scrutinize closely those justifications that are placed on the record.

A simple notice and comment process would be viewed by some participants in Commission proceedings to be like other notice and comment proceedings at the Commission. This would draw filings with conclusory argument, rather than the requisite financial and other justification. The record would be diluted, and yet expand unnecessarily.

In contrast, anticipation of a threshold level of evidentiary documentation would promote a decision based on substantive merit rather than interest group advocacy. It is in the public interest to structure Part 65 to promote serious filings with a substantive focus and objective data. This best promotes reasoned decisionmaking and core fairness.

C. The Paper Hearing Structure Now in Place Can Be Streamlined in Ways That Achieve the Stated Objectives of This Rulemaking.

It is not necessary to change the core structure of rate of return prescription to achieve the ends of the Notice. USTA agrees in large part with the Commission's observation that the current Part 65 system goes beyond what is necessary to achieve the goals of a represcription proceeding under the Act.[40] However, this Notice proposes an alternative that lies near the opposite pole. The continued availability of certain procedural safeguards and protections remains justified, whether or not they are specifically

[40] Notice at ¶ 27.

articulated in Part 65. In accord with the Commission's invitation at paragraph 27, USTA suggests an alternative.

1. The Core Structure of a Direct Case, Responsive Case and Rebuttal Should Be Retained in a "Paper Hearing" Framework.

Assuming the Commission will not return to the original assumptions behind section 205, USTA advocates maintenance of the essential core aspects of the Part 65 "paper hearing" process, as described and augmented here. There is no reason to depart from this fundamental structure.

Some of the Commission's apparent discontent with the "paper hearing" framework originated with the 1990 represcription.[41] However, the structure of Part 65 itself had little or no impact on the speed with which the Commission concluded that proceeding. The primary difficulty in timing with the 1990 represcription lay in the unavoidable interweaving of represcription with related issues in the price cap proceeding.[42] A staggered pleading cycle was instituted partway through each of these proceedings, and the Commission elected to seek comment in a very specific order on individual issues.[43] It thereafter had to pursue an internal reconciliation of those issues to minimize conflict or inconsistency.

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[41] Notice at ¶¶s 16, 34-36.

[42] Order, Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, 5 FCC Rcd 1812 (1990) at ¶¶ 1,7,9.

[43] Id. at ¶ 9 and Appendix A.

The other structural problem in the 1990 represcription occurred with discovery. There, it was the ambiguity of the rules, and not the mere existence of discovery provisions, that generated problems. The alternative set out below addresses that problem. The process by which Part 65 anticipates discovery invites multiple repetitive filings and requires Commission decisionmaking on many details that consume time and resources.[44] That can be modified. However, the central feature of a Direct Case, Responsive Case and Rebuttal should be retained.

The Commission proposes to do away with separated trial staff, cross examination and oral argument. USTA does not oppose the deletion of specific requirements for them in the rules, as proposed in paragraphs 30 and 38 of the Notice, provided there remains a reasonable opportunity to seek them. However, USTA does not agree with the Commission's rationale that represcription is essentially indistinguishable from other Commission proceedings in the nature of rulemakings.[45] There are fundamental underlying distinctions that exist with represcription.

USTA does not disagree with the deletion of these items from the rules only because oral cross-examination and oral argument are not consistently as central to paper hearings as to trial-type hearings. However, as noted above, availability of these options

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[44] Notice at ¶¶s 32-37.

[45] Notice at ¶ 39.

would contribute to help assure the accuracy and quality of data and other submissions.

Likewise, a separated trial staff has not been utilized recently because of the use of the paper hearing, and because of budget constraints. What the separated trial staff stands for, however, is the proposition that no Commission staff handling a represcription should have any view in advance as to the appropriate rate of return that should result. It is not clear that this has always been the case. Our system of law assumes that the prosecutor and the judge can never be the same, as their interests are inherently different.

USTA addresses the proposed deletion of appearances, proposed and reply findings, and other streamlining in context below.

2. The Rules Should Accommodate the Essential Procedural Steps of a Represcription Without Prohibiting Other Steps Now Extant in Part 65.

The revised represcription process should contain four to six main procedural steps before a decision is reached, depending upon whether the Commission can develop a satisfactory trigger mechanism and whether it maintains an entry of appearance step.[46] These steps would be:

(1) Trigger Mechanism. If it is agreed to satisfy the threshold burden of justifying a represcription, a trigger mechanism can be set in place to signal the possible need for a

[46] Notice at ¶ 28.

represcription proceeding. This could be as simple as leaving the origination of a proceeding to the Commission or a carrier, as appropriate, when it felt represcription was justified, or a more extensive trigger mechanism where justification for a represcription is based on criteria recognized by the Commission and by affected carriers, and satisfies the requisite evidentiary threshold.[47] The nature of a trigger mechanism is discussed below.

(2) Order Commencing Proceeding. When represcription is triggered, the Commission would issue an order commencing represcription. USTA agrees with this proposed step as set out at pr 28.

The order commencing a represcription should contain all material needed to be known by affected carriers in order to prepare their Direct Case. If a one page order is released that commences a represcription, and then is followed by another order that discusses the basis for starting the represcription or additional issues to be addressed, the preparation and filing of Direct Cases would be severely prejudiced, as necessary lead time would be lost. The due date for filing a Direct Case should be calculated from the date of the last order related to the commencement of represcription.

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[47] Notice at ¶¶s 19-25.

(3) Optional Entry of Appearance/Request for Direct Case. Once an order commencing a represcription is released, there may be a provision for interested parties and carriers to enter an appearance. Retaining this step depends upon what the Commission's goal for this step is.[48]

In USTA's view, the entry of appearance serves to identify a party as one who should receive a copy of each Direct Case, in addition to the Commission. If this is the role that the Commission seeks for an entry of appearance, then commencement of a represcription should include a requirement that those who seek to receive the Direct Case file an entry of appearance (or Request for Direct Case), but no one else need file one.
If the Commission eliminates this step, then the Direct Case would be filed only with the Commission.

If an appearance is provided for in the new Part 65 rules, the failure to enter an appearance should not prevent later participation by any interested person in the proceeding. Carriers always should be able to file a Direct Case, Responsive Case or a Rebuttal, as appropriate.

The Commission's rules should not mandate participation by any party.[49] The Commission retains sufficient authority to request the raw data it may find necessary to assess the need for

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[48] Notice at ¶ 30.

[49] Notice at ¶¶s 34, 40-41.

represcription. Assuming that the Commission adopts the simplification proposals set out below, much of the data will already be on file at the Commission.

If the Commission determines that there may be a need for some mandatory participation, it should wait to determine those entities to be included until the time a proceeding is commenced. There is no reason to single out any particular entity for mandatory participation in the Commission's rules themselves. The nature and extent of participation is best determined on a case-by-case basis.

The small size and limited resources of most rate of return regulated exchange carriers makes it essential that they have the opportunity to participate in any represcription effectively, even if that requires that they do so through a surrogate or agent, or do so in a group, rather than individually. Some may choose to retain a consultant or financial analyst to prepare a Direct Case and to file it for them. They should be entitled to do this.

USTA agrees that the Commission can eliminate specific rules governing petitions for exclusion from a rate-of-return determination, but does so only as long as there remains an opportunity for an individual carrier to seek exclusion from a unitary rate of return. While USTA supports a unitary rate of return, due process and Fifth Amendment considerations require the

continued availability to every exchange carrier of an opportunity to seek to opt out.[50]

To the extent the Commission provides for the entry of an appearance, it should be for purposes of receipt of the Direct Case and to request initial discovery. The appearance should be filed solely with the Commission, without need for service, targeted for filing within 15 days after the release of the order commencing the represcription proceeding. Those filing a Direct Case can compile their service list from Commission records. No special order identifying participants would be necessary. Those who fail to enter an appearance by the deadline are not penalized. They would rely on the Commission's contractor for a copy of any filing they need.

(4) Direct Case. A party's Direct Case should be filed with the Commission and served on parties who have filed appearances. The Direct Case would be expected to recommend the appropriate rate of return to be prescribed and include the material that supports the recommendation, with an analysis of that material. Any proposed findings that a party seeks to have included in the record should be submitted with its filing. They need not be filed separately, nor required at all.[51] The page limitations suggested in the Notice are acceptable, but should not be reduced further.[52]

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[50] Notice at ¶ 43.

[51] Notice at ¶ 30.

[52] Notice at ¶ 31.

Discovery issues arise in the context of the filing of Direct Cases and Responsive Cases. USTA addresses discovery in the next subsection, but notes here that it believes a core of self-executing discovery between participants would serve the public interest, and that an opportunity for additional discovery should be available, even if not expected to occur automatically.

Direct Cases that are filed should be targeted for filing 45 days after the commencement of a represcription proceeding.

Comments as to the specific structure of filings are addressed separately below. The submission of material based on relevant methodologies and information forms the substantive core of this proceeding, and is not simply a procedural modification.

(5) Others' Responsive Cases. The Responsive Cases of others should be filed with the Commission and served on parties who have filed appearances and every entity filing a Direct Case. The Responsive Case also would be expected to recommend the appropriate rate of return to be prescribed, and include the material that supports the recommendation, with an analysis of that material. As a Responsive Case, it would also be expected to discuss any Direct Case material or recommendation with which it differs, identifying the difference and the basis for the difference.

Any proposed findings that these parties seek to have included in the record should be submitted with the Responsive Case. They

need not be filed separately, nor required at all.[53] Also, the page limitations suggested in the Notice are acceptable.[54] The same discovery rules would apply as apply for Direct Cases, including self-executing discovery within the same time frames.

The Responsive Case should be targeted for filing at a time 21 days after the Direct Case, subject to any Bureau extension where uniquely requested discovery is incomplete. Since the Responsive Cases have typically focused on and included much of the same universe of data as Direct Cases, in different ways, the parties who file Responsive Cases actually file a form of "opposition direct case." They will already have had the benefit of the time for filing Direct Cases to prepare most of their basic submissions, and the only material that would require additional time would be the development of material and argument that responds directly to a Direct Case argument.

(6) Rebuttal/Reply. A party filing a Direct Case should have the same time between the filing of the Responsive Case and their Rebuttal as is allowed for Responsive Cases after the filing of Direct Cases. Of course, this also must be subject to any extension where uniquely requested discovery is incomplete.

Any additional findings that those filing Direct Cases seek to have included in the record could be submitted here, but need not

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[53] Notice at ¶ 30.

[54] Notice at ¶ 31.

be required.[55] The page limitations suggested in the Notice for Rebuttals also are acceptable.[56]

3. A Core of Self-Executing Discovery Between Participants Should Be Provided For in the Rules, With Opportunities for Additional Discovery Available.

The matter of discovery provides a fertile ground for simplification of Part 65. The Commission offers options for simplification, but does not yet endorse any single option.[57] It does propose to eliminate written interrogatories, cross examination and oral argument. USTA believes an opportunity for adequate discovery is important, but offers options by which Part 65 can incorporate such options.

The Commission favors automatic filing of documents with the Commission and service on other parties.[58] USTA agrees with the former - the filing of such documents with the Commission - but suggests that automatic service of those background documents on all parties would be wasteful.

It has been the time involved in discovery requests, and in particular the time involved in awaiting Commission decision on such requests, that has made this part of the process unworkable. The time frames set out in the rules have not been able to be

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[55] Notice at ¶ 30.

[56] Notice at ¶ 31.

[57] Notice at ¶¶s 32-39.

[58] Notice at ¶ 34.

accommodated. To eliminate the need for most routine anticipated discovery, the work papers and background documents related to a filing should be available from the carrier on receipt of a request from the Commission at any time, or on request from a party within ten days of filing. Access to otherwise unavailable work papers and background documents should occur automatically after a request, without need for Commission action, unless a filing entity seeks protection from automatic disclosure. Access could be provided through photocopies of background papers, providing reasonable access to papers that may be too voluminous or otherwise not easily copied, or a listing of available database(s) from which the data relied upon was derived, with an explanation of the steps taken.

This self-executing core of discovery should resolve most of the difficulty experienced by the Commission and parties in 1990, as it would eliminate many of the procedural steps identified by the Commission in the Notice - filing, pleading cycles, and individual Bureau determination.[59]

It is USTA's experience that most parties do not utilize or need the full range of work papers and background documents, and that active parties will request specific items. It is also USTA's experience that the most directly-relevant background materials can be routinely made available through copies or reasonable access. More peripheral documents would not be as crucial to developing a

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[59] Notice at ¶ 37.

response, and the need for them to be made available therefore can be addressed as needed, without a specific rule in Part 65 that dictates a result. An interested person who may not have filed an appearance may be requested to pay for the costs of reproduction of any background documents or work papers requested, particularly if the request is expansive.

Other discovery issues are raised in the Notice that relate to the resolution of a represcription proceeding. Work papers and background documents may not be all that may come into play. USTA agrees with the Commission that Part 65 need not specifically provide for written interrogatories; however, the opportunity to ask interrogatories should always be available. While it is true that represcription differs from complaint processes, the discussion above at pp. 7-17 articulates why "fact-finding" matters are unique in represcription under the Act.

There must remain an opportunity to seek information that another party relies upon that comes into question, and document exchange may not always resolve key issues. Any order should so provide. As noted above, the very possibility of written interrogatories assures a higher quality in the substantive filing, as the filing entity will be aware that all of its relevant material may become subject to additional scrutiny.

The Commission inquires as to whether Bureau data requests can reduce or eliminate the need for discovery.[60] USTA respectfully disagrees with the replacement of discovery with Bureau-controlled information production. The Commission retains wide authority to seek information in a represcription proceeding from carriers, and participants have some self-interest in voluntarily providing material that justifies their views.

However, centralized Bureau-originated data requests, while helpful to the Bureau, are an insufficient means for other parties to be able to gain needed information. Under this framework, if the Bureau does not agree with a party's perceived need for information, that party would be denied all option to gain that data. Self-executing discovery of background documents and work papers, subject only to objection filed with the Bureau, better resolves this issue.

IV. USTA SUPPORTS THE ELIMINATION OF THE TWO YEAR CYCLE IDENTIFIED IN PART 65, AND PREFERS A BALANCED "TRIGGER" MECHANISM THAT OPERATES FAIRLY IN EACH DIRECTION, IF AFFECTED CARRIERS AND THE COMMISSION CAN AGREE THAT THE TRIGGER THAT IS CHOSEN MEETS THE REQUISITE THRESHOLD PROOF REQUIREMENT.

The Commission recognizes that one central anomaly in Part 65 is its inflexible wording that calls for the initiation of a Part 65 proceeding every two years.[61] The Commission recognizes that this schedule is unrelated to how the cost of capital changes over time.[62] USTA strongly agrees. The two year cycle has been more

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[60] Notice at ¶ 35.

[61] Notice at ¶ 19.

[62] Notice at ¶ 19.

honored in the breach than in the observance. It does not track the economic cycles that affect the carriers' cost of capital, and it creates uncertainty for carriers each time that a Direct Case is contemplated by the rules. Extensions or deferrals based on a Commission analysis of the marketplace have been the most prevalent procedure. This has operated somewhat as a "negative option" trigger mechanism - the obverse of what the Commission discusses in the Notice.

The original structure contemplated by the Act was for there to be no "ticking clock" at all. When the cost of capital appeared to have changed sufficiently, either the Commission or the carrier, then AT&T, sought to begin a represcription. USTA agrees that a trigger mechanism is better than the current Part 65 procedure. The nature of the "trigger", however, will affect USTA's support for it.

A. <u>Data Measuring Cost of Capital.</u>

A trigger mechanism must be stable and objectively fair in its operation. To that end, it must utilize appropriate measures that track cost of capital trends, and that operate to match the rate of return process with cost changes accurately.

The Commission uses the term "significant change in capital markets that is likely to persist over time" as the qualitative standard against which a trigger mechanism will be measured.[63]

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[63] Notice at ¶ 21.

USTA agrees that the authorized rate of return must change when there are significant and persistent changes in carrier cost of capital.[64]

The Commission identifies a variety of ways to convert this qualitative standard to a real test of data. In 1989, the Commission used interest rates.[65] USTA and other carriers have pointed out to the Commission that the courts have opined that cost of capital moves in general alignment with interest rates.[66] There may be no single self-evident measure for a trigger.

The trigger must be a balanced package of three factors - the standard data used to reflect capital market conditions; the delta, or band that sets the boundary between "significant" and insignificant changes; and the duration of time that provides comfort that the change in capital markets will "persist." Each of these factors plays an important role.

Based on a consideration of the way in which the various factors interact, USTA can support a semiautomatic trigger mechanism that would lead to commencement of a represcription at the time that there has been a 150 basis point shift in the six-month moving average of Aa public utility bond yields as measured

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[64] FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

[65] 1990 Represcription Commencement Order, 5 FCC Rcd 197 at ¶ 45.

[66] Tennessee Gas Pipeline Co. v. FERC, 926 F.2d 1206 (D.C.Cir. 1991)

by Moody's Bond Record (Moody's), that lasts for six consecutive months, commencing after the completion of this rulemaking.

Having an automatic, non-discretionary trigger would suggest that there should be slightly greater stability built into two factors - the band and duration of the identifying change - i.e., the band should be wider or the duration longer, or both. Otherwise, repetitive proceedings could be set in motion. Therefore, if the trigger is an automatic, non-discretionary trigger, a 200 basis point shift for that period should be used as the trigger.

Since the issue to be determined in considering the need for a represcription is the applicable cost of capital - that is, the return required by investors through the capital markets - the Commission should rely on capital market information to decide if a review is needed. The chosen measure must be a long term measure reflecting the investment horizons applicable to investors in exchange carriers. There are two capital market costs that are relevant: debt and common equity. The measurement of the cost of equity is controversial, and not directly observable. It requires careful interpretation of various market forces. The cost of debt, on the other hand, is directly observable. Thus, USTA recommends that any trigger be based on changes in long term debt costs.

The Aa public utility bond yield is highly relevant to exchange carriers, and tracks these capital costs better than government or industrial bond yields. It is easily available on a

monthly basis, and is least subject to the influence of factors not relevant to the capital costs of exchange carriers. Any shorter term rates should be rejected. They are much more volatile. Also, in contrast to long term debt costs, short term capital cost measures are often altered as a result of federal government action unrelated to the cost of capital. The exchange carriers' capital costs and investments are predominantly long term in nature.

Based on an examination of Commission action in this area since divestiture, the option supported above would have resulted in the same number of represcriptions as has actually been experienced. This suggests that there will not be an unreasonable change in the number of future represcriptions if it is utilized.

B. Magnitude of Change in Capital Markets.

The bands are significant in that their size adds to or reduces volatility in monitoring. Smaller bands would tend to increase the number of proceedings. Yet, repeated represcriptions are not in the public interest when insignificant changes in cost of capital occur. At the same time, prescribed rate of return changes must be made when there are significant and persistent cost of capital changes.

C. Duration of Change in Capital Markets.

Likewise, responding to changes of shorter duration would increase the number of represcriptions. The Commission inquires

how often it should undertake assessments of the triggering events.[67] USTA supports an assessment using a six-month moving average, measured each month, rather than more extended assessment periods. A quarterly or annual review would add to regulatory lag, and would increase the likelihood of a mismatch between capital market facts and the prescribed rate of return.

A proper balance of the band and the time duration for any trigger is crucial. Wider bands or longer times during which a change must be sustained will add stability. An assessment of the data suggests that a six-month moving average is appropriate to balance out normal fluctuation with "persistence" in capital market changes. A band of 100 basis points, with a duration of change of six consecutive months, would have led to four represcriptions since divestiture. A band of either 150 or 200 basis points would have led to one.

The initial base rate to be used for comparison with the six-month rolling average should be set at the time of the order in this proceeding. This would eliminate any possible bias of the trigger as a result of the selection of some known historical point. The counting of the six consecutive months should commence after an order completing this proceeding. This will prevent any party's short term interest in slowing or speeding a represcription from interfering with the development of sustainable Part 65 rules.

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[67] Notice at ¶ 23.

A Part 65 revision should focus on the long term and not be swayed by short term considerations.

There are some procedural ties between this factor and the choice of a "semiautomatic" or "automatic" trigger, addressed in the next section. If the Commission were to use a semiautomatic trigger, and then seek significant additional data to determine whether to start a represcription, or take public comment, or both, the process would consume the same time as simply waiting to see if a trigger change would endure for a few additional months.

D. Automatic or Semiautomatic Operation.

The Commission inquires about the need for an automatic or semiautomatic trigger mechanism.[68] What is really being addressed is the level of discretion that should be available to the Commission (or Bureau) to use the data or ignore it in commencing a represcription. A true automatic trigger would be subject to no discretionary "abort" decision.

One benefit of an automatic trigger is that it would eliminate controversy over its application and operate objectively over time. Another benefit is that it would insulate the Commission and carriers better from external pressures. As a practical matter, the Commission is unlikely to be willing to adopt a wholly automatic trigger, and the very existence of the Commission's waiver power effectively prevents a pure automatic trigger. Even

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[68] Notice at ¶ 25.

the Commission recognizes that its proposed "automatic" trigger is not fully automatic, since it could be subject to Commission ad hoc postponements.[69] In concept, a semiautomatic trigger would be more flexible and could avoid unnecessary data filings and Commission action when a rate of return change may not really be needed. However, as a practical reality, this Notice does not truly describe an automatic trigger.

USTA's primary interest is in assuring that any trigger utilizes measures that carriers would accept as requisite proof of the need for change, and operates fairly and accurately. A well designed trigger should create a strong presumption for action. The process cannot be asymmetrically implemented and the Commission should be consistent in implementing the rules. It should not have total discretion in commencing a represcription, and should be mindful that an unreasonably low rate of return can be as inimical to the public interest as an unreasonably high one, by limiting a carrier's ability to attract lower cost capital.[70]

If the Commission adopts a semiautomatic trigger, interested parties should be able to comment on whether a represcription is merited. If the Commission adopts a rule allowing it to review whether to commence a represcription, there should be an opportunity for input from the parties who would be directly affected.

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[69] Notice at ¶ 25.

[70] See Bluefield Waterworks & Improvement Co. v. West Virginia Public Service Commission, 262 U.S. 679 (1923).

In line with the structure of § 205, a carrier should be able to seek a represcription and file a Direct Case, even if the Commission chooses not to commence a represcription itself. This should be the case for the same reasons as a carrier should be able to have an opportunity to show why it should not be subject to an otherwise unitary rate of return represcription.

To summarize, a trigger mechanism raises questions under the Act because of the impact on the burden of proof regarding represcription. Both the Commission and affected exchange carriers should be able to agree that a particular trigger mechanism provides the requisite quantum and accuracy of evidence to justify represcription. USTA believes that a trigger that uses a six-month moving average of Aa public utility bond yields would provide the most useful data.

This moving average should be tracked monthly. When the moving average has deviated from a defined base level by 150 basis points for six consecutive months from a commencement point set after the end of this proceeding, the Commission and affected carriers should address the need for represcription and the Commission should then make a decision. If there is no discretion reserved to the carriers or Commission for assessing the need for represcription, the 150 basis point change should be increased to 200 basis points.

USTA believes its member carriers would agree to such a trigger as sufficiently probative.

V. THE COMMISSION SHOULD NOT PRESCRIBE IN ITS RULES PARTICULAR METHODOLOGIES FOR DETERMINING COST OF EQUITY AND SHOULD PERMIT THE USE OF ANY RELEVANT METHODOLOGY.

The Commission proposes to continue its weighted cost of capital methodology, and suggests that it will adopt presumptive or conclusive methodologies for all components of its rules except cost of equity, for which it will determine the weight to be given particular methods in each proceeding.[71] The Commission asks if such proposals are consistent with its goals in the proceeding.[72]

The Commission should not prohibit the use of any methodology in a prescription proceeding. There is a significant difference between a rule that requires only a presumptive or conclusive methodology be used, and a rule that may require calculations according to an identified methodology but also accommodates other relevant and commonly used methodologies. While there is benefit in the methodologies identified by USTA below (that supported by Form M capital structure and cost of debt data, for instance), the Commission should not select specific cost of equity methodologies and incorporate these favored methodologies into its rules. If it wants to have carriers and others include a particular analysis in a submission, it need not prespecify the methods in its rules, and it need not prohibit the submission of any additional analysis using other methodologies. Factfinding should accommodate all relevant evidence, rather than limit evidence to the facts as the factfinder wishes to hear them. That the Commission does not like

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[71] Notice at ¶¶s 46-47.

[72] Notice at ¶ 47.

a particular methodology that has academic or other merit is not a reason to reject it. The nature of the administrative process contemplates that parties may take different views on technical subjects.

The 1990 represcription did not present any problem based on different methodologies that merits any one methodology being preferred or disqualified. It was correct for the Commission to indicate at the commencement of that represcription that parties could provide submissions that used comparable firms methodologies that varied from those set out in Part 65.[73]

Some of the methodologies that now are used in ratemaking did not exist at the time of earlier represcriptions, and could not have been included in Part 65. Institutional Brokers Estimate System (IBES) long term growth estimates have been available only since mid-1983. IBES is not likely to be the last new tool or innovation in financial analysis. The Commission should not make the error of limiting its rules to today's methods, as they may be obsolete or less favored in the future as better options emerge. Here, it appears that one result of the Notice as outlined will be the rejection of material that was accepted in earlier cases, and that continues to be recognized as having merit.

Simplification in the rules actually is facilitated by providing for flexibility in use of available methodologies. A

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[73] 1990 Represcription Commencement Order at ¶¶ 47-48.

flexible rule accommodates change in financial analysis techniques; a detailed rule does not, leading to questions and a need for waivers. An inflexible rule would inexorably lead to a bias against participants where an alternative methodology is both more accurate and more favorable, but disallowed.

A presumptive or conclusive cost of equity methodology arguably runs counter to the spirit of the rate of return cases. In the Duquesne case, for example, the Supreme Court indicated that the adoption of a single theory of ratemaking, at least on a constitutional basis, would "unnecessarily foreclose alternatives which could benefit both consumers and investors."[74] Finally, there is a pending appeal that calls into question some of the basic proposals in this Notice.[75] Its resolution could cause a specific rule adopted here to have to be revised yet again. Certainly, no cost of equity procedure has solidified so significantly that Part 65 merits methodology limitations.

VI. COMMENTS ON SPECIFIC COST OF CAPITAL METHODOLOGY ISSUES.

A good part of the Notice addresses substantive methods, rather than Part 65 structures.[76] These are addressed in this part of the Comments.

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[74] Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989).

[75] Illinois Bell Telephone Co., et.al., v. FCC, No. 91-1020 (D.C. Cir. filed January 11, 1991); oral argument scheduled for January 13, 1993.

[76] Notice at ¶¶s 48-89.