

of the scope and general thrust of the proposed rule, and an opportunity to submit written comments, are all the procedure that an agency engaged in 'informal rulemaking' is required to provide." *United Air Lines v. CAB*, 766 F.2d at 1116.

When United challenged the Civil Aeronautics Board's use of informal rulemaking procedures in the first CRS rulemaking, the Seventh Circuit expressly held that the Board was not required to hold a formal hearing before adopting the original CRS rules, notwithstanding the nature of the issues in that rulemaking and the existence of factual disputes. *United Air Lines v. CAB*, 766 F.2d 1107 (7th Cir. 1985). As the court stated, "the weight of authority * * * is overwhelming against forcing an administrative agency to hold an evidentiary hearing to resolve disputed issues of antitrust fact." 766 F.2d at 1119. "Agencies, without having to conduct an evidentiary hearing, have been allowed to decide such antitrust questions as whether a particular firm or group of firms has or is abusing or is likely to abuse market power * * *." 766 F.2d at 1120. Furthermore, requiring evidentiary hearings would probably not improve the quality of rulemaking decisions by much, for "cross-examination is perhaps not a terribly useful tool for extracting the truth about what are at bottom complex economic phenomena." 766 F.2d at 1121.

Sabre nonetheless asserted that this proceeding involves disputed issues of material adjudicative fact that cannot fairly be resolved through notice-and-comment rulemaking procedures. Sabre Petition at 18–19. Since this is a rulemaking, our decision will not involve adjudicative fact-finding. Moreover, even if the proceeding did involve disputes over adjudicative facts, Sabre's position would be erroneous. As we pointed out in the parity clause rulemaking, we have decided adjudicatory cases without holding a formal hearing, and the courts have upheld such procedural choices. 62 FR at 59800, citing *City of St. Louis v. DOT*, 936 F.2d 1528, 1534, n.1 (8th Cir. 1991). In adjudicatory proceedings, we have resolved factual disputes over antitrust issues, even in controversial cases, through show-cause procedures that provided no opportunity for cross-examination. See, e.g., *U.S.–U.K. Alliance Case*, Orders 2001–12–5 (December 4, 2001) and 2002–1–12 (January 25, 2002); *American Airlines v. Iberia, Lineas Aereas de Espana*, Order 90–6–21 (June 8, 1990) at 13–14. Because the presence of material antitrust issues in an adjudication does

not mandate an evidentiary hearing, the presence of such issues in this rulemaking similarly cannot mandate such a hearing.

Sabre primarily grounded its petition for a "fact hearing" on a charge that our notice of proposed rulemaking set forth no factual support, based on recent data, for our tentative findings and proposals. Sabre thus complained that the notice of proposed rulemaking "is virtually devoid of information reflecting developments since the 1992 modifications of the rule," such as "new Internet technology, increasingly 'Web-savvy' air travelers (and travel agents); airlines' divestiture of their CRS ownership; and airlines' attempts to reach consumers via direct marketing promotions." Sabre Petition at 15. These allegations ignore the lengthy discussions of these matters in the notice of proposed rulemaking. See 67 FR 69373–69375, 69376–69378, 69379–69380, 69411–69415 (airline, travel agent, and consumer use of the Internet); 67 FR 69373, 69382–69383, 69384–69385 (system ownership changes). For example, we considered whether the Internet and other changes in airline distribution would give airlines some bargaining leverage against the systems. We tentatively found that the travel agencies' ability to access Web sites for airline information and bookings should give airlines some ability to bypass the systems, although the possible inefficiency of using multiple sources of information might deter travel agents from routinely booking airline tickets outside of a system. We based this factual analysis on, among other things, comments submitted last year by travel agency parties in a related rulemaking and recent press articles. 67 FR 69373, 69379, 69391. We also suggested that the Internet in some respects may not have weakened the systems' market power. 67 FR 69376–69377. We further noted, however, that the airlines' ability to deny the systems access to their E-fares (or webfares) could give airlines some bargaining leverage against the systems, due to the systems' economic interest in obtaining those fares so that travel agents could book them through a system. 67 FR 69381. Some systems have since offered airline participants lower fees in exchange for access to the airlines' E-fares. See, e.g., October 25, 2002, U.S. Airways Press Release; January 21, 2003, Galileo Press Release; and September 25, 2002, American Press Release.

Furthermore, we gave the public notice of our intent to consider these issues by issuing a supplemental advance notice of proposed rulemaking

that specifically asked interested persons to file comments addressing the impact of the systems' ownership changes and the growing use of the Internet in airline distribution. 65 FR 45551, July 24, 2000. Sabre, like all other interested persons, had the opportunity to submit comments on these issues with recent factual information.

Sabre additionally argued that the courts in reviewing the validity of our final decision in this proceeding would consider whether the notice of proposed rulemaking satisfied the substantial evidence standard. Sabre Petition at 11–12. This argument has no merit even if the substantial evidence standard would be the applicable standard for judicial review. The substantial evidence standard does not require agencies to adopt rulemaking procedures in addition to those required by the Administrative Procedure Act. Moreover, on review the courts would consider whether our final decision, not the notice of proposed rulemaking, has the necessary support in the record. Sabre's argument also assumes that our notice of proposed rulemaking did not provide a factual basis for our proposals. As shown, that assumption is false.

Sabre wrongly contended that a "fact hearing" is necessary to satisfy our obligations under section 515 of the Treasury and General Government Appropriations Act, 2001, Pub. L. 106–554. Sabre Petition at 23. Pursuant to that statute on data quality, agencies provide a process allowing affected persons to seek and obtain corrections of information disseminated by an agency that does not meet applicable guidelines for quality, objectivity, utility, and integrity.

Sabre's suggestion that a fact hearing should be held to ensure compliance with the data quality statute is contrary to our guidelines. There is nothing in the statute or our guidelines or those of the Office of Management and Budget on the subject that require a "fact hearing." Moreover, our guidelines specifically state that we comply with the statute in informal rulemaking proceedings when interested persons have the opportunity to file comments in response to a notice of proposed rulemaking containing alleged factual misstatements, Department Guidelines at 24–25:

When the Department seeks public comment on a document and the information in it (e.g., a notice of proposed rulemaking * * *), there is an existing mechanism for responding to a request for correction. This mechanism is a final document that responds to public comments (e.g., the preamble to a final rule).