

COMMUNICATIONS ACT AMENDMENT—COMMON
CARRIER TARIFF PROCEEDINGS

JUNE 30, 1976.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and
Foreign Commerce, submitted the following

REPORT

(Including cost estimate of the Congressional Budget Office)

[To accompany H.R. 13961]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 13961) to amend sections 203 and 204 of the Communications Act of 1934, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

A BILL To amend sections 203 and 204 of the Communications Act of 1934

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 203 (b) of the Communications Act of 1934 (47 U.S.C. 203 (b)) is amended to read as follows:

“(b) (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

“(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.”

SEC. 2. Section 204 of the Communications Act of 1934 (47 U.S.C. 204) is amended to read as follows:

“SEC. 204. (a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Com-

mission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be not found justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

“(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).”

PURPOSE AND SUMMARY OF THE BILL

The bill (H.R. 13961) would (1) extend to 90 days the period of notice required before a tariff may be changed, (2) extend from three months to five months the period in which the Federal Communications Commission may suspend new or revised tariff schedules, and (3) authorize the Commission, based upon a preliminary written proceeding, to grant or suspend a tariff, in whole or in part, pending hearing and decision on the lawfulness thereof or to grant temporary authorization of a tariff.

BACKGROUND AND NEED FOR LEGISLATION

TARIFF NOTICE PERIOD

Section 203(b) of the Communications Act of 1934 presently provides that no change shall be made in the tariff charges, classifications, regulations, or practices which have been filed with the Federal Communications Commission except after 30 days notice to the Commission and the public. However, the Commission may modify this requirement if the particular circumstances so warrant.

The Commission alleges that the current 30-day notice period is inadequate to effectively review a tariff filing. Because of Commission procedural rules, the Commission maintains that when considering certain filings, the Commission may have only 4 to 6 days, including weekends and holidays, to review the tariff filing and the submissions of interested parties, and to reach a decision on whether or not to suspend the tariff. Contemporary tariff filings are often thousands of pages of complex and detailed information, and it is the Committee's finding that an extension from 30 to 90 days of the notice period in section 203(b) of the Act is essential for the Commission to meet its tariff review responsibilities consistent with the demands of due process.

As discussed below, H.R. 13961 would authorize the Commission to conduct a preliminary written proceeding on a tariff filing and based thereon to grant partial or temporary tariff changes pending full hearing on the lawfulness of the filing. Extension of the notice period to 90 days is also necessary for the Commission to effectively utilize this new authority as additional time will be required for the Commission to determine whether a temporary or partial change should be approved in the case of a particular tariff filing.

While the judicial construction of section 203(b) of the Act has affirmed the Commission's authority to modify the notice requirement to 60 days in the case of tariff increases, the Committee is of the view that with the notice period being extended to 90 days by H.R. 13961, the Commission should be able to complete its initial review of a tariff filing within that time. Therefore, H.R. 13961 would provide that the Commission not modify the 90-day notice period except to shorten it. The Committee expects that the Commission will not require the full 90-day notice period in most cases, and that the maximum notice period will be required only where there is a compelling reason to do so.

TARIFF SUSPENSION PERIOD

Section 204 of the Communications Act provides that the Commission may, upon complaint or upon its own initiative, designate a tariff filing for hearing concerning its lawfulness, and, pending such hearing, suspend the operation of the tariff for a period of not longer than 3 months beyond the time when it would otherwise go into effect. If the hearing process is incomplete at the end of the suspension period, the tariff becomes effective. Where an increased rate is at issue, the Commission may require a carrier to account for all funds received under the increase following the suspension period, and may order refunds with interest as may be appropriate upon conclusion of the

hearing. In situations where the accounting orders result in refunds, the Committee became concerned about the extremely high costs when accounts and refunds are not by classes of users. These high costs reduce the amount of funds available for refund to the consumer. The Committee expects that, when requiring accounting orders, the Commission will order accounts and refunds by classes of users rather than by individuals.

The Commission alleges that it is simply not possible to conclude a tariff proceeding in a 3-month period of time. Moreover, section 204 of the Act was drafted in an era when regulated common carrier communication were less complex and the demands made upon the Commission's hearing process were considerably lighter.

Under the Administrative Procedure Act (APA), the Commission is required to give reasonable notice (generally 30 days by administrative interpretation) of the time and place of the hearing. Following the close of hearings and prior to issuance of an initial decision, the APA requires that parties be given "reasonable opportunity" to file exceptions to proposed findings of facts and conclusions or "reasonable opportunity" to file exceptions to an initial decision. The Commission's procedural rules provide a 20-day period for the filing of proposed findings of fact and conclusions after the close of the hearing record. This 20-day period is generally inadequate and must be extended. The FCC rules also provide a 30-day period for the filing of exceptions to an initial decision, and this period is often extended at the request of the parties. Beyond these due process requirements, time is required for the Commission to hold the hearing itself and to prepare a reasoned decision which is subject to judicial review.

Given these time demands and procedural constraints, the Commission cannot realistically be expected to complete a tariff hearing within the existing 3-month statutory suspension period. As a result, most tariff filings, some involving revenue increases amounting to several hundred million dollars annually, go into effect before hearings on their lawfulness are concluded. In this regard, the imposition of an accounting and refund order is an imperfect protection against rate increases which may ultimately be held unlawful. Consumers lose the use of their money during the time such increased rates are in effect, and the accounting and refund procedures entail considerable expense and administrative burden to the carriers.

In addition, many tariff proceedings involve new or reduced rates where the issue presented is whether an unlawful discrimination or preference exists. The accounting and refund provisions, being applicable only in rate increase situations, afford no protection or remedy against new or reduced rates which are ultimately found to be unlawful but have become effective at the end of the suspension period before a decision can be reached. In such cases, users may have made substantial changes in their communications operations based on the new or reduced rate schedule, and may experience serious dislocations should the schedule be finally declared unlawful and hence void. An extension of the suspension period would enable the Commission to minimize these effects.

The Committee believes that these reasons support the Commission's expressed need for a longer suspension period to enable it to keep pace with its regulatory responsibilities.

While the Commission had initially sought an extension of the suspension period to 9 months, the Committee received comments from the Office of Telecommunications Policy (OTP) which recommended an extension of the suspension period to 5 months. The Commission and OTP discussed the legislation and by letters informed the Congress that a maximum suspension period of 5 months would be helpful to the Commission and in the public interest.

In adopting a 5-month suspension period in H.R. 13961, the Committee emphasizes that in so doing it is only attempting to remedy a Commission procedural inadequacy caused by an inadequate time frame for the handling of certain complex tariff filings. Most Commission tariff filings are presently completed within the present 3-month suspension period. The Committee fully expects that the Commission will continue to handle the majority of its less complicated tariff filings within the 3-month time frame. The Committee also expects that through streamlining its tariff hearing procedures and decision-making process and increasing staff assigned to major common carrier rate matters, the Commission will be able to complete major tariff filings within the 5-month time frame that have previously taken years to conclude. The Committee believes that both the carriers and the rate-paying public will benefit from an extension of the suspension period to 5 months.

PARTIAL OR TEMPORARY TARIFF APPROVAL

Section 204 of the Act presently does not specifically authorize the Commission to separate questionable from legitimate aspects of a tariff filing prior to hearing and thus does not permit the Commission to suspend the former tariff elements and allow immediate implementation of latter. The Commission is also without authority to permit a temporary tariff change. As a result, legitimate changes must await hearing on questionable aspects of the tariff and an unnecessary regulatory delay is created.

H.R. 13961 would amend section 204 to allow the Commission to make a preliminary judgment as to whether a tariff filing should become effective or be suspended in whole or in part pending hearing. In particular, the new section 204(b) would enable the Commission to permit part of a tariff filing to go into effect based upon a written showing by the affected carrier or carriers, with opportunity for written comment by affected persons, that such partial authorization is just, fair, and reasonable. The provisions H.R. 13961 would also enable the Commission, upon a similar written showing, to allow all or part of a tariff filing to become effective on a temporary basis subject to further Commission orders.

In the Committee's judgment, the new authority to approve temporary or partial tariff changes will provide the Commission with the flexibility needed to mitigate unnecessary effects of regulatory delay which presently attend the hearing and suspension process.

ACCOUNTING AND REFUND ORDERS

Section 204 of the Act authorizes the Commission to impose accounting and refund orders only in cases of tariffs involving increased charges. H.R. 13961 would amend section 204 to provide that the Com-

mission may also issue accounting and refund orders in connection with tariffs involving charges for a new service.

Under the existing law, customers of a new service are unprotected against charges which become effective and are later found to be unlawfully excessive. The accounting and refund procedures should be available to the Commission to close this gap in remedy.

As amended by H.R. 13961, section 204 would authorize the Commission to impose accounting and refund orders in connection with new or increased charges which go into effect either pursuant to a temporary authorization or upon the expiration of a period of suspension.

COMMITTEE ACTION

The Committee, acting through its Subcommittee on Communications held 5 days of hearings on November 10, 11, 13, 17, and 18, 1975, on H.R. 7047, a bill submitted by the Federal Communications Commission. In the course of these hearings, testimony was taken from the Acting Director of the Office of Telecommunications Policy, Chairmen of the Federal Communications Commission, Chairman of the New York State Public Service Commission and representatives of other organizations and companies involved in the common carrier communications industry.

The Subcommittee on Communications met in open mark-up session on May 12, 1976, to consider H.R. 7047 and reported a clean bill, H.R. 13961, to the full Committee.

H.R. 13961 was ordered reported to the House by the Committee on May 26, 1976, by a voice vote while a majority of the Committee was present.

SENATE ACTION

The Senate passed S. 2054 on May 27, 1976.

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 203(b) of the Communications Act of 1934 is amended to extend from 30 to 90 days the period of notice required before a tariff may be changed, and to provide that the Commission may allow tariff changes upon less (but not more) than 90 days notice.

SECTION 2

Section 204 of the Act is in effect redesignated section 204(a) and is amended to extend from 3 to 5 months the period during which the Commission may suspend the operation of a tariff filing in whole or in part pending hearing on the lawfulness thereof. Other minor language changes in the subsection clarify that the provisions of the subsection are applicable to new, as well as revised, charges, classifications, regulations or practices. The accounting and refund order provisions of the subsection are made specifically applicable to charges for new service, as well as increased charges. The subsection substan-

tially retains the provision of existing section 204 which specifies that in any hearing involving an increased charge or proposed increase the burden of proof shall be upon the carrier to show that the increased charge or proposed increase is just and reasonable.

A new subsection 204(b) is added, providing that notwithstanding the provisions of subsection (a), the Commission may allow part of a charge, classification, regulation, or practice, to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. The new subsection (b) also provides that additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. The subsection further provides that authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).

OVERSIGHT FINDINGS

There are no formal oversight findings by the Committee pursuant to clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives.

No oversight findings have been submitted to the Committee by the Committee on Government Operations pursuant to clause 2(1)(3)(D) of the Rules of the House of Representatives.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of the Rules of the House of Representatives, the Committee makes the following statement regarding the inflationary impact of the reported bill:

The Committee is unaware that any inflationary impact on the economy will result from the passage of H.R. 13961.

COST ESTIMATE

Pursuant to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee estimates that no additional costs will be incurred if H.R. 13961 is enacted.

The cost report prepared by the Congressional Budget Office follows:

CONGRESS OF THE UNITED STATES,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., June 10, 1976.

HON. HARLEY O. STAGGERS,
*Chairman, Committee on Interstate and Foreign Commerce, U.S.
House of Representatives, Rayburn House Office Building,
Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 13961, a bill to amend sections 203 and 204 of the Communications Act of 1934.

Based on this review, it appears that no additional cost to the government would be incurred as a result of enactment of this bill.

Sincerely,

(For Alice M. Rivlin, Director).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman) :

COMMUNICATIONS ACT OF 1934

* * * * *

TITLE II—COMMON CARRIERS

* * * * *

SCHEDULE OF CHARGES

SEC. 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ~~thirty days~~ *ninety days* notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe ~~];~~ but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions].

(2) *The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission*

may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense.

HEARING AS TO LAWFULNESS OF NEW CHARGES; SUSPENSION

SEC. 204. (a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than [three] five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after [it] such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed [change of] new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such [increase] charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be [found not] not found

justified. At any hearing involving a charge increased, or sought to be increased, [after the organization of the Commission,] the burden of proof to show that the increased charge, or proposed [increased] charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) *Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a.)*

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AGENCY REPORTS

In addition to the report from the Federal Communications Commission, the Committee has enclosed the Executive Communications on the Senate bill, S. 2054, which was identical to H.R. 7047, the House version of the bill. The above cited reports follow:

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C., May 12, 1975.

HON. CARL ALBERT,
Speaker of the House of Representatives,
Washington, D. C.

DEAR MR. SPEAKER: Enclosed are six copies of a draft bill, and explanatory statement, to amend sections 203 and 204 of the Communications Act of 1934. This proposal, which is part of the Commission's legislative program for the 94th Congress, would extend to 90 days the period of notice required before a tariff may be changed; extend from three months to nine months the period for which the Commission may suspend new or revised tariff schedules; and authorize the Commission, based upon a preliminary written proceeding to grant or suspend a tariff in whole or in part pending hearing and decision on the lawfulness thereof or to grant temporary authorization of a tariff.

Section 203 (b) of the Communications Act provides that no change shall be made in the tariff charges, classifications, regulations or practices which have been filed with the Commission except after thirty days notice to the Commission and the public. The Commission has found that this period is inadequate to effectively review a tariff filing. The thirty day notice period together with Commission rules has left the commission with only four to six days including weekends and holidays to review the tariff, the contentions of the various parties, and to reach a decision on whether or not to suspend the tariff.

Section 204 of the Communications Act provides that the Commission may, upon complaint or upon its own initiative, designate a tariff filing for hearing concerning its lawfulness, and, pending such hearing, suspend the operation of the tariff for a period of not longer than three months beyond the time when it would otherwise go into effect. If the hearing process is incomplete at the end of the suspension period, the tariff becomes effective. Where an increased rate is at issue, the Commission may require a carrier to account for all funds received under the increase following the suspension period, and may order refunds with interest as may be appropriate upon conclusion of the hearing. In some cases the revenue increases sought may amount to several hundred million dollars annually.

The Commission has found that it is simply not possible to conclude a tariff proceeding in this short a period of time. Section 204 was drafted in an era when communications media were less complex and the Commission's hearing docket was considerably lighter. Section 204 does not now specifically authorize the Commission to separate questionable items from legitimate aspects of a tariff filing and thus does not permit the Commission to suspend the former and implement the latter. In addition, the Commission does not have authority to implement a temporary tariff change. Because legitimate changes may await completion of the hearing on questionable elements of a tariff, an unnecessary regulatory lag may be created.

The Administrative Conference of the United States recommended that regulatory agencies seek statutory authority to allow temporary or partial rate increases in order to solve this problem. The amendatory language proposed by the Commission is designed to implement this recommendation. It authorizes the Commission to make a preliminary judgment as to whether a tariff filing should become effective or be suspended in whole or in part pending hearing.

The Office of Management and Budget advises that it has no objection to the submission of this draft bill to the Congress with the understanding that other agencies may wish to testify thereon.

Consideration by the House of Representatives of the proposed amendment to the Communications Act of 1934 would be greatly appreciated. The Commission would be pleased to furnish any additional information that may be desired by the House or by the Committee to which this proposal is referred.

Sincerely yours,

RICHARD E. WILEY,
Chairman.

Enclosures.

PROPOSED BY THE FCC FOR THE 94TH CONGRESS

A BILL To amend sections 203 and 204 of the Communications Act of 1934

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 1.

Section 1.

Section 203(b) of the Communications Act of 1934 [47 U.S.C. 203(b)] is amended by deleting "thirty" and inserting in lieu thereof "ninety."

Section 2.

Section 204 of the Communications Act of 1934 [47 U.S.C. 204], is amended to read as follows: (new language is printed in italics; language to be deleted is enclosed in black brackets).

"SEC. 204 (a). Whenever there is filed with *the* Commission any new *or revised* charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, *in whole or in part* but not for a longer period than [three] *nine* months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with references thereto as would be proper in a proceeding initiated after [it] *such charge, classification, regulation, or practice* had become effective. If the proceeding has not been included and an order made within the period of the suspension, the proposed [charge of] *new or revised charge, classification, regulation, or practice* shall go into effect at the end of such period; but in case of a proposed *charge for a new service or an increased charge*, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such [increase] *charge for a new service or increased charge*, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such *charge for a new service or increased charges* as by its decision shall be found not justified. [At any hearing involving a charge increased, or sought to be increased after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and] The Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice, to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice, to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).

EXPLANATION OF PROPOSED AMENDMENTS TO SECTIONS 203 AND 204 OF
THE COMMUNICATIONS ACT OF 1934

The Federal Communications Commission recommends to the Congress enactment of legislation to amend sections 203 and 204 of the Communications Act of 1934 with respect to three matters:

(1) To extend to 90 days the period of notice required before a tariff may be changed;

(2) To extend from three months to nine months the period for which the Commission may suspend new or revised tariff schedules;

(3) To authorize the Commission to conduct a preliminary written proceeding to determine whether a tariff filing should become effective or be suspended in whole or in part pending hearing and decision on the lawfulness thereof; or whether temporary authorization of a tariff filing should be permitted.

Section 203(b) of the Communications Act provides that no change shall be made in the tariff charges, classifications, regulations or practices which have been filed with the Commission except after thirty days' notice to the Commission and the public. However, the Commission may modify this requirement if particular circumstances warrant.

The Commission has found that this period is inadequate to effectively review a tariff filing. The thirty day notice period together with Commission rules has left the Commission with only four to six days including weekends and holidays to review the tariff, the contentions of the various parties, and to reach a decision on whether or not to suspend the tariff.¹

The Commission obtained a greater period of time during which to review tariffs prior to a suspension decision by amending its rules to require that all tariffs in which increases are sought must be filed on sixty days notice.² This amendment was sustained against challenge by the Second Circuit Court of Appeals on the grounds that the Commission's power to "modify" the period included power to extend.³ However, this amendment does not apply to tariff filings which do not involve increases.

The Commission recommends that the notice period be extended to ninety days. This extension is particularly necessary to facilitate effective utilization of the Commission's power to authorize temporary or partial tariff changes recommended herein.

Section 204 of the Communications Act provides that the Commission may, upon complaint or upon its own initiative, designate a tariff filing for hearing concerning its lawfulness, and, pending such hearing, suspend the operation of the tariff for a period of not longer than three months beyond the time when it would otherwise go into effect. If the hearing process is incomplete at the end of the suspension period, the tariff becomes effective. Where an increased rate is at issue, the Commission may require a carrier to account for all funds received under the increase following the suspension period, and may order refunds with interest as may be appropriate upon conclusion of the hearing. In some cases the revenue increases sought may amount to several hundred million dollars annually.⁴

The Commission has found that it is simply not possible to conclude a tariff proceeding in this short a period of time. Moreover, sec-

¹ Petitions for suspension may be filed as late as fourteen days before the effective date of the tariff. 47 C.F.R. 1.773(b). The filing carrier then has three days to file a reply. However, these three days become in reality eight to ten days. This is due to 47 C.F.R. 1.4(f) and (g) which provide additional time where short filing periods are involved.

² First Report and Order, 25 FCC 2d 957 (1970); Memorandum Opinion and Order, 40 FCC 2d 149 (1973).

³ AT&T v. FCC (2d Cir.) No. 73-1758, decided September 23, 1974.

⁴ In Docket No. 19129, an investigation into AT&T's charges for domestic telephone services, the revenue increases sought amounted to more than \$500 million annually. The January 3, 1975 AT&T across-the-board tariff increase seeks increased revenues of more than \$717 million annually.

tion 204 was drafted in an era when communications media were less complex and the Commission's hearing docket was considerably lighter.

Under the Administrative Procedure Act, the Commission is required to give reasonable notice (generally interpreted administratively as 30 days) of the time and place for hearing. Following the close of hearing and prior to issuance of an initial decision, the Administrative Procedure Act requires that parties be given "reasonable opportunity" to file exceptions to proposed findings of facts and conclusions or "reasonable opportunity" to file exceptions to an initial decision. The Commission's Rules provide a 20-day period for the filing of Proposed Findings of Fact and Conclusions after the close of the record (which is inadequate and must be extended); and a 30-day period for the filing of exceptions to an initial decision (which is also often extended at the request of the parties). Considering the time required to hold the hearing itself and to prepare the initial and final decisions, it is readily apparent that the present period of suspension is an inadequate length of time even to make substantial progress, let alone conclude a tariff proceeding. Several tariffs filed in recent years illustrate the need for a longer suspension period.

Docket No. 19919, an investigation into AT&T's hi-lo private line rate structure and charges, was commenced January 25, 1974. In its order designating the matter for hearing, the Commission suspended the proposed tariff in its entirety and issued an accounting order. Furthermore, it established procedures designed to expedite the hearing process. It called for a paper evidentiary proceeding in place of the usual time-consuming oral hearing, and for the first time established a separate trial staff to handle the matter. Findings of fact were received July 18, 1974 and reply comments were filed August 2, 1974. A one day's oral argument was held November 5, 1974. An initial decision is expected shortly. From the time of suspension until issuance of the initial decision, the proceeding is expected to last more than one year.

A similarly expedited proceeding, Docket No. 19989, an investigation into AT&T's WATS tariff revisions, began with the filing of revised tariffs on January 15, 1974. The matter was designated for hearing April 5, 1974, at which time the Commission ordered the tariff suspended and issued an accounting order. Again, procedures for an expedited paper evidentiary hearing were established and a separate trial staff formed. An initial decision is expected by May of 1975. Here also, the period from suspension until the estimated time of initial decision amounts to more than one year.

Although none of the Commission's recent cases involving tariff suspensions have been completed in nine months, it is believed that this is a reasonable target period. Improvements in procedures, together with an expanded staff assigned to rate matters, should shorten the time between tariff filing and decision in hearing cases. Also discussions have been initiated with some of the principal carriers for the purpose of developing methods of obtaining cost information relating to the various services more expeditiously. Since this period more accurately reflects the amount of time required for a hearing, a longer suspension period will reduce the amount of time during which a

consumer is without the use of money and simplify the accounting burden borne by carriers.

Other Federal regulatory bodies dealing with utilities or carriers have suspension periods ranging from five to seven months. The National Gas Act⁵ and the Federal Power Act⁶ provide for suspension periods of five months. The Civil Aeronautics Act⁷ provides for a 90-day suspension period with an additional period of 90 days if the proceeding has not been concluded. The Interstate Commerce Act⁸, on which this part of the Communications Act is based, provides for a seven-month suspension period. However, the Commission believes that the enormity and complexity of the tariff cases and the industry with which it deals are distinguishable from those of other regulatory agencies and that a longer period of suspension is appropriate.⁹

Two basic types of suspension statutes are commonly used by the states. The majority of state commissions may only suspend an application for a designated period of time. This may range from 90 days (Arkansas and Tennessee) to twelve months (Iowa and Virginia).¹⁰ Three states have indefinite suspension authority (Hawaii, Kansas and Ohio) while four have no suspension power at all (Georgia, South Dakota, Wyoming and Texas).¹¹ A number of states have suspension periods in the ten to twelve month range (Illinois, Virginia, Missouri, New York, North Dakota, Oregon, Utah, Massachusetts, and Washington).¹²

The present short suspension period means that most tariff filings take effect before the hearing thereon is concluded. Moreover, while the Commission does not accept amendments during the suspension period, amendments may be filed after this period expires.¹³ Because the suspension period is so short, tier upon tier of amendatory filings before the initial hearing is complete can significantly complicate Commission decision-making. A more lengthy period of suspension would simplify and perhaps expedite tariff proceedings because additional tariff filings, under current Commission policy, would not be accepted during the longer period of suspension.

Furthermore, a large number of rate proceedings involve new or reduced rates where the question presented is whether an unlawful discrimination or preference will exist. When such rates are suspended and become effective upon the expiration of the suspension period but

⁵ 15 U.S.C. Sec. 717c(e).

⁶ 16 U.S.C. Sec. 824d(e).

⁷ 49 U.S.C. Sec. 1482(g).

⁸ 49 U.S.C. Sec. 15(7).

⁹ In Docket No. 19129, *supra*, for instance, a special task force of fifty persons was required to examine a proposed annual revenue increase of more than \$500 million. The \$717 million annual revenue increase filed by AT&T on January 3, 1975, exceeds Docket No. 19129 in complexity, and filled more than 100 pounds of paper.

¹⁰ Federal and State Commission: Jurisdiction and Regulation—Electric, Gas, and Telephone Utilities, Federal Power Commission, pp.8-9 (1973).

¹¹ *Id.*, at p. 8.

¹² *Id.*

¹³ At first the Commission accepted amendatory filings on grounds that it had no statutory authority to reject them. This practice was sustained against challenge, by the District of Columbia Court of Appeals in *Associated Press v. FCC*, 448 F.2d 1095 (D.C. Cir. 1971). Later, however, the Commission attempted to limit this practice by issuing an order in Docket No. 18128, 12 FCC 2d 1028 (1968), an investigation of AT&T's rate levels and rate structure, barring further tariff filings in that proceeding unless authorized by special permission of the Commission, 33 FCC 2d 522 (1972). In so doing, the Commission indicated that further revisions would unduly disrupt or delay the conclusion of the initial proceeding. However, the Commission's ruling was overturned by the Second Circuit Court of Appeals in *AT&T Co. v. FCC*, 487 F.2d 864 (2d Cir. 1973). The Court held that issuance of such a rule was not authorized by the Communication Act.

before any decision regarding their lawfulness, the accounting and refund provisions of section 204,¹⁴ being applicable only in rate increase situations, provide no remedy at all. Meanwhile, many customers may have made major changes in their communication and other operations based on the availability of a rate schedule ultimately found to be unduly preferential or discriminatory and therefore unlawful. An order of the Commission directing cancellation of the unlawful rate schedule, in these cases, may cause serious dislocation of the users business operations. The adoption of the proposed nine-month suspension period should enable the Commission to minimize this situation.

Current section 204 does not specifically authorize the Commission to separate questionable from legitimate aspects of a tariff filing and thus does not permit the Commission to suspend the former and implement the latter. Also, the Commission does not have authority to implement a temporary tariff change. Because legitimate changes may await completion of the hearing on questionable elements of a tariff, an unnecessary regulatory lag may be created.

The Administrative Conference of the United States recommended that regulatory agencies seek statutory authority to allow temporary or partial rate increases in order to solve this problem:¹⁵

"Regulatory statutes should be amended, to the extent that existing authority is lacking, to authorize rate-making agencies, as an adjunct to their power to suspend, to allow temporary rate increases, including partial increases, subject to appropriate conditions (including, where practicable, provision for refund if the interim increase is ultimately found unjustified). A temporary increase should be authorized only when the agency makes a preliminary judgment, on the basis of a written showing by the regulated company and an opportunity for comment thereon by affected persons, that a proposed increase is justifiable at least in part. Exercise of authority to grant temporary increases, rather than suspending a proposed increase in full or allowing it to go into effect without suspension, would mitigate the effects of regulatory lag. Similar authority to allow temporary and partial rate reductions, or other temporary changes, should also be sought where appropriate."

The amendatory language proposed by the Commission is designed to implement this recommendation. It authorizes the Commission to make a preliminary judgment as to whether a tariff filing should become effective or be suspended in whole or in part pending hearing. It will also enable the Commission, upon a written showing by the affected carrier(s), and opportunity for written comment by affected persons, that a partial authorization is just, fair, and reasonable, to allow partial tariff charges to go into effect finally, and/or temporary tariff charges to become effective subject to further orders of the Commission. The Commission may issue an accounting order in connection with a temporary tariff change involving a new or increased charge.

¹⁴ In those cases where it is clear that some increase in rates is warranted and only a small percentage of the increase is in question, the Commission may, and has suspended rates for only one day, thereby permitting the carriers to collect the increased rates without delay, subject to being ordered to refund any amounts not found to be justified.

¹⁵ Administrative Conference of the United States Annual Report (1972), p. 64, Recommendation No. 724, Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies.

The Commission believes that this authority will confer upon it the flexibility necessary to more equitably and expeditiously handle tariff matters, with resulting benefits both to carriers and to the consuming public.

The present wording of section 204 places the burden of proof on the carrier for proving the legitimacy of increased charges. The Commission's proposal deletes this provision as unnecessary in light of section 556(d) of the subsequently-enacted Administrative Procedure Act which provides that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."¹⁶

Adopted: February 20, 1975.

Commissioner Reid concurring; Commissioner Washburn concurring and issuing a statement.

CONCURRING STATEMENT OF COMMISSIONER ABBOTT WASHBURN

In my view the using public as well as the investors in, and planners of, our vital communications systems have a right to expect timely action by their Government on rates. This is particularly true in the cases where competitive incentives have been introduced into a heretofore monopoly industry. The essence of a competitive marketplace lies in the timeliness of responses both in services and/or price by the competitors. To encumber the free flow of market forces with possibly up to a full year of administrative delay would multiply the uncertainties surrounding these markets and could have a chilling effect on the normal competitive incentives. If the legislation here proposed is enacted, I hope the Commission will utilize maximum period suspensions sparingly, particularly in the case of new and better service offerings or rate reductions which derive from emerging competitive pressures. Fortunately the added flexibility to allow temporary and/or partial tariff changes will be a help in mitigating the problem of lag.

We should bend every effort to expedite our administrative processes and, where possible, to increase our reliance on "self regulation" by free market forces rather than on extensive records of evidentiary hearings. To the extent that judicious applications of the powers requested here serve that worthwhile purpose, I concur in the action of the majority.

OFFICE OF TELECOMMUNICATIONS POLICY,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., September 17, 1975.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Office of Telecommunications Policy on S. 2054, proposed legislation to amend Sections 203 and 204 of the Communications Act of 1934. This bill would:

(1) Extend from thirty days to ninety days the period of notice required before a tariff may be changed;

¹⁶ 5 U.S.C. 556(d).

(2) Extend from three months to nine months the period during which the Federal Communications Commission may suspend new or revised tariff schedules;

(3) Authorize the Commission to conduct preliminary written proceedings to determine whether a tariff filing should become effective in whole or in part pending a hearing and decision on the lawfulness thereof, or whether temporary authorization of a tariff filing should be permitted.

To summarize our position, we believe that statutory amendments to extend the notice period to ninety days and to enable the Commission to grant partial or temporary authorization of tariff changes are appropriate and desirable. However, we are skeptical, for the reasons discussed herein, about extending the statutory tariff suspension period from three months to nine months.

EXTENSION OF NOTICE PERIOD

Section 203(b) of the Communications Act presently prohibits carriers from making tariff changes except after thirty days notice to the Commission and the public. The same section provides that the Commission "may, in its discretion and for good cause shown, modify [the notice requirement] in particular instances or by a general order applicable to special circumstances or conditions."

In the past, the Commission has found that the thirty day notice period was insufficient in cases involving tariff increases. Such filings generally draw considerable opposition, and the Commission was unable within the thirty day period to review the tariff filing, together with the contentions of parties opposing it, and to reach a decision on whether or not to suspend it and order a hearing. The Commission therefore has modified its rules to require that all tariffs involving increased rates be filed on sixty days notice. 47 C.F.R. §61.58 (1973). This modification was challenged shortly after its adoption on the sole ground that it was beyond the Commission's statutory authority as set forth in the above-quoted language. The court disagreed, however, noting that the authority to "modify" included the power to lengthen as well as shorten the notice period. *AT&T v. FCC*, 503 F.2d 612 (2d Cir. 1974).

The proposed legislation would extend the notice period to ninety days for *all* tariff changes. The Commission notes in its Explanation of Proposed Amendments introduced with the bill (121 Cong. Rec. 11965, daily ed. July 8, 1975) that such an extension is "particularly necessary to facilitate effective utilization of the Commission's power to authorize temporary or partial tariff changes," proposed in Section 2(b) of the bill. We agree. As we discuss later, we believe that the proposed authority to grant partial or temporary rate changes pending a full inquiry by the Commission is a necessary and appropriate measure, and that the Commission will need additional time to make the requisite determinations prior to authorizing a temporary or partial change.

We do note that there may be a question concerning the necessity of a statutory amendment to achieve this objective. In view of the judicial construction of the Commission's existing power to modify the notice period, it would appear that the Commission could extend the period to ninety days without new statutory authority, and that it

could do so for all tariff changes, decreases as well as increases, assuming it could show "good cause" for lengthening the period. Nevertheless, given the previous challenge to the Commission's prior exercise of its authority to modify the notice period, it is advisable, on balance, to seek an explicit statutory change and thereby avoid protracted litigation.

SUSPENSION PERIOD

The Communications Act provides generally that tariff changes go into effect automatically at the end of the requisite notice period unless the Commission takes affirmative action to the contrary. Section 204 of the Act authorizes the Commission to designate a tariff filing for hearing and, pending completion of such hearing, to suspend the operation of the tariff for a period not longer than three months beyond the time when it would otherwise take effect. If the hearing process is not completed by the expiration of the suspension period, the tariff automatically takes effect, and, in the case of an increase in rates, the Commission may require a carrier to account for all funds received pursuant to the new tariff. Upon completion of the hearing, the Commission may order refunds with interest if the tariff, or a portion thereof, is found to be unlawful.

The Commission states in its "Explanation," supra, that it has been unable to conclude tariff hearings prior to the expiration of the present three month suspension period, and that a longer suspension time is therefore necessary. A longer suspension period, according to the Commission, will reduce the amount of time during which consumers are without the use of their money and simplify the accounting burden borne by the carriers.

In assessing the merits of the proposed legislation, it is appropriate to address the rationale behind the present suspension provisions of the Act. The statutory limit on the duration of a tariff suspension represents a Congressional recognition of the economic harm to carriers resulting from lost revenues during the time it takes a regulatory agency to decide the lawfulness of a tariff change. This has been recognized by the courts on numerous occasions. The Court of Appeals for the Second Circuit, for example, has pointed out that the statutory scheme "reflects the realization of Congress that when a carrier is prevented from placing in effect new rate increases it may suffer irreparable loss which in turn may impede the provision of adequate service during a period of rising costs." *American Telephone and Telegraph Co. v. FCC*, 487 F. 2d 864 (2d Cir. 1973). Similarly, the Supreme Court, in discussing the limited suspension authority granted to the Federal Power Commission, stated:

"Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible." *United Gas Pipeline Co. v. Memphis Gas Division*, 358 U.S. 103, 113 (1968).

The Congress has also recognized, however, that when a new tariff goes into effect prior to a determination of its lawfulness, rate-payers should be made whole if the tariff is ultimately found unlawful. Thus,

in *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973), the Supreme Court noted in connection with the Interstate Commerce Commission's authority to suspend rate increases that:

"... Congress was aware that if the Commission did not act within the suspension period, then the new rates would automatically go into effect and the shippers would have to pay increased rates that might eventually be found unlawful. To mitigate this loss, Congress authorized the Commission to require the carriers to keep detailed accounts and eventually to repay the increased rates if found unlawful." 412 U.S. 697.

The Act is thus an attempt to balance the interests between rate-payers and carriers with regard to tariff increases. We are sympathetic with this legislative proposal to lengthen the suspension period to nine months so as to reduce the amount of time during which rate-payers would be deprived of the use of their money. But we are mindful that the proposal would also increase the amount of time during which carriers would be precluded from receiving increased revenues under new rates. As a matter of equity in this regard, it is significant that even if the new rates were ultimately found lawful after completion of a hearing, the carrier would be unable to recover the revenues which it would have received but for the suspension, whereas customers have the benefits of the refund provisions if the rates are found unlawful.

The adverse effects of "regulatory lag," i.e., the delay between the time when increased costs occur and the time when they can be reflected in higher tariffs, can be significant, particularly in an inflationary period. If a carrier is prohibited for an extended period of time from instituting tariff increases to cover rising costs, its ability to attract capital, whether debt or equity, could be impaired, with a consequent and adverse impact on the provision of adequate service to its customers. The adverse effects of regulatory lag on the electric utilities, for example, was the genesis of the Administration's recent proposal to reform state regulatory processes by imposing a maximum limit of five months for rate and service proceedings. See White House Fact Sheet, p. 39, January 15, 1975.

The Commission has also stated that a longer suspension period is needed for situations involving tariffs for new services or reduced rates, in which case the accounting and refund provisions of § 204 are not applicable. The Commission notes that customers may make major changes in their operations based on the availability of rate schedules ultimately found to be unduly preferential or discriminatory, and that an order directing cancellation of the unlawful rate schedule would cause serious dislocations. The proposed nine month suspension period would, in the Commission's view, minimize this problem.

Tariffs for reduced rates or new services have often been the result of competitive pressures on the established carriers in various communications submarkets. It has been recognized that long delays in the implementation of tariffs for new services and lower rates can also have adverse impact on carriers. As the Court stated in *AT&T v. FCC*, supra, "the loss sustained when an agency delays a rate reduction can be equally as damaging, for during the delay customers may turn elsewhere and be permanently lost to the carrier." 487 F. 2d, supra, at n. 18.

On the other hand, if such a tariff were ultimately found unlawful, customers who might encounter "dislocations" as a result of an order directing cancellation of the rate or service would have no remedy comparable to the refund provisions available in the case of an unlawful increase. Similarly, no remedy would be available to competitors of the carrier who may have suffered a loss of customers who were attracted to the carrier's new services or lower rates. In view of these considerations, lengthening the suspension period for only those tariff changes involving new services or reduced rates may be an acceptable alternative.

In any event, we believe that there should be an increased emphasis on completing tariff proceedings as expeditiously as possible. In this regard, we note that the Commission, in its "Explanation" accompanying the bill, states that "improvements in procedures, together with expanded staff assigned to rate matters should shorten the time between tariff filing and decision in hearing cases." In addition, the Commission refer to discussion it has had with carriers regarding the development of more expeditious methods of obtaining cost information relating to the various services. We applaud these measures and would encourage the Commission to pursue these and similar steps designed to expedite the tariff investigative process.

PARTIAL AND TEMPORARY RATE INCREASES

The proposed legislation would also amend § 204 to permit the Commission to authorize temporary or partial tariff changes. This change is generally consistent with the 1972 recommendation of the Administrative Conference that regulatory statutes should be amended, to the extent that existing authority is lacking, to authorize temporary and partial rate increases.

We believe that statutory authority to grant partial increases, as an adjunct to authority to suspend a proposed increase in full or allow it to go into effect without suspension, would mitigate somewhat the adverse effects of "regulatory lag" on carriers. Such authority is particularly appropriate given that, in many cases, an ultimate determination of the unlawfulness of a tariff increase goes to only part of the increase, rather than the entire tariff change.

We do note, that the language of the proposed amendment is somewhat unclear. The report of the Administrative Conference states that temporary increases should be authorized "only when the agency makes a preliminary judgment, on the basis of a written showing by the regulated company and an opportunity for comment thereon by affected persons, that a proposed increase is justifiable at least in part." (See Report of the Administrative Conference of the United States for 1971-72 at p. 86, emphasis added.) The language of the proposed amendment differs from this recommendation in certain respects. The amendment, for example, eliminates the "preliminary judgment" aspect of the Administrative Conference recommendation, and the proposed standard of "just, fair, and reasonable" is somewhat ambiguous. We suggest that a more precise standard be developed, lest the deliberations regarding a partial or temporary authorization become as protracted as an overall rate inquiry.