

adequate record for our final decision. Interested persons will have an ample opportunity to present their views on the relevant factual, legal, and policy issues and to respond to the arguments made by other commenters, particularly since we have authorized the commenters to submit reply comments. Our notice of proposed rulemaking set forth a detailed analysis underlying our tentative findings and proposals, which we based on the most current data available to us. Interested persons can therefore see the rationale for our proposals.

We and the Civil Aeronautics Board ("the Board") used the notice-and-comment procedures in all past CRS rulemakings. See 57 FR 43792; 62 FR 59799–59800. Those procedures allowed us and the Board to resolve material factual disputes without holding any kind of hearing. As discussed below, the Seventh Circuit held that the Board could adopt the initial CRS rules without holding a hearing. *United Air Lines v. CAB*, 766 F.2d 1107 (7th Cir. 1985). Furthermore, we rejected a claim by Sabre in our earlier rulemaking on CRS parity clauses that the notice-and-comment procedures authorized by the Administrative Procedure Act were inadequate and must be supplemented with a formal hearing. We determined that Sabre's argument had no merit. 62 FR 59784, 59800, November 5, 1997.

Furthermore, as noted, we have determined to hold a hearing where commenters can orally present their arguments. That hearing will give the commenters an additional opportunity to present their position and enable us to develop a better record.

Sabre, however, urges us to hold a "fact hearing" where the commenters can question each other's experts and can cross-examine Department staff members on the tentative analysis and findings presented in the notice of proposed rulemaking. We are denying Sabre's request, because the kind of hearing sought by Sabre is not necessary for the development of a complete record on the rulemaking issues.

The comment process will give interested persons an opportunity to address our tentative factual findings and analysis. They do not need a "fact hearing" to present updated information. We enhanced their opportunity to respond to our proposals by authorizing reply comments as well as comments and, at Sabre's request, by extending the entire comment period by three months.

Sabre asserted that such information as the percentage of airline bookings made through a travel agency using a

CRS, the percentage of travel agency subscribers who own their own equipment, and the travel agents' ability to access other systems and databases from their CRS equipment may be critical to our decision-making. Sabre Petition at 3–5. We agree that such factual information may well be useful. Sabre can include recent data on these points in its written and oral comments, and we invite the other commenters to present their own data on these issues.

In addition, Sabre's "fact hearing" would not significantly improve the rulemaking record, because it would include an examination of our staff. Sabre Reply at 8. We do not plan to base our final decision solely on the information known to our staff when the notice of proposed rulemaking was issued. We will also fully consider all factual information and argument provided by the comments and reply comments. The commenters' familiarity with the current state of the airline distribution and CRS businesses will enable them to provide current and accurate information on industry conditions and developments.

Furthermore, holding a "fact hearing" could substantially delay our final decision in this proceeding despite Sabre's claims to the contrary, without necessarily improving the quality of the record for our decision. As noted, Sabre proposed that we allow staff members to be cross-examined by the commenters and allow each of them to question experts designated by the others. Sabre also proposed to present its own evidence at the hearing. Sabre Petition at 4–5. Sabre additionally listed 73 factual statements that it intends to challenge. Sabre Petition at 27–32. Other commenters presumably would use a hearing to challenge other factual findings that Sabre will not contest. Given these conditions and the number of commenters in this proceeding, a "fact hearing" would likely require a substantial amount of time.

Sabre noted that, in 1976, the Administrative Conference of the United States recommended that agencies consider, among other things, providing for cross-examination procedures in some rulemakings. Sabre Petition at 22–23, citing Recommendation 76–3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 FR 29654, July 19, 1976. That Conference recommendation suggested that agencies consider doing more than just issue a notice of proposed rulemaking and provide one round of comments in informal rulemakings. The Conference suggested that agencies in appropriate cases should consider using

additional procedures such as, among other things, issuing an advance notice of proposed rulemaking with an opportunity to comment and allowing commenters to submit written responses to each other's comments on a notice of proposed rulemaking. 41 FR 29655. As noted, we have taken both of these steps. The Conference also suggested that agencies could consider providing an opportunity for cross-examination of the commenters and agency staff, but it did not recommend doing so in all complex rulemakings. The Conference instead stated, "An agency should \* \* \* permit cross-examination only to the extent that it believes that the anticipated costs (including those related to increasing the time involved and the deployment of additional agency resources) are offset by anticipated gains in the quality of the rule and the extent to which the rulemaking procedure will be perceived as having been fair." 41 FR 29655. The Conference recommendation grew out of a study of several court decisions that had required agencies to create an opportunity for cross-examination in specific rulemakings, Stephen F. Williams, "'Hybrid Rulemaking' under the Administrative Procedure Act: A Legal and Empirical Analysis," published at 42 U. Chicago L. Rev. 401 (Spring 1975). The study concluded that cross-examination in these rulemakings had been of "questionable efficacy" and that "cross-examination may actually tend to frustrate its own supposed goal: elucidation of the issues." *Id.* at 445, 444. We believe that a "fact hearing" of the kind sought by Sabre would not significantly improve the quality of our final decision but probably would substantially delay the completion of this rulemaking. Our experience with past CRS rulemakings shows that we may fairly and accurately resolve disputed factual issues in the context of a rulemaking proceeding without an opportunity for cross-examination.

In addition, we have no legal obligation to hold a "fact hearing." Sabre initially argued that we were required by law to grant its petition for a "fact hearing." Sabre Petition at 11–19. Sabre has apparently abandoned that claim, for Sabre's reply contended only that the "fact hearing" would be the best way to obtain current and correct information necessary for our final decision in the rulemaking. Sabre Reply at 6. Our issuance of a notice of proposed rulemaking that set forth in detail the basis for our tentative findings and proposals clearly satisfies all legal requirements. The Administrative Procedure Act "makes clear that notice