations involved, thoroughly and inexpensively prepare its case-in-chief without knowledge of possible opposing interests? The question directly posed certain possible problems to be faced by applicants

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> The Commission may . . . make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it . . . including forms of notices and the service thereof, which shall conform as nearly as may be, to those in use in the courts of the United States.

Id.

30. In the orderly course of proceeding, the current Commission rule relevant in the modified procedure requires that the party whose responsibility it is to go forward with the evidence (in this case, an applicant) should bring out the full strength of its proof in its initial presentation. General Rules of Practice, Rule 51, 49 C.F.R. § 1100.51 (1975). While an applicant which has concluded its case-in-chief has the right, subsequently, to introduce competent evidence to rebut evidence of new facts brought out in the verified statement of a protestant, the general rule with respect to an applicant's rebuttal statement will exclude all evidence which was previously available to applicant (including evidence of deficiencies in existing service) or which has not been made necessary by a protestant's verified statement. *See* Kerr Contract Carriage, Inc.—Contr. Car. Applic., 115 M.C.C. 862, 866-67 (1972) and Major Conversion Application, 100 M.C.C. 410, 411 (1966). *See also* Introduction of New Evidence in Rebuttal Statements Filed Under Modified Procedure, 40 Fed. Reg. 42810 (1975).

31. Under existing ICC procedure the issues were said to be joined when notices of protest to an application were filed. Thereafter an applicant in its initial evidentiary presentation was afforded opportunity to respond to issues raised by such notices of protest. This opportunity, it was argued, would be lost under the case-in-chief procedure.

32. 5 U.S.C. § 554 (1970). The Act provides in relevant part:

> (b) Persons entitled to notice of an agency hearing shall be timely informed of—
> (1) the time, place, and nature of the hearing,
> (2) the legal authority and jurisdiction under which the hearing is to be held, and
> (3) the matters of fact and law asserted.
> When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law . . .

It was argued that inasmuch as the procedure involved in applications for operating authority has been held to be adjudicatory in nature, Riss & Co. v. United States, 341 U.S. 907 (1951), *rev'g per curiam,* 96 F. Supp. 452 (W.D. Mo. 1950), it is subject to the notice provisions of the Administrative Procedure Act § 554, which have been held to be fundamental to due process of law. *See* Bell Lines, Inc. v. United States, 263 F. Supp. 40, 46 (S.D.W. Va. 1967).

33. 125 M.C.C. at 799.

under the case-in-chief proposal and implied others. One argument raised the problem of the identification of all possible existing services,[34] especially because of the fact that, as a practical matter, a supporting witness' knowledge of existing service is limited to service used or offered in the past and in view of the claim that neither ICC field offices nor current transportation directories could supply complete information. Another argument warned that the increased expense to be borne by an applicant under the proposal[35] would thereby strengthen the anticompetitive barriers to entry.

The relative paucity of commentary received by the Commission regarding the other major proposals (format, discovery, and extensions) demonstrates the overwhelming concern of the transportation industry and bar for the effects of the case-in-chief proposal. The reader of the record in the proceeding can sense that the great majority of commentary by interested citizens accepted these other proposals as tolerable. The format proposal, it was feared, would lead to the proliferation of canned forms and was decried as cumbersome and inefficient in view of the varied types and problems raised in each application.[36] The discovery proposal was supported by a majority of commentators who urged that the discretionary discovery rules[37] contained in the Commission's General Rules of Practice[38] were worthless; other commentators urged retention of the discretionery discovery procedure for a sufficient trial period.[39] The proposal on extensions was criticized on both legal and administrative grounds.[40]

V. THE ISSUES RESOLVED

The ICC's decision reflects a consideration of the consequences of using a particular line of reasoning in the decision-making process to avoid future problems. In rejecting the case-in-chief proposal, the Commission could have avoided due process issues raised by simply finding the proposal infeasible; but significantly it chose to meet the due process issues in

34. Under the *Novak* criteria, *see* note 23 *supra*, the verified statements in support of an application must contain a thorough assessment of existing service and any deficiencies found to exist in such service. Without the facilities to discover all possible existing service, it was argued, an applicant would place itself in jeopardy of being confronted with surprise protestants after it had introduced its evidence, and as to which it could not, in its rebuttal, introduce detailed deficiency evidence. *See also* note 30 *supra*.

35. Expenses could be increased, for instance, by seeking additional support for an application to heighten the possibility of a grant or by obtaining more experienced representation.

36. *See* note 27 *supra*.

37. 49 C.F.R. §§ 1100.57-.67 (1974). The rules as originally written permit certain forms of discovery to be utilized for applications heard orally or handled pursuant to the modified procedure, without petitioning the Commission for permission.

38. 49 C.F.R. § 1100 (1976).

39. 125 M.C.C. at 796.

40. *Id*. at 795-96. Some of the reasons stated include views that the need for extensions was an unavoidable part of doing business, that the Commission is often the cause of requests for extensions due to the unpredictability of when decisions will be reached, that the proposal would work a hardship on small practitioners or firms, and that in the courts of law "good cause" is the prevailing standard.

order to signal the public that while certain specific proposed procedural reforms may not be accepted, the process of reforming the Commission's rules of procedure would be a continuing one.[41]

In contradicting the position that section 17(3) of the Interstate Commerce Act[42] requires conformity with United States court practice for proceedings before the Commission, the report in this proceeding noted that the same courts have dismissed this argument in clear language.[43] And to pave the way for future possible procedural reforms, the report went on to note:

> Of course, the principles of fair play inhere in the laws under which the Commission operates. They require that interested parties be afforded

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41 *Id*. at 793.

42. 49 U.S.C. § 17(3) (1970). This section further directs the Commission to "conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

43. The Supreme Court has recognized the differences of function between courts and administrative agencies. For instance, in FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), the Court remarked:

> Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. . . . [footnote omitted] Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims. . . . Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation. . . . These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. . . . [B]odies like the Interstate Commerce Commission . . . should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties [footnote omitted].

Id. at 142-43.

Twenty-five years later, in construing a provision of the Communications Act of 1934, 47 U.S.C. § 154(j) (1958 ed.), (virtually identical to the language of § 17(3) of the Interstate Commerce Act, 49 U.S.C. § 17(3) (1970) empowering the Federal Communications Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"), the Court confirmed this position:

> This Court has interpreted that provision as "explicitly and by implication" delegating to the Commission power to resolve "subordinate questions of procedure . . . [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings and similar questions." Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S.134, 138. The statute does not merely confer power to promulgate rules generally applicable to all Commission proceedings, cf. Federal Communications Comm'n v. WJR, 337 U.S. 265, 282; it also delegates broad discretion to prescribe rules for specific investigations, cf. Norwegian Nitrogen Co. v. United States, 288 U.S., 294, 321-322 and to make ad hoc procedural rulings in specific instances [citation omitted] . . . Congress has "left largely to its judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate" the proper dispatch of its business and the ends of justice [citation omitted].

FCC v. Schrieber, 381 U.S. 279, 289 (1965).

See also Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975). Identical statutory language is contained in § 1001 of the Federal Aviation Act, 49 U.S.C. § 1481 (1970) and the court made a similar interpretation of those provisions. *See* City of San Antonio v. CAB, 374 F.2d 326, 329 (D.C. Cir. 1967).

> notice of the proceeding and an opportunity for hearing, and that judgment must express a reasoned conclusion. To require more, however, is to disregard the task for which this Commission was established and to inhibit its exercise of imaginative resourcefulness and judicial inventiveness in developing procedures which enable it to stem the tide of an increasing caseload.[44]

The same conclusions were reached with respect to the issues of due process in respect to the Administrative Procedure Act. The report confirmed that the provisions of the APA govern the nature of proceedings before the Commission,[45] including applications for motor carrier authority. The procedures designed to achieve due process requirements (prompt notice of issues controverted in fact and law) may vary depending on the nature and importance of the issues presented and the ultimate objectives of the governing law.[46] And, as it was further pointed out, "[p]rocedural due process in administrative proceedings has never been a term of fixed and invariable content";[47] what is required under a given procedure is a rea-

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44. Ex Parte No. 55 (Sub-No. 14), 125 M.C.C. at 817-18. "[T]he Supreme Court and all Courts in a supervisory role are concerned with delay. It has recently had occasion to deplore the 'nigh interminable' delay in connection with some administrative agency proceedings. . . ." [citation omitted] FTC v. J. Weingarten, Inc., 336 F.2d 687, 691 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965). Because of this, courts have been eager to permit administrative agencies wide latitude to choose methods of procedure in an attempt to speed up caseload disposition. One such example is evident in Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972), wherein the court stated:

> This Court is only too painfully aware of the inescapable backlog which inevitably develops when exploding dockets exhaust severely limited resources which are not increased in proportion to the ever-expanding demands and inundating filings. In the setting of such exacerbated circumstances, "agencies must exert the greatest resourceful, imaginative ingenuity in devising procedures which in a day of ever-expanding dockets will permit the regulatory process to function properly with reasonable dispatch." (citation omitted).

Id. at 748. *See also* Carolina Freight Carriers Corp. v. United States, 307 F. Supp. 723 (W.D.N.C. 1969); Tose, Inc. v. United States, 304 F. Supp. 894 (E.D. Pa. 1969); Younger Brothers, Inc. v. United States, 238 F. Supp. 859 (S.D. Tex. 1965).

45. *See* Minneapolis & St. L. Ry. v. United States, 361 U.S. 173 (1959).

46. Although the Administrative Procedure Act § 554 (5 U.S.C. § 554 (1970)), adjudications, applies only to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," and while nothing in the Motor Carrier Act expressly requires a hearing on the record as a prerequisite for the issuance of a certificate of public convenience and necessity, implicit in the holding of Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), and Riss & Co. v. United States, 341 U.S. 907 (1950) (per curiam), is the notion that "due process requires compliance with secton 554 when a carrier applies for a certificate and presents facts which, if true, entitle him to that certificate under the applicable substantive law." Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925, 936 n.9 (D. Del. 1973).

47. 125 M.C.C. at 818. *Accord* FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949). Neither the fifth nor the fourteenth amendment to the Constitution guarantees any particular form of procedure. Indeed, flexibility is the key. The most comprehensive statement of principle was made in Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961):

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [citations omitted]. " '[D]ue process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." It is "compounded of history, reason, the past course of decisions. . . ." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63 (concurring opinion).

sonable opportunity to know the claims of opposing parties and to meet them.[48]

Having found due process arguments to be without foundation, the ICC considered practical consequences of the case-in-chief proposal. Under existing Commission precedent an applicant's initial evidentiary presentation must include a delineation of existing service alternately available as well as any known deficiencies in such service.[49] This does not mean service available only from protesting carriers. Pragmatically, however, an applicant's presentation on these issues (in the verified statements of supporting public witnesses) usually details only those existing services which are presently used or have been used recently, or the services of those carriers which have solicited the traffic.[50] The case-in-chief proposal raises

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As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.

See also Goss v. Lopez, 419 U.S. 565 (1975); Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). Flexibility is not unbounded, however:

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

Hannah v. Larche, 363 U.S. 420, 442 (1960). These traditional minimal judicial procedures were defined in Boddie v. Connecticut, 401 U.S. 371 (1971):

> What the Constitution does require is "an *opportunity* . . . granted at a meaningful time and in a meaningful manner," [citation omitted], "for [a] hearing appropriate to the nature of the case," [citation omitted]. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.

Id. at 378.

Section 554 of the Administrative Procedure Act (5 U.S.C. § 554 (1970)) supplies administrative procedures which meet minimal notice and hearing requirements of due process as to administrative adjudications. *See* note 46 *supra*. Like constitutional standards of procedural due process, APA procedural requirements are skeletal. No particular form of procedure is required to constitute due process in administrative hearings. NLRB v. Prettyman, 117 F.2d 786 (6th Cir. 1941). Certainly administrative bodies which perform adjudicatory functions are not required to conform to the specific procedural niceties that surround the judicial process. *See* Alesi v. Cornell, 250 F.2d 877 (9th Cir. 1957); Unglesby v. Zimny, 250 F. Supp. 714 (N.D. Cal. 1965); United States v. Rasmussen, 222 F. Supp. 430 (D. Mont. 1963). "In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise." Richardson v. Wright, 405 U.S. 208, 209 (1972).

48. *Cf.* FTC v. National Lead Co., 352 U.S. 419 (1957) (FTC cease and desist order); Morgan v. United States, 304 U.S. 1 (1938) (Secretary of Agriculture inquiry into reasonableness of market agency rates); L.G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971) (FTC order finding manufacturer in violation of Federal Trade Commission Act); Swift & Co. v. United States, 393 F.2d 247 (7th Cir. 1968) (Secretary of Agriculture cease and desist order); Russel Newman Mfg. Co. v. NLRB, 370 F.2d 980 (5th Cir. 1966) (NLRB order finding employer in violation of National Labor Relations Act); Philadelphia Co. v. SEC, 175 F.2d 808 (D.C. Cir. 1948) (SEC order revoking exemption of railway corporation), *vacated as moot*, 337 U.S. 901 (1949).

49. *See* note 24 *supra*.

50. The Commission does not regulate the shipping and consuming public. Often shippers and consignees maintain informal recordkeeping procedures to monitor the effectiveness

the possibility that even a reasonable search for all existing services might not be fruitful. This conclusion was reached because of the lack of comprehensiveness of current transportation directories and the regional character of Commission field offices, which often do not have complete information available. Two other significant factors, the plethora of gateway elimination applications[51] filed and granted as a result of the 1973-74 energy crisis and the possibilities of carrier interlining,[52] were found to exacerbate shippers' and consignees' problems in discovering all existing service.[53] Further, the evidence adduced in the comments and at oral argument in the proceeding showed that increased costs to applicants would result from the case-in-chief proposal.[54] For these reasons, the proposal was rejected.

Opposite conclusions were reached concerning the proposals on format requirements (which were promulgated to oblige parties to adequately consider necessary elements of an application or protest and to permit the Commission to consider more expeditiously evidence so submitted) and limitations on extensions of time (which were adopted after a study[55] was conducted showing the numerous requests for extensions, their frequency per case, and the delay incident thereto). It was further noted that only a nominal decrease in extension requests had occurred since Division One's Notice of General Policy Concerning Operating Rights-Extensions of Time (published in the *Federal Register* approximately eight months before the report was served).[56]

The resolution of the discovery issues presented again somewhat more of a problem. After concluding that the Commission held authority to promulgate discovery rules,[57] the ICC made a comparison of the purposes of the modified procedure vis-á-vis the purposes of holding oral hearing in any given adjudicatory proceeding. It was found that in cases assigned to modified procedure there are few disputed facts, that all of the relevant evidence is presented to the opposing party in written form, and that the possibility of prejudicial surprise evidence is unlikely. This was contrasted with cases assigned for oral hearing where complex factual and legal issues and numerous parties are present cross-examination is necessary, and the possibility of prejudicial surprise is ever present.

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and reliability of their transportation services. Such recordkeeping is useful also when testimony is given in Commission proceedings as to services used and deficiencies in that service. The Commission does not require maintenance of such records which are entirely optional with each shipper.

51. *See* Ex Parte No. 55 (Sub-No. 8), Motor Common Carriers of Property, Routes and Service (Petition for Elimination of Gateways by Rulemaking), 119 M.C.C. 530 (1974).

52. Carriers with incomplete operating authority may accomplish point to point service by combining their operating authority with that of another carrier.

53. 125 M.C.C. at 819-20.

54. *Id.* at 820.

55. *See* chart 1 *supra*.

56. 41 Fed. Reg. 8454 (1976).

57. 125 M.C.C. at 815.

Discovery has three main purposes: (1) to obtain evidence for use at trial, (2) to secure information about the evidence that may be used at trial, and (3) to narrow issues so that at the trial, it is necessary to produce evidence on those matters found to be actually disputed.[58] Inasmuch as oral hearings are akin to court trials, discretionary discovery is suitable, both definitionally and practically. Modified procedure is different, although there might be instances where discretionary discovery could theoretically be useful. A survey was taken of modified procedure cases in which discovery had been utilized to retrieve evidence. It was found that in the overwhelming majority of such instances the evidence sought to be discovered was either irrelevant to application proceedings, not required by either side in order to meet its burden of proof, or prematurely sought before the verified statements were submitted[59] and, therefore, dilatory. The proposed discovery rule was adopted.

Having disposed of the issues presented in the original notice of proposed rulemaking,[60] the Commission decided to investigate new possible avenues of reform. In its surveys, the ICC found major unnecessary periods of delay surrounding the original publication of the application in the *Federal Register* and the period surrounding the service of designation orders. It promptly considered two suggestions received in the comments that were designed to ameliorate those periods of delay, promulgating one and continuing the rulemaking proceeding to investigate the feasibility of the other. A relatively minor, yet significant, requirement for filing new applications will involve the submission with the application of a *Federal Register* caption in acceptable form.[61] The Commission hoped that compliance with this requirement will both speed publication in the *Federal Register* and at the

58. *Id., citing*, 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2001 at 15 (1970). *See also* Wood v. Todd Shipyards, 45 F.R.D. 363 (S.D. Tex 1968) and Berry v. Haynes, 41 F.R.D. 243 (S.D. Fla. 1966). Numerous federal opinions reveal that discovery is found to have a number of other uses:

(1) to clarify and narrow the issues to be tried by providing each party with the fullest pretrial knowledge of the facts, Nutt v. Black Hills Stage Lines, Inc., 452 F.2d 480 (8th Cir. 1971); Carlson Cos., Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080 (D. Minn. 1974);

(2) to secure just, speedy and inexpensive determination of actions, *In re* Ira Haupt & Co., 253 F. Supp. 97 (S.D.N.Y. 1966), *aff'd*, 379 F.2d 884 (2d Cir. 1967);

(3) to reduce the element of surprise to a minimum, Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973); United States v. Brown, 349 F. Supp. 420 (N.D. Ill. 1972), *aff'd and modified on other grounds*, 478 F.2d 1038 (7th Cir. 1973);

(4) to prevent delay at trial, United States v. International Business Machines Corp., 68 F.R.D. 315 (S.D.N.Y. 1975);

(5) to obtain information for cross-examination and for the impeachment of witnesses, Kerr v. United States Dist. Court, 511 F.2d 192 (9th Cir. 1975), *aff'd on other grounds*, 426 U.S. 394 (1976); or

(6) to gain information where complex factual matters are in question, Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973). These uses are antithetical to the very definition and purposes of the modified procedure.

59. 125 M.C.C. at 816 & nn. 35 & 36.

60. 40 Fed. Reg. 52058 (1975).

61. Appendix F to the decision presents seven examples of acceptable *Federal Register* captions covering the most frequent types of applications. 125 M.C.C. at 838.

same time free certain Commission personnel for other necessary assignments. The ICC is justified in its belief that this will result because of experience gained during the gateway elimination project in which many parties submitted appropriate captions resulting in speeding up publication time considerably.

The following chart[62] compares present processing with the caption requirement versus projected processing under the new proposal:

Chart 3

Comparison of present processing versus proposed processing

	Present	Proposed
1. Filing	———	———
2. Publication (see chart 1)	30	21
3. Protests	30	30
4. Designation order served (see chart 1)	63	———
5. Applicant's verified statements due	45	30
6. Protestant's verified statements due	30	30
7. Rebuttal due	20	20
8. Extension (see chart 1)	23	10
	241	141
9. Submittal (see chart 1)	241—(average 251; add 10 days for motions)	
10. Initial order or report (see chart 2)	482	

The new proposal[63] set for further study would require the filing of verified statements within a specified period of time from the date of an application's publication in the *Federal Register* (applicant's verified statement—60 days; protestants' verified statements—90 days; applicant's rebuttal—110 days).[64] Under this new proposal, the designation order would be eliminated and designation would not occur until all verified statements are received. It is recognized that this new procedure might result in the filing of verified statements in cases most likely to be assigned for oral hearing (twelve percent of operating rights applications[65]) and consequently an exception would exclude from this proposal those applications supported by more than twenty public witnesses *and* which seek regular-route general commodities or passenger authority.

The new proposal is presently under consideration.

VI. Personal Views

The motor carrier bar has been more of a reactor to Commission ideas than an initiator of new proposals. It is the failure of the motor carrier bar to

62. 125 M.C.C. at 836.

63. The new proposal to modify 49 C.F.R. § 1100.247 (1976) was published on December 9, 1976, at 41 Fed. Reg. 53832. The comment period ran until March 7, 1977.

64. 41 Fed. Reg. 53832 (1976).

65. 125 M.C.C. at 821.

police their own members that has led to certain Commission activities and reforms. Motor carriers want their cases processed more expeditiously, and the Commission, at times, takes too long in reaching a decision. Internal reforms are occurring in an attempt to alleviate this problem. Authorization to recruit more attorneys for operating rights and imposition of staff time frames for management oversight should reduce both backlog and delay.

Delays by practicing attorneys must be reduced too. Abuses by attorneys in requesting extensions of time, for example, are glaring. Yet rarely is a censure motion made by an opposing attorney and no action has ever been taken by the organized motor carrier bar. Therefore, a void existed which the Commission filled. Likewise, too many statements filed on behalf of parties to a modified procedure ramble on page after page. The format requirements will eliminate such disorganized presentations.

One idea raised by the motor carrier bar in this proceeding deserves further attention: a continuing procedural study group composed of carriers, practicing attorneys and practitioners, and Commission personnel. This group would serve many useful purposes: not as a reaction group in the case-in-chief proceeding but as an initiator of future reforms, not as an alternative to existing rulemaking, but as a foundation of future rulemaking. Motor carrier representatives should not abandon this idea because it was not accepted as a means of resolving the case-in-chief rulemaking. Exchanges of ideas are necessary and a regular channel for informal communication can only advantage all parties.

Conclusion

The Commission, throughout the decades of its existence, has continuously sought to promote the expeditious handling of all matters coming before it for decision. Its rules and processing system have been continuously revised and upgraded in the face of an increasing caseload vis-á-vis a relatively limited budget and staff in order to promote a balance between the ability of all parties to get a full and fair hearing on the merits and the ability of the Commission to expeditiously process its caseload. This proceeding and its progeny are attempts to reach that proper balance.