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EXTENSION OF THE ADMINISTRATIVE CONFERENCE

GOVERNMENT

STUDY ON MAGNUSON-MOSS RULEMAKING

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HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

OF THE

COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

H.R. 12563

A BILL TO AMEND THE MAGNUSON-MOSS WARRANTY-FEDERAL
TRADE COMMISSION IMPROVEMENT ACT TO EXTEND THE FILING
DATE OF A STUDY OF RULEMAKING PROCEDURES UNDER SEC-
TION 18 OF THE FEDERAL TRADE COMMISSION ACT

JUNE 15, 1978

Serial No. 95-151

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EXTENSION OF THE ADMINISTRATIVE CONFERENCE STUDY ON MAGNUSON-MOSS RULEMAKING

THURSDAY, JUNE 15, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, at 9:30 a.m., pursuant to notice, in room 2218, Rayburn House Office Building, Hon. Bob Eckhardt, chairman, presiding.

Mr. ECKHARDT. The hearing of the Subcommittee on Consumer Protection and Finance will be in session.

Without objection the text of H.R. 12563 will be printed in the record at this point.

[The text of H.R. 12563 follows:]

(1)

95TH CONGRESS
2D SESSION

H. R. 12563

IN THE HOUSE OF REPRESENTATIVES

MAY 4, 1978

Mr. ECKHARDT introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A BILL

To amend the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act to extend the filing date of a study of rulemaking procedures under section 18 of the Federal Trade Commission Act.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That section 202 (d) of the Magnuson-Moss Warranty-
- 4 Federal Trade Commission Improvement Act is amended
- 5 by striking out "July 5, 1978" and inserting in lieu thereof
- 6 "June 30, 1979".

Mr. ECKHARDT. Mr. Scott, you are accompanied by Dean Barry B. Boyer, and you may proceed in the manner in which you desire.

STATEMENT OF JOSEPH B. SCOTT, EXECUTIVE DIRECTOR, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY BARRY B. BOYER, DEAN, SCHOOL OF LAW, STATE UNIVERSITY OF NEW YORK, AT BUFFALO

Mr. SCOTT. Thank you, Mr. Chairman.

We appreciate the opportunity to be here this morning and testify on H.R. 12563, which is the bill introduced at our request to extend the filing date for the study of the Federal Trade Commission's rulemaking procedures that the administrative conference was directed to undertake by the Magnuson-Moss Improvement Act.

On the assumption that the joint statement that we have presented will be made a part of the record, I think we will forego reading our statement and just briefly summarize the main points.

Mr. ECKHARDT. Without objection, it will be entered in the record and you may proceed.

I might say that the subcommittee is fully aware of the broad ramifications of the rulemaking procedures which the subcommittee actually drafted, and we are aware of the extensive problems. Really, what I am most concerned about is the question regarding what is being done until information is obtainable. Is there useful work for persons employed during that period of time?

We had envisaged the rules process going into effect at a shorter period of time. I understand quite clearly that, when there are only a few rules available, to study those rules would be premature. So, you do not have to convince us of that or of the very large and important job involved here and the many problems related to it.

But, what I am most concerned about is, since we have underestimated the time that rules would go into effect and we have placed certain deadlines, when we extend those deadlines what happens to the people who are on the program? I just want to be assured that there is something for them to do.

Perhaps, we had better give up the whole program for a while and then reinstate it, or is there some manner in which they may be employed elsewhere? Is there flexibility within the staff and within the assignments of the agency?

Mr. SCOTT. That is certainly a fair question, Mr. Chairman, and I think we can address that hopefully to your satisfaction. I do not want to give the impression that we are simply sitting back and waiting for the FTC to catch up with us. I think that there was underestimation in terms of how long these rulemaking proceedings would take.

As you know, we only have the one rule, which was issued a few weeks ago. But I think we have also underestimated the extremely complex and voluminous character of the collective record that we are being asked to review and study. Our folks are extremely busy, I think Professor Boyer can describe to you precisely what they are doing.

The point I want to make, though, is that the staff, the full-time staff—Professor Boyer works essentially part time on the project—the full-time staff that we have working on this matter are all

contract personnel. We have watched very closely the level of work that they have been doing and at every chance we have had we have evaluated what our needs were, given the grist that we had to engage us at that time.

We have scaled down the staff from time to time, most recently I think about 3 months ago when two of the professional members went off the staff. We now have four full-time people. They are paid—two attorneys are paid at approximately the GS-12 and GS-11 level, a secretary about a GS-7 level, and a paralegal.

This 1-year extension that we are contemplating that we hope to obtain, it is clear to us that even these few people that we have working on the project now will not be working throughout that 1-year period. There is an awful lot for them to do now and what we contemplate essentially is a substantial scale-down around November or December, when what we will be left with is Professor Boyer and perhaps one attorney who will assist the nonpaid membership component of the conference, this diverse body made up of people from the public sector and Government who are not reimbursed for their services.

Professor Boyer and the one attorney will assist them in their deliberations, in their ultimate consideration of the final product. But I guess the point is that no, we are not sitting back waiting; there is quite a bit to do.

I think Professor Boyer can best describe to you precisely what we do on a daily basis.

[Testimony resumes on p. 18.]

[The prepared statement of Messrs. Scott and Boyer follows:]

Statement of
Joseph B. Scott
Executive Director
Administrative Conference of the
United States

and

Barry B. Boyer
Associate Dean, School of Law,
State University of New York
at Buffalo, and Principal
Investigator, ACUS Study of
Trade Regulation Rulemaking

Before the
Subcommittee on Consumer Protection
and Finance
of the
House Committee on Interstate and
Foreign Commerce

June 15, 1978

Mr. Chairman and members of the Subcommittee, we appreciate the opportunity to testify before you today on H.R. 12563, a bill introduced at our request to extend the filing date for the study of the Federal Trade Commission's rulemaking procedures that the Administrative Conference has been directed to undertake by the Magnuson-Moss Improvement Act. I am Joseph Scott, Executive Director of the Administrative Conference. With me today is Professor Barry Boyer, who is the principal investigator for this study. He will describe briefly the nature of the research that we have undertaken, and then I will comment on scheduling and budget matters. Before turning to Professor Boyer, however, I would like to make several general comments that I believe may help to put our request for an extension into perspective.

As you know, this project was undertaken in response to section 202(d) of the Magnuson-Moss Act, which directed the Administrative Conference "to conduct a study and evaluation of the rulemaking procedures" created by amended section 18 of the Federal Trade Commission Act. We welcomed this opportunity for several reasons. Title II of the Magnuson-Moss Act exemplified the new hybrid rulemaking procedures which have emerged within the past decade. These procedures are an important contemporary development in administrative procedure. If made workable, hybrid rulemaking can have a significant effect upon the fairness and efficiency of administrative regulation in a wide variety of programs. Thus, the general phenomenon of hybrid rulemaking represented an area of high priority for investigation by the Administrative Conference. Additionally, this study of trade regulation rulemaking has required the Conference to apply to the evaluation of administrative procedures more systematic and detailed research methodologies than we had traditionally employed. Most Administrative Conference reports

have been based primarily on library research, supplemented by limited interviewing and other data supplied by the agencies. The very nature of the FTC study dictates a close examination of the new procedures, using observation, detailed record analyses, and survey research techniques. Moreover, the Conference's prior experience with its Internal Revenue Service study, which was very successful and played an important role in improvement of many IRS procedures, suggests that intensive empirical research projects of this sort hold forth the promise of making major contributions to our understanding of the administrative process, and to improvements in the administration of regulatory programs.

Thus, the first general point I wish to make is that the Conference has been very enthusiastic about this project and in no way reluctant to undertake it. It should also be understood, however, that notwithstanding our intense interest in the study we do not casually ask for this extension of our reporting deadline. For, in doing so, we necessarily commit ourselves to further expenditures. While these required outlays may seem small by some standards, they are nonetheless proportionately large for our small budget. Therefore, we did review the question very carefully before requesting an extension. We have concluded that a delay in the preparation and submission of the report is necessary if the study is to serve the purposes Congress had in mind for it.

The need for an extension derives from the fact that the Conference was directed by Congress to study Magnuson-Moss rulemaking and report on its effectiveness by a date when in fact there will have been very little rulemaking completed under the Act. While the deadline made good sense at the time it was set, the slow pace of the proceedings that has developed makes it impossible for us to issue a report by July 1978 that will satisfy the mandate we were given.

In other words, we have planned from the outset on the basis that the report to Congress must be informed by our study and comments on a meaningful sample of completed Magnuson-Moss rulemaking proceedings. This is so since evaluation of the procedural features which are the focus of our study -- including cross-examination of witnesses, pre-hearing procedures to narrow and define issues, compensation for public participation, and post-hearing use of the rulemaking record and staff reports -- depends in large measure on whether and how these procedural components ultimately contribute to a fair and informed administrative decision. Until there has been an opportunity to observe the final stages of the trade regulation rulemaking procedures across several proceedings, and to analyze the decisions that emerge, judgments about the efficacy of the various procedural stages, must be provisional and tentative at best. As former FTC Chairman Collier expressed it in testimony before this Subcommittee in March of 1977:

[I]n the final analysis, it is going to be the quality of the records and the quality of the Commission's decisions based on those records that should be the acid test of whether these procedures are worth it. . . . You should compare the product in terms of the quality of the record, the quality of our deliberations, and then and only then, it seems to me, can you make a final decision whether these . . . procedures . . . are worth these admitted costs. . . .

Regrettably, FTC has completed only one rule to date, and this has occurred only in the past few weeks. This is not enough -- or soon enough -- to supply the basis for a report by the July deadline. There are, however, about ten proposed rules which have reached the post-hearing stage of rulemaking. Although it is difficult to predict the speed at which these will be decided by the Commission, the Commission probably will take final action on a few of the proceedings by the end of this year. In our judgment, a report responsive to the congressional mandate must have a basis in at least some completed rules.

Finally, as a further general comment, it should be pointed out that while H.R. 12563 would extend our reporting deadline until the end of June 1979, the full-time, paid staff currently working on the project will not be employed during the entire period.

As you know, studies of this sort and the recommendations they yield must be reviewed and debated by the Conference's unpaid membership before they can be finalized and issued. The pertinent committee of the membership will meet a number of times over a period of months to discuss the report and recommendations that Professor Boyer and his staff generate. And, thereafter, the matter will be considered by the Conference's Presidentially-appointed Council, and ultimately by the entire membership or Assembly meeting in Plenary Session.

The point is that about five or six months of the one- year extension we are seeking is needed to accommodate the Conference's collegial decision-making process, a process that is obligatory under our statute. We plan to have the bulk of the study's current full-time, paid staff -- current staff is a GS-12 lawyer, a GS-11 lawyer, GS-8 para-legal and a GS-7 secretary -- off the rolls by November or December of this year. Professor Boyer, who works part-time, and perhaps one attorney, will continue until June 1979 to assist the membership in its deliberations.

With these general comments as background, we would now like to turn to a description of our study and then a discussion of budget and scheduling.

I. SUMMARY OF THE RESEARCH

In planning and executing the study of Magnuson-Moss rulemaking procedures, our starting point was the goals that Congress sought to accomplish

in the statute. The hybrid procedures embodied in Title II of the Magnuson-Moss Act had as their basic objective the assurance of more wide-spread and more effective participation by interested persons than would be available in informal, notice-and-comment rulemaking. To assure more extensive participation, the Magnuson-Moss Act broadened opportunities to be heard by giving interested persons the right to present statements orally as well as in writing, to submit rebuttal presentations, and to conduct limited cross examination. It also authorized the FTC to compensate those who were financially unable to participate in TRR proceedings. To make sure that this broadened public participation would be effective -- that is, be given due weight in the agency's decision-making -- the statute required that any final rule must be supported by substantial evidence in the rulemaking record. It also enumerated the factors that the FTC must consider in issuing a trade regulation rule. At the same time, the Magnuson-Moss procedures fall short of formal rulemaking-on-a-record, reflecting Congressional intent that trade regulation rulemaking be efficient and free from undue delays.

Starting from these premises, the study has focused on four major areas. The first of these is the usefulness of the rulemaking record. Trade regulation rulemaking proceedings under the Magnuson-Moss Act have generated enormous records running into the hundreds of thousands of pages, and the bulk and disorganization of these records raise a variety of issues at virtually all stages of the process. The state of the prehearing record, consisting of staff investigative materials and public comments, often determines whether

the FTC can focus and manage the rulemaking hearings, and affects the practicality of designating disputed issues of material fact at the outset of the hearings. Also, to the extent that the prehearing record is inaccessible or unusable, the participation of those who have submitted written comments may become a nullity. In the later stages of the proceeding, the size and utility of the rulemaking record can be a principal cause of delay, since one of the largest blocks of time in the current TRR proceedings is the extended period required for the FTC staff and Presiding Officers to master the records and prepare their reports to the Commission.

A second major area treated in the study is the functioning of the compensation program. Direct compensation to public participants in administrative proceedings is a matter of widespread interest, both in the agencies and in the Congress. The FTC's compensation program under the Magnuson-Moss Act is one of the few financial assistance programs that have been in existence long enough to permit evaluation of the practical problems of reimbursing participants. Some of the issues investigated include problems in developing and applying criteria for defining and selecting among the groups and interests that are eligible for compensation; applications for and administering compensation grants; the extent to which the compensation program has succeeded in balancing advocacy of different viewpoints; and the contributions to the decision-making process that are being made by the compensated participants.

The third -- and the largest and most complex -- portion of the study centers on the conduct of the rulemaking hearings. In this area, there are a variety of topics that bear on the question of whether the procedures used

in trade regulation rulemaking further the statutory objectives of widespread, effective participation and efficiency in the conduct of proceedings. One such topic is the procedures and techniques that are used to discover relevant information and to narrow or focus issues. This includes the use of prehearing conferences, subpoena requests, Freedom of Information Act requests, and a variety of miscellaneous motions. Also included in this topic is an analysis of the extent to which the statutory standard of "disputed issues of material fact [which are] necessary to resolve" has proved effective in limiting or structuring the hearings.

Another topic involves the interested persons -- witnesses and group representatives -- who are participating in TRR hearings. Among the questions being addressed are: What is the mix of interest groups represented at the different hearings, and are there any apparent changes attributable to the new procedures -- for example, a shift to more expert witnesses in reaction to the substantial evidence test, or a decline in the proportion of individual consumer or business witnesses due to fear of being cross-examined in a formal proceeding? How do the witnesses react to different aspects of the procedures? For example, do they feel that they have had an adequate opportunity to present their views? Were they intimidated or embarrassed by cross-examination? Do they believe that the hearings were fair and unbiased? Does the opportunity to participate more extensively and intensively tend to make the rule as finally adopted acceptable to those who opposed it during the proceeding?

A related area of interest is the role of the FTC staff and presiding officers. Controversy has arisen regarding the extent to which staff attorneys have taken on the role of advocates for the rule, and the extent to which the Magnuson-Moss procedures might produce such an attitude. The

status of the presiding officers as employees of the Bureau of Consumer Protection rather than independent administrative law judges has also drawn strong criticism. The study addresses both the actual pressures on the staff and presiding officers, and the perceptions of possible bias or closed-mindedness among interested persons. In addition, a variety of other procedural disputes have arisen at the hearings, including the use of time limits on cross-examination, the handling of objections to testimony or questioning, the adequacy of advance witness statements, and the propriety of adverse parties seeking voluntary disclosure of information from potential witnesses. These and other procedural matters relating to the conduct of the hearings and the techniques of presiding officers will be analyzed in the report.

Perhaps the most significant issue in the TRR hearings is the use of cross-examination -- the amount of time it is taking up, the subjects or lines of cross-examination being pursued by group representatives, and its usefulness in eliciting new information or illuminating shortcomings in witness testimony. The nature and functions of rebuttal submissions also must be investigated and compared to cross-examination, since the statute treats rebuttal as at least a partial substitute for cross-examination. Finally, problems of establishing standards of relevance and probative value in broad-ranging policy rulemaking run throughout the conduct of hearings.

The fourth and final area of concentration is the post-hearing stages of the rulemaking process, from rebuttal to the issuance of a final rule. As we have indicated, our research design has been to follow a cluster of rules from start to completion, with the objective of analyzing the ways in which different procedural devices and forms of participation affected the final outcome. As the FTC's projections of time for final action continued to

lengthen, it has become apparent that even with the requested one-year extension of the reporting deadline, it is doubtful that we will be able to analyze any substantial number of final rules and their supporting documents in detail. Nonetheless, we have no choice but to plan on the basis that with the extension we will have the opportunity to base our report on a small but sufficient number of completed rules. Even though the preparation of reports and recommendations is going forward on the assumption that fewer rules will be issued in final form early enough to include in the report than we had originally planned for, there remain important procedural questions in the post-hearing stages that will be discussed. These include the possible need for separation of functions requirements and prohibitions on ex parte contacts, which are particularly significant in the last stages of the proceedings; the desirability and format of direct oral presentations to the Commissioners; the need for a second, post-hearing comment period; and the content and sequence of the reports prepared by the presiding officer and FTC staff.

In addition to providing the opportunity for more careful analysis and deliberation of questions of this sort, the extension of the reporting deadline would make it possible for the report to contain some commentary on the procedural innovations that the FTC is currently using in several recently-initiated rules. Of particular interest is the recent use of a two-stage hearing process, with a general speechmaking hearing followed by a more limited hearing for cross-examination. Some observers have urged that this two-step process is a more efficient and economical method of conducting hybrid rulemaking hearings than the single-hearing approach used in most TRR proceedings, and this alternative approach will necessarily be considered in the course of the Conference's deliberations.

As previously indicated, we have used a variety of techniques to collect detailed empirical data relating to these topics. Members of the research staff have observed the conduct of prehearing conferences, rulemaking hearings, and sunshine meetings dealing with rulemaking matters. Participants in rulemaking-proceedings, both inside and outside the agency, have been interviewed. A detailed questionnaire has been submitted to witnesses who testified in seven of the early rulemaking proceedings conducted under the Magnuson-Moss Act, and their responses have been computer-coded and analyzed. We have also reviewed and abstracted rulemaking records and transcripts of hearings, and obtained copies of relevant documents that do not appear on the public record. We are currently in the process of completing computer analyses, filling in some gaps in the data, and moving the various report sections into draft.

II. BUDGET AND SCHEDULING

As indicated earlier, this study has placed budgetary burdens on the Conference over a three year period. Among the consequences has been the need to postpone other research activities during this period so that we could properly fund the FTC project. Thus, in 1976 we had a total research and study budget of approximately \$225,000, of which \$90,000 or 40% was expended on this study. Our budget for research purposes in FY 1977 was \$210,000. We originally anticipated that the project would be completed in FY 1977 and that \$135,000 would be needed for the project in that year. As it turned out, about \$150,000 or 70% of our total research budget had to be used. Our best estimate is that we will be required to spend approximately \$80,000 of our FY 1978 research budget on these activities, which is about 45% of the total funds we have available for research purposes during the current fiscal year.

While the cost of this study has been fairly large by our standards, we have undertaken one other project on this scale. Our study of IRS procedures cost about \$225,000 over a two year period. And, the cost of the FTC study compares very favorably with similar undertakings by other agencies and organizations. For example, in Fiscal Year 1974 Congress appropriated \$5,000,000 for EPA so that it, in turn, could contract with the National Academy of Sciences to conduct a study of decision-making in the EPA. Between 1975 and 1978 Georgetown University conducted a study of plea bargaining for the Department of Justice that cost more than \$700,000. And, the National Center for State Courts was grantee on a two year, \$275,000 project sponsored by the National Science Foundation that studied the procedures of Small Claims Courts.

In any event, early in this fiscal year we scaled down the number of contract personnel we had on this project and, as mentioned above, we plan to scale down even further in November/December. Based on the current staff of four, we have projected our monthly outlays at about \$8,500. Of this amount, about \$6,300 is for salary and related costs. The balance is for space, supplies, and the like. Again, expenses at this level will continue until the latter part of this calendar year and then should reduce quite significantly for the last five or six months of the one year extension we are seeking.

Assuming that our request for an extension of the reporting deadline is granted, the current schedule calls for consideration of the draft report and recommendations by the Conference's Committee on Rulemaking and Public Information this fall and winter, with consideration by the entire membership in plenary session next spring, so that a final report can be submitted to the Congress in early summer of 1979. The committee has already met

several times to discuss general matters, such as the study's format, and quite recently held a meeting at which an FTC official provided useful background information about FTC's view of its experiences under Magnuson-Moss.

In conclusion, I wish to stress that though the cost to us in time and money of this project has been more than we originally expected, and has necessarily cut deeply each year into our limited resources available for research project activities, the Conference has nevertheless been willing to endure impairment of its other activities because of its realization that the FTC project is an extremely important one. Again, we remain confident that both overall and for the particular data and analyses they generate, our efforts will yield value for Congress, for other agencies and, most immediately, for the Federal Trade Commission.

Mr. ECKHARDT. In addition to Professor Boyer, you have two lawyers, a paralegal, and a secretary at the present time?

Mr. SCOTT. That is correct.

Mr. ECKHARDT. I would like to know what they are doing and what they would do during this considerable period of time before more rules are available for analysis.

STATEMENT OF BARRY B. BOYER

Mr. BOYER. Well, the activities that they are engaging in on a daily basis are of three sorts.

One is moving in to draft the information that we have accumulated so far. It is going to be a very lengthy report. We have a fair amount that is in different stages of rough draft right now but still a large amount that has to be reduced to writing before we will have a final report that can be submitted to the administrative conference.

The second is following current developments in rulemaking, especially the posthearing stages of the rules that we have followed through from the outset, plus trying to keep current on some of the procedural innovations that the Trade Commission is attempting.

The children's advertising and R value rules are the two we are most interested in from that perspective. Then there is a certain amount of collection or record review, plus filling in gaps that become exposed as you start reducing something to draft, and you find out there are certain bits of information you need to complete a sequence.

So for the next 2 to 3 months they will be fully occupied in those kinds of activities. There is no problem as I see it of people underutilized during that period. They will have plenty to do.

Mr. ECKHARDT. It would seem to me that even though you have relatively few cases, you do have information that gives you some idea of how the new rulemaking procedures are being used and how the commission is operating under these processes. Of course, you also have considerable experience in the past with the old rulemaking procedures.

It would seem to me that you might be preparing what ultimately might be a report, even prior to further experience, with the idea of revising it with whatever experience you get. If that were true, it would seem to me, there would be room for persons to be fully employed in this program. At the present time, I just want to be assured that this interim time is not merely a waiting period, but that it is a time for developing the report, itself.

Mr. BOYER. Yes, sir, that is exactly what we are doing right now. We are moving things into draft with the view that we may have to go back and change some things as we learn more about the end state of the process—we see more rules coming there—and what the effects are of the procedural changes they are making in R value and children's advertising, but that is exactly what we are trying to do. It will be a massive document and we will have to move it quickly into draft, and we are trying to.

Mr. ECKHARDT. We have had some preliminary considerations—hearings that have brought in some facts concerning the rules, and we do intend, by the time your report is made, to have full hear-

ings on this whole question because I am very interested in this matter.

I have received enough information through previous oversight hearings to identify some points of concern. I always have felt that the fact that oral hearings are available, and that a certain degree of cross-examination is available, should not extend necessarily the length of the hearings or of the record. We had felt that the only way there could be a meaningful review of the question of whether factual data supported the rule was to provide a record so that it would be known precisely what went into it.

In other words, you are in a pretty bad position if you go into court and you are trying to show support for the rule and there was no substantial evidence on the record, as a whole, to support the rule. Of course, you are in an even worse position if you have to operate on the basis that the action was arbitrary and capricious.

You are in pretty bad shape if you look at all the record and find nothing to support the rule or you find such overwhelming evidence to the contrary that it cannot be said that, on the whole, there is support of the rule, and then, the agency pulls something out of its back drawer and says, "Look we are not sure that we knew about this at the time but it does in fact support the rule." Now, I think that may be an exaggerated situation and it may not even support the rule under Federal law. It does, however, under the law of the State of Texas. It is something that we were attempting to avoid in drafting this legislation.

But, it would seem to me that there are possibilities of making the record somewhat shorter if the hearing officer or the law judge, whatever person will be conducting the proceeding, will let it be known that the action will be taken on some relatively constricted or limited volume of evidence, and that a great number of documents thrown in would be simply makeweight, and they might actually detract from the focal point.

I remember Maury Maverick, an old New Deal Member of Congress and a rather salty character—his family being the family from which the term "maverick" comes. He used to say the way to try a case before the Commission was to get a great number of mimeographed pages—it did not make much difference what they were—staple them together and start piling them up as exhibits to the point where the whole record was so indigestible that the agency would never finish any type of regulatory process. It seems to me what we have heard up to now indicates that this process is one that has been brought to a fine art at the present time.

Mr. BOYER. Well, I think as we suggest in the statement, some of the major problems that cut across all stages of the proceeding, and I think are a principal cause of some of the delay they are experiencing, are these questions of relevance and probative value. That is when you have one of these broad rules that governs a variety of industry practices, almost anything has some relevance to it that anybody wants to present.

There is some difficulty in understanding what is really going to affect the outcome, what is going to be weighed most heavily in the agency decision. So uncertainties as to what is going to be outcome-determinative creates or feeds some of these problems that they

are having in discovery, in motions for production of documents, in disorganization of the record, in lack of limits on cross-examination, other than time limits.

I think all of these things are related to the problems of relevance and proof.

Mr. SCOTT. I think as well, just the threshold question of defining the issues; one of the things we are looking at is the mechanism which is in the bill for doing that and the question whether it is working in the way that we think the drafters of the bill contemplated, because certainly the bulk of the record, its voluminous quality is to some extent the result of imprecision at the threshold in defining what the pertinent questions are.

There are mechanisms in the bill for honing in. One of the things we are looking at is whether it is working to do the job. If not, why not? But I think that threshold question is a key one.

Mr. ECKHARDT. I think that is undoubtedly true. I know one of the difficulties that we have—and perhaps we have not actually worked that out and maybe it can only be worked out by a sort of common law definition—is the question of that which goes to a totally judgmental decision and that which constitutes an essentially basic fact.

After all, if you are trying to determine whether or not it is desirable to have bank paper stamped as consumer paper, there is not much fact that goes into that question; it is largely a question of judgment. On the other hand, if you are looking into the question of whether or not octane ratings are meaningful, given in a certain way, I think you have a pretty typical fact question.

I think the division between these two processes is one of the most troublesome questions that we meet in trying to define what the standards of review should be.

Mr. SCOTT. That is right.

Mr. BOYER. It seems to be true of the few proceedings that we have seen move into the posthearing stages so far; that as, the rule moves its way up to the Commission, these remedial policy issues—that is, what sorts of protective provisions are needed, will they be effective, will they be enforceable, can industry live with them—are the ones that come to dominance as the Commissioners themselves become involved in the rulemaking.

The more factual questions of whether there are abuses and whether the abuses are serious enough to warrant a rule can tend to become less important.

Mr. ECKHARDT. Well, we certainly will look forward to your report. It does seem to me there is much that can be done prior to that time on the very type of questions I am raising. There must be enough material in the hearings to judge that to some extent now.

Another thing that it seems to me you might be looking into pending the report, and you probably are, is the question of the demeanor and the process of the hearer—the hearing officer or the law judge.

I have had some experience before the National Labor Relations Board when they used to have the hearing offices. A good hearing officer could make these hearings go pretty fast even though we had full right to cross-examination, virtually the same as a trial. As a matter of fact, I suspect the cross-examination was even more

liberally treated than it is in the Federal court. But a good hearing officer could get a lot done in a relatively short period of time.

I wonder whether or not persons engaged in these rulemaking hearings are sufficiently rigorous in keeping the record to the most important issues, rather than permitting them to be spread out over a very long period of time.

While I do not think he would have enforced it, I have seen a hearing officer with some cross-examination that extended too long, and he just pulled out his watch and said, "I am going to terminate this in 15 minutes. I just want to warn you about it." The lawyer got through with his cross-examination.

Of course, the hearing officer did not have to impose a time limitation and he probably would not have. But there are ways I think that you can move these things.

Mr. SCOTT. We are generating quite a bit of information about precisely that question from two standpoints, both from our own review of the transcript of the records in an attempt to identify what we think are good practices in some hearings, the way some presiding officers conduct matters, as opposed to the way others do.

We also have sent out and gotten quite a high return on questionnaires to the various participants in the hearings. Among other things, they are providing us with comments upon the way the hearing is conducted and what we think are good and bad practices. There is variation among the various presiding officers.

What we are trying to do is hone in on what we think are the proper practices and set some sort of standards.

Mr. BOYER. The question of the role and function of the presiding officer is a major focus of the work that we are doing right now.

As Mr. Scott suggested, what we are doing now is trying to digest the great mass of information we have, and distill out of it some sense of techniques of presiding, the extent to which the personality and experience of the presiding officer contribute to the efficient conduct of the hearing; what kinds of doctrinal tools do they have to try to keep the hearings progressing and focused in an orderly fashion.

So we are very concerned about this. We expect to come back with a report that will address this issue in some detail.

Mr. ECKHARDT. Of course, you have experience from other areas too that I think would be very valuable to bring into play here. For instance, handling a large class action suit with techniques like the devising of printed factual briefs of agreed facts on certain subjects tend to make the total amount of information digestible. Those briefs frequently are highly technical and extensive, but if there can be some area of agreement and some understanding of what the basic subject matter of the lawsuit is, a decision be made reasonably on these facts even by juries. I understand that this technique has been used with juries—a printed agreement as to fact with highly technical matters in it is made available to a jury. Perhaps, some of the techniques used in large class actions would be useful in this type of project.

Mr. BOYER. Yes; we are comparing some of the practices the FTC is using to those that are contained, for example, in the manual for complex and multidistrict litigation.

Mr. ECKHARDT. Yes.

Mr. BOYER. Some of them may be adaptable. It is not a perfect analogy, but some of them may well emerge in recommendations.

Mr. ECKHARDT. What we have heard up to now has indicated that the mass of the time is not occupied in the hearing but in certain prehearing preparation.

Mr. BOYER. And as we are now learning in the posthearing stages of trying to master the record and write reports based on it. That is probably the longest block, depending on when you start the time running and how you compute the prehearing stages.

Mr. ECKHARDT. But that depends partly on how much fodder or grain was in the grist mill in the beginning; does it not?

Mr. BOYER. And how much chaff, also.

Mr. ECKHARDT. Yes.

Well now, what about this: In one of these hearings, undoubtedly, there are extensive documents presented by the agency and by persons affected by the rule in advance of the hearing. Is this material presented like it would be in court, exhibit by exhibit? Or does it come in a great sort of undigested mass?

Mr. BOYER. Well, there are several different kinds of documents that are handled somewhat differently.

In the prehearing stages you have two categories of documents that get put into the rulemaking record. The first is the staff investigative material, which at least during the early stages of Magnuson-Moss rulemaking was dribbled onto the record in a piecemeal fashion up to and sometimes beyond the eve of hearing. So it was difficult to gain access to it and it was not present in a timely fashion.

Then there is the prehearing comment record which is open up until approximately 45 days before the start of the hearings, which again is not well enough organized to access certain kinds of subject matter or issues that you are interested in, although they have been making some improvements in the organization of the record. But generally, those kinds of documents are simply put in the record in a very simple form of organization, and are difficult to get at.

In addition, there is only one official copy. So it is not, for example, distributed to the regions routinely. There were problems of access to those prehearing kinds of documents, organization and interpretation of them.

Then at the hearings themselves there has been fairly varied practice. When a witness comes in with documents, for example, or counsel wants to use documents as a basis for cross-examination, that has been worked out pretty much on an ad hoc fashion by the presiding officers in particular hearings. There have been some disputes and uncertainties on that.

Mr. ECKHARDT. Does the party affected by the rule have an opportunity to determine who prepared a document, particularly with issues having to do with fact questions that may be highly technical? Does he have an opportunity, in fact, to cross-examine the person who prepared it or is he just faced with a faceless document?

Mr. BOYER. Not necessarily would he have an opportunity to cross-examine the preparer of every significant document in the record.

Mr. ECKHARDT. Of course, the documents have to be a collegial job at some point. But there must be some significant input of a technical nature that may be identified as relating to a specific fact.

What I am getting at is this—can it be ferreted out who contributed the agency's expertise in that area, so that cross-examination is really meaningful?

Mr. BOYER. The agency's?

If we were talking about documents prepared within the agency, then there is one key prehearing document and that is the investigative staff report, which summarizes the investigation and is submitted to the Commission when the staff recommends that they issue an initial notice and proceed into the hearing stages of rule-making.

By and large, that document has been prepared by staff lawyers at the Commission. They may get input from outside consultants or from the Bureau of Economics, but it is drafted by the lawyers who are essentially staff representing the commission in the proceeding. Generally there is no opportunity to cross-examine them, as such.

Now the staff, like the other hearing group representatives, will present certain witnesses, and has presented a high proportion of expert witnesses in most of these hearings. When those witnesses appear, the other group representatives or affected interests will have a pretty wide-ranging opportunity to cross-examine.

Mr. ECKHARDT. Can the rule be based solely on the investigative report or can it be based on portions of the investigative report and other matter which has been brought in to a hearing, so that the investigative report makes it part of that necessary evidence or that necessary factual basis that may be said to provide support on the record, as a whole, of the ultimate rule?

Mr. BOYER. Theoretically, as I read the statute, it would be possible to have a rule that was based on nonhearing documents; that is information in either the investigative portion of the record—

Mr. ECKHARDT. Nonhearing in the sense that the document was prepared outside the hearing, but it ultimately went into the hearing?

Mr. BOYER. Well, it would be possible to have documents not subject to any cross-examination

Suppose, for example, the commission's staff engaged a consultant to do a study of consumer behavior on a particular subject. Instead of producing him as a witness at the hearing, they simply submitted this into the record. There is nothing in the statute except judicial review which would prevent them from doing that and from basing a rule on it.

Now in fact, they have not done that very much. The assumption has been that important studies and bits of evidence will be brought in at the hearing and subjected to cross-examination, in part for fear of judicial review, I think.

Mr. ECKHARDT. It is one of those issues which, if we had anticipated such problems in the statute, we undoubtedly would have restricted too tightly the agency. Yet, I think it is an area in which it is very important to know what the practice is because it was clearly the intent of Congress to have decisions made upon an

important factual basis, to the extent feasible, without duplicating the efforts of various persons concerned with the issue through the participation of their lawyers, by submitting all of this to cross-examination. Of course, cross-examination is controlled pretty much at the discretion of the trier of fact.

I think it would be very important to hear from you what the experience has been in this area. Obviously, studies of the type you are talking about are going to have to come from diverse sources, and even in court, there is frequently no opportunity to cross-examine in certain areas of factual concern. And, if we attempted to tie this rulemaking to even as strict a rule as the courts apply, we are dealing with a quasi-legislative field which affects a great many persons and is spread over a very wide area of relevant actual information, more so than the fairly narrow issue before a court.

But, I do think it is important for the agencies to develop certain practices which may become a kind of common law process of that agency. I would be interested in your analysis of that issue when we ultimately get your report.

Incidentally, I look forward to seeing the report, and I hope that we may call you before us at that time, so we may have a discussion of it with a bit more formalized basis for questions and answers.

Mr. BOYER. It would be my pleasure to come back when we have the report.

Mr. ECKHARDT. I thank you very much for your attendance here. We are very interested in what you are doing. That is the main reason we called you in as well as to find out if some people were on the payroll without anything to do. I am reasonably convinced that that is not the situation.

Mr. SCOTT. Thank you very much, Mr. Chairman.

Mr. BOYER. Thank you.

Mr. ECKHARDT. Thank you.

The hearing is adjourned.

[The following questions and responses thereto were received for the record:]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
Washington, D.C., June 27, 1978.

HON. JAMES T. BROYHILL,
*Subcommittee on Consumer Protection and Finance of the House Committee on
Interstate and Foreign Commerce, Washington, D.C.*

DEAR CONGRESSMAN BROYHILL: This is in response to your letter of June 15 containing questions with respect to H.R. 12563, a bill to extend the deadline for the Administrative Conference's study of Magnuson-Moss rulemaking. Your questions were addressed to Joseph Scott, Executive Director of the Administrative Conference. Since Mr. Scott is on vacation, I am responding for him.

The answer to your questions (restated herein for the sake of clarity) were prepared after consultation with Professor Barry B. Boyer, the consultant-director of our FTC Rulemaking Project.

Question 1. Your request for an extension is based on the fact that the FTC, to date, has issued only one rule under the Magnuson-Moss procedures and on your belief that the report should be based on several completed rules. In its recent notice of proposed rulemaking with respect to television advertising to children, the Federal Trade Commission has significantly revised the procedures applicable to a rulemaking proceeding. To what extent will your study reflect these modified procedures? Is an additional year sufficient to study the impact of these changes?

Answer. The procedural changes adopted by the FTC in the Children's Advertising and R-Value rulemaking proceedings are of considerable interest to the re-

searchers conducting the study. Several procedural techniques that are being used in these proceedings, such as the two-stage hearing, decreased emphasis on designation of disputed issues, and modification of the nature and sequence of post-hearing reports, have been suggested as improvements for trade regulation rulemaking, or used with apparent success in other agencies. The Children's Advertising and R-Value rules should provide some indication of whether they would be workable in trade regulation rulemaking.

It should be noted that existing levels of resources will not permit the researchers to study the Children's Advertising and R-Value rules in the same depth and detail as they did earlier TRR proceedings. These rules will be monitored primarily through interviews with major participants, selective review of public record materials, and limited observation of proceedings.

The sufficiency of an additional year depends partly upon the speed with which the FTC conducts the Children's Advertising proceeding. The Commission's current schedule calls for completion of the post-hearing report and comment stage by October of 1979. However, that schedule includes a disputed issues hearing, which, conceivably, may not be held if the Commission determines that there are no disputed issues of fact requiring further hearing.

Given the uncertainty about the date of completion of the Children's Advertising TRR proceeding, and the considerable time which has elapsed since this study was commissioned, we believe that we should submit our report to Congress by June 30, 1979. At that time, we may propose, or Congress may request, a supplemental report evaluating significant developments in the Children's Advertising or other rulemaking proceedings.

Question 2. The rulemaking procedures for the children's advertising proceeding are substantially different from those used in previous rulemaking proceedings. Two differences which have received a great deal of comment are the rule governing so-called *ex parte* communications and the requirement that a participant search his files for adverse material and also submit that material for the record. Will your study include a look at these two aspects of the children's advertising proceeding?

Answer. It is expected that the report will analyze the FTC's practices with regard to *ex parte* contacts and separation of functions in trade regulation rulemaking, and also address related subjects bearing on the role of FTC staff attorneys and presiding officers. To date, the Children's Advertising Rule has not involved any material changes in the FTC's procedures relating to separation of functions and *ex parte* contacts.

The so-called "search and submission" requirement adopted in the Children's Advertising rulemaking touches on a subject that is of major interest to the researchers, i.e., the role of discovery and related procedural devices for gaining access to information in TRR proceedings. The research staff has begun collecting and analyzing public record documents, and plans to interview participants on this subject.

Question (a). Chairman Eckhardt has expressed concern on several occasions that an advocate for a particular point of view might adopt a tactic of simply overwhelming the rulemaking record by submitting volumes and volumes of materials. Would not the FTC's "search and submission" rule tend to exacerbate this problem, if it does indeed exist?

Answer. The size and organization of the rulemaking record has been a source of controversy in several TRR proceedings under the Magnuson-Moss Act, and, as our prepared statement indicates, our final report will deal at some length with the usefulness of these records. It is too early to determine whether the search-and-submission requirement in Children's Advertising might exacerbate problems of record management, since interested persons have not yet begun to submit materials in compliance with this requirement. It is also possible that the broad language of the requirement could be clarified and narrowed in practice as the proceeding progresses. The Presiding Officer recently issued one clarifying ruling, and the matter has been certified to the Commission for review.

Question (b). Could not the "search and submission" rule have a chilling effect on participation in a proceeding? To what extent will your study be able to measure this?

Answer. If the search-and-submission requirement remains in effect in its present form, researchers will attempt to explore, through interviews with participants, the ways in which this provision may have affected the decision to participate, or the nature and scope of participation. However, there are some measurement problems in this approach. We have no means for systematically identifying those interested persons or organizations who may decide to forego participation entirely. In addi-

tion, interview subjects may be reluctant to discuss their litigation strategy with our interviewers.

Question (c). The "search and submission" rule applies to data of other clients in the possession of a participating attorney. Does this aspect of the rule do violence in any way to either the attorney-client privilege or to the code of professional responsibility?

Answer. While several general claims regarding impairment of the attorney-client privilege have been made in the Children's Advertising proceeding, the practical effects of the search-and-submission requirement on the attorney-client relationship are uncertain at the present time. This is one of the issues which may be clarified by the pending certification to the Commission for review.

We hope we have answered your questions satisfactorily. If not, please feel free to contact me.

Sincerely yours,

RICHARD K. BERG,
Executive Secretary.

[Whereupon, at 10:15 a.m., the subcommittee adjourned.]





