

12388 COMPETITIVE PROBLEMS IN THE DRUG INDUSTRY

for if his price for any drug covered by a MAC determination exceeded the designated level, he would, as a practical matter, be foreclosed from a substantial and growing sector of the market. In short, by creating a strong incentive for suppliers to limit their prices to the designated ceiling, a MAC determination might be essentially indistinguishable in its effects from traditional rate regulation. And, not surprisingly, many of the factual issues in a MAC proceeding -- e.g., those relating to costs -- closely parallel those encountered in rate regulation.

In almost all instances of federal rate regulation, Congress has specifically provided for a hearing to precede any agency action that would establish a rate for a regulated entity. For example, under the Interstate Commerce Act, 49 U.S.C. §§ 1, et seq., regulated carriers have the option of setting their rates unilaterally. However, under 49 U.S.C. §§ 15(1) and 15(7), the rates established by the carrier are subject to challenge either on the complaint of an interested party or on the Commission's own initiative. A rate so challenged may be set aside by the Commission, and, in appropriate cases, the Commission may prescribe a new rate to be observed in the future.

But neither of these acts -- setting aside an existing rate or prescribing a new one -- may be taken by the Commission without first affording the affected carrier a hearing. Similar hearing provisions are found in other federal legislation authorizing rate regulation.^{59/} In light of the similarity which MAC determinations bear to rate regulation, there is good reason, as a matter of policy, to adopt the same kinds of hearing procedures which Congress has traditionally enjoined upon federal agencies having rate regulation responsibilities.