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ERRATUM

In the article by Robert B. Donin in the last issue of this journal, Safety Regulation of the Concorde Supersonic Transport: Realistic Confinement of the National Environmental Policy Act, the last sentence of the first paragraph on page 59 should read:

As applied to Concorde, this means that while the United States is free under Article 11 to apply its own regulations regarding, for example, fuel reserves, since this is a matter relating to the "admission or departure" of the airplane, it is severely circumscribed by Article 33 in the extent to which it may examine, for example, the adequacy of Concorde's system for fuel tank fire suppression since that is an "airworthiness" matter as to which the United States is obligated to accept the assurance of the British and French aviation authorities.48
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From Litigator to Commissioner—
Some Thoughts on Judicial Review*

BETTY JO CHRISTIAN**

I feel as if I am being somewhat selfish in the topic I have chosen for today's meeting—selfish because it is a subject that has been of tremendous interest to me personally since the beginning of my own career. For fifteen years, I spent the bulk of my time representing the Interstate Commerce Commission in the Federal courts—defending its decisions against whatever challenge might be brought by a dissatisfied party. At first, my interest focused simply upon the result in my own specific cases—whether I won or lost, and whether my carefully constructed arguments were accepted or rejected by the court. But gradually, over a period of time, I became even more interested in the pattern which I began to perceive of the complex interrelationship between the courts and the Commission, and the way in which the Commission's actions were influenced and affected by the decisions being handed down by the courts. From this, it was only one more step to begin to form some judgments as to the value of this interaction—whether particular types of effects which I began to recognize were actually beneficial or detrimental to the proper functioning of the agency, as intended by Congress. And now, as a result of my appointment as a Commissioner, I have had the unusual opportunity of viewing this whole interrelationship from a second vantage point—that of the decision-maker whose deci-

** Commissioner, Interstate Commerce Commission. B.A., University of Texas, 1957; LL.B., University of Texas School of Law, 1960.
sions are being reviewed. So today, I would like to share with you some of the thoughts that I have developed over a period of years, in the hope that the subject will be equally interesting to other lawyers also involved, in a different role, in ICC litigation.

Those of us who work for the Commission, in whatever role, invariably seem to begin any discussion of the judicial review process with a proud recitation of the statistics—the fact that, over a period of years, the Commission has been sustained in more than eighty percent of its cases in the lower appellate courts and over ninety percent in the Supreme Court. Indeed, sometimes I suspect that we do this in hopes of discouraging you from seeking review, on the theory that your statistical chance of success really isn't very large! But what do these statistics actually mean? Do they mean that the Commission is "right" over eighty percent of the time and "wrong" less than twenty percent of the time? Or that the Commission's lawyers write the best brief or deliver the best argument over eighty percent of the time? When I was supervising the Commission's litigation branch, I would have liked to believe that it was the latter, and now that I am a Commissioner I would like to believe it is the former—but I long ago accepted the fact that this simplistic (and very pleasant!) analysis is largely irrelevant.

FACTUAL DISPUTES

The first thing that becomes obvious to even the most casual observer of the review process is that there is one particular type of case in which the courts will almost invariably uphold whatever decision the agency has reached—and that is the case which involves nothing more than a factual dispute. The concept of "substantial evidence" as the standard for reviewing such decisions is now firmly embedded, and the few deviations from that standard which still occur are—when the agency or intervenor in support decides to appeal—promptly corrected by the Supreme Court. And I am forced to admit that this type of factual case makes up a large part of that nice eighty percent that I mentioned earlier!

But apart from raising the Commission's batting average, do these essentially factual cases have any importance in the overall interplay between court and agency? I believe they do, for they represent a reaffirmation of something that, to me, is one of the most important strictures upon the administrative agency—that we must base our adjudicative decisions upon the evidence presented to us in the case we are deciding. We tend to take this for granted now, but in the early days of the regulatory agencies' existence, the way in which the agencies were to approach decision-making was far from a settled question. At that time, an agency was a rather odd animal—neither court nor legislature—not fitting comfortably into any of the three categories of government which originally made up the American

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system. Could agencies, like legislatures, base their decisions upon whatever facts happened to be within their personal knowledge? Or were they required, like courts, to decide a case upon the basis of the facts put into the record by the parties? The determination of this issue, and the resulting dichotomy between the rulemaking and adjudicative functions of the agency, was fundamental to the entire administrative and regulatory system—and its creation was largely the work of the early courts who reviewed agency decisions. Thus, to the extent that the development of the "substantial evidence" concept has had the effect of insuring that agencies base their decisions in adjudicatory cases upon the evidence of record, the court-agency interplay has been an enormously beneficial one. Indeed, without it, I suspect that the administrative agency would have become a far different system than the one we know today. And we owe a great debt of gratitude to some of those long ago judges—men such as Mr. Justice Lamar and Mr. Justice White—who were instrumental in bringing it into being.

**Administrative Procedures**

If the courts have, as I believe, played a large role in defining the factual boundaries within which an agency's adjudicative decisions must be made, they have played an equally large role in determining the procedures by which the proceedings must be conducted and the decision made. In this area, however, I am not convinced that the results of the court-agency interplay have been entirely beneficial. Rather, after watching the review process for a number of years, I am inclined to believe that the results in the procedural area have been a mixture of benefit and detriment to the administrative process.

There is no doubt that the courts have performed an enormously useful service in demanding that whatever procedures are employed must satisfy the basic requirements of fair play and due process for all interested parties. Thus the courts have quite properly insisted that the most meticulous attention be paid to the adequacy of notice published in the *Federal Register,* since this is often the only means of assuring that potentially interested persons are informed of the existence of a proceeding in time to protect their interests. The courts have performed a distinct service by requiring that parties to an agency proceeding be afforded a full and fair opportunity to make their case, since a decision on the record can be meaningful only if that record is complete from the standpoint of all parties. And the courts have quite rightly demanded that the decisions rendered by the agencies

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contain findings which are sufficient to inform the parties of the essential reasons for the agency’s decision on every important issue.\(^6\)

I am convinced, however, that some of the other procedural requirements imposed by courts upon the agencies have not been beneficial, but instead have in the long run resulted in a real detriment to the administrative process. In large part, these rulings seem to me to be a result of what I can only describe as an “over-judicializing” of the administrative process—that is, a tendency to regard the way that the courts approach a problem in a judicial context as the only appropriate way to handle the problem.

For example, all of us are familiar with the tendency, in typical administrative proceedings, to present virtually all evidence in the form of testimony of individual witnesses, making very little use of other possible methods for developing factual data. Yet, in my opinion, many issues decided by the agencies could be developed far better in other ways, such as through economic data, traffic statistics, and expert views. Why has this witness-by-witness approach developed? Why didn’t the agencies, from their very inception, develop different methods of establishing the facts needed for their determinations? I am convinced that at least one reason was the tendency of the courts, in some of the early cases reviewing agency actions, to insist that a trial-type procedure, with testimony adduced by individual witnesses, was required as a matter of law.\(^7\) I personally am convinced that these cases would no longer be followed by modern courts.\(^8\) Nevertheless, I believe that their effects are still being felt in the way that agencies have developed their procedures over the years.

Occasionally courts have appeared to force upon agencies their own ideas of what procedure an agency should follow, although the parties to the case have not raised the point or have even conceded that the agency’s decision was proper. For example, I can recall one case in which a court set aside an ICC decision denying a late-filed petition for intervention despite the fact that the concerned party expressly conceded that the denial of intervention was within the Commission’s discretion.\(^9\) In another case that I recall, a court remanded a modified procedure case with instructions to hold an oral hearing, although the plaintiff had never contested the use of modified procedure and, in fact, didn’t even want an oral hearing since he knew that his witnesses were unwilling to attend an oral hearing.\(^10\) In the latter case the court evidently felt that the record would have been improved by cross-examination, whether the parties to the case wanted to or not.

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\(^7\) See, e.g., Philadelphia Co. v. SEC, 175 F.2d 808 (D.C. Cir. 1948), dismissed as moot 337 U.S. 901 (1948); L.B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir. 1948).

\(^8\) See, e.g., Permian Basin Area Rate Cases, 390 U.S. 747 (1968).


PROBLEMS OF "OVER-JUDICIALIZING"

Yet, in my opinion, this "over-judicializing" is a disservice to the administrative process. The simple fact is that an administrative agency is not a court, and is not supposed to be a court. If the agencies had been nothing more than another branch of the judiciary, their purpose could have been served just as well by the creation of another set of federal courts. The main reason for the creation of the agencies as separate entities was that they were expected to perform a function different from either the courts or the legislatures—to act in a manner which may be either quasi-judicial or quasi-legislative, but essentially distinct and more flexible than either. When the agencies are forced into a mold which too closely resembles the trial of a court proceeding, the result may well be to deprive the public of many of the benefits that the administrative process is designed, and in fact is able, to produce.

The effects of this are, I believe, widespread. For example, one of the agency problems most frequently discussed today is regulatory lag—a problem whose very existence is ironic, since one of the purposes behind the creation of the agencies was to eliminate the delay inherent in the judicial system. Needless to say, there are many contributing causes to the problem of regulatory lag, and I certainly do not intend to single out the courts as the principal villain. Nevertheless, I believe it is inescapably true that at least one of the causes for the amount of time often consumed in completing an administrative proceeding is the procedural requirements mandated by the courts—requirements which may not be either necessary or appropriate for resolution of the particular issue involved. Where the result of the courts' procedural decisions is to discourage agencies from quickly implementing innovative procedures specially designed to resolve pressing issues with fairness to all parties, then I believe the administrative process is badly served. And where the courts' decisions operate to mandate specific considerations and thus inhibit the agencies from making full use of the expertise that they in fact possess—and are supposed to possess—then I believe that the court-agency interplay results in a detriment to the administrative process.

POLICY

The final area that I want to discuss, in which the courts and the agencies interact with each other, is in the realm of policy. At first blush, this may seem to be a contradiction in terms, for it has become almost a truism to say that the courts do not interfere with the agencies' actions on matters of policy. But is this entirely true? I am convinced that it is not, in several respects.

To begin with, the courts can and do play an extremely important role in making certain that the agencies in fact carry out the policy determinations

of Congress. This occurs most frequently in the context of interpreting and applying a new statutory provision. In the case of the Interstate Commerce Commission, examples that readily come to mind are the Supreme Court's decisions in such cases as *ICC v. J-T Transport*, involving the Commission's implementation of the statutory provisions governing contract carrier applications, and *ICC v. New York, New Haven & Hartford Railroad*, involving the Commission's interpretation of the then-new "rule of ratemaking" embodied in the Act. Although technically the courts may do no more than issue a legal interpretation of the language of a statute, the result can be—and in the two cases I have cited was—a dramatic shift in policy which the court in effect compels the agency to make.

No one can deny the propriety—and indeed the necessity—for judicial interpretation of the statutes which embody the policy determinations of Congress. But there comes a point at which the policy actually enacted by Congress ceases to be clear, and the courts are still called upon to determine whether what the agency has done is in accord with a fuzzy and unclear congressional policy. In these areas, the interrelationship between the courts and the agencies can have even more profound effects upon the policies pursued by the agencies, well beyond mere questions of statutory interpretations.

Perhaps the most telling example of this latter type of policy review in recent years occurred in connection with cases arising under the National Environmental Policy Act of 1969. When that statute was first enacted, most agencies, including the Interstate Commerce Commission, assumed that the broad language of the statute left them with considerable leeway in how the Act's requirements should be meshed with their pre-existing responsibilities. But in the early court cases arising under that Act it soon became apparent that the courts were taking it upon themselves to determine the precise procedural methods by which the policies reflected in the Act must be implemented by the agencies. The result was a far-reaching change in agency procedures and methodologies, with such things as "threshold assessments" and "impact statements" assuming an integral role in the agency process. And although some of the more extreme procedural requirements imposed by the lower court decisions have now fallen by the wayside as a result of the Supreme Court's decision in the SCRAP litigation, the result of the entire complex of environmental cases has been a significant change in the manner in which agencies must pursue policy questions which involve environmental issues.

Another recent example of this type of judicial influence upon policy-making is in connection with the role of the economic regulatory agencies

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with regard to the national goal of ending racial discrimination and promoting equal opportunity. The question of whether the "public interest" standard embodied in economic regulatory statutes such as the Interstate Commerce Act and the Natural Gas Act encompasses such matters as promoting minority ownership or employment was certainly not clear from the face of the statutes or the underlying legislative history. Yet recent Supreme Court and district court cases\(^\text{15}\) have decided these questions, as matters of statutory interpretation, thereby exerting a dramatic effect upon the policies pursued by the agencies in this area.

This type of court-agency interplay in the policy area is one that is, to me, the most disturbing in terms of its potential effects upon the administrative process. Regardless of whether I may agree or disagree with the result in a particular case, it disturbs me to see the ultimate decision in what is essentially a policy matter made, not by the Congress or the agency created by Congress, but by the judicial branch of the government. Theoretically, of course, the decision can always be reversed by Congress through a new statutory amendment, but this avenue is often more theoretical than real, given the practical problems inherent in attempting to secure the enactment of legislation. And unless and until such a reversal is accomplished, the agency is compelled to implement the policy as laid down by the reviewing court, even if the agency itself does not believe that this policy is appropriate or in accord with its specific mandate from Congress.

I hope that you are not all waiting for me to suddenly announce a neat formula that will solve all the problems—because I must confess that I have not found one. The interrelationship between the courts and the agencies is one that has had tremendous benefits in some areas, but I believe it has had disadvantages in other areas. I hope that in these brief remarks I have at least caused some of you to begin to think about the problem, and perhaps to view the judicial review process as something more than just an exercise in "Did I win or lose the case?"

Recent Decisions of the Interstate Commerce Commission*  

ROBERT J. BROOKS**

I. FOREIGN COMMERCE  
II. PARCEL CARRIERS  
III. PASSENGERS  
IV. COMMERCIAL ZONES AND TERMINAL AREAS  
   A. BACKGROUND INFORMATION  
   B. Ex PARTe No. MC-37 (Sub-No. 26)  
V. HOUSEHOLD GOODS  
VI. WATER CARRIERS  
VII. PROPERTY BROKERS  
VIII. GENERAL RULES OF PRACTICE  
IX. FITNESS FLAGGING PROCEDURES  
X. CONTRACT CARRIERS  
XI. OTHER IMPORTANT RIGHTS CASES

This compilation of significant motor carrier proceedings decided during the past year was prepared by the Office of Proceedings' Section of Operating Rights under the supervision of Section Chief J. Patterson King and Assistant Section Chief Michael Erenberg.

As this paper goes to press, decisions are imminent in several rule making proceedings which are of considerable concern to you. One is Ex Parte No. MC-96, Entry Control of Brokers, in which the proposal—first

advanced by the Commission's Blue Ribbon Staff Panel—was to lower the barriers to entry by brokers (passenger as well as freight brokers).

Another such proceeding is Ex Parte No. 55 (Sub-No. 24), Revised Rules of Practice. Under section 305 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act)\(^1\) the Commission was given 360 days to submit to Congress an initial proposal setting forth its Rules of Practice for dealing with railroad matters. Following that, the Administrative Conference was to have sixty days to submit to Congress and the Commission its comments and recommendations as to the proposed rules. Thereupon, the Commission would have thirty days to consider the comments and submit a final proposal for Congressional approval. In all, Congress provided 450 days for the development of the final proposal.

While the 4-R Act deals primarily with railroads, you will recall that the Commission in 1975 had begun a revision of its Rules of Practice as they affect all modes. It was our hope at that time to complete the project by early 1976, and the Motor Carrier Lawyers Association very graciously and industriously pitched in to help with an analysis and comments under great pressure from us in late 1975. But by the time the final product could be prepared, we had the new requirements of the 4-R Act.

At any rate, I shall be prepared to discuss with you the initial and the interim documents issued by the Commission in Ex Parte No. 55 (Sub-No. 24) to the extent you may consider such discussion helpful and appropriate.

The Office of Proceedings maintains a Reference Services Branch under the supervision of Mr. Jack Long. You may wish to consult with that branch, for annotations and digests reflecting the Commission's recent decisions in significant cases. You can also find there a wealth of information on older cases. Research routes may be through case citation, descriptive words and phrases, annotations by statute, and other means.

Some of the personnel in the branch have had long service and have a penchant for remembering factual situations in important cases. I have found that they frequently can zero in on a case with merely a hazy description of the significant facts and the general time period in which the decision was rendered.

One of the services maintained is a citer which is comparable to service of Shepard. I invite you to consult the Reference Services Branch and to keep up with the more recent developments through its Advance Bulletins on annotated cases and statutory changes. The Branch is located in Room 6367. Its telephone numbers are: (202) 275-7221, 275-7143 and 275-7119.

Needless to say, all Sections of the Office of Proceedings are at your service for such consultation as we are in a position to provide. They are always ready to assist you, your clients, and the general public in finding ways to expedite proceedings and improve the regulatory processes.

I. FOREIGN COMMERCE

The key decision relating to foreign commerce issued by the Commission since last year's meeting was that in *J.W. Allen—Investigation of Operations and Practices.* In that proceeding the Commission instituted an investigation on its own motion to determine whether respondents were engaging in foreign commerce without proper authority. Respondents were transporting bananas from Galveston to Fort Worth, Texas. The motor carrier transportation was immediately subsequent to the movement of the bananas by an oceangoing vessel. Respondents argued that there were two distinct and separate movements, one by ship from the foreign country to the port of Galveston, and the other by motor carrier from Galveston to Fort Worth. The factual circumstances were strikingly similar to those in the *Melburn* case which was discussed under this topic last year. Respondents also argued that the water movement to Galveston was in private carriage, and that the subsequent transportation within Texas by respondents was the initial movement of the bananas by a for-hire carrier.

The Bureau of Enforcement argued that the transportation was in foreign commerce. It considered the situation similar to two cases involving water-rail movements which arose under Part I of the Interstate Commerce Act. Respondents countered that argument by asserting that the Commission's regulatory responsibilities were different under Part II.

The Commission applied the rule of the fixed and persisting transportation intent of the shipper at the time of shipment. It recognized shipper's intent that the bananas move beyond Galveston and considered the subsequent single-state movement to be one of continuous foreign commerce. This conclusion was in conformity with the decision in *Melburn.*

Having concluded that the considered transportation of bananas from Galveston to Fort Worth was in foreign commerce, the Commission then considered respondents' contention that the transportation was not subject to economic regulation by the Commission because of the principles regarding single-state transportation subsequent to private carriage established in the *Single-State* case. The Commission stated that the question was not whether the movement of bananas was commerce or even foreign commerce, but rather whether it was a form of commerce which Congress had subjected to federal regulation. The Commission further stated that in determining the application of Part II of the Act, transportation begins for that purpose when the merchandise has been placed in the hands of a for-hire carrier.

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6. *Id.* §§ 301-327.
motor carrier, and that the fixed and persistent intent test for determining whether interstate or foreign commerce is involved, does not depend on whether the carrier rendering the transportation service is subject to federal regulation. The Commission concluded that the controlling question under the Pennsylvania and Single-State cases is whether the for-hire motor carriage wholly within one state has been preceded or followed by a movement in private carriage. It determined that the prior water movement was in private carriage, and that respondents' motor movement thus was not subject to federal regulation.

II. PARCEL CARRIERS

The bankruptcy estate of REA Express, Inc., has been involved in two significant and related Commission proceedings during the past year. In Brada Miller Freight System, Inc. v. Rexco, Inc., four complaint actions and two petitions attacking the remaining REA operations and operating authority were consolidated for hearing. The complainant motor carriers challenged the lawfulness of REA's Rexco Division operations, the only operations being performed by the bankrupt carrier. The petitioner, the American Trucking Associations, Inc., sought dismissal of the REA application for permanent authority to operate under the so-called "Hub" system and revocation of the corresponding "Hub" temporary authority. The Commission ordered its Bureau of Enforcement to participate and help to develop the record in the complaint proceeding.

In a finance proceeding, Alltrans Express U.S.A., Inc.—Contract to Operate and Purchase REA Express, Inc.—the Commission dealt with a request by Alltrans Express U.S.A., Inc., under section 210a(b) of the Interstate Commerce Act, for temporary authority to lease REA's operating rights pending determination of Alltrans' application under section 5(2) of the Act. Under that section, Alltrans requests approval of its agreement with REA for a long-term lease and ultimate purchase of the REA operating rights and substitution as applicant in all pending REA application proceedings. The "Hub" temporary authority and corresponding "Hub" permanent authority application at issue in the complaint proceeding constitute the primary properties involved in the Alltrans-REA proposed transaction in the finance proceeding.

By order of November 3, 1976, in the finance proceeding, the Commission determined that it would hold in abeyance the request by Alltrans under section 210a(b) pending the outcome of the REA complaint proceeding. In so doing, the Commission invoked its discretion under section 17(3) of the

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10. The Hub system consists of 24 major receiving and dispatching points located throughout the country, linked by a network of line-haul routes.
11. No. MC-F-13003.
13. Id. § 5(2).
Act to "conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice."\textsuperscript{14}

Under an expedited procedure, the Commission issued the initial decision in the complaint case based on the record certified to it by the presiding Administrative Law Judge. In its decision entered November 17, 1976, the Commission included a cease and desist requirement against the Rexco operations, finding them to be inconsistent with express service and "totally unlawful." Furthermore, the Commission found that the REA "Hub" application should be dismissed for want of prosecution under Rule 247(f)\textsuperscript{15} of the Commission's General Rules of Practice and that the corresponding "Hub" temporary authority should be revoked. The Commission found that statements made by REA in other proceedings repudiating the operating economy and efficiency of the "Hub" concept for distribution of express traffic demonstrated that REA did not intend to promptly prosecute its "Hub" application in accordance with Rule 247(f). The "Hub" temporary authority was cancelled by operation of law upon dismissal of the "Hub" application. Nevertheless, the Commission also found that the unlawful operation conducted under the "Hub" temporary authority warranted revocation thereof irrespective of the dismissal of the corresponding "Hub" application. On reconsideration, this decision was unanimously affirmed by the Commission in its order of January 28, 1977.

The Commission also denied Alltrans' section 210a(b) request in an order issued simultaneously with its decision on reconsideration in the complaint case. The Commission, noting its determination in the complaint proceeding, found that withholding the sought 210a(b) authority would not result in destruction of or injury to the motor carrier properties involved or interfere substantially with their future usefulness. In this regard, the Commission also cited statistics which showed "a dramatic erosion of REA service" in the decade prior to REA's shutdown.

Meanwhile, REA sought and obtained an order of the United States Court of Appeals for the Second Circuit staying the effective date of the Commission's November 17 decision in the complaint case pending judicial review in that court.\textsuperscript{16} A noteworthy facet of the decision was that the court rendered it even though the appellant had simultaneously filed a petition for reconsideration with the Commission. A dissenting judge said that the matter was not administratively final; and he also noted the lack of a showing of irreparable harm.

While the possibilities for a resurrection of REA's historic nationwide express service have been dwindling, United Parcel Service (UPS) has been attempting to broaden the scope of its small package service. By a

\textsuperscript{14} Id. § 17(3).
\textsuperscript{15} 49 C.F.R. § 1100.247(f) (1976).
\textsuperscript{16} REA Express, Inc. v. United States, No. 76-4278 (2d Cir., filed Dec. 17, 1976).
petition filed November 17, 1976, UPS is seeking to remove from its common carrier authority a weight restriction which prohibits transportation of packages whose aggregate weight exceeds 100 pounds from one consignor to one consignee on any one day. Protests have been received by several motor carriers as well as the Local and Short Haul Carriers National Conference. By order of February 1, 1977, this proceeding has been designated for oral hearing.

III. PASSENGERS

In several instances during the past year, the Commission has had occasion to determine whether or not particular operations are subject to economic regulation. In one proceeding, the question was raised whether certain operations constituted private carriage not subject to regulation or whether they constituted for-hire transportation. The applicant was a travel agency which arranged air and ocean tour services. Its proposal was to provide connecting ground transportation for its customers between their homes and various airports and steamship piers. An administrative law judge concluded that this type of transportation was not for hire, and recommended that the application be denied. On exceptions, Division 1 determined that the proposed transportation was in fact for-hire carriage, and thus that it required operating authority from the Commission. The Division also determined that the transportation was common carriage rather than contract carriage, since applicant’s tour services as a travel agency were held out to the general public, even though the regulated transportation services specifically under consideration would only be offered to actual tour customers. Finally, since the transportation could involve aspects of either special or charter operations in differing circumstances, the authority granted was framed so as to include both types of operation.

In another case, the question was presented whether similar motor-bus transportation within a single state in connection with interstate air tours constituted transportation in intrastate or interstate commerce. Although the tour services as a whole clearly embraced air travel in interstate or foreign commerce, Division 1 concluded, on the basis of the Commission’s determination in Motor Transportation of Passengers Incidental to Air, that the bus transportation does not require operating authority from the Commission as long as the motor carrier does not sell or honor through tickets with the air carrier nor maintain any common arrangement with the air carrier involved. Therefore, the travel agents arranging these interstate air tours and the connecting single-state motor transportation are not brokers subject to regulation by the Commission.

17. No. MC-115495 (Sub-No. 3).
20. 95 M.C.C. 526, 536 (1964).
Insofar as the so-called incidental-to-air exemption of section 203(b)(7a) is concerned, I might mention in passing at this point that the exempt zone for Chicago's O'Hare Airport has recently been expanded to embrace a somewhat larger area in Indiana. 21

Section 203(b)(1) of the Act provides another exemption from the Commission's regulatory jurisdiction: namely, the transportation of school children and teachers to or from school. The question arose in this regard whether the exemption would embrace the transportation of school children to or from boarding schools at the beginning and end of vacation periods. 22 Division 1 concluded that, even though the transportation might be only between the boarding school and a public transportation terminal (rather than the students' homes) and though the parents would reimburse the school for the transportation charges, there was nothing in the Act to deny the appliability of the exemption in this situation. Fundamentally, it was concluded that the plain language of the statute clearly embraces this type of transportation, and that past Commission decisions to the effect that field trips would qualify under the exemption only if sponsored and supervised by school authorities do not limit the appliability of the statutory exemption in this situation.

Turning now to proceedings involving determination of applications for operating authority, we find that the Commission has dealt with significant issues in connection with most of the various types of operating authority pertinent to passenger carriers. In a regular-route application proceeding, 23 Division 1 drew a distinction between local and long-haul transportation services. Applicant was a long-haul Mexican carrier seeking authority to cross the international boundary into the United States for the purpose of making connections at the terminals of an American carrier. The protestant provided a frequent local service across the border following essentially the same route. The Division concluded that, although there was no showing that protestant's service was in any way inadequate for the prevalent local traffic crossing the border, applicant's proposed operations would be an improved service for long-haul passengers, for whom protestant's service would not be particularly responsive. Therefore, the authority sought was granted based upon the substantial differences between applicant's proposed manner of operation and that of protestant.

In an application for charter authority, 24 the Division found that, although the services of one protestant were not responsive to the particular needs demonstrated by the supporting witnesses, two other protestants did provide a service substantially similar in nature to that proposed by applicant. The Commission did consider the evidence of four travel agencies in sup-

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port of the application, on the grounds that they were in a position to reflect the transportation needs of the public. Nevertheless, the application was denied because of the untried services of the two protestants.

Another application for charter authority\textsuperscript{25} was granted, however, in a situation where the protestants were shown to be unable to provide a flexible service on short notice. In this case, Division 1 concluded that a grant of authority would not result in any appreciable harm to the protestants, whereas the public was entitled to a service capable of meeting the short-notice needs of the supporting witnesses.

The Commission has also had occasion to deal with several aspects of the regulation of passenger brokers. In one proceeding,\textsuperscript{26} the question presented was whether certain tour services were being arranged for compensation, such that they would be subject to the regulatory provisions of section 211 of the Act. Defendant in this complaint proceeding claimed to be arranging bus tours as a hobby on a non-profit basis. However, Division 1 found that compensation did exist because some of the monies received from the tour passenger were used to cover advertising expenses and other items not attributable to a single particular tour. Accordingly, it was concluded that operations for compensation are not necessarily those which are conducted at a profit, and defendant was ordered to cease and desist from conducting unauthorized brokerage activities.

In dealing with an application for authority to operate as a broker,\textsuperscript{27} Division 1 authorized the granting of a license in a situation where it concluded that such a grant would introduce a beneficial competitive element in the tour market considered. Applicant proposed a highly personalized service of distinctive quality which drew a loyal clientele who found other services not well suited to their particular needs. In granting the application, the Division concluded that applicant was unlikely to gain an undue competitive advantage over existing services.

In another broker application,\textsuperscript{28} however, Division 1 considered a circumstance in which the broker applicant was affiliated with a motor common carrier of passengers which was itself authorized to conduct sightseeing and pleasure tour services. Although the Division concluded that a need for the broker’s proposed services had been demonstrated, the fact of the affiliation with a carrier raised issues related to those currently under consideration by the Commission in the rulemaking proceeding in Ex Parte No. MC-93.\textsuperscript{29} Although it was decided that the fact of applicant’s affiliation with a motor carrier did not warrant denial of the application in the particular circumstances presented, the grant of authority was nonetheless limited so

\textsuperscript{25} Robinson Common Carrier Application, 126 M.C.C. 180 (1976).
\textsuperscript{26} Millenburg Tours, Inc. v. Hofmeister, 124 M.C.C. 297 (1976).
\textsuperscript{27} Goodman - Broker Application, 125 M.C.C. 223 (1976).
\textsuperscript{28} Peter Pan World Travel, Inc. - Broker Application, 125 M.C.C. 728 (1976).
\textsuperscript{29} Passenger Brokers Affiliated with Motor Carriers, 120 M.C.C. 656 (1974).
as to prevent the applicant broker from operating tours duplicative of those which could be conducted by its motor carrier affiliate under its own authority.

Two rulemaking proceedings affecting passenger carriers are also worthy of note at this time. In one, the Commission considered a petition for modification of its existing smoking regulations so as to enlarge the smoking section on buses from twenty percent to fifty percent of the available seating capacity. Upon consideration of statistical evidence presented by the National Association of Motor Bus Owners, a majority of the Commission concluded that an increase in the size of the smoking section to thirty percent of the seating capacity was warranted. It concluded that the evidence of the number of non-smoking passengers who were traveling with smokers did not necessarily justify the entire increase sought. Rather, it decided that the lesser increase approved was all that was warranted by the statistical evidence presented.

In the other rulemaking proceeding, the Commission considered a petition to modify its regulations concerning the transportation of special or chartered parties so as to permit the transportation of certain non-identical groups of passengers as if they constituted a single round-trip movement. The Commission found that there were certain circumstances in which movements of military personnel so coincided that they could physically be handled by a single carrier except for the fact that the carrier might not be authorized to originate charter traffic at one of the origin points involved. As a result, it could occur that two carriers might have to deadhead equipment in opposite directions for lack of authority to complete the return movements. In order to reduce this deadhead mileage and encourage a comitant saving in fuel, the Commission promulgated amended regulations which permit charter carriers to treat as a single round-trip movement two one-way movements of non-identical passengers under arrangement with the same chartering party. The resulting fuel savings and efficiency in operations were believed to outweigh any possible detriment to other carriers.

IV. COMMERCIAL ZONES AND TERMINAL AREAS

In December 1976, the Commission promulgated new rules and regulations concerning commercial zones and terminal areas in the final report in its rulemaking proceeding Ex Parte No. MC-37 (Sub-No. 26). Before discussing the specific rules adopted, a brief background discussion is appropriate.

A. BACKGROUND INFORMATION

Ordinarily, the interstate movement of passengers or property by motor carriage is subject to economic regulation by this Commission. There are certain types of motor carrier operations, however, which Congress has decided to exclude from such regulation. Section 203(b)(8) of the Interstate Commerce Act establishes one such area of exemptmotor carrier operations by excluding from economic regulation transportation that is "wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities." It must be pointed out that this exemption does not apply to local cartage operations when such transportation is performed under common control, management, or arrangement for the continuous carriage of a shipment to or from a point outside the limits of a particular municipality or its commercial zone. In other words, when the local transportation is part of, or incidental to, a line-haul service, the exemption of section 203(b)(8) is withheld.

In this context, however, section 202(c) comes into play. This section, which was added by amendments to the Act in 1940 and 1942, speaks of "terminal areas" and complements the commercial zone exemption by excluding from direct economic regulation the transfer, collection, and delivery performed within the terminal areas of line-haul carriers in connection with line-haul services. Thus, "the combined effect of sections 202(c) and 203(b)(8) is partially to exempt from regulation all local motor transportation, in interstate or foreign commerce, within commercial zones or terminal areas."33

While it is apparent from these sections of the Act that Congress intended to exempt motor carrier transportation in urban areas from regulation by this Commission, the geographic extent of these exemptions was not specified. The responsibility for making such determinations was left to this Commission as one of its duties in administering the provisions of the Act. Recognizing that a commercial zone exists about every municipality in the United States, the sheer impossibility of specifically defining on a case-by-case basis both the commercial zone limits at every city and the terminal area of each carrier at each of its authorized service points dictated the necessity of formulating some general guidelines in this area. The initial rulemaking on this matter was Ex Parte No. MC-37, initiated in the mid-1940's.

The creation of general guidelines in this area involved three primary tasks: (1) developing a general method for establishing commercial zone limits at all municipalities; (2) defining by general rule the geographic limits of carriers' terminal areas; and (3) construing motor carrier operating authorities which utilize municipalities in their territorial descriptions. The first

undertaking was dealt with in 1946. The latter two were the subjects of Commission decisions in 1948 and 1952.

The following regulatory scheme emerged: (1) a population-mileage formula was adopted for determining commercial zone limits; (2) the terminal area of a motor carrier or freight forwarder at a particular municipality was determined to be coextensive with the limits of the commercial zone of that municipality, although a carrier's terminal area may not extend beyond the territorial limits of the particular motor carrier's or freight forwarder's operating authority; and (3) with respect to the construction of operating authorities, motor carrier authority to serve a particular municipality, unless otherwise territorially limited, was construed as authority to serve all points and places which are in the commercial zone of that municipality. Provision was also made for interested persons to petition the Commission to define the limits of a particular commercial zone. Since the promulgation of the original population-mileage formula, petitions have been filed to determine specifically forty-three commercial zones. The usual case involves efforts by an interested party or parties to have an industrial park or a similar commercial location included in the commercial zone of a particular city.

B. Ex Parte No. MC-37 (Sub-No. 26)

The above-described commercial zone regulations remained intact since their inception. Recognizing that changes have occurred in the location of business and industrial activity since the development of commercial zone regulations in the mid-1940's, the Commission instituted, on its own motion, a rulemaking proceeding to re-examine the population-mileage formula in light of contemporary demographic and industrial location patterns. Over 400 parties—motor carriers, motor carrier associations, freight

34. Commercial Zones and Terminal Areas, 46 M.C.C. 665 (1946).
35. Commercial Zones and Terminal Areas, 48 M.C.C. 418 (1948).
37. A commercial zone consists of a "base municipality," contiguous municipalities, and all other municipalities and all unincorporated area within the United States which are adjacent to the base municipality as follows:
   (1) When the base municipality has a population less than 2,500 all unincorporated areas within two miles of its corporate limits and all of any other municipality any part of which is within two miles of the corporate limits of the base municipality;
   (2) When the base municipality has a population of 2,500 but less than 25,000, all unincorporated areas within 3 miles of its corporate limits and all of any other municipality any part of which is within 3 miles of the corporate limits of the base municipality;
   (3) When the base municipality has a population of 25,000 but less than 100,000, all unincorporated areas within 4 miles of its corporate limits and all of any other municipality any part of which is within 4 miles of the corporate limits of the base municipality, and
   (4) When the base municipality has a population of 100,000 or more all unincorporated areas within 5 miles of its corporate limits and all of any other municipality any part of which is within 5 miles of the corporate limits of the base municipality.
forwarders, local interests, labor unions, and governmental agencies—filed written representations during the interim stage of this rulemaking. On January 12, 1976, the Commission published an interim report in Ex Parte No. MC-37 (Sub-No. 26), wherein certain tentative proposals were made for expanding the then existing commercial zone limits to account for increased business and industrial activity in suburban areas. An effort was also made to simplify the general plan of commercial zone rules and regulations in order to eliminate certain confusing situations which have arisen in the past. In arriving at this set of interim proposals, the Commission endeavored to give fair and proper consideration to the views expressed by all participating parties.

An additional sixty day period was set aside for comment on the proposals contained in the interim report and for submission of additional economic and demographic data on proper limits for incorporation in a revised population-mileage formula.

Upon careful analysis of the additional economic and demographic data, the Commission concluded that they substantiated the findings of the interim report that there is a definite trend toward increasing suburban commercial and residential activity. The population levels for central cities are generally stable or declining slightly, while outlying areas are experiencing rising populations. Many factors have contributed to the shift in economic activity from the central city to the suburbs—availability and expense of land, need for new and larger facilities, urban congestion—and these reasons indicate that suburban activity is a necessary and inevitable outgrowth of the central city. The profile of the modern-day city indicates that there is an evolving location pattern for metropolitan economic activity. The central city remains the home of administrative, financial, and service functions, activities which are compatible with multi-storied environments in concentrated urban centers. Manufacturers, wholesalers, and retailers, prime users of transportation services, are migrating to suburban locations, where land is available for single-story industrial plant technology. Improved communication and transportation networks facilitate the movement to the suburbs and permit a greater degree of commercial integration between city and suburb.

The main finding of the final report is that the population-mileage formula adopted in the 1940's does not accurately describe the area of business and industrial activity existing about modern-day cities.

The following population-mileage formula, which was tentatively proposed in the interim report, was adopted:41

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40. Id. at ¶ 36,804.04.
41. Id. at ¶ 36,804.05.
The post office continues to be the central point from which the radius is measured for unincorporated communities. Where there is no post office, the generally recognized business center is the only alternative central point. The final report affirmed the traditional rule of construction that certifies and permits authorizing service at unincorporated communities confer implied authority to serve points encompassed by the revised population-mileage formula applicable to unincorporated communities.

On the issue of freight forwarder terminal areas, the Commission found that the evidence did not warrant departure from the long-standing rule that the commercial zones of municipalities and the terminal areas of motor carriers and freight forwarders should be geographically coextensive. While recognizing that such a rule is not mandated by statute, the Commission found that the benefits of administrative simplicity and public comprehension gained through uniform treatment of the geographic scope of

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42. Id. at ¶ 36,804.06-07.
43. In the original report in Ex Parte No. MC-37, former Division 5 found that the term “municipality” as used in section 203(6)(8) includes only cities, towns (except New England-type townships), villages, and boroughs which are generally recognized as such by appropriate legislative action and which have local self-governments. 46 M.C.C. at 679-81.
44. [1977] 3 Fed. Carr. Rep. (CCH) at ¶ 36,804.06 n.44.
45. Id. at ¶ 36,804.06.
46. Id. at ¶ 36,804.07.
commercial zones and terminal areas are substantial, and that such treatment also has certain functional benefits. Freight forwarders often utilize local cartage firms operating pursuant to the section 203(b)(8) exemption to effectuate collection and delivery services. Disparate areas of operation would force those truckers and forwarders to separate shipments according to distance and would generally interfere with the flexibility of the operations. There could also be some difficulty in monitoring the operations of exempt motor carriers serving nonidentical geographic areas under sections 202(c) and 203(b)(8).

The Commission accorded certain cities special treatment. These cities have individually determined commercial zones which would contract in some manner under the new population-mileage formula. The Commission redrew the zones for these cities along readily identifiable lines, so as to eliminate any unintended contraction of existing commercial zone limits. The Commission also codified zone limits for certain “Twin Cities” and “Consolidated Governments”. Finally, the Commission restored the commercial zone exemption to Los Angeles, St. Louis, Missouri—East St. Louis, Illinois and New York City. It also restored the exemption to New York and New York municipalities which are within the New York City commercial zone, and described an area in New Jersey which will share the limits of the New York City commercial zone on shipments having a prior or subsequent movement by rail or water.

While the size of commercial zones is a matter of economic fact determined without regard to public transportation needs or competitive impact on existing carriers, the evidence submitted in this rulemaking was compelling that zone expansion would be in the public interest. Zone expansion will enhance the ability of motor carriers to adjust more quickly to shipper migration to outlying areas and to the emergence of new suburban markets.

48. St. Louis, Mo.—East St. Louis, Ill.; Kansas City, Mo.—Kansas City, Kans.; Davenport, Iowa, and Rock Island and Moline, Ill.; Minneapolis-St. Paul, Minn.; Bluefield, Va.—W. Va.; Bristol, Va.—Tenn.; Delmar, Del.—Md.; Harrison, Ohio—West Harrison, Ind.; Junction City, Ark.—La.; Texarkana, Ark.—Tex.; Texhoma, Okla.—Tex.; and Union City, Ind.—Ohio. at ¶ 36,804.15.
49. These are cities which have consolidated all, or substantially all, of their governmental and corporate functions with the governmental and corporate functions vested in the counties in which such municipalities are located and have created a new governmental entity combining these functions. Id. at ¶ 36,804.12.
50. Id. at ¶¶ 36,804.08—10. The exemption provided by section 203(b)(8) had previously been removed, either partially or completely, with respect to these cities. See Los Angeles, Calif., Commercial Zone, 3 M.C.C. 248 (1937) and 114 M.C.C. 86 (1971) and Commercial Zones and Terminal Areas, 51 M.C.C. 676 (1950); New York, N.Y., Commercial Zone, 1 M.C.C. 665 (1937) and 2 M.C.C. 191 (1937) and Commercial Zones and Terminal Areas, 53 M.C.C. 451 (1951); and St. Louis, Mo.—East St. Louis, Ill., Commercial Zone, 1 M.C.C. 656 (1937).
51. This area in New Jersey is described as follows: points in New Jersey south of Interstate 495 and New Jersey Highway 3, east of the Garden State Parkway, and north of the Raritan River.
Terminal area expansion will result in more single-line service, thus improving the transportation service being offered the shipping public and benefiting long-haul motor carriers. No doubt some short-haul regulated carriers will suffer some traffic diversion due to increased competition from exempt carriers and loss of some interline traffic to long-haul carriers. This adverse effect is outweighed, however, by the abundant evidence presented by suburban shippers concerning their difficulties in obtaining prompt and dependable motor service.

A prime objective of the plan of federal economic regulation of interstate motor carriage "is to assure that shippers will be provided with a healthy system of motor carriage to which they may resort to get their goods to market." On the basis of the extensive shipper testimony presented in this proceeding, the Commission determined that this objective was not being met under the outdated commercial zone rules and regulations, and that, therefore, the new rules and regulations are warranted.

The new regulations promulgated in Ex Parte No. MC-37 (Sub-No. 26) were scheduled to become effective March 29, 1977. Several interested parties have filed petitions for stay of the effective date and/or reconsideration. These petitions have been assigned high priority and are presently under consideration. A court action involving this proceeding has been filed in the United States Court of Appeals for the Ninth Circuit.

V. HOUSEHOLD GOODS

Almost a million shipments of household goods are handled in interstate commerce by motor common carriers of household goods during the peak season between April 1 and October 31 each year. The transportation of household goods has more impact on the direct consumer than any other category of transportation. No segment of the trucking industry has been more stringently regulated by the Commission than the motor common carriers of household goods. If the needs of the people of this Nation are to be met, further improvements must be effected.

During 1976, without impairing the ability of the household goods carriers to provide adequate, economical, and efficient service, a number of regulations were adopted to assure that the average householder shipping most valued possessions continues to get all the protection this Commission can afford in the transactions with the household goods carriers.

The Commission regulations served March 1, 1976: (1) prohibit motor common carriers of household goods from limiting their liability for loss and damage for so-called "articles of extraordinary value," unless such articles are listed by the shipper on the shipping documents; (2) no longer allow these carriers to exclude liability for loss or damage due to strike, lockouts,

labor disturbances, riots, etc.; and (3) require the carriers, when settling claims for loss and damage, to use the replacement cost of that lost or damaged item as a base to apply a depreciation factor in order to arrive at the current actual value of the item.\(^{55}\)

To further protect the consumer, the Commission in Ex Parte No. MC-19 (Sub-No. 24)\(^{56}\) codified its findings in Ex Parte No. MC-19 (Sub-No. 13).\(^{57}\) This new rule prohibits household goods carriers from collecting any freight charges, including charges for accessorital and terminal service, when shipments of the household goods under the first proviso of the definition of household goods\(^{58}\) are totally lost or destroyed in transit. The new rule also provides that a carrier shall not collect that portion of the published freight charges which corresponds to the percentage of the shipment lost or destroyed.

By order served January 12, 1977, in Practices of Motor Carriers (Advertising),\(^{59}\) the Commission took its first step in its attempt to eliminate deceptive and misleading advertising by carriers holding no authority from this Commission. These carriers often obtain an order for service by promising services which they are not authorized to perform and fail to disclose that they are not responsible for these services. The new regulations require motor common carriers of household goods in interstate or foreign commerce and their agents to disclose, in each advertisement as defined by the Commission, the name and certificate or docket number of the carrier under whose operating authority the potential customer's shipment will be transported.

VI. WATER CARRIERS

During the past year the Commission has continued to expeditiously decide applications for water carrier authority. During this time it has handled applications involving many of the major river systems and coastal areas of the United States. For example, applicants sought authority to serve

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58. "Household goods" are defined as:
(1) personal effects and property used or to be used in a dwelling when a part of the equipment or supply of such dwelling; (2) furniture, fixtures, equipment, and the property of stores, offices, museums, institutions, hospitals, or other establishments, when a part of the stock, equipment, or supply of such stores, offices, museums, institutions, hospitals, or other establishments; and (3) articles, including objects of art, displays, and exhibits, which because of their unusual nature or value require the specialized handling and equipment usually employed in moving household goods.
60. 41 Fed. Reg. 11,326 (1976) (to be codified in 49 C.F.R. § 1056.1(e)).
The Commission has been concerned with the effect of water carrier operations on the environment. In this regard it ordered that an environmental impact statement be prepared before deciding whether to grant an applicant authority to operate a ferry vessel across Long Island Sound between New London, Connecticut and Greenport, New York. Division 1 concluded that the evidence of service failures, involving waits of up to six hours, showed the inability of protestant to meet the needs of the public. It also concluded that applicant's operation would generate sufficient passenger traffic to justify two carriers. Next, the Division considered environmental impact, and concluded that the proposed operations would not have such a deleterious effect as to warrant denial of the application. Because a number of problems had to be resolved before operations could be undertaken, applicant was granted a term certificate for a three-year period, after which it must show it is in fact operating. The proceeding is now pending on petitions for reconsideration.

In another proceeding, the Commission considered five applications for authority on the Columbia-Snake River system. Part of the Snake River is in the Wild and Scenic Rivers system, and several environmental groups registered great concern. After due consideration on the merits, it was determined that no need existed for service over that portion of the Snake River within the Wild and Scenic Rivers system.

The Commission has continued to police the operating rights of authorized water carriers to make sure they are providing service under the rights issued them. The Bureau of Enforcement (now, Bureau of Investigations and Enforcement) brought an action alleging that a carrier was not using its rights to fully meet the transportation needs of the public along its authorized waterway. After hearing, it was determined that the carrier was operating and that its authority was not dormant. Thereupon, the proceeding was dismissed. That type of proceeding tends to induce water carriers to solicit all water traffic available and not merely hold paper rights which do not serve the public's need for sufficient and efficient water transportation services.

68. Western Transportation Co., Extension—Snake River, No. W-303 (Sub-No. 1) (Jan. 5, 1977). This case embraced four other applications.
Finally, the Commission considered an exemption application\(^\text{70}\) where the applicant engaged in construction jobs along the Atlantic and Gulf of Mexico coastlines. The proposed operation was found to be contract carriage under a demise charter and therefore susceptible of being found exempt. But, to be exempt, the proposal must not be in substantial competition with existing authorized service. Inasmuch as the proposed service was one which protestants could individually or jointly provide, the Commission determined that it would be competitive with existing services, and therefore the exemption application was denied.

### VII. Property Brokers

Although applications for licenses as a broker in arranging transportation of property by motor carrier are infrequent, the Commission has recently decided two significant proceedings involving household goods brokers, the first such applications to come before the Commission since 1961.

One applicant, McEvoy,\(^\text{71}\) sought to operate as a broker at New York City arranging the transportation of household goods by motor vehicle between points in the United States. In addition to choosing the proper carrier for transporting household goods, McEvoy promised to provide a service where she would aid small c.o.d. shippers in various facets of their moving experience and provide needed information to them regarding their moves. The Commission indicated its sympathy with the plight of household goods shippers and referred to its past efforts at aiding them through its household goods regulations,\(^\text{72}\) but found that the proposed operation would not be consistent with the public interest and the national transportation policy. The Commission concluded that applicant would choose only household goods carriers willing to pay her fee, rather than the most suitable carriers available. Moreover, applicant's provision of nonbrokerage services was found to interfere with the Commission's efforts to supply household goods shippers with clear and accurate information about their moves\(^\text{73}\) and would obstruct rather than enhance the shipper-carrier relationship. The application was denied.

In the second proceeding,\(^\text{74}\) applicant proposed a service similar to that proposed in McEvoy. The Commission found some carrier support and a more sophisticated organization behind applicant, but the same deficiencies as existed in McEvoy and it denied the application. More specifically, the Commission noted that while applicant intended to aim its service at corporate clients, it would not be precluded from serving any shipper, large

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\(^{71}\) McEvoy Broker Application, 124 M.C.C. 32 (1975).

\(^{72}\) Transportation of Household Goods in Interstate or Foreign Commerce, 49 C.F.R. Part 1056 (1976).

\(^{73}\) Bop 103, Summary of Information for Shippers of Household Goods and Public Advisory No. 4, Lost or Damaged Household Goods.

\(^{74}\) Exec-Van Systems, Inc.—Broker Application, No. MC-130236 (Nov. 9, 1976).
or small, and its operations would thus have a potentially detrimental effect on the implementation of the Commission's household goods regulations.

VIII. GENERAL RULES OF PRACTICE

During the past several years the Commission, pursuant to a recommendation by its Blue Ribbon Staff Panel in 1975, has undertaken an evaluation of its Rules of Practice with the aim of updating, clarifying, and improving them. A number of the Panel's recommendations were the subject of separate consideration prior to the past year, and have been implemented. During the past year, in two such separate rulemaking proceedings, major revisions were made. In Ex Parte No. 55 (Sub-No. 14), the Commission amended certain rules dealing with operating authority to provide that, for publication in the Federal Register, the applicant shall submit with its application a caption summary of the authority sought, that extensions of time for filing pleadings will be granted only in the most extraordinary circumstances, that discovery would be available in modified procedure cases only upon petition, and that verified statements in modified procedure cases under Special Rule 247 will have to comply with a specified format. At the same time, the Commission proposed additional revisions of Rule 247 to provide that the due dates for filing verified statements would be automatically fixed to occur from the date of the publication in the Federal Register.

In Ex Parte No. 55 (Sub-No. 19), the Commission revised the content requirements and page limitations on petitions for reconsideration. All petitions for review filed after December 29, 1976, require a three-page preface setting forth the specifications of error, relief sought, and the argument in summary form. The preface must be a succinct, but accurate and clear, condensation of the matters raised on petition. It is suggested that such preface precede all other matter presented in the petition. In addition, the Commission imposed a ten-page limitation (except in extraordinary circumstances and upon leave granted) upon petitions for reconsideration in cases wherein a division has already considered either exceptions or a prior petition for appellate review.

In addition, the Commission appointed a Special Staff Committee on Rules to undertake a comprehensive review of the entire body of the Rules of Practice. Revised Rules of Practice were compiled, designed to clarify and simplify existing rules and make Commission procedure more efficient. The rules were set forth in a Notice of Proposed Rulemaking.

75. 125 M.C.C. 790 (1976). For a discussion of this proceeding, see article p. 37 infra.
77. 125 M.C.C. 790 (1976).
78. Subsequently, the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, charged the Commission with a duty to review and revise its Rules of Practice in the rail area.
published November 8, 1976, and written comments from the general public were invited. Some thirty-eight comments from a variety of parties, including the Motor Carrier Lawyers Association, were submitted. The proposed revisions were, in the main, well received. The major areas of inquiry and criticism concerned computation methods and page and time limitations, the appearance of employee-representatives in the dual capacity of advocate and witness, protests against publications, discovery, bench decisions, interventions, oral argument in lieu of briefs, administrative appeal from first decisions of a division or the Commission, the number of counsel per side at oral argument, and compliance with the Railroad Revitalization and Regulatory Reform Act of 1976.

The Commission, on March 4, 1977, issued an interim report and order, generally reaffirming the proposed rules, but with important revisions, particularly with respect to the timeliness of pleadings, dual participation of employee-representatives, and the powers of Administrative Law Judges to dismiss applications. Further comments by parties to the rulemaking have been permitted.

IX. FITNESS FLAGGING PROCEDURES

As a result of certain developments in the area of fitness flagging procedures, notably a special internal staff committee study completed in July 1975, the findings of the Commission's Blue Ribbon Staff Report, and the decisions in North American Van Lines, Inc. v. ICC and North American Van Lines, Inc. v. United States, the Commission instituted a rulemaking procedure, in Ex Parte No. 55 (Sub-No. 23), for the purposes of adopting appropriate procedures for the determination of the circumstances that would raise a flagging issue and of setting forth standards to be applied in determining whether a fitness flag is to be raised. Notice of the proposed rulemaking was published in the Federal Register of August 9, 1976. The proposed rules were adopted by the Commission on an interim basis pending final resolution of the rulemaking proceeding.

Briefly, under the new procedures, the Commission's Bureau of Investigations and Enforcement (BIE) may no longer intervene in application proceedings on its own; such participation shall be only by order of the Commission or the appropriate Division, upon request of BIE, and based upon a determination as to whether its participation, if approved, could result in a negative fitness finding. In the order approving such participation, or in a separate "show cause" order, procedures would be set forth affording applicant an opportunity to show cause why its other pending applications should not be flagged (i.e., authority not issued pending resolution of the

80. [1977] 3 FED. CARR. REP. (CCH) ¶ 36,817.
82. 412 F. Supp. 782 (N.D. Ind. 1976).
83. 125 M.C.C. 739 (1976).
fitness issue in the selected application proceeding). The order would also notify applicant in general of the statutes, requirements, rules, and regulations allegedly violated and of the general substance of the allegations made and would identify all pending applications (called designated applications) in which flagging is to be considered. BIE or, on safety matters, the Department of Transportation (DOT) would then be required to advise applicant in writing of all matters of fact and law to be asserted with sufficient particularity to make clear the violations alleged and the nexus alleged to exist between those violations and other pending applications as to which flagging is being considered. Applicant would be afforded an opportunity to submit written representations to show why all or any of its pending designated applications should not be flagged, and BIE or DOT would have an opportunity to respond. The issuance of the order would temporarily bar issuance or authority or consummation as to any designated application.

Within 75 days of issuance of the show cause order, the Commission is required to issue its order determining whether flagging is warranted. Failure of an applicant to respond to the show cause order results in a flagging of its pending applications, notice of which will be formally given. On the other hand, failure of the Commission to issue a flagging order within the prescribed 75-day period results in the discontinuance of the flagging proceeding. The show cause order is not subject to a petition for reconsideration within the Commission. The flagging order is subject to a petition for such review, and, if denied, is appealable to the courts.

New applications during this time by the same applicant would by notice be added to the list of designated applications in which the question of flagging has been raised in the show cause proceeding. If the show cause proceeding has already been resolved to flag pending applications, applicant would be required to petition the Commission to have a new application excluded from flagging (failure to petition shall be construed as a waiver). An administratively final adverse fitness finding in the selected application shall result in denial of the application in the selected proceeding and all designated pending flagged applications.

In subsequently filed applications, the applicant will be expected (and required) to establish its fitness as in any ordinary proceeding, except that the Commission may take official notice of the prior adverse fitness finding.

By report and order of March 7, 1977, the Commission adopted the proposed rules, with minor revisions.

During the period when the rules were in effect on an interim basis, show cause orders were issued affecting some twenty-five carriers, resulting in the flagging of seventeen such carriers. Five flagging proceedings were discontinued, and three are pending. In a number of cases, particular applications were removed from flagging for good cause shown. The Com-

mission has met its own deadline in each proceeding, and, in only one case did an applicant fail to respond. Our experience thus far indicates that these new procedures are efficient.

X. CONTRACT CARRIERS

Over the past year the Commission has further clarified the criteria for qualification as a contract carrier. In one proceeding,66 Division 1 considered all of the pending applications of Bass Transportation Company. Some of these had previously been the subject of an order or report determining that a grant of authority would put Bass in the position of serving more than a limited number of persons.

The report discussed the historical background of section 203(a)(15) of the Interstate Commerce Act as it is now phrased. It noted that while Commission policy generally has been to consider service for more than six or eight persons as service for more than a “limited number of persons,” this is not a rigid rule, and the legislative and historical background suggests that the guiding purpose in determining what constitutes a “limited number of persons” in a given situation is the policy of keeping contract carriage limited in nature. The Division further inferred from the legislative history that the concern which prompted the limited-number-of-persons restriction was not simply contract carriers holding contracts with too many persons, but their being able to provide service for too many entities and thus approximating the service of a common carrier.

This concern, the Division reasoned, renders it both appropriate and necessary to consider the size and organizational structure of conglomerate shippers where divisions and subsidiaries maintain independent operations and may be the actual parties receiving transportation benefits. The report stated that divisions and subsidiaries could be considered as “persons” under the definition in section 203(a)(1) of the Act, and that the Commission is under no obligation to consider the parent rather than one of its divisions or subsidiaries as the proper “person” to be considered in evaluating whether a carrier’s operations would be for a limited number of persons.67

Furthermore, the decision in Administrative Ruling No. 76,88 by defining a shipper as the entity which controls the carrier selection and the routing of shipments, precludes the Commission from automatically counting a conglomerate parent as the contracting person. Even the inability of a division or subsidiary to legally contract in a given situation would not change this viewpoint, since the parent could contract on its behalf and the division or subsidiary could still be considered the “person” being served.

As a further corollary of the principle that the “six or eight persons” rule is not rigid, the report stated that the organizational size of a person or

67. Id. at 243.
68. 117 M.C.C. 433 (1972).
Where a need for service was found, the proceedings were held open. The number of conglomerates or larger shippers which a contract carrier serves would tend to reduce the total number of persons it would be permitted to serve.

The Division then examined the organizational structure of each of the shippers Bass served or sought to serve and found that many more entities were involved than was apparent on the face of the existing permits. This was considered to be more than a limited number of persons, and the pending applications were treated as ones for common carrier authority. Where a need for service was found, the proceedings were held open pending final disposition of Bass’ applications for conversion of its existing contract carrier authority.90

The decision in Fast Motor Service, Inc., Extension—Metal Containers,91 also aided in clarifying the "limited number of persons" criterion. Fast Motor Service held authority to serve seven shippers or persons, five of which were in the container industry and used applicant’s service to ship metal and glass containers. Applicant sought to serve an additional container shipper. Division 1’s report noted the specialized service required by shippers in the container industry. It stated the principle that where a contract carrier provides little in the way of a specialized service, it must show a real devotion to a very limited number of selected shippers. In other words, the number of shippers which a contract carrier would be permitted to serve will ordinarily diminish as the degree of specialization in physical services diminishes. In this particular case, the fact that most of the shippers served had similar requirements and were furnished a similar specialized service acted in favor of an increase in the number of persons applicant could serve.

In Conalco Contract Carrier, Inc., Contract Carrier Application,92 Conalco, a wholly-owned subsidiary of Consolidated Aluminum Corporation, proposed to conduct contract carrier operations previously performed by Consolidated’s private fleet. It planned to make these operations more feasible by serving a second shipper, American Olean Tile Company, in backhaul service. Division 1, in its report, rejected the arguments of protestants and other parties that to allow such a conversion from private to contract carriage would be contrary to the Commission’s duty to protect regulated public carriers. The Division stated that it would not automatically deny such a conversion on policy grounds simply because the private carrier operations are extensive and the reason for the conversion is to reduce empty

89. 125 M.C.C. at 245.
90. Id. at 258-59.
91. 125 M.C.C. 1 (1976).
92. 125 M.C.C. 361 (1976).
backhauls by serving an additional, unrelated contracting shipper. These factors would not be relevant from a policy standpoint as long as the transportation proposal is bona fide and the applicant is actually offering to become a regulated contract carrier.

The report went on to determine whether Conalco would qualify as a contract carrier under the alternative criteria of section 203(a)(15). It found that Conalco would not be assigning equipment to the exclusive use of each supporting shipper under the meaning of that section, because the trailers were to float throughout the system to be used by whichever shipper needed them. In particular, it appeared that in some situations Olean would be dependent for equipment on the termination of vehicles in the area delivering shipments for Consolidated. Such a situation would violate the requirement that a contracting shipper be assigned equipment to meet its demonstrated needs, be able to view the equipment as its own, and be free from competing for equipment with other shippers. It also indicated that the backhaul service for Consolidated would interfere with the necessary assignment of vehicles to Olean. Comparison of the factual situation in this proceeding with those in other contract carrier cases involving reciprocal backhauls demonstrated that the evidence presented by Conalco was not sufficiently specific and detailed to provide assurance that the movements for each shipper would not have a detrimental or delaying effect on the availability of vehicles assigned to meet the transportation requirements of the other.

In examining whether Conalco proposed a service designed to meet the distinct needs of each supporting shipper, the Division noted that Consolidated's desire to reduce its empty movements in private carriage by having applicant transport Olean's traffic in backhaul movements was the evident need expressed by Consolidated and the primary purpose for both the filing of the application and the proposal to serve Olean. The Division stated that the reduction of a shipper's empty backhauls could not per se be considered as meeting the "distinct need" test, since the statute contemplates the furnishing of a transportation service designed to meet the distinct needs of the customer receiving the service, whereas here Conalco sought to meet one shipper's need by furnishing a transportation service not to it but to another. In addition, since Conalco would now be bearing the transportation responsibilities rather than Consolidated's private fleet, the reduction of deadhead miles would be a benefit accruing to Conalco and meeting its needs rather than those of Consolidated. Nevertheless, the Division felt that the predominance of the backhaul issue would not negate other legitimate expressed needs of the individual shippers. Since such

93. Id. at 365-66.
94. Id. at 368.
95. Id. at 369.
96. Id. at 370.
97. Id.
needs existed in this proceeding, and since Conalco would be providing a service designated to meet them, Conalco qualified as a contract carrier under this criterion.

XI. OTHER IMPORTANT OPERATING RIGHTS CASES

The Commission has rendered a number of significant decisions in the operating rights area. During the past year, significant developments have taken place with regard to shipper-carrier affiliation. Division 1, in denying the application in Stanley Amsden Common Carrier Application, reaffirmed the Commission’s policy of withholding grants of operating authority to individuals or firms engaged in a principal business other than transportation. It was determined that the relationship between applicant’s lumber production business and his proposed for-hire transportation, rather than being one arising from common control or management, was such that applicant would have a clear competitive advantage over other transportation firms because of the large volume of traffic available from his mill. This potential for preferential treatment would be at the disadvantage of competing lumber mill operations, none of which supported the application.

A portion of the authority sought in Aycock, Inc., Common Carrier Application, was similarly denied because applicant, an installation contractor, failed to demonstrate that adequate provisions or special circumstances exist for safeguarding against preferential treatment between it and its commonly-controlled shipper. With regard to the remainder of the application, the Division found that applicant’s proposed heavy-hauler type operation between points in twenty-two states constituted private carriage within the scope, and in the furtherance, of a primary business enterprise other than transportation. That part of the application was accordingly dismissed. In applying the primary business test, the Division observed that ninety percent of the business consisted of activities other than over-the-road transportation and that the majority of the capital investment was devoted to service other than transportation. Also considered important were Aycock’s holding itself out as an installation contractor and limiting its bidding to contracts requiring a minimum of transportation.

In Shippers Truck Service, Inc.—19 States, the issue was whether the Administrative Law Judge’s consideration of applicant’s minority ownership as a determining factor in the public convenience and necessity was appropriate. In denying the application, the Commission concluded that the consideration of racial factors was not consistent with recent court decisions and prior Commission rulings. Specifically, the Commission cited NAACP v. Federal Power Commission where the Supreme Court held that the FPC's

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98. 124 M.C.C. 536 (1976).
99. 124 M.C.C. 536 (1976).
100. 125 M.C.C. 323 (1976).
statutory obligation to act in the “public interest” was intended only to relate to the Commission’s supervision of the production and sale of electric energy and natural gas and was not a directive to consider racial factors and other extraneous considerations unrelated to its fundamental jurisdiction. The Commission also referred to the decision of the United States Court of Appeals for the Sixth Circuit in O.J. Transport Co. v. United States,102 in which the court concluded that the Interstate Commerce Commission was not statutorily required to “consider minority ownership as a separate factor in determining public convenience and necessity . . . .”103

In light of these decisions, the Commission reaffirmed its view that “our prior policy of considering racial and ethnic factors only when they relate to the nature of the transportation service proposed by an applicant, and the public’s need for that service, is correct.”104 As an example of that policy, the Commission referred to grants of authority where the supporting shippers or public users were members of an ethnic group requiring a carrier with knowledge of their language.

The Commission strongly rejected the argument that racial or ethnic factors can never be pertinent in determining public convenience and necessity. It concluded, however, that applicant had not related its service proposal to the needs of the public but had merely argued for a grant of authority predicated on the race of applicant’s owner. And it ruled that an improper basis for a grant of authority. It also concluded that the extensive nature of applicant’s illegal operations, its persistence in operating unlawfully, and the lack of mitigating circumstances made it unlikely that applicant would operate in the future in compliance with the Interstate Commerce Act and the applicable federal rules and regulations and therefore rendered it unfit.

In Kissick Truck Lines, Inc., Ext.—Iron and Steel,105 Division 1 found applicant unfit on the basis of flagrant and persistent misconduct in disregarding its certificates and the provisions of the Act immediately following civil forfeiture claims made against it for similar misconduct. Applicant, a motor common carrier whose officers had considerable experience in the motor transportation industry, had been operating under its pertinent certificate for approximately thirteen years. It claimed that unlawful operations conducted subsequent to settlement of the civil forfeiture claims were undertaken on advice of counsel.

Advice of counsel, even if precisely followed, is not an absolute defense to a violation of the Act. But Division 1 did recognize that when a party which has erred seeks, in good faith, the guidance of capable counsel who, after evaluating all the facts fully and honestly placed before him, gives rea-

102. 536 F.2d 126 (6th Cir. 1976). For a discussion of this case, see p. 211 infra.
103. 536 F.2d at 133.
104. 125 M.C.C. at 330.
sonable advice for the future, and there is significant improvement in con-
duct, the party ought not be viewed as having such a proclivity for wrongdoing
that subsequent transgressions be cast in the worst possible light. In the
considered proceeding, however, the record was silent as to whether appli-
cant sought, in good faith, such advice. Applicant's unsubstantiated claim
could not serve to militate against a finding of unfitness under the facts and
circumstances as developed in the record.

In a consolidated proceeding entitled Tri-State Motor Transit Co.,
four applicants sought common carrier authority to transport radioactive and
non-radioactive waste materials requiring special disposition for ecological
purposes, and containers and equipment used in the transportation or
disposition of such commodities, between six specified disposal facilities on
the one hand, and, on the other, points in the United States, subject to an
"originating at—destined to" restriction. Two motor common carriers op-
posed the applications. The Administrative Law Judge recommended that
the applications be denied. On exceptions, Division 1 reversed the decision.

The Division concluded that protestants were unable to provide the
required service and that, based on the nature of the involved commodities,
there was a need for the services of all four applicants. The supporting
shipper required carriers with specialized knowledge, radiation detection
equipment and protection gear, and specially trained personnel. The Divi-
sion further concluded that size-and-weight authority was not sufficient to
handle the majority of the involved commodities, even though most of them
were transported in large containers.

In Builders Transport, Inc.—Particleboard, the petitioner sought a
declaratory order which would affirmatively find that motor carrier authority
to transport "lumber" and "lumber products" embraces authority to trans-
port particleboard. In the alternative, petitioner requested that appropriate
proceedings be instituted for the purpose of enlarging lumber haulers' 
authority based upon their past "good faith" transportation of particleboard.
In opposing the declaratory relief sought, protestant maintained that it has
long been recognized that the commodity description "lumber" or "lumber
products" does not include particleboard and, consequently, there could
not have been a good faith transportation of particleboard by petitioner.

In denying the request, Division 1, after analyzing the supporting evi-
dence submitted by one shipper and two motor carriers operating in the
Northwest, found controlling pertinent Commission's decisions which in the
past interpreted the involved commodities. The Division concluded that
since these decisions involved analogous facts, particleboard may not be
transported pursuant to "lumber" authority. It was further found that, al-

106. 125 M.C.C. 343 (1976).
though particleboard is included in the description "wood products", it is not included within "lumber products" authority, since it is not considered to be a derivative of lumber. Petitioners' request for alternative relief was denied because of the lack of appropriate application and public support for extension of authority.
I. INTRODUCTION

Delay is preferable to error.

Thomas Jefferson

It is essential to the triumph of reform that it should never succeed.

William Hazlitt

Of all the criticisms leveled at federal administrative agencies, perhaps the most persistent and serious has been that of unnecessary delay in the regulatory process. The reason is that administrative agencies were created to produce expeditious determinations of matters that courts and legislatures could not effectively handle. The problem remains relevant.
today. Indeed, since the passage of the Administrative Procedure Act, numerous suggestions for reform of various aspects of the administrative process have been offered. Success, however, has been spotty. The stubborn persistence of the problem, despite repeated attempts to find solutions, indicates that unnecessary delay is not easily remedied. Proposals, either in announced policy shifts or in formal decision-making proceedings, often meet with heavy opposition from persons who feel that their “ox is being gored.” Just as often the opposition is institutional, coming from within agencies that are fearful of “tinkering” with procedures.

Quite recently, the Interstate Commerce Commission wrestled with the problem and the result appears to have been a draw. In 1975, the Commission’s “Blue Ribbon Staff Panel,” an internal staff study committee, concluded that the Commission should take immediate steps to improve case processing. The proposals, published in the Federal Register on November 7, 1975, were designed as part of an ongoing process of procedural reform to improve the Commission’s operations and to reduce the time required to process applications for authority to conduct operations as common and contract carriers of property and passengers by motor vehicle, as brokers, as water carriers, and as freight forwarders. Foremost among these proposals was the “case-in-chief” proposition, designed to reduce delay by requiring applicants for operating authority to submit all their evidence at the time the application is filed. This article will focus on the issues raised in considering these procedural reforms.

II. BACKGROUND

A. EARLY PROCEDURE

The ICC, the first established federal administrative agency, quickly developed an affinity for administrative oral hearings. The impetus was provided by a succession of statutes conferring rulemaking authority upon

6. The proposals were enumerated under the title: Ex Parte No. 55 (Sub-No. 14), Revision of Application Forms For Operating Authority and Amendments to General Rules of Practice, 40 Fed. Reg. 52058 (1975).
13. 125 M.C.C. at 793.
the Commission but providing that the regulations should issue only "after hearing" or "after full hearing." This was coupled with a lack of more specific Congressional guidance and buttressed by a certain confusion in early judicial pronouncements directed primarily at what were perceived as customary administrative determinations.\textsuperscript{15} Despite the fact that the Commission was not required to observe judicial procedure,\textsuperscript{16} the courts came to view the trial examiners as jurists who heard and evaluated evidence and arguments.\textsuperscript{17} This procedural system worked reasonably well until passage of the Motor Carrier Act of 1935.\textsuperscript{18} Thereafter, in steadily rising numbers, the volume of motor carrier applications began to build until, in 1966, they constituted eighty-five percent of the Commission's formal case docket. At that point case filings exceeded dispositions so that the pending docket of this category of applications totaled more than 6,500.

\textbf{B. Modified Procedure}

On May 3, 1966, the ICC radically altered its procedures to reduce the number of applications heard orally\textsuperscript{19} by the establishment of a "modified procedure." This procedure was to be followed in proceedings where the issues presented were well defined or where the matters involved were not of sufficient moment or complexity to justify the expense of an oral hearing.\textsuperscript{20}

\begin{itemize}
  \item 15. "Undoubtedly where life and liberty are involved due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved." Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708 (1884).
  \item 18. 49 Stat. 543 (1935).
  \item 19. \textit{See} General Policy Statement Concerning Motor Carrier Licensing Procedures, 31 Fed. Reg. 6600 (1966). The rationale given for the establishment of the modified procedure was stated succinctly: "For the regulated surface transportation industry to continue to thrive, to grow, and to keep pace with the expanding national economy, the mechanics of regulation must be such that administrative decisions are not only fair and impartial, but are rendered with reasonable dispatch and efficiency." Id. The Commission then admitted that operating under its present procedures, it was no longer able to deal promptly and efficiently with motor carrier application proceedings.
  \item 20. Theatres Service Co. Extension—Duluth, Ga., 113 M.C.C. 744, 746 (1971). Subsequent to the establishment of the modified procedure the courts recognized the practical necessity of handling many applications for operating authority under that procedure and found
\end{itemize}
It provided simply for an adversary hearing wherein the parties would be required to submit their evidence in the form of written verified statements without the right (or need) of cross-examination. Approximately eighty-eight percent of all operating rights applications are now handled pursuant to following the modified procedure:

1. an application for operating authority, filed at the Commission, is published in the *Federal Register*,
2. within thirty days from such publication, notices of protest to the granting of the authority (normally made by carriers holding authority wholly or partially subsumed by the application) are due,
3. when the thirty-day period has ended, the application is designated for oral hearing (requiring a notice of the time and place of the hearing), or for modified procedure (requiring a formal designation order),
4. a designation order is served listing the dates within which the applicant's initial verified statement is due, protestants' verified statements are due, and applicant's rebuttal is due,
5. the applicant files its verified statement,
6. protestants file their verified statements,
7. the applicant files its rebuttal,
8. the record is closed and the proceeding is submitted to an employee review board for decision,
9. the review board serves a decision (in the form of an order or a report and order),
10. thereafter, an appellate procedure may follow.

The filing of verified statements may be delayed because of extensions granted upon sufficiently demonstrated good cause, and various motions may be filed during steps 4 through 8, but essentially all proceedings designated for modified procedure are processed in this way.21

As of November 1975, motor carrier applications alone constituted 78.2 percent of the Commission's formal case docket and had increased between 1973 and 1975 from 6,197 new filings to 7,155 new filings. In 1976, there were 6,717 new filings of motor carrier applications constituting 74.5 percent of the Commission's formal case docket leaving a pending motor carrier application case docket of 5,507 proceedings.22 Actual average processing time of modified procedure cases can be gleaned from charts 1 and 2, *infra.*23

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22. Information was supplied by the ICC, Office of Proceedings, Section of Case Control and Information. See 40 Fed. Reg. 52058 (1975).
23. All charts are from 125 M.C.C. 790.
### Chart 1

**Contested modified procedure time survey—to submittal date**

(Cases filed after October 1, 1974, and submitted for decision before April 1, 1976)

<table>
<thead>
<tr>
<th>Date application filed to application published in Federal Register.</th>
<th>14 days</th>
<th>21 days</th>
<th>28 days</th>
<th>35 days</th>
<th>42 days</th>
<th>49 days</th>
<th>56 days</th>
<th>63 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>cases</td>
<td>4</td>
<td>88</td>
<td>258</td>
<td>133</td>
<td>41</td>
<td>9</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date designation order entered after days of publication in Federal Register.</th>
<th>15 days</th>
<th>30 days</th>
<th>45 days</th>
<th>60 days</th>
<th>75 days</th>
<th>90 days</th>
<th>105 days</th>
<th>120 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>cases</td>
<td>2</td>
<td>205</td>
<td>171</td>
<td>94</td>
<td>17</td>
<td>51</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Extension request numbers and days granted per request.</th>
<th>0 requests</th>
<th>15-day requests</th>
<th>30-day requests</th>
<th>45-day requests</th>
<th>60-day requests</th>
<th>75-day requests</th>
<th>90-day requests</th>
<th>150-day requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>cases</td>
<td>168</td>
<td>265</td>
<td>216</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date after application filed that evidence is in and case is ready for decision (submittal date).</th>
<th>5 mos.</th>
<th>6 mos.</th>
<th>7 mos.</th>
<th>8 mos.</th>
<th>9 mos.</th>
<th>10 mos.</th>
<th>11 mos.</th>
<th>12 mos.</th>
<th>13 mos.</th>
<th>14 mos.</th>
<th>15 mos.</th>
<th>16 mos.</th>
<th>17 mos.</th>
</tr>
</thead>
<tbody>
<tr>
<td>cases</td>
<td>2</td>
<td>16</td>
<td>120</td>
<td>175</td>
<td>130</td>
<td>64</td>
<td>23</td>
<td>5</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

**Summary of random study**

1. Number of cases randomly surveyed ........................................................................................................... 540
2. Average number of days from filing of application to publication in Federal Register ........................................ 30.3
3. Average number of days from date of publication in Federal Register to entry (not service) date of order designating proceeding for handling under modified procedure ................................................................. 77
4. Service date of such orders .......................................................................................................................... 93
5. Number of cases containing extension requests ............................................................................................. 372
6. Number of extension requests ........................................................................................................................ 490
7. Percentage of cases containing extension requests .......................................................................................... 68.9
8. Average number of days extension in cases with granted extension ................................................................. 22.6
9. Number of months/days for case to be ready for decision (submittal date) ..................................................... 8.41/252
III. THE PROPOSALS

All of the proposals presented in the ICC case-in-chief proceeding were directed towards the elimination of certain unnecessary delays. Charts 1 and 2 indicate the stages in processing where some of these delays occur. The essence of the proposals was the case-in-chief concept, requiring applicants for operating authority to submit with their applications verified statements containing all the evidence upon which they intend to rely. Under the proposed rules, failure to file such statements at the same time as the application would have resulted in summary dismissal of the application for want of prosecution. This proposed requirement was designed to encourage more diligence in the preparation of applications by compelling the carrier to scrutinize more closely its own capabilities and the actual needs of the public witnesses supporting its proposed operation before the carrier initiated any action on the Commission's docket.

Another major proposed change in existing procedures was the mandatory requirement that verified statements submitted by any party to the proceeding be prepared in accordance with a format specifically described in the rules. The proposal required each element of information to be clearly identified, titled, and placed in a separately numbered paragraph.24 Evidence which was lengthy and susceptible to being listed or similarly compiled could be presented in an appendix clearly identified as such within the statement format. The proposed rule provided that other information not within a category specified in the rules as well as legal argument might appear as final portions of the statement.

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24. The requirements for an applicant's initial evidentiary presentation are contained in Novak Contract Carrier Application, 103 M.C.C. 555, 558 (1967). In order for the Commission to rationally fashion a grant of operating authority, those public witnesses supporting the application must identify clearly the commodities they ship or receive, the points to or from which their traffic moves, the volume of freight they would tender to applicant, the transportation services now used for moving their traffic, and any deficiencies in existing service.
Two other proposals dealt with discovery and extensions. The proposal on discovery would exempt application cases designated for handling under the modified procedure from the provisions of rules 57-67 of the Commission's General Rules of Practice and would require the filing of a petition to the Commission to gain discovery (upon a showing of good cause) in such cases. The final proposal would tighten the requirements for an extension of time to a showing of "most extraordinary circumstances" (not to include vacations, scheduling problems, and occurrences happening in the normal course of any business).

Case processing under the proposals would have worked as follows:

1. an application for operating authority (including all of applicant's opening evidence) would be published in the Federal Register (including a list of those parties supporting the authority sought),
2. within thirty days from publication, protests would be due,
3. within fifteen days of the expiration of the protest period, applicant would be required to serve copies of its verified statements on all protestants,
4. at the end of this fifteen-day period, the Commission would designate the application for handling under the modified procedure or oral hearing,
5. protestants would serve their verified statements on applicant within the time fixed by the designation order,
6. applicant's rebuttal would be served on protestants within the time fixed by the designation order, and the procedure would thereafter remain unchanged.

IV. The Issues

The overwhelming volume of comment received by the ICC in the proceeding amending the General Rules of Practice dealt with the case-in-chief proposition, and the responses received were virtually united in condemnation. Two basic lines of attack were employed. The first was a legal argument—the case-in-chief proposal was criticized as a denial of fundamental procedural due process; second was an administrative argument—the comments denounced the proposal as infeasible. Due process, it was claimed, under section 17(3) of the Interstate Commerce Act, requires

26. A tightening of the requirements for a grant of an extension request was suggested as far back as 1960, Zoll, Are Practitioners Responsible For Avoidable Delays In Commission Proceedings?, 28 ICC Prac. J. 16 (1960), and was implemented by Notice of General Policy-Operating Rights-Extensions of Time, 41 Fed. Reg. 8454 (1976).
27. See note 24 supra.
28. Comments received by the ICC from various motor carriers, shippers, and carrier legal representatives are discussed in more detail in Ex Parte No. 55 (Sub-No. 14), 125 M.C.C. 790 (1976).
conformity with rules applicable in courts of the United States with respect to the general rules and orders of the Commission and should, by implication and precedent, require conformity to Commission proceedings themselves. Consequently, the inability of an applicant in its initial presentation to refute allegations made by a protestant in its notice of protest was said to constitute a denial of procedural due process contrary to the fundamental judicial policy of not compelling a party to present its evidence and be bound thereby before the issues are joined. Further, it was argued, section 554 of the Administrative Procedure Act requires that “prompt notice of issues controverted in fact or law” be given an applicant, which would not be possible where an applicant’s entire affirmative presentation had to be made before potential opposition was known.

The thrust of the comments concerning the feasibility of the case-in-chief revolved around a question: How can an applicant, in light of the proposed procedural revision, existing application requirements, and the practical limitations involved, thoroughly and inexpensively prepare its case-in-chief without knowledge of possible opposing interests? The question directly posed certain possible problems to be faced by applicants.

The Commission may . . . make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it . . . including forms of notices and the service thereof, which shall conform as nearly as may be, to those in use in the courts of the United States.

30. In the orderly course of proceeding, the current Commission rule relevant in the modified procedure requires that the party whose responsibility it is to go forward with the evidence (in this case, an applicant) should bring out the full strength of its proof in its initial presentation. General Rules of Practice, Rule 51, 49 C.F.R. § 1100.51 (1975). While an applicant which has concluded its case-in-chief has the right, subsequently, to introduce competent evidence to rebut evidence of new facts brought out in the verified statement of a protestant, the general rule with respect to an applicant's rebuttal statement will exclude all evidence which was previously available to applicant (including evidence of deficiencies in existing service) or which has not been made necessary by a protestant's verified statement. See Kerr Contract Carriage, Inc.—Contr. Car. Appl., 115 M.C.C. 862, 866-67 (1972) and Major Conversion Application, 100 M.C.C. 410, 411 (1966). See also Introduction of New Evidence in Rebuttal Statements Filed Under Modified Procedure, 40 Fed. Reg. 42810 (1975).

31. Under existing ICC procedure the issues were said to be joined when notices of protest to an application were filed. Thereafter an applicant in its initial evidentiary presentation was afforded opportunity to respond to issues raised by such notices of protest. This opportunity, it was argued, would be lost under the case-in-chief procedure.

32. 5 U.S.C. § 554 (1970). The Act provides in relevant part:

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing,
(2) the legal authority and jurisdiction under which the hearing is to be held, and
(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law . . .

It was argued that inasmuch as the procedure involved in applications for operating authority has been held to be adjudicatory in nature, Riss & Co. v. United States, 341 U.S. 907 (1951), rev'g per curiam, 96 F. Supp. 452 (W.D. Mo. 1950), it is subject to the notice provisions of the Administrative Procedure Act § 554, which have been held to be fundamental to due process of law. See Bell Lines, Inc. v. United States, 263 F. Supp. 40, 46 (S.D.W. Va. 1967).

33. 125 M.C.C. at 799.
under the case-in-chief proposal and implied others. One argument raised the problem of the identification of all possible existing services, especially because of the fact that, as a practical matter, a supporting witness' knowledge of existing service is limited to service used or offered in the past and in view of the claim that neither ICC field offices nor current transportation directories could supply complete information. Another argument warned that the increased expense to be borne by an applicant under the proposal would thereby strengthen the anticompetitive barriers to entry.

The relative paucity of commentary received by the Commission regarding the other major proposals (format, discovery, and extensions) demonstrates the overwhelming concern of the transportation industry and bar for the effects of the case-in-chief proposal. The reader of the record in the proceeding can sense that the great majority of commentary by interested citizens accepted these other proposals as tolerable. The format proposal, it was feared, would lead to the proliferation of canned forms and was decried as cumbersome and inefficient in view of the varied types and problems raised in each application. The discovery proposal was supported by a majority of commentators who urged that the discretionary discovery rules contained in the Commission's General Rules of Practice were worthless; other commentators urged retention of the discretionary discovery procedure for a sufficient trial period. The proposal on extensions was criticized on both legal and administrative grounds.

V. THE ISSUES RESOLVED

The ICC's decision reflects a consideration of the consequences of using a particular line of reasoning in the decision-making process to avoid future problems. In rejecting the case-in-chief proposal, the Commission could have avoided due process issues raised by simply finding the proposal infeasible; but significantly it chose to meet the due process issues in

34. Under the Novak criteria, see note 23 supra, the verified statements in support of an application must contain a thorough assessment of existing service and any deficiencies found to exist in such service. Without the facilities to discover all possible existing service, it was argued, an applicant would place itself in jeopardy of being confronted with surprise protagonists after it had introduced its evidence, and as to which it could not, in its rebuttal, introduce detailed deficiency evidence. See also note 30 supra.

35. Expenses could be increased, for instance, by seeking additional support for an application to heighten the possibility of a grant or by obtaining more experienced representation.

36. See note 27 supra.

37. 49 C.F.R. §§ 1100.57-67 (1974). The rules as originally written permit certain forms of discovery to be utilized for applications heard orally or handled pursuant to the modified procedure, without petitioning the Commission for permission.


39. 125 M.C.C. at 796.

40. Id. at 795-96. Some of the reasons stated include views that the need for extensions was an unavoidable part of doing business, that the Commission is often the cause of requests for extensions due to the unpredictability of when decisions will be reached, that the proposal would work a hardship on small practitioners or firms, and that in the courts of law "good cause" is the prevailing standard.
order to signal the public that while certain specific proposed procedural reforms may not be accepted, the process of reforming the Commission's rules of procedure would be a continuing one. 41

In contradicting the position that section 17(3) of the Interstate Commerce Act 42 requires conformity with United States court practice for proceedings before the Commission, the report in this proceeding noted that the same courts have dismissed this argument in clear language. 43 And to pave the way for future possible procedural reforms, the report went on to note:

Of course, the principles of fair play inhere in the laws under which the Commission operates. They require that interested parties be afforded

41 Id. at 793.
42 49 U.S.C. § 17(3) (1970). This section further directs the Commission to "conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice."
43 The Supreme Court has recognized the differences of function between courts and administrative agencies. For instance, in FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), the Court remarked:

"Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those... [footnote omitted] Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims. ... Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation. ... These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts... [B]odies like the Interstate Commerce Commission... should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties [footnote omitted]."

Id. at 142-43.

Twenty-five years later, in construing a provision of the Communications Act of 1934, 47 U.S.C. § 154(j) (1958 ed.), (virtually identical to the language of § 17(3) of the Interstate Commerce Act, 49 U.S.C. § 17(3) (1970) empowering the Federal Communications Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"), the Court confirmed this position:

This Court has interpreted that provision as "explicitly and by implication" delegating to the Commission power to resolve "subordinate questions of procedure... [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings and similar questions." Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 138. The statute does not merely confer power to promulgate rules generally applicable to all Commission proceedings, cf. Federal Communications Comm'n v. WJR, 337 U.S. 265, 282; it also delegates broad discretion to prescribe rules for specific investigations, cf. Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 321-322 and to make ad hoc procedural rulings in specific instances [citation omitted]. ... Congress has "left largely to its judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate" the proper dispatch of its business and the ends of justice [citation omitted].


The procedures designed to achieve due process requirements (prompt notice of the proceeding and an opportunity for hearing, and that judgment must express a reasoned conclusion. To require more, however, is to disregard the task for which this Commission was established and to inhibit its exercise of imaginative resourcefulness and judicial inventiveness in developing procedures which enable it to stem the tide of an increasing caseload.44

The same conclusions were reached with respect to the issues of due process in respect to the Administrative Procedure Act. The report confirmed that the provisions of the APA govern the nature of proceedings before the Commission,45 including applications for motor carrier authority. The procedures designed to achieve due process requirements (prompt notice of issues controverted in fact and law) may vary depending on the nature and importance of the issues presented and the ultimate objectives of the governing law.46 And, as it was further pointed out, "[p]rocedural due process in administrative proceedings has never been a term of fixed and invariable content";47 what is required under a given procedure is a rea-

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44. Ex Parte No. 55 (Sub-No. 14), 125 M.C.C. at 817-18. "[T]he Supreme Court and all Courts in a supervisory role are concerned with delay. It has recently had occasion to deplore the 'nigh interminable’ delay in connection with some administrative agency proceedings. . . ." [citation omitted] FTC v. J. Weingarten, Inc., 336 F.2d 687, 691 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965). Because of this, courts have been eager to permit administrative agencies wide latitude to choose methods of procedure in an attempt to speed up caseload disposition. One such example is evident in Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972), wherein the court stated:

This Court is only too painfully aware of the inescapable backlog which inevitably develops when exploding dockets exhaust severely limited resources which are not increased in proportion to the ever-expanding demands and inundating filings. In the setting of such exacerbated circumstances, "agencies must exert the greatest resourceful, imaginative ingenuity in devising procedures which in a day of ever-expanding dockets will permit the regulatory process to function properly with reasonable dispatch." (citation omitted).


46. Although the Administrative Procedure Act § 554 (5 U.S.C. § 554 (1970)), adjudications, applies only to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," and while nothing in the Motor Carrier Act expressly requires a hearing on the record as a prerequisite for the issuance of a certificate of public convenience and necessity, implicit in the holding of Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), and Riss & Co. v. United States, 341 U.S. 907 (1950) (per curiam), is the notion that "due process requires compliance with section 554 when a carrier applies for a certificate and presents facts which, if true, entitle him to that certificate under the applicable substantive law." Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925, 936 n.9 (D. Del. 1973).

47. 125 M.C.C. at 818. Accord FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949). Neither the fifth nor the fourteenth amendment to the Constitution guarantees any particular form of procedure. Indeed, flexibility is the key. The most comprehensive statement of principle was made in Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961):

The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [citations omitted]. "'[D]ue process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." It is "compound of history, reason, the past course of decisions. . . ." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63 (concurring opinion).
sonable opportunity to know the claims of opposing parties and to meet them. 48

Having found due process arguments to be without foundation, the ICC considered practical consequences of the case-in-chief proposal. Under existing Commission precedent an applicant's initial evidentiary presentation must include a delineation of existing service alternately available as well as any known deficiencies in such service. 49 This does not mean service available only from protesting carriers. Pragmatically, however, an applicant's presentation on these issues (in the verified statements of supporting public witnesses) usually details only those existing services which are presently used or have been used recently, or the services of those carriers which have solicited the traffic. 50 The case-in-chief proposal raises

As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action. See also Goss v. Lopez, 419 U.S. 565 (1975); Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). Flexibility is not unbounded, however: "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. Hannah v. Larche, 363 U.S. 420, 442 (1960). These traditional minimal judicial procedures were defined in Boddie v. Connecticut, 401 U.S. 371 (1971):

What the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner," [citation omitted], "for [a] hearing appropriate to the nature of the case," [citation omitted]. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.

Section 554 of the Administrative Procedure Act (5 U.S.C. § 554 (1970)) supplies administrative procedures which meet minimal notice and hearing requirements of due process as to administrative adjudications. See note 46 supra. Like constitutional standards of procedural due process, APA procedural requirements are skeletal. No particular form of procedure is required to constitute due process in administrative hearings. NLRB v. Prettyman, 117 F.2d 786 (6th Cir. 1941). Certainly administrative bodies which perform adjudicatory functions are not required to conform to the specific procedural niceties that surround the judicial process. See Alesi v. Cornell, 250 F.2d 877 (9th Cir. 1957); Unglesby v. Zimny, 250 F. Supp. 714 (N.D. Cal. 1965); United States v. Rasmussen, 222 F. Supp. 430 (D. Mont. 1963). "In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise." Richardson v. Wright, 405 U.S. 208, 209 (1972).

48. Cf. FTC v. National Lead Co., 352 U.S. 419 (1957) (FTC cease and desist order); Morgan v. United States, 304 U.S. 1 (1938) (Secretary of Agriculture inquiry into reasonableness of market agency rates); L.G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971) (FTC order finding manufacturer in violation of Federal Trade Commission Act); Swift & Co. v. United States, 393 F.2d 247 (7th Cir. 1968) (Secretary of Agriculture cease and desist order); Russel Newman Mfg. Co. v. NLRB, 370 F.2d 980 (5th Cir. 1966) (NLRB order finding employer in violation of National Labor Relations Act); Philadelphia Co. v. SEC, 175 F.2d 808 (D.C. Cir. 1948) (SEC order revoking exemption of railroad corporation), vacated as moot, 337 U.S. 901 (1949).

49. See note 24 supra.

50. The Commission does not regulate the shipping and consuming public. Often shippers and consignees maintain informal recordkeeping procedures to monitor the effectiveness
the possibility that even a reasonable search for all existing services might not be fruitful. This conclusion was reached because of the lack of comprehensiveness of current transportation directories and the regional character of Commission field offices, which often do not have complete information available. Two other significant factors, the plethora of gateway elimination applications filed and granted as a result of the 1973-74 energy crisis and the possibilities of carrier interlining, were found to exacerbate shippers' and consignees' problems in discovering all existing service. Further, the evidence adduced in the comments and at oral argument in the proceeding showed that increased costs to applicants would result from the case-in-chief proposal. For these reasons, the proposal was rejected.

Opposite conclusions were reached concerning the proposals on format requirements (which were promulgated to oblige parties to adequately consider necessary elements of an application or protest and to permit the Commission to consider more expeditiously evidence so submitted) and limitations on extensions of time (which were adopted after a study was conducted showing the numerous requests for extensions, their frequency per case, and the delay incident thereto). It was further noted that only a nominal decrease in extension requests had occurred since Division One's Notice of General Policy Concerning Operating Rights-Extensions of Time (published in the Federal Register approximately eight months before the report was served).

The resolution of the discovery issues presented again somewhat more of a problem. After concluding that the Commission held authority to promulgate discovery rules the ICC made a comparison of the purposes of the modified procedure vis-à-vis the purposes of holding oral hearing in any given adjudicatory proceeding. It was found that in cases assigned to modified procedure there are few disputed facts, that all of the relevant evidence is presented to the opposing party in written form, and that the possibility of prejudicial surprise evidence is unlikely. This was contrasted with cases assigned for oral hearing where complex factual and legal issues and numerous parties are present cross-examination is necessary, and the possibility of prejudicial surprise is ever present.

and reliability of their transportation services. Such recordkeeping is useful also when testimony is given in Commission proceedings as to services used and deficiencies in that service. The Commission does not require maintenance of such records which are entirely optional with each shipper.

51. See Ex Parte No. 55 (Sub-No. 8), Motor Common Carriers of Property, Routes and Service (Petition for Elimination of Gateways by Rulemaking), 119 M.C.C. 530 (1974).
52. Carriers with incomplete operating authority may accomplish point to point service by combining their operating authority with that of another carrier.
53. 125 M.C.C. at 819-20.
54. Id. at 820.
55. See chart 1 supra.
57. 125 M.C.C. at 815.
Discovery has three main purposes: (1) to obtain evidence for use at trial, (2) to secure information about the evidence that may be used at trial, and (3) to narrow issues so that at the trial, it is necessary to produce evidence on those matters found to be actually disputed. Inasmuch as oral hearings are akin to court trials, discretionary discovery is suitable, both definitionally and practically. Modified procedure is different, although there might be instances where discretionary discovery could theoretically be useful. A survey was taken of modified procedure cases in which discovery had been utilized to retrieve evidence. It was found that in the overwhelming majority of such instances the evidence sought to be discovered was either irrelevant to application proceedings, not required by either side in order to meet its burden of proof, or prematurely sought before the verified statements were submitted and, therefore, dilatory. The proposed discovery rule was adopted.

Having disposed of the issues presented in the original notice of proposed rulemaking, the Commission decided to investigate new possible avenues of reform. In its surveys, the ICC found major unnecessary periods of delay surrounding the original publication of the application in the Federal Register and the period surrounding the service of designation orders. It promptly considered two suggestions received in the comments that were designed to ameliorate those periods of delay, promulgating one and continuing the rulemaking proceeding to investigate the feasibility of the other. A relatively minor, yet significant, requirement for filing new applications will involve the submission with the application of a Federal Register caption in acceptable form. The Commission hoped that compliance with this requirement will both speed publication in the Federal Register and at the

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58. Id., citing, 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2001 at 15 (1970). See also Wood v. Todd Shipyards, 45 F.R.D. 363 (S.D. Tex 1968) and Berry v. Haynes, 41 F.R.D. 243 (S.D. Fla. 1966). Numerous federal opinions reveal that discovery is found to have a number of other uses:

(1) to clarify and narrow the issues to be tried by providing each party with the fullest pretrial knowledge of the facts, Nutt v. Black Hills Stage Lines, Inc., 452 F.2d 480 (8th Cir. 1971); Carlson Cos., Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080 (D. Minn. 1974);

(2) to secure just, speedy and inexpensive determination of actions, In re Ira Happt & Co., 253 F. Supp. 97 (S.D.N.Y. 1966), aff'd, 379 F.2d 884 (2d Cir. 1967);

(3) to reduce the element of surprise to a minimum, Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973); United States v. Brown, 349 F. Supp. 420 (N.D. Ill. 1972), aff'd and modified on other grounds, 478 F.2d 1038 (7th Cir. 1973);

(4) to prevent delay at trial, United States v. International Business Machines Corp., 68 F.R.D. 315 (S.D.N.Y. 1975);

(5) to obtain information for cross-examination and for the impeachment of witnesses, Kerr v. United States Dist. Court, 511 F.2d 192 (9th Cir. 1975), aff'd on other grounds, 426 U.S. 394 (1976); or

(6) to gain information where complex factual matters are in question, Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973). These uses are antithetical to the very definition and purposes of the modified procedure.

59. 125 M.C.C. at 816 & nn. 35 & 36.
61. Appendix F to the decision presents seven examples of acceptable Federal Register captions covering the most frequent types of applications. 125 M.C.C. at 838.
same time free certain Commission personnel for other necessary assignments. The ICC is justified in its belief that this will result because of experience gained during the gateway elimination project in which many parties submitted appropriate captions resulting in speeding up publication time considerably.

The following chart compares present processing with the caption requirement versus projected processing under the new proposal:

| Chart 3
| Comparison of present processing versus proposed processing |
|----------------|-----------------|-----------------|
|               | Present         | Proposed        |
| 1. Filing     |                 |                 |
| 2. Publication (see chart 1) | 30             | 21              |
| 3. Protests   | 30              | 30              |
| 4. Designation order served (see chart 1) | 63             |                 |
| 5. Applicant's verified statements due | 45             | 30              |
| 6. Protestant's verified statements due | 30             | 30              |
| 7. Rebuttal due | 20             | 20              |
| 8. Extension (see chart 1) | 23             | 10              |
| 9. Submittal (see chart 1) | 241—(average 251; add 10 days for motions) | 141 |
| 10. Initial order or report (see chart 2) | 482             |                 |

The new proposal set for further study would require the filing of verified statements within a specified period of time from the date of an application's publication in the Federal Register (applicant's verified statement—60 days; protestants' verified statements—90 days; applicant's rebuttal—110 days). Under this new proposal, the designation order would be eliminated and designation would not occur until all verified statements are received. It is recognized that this new procedure might result in the filing of verified statements in cases most likely to be assigned for oral hearing (twelve percent of operating rights applications) and consequently an exception would exclude from this proposal those applications supported by more than twenty public witnesses and which seek regular-route general commodities or passenger authority.

The new proposal is presently under consideration.

VI. PERSONAL VIEWS

The motor carrier bar has been more of a reactor to Commission ideas than an initiator of new proposals. It is the failure of the motor carrier bar to

62. 125 M.C.C. at 836.
64. 41 Fed. Reg. 53832 (1976).
65. 125 M.C.C. at 821.
police their own members that has led to certain Commission activities and reforms. Motor carriers want their cases processed more expeditiously, and the Commission, at times, takes too long in reaching a decision. Internal reforms are occurring in an attempt to alleviate this problem. Authorization to recruit more attorneys for operating rights and imposition of staff time frames for management oversight should reduce both backlog and delay.

Delays by practicing attorneys must be reduced too. Abuses by attorneys in requesting extensions of time, for example, are glaring. Yet rarely is a censure motion made by an opposing attorney and no action has ever been taken by the organized motor carrier bar. Therefore, a void existed which the Commission filled. Likewise, too many statements filed on behalf of parties to a modified procedure ramble on page after page. The format requirements will eliminate such disorganized presentations.

One idea raised by the motor carrier bar in this proceeding deserves further attention: a continuing procedural study group composed of carriers, practicing attorneys and practitioners, and Commission personnel. This group would serve many useful purposes: not as a reaction group in the case-in-chief proceeding but as an initiator of future reforms, not as an alternative to existing rulemaking, but as a foundation of future rulemaking. Motor carrier representatives should not abandon this idea because it was not accepted as a means of resolving the case-in-chief rulemaking. Exchanges of ideas are necessary and a regular channel for informal communication can only advantage all parties.

CONCLUSION

The Commission, throughout the decades of its existence, has continuously sought to promote the expeditious handling of all matters coming before it for decision. Its rules and processing system have been continuously revised and upgraded in the face of an increasing caseload vis-à-vis a relatively limited budget and staff in order to promote a balance between the ability of all parties to get a full and fair hearing on the merits and the ability of the Commission to expeditiously process its caseload. This proceeding and its progeny are attempts to reach that proper balance.
Transportation Planning, Urban Goods Movements and the Trucking Industry

JERRY R. FOSTER*

I. INTRODUCTION

Since 1962 government officials have attempted to "comprehensively" plan for transportation development of the urban environment.\textsuperscript{1,2} Transportation planning efforts have been directed toward discernment of how people can move expeditiously and economically within the urban area, without any overt concern for urban freight movements. For all the studies that have been conducted, at a cost of millions of dollars, one is struck by the fact that this planning effort has not been truly comprehensive. This lack of comprehensiveness results from the fact that very few cities have included urban freight movements as an integral part of the total planning process.

The attention devoted to the movement of goods in the urban areas by planners, government officials, private citizens and members of affected industries has been sparse. Perusal of previous transportation studies reveals that all that has really been done is to document truck origins and destinations within the urban area.\textsuperscript{3} Illustrative of this fact is the "comprehensive plan" of a Colorado community in which concern for urban goods

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\textsuperscript{1} BUREAU OF PUBLIC ROADS, U.S. DEPARTMENT OF TRANSPORTATION, POLICY & PROCEDURES MEMORANDUM 1 (June 21, 1967).
\textsuperscript{3} F. BOLGER & H. BRUCK, AN OVERVIEW OF URBAN GOODS MOVEMENT AND DATA SOURCES (1973).
movement is nonexistent. In fact, the plan contains the statement that "mass transportation and bike paths are essential ingredients in the plan, to be actively and imaginatively pursued in meeting the transportation needs and desires of all residents..." No mention is made of urban freight or the fact that the citizens and industries need to receive freight in order to exist.

Major urban areas defined by Standard Metropolitan Statistical Areas (SMSAs) do not exhibit much difference from the attitude of this community. As one report has indicated, "there is absolutely no commodity flow data on a metropolitan region or intra-urban bases," where such data refers to the type of shipment, size, weight, and so forth. The report further relates "that only the work in Chicago and New York is being done in the context of continuing metropolitan transportation planning studies." Of the other three cities cited in the report—Baltimore, San Francisco, and St. Louis—data is either not being collected or the data collected is only for the central city and not the entire urban area.

This paucity of urban goods movement information is somewhat understandable since truck traffic represents only a small proportion of the total vehicle traffic in urban environments. Thus, individual planning efforts have been directed toward eliminating pollution and congestion caused by the automobile. Even though trucks constitute a small portion of the total traffic, the cost of moving freight by truck within the urban area is significant. The costs arise both from the standpoint of freight rates and social diseconomies such as pollution and energy consumption. As will be demonstrated in the remainder of this article, total commitment to resolving the personal mobility problem may prove to be detrimental to truly comprehensive planning.

The receipt and delivery of goods within the urban area is crucially important to everyone. Without the receipt of raw materials, production ceases, unemployment rises and workers no longer have the need to travel during morning and evening rush hours. This simple fact indicates a more complex analysis which establishes a direct positive correlation between the movement of people and commodities. A positive correlation between land use and the movement of goods and people may then be derived from such analysis.

As manufacturing, wholesaling and retailing activities increase on any parcel of land, more workers will be needed to assist in the production and selling processes and more raw materials must be provided. Even if a...
production or service facility were totally automated, workers would still need to be present to monitor the dials on the equipment, sell merchandise or provide other services. Thus, as manufacturing and selling activities increase, an increasing number of trucks and automobiles or transit vehicles will be required to bring goods and personnel to these facilities.

It is the purpose of this article to address the urban goods movement problem with respect to urban planning, to discuss some of the more complex issues, and to suggest some possible future courses of action. While transit of both goods and people is important, the latter is discussed only as it relates to urban goods.

II. REVIEW OF EXISTING TRANSIT PLANNING EFFORTS

Philosophically, urban planning is undertaken in order to improve the urban environment and maximize the urban dweller’s satisfaction. As noted in one typical comprehensive plan: “Planning is the art and science of guiding, in a comprehensive way, the physical development of a community. Order, convenience, efficiency and beauty are its watchwords.”10 But this philosophy has not been realized, in part because of a lack of local financial resources and a commitment to planning and, in part, because of the problems created by federal government highway construction programs, the federal government provided the impetus for comprehensive planning.

As stated previously, current transportation planning requirements were initiated at the federal level of government by the Federal-Aid Highway Act of 1962.11 Section 9 of that Act required that areas with more than fifty thousand people must conduct a continuous comprehensive transportation planning effort in order to qualify for federal assistance on proposed transportation projects.12

A basic phrase used throughout that Act is “comprehensive planning.” As pragmatically defined by planners, citizens, and government officials, comprehensive planning has meant concern, almost exclusively, for the movement of people and automobiles within the urban area. Freight movements have received little, if any, attention in the majority of transportation studies. This is highlighted by the fact that only five cities have exhibited any overt concern with this issue.13 None really have included freight as an integral part of the total planning process except New York and Chicago. While the existence of freight movement has been recognized, it has received little attention because politicians and planners have responded to constituent demands for the resolution of congestion, delays and pollution-filled environments. Based upon this author’s observations as both a consultant and member of civic groups involved in transportation planning, indus-

10. Forward to HARE & HARE, COMPREHENSIVE PLAN ALLIANCE, NEBRASKA (1965).
12. Id.
try and truck fleet owners have participated very little in the transportation planning effort thus contributing to a general failure to identify the magnitude of the goods movement problem.

The creation, by the Colorado legislature in 1969, of the Regional Transportation District (RTD) for the Denver metropolitan area is illustrative of this assertion with respect to politicians. As related in one RTD publication, the planning efforts of RTD are to be directed toward a study of the regional ecological and social composition and identifying areas where air pollution is great.\textsuperscript{14} In this study, RTD merely identified the number of trucks in the area, even though they contribute greatly to pollution. Furthermore, future planning efforts of RTD are to be directed toward developing, maintaining, and operating a mass transportation system and are not to be directed toward studying and analyzing urban freight movements.\textsuperscript{15} Since only five urban areas in the United States have exhibited an overt interest in urban freight flows, Denver is not a unique city in this respect.

Concern for the environment and lack of funding have contributed to this state of affairs. Funds for urban transportation are channeled toward resolving the problem of moving people in the urban area not toward freight studies. These funds, primarily from the federal government, have been appropriated in order that personal urban mobility can be improved and continued dependence upon highways and the automobile can be lessened. Before one can gain a full appreciation of the role of the urban goods movement problem, it is important that the urban transportation planning process be comprehended.

III. THE EXISTING URBAN TRANSPORTATION PLANNING PROCESS

Initially, the planning process requires that an inventory (itemized list) of all facets pertaining to the urban area be prepared. Such factors as population (categorized by sex, age, income, race), land uses (residential, commercial, industrial), transportation facilities (highways, streets, automobiles, transit vehicles, ridership), travel patterns, and financial resources are a few examples of these factors used to describe the SMSA. This inventory will reveal to the planner such things as: how many people live in the urban area and their distribution, how many automobiles there are, how the total land acreage is used, and how many personal trips are made and the type of mode utilized.

Once the inventories have been completed, the data that has been generated can be analyzed and then developed into forecasting models for each of these elements. Typically, the forecasts are made through some predetermined time horizon, usually twenty to twenty-five years. Upon completion of the forecasts, a composite urban system is constructed whereby

\begin{itemize}
  \item \textsuperscript{14} Regional Transportation District, A Program for Public Transit Service for Colorado's Regional Transportation District 3 (1973).
  \item \textsuperscript{15} League of Women Voters, Transportation Now 8 (1971).
\end{itemize}
the projected growth of the area and travel demand of residents can be accommodated.

These projections rest upon many assumptions made with respect to the factors being studied. One major assumption is that someone—citizen, planner, or government official—can identify the manner in which the area should develop. It is assumed that such person or group of persons can discern a consensus among the residents in terms of urban growth. Other assumptions include linearity of population growth, continued neighborhood cohesiveness, continued travel patterns, and continued limitations of financial resources. It is also assumed that commercial activity will grow in proportion to the population growth of the area.

Of particular importance to this article is the personal subjectivity of land use forecasting—an assumption which may involve more serious problems for the movement of freight in the urban area. As one authoritative source has noted, "The development of sound land use models, however, is still in the evolutionary stage." The author acknowledges that land use models, even though evolutionary are more sophisticated for residential areas and the movement of people than for freight and truck movements.

In contrast to personal mobility, "the location patterns of other commercial and manufacturing facilities are best predicted on an individual industry basis, with judgment supplemented by a forecasting model." In other words, industrial land use models rely on subjectivity and intuition. Given this "level of sophistication," one must question the viability of such models and, more especially, whether or not the impact upon urban freight flows caused by industrial growth is both being truly comprehended and receiving adequate attention by planners. If only the impact of individual industries is forecasted, it would seem difficult to establish mathematically accurate models to forecast freight movements because of the inability to appreciate the relationships of freight flows between industrial activities.

Forecasting model accuracy is also difficult because of land use zoning. As one plan suggests, "It should be kept in mind that the zoning map is a day to day regulatory tool and that the General Plan is long range in nature, thus changes in the zoning map, based upon property owner request, will be in order." Property owners make their requests for zoning variances to local governments and, therefore, predictions of land use are tied to political fortunes.

As politicians are voted into and out of office with each election, different perspectives of land usage arise. In response to their constituents, some politicians may view parcels of land as being best suited for industrial development. Others may envision the same parcel of land as being best

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17. Id.
utilized for residential purposes. A perusal of nearly any daily newspaper demonstrates that public officials grant zoning variances quite readily. By virtue of these variances, it is nearly impossible to predict where and when land use changes will occur. It is, therefore, nearly impossible to predict accurately the patterns of freight flow.

 Normally, the factors included in projecting future land use include population growth, employment patterns, numbers of households, travel times and other traffic generating forces operating within the urban area. Such factors are included because travel, whether truck or any other mode, is dependent upon the spatial configurations and intensity of land use within the urban area. Noticeably absent from these factors, however, are elements characterizing urban freight movements, including changes in production technology and the rate of these changes, corporate decision factors impacting upon the location of production facilities, types of commodities, and the patterns of movement of commodities within or beyond the urban area.

 Such factors are important because firms seek to remain competitive in the free market economy. Firms will seek to incorporate new technologies so that products can be produced more economically. If new technologies are to be utilized or revolutionary products are to be developed, a business may either have to seek a new site and construct a new facility or remodel existing facilities in order to utilize modern equipment and machinery. As these changes occur through zoning variances, freight flow patterns between a plant and its customers will be altered.

 By excluding variables for commodity flows, little or nothing is known about the existing freight system; therefore, it is impossible to project urban freight demands. In the past, this data has been excluded because firms were reluctant to divulge the needed information (relocation and plant expansion) to planners or anyone else because of the fear that a competitor might gain an advantage. But without this data, planners are left with subjective planning.

 In addition to the assumptions made with respect to land use planning are those assumptions involving future highway construction. Typically, the transit planning process assumes that no additional highways will be constructed beyond those for which plans have been developed or finances committed. As one plan relates, "the plan shows very few new transportation routes. Highway design and abutting land treatment will be given major consideration so as to protect the efficiency of roads while eliminating as much disruption to residential areas as possible." Such assumptions are predicated upon the fact that as travel demands are discerned and as a transit system is developed to accommodate those demands, new high-

ways or expanded highways will not be necessary. This assertion is made because an improved transit system should create a demand for its services. As more people are diverted from their automobiles to the transit system, fewer automobiles will be traveling the highways, and, therefore, fewer new highways will be necessary.

Such reasoning could very easily be fallacious because urban goods movement has not been included in the planning process. A basic fault with this logic is that it has been assumed that transit systems will be a panacea for the automobile and its related ills. It has yet to be demonstrated that such an event will occur. A recent study has indicated that by the year 2000 (with the advent of a new transit system) only twenty percent of all travel in the urban area will be by transit.20 Thus as the urban automobile traffic continues to grow, so too will the demand for highways. It remains to be seen whether or not congestion levels can be appreciably reduced. It is entirely possible that, because of the level of use of mass transit systems, truck travel times will either remain the same or be increased, depending upon the volume of travel in the year 2000.

The study further relates that parking spaces also will be reduced significantly.21 Were this to occur, trucks would then have fewer spaces in which to park and make deliveries or pick up freight. Given this event, trucks would continue to be forced to park on the streets which would result in congestion for the remaining automobile drivers. Furthermore, any of the parking spaces removed from large tracts of land would release this land for other uses. As this land is then developed, the demand for freight would increase and escalating delays and costs result.

IV. MAGNITUDE OF THE URBAN GOODS MOVEMENT PROBLEM NOW

In 1974 the total cost of moving freight in the United States was approximately $139 billion, about ten percent of the gross national product.22 This figure also represented 46% of the total transportation expenditures in the United States.

At the urban level, trucks account for the preponderance of freight moving costs. Again, costs of movement are high. Urban truck costs of moving goods were approximately $50.5 billion in 1972.23 This figure represents a 205.4% increase in the cost of moving goods in the urban area since 1962.24 Therefore, urban trucking costs represented 55% of the total trucking costs ($92,166,000 total truck costs and $50,498,000 local truck costs)25

21. Id. at 9-4.
22. TRANSPORTATION ASSOCIATION OF AMERICA, TRANSPORTATION FACTS & TRENDS 3 (1976) [hereinafter cited as TRANSPORTATION ASSOCIATION].
23. Id. at 4.
24. Id. at 8.
25. Id.
in this country. Given the increases in costs and associated increases in rates, it is readily apparent that this industry has a significant impact upon urban consumers.

Quite apart from the direct costs of moving goods in the urban area by truck are social costs accompanying truck movements. Significant social costs arise with truck congestion. In one study, approximately five percent of the total pollution in the city was due to trucks.26 Again, any increase in freight demand would likely result in increased pollution levels.

Between 1962 and 1974, there was a 92.4% increase in the number of trucks registered in this country.27 Of all truck miles driven, 43% (114.3 million miles) occurred in urban areas.28 Thus not only did trucks contribute significantly to traffic congestion and pollution, but they also contributed to a rapid consumption of energy resources in view of the fact that trucks average less than nine miles per gallon.29 Such evidence readily demonstrates that the exclusion of trucks from the urban planning process can have serious implications for any plan that is developed. Given the goals of the urban area to reduce congestion, pollution, and energy consumption and the fact that truck growth is rapidly increasing, it makes little sense to exclude trucks from the planning process.

In part, the growth of truck traffic can be attributed to urban growth in terms of both population and increased land area. As mentioned previously, the increased land area resulted from changes in zoning restrictions. These changes resulted in greater demands for urban trucking. Furthermore, as one author has noted, densely settled residential zones generate less truck traffic per unit of population than do low density residential zones.30 This seemingly inexorable expansion, in other words, has resulted in an increased demand for truck traffic as suburban residents demand more frequent and rapid deliveries.

This means that transportation costs are high and will increase since such service requires more capital and labor investments on the part of truck firm owners. Truck owners would have to expand their fleet sizes, other things being equal, as new suburbs are developed. This would occur because of the increasing distances that would be involved and because of the increased number of pick-up and delivery points that would result from growth.

Some may contend that this pattern would not arise if there were no urban growth by claiming that some areas may now have a zero growth.

27. TRANSPORTATION ASSOCIATION, supra note 22, at 8.
28. Id.
29. Id.
This would not affect the need to study the urban freight problem for two reasons. First, the level of personal consumption may be changing. Second, population shifts are occurring in this country. Thus, one city’s loss may be another city’s gain. The fact remains that there is a need to study this problem.

Finally, urban truck transport costs are high because a multitude of inefficiencies exist within the urban transport system. For example, one study has found that the average speed of trucks in an urban area was 5.2 miles per hour.\textsuperscript{31} A continuation of this average speed, coupled with a growth in the geographic size of an area means that more trucks will be needed to accomplish the same level of service. It also means that, with this low operating speed, trucks inefficiently consume fuel and contribute to pollution. Furthermore, the same study found that by consolidating truck shipments (obtaining greater load factors per truck), a 90\% reduction of truck traffic could be achieved with a resultant annual savings of $2.1 million.\textsuperscript{32} This data suggests that not only are planners deficient in studying truck movements, but also owners are paying needlessly high monetary costs.

V. **Planning and Urban Goods Movement Conflicts**

From the foregoing, it is obvious that private savings and public benefits can be obtained from a thorough study and comprehension of the goods movement problem. There are, however, other factors associated with this issue.

In general, transit and land use planning may dictate that certain types of building construction can occur only in designated portions of an urban area. Some portions of an area may be zoned commercial (downtown business districts for example) so that only office buildings and retail outlets may be built in this area. Similarly, commercial development may not be permitted in sections of the city zoned residential. The planning effort fails at this point by not proceeding one additional step. Study is needed to more fully determine the relationships between freight flow and building configurations, the relative location of various business enterprises, and pedestrian flow.\textsuperscript{33}

Another deficient area in the planning process concerns the use of exclusive bus lanes (streets or highway lanes designated for buses only) as

\textsuperscript{31} McDermott & Robeson, \textit{supra} note 26, at 169.

\textsuperscript{32} Id. at 173.

\textsuperscript{33} Indicative of this fact is an actual instance where a pedestrian mall is being constructed in Boulder, Colorado, which results in difficult accessibility for trucks. The trucks must use narrow alleys to make freight deliveries and pick-ups because streets have been abandoned for the mall. This means that truck drivers queue up to make deliveries in alleys or park on streets. This does not mean that malls should not be constructed. Rather, planning of this nature results in higher transport costs, poor service to the customer, and higher freight rates. This may be socially desirable, but a cost-benefit analysis and informed public might reveal other results.
an attempt to make the use of transit more attractive to automobile users. While greater transit passenger volumes can be achieved by this system, since buses do not have to compete with automobiles, such procedures can prove detrimental to trucking operations. For example, a normal procedure is to designate one lane of a four-lane highway as an exclusive bus lane. Assuming that only buses may use the exclusive lane, trucks and automobile users would, therefore, be left with only three lanes of highway. If there were no change in auto use and truck traffic remained the same, additional congestion would occur on the remaining three lanes. As noted in the *Highway Capacity Manual*:

> From the viewpoint of the driver, low flow rates or volumes on a given lane or roadway provide higher levels of service than greater flow rates or volumes on the same lane or roadway. Thus, the level of service for any particular lane or roadway varies inversely as some function of the flow or volume, or of the density.\(^{34}\)

To the trucker this occurrence has serious implications. If, for example, a driver had been able to make a delivery every fifteen minutes (four per hour) when there were four highway lanes available, a fifteen minute delay due to congestion with only three lanes would mean that only three deliveries could be made in one hour. A trucking firm desirous of maintaining the same level of service to its customers would then have to obtain another truck in order to make the delivery to the fourth destination.

This problem is further compounded by the fact that many production firms adhere to tight production schedules. Deliveries are permitted to many facilities only during specified hours to coincide with the arrival of the labor force. For example, deliveries are made at a store during working hours because the owner does not want to pay overtime or hire additional labor in order to handle deliveries during normally non-working hours.\(^{35}\) Rapidly increasing production costs and the desire to maintain better levels of inventories have led to these stringent schedules. Thus, the removal of one highway lane may be deemed a social benefit today and criticized tomorrow for causing higher prices due to higher costs.

Parking restrictions also pose a problem for freight movement. As is true with highways, a reduction of parking facilities is classified as a net social benefit.\(^{36}\) This perceived social benefit occurs because parking spaces are viewed as traffic generators and use vast amounts of urban property. However, any reduction in their availability causes problems for truck deliveries.

In a survey conducted by this author, the lack of parking facilities for making pick-ups and deliveries was one of the most frequent responses to

the survey. Many truck owners related that as parking spaces were curtailed, their trucks were forced to park on the streets. While parked on the street, drivers were ticketed for illegal parking or had their trucks stolen while the drivers were in the store.

A better appreciation for this highway and parking space problem can be gained from the example of a transit study done for the Denver metropolitan area. This study indicated that provision of an innovative transit system (one requiring the adaptation of new technology) would reduce the need for parking spaces in activity centers (shopping centers for example) by 11-15,000 and highway lane miles by a minimum of 1,378 miles. The deletion of the need for these parking spaces and highway lanes would result because automobile drivers would divert to the new transit system. The major difficulty with this assertion is that the impact upon the trucking industry requirements was not studied. As discussed previously, simply providing better transit service and deleting parking spaces is not a panacea to transportation problems given the metabolism of the city. The planning was not truly "comprehensive."

Studies done in other cities, as previously cited, indicate that the existing street systems are antiquated and the removal of more parking spaces and highway lanes would only exacerbate the goods movement problem. Again, this occurs because many stores are dependent upon on-street parking. As trucks block traffic or use spaces designed for auto parking, the net social gains asserted in the plan are negated.

This problem is given further credence by an analysis of the data presented for one of the traffic zones in a 1971 origin/destination study. This study indicates that in that year there were 3,672 truck trips for that zone. For the same zone in the year 2000, the projected estimates indicate that there will be a total of 38,625 truck trips, an increase of 950%. This means that the number of truck trips per hour (based on a twenty-four-hour day) would increase from 153 per hour in 1971 to 1,609 per hour in the year 2000. An assumption made by planners in the comprehensive plan was that no new highways would be built in that zone. It is logical to conclude that traffic congestion levels would rise precipitously, given increases in auto traffic, and production schedules of manufacturing firms would suffer.

37. A survey of twenty local trucking firms was conducted during October 1974. While the survey was not random, answers to the question, "What is the major problem you encounter in the Denver area in delivering freight?" did not differ from other evidence on the subject.
38. REGIONAL TRANSPORTATION DISTRICT, supra note 20, at 13.
41. Traffic zones in an urban area are small geographic subdivisions created by planners to facilitate the measurement of traffic flows.
42. DENVER REGIONAL COUNCIL OF GOVERNMENTS, REGIONAL TRANSPORTATION STUDY TRUCK INTERVIEW REPORT (1971).
Such truck traffic growth is not surprising although the actual figures may vary by the year 2000. One author has noted that every urban area demonstrates a metabolic rate; he found the people in his study city consumed sixteen tons of freight per year. Furthermore, he found that "internal truck freight (measured in tons per person) grew by 143 percent from 1945 to 1965, while population increased by 31 percent." This would suggest that personal consumption patterns are, in fact, increasing.

Even if a specific city had no change in its population size or geographic configuration, it would still require freight. As already pointed out, economic theory would suggest that any increase in disposable income by the residents of the city would likely result in larger quantities of freight being demanded. Thus with more income, people would purchase more color televisions, clothes or other items and freight transportation per capita would rise. While this is a reasonable expectation, research is needed in this area to better determine the actual rate of change in freight demand.

It is highly probable that, were such events to occur, truck owners would begin to lobby their political leaders to stimulate highway construction. In fact, these owners might even speak loudly enough to have new highway lanes and parking spaces constructed. To the extent that their efforts were successful and highways were expanded, the "comprehensive plan" would have been subverted.

VI. CONCLUSIONS AND RECOMMENDATIONS

Previous discussion has suggested that there are serious deficiencies in the current planning process. Continued exclusion of urban goods movements from the comprehensive planning endeavor may eventually lead to "unplanned" growth in highways as the need to deliver goods outweighs the need for increased transit ridership.

As a freight terminal, the existence of the city is dependent upon the receipt and delivery of freight. While it is true that people in their automobiles constitute the preponderance of congestion, it is not true that elimination of auto congestion will necessarily eliminate the goods delivery problem. Financial resources by all levels of government must be committed to the study of this issue in order that areas of economic efficiency can be discerned. With such knowledge, the "total" urban environment can be better planned and community objectives attained.

Obviously, an urban area will change with the passage of time and so too will the objectives of the area. It matters little how the urban area changes, to the extent that people will still need to eat and produce goods

43. Hedges, supra note 39, at 173.
44. Id.
and services. The problem is that all facets of the urban area must be planned in light of community objectives. We need only look at the cities in the northeast during the winter of 1977 to realize what happens when freight services are halted.

All individuals having an interest in the problem must become involved. Planners in all cities must be made to realize that optimizing personal mobility may be suboptimal for goods movements and result in higher consumer prices as freight costs rise. To that extent, planners must be given direction by government and by the private citizen as to where the threshold is between social benefits and both social costs and consumer prices.

Truck owners must be made aware of the issues of this problem and they must commence participation in the planning process. In part, this problem has arisen through their negligence. They must be made to realize the detrimental impacts their industry imposes upon society. They must also realize that their lack of comprehending the many facets of this problem contributes to their rising operating costs. Correction of this deficiency lies in both education and an active solicitation by planners to seek input from the trucking industry.

Freight consignees must also become involved in planning. They too must be made to understand that, through their actions, greater demands are being placed upon the trucking industry and inappropriate locational decisions may result in higher consumer prices. In this regard, a coordinated effort is needed between planners, truck owners and business owners before locational decisions are made.

All levels of government—federal, state, regional, and local—must begin to question their previous actions. The federal government, by requiring comprehensive planning, recognized that simply providing highways would not curtail the urban transportation problems. Similarly, continued funding of passenger transit studies only will not likely resolve the issue. The federal government must begin to demand truly comprehensive planning. State, regional, and local governments also must begin to play a more active role in the urban goods movement problem. As land use and zoning are crucial to the planning process for both people and freight, these governments must seriously consider existing practices, rules and regulations of land use and zoning. Perhaps stronger land use commissions are needed. Perhaps local control over zoning should be absorbed by a regional or state agency. This is not to suggest a socialistic state; rather, the intricacies of land use and transportation need to be studied and then changes made on the basis of the results obtained.

With respect to funding, transit planning should be considered in terms of marginal costs and marginal benefits. Is the marginal increase being attained in transit ridership worth the marginal costs? To the extent that the
answer is no, a re-allocation of the funding may be permitted and funds can be channeled into a study of the goods movement problem.

It is quite apparent that there are neither any simple answers to this problem nor any concrete solutions. Equally evident is the fact that people and freight are inextricably bound. We have studied one and now we must begin to analyze the other.
Recent Developments in Airline Tariff Regulation:
Procedural Due Process and Regulatory Reform

JOHN E. GILICK*

I. INTRODUCTION

Recently, there have been several important judicial, administrative, and legislative developments concerning the authority of the Civil Aeronautics Board (Board) to regulate the form and, more importantly, the substantive content of air carrier tariffs pursuant to the provisions of the Federal Aviation Act of 1958, as amended (the Act).1 Among the most significant of these developments are the potentially far-reaching decision of the District of Columbia Circuit in Delta Air Lines, Inc. v. Civil Aeronautics Board,2 the administrative reaction of the Board to that decision, and the various "regulatory reform" proposals which seek to amend the Act, including its ratemaking provisions, to inject new pressures for additional competition into the statutory scheme for regulation of the Nation's air transportation system. It is the purpose of this article to review these developments and discuss their implications for future air carrier tariff regulation by the Board.

II. THE STATUTORY FRAMEWORK FOR AIR CARRIER TARIFF REGULATION UNDER THE FEDERAL AVIATION ACT

Sections 403, 404, and 1002 of the Act establish the general ratemaking scheme to be administered by the Board for tariffs involving air transpor-

2. 543 F.2d 247 (D.C. Cir. 1976) [hereinafter cited as Delta].

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tation, and section 801(b) provides the vehicle for Presidential disapproval of certain Board orders pertaining to rates, fares, or charges for foreign air transportation. The following is a brief summary of the relevant provisions of these sections which is designed to provide a useful point of departure for discussing and evaluating these various developments.

Section 403 of the Act requires every carrier to file with the Board tariffs showing "all rates, fares, and charges for air transportation" and "to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation." These tariffs must also be "filed, posted, and published, in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with [section 403] and such regulations. Any tariff so rejected shall be void . . . ." Section 403(c) requires thirty-day advance filing,


Under the Act, "interstate," "overseas" and "foreign" air transportation are defined, respectively, in the following manner:

"Interstate air transportation," "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation. 49 U.S.C. § 1301(20) (1970).


5. 49 U.S.C. § 1373 (1970). Section 403 also mandates carrier observance of tariffs, specifically prohibits rebating, requires the filing of the established divisions of all joint rates, fares and charges for air transportation and authorizes free or reduced-rate transportation for persons identified in that section. As discussed intra, there are presently pending before the Congress several so-called "regulatory reform" bills which would amend the Act in various ways. Included among these proposed changes are bills which would expand the scope of section 403 so as to permit the carriers to provide reduced-rate transportation to the young, elderly and handicapped.

6. 49 U.S.C. § 1373 (1970) (emphasis added). By "rejecting" a tariff, the Board prevents that tariff from going into effect without giving any opportunity for hearing whatsoever. The Board's regulations promulgated under this section are found in 14 C.F.R. part 221 (1976), and specify the requirements concerning tariff rejection, who is authorized to issue and file tariffs, form and other specifications of tariff publications, contents of tariffs, requirements applicable to all statements of fares or rates and only to statements of property rates, governing tariffs, amendment of tariffs, suspension of tariff provisions by the Board, vacating the suspension of tariff matter, canceling suspended matter in compliance with a Board order, indexing of tariffs, filing tariff publications with the Board, posting tariff publications for public inspection, special tariff permission, waiver of tariff regulations, giving and revoking of concurrences to carriers

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posting, and publishing of any change in any rate, fare, or charge, including classifications, rules, regulations, or practices affecting them or the value of service thereunder.  

Section 404 of the Act requires, inter alia, every air carrier and foreign air carrier to establish, observe, and enforce just and reasonable classifications, rules, regulations, and practices relating to air transportation and foreign air transportation. Section 404(b) of the Act grants the Board authority to deal with undue or unreasonable preferences or advantage and unjust discrimination by air carriers and foreign air carriers in air transportation.

Section 1002 of the Act sets forth the Board’s authority to investigate or suspend tariffs which raise substantive questions. Section 1002(g) provides that if an air carrier files a tariff setting forth a “new” rate, rule, or regulation in interstate or overseas air transportation, the Board is empowered to enter upon a hearing concerning the lawfulness of such proposed rate, rule, or regulation. Pending the hearing and decision thereon, the Board may suspend the new tariff for up to 180 days upon the filing of a statement in writing of its reasons for such suspension. If, at the end of the 180-day period the Board has not prescribed a rule or regulation, the proposed rate will go into effect, but the Board may nevertheless prescribe a rate to become effective thereafter.
Section 1002(d) gives the Board authority, after notice, to hold a hearing to determine whether or not a rate, fare, charge, rule, or regulation, in effect for interstate or overseas air transportation is or will be unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial. If the Board finds that a carrier's rate, fare, or charge fails to pass this test, it can set maximum, minimum, or both maximum and minimum levels for a lawful rate, fare, or charge. In the case of interstate air transportation, the Board can also determine the actual rate, fare, charge, rule, or regulation to be made effective.\textsuperscript{14}

In 1972, Congress amended the Act principally to vest the Civil Aeronautics Board with specific authority to suspend, reject, or cancel tariffs in foreign air transportation.\textsuperscript{15} This new authority was to be a discretionary one for the Board and, when exercised, would be subject to disapproval by the President. Section 1002(j) of the amended Act sets forth the Board's new authority with regard to rates, rules, and regulations in foreign air transportation.\textsuperscript{16} Section 1002(j)(1) is somewhat similar in operation to the Board's authority concerning "new" tariffs for interstate and overseas air transportation,\textsuperscript{17} but authorizes suspension of the tariff in question for a period of up to 365 days. Moreover, at the end of the hearing, the Board is authorized to "reject or cancel" such tariff and prevent the use of such rate, rule, or regulation. If the proceeding is not concluded prior to the expiration of the

\begin{itemize}
  \item \textsuperscript{14} In exercising its authority with respect to the determination of rates for the carriage of persons or property, the Board is required to take into consideration, among other factors,
  \begin{enumerate}
    \item The effect of such rates upon the movement of traffic;
    \item The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;
    \item Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;
    \item The inherent advantages of transportation by aircraft; and
    \item The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.
  \end{enumerate}


15. Pub. L. No. 92-259, 86 Stat. 95. Section 4 of the 1972 Act provided that the amendments to the Federal Aviation Act contained therein shall not be deemed to authorize any actions inconsistent with the provisions of section 1102 of the Federal Aviation Act, 49 U.S.C. § 1502 (1970) (concerning the need for the Board to take action consistently with any treaty, convention or agreement between the United States and a foreign country).

16. Section 1002(f) gives the Board authority to alter rates, rules and regulations which it determines to be unjustly discriminatory, unduly preferential, or unduly prejudicial to the extent necessary to correct such discrimination, preference, or prejudice and order the carrier to discontinue collecting such rates or enforcing such rules, regulations or practices. 49 U.S.C. § 1482(f) (1970). Section 1002(j)(4) indicates that compliance with section 1002(j) and any Board order issued pursuant thereto shall be an express condition on the operating authority of carriers performing such transportation and the continuation of the affected service. Section 1002(j)(5) sets forth the "rule of ratemaking" to be used by the Board in evaluating tariffs pertaining to "foreign air transportation."

17. As with tariffs for interstate and overseas air transportation, the Board's suspension and rejection authority for tariffs pertaining to foreign air transportation does not apply to an "initial" tariff filed by a carrier.
suspension period, the rate, rule, or regulation is permitted to go into effect, but is subject to being canceled when the proceeding is concluded. During the period of any suspension, or following rejection or cancellation of a tariff, including tariffs which have gone into effect provisionally, the carrier is required to maintain and use the rate, rule, or regulation "which was in effect immediately prior to the filing of the new tariff."\(^{18}\)

Section 1002(j)(2), on the other hand, grants the Board significantly greater powers to deal with existing tariffs for foreign air transportation than the Board has with regard to tariffs involving interstate or overseas air transportation. This section authorizes the Board to suspend an existing tariff for 365 days while the Board is holding a hearing on its lawfulness. For purposes of operation during such suspension or following the cancellation of an existing tariff pending effectiveness of a new tariff, the carrier may file a tariff embodying a rate, rule, or regulation currently in effect (and not subject to a suspension order) for any air carrier\(^ {19}\) engaged in the same foreign air transportation.

If the Board finds that the government or aeronautical authorities of any foreign country have refused to permit the charging of rates, fares, or charges contained in a proper tariff of an air carrier filed under the Act for foreign air transportation to such foreign country, the Board is empowered to take action concerning tariffs of foreign air carriers serving the United States and such country. In such circumstances, the Board is authorized to (1)

\(^{18}\) In Pan American World Airways v. Civil Aeronautics Board, No. 76-1997 (D.D.C. Nov. 12, 1976), the court was called upon to interpret the meaning of the clause contained in section 1002(j)(1) providing that "the affected air carrier or foreign air carrier shall maintain in effect and use the rate fare or charge . . . which was in effect immediately prior to the filing of the new tariff," Federal Aviation Act § 1002(j)(1), 49 U.S.C. § 1482(j)(1) (Supp. 1973). In that case, the Board had suspended and set for investigation, on October 15, 1976, certain of the individual fare increases proposed by the various members of the International Air Transport Association, which suspension was approved by the President. (In the past, member carriers of IATA have generally been able to reach an agreement on appropriate fare levels, such an agreement is then filed with the Board, and individual member carriers file tariffs implementing that agreement. Last year, however, the carriers were unable to reach agreement on North Atlantic passenger fares for the 1976-77 winter season (November 1—March 31) to supersede the shoulder season fares scheduled to expire on October 31, 1976.) In rejecting the Board's claim that when, for example, a winter season tariff is suspended, the airlines must maintain in effect the prior winter season fares under section 1002(j)(1), the court found, on the basis of the plain meaning of the statute, that the word "immediately," in the statute refers to those fares in effect immediately prior to the filing of the new tariffs, i.e., the 1976 fall shoulder season (September 1—October 31) fares, not the 1975-76 winter season fares which were not in effect at that time and had not been in effect for several months. It should be noted that, although this interpretation was of "benefit" to the carriers in this instance (the 1976 shoulder season fares being higher than the 1975-76 winter season fares), the court noted that this interpretation could benefit the air traveler, i.e., for example, the carriers were to file new tariffs during the spring "shoulder" season (April 1—May 31), containing peak season fares higher than the prior peak season fares, this new tariff were to be suspended, and the airlines would then be required to maintain in effect the lower spring shoulder season fares.

\(^ {19}\) "Air carrier", under the Act, is defined as "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." 49 U.S.C. § 1301(3) (1970).
suspend the operation of any existing tariff of any foreign air carrier providing services between the United States and such foreign country for a period or periods not exceeding 365 days in the aggregate from the date of such suspension, and (2) during the period of such suspension, order the foreign air carrier to charge rates, fares, or charges which are the same as those contained in a properly filed and published tariff (designated by the Board) of an air carrier filed under the Act for foreign air transportation to such foreign country. The effective right of an air carrier to start or continue service at the designated rates, fares, or charges to such foreign country shall be a condition to the continuation of service by the foreign air carrier in foreign air transportation to such foreign country.

Finally, section 801(b) provides that any order of the Board issued pursuant to section 1002(j) suspending, rejecting, or cancelling a rate, fare, or charge for foreign air transportation, and any order rescinding the effectiveness of any such order, shall be submitted to the President before its publication. The President may disapprove any such order within ten days if he finds that disapproval is required for national defense or foreign policy reasons.20

The preceding discussion constitutes a brief summary of the scope of the Board's ratemaking authority under the Act, which, as will be seen in the following section, was necessarily the primary focus of the court's attention in the Delta case and, as discussed in section IV, infra, has become one of the principal targets of the advocates of regulatory reform.

III. DELTA AIR LINES, INC. v. CIVIL AERONAUTICS BOARD AND ITS PROGENY

A. THE DELTA DECISION

In the Delta case,21 one of the most comprehensive judicial explications of the scope of the Board's ratemaking authority in the history of the Act, the U.S. Court of Appeals for the District of Columbia Circuit recently delineated with great particularity the proper scope of the Board's authority to (1) reject

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20. Recently, President Carter, acting under the authority granted by section 801(b), 49 U.S.C. § 1461, wrote to the chairman of the Civil Aeronautics Board and stated that, as part of his Administration's efforts to encourage price competition among carriers, his future policy on proposed rate or fare decreases in foreign air transportation would be as follows:

As a general matter, therefore, I am opposed to suspensions or cancellations of fare or rate decreases in international aviation cases, and in the future I would expect to disapprove such suspensions in the absence of compelling circumstances. I would ask the Board to keep this policy in mind as it considers future applications by carriers for fare or rate decreases.

21. As discussed infra, this case involved the lawfulness of Board action under the ratemaking provisions of the Act regarding certain hazardous materials tariffs which had been filed by several air carriers. The focus of this article's discussion of the Delta case is upon the implications of this decision for future Board action in the ratemaking area. A previous note published in this Journal, Delta Air Lines, Inc. v. CAB: Air Line Control of Radioactive Cargo, 8 Trav. L.J. 293 (1976), discussed, in great depth, the implications of that decision for hazardous materials transportation regulation.
This consolidated appeal involved a challenge to five separate orders of the Board relating to tariff revisions filed by four air carriers. These tariff revisions provided that the air carriers would not transport certain items designated as “dangerous articles” by the Federal Aviation Administration (FAA) and the Department of Transportation (DOT). In the five challenged orders, CAB Orders 74-9-14, 75-1-124, 75-2-105, 75-3-13, and 75-4-

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22. At the time of this litigation, the Federal Aviation Administration (FAA), an operating administration within the U.S. Department of Transportation (DOT), was responsible administering part 103 of the Federal Aviation Regulations, 14 C.F.R. part 103 (1975). This part set forth the FAA/DOT safety regulations applicable to hazardous cargo transportation and prescribed a comprehensive set of “rules for loading and carrying dangerous articles and magnetized materials in any civil aircraft in the United States and in civil aircraft of United States registry anywhere in air commerce.” 14 C.F.R. § 103.1(a) (1975). The authority to promulgate such regulations has since been delegated to the Materials Transportation Bureau, another entity existing within the DOT, but this redelegation does not have any effect whatsoever concerning the holding of the court in the Delta case. See 49 C.F.R. § 1.53 (1976).

23. CAB Order No. 74-9-14 (Sept. 5, 1974) was an order concerning a tariff revision (i.e., a “new” tariff under section 1002) filed by Delta Air Lines, Inc., which restricted Delta’s acceptance of radioactive materials to those which the shipper certified in writing as “(1) intended to be administered to humans for diagnostic or therapeutic medical purposes; (2) to be used in the analysis, for medical purposes, of biological materials from humans; or (3) essential to the conduct of medical research having direct application to medical welfare.” Order 74-9-14 at 1. In addition, Delta proposed not to accept individual packages of radioactive material having a Transport Index (a radiation dose rate measure) in excess of 5.0. Finding Delta’s proposed restrictions “considerably more stringent than either existing provisions or recommended revisions of the FAA’s regulations,” the Board rejected the tariff. Id. at 2.

24. CAB Order No. 75-1-124 (Jan. 29, 1975) involved another Delta radioactive material tariff, similar to the first, which was filed subsequent to enactment of the Transportation Safety Act of 1974, 49 U.S.C. § 1801 (Supp. IV, 1974), but prior to the publication of proposed amended regulations in accordance with the mandate of section 108 of that Act. Choosing not to reject, the Board deferred action on the complaints filed against the tariff (which sought rejection of the tariff) until after adoption of regulations pursuant to section 108 of the Transportation Safety Act.

25. CAB Order No. 75-2-105 (Feb. 26, 1975) involved tariffs filed by Eastern Air Lines, Inc., and Frontier Airlines, Inc., which mirrored the second Delta tariff. (By the time the Board acted upon the Eastern and Frontier tariffs, the DOT had promulgated proposed regulations which, if adopted, would have prohibited the carriage of radioactive materials intended for nonhuman, nonmedical research as well as for human-related medical research.) The Board, once again, deferred action on a complaint requesting rejection (filed by the DOT/FAA), but noted that the Eastern/Frontier tariffs and other similar tariffs already in effect (e.g., the Delta tariff) appeared “more narrow in scope with respect to allowed radioactive ‘research’ and medical materials than as proposed in the FAA rulemaking.” Order 75-2-105 at 3. Consequently, the Board stated that it “expect[ed] the carriers promptly to conform their tariff provisions to the FAA proposed rulemaking.” Id. (emphasis added).

26. CAB Order No. 75-3-13 (Mar. 6, 1975) involved a tariff revision filed by Allegheny Airlines, Inc., which, if permitted to go into effect, would have banned the carriage of materials labeled “Poison B,” a category of poisonous articles which are toxic to man and regulated by the DOT. Finding that the Allegheny proposal “would be more restrictive than current FAA Regulations, as well as rules currently proposed by FAA . . .,” the CAB rejected Allegheny’s tariff “without prejudice to the carrier’s refiled tariff provisions reflecting FAA’s proposed rules.” Order 75-3-13 at 2 (emphasis supplied). The Board further expressed its “expect[ation] that other carriers that currently have in effect tariffs refusing to accept Poison B materials will promptly conform their tariffs to the proposed FAA Regulations.” Id.
The court held that absent either of these conditions, the Board can prevent a new, proposed tariff from the tariffs at issue.29 In making this finding, the court reviewed the Act and relevant case law and determined that the Act authorizes the rejection of a tariff only (1) where technical requirements of form and order have not been satisfied, and (2) "where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold . . . ."30 The court held that absent either of these conditions, the Board can prevent a new, proposed tariff from

27. CAB Order No. 75-4-75 (Apr. 15, 1975) was, in essence, a "housekeeping" order issued by the Board which dealt with all hazardous cargo tariffs still pending before the Board (including certain proposed tariff revisions on which the Board had not yet acted and those as to which the question of rejection had been deferred, including the Delta, Eastern and Frontier tariffs). As to these tariffs, that order concluded:

The tariff provisions proposed or in effect for [the carriers] that restrict the carriage of hazardous materials permitted by present or proposed DOT/FAA Regulations present essentially the same problems as discussed . . . for embargoes. However, as to refusals to carry hazardous articles pursuant to tariffs, the Board must defer to the position of DOT/FAA to the effect that freight which complies with FAA Regulations must be accepted for carriage by the carriers, and that Section 1111 does not permit their refusal. These tariffs are not consistent with Section 221.38(a)(5) of the Board's Economic Regulations and will be rejected pursuant to the provisions of Section 403 of the Act and subpart O of Part 221 of the Board's Regulations. Order 75-4-75 at 7.

28. Section 221.38(a)(5) of the Board's regulations provided that the carrier rules and regulations relating to the transportation of dangerous or restricted articles must be "in conformity with" the FAA/DOT hazardous materials regulations. 14 C.F.R. § 221.38(a)(5) (1975). 14 C.F.R. § 221.180 (1975) provided that tariffs not consistent with the Board's regulations set forth in 14 C.F.R. part 221, e.g., section 221.38(a)(5), can be rejected. 14 C.F.R. § 221.38(a)(5) (1975). Consequently, the issue presented was whether the air carrier tariffs were "in conformity with" the DOT/FAA regulations, for, if they were "in conformity", the Board's rejection of those tariffs was unlawful.

29. It should be noted that the issue presented was not what the Board would ultimately approve as the proper substantive content for the tariffs finally put into effect. Instead, the issue was whether the Board must proceed under section 1002 with due notice, hold a hearing, and receive evidence bearing on a number of factors which the carriers contended were never considered by the Board in issuing the orders challenged in the appeal.

30. 543 F.2d at 263 (quoting Municipal Light Bds. v. FPC, 450 F.2d 1341, 1346 (1971)).
becoming effective only by suspending it for a maximum of 180 days, pending a hearing of its lawfulness.\textsuperscript{31}

Turning to the particular facts presented, the court found that the Board had not rejected the tariffs for any formal or technical defect, but instead for what the Board believed to be substantive deficiencies.\textsuperscript{32} On this point, the court determined that the carrier tariffs did not contain any substantive deficiencies warranting rejection under section 403, finding that the tariffs were in conformity with part 103 of the Federal Aviation Regulations\textsuperscript{33} and, consequently, were consistent with section 221.38(a)(5).\textsuperscript{34} To do otherwise, the court held, would be to deny the carriers a hearing for the purpose of considering those economic and other issues reserved to the Board, not the FAA.\textsuperscript{35}

Since the Board had stated in Orders 75-2-105 and 75-3-13 what it expected the carriers to do regarding the tariffs at issue, the court was required to reach the question of the Board's authority to impose tariffs without hearing. Initially, the court found that section 1002(d) was the only provision of the Act which authorized the Board to determine and prescribe the lawful rates, rules, and regulations to be made effective in tariffs.\textsuperscript{36} In interpreting that section, the court held that the Board could only impose a tariff upon a finding of unlawfulness and only after acting on notice and hearing.\textsuperscript{37}

In disapproving the "short cut" pursued by the Board with regard to the tariffs at issue, the court found that:

\begin{quote}
[T]he Board was attempting to determine and prescribe the rules and regulations applicable to hazardous cargo, without notice and hearing, \textit{i.e.}, the Board was telling the carriers exactly what rules and regulations to include in their tariffs. Under any realistic interpretation, these orders involved the legislative determination of rules and regulations affecting petitioner's rates, and therefore the Board should have adhered to Section 1002, the statutory provision explicitly designed for the prescription of such rates, rules, and regulations "after notice and hearing."\textsuperscript{38}
\end{quote}
Since the Board had also permitted two of the tariffs at issue (the Eastern-Frontier and the "second" Delta tariff) to become effective (pending decision on the deferred question of rejection) and then rejected these tariffs, the court was required to determine the scope of the Board's authority to take action with regard to already effective tariffs. The court determined that, once a tariff is permitted to become effective, the Act authorizes modification of an existing tariff only after an investigation and hearing and a finding of unlawfulness pursuant to section 1002. Specifically, the court found that (1) given the preemptory nature of rejection, it is a regulatory device properly used only prior to a tariff's effective date, and (2) in view of the plain words of section 1002(g) (i.e., what "would be proper" after a tariff "had become effective"), "it is clear that once the Board has permitted a tariff to become effective, it may not reject or suspend that tariff; it may only investigate and take appropriate action after notice and hearing." In summary, the principal holding of the court in the Delta case was that, in the absence of any of the tariff filing deficiencies specified in section 403, the only lawful manner in which the Board can prevent a proposed tariff from going into effect is suspension pursuant to section 1002(g), based upon a finding of possible unlawfulness and a determination to set the tariff for hearing. Once it is determined that a tariff filing has been made "in compliance with the basic formal requirements and minimal substantive requirements" of the Act, it must be accepted by the Board "for filing" and "substantive concerns regarding the lawfulness of the rules or regulations in such a tariff (unless, of course, the tariff is, on its face, a substantive nullity) can only be resolved after a hearing, during which time the Board may suspend the tariff for up to 180 days." In short, the Act simply does not permit the Board, on its own motion and without hearing, to reject a tariff filing simply because the Board believes that the particular rates, rules, or regulations set forth in the tariff are substantively improper.

B. BOARD REACTION TO THE DELTA DECISION

Notwithstanding this rather clear explication by the court of the limits of the Board's authority with respect to tariff filings under the Act, actions taken by the Board subsequent to the Delta decision indicate, at least in certain another Board attempt to prescribe rates without notice and hearing, that time by using its suspension, rather than its rejection, authority. In Moss, the court stated:

As a practical matter, the Board's order amounted to the prescription of rates because, as the Board admit[ted], the pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistible. All the carriers had indicated an urgent need for an immediate increase in revenues; the Board had made it clear, by threatening to use its power to suspend proposed rates, that only rates conforming to its detailed model would be accepted and not suspended.

40 543 F.2d at 268-69.
41 430 F.2d at 897 (footnote omitted).
39 543 F.2d at 897 (footnote omitted).
39. CAB Order No. 75-4-75. See note 27, supra.
40. 543 F.2d at 268-69.
41. Id. at 269 (emphasis in original).
circumstances, an ongoing eagerness on the part of the Board to avoid the procedural strictures established by the Act for controlling Board action in the ratemaking area. These actions may foreshadow a Board determination to attempt to "live" with the Act's hearing requirements, through the adoption of so-called "paper" hearing procedures.

1. The Delta Decision and Subsequent Board Regulation of Hazardous Materials Tariffs

In CAB Order No. 76-10-24,42 the Board vacated its requirement, previously imposed by CAB Order No. 75-11-3143 and stayed in CAB Order No. 75-11-92,44 that certain carriers cancel their tariff provisions refusing acceptance of hazardous materials, including the tariff provisions considered in the Delta case. Subsequently, two separate hazardous materials tariff revisions were filed, and the Board's action on these proposed tariffs appears to be instructive as to future Board action regarding hazardous materials tariffs.

The first order,45 involved certain revisions to the carriers' materials tariff governing carriage of hazardous materials.46 In this order, the Board (a) permitted the carriers' proposed shipper certifications to become effective, finding that, although the tariff requirements were more stringent than the requirements imposed by the DOT regulations, the tariff provisions did not place an undue burden upon shippers, but (b) rejected the proposed provisions for transporting gallium metal, taking the position that the carriers had failed to provide any economic justification for that proposal.47 There-

42. CAB Order No. 76-10-24 (Oct. 5, 1976).
43. CAB Order No. 75-11-31 (Nov. 11, 1975).
44. CAB Order No. 75-11-92 (Nov. 24, 1975). Essentially, Order 75-11-31 had vacated a stay of the effectiveness of Order 75-4-75 (subsequently found unlawful in the Delta case) by which, in essence, the Board had rejected these tariff provisions. Subsequently, the Board issued Order 75-11-92 which stayed the effectiveness of Order 75-11-31, insofar as it required cancellation of those tariff provisions, until 15 days after issuance of the court's mandate in the Delta case.
45. CAB Order No. 76-12-88 (Dec. 15, 1976).
46. The carriers had proposed to (a) revise the required shipper's certification forms to become effective, finding that, although the tariff requirements were more stringent than the requirements imposed by the DOT regulations, the tariff provisions did not place an undue burden upon shippers, but (b) rejected the proposed provisions for transporting gallium metal, taking the position that the carriers had failed to provide any economic justification for that proposal.47 There-

47. The Board cited 14 C.F.R. § 221.165 (1975), which provides, in pertinent part, that:

When a tariff publication is filed with the Board which contains new or changed rates, fares, rates, or charges for air transportation, or new or changed classification, rules, regulations, or practices affecting such rates, fares, or charges, or the value of the service thereunder, the issuing air carrier, foreign air carrier, or agent shall submit with the filing of such publication in or attached to the transmittal letter:

(a) An explanation of the new or changed matter and the reasons for the filing, including (if applicable) the basis of rate making employed.

(b) Economic data and/or information in support of the new or changed matter, including, in cases where pertinent,
fore, the Board believed these provisions to be in violation of the tariff justification requirements set forth in that section. In the second order, the Board investigated, but did not reject or suspend, a tariff rule of United Airlines, in which United proposed to refuse to carry containers of materials classified as Other Regulated Material, Class D (ORM-D). In so deciding, the Board noted that United's refusal to accept ORM-D materials in containers would constitute a restriction not included in the DOT regulations and, therefore, the proposal should be subjected to the scrutiny of an investigation. However, the Board refused to suspend the proposal on the ground that the operation of the proposed rule would not result in the imposition of higher charges on ORM-D shippers.

While, it may be difficult to argue that two cases constitute a "trend" in Board policy, these cases nevertheless indicate that the Board remains uncomfortable in regulating hazardous materials tariffs. This is particularly true in view of the Delta court's reaffirmance of the Board's substantive responsibilities in this area and the court's concomitant denial of any authority in the Board to deal preemptorily with these tariffs through reliance on the Department of Transportation's regulatory scheme and the Board's rejection powers. Consequently, as may be seen from the Board's action concerning the gallium metal provision, it will look carefully at the justification submitted by the carriers in support of proposed hazardous materials tariffs. If such a justification is not submitted and the tariff is challenged, it may well attempt to reject the tariff on that basis.

As discussed supra, section 221.180 of the Board's regulations authorizes rejection of tariffs not "consistent with" regulations issued in part 221, including section 221.165. The lawfulness of this position is discussed at note 51 infra.

48. CAB Order No. 77-3-110 (Mar. 18, 1977).

49. As explained by the Board in Order 77-3-110, an ORM-D material, as defined in the Department of Transportation's regulations, is a material, such as a consumer commodity, which, although otherwise subject to the DOT hazardous goods regulations, presents a limited hazard during transportation due to its form, quantity, and packaging. 49 C.F.R. § 173.500(a)(4) (1975). If a material comes within this classification, it is generally exempted from most of the DOT's hazardous materials regulations. See CAB Order No. 77-3-110 at 1.

50. Another rule, set forth in the same tariff, provided that restricted articles (including ORM materials) tendered as outside pieces with a containerized shipment will be rated as though tendered outside the container, thus resulting in the same charge for the shipper.

51. In this regard, it is important to remember that, in response to the Board's petition for rehearing in Delta, which pointed out that only safety justifications, and no economic justifications, were advanced by the carriers when they filed the tariffs there at issue, the court noted that this fact did not eliminate the need for a hearing in this case or legitimize the CAB's rejection of the carriers' tariffs. As the court stated, its decision did not preclude the possibility that the Board retains a small residue of jurisdiction over safety matters whereby it could approve these tariffs based on safety justifications above. In any event, the court made it clear that, while the Board may have the authority to require air carriers to transport all cargo which the FAA/DOT defines as acceptably safe, "it does not have the authority to accomplish this result by the shorthand method of rejection." 543 F.2d at 267.
the United case indicates that the Board, in view of the court’s explication of its responsibilities in the Delta case, will attempt to evaluate more rigorously than in the past the merits of a hazardous materials tariff including the accompanying justification and the allegations contained in any complaint filed against such a tariff in reaching a threshold determination as to the lawfulness of the tariff, which, in turn, would form the predicate for the Board’s decision as to whether such a tariff should be suspended or investigated. In this regard, the carriers have recently filed a tariff revision designed to implement massive changes in the Department of Transportation’s hazardous materials regulations and, significantly, the complaining shippers have sought only investigation, not rejection or suspension, of the proposal. 52

2. Notice and What Kind of a “Hearing”: Board Action Concerning Air Carrier Overbooking and Baggage Liability Tariff Rules

In what is probably the most significant development since Delta, the Board has stated, in two recent cases, 53 its view that the notice and hearing requirements contained in section 1002 do not necessarily require an adjudicative-type oral hearing in every instance. This position is a marked departure from the Board’s previously invariable practice of conducting oral, adjudicatory hearings in tariff proceedings. Indeed, the last time that the Board examined the carriers’ baggage liability tariffs, the subject of the second case discussed infra, the Board conducted a full oral, evidentiary hearing.

In the first case, Delta Air Lines, in reaction to the Supreme Court’s decision in Nader v. Allegheny Airlines, Inc., 54 filed a proposed tariff rule to give notice to the public that Delta’s flights are subject to overbooking and that a possible result of overbooking might be its inability to carry a passenger with a confirmed reservation. 55 Without making any determination as to

52. The carriers had filed an earlier tariff revision which had proposed, through inadvertence, to authorize carriage of certain materials which were prohibited from carriage on aircraft by the Department of Transportation regulations. Certain shippers and the DOT filed complaints against this tariff revision seeking rejection, and the tariff was withdrawn by the carriers prior to effectiveness. Pursuant to an order issued by the Board under section 416(b) of the Act, the carriers have been exempted by the Board from the tariff filing requirements of the Act from January 1, 1977 (the effective date of the new DOT regulations) to June 25, 1977 (the effective date of the carrier’s recently-filed tariff). CAB Order No. 77-2-59 (Feb. 11, 1977); CAB Order No. 77-4-71 (Apr. 14, 1977).

53. In the Domestic Passenger-Fare Investigation, the Board utilized rule-making procedures without objection for three phases of the investigation: (a) standards for the depreciation, life and residual value of current aircraft types for ratemaking purposes; (b) appropriate treatment of leased aircraft for ratemaking purposes; (c) treatment of deferred federal income taxes for ratemaking purposes. CAB Order No. 70-2-121 (Feb. 26, 1970).


55. Delta’s exception read as follows:

(Applicable to DL only) All of the carrier’s flights are subject to overbooking which could result in the carrier’s inability to provide previously confirmed space for a given flight or for the class of service reserved. In that event, the carrier’s obligation to the passenger is...
lawfulness of the tariff, the Board suspended the Delta proposal and similar rules of other carriers "to afford the Board a more adequate period of time within which to evaluate the proposals," merely indicating that the "Board contemplates reaching its conclusion on this matter at an early date."56  

Significantly, in denying a motion seeking an evidentiary hearing in a rulemaking proceeding instituted by the Board to reexamine its existing policies relating to deliberate overbooking and oversales, the Board stated the following with regard to the nature of the hearing required pursuant to section 1002 of the Act:

Nor does the fact that this proceeding now includes the tariff issues consolidated by Order 76-9-72 lead us to conclude that an oral hearing will necessarily be required. The question of what tariff provisions describing the carriers' overbooking practices should be permitted or prescribed may well be self-evident, or essentially constitute a determination of policy, once this rule-making proceeding is concluded, and we reject the notion that an evidentiary hearing is required in each and every investigation set pursuant to section 1002 of the Act, regardless of the nature of the issues to be determined therein.57

In a similar vein, the Board has recently denied a motion, filed by sixteen air carriers, which had sought an evidentiary hearing (an adversary, adjudicative-type oral hearing with all interested persons having the right to cross-examine witnesses) in a proceeding involving air carrier tariff rules. In March 1975, the Board issued Order 75-3-18,58 (a) stating its tentative view that certain of the existing rules governing baggage acceptance and liability were unlawful and that it would be necessary to eliminate or modify these rules in a number of significant respects, (b) making certain tentative findings as to the lawful content of such tariffs, and (c) ordering interested persons to show cause why these findings should not be made final. The carriers filed comments on the show-cause order and filed a separate motion for a full adjudicatory hearing in which it was contemplated that all parties would have an opportunity to explore fully, through the presentation of testimony and the cross-examination of witnesses, the factual considerations underlying the Board's order.

In denying the carriers' motion, the Board held that a full adjudicatory hearing is not necessarily required to meet the notice and hearing requirements of the Act. Determining that "there is some flexibility in the statutory framework," the Board found "no need for unthinking application of proce-

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56. CAB Order No. 76-8-58 (Aug. 11, 1976) at 1. It was not until the Board issued an order over a month later that it "tentatively conclude[d] that the proposed tariff is unreasonable in the absence of ... additional notice [i.e., distribution of forms indicating the carrier's overbooking practices]." CAB Order No. 76-9-72 at 3 (Sept. 14, 1976). The Board has subsequently completed that rulemaking proceeding, and the Delta tariff provision has gone into effect.


58. CAB Order No. 75-3-18 (Mar. 6, 1975).
dures that are not required either for the protection of the parties or the development of a sound record.\textsuperscript{59} On reconsideration, the Board made clear its position that: "The current proceeding is similarly based upon industry-wide data and is designed to establish rules for application to all certificated air carriers. We are acting in a legislative, not a judicial, capacity here. Accordingly, we are not required as a matter of law to hold trial-type proceedings."\textsuperscript{60}

In short, the Board, in each of these two cases, has begun to take the position that the hearing required by the Act and discussed by the \textit{Delta} court need not necessarily be an adjudicative-type oral hearing, at least in certain, but as yet not fully defined circumstances.\textsuperscript{61} This is notwithstanding the fact that it has, in the past, invariably conducted oral, evidentiary hearings in tariff proceedings. Whatever the merits of this legal position,\textsuperscript{62} and whatever the practical consequences for the development of an adequate record may be,\textsuperscript{63} these cases seem to make it clear that the Board, (a) having been told by the \textit{Delta} court that it can act on the substantive issues raised by carrier tariffs only after hearing, (b) perceiving itself to be under pressure to move quickly,\textsuperscript{64} (c) experiencing difficulty in resolving adjudicatory cases quickly, and (d) desirous of pursuing procedural expedition as an

\textsuperscript{59} CAB Order No. 77-2-9 at 12 (Feb. 2, 1977).

\textsuperscript{60} CAB Order No. 77-4-73 at 10 (Apr. 15, 1977). By CAB Order No. 77-4-82 (Apr. 18, 1977), the Board suspended thirteen words of a baggage liability rule proposed by United Airlines rather than suspend the tariff in its entirety. United has recently petitioned the Board for reconsideration of that order on the ground that the Board has prescribed a rule without a hearing in violation of Moss v. Civil Aeronautics Board, 430 F.2d 891 (D.C. Cir. 1970).

\textsuperscript{61} Although the precise type of hearing to be held was not before the \textit{Delta} court, the court's opinion makes it clear that it expected the Board to hold an oral evidentiary hearing. \textit{See, e.g.}, 543 F.2d at 260-61, 269-70.

\textsuperscript{62} Under section 1006 of the Act, petitions for review of the baggage liability order must be filed in the Court of Appeals by mid-June 1977. The joint petitioners' principal argument in support of their request for hearing was that section 1002(d) of the Act is the only provision which could authorize the action taken by the Board and exercise of that authority (a) requires notice and hearing, and (b) is taken by "order", which, in turn, must set forth the findings of fact on which it is based, 49 U.S.C. § 1485(b) (1970), and these findings must be supported by substantial evidence. 49 U.S.C. § 1486(e) (1970). In these circumstances, the carriers argued, even if the Board considered the proceeding to be rulemaking, (a) section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1970) requires that an evidentiary hearing be held in the relevant statute, (b) that rulemaking be accomplished "on the record after opportunity for an agency hearing," and (b) that the courts have held that the requirement for "notice and hearing," when coupled with a "substantial evidence" test, as in the Federal Aviation Act, requires an evidentiary hearing. \textit{See, e.g.}, Independent Bankers Association v. Board of Governors, 516 F.2d 1206 (D.C. Cir. 1975).

\textsuperscript{63} In this regard, the Federal Communications Commission has, under its regulatory statute, adopted a "paper case" procedure in an effort to expedite hearing cases, in which all evidence is submitted in writing and oral hearings only after a showing had been made that the omission of cross-examination was prejudicial, but this system has not been without its problems. \textit{See} Digital Data Services Case, FCC 76D-34 (1976), FCC 77-35 n. 4 (1977); AT&T Charges, Regulations, Classifications and Practices for Voice Grade/Private Line Service (High Density-Low Density), 55 F.C.C.2d 224 (1975); 58 F.C.C.2d 382 (1976); AT&T Charges for Private Line Service (Multi-Schedule Private Line Service), FCC 76-1123 (1976).

\textsuperscript{64} In each of the two cases discussed supra the Aviation Consumer Action Project (an aviation consumer group that participates, from time to time, in Board proceedings) had urged the Board to act expeditiously.
end in itself, has decided to attempt to pursue “paper” hearings as one solution to this dilemma. Consequently, until such decisions are reversed by a court of appeals or the Board changes its policy, it appears advisable for persons seeking an adjudicative, oral hearing to bring to the attention of the Board, in any document seeking such hearing, (a) the subject or subjects believed to require an oral hearing, (b) the types of facts to be adduced at such a hearing, (c) the particular facts which require exploration by cross-examination at oral hearing, and (d) any other material or information which would be supportive of the need for a trial-type hearing in the particular circumstances presented.

Although the impact of the Delta decision will, of course, be most significant for those carriers whose tariffs are regulated by the Civil Aeronautics Board, the broad bases upon which the decision rests make it clear, for several reasons, that it will have important implications for other regulated industries as well. First of all, notwithstanding the fact that the court’s discussion of the permissible bounds of the Board’s rejection authority was principally in the context of the Federal Aviation Act, the logic of the court’s discussion is equally applicable to any other regulatory statute which similarly restricts the rejection authority of an agency. Moreover, the court’s discussion of the limits of the Hazardous Materials Transportation Act (i.e., that the Act does not require carriers to transport hazardous materials) has important ramifications for efforts by surface carriers, over whom economic and common carrier regulatory authority resides in the Interstate Commerce Commission, to limit their “holding out” with regard to the carriage of hazardous materials through the tariff process. Thus, while the most direct impact of the Delta decision will be felt by the Board and the carriers it regulates, the decision transcends those regulated by the Federal Aviation Act and may well find application to other agencies charged with similar regulatory responsibilities and duties.

IV. “REGULATORY REFORM” AND PROPOSED AMENDMENT OF THE BOARD’S Ratemaking Authority

Under the Act

Over the past two years, advocates seeking reform of the existing mechanism for regulation of the air transport system in the United States have urged that the Federal Aviation Act be amended in several respects so as to place greater reliance on competitive market forces in determining both the nature and scope of the nation's air transportation system, most particularly in the areas of increased pricing flexibility and liberalized entry requirements. Although it is still too early to predict with any certainty the

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65. The initial impetus for the so-called regulatory reform movement came from a White House Task Force on revision of regulatory statutes, and hearings subsequently held by Senator Kennedy’s Senate Subcommittee on Administrative Practice and Procedure during 1975. Hearings on S. 2551 before the Subcommittee on Administrative Practice of the Senate
eventual outcome of this congressional debate concerning the need for regulatory reform, 66 it is nevertheless useful to delineate the portions of the Board's present ratemaking authority which would be modified (in both a substantive and procedural sense) by the various proposals presently before the Congress.67 This will indicate not only the possible directions in which such regulation may go in the future, but also the Board's own thinking in this area. For example, the ratemaking provisions set forth in S. 292, a bill introduced in the current session of Congress by Senators Pearson and Baker, were adopted from a Board proposal which had been introduced during the last session of Congress. Accordingly, the following discussion will address five ratemaking areas which could be affected by enactment of the reform proposals presently before Congress: 68 (1) mandating a "zone of reasonableness," (2) reduced regulation of charter, cargo, and mail rates, (3) proposed alteration of the substantive content of the "rule of ratemaking," (4) modification of the Board's tariff rejection authority, and (5) denigration of the hearing requirements for tariff proceedings, three of which are designed to reduce the level of Board regulation and two of which are designed to increase the level of Board regulation.

Committee on the Judiciary, 94th Cong., 1st Sess. (1975). The product of the efforts of this task force was S. 2551, the Aviation Act of 1975, which was introduced in Congress in October of 1975 (the companion bill, introduced in the House of Representatives, was H.R. 10261). Subsequently, Senator Kennedy introduced his own bill, S. 3364, the Air Transportation Act of 1976, the Board developed its own legislation, S. 3536, the Federal Aviation Amendments of 1976, and Senator Cannon also introduced a bill of his own, S. 3830, the Aviation Improvement Act of 1976. Extensive hearings were held by the Senate and House aviation subcommittees during 1976, consuming over 3,000 pages of testimony, but a bill was not reported by either committee.

66. One of the principal controversies at the heart of this debate is whether it is necessary to enact massive amendments to the Act so as to authorize the results urged by the reformers. In this regard, as may be seen in the following discussion concerning adoption of a "zone of reasonableness," there exists a serious question, for example, as to whether Board policy, rather than the statute, must be "amended" to accomplish this result. See Callison, Airline Deregulation-A Hoax?, 41 J. Air L. & Com. 747 (1975) (an excellent article which challenges both the need for, and desirability of, the changes suggested by the reformers). See also Rasenberger, Deregulation and Local Airline Service—An Assessment of Risks, 41 J. Air L. & Com. 843 (1975).

67. At the present time, the Senate Aviation Subcommittee has concluded hearings on the Commercial Aviation Regulatory Reform Act of 1977, S. 292, 95th Cong., 1st Sess. (1977) (introduced by Senators Pearson and Baker), and the Air Transportation Regulatory Reform Act of 1977, S. 689, 95th Cong., 1st Sess. (1977) (introduced by Senator Cannon, the Chairman of the Subcommittee), the two bills which have been introduced to date in this session of Congress which deal with this subject, but the Committee has not yet begun to "mark up" these bills. It should be noted that, in introducing S. 689, Senator Cannon stated that, although he strongly supported this bill, his "views are not cast in stone." 123 Cong. Rec. 52488 (daily ed. Feb. 10, 1977). In this regard, Senator Cannon gave a speech on April 26, 1977, before the Aero Club of Washington on this subject, and indicated certain changes which he believed should be made in S. 689 as a result of the testimony given in these hearings. Remarks of Senator Howard W. Cannon before the Aero Club of Washington (April 26, 1977), The Ebb and Flow of Airline Regulation—Was 1938 Really a Vintage Year? (hereinafter Aero Club·Speech). The House Aviation Subcommittee has tentatively scheduled hearings in late spring on this subject, and Chairman Anderson is expected to introduce shortly a regulatory reform bill of his own.

which, offered in the guise of reform, may well have the effect of increasing the Board's authority and the level of its regulation.69

A. **MANDATING A "ZONE OF REASONABLENESS"**

As described in section II, supra, section 1002(d) of the Act gives the Board authority to deal with the problem of unfair rates, fares, or charges.70 Under the Act, the Board is authorized to deal with this problem by the creation of limits for rates, fares, or charges—either maximum or minimum, or maximum and minimum levels.

Prior to the Board’s decision in phase 9 of the Domestic Passenger Fare Investigation (DPFI),71 this statutory scheme, as implemented by the Board, gave the carriers considerably more pricing freedom than presently exists—the carriers initiating rate/fare changes, and the Board taking action in the event of complaint or on its own motion with respect to these specific, individual proposals. Today, however, in light of that decision (in which the Board chose to use average industry costs, and established a uniform cost of Columbia.

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and mileage-related formula that produces equal fares for trips of equal distance) and the Board's refusal to establish a zone of reasonableness, the carriers have been denied the freedom (without the risk of suspension) to modify standard, basic fares within a range (deemed reasonable by the agency) about the midpoint of a "basic" fare produced by the Board's market-by-market fare formula. Thus, while the Board has the full authority to create such a zone of reasonableness under the existing Act, it has steadfastly refused to do so, and it now appears that a legislative nudge in this area may be necessary.

Although it appears that a legislative change to establish a zone of reasonableness may be necessary, the approach taken in section 16 of S. 292 falls far short of mandating the establishment of a zone of reasonableness, especially with regard to the Board's authority concerning maximum fares. This failure is especially noteworthy in comparison with S. 292's proposal for airfreight rates and charter rates, discussed infra. (In short, in circumstances where the Board wants to create pricing flexibility in the Act, it knows how to accomplish that result.) Moreover, the mechanism established in section 16 is unnecessarily intricate, and could, if enacted, result in uneven administration of this authority.

72. In Phase 9 of the DPFI, several air carriers, the Department of Transportation and the Department of Justice argued that the Board should establish such a "zone", and that a tariff filed within that zone should not be suspended as being unjust or unreasonable. Although the Board did not hold that it was without authority to establish such a zone, it nevertheless chose not to establish such a zone, principally on the policy grounds that adoption of such a system would preclude meaningful regulation of passenger fares and the proposals contained no safeguards to prevent unreasonable increases in the overall fare level. CAB Order No. 74-3-82 (Mar. 18, 1974) at 121.

73. Section 16 of S. 292 would amend, as here relevant, Section 1002(d) as follows:

Power to Prescribe Rates and Practices of Air Carriers
(d)(1) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected, or received by any air carrier for scheduled interstate or overseas air transportation of persons,
(A) is or will be unreasonably high, the Board shall determine and prescribe the lawful maximum fare or charge thereafter to be demanded, charged, collected, or received;
(B) is or will be predatory or tend to restrain competition among air carriers, the Board shall determine and prescribe the lawful minimum fare or charge thereafter to be demanded, charged, collected, or received; or
(C) does or will preclude the provision of adequate service by the carrier in the market to which the fare or charge is applicable, the Board shall determine and prescribe the lawful minimum fare or charge thereafter to be demanded, charged, collected, or received.

This section adopts S. 3536, the Board's proposal introduced during the last session of Congress, S. 3536, 94th Cong., 2d Sess. (1976).

74. The Board has urged that this authority not be changed. See e.g., Hearings on S. 2551, S. 3364, and S. 3536 Before the Aviation Subcommittee of the Senate Comm. on Commerce, 94th Cong., 2d Sess. 394 (1976). [hereinafter Senate Hearings].

75. In this regard, compare the provisions of proposed section (d) (1), set forth supra, with proposed section (d)(4):

(4) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for scheduled interstate or overseas air transportation of persons or property, or any classification, rule, regulation, or practice

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On the other hand, S. 689 is more effectively designed to assure that carrier tariffs falling within a specified zone will not be suspended, but it too, as presently drafted, also contains certain problems. Under section 21(a) of S. 689, section 1002(d) of the Act would be amended so as to preclude the Board from suspending a tariff on the grounds of being too high, unless the rate, fare, or charge is, with respect to determinations before January 1, 1980, more than 10 percent higher, or after December 31, 1979, more than 20 percent higher than the rate, fare, or charge in effect for the service at issue one year prior to the filing of the rate, fare or charge.\textsuperscript{76}

While an increase of this magnitude might be appealing to a particular airline, especially if it has a significant number of monopoly markets, it does

\textsuperscript{76} S. 689, § 21(a) 95th Cong., 1st Sess. (1977) would amend section 1002(d), 49 U.S.C. § 1482(d) (1970), in the following manner:

\textbf{Power to Prescribe Rates}

(d) Whenever, after notice and hearing on the record, upon complaint, or upon its own initiative, the Board shall determine that any individual or joint rate, fare, or charge demanded, charged, collected, or received by an air carrier for interstate or overseas air transportation, or any classification, rule, regulation or practice affecting such rate, fare, or charge, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the maximum or minimum lawful rate, fare, or charge thereafter to be demanded, charged, collected or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: Provided, however, That (i) the Board may not find any rate, fare, or charge in interstate or overseas air transportation to be unjust or unreasonable on the basis that it is too high unless the rate, fare, or charge is, with respect to determinations before January 1, 1980, more than 10 percent higher, or after December 31, 1979, more than 20 percent higher than the rate, fare, or charge in effect for the service at issue one year prior to the filing of the rate, fare, or charge; (ii) a rate above direct costs may not be found to be unlawful on the basis that it is too low, and the Board may not require an air carrier to charge, demand, collect, or receive compensation in excess of that carrier’s direct costs for the service at issue. ‘Direct Costs’ means the direct operating costs of providing service to which a rate, fare, or charge applies, and shall not include such items as general and administrative expenses, depreciation, interest payments, amortization, capital expenses, costs associated with the development of a new route or service, and other costs which do not vary immediately and directly as a result of the service at issue.

S. 689, 95th Cong., 1st Sess. § 21(c) (1977) would add the following to Section 1002(g), 49 U.S.C. § 1482(g) (1970):

Provided further, That the Board may not suspend any proposed tariff because of a proposed rate fare or charge contained in the tariff unless the Board is authorized under subsection 1002(d) of this Act to find the proposed rate fare or charge unlawful; Provided further, That the Board may not suspend any proposed tariff on the basis that a proposed rate, fare or charge contained in the tariff is too low unless the Board, after notice and hearing, first finds there to be a substantial probability that:

(1) the proposed rate, fare or charge will be found by the Board to be unlawful under subsection 1002(d); and

(2) the complaining party will suffer substantial injury if the proposed rate fare or charge is not suspended pending the full hearing and final order under subsection 1002(d); and

(3) the complaining party has no adequate alternative remedy other than suspension to compensate any substantial injury if the proposed rate fare or charge is not suspended.
not appear necessary, at least at this time, to have such a high upper limit for the "zone." Senator Cannon recognized this fact in his Aero Club speech in stating that "a pricing zone of reasonableness should not extend upward above 10 percent a year [including, however, an allowance for anticipated future cost increases]."77

As to the lower limit of such a zone, the Board, under S. 689 as presently drafted, may not suspend a carrier tariff on the grounds of being "too low" and the Board may not require an air carrier to charge, demand, collect, or receive compensation in excess of its "direct costs" if the proposed fare is in excess of that carrier's "direct costs" for the service at issue. In apparent response to testimony concerning the difficulties occasioned by the use of this "direct cost" standard,78 Senator Cannon indicated in his Aero Club speech, that

[T]he direct cost test used in S. 689 is not practical. It would create administrative difficulties as the Board would have to determine, on a route-by-route basis, what direct costs were. It is preferable to use a percentage figure on the down side below which a carrier could reduce his fares but subject to CAB suspension. I am considering a figure in the 25 to 35 percent range.79

During the course of the Senate hearings, Delta Air Lines (an advocate of the zone of reasonableness in the Domestic Passenger Fare Investigation) suggested, in lieu of the zone of reasonableness proposed in either S. 689 or S. 292, its own revision to section 1002(g) which would, for a two-year experimental period, essentially create a ten percent zone of reasonableness both above and below the basic rate, fare, or charge for a market. This would thereby preclude the Board from suspending tariffs setting forth rates, fares, or charges falling within the zone as calculated in accordance with that provision.80 Moreover, this proposal would provide for individual

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77. Aero Club Speech, supra note 67, at 14. Historically, the Board, in regulating rates and fares, has precluded the carriers from establishing fares on the basis of anticipated cost increases. Under the methodology which has evolved from the DPFI, carriers are permitted to project, in their fare justifications, cost increases only to the effective date of the proposed fare increase. See CAB Order No. 75-6-72 (June 13, 1975).

78. For example, as Delta pointed out in its testimony, (1) the definition is not entirely clear, most particularly that portion of the definition which would exclude "other costs which do not vary immediately and directly as a result of the service at issue" (which might permit an individual carrier, under traditional classifications of variable costs in the industry, to justify costing of its service at prices as low as 25% of the basic (fully allocated cost) fare, (2) such a low fare would permit large, well-financed carriers to drive smaller, less well-financed carriers out of markets, and (3) the range created (20% up and as low as "direct costs") is so great as to permit an unraveling of the rationalized fare structure. Testimony of Richard S. Maurer on Behalf of Delta Air Lines, Inc. Before the Aviation Subcommittee of the Senate Commerce Committee (March 29, 1977) at 91-93 [hereinafter Maurer Testimony].

79. Aero Club Speech, supra note 67, at 15. Recent press reports indicate that the Secretary of Transportation is in the process of drafting his own "regulatory reform" bill which would authorize a "zone of reasonableness" with an annual upper limit of 7% to a lower limit of 20%. 231 Aviation Daily 58 (May 11, 1977).

80. Delta recommended that the following language be added to section 1002(g), 49 U.S.C. § 1482(g) (1970):
market, rather than system, freedom. And finally, it would help preserve the benefits of the present structure (even while allowing considerable freedom) by focusing on the reality that the day coach fare is the key to the Domestic Passenger Fare Investigation fare structure. Consequently, under the Delta proposal, when a change is made in the level of the day coach fare in any market, the percentage relationship between it and other fares would be maintained by simultaneous changes in the other fares. While one could amend section 1002(g) so as to permit individual adjustments for each class of service (e.g., day coach, night coach, or first class) without requiring that other classes of service be correspondingly adjusted, a proliferation of such adjustments could ultimately undermine the rationalized and generally beneficial overall fare structure (both for establishing coach fares and determining their relationship to other fares) which was developed in the DPFI.

Although it is simply not possible, at this time, to predict whether Congress will go forward with airline regulatory reform or not, it does seem clear that, if the Congress is to amend the Act, some form of zone of reasonableness will be legislatively mandated, even though the nature of such an amendment is not certain at the present time.

**B. PROPOSED ALTERATION OF THE “RULE OF RATEMAKING”**

Section 1002(e) of the present Act, as mentioned in section II, supra, established a “rule of ratemaking” to be utilized by the Board in exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons and property. The advocates of regulatory reform have attacked the existing provision as containing contradictory statements and precluding the Board from placing sufficient emphasis on competitive and carrier efficiency considerations in fare decisions. Not surprisingly, therefore, both S. 292 and S. 689 contain proposals to amend section 1002(e) in such a manner as to, in the Board’s words, “give preemi-
nence to encouraging competition and efficiency of operations."\(^{81}\)

In this regard, section 16(b)\(^{82}\) of S. 292 would amend section 1002(e) of the Act (a) to make it applicable only to rates for the carriage of persons and mail (consistent with the thrust of S. 292 to reduce the Board's regulation of charter and cargo rates), (b) to incorporate the pro-competitive policy set forth in S. 292's amendments to section 102 of the Act,\(^{83}\) (c) to eliminate what the Board believes are carrier-protective criteria, and (d) to emphasize the need to control maximum, but not minimum, fares in considering the economic and financial impact of a specific fare proposal on the carrier.

On the other hand, S. 689 contains essentially the "rule of ratemaking" provision initially proposed in the Aviation Act of 1975, the Ford Administration "deregulation" proposal. Under section 21(b) of S. 689\(^{84}\) subsections

\(^{81}\) Senate Hearings, supra note 74, at 394.

\(^{82}\) S. 292, 95th Cong., 1st Sess. § 16(b) (1977) provides as follows:

\(^{83}\) S. 292, 95th Cong., 1st Sess. § 102 (1977), if adopted, would amend the existing declaration of policy in the Act, section 102, 49 U.S.C. § 1302 (1970), as here relevant, in the following manner:

Declarations of Policy: The Board

Sec. 102(a) Interstate and Overseas Air Transportation.—In the exercise and performance of its powers and duties under this Act with respect to interstate and overseas air transportation, the Board shall deem the following, among other things, to be in the public interest:

1. The maintenance of an efficient private enterprise air transportation system responsive to the present and future needs of the foreign and domestic commerce, the Postal Service, and the national defense of the United States.

2. The progressive transition to an air transportation system which relies on natural competitive market forces to determine the variety, frequency, quality, and price of air services without unjust discrimination, undue preferences or advantages, or unfair, deceptive, or predatory practices.

3. The reliance on entry or potential entry of new carriers into all phases of air transportation to provide the stimulus for the provision of efficient and innovative air transportation with meaningful price competition and optimal carrier efficiency.

4. The continued access of rural or isolated areas to the Nation's air transportation network with direct Federal assistance where appropriate.

5. The maintenance of the highest degree of safety in air commerce.

\(^{84}\) S. 689, 95th Cong., 1st Sess. § 21(b) (1977) provides as follows:

Standards for Board Ratemaking

(e) In exercising and performing its powers and duties under subsection (d) of this section the Board shall take into consideration, among other factors—
(3) and (4) of the existing section 1002(e) would be deleted and four new subsections would be adopted. In addition to the present standards set forth in section (e)(1), (2), and (5) of the Act, the Board would be directed to consider the pro-competitive public interest criteria set forth in section 102(a), including the need for price competition, the quality and type of service required or preferred by the public in each market, the desirability of a variety of price and service options, and the desirability of determination of prices by individual air carriers in response to the particular competitive market conditions experienced by the individual carrier.

As one will note in comparing these two provisions, the principal difference is the greater emphasis placed by S. 689 on a more explicit delineation of the desirability of relying upon competitive forces and particular carrier efficiencies in determining fares in individual markets.

In the last analysis, however, the ultimate resolution of the need to amend section 1002(d) is closely related to the overall debate concerning the need for amending section 102 of the Act to place a greater emphasis on competition when the Board makes “public interest” and “public convenience and necessity” determinations. Should Congress decide that there is a need to amend the Act to place greater emphasis on competitive principles in section 102, then it seems clear that section 1002(e) will be similarly amended. As previously discussed, one of the significant debates in this area is whether it is the Board’s unnecessarily rigid fare policy or the ratemaking provisions of the Act which is in need of amendment.

1. The criteria set forth in subsection 102(a) of this Act;
2. The need in the public interest for adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;
3. The quality and type of service required or preferred by the public in each market;
4. The need of each carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service;
5. The effect of rates upon the movement of traffic;
6. The desirability of a variety of price and service options such as peak and off-peak pricing or other pricing mechanisms to improve economic efficiency; and
7. The desirability that individual air carriers determine prices in response to the particular competitive market conditions experienced by the individual carrier.

S. 689, 95th Cong., 1st Sess. § 5 (1977) would amend section 102 of the Act in pertinent part, to read as follows:

(a) In the exercise and performance of its powers and duties under this Act with respect to interstate and overseas air transportation, the Board shall consider the following, among other things, as being in the public interest, and consistent with the public convenience and necessity:
1. The maintenance of an efficient air transportation system responsive to the present and future needs of the public, of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
2. The encouragement, development and attainment of an air transportation system which relies on competitive market forces to determine the variety, quality, and price of air services;
3. Reliance on actual and potential competition to provide a variety of efficient and innovative low-cost transportation services;
4. The encouragement of new carriers;
5. The provision of a variety of adequate, economic, and low-cost services by air carriers without unfair or deceptive practices;
6. The promotion of safety in air commerce.
C. Reduced Regulation of Charter, Cargo, and Mail Rates

1. Charter and cargo rates

One of the most significant thrusts of the regulatory reform legislation is to reduce substantially the level of Board regulation for domestic all-cargo carriers, domestic air freight rates, and charter air transportation. In pursuit of this objective, both S. 292 and S. 689 significantly reduce the Board entry requirements for charter and cargo operations and S. 292 would specifically reduce the level and scope of rate regulation for each of these two categories of transportation. Clearly, however, if either of these proposals were adopted there would be a reduction in the level of rate regulation by the Board, especially in rate minimums.

Under the present statute, the full range of the Board's regulatory powers concerning rates, fares, and charges, specified in detail in section II, supra are available to the Board for regulating rates, charges, rules, and regulations for charter and cargo transportation. If S. 292 were enacted, however, the Board's authority in this area would be reduced significantly by (a) limiting the Board's authority concerning passenger charters to regulation of the reasonableness only of carrier rules, not carrier charges, and (b) amending sections 403, 404, and 1002 of the Act to eliminate carrier duties and Board regulation with respect to the reasonableness of scheduled and charter freight rates in "domestic" (interstate and overseas) air transportation. The Board would retain jurisdiction only over discriminatory air freight rates in scheduled transportation and reasonable rules for domestic scheduled and charter freight transportation.

As mentioned in the previous section, the range of the zone of reasonableness prescribed in section 21(a) of S. 689 is sufficiently broad (particularly the minimum rate provision) that it is not necessary, as a practical matter, to except charter and cargo transportation from the ratemaking provisions set forth in that proposal. Presumably, these carriers would not operate below their direct costs for an extended period of time. Since the zone established in S. 292 is not nearly as broad as that in S. 689, however, it is necessary, under the scheme established in S. 292, to make the specific reductions set forth in the level of rate regulation otherwise applicable to charter and cargo operations.

2. Mail Rates

If enacted, S. 292, would also substantially modify the manner in which mail rates are determined. Under the present regulatory scheme, the Board, rather than the carriers, is required to establish rates for the transportation of mail.66 As a consequence, each time a carrier or the Postal Service has petitioned for a change in service mail rates the Board is required to hold lengthy evidentiary hearings. The practical problem occasioned by this

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process is that mail rates may remain unsettled for several years, with neither the carriers nor the Postal Service knowing that their respective revenues and costs will be during this "open" period. When the Board has finally determined the lawful rates (often after protracted hearings), either the carriers must reimburse the Postal Service for overpayments or the Postal Service must pay additional compensation to the carriers. During this process, neither can make any final accounting.

Under section 7 of S. 292, the air carriers would be required to file their mail rates (or changes in those rates) with the Board in the form of tariffs. If the Postal Service does not object to the rates and the Board does not order the tariffs investigated, the new tariffs would go into effect forty-five days after they are filed. In such cases, the Board would not be called upon (as under present law) to make an affirmative finding, after notice and opportunity for hearing, that the rates were fair and reasonable. This modified tariff system would thus enable the Postal Service and the carriers to institute new rates promptly. On the other hand, if the Postal Service objects to an existing rate or a new carrier-proposed rate and the Board decides to investigate, the Board would have full powers, after notice and hearing, to prescribe just, reasonable, and nondiscriminatory mail rates for the future.

Once again, amendment of the Act to make changes in these three areas is dependent, to a great extent, on whether Congress will decide to reduce the overall degree of regulation over cargo, charter, and mail transportation.\(^87\) To the extent that Congress deems it necessary to amend the Act to change the level of competition in these areas, amendment of these rate provisions would follow.

**D. Expansion of the Board's Tariff Rejection Authority**

As may be seen from the court's discussion of the scope of the Board's rejection authority in the \textit{Delta} case,\(^88\) the principal determinant in the court's finding that the Board's authority to reject tariffs was limited to the "formal" and "technical" was the court's reading of section 403 of the Act as authorizing rejection only on the basis of inconsistency with Board regulations dealing with the form and manner of filing tariffs (\textit{i.e.}, Board regulations promulgated pursuant to the Board's limited authority under section 403).\(^89\)

\(^87\) The more controversial proposals in the mail area are provisions which would amend the Act and the Postal Reorganization Act, 39 U.S.C. § 5402(a) (1970), to recognize the authority of charter air carriers to carry mail and enhance the mail contracting authority of the Postal Service.

\(^88\) 543 F.2d at 254.

\(^89\) In the \textit{Delta} case, the court held that:

Summarizing the most important aspects of section 403 and its underlying regulations, we repeat that no other relevant statutory provision authorizes "rejection," and section 403 itself strictly limits the use of this authority to tariff filings that are inconsistent with (1) the form and information requirements of section 403 or (2) the Board's regulations (14 C.F.R. Part 211 (1976)) establishing the proper form and manner for filing, posting, and publishing tariffs. In other words, section 403 only authorizes rejection for technical deficiencies in the form, the manner of filing, and the information content of proposed tariffs. 543 F.2d at 254 (footnote omitted).
Section 7 of S. 292 (which, as discussed previously, has incorporated much of the Board’s proposal for regulatory reform introduced during the last session of Congress) is designed \(^90\) to amend section 403(a) of the Act to empower the Board to reject any tariff which is not consistent with section 403 and any of the Board’s regulations, not simply those which are promulgated under section 403 relating to the form and manner of filing tariffs. S. 292 thus creates the potential to undermine the court’s holding in Delta.

Such a change would authorize the rejection of tariffs inconsistent with any of the Board’s regulations, not only those relating to the form, manner, and information content. This would greatly expand the Board’s authority to control carrier tariffs without any right to a hearing—a result contrary to the overall objective of the regulatory reform bills which is to reduce, rather than increase, the Board’s ability to limit carrier flexibility in the ratemaking area. Moreover, as was fully understood and vigorously precluded by the Delta court,\(^91\) such an amendment could well have the ultimate effect of undermining other ratemaking provisions of the Act through Board adoption of regulations covering the gamut of potential tariff filings and subsequent rejection of carrier tariffs not consistent with those substantive regulations. Significantly, S. 689 does not contain such a provision and, hopefully, Congress will reject this agency-inspired proposal.\(^92\)

**E. MODIFICATION OF THE HEARING REQUIREMENT FOR TARIFF PROCEEDINGS**

As discussed in both sections II and III, supra, the Board is only empowered to determine and prescribe rates, fares, and charges, and rules, regulations, and practices relating thereto after notice and hearing. In this regard, section 15 of S. 292\(^93\) would add a new subsection (b) to section 1001 of the Act:

\(^90\) Section 7 of S. 292 would amend Section 403(a) as follows:

Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information as the Board shall promulgate by regulation prescribe, and the Board is empowered to reject any tariff so filed which is not consistent with this section and its [rather than “such” as in the present Act] regulations (emphasis added).

\(^91\) As noted by the court, in rejecting the Board’s argument that its authority to promulgate regulations pertaining to “information” which must be set forth in carrier tariffs authorized rejection of the tariffs at issue:

In its brief the CAB seems to suggest that the term “information” as used in section 403(a) permits the Board to impose substantive ratemaking requirements via the rejection procedure of the Act. Brief for Respondent at 4 & 23-25. We vigorously deny the existence of any such authority. To sanction this erroneous interpretation urged by the CAB, would permit the Board to issue substantive ratemaking requirements in 14 C.F.R. Part 221, to require future tariffs to contain “information” conforming to these requirements, to reject tariffs not providing such “information”, and, thereby, to circumvent completely the ratemaking procedures of the Act. 543 F.2d at 253, n. 8.

\(^92\) Indeed, it appears more than significant that the impact of this proposed amendment is not discussed at all in the section-by-section analysis accompanying either S. 3536, 94th Cong., 2d Sess. (1976) or S. 292, 95th Cong., 1st Sess. (1977).

\(^93\) S. 292, 95th Cong., 1st Sess. § 15 (1977) would add the following new section (b) to Section 1001 of the Act:

(b) Notwithstanding any provision of this Act requiring the Board to act after notice and hearings, the Board may by order, entered after notice and such opportunity for interested persons to file appropriate written evidence and argument as it shall by rule provide, dispense with an oral evidentiary hearing and proceed to final decision, with or without an
1001 of the Act permitting the Board, in situations where it is only authorized to act after notice and hearing, to dispense with an oral evidentiary hearing after following certain procedural steps and proceed to final decision (with or without an opportunity for further written or oral argument before the Board) if it finds that there are no significant issues of material fact in the case which require an oral evidentiary hearing for their determination. Thus, section 15, in addition to authorizing show cause procedures in, for example, licensing proceedings, will also authorize show cause procedures for rate proceedings that also must be decided after notice and hearing. While, as discussed supra, the Board has asserted that it has such authority under the present Act, it has admitted that the purpose of this amendment is to “give an express statutory underpinning to the Board’s employment of Show Cause procedures.”

In this regard, a bill introduced by Senator Cannon during the last session of Congress would have made sections 554, 556, and 557 of the Administrative Procedure Act inapplicable to the expedited procedures authorized by that bill concerning action taken by the Board pursuant to an application for interstate or overseas air transportation filed with the Board pursuant to Title IV of the Act, thereby raising a question as to the status of ratemaking actions which are regulated, in part, under Title IV. Section 23 of S. 689 (Senator Cannon’s proposal introduced during this session of Congress), adding a new section 1010 for the purpose of expediting procedures concerning Title IV applications, does not contain a provision, such as

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94. See section III B 2 supra.
98. Title IV of the Federal Aviation Act of 1958, entitled Air Carrier Economic Regulation, contains the Board’s basic authority to regulate the economic aspects of air carrier operations, including routes, rates, mergers, and agreements. 49 U.S.C. §§ 1371-87 (1970).
99. S. 3830, 94th Cong., 2d Sess. § 16 (1976) would have provided:
(a)Whenever an application pertaining to interstate or overseas air transportation is filed with the Board pursuant to title IV of this Act, the Board shall, within 30 days of receipt of such application, determine whether the public interest requires that the application be set for a public hearing.

(e) The provisions of sections 554, 556, and 557 of title 5, United States Code, shall not apply to proceedings under this section.
that in S. 3830, declaring the inapplicability of the above-referenced provisions of the Administrative Procedure Act. Moreover, the description of that provision, contained in the accompanying section-by-section analysis for S. 689, states that it is not intended to affect ratemaking procedures, but instead is designed "to provide expedited and streamlined procedures for the Board to follow when considering route and entry applications."100

While, at first blush, it might appear that increased use of show cause procedures in ratemaking matters pursuant to the authority proposed in S. 292 would introduce new flexibility into the ratemaking process and reduce regulatory lag, enactment of such a provision could also result in increased intrusion by the Board into carrier tariff matters, particularly if the Board is thought to possess discretion in making determinations as to the existence of material issues of disputed fact. As noted supra, the Board invariably conducts trial-type, adjudicatory hearings in rate proceedings. Consequently, the present requirement for notice and hearing with its concomitant demand on the Board's resources has also had a salutary effect on the Board's proclivity to interfere unduly in these matters. The availability of arguably less burdensome show cause procedures, on the other hand, might induce the Board to increase, rather than reduce, its rate regulation. Moreover, use of a show cause procedure in rate proceedings is no guarantee of expeditious action, as it took the Board twenty-three months (the time between the date of the show cause order and the Board's final order) to decide the Board-instituted baggage liability case discussed in section III B 2, supra. Thus, Congress must carefully evaluate the need for, and desirability of, a show cause provision such as that proposed in S. 292, at least insofar as it would be applicable to rate proceedings, in order to assure that such a provision is not, once again, the proverbial "wolf in sheep's clothing."

In summary, as with the Delta decision, the significance of this effort to reform the system for regulating air transportation transcends this industry and, indeed, has important implications for other regulated industries as well. In this regard, President Carter has recently stated that, in addition to reform of air transportation economic regulation, he will seek "deregulation" of the motor carrier industry, notwithstanding the fact that a similar effort undertaken in the last Congress met with little success. Thus, while at the present time the airline industry is the principal target of those seeking reform, it can safely be assumed that, if the effort in that area is successful, similar attempts to reform the regulatory schemes applicable to other industries will follow.

V. Conclusion

As one may see from even this brief summary of developments, the past two years have been busy and, in at least one sense, anomalous ones.

for air carrier tariff regulation. On the one hand, we see the Board attempting to abandon adjudicative oral hearings in an apparent reaction to pressure to have its will imposed on carrier tariffs more quickly. On the other hand, we see the regulatory reformers and even the Board, to a limited degree endeavoring to free the carriers, in making rate and fare decisions, from Board control. Where this will all end up is anyone’s guess at this time, but one thing is clear: the developments over the next two years in air carrier tariff regulation will, in all likelihood, be as far-reaching as those of the last two.
Rights-of-Way on Federally Owned Lands:  
A Journey through the Statutes by  
Way of the Federal Land Policy  
and Management Act of 1976*

LEE D. MORRISON**

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* My deepest thanks to two persons associated with the Joint Federal-State Land Use Planning Commission for Alaska (JFSLUPC) for their help in preparing this article. John W. Katz, Counsel for the JFSLUPC, reviewed my preliminary work and David L. Schooler, a former law intern with JFSLUPC, did initial research into the topic. However, the responsibility for any errors in the contents of this article rests solely with the author.

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V. CONCLUSION

I. INTRODUCTION

Rights-of-way across federally owned lands are necessary for the development of transportation facilities in the United States, especially in the eleven contiguous western states and Alaska. Roads, railroads, electrical power and communication facilities, water distribution facilities, and oil and gas pipelines constructed over any substantial distance cannot ordinarily avoid crossing federally owned lands in those states for several reasons. Natural resources related to such projects are found in abundance on federally owned lands. Minerals, oil and gas, hydroelectric power and timber produced on these lands require transportation facilities in order to reach their market. Federally owned lands are sometimes situated so that the only reasonable access to private or state owned lands is across the federal lands. The federal government owns approximately one-third of the nation's lands and nearly eighty percent of the land in the eleven contiguous western states and Alaska. State and Native selection rights in Alaska will eventually be reduced to approximately 57%. Section 17(d)(2) of ANSCA provides for the withdrawal of 80 million acres of public lands by the Secretary of the Interior (d-2 lands) for surface transportation in Alaska. With the exception of the trans-Alaskan pipeline and haul road, present surface transportation systems are limited to the southcentral portion of Alaska. Proposals for future transportation systems into the remote areas of Alaska will inevitably involve d-2 lands. One function of this article is to set forth the current state of the law regarding rights-of-way across federally owned lands so that the effect of including an area into one of the four systems or the national wilderness preservation system will be known. The article also deals with other existing land classifications: public lands and military reservations.

2. BUREAU OF LAND MANAGEMENT, UNITED STATES DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 10 (1975) [hereinafter cited as STATISTICS]. The State of Alaska is especially dependent on the availability of rights-of-way across federally owned lands for transportation purposes. In 1974, 96% of the 365 million acres of land in Alaska was in federal ownership. By the terms of the Alaska Statehood Act, Pub. L. No. 85-508 § 6(a),(b), 72 Stat. 340 (1958), and the Alaska Native Claims Settlement Act (ANSCA), 43 U.S.C. §§ 1611, 1613(h) (Supp. IV 1974), this figure will eventually be reduced to approximately 57%. Section 17(d)(2) of ANSCA provides for the withdrawal of 80 million acres of public lands by the Secretary of the Interior (d-2 lands) for possible inclusion into the national parks, forest, wildlife refuge, and wild and scenic rivers systems (the four systems). The Secretary has made recommendations as to the disposition of those lands and Congress is required to act on these recommendations by 1978. 43 U.S.C. § 1616(d)(2) (Supp. IV 1974).

The final disposition of these federally owned lands is of critical importance to the future of surface transportation in Alaska. With the exception of the trans-Alaskan pipeline and haul road, present surface transportation systems are limited to the southcentral portion of Alaska. Proposals for future transportation systems into the remote areas of Alaska will inevitably involve d-2 lands. One function of this article is to set forth the current state of the law regarding rights-of-way across federally owned lands so that the effect of including an area into one of the four systems or the national wilderness preservation system will be known. The article also deals with other existing land classifications: public lands and military reservations.


4. The Alaska Native Claims Settlement Act, §§ 12, 14(h), grants Alaskan Natives the...
reduce this figure to approximately fifty percent during the next several years, but the area is still substantial.

The federal government has a long standing policy of granting rights-of-way across federal lands. Right-of-way statutes presently in force date as far back as 1891.\(^5\) Congress, in establishing the Public Land Law Review Commission (PLLRC) in 1964, recognized that:

The public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other.\(^6\) Those laws, or some of them, may be inadequate to meet current and future needs of the American people.\(...\)
Administration of the public lands and the laws relating thereto has been divided among several agencies of the Federal Government.\(...\)\(^6\)

This statement was, and to some extent, still is indicative of the state of the public land laws dealing with rights-of-way. Grants of rights-of-way under the older statutes have recently been challenged as being beyond the scope of the authority granted by Congress to the land managing agencies.\(^7\) One such challenge\(^8\) resulted in a 1973 revision of the right-of-way section of the Mineral Leasing Act in order that the trans-Alaskan pipeline could be constructed.\(^9\)

The Federal Land Policy and Management Act of 1976\(^10\) (BLM Act) represents a major revision in public land law, including the law dealing with rights-of-way. The BLM Act grants to the Bureau of Land Management (BLM) comprehensive authority to manage the public lands pursuant to extensive policy guidelines. Public lands are to be retained in federal ownership unless disposal "will serve the national interest."\(^11\) The BLM Act sets up a program of land and resource inventory in conjunction with a land use planning process.\(^12\) Management is to be according to multiple use\(^13\) sustained yield principles\(^14\) with a strong emphasis on protection of environmental and wilderness values.\(^15\) The right-of-way provisions of the BLM

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12. Id. §§ 1711-12.
13. Id. § 1702(c).
14. Id. § 1702(h).
15. Id. §§ 1701(a)(7,8), 1782.
Act represent a comprehensive system for the grant and management of such rights-of-way. One purpose of this article is simply to identify the significant aspects of these right-of-way provisions. Another purpose is to compare the BLM Act provisions, which govern public lands and national forest system lands, with the statutes applicable to the national wildlife refuge and park systems, military reservations, and national wilderness preservation and wild and scenic rivers systems.

The inconsistent use of terminology has long been the bane of those practicing public land law. Unless otherwise noted, the term public lands will hereafter be defined in accordance with the BLM Act as "any land and interest in land owned by the United States within the several states . . ." administered by the BLM, excepting lands located on the outer continental shelf or lands held for the benefit of Indians, Aleuts, and Eskimos. The term reserved lands or reservation will be defined as federal lands which have been set aside for a specific public purpose or program and are not generally subject to disposition under the public land laws. This is a generally accepted meaning of the terms even though certain statutes provide other definitions. The term right-of-way is also to be defined according to the BLM Act. This definition is very broad and includes "an easement, lease, permit or license to occupy, use or traverse public lands granted for the purposes listed in . . . [the] Act." \(^{19}\)

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16. Id. §§ 1761-71.
17. Id. § 1702(e).
19. 43 U.S.C.A. § 1702(f) (West Supp. 1977). The purposes are listed in § 501(a) of the BLM Act, 43 U.S.C.A. § 1761(a) (West Supp. 1977), which states that rights-of-way may be granted for:

- reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels and other facilities and systems for the impoundment, storage, transportation, or distribution of water;
- pipelines and other systems for the transportation or distribution of liquids and gases, other than water and other than oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom, and for storage and terminal facilities in connection therewith;
- pipelines, slurry and emulsion systems, and conveyor belts for transportation and distribution of solid materials, and facilities for the storage of such materials in connection therewith;
- systems for generation, transmission, and distribution of electric energy, except that the applicant shall also comply with all applicable requirements of the Federal Power Commission under the Federal Power Act of 1935 (49 Stat. 847; 16 U.S.C. 791);
- systems for transmission or reception of radio, television, telephone, telegraph, and other electronic signals, and other means of communication;
- roads, trails, highways, railroads, canals, tunnels, tramways, airways, livestock driveways, or other means of transportation except where such facilities are constructed and maintained in connection with commercial recreational facilities on lands in the National Forest System; or
- such other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way over, upon, under, or through such lands.
II. PUBLIC LANDS

Management of the public lands is primarily governed by one statute. The Federal Land Policy and Management Act of 1976\(^{20}\) gives the Bureau of Land Management (BLM) comprehensive authority to administer the public lands. Some of the provisions of the BLM Act apply to the Forest Service administration of national forest system lands as well. The BLM Act repeals partially or totally thirty statutes\(^{21}\) which previously authorized rights-of-way and replaces them with a single title, Title V. This title authorizes the Secretaries of the Interior and Agriculture to grant rights-of-way across public lands and forest system lands, respectively. This authority does not extend to areas designated as wilderness.\(^{22}\) The BLM Act is not the only statute governing rights-of-way on public lands. Section 28 of the Mineral Leasing Act,\(^{23}\) the acts relating to federally funded highways,\(^{24}\) and the Federal Power Act\(^{25}\) also authorize certain rights-of-way on public lands.

Section 302 of the BLM Act is closely related to, and may overlap with Title V. Section 302, which does not apply to national forest system lands, grants the Secretary of the Interior the authority to regulate the use, occupancy, and development of public lands by several means, including easements, permits, licenses and leases. Federal agencies may not acquire the right to use public lands by means of this section.\(^{26}\)

The following discussion of rights-of-way on public lands is divided into two parts. Part A deals with the general provisions of the BLM Act which could be applied to any rights-of-way granted under the Act. Part B analyzes the various purposes for which rights-of-way may be obtained under the BLM Act and other applicable statutes.

A. GENERAL RIGHT-OF-WAY PROVISIONS OF THE BLM ACT

1. Application

An applicant for the grant or renewal of a right-of-way is required to submit to the Secretary information reasonably related to the use or intended use of the right-of-way, including the effect on competition.\(^{27}\) In addition, the Secretary may require the submittal of a plan of construction, operation, and rehabilitation by an applicant if the Secretary finds that the proposed use of the right-of-way may cause a significant impact on the environment.\(^{28}\)

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27. Id. § 1761(b).
28. Id. § 1764(d).
The Secretary may grant the right-of-way only when he is satisfied that the applicant has the technical and financial capability to construct the project in accordance with the requirements of the Act.\textsuperscript{29}

2. \textit{Limits on Size and Duration}

The BLM Act does not quantify the limits on size and duration, but instead, sets forth the factors the Secretary must take into account in specifying the limits for each right-of-way. The Act requires that each right-of-way be limited to the ground which will be occupied by the project for which the right-of-way was issued, is necessary for operation of the project, is necessary for public safety, and will do no unnecessary damage to the environment. The Secretary may also authorize the temporary use of additional lands for construction, operation, maintenance, termination of, and access to, the project.\textsuperscript{30} A right-of-way is limited to a "reasonable term in light of all circumstances concerning the project."\textsuperscript{31} Circumstances which are to be considered include the cost, useful life, and public purposes of the project.

3. \textit{Controls on Use and Occupancy}

The Secretary has at his disposal several means by which he may exert control over the use and occupancy of rights-of-way. Environmental concerns are of great importance, but other conditions may serve as a basis for control as well. Section 505 requires each right-of-way to contain terms and conditions which will minimize damage to the environment, require compliance with applicable federal or state air or water quality standards, and require compliance with similar state standards for the use of rights-of-way if those standards are more stringent than federal standards.\textsuperscript{32} Further conditions may be included if deemed necessary to protect federal interests, manage the surrounding lands, and protect the interests of subsistence users. In addition, location of a route that will cause the least damage to the environment, taking into consideration the feasibility of that route, may be required.\textsuperscript{33} The Secretary may include a liability clause in the terms of the right-of-way\textsuperscript{34} and may require the posting of security for obligations imposed upon the holder of the right-of-way.\textsuperscript{35} The BLM Act permits the use or disposition of minerals or vegetative materials, including timber, located on or around rights-of-way, only if authorization has been obtained pursuant to other applicable laws.\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{29} \textit{Id.} § 1764(i).
\item \textsuperscript{30} \textit{Id.} § 1764(a).
\item \textsuperscript{31} \textit{Id.} § 1764(b).
\item \textsuperscript{32} \textit{Id.} § 1765(a).
\item \textsuperscript{33} \textit{Id.} § 1765(b).
\item \textsuperscript{34} \textit{Id.} § 1764(h).
\item \textsuperscript{35} \textit{Id.} § 1764(l).
\item \textsuperscript{36} \textit{Id.} § 1764(l).
\end{itemize}
The BLM Act deals separately with the granting of rights-of-way to federal agencies or departments. The Secretary may grant such rights-of-way, subject to "such terms and conditions as he may impose." The section 302 use, occupancy and development provisions do not apply to federal agencies or departments.

4. Right-of-Way Corridors

The BLM Act encourages the consolidation of rights-of-way into transportation and/or utility corridors. "In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way in common shall be required to the extent practical." The Act requires the Secretary to reserve, in any right-of-way or permit, the authority to designate right-of-way corridors and to require that all rights-of-way in common shall be required to the extent practical...

5. Payment for Use

Generally, the holder of a right-of-way granted under the BLM Act is required to pay annually the fair market value of the right-of-way, as determined by the Secretary. A right-of-way applicant may also be required to reimburse the United States for all reasonable costs incurred in the processing of the application. The rent may be waived where the United States has been granted reciprocal rights-of-way over the applicants' land pursuant to a cost share agreement and may be waived or reduced for federal, state, or local governments and non-profit organizations.

6. Suspension or Termination

Abandonment or noncompliance with the Act, applicable regulations, or conditions of the right-of-way, may be grounds for suspension or termination of the right-of-way. The suspension or termination may take place after due notice to the holder of a right-of-way, or an appropriate proceeding under the Administrative Procedure Act for a holder of an easement.

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37. Id. § 1767.
38. Id. § 1763.
39. Id. § 1764(g).
41. Neither the BLM Act nor its legislative history shed any light on how an easement varies from a right-of-way. The language in 43 U.S.C.A. § 1764(a)(b) would indicate that there is a difference between a right-of-way and a permit (contra text accompanying note 19 supra) but not between a right-of-way and an easement. But see the BLM interim guidelines for issuance of rights-of-way, which require a right-of-way grant to contain language stating that it is an easement issued pursuant to the BLM Act. BLM Organic Act Directive No. 76-15 (December 14, 1976). Further confusion is created by § 302(c) of the BLM Act, 43 U.S.C.A. § 1732(c) (West Supp. 1977), which states: "[T]he Secretary [of the Interior] shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final
administrative proceeding is required if the right-of-way terminates by its own terms; and there may be an immediate temporary suspension, without hearing, in order to protect public health, safety, or the environment.  The Act does not terminate pre-existing rights-of-way but, with the consent of the holder, the Secretary may reissue the rights-of-way pursuant to the BLM Act.

B. SPECIFIC PURPOSES FOR RIGHTS-OF-WAY

1. Transportation

The basic statutory authority for the grant of rights-of-way across public lands for transportation is the BLM Act. Rights-of-way may be issued under the Act for such things as roads, railroads, canals, tunnels, tramways and airways. The BLM Act also authorizes the construction of roads within and near public lands which will permit maximum economy in harvesting timber while at the same time meeting the requirements for managing other resources. Financing may be accomplished by use of any combination of appropriated funds, timber purchase contract requirements, or cooperative financing with public or private agencies.

Where a right-of-way is sought under the BLM Act for the realignment of a railroad already on public lands, the Secretary has the option of granting the new right-of-way under the same terms and conditions as the portion of the old right-of-way relinquished to the United States. The Secretary may do so if the lands involved are not within a community and are of approximately equal value, and if he finds the action to be in the public interest.

Rights-of-way across public lands for the purpose of constructing federally funded highways may be obtained by the states. The routes for federal-aid highways are designated by state or local officials subject to approval by the Secretary of Transportation. The Secretary of Transportation is required to cooperate with the Secretaries of the Interior, Housing and Urban Development, and Agriculture and with the states "in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed." Once the Secretary of

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43. Id. § 1769(a).
44. See note 19 supra.
46. Id. § 1769(b).
49. Id. § 103(b)(1), (c)(1), (d)(1), (e)(1).
51. Id. § 138 (also codified at 49 U.S.C. § 1653(f) (1970)).
Transportation determines that land owned by the United States is reasonably necessary for the highway right-of-way, he must file the required information and a request for the right-of-way with the Secretary of the department which administers the lands in question.52

2. Electric Energy, Communication, and Water Facilities

The BLM Act authorizes rights-of-way for "systems for generation, transmission, and distribution of electric energy,"53 but requires that the applicant also comply with the Federal Power Act of 1935 (FPA).54 The portion of the FPA which deals with rights-of-way on federally owned lands is intended to provide "a complete scheme of national regulation which would promote the comprehensive development of water resources of the Nation . . . ."55 The FPA authorizes the Federal Power Commission (FPC) to grant licenses which, among other things, permit the use and occupancy of public lands. These licenses may be issued

for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, powerhouses, transmission lines, or other project works necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction . . . or upon any of the public lands and reservations . . . or for the purpose of utilizing the surplus water or water power from any government dam . . . . 56

No licenses may issue until the FPC determines that the project will be in conformance with a comprehensive plan for improving or developing waterways and improving or utilizing water-power development, and for other beneficial public uses including recreation.57

The FPC has no jurisdiction to license power lines crossing federal lands which are not a part of a hydroelectric project.58 Furthermore, the FPC interprets its authority over powerlines which are a part of a hydroelectric

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52. If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary [of Transportation] that the proposed appropriation of such land . . . is contrary to the public interest or inconsistent with the purposes for which such land . . . [has] been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land . . . may be appropriated and transferred to the State highway department . . . .


58. Id. § 797(e).
project as applying only to "primary lines transmitting power from the power house or appurtenant works of a project to the point of junction with the distribution system or with the interconnected primary transmission system..."  

Regulations promulgated under prior law imposed special conditions on rights-of-way over lands administered by the Departments of Agriculture and the Interior for electrical transmission lines of thirty-three kilovolt (kV) capacity or greater. Briefly, these conditions allow the Secretary to require an applicant for a right-of-way to make "surplus capacity" available to the federal government or to allow the federal government to add to the transmission facilities in order to create surplus capacity. This enables the federal government to transmit power over existing private power lines, a practice known as "wheeling", without being required to build its own lines. The BLM Act makes no mention of wheeling but the legislative history indicates that there was no intent to abolish the practice. The BLM Act has proposed a rule change, pursuant to the BLM Act's general grant of authority to issue rights-of-way, to make the wheeling regulations applicable to power lines of sixty-six kV capacity or greater.

Rights-of-way for communications facilities are authorized by the BLM Act. Similarly, the Act authorizes rights-of-way for facilities for the distribution and impoundment of water. Presumably, any water facilities constructed for the purpose of hydroelectric generation of electric energy would be considered under section 501(a)(4) and be subject to the FPA.

3. Pipeline Systems

There are essentially two statutes which govern pipelines and associated facilities for materials other than water, on public and forest lands. The first statute is the BLM Act, which provides authority for the granting of rights-of-way for the transportation and storage of solid materials, as well as...
as gases and liquids not covered by the Mineral Leasing Act.\textsuperscript{69}

Section 28 of the Mineral Leasing Act (MLA) governs rights-of-way for pipelines for the transportation of natural gas and petroleum.\textsuperscript{70} A right-of-way for a purpose associated with an oil or gas pipeline, such as communication facilities, may possibly be obtainable under either Act. Section 28 of the MLA generally applies to "Federal lands,"\textsuperscript{71} a term which excludes lands in the national park system, but includes other types of reserved lands. Any agency head\textsuperscript{72} has the authority to grant a right-of-way if the surface which is the subject of the right-of-way application falls entirely under that agency's jurisdiction.\textsuperscript{73} Otherwise, the Secretary of the Interior is empowered to make the decision. In the event the lands covered by the right-of-way in question are controlled by more than one department of the federal government, the Secretary of the Interior must consult with the appropriate Secretaries before making a decision.\textsuperscript{74} In contrast, the BLM Act requires a separate right-of-way grant from the Secretaries of Agriculture and the Interior, where the right-of-way crosses lands administered by both Departments.\textsuperscript{75} In all cases, if a Secretary or agency head determines that a right-of-way through a federal reservation under his jurisdiction is inconsistent with the purposes of the reservation, a right-of-way will not be granted.\textsuperscript{76}

a. Application. The requirements for making application for a right-of-way under the MLA are similar to those under the BLM Act. The MLA requires the applicant for a right-of-way to submit information regarding the use of the right-of-way. The MLA, in contrast to the BLM Act, lists specific types of information which may be required.\textsuperscript{77} The MLA does not specifically require information regarding the effect of the use of the right-of-way on competition, but operators of pipelines are subject to various regulatory schemes.\textsuperscript{78} The MLA, unlike the BLM Act, provides an opportunity for the public and governmental agencies to participate in right-of-way application determinations, including where appropriate, public hearings.\textsuperscript{79} The Secre-
panying note 28. The MLA requires the Secretary of the Interior or agency head to notify the House and Senate Interior and Insular Affairs Committees upon receipt of a right-of-way application for an oil or gas pipeline twenty-four inches in diameter or greater. In this situation, the right-of-way in question may not be granted for a period of sixty days after such notice unless the Committees waive the time requirement. Both statutes provide that the right-of-way may be approved only if the applicant has the requisite technical and financial capabilities.

b. Limits on Size and Duration. The Secretary has less discretion under the MLA than under the BLM Act to set the maximum size and duration of rights-of-way. The width is limited to fifty feet plus the ground occupied by the facilities, unless the Secretary of the Interior or an agency head makes a written determination that additional lands are necessary for the operation of the project and protection of the environment. Both statutes authorize the temporary use of additional lands and require the consideration of the same factors in determining the duration of the right-of-way, but the MLA permits an absolute maximum term of thirty years.

c. Controls on Use and Occupancy. The use and occupancy of rights-of-way may be controlled in much the same way under the Mineral Leasing and the BLM Acts. Each allows the Secretary to include a liability clause in the right-of-way and require the posting of security. Both Acts specify certain terms which must be imposed on rights-of-way, but the BLM Act also lists certain terms which may be imposed at the Secretary’s discretion. One major difference between the Acts is in the emphasis the BLM Act places on the compliance with state standards which are more stringent than the federal standards. The MLA merely requires the Secretary or agency head to comply with state standards for right-of-way construction, operation and maintenance to the extent practical.

d. Right-of-way Corridors. The provisions dealing with the joint use of rights-of-way are nearly identical in the two Acts. The BLM Act has an

80. Id. § 185(h)(2). There is a similar requirement under the BLM Act, see text accompanying note 28 supra.
82. Id. § 185(j); see text accompanying note 29 supra.
83. Id. § 185(d).
84. Id. § 185(e); see text accompanying note 30 supra.
85. Id. § 185(n); see text accompanying note 31 supra.
86. Id. § 185(n).
87. Id. § 185(x); see note 34 supra.
88. Id. § 185(m); see note 35 supra.
89. Id. § 185(h)(2); see text accompanying note 34 supra.
additional provision which sets forth the criteria to be used in designating transportation and utility corridors.92

e. Payment for Use. The MLA is consistent with the BLM Act in requiring payment of fair market rental value for the right-of-way plus the costs of processing the application and inspecting the facility.93 However, there are no exceptions to this requirement in the MLA.

f. Suspension or Termination. The grounds as well as the administrative procedures for suspension or termination of a right-of-way are essentially the same under the MLA and the BLM Acts.94 Where an administrative proceeding is appropriate, the BLM Act requires a hearing pursuant to the Administrative Procedure Act for easements only, but the MLA requires such a hearing for all rights-of-way.95

III. NATIONAL FOREST SYSTEM

The sections of the BLM Act dealing with policies and planning do not apply to the national forest system lands. Instead, the policy guidelines and planning requirements for the Forest Service are set forth in a number of other statutes. Congress has authorized the Secretary of Agriculture to administer national forests.96 The purposes of the national forests are "to improve and protect the forest," to secure "favorable conditions of water-flows . . . , to furnish a continuous supply of timber,"97 and to provide for outdoor recreation, range, and wildlife and fish. Mining is also a generally accepted use.98 Renewable resources of lands in the national forest system99 are to be managed on a multiple use sustained yield basis.100 To this end, the Forest and Rangeland Renewable Resource Act of 1974 requires an assessment of the renewable resources and the preparation of a renewable resource program.101

92. Id. § 185(p); 43 U.S.C.A. § 1763 (West Supp. 1977).
93. 30 U.S.C. § 185(l) (Supp. IV 1974); see text accompanying note 39 supra.
94. 30 U.S.C. § 185(o) (Supp. IV 1974); see text accompanying notes 40-42 supra.
97. Id. § 475.
98. Id. § 528.
99. The national forest system is defined as:
all national forest lands reserved or withdrawn from the public domain of the United States,
all national forest lands acquired through purchase, exchange, donation, or other means,
the national grasslands and land utilization projects administered under title III of the
Bankhead-Jones Farm Tenant Act [7 U.S.C. §§ 1010 et seq. (1970)], and other lands,
waters, or interests therein which are administered by the Forest Service or are designated
for administration through the Forest Service as a part of the system.
100. The BLM Act requires public lands to be administered on a similar basis but the
definitions of multiple use and sustained yield are not identical between the two statutes. 16
Congress has specifically addressed policies relating to transportation in and around the national forest system and declared that the "installation of a proper system of transportation to service the National Forest System ... shall be carried forward in time to meet anticipated needs on an economical and environmentally sound basis . . . ." 102

Under the BLM Act, the Secretary of Agriculture has nearly identical authority to grant rights-of-way, with respect to national forest lands as does the Secretary of the Interior, with respect to the public lands. 103 One difference is that rights-of-way for transportation facilities are not authorized "where such facilities are constructed and maintained in connection with commercial recreation facilities on lands in the national forest system." 104 Another difference is that the Secretary of Agriculture is excluded from the BLM Act section authorizing roads for timber production. 105 This is so because he already has similar authority under section 4 of the Act of October 13, 1964, 106 which applies to national forest system lands.

The same provisions of the MLA which apply to public lands apply to national forest system lands. 107 However, the Secretary of Agriculture can disallow the issuance of an oil and gas pipeline if he determines that the right-of-way would be inconsistent with the purposes of the reservation. 108

At least two statutes relating to rights-of-way on national forest lands were not repealed by the BLM Act. One of these, the 1964 Act, authorizes the Secretary of Agriculture to grant permanent or temporary easements for roads in the national forest system. 109 The other is the Forest Service Organic Act, a section of which permits settlers within the boundaries of national forests to construct wagon roads in order to reach their homes and utilize their property. 110

IV. OTHER RESERVED LANDS

A. STATUTES OF GENERAL APPLICABILITY

There are several statutes which either establish the authority to grant rights-of-way or determine the conditions of such rights-of-way on reserved public lands. For organizational purposes, these statutes have been divided into two categories. The first category of statutes which also apply to national forest system lands and public lands will only be discussed insofar as they apply to each type of reserved land. These statutes include: the

102. Id. § 1608.
104. Id. § 1761(a)(6).
105. Id. § 1762(a).
108. Id. § 185(b)(3).
110. Id. § 478.
The second category of statutes have been repealed insofar as they apply to national forest system lands and public lands, but remain applicable to some types of reserved lands. These statutes include a group of ditches and canals acts, the 1901 Act, and the 1911 Act.

The canals and ditches acts grant to canal ditch companies or irrigation or drainage districts, rights-of-way for canals, laterals, and reservoirs, and permit such rights-of-way to be used for water transportation, domestic purposes and development of power. The statutes prescribe the maximum size of the right-of-way, but additional land may be used when the Secretary of the Interior deems it necessary for the operation and maintenance of the reservoirs, canals and laterals. The Secretary may also grant permits for dwellings, buildings or corrals for the convenience of those engaged in the care and management of the water works. Rights-of-way on reservations are to be located so that they do not "interfere with the proper occupation by the Government . . . ."

The 1901 Act presently authorizes the Secretary of the Interior to grant rights-of-way through federal reservations and certain national parks for structures used in the generation and distribution of electrical power and for telephone and telegraph purposes. The statute also authorizes structures for the transportation and storage of water. The interest granted is denoted as a "right of way", but because the Secretary of the Interior can revoke the right-of-way at his discretion, the courts have construed the interest as a permit or license. The maximum size is specified by the Act and no such right-of-way may be granted through a reservation without the approval of the chief officer of the supervising department. Such approval is contingent upon a finding by him that the proposed right-of-way is not incompatible with the public interest.

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111. See text accompanying notes 53-59 supra.
112. See text accompanying notes 70-95 supra.
113. See text accompanying notes 47-52 supra.
118. Id. § 951.
119. Id. § 946.
120. Id. § 950.
121. Id. § 946.
The 1911 Act empowers the head of the department with jurisdiction over the lands involved to grant "an easement for rights-of-way" across federal reservations if he finds that such use is not incompatible with the public interest. Such an easement may be granted for placement of poles and lines for electric power transmission, and for structures and facilities for communication purposes. The maximum term of the easement is fifty years and the interest is subject to forfeiture for abandonment or failure to use for two years. The maximum size of the right-of-way is also specified by the statute.126

A comparison of the ditches and canals acts, and the 1901 and 1911 Acts with the BLM Act is not particularly useful. The early statutes are much less detailed than the BLM Act. As a result, extensive regulations have been promulgated in order to create a total system of administration and management of rights-of-way. However, when promulgated these regulations applied to public lands and national forest system lands as well as reserved lands. It remains to be seen whether the regulations promulgated under the BLM Act will be applicable to reserved lands. The other complicating factor is that the reserved lands frequently have specific rights-of-way authorities outside of the early statutes. Thus, the practical applicability of the early statutes is somewhat in doubt.

B. MANAGEMENT SYSTEMS

1. National Wildlife Refuge System

The Secretary of the Interior has authority to administer the national wildlife refuge system (NWRS) through the Fish and Wildlife Service (F&WS). The NWRS includes "all lands, water, and interests therein administered by the Secretary [of the Interior] as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas . . . ."127

In contrast to the public lands, there is no unified statute which sets forth management policies and the purposes for the NWRS. Regulations for administering the NWRS128 cite as management authority the National Wildlife Refuge System Administration Act129 and seven other statutes which deal with administrative procedures, individual units of the NWRS, and game and fish management.130

126. Id. § 961.
Easements may be granted under the Refuge Administration Act for essentially the same purposes as rights-of-way under the BLM Act. These purposes include, but are not limited to, powerlines, telephone lines, pipelines, canals, ditches, and roads.\textsuperscript{131} The Refuge Management Act is similar to the BLM Act, in that the right-of-way provisions require payment of fair market value for use of the rights-of-way and limit the size of rights-of-way to the land necessary for the construction, operation, and maintenance of the permitted activities.\textsuperscript{132} The BLM Act provisions are much more extensive than the Refuge Administration Act, especially in the area of protection of the environment and public safety. However, the Refuge Administration Act requires a determination by the Secretary of the Interior that the permitted activity is "compatible with the purposes for which these areas are established."\textsuperscript{133}

There are several statutes of broad applicability which may apply to the NWRS: The ditches and canals acts,\textsuperscript{134} and the 1901\textsuperscript{135} and 1911\textsuperscript{136} Acts have not been repealed insofar as they apply to the NWRS, but the F\&WS regulations no longer cite them as authority for granting rights-of-way.\textsuperscript{137} In any case; project works subject to FPC jurisdiction must be licensed by the FPC.\textsuperscript{138} This license may be granted only if the FPC finds that the licensing will not interfere with the purposes of the refuge, and any such license is subject to the conditions the Secretary of the Interior deems necessary to protect the reservation.\textsuperscript{139} Rights-of-way for federally-funded highways may be acquired across NWRS lands,\textsuperscript{140} but special protection is granted NWRS lands and other publicly owned lands of special significance. For example, the Secretary of Transportation

shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife or refuge of national, state, or local significance . . . or any land from a historic site . . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.\textsuperscript{141}
There are also special provisions which apply to oil and gas pipeline rights-of-way in the NWRS. Under section 28 of the MLA, rights-of-way may be issued across a refuge\textsuperscript{142} unless the Secretary or agency head determines that such a right-of-way is inconsistent with the purposes of the refuge.\textsuperscript{143}

2. National Park System

The national park system is administered by the Secretary of the Interior through the National Park Service (NPS).\textsuperscript{144} The NPS is charged with promoting and regulating the use of national park system\textsuperscript{145} lands "by such means and measures as conform to the fundamental purpose of the said [lands] . . . , which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations . . . ."\textsuperscript{146} A statute which applies specifically to a particular area within the park system will control, in the event of a conflict, over a statute generally relating to the administration of the park system.\textsuperscript{147}

There is no comprehensive right-of-way authority for the national park system. Instead, a patchwork system of outdated laws supplies the right-of-way authority. The ditches and canals acts\textsuperscript{148} and the 1911 Act\textsuperscript{149} are applicable to lands in the national park system. The 1901 Act specifically applies to Yosemite and Sequoia National Parks and other reservations.\textsuperscript{150} Other reservations, in this context, probably would include national recreation areas and national monuments but not other national parks. The FPC has no authority to license project works within national parks or monuments. Instead, Congress must license projects located within parks or monuments.\textsuperscript{151} The FPC can license projects on reservations, other than parks and monuments, if it finds that the licensing will not interfere or be inconsistent with the purposes of the reservation.\textsuperscript{152}

\begin{footnotesize}
\textsuperscript{142} In its final version, the amendment to section 28 of the MLA excluded only national park system lands, lands held in trust for Indians or Indian tribes and outer continental shelf lands from the authority to grant rights-of-way. The Senate version of the bill also excluded wilderness areas and wildlife refuges. H.R. Rep. No. 624, 93d Cong. 1st Sess. 21-22, reprinted in [1973] U.S. Code Cong. & Ad. News 2523.


\textsuperscript{145} The national park system includes national parks, monuments, memorials, parkways, and other lands administered through the NPS. 16 U.S.C. § 1c(a) (1970).

\textsuperscript{146} 16 U.S.C. § 1 (1970). This section is made applicable to national park system lands by 16 U.S.C. § 1c(b) (1970).

\textsuperscript{147} 16 U.S.C. § 1c(b) (1970).

\textsuperscript{148} 43 U.S.C. §§ 946-954 (1970); see text accompanying notes 117-21 supra.


\textsuperscript{152} id. § 797(e) (1970); see text accompanying notes 53-59, 138-39 supra.
\end{footnotesize}
Rights-of-way for surface vehicle transportation can be obtained in a number of ways. Rights-of-way for federally funded highways may be obtained for crossing national park system lands, subject to a finding of a lack of feasible or prudent alternatives. Recently, authorization was given for federal-local cooperative studies to determine "the most feasible Federal-aid routes for the movement of vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas." The Secretary of the Interior has special authority to construct and improve roads and trails in the national park system. Rights-of-way for oil and gas pipelines cannot be obtained through national park system lands. Section 28 of the MLA specifically excludes those lands.

3. Military Reservations

The secretary of a military department has broad authority to grant easements for rights-of-way over lands reserved for use by his department or otherwise under his control. However, there is nothing like the BLM Act's comprehensive guidelines for administering rights-of-way. The secretary makes such grants under his own conditions, but he may only grant the easement if he finds that it will not be against public interest. The rights-of-way may be used for such purposes as railroads, oil pipelines, ditches and canals, and roads. He may also grant rights-of-way for gas, water and sewer pipelines if he makes an additional finding that the right-of-way will not substantially injure the interest of the United States in the property affected.

Military reservations are subject to some of the statutes of broad applicability. In particular, the 1911 Act has specifically been recognized as applying to military reservations. The ditches and canals acts and the 1901 Act apply to such lands, but the specific statute governing military reservations would take precedence in the event of a conflict. The FPC licensing authority applies to military reservations with the special condition that the FPC find that such a license is not inconsistent with the purposes of the reservation. The MLA pipeline provisions allow the grant-
There is a possible conflict between the MLA and the statute which applies specifically to military reservations.

4. National Wilderness Preservation System

The national wilderness preservation system (NWPS) was established in 1964 by the Wilderness Act. The basic policy of the Act is to secure "for the American people of present and future generations the benefits of an enduring resource of wilderness." Congress may designate wilderness areas in national forests, the national park system, the national wildlife refuge system, and on the public lands. The agency or department holding management authority prior to the designation of lands as wilderness retains jurisdiction over those lands. The effect of the Act is to provide a special set of rules which require the managing agency or department to administer wilderness areas within their jurisdiction—"for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness . . . ."

As a general rule, the Act prohibits manmade structures within wilderness areas. The Act states that "except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area . . . . and except as necessary . . . for the purpose of this chapter . . . . there shall be . . . no structure or installation within any such area." Rights-of-way through specific wilderness areas may be authorized by the President, in accordance with any regulations he may desire. This authority extends to:

- reservoirs, water conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road
- much different standards than the MLA.
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As a general rule, the Act prohibits manmade structures within wilderness areas. The Act states that "except as specifically provided for in this chapter, and subject to existing private right
construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial.\textsuperscript{175}

This authority applies only to wilderness areas located on public lands or in national forests and does not include national park system or national wildlife refuge system wilderness areas. Access rights, of an unspecified type, are to be granted to owners of land surrounded by national forest or public land wilderness areas.\textsuperscript{176} Similarly, the Secretaries of Agriculture and the Interior are required to permit "by reasonable regulations consistent with the preservation of the area as wilderness," ingress and egress to valid mining claims or other valid occupancies surrounded by national forest and public land wilderness areas.\textsuperscript{177} In summary, the Wilderness Act authorizes no rights-of-way through national park or wildlife refuge system wilderness areas but does allow certain uses of national forest and public land wilderness lands.

The MLA authorizes, with the exception of national park system wilderness areas, oil and gas pipelines through wilderness areas. A right-of-way through any wilderness area could be denied by the appropriate department Secretary or agency head on the basis of incompatibility with the purposes for which such wilderness areas are established.\textsuperscript{178}

Under the BLM Act special rules apply to public lands which have been identified as having wilderness characteristics and are awaiting congressional action. The Secretary of the Interior is required to administer such lands in a manner "so as not to impair the suitability of such areas for preservation as wilderness."\textsuperscript{179} This standard apparently precludes rights-of-way in such study areas except to the extent those rights-of-way would be allowed in a wilderness area.\textsuperscript{180}

5. National Wild and Scenic Rivers System

The national wild and scenic river system was created by Congress to preserve those rivers in a "free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations."\textsuperscript{181} In general, the wild and scenic river system "shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as

\begin{footnotes}
\footnote{175. Id. § 1133(d)(4).}
\footnote{176. Id. § 1134(a).}
\footnote{177. Id. § 1134(b).}
\footnote{178. 30 U.S.C. § 185(b)(1) (Supp. IV 1974). See text accompanying notes 70-95, 143 supra.}
\footnote{179. 43 U.S.C.A. § 1782(c) (West Supp. 1977); c.f. Parker v. United States, 448 F.2d 793 (10th Cir. 1971), cert. denied 405 U.S. 989 (1971), which involved addition of contiguous areas to a national forest primitive area.}
\footnote{180. See text accompanying notes 174-78 supra.}
\footnote{181. 16 U.S.C. § 1271 (1970).}
\end{footnotes}
is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values."182

The right-of-way provisions of the Wild and Scenic Rivers Act (WSRA) cannot be understood without information regarding the classification and designation. There are three possible classifications within the wild and scenic rivers system—wild, scenic and recreational. Wild river areas are free of impoundments, generally accessible only by trail, and essentially primitive and unpolluted. Scenic river areas are free of impoundments, largely primitive and undeveloped, but accessible in places by roads. Recreational river areas are readily accessible by road or railroad, may have some development, and may have undergone some impoundment in the past.183 A river may be included in the wild and scenic rivers system either by Congressional designation, or by an act of a state legislature followed by approval by the Secretary of the Interior.184

Rivers within the system are subject to several jurisdictional authorities. Rivers designated by state action are administered by that state.185 Congressionally designated rivers may be administered by either the Secretary of the Interior or Agriculture, through agencies within their departments. Any portion of the system which lies in the national wilderness preservation system "shall be subject to the provisions of both the Wilderness Act and this chapter with respect to preservation of such river and its immediate environment, and in case of conflict between the provisions of the Wilderness Act and this chapter the more restrictive provisions shall apply."186

The WSRA indicates the statutory authorities which dictate the management of rivers in the system.187 Transportation functions are treated separately from management in general. The Act states that the Secretaries of the Interior and Agriculture "may grant easements and rights-of-way over ... any component of the wild and scenic rivers system in accordance with the laws applicable ..." to the national park and national forest systems respectively, but any conditions precedent to granting of rights-of-way must

182. Id. § 1281(a).
183. Id. § 1273(b).
185. Id. § 1273(a)(ii).
187. With respect to management generally, any component of the Wild and Scenic River System that falls within or is added to the national park system is subject to the statutory authority governing the parks. Similarly, wild and scenic rivers located within the national wildlife refuge system are subject to the statutory authority governing refuges. If there is conflict between the Wild and Scenic Rivers Act and the national park system acts or the act establishing the national wildlife refuge system, the more restrictive provisions shall apply. Under the Wild and Scenic Rivers Act, the Secretary of Agriculture "may utilize the general statutory authorities relating to the national forests in such manner as he deems appropriate to carry out the purposes of this chapter." 16 U.S.C. § 1281(d) (1970). Consequently, the Secretary of Agriculture is given more discretion to administer wild and scenic river areas that fall within his jurisdiction than is the Secretary of the Interior for parks and refuges.
be related to the policy and purpose of the Wild and Scenic Rivers Act.\textsuperscript{168} This may seem to be of academic importance until one considers the effect on the MLA. Oil and gas pipeline rights-of-way are not authorized in national park system lands.\textsuperscript{169} Therefore, any river designated under the WSRA, which is administered by the Interior, could not be crossed by oil and gas pipelines, even if the river is merely designated as "recreational."\textsuperscript{190}

The WSRA has a significant impact on the water project licensing authority of the FPC.\textsuperscript{191} The FPC is prohibited from licensing project works directly affecting any river designated as a component of the wild and scenic rivers system.\textsuperscript{192} This prohibition also extends to rivers designated by Congress as potential additions to the system.\textsuperscript{193}

V. CONCLUSION

A complete assessment of the legal authorities for obtaining rights-of-way across federally owned lands cannot be undertaken until regulations have been promulgated under the BLM Act. The amount of discretion left to the managing agency in promulgating regulations is much less than under other rights-of-way authorities, with the exception of the MLA, but actual operation of the BLM Act still depends in large measure upon agency interpretation and implementation. This article has set forth some of the areas where problems of interpretation and implementation of the BLM Act right-of-way provisions might arise, but the BLM Act does represent a significant effort by Congress to reform public land law by presenting a comprehensive system for the grant and management of rights-of-way on public lands and national forest system lands.

Reform is still needed for rights-of-way authorities governing federally owned lands not subject to the BLM Act. This article has detailed areas of confusion in and overlap between the various right-of-way statutes applicable to different types of reserved lands. One possible partial solution would be to apply the BLM Act right-of-way provisions to all types of federally owned lands, subject to additional provisions consistent with the special nature of each management system. The most critical provisions are those dealing with the threshold requirements for the grant of a right-of-way. For example, the secretary of the department charged with administering the lands in question, or in the case of wilderness areas, the President, can be required to make a written determination that the proposed right-of-way is not inconsistent with the purposes for the reservation or is in the public interest to grant the right-of-way. Such a determination can be made subject to public review and comment. A stricter test, similar to the test the Secretary

\textsuperscript{188} 16 U.S.C. § 1284(g) (1970).
\textsuperscript{189} 30 U.S.C. § 185(a)(b)(1) (Supp. IV 1974); see text accompanying note 71 supra.
\textsuperscript{190} See text accompanying note 183 supra.
\textsuperscript{191} See text accompanying notes 53-59, 138-39 supra.
\textsuperscript{193} Id. § 1278(b).
of Transportation must apply to projects subject to his approval,\(^{194}\) can be applied by requiring a finding that there is no feasible and prudent alternative to the proposed use of such land. Certain uses of rights-of-way which Congress finds particularly repugnant to the purposes of a particular management system can be prohibited entirely. Terms and conditions, in addition to those imposed by the BLM Act, can be imposed to minimize aesthetic and environmental impacts if a right-of-way application is granted.

The BLM Act is evidence that Congress has embarked on a strong program of public land law reform. It should be apparent from this article that more reform is in order, at least in regard to the laws governing rights-of-way.

\(^{194}\) See text accompanying notes 140-41 supra.
Highway Rights-of-Way on Public Lands

JOHN M. RIPPLEY*

In many states it has been found that, in the past, highways were constructed over public lands without a formal easement or deed for right-of-way having been obtained from the federal government. Patents subsequently have been issued on such land in many cases without an express reservation of the right-of-way or with an ambiguous reservation that does not specify the extent of the right-of-way. When encroachments are found or when a state desires to improve the highway, a question arises regarding the relative rights of the highway agency and the holder of a subsequent patent to the land. This article reviews the general legal principles applicable to such conflicts, and suggests possible resolutions or steps that highway agencies might take to improve or preserve their legal position. The impact of recent federal legislation is also discussed.

I. FEDERAL OFFER TO DEDICATE LAND FOR HIGHWAYS

In the Act of July 26, 1866, Congress provided that "[t]he right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."1

The intent and effect of this statute has been well established primarily through litigation in the state courts. The statute constitutes an "express dedication" or "grant" by the federal government which becomes effective upon acceptance by the public or proper public authority.2 The statute is

also characterized as a "statutory offer to dedicate" lands for highway purposes.\(^9\) Whether the offer has been accepted by establishment of a public highway, and whether the width and extent of the right-of-way so established is proper, are issues to be determined under the law of the state in which the land is located.\(^4\) It is also clear that a patentee takes title subject to existing rights-of-way whether or not specifically reserved in the patent.\(^5\) This was clearly seen in a 1968 Arizona case:

> It is true that a patent is "the highest evidence of title" and that a patent may not be "attacked" in a collateral proceeding. However, it is also clear from cases decided under 43 U.S.C.A. § 932 that a subsequent patentee takes subject to previous right-of-ways established under the grant contained in that federal statute . . . . The silence of the patents does not preclude the State from showing the full extent of its right-of-ways established prior to the time when the patents were issued . . . .\(^6\)

### II. ACCEPTANCE OF THE GRANT

The grant may be accepted either by actual use of the land for highway purposes or by formal action by public authorities. Some courts have been very liberal in finding acceptance based on use. For example, the Colorado Supreme Court has summarized Colorado law as follows:

> The grant may be accepted either by actual use of the land for highway purposes or by formal action by public authorities. Some courts have been very liberal in finding acceptance based on use. For example, the Colorado Supreme Court has summarized Colorado law as follows:

> The sum of our holdings is that the statute is an express dedication of right of way for roads over unappropriated government lands, acceptance of which by the public results from "use by those for whom it was necessary or convenient." It is not required that "work" shall be done on such a road or that public authorities shall take action in the premises. User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices.\(^7\)

In general, use of a road by the public for such length of time and under such circumstances as to indicate clearly an intention on the part of the public to accept the grant is sufficient. It is not a question of establishment by prescription or adverse use but a question of acceptance.\(^8\) Nonetheless, some courts will look to the state law regarding establishment of roads by prescription over private lands for guidance.\(^9\) Most of the reported cases involve roads which evolved from stock trails or paths.

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\(^{278}\) (1963); Kirk v. Schultz, 63 Colo. 278, 119 P.2d 266 (1941); Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 864 (1946); Bishop v. Hawley, 33 Wyo. 271, 238 P. 284 (1925).


\(^{5}\) City of Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593, 595 (1909); Sullivan v. Condas, 76 Utah 585, 290 P. 954, 957 (1930); Bishop v. Hawley, 33 Wyo. 271, 238 P. 284, 286 (1925).


\(^{9}\) See, e.g., Jeremy v. Bertagnole, 101 Utah 1, 116 P.2d 420, 422 (1941) and cases cited therein. Acceptance based on use was not permitted in Cross v. State, 147 Ala. 125, 41 So. 875 (1906).
Where highways are established by public authority rather than by use, there is some divergence of opinion on what acts are required to constitute acceptance. The more liberal majority view holds that "all that is needed for acceptance is 'some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept.'" However, there are a few cases indicating that actual construction of the highway may be necessary before acceptance takes place.

The better view appears to be that, as far as the federal government is concerned, any positive act on the part of local officials to accept the grant is sufficient to consummate the grant unless state law requires something more. The view is best expressed in Smith v. Mitchell, an early case from Washington state where the court said:

The act of Congress . . . does not make any distinction as to the methods recognized by law for the establishment of a highway. It is an unequivocal grant of right of way for highways over public lands, without any limitation as to the method for their establishment, and hence a highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located.

Some western states enacted legislation while still territories or during early statehood dedicating public highways along all section lines in the state. The courts in those states have held that the legislative declaration or dedication of section line highways alone constitutes an acceptance of the federal grant in the 1866 Act. The acceptance of the grant takes place at the time of dedication even without any subsequent construction. Many western states are still constructing new highways along section lines with substantial savings in right-of-way acquisition costs.

There appears to be only one case disputing the general interpretation given to 43 U.S.C. § 932. In United States v. Dunn, the court in a footnote stated that section 8 of the Act of 1866 was enacted to protect persons who already have encroached upon the public domain without authorization. "It was not intended to grant rights, but instead to give legitimacy to an existing status otherwise indefensible." For this proposition the court cited

12. 21 Wash. 536, 58 P. 667, 668 (1899).
15. Most of the section line dedications specified a width, generally 66 feet, which is insufficient for modern highways. The additional width required by current standards must be obtained by purchase or condemnation.
16. 478 F.2d 443 (9th Cir. 1973).
Although the Court held in *Central Pacific Railway v. Alameda Co.* that one purpose of section 8 of the 1866 Act was to confirm pre-existing rights, the Court did not rule on whether the statute was also to grant new rights. Much of the opinion discusses, by analogy, section 9 of the same act, dealing with rights-of-way for canals and ditches. Section 9 states, "The right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed . . . ." That language is significantly different from the "grant" language in section 8 dealing with highway rights-of-way. The Court's purpose in *Central Pacific* was to expand section 8 to cover pre-existing rights. The Court accomplished its purpose through analogy to the principles in section 9. The opinion, however, does not limit or nullify the grant language in section 8.

The question may arise whether the 1866 statute was superseded by the numerous subsequent statutes regarding rights-of-way over public lands. In *Wilderness Society v. Morton*, it was argued that the statute was superseded in part by section 28 of the Mineral Leasing Act of 1920. The court rejected the argument with the following language:

> A differently phrased yet similar principle of statutory construction is that where there are two acts on the same subject—here rights-of-way in federal lands—effect should be given to both if possible . . . . This doctrine should be of special significance when we deal with allegedly conflicting public land laws. As a cursory glance at those sections of the United States Code which deal with public lands will indicate, these laws are hardly a model of neat organization and uniform planning . . . . This is an area of the law where it truly can be said that most statutes are *sui generis*. It is an area where it is extremely doubtful that Congress, when passing certain legislation, was aware of, let alone intended, inconsistencies with prior legislation.

III. EXTENT OF RIGHT-OF-WAY

The major issue is often not whether a public right-of-way exists but the extent or width of the right-of-way. The question of the width of the right-of-way is a mixed question of law and fact. Where right-of-way has been acquired by use, its width "must be determined in accordance with what is reasonable and necessary for the uses to which the road has been put." The width is not confined to the beaten path or actual roadway. "Congress must have intended such a highway as is recognized by the local laws, customs, and usages."

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A particular use having been established, such width should be decreed by the court as will make such use convenient and safe. A bridle path abandoned to the public may not be expanded, by court decree, into a boulevard. On the other hand, the implied dedication of a roadway to automobile traffic is the dedication of a roadway of sufficient width for safe and convenient use thereof by such traffic.\textsuperscript{27}

State statutes should always be consulted since many states have current or past legislation specifying normal right-of-way width.\textsuperscript{28} Where a statute at the time of a grant specifies a normal right-of-way width, there is a presumption that the grant was for the width so specified.\textsuperscript{29} Section line roads generally pose no problem regarding width because the statutes when the 60 to 100-foot right-of-way was the norm. The principles, however, can be used to support any right-of-way that can be shown to have been reasonably necessary. One recent Arizona case, \textit{State v. Crawford},\textsuperscript{33} indicates that, given sufficient facts, the court would have found a 400-foot right-of-way.

\textit{Crawford} illustrates many of the problems that highway agencies face in attempting to prove right-of-way under the 1866 Act. It was an inverse condemnation proceeding against the state for allegedly taking a 200-foot strip of plaintiffs' land in constructing a second lane of highway parallel to an existing highway which had been constructed earlier on a concededly valid 100-foot right-of-way. The original highway was built in 1920 over unserved United States public lands. Plaintiffs' patent, issued in 1954, contained no express reservation of right-of-way for the highway. The physical roadway and necessary appurtenances never extended beyond 100 feet. In 1964, the state constructed additional lanes which consumed 200 more feet of right-of-way.

The state attempted to show that in 1940 the state highway engineer had prepared a map on which he drew a 400-foot right-of-way for the road. In 1942, the Arizona State Highway Commission passed a resolution incorporating the map by reference and ordering the improvement of the highway. Unfortunately, the state was never able to produce a copy of the map. The resolution did not itself describe the width of the right-of-way. The

\textsuperscript{27} Jeremy v. Bertagnole, 101 Utah 1, 116 P.2d 420, 424 (1941).
\textsuperscript{28} See, \textit{e.g.}, S.D. \textsc{compiled laws ann.} § 31-3-18 (1967).
\textsuperscript{29} Meservey v. Guilford, 14 Idaho 133, 93 P. 780, 785 (1908); Hunsaker v. State, 29 Utah 2d 322, 509 P.2d 352, 354 (1973).
\textsuperscript{30} See, \textit{e.g.}, N.D. \textsc{cent. code} § 24-07-03 (1970) (two rods each side of section line); S.D. \textsc{compiled laws ann.} § 31-18-2 (1976) (sixty-six feet to be taken equally from each side of the section line).
\textsuperscript{31} City of Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593 (1909).
\textsuperscript{32} Bishop v. Hawley, 33 Wyo. 271, 238 P. 284 (1925).
The case is significant because the court indicated that if the state could have produced a map or resolution clearly manifesting its intent to accept the additional right-of-way prior to plaintiffs' patent, the state might have prevailed even though actual construction did not take place until more than twenty-two years later (and ten years after plaintiffs' patent). The case illustrates the necessity for preserving old files relating to highways for which the right-of-way has not been firmly established by a written easement or deed.

It is interesting that even a survey predating the patent was not found to be controlling. A 1954 resurvey prior to plaintiffs' patent indicated the existence of a 400-foot right-of-way for the road in question. In spite of the fact that plaintiffs' patent referred to the survey which had been approved by the Department of Interior, the court found that the survey did not affect the conveyance. The primary reason cited was that the patent itself contained no reservation of right-of-way. The court also stated, "A surveyor is not a judicial officer. It is not within his province to make a determination as to whether land is within or without the operation of certain laws." Another factor not mentioned is that the survey, having been prepared by the United States Government, does not evidence the state's intention to accept the additional right-of-way. One must look primarily to the actions of the state and not the actions of the federal government to determine whether a state has accepted the federal offer to dedicate under 43 U.S.C. § 932. Note, however, that if the patent had contained a general reservation for a highway, the results of the case would probably have been different.

Although the extent of right-of-way is a matter of state law and may therefore vary from state to state, the following factors appear to be given significant weight by the courts (in order of probable weight):

(1) A permit from the federal agency having control over the land giving local authorities permission to occupy a specified amount of right-of-way for highway purposes.

(2) A city, county or state highway commission resolution regarding the particular highway which mentions right-of-way width.

(3) Statutes or regulations specifying a minimum or typical width of right-of-way for the class of road in question.

(4) A survey predating the patent showing a specific width of right-of-way. (In Arizona this is considered only if the patent also contains a general reservation for a highway.)

(5) Engineering plans predating the patent which indicate width of right-of-way.

34. Id., 441 P.2d at 589.
(6) Evidence regarding the customary width of right-of-way for the
class of road in the locality.

(7) Evidence regarding the minimum necessary width for convenient
and safe travel and for proper maintenance.
All of the above must relate to the time predating any patents to the land.

IV. MEASURES TO IMPROVE OR PRESERVE RIGHTS-OF-WAY

A. RIGHT-OF-WAY WHERE PATENTS HAVE ALREADY BEEN ISSUED.

In the case of right-of-way on lands where patents have already been
issued, the best that highway agencies can do is to take measures to insure
that documentary evidence relating to the right-of-way and its width is
preserved. Once a patent is issued, it is too late to obtain a deed from the
appropriate federal agency. Only a judicial determination can establish title.
The agency claiming the right-of-way should record all permits, resolutions,
plans, or other documents which predate the patent and support the agen­
cy's claim to the right-of-way. Documents relating to right-of-way width are
particularly important. The claimed right-of-way should also be vigorously
defended against new encroachments.

B. RIGHT-OF-WAY WHERE PATENTS HAVE NOT BEEN ISSUED.

Coordination with the Bureau of Land Management should be main­
tained to insure that future patents reserve in detail all highway rights-of­
way. Although a general reservation is better than none, a specific reserva­
tion setting forth the right-of-way width is desirable.

Ideally, recordable right-of-way instruments should be obtained for all
existing rights-of-way over currently unpatented public lands. Whether this
solution is practical would depend on the quantity of rights-of-way which
falls in this category.36 A compromise would be to obtain deeds for those
highway sections on public land that are ripe for future development and
particularly for those sections where no documentary evidence supports a
claim to the right-of-way.

At the very least, all existing documents relating to claimed rights-of­
way over public lands should be preserved when no deed exists to insure
their availability when disputes arise in future years.

V. RIGHTS-OF-WAY IN NATIONAL FORESTS

Since national forest lands are "reserved for public use," the grant in 43
U.S.C. § 932 does not apply to such lands. Right-of-way over national forest
lands must be acquired under 23 U.S.C. § 317 (federal-aid) or 40 U.S.C. §
345c (non-federal aid). It should be noted, however, that the status of a
public highway constructed on public domain land prior to the

36. Section line roads would have low priority where the highway agency is satisfied with
the statutory width.
establishment of a forest reserve, is not changed by the subsequent establishment of a forest reserve.\textsuperscript{37} The same is true with respect to Indian reservations.\textsuperscript{38}

As in the case of unreserved lands, rights-of-way were acquired in the past in national forests without easement deeds and in many cases without even special use permits having been issued. Although forest lands, being reserved, are not open to settlement, they are generally open to mineral entry, and the Forest Service frequently allows use of its lands by permittees. Further, it is not uncommon for national forest lands to be transferred to private parties in exchange for other land. Right-of-way disputes with subsequent permittees or patentees or with holders of mineral rights are, therefore, a very real possibility.

As in the case of roads over unreserved public lands, the most common dispute will involve the width of the right-of-way rather than the existence of a right-of-way. The first published regulations regarding rights-of-way over national forest land appeared in the first volume of the \textit{Federal Register}, and provided as follows:

The right of way over national forest land for any State or county highway or road which is a part of the approved system of public roads shall be two chains in width [132 feet] for roads of class 1 or class 2, and one chain in width [66 feet] for roads of class 3 or other county roads of a secondary character; the center line of the highway or road to be the center line of the right of way except where otherwise provided by permit. National forest lands within the limits of such right of way shall continue to be administered by the Forest Service, but their use for highway or road purposes shall be the dominant use, and no occupancy for other purposes shall hereafter be authorized by the forest supervisor or regional forester unless approved and concurred in by the appropriate State or county officials, but if agreement can not be reached regarding other forms of use or occupancy regarded by the regional forester as essential to the proper use and management of the national forest the matter shall be submitted to the Secretary of Agriculture for final decision.

Approval by the Secretary of Agriculture of a forest highway construction program is ipso facto an authorization for the occupancy of national forest lands by the highways included in such construction program, but where a permit for a project included within a forest highway program is desired by a State or county as a means of meeting legal or fiscal requirements, or as a basis for the execution of road contracts, such permit shall be issued by the regional forester and shall contain such conditions or be supported by such stipulations as may be necessary adequately to protect national forest interests.\textsuperscript{39}

The regulation remained in effect until it was revoked in 1968. Rights-of-way for class I and class II roads prior to 1968 can, therefore, be assumed to

\textsuperscript{37} Duffield v. Ashurst, 12 Ariz. 360, 100 P. 820, 825 (1909).

\textsuperscript{38} Bird Bear v. McLean County, 513 F.2d 190 (8th Cir. 1975); Faxon v. Lallie Civil Tp., 36 N.D. 634, 163 N.W. 531 (1917), \textit{appeal dismissed}, 250 U.S. 634, (1919).

be 132 feet unless a special use permit or easement can be found granting a different amount.  

The main problem with relying on the Forest Service regulation or on special use permits for right-of-way is that neither can be characterized as a true "grant." They are only revocable permits by their literal terms. Being revocable, they are subject to arguments of implied revocation. They provide highway agencies little protection in the event of disputes with third parties. Of course, with respect to that portion of the right-of-way where the highway agency has expended a considerable investment in capital (the paved portions), the revocable permit may for all practical purposes be irrevocable. In *Wilderness Society v. Morton*, the court said with respect to special use permits for pipelines, "If the use is really not temporary or occasional, but is permanent (or at least longlasting), the matter cannot be papered over merely by designating it as 'revocable' when it is not intended to be revocable and, in the nature of things, is not in fact revocable." However, right-of-way conflicts are most likely to arise on the unpaved maintenance area of the right-of-way where such reasoning may not be persuasive.

In addition to the above problems, unrecorded or poorly documented rights-of-way in national forests can be particularly troublesome in relationship to section 4(f) of the Department of Transportation Act. Section 4(f) provides in part that the Secretary of Transportation shall not approve any project which requires the use of any publicly owned land from a public park or recreation area unless there is no feasible and prudent alternative to the use of such land. The Federal Highway Administration has issued regulations implementing section 4(f) of the DOT Act which require that detailed analysis and findings be prepared whenever land from a significant park, recreation area, or wildlife refuge is to be used for a highway project. National forests are managed for multiple uses and the regulations provide that section 4(f) of the DOT Act does not apply where the portion of land to be taken for highway purposes is not in fact being used or planned for use as a park, recreation area or wildlife preserve. Since national forests are increasingly being used for recreation purposes, acquisition of rights-of-way in the national forest increasingly presents a 4(f) situation. Poorly documented rights-of-way could result in time-consuming and costly section 4(f) procedures for the improvement of a forest highway that could be avoided if adequate rights-of-way were properly documented beforehand.

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40. In *Hunsaker v. State*, 29 Utah 2d 322, 509 P.2d 352, 354 (1973), the court held that a public highway is presumed to be of the prescribed statutory width unless the contrary is proven. The same reasoning would apply to prescribed regulatory width.


43. 23 C.F.R. § 771.19 (1976). The statute does not specifically require formal findings or other special procedures. The procedures were instituted largely in response to judicial decisions such as *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

44. 23 C.F.R. § 771.19(d) (1976).
The amount of right-of-way to be acquired will often be a major factor in determining whether an environmental impact statement need be prepared under the National Environmental Policy Act. Where an existing right-of-way is not adequately documented, it may have to be “reacquired” with the use of otherwise unnecessary procedures.

In summary, inadequately documented rights-of-way in the national forests pose similar problems to those on unreserved public lands. An effort should be made to obtain recorded easements for all rights-of-way not currently so documented.

VI. FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

The problem of undocumented rights-of-way should receive increased attention since Congress enacted the Federal Land Policy and Management Act of 1976. A major purpose of the new “organic act” was to modernize and rationalize the public land laws which had grown haphazardly during 170 years of ad hoc legislation. The new act repealed twenty-nine statutes relating to specific rights-of-way on public lands, replacing them with one comprehensive title authorizing the Secretaries of Interior and Agriculture to grant most types of rights-of-way. One of the statutes repealed was the 1866 Act granting rights-of-way for the construction of highways on public lands.

One certain effect of the new legislation is that highway agencies will not be able to rely on actions occurring after October 21, 1976, to constitute acceptance of the 1866 grant. Since the new legislation provides that it shall have no effect on existing rights-of-way, actions prior to October 21, 1976, can still be used to prove right-of-way under the repealed statute. However, reliance on the repealed statute entails many risks in those cases where particular rights-of-way have not been established by court decisions. In many instances, highway agencies have no way of knowing with certainty the extent of their right-of-way unless the matter has been litigated. In those cases where future conflicts or encroachments are likely to arise, they should consider obtaining new grants of right-of-way meeting current stand-

49. Id. Title VI. A few specific grants of right-of-way are retained. Id. § 706(b).
51. Section 701(a) provides: “Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.” Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743.
ards rather than rely on the uncertain outcome of future litigation which at best may only confirm the existence of a substandard right-of-way.

The new legislation permits the cancellation of existing rights-of-way with consent of the holder and the reissuance of a new right-of-way.\textsuperscript{52} Whether this procedure will be useful will depend largely on the kind of regulations that are issued to implement the legislation. For example, the new legislation provides that the grant or renewal of rights-of-way "shall be limited to a reasonable term in light of all circumstances concerning the project."\textsuperscript{53} If by regulation or policy highway rights-of-way are limited to a term of years subject to renewal, a new grant right-of-way may be less desirable than the permanent grant under the repealed statute. It would be desirable if the new legislation is interpreted to allow the use of permanent grants (subject to reversion) for highway rights-of-way. A good case can be made for the proposition that a permanent grant is the only "reasonable term" for permanent facilities such as highways. The interest of the federal government is adequately protected by a reversionary interest. A term of years requiring periodic renewal would result in needless paperwork and could cause significant legal problems in cases of inadvertent failure to renew.

The new "organic act" has potential far-reaching effects on those who use public lands and on the agencies that administer public lands. The actual effects will not be known until the statute is implemented by policy and regulation. Highway agencies should closely monitor the implementation and participate in the rule making process to insure that their needs are brought to the attention of the federal agencies administering the legislation.

\textsuperscript{52} Id. § 509(a). The major effect of the new legislation will be on public highways which are not included in the federal-aid system. The statute provides that it shall not affect use of lands for highway purposes pursuant to 23 U.S.C. §§ 107 and 317. Id. § 510(b).

\textsuperscript{53} Id. § 504(b).
Defining Economic Terms Used in the Railroad Revitalization and Regulatory Reform Act*

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I. INTRODUCTION

The Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act)1 dealt with a number of issues pressing upon the railroad industry. It contained provisions with regard to implementation of the Final System Plan (for the Northeast rail reorganization), commuter passenger subsidies, long-range planning, financing for private-sector railroad companies, and reforms of the Interstate Commerce Commission.

This paper focuses on the 4-R Act's use of five economic terms which set guidelines for Commission reforms. The five terms are:

(1) avoidable costs,
(2) cash-outlay costs,
(3) incremental costs,

* Much of the research underlying this paper was conducted under a contract with the United States Department of Transportation. The remarks made in this article do not necessarily reflect the views of the Department.


(4) variable costs, and
(5) contribution to going concern value.

Section 309 of the 4-R Act\(^2\) amends section 205 of the Regional Rail Reorganization Act of 1973 (3-R Act);\(^3\) it deals with the responsibilities of the Rail Services Planning Office. "Avoidable costs" are mentioned in this section and then the term is raised again in section 802 which amends section 1(a) of the Interstate Commerce Act (ICA).\(^4\) Section 205(e)(1) of the amended 3-R Act instructs the Rail Services Planning Office to issue regulations which:

(A) develop an accounting system which will permit the collection and publication by the Corporation or by profitable railroads providing service over lines scheduled for abandonment, of information necessary for an accurate determination of the attributable revenues, avoidable costs, and operations of light density lines as operating and economic units, and (B) determine the avoidable costs of providing rail freight service,' as that phrase is used in section 1a (6)(a)(ii)(A) of the Interstate Commerce Act. The Office may, at any time, revise and republish the standards and regulations required by this section to incorporate changes made necessary by the accounting system developed pursuant to this subsection.\(^5\)

As amended, section 1a(6)(a)(ii)(A) of the ICA uses "avoidable cost" in comparing revenues and costs of potentially abandonable line. The Commission is to delay abandonment of such a line if a railroad is offered financial assistance which would "cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line. . . ."\(^6\)

The 4-R Act amends section 15 of the ICA to set up provisions for separate rates for distinct services. These rates would be based on cash-outlay costs, a term heretofore not used by the railroad industry or its regulators. The 4-R Act language is:

In order to encourage competition, to promote increased reinvestment by railroads, and to encourage and facilitate increased nonrailroad investment in the production of rail services, a carrier by railroad subject to this part may, upon its own initiative or upon the request of any shipper or receiver of freight, file separate rates for distinct rail services. Within 1 year after the date of enactment of this paragraph, the Commission shall establish, by rule, expeditious procedures for permitting publication of separate rates for distinct rail services in order to (a) encourage the pricing of such services in accordance with the carrier's cash-outlays for such services and the demand therefor, and (b) enable shippers and receivers to evaluate all transportation and related charges and alternatives.\(^7\)

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2. Id. § 309.
6. Id. (emphasis added).
7. Id. § 202(d)(18) (emphasis added).
The 4-R Act also amends section 1(5) of the ICA, which deals with rates and market dominance; it states:

(b) Each rate for any service rendered or to be rendered in the transportation of persons or property by any common carrier by railroad subject to this part shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful. No rate which contributes or which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered. A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier or carriers proposing such rate (hereafter in this paragraph referred to as the 'proponent carrier'). In determining variable costs, the Commission shall, at the request of the carrier proposing the rate, determine only those costs of the carrier proposing the rate and only those costs of the specific service in question, except where such specific data and cost information is not available. The Commission shall not include in variable cost any expenses which do not vary directly with the level of service provided under the rate in question. Notwithstanding any other provision of this part, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum. Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going concern value of the proponent carrier to a level which contributes to such going concern value and is otherwise just and reasonable. For the purposes of the preceding sentence, a rate increase which does not raise a rate above the incremental costs (as determined through formulas prescribed by the Commission) of rendering the service to which such rate applies shall be presumed to be just and reasonable.8

These economic concepts are the crux of the sections in which they are used. The way each is interpreted will be the fundamental determinant of how that section of the 4-R Act will be implemented. They are terms of art in railroading, accounting, and economics. Unfortunately, if one asks an expert from each field to define each term, it is likely that the definitions would differ both with respect to the theoretical interpretation and the language used in the definition.

In this article, we have attempted to define these terms on a ground acceptable to all three disciplines. We documented our findings so that one can trace the underlying meaning and the interrelationships between the economists', accountants', and railroaders' languages used to describe the intuitive meaning of the term. Furthermore, because these terms are closely

8. Id. § 202(b) (emphasis added).
interrelated, we sought to ensure that the meanings were consistent among each other. Finally, we deliberately established definitions which are understandable in lay terms.

II. BASIC PRINCIPLES

As a foundation for postulation of definitions of the concepts, some important principles of economics, railroading, and accounting should first be set forth.

A. VARIABLE AND MARGINAL COSTS

As economists distinguish them, variable costs are those components of total costs which vary in response to changes in output. Economists often specify variable costs as positive mathematical functions of output. By estimating the first derivative of the cost function, the economist is able to examine the incremental changes in costs (marginal costs) due to a single, infinitesimal additional unit of output. By then estimating the second derivative of the cost function, the economist is able to specify whether the incremental change in costs is smaller or larger than the one immediately preceding it. This second order analysis is "The Law of (Eventually) Diminishing Returns to Scale," which essentially says that marginal costs first fall with each additional unit of output, but eventually must rise as fixed inputs are used more intensively. For a further review of these principles, the reader should refer to any authoritative economic text.9

Expressed in less rigorous terms, variable costs are those costs which, over a given time horizon, vary as the output level varies (the remainder of total costs being fixed). Distinctions exist between variable and marginal costs. Marginal cost is that addition to the total cost which will be incurred with additional output, or avoided by reducing output. For a given output change, all marginal costs are variable in nature. The distinction, however, is that variable costs measure a distinct part of total costs at a given output level, while marginal costs measure the change in variable costs incurred by an output change. In other words, marginal cost is equal to the additional variable costs incurred with an incremental unit of output.10 Variable costs, thus, connote those portions of total costs which change directly with output shifts.

B. NON-VARIABLE COSTS

It is important to understand why some portions of total costs do not change with shifts in output. There are essentially two types of costs which are not variable: (1) fixed costs and (2) joint costs.

10. See, e.g., C. FERGUSON, supra note 9, at 188-93; J. HENDERSON & R. QUANDT, supra note 9, at 55-62; 1 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 70-75 (1970); E. MANSFIELD, supra note 9, at 159-68; P. SAMUELSON, supra note 9, at 442-45.
As defined by Samuelson, fixed costs are
the total dollar expense that goes on even when zero output is produced. It is often called "overhead cost" and usually includes contractual commitments for rental, maintenance, depreciation, overhead, salaries and wages, etc. It is a sunk cost that is quite unaffected by any variation in [quantity]; in the time period for which it is sunk, the only rule is this: Disregard fixed cost because [it] cancels completely out of every decision.11

An economic discussion of fixed costs and inputs, and their relation to decision making and total costs, can be obtained from many sources.12

Usually, no portion of fixed costs can or should be uniquely traced to a unit of output. Because they cannot be so traced, fixed costs can only be associated to specific service types by use of arbitrary allocation. Furthermore, some cost components which are fixed in the very short term, or are fixed with very small changes in output, may vary over a somewhat longer period or over larger changes in output. Thus, more cost items could become variable as the time horizon is lengthened. There may also be a range of output increments over which more and more cost items will vary as the size of the increment of output increases. There is a limit to this stretching of the incremental cost concept since some costs are invariant except in the long run.13 The consideration of the time frame and size of output considered in determining incremental cost is essentially a management pricing and marketing decision. (The problem of identifying variable cost components will be more fully discussed later.)

Some outputs may share certain component costs of production; these costs are popularly called "common" or "joint." Although some authorities treat joint and common costs as identical, Behling provides a distinction:

Common costs are outlays devoted to either of two or more classes of services which may be variably proportioned at the discretion of management, with the result that it is, in principle at least, possible to trace them to individual services.

Joint costs, in contrast, are costs for which the proportions of output are not variable, so that supplying one class of service in a given amount results automatically in making available another class of service in some unalterable amount. The practical consequence is that incremental joint costs are not traceable to individual railroad services and can be allocated only arbitrarily. In contrast, those common costs which are incremental are traceable in principle, although it may be impossible over a considerable range to do so in practice.14

11. P. Samuelson, supra note 9, at 443.
12. See, e.g., C. Ferguson, supra note 9, at 113-14; J. Henderson & R. Quandt, supra note 9, at 55-62; E. Mansfield, supra note 9, at 116-18; P. Samuelson, supra note 9, at 441-44; Systems Analysis & Research Corp., Cost Based Freight Rates—Desirability & Feasibility 47 (1966).
14. Id. at 359. See also J. Henderson & R. Quandt, supra note 9, at 67-68; 1 A. Kahn, supra note 10, at 77-83; Systems Analysis & Research Corp., supra note 12, at 49-50.
The key to the distinction between common and joint costs, lies in their traceability to output units. Joint costs are not traceable. An example of joint costs in manufacturing would be kerosene and gasoline. Both products result from a refinery apparatus and process which cannot be separated and are therefore joint. In railroads, for example, the maintenance of catenary structures which are utilized for freight and passenger service is a joint cost. Any attempt to allocate this joint cost to a particular service will be an arbitrary proration rule. For this reason, joint costs are irrelevant in evaluation of alternative choices. In fact, the only merit of joint cost allocation is as a method of inventory valuation under the accounting principle of full or absorption costing.

Inasmuch as joint costs by their very nature cannot be directly traced to units worked on, any method of apportioning such costs to various units produced is essentially arbitrary. The usefulness of joint-cost apportionment is limited to purposes of inventory costing. Such apportionment is useless for cost-planning and control purposes. Since inventory valuation is a relatively minor problem for railroads (their product is service), then even this use of joint cost allocations becomes tenuous.

C. DIRECT VS. VARIABLE COSTS

Although laymen often view direct and variable costs as identical concepts, they are clearly distinct. Horngren defines variable costs as “those which are expected to fluctuate, in total, directly in proportion to sales, production volume, or other measure of activity.” Direct costs “are the costs that can be specifically related to particular units of output, such as direct labour and direct material costs . . . . Generally, direct costs are variable, in that they increase with output.” But note that direct costs are not always equal to variable costs. Heiser sheds considerable light on the distinction by pointing to a direct cost which is, at least in part, fixed:

Analysis of direct labor in some companies indicates that there is a goodly sum of direct labor cost which is, in fact, fixed and will not vary with production volume. This is usually true of the highly skilled groups of workers. As a matter of fact, I know of one company employing highly skilled workers, in which the size of the labor force governs production rather than production governing the labor force. Of course, direct costing could not contemplate the exclusion of such labor cost from inventories, even though such cost did not vary with volume.

A direct cost, then, is a cost of operating an enterprise which is directly identifiable as an input into production. Some direct costs will contain fixed and variable elements.

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D. FUTURE-PERIOD COSTS

Perhaps a clearer picture of these concepts can be seen in terms of a definition of incremental costs to include any sacrifice of future value or any future realization of higher costs that are causally attributable to present production.19

The critical principle is that variable costs are not necessarily realized (i.e., paid for) at the same instant as the event which induced the costs. In economic theory, variable costs encompass any resources which are directly exhausted as the result of an incremental unit of output. Some of these resources will not in actuality be paid for until several years after the moment in which they are caused. Consider, for example, a machine whose lubrication is a function of units of output, but whose required frequencies of lubrication are such that the actual application of lubrication servicing only occurs every several years. Thus, it is an undisputed physical fact that an additional unit of output has as a variable cost an additional amount of required lubricant. But, because of the nature of servicing the machine, the incurrence of the expense will not be until a future period after the performance of the output.

These situations occur in railroading in areas such as maintenance. For example, wheel grinding, bolt tightening, painting, lubrication, tamping, and other aspects of normalized maintenance of way or equipment are variable costs which may not be realized until a year or more after the production which induced the variable cost. This point is made in order to demonstrate that variable costs in a true theoretical sense entail a short-run time horizon, but actual monetary expenditures to cover such costs may not occur for several accounting periods. Such future-period costs do not disqualify these sources of cost as being defined as variable. It is very important, however, to distinguish future-period variable costs from those costs associated with long-run investment decisions, for the latter are not variable costs. Even though variable costs are distinguished from fixed costs, if time horizons are extended so far that capital becomes variable, then investment costs become a future-period variable cost. This type of cost, though, is due to managerial adjustments of capital stocks based upon a decision-making time horizon at least as great as that required for carrying out investment expenditures. Thus, the test for variable costs is whether resources must be expended—either now or in the future—as a direct and immediate result of a change in output.

19. 1 A. Kahn, supra note 10, at 71. Kahn continues:

This element in variable cost is called user cost: it is the loss in the net value of a firm's assets to its having engaged in production. . . . It could be measured as the discounted present value of the additional prospective yield that could be obtained from the facilities if these were not used. . . . Or, it could be conceived as the (discounted) additional future cost of repair or earlier replacement attributable to current use.

Id. at 71 n.20. By this rationale, incremental cost is akin to both avoidable and cash-outlay cost.
The effect of this distinction is that variable costs, when defined for railroading purposes, should not include any prorations of overhead, fixed costs, common costs, or any other item of expenses over which management does not have short-run discretionary power with respect to the incurrence of these expenses. This painstaking distinction has been made in order to use complete rigor in development of the economic definitions of the five terms used below. With regard to accounting definitions, the distinction is, for all intents and purposes, moot since accounting systems do not, as yet, have the capability to record and match actual future-period costs with present-day events, whether they are capital costs or variable costs. Therefore, in light of the constraints of accounting technology, the future-period-incurred variable costs can only be recognized by making a special calculation—outside of the standardized costing formulas applied to accounting data—to estimate the future costs. For example, a measurement of those portions of maintenance of way which are variable with traffic might be calculated through use of major engineering or statistical studies.

E. INTERDEPENDENCE OF THE ECONOMIC CONCEPTS

The five economic concepts—variable, incremental, avoidable, and cash-outlay costs, as well as, contribution to going concern value—are all interrelated. Total variable costs are all the marginal resources required to produce a given quantity of output; they are to be distinguished from fixed costs. Incremental, avoidable, and cash-outlay are each marginal concepts of costs. Thus, these terms are the variable-type costs which must be incurred (reduced) with an addition (deletion) of a discrete change in output. Variable costs are empirically identical to these three concepts if the increment over which output is varied is equal to total output.

This equality of variable and incremental costs is exemplified by an attempt to distinguish between variable costs and incremental costs associated with discontinuance of transit privileges for grain movements to Gulf coast ports from North Dakota. No matter how the costs are compiled, the increment of providing the total service is equal to the total variable costs required to provide the distinct service. When computed from a location-specific direct cost responsibility accounting system, the cash-outlay (or incremental or avoidable) costs of the transit privileges are taken directly from the direct cost base supplied by the accounting system. In this case, the answer would be precisely the same as a variable cost computation for the same service.

Sometimes, incremental costs will specifically differ from variable costs, as computed on the basis of direct cost accounting information, when the definition of the time horizon in which costs can vary differs for the two concepts. For example, if variable costs are defined on the basis of annualized data—therefore a year-long time horizon—then, incremental costs of a managerial decision to send out an extra way freight on a particular day, will be less than the variable costs of that train as rigorously
<table>
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<td>Variable Costs</td>
<td><strong>DEFINITION:</strong> Variable costs are those costs which, over a given time horizon, vary with changes in output.</td>
<td><strong>DEFINITION:</strong> Variable costs are those present and future resources whose consumption varies as a direct result of some output change.</td>
<td><strong>DEFINITION:</strong> Variable costs are those elements of costs which vary with output, as measured from each element of direct costs in the chart of accounts.</td>
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<td>Incremental Costs</td>
<td><strong>DEFINITION:</strong> Incremental cost is the present value of present and future costs incurred by the firm due to discrete changes in output.</td>
<td><strong>DEFINITION:</strong> Incremental costs are those additional resources directly required to facilitate a finite and discrete change in output.</td>
<td><strong>DEFINITION:</strong> Incremental costs are the total of those items of costs (as taken from each element of direct costs in the chart of accounts) that directly increase (decrease) with a discrete change in output.</td>
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<tr>
<td>Avoidable Costs</td>
<td><strong>DEFINITION:</strong> Avoidable costs are equal to decremental (incremental) costs.</td>
<td><strong>DEFINITION:</strong> Avoidable costs are equal to the savings in resources due to the elimination of a particular activity.</td>
<td><strong>DEFINITION:</strong> Avoidable costs are the total of those items of costs (as taken from each element of direct costs in the chart of accounts) that directly decrease with a discrete decrease in output.</td>
</tr>
<tr>
<td>Cash-Outlay Costs</td>
<td><strong>DEFINITION:</strong> Cash-outlay costs are the value of (including the present value of all directly traceable future) costs incurred by the firm due to discrete changes in output.</td>
<td><strong>DEFINITION:</strong> Cash-outlay costs are those additional resources directly required to facilitate finite and discrete change in output.</td>
<td><strong>DEFINITION:</strong> Cash-outlay costs are the total of those items of costs (as taken from each element of direct costs in the chart of accounts) that directly increase (decrease) with a discrete change in output.</td>
</tr>
<tr>
<td>Contribution to Going Concern Value</td>
<td><strong>DEFINITION:</strong> Contribution to going concern value is the amount by which the revenues attributable to a service exceed its total variable costs.</td>
<td><strong>DEFINITION:</strong> The contribution to going concern value is equal to the excess of total revenues attributable to a service over the total variable costs that were incurred to provide that service.</td>
<td><strong>DEFINITION:</strong> The contribution to going concern value of a service is the excess of revenues attributable to the service over the total variable costs that were incurred to provide the service.</td>
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</table>
computed on the basis of the accounting data. The disparity is due to the fact that the avoidable costs of the way freight are principally equal to fuel, possibly some crew expenses, and possibly per diem. If the time horizon were lengthened to one year—equal to the definition for computation of variable costs—additional cost items such as yard supervision, clerical, and equipment maintenance might all be added into the computation. Thus, as will be shown more exactly in the definitions below, variable costs are frequently empirically equal to incremental, avoidable, and cash-outlays, but not always.

Contribution to going concern value is a concept emergent from marginal notions underlying microeconomic theory. The concept is used by management to assess the viability of a particular activity of an enterprise—its marginal contribution to pay for fixed costs. Total variable costs of the entire service are netted out from its revenue contribution to the enterprise. The accompanying table in Exhibit 1 relates the definitions of all five of these concepts across each of the three disciplines.

Before commencing the definitions of the five concepts, it is important to point out that both the concepts and the three definitions for each concept are interdependent and should be read in this context.

III. DEFINITIONS OF THE ECONOMIC CONCEPTS USED IN THE 4-R ACT

A. VARIABLE COSTS

1. Economic Definition

Definition Variable costs are those costs which, over a given time horizon, vary with changes in output.

Because the 4-R Act requires the use of this concept in certain regulatory matters, a definition of variable costs that enables measurability is needed.20

20. The concept must be a term that can be measured, not just identified. Because of the need for a workable measure of variable costs, average variable costs (AVC) will undoubtedly be required in the computation of costs associated with certain services. Ferguson provides a formal definition: "Average variable cost is total variable cost divided by output." In terms of pure economic theory, this definition is certainly an acceptable way to define variable costs. As will be discussed in the railroading and accounting definitions, the rigorous application of this term is not simple. Typically, AVC will decline with increased output, reach a minimum, and then increase. C. FERGUSON, MICROECONOMIC THEORY, 190-92 (1969).

The shape of the AVC curve is explained by the law of diminishing marginal returns, which is reflected in the eventual rise in marginal costs—the contributor to total variable costs.

Accountants arithmetically treat these costs as having a linear correlation with the applicable activity measure. In reality, this assumption can usually be made only over a small, finite range of measurement. Horngren acknowledges, however, that with a wide enough range of output shifts, variable costs are probably curvilinear. C. HORNGREN, supra note 16, at 238-39. This phenomenon is important because it means that average variable costs are not an accurate measure of marginal cost concepts when large changes of output are under measurement. For further discussion of average variable costs, See, e.g., J. HENDERSON & R. QUANDT, supra note 9, at 55-56; E. MANSFIELD supra note 9, at 163-71; P. SAMUELSON, supra note 9, at 445-47.
Variable costs should meet several basic tests; they must:

1. vary with identifiable changes in output and time rather than being a simple average over some level of output.
2. encompass the discounted change in future replacement costs directly due to the change in output rather than the change in book value of current assets.
3. not encompass portions of fully allocated costs by apportioning untraceable components of cost to costs arising from changes in output.

These are the criteria for identifying variable costs. Note that they encompass future costs directly traceable to the present production decision. They do not include costs fixed in the short run. Fixed costs are sometimes called sunk costs and are included in fully allocated cost pricing schemes. (Note also, that to the economist fixed costs contain opportunity costs of capital or normal profit.)

2. **Railroading Definition**

The definitions of variable costs in theoretical and accounting terms are highly dependent upon the identification of those costs that vary with output. Variable costs generally (but not always) have as surrogates specific direct cost items in a location-specific direct cost responsibility accounting system. Cost items that are truly inflexible with changes in output are invalid as components of variable costs.

Baumol explains:

"Fully distributed cost" refers to any method of apportionment of a company's total costs among the individual services it provides. In addition to the costs directly attributable to a particular service on an incremental basis (that is, those costs which are responsive to the volume of the service, including the decision to provide or discontinue the service), it includes an allocation of the unattributable residue—that is, those costs which are incurred in common for several company services and some portion of which does not vary with the volume of the individual services supplied including inauguration or elimination of the service.

The significant cases usually involve costs, portions of which are attributable directly but which involve a significant unattributable residue. This is typically true of plant which serves several company outputs in common such as the railroad track and switching equipment used by

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21. The relevant incremental costs are a function principally of the prospective volume in relation to present volume and unutilized capacity in existing plant and organization. The rate over time at which the prospective volume is likely to be achieved, the prospects for its continuance over the longer term, and its distribution over stated time periods (for example, seasonality and peaking characteristics) are all relevant to the determination of appropriate incremental costs. From consideration of the prospective volume and its characteristics it may be feasible to estimate those elements of plant and organization which will require ultimate replacement, allowances for the use of which should figure currently in costs. If volume promises to build up substantially over time, the likelihood and cost of the required expansion in capacity must be recognized.

Behling, supra note 13, at 362 n.4. In other words, any opportunity costs in the form of a need to replace certain capital resources are variable costs if directly traceable as a result of the output.
several types of traffic. There is no economic basis on which these residual costs can be apportioned, since they cannot be attributed logically to any one service. They must be allocated on some arbitrary basis, usually on the basis of a rule of thumb selected as a convention. Thus, as just two out of many possible examples, these costs may be divided in proportion to relative revenues or relative incremental costs.

... While the choice is an arbitrary one, it is of great importance to the customers of the various services and for the allocation of society’s resources, because if fully distributed costs determine the price, the arbitrary criterion selected will decide which portion of a company’s services will be required to charge a relatively high rate with a corresponding limitation in its sale volume. ...

Yet, so far as I am aware, there exists nowhere in the pertinent literature anything that can be said to resemble an affirmative analytic case for fully distributed cost. There is never an analysis based on fundamental principles which asserts that this measure rather than any other measure is required to achieve efficiency or to prevent noncompensatory operation or to accomplish any other well-defined objective of public policy.22

With respect to the measurement of variable costs, the railroad industry is especially perplexing as the number of items of expense which are capable of varying with output continually expands as the time horizon lengthens:

<table>
<thead>
<tr>
<th>TIME HORIZON</th>
<th>SAMPLE CHANGE IN OUTPUT</th>
<th>SAMPLE OF VARIABLE COSTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very short run (e.g., 8 hr. workday)</td>
<td>Spot an extra car</td>
<td>Fuel (No labor assuming no overtime)</td>
</tr>
<tr>
<td>Short run (e.g., one week)</td>
<td>Run an extra way freight</td>
<td>Fuel, crew, per diem</td>
</tr>
<tr>
<td>Intermediate run (e.g., one to five years)</td>
<td>Schedule a train</td>
<td>Fuel, crew, motive power, maintenance</td>
</tr>
<tr>
<td>Long run (e.g., ten to thirty years)</td>
<td>Schedule a train</td>
<td>Fuel, crew, motive power, maintenance, way and structures</td>
</tr>
</tbody>
</table>

Therefore, what accounts are variable? The answer lies in three areas:

(1) A responsibility form of direct cost accounts should by definition classify accounts in such a way that assignments do not occur—all expense items are identified and matched with service units of inputs. For each, it is easy to change the label from “fixed” to “variable” as the time horizon expands.

(2) The appropriate time horizon for defining variability is a function of the leeway of managerial discretion. If the matter relates to investment in plant, then variable costs should encompass these capital items. If the matter relates to rates, then the appropriate horizon is more probably set at the intermediate term.

(3) Even though one can identify which cost items are, in fact, variable, the computation of average variable costs is complicated by the task of defining the appropriate denominator for the averaging. This problem relates to costing; it should not be an accounting task. That is to say, what units of output or input are the best surrogates for apportioning the variable items among the disparate services they supported?

The point is that the railroads must treat in a discrete manner those costs which are variable. This objective is the crux of a direct cost accounting system. Railroad variable costs therefore, can be defined as:

Definition Variable costs are those present and future resources whose consumption varies as a direct result of some output change.

3. Accounting Definition

Definition Variable costs are those elements of costs which vary with output as measured from each element of direct costs in the chart of accounts.

Currently, corporate information systems are unable to identify and record resource expenditures as they actually occur and match them with units of output produced. Essentially, these systems cannot identify true marginal costs. Only when a level of a new technology in recording costs is developed will actual measurement of marginal costs on a systematic basis be feasible.

In the interim, the best available alternative is to identify those items of expense which are the components of incremental costs and then develop surrogates for identification and measurement of output directly affecting the use of these resources. In other words, the variable costs associated with a particular function must be identified.

In a direct cost accounting system, the variable cost components are identified and labeled as a supplement to the base of raw accounting data. That is to say, a classification of direct costs as either variable or fixed (or apportioned between the two) will be displayed as an addition to the accounting system. In this way, direct cost information will not be distorted by a cost accountant’s arbitrary categorization of variable versus fixed. The raw data remains available for the Commission to analyze in an unfettered manner. Thus, for each proceeding, a time horizon of managerial discretion is established, and then, the segregation of variable costs can be applied. This separation should be aided by railroad-supplied reports which indicate what portion of each direct cost account is defined as variable during the annual accounting period. Such distinctions are already required since the carrier must distinguish between capital and operating expenses.
Although this separation of fixed and variable is conceptually rather straight forward, its implementation is not so easy. Ideally, for example, roadway maintenance should be divided into that which is required to bring the road condition up to a given standard (i.e., recovery of deferred) and that which is continually required to keep it at a normalized standard (i.e., current maintenance expense). These classifications should then be further divided into a portion which is fixed (contributes to capital stocks) and a variable or use-related portion. In practice, of course, these delineations of costs are made by bookkeepers and maintenance foremen whose allocations are likely to be less than an accurate rendition of the true economic relationship. In theory, these subdivisions should be made from the raw data by engineers and other professionals with the aid of scientific measurement and statistical tools. Even here, of course, some cost distinctions will be lost because of the technological limitations of current tools.

Even though accounting data can cope with identification of variable costs, there is a problem in applying economic theory to the management information systems using technology of the 1970’s. The problem is that variable costs are not, in theory, identical to marginal costs. But, because the state-of-the-art of accounting has not achieved a level of matching variable costs with specific outputs, these costs are accumulated over a period of time and matched against a like accumulation of those units of output for which the variable costs were responsible for the production. By relating the output to the costs, it is possible to develop a “variable unit cost of production.” Over a period of time, this measure is empirically akin to the economist’s notion of average variable cost. (Average variable costs differ from marginal costs in that the marginal costs are the additional variable costs incurred to increase (decrease) output from a given level to the next finite increment of output. Average variable costs, on the other hand, are the average of all the market variable cost components divided by all the units of output during the time.)

23. It is theoretically possible for average variable cost (AVC) to equal marginal cost (MC). Let \( AVC = f(q)/q \) where \( q \) is output. AVC reaches its minimum when \( d(\frac{f(q)}{q})/dq = 0 \). Taking the first derivative of AVC,

\[
\frac{d\left(\frac{f(q)}{q}\right)}{dq} = \frac{qf'(q) - f(q)}{q^2}
\]

\[
= \frac{1}{q} \left( f'(q) - \frac{f(q)}{q} \right) = 0
\]

\[
AVC = MC \text{ or } f'(q) = \frac{f(q)}{q} \text{ when } AVC \text{ reaches its minimum.}
\]

Empirically in this industry, this condition can be approximated over a significant range of output because of the “flatness” of the incremental (marginal) cost curve with respect to many activities of railroad operations.
Other difficulties encountered in deriving variable costs stem from:

1. their curvilinear behavior over wide ranges of activity,
2. their variance depending on the measure of activity used,
3. the fact that the time horizon plays a major role in determining variability (since, in the very long run, all costs are variable), and
4. the fact that some direct costs may be quasi-variable, or mixed, being composed of fixed and variable portions.

Identification of variable costs is essential in deriving avoidable, incremental, contribution, and other marginal figures. Any measurement of variable costs will probably need verification through engineering estimates or statistical analyses. The process of segmenting variable from fixed within an account is most accurate if the account is comprised of homogeneous expenses rather than aggregations of expenses from several facets of the railroad's operations.

For this reason, primary accounts must be kept on the basis of direct costs—the most elementary form of accounting information. No manipulations, prorations, apportionments, or decisions with respect to variable or fixed should be done prior to recording of direct costs. Direct costs per se are not surrogates for variable costs, but they offer the raw data from which variable costs can best be developed. The identification and measurement of surrogates for variable costs will succeed, provided that the following conditions are met:

1. the accounting data base must consist of direct cost accounts,
2. the direct cost account must be sufficiently disaggregated to minimize allocations,
3. the direct cost account must be sufficiently disaggregated so that the relationships of the resource expenditures to outputs, reflected in those accounts, are homogeneous,
4. the techniques of segregating variable portions must be sensitive to the variations in time horizons and output level (activity level),
5. the engineering or statistical manipulations must be sensitive to changing technologies, and
6. direct cost accounts must be segregated by site in order that line-segment-specific variable costs will not be biased by system-wide averages.

In sum, a chart of accounts keeping direct costs will provide the best raw data base for the managerial manipulations needed to compute variable costs.

B. INCREMENTAL COSTS

1. Economic Definition

Definition Incremental cost is the present value of present and future costs incurred by the firm due to discrete changes in output.
Incremental costs are an empirical measurement of marginal costs. The former measures cost changes over finite or discrete changes in output, while the latter does the same for an instantaneous (i.e., continuous and infinitesimal) change in output.

Because few production functions are continuous and because output changes are not infinitesimal, many costs can be identified only in discrete amounts. For these reasons, incremental costs are used as a practical substitute for marginal costs.\(^\text{24}\) In fact, the term incremental costs is seldom used by economic theoreticians, but is used more commonly by those who translate the theory into practice. The translation of the theoretical concept of marginal to its applied approximation, incremental, is replete with pitfalls. In addition to the problem of unbundling fixed, common, and joint costs, real world outputs are not definable in infinitesimal units. Furthermore, marginal costs vary from one moment to the other due to changes in demand that alter the point on the marginal cost curve on which the firm is operating. Therefore, while the theoretical discussion of marginal cost is useful from a conceptual standpoint, it cannot be rigorously applied in practice.\(^\text{25}\) Yet, perhaps the most serious problem in developing incremental costs is that of determining the future cost implications of current production activity. Such factors as changes in price level, operating techniques, and technology cannot be accurately predicted.

As will be shown below, incremental costs can be computed. Despite all the deficiencies in these rudimentary computations, there are strong reasons for using this concept in pricing. The economist can readily show that marginal cost and incremental cost are relevant in the pricing of outputs.

Incremental costs indicate (by comparison with the incremental revenues they will bring) whether additional outputs of any commodity are worth producing and (by incremental costs comparisons) which of the alternative ways of satisfying wants or requirements is the most efficient.\(^\text{26}\) Marginal cost pricing is one of the most fundamental principles of the modern microeconomic theory of resource allocation.

What, then, are the relevant costs which can be properly called incremental? For the economist, the proper approach to this identification problem is to determine those costs which vary with a change in output—for a given scale of plant. Often in the case of small changes in output the majority of these costs are direct labor and material payments and other costs associated with varying the size or utilization of the work force. In addition, "incremental costs include cost increments associated with new investment. For example, if special equipment is acquired in order to handle certain additional traffic, the costs are incremental to that traffic."\(^\text{27}\)

\(^{24}\) A. KAHN, supra note 10, at 66-67; P. SAMUELSON, supra note 9, at 444-45.
\(^{25}\) See, e.g., A. KAHN, supra note 10, at 66-67; P. SAMUELSON, supra note 9, at 444-45.
\(^{26}\) Behling, supra note 13, at 358.
\(^{27}\) Id at 358.
In general, incremental costs should not equal price since there are problems in estimating future costs. Indeed, there are difficulties in estimating costs due to short run incremental changes in output. Thus, incremental cost should be used as a price floor:

The application of this principle (using incremental cost as a price floor) in particular situations may require special care in estimating the pertinent incremental costs and incremental revenue. Especially in the short run they may be different from what they superficially appear. Example: the hidden incremental costs of dismissing and later reassembling a key workforce; and the hidden, foregone incremental revenue that may result in losing a profitable customer by refusing to take an occasional order below incremental cost.28

As a result of these problems in estimating incremental costs, they should be carefully used as a price floor. The advent of intermodal and intramodal competition ensures that equitable prices based on incremental (marginal) costs will be sought in any event:

Since demands for rail services have become increasingly elastic as alternative means of transportation (both for hire and private) have become evermore available, the greatest total contribution to net income will for many items and hauls result from a low unit margin above incremental cost and a large volume. Estimating the volume of traffic which might move at different levels of rates and the effect on net income is a key aspect of pricing. This vital function is a primary management responsibility which should be performed on the basis of managerial and not regulatory judgment. Rates so determined, however, can legitimately continue to be subject to regulation of maximum rates and to legal rules against unjust discrimination.29

In other words, railroad pricing strategy is likely to lead to incremental cost pricing anyway. Both competitive forces and the elimination of arbitrary markups designed to cover fixed assets will give the railroads sufficient incentives to change to the lowest rates possible.

2. Railroading Definition

Railroads must understand the importance of incremental concepts in management decision making. Cash-outlay, avoidable, and incremental costs are each empirical estimates of marginal costs, a theoretical term. This concept is critically important for management and regulators to understand. In discussing pricing of rail service in the Northeast Corridor, Baumol explains:

No advocate of incremental pricing standards has, to my knowledge, ever maintained that a private firm whose operations are not sustained by subsidy should be expected to sell its services at prices equal to their incremental costs. Specifically, if the operations of that firm are characterized by economies of scale, financial viability requires that it be able to sell its services at prices sufficiently above its incremental costs to permit it to cover, overall, the residue of the total costs necessary for the services it provides, plus an acceptable rate of return on its investment.

28. Id. at 362.
29. Id. at 363.
Firms operating in free markets are able to achieve such earnings if their performance is sufficiently good to meet the terms offered by competition and to make their product attractive to consumers. Their costs must, however, not be excessive, nor must the quality of their product be poor. If they fail on either of these scores, nothing will guarantee them revenues that are financially viable. That, of course, is one of the crucial features of the pricing mechanism—of the invisible hand that guides economic activities into channels and patterns that serve consumer interests effectively.30

Baumol explains that "cost plus pricing"—setting rates on the basis of fully allocated costs—distorts the powers of the free market mechanism by arbitrarily assigning costs to functions. As a result, both the railroad's and society's resource allocation is affected by these arbitrary cost assignments. "Cost plus pricing" also provides no inducement for high quality performance since the supplier of service knows that costs are covered. Of course, management should set its rates at that level which maximizes profits, but profit maximization can only occur by directing attention to marginal concepts.

In any event, it is clear that a reward for efficiency virtually becomes impossible under any arrangement that resembles cost plus pricing. That sort of pricing rule is indeed the antithesis of an inducement for efficiency. It involves payment of whatever costs the supplier chooses to incur, and whatever the quality of the product he is prepared to supply. It is an open invitation to waste, shoddy performance and all the undesirable characteristics which have so frequently accompanied that sort of pricing in practice.31

The temptation to employ fully allocated costs is enhanced in the case of the railroad industry because relative to highway, water, and air carriers, such costs make up a disproportionately large share of total costs. Because fully allocated cost pricing schemes introduce an upward bias in the rate floor, the railroads are subject to underutilization (through over pricing) of capacity.

With the persistent and serious underutilization of capacity which is characteristic of the railroad's basic plant and organization, large amounts of fixed costs remain fixed indefinitely. The least effective way to cope with unutilized railroad capacity would be to include its fixed costs in floors for pricing. For the high prices which would result could only discourage utilization of these facilities and aggravate the condition.32

The practice of fully allocating common and fixed costs is contradictory to a marginal cost pricing scheme and can produce substantial differences

30. Baumol Statement, supra note 22, at 8-9. By distinguishing cost from profit, Baumol is implicitly using the accountant's definition of incremental cost. The difference from the economist's definition is explained in a later section.
31. Id. at 10-11.
32. Behling, supra note 13, at 361.
when making pricing and service output decisions. Most economists realize the shortcomings of fully distributing fixed costs.\textsuperscript{33}

Behling further underscores this point by stating that incremental costs are the appropriate guide for pricing railroad services, but they are not the number with which rates should be equated:

As a general rule, any rate below incremental costs is both unprofitable and socially wasteful of resources because the additional (incremental) revenue obtained is less than the additional cost incurred. However, this does not mean that the railroads should set rates at that cost level or that they should be required to do so. On the contrary, this cost reference is uniquely important as a guide in determining the specific rates which will provide the maximum contribution to the overhead burden and thus to net income. The margin above incremental costs which maximizes this contribution depends upon the price sensitivity demand, determined primarily by the alternatives available to shippers. The judgment of management should be relied upon to make this determination, subject to limitations imposed by regulation of maximum rates and discrimination. Thus, while incremental costs should not determine prices or rates, they set the lower boundary (and demand conditions and regulation the upper boundary) within which pricing decisions should be made.\textsuperscript{34}

Based upon this comprehensive explanation of what the purposes of incremental costs are, a definition can be given:

\textit{Definition} Incremental costs are those additional resources directly required to facilitate a finite and discrete change in output.

Incremental costs can be positive or negative depending on the direction of the change in output.

3. \textit{Accounting Definition}

Management information systems are almost completely incapable of calculating marginal concepts. One must identify and then measure the amount of variable-type cost expenditures which occur with an incremental unit(s) of output. In addition, as the length of the accounting period for which costs are recorded and computed is decreased, the variable cost measurements more closely coincide with short run marginal costs. (An accounting period equal in length to the period for production of just one unit of output, would actually have incremental costs equal to marginal costs equal to variable costs.)

Accounting systems are also incapable of making distinctions between short run marginal costs and long run marginal costs. Accounting is completely insensitive to differing time horizons. The problem is that as the time


\textsuperscript{34} Behling, \textit{supra} note 13, at 362 (emphasis added).
horizon is increased, the different components of the production function which are variable expand; but the accounting system does not have any way to indicate the components which have become variable. Therefore, the array of true variable costs widens and any computation thereof should bring in a greater number of expense accounts.

The best definition of long run marginal costs is set up by first postulating the time horizon in which costs are, in fact, variable. Then, it is appropriate to identify the direct cost accounts on the chart of accounts which are wholly, or in part, variable. From these items, long run variable costs could be calculated; however, this measure is not in consonance with true economic variable costs because the accounting system does not: (1) match items of expense that will occur in the future to the units of output which are directly responsible for the future costs or (2) compute such costs on the basis of replacement costs.

In other words, long run marginal (incremental) costs are almost impossible to compute purely on the basis of accounting data because it is necessary for one to determine what is actual incremental quantities of fixed and semi-fixed inputs which vary with production. In railroading, this means one must identify how much additional investment in plant and equipment is needed to accommodate given additional outputs:

(1) a ton of freight in a car,
(2) a car over a line segment,
(3) a line segment in a system,
(4) a train,
(5) a track in the system, or
(6) a locomotive in a train.

Despite these difficulties, the need for understanding and estimating incremental costs—whether long run or short run—is undeniable. Because it measures the change in total cost of some increased activity, "it is an important measure, since the process of decision making is essentially one of choosing between alternatives."35 The quality of the decision made, then, will largely be a question of the accuracy of the variable costs involved. As previously explained, the inability of present systems to measure true variable costs, compels us to rely on the more workable concept of average variable cost.

Variable costs, where averaging occurs, is an imperfect substitute for incremental cost because:

average variable cost [is] averaged over some period of time in the past and assumed to remain constant over some period in the future—until there occurs some clear, discrete shift caused by an event such as a

35. H. Wilson, supra note 17, at 94.
change in wage rates. But since short-term average variable costs . . . are never as large as average total costs . . . , universal adoption of this type of pricing is infeasible if sellers are to cover total costs, including (as always) a minimum required return on investment. 36

That is, there is no possibility that average fixed costs will be covered by the price unless a markup over average variable costs is established. This "deficit" explains the common tendency to use a fully allocated cost pricing scheme. In that case, costs which are fixed over a long period of time would be included in the concept of variable cost. The dangers inherent in such practices have been fully documented above. Therefore:

**Definition** Incremental costs are the total of those items of costs (as taken from each element of direct costs in the chart of accounts) that directly increase (decrease) with a discrete change in output. 37

This workable definition of incremental costs once again underscores the necessity for development of a direct cost accounting system. In order to calculate an incremental cost, it is necessary to identify the relevant direct cost accounts, 38 and then through statistical or engineering studies determine those portions which are variable (for the given time horizon) with additional units of output.

The time horizon underlying the managerial decision fundamentally influences which direct costs (or portions thereof) will be variable. Therefore, it is critical that an accounting system store and display direct costs in order that varying time horizons can be used in a diversity of analyses. It should be kept in mind that it is not a simple procedure to convert direct costs into variable and fixed components. With maintenance-of-way crew expenses, the foreman can, in fact, make an estimate of those portions which should be capitalized and those portions which should be expensed, although such estimates will be arbitrary. But rigorous studies of these costs are difficult to implement; and furthermore, they require much more sophisticated engineering statistical analyses than may be immediately apparent. For example, the time horizon factor can mean that certain direct cost accounts will be totally fixed in short time horizons but will become increasingly flexible as time horizons lengthen. Also, it is possible that the variable cost relationships are not just simple linear arithmetic functions of output, but may have much more complex factors influencing their occurrence.

36. 1 A. KAHN, *supra* note 10, at 84.
37. Accounting texts rarely use this term; therefore, no authoritative accounting discussion of the subject was found.
38. Economists develop their pricing theory—where marginal revenues and marginal costs are equated—with "normal profit" computed into the cost curve. In this way, when an equilibrium market situation is achieved, the supplier earns a "normal" profit. However, accounting systems do not reach the same solutions since their computations of "costs" do not have an imputed normal profit figure.
C. AVOIDABLE COSTS

1. Economic Definition

It was mentioned above that avoidable cost\(^{39}\) is akin to the notion of incremental cost. The distinction is that the term "avoidable cost" is usually employed with regard to retractions of service (decreases in output). That is, it is usually thought of as a decrement; but the concept and method for deriving avoidable cost are the same as those for incremental cost, and therefore, it is perfectly acceptable to use this term for analysis of positive changes in output. Bear in mind "the difference between costs of expansion and costs of regression. For short periods of time, unit costs of expansion may be quite unrelated to costs of shirinkage."\(^{40}\)

**Definition** Avoidable costs are equal to decremental (incremental) costs.

Avoidable costs still include the discounted future cash-outlay costs avoided through a discontinuance. (A more rigorous discussion of avoidable costs is contained in the following section.) The method for calculating incremental and avoidable costs is the same, but the numerical value of each may be different in any given case. The distinction between incremental and avoidable costs can be further clarified in the following example adapted from Baumol.\(^{41}\) Suppose a railroad has just been faced with the proposition of discontinuing a service which obligates it to spend $100 next year and $200 two years from now, but if service were discontinued, its obligation would be $25 per year. The avoidable cost would then be the present value of $75 ($100-$25) discounted one year plus $175 ($200-$25) discounted for two years. Now, alternatively, assume that the railroad wants to double the service instead of discontinuing it. There is no guarantee that the incremental cost would equal the avoidable cost. That is, if the railroad is not subject to constant costs, the incremental cost could be above or below the avoidable cost of an equal amount of service. The reader may balk at this example on the grounds that a comparison between unlike things is being made. That is, increasing or decreasing service by the same amount results in the firm being on different portions of its production function. That is correct; the example only serves to indicate the proper occasion for the use of the two concepts.

In conclusion, avoidable costs are an empirical measure of marginal costs that will decrease (increase) through a finite and discrete reduction (expansion) in output. They are simply incremental costs for a negative change in output. In sum, avoidable costs are another applied form of marginal costs.

39. Avoidable cost is a "word of art" unique to the railroad industry and is therefore virtually unheard of in economic literature.
40. SYSTEMS ANALYSIS & RESEARCH CORP., supra note 12, at 47.
2. Railroading Definition

Avoidable costs are an important concept in railroading because of the tremendous amount of resources sunk into fixed plant and structures. As a result, the difference between average total costs and average variable costs will be substantial. Furthermore, if management is to pursue rational policies in pricing and output, then it should fully understand these differences.

In railroading, avoidable costs are precisely equal to incremental costs. In semantic terms, avoidable costs are thought of as negative increments (decrements), but conceptually the two are identical.

Baumol describes this term in the railroading context:

Avoidable cost in our plan serves merely as a benchmark, as an initial point for purposes of calculating compensation level. Its virtue for this purpose is that it is well defined on a firm basis of economic analysis and, since it requires no allocation of unassignable costs, it is not subject to the arbitrary choice of basis for allocation selected to suit the purposes of the user at that particular moment.42

Furthermore, Baumol proceeds to set forth a rigorous definition:

It may be useful at this point to offer a definition of the term "avoidable cost" in the sense it is used by economists. The avoidable cost of a service is the present value of all savings in current and future cash outlays that would be realized by the supplier if he were to discontinue that service. That is, if continuation of the service obligates him to an outlay of $100 next year and $200 the following year, while if he were no longer to provide it he would be left to pay only $25 a year because of contracted arrangements, the avoidable cost is $100-$25=$75 discounted for one year, plus $200-$25=$175 discounted for two years. Note that this figure normally include at least some portion of common cost; e.g., if at the reduced scale of its overall operations the firm requires only 60 instead of 100 maintenance men (who each in fact now serve several company activities), then . . . 40 maintenance men constitute an avoidable cost . . . . [A]voidable costs include appropriate capital outlays. If the service in question requires investment in a new machine next year, then presumably the cost of that investment will be avoided if the service is discontinued.

Avoidable cost is a particular type of the more general category of incremental cost. It is the incremental (decremental) cost where the two alternatives whose costs are compared are the continuation of the service on current terms versus elimination of that service.43

Note the use of the term "cash-outlays" above; Baumol relates avoidable as equal to cash-outlays that occur through time. In essence, avoidable costs are analogous to a cash flow statement (present valued) relating the cash (and equivalents) changes attributable to elimination of a particular asset or service.

42. Id. at 13.
43. Id. at 13 n.1 (emphasis added in part).
Definition Avoidable costs are equal to the savings in resources due to the elimination of a particular activity.

3. Accounting Definition

At this point, an overall view is appropriate. This discussion of definitions of avoidable, incremental, and variable costs have all focused upon the feasibility of collection of and calculation from the proper data base. It is impossible, by definition, to calculate any of these marginal notions for a Class I carrier if the data base is an aggregation of systemwide expenses. Avoidable costs—actual variable inputs—cannot be computed if the direct costs of the service in question are not available. Therefore, for a rate proceeding on a service over a particular route, abandonment of a line, or a separate price for a distinct service, avoidable (incremental and variable) costs can only be determined if carrier data is disaggregated to logical cost centers.

Definition Avoidable costs are the total of those items of costs (as taken from each element of direct costs in the chart of accounts) that directly decrease with a discrete decrease in output.

Note that although this definition is similar to the economic definition, the accounting treatment of avoidable cost will differ significantly from the economic treatment in three respects:

First, any chart of accounts will not directly consider any present value or cash discounting of future-period avoided costs. Accounting systems rely on historical cost since they are a repository of records of the past. As a result, the forward-looking present value methods are outside of today's accounting techniques.

Second, avoidable costs derived from accounting records are generally blind to opportunity costs. Because accountants try to avoid "creation" of costs, a cost must typically meet the test of having been the result of a transaction. Since opportunity costs are seldom a transaction at all, accounting systems do not recognize them.

Third, in economics, cost measurement is not constrained by discrete time periods, as it is in accounting. As a result, typical accrual expenses (e.g., depreciation) are unnecessary in the economist's world. The economist recognizes this cost at the instant the resources are accrued. Accountants, on the other hand, record these costs when the "transaction" occurs to pay for the expense. An accrual system tries to at least emulate true economic cost behavior by setting up surrogates (e.g., time, output) by which to charge expenses in a systematic way. This transition between cost

44. Avoidable cost is a term unique to railroading and is therefore virtually unmentioned in general accounting literature.

45. An exception is in the public utility field, where an opportunity cost for corporate funds tied up in a construction venture can be capitalized as a cost of that project.
and accrual must be carefully considered when evaluating projects in both the economic and accounting modes.

Despite these distinctions, avoidable cost to the accountant remains that cost which can be avoided by discontinuing or cutting back output. The difference with the economist lies in the scope and measurement of the costs involved.

Because many abandonment and rate change proceedings hinge upon incremental concepts pertaining to a small subcomponent(s) of a firm's total activities, the carrier must compile direct costs for particular line segments. As one can readily imagine, many regulatory proceedings focus on services that are not accurately characterized by total variable costs for a given line segment (much less the entire system).

For instance, an abandonment of a five-mile nodal end of a light density line with only a nominal amount of traffic most certainly has higher switching costs for local freight service than the average variable costs for switching the entire line segment (as defined by the carrier's accounting system.)

The solution to this sort of problem, which ought to be sanctioned by the Commission, is to permit the carrier, when the carrier so chooses, to perform a special study to collect the actual variable costs associated with the individual service under scrutiny before the Commission. In other words, a study based upon a direct cost data base should be prepared to compute the avoidable costs of the activity.46 Thus, if the carrier seeking to abandon a short light density line segment cannot demonstrate with line-segment-specific costs that abandonment is warranted, then the carrier should proceed to keep a record of the actual direct costs of providing service to that line segment. Such a special study might show that the switching minutes per freight car terminated is much higher than variable costs as averaged over the entire line segment.

These special studies can be conducted by redefining the line segment records in the accounting system to record the direct costs for the five-mile light density line. Alternatively, the carrier might wish to conduct the special study in a different way—a time study of the actual labor and equipment resources required to perform a given service unit of output for the service. This approach manually computes actual variable costs of a subcomponent of a line segment so that those subcomponents with higher costs can receive rates more reflective of true economic marginal costs. If a special study is to be sanctioned as a valid way to calculate avoidable costs, then the following procedural issues must be addressed:

1. Under what circumstances is a special study permissible?
2. What methodologies for a special study are acceptable?
3. How should a special study be audited?

46. Such studies are now conducted at some railroads with location-specific accounting data.
(4) What other parties should be permitted to conduct independent special studies, and/or audit the carriers?

(5) Upon whom should the burden of proof be placed with respect to proving the findings shown in the carrier's (other's) special study?

To summarize, the special study probably needs to be used in order to prevent the same misfortune happening in the future as has happened elsewhere with Rail Form A. That is, the litigants in a proceeding would not be constricted to rigid, unyielding reliance upon costs averaged over an operating unit not necessarily reflective of that under scrutiny in a proceeding.

D. CASH-OUTLAY COSTS

1. Economic Definition

The phrase “cash-outlay” is not part of the typical parlance of economists. “Cash” is thought of as a resource in the assets of the enterprise, but it is not typically referred to as a surrogate measure in the identification of costs. Of course, when one discusses the idea of cash-outlay, the rational approach is to take those items of cost which are directly incurred in response to incremental output. In other words, cash-outlay is another term connoting marginal costs.

With respect to establishing a time frame in which costs are able to vary, the decision horizon becomes the determining factor. Cash-outlay can be interpreted to mean those short-term variable costs which are typically paid for by cash or cash equivalents. In this case, fixed costs are decidedly excluded from the measure. A broader notion of cash-outlay (and that favored by us) would include an opportunity cost and would require discounting future cash-outlays to their present value.

Baumol ties the avoidable and the cash notions together in his definition of avoidable costs, from which the following statement is an excerpt: “The avoidable cost of a service is the present value of all savings in current and future cash outlays that would be realized by the supplier if he were to discontinue that service.”47 Essentially, cash-outlay is a short-term cost phenomenon measured directly from variable costs. (We recommend the adoption of the short-term marginal cost approach in which the opportunity costs of equipment are unequivocally defined as relevant cost to be included in the computation.)

Definition Cash-outlay costs are the value of costs (including the present value of all directly traceable future costs) incurred by the firm due to discrete changes in output.

47. Baumol Reply Statement, supra note 41, at 13 n.1.
2. Railroading Definition

The notion of cash-outlay is not yet part of the parlance of railroad economics. It is likely that many people will confuse this concept with out-of-pocket costs. However, there are several important clarifications which should be made with regard to establishing an operative definition of cash-outlay. First, the context of using the term in the 4-R Act is sufficiently vague so that the concept could be interpreted to mean short-run marginal costs or long-run marginal costs. Either way, it is an incremental concept but the identification of the appropriate time horizon is at issue.48

We recommend that cash-outlay be defined as short-run marginal cost explicitly including the opportunity cost (if any) of equipment involved in the service.49

We further recommend that any definition of this motion which is eventually implemented in a rulemaking should contain the flexibility to include capital costs which can be identified as being variable with the institution of the distinct service for which the costs are being computed. Therefore, if the distinct service entails the addition to, deletion from, or modification of the capital assets of the railroad, then this resource expenditure should be incorporated into the calculation.50 Strictly speaking, this definition is not identical to short-run marginal costs or variable costs.

**Definition** Cash-outlay costs are those additional resources directly required to facilitate a finite and discrete change in output.

3. Accounting Definition

The defining of this term for accounting purposes should be done carefully if the regulator expects to receive accounting data useful for regulatory decision making. The word “cash” should not be rigorously interpreted to mean only items of expense against which cash expenditures are traced. Rather, the concept should encompass all direct items of ex-

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48. This issue is definitely not insignificant, because the arithmetic of calculating surrogates for long-run and short-run incremental costs brings about decidedly different results. The lengthening of the time horizon from short- to long-run converts many "fixed" or "common" costs into the direct cost category; i.e., they are variable with shifts in output.

49. The installation of the notion of opportunity costs of equipment must be coordinated with the rulemaking on peak and seasonal period pricing. If the ICC opts for a policy of peak period pricing based upon opportunity costs for equipment, then the information systems required to collect the relevant data to administer the peak period pricing will be compatible with the information required herein. However, if the ICC decides not to pursue this policy, then a revision of the opportunity cost provision should be performed.

50. The measurement of capital costs which vary with the provision of the distinct service may develop in to a controversial issue subject to litigation. For example, other carriers protesting the "low rates" of a carrier seeking to set up a separate tariff for a distinct service could counter the proposed rate by contending the measurement of cash-outlay has failed to take into account certain "identifiable" capital costs. In order to grant the railroads the maximum flexibility in pricing policy, the burden of proof should be placed upon the protestant to demonstrate that the carrier's computation of incremental capital expenses is in error—provided, however, that the carrier seeking to include certain capital expenses as varying with provision of the distance service must fully document the computations by including an explanation as to what use these capital items will be employed.
pense against which cash or cash equivalent resources have to be allocated for their replacement. In terms of the location-specific direct cost responsibility accounting system, cash-outlays—a marginal cost concept—are very simply identical to incremental costs.

As with avoidable costs, although the accounting and economic definitions of cash-outlay costs are quite similar, their differences involve recognition of present and future costs (as opposed to accounting’s need to identify a transaction) and accounting’s accrual methods, which may recognize an expense at a time different from the actual economic consumption of resources. As with incremental and avoidable costs, an accountant’s measurement of this concept is usually exactly equal to variable costs for the service. In sum, a marginal cost concept turns out to be equal—when measured—to variable costs.

Definition Cash-outlay costs are the total of those items of costs (as taken from each element of direct costs in the chart of accounts) that directly increase (decrease) with a discrete change in output.

E. CONTRIBUTION TO GOING CONCERN VALUE

1. Economic Definition

Economists do not regularly use the term “contribution to going concern value,” but the concept has a solid rooting in economics. These roots are best understood by looking at how this term has been used in a management context, especially with regard to the railroad industry. (Specifically, refer below to the railroading definition of this term.)

For an activity to contribute to the going concern value (GCV) of a firm, it must generate total revenues exceeding total variable costs, as shown on the graphs in Exhibit 2. In short, any contribution to fixed costs by the service is construed to enhance the viability of a firm and thereby satisfy this definition. Friedlander explains why contribution to going concern value is applicable to railroads: “So long as the demand is sufficient to cover short run average variable costs, it will pay the railroad to carry the traffic and thus earn some return on its overhead.”51 This view, of course, is equally applicable to all industries which face the necessity of covering fixed expenses.

Contribution to going concern value is usually calculated over the duration of an accounting period. In other words, purely marginal relationships are not applicable. It is acceptable to calculate the difference between revenues and costs for incremental periods; i.e., a discrete interval may be set and then the costs and revenues which occurred would be measured.

Baumol elaborates on this point by defining the benchmark at which noncompensatory pricing takes place. When prices are compensatory, as defined by Baumol, then a positive contribution to going concern value occurs:

51. A. FRIEGLANDER, supra note 33, at 134.
The benchmark that is appropriate for the prevention of such non-compensatory pricing follows by straightforward reasoning from the logic of the issue. If revenues are to make it more profitable to continue to supply the service than to abandon it, then they must *at least* be equal to avoidable costs. Thus avoidable costs serve logically as the standard of base payment level necessary to avoid noncompensatory pricing.\(^{52}\)

Based upon these principles, the contribution is the excess of total revenues over total variable costs, as the bottom graph in Exhibit 2 demonstrates.

\[\text{Exhibit 2} \]

*Contribution to Going Concern Value*

Definition  Contribution to going concern value is the amount by which the revenues attributable to a service exceed its total variable costs.

An important note should be set forth with regard to policies using this concept: A contribution to going concern value exists whenever total revenues exceed total variable costs. However, one must be very careful in analyzing changes in contribution to going concern value between past and future policies. For instance, if a railroad is faced with loss of traffic due to emergence of a new competitive force, the carrier, in order to earn at least some contribution, may be rationally compelled to reduce its rates so long as it still earns a positive contribution to GCV. Since the alternative would be lose the movement altogether—a condition with zero contribution—the carrier will accept a negative change in its position in order to avoid an even worse situation.

In other words, the marginal contribution to GCV due to the defensive rate change is positive when the new contribution is properly compared to the contribution to GCV (zero) which occurs without the rate reduction. Therefore, the comparison of former contributions against the contribution after a defensive rate change would show a negative shift, but such a comparison is fundamentally irrelevant since the choice faced by management is either preserving the rates and losing the haul or cutting rates and making some positive, but reduced, contribution. Finally, it should be pointed out that implicit in an economist's view of cost is an allowance for a normal profit (opportunity cost). Therefore, in equilibrium, where total cost equals total revenue, profit is being earned. Under this condition, then, the economist's view of contribution margins will differ from the accountant's because normal profits are included in the economist's cost definitions, while they are excluded from the accountant's definition.

2. Railroading Definition

A substantial amount of case law in railroading has been written that establishes a meaning for contribution to going concern value.53 This notion is a benchmark concept in the valuation of railroad properties during reorganization proceedings pursuant to section 77 of the Bankruptcy Act.54 Furthermore, the bankruptcy judge in a section 77 reorganization is typically called upon to make findings with respect to the “going concern value” of the equity securities to be issued in a reorganization plan to the claimants of the estate.

In these proceedings, it must be demonstrated that an enterprise generates enough cash from operations to satisfy senior debt obligations and still leave an adequate prospect for payment of dividends on capital stock. In other words, the asset under scrutiny by the court—the reorganized railroad—must have revenues exceeding expenses adequate enough to

ensure a reasonable prospect for tangible value for the equity in the new company. Therefore, in this particular calculation, dividends are the definition of "overhead."

The court looks to this concept because section 77(e) of the Bankruptcy Act states:

The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.\(^5\)

The "earning power" concept is the root of much of the law in this area.

With respect to valuation of a particular individual asset component of a railroad, "contribution to going concern value" measures the present value of the net operating cash flows generated by the asset. These operating revenues are first applied against the variable expenses of the asset. All cash flows in excess of these variable costs contribute to the defraying of fixed expenses and then to profits of the rest of the enterprise.

There are two basic methodologies, based upon different principles, that could be used to calculate these "contributions:"

Segregation Studies

In such studies segregated earnings are determined by partitioning the transportation entity into selected units, or in many cases mortgage districts, and then allocating revenues and expenses to such units on a formula basis. Such studies develop the earning power of each segment as part of the transportation entity of which it is a part and include its share of costs for overhead and existing inefficiencies. The total of the earnings for all of the segments equals the earnings of the entire entity. Segregation studies have been used in Section 77 reorganizations, as an allocation method involving securities between various lines of equal rank.

Severance Studies

Severance studies develop the earning power of an operable segment on the assumption that it has been severed from the remainder of the property. Severance earnings may support a higher value than would be found by a segregation study if the unit were to remain a part of the transportation entity of which it is a part. A severance study is a means of calculating the loss of earnings to the remainder of the transportation entity if the unit under study is severed. The results of such studies may also be used to measure potential value to an acquiring carrier.\(^5\)

Though no completely steadfast statement can be made, severance studies indicate the contribution to going concern value based upon incremental or avoidable costs. Segregation studies measure the term based upon the averaging of system-wide expenses and the assignment of certain fixed costs.

A severance approach to computation of contribution to going concern value is consistent with definitions in this paper. Furthermore, any capital costs directly incurred in order to produce the output should be classified as a relevant expense to be netted in the cash flow calculation before the present valuing step. We suggest that the notion of contribution to going concern value should be promoted as a purely short-run concept whereby financing should not be netted out of the contribution. This interpretation lowers the threshold at which the rate qualifies as satisfying the contribution criteria. Encompassing all these notions:

Definition The contribution to going concern value is equal to the excess of revenues attributable to a service over the total variable costs that were incurred to provide that service.

3. Accounting Definition

Contribution analysis has long been a valuable tool of managerial accountants. Although a discussion of its merits can be found in many sources, Wilson's was the best encountered. He explains why contribution analysis is essential:

The contribution concept is of vital importance . . . and represents the difference between the selling price and the variable cost of an item. It is, in fact, the contribution that the sale of a product makes to fixed costs and profits after having covered the avoidable costs of making that product. This point indicates the realistic perspective of [contribution] analysis in not attempting to allocate common costs to units of output, since the possibility of volume variations renders a unit total cost, with its associated gross profit margin, meaningless.

In addition to pointing out the need for an unbiased data base for decision making, Wilson elaborates on the advantages of contribution analysis:

[It is a] background information device for important decisions, such as selecting distribution channels, make or buy, and pricing decisions. In this role it offers an overall view of costs and sales in relation to profit planning, and also provides pointers to possible changes in the firm's strategy. Its other values include:

(a) furnishing a simple means of evaluating current profit levels by showing the profit performance adjusted for volume;
(b) providing a useful tool for calculating rapidly effects on costs and profits of changes in volume, and other analyses that are highlighted by such points as:
(i) a change in the selling price or the variable cost rate alters the break-even point as well as the contribution margin ratio,
(ii) other factors being equal, a change in total fixed costs alters the break-even point by the same percentage, and the net profit by the same amount,
(iii) the larger the margin of safety, the greater can be the fall in sales before losses are incurred, and so forth;

57. Charged against revenues generated by the asset or service.
58. H. Wilson, supra note 17, at 135.
(c) demonstrating graphically the approximate sales volumes at which the company will lose money, and at which it will achieve its profit objectives;
(d) planning and controlling profits and costs; and
(e) providing cost and revenue estimates and comparisons that help to answer various managerial problems.  

We recommend the furtherance of the contribution to overhead concept calculated on the basis of the severance methodology (both of which are set forth above in the economic and railroading definitions respectively).

The accounting profession has two sides with respect to the reporting of contribution to overhead; Hawkins discusses them:

Under below-capacity conditions, it is debatable whether or not a fair portion of general manufacturing overhead should be charged to the cost of assets constructed for a company's own use. The arguments for charging a portion of general manufacturing overhead include: (a) the current loss from idle capacity will be overstated unless a cost for the idle capacity used for construction is capitalized; (b) the construction will have future benefits, so all costs related to acquiring these benefits should be deferred; and (c) the construction project should be treated the same as regular products, which are charged with general overhead.

The principal arguments opposing this point of view are: (a) the cost of the asset should not include general overhead costs that would still have been incurred in the absence of the construction; (b) the general overhead was probably not considered as a relevant cost in making the decision to construct the asset for the company's own use, since the costs would be incurred irrespective of whether or not the asset was constructed; (c) by capitalizing part of the general overhead, current income will increase due to construction rather than the production of salable goods; and (d) it is more conservative not to capitalize general overhead.

Increasingly, the practice of charging fixed assets constructed for a company's own use with general overhead on the same basis and at the same rate as regular goods produced for sale is being adopted, irrespective of the prevailing capacity conditions. This trend reflects a movement away from conservatism for its own sake and a growing concern for the proper allocation of costs to reduce distortions of periodic income due to undervaluation of assets or overcosting of inventory.

For useful regulatory assessments, it is almost imperative that the Commission rely upon the variable-cost-only philosophy for computing contributions to going concern value, since allocated overhead is seldom incremental or avoidable. Hawkins' recommendations are fine for financial reporting purposes, but as he recognizes, managerial decisions do not apportion overhead to any contribution decision. Therefore:

**Definition** The contribution to going concern value of a service is the excess of revenues attributable to the service over the total variable costs that were incurred to provide the service.

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59 Id. at 139.
IV. CONCLUSION

When we originally embarked on this research, we were not aware of the tremendous importance of nuance in technical language when it is applied to law. As economists, we felt we had a thorough understanding of these terms and that we were "right." However, the more involved we became, the more obvious it was that we had to be extremely careful in establishing definitions that were also satisfactory to an accountant or a railroader, yet at the same time maintained a consistent meaning between the three disciplines. The research program, as a result, consisted of many hours of arguments over how one would interpret a particular term, and whether a given principle was conveyed to each discipline.

These key terms of the 4-R Act are now understandable on a common ground by all of the interested parties. This process should assist the Commission in developing definitions that are based on sound theoretical grounds. Hopefully, our efforts advanced the communication between these specialized disciplines.

Finally, many of the lessons derived from this process are readily translatable into the words of art used in other transportation modes. The principles are the same, the economic phenomena are similar, and the need to establish understandable economic regulation must be satisfied.
Equal Access to Mass Transportation for the Handicapped

GALE NORTON REED*

I. INTRODUCTION

The need for mass transit increasingly has been recognized from the urban planning viewpoint in order to ease the pressures of congested highways, to facilitate movement of passengers throughout metropolitan areas, to limit vehicular air pollution, and to conserve fuel. However, the need for public transportation must also be regarded from the individual's viewpoint. Mass transit agencies must identify and respond to the requirements of particular segments of the population, and in doing so they should consider transportation for minorities more desperately in need of transportation assistance than the general public—the handicapped and elderly.

The transit needs of these groups are unique because the physical obstacles commonly encountered in transportation can serve as complete barriers to travel, to education, to employment, and to social contact. This article examines the special transportation needs of the physically handicapped, the alternative ways of meeting these needs, and the legal rights to service of these needs by mass transit entities.

The manner in which transit systems must be modified to meet the requirements of those with special problems depends in large part upon the type of system involved. Although mass transit today is provided through a variety of modes, the mode most embroiled in the accessibility controversy is the passenger bus.1 Buses present a more difficult technological problem

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1. Regulations have recently been promulgated by the Urban Mass Transportation Administration specifying accessibility standards for fixed facilities, light rail, and rapid rail vehicles. 49 C.F.R. §§ 609.13, .17, .19 (1976).
than other types of mass transit vehicles because the passenger area floor is generally about thirty-five inches above the ground, whereas other transit vehicles are usually boarded at fixed terminals where level entry is provided. Thus buses are more difficult to modify to allow easy entry by the handicapped.

Present regulations of the Urban Mass Transportation Administration (UMTA) do not require that buses be accessible to the wheelchair handicapped, although these regulations were promulgated pursuant to a statute requiring "special efforts" to make transportation facilities accessible. Another relevant statute generally prohibits discrimination against the handicapped in federally funded programs. These laws do not clearly define what is necessary to meet legal requirements; e.g., is it necessary to make transportation facilities fully accessible to individuals in wheelchairs when this would require substantial expenditures and might decrease the efficiency of the transit system? Several suits have been filed by handicapped individuals and organizations seeking definition of the requirements.

There are two primary issues in the equal access controversy. The threshold question is whether or not public transportation systems must provide transportation for mobility-disabled individuals. The second question is whether this transportation must be provided by making main-line transit buses fully accessible or whether requirements can be satisfied by a separate system for use specifically by the elderly and handicapped.

II. IDENTIFYING THE HANDICAPPED

Although equal accessibility lawsuits deal primarily with the interests of the severely and permanently handicapped, especially those confined to wheelchairs, these are not the only people whose physical conditions prevent full access to mass transportation facilities. There is an entire mobility-disadvantaged group that may be divided into two categories: those whose handicaps are "acute" and those whose handicaps are "chronic." The latter includes the type of disabilities most readily brought to mind by the term "handicapped"—the blind; the deaf; persons using braces, wheelchairs and prosthetic limbs; and those with cardiac and vascular conditions.

References:

Acute handicaps include temporary disabilities like fractures and sprains. The handicaps caused by advanced age must also be taken into account in transit planning.

A great deal of disparity exists in estimates of the number of handicapped persons who would be benefited by more accessible transportation. One study places the number of those with mobility-limiting handicaps living in urban areas (excluding those so severely handicapped that they are confined to bed) at about 6.1 million. The Department of Transportation made the highest estimate of the number of persons who would benefit from removal of transportation obstacles—nearly forty-four million people.

Most of this disparity is due to differing definitions of the term "handicap." The latter estimate included people "with limited social and economic opportunities who would benefit significantly in time savings, comfort and convenience for the duration of their handicap if transportation were improved." The same report also stated, "For a traveler, then, a handicap is an inability to perform one or more of the actions required by existing transportation systems at a comfortable level of proficiency." In contrast, the six million figure concentrated only on those whose mobility was actually restricted by transportation barriers.

The Department of Transportation has taken into account both acute and chronic conditions in defining the group to be served by its latest regulations on transportation for the handicapped and elderly.

"Elderly and handicapped persons" means those individuals who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, including those who are non-ambulatory wheelchair-bound and those with semi-ambulatory capabilities, are unable without special facilities or special planning or design to utilize mass transportation and services as effectively as persons who are not so affected.

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9. Id.
11. L. Hoel, supra note 8, at 50. This estimate was based on statistics from the National Center for Health Statistics.
13. Id.
14. Id. at 4-5.
15. "Estimates derived indicate that there are, in American SMSA's [standard metropolitan statistical areas], 3,203,000 chronically handicapped persons, 1,580,000 persons with acute handicaps resulting from injuries, and 1,355,000 elderly persons with other types of acute conditions, yielding a total population estimate of 6,138,166 persons with handicaps resulting in mobility limitations." L. Hoel, supra note 8, at 50.
Using a similar functional definition, the Urban Mass Transportation Administration estimated that 13.3 million people cannot use current bus stairways or entrance-ways, or experience substantial difficulty in doing so.\textsuperscript{17} This final estimate appears most realistic for the purpose of this article. No matter which estimate is relied upon, it is apparent that a large number of people would be allowed access to mass transportation for the first time if physical barriers were removed. Countless others would find mass transit more convenient and would consequently increase ridership.

With the present transportation system, the chronically handicapped travel only about half as much as the rest of the population.\textsuperscript{18} The largest difference in numbers of trips between the disabled and other mass transit passengers is in social/recreational, work, and shopping trips. The handicapped take only about one-third as many trips for these purposes as the able-bodied.\textsuperscript{19} In fact, almost a third of the severely disabled are homebound, meaning that they travel only once a week or less.\textsuperscript{20} If an accessible transportation system were available the number of trips made by these people would increase significantly.\textsuperscript{21}

The major impact that inaccessible transportation has on the handicapped is reflected in employment statistics. Of disabled people aged seventeen to sixty-five, about eighty-six percent have the ability to work, but only thirty-six to forty-four percent are employed. Lack of transportation is the single most important factor preventing thirteen percent of the disabled from working, and removal of travel barriers should allow 200,000 handicapped people to enter the work force.\textsuperscript{22}

The cost of providing accessible transit will undoubtedly be high. However, the benefits to society from the utilization of the handicapped population's talents help counterbalance the cost:

[S]ociety has a distinct interest in utilizing every possible source of human skill and ingenuity, including the skills and talents of mobility-handicapped individuals. When effectively confined to a single floor, building, or city block, not only are the handicapped deprived of the myriad benefits of society, but society is deprived of the valuable contributions of these otherwise normal human beings. And this deprivation is compounded by

\begin{quote}
\textsuperscript{18} \textit{Travel Barriers, supra note 12, at 7.}
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Atlantis Community, Independent Living for the Physically Disabled 92 (1976), citing Urban Institute, Comprehensive Service Needs Study.}
\textsuperscript{21} "If an accessible transportation system were available at 'no cost' these persons would make 50 percent more medical trips, 82% more shopping trips, 85% more church trips and 111% more social and recreational trips." \textit{Id.} at 93 (\textit{citing ABT Associates, Inc., Travel Barriers—Transportation Needs of the Handicapped} (1969) (prepared for the Office of Economics and Systems Analysis, U.S. Dep't of Transportation)).
\textsuperscript{22} \textit{Travel Barriers, supra note 12, at 19; Transportation Systems Center, U.S. Dep't of Transportation, An Inflationary Impact Statement of the Urban Mass Transportation Administration's Proposed Elderly and Handicapped Regulation 40-43 (March 4, 1976).}
\end{quote}
The Department of Transportation found that a net economic benefit of approximately $800 million would result from elimination of transportation barriers.24

III. EQUAL ACCESS VS. SEPARATE SYSTEMS

The optimum means for fulfilling the needs of the mobility-disabled while maximizing the efficiency of the overall transportation system is subject to debate. It must be determined whether the handicapped should be afforded access to transit facilities used by the general public or whether a separate system designed to fit the unique needs of the disabled would be desirable and legally sufficient.

Presently the severely handicapped rely a great deal on private transportation in the form of taxicabs and specially equipped van services. Fares for the latter mode in particular have been termed "outrageous."25 particularly in light of the fact that the average income for the mobility-disabled is poverty-level.26

There are few transportation alternatives available for mobility-disabled. 

"[I]n a society where mobility is a prerequisite of living, the handicapped are forced to travel very little and either depend upon their friends and family for transportation or pay the high cost of special transportation."27 Thus a handicapped person generally has a greater need for public transportation than an able-bodied person.

A. THE RATIONALE FOR SEPARATE SYSTEMS

Modes of transportation that provide service to the handicapped as an alternative to full accessibility of the general public transit system may be referred to as "paratransit."28 The alternatives include subsidizing private handicapped transportation services, sharing of specially modified automobiles driven by the handicapped, and private taxi service.

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24. Transportation Systems Center, U.S. Dep't of Transportation, An Inflationary Impact Statement of a Program of Transportation Services to Elderly and Handicapped Persons 82-83 (1976) estimates that a benefit of $300 million to $500 million would result from each 100,000 handicapped people returned to the work force. Abt Associates estimated the benefit of eliminating barriers at $824 million, an average of $3,887,000 per major metropolitan area. Travel Barriers, supra note 12, at 19.
25. Atlantis Community, supra note 20, at 100. A round trip within a metropolitan area via specially equipped van costs $15.00 to $20.00. Id. at 99.
26. L. Hoel, R. Lauder, supra note 8, at 51; R. Lauder, supra note 15, at 5.
27. K. Dallmeyer, quoted in Atlantis Community, supra note 20, at 92.
The most commonly advocated alternative is the small wheelchair-accessible transit bus operated by the transportation authority on a demand-responsive basis (either through subscription, dial-a-ride, or a combination of the two). Advantages of this type of system may be measured both in terms of service to the disabled and of increased efficiency for the main-line system. For the disabled, a demand-responsive public system provides door-to-door service, avoiding other physical barriers faced by the handicapped in traveling to bus stops and reaching their ultimate destinations after departing from the bus. One of the most common complaints expressed by the handicapped about mass transit is crowded conditions of vehicles and stations. Overcoming this problem might best be accomplished by use of paratransit facilities because there would be less waiting, less jostling, and fewer people.

Demand-responsive transportation and modes that provide door-to-door service for the severely disabled fulfill a definite need, and would continue to have a function even if the public transportation system became fully accessible. For example, a small wheelchair-accessible bus could serve as a feeder for an accessible main-line system. Private vans could transport the disabled to destinations not serviced by public transportation and could aid those who, because of severe multiple disabilities or psychological problems, could not use mass transit.

Also, a separate system for the handicapped may maintain the efficiency of the overall transit system.

Most rapid transit systems depend upon quick loading and unloading at stations, in order to maximize the overall running speed of the system. The ambulatory problem person is often not able to operate within the loading and unloading system at a speed commensurate with the system design, especially under crowded or rush hour conditions.

Loading a wheelchair on a main-line bus may cause a slowdown in service of two to four minutes, although this figure is apparently decreasing as technology is improved. Buses equipped for handicapped accessibility may be inherently inefficient for transporting the able-bodied because of seldom-used features like wheelchair tie-downs, lifts, or ramps. These features add to the cost of purchasing a bus, and the space in the passenger area necessary for a wheelchair tie-down may eliminate seats that could carry four to six other passengers.

29. The irregular, dense and usually hurried pedestrian traffic in most travel situations is a physical menace to many disabled travelers as well as a source of apprehension. About one-third of the handicapped are frightened or upset by crowds of strangers. The social pressure implicit in a situation in which the slower moving handicapped person may feel that he is impeding others can also be upsetting.

TRAVEL BARRIERS, supra, note 12, at 14. See also L. Hoel, supra note 8, at 58.

30. L. Hoel, supra note 8, at 42.

31. Statement of Barbara Williamson, Denver Regional Transportation District, in Is urban transit being handicapped?, 91 AM. CITY & COUNTY, No. 6 at 6 (1976).

32. See notes 116-118 infra.
Serving travel demand for the handicapped by means of specially-equipped and subsidized para-transit modes would be clearly a great deal cheaper than equipping all the vehicles and stations of an urban transit system to serve them, and indeed would almost certainly result in a higher level of service.”

B. THE RATIONALE FOR A FULLY ACCESSIBLE SYSTEM

The primary reason that a fully accessible system would be a desirable goal is intangible and unquantifiable: the psychological and social benefit to the handicapped and elderly of being more fully integrated into society. While a separate bus system could ideally provide adequate transportation, it would nevertheless create another circumstance wherein the handicapped are segregated from the rest of the population.

In practical terms, a fully accessible main-line system may be more effective in providing transportation for the disabled than a demand-responsive system alone, based on actual experience with the latter. The Denver Regional Transportation District, for example, created an innovative “HandiRide” system consisting of twelve small buses equipped with wheelchair lifts. The buses offer door-to-door service on a subscription basis to elderly and handicapped passengers. Although the HandiRide provides a necessary and valuable service, many of the disabled hold a negative view of the service. The limited capacity of the system, which makes it difficult for the handicapped or elderly to get service, and the inflexibility of scheduling have been pinpointed as the major problems. Only 185 individuals are presently served by HandiRide and these people must schedule trips about a month in advance.

Problems like this are by no means unique to Denver. Criteria for comparing the quality of service provided by separate systems and by fully accessible systems were identified by Dennis Cannon in a study for the Southern California Regional Transportation District. To act as an acceptable substitute for an accessible main-line system, a transit system for the handicapped should display equivalence in geographic service area, choice of origin and destination points, transfer frequency, travel time, and trip-decision time.

Trip-decision time reflects how far in advance a user must decide to travel. As indicated above, this element is particularly weak in some existing transit systems for the handicapped and elderly. A fully accessible system

33. R. Krey, supra note 28, at 42.
34. Interviews conducted in Denver found that 47% of the disabled have a negative view of HandiRide and 63% of those served by HandiRide felt negatively about it. ATLANTIS COMMUNITY, supra note 20, at 105.
35. Consequently the purposes of trips are almost exclusively for employment, education, or medical care. Id. at 111.
37. Id.
would give the disabled person the same freedom to come and go at any
time as the non-handicapped person.

The range of fares charged to handicapped riders was listed by Can­non as an evaluative criterion, but this point has been made obsolete by recent UMTA regulations specifying that rates for handicapped and elderly passengers during non-peak hours may not exceed one-half the peak-hour fares applicable to other passengers.38

Although special systems for the handicapped and elderly like Denver’s HandiRide have helped fill a definite need, they are sometimes op­posed as stopgap measures that slow progress toward full accessibility. Because it is more expensive to retrofit buses currently in use to make them wheelchair accessible than to add this option to new buses, and because UMTA’s other accessibility regulations deal only with new transit buses, most cities will probably acquire accessible buses only through the process of gradually replacing older buses with new accessible buses. Thus, accessible buses will be added only when other considerations dictate that new buses are necessary to expand the system or replace worn-out vehi­cles. Obviously, each purchase of non-accessible main-line buses slows the accessibility process by several years.

The cost/benefit analysis of either type of system is, of course, an important analytical tool, but the present estimates of cost vary so widely that their value is questionable.39

IV. LEGAL ASPECTS OF EQUAL ACCESS

Legal requirements for accessible transportation have changed dra­matically in the last few years as part of a movement toward equalizing the rights of handicapped citizens. Congressional mandates have begun to define the standards, and these statutes are being further sketched in by administrative and judicial interpretation. Pending legislation may also serve to alter and clarify the rights of the mobility-disabled.

It is first necessary to review the various legal foundations for the rights of the mobility-disabled population. Most of the cases filed to date by the handicapped demanding equal access have relied on a combination of these foundations. The primary constitutional source is the Equal Protection Clause,40 supplemented by the judicially recognized constitutional right to travel. Statutory causes of action have been based on the Rehabilitation Act,41 the Urban Mass Transportation Act,42 the Federal-Aid Highway Act,43

38. 49 C.F.R. § 609.23 (1976).
and various state statutes. Regulations implementing the federal statutes further amplify the basis for mobility rights of the disabled, particularly the 1976 UMTA regulations entitled Transportation for Elderly and Handicapped Persons.

**A. The Urban Mass Transportation Act**

Powerful language in the Urban Mass Transportation Act of 1964 creates a right to public transportation for the handicapped and elderly, leaving no doubt that the disabled must be provided access to at least some form of mass transit. Section 16 of the Act provides: "It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services . . . ."47

It is unusual in the face of such strong statutory assertion of a right that this passage is not relied on a great deal in accessibility suits. Actually, section 504 of the Rehabilitation Act preventing discrimination in federal funding is cited much more frequently.49 The statement of rights of the disabled in the Urban Mass Transportation Act is weak in that it is merely a statement of "national policy." A right is created, but without the underlying foundation necessary to render it enforceable.

Another portion of this same statutory section contains the most controversial term in the accessibility issue: "special efforts." The Act requires that "special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured . . . ."50

This portion of the Act may weaken the statement of rights of the handicapped and elderly because the only implementation required is special effort in planning and design. It does not set a physical standard for compliance; it does not clarify whether the right conferred is actually exercisable.

Judicial interpretations of this Act have found thus far that this section creates no requirement for a fully accessible system.51 The rationale in these decisions has been that the "special efforts" requirement cannot demand accessibility when accessible buses are not yet in commercial production. The limiting factor has been feasibility.52

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45. 49 C.F.R. § 613.204 (1976).
47. Id.
49. *See* Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977).
52. 409 F. Supp. at 1300.
The legislative history of the Act, on the other hand, tends to support the idea that the aim of section 16 is to create full accessibility.\textsuperscript{53} While exercise of the right may be limited on an interim basis by technological factors, the ultimate goal may not stop short of complete accessibility. The chief sponsor of the amendment creating the present section 16 stated:

Heretofore handicapped Americans were relegated to separate and unequal transit systems—systems that were very costly not only to the Government, but also to the individual user. My 1970 amendment sought to require that design and construction of all new mass transit systems, equipment, and facilities be totally accessible to the elderly and handicapped.\textsuperscript{54}

Regulations recently promulgated by the Urban Mass Transportation Administration make it clear that UMTA does not interpret the special efforts requirement as necessitating full accessibility—a separate system for the handicapped is sufficient. The UMTA regulations specifying criteria for project approvals reiterate the special efforts criterion for receipt of federal funding but do not fully define special efforts.\textsuperscript{55}

The initial determination of what the standard encompasses is left to local planners. Although the appendix to these UMTA regulations states, "UMTA will not specify a program design to meet the 'special efforts' requirement,"\textsuperscript{56} some guidance is provided through a list of examples of actions that would meet the special efforts standard. Among these examples of sufficient programs is provision of a separate substitute service for non-ambulatory individuals.\textsuperscript{57}

A later notice issued by UMTA gave further insight into the agency's interpretation of the statutory language:

UMTA has taken a strong position in these regulations [49 C.F.R. part 609] and in testimony, however, that the Federal Government should leave

\textsuperscript{53} For a more thorough discussion of the legislative history of section 16, see Comment, \textit{Mass Transportation for the Handicapped and the Elderly}, 1976 DET. C.L. REV. 277.

\textsuperscript{54} 120 CONG. Rec. 5309 (1974) (remarks of Rep. Biaggi). The Biaggi Amendment was introduced on the floor of the House of Representatives during debate and so was never considered by committee. Bohlke v. Golden Gate Bridge, Highway, & Trans. Dist., No. 73362 (Cal. Super. Ct., filed Nov. 18, 1974) (citing 116 CONG. REC. 34180-81 (1970)).

\textsuperscript{55} 49 C.F.R. § 613.204 (1976). \textit{See also} 23 C.F.R. § 450.120(5) (1976).

\textsuperscript{56} 49 C.F.R. § 613 Appendix (1976).

\textsuperscript{57} Other examples listed by UMTA as “illustrative of a level of effort that will satisfy the 'special efforts' requirement” are

1. A program for wheelchair users and semi-ambulatory handicapped persons that will involve expenditure of an average annual dollar amount equivalent to a minimum of five percent of the section 5 [49 U.S.C. § 1604 (Supp. 1974)] apportionment to the urban area . . . .

2. Purchase of only wheelchair-accessible new fixed route equipment until one-half of the fleet is accessible . . . .

3. A system of any design that would assure that every wheelchair user or semiambulatory person in the urbanized area would have public transportation available if requested for 10 round trips per week at fares comparable to those which are charged on standard transit buses for trips of similar length within the service area of the public transportation authority.

to local jurisdictions the choice of whether to use such wheelchair accessible transit buses or separate specialized services, or some combination, to meet the transit needs of wheelchair users and semi-ambulatory persons.\textsuperscript{58}

Along with regulations requiring that the needs of the handicapped and elderly be considered in the planning process, UMTA also published more specific criteria for vehicular and fixed facility features to aid the disabled.\textsuperscript{59}

Again, there was no clear requirement for full accessibility.\textsuperscript{60}

These regulations will, of course, be given a great deal of weight in any judicial interpretation of the Urban Mass Transportation Act. Thus any argument that the Act requires full accessibility of main-line buses must come from the Act itself and must be strong enough to overcome the deference given to agency interpretation. Since the statute, as discussed supra, is somewhat ambiguous, it is very probable that UMTA’s interpretation would be adopted.

Legislation is pending in Congress that would clarify the language of section 16 of the Urban Mass Transportation Act, making equal access mandatory.\textsuperscript{61} Although its passage would resolve the conflict in favor of full accessibility, during its pendency the fact of its existence adds to the arguments against full accessibility. It serves as yet another statement that the present section 16 does not require complete accessibility.

\section*{B. THE FEDERAL-AID HIGHWAY ACT}

Section 165 of the Federal-Aid Highway Act of 1973\textsuperscript{62} is usually regarded as demanding stronger action to achieve accessibility than the Urban Mass Transportation Act.\textsuperscript{63} Each act applies to the portion of mass transit funding distributed under its aegis.\textsuperscript{64} In addition to a declaration of national policy establishing the handicapped’s right to use mass transportation (very similar to that expressed in the Urban Mass Transportation Act),\textsuperscript{65} the Federal-Aid Highway Act provides:

\begin{quote}
The Secretary shall require that any bus or other rolling stock used for mass transportation purposes and any station, terminal, or other passenger loading area, improved or constructed in whole or in part with Federal funds or under authority of Federal law after June 30, 1975, be designed with features to allow utilization by elderly and handicapped persons.
\end{quote}

\begin{thebibliography}{99}
\bibitem{59} 49 C.F.R. § 609.1-19 (1976).
\bibitem{60} 49 C.F.R. § 609.16 (1976).
\begin{quote}
The Secretary shall require that any bus or other rolling stock used for mass transportation purposes and any station, terminal, or other passenger loading area, improved or constructed in whole or in part with Federal funds or under authority of Federal law after June 30, 1975, be designed with features to allow utilization by elderly and handicapped persons.
\end{quote}
\end{thebibliography}
The Secretary shall not approve any program or project to which this section applies which does not comply with the provisions of this subsection requiring access to public mass transportation facilities, equipment, and services for elderly or handicapped persons.\(^66\)

The strong language quoted above was added to the Act in 1974.\(^67\) Legislative history of this amendment reveals that Congress' intent was to force creation of a transportation system that is accessible "to the maximum extent feasible."\(^68\) Although the requirement falls short of complete accessibility at this time, it would become a requirement when technically and economically feasible. Congress was clear in its assertion that accessibility must include wheelchair accessibility:

The [Senate Public Works] Committee has found that while funds have been spent on such worthwhile projects as overhead grip rails, non-skid flooring material, improved lighting and public address systems, and additional vertical handrails at side doors, there has been a lack of facilities such as turnstile alternatives or elevators which would make a system accessible to persons in wheelchairs.

The Committee proposes to amend Section 165(b) to insure that any project receiving Federal financial assistance under the urban mass transit, Interstate transfer, or rural bus demonstration sections of the Federal Aid Highway Act of 1973 shall be "planned, designed, constructed and operated so as to allow effective utilization by elderly or handicapped persons," including those in wheelchairs.\(^69\)

As with the Urban Mass Transportation Act, judicial interpretation has found that the Federal-Aid Highway Act "does not require every standard-size transit bus to be totally accessible to every mobility handicapped person."\(^70\)

UMTA's regulations discussed in the preceding section were promulgated partially under the authority of the Federal-Aid Highway Act, so they serve as administrative interpretations of this Act as well as the Urban Mass Transportation Act. The Federal Highway Administration has also created rules regarding planning for the handicapped.\(^71\) Perhaps the clearest statement of the administrative view of statutory requirements is found in an internal UMTA document:

[W]e interpret Section 165(b) as requiring that mass transit facilities and services funded under the affected provisions must incorporate features which will facilitate the use of those facilities and services by a particular

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\(^{68}\) "It is . . . the [Senate Public Works] Committee's intent that any project receiving funds after the date of enactment, under any of the programs referred to in this subsection, to the maximum extent feasible, be planned, designed, constructed and operated to provide for effective use by the elderly or handicapped." S. Rep. No. 93-1111, 93d Cong., 2d Sess. 8 (1974).

\(^{69}\) Id. (emphasis added).


group of the elderly and handicapped. The group which is of concern is those persons who normally utilize and can be expected to utilize mass transit facilities and services but, due to age or physical disability, cannot do so "as effectively as" persons without those characteristics . . . . Such persons include, for example, those with poor eyesight, but not the blind; those who are lame, but not those confined to wheelchairs.72

C. The Rehabilitation Act of 1973

The Rehabilitation Act, section 504,73 has served as a stronger base for lawsuits seeking accessible transportation systems than have either of the transportation-related acts.74 This Act prohibits discrimination against handicapped persons in any federally funded project.75

The Rehabilitation Act closely parallels civil rights legislation; in fact, it was originally introduced as legislation to include the handicapped within the list of groups protected under Title VI of the Civil Rights Act.76 It has been interpreted as not only expressing substantive rights of the disabled, but also as conferring a private right of action to enforce the statute.77

Lloyd v. Regional Transportation Authority,78 the foremost decision on the handicapped accessibility issue, relied heavily on section 504. Plaintiffs in this case were two handicapped individuals suing on behalf of the class of mobility-disabled people in the northeastern Illinois region served by defendants, the Chicago Transit Authority and Regional Transportation Authority. Defendants were planning to purchase new vehicles that would not be wheelchair-accessible. Plaintiffs asked for a preliminary injunction to prevent use of new facilities that were not fully accessible and also for a mandatory injunction requiring defendants to make the existing transportation facilities accessible. Defendants' motion to dismiss was granted by the district court on the basis that the statutes relied upon by plaintiffs79 did not create a private cause of action and no valid equal protection argument existed. The Court of Appeals vacated and remanded.


74. Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977).
75. Section 504 provides:
   No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
76. 548 F.2d at 1280 n.9.
77. Id. at 18.
78. 548 F.2d 1277 (7th Cir. 1977).
a Supreme Court case interpreting the Civil Rights Act, in determining that a right to file a private action to enforce statutes aiding the handicapped exists under section 504.

Lloyd left unanswered the question of whether separate facilities for the handicapped can adequately substitute for a fully accessible system; there was no decision on the merits of plaintiffs' claim. However, the court presented a strong case for the existence of an affirmative duty to provide accessible facilities. The court paraphrased Justice Douglas in Lau: "Under these [federal] standards there is no equality of treatment merely by providing [the handicapped] with the same facilities [as ambulatory persons]... for [handicapped persons] who [can] not [gain access to such facilities] are effectively foreclosed from any meaningful [public transportation]."81

Two decisions prior to Lloyd, Snowden v. Birmingham-Jefferson County Transit Authority82 and United Handicapped Federation v. Andre,83 took a view of the impact of section 504 that rendered it virtually meaningless in the transportation accessibility context. These cases found that section 504 prohibits only affirmative discrimination without requiring action to aid the handicapped. "The defendant transit authority does not exclude the wheelchair handicapped from riding the transit buses if they can arrange for someone to assist them in boarding and exiting the bus. The defendants are not in violation of the Rehabilitation Act of 1973."84

Thus the only possible violation under Snowden and Handicapped Federation would be a rule prohibiting all handicapped persons from riding buses. A physical barrier producing the same result would not be violative.85

The Department of Health, Education, and Welfare did not interpret section 504 as prohibiting only active discrimination in recently proposed regulations. On July 16, 1976, HEW published proposed rules86 for implementing the provisions of the Rehabilitation Act. Although these rules have no direct applicability to mass transportation because they apply only to funds administered by HEW,87 they are significant because HEW has been assigned the task of overseeing implementation of the Rehabilitation Act by other federal agencies,88 and will issue separate regulations in its supervisory role. The current proposed regulations provide some insight into HEW's interpretation of the statute, both to predict the content of its supervisory regulations and to serve as persuasive authority in judicial interpretation.89

81. 548 F.2d at 1284 (quoting 414 U.S. at 566) (bracketed words in original).
89. The proposed regulations were cited at length by Circuit Judge Cummings in Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977).
Proposed 45 C.F.R. Section 84.4(b)(2) provides that a recipient of federal financial assistance “may not provide different or separate aid, benefits, or services to handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services which are as effective as those provided to others.” 90 Advisory material accompanying this regulation made even more explicit its intention that services should be provided in a manner that will meet the needs of the handicapped with a minimum of separation from the able-bodied public:

[I]n order to meet the individual needs of handicapped persons to the same extent that corresponding needs of non-handicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary . . . . [A]lthough separate services may be required in some instances, the provision of unnecessarily separate or different services is discriminatory. 91

The reasoning of Snowden and Handicapped Federation is also contradicted by looking at other portions of the Rehabilitation Act. The creation of the Architectural and Transportation Barriers Compliance Board contemplates affirmative action to eliminate physical barriers, particularly in federal facilities. 92 In this regard, the House Committee on Education and Labor stated, “[I]t is imperative that handicapped individuals be given the opportunity to move freely in the society into which they must integrate themselves.” 93

D. EQual Protection

Equal protection is the primary constitutional basis for assertion of rights to equal access by the mobility disabled, and has been pleaded in almost every accessibility suit to date, 94 often under 42 U.S.C. § 1983. 95 The only published handicapped accessibility decisions addressing the equal protection argument. Snowden and Handicapped Federation found it unpersuasive. However, neither case discussed the equal protection issue in depth.

The analysis employed thus far in evaluating equal protection claims may be criticized as being outmoded; the courts utilized a rigid test that has been abandoned by the Supreme Court in recent years. 96 Commentators have recognized three formulations used to determine equal protection

90. 41 Fed. Reg. 29561 (1976) (to be codified as 45 C.F.R. § 84.4(b)(2)).
94. See, e.g., cases cited note 7 supra.
questions. These formulations are denominated as the "old," the "new," and the "newer" equal protection tests. In addition, the most recent Supreme Court decisions indicate that the Court may be moving into yet another phase in equal protection analysis. The latest standard that has been employed may be entitled "discriminatory intent."

The primary point of divergence for these tests is the standard of review to be applied in determining the validity of discriminatory state action. The old equal protection test requires only that state action demonstrate a "rational basis" for its classification scheme, while under the new equal protection test the involvement of a fundamental right or suspect class triggers the necessity for a "strict scrutiny" test of the state's basis for discrimination. The new test clearly eases the way for invalidation of state action in cases where the necessary prerequisite of a fundamental right or suspect class exists, but makes acceptance of the state action virtually automatic if the absence of these prerequisites causes the court to revert to the rational basis test. This latter reversion is illustrated by Snowden and Handicapped Federation.

1. The Strict Scrutiny Test

The analyses used in Snowden and Handicapped Federation followed new equal protection reasoning by examining whether a fundamental interest or suspect category were involved that would necessitate employment of the strict scrutiny standard. The disabled plaintiffs in these cases argued that the defendant mass transportation systems interfered with the exercise of the fundamental right to travel and that the mobility-disabled constituted a suspect class. Consequently, state action discriminating against the handicapped by purchasing inaccessible buses had to be evaluated using a strict scrutiny test. The contentions of the plaintiffs were based in part on the right to travel, which has been recognized by the Supreme Court as a fundamental right. When the right to travel is charac-

104. 407 F. Supp. at 397-98.
105. 409 F. Supp. at 1301-02.
106. Shapiro v. Thompson, 394 U.S. 618, 629 (1969) stated:
   This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. Shapiro's holding is limited to interstate travel, but other cases have held that the right exists for intrastate travel as well. "It would be meaningless to describe the right to travel between states
characterized as broad enough to encompass local public transportation, state action discriminatorily interfering with exercise of that right must be justified by a "compelling state interest." If the courts in *Snowden* and *Handicapped Federation* had recognized this fundamental right as being abridged, the next step in the analysis would have been evaluation of the state's interests to determine their "compelling" nature. The primary state interest appears to be maximizing the efficiency of the transportation system while saving tax money. It is doubtful that efficiency alone could be considered compelling, and cutting expenditures has been expressly rejected as a compelling interest in failure to provide special services for the handicapped. Thus the plaintiffs contended that the government had to act affirmatively to provide equal access.

The courts in *Snowden* and *Handicapped Federation* rejected new equal protection arguments, holding that no fundamental right was involved, and the only constitutional requirement was the presence of a rational basis for discrimination. This basis was found in the technological and economic infeasibility of providing wheelchair-accessible facilities.

The facts of this case do not appear to involve any invidious discrimination against similarly situated persons. Such discrimination as may in fact exist results from technological and operational difficulties in designing, producing, and operating the kind of special vehicles needed to allow plaintiff and the class she represents to utilize BJCTA's [Birmingham-Jefferson County Transit Authority's] bus system with safety and convenience for themselves and other passengers.

Another statement of this rationale was presented in an amicus brief prepared by UMTA in another accessibility case.

Perhaps the essence of the weakness of plaintiff's constitutional claim is the fact that their Complaint shows on its face that they are not "situated similarly" to the non-handicapped passenger because of their physical

107. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the . . . [s]ystem whether occasioned by insufficient funding or administrative inefficiency certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child. *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972).


impairments and hence require special and costly modifications to transit
buses before they can safely board, ride and alight.  

2. The Newer Equal Protection

The strict scrutiny test described above proved overly rigid in some
instances. Rights considered “fundamental” were given a great deal of
protection; rights only slightly less important that had not been recognized
as “fundamental” were only marginally protected. Gradually it has been
realized that a test lying between these extremes may be necessary. This
newer equal protection test determines the strictness with which state action
will be examined on the basis of the degree of harm to the affected class.
The more serious the infringement of rights, the stricter will be the examina-
tion of the state’s justification for its actions.  

Although the language employed in Supreme Court cases utilizing this test has been similar to the
old rational basis equal protection standard, the results have been different, i.e., the Court has invalidated legislation for failure to meet the rational basis
requirement. While the standard has been merely a rational basis, there has
been a requirement of showing that the basis is indeed rational, thus
eliminating the perfunctory approval of state action that formerly followed
designation of a case for rational basis analysis.

Application of newer equal protection to equal access suits would have
the effect of raising the standards for showing of a rational basis. Defendant
transit entities would need to affirmatively prove the rationality for the exist-
ence of travel barriers. The harm to individuals from denial of access to
mass transportation is great, and the right to public transportation for the
handicapped has been affirmed by statute. Thus, the balancing of interests
might show that equal protection demands accessibility.

3. Discriminatory Intent

A discussion of equal protection must conclude with mention of the
Supreme Court’s most recent direction in discrimination cases, set forth in Village of Arlington Heights v. Metropolitan Housing Development Corp. This case represents the strongest example to date of the degree to which the current Court’s thinking has diverged from past civil rights cases. The plaintiffs in Arlington Heights attacked an exclusionary zoning ordinance as a violation of the Fair Housing Act and the fourteenth amendment. The Supreme Court refused to invalidate the ordinance, requiring that there be a showing of actual intent to discriminate. This case possibly may be

115. The Supreme Court stated:
confined within its narrow factual situation, but its impact appears to extend much further. If its requirement of showing actual intent is applied to the handicapped accessibility area, for example, it will mean that mobility-disabled plaintiffs must prove that transit entities purchased inaccessible buses with the intent of barring access to those in wheelchairs. If other justifications for the action can be pinpointed, e.g., system efficiency or financial factors, then the agency’s action will be upheld. This extreme judicial deference would virtually destroy any hope of achieving accessible transit through litigation.

V. TECHNOLOGY

The “state of the art” in providing transportation for the handicapped is an important factor to be considered. When a balancing test is employed by public decisionmakers to weigh the costs of providing accessible transportation against the benefits, factors like system efficiency and feasibility can tip the scales.

One major problem with accessibility has been the additional time per stop it would take to load passengers if a wheelchair lift is deployed. If a device were used that took three or four minutes to operate, loading two wheelchairs per trip would cause a bus to fall behind schedule. On the other hand, if a lift or ramp could load a wheelchair in twenty seconds, then picking up disabled passengers would take little more time than other riders.116

The possibility of redesigning buses entirely to create maximum accessibility for all passengers by lowering bus floors and eliminating steps has been controversial. UMTA began a project working with bus manufacturers to develop Transbus, a low-floor accessible bus incorporating advanced design techniques. Transbus did not prove to be a popular project among transit planners due to disadvantages like higher cost, increased fuel consumption, and reduced seating capacity.117 Some of the original criteria for this project, most notably the low floor height, had to be compromised in order to meet demands for advanced transit buses more quickly.118

Our decision last Term in Washington v. Davis, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. “Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.” Id. at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. 97 S. Ct. at 563.

116. Several devices have been developed that allow for rapid loading and unloading of wheelchairs. ATLANTIS COMMUNITY, supra note 12, at 124.

117. Young, The Battle of the Buses, 3 Mass Transit No.5, at 6 (1976); Is urban transit being handicapped?, 91 AM. CITY & COUNTY No.6, at 6 (1976).

118. The original plans for Transbus involved a major redesign of existing transit buses that included lowering of bus floors to 22 inches or less. Due to time and cost factors, UMTA determined that the needs of the transit public would be better served by “interim buses” incorporating some of the advanced aspects of Transbus but without the complete redesign of
The Transbus project is an example of the necessity for planning on a federal level to bring accessible transit buses into production. Since cities usually purchase a maximum of 200 to 300 buses at a time, it is not economically feasible for manufacturers to make major modifications in the standard bus design for an individual city. A manufacturer would be unwilling to incur the massive expenses of retooling without assurance that such features would be purchased by local governments.  

Current regulations require all new full-size buses purchased with UMTA grants to be equipped with several features to make them more accessible and more convenient. Among these features are handrails usable when boarding, overhead handrails, a rail located near the fare-collection box for passengers to lean against, and other handrails and stanchions "sufficient to permit safe on-board circulation, seating and standing assistance and unboarding by elderly and handicapped persons." Visual factors should also make bus transit easier for some of the elderly and handicapped: illuminated destination and route signs on the front and side of the vehicle, stepwell lighting, outside lighting, priority seating signs, and a band of bright contrasting color on each step. Under these regulations, the height from a standard six-inch curb to the first step cannot exceed eight inches, and each step inside the bus may also not exceed eight inches (the height of an average household step).  

Existing buses. A low floor height (of 29 inches or less) would be achieved by a combination of lowering the floor height somewhat and utilizing "kneeling devices," which are "deflatable airbag devices which permit the front-end or front right corner of a bus to 'kneel' down by four or five inches." UMTA Policy Statement on Transbus, 41 Fed. Reg. 32286, 32287 (1976). These devices are now offered by all three major bus manufacturers for $300-$400, and will result in an effective floor height of 24 inches or less. Id. Although these features are less advanced than UMTA's original goal, they may still be helpful in providing accessibility:  

[A] net 24-inch floor height, when combined with the further offset of a typical six-inch curb, may permit use of a ramp instead of a more expensive lift for wheelchair access (although assistance to the wheelchair user may be necessary, depending on the length of the ramp). Thus, for an increase in price of less than one percent per bus, features which substantially improve the accessibility of the vehicle for all riders, and especially for elderly and handicapped person[s], can be added. Id.

119. William M. Spreitzer, Head of the Transportation Research Department of General Motors, commented about the acceptance of a prototype incorporating a low floor, a kneeling device, and a new braking system for smoother stopping: "Follow-up market studies within the transit industry indicated that, desirable as some of these features were from the standpoint of the elderly and the handicapped, there was not sufficient interest to justify including them on future production models." A Barrier-Free Environment for the Elderly and the Handicapped: Hearings before the Senate Special Comm. on Aging, 92d Cong., 1st Sess., pt. 3, at 165 (1971).

A Department of Transportation publication stated:

Major changes in vehicle design require a large investment which the manufacturers are not eager to make without guarantees of increased revenues . . . . The structure is another deterrent to action. While a larger share of the market might ordinarily be a strong incentive for any manufacturer to invest in product improvements, the largest bus manufacturers are already able to influence the market in such a way that it is not advantageous for them to initiate the changes. TRAVEL BARRIERS, supra note 12, at 39.

120. 49 C.F.R. § 609.15(e)(3) (1976).

The primary choice left open for local transit planners is whether or not to purchase wheelchair loading devices. The regulations do not require purchase of the wheelchair option, but only that the bus be capable of being equipped with the option.\textsuperscript{122} Any transit bus may be retrofit for wheelchair accessibility, but it requires alterations in the structure of the bus like widening doorways and aisles that make retrofitting costly. Buses can be constructed with the necessary structural alterations so that retrofitting requires only attachment of the wheelchair loading device. Thus, what the present regulations require is not wheelchair accessibility, but only construction of buses so that they may, at some future time, be made accessible at minimum cost.\textsuperscript{123}

The regulations also contain a requirement directed toward bus manufacturers, although enforced only through indirect pressure. UMTA will approve funds for acquisition of transit buses only if the local transit entity's bid requires an assurance from each vehicle manufacturer that wheelchair options are available. Thus before a manufacturer can participate in bidding for federally funded transit bus contracts it must offer a wheelchair option.

\section*{VI. Conclusion}

The need for accessible transportation is apparent. There are millions of Americans who are constantly restricted from leading fuller lives by mere physical barriers; barriers that could and should be removed. Unfortunately, there is not yet a firm legal foundation for requiring accessible transit facilities. Thus the action that must be taken is primarily for the legislatures, not the courts.

Action should be taken in the near future while transit systems are expanding so that expensive retrofitting will not be necessary. Until accessible full-size buses are developed for practical use in mass transportation, planners should examine the possibilities for operating paratransit modes that could later be used as supplemental systems.

The justifications for discriminatory separate systems or failure to provide any facilities for the handicapped become weaker as technological developments make a fully accessible system more feasible. Legal precedents are quickly being established in this area. To prevent the law from being frozen at a stage far behind the state of the art, the precedents must be regarded in the perspective of their factual context.\textsuperscript{124}

\textsuperscript{122} "The term 'wheelchair accessibility option' means a level change mechanism (e.g., lift or ramp), sufficient clearances to permit a wheelchair user to reach a securement location, and at least one wheelchair securement device." 49 C.F.R. § 609.15(b) (1976).

\textsuperscript{123} The regulation provides that "procurement solicitations shall provide for a bus design which permits the addition of a wheelchair accessibility option and shall require an assurance from each bidder that it offers a wheelchair accessibility option for its buses." \textit{id.}

INTRODUCTION

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (ATIA) was signed into law by President Ford on September 30, 1976. While its effect is yet to be seen, the section empowering state attorneys general to bring suit as parens patriae on behalf of injured citizen-consumers is of particular significance. Prior to the ATIA, consumers seeking redress for violations of the antitrust laws were without a judicial remedy in cases where injury of a very small nature occurred individually to millions of people. As will be discussed later in this note, the main obstacle to consumer action in the courts was lack of standing. The ATIA effectively overcomes this obstacle by granting standing to state attorneys general acting as parens patriae on behalf of consumers in large, otherwise unmanageable, cases.

Parens patriae actions are not new; the concept antedates the formation of the United States. In order to familiarize the reader with parens patriae actions and the changes wrought by the ATIA, this note will begin with an overview of parens patriae, especially under the Clayton Act, prior to the ATIA.


4. See, e.g., Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972); California v. Frito-Lay Inc., 474 F.2d 774 (9th Cir. 1973).

Following the history of *parens patriae*, Title III of the ATIA will be examined. This title contains the authorization for *parens patriae* actions. Particular emphasis will be placed upon the sections dealing with assessment and measurement of damages. These sections allow damages in certain cases to be measured using aggregate methods instead of individual proof of damages. Such methods sound simple and equitable when described by the Act's supporters; however, closer examination reveals a possibility for unjust results under this seemingly simple method.

This note will explore such a possibility by hypothetical application of the ATIA damage provisions to the recent case of *In re Multidistrict Vehicle Air Pollution*, a case whose history reveals the complexities of the efforts expended in an attempt to get relief prior to the ATIA. Although the ATIA reduces these complexities, it raises new problems in its damage calculations, as will be shown in the final section of the note.

**THE DEVELOPMENT OF PARENS PATRIAE IN THE UNITED STATES**

*Parens patriae* is a concept with its roots in the constitutional system of feudal times. The literal translation, "father of the country", refers to the English system in which the monarch was empowered to act as guardian for persons legally unable to act for themselves. Historically, these persons were "infants, idiots, and lunatics. This function is now generally served by actions wherein the state is appointed guardian *ad litem*.

In the United States, the development of *parens patriae* has come under article III, section 2 of the United States Constitution. This allows the government of a state to protect its "quasi-sovereign" interest through *parens patriae* actions. "Quasi-sovereign" interests range from the protection of water rights to an injunction against a restraint on the commercial flow of natural gas. Analysis of the development of *parens patriae* in the United States reveals a "background of unclear principles", especially in terms of possible action under the Clayton Act prior to *Hawaii v. Standard Oil Co.*

In *Hawaii*, Justice Marshall endeavored to set straight the record concerning a state's power to bring a *parens patriae* action under section 4 of

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8. 538 F.2d 231 (9th Cir. 1976).
10. Id.
11. 3 W. BLACKSTONE, COMMENTARIES 47.
the Clayton Act for damages to its general economy. The state of Hawaii alleged that the "conspiracy among the respondent oil companies has 'injured and adversely affected the economy and prosperity' of Hawaii." After discussing the history of the case and the development of parens patriae actions, Justice Marshall focused on the necessity of injury to the plaintiff state's "business or property", which was equated with commercial interest. Commercial interest was found necessary by analogy to the power of the United States to sue under the Clayton Act. The Court reasoned that the federal government could sue "only for those injuries suffered in its capacity as a consumer of goods and services" and not for "economic injuries to its sovereign interests." Since section 4, which empowers a state to sue, uses language identical to that which enables the United States to sue, section 4 was interpreted to have the same limitations.

Justice Marshall did not accept the allegations in the plaintiff's complaint as sufficient even though they were very similar to those accepted by the court in Georgia v. Pennsylvania Railroad, a case which implicitly allowed a state to sue for damages to its general economy. Instead, the Court held that the injuries alleged by Hawaii were "no more than a reflection of injuries to the 'business of property' of consumers for which they may themselves recover under section 4." The specter of a consequent double recovery was thereby raised and undoubtedly influenced the decision. As an alternative to parens patriae, class action suits under Rule 23 of the Federal Rules of Civil Procedure were offered. Such class actions were rendered impossible by the subsequent decision in Eisen v. Carlisle & Jacquelin, which established onerous notice requirements for plaintiffs. Attempts by states to protect their quasi-sovereign interests in many cases were thus effectively forestalled.

19. The statute reads as follows:
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover treble the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
21. The allegations were that Standard Oil's actions resulted in:
1) wrongful extraction of revenues from the state;
2) higher taxes on citizens and business to make up for lost revenues;
3) curtailment and restriction of manufacturing, shipping, and commerce;
4) prevention of maximum utilization of state resources;
5) preclusion of Hawaiian goods from the national market due to higher manufacturing costs;
6) frustration of state efforts at improving progress and welfare;
7) arrest of Hawaii's economic development.
22. 324 U.S. 349 (1945).
24. 479 F.2d 1005 (2d Cir. 1973).
Soon after Hawaii, in California v. Frito-Lay Co., California sought to sue as parens patriae, not for its quasi-sovereign interests, but rather on behalf of its citizen-consumers for injuries they allegedly suffered through price fixing by twelve "snack food" manufacturers. The injury in this case was one to the "business or property" of the consumers. However, the court held that such a suit was not proper under section 4 of the Clayton Act. Instead, a class action, while recognized as difficult, was again considered appropriate. Contained in the decision was a judicial invitation to Congress to provide a solution to problems such as those faced by California’s citizens.

CONGRESSIONAL ACTION

Hawaii, Frito-Lay, and Eisen left citizens without an effective judicial remedy for antitrust violations in which individual damage was relatively small, but collective damage was vast. Legislation intended to fill this void is found in the Antitrust Improvements Act first introduced on February 4, 1974, by Congressman Peter Rodino.

The ATIA greatly increases the power of a state’s attorney general to bring suit as parens patriae. Section 4C contains the broad grant of power:

[A]ny attorney general of a state may bring a civil action in the name of the State, as parens patriae on behalf of natural persons residing in such state, . . . to secure monetary relief . . . for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act.

The monetary relief is to be “threefold the total damage” plus costs, including a “reasonable attorney’s fee.” Considering the importance placed on the “business or property” language of the original Clayton Act by the Court in Hawaii, the word “business” is conspicuously absent from the new section 4C. Lest this omission be thought inadvertent, the new Act specifically excludes “any business entity” from recovery under the ATIA. The "commercial interest" obstacle is thereby removed, enabling citizens through their attorney general to have standing in virtually any case in which they have lost money as a result of alleged antitrust violations. In fact, this statute is “a response to the judicial invitation extended in Frito-Lay. The thrust of the bill is to overturn Frito-Lay by allowing State attorneys general to act as consumer advocates . . . .”

25. 474 F.2d 774 (9th Cir. 1973).
26. Id. at 775.
27. Id. at 776.
31. Id. § 15c(a)(1).
32. Id. § 15c(a)(2).
33. Id. § 15c(a)(1).
Once a violation under section 4C is shown, the treble damages referred to previously must be calculated. Measurement of damages is covered in section 4D which says:

In any action under 4C(a)(1), in which there has been a determination that a defendant agreed to fix prices in violation of the Sherman Act, damages may be proved and assessed in the aggregate by statistical sampling methods . . . or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim or amount of damage to persons on whose behalf the suit was brought.35

Certainly a plaintiff bringing a suit for an alleged violation of the Sherman Act would want to be able to use aggregation to measure damages since this allows both flexibility and relative ease of calculation.

The general vagueness of the report36 accompanying the final bill37 and the following language by one of the Act's cosponsors, the late Senator Philip Hart, lend support to a broad application of measurement by aggregation:

At the present time there is a division of opinion as to whether the courts have the inherent power to use aggregation as a technique for measuring damages in other [than price fixing] cases . . . [This issue] is one for the courts themselves to decide. If in the future the courts conclude that they have the inherent power to use the aggregation technique, then that technique would of course also be available for all parens patriae damage suits. In this regard, proposed section 4D should be read as an authorization not as a limitation.38

Closer examination of the legislative history reveals that the "authorization" is not so clear as Senator Hart would have had us believe. The original Senate bill39 provided for aggregate damages for all violations of the Sherman Act. In floor debate, the aggregate damage provision was limited to per se violations of the Sherman Act.40 Finally, aggregate damage recoveries were further limited to price fixing and patent fraud.41 A similar narrowing of the aggregate damage provision occurred in the House.42 The final result, achieved through the compromise efforts led by Senator Robert Byrd allowed aggregation only for price fixing.43

The members of Congress who opposed such a narrowing of the aggregation provisions argued strenuously that many violations of the Sher-

36. H.R. REP. NO. 499, supra note 34.
man Act would be left uncovered by the new legislation. Despite such arguments, the aforementioned narrowing continued. Thus aggregation was continually and specifically limited in its role as a damage measuring technique. For Senator Hart to have claimed after such development that the bill was an authorization, and not a limitation, was to ignore congressional intent and attempt to shift responsibility for innovation in antitrust law to the courts.

While the ATIA struggled through Congress, an involved antitrust case was being litigated in the Ninth Circuit. The ATIA was not applied to this case since the Act did not become effective until after In re Multidistrict Vehicle Air Pollution was decided. If the ATIA had been in effect, it could have been applied with results probably not fully appreciated by the Act's supporters.

THE DEVELOPMENT OF In re Multidistrict Vehicle Air Pollution

In 1953, General Motors, Ford, Chrysler, American Motors, and seven other companies entered into a cooperative research and development program. The program enabled the participating companies in 1955 to enter into “an open access, royalty-free, cross-licensing agreement as the basis for exchanges of technical and engineering information about the nature, measurement, and control of vehicle emissions.”

The United States Justice Department began investigating the cooperative program in 1965. A grand jury was convened, but after eighteen months, no indictment was returned. On January 10, 1969, a civil action was initiated by the Justice Department against the major automobile manufacturers and their trade association, the Automobile Manufacturers Association. The government charged that the automobile manufacturers and the Automobile Manufacturers Association had conspired in violation of section 1 of the Sherman Act to "eliminate competition in the research, development, manufacture, and installation of motor vehicle air pollution control equipment, and in the purchase from others of patents and patent rights covering such equipment." The case, and the cooperative agree-

46. Brief for Appellee, Ford Motor Co., In re Multidist. Vehicle Air Pollution, 538 F.2d 231 (9th Cir. 1976).
ment, ended in 1969 with a consent decree. The court, in approving the decree, noted that "the Government’s case is based upon a novel and unadjudicated theory." Soon after the consent decree received judicial sanction, some thirty-four states, several political subdivisions, one farmer, and several other individuals, in their respective capacities as parens patriae, class representatives, and individuals, brought suit against the same defendants throughout the country. These suits sought treble damages under section 4 of the Clayton Act and equitable relief under section 16. All of these actions were transferred to the Judicial Panel on Multidistrict Litigation in Los Angeles. The defendants' motion to dismiss was denied. Interlocutory appeal of this denial was made. On this appeal, the court dealt extensively with the question of standing under both sections of the Clayton Act. Under section 4, the state governments alleged diminution in value of their property and increased expenses as damages suffered. The court held that the states lacked standing under section 4 because no showing of injury to "business or property" was made. Injury to "business or property" was interpreted as requiring injury to "interests in commercial ventures or enterprises." Unlike section 4, section 16 requires only an injury cognizable in equity and not necessarily to "commercial interests"; consequently, the court found sufficient allegations by the plaintiffs to allow standing under section 16. However, it was expressly held that in this case the grant of standing did not imply that a remedy was available.

51. The consent decree stated that:


57. The farmer, who alleged crop damage, was dealt with separately. The individuals and political subdivisions were represented by the states. From this point on, this note will deal only with the states.


59. Id. at 131.

60. Id.
The case returned to the district court where the plaintiffs sought equitable relief in the form of "all possible tort remedies to cure the effect of the 'continuing injury' caused by their [the defendants'] unlawful conspiracy." Judge Real was not overly sympathetic to the defendants, calling their cooperative efforts "less than spectacular" and bordering on "legerdemain." Nevertheless, he refused to grant equitable relief under section 16 because such remedies had no "antitrust application" and were an attempt to squeeze a nuisance body into antitrust form.

Another appeal was then made, and again the plaintiffs lost. In this proceeding, the relief sought was narrowed to two basic forms: 1) retrofitting, i.e., installation of current pollution control devices on all autos not so equipped, and 2) restitution, i.e., payment to all persons who had already paid to have pollution control devices installed on their own cars. The court, per judge Duniway, held that section 16 deals with threatened or future loss of damage. Therefore, restitution was inappropriate since it is a remedy based on past losses. Furthermore, the retrofit remedy was not available because it did not serve any of the antitrust functions that section 16 was meant to serve.

**Damage Determination in Vehicle Air Pollution Under the ATIA**

A primary purpose behind the ATIA is to end standing problems in certain cases, and although it is not supposed to create any new liability, the likelihood of financial recovery is "significantly increased." Since it was the failure of the states in *Vehicle Air Pollution* to show injury to "commercial interests" that prevented them from having standing to sue, they would clearly have standing now that the requirement has been removed. The reprieve for the plaintiffs on this point would provide them with a judicial forum in which to argue the merits of their case. Should the plaintiffs prevail, the defendants would be faced with damage determination under an uncertain combination of pre-ATIA case law and the new ATIA provisions.

Under pre-ATIA case law, antitrust damage calculation may be predicated upon "a just and reasonable estimate of the damage based upon..."
relevant data'"71 which is proper "although the result is only approximate."72 Still, the jury may not return a verdict based on speculation or guesswork,73 and the plaintiff may not use just any method of damage estimation. If estimated, it must be done reasonably. Implicit in the requirement of reasonableness is a rational basis for establishing a damage figure, however, obtaining such a rational economic basis is not always easy. "[T]he more dissimilar a violation is from the exaction of overcharges through price-fixing, the more difficult it becomes to prove that consumers have suffered any compensable injury at all . . . ."74

The actions of the automakers in Vehicle Air Pollution would have to be construed as either price fixing, with its aggregation of damages potential, or non-price fixing with consequent increased difficulty in damage calculation. Clearly, the defendants' activities were not classic price fixing. Instead, the definition of price fixing would have to be expanded from one where merchants agree to maintain artificially high prices, to one where price is improperly influenced in an indirect way. The following comment of one of the Act's cosponsors, Congressman Peter Rodino, would appear to prevent such a broadening of the term price fixing. "Under the compromise bill, 'price fixing' means horizontal price fixing or vertical price fixing. It does not mean monopolization, market allocations, output restrictions, customer or territorial restraints, tie-ins, group boycotts or other non-price fixing violations of the Sherman Act."75 If, due to such language, the plaintiffs in Vehicle Air Pollution were not able to have the defendants' actions construed as price fixing, the aggregation technique could not be used. If the aggregation technique were not available, the plaintiffs might again be in the position of having standing but no judicial remedy, since individual injury to all possible claimants would be extremely difficult to prove. However, Congressman Rodino's reference to "other non-price fixing violations" implies that he believes price fixing to be a strictly defined term. In fact, it is not always strictly defined. The case of United States v. Socony-Vacuum Oil Co.76 held that price fixing can result even through the intent or design behind the actions is not directed specifically toward price fixing. This case was cited by one of the Act's cosponsors as providing the definition of price fixing covered by the ATIA.77

76. 310 U.S. 150 (1936).
77. "It is the purpose of this provision [aggregation of damages] to assure that potential violators be deterred by the courts under existing case law." (citing Socony) 122 CONG. REC. S15417 (daily ed. Sept. 8, 1976) (remarks of Sen. Hart).
any action which is marginally price sensitive is a potential price fixing violation.

Such a broad definition of price fixing would include cases in which all competition, including price competition, had been eliminated. In Vehicle Air Pollution, the cooperative agreement eliminated competition in the development of emission control devices. The price of each manufacturer's device was not allowed to be determined by unfettered competition, but rather it was postponed until some point in the future when a presumably uniform device could be installed in the cars of all manufacturers. The price of such uniform devices would be uniform as well, resulting in an equal increase in the price of each company's automobiles. Under this reasoning, the automakers' activities could be construed as price fixing, thereby allowing damages to the many claimants to be calculated in the aggregate.

Even if the court found that the automakers had engaged in price fixing, the task of damage calculation would not be easy. In order to understand why this is so, one must consider the nature of the automobile market. Car dealing has been judicially noticed as being "notorious for its haggling" with the result that "prices vary even among identical automobiles sold by different dealers." Simply figuring the cost of pollution equipment as of a base year and then multiplying that by the number of cars sold without such equipment for a certain number of years is the type of calculation envisioned in the Act. Such calculation ignores many variables that affect the price and sale of cars, such as the aforementioned discrepancies between dealers. It would also have to be determined whether or not the damage ended with the first purchaser or continued to the buyer of used cars. The inclusion of used car buyers would raise the number of potential claimants to a staggering level, with the allocation of the extent of damage becoming more attenuated with each subsequent purchaser.

The damage calculation problem in Vehicle Air Pollution would not end with price fixing calculations since the damage claimed included the allegation that the defendants were responsible for greatly increasing air pollution. Air pollution and its detrimental effects are well documented, so damage in a broad sense would be relatively easy to prove. However, in order to equitably assess the amount and type of pollution attributable to each defendant, more precise calculation would be necessary. Such a calculation would introduce many variables, such as climate, maintenance

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80. Brief for Appellants, In re Multidist. Vehicle Air Pollution, 538 F.2d 231 (9th Cir. 1976).

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of automobiles, and altered location of potential claimants during the period, which would create possibly insurmountable barriers to a truly just and accurate damage figure.

While difficulty in determining the quantum of damage once injury has been shown is not necessarily enough to prevent a court from setting a damage figure,\textsuperscript{82} the specter of potentially arbitrary and unjust estimates in a case such as \textit{Vehicle Air Pollution} cannot be lightly dismissed. This potential is made more likely by the reference in the committee report to the concept of "social cost" as an indicium of damages.\textsuperscript{83} No definition of "social cost" is provided in the report, but a phenomenon such as air pollution, with its effects being felt to some extent by all persons located in a high smog area, would seem to be a prime example of an antitrust violation that has great "social cost." Millions of citizens obviously are adversely affected. Once the potential for such a large figure in actual damages is realized, it must be remembered that this figure will always be \textit{trebled} before being applied to the defendants.

\textbf{CONCLUSION}

It is possible to set a treble sum based upon both price fixing and the "social cost" in a case such as \textit{Vehicle Air Pollution}. Such a figure could be astronomically high with Draconian punishment as the result. While a certain deterrent effect may be desired and served by the potential damage assessment under the ATIA, the possibility of hobbling even the strongest corporation with unpredictable and insurmountable obligations should be further addressed by the statute's supporters. Perhaps the feasibility of fines or single damages for unwitting violations should be reassessed.\textsuperscript{84} In this period of inflation and high unemployment, the possible social displacement of shackling a corporation with a debt that may severely affect its economic viability should be weighed against the seriousness of the violation.

Antitrust violations, outside of clear cut \textit{per se} offenses, are often difficult to define for even skilled legal minds. It is quite possible that the deterrent effect of the ATIA will be frustrated by unwitting violators. The corporate board may not have actually or intentionally violated the law, but, when faced with actions under the ATIA, may well decide to enter into a consent decree. This will occur because even the remote possibility of an adverse verdict with the aforementioned damage calculation would be a prohibitive risk. The comment of Senator Sam Ervin in reference to an


antitrust-related bill is equally applicable to the ATIA in its possible application to cases such as Vehicle Air Pollution. Senator Ervin suggested that settled cases and consent decrees will occur because "it is cheaper to settle them, cheaper to buy your peace, than it is to seek justice."  

William H. Mellor III

Bowman Transportation: The Role of Competition in Motor Carrier Regulation

I. INTRODUCTION

The role that competition and antitrust policies should play in the motor carrier industry has been the subject of much discussion in recent years. A number of economists, legal scholars, and courts have addressed the subject and generally have concluded that regulation of motor carriers should increasingly accommodate antitrust policies by encouraging competition.\(^1\) Contemporary theories are not in agreement regarding the extent to which competition must be balanced against regulation.\(^2\) Nonetheless, a comparison of past and present philosophies reveals that current approaches more strenuously urge allowing competition to shape the market structure. Thus far, these approaches have not caused complete deregulation; they have not even had the effect of greatly decreasing the involvement of the Interstate Commerce Commission in motor carrier regulation. However, the approaches have inspired discussion and could very well cause a reevaluation of the extent to which the ICC should consider competition as it controls market entry. To date, this issue is still the subject of much debate.

Justice Douglas participated in the debate in his majority opinion in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*\(^3\) The policies expressed in the opinion are representative of the popular trend and, taken by themselves, afford a reasonable basis for predicting the resolution that may be reached by the courts. The case provides an even better basis for prediction when it is examined in its historical context and when it is compared with recent decisions affecting the role of competition in other regulated industries.

It is the objective of this note to examine the policies which *Bowman Transportation* expressed regarding the role of competition in the motor carrier industry; to review the history which led to the opinion; to compare its policy with the policies assumed in regard to other regulated industries; and, in conclusion, to formulate a reasonable prediction of the course the courts will take in the future.

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Bowman Transportation reached the Supreme Court\(^4\) on appeal of Bowman Transportation, Inc. to reverse a district court’s decision which invalidated an order of the ICC.\(^5\) The invalidated order,\(^6\) a product of six years of extensive litigation,\(^7\) had authorized the issuance of certificates of public convenience and necessity to four motor carriers, one of which was Bowman. Reversal was based on the district court’s finding that the ICC’s decision was vaguely stated and supported as well as arbitrary and capricious. The Supreme Court considered and rebutted the district court’s reasoning,\(^8\) concluding that, except for one issue which required reconsideration by the ICC,\(^9\) the administrative order should be upheld.\(^10\) Justice Douglas did not limit the scope of his opinion to the issues of administrative review addressed by the lower court. Instead, he ventured into the issue of the extent to which the ICC should accommodate antitrust policies and encourage competition within the motor carrier industry.\(^11\)

A discussion relating to the appropriate construction of “public convenience and necessity” provided the opinion’s point of departure from determination of scope of administrative review.\(^12\) To begin, any party seeking authorization to operate a trucking service must prove to the ICC that

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\(^{7}\) The litigation began in 1965 after a large number of applications involving routes in the Southeastern and Southwestern areas of the country were submitted to the ICC. Apparently most of the applications were filed as a defensive tactic. All of these applications were filed within a short period of time, and as a rule, carriers with Southeastern routes applied for Southwestern routes, and carriers with Southwestern routes applied for Southeastern routes. Initially all parties opposed all applicants that sought to duplicate their own routes and at the same time submitted their own applications for additional routes. Eventually the parties assumed different strategies. Some carriers concentrated on pursuing their applications while others concentrated on protesting applications. After the carriers aligned themselves as either applicants or protestants, the remaining applications were then consolidated and considered at a hearing before two hearing examiners. The examiners issued a report after an extensive record had been built. According to the report, public convenience and necessity did not justify the issuance of any of the certificates. In fact, it found that the granting of any of the certificates would result in the deterioration of existing services. A petition for reconsideration was subsequently filed with the ICC in the name of all the applicants. The petition was granted over loud protests. Upon reconsideration, three of the applications were granted. (A fourth was later granted.) Protestants then appealed to the district court. Arkansas-Best Freight System, Inc. v. United States, 364 F. Supp. 1239 (W.D. Ark. 1973).

\(^{8}\) The Supreme Court reversed the decision of the district court on the basis that an agency’s decision would be upheld even though the clarity of its reasoning was less than ideal as long as some rational basis for the decision was discernible. 419 U.S. at 286.

\(^{9}\) The ICC was required to reconsider the scope of its grant of authority to Bowman Transportation, Inc. The authority granted exceeded the authority sought in Bowman’s original application. 419 U.S. at 299.

\(^{10}\) 419 U.S. at 300.

\(^{11}\) 419 U.S. at 288-96.

\(^{12}\) 419 U.S. at 288.
such service will meet the “convenience and necessity” of the public.\textsuperscript{13} Contrary to previous decisions,\textsuperscript{14} the opinion noted\textsuperscript{15} that to meet the standard, an applicant is not required to show that existing service fails to fulfill some minimal expectation of performance. The effect of such a requirement would be to protect existing carriers from additional competition; however, the ICC has no primary obligation to protect existing carriers.\textsuperscript{16} Upon balancing competing interests, the Commission is free to conclude that “public convenience and necessity” requires more weight to be given to benefits which might accrue to consumers than to foreseeable adverse impact upon existing carriers.\textsuperscript{17} The opinion concludes that the policy favoring competitive market structure is “entitled” to consideration by a regulatory agency even when Congress has decided that public interest may be best served by governmental regulation of an industry.\textsuperscript{18}

The \textit{Bowman Transportation} opinion departs from philosophies expressed in the past regarding the extent to which the ICC should favor a competitive market structure. So that the nature and significance of the difference might be appreciated, it would be useful at this point to review the history of the courts’ stances.

\section*{III. Historical Background.}

In 1935, Congress passed the Motor Carrier Act,\textsuperscript{19} and in so doing provided for the regulation of the motor carrier industry by bringing it within the jurisdiction of the Interstate Commerce Commission.\textsuperscript{20} According to the Act, motor carriers subject to regulation\textsuperscript{21} are authorized to operate only upon the granting of a certificate of public convenience and necessity by the ICC.\textsuperscript{22} The Motor Carrier Act was incorporated into the Interstate Commerce Act\textsuperscript{23} whose purpose, as formally declared by Congress, is to:

\begin{quote}
provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; \textit{to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and}
\end{quote}

\begin{itemize}
\item \textsuperscript{15} 419 U.S. at 288.
\item \textsuperscript{16} \textit{id.} at 298.
\item \textsuperscript{17} \textit{id.}
\item \textsuperscript{18} \textit{id.}
\item \textsuperscript{20} 49 U.S.C. § 302 (1970).
\item \textsuperscript{21} See 49 U.S.C. § 303(b) (1970) for categories of motor carriers not subject to regulation.
\item \textsuperscript{23} 49 U.S.C. §§ 1-1240 (1970).
\end{itemize}
among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.\textsuperscript{24}

However, the more immediate, and perhaps less altruistic purpose of passing the Motor Carrier Act involved an intent to control competition within the motor carrier industry and to limit competition between railroads and truckers.\textsuperscript{25}

By the mid-thirties, trucking concerns had already demonstrated the desire and the ability to effectively compete with railroads.\textsuperscript{26} However, railroads were subject to ICC rate regulation and could not spontaneously adjust rates to reflect either lower costs of service, or the need to compete with the quickly developing trucking industry.\textsuperscript{27} The ICC recognized that the truckers' freedom from regulation created a competitive advantage over railroads. With the intent of protecting its ward and preserving its own power, the ICC sought to bring motor carriers within its control.\textsuperscript{28} At the same time, larger firms within the trucking industry recognized that uncurtailed expansion of trucking promised to create ruinous competition similar to that which had inspired regulation of the railroads fifty years earlier.\textsuperscript{29} They, too, supported governmental regulation. Therefore, it was with the support of the ICC and the major truckers that the Motor Carrier Act was passed, and their objectives were to limit competition.

The purpose of the original Interstate Commerce Act,\textsuperscript{30} into which the Motor Carrier Act was incorporated, was to inject some of the beneficial effects of competition into the railroad industry, which was characterized as a natural monopoly.\textsuperscript{31} Ironically, the Motor Carrier Act was designed to curb competition. The philosophy prevailing at the passage of the Motor Carrier Act was that regulation would curb the adverse effects of limited competition, therefore, free and open competition was not necessary to encourage adequate, economical, and efficient service.\textsuperscript{32} Early courts subscribed to this philosophy and readily recognized the authority of regulatory agencies to limit competition within their jurisdiction\textsuperscript{33} and regulated industries generally enjoyed immunity from antitrust laws.

\textsuperscript{24} 49 U.S.C. preceding §§ 1, 301, 901, 1001 (1970) (emphasis added).


\textsuperscript{26} Jacobs, supra note 25.

\textsuperscript{27} Id.

\textsuperscript{28} Id.

\textsuperscript{29} Id


\textsuperscript{31} Jacobs, supra note 25.

\textsuperscript{32} Davis & Sherwood, supra note 1.

While operating in the atmosphere of deference produced by courts, the ICC, in *Pan-American Bus Lines Operation*, promulgated the following criteria for issuance of a motor carrier operating authority:

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers, and whether it can be served by this applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

From 1936 until the early sixties, the ICC's criteria were interpreted by the courts as having established a requirement of proof either that existing service was inadequate or that the new entrants would advance improvements in service. Notably, such interpretation was qualified by denial that the holder of a certificate could claim blanket protection from increases in competition. Therefore, the courts were willing to validate grants of operating authorities which inspired an increase in competition when such grants were based on a need to improve existing inadequate service. Nevertheless, the Motor Carrier Act was construed to be "basically designed to protect established carriers against the institution of any competing services . . . ." For years, many applications were denied by the ICC on the basis that sound economic conditions in the motor carrier industry would be hindered by the entrance of new carriers into routes already adequately serviced by carriers capable of expanding to meet new demands.

During the early and mid-sixties scattered courts began to express the opinion that inadequate service was not a dispositive factor, but simply one of many to be considered in granting new authorities. Some of the other factors acknowledged to be worthy of consideration in 1964 by *Motor Express, Inc. v. United States* included potential of developing different kinds of service, the desirability of increased competition and the possibility of encouraging improvements in service. Courts which followed

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34. 1 M.C.C. 190 (1936).
35. Id. at 203.
this philosophy continued to require consideration of the adequacy or inadequacy of existing service, but were not willing to preclude issuance of a new certificate solely because existing service was adequate.

These cases received very little attention throughout the early sixties, but by the middle of the decade, they gained enough influence that the courts began to assume divergent positions regarding the need for competition in the motor carrier industry. For purposes of illustration, the following opinions are reviewed. In 1967, United Van Lines, Inc. v. United States\(^43\) stated that the ICC may determine the criteria for public convenience and necessity and may weigh evidence as it sees fit even if it gives more weight to the benefits of competition than to the protection of existing carriers. In the same year, the Lester C. Newton Trucking Co. v. United States\(^44\) decision included a determination of adequacy of existing service as a basic element of public convenience and necessity. The court of Younger Brothers v. United States\(^45\) decided in 1968 that adequacy of existing service was only one of several elements to consider. But, in 1969, Drum Transport, Inc. v. United States\(^46\) objected to broad statements made in Dixie Highway Express, Inc. v. United States,\(^47\) which negated the ICC obligation to find the services of existing carriers inadequate.

The debate seems to have peaked between 1967 and 1969. Since then the courts have consistently recognized that competition is a legitimate objective of the ICC and that existing carriers providing adequate service do not have a right to be protected against additional competition.\(^48\) However, as of yet, no court has gone so far as to specifically require the ICC to consider antitrust policies which favor competition in entry regulation. In fact, in other areas regulated by the ICC, the agency has been expressly absolved of consideration of antitrust policies.\(^49\)

The Supreme Court has rarely addressed the issue. In ICC v. J-T Transport Co.,\(^50\) it did decide that the ICC should not indulge in a presumption that existing carriers would be adversely affected by new entry, and that existing carriers are not entitled to be notified of shippers' grievances so that they may improve service before new entrants are allowed.\(^51\) No Supreme Court decision has ever spoken directly to the issue before Bowman Transportation.

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Language found in *Bowman Transportation*, when compared with language of the earlier courts, demonstrates the magnitude of the change that has taken place. As late as 1963, *Roadway Express, Inc. v. United States* supported the ICC’s contention that the statutory standards were basically designed to protect existing carriers from competition as long as the established carriers were capable and willing to provide sufficient service. *Bowman Transportation*, on the other hand, made the following statements:

> Our decisions have dispelled any notion that the Commission’s primary obligation is the protection of firms holding existing certificates. . . . A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration.53

Such language suggests that the ICC may be required to consider competition as an objective. In fact, subsequent courts have cited *Bowman Transportation* as supporting the contention that the ICC must "adequately consider the public interest in having a competitive market structure."54 However, not all courts infer such significant mandates. *Hilt Truck Line, Inc. v. United States*55 cites *Bowman Transportation* merely as authority for the rather old idea that carriers should not be given a blanket protection from the effects of competition. Nevertheless, viewing *Bowman Transportation* in the light of history, it at least demonstrates an increasing preference that market structure be defined by competition. The limits of such a trend would be hard to predict except that other regulated industries have witnessed similar judicial trends in recent years.

IV. OTHER REGULATED INDUSTRIES

As already noted,56 until the last decade the courts have recognized little tension between regulation and antitrust policies.57 At an early date, 1907, the Supreme Court applied the doctrine of primary jurisdiction in a case involving a conflict between federal regulation by the ICC and state common law.58 The doctrine, which then stated that a federal statutory scheme was not subject to interference by conflicting state law, was quickly expanded to preclude application of the Sherman59 and Clayton60 Acts when the party was pervasively controlled by a federal regulatory agency.61

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53. 419 U.S. at 298.
55. 532 F. 2d 1199 (8th Cir. 1976).
56. See note 33 supra.
Even when the scope of regulation has not precluded application of the Sherman Act and Clayton Act, courts have referred cases to the relevant agency for initial review. The extent to which a regulatory statute exempts an industry from application of the antitrust laws depends upon the provisions within the regulatory statute. Some expressly provide for exemption of activities upon agency approval. Other regulatory statutes provide for such pervasive regulation that the courts have been willing to imply antitrust immunity so that the regulatory objective and antitrust policies do not clash.

In recent years immunity from the antitrust laws has been disintegrating. In a number of regulated industries the courts now require the agencies to take into account antitrust policies or have decided that the agencies have no power to decide antitrust issues. In 1959, the Federal Communications Commission was declared not to have the power to decide antitrust questions. In 1963, the Supreme Court rejected the position taken by bankers that the high degree of governmental regulation immunized banking from the antitrust laws. Otter Tail Power Co. v. United States and Gulf Utilities Co. v. FPC subjected the public power industry to antitrust policies in 1973 by requiring the Federal Power Commission to consider potential effects on competition in coming to its decisions. Although the Atomic Energy Act required the Nuclear Regulatory Commission to make affirmative findings in its licensing procedure as to whether the activity for which license is sought is inconsistent with the antitrust laws, the Nuclear Regulatory Commission has refused to limit the mandate to licensing procedures, and requires consideration of antitrust policies in every case evaluated by the Commission.

In the last few years, the concept of regulation has been subject to heavy criticism. Many writers suggest that it be radically modified to facilitate the growth of competition. Some feel that without additional legisla-
tion, progress in that direction will be impeded. However, with little legisla-
tive aid the courts to date have managed to inject a policy favoring
competition into the objectives of many regulatory agencies.

V. CONCLUSION

Bowman Transportation is evidence of the fact that the courts have met
the difficult task of changing the Motor Carrier Act, whose original purpose
was to limit competition within the transportation industry, into legislation
which incorporates the policies favoring competitive market structure and
that requires the ICC to consider the antitrust laws. This radical change has
been accomplished without the express sanction of Congress, and it is not
surprising that the transition has been fitful. The inclusion of antitrust objec-
tives in the ICC's regulation of entry into the motor carrier industry would be
greatly facilitated by legislation. However, the courts have exercised their
power to enforce such policy without directives from Congress, and have
demonstrated an inclination to do so in other industries. In the motor carrier
industry, unless legislative action is taken fairly soon, Congress may have
just two basic options: one, to ratify or refine the changes already made by
the courts; or two, to reject them altogether. An examination of history and
the present political environment compel the conclusion that rejection will
not occur and that the antitrust policies will be increasingly incorporated into
regulation. Bowman Transportation indicates that such could be accom-
plished by the courts alone.

Teresa Ponder

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72. Handler, supra note 1.
O-J Transport Co. v. United States: Minority Ownership in the Motor Carrier Industry

I. THE CASE

O-J Transport Company is a small Detroit-based firm owned and operated as a minority enterprise by two black businessmen. The company (hereinafter referred to as O-J) filed an application in April of 1973 with the Interstate Commerce Commission for a certificate of public convenience and necessity under the Interstate Commerce Act. O-J sought authority to haul automobile parts between various points in lower Michigan and Chicago, Illinois.

Nine carriers protested the application to carry auto parts. All protestants were considerably larger than O-J, and all carried auto parts over routes affected by this application. The application was supported by Ford Motor Company, American Motors, and five divisions of General Motors.

A hearing on the application was held before an administrative law judge in November of 1973. Protestants, supporters, a representative of the Small Business Administration, and O-J itself all presented evidence. The December 1973 decision granted authority to haul the auto parts after deleting one city in Wisconsin. The judge concluded that the proposed service served a public need without impairing existing carriers' operations. In reaching this decision the administrative law judge did not rely on the fact that O-J was a minority enterprise owned by black businessmen.

Protestants appealed this decision to the ICC. The Commission reversed the administrative law judge's decision by a 2-1 margin in a December 1974 ruling. The ICC, like the administrative law judge, refused to consider minority ownership in ruling on the application:

Applicant has introduced evidence concerning its ownership by owners of a particular ethnic group and seems to contend that such evidence should be the basis, at least in part, for a grant of motor carrier operating authority. Such evidence cannot play any role in a determination as to

whether a grant of authority should be made herein. This agency is required to work within the framework of the Interstate Commerce Act and that statute requires us to consider each matter in the public interest as a whole. It does not provide us with any regulatory authority to favor any one group or individual over another for any such divisive reasons as race, creed, color, sex, or national origin. This agency is not empowered to change the legislative direction given by Congress, and any preferential treatment to a particular group or individual would be arbitrary and capricious in the absence of a legislative mandate. Therefore, in determining whether this application should be granted or denied, we will not give consideration to the race, creed, color, sex, or national origin of any of the parties to this proceeding.

This clearly establishes the ICC policy prohibiting the consideration of minority ownership as a factor influencing the decision to grant or deny a certificate of public convenience and necessity.

O-J appealed the ICC denial of its application to the United States Court of Appeals for the Sixth Circuit in O-J Transport Co. v. United States. An important part of O-J’s argument centered on the ICC’s failure to consider the minority status of the applicants. The Sixth Circuit addressed this issue in affirming the ICC denial of the certificate:

The skills of the Commission’s staff are not those required to implement an affirmative action program designed to enlarge the opportunities of minority-owned and operated businesses. The public interest which Congress intended the Interstate Commerce Commission to promote and protect is one related to transportation, not the more general public interest in the sense of the general welfare. While we agree with the dissenting member O’Neal that the language of the majority in the Report of the Commission is too broad if read to mean that evidence of ownership by a particular ethnic group can never play a role in the determination of whether to grant authority, we find it was not a proper consideration in the present case because it was totally unrelated to the transportation needs of the public.

The United States Supreme Court has refused to entertain O-J’s petition for certiorari of this Sixth Circuit decision.

Although O-J argued that the certificate should be granted even if black ownership is not considered, this note is concerned only with the issue of whether or not the ICC could consider minority ownership in acting on an application for a certificate of public convenience and necessity. There are two important concerns in resolving this issue: (1) whether “public convenience and necessity” encompasses consideration of minority status; and (2) whether ICC authority is limited by a narrow interpretation of the Interstate Commerce Act.

II. PUBLIC CONVENIENCE AND NECESSITY

The Interstate Commerce Act requires a finding of public convenience and necessity before the ICC grants a certificate:

5. Id. at 703.
7. Id. at 132.
[A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

O-J's application was denied since it was not found to be required by present or future public convenience and necessity.

There is no precise statutory definition of public convenience and necessity. A significant ICC definition is found in Pan-American Bus Lines Operation.10 That case involved an application to carry passengers along the East Coast. The applicant was offering a unique service in that its buses would follow historically interesting routes which varied geographically from those already existing, it would not involve bus transfers as other carriers required, and it would provide, without charge, some services which other carriers charged for, such as pillows and porter service. The ICC was able to find that this service was required by public convenience and necessity:

The words 'convenience' and 'necessity' are used conjunctively, and we have found that they are not synonymous but must be given separate and distinct meaning.... Yet it is clear that the word 'necessity' must be somewhat liberally construed, for there are comparatively few things in life which can be regarded as an absolute 'necessity', and it was surely not the intent of Congress to use the word in so strict and narrow a sense.11

The Commission noted that there was no evidence of harm to the protestants, that the Interstate Commerce Act does not prohibit competition, and that this new type of service could be viewed as an experiment. It went on to say that more than the adequacy of existing service should be considered in evaluating public convenience and necessity:

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.12

This test is often cited and was used by the ICC in O-J.13

The ICC has considered many factors other than adequacy of existing service in determining public convenience and necessity. Norfolk Southern Bus Corp. v. United States 14 pointed out that a specific finding of inadequacy of existing service is not necessary. The court upheld a grant of authority to a new public carrier where there was an overlap with existing

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10. 1 M.C.C. 190 (1936).
11. Id. at 202.
12. Id. at 203.
service. "Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition . . . . Even though the resulting competition causes a decrease of revenue for one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to the new competitor."\(^{15}\) Witnesses for O-J testified before the administrative law judge that they favored increased competition to help improve the service they were receiving.\(^ {16}\)

In *Nashua Motor Express, Inc. v. United States*\(^ {17}\) the court specifically overruled an ICC decision that inadequacy of existing service is a necessary prerequisite to granting a certificate. The court noted that, "other elements of importance appear to be the desirability of competition, the desirability of different kinds of service, and the desirability of improved service."\(^ {18}\) The court favored a broader understanding of public convenience and necessity stating that, "it appears to be the more reasonable view that the narrower conceptual element of inadequacy of present service was not intended to be imposed as a strait jacket upon the process of determining the *broader interests* of public convenience and necessity in the effectuation of the National Transportation Policy."\(^ {19}\)

In *National Bus Traffic Association v. United States*\(^ {20}\) the court considered an application for limousine service in nine-passenger cars from El Paso, Texas, to Los Angeles, California. Existing service was available but the applicant employed Spanish-speaking drivers. The Commission considered several factors in approving the application—including the fact that employment of minority drivers who speak Spanish would make travel easier for Spanish-speaking passengers. The Association, in opposing the application, contended that this was not a proper ground for issuing the certificate. The court disagreed saying, "We hold only that the Commissioner's action here was within his statutory power . . . ."\(^ {21}\)

*Patterson Extension - York*\(^ {22}\) followed *Nashua*. The Commission noted that public interest and the national transportation policy require consideration of the effect of denial of an application on the applicant as well as the effect of approval on protestants. The court agreed stating that, "even though the resulting competition from the institution of a newly authorized service will cause a decrease in revenue from a carrier presently providing service, the public interest and the national transportation policy may best

18. Id. at 652.
19. Id. at 653 (emphasis added).
21. Id. at 272.
be served . . . by the issuance of new operating authority."23 There was ample evidence presented by O-J at the administrative hearing to indicate that granting the certificate would have a minimal effect on the operations of existing carriers and yet would be critical to the existence and growth of O-J.24

The ICC has continued to recognize that existing carriers are not immune from future competition. In Onley Refrigerated Transportation, Inc. - Food Stuffs and Drugs25 the Commission said that a "major question . . . is whether the advantages to the public that would use the proposed service outweigh the disadvantages, real or potential, that may result upon existing services (and those who depend upon them)."26 The advantage to the public in Onley was that additional refrigerated trucks would be made available on existing routes.

Thus, the preceding cases demonstrate that public convenience and necessity is an expansive concept. Its expansiveness is seen in several ways: (1) inadequacy of existing service is not a mandatory predicate to finding public convenience and necessity; (2) certificates are not a guarantee against future competition; (3) the granting of certificates should be responsive to public demand or need; (4) ethnic considerations can affect public convenience and necessity; and (5) the materiality of the adverse effect on protestants should be weighed against benefits to the applicant.

Although it acknowledges these cases, the court in O-J goes on to say that the "public interest" to be served by granting certificates is not a general public interest, but rather the public's specific interest in transportation. The court then states that the ICC "is primarily concerned with insuring that the public has available for its use systems of transportation which are safe, adequate, economical and efficient."27 National Bus Traffic Association is then cited by the court to show that non-transportation considerations such as minority status do affect public convenience and necessity. The court distinguishes the situation in O-J and National Bus by saying that the ethnic status in National Bus benefited users while ethnic status would benefit only the applicant in O-J.

This distinction seems significant at first. Yet, Spanish-speaking drivers do not make transportation more safe, economical, or efficient. If these drivers make transportation better, it is better only for a very small number of users. Thus, this court allows consideration of minority status when it affects a small number of users, while denying such consideration to a minority applicant with significant personal interest. This is inconsistent with Nashua and Patterson Extension where "public interest" was found to require consideration of effect of denial on the applicant.

23. Id. at 650.
26. Id. at 721-22.
The court continues this line of thought saying that, "[T]here is no showing in the present case that the transportation needs of the public as opposed to the general public welfare would be served by the entry of minority-owned carriers . . . ." This does not deny that transportation needs of the public may be fulfilled in some way by minority ownership of carriers. A significant need is not required as was seen in National Bus. Indeed, it is possible that black ownership and operation might facilitate more effective carriage. One of the shippers, Ford Motor Company, has an active program, the Minority Group Supplier Program, to encourage the establishment and growth of minority-owned businesses by increasing the amount of business that Ford does with minority-owned companies. Yet, the Sixth Circuit chose not to make a statement favoring the consideration of minority status.

The issue is one of degree. O-J did not assert that the certificate must be granted because of its minority status; it merely claimed that such status was a factor to be weighed in the balance when determining public convenience and necessity. Thus, while public convenience and necessity is intended to serve the public interest, it is not limited by it. The Sixth Circuit focused on public interest and transportation needs of the public instead of on public convenience and necessity itself.

The criteria for public convenience and necessity have been well established by the ICC, beginning with Pan-American. Yet, factors affecting these criteria are expanding. Inadequacy of existing service is not a mandatory prerequisite. Competition and improved service are factors to be encouraged. Minority status has already been acknowledged as a factor when directed at user interests. The common thread running through the various factors concerns their effect on determining public convenience and necessity.

Public convenience and necessity is a concept broader than either public interest or the transportation needs of the public. Public interest and transportation needs are merely additional factors which are part of public convenience and necessity. The cases clearly indicate that the inadequacy of existing service is not a mandatory element of public convenience and necessity. If this is true, then the concept of public convenience and necessity cannot be strictly limited by the concept of "transportation needs of the public." If existing service is adequate, then the transportation needs are definitionally fulfilled. It is the other factors, then, that facilitate a Commission finding of public convenience and necessity. O-J claimed that minority ownership was one of these other factors. Consideration of minority ownership does not guarantee that public convenience and necessity will be established, but it does insure that each application will be evaluated in the broadest and fairest manner possible.

28. Id. at 132.
III. SCOPE OF ICC AUTHORITY

The Sixth Circuit also rejected minority ownership as a consideration in determining public convenience and necessity on the grounds that ICC authority is limited to specific provisions of the Interstate Commerce Act. This argument was presented in two ways: (1) that the ICC's expertise is related to transportation and not to solving racial problems, citing NAACP v. Federal Power Commission;30 and (2) that the consideration of minority ownership is not consistent with our national transportation policy.31 This section will consider both of these arguments.

A. NAACP v. FEDERAL POWER COMMISSION

In NAACP v. Federal Power Commission the NAACP and other parties petitioned the Federal Power Commission (hereinafter FPC) for the issuance of a rule requiring equal employment opportunity and non-discrimination in the employment policies of businesses regulated by the FPC. The FPC refused to issue such a rule claiming that it had no jurisdiction. The court in O-J cited the following language from NAACP:

Congress may have felt that other significant goals would be inadequately served if the attentions of the agencies set up to pursue them were divided. The Commission's ([FPC]) principle task of passing on statutorily specified license and rate applications is prodigious. To perform it, a staff has been built up of specialists in the technical aspects of gas and electric power production and distribution. The unfamiliar problems of employment discrimination regulation might divert an inordinate amount of their energies and skills from the ends to which these are most productively applied.32

Although it is true that ICC expertise is concentrated in the transportation area, this argument is inappropriate for two reasons.

First, in the NAACP case itself, the court acknowledges that the FPC may have some jurisdiction to consider employment discrimination by the people it regulates. The court said that the FPC has sufficient authority to consider any relevant evidence to decide if the regulatee has incurred illegitimate costs resulting from racially discriminatory employment practices.33 Thus, NAACP does not stand for the proposition that federal regulatory agencies cannot consider factors outside their expert decisions.34 The

court in *NAACP* recognized that dealing with constitutional obligations is a primary responsibility of the administrative agency.\footnote{520 F.2d 432, 447 (D.C.Cir. 1975).}

The second reason that reliance on *NAACP* is somewhat misplaced is that the racial considerations are not parallel with those in *O-J*. *NAACP* involves direct agency control over the employment practices of its regulatees. *O-J*, however, involves an assessment of public convenience and necessity as to a specific license application. The issue in *NAACP* is whether race can be a factor in FPC determinations. But the ICC, unlike the FPC, is not being asked to monitor its regulatees' employment practices. In short, the scope of the action that the ICC is being asked to take in *O-J* is much broader than is implied by the Sixth Circuit’s decision.

\section*{B. NATIONAL TRANSPORTATION POLICY}

The National Transportation Policy is stated at the beginning of the Interstate Commerce Act:

> It is hereby declared to be the national transportation policy of the Congress to provide fair and impartial regulation of all modes of transportation subject to the provisions of this act; . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions all to the end of developing, coordinating, and preserving a national transportation system . . . \footnote{520 F.2d 432, 447 (D.C.Cir. 1975).}.

The Sixth Circuit cites *Elegante Tours, Inc.—Broker Application*\footnote{113 M.C.C. 156 (1971).} for the proposition that the national transportation policy precludes ethnic or racial considerations. This appears to be contrary to the plain meaning of the language. It may be reasonably asserted that black-owned carriers can help "foster sound economic conditions in transportation." Shippers may favor using a certain number of black carriers as a means of promoting the good will of their businesses. Existing carriers cannot fulfill this need, partly because the Act contains a grandfather clause\footnote{49 U.S.C. preceding § 1 (1970).} which provides that those carriers legitimately in existence at the inception of the Act received certificates without an independent showing of public convenience and necessity. Social conditions in our country in 1935 precluded most black persons from participating in the motor transit market place in an ownership capacity. Thereafter, this trend of non-black ownership has persisted, such that a characterization of "unfair or destructive competitive practices" is also appropriate.

\footnote{49 U.S.C. § 306(a)(1970) (emphasis added).}
In any case, the national transportation policy is not narrow conceptually. Its primary objective is clearly to enhance transportation services in this country, but it encourages accomplishment of this goal through fair competitive practices. Therefore, objective consideration of minority ownership in determining public convenience and necessity tends to promote, rather than hinder, the national transportation policy.

CONCLUSION

It is clear that the ICC is not prevented by either prior decisions or its specific statutory authority from considering black ownership of a business as a factor in determining public convenience and necessity. The court in O-J chose to focus on the narrow concept of the public’s transportation interest and declined to consider minority status without a specific legislative mandate. While the timidity of the court is understandable, the reluctance of the ICC to construe public convenience and necessity in its broadest national terms is not. Ever since Pan-American, public convenience and necessity has been a broadly-based concept. Also, it is clear that the ICC’s statutory authority in no way precludes consideration of minority status. The problem is circular and it appears that the ICC is the only appropriate party to clarify the situation. If the ICC decides to consider minority ownership in determining public convenience and necessity, then it will tacitly acknowledge that minority ownership can serve the transportation needs of the public. Once this is done, the primary objection of the Sixth Circuit will be nullified. Minority ownership should not guarantee a finding of public convenience and necessity, but consideration of that factor by the ICC will help insure that our nation’s broad national transportation policy is carried out effectively.

Michael T. Spink

39. See Shippers Truck Service, Inc. Extension—19 States, 125 M.C.C. 323 (1976). The ICC reaffirmed its policy of considering minority status as a factor in determining public convenience and necessity only when framed in terms of users’ needs. This policy does not preclude consideration of minority status when a creative argument shows that such status will serve users’ transportation needs, but it ignores ICC responsibility to encourage the growth of minority owned business in this country.
National Wildlife Federation v. Coleman:  
Endangered Species and Highway Planning

I. INTRODUCTION

The environmental movement and its resulting offspring, environmental legislation, are having a profound impact on many segments of our economy. Particularly affected are those industries directly regulated by the federal government or indirectly controlled by the "purse-string power" of the federal government.

The highway construction industry is one that has been affected by the National Environmental Policy Act (NEPA).1 The courts interpret the Act to require that "every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment".2 To assure such consideration, the Act requires an environmental impact statement which takes into account the various ecological factors involved in the particular project. Although the requirements of NEPA have not been a part of the legal scenery for very long, the arms of government and the sectors of private industry affected have adjusted to the requirements imposed on them by NEPA.

One piece of environmental legislation which has not been encountered until recently is the Endangered Species Act (ESA) of 1973.3 First, it is a recent legislative enactment so that opportunities for its interpretation had not come through the judicial system. Second, since these species are indeed rare, as their designation as "endangered species" by the Department of Interior indicates, the chances of encountering them during a construction project have been slim, even though accelerating growth and urbanization increases the likelihood of a confrontation with such species.4

The key provision of the ESA is section 7, which seeks to insure that actions taken by federal agencies do not threaten the continued existence of endangered species. Nor can such actions destroy or modify habitat of endangered species which has been designated as critical by the Secretary of the Interior.

II. SECTION 7 OF THE ENDANGERED SPECIES ACT


The Secretary (of Interior) shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to ensure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.\(^6\)

The opinion of the Fifth Circuit in the Coleman case and of the Sixth Circuit in the recent case of Hill v. Tennessee Valley Authority\(^7\) are the

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7. Hill v. TVA, [1977] 7 ENVIR. REP. (BNA) 20172 (6th Cir.). This case concerned the Tellico Dam project on the Little Tennessee River on which construction started in March, 1967. This multimillion dollar project was more than 80% completed at the time of the court decision. In August 1973 a University of Tennessee ichthyologist discovered a unique and previously unknown species of fish, the snail darter (Percina Imostoma tanasi), thriving in the Little Tennessee River. On November 10, 1975, over TVA's objections, the snail darter was designated as an endangered species primarily because of the threat posed by the Tellico dam to destroy the species and its only known habitat.

Appellants brought suit in the United States District Court for the Eastern District of Tennessee seeking to permanently enjoin completion of the dam. Hill v. TVA, 419 F. Supp. 753 (E.D. Tenn. 1976). Soon after suit was brought the United States Fish and Wildlife Service, acting pursuant to rulemaking authority originally granted to the Secretary of Interior, designated the river sections involved as critical habitat of the snail darter. The district court acknowledged that the completion of the dam would probably result in the complete destruction of the snail darter's critical habitat. However, the district court weighed the equities of the situation and thought it would be unreasonable to halt a project so near completion for which Congress had continued to appropriate funds.

The Sixth Circuit reversed and permanently enjoined all activities relating to the project until either Congress exempted it from the Act or the Department of Interior delisted the snail darter or redefined its critical habitat. The court refused to consider the fact that the dam was nearing completion saying that even if the dam was completed and an endangered species was discovered before impoundment of water was scheduled to start, section 7 of the Endangered Species Act would require permanently enjoining the impounding of water.

The Sixth Circuit used the same reasoning as the Fifth Circuit did in Coleman to interpret section 7 as being an absolute mandate that the survival of endangered species and their critical habitat must be insured. The Sixth Circuit followed Interior's construction of an action affecting designated critical habitat to the point of being violative of the ESA. See note 16 infra, emphasized section. The Fifth Circuit also relied on this standard, although not as explicitly as the Sixth Circuit. In Hill the court stated a preference that this standard be applied to adjudication of all future cases involving the ESA. This would assist the Secretary of the Interior in achieving a uniform federal conservation posture with minimal reliance upon the courts.

Hill takes the Coleman decision further and makes section 7 of the ESA a very strong federal protection of endangered species and their critical habitat. In other words, the value placed on endangered species is higher than any millions of dollars expended on a highway or dam.
landmark decisions in the interpretation of section 7. The position of the Sixth Circuit is essentially the same as the one that the Fifth Circuit took in Coleman. The Supreme Court has yet to interpret section 7, but it did refuse to hear an appeal from the Coleman decision, so it is fairly safe to assume that the current status of the law in this area is as stated in these decisions.

A. BACKGROUND OF THE COLEMAN CASE

The endangered species in Coleman was the Mississippi Sandhill Crane (Grus canadensis pulla), which closely resembles the Florida Sandhill Crane (Grus canadensis pratensis). There are approximately forty of these birds left. (A January aerial survey spotted thirty-seven.) Their range is estimated to be about 40,000 acres. This population is the remnant of a population that at one time extended from western Louisiana to Georgia. The birds are non-migratory, although they seem to prefer certain areas for roosting and breeding. During the winter they congregate on farmed feeding areas. Their preferred habitats are savannas, which in simple terms could be called wet prairies and swamps. It is this preference for these environments that makes the Mississippi Sandhill Crane distinct from other cranes.

The highway involved in the Coleman case was Interstate Route 10 (I-10), a limited access, divided highway which is part of the National System of Interstate and Defense Highways. Plans call for this highway to traverse the southern United States between the cities of Jacksonville, Florida on the east and Los Angeles, California on the west. In the state of Mississippi, I-10 will be about 77.1 miles long. By the time this case reached the Fifth Circuit Court of Appeals approximately 58.2 miles of I-10 from the Louisiana border to Mississippi state highway 57 was near completion. The remaining 18.9 miles of I-10 extended eastward from state highway 57 to the Alabama line and contained the 5.7 mile segment in controversy.

The conflict arose because this uncompleted segment of I-10 crossed the habitat of the Mississippi Sandhill Crane. A wildlife refuge for the protection of the birds has been proposed by the U.S. Fish and Wildlife Service, which is currently in the process of acquiring the land. The Service, on August 30, 1973, approved the acquisition of 11,360 acres of land in Jackson County, Mississippi. The first tract was obtained in December 1975, and through the fall of 1976, 2,226 acres had been purchased. An additional area of 4,800 acres was approved for acquisition on April 22, 1976. This additional area includes important habitat of the crane and also

11. 529 F.2d at 362.
includes the very important proposed Earl Bond Road/I-10 interchange.\textsuperscript{12} This planned interchange became a focal point of the appellate court decision.

There are two units to this proposed refuge. The western unit, Ocean Springs, was not involved in this controversy. The eastern unit, Fountain Bleu, would be bisected by I-10. Included in this portion of the refuge are lands which the Nature Conservancy, a private organization, acquired and held at the request of the Fish and Wildlife Service until the Service obtained adequate funding from Congress to purchase that land and make it a part of the refuge. In late 1974, the Conservancy acquired about 2,000 acres pursuant to this request.\textsuperscript{13}

Part of this proposed refuge is land held in trust by the State of Mississippi for the Jackson County School System. The Jackson County School Board has agreed to sell this land to the Fish and Wildlife Service "at a fair market value which can be determined when you need the property."\textsuperscript{14} Thus, I-10 crosses the crane refuge, albeit the land is still in the acquisition stage and not yet a legal entity.

In Coleman, both the Federal District Court and the Fifth Circuit Court of Appeals focused on the applicability of two statutes to the facts of the case: section 7 of the Endangered Species Act and section 4(f) of the Department of Transportation Act.\textsuperscript{15}

B. FIFTH CIRCUIT'S INTERPRETATION OF SECTION 7 OF THE ESA

The plaintiffs charged that the construction of I-10 and the interchange at Earl Bond Road would threaten the well being of the Mississippi Sandhill Crane and would result in the modification or destruction of its critical habitat and therefore violate section 7 of the Endangered Species Act of 1973. The determination that this habitat was "critical" to the survival of the crane was made on June 25, 1975.\textsuperscript{16}

\begin{itemize}
  \item \textsuperscript{12} Department of the Interior, Current Status of the Mississippi Sandhill Crane Interstate Highway I-10 Controversy (Sept. 1976).
  \item \textsuperscript{13} 529 F.2d at 363.
  \item \textsuperscript{14} Mississippi Press, Dec. 6, 1976, at 10A.
  \item \textsuperscript{15} 49 U.S.C. § 1653(f) (1970).
  \item \textsuperscript{16} The following interpretation of "critical habitat" as it pertains to section 7 of the Endangered Species Act was published by the Department of the Interior and the Department of Commerce:
    \begin{itemize}
      \item The term habitat could be considered to consist of a spatial environment in which a species lives and all elements of that environment including ... land and water area, physical structure and topography, flora, fauna, climate, human activity, and the quality and chemical content of soil, water and air.
      \item "Critical" habitat for any Endangered species ... could be the entire habitat or any portion thereof if, and only if, any constituent element is necessary to the normal needs or survival of that species.
      \item Actions by a federal agency which result in the destruction or modification of habitat considered "critical habitat" for a given Endangered ... species would not conform with Section 7 of the Endangered Species Act ... if such an action might be expected to result in a reduction in the numbers or distribution of that species of sufficient magnitude to place the species in further jeopardy, or restrict the potential and reasonable expansion or
    \end{itemize}
\end{itemize}
The Endangered Species Act is unique in that standing to sue is automatic. Usually the courts and the Congress cast a jaundiced eye toward allowing easy access to the federal judiciary. Under this Act, all one need do is allege a violation and give notice sixty days before suit is filed to the Secretary of the Interior and the alleged violator.

In Coleman, the district court held that the plaintiffs failed to meet their burden of proof that the project in controversy would jeopardize the continued existence of the crane or result in the destruction or modification of its critical habitat. According to the district court, the defendants adequately considered the effects of the project on the crane and its habitat. The Fifth Circuit did not agree with the district court on these points. Its decision indicates a different construction as to what the burden of proof for the plaintiffs in a section 7 case entails. According to the Fifth Circuit, the plaintiffs have the burden of proving that the defendants failed to take the "action necessary to insure" that construction of I-10 would not jeopardize the existence of the crane or will not destroy or modify critical habitat. Thus, the mere fact that the defendants adequately considered the potential effects of the highway on the crane was not sufficient.

One important factor in the decision holding that the requirements of section 7 were not met was the defendants' own Final Environmental Impact Statement (FEIS) which NEPA, as previously mentioned, requires of most federal construction projects. This statement, prepared by the defendants (and thus possibly self-serving), had weaknesses as pointed out by the Department of the Interior. Yet, key parts of it were used to back up the circuit court's conclusion that the cranes as well as some important habitat were indeed being threatened by this project.

recovery of that species. [A]pplication of the term "critical habitat" may not be restricted to the habitat necessary for a minimum viable population.


17. 16 U.S.C. § 1540(g) (Supp. 1974). The relevant provisions on standing are as follows:

(g)(1) Except as provided in paragraph two of this sub-section any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof . . . .

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation as the case may be

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary [of the Interior], and to any alleged violator of any such provision or regulation . . . .

Id. (emphasis added).

18. Id.

19. 529 F.2d at 371.

20. Letter from Stanley Doremus, Deputy Assistant Secretary of the Interior, to E.L. Shaw, Division Engineer of the Federal Highway Administration (Apr. 3, 1975) [hereinafter cited as Doremus letter].
The court also felt that inaccuracies were present in the report. One such error was the following: "This section of Interstate Route 10 would commit approximately 40 acres of the cranes best nesting and feeding range to highway right of way. Other than this loss of habitat, the direct effects of a highway facility on the existence of the crane are relatively unknown." In addition to this acreage, the FEIS acknowledged the loss of 140 acres of roosting and feeding range. The circuit court seemed impressed by the letter of Deputy Assistant Secretary of the Interior Stanley Doremus who wrote to defendant E.L. Shaw, Division Engineer of the Federal Highway Administration, commenting on the FEIS and opposing the highway because of the likelihood of adverse effects on the habitat of the crane. Doremus thought the acreage affected by I-10 was larger than the amount claimed by the FEIS. The following statements from the letter illustrate this:

Apparently, the 40 acres referred to here considers only the direct loss of habitat on the proposed crane refuge. Since the sandhill crane utilizes most of the habitat through which this entire section of highway passes, we do not feel the FEIS adequately describes the total impact of this project . . . [It] appears that the proposed I-10 route will result in the direct loss of at least 406 acres of sandhill crane habitat that is presently used . . . [A]n additional direct loss of habitat will result from excavation of borrow pits. Other effects of borrow pits, beyond the direct loss of land, are disruptions to drainage patterns, lowering of the water table in the vicinity of the pits. . . .

Mr. Doremus’ analysis points out that although the Mississippi Highway Department and other involved parties have no direct control over private development outside of the highway right-of-way, they do have an indirect and important control over such development by the routing of the highway and the placement of interchanges along the highway. As an example, exclusion of the planned interchange at Earl Bond Road would greatly retard commercial and residential development along that segment of the highway.

The FEIS admits that there are known hazards in growth along a newly constructed superhighway. In this particular instance the effects on the crane seem obvious: "The crane cannot survive in built up areas, and a certain amount of private development will always accompany construction of a major highway facility. This new development within the crane’s habitat is the most significant effect to be feared." These considerations as to the effect of the highway on the crane are open to some argument as they deal with a problem that cannot be answered with certainty, but the fact remains

22. Doremus letter, supra note 20, at 5.
23. Id. at 6.
24. Supra note 21 (emphasis added).
that section 7 imposes on federal agencies the affirmative duty\textsuperscript{25} to insure that their actions will not jeopardize the continued existence of an endangered species or destroy or modify critical habitat of an endangered species.

The court views the primary responsibility for the implementation of section 7 as resting with the Secretary of the Interior who is to be consulted by other federal agencies when they are contemplating action which could threaten endangered species or their critical habitat. Once such consultation has taken place, the final decision on whether to go forward with the project, and with what modifications, rests with the agency itself and not with the Secretary of the Interior. In other words, the Secretary has no veto power. The agency itself has to take all steps necessary to \textit{insure} that its actions are not jeopardizing the involved endangered species or its habitat. However, once the agency's decision to go ahead with the project has been made, it is still subject to judicial review to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."\textsuperscript{26}

In the opinion of the Fifth Circuit, the district court's determination that the defendants had "adequately considered" the effects of the highway on the crane was a misconstruction of section 7. As earlier mentioned, section 7 imposes on all federal agencies the \textit{mandatory duty to insure} that their actions do not threaten the continued existence of an endangered species or destroy habitat "critical" to that species. In this instance the administrative record and the FEIS indicated that the defendants did recognize and consider the threat posed by the construction of I-10 to the well being of the crane but they \textit{failed} to take the necessary steps "\textit{to insure}" that the highway would not jeopardize the Mississippi Sandhill Crane or its critical habitat.

It is apparent that the district court put undue emphasis on parts of the testimony of an expert on the cranes, Jacob M. Valentine. He estimated that the direct loss of habitat to the crane would be 300 acres which the district court viewed as an insignificant number. But the evidence presented, including Mr. Valentine's testimony, indicated that the effects of the highway on the crane would be far greater than the loss of 300 acres of habitat. Additional loss of habitat would come from the borrow pits and the resulting drainage of wetlands caused by the excavation of these pits.

More importantly, Mr. Valentine's views had changed since the 1963 report he authored and upon which the district court relied in part. There he said that timber management was the biggest danger to the crane. At the

\textsuperscript{25} H.R. Rep. No. 412, 93rd Cong., 1st Sess. 14 (1973) emphasizes the mandatory nature of the duty imposed on federal agencies: "This subsection requires . . . that those agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species."

trial, he testified that in addition to the creation of a refuge the most important things that could be done to save the crane from an early and untimely end would be the elimination of the planned Earl Bond Road interchange and of borrow pits in crane habitat areas. Thus, two courts examining the same testimony seemed to arrive at different conclusions and found support for their respective positions. The record does, however, seem to support the Fifth Circuit’s conclusions regarding the dangers to the crane from construction of I-10 as originally planned.

A good statement on the precarious position of the crane can be found in the letter of Assistant Deputy Secretary of the Interior Stanley Doremus to defendant Shaw:

> It is our opinion that the Mississippi Sandhill Crane has survived primarily because the land it occupies has been considered unmanageable for agriculture, timber and residential purposes. However, because of recent industrial developments and population increases, the economic base of the region has changed and lands formerly considered unmanageable are now valuable. Encroachment by highways, residences, tourist facilities, industry, and timber management have now reached the point that every acre of actual or potential habitat is vital to the survival of the cranes. The crane is very shy, particularly during the breeding season, and the disturbance during construction and by vehicular traffic after completion of the highway will remove additional habitat from crane use.

It appears that perhaps the crane could survive the loss of 300 acres of habitat if that would be the only result of the construction of I-10. But the evidence and defendants’ FEIS indicate that the loss to the crane would be far greater than 300 acres of habitat. It is questionable whether the Mississippi Sandhill Crane could survive the additional loss of habitat caused by some of the aforementioned indirect effects of the highway.

In the words of the Fifth Circuit, “the relevant consideration is the total impact of the highway on the crane.” As the Court of Appeals for the District of Columbia has stated, “a far more subtle calculation than merely totaling the number of acres to be asphalted is required.” Viewing the situation in its entirety, the Fifth Circuit came to its conclusion that the highway builders had not lived up to the requirement of section 7, namely, they have to take all action necessary to insure their actions would not jeopardize the crane or its habitat.

C. Relief: Requested and Granted

The relief sought by the plaintiffs was modification of the project to satisfy the Secretary of the Interior that the highway would not jeopardize the crane. The modifications which plaintiffs desired were (a) the elimination of

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27. 529 F.2d at 372-73.
30. 529 F.2d at 373.
the Earl Bond Road interchange (b) the elimination of borrow pits in the area determined to be critical habitat and (c) the acquisition of land by the Federal Highway Administration to mitigate the loss of "critical" land taken by the highway. The first two were key points made by almost everybody who was familiar with the crane and its predicament. The last point, which the court ignored, was based on a program within the Federal Highway Administration (FHWA) known as "functional replacement," by which the FHWA buys land to replace valued public resources (e.g., parks, schools) lost through the highway right-of-way. The cost of buying replacement land for harm done to publicly important resources is viewed by highway authorities as a legitimate cost of a highway project. The plaintiffs believed that this power should be used by the federal government to mitigate the harm done to the crane and its habitat. This argument is made more compelling since Congress, by enacting the Endangered Species Act, put special importance on endangered species such as the Mississippi Sandhill Crane. However, whether or not this power should be exercised by court imposition was left for future resolution.

The Fifth Circuit did agree with the plaintiffs on their first two requests for relief. It directed the district court on remand to enter an order restraining and enjoining the defendants:

(a) From initiating or carrying out any further work or incurring any further contractual obligations with respect to the interchange at the Earl Bond Road.

(b) From excavating any borrow pits in the area determined to be critical habitat for the Mississippi Sandhill Crane under the notice published on June 30, 1975, at 40 Fed. Reg. 27501-27502.

This injunction is to remain in force until the Secretary of the Department of Interior determines that the necessary modifications are made in the highway project to insure that it will no longer jeopardize the continued existence of the Mississippi Sandhill Crane or destroy or modify critical habitat of the Mississippi Sandhill Crane.

The court deferred to the Department of the Interior as to what modifications were necessary since the Department has primary jurisdiction for administering the Endangered Species Act. Also, the Department has expertise in the field of wildlife and habitat which the court deferred to in its injunction.

32. "We do not reach a decision as to whether the FHWA can be ordered to acquire land to replace that taken by the highway project, since we are confident that the Secretary of Transportation and the Secretary of Interior will take all actions necessary on remand to protect the continued existence of the Mississippi Sandhill Crane and its habitat." 529 F.2d at 375.

33. Authority for this program, according to defendants' answers to interrogatories, comes from statutes and regulations (23 U.S.C. § 315 (1970), 42 U.S.C. § 4633 (1970), and 23 C.F.R. § 1.32 (1976)) which provide for the issuance of regulations and such actions as would fulfill the mandates of the Federal Highway Act. These regulations are at 23 C.F.R. § 712.601-606 (1976). Section 712.604(b) says: "[F]unctional replacement is defined as the replacement of real property... acquired as a result of a highway or a highway related project with land or facilities, or both, which will provide equivalent utility." For a detailed discussion of this issue, see Brief for Appellants at 28 n.25.

34. 529 F.2d at 375.
There is an inconsistency between the opinion and the relief granted. The opinion states that the Department of the Interior does not have a veto power over other federal agencies once those agencies have made the necessary consultations with the Department. However, the relief provides that the injunction is to remain in effect until the Secretary of the Interior determines to his satisfaction that the modifications necessary "to insure" that the highway will no longer threaten the continued existence of the crane or destroy or modify its "critical habitat" have been made.

III. SECTION 4(F) OF THE DEPARTMENT OF TRANSPORTATION ACT

Looking at section 7 of the Endangered Species Act and its application here in Coleman, one would be tempted to call this decision a clear, resounding victory for environmental concerns. As far as section 7 is concerned, this is true. However, the plaintiffs tried to use section 4(f) of the Department of Transportation Act to help the cranes, but both the district court and the Fifth Circuit court said it could not be applied to this case. The regrettable aspect of this case is that it presented an excellent opportunity to expand the application of section 4(f).

The Fifth Circuit's holding on section 4(f) is an important, yet generally overlooked, facet of this case. Section 4(f) of the Department of Transportation Act states:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

The district court held that 4(f) was inapplicable to the lands affected by the construction of I-10 in that: (1) there are no lands which fit the 4(f) definition to be crossed by the highway, and (2) that an opinion given by the Office of the Attorney General of Mississippi that the lands in dispute are not publicly owned lands from a public park, recreation area or wildlife and waterfowl refuge within the meaning of 4(f) was binding on the Secretary of

35. Id. at 371.
Transportation. The Fifth Circuit agreed with the first conclusion but did not agree with the second.

A. AUTHORITY OF LOCAL OFFICIALS UNDER 4(f)

To support their disagreement as to the authority of the opinion from the Mississippi Attorney General’s Office, the Fifth Circuit looked at several other court cases including an earlier opinion rendered by it. In that case they stated that Congress in enacting Section 4(f) clearly “did not intend to leave the decision whether federal funds would be used to build highways through parks of local significance up to the city councils across the nation.” Otherwise, if state or local officials with jurisdiction over the publicly owned lands proposed for a federally funded highway were allowed the authority to make a final and binding determination, then the expressed national policy in 4(f) could easily be defeated.

The Fifth Circuit’s analysis of this question indicates that the initial or threshold determination as to the significance of these lands should be made by those state and local officials who are most likely to be aware of the land’s importance to the local community. However, this initial determination is not binding. It is subject to reversal by the Secretary of Transportation who is not limited to information supplied by local officials. In fact, the Supreme Court has stated that the Secretary of Transportation must go beyond the information supplied by state and local officials to reach “his own independent judgment.”

Although siding with the plaintiffs on this point, the Fifth Circuit made it academic by saying that the land in question could not be considered as being protected by 4(f). The court stated it as follows:

Section 4(f) as amended is applicable only if two conditions are satisfied by the land in question: first, except for land from an historic site, the land to be used by a project must be Publicly owned land and second, the land must be from one of the enumerated types of publicly owned land, i.e. a public park, recreational area, or wildlife and waterfowl, refuge. None of the land in question satisfied both of these conditions at the time of the trial.

B. LEGAL STATUS OR ACTUAL USAGE OF THE LAND

These requirements for inclusion under section 4(f) appear to be formalistic. As an example, the land held in trust by the State of Mississippi for

37. 400 F. Supp. at 709.
38. 529 F.2d at 368, 370.
40. Id. at 1026.
42. EDF v. Brinegar, [1974] 6 ERC (BNA) 1577, 1593-1594 (E.D. Pa.)
43. Id.
44. 529 F.2d at 370.
the Jackson County School District was never designated or administered as a wildlife refuge, so even though it was public land and was in fact being used by the cranes as a refuge, this land was held not to qualify for inclusion under section 4(f). The land held by the Nature Conservancy was specifically obtained for future transfer to the Fish and Wildlife Service as a wildlife refuge for the benefit of the cranes. It could be argued that the Conservancy was acting as a constructive trustee for the Fish and Wildlife Service in its acquisitions of properties for the proposed refuge. Yet, this property did not qualify for inclusion under section 4(f) because the Fifth Circuit held that only after the Fish and Wildlife Service declared land as a wildlife refuge through publication in the Federal Register would the land qualify for the application of section 4(f).

The Service purchased 1,708 acres from the Nature Conservancy during the period of deliberation by the Fifth Circuit. Since this purchase occurred after the start of highway construction it was considered to be after the fact by the court and thus not protected by section 4(f). This property, as well as the school district land, was being used as a de facto sanctuary or refuge and was determined by the Department of the Interior to be "critical habitat" necessary for the continued survival of the crane. Some of this land will become part of an "official" refuge even though not yet acquired by the Service. It appears to be a question of timing.

In this case, a wildlife refuge is in the process of creation. Whether the land is publicly owned or not, at the moment it is in fact being used as a sanctuary. One could say, with justification, that the land constitutes a de facto refuge. Is it the legal status of the land which is important, or is the true nature of the property as it is being used more important? Must the courts and agencies involved wait for that magic moment of Federal Register publication before section 4(f) can be applied?

Support for the position that the factual usage of the land is of equal or more importance than the formalized legal status of the property is found in the positions taken by the Department of Transportation, which administers the statute and whose interpretations are therefore entitled to great weight.45 In Goleta Slough, an administrative decision by Secretary of Transportation Volpe on April 11, 1970, it was stated:

No part of Goleta Slough or Tecolotito Creek has been formally declared a recreation area, wildlife and waterfowl refuge, or historic site by federal, state, or local officials having jurisdiction thereof. In fact, however, the creek and slough are publicly owned, and have been determined by the Department of Interior to be a recreational area, a wildlife and waterfowl refuge, and an historic site of some significance. I therefore find that your project will require the use of publicly owned land from a wildlife and waterfowl refuge and an historic site of national significance.46

46. For further discussion of this case, see Gray, Section 4(f) of the Department of Transportation Act, 32 MARYLAND L. REV. 327, 350-51.
Another example of the actual use of land being determinative is the following quote from a Department of Transportation order: "Where lands are being administered for multiple uses, the federal official having jurisdiction over the lands shall determine whether the subject lands are in fact being used for park, recreation, wildlife, waterfowl, or historic purposes."47

Using the standard expressed in the Volpe decision above, it would appear that at least some of the lands in Coleman could be considered as falling under the protection of section 4(f). The Department of the Interior had determined this land to be critical habitat for the survival of the crane and is in the process of obtaining land for a wildlife refuge for the crane. The Fifth Circuit has deemed the crane "significant" enough to intercede on its behalf under section 7 of the ESA. Under Goleta Slough these factors would seem to be more than enough to bring the lands under question within the protection of section 4(f). This protection would require the Secretary of Transportation to make the determination that I-10 is the only "feasible and prudent alternative". If he made this determination, all efforts would be undertaken to minimize the harm done to the crane and its habitat.

Section 4(f) was not applied in Coleman despite the strong case made for its application. If there were no section 7 of the ESA to be applied, the Fifth Circuit might have looked at the applicability of section 4(f) of the Department of Transportation Act with a more favorable eye. But the court already had one statutory vehicle which was more than adequate.

Since the court did not view section 4(f) as applying to a situation such as Coleman it missed the most important time for application of this statutory provision. The most delicate time for a wildlife refuge is in its land acquisition and formation stage. Once established as a refuge it is a legal, effective haven and sanctuary for the flora and fauna that reside within its boundaries. However, before this cloak of protection descends, the intrusion of man and his instruments of habitat destruction could eliminate the wildlife which the refuge would protect. If section 7 of the ESA was not applied in Coleman, that very well could have happened.

IV. CONCLUSION

The decisions by the Fifth Circuit and the Sixth Circuit in Coleman and Hill v. TVA respectively make it clear that endangered species are going to be protected as fully as a fair reading of the statute will allow. These courts have not restricted any of the statutory provisions of section 7 of the ESA. Even multi-million dollar projects which are nearing completion will be halted if necessary. An excellent example of this is Hill. The Tellico project, a $90 million dollar dam on the Little Tennessee River, was eighty percent completed. A three inch fish called the snail darter was discovered after construction had already started and later this fish was put on the endangered species list. The Sixth Circuit used the same standards and interpretation of

47. Department of Transportation, Order 5610.1B, Attachment 2, Paragraph 4b(2).
section 7 that the Fifth Circuit had used in Coleman and thus enjoined further construction on the dam. The court even said that under section 7 they would be compelled to halt impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before the impounding of water was scheduled.\textsuperscript{48} In the words of the Sixth Circuit: "[T]he welfare of an endangered species may weigh more heavily upon the public conscience, as expressed by the final will of Congress, than the writeoff of those millions of dollars already expended for Tellico in excess of its present salvageable value."\textsuperscript{49} Thus it appears that the words "to insure" in section 7 mean exactly that. The survival of endangered species and their habitat is to be guaranteed.

One obvious result of these decisions on section 7 of the ESA is the large role to be played by the Department of the Interior. It is not the judiciary, but the Secretary of the Interior who bears the responsibility for maintaining the official endangered species list and designating the critical habitats of these species. The Secretary is to be consulted by other agencies if a project may affect an endangered species or critical habitat of that species. Although the Secretary does not have a veto power over the decisions of the other agencies, the fact that anyone can sue under section 7 leaves the door open for Interior to make its impact through the judicial process as it did in Coleman. Courts really do not have much expertise in the environmental field and as a result will give weight to the views of the Department of the Interior. In Coleman the injunction allowed the Department to determine when the modifications in the highway were sufficient to insure the survival of the crane, and only then could construction of the highway proceed.

Although section 7, as interpreted, is a strong weapon in the battle to save endangered species, it is limited in its application. Section 7 applies only to species officially listed as endangered species under the federal criteria established for such listing. As the decision turned out, the Mississippi Sandhill Crane was "fortunate" to have been officially endangered. Otherwise, there was little that could legally be done to save it from the negative aspects of I-10 as originally planned.

But the potential scope of section 4(f), especially if the Coleman decision had sided with the actual usage of the land instead of its legal title, is

\textsuperscript{48} Where we to deem the extent of project completion relevant in determining the coverage of the Act, we would effectively defeat responsible review in those cases in which the alternatives are most sharply drawn and the required analysis most complex. This expeditious strategy would frustrate effective enforcement of the Act and hinder efforts to prevent the wanton destruction of vulnerable species. Current project status cannot be translated into a workable standard of judicial review. Whether a dam is 50% or 90% completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique form of life. Courts are ill-equipped to calculate how many dollars must be invested before the value of the dam exceeds that of the endangered species.

\textsuperscript{49} Id. at 20176.
greater than section 7 of the ESA. Even using the standards set up by the Fifth Circuit, there are many thousands of parks and wildlife refuges, recreational areas and historic sites across the country. Section 4(f) would give its protection to those tracts of land. This protection is reasonably strong since the highway must be the only "feasible and prudent alternative," and if it is, harm must be minimized to the land that is used.

If section 4(f) would have been held to include the situation in Coleman the scope of 4(f) would have been expanded considerably and would have afforded protection where and when needed the most. From an environmental standpoint, the Coleman decision on section 4(f) is negative and a setback when one considers the strong equitable and de facto nature of the refuge in Coleman.

The really important consideration in Coleman is whether the actions taken under section 7 of the ESA and the proposed wildlife refuge will be sufficient to save the Mississippi Sandhill Crane from extinction. Society's understanding of the importance of endangered species has increased tremendously in the last fifteen years. Section 7 and the judicial interpretations of it are an excellent example of the increased awareness of the value of these species. For some species this happened too late. Hopefully, the actions taken by the crane's friends will be enough to leave it an island of safety in our increasingly urbanized world.

John Zadvinskis
HAROLD S. SHERTZ ESSAY AWARD CONTEST

The Film, Air and Package Carriers Conference of the American Trucking Association in conjunction with the Motor Carrier Lawyers Association, in an endeavor to encourage interest within the legal education community in the field of transportation, annually hold the Harold S. Shertz Essay Award Contest. The contest title was selected to honor Harold S. Shertz, Esq., of the Philadelphia, Pennsylvania, Bar for his long service to the transportation industry and to the legal profession.

Submission of manuscripts must be in conformance with the competition's rules as follows:

1. Eligibility:
   The contest is open to any law student of a school in the United States or Canada other than student members of the staff of the Transportation Law Journal. An essay may be written in collaboration with another student provided there is full disclosure.

2. Subject Matter:
   A contestant may write on any area of transportation law.

3. Determination of Award:
   Essays will be judged on timeliness of the subject, practicality, originality, quality of research, and clarity of style. The Board of Governors of Transportation Law Journal shall act as judges. In the discretion of the judges, no prize may be awarded. The decision of the judges shall be final.

4. Prizes:
   A prize of $250.00 will be paid and the winning essay will be published in the Transportation Law Journal.

5. Right of Publication:
   Each contestant is required to assign to the Transportation Law Journal all right, title, and interest in the essay submitted, and shall certify that the essay is an original work and has not had prior publication. Papers written as part of a contestant's law studies are eligible provided first publication rights are assigned to the Transportation Law Journal.

6. Formal Requirements:
   Essays must be submitted in English and be typewritten (double space) on 8½ x 11 paper with 1 margins. Footnotes shall be typed separately and all citations must conform to the Harvard Law Review citation booklet (12th Edition). The essay shall be limited to forty pages including text and footnotes.

7. Submission Requirements:
   Three copies of the essay should be enclosed in a plain envelope and sealed. Contestant's name should not appear on either the envelope or the essay. The envelope containing the essay should be placed in another envelope with a letter giving the name and address of the contestant and stating that the article is submitted for the contestant and that the author has read and agrees to be bound by the Rules of the contest. Enclosed with this letter must be the certification set forth in Rule 5 above and a brief biographical sketch of the contestant.

8. Closing Date:
   Papers must be received by March 1, 1978. The winner will be announced by June 1, 1978.

   All correspondence, including the submittal of entries, and questions should be directed to Professor Andrew F. Popper, Transportation Law Journal, University of Denver College of Law, 200 West 14th Avenue, Denver, Colorado 80204.
The Impact of the National Environmental Policy Act on the Procedures of the Interstate Commerce Commission*

EDWARD J. MOMKUS**

I. INTRODUCTION

With passage of the National Environmental Policy Act of 1969 (NEPA),¹ Congress sought to impose upon federal agencies various substantive and procedural requirements designed to insure consideration of the environmental impact of agency decisions. This article focuses upon section 102(2)(C) of NEPA, which requires that "to the fullest extent possible... all agencies of the Federal Government shall... include in every recommendation or report on... major Federal actions significantly affecting the quality of the human environment, a detailed statement... on... the environmental impact of the proposed action..."² More particularly, an attempt will be made to determine the effect of section 102(2)(C) upon the decision-making processes of the Interstate Commerce Commission (ICC). To this end, this article will discuss the regulations, litigation, and recent legislation which concerns the relationship between NEPA and the ICC.

II. JUDICIAL INTERPRETATIONS OF NEPA'S REQUIREMENTS

Section 102(2)(C) of NEPA was created as part of the "action-forcing" mechanism³ designed to implement the more general goals and directives

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¹ 1977 winner of the Harold S. Shertz Essay Award Contest.
** B.A., Elmhurst College, 1974; J.D., Northwestern University School of Law, 1977.
2. Id. § 4332(2)(C).
3. "To insure that the policies and goals defined in this act are infused into the ongoing..."
aluled to in other NEPA sections. It requires agency preparation of an
environmental impact statement (EIS) whenever certain threshold require-
ments are met:

1) if the action is "federal,"
2) if it is "major" federal action,
3) if it "significantly" affects the quality of the environment, and
4) if it affects the "human" environment.

Though agencies must also file an EIS when making recommendations or
reports on proposals or legislation, that topic is beyond the scope of this
article. Nor will this article examine what constitutes "federal" action since
our focus will be upon the ICC. However, for a proper understanding of
the topic here examined, a brief review of some of NEPA's section 102(2)(C)
requirements follows.

A. NEPA Threshold Requirements

The "major federal action" test for determining when an EIS must be
prepared reflects a broad standard which courts have dealt with on a
case-by-case basis. As a result, definitions of this term are nearly as broad
as the standard itself. For example, in Natural Resources Defense Council v.
Grant, the court held that "a major federal action is federal action which
requires substantial planning, time, resources and expenditure."6

Most clearly, capital projects which anticipate the expenditure of sub-
stantial amounts of federal funds or which foresee extensive dredging or
remodeling must be considered major federal actions. Only slightly less
clear is the applicability of that standard to federal regulatory proceedings
and program development. Any doubts that may have existed should have
been dispelled by the Supreme Court's decision in Aberdeen and Rockfish
Railroad v. Students Challenging Regulatory Agency Procedures. In that
case (to be discussed in greater detail) the Court stated that a general
revenue proceeding instituted in the ICC is a "major federal action" within
the meaning of section 102(2)(C) of NEPA.8

programs and actions of the Federal Government, the act also established some important
'action-forcing' procedures." 115 CONG. REC. 40416 (1969) (remarks of Sen. Jackson). See also
Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1113 (D.C. Cir. 1971).
4. For a comprehensive overview of what these threshold requirements entail, the reader
should consult either the Council on Environmental Quality's guidelines, 40 C.F.R. §§ 1500.1-
.14 (1976), or one of the myriad of law review articles on the subject, e.g., D'Amato and Baxter,
The Impact of Impact Statements Upon Agency Responsibility: A Prescriptive Analysis, 59 IOWA
L. REV. 195 (1973); Remus, The Impact of the National Environmental Policy Act on the Motor
Carrier Industry, 5 TRANSP. L.J. 127 (1973); 1974 WIS. L. REV. 600.
6. Id. at 366. Applying this standard, the court found that a project sponsored by the
Department of Agriculture which involved 66 miles of stream channelization at a cost of
$1,503,831, $706,784 of which was federally funded, was a major federal action.
8. Id. at 318-19.
Beyond these general propositions, the guidelines of the Council on Environmental Quality (CEQ)\(^9\) have done a fairly comprehensive job of codifying other considerations which courts have found important: 1) the cumulative impact of related federal programs; 2) whether the action, though localized, may potentially cause a significant effect; and 3) the existence of impacts likely to be highly controversial. The mere fact that an action is temporary does not preclude a finding that it is major.\(^10\)

The vague nature of these considerations leaves a large area of discretion to agencies in determining whether they must file an EIS. Nevertheless, most agencies find it to their advantage to prepare an EIS whenever it seems that their action may be major, particularly where public controversy is likely to arise.

Whether an impact upon the environment is "significant" has been more thoroughly considered by courts than the "major federal action" threshold. Perhaps the best summary is to be found in *Hanly v. Kleindienst*.\(^11\) There the court found two factors particularly relevant:

1. the extent to which the action will cause environmental effects in excess of those created by existing uses in the area affected by it, and
2. the absolute quantitative effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.\(^12\)

Particular attention is given to the impact on those who are most directly affected by the project,\(^13\) although citizen opposition, standing alone, is insufficient to merit a finding of significance.\(^14\)

**B. Preparation, Timing, and Contents of the EIS**

The responsible federal agency has a primary and non-delegable duty to make its own comprehensive and objective evaluation of environmental impact.\(^15\) It may not defer to standards set by other agencies and is responsible for an individual balancing of the relevant factors.\(^16\)

An EIS is mandatory once threshold requirements have been met. Section 102's directive that agencies "to the fullest extent possible" shall file...

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9. 40 C.F.R. § 1500.6 (1975).
11. 471 F.2d 823 (2d Cir. 1972).
12. Id. at 830-31.
14. Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972). The significance of a proposed action may vary with the setting, so that similar actions may have different impacts in different areas. Also, the setting which is selected should be appropriate: one which is too large will "dilute" the environmental impact whereas one which is too small may preclude analysis of total effects.
impact statements cannot be used as an escape hatch. In *Calvert Cliffs’ Coordinating Committee v. AEC*,17 Judge Skelly Wright indicated that this phrase does not make agency NEPA duties flexible, but means that agencies must comply to the fullest extent unless there is a clear conflict of statutory authority.18

One of the major issues that has arisen with respect to section 102(2)(C) relates to the timing of the EIS. Since one purpose of the impact statement is the facilitation of agency decision-making, the time at which the statement is issued may critically affect the decision’s outcome. As a result, the final EIS must be prepared before the project is launched so as not to inject factors which change the cost-benefit analysis.19 More specifically, EIS preparation must occur before an “irretrievable commitment” of resources is made so as to avoid post hoc rationalization of decisions already made.20 Such early preparation of the EIS is meant to facilitate agency compliance with the substantive provisions of NEPA requiring consideration of environmental factors at every important stage of decision-making.21

Problems arise when an agency holds public hearings before coming to a decision. The last sentence of section 102(2)(C) requires that the statement “accompany the proposal through the existing agency review process.”22 Many agencies base final decisions upon findings developed as a result of hearings. As to them, without a requirement that the EIS be prepared before hearings are held, the purpose of the hearing process could be undermined.23

A key case dealing with this problem is *Green County Planning Board v. FPC*.24 There the FPC had not required its staff to prepare impact statements prior to hearing but instead directed applicants to submit their own statements. This procedure conformed to the then-existing CEQ guidelines,25 but the court said that this flew in the face of NEPA’s requirement that the statement should accompany the proposal through the existing agency review process. Therefore, the court held that a draft EIS had to be prepared before the hearings were held.26 This seemed to be a sensible way to attain fulfillment of NEPA’s objectives without making the hearing process a mere formality.

This ruling is particularly important to the topic before us because it has direct application to the ICC and its procedures. A subsequent case, how-

17. 449 F.2d 1109 (D.C. Cir. 1971).
26. 455 F.2d at 422.
ever, has called into question the vitality of Green County.27 This matter will be discussed further.

A glance at the subsections of section 102(2)(C) gives one a good idea as to the type of analysis an EIS must reflect. The impact statement must be detailed, comprehensive, accurate, and objective.28 One major reason for this is the development of a record for purposes of judicial review.29 However, the depth and detail of a statement may be tailored to the intensity of the potential environmental consequences.30 As a result, agencies may submit impact statements when in doubt as to whether the “major federal action” and “significance” standards require one, without risking judicial rulings that the statement is insufficient for lack of comprehensiveness.31

III. NEPA AND THE ICC

In its Fifth Annual Report (1974), the CEQ found that implementation of NEPA has gone through three stages.32 The first took place in 1969-70, when awareness of the statute’s requirements began to spread. The second stage lasted from 1970-73 and basically reflected agency attempts to comply with NEPA. During this period, the CEQ revised its interim guidelines to provide expanded guidance on the timing and preparation of EIS’s and their use in agency decision-making processes. These and subsequent guidelines accumulated agency experience and codified many of the court decisions referred to above. The third stage began in 1973 and continues to the present with agencies attempting to integrate NEPA into their operations.

A. The ICC’s Initial Regulations

On April 16, 1971, the ICC issued a notice of proposed rulemaking which dealt with implementation of NEPA’s section 102(2)(C) requirements.33 After public comments had been forwarded and considered, the Commission revised and codified those rules in 1972.34 The overriding

27. It is unclear but likely that Green County has been overruled on this point by Aberdeen and Rockfish R.R. Co. v. S.C.R.A.P., 422 U.S. 289 (1975).
29. Calvert Cliffs’ Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir 1971). It might be noted also that decisions not to prepare an EIS must be adequately documented for judicial review purposes. Thus, agencies may need to submit a “mini-impact statement” when making a negative declaration. Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972). See 49 C.F.R. § 1108.10(b) (1976).
31. In accord with this principle, the ICC regulations provide for preparation of either Environmental Threshold Assessment Surveys, 49 C.F.R. § 1108.13 (1976), or Environmental Impact Statements, 49 C.F.R. § 1108.14 (1976) depending upon the type of federal action involved.
34. 49 C.F.R. § 1100.250 (Oct. 1972 ed.).
consideration of these regulations was obviously administrative efficiency. The regulations required submission of impact statements by all parties filing initial papers, but they did not specifically indicate their required content. The comments of the Department of Transportation (DOT) noted this lack of specificity and suggested clearer requirements as to contents and timing. This suggestion was rejected, with the ICC candidly admitting that the rules were a product of a balancing of requests by special interest groups rather than of consideration of NEPA’s objectives.

The final rules significantly modified those originally proposed. Most important to this discussion is the subsection which concerned the environmental impact of ICC proceedings. As originally proposed, that subsection read as follows:

DETERMINATION OF ENVIRONMENTAL IMPACT.—The National Environmental Policy Act does not contemplate that all of this Commission’s proceedings shall be subject to the scrutiny of an environmental investigation even though all such proceedings may have some slight environmental impact. For example, it would not be administratively feasible to require environmental statements and determinations in the vast number of individual motor carrier operating rights applications filed with this Commission each year.

The following classifications of proceedings have been determined to be among those which might have a significant effect on the quality of the environment:

1) Rulemaking proceedings except those relating to rules of agency organization, procedure, or practice.
2) Application for a certificate authorizing the construction, extension, or abandonment of all or a portion of a line of a railroad.
3) Notice or petition to discontinue train or ferry service.
4) Application for, approval of, or to amend, a rate association agreement.
5) Proceedings concerning the lawfulness of rates for the future on waste products or reusable materials or on substitute raw materials.
6) Proceedings concerning the lawfulness of rates for the future on waste products or reusable materials or on substitute raw materials.

The promulgated subsection, however, eliminated the “classification of proceedings... which might have a significant effect on the quality of the environment” from the proposed rule and substituted a generalized statement requiring all initial papers filed with the ICC to include a statement on environmental impact:

PAPERS TO SHOW EFFECT OF SUBJECT MATTER OF PROCEEDING ON THE QUALITY OF HUMAN ENVIRONMENT. (1) In all initial papers filed with the Commission by a party, there shall be filed a statement indicating

36. Id. at 437.
the presence or absence of any effect of the requested Commission action on the quality of the human environment. If any such effect is alleged to be present, the paper shall include, but not be limited to, statements relating to each of the relevant factors set forth in . . . this section.

(2) In all proceedings determined or alleged to have a significant effect on the quality of the environment, all parties shall file statements submitting information relating to the relevant factors set forth in . . . this section.38

Despite the fact that the revised rule required all parties to submit statements on environmental impact, that rule represented a significant undercutting of the subsection originally proposed. "The major opposition raised to the proposed rules was the inclusion of the listed proceedings and the special attention they would be required to receive."39 Carriers feared that subjecting the concerns listed in the original subsection to special scrutiny would impede the likelihood that their requests would be granted. As a result, the rule provided little guidance as to what the ICC will generally consider a "major federal action significantly affecting the quality of the human environment."

Under the ICC's procedures, public notice was limited to situations where environmental impact is "found" or alleged to be present. This meant that if the applicant filing initial papers did not allege an impact or if no impact "appears evident in a proceeding in which notice would not ordinarily be given to the public, no added notice would be required."40 As an example the Commission noted that "if the environmental statement accompanying the filing of a tariff asserts that environmental issues are not present and none appears to be involved, then formal notice need not be given to the public."41

This regulation was closely tied to the rule that required the EIS to issue as part of determinations made after hearing. In other words, draft impact statements would not be made available to the public prior to the initial hearing. As a result, it was possible that 1) no notice would issue to the public if carriers filing initial papers alleged there was no environmental impact and no one challenged those allegations; 2) that because of no notice, significant challenges to carrier requests did not occur prior to or during initial hearings; and 3) that because draft impact statements did not issue until after the Commission's first hearing, expected environmental impacts were not known to the public until significant steps in the decision-making process had taken place. Thus, the ICC's rules minimized the action it would take in considering environmental impact.

38. 49 C.F.R. § 1100.250(d) (Oct. 1972 ed.).
40. Id. at 440.
41. Id. This was in direct contrast to the DOT procedures which attempt to have all potentially interested parties informed and require early preparation and circulation of draft EIS's.
In July of 1976 new regulations were promulgated by the ICC which substantially revamped its EIS process. An examination of these changes is a sequel to the following case study.

B. The ICC and the Courts

As has been noted above, the ICC rules implementing NEPA were promulgated in 1972. Challenges to ICC decisions, however, continued and intensified. This was due to the fact that the rules gave little specific guidance for the preparation of impact statements and also because the Commission’s good faith was questionable. As was noted in New York v. United States, the Commission has been slow in reacting to the directives of the CEQ . . . and of NEPA itself that each federal agency establish formal procedures to guide the preparation of § 102(2)(C) environmental impact statements . . . . In that case an action had been brought to annul an ICC order authorizing the abandonment of a railroad line running between New York and New Jersey. Referring to the then-proposed ICC rules, the court found that NEPA applied to such railroad abandonments and remanded the case to the ICC for consideration of environmental factors.

One of the effects of New York v. United States was clarification that NEPA applies to abandonment proceedings. A second effect was the Commission’s amendment of its rules pertaining to NEPA implementation. As was discussed above, the proposed subsection which classified proceedings with potential environmental impact was eliminated.

Any remaining doubt that NEPA applies to ICC abandonment proceedings was erased by the Second Circuit’s decision in Harlem Valley Transportation Association v. Stafford. There, various public interest groups alleged that the Commission’s procedures with respect to rail abandonments violated NEPA. The lower court had granted a preliminary injunction requiring that the determination of whether an EIS would be required be made at the outset of all abandonment proceedings. Furthermore, relying upon Green County Planning Board v. FPC, it held that NEPA required preparation of a draft statement prior to any hearing. The Second Circuit affirmed, noting that “the ICC made no effort to modify its procedures after certiorari was denied in [Green County].” Judge Lumbard observed that after the CEQ guidelines were revised in order to incorporate Green County, the ICC protested that strict adherence would require a twenty percent increase in staff and appropriations. The CEQ had noted in response that no other agency had come even close to such a high estimate. As a result, Judge

43. Id. at 158.
44. 500 F.2d 328 (2d Cir. 1974).
46. 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972).
47. 500 F. 2d 328, 332 (2d Cir. 1974).
48. Id. This figure does seem to be inordinately high; the DOT, for example, in 1974 estimated that it expended $2,400,000 in preparing impact statements and $800,000 in the...
Lumbard found that "[r]equesting the ICC to prepare impact statements prior to hearing may inconvenience it but does not prohibit any effort by the Commission to regulate carriers subject to its jurisdiction."\textsuperscript{49}

Though the Commission's responsibilities in abandonment proceedings were greatly clarified, additional problems arose as to the enforcement of NEPA in rate regulation cases. Involved in these problems was the doctrine of Arrow Transportation Co. v. Southern Railway,\textsuperscript{50} which held that 49 U.S.C. § 15(7) vests exclusive power in the Commission to suspend the operation of new rates and withdraws from the judiciary any pre-existing power to grant injunctive relief against such rates. As a result, judicial review of rate-making decision by the ICC is significantly limited. Consequently, examination of the Commission's consideration of environmental factors is also limited. This situation is discussed in the following case studies.

C. Case Studies: SCRAP I & II

On December 21, 1971, the ICC handed down a decision in Ex Parte No. 281, Increased Freight Rates and Charges.\textsuperscript{51} It declined to exercise power under 49 U.S.C. § 15(7) to suspend an interim 2.5% across-the-board increase in railroad rates. This interim surcharge was a temporary measure and was to be followed by a more selective rate increase. On February 28, 1972, the railroads filed this selective increase proposal. Prior to this, they had been directed to file an EIS with respect to these increases. Based on preliminary determinations, the ICC suspended under 49 U.S.C. § 15(7) the effectiveness of these rates. On March 6, 1972, the ICC served a short draft EIS upon interested parties which concluded that no substantial effect upon the environment would occur.

Soon after, a group named Students Challenging Regulatory Agency Procedures filed a lawsuit (SCRAP I) alleging that the ICC's decision not to suspend the interim 2.5% surcharge would have a substantial effect upon the environment and thus required the preparation of an EIS. The basis of this claim was that the pre-existing rate structure discriminated against recyclable materials and that general rate increases heightened the problem. SCRAP sought suspension of the surcharge and an injunction against its collection. A three-judge district court granted this relief.\textsuperscript{52} On September...
27, 1972, the ICC came to a final decision on Ex Parte No. 281. It suspended the interim surcharges but declined to declare unlawful the selective increases. The decision noted that the railroads were in dire need of larger revenues and that the possible adverse effects to the environment were: "1) whether increased rail freight rates will divert traffic from the railroads to other modes of transportation in degradation of our human environment, and 2) whether the proposed increased rail rates will adversely affect the movements (and hence, it is argued the recycling) of secondary materials." As to the first, the danger was considered minimal because motor carriers had been subject to the same cost increases that the railroads had encountered. As to the second, the ICC found that the rate structure did not discriminate against recyclables and that in any event the question would more appropriately be considered in pending Ex Parte No. 270, which was a comprehensive reexamination of the entire rate structure.

On November 7, 1972, the ICC reopened the case for reconsideration of environmental effects. At this point the railroads agreed to suspend their rates for another seven months. A new draft EIS was issued by the Commission and became final on May 1, 1973. This EIS came to essentially the same conclusion as the report of March 6, 1972. Ex Parte No. 281 was terminated.

Eleven days before the final rates were to go into effect, SCRAP and the Environmental Defense Fund filed motions for a preliminary injunction restraining their implementation. The injunction was granted. Eleven days after that, the Supreme Court on direct appeal reversed the injunction as to the interim rates, holding that Arrow Transportation Co. v. Southern Railway was controlling. Shortly before, Chief Justice Burger, acting as circuit justice, had stayed the preliminary injunction on the final rates, and his order was affirmed by the full court on June 25, 1973. The preliminary injunction was vacated and the case remanded in November 1973. The district court vacated the ICC order terminating Ex Parte No. 281, ordered preparation of a new EIS analyzing the problem of recyclables in greater detail, and ordered that a new hearing be held after circulation of the new impact statement.

refusal to allow its staff to be cross-examined raised some suspicions, especially since it had previously relied upon statements prepared by the railroads. See also ASSOCIATION OF ICC PRACTITIONERS, TRANSPORTATION LAW SEMINAR, PAPERS AND PROCEEDINGS, 11-24 (1972).

54. Id. at 319.
55. Id. at 324-25.
56. 341 I.C.C. 290, 327 (1972).
In \textit{SCRAP II}, the Supreme Court considered an appeal from the decision of the district court. From the confusion of the extended litigation, the Court attempted a synthesis of many statutes and cases.

The first major consideration was the Interstate Commerce Act, which gives the ICC power to declare railroad rates unlawful if unjust, unreasonable, preferential, or discriminatory and also allows suspension of a rate for seven months pending a determination of its lawfulness. In general revenue proceedings the ICC may focus entirely on the railroad's general need for revenue and defer the question of the legality of specific increases. The second major consideration was NEPA and agency duties thereunder. Some reconciliation of the requirements of the two statutes had to be made.

The Supreme Court noted that a general revenue proceeding was involved and that in such proceedings courts have traditionally refused to set aside rate increases where the ICC has examined only whether the general increase is reasonable and not whether particular increases are reasonable. However, that policy was inapplicable in this case because no injunction against the collection of rates had been issued by the lower court. Furthermore, since the ICC had already decided that environmental factors would get no further consideration in Ex Parte No. 281, the ICC's decision on environmental considerations was final and courts could grant relief: "a general revenue proceeding is itself a 'major federal action,' independent of any later adjudication of the reasonableness of particular rates, requiring its own final environmental impact statement so long as the proceeding has a substantial effect on the environment." Thus, the general revenue proceeding may be "final" for NEPA purposes even though it is "interim" for purposes of the Interstate Commerce Act.

Secondly, the Court called into question the holdings of \textit{Green County} and \textit{Harlem Valley} that draft impact statements must be prepared prior to hearings. It held that the phrase "shall accompany the proposal through the existing agency review process" does not affect the timing of the EIS hearing.

\begin{itemize}
\item \textbf{64.} Aberdeen & R.R. v. S.C.R.A.P., 422 U.S. 289 (1975) [hereinafter cited as \textit{SCRAP II}].
\item \textbf{65.} Certain preliminary jurisdictional questions were dealt with first, but discussion of them is beyond the scope of this paper.
\item \textbf{69.} United States v. Louisiana, 290 U.S. 70 (1933).
\item \textbf{70.} 422 U.S. at 314.
\item \textbf{71.} \textit{Id.} at 316. In such cases courts have declined review on the ground that administrative remedies have not been exhausted.
\item \textbf{72.} \textit{Id.} at 318-19.
\item \textbf{73.} 455 F.2d 412 (2d Cir. 1972), \textit{cert. denied}, 409 U.S. 849 (1972).
\item \textbf{74.} 500 F.2d 328 (2d Cir. 1974).
\item \textbf{75.} 422 U.S. at 320-21. The status of \textit{Green County} and \textit{Harlem Valley} with respect to this issue is unclear. The court suggests these cases were wrongly decided on this point, but clarification is necessary.
\end{itemize}
but merely directs what must be done with it after preparation. The agency must have the final statement ready when it makes a report or recommendation on a proposal for federal action but need not prepare a draft earlier. Thus the lower court’s additional order that the ICC begin its hearing processes anew did not stand since the Commission was found to have complied with NEPA’s procedures.

Finally, the Court concluded that the final EIS submitted by the Commission was sufficient. It stated that SCRAP’s contention that the underlying rate structure must be explored in the EIS should be rejected, since general revenue proceedings require only the conclusion that the railroads are in immediate financial need. In fact, since the Commission had in a separate proceeding begun an investigation of the railroad rate structure, SCRAP’s arguments lost much of their force. The ICC’s action could not be considered an approval of the existing rate structure, but was merely a necessary response to immediate needs. Therefore, no analysis of the effect upon the shipment of particular commodities had to be included in the EIS.

The foregoing recounting of the SCRAP cases illustrates the effort which may be expended in preparation of an impact statement. The major result of the cases is that the ICC need not prepare a comprehensive EIS relating to every phase of major federal actions, but may defer environmental issues for more appropriate handling in subsequent proceedings. A second result is the apparent overruling of Green County and Harlem Valley as to the timing of an impact statement: a draft EIS need not be prepared prior to initial hearings and may not be necessary at all.

III. DEVELOPMENTS SINCE SCRAP

A. RECENT LEGISLATION

Perhaps the best insight into the difficulties which NEPA has generated for the ICC is given by examination of recent legislation relating to NEPA and recyclables. When the Regional Rail Reorganization Act of 1973 was first being considered, the Senate version contained specific instructions for the ICC to follow in dealing with freight rates for recyclables. The ICC was directed to effect lawful changes in the rate structure so as to “promote the movement of recovered materials in commerce at the lowest possible rates compatible with the maintenance of adequate transportation service,” and the Administrator of the Environmental Protection Agency (EPA) was to take

77. 422 U.S. at 320.
78. Id. at 321.
80. 422 U.S. at 325.
81. Id.
84. Id.
all action necessary to insure that these changes were implemented.\textsuperscript{85} Unreasonable and unjustly discriminatory rates were made unlawful, with unjust discrimination specifically related to competition between recovered and virgin natural materials.\textsuperscript{86} To insure proper consideration of this competition, the Senate version provided that in proceedings before the ICC, virgin and recovered materials were presumed to be competitive when these are functionally or technically equivalent in the production of similar end products.\textsuperscript{87} Furthermore, any interested person was allowed to challenge an existing rate, and in such a proceeding the burden of proof was shifted from the challenging party to the carrier.\textsuperscript{88}

The House showed little interest in these provisions, and as a result the Act as passed merely directed the ICC to adopt rules designed to eliminate discrimination against recyclable materials.\textsuperscript{89} This provision was codified at 45 U.S.C. § 793. But in 1976, section 793 was extensively amended by section 204 of the Railroad Revitalization and Regulatory Reform Act (4-R Act)\textsuperscript{90} and now more closely resembles the original Senate version.\textsuperscript{91} Section 793 now "directs the Commission to conduct an expedited investigation of the rate structure for the transportation of recyclable or recycled materials and . . . the manner in which that rate structure has been affected by the general rate increases approved by the Commission."\textsuperscript{92} Secondly, it authorizes the Administrator of the EPA to participate as a party in those proceedings and to take steps necessary to insure the ICC's compliance with this directive.\textsuperscript{93} Thirdly, it requires the development of research and demonstration programs designed to improve transportation of reclaimed material.\textsuperscript{94} And finally, it requires the ICC to "comply fully" with NEPA requirements.\textsuperscript{95}

It is not clear why section 793 was thus amended, and the legislative history relating to this point is not helpful. We may speculate, however, that Congress was not entirely happy with the ICC's attitude towards environmental concerns. The Senate Report stated: "The record before the Committee indicates that the Commission may not be taking into account the full competitive relationship between the recyclable and recycled commodities,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id. The legislative history noted: "In past investigations of rates for competing recovered and virgin materials, the ICC has denied that certain virgin and recovered materials compete with each other or has rejected evidence of the extent and manner of such competition." Id.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} 45 U.S.C. § 793 (Supp. IV 1974).
\item \textsuperscript{90} Pub. L. No. 94-210, 90 Stat. 33 (1976).
\item \textsuperscript{91} 45 U.S.C.A. § 793 (West Supp. 1977).
\item \textsuperscript{93} 45 U.S.C.A. § 793(b) (West Supp. 1977).
\item \textsuperscript{94} Id. § 793(c).
\item \textsuperscript{95} Id. § 793(d).
\end{itemize}
\end{footnotesize}
on the one hand, and virgin materials on the other hand."\(^{96}\) Possibly the lengthy SCRAP litigation had brought to Congress' attention some signs of unwarranted hesitation on the part of the Commission.

Particularly interesting is the directive in the revised section 793 that "in all proceedings under this section, the Commission shall comply fully with the requirements of the National Environmental Policy Act of 1969."\(^{97}\) That sentence may be read as requiring ICC compliance with NEPA only in proceedings mandated by section 793 (section 204 of the 4-R Act). However, the legislative history, though sparse, indicates that Congress' intent was to require such compliance in all proceedings arising under both sections 203 and 204 of the 4-R Act.\(^{98}\)

Section 203 amended sections 15(3) and 15a of the Interstate Commerce Act.\(^{99}\) It specifies that in deciding on proposals to cancel joint and through rates under section 15(3), the Commission must consider the question of potential energy savings, compare distances over alternate routes, and take into account the overall impact of such cancellation on affected shippers. It also requires that the ICC "in any proceeding which involves a proposed increase or decrease in railroad rates, specifically consider allegations that such increase or decrease would change the rate relationship between commodities. . . ."\(^{100}\)

There is thus implicit in section 793 a congressional determination that the ICC has been lax in its compliance with NEPA where transportation of recyclable materials is at issue. Furthermore, if section 793 is read together with section 203 of the 4-R Act, it becomes evident that Congress was concerned not only with the rates applied to reclaimed materials but also more generally with the Commission's consideration of environmental effects arising from all its rate-making proceedings.  

B. RATES FOR RECYCLABLES

On February 26, 1976, the ICC instituted an investigation of the rate structure relating to recyclable and recycled materials.\(^{101}\) The final impact statement for this proceeding issued on December 20, 1976. It found that:

The environmental impacts associated with the various freight rate policies considered are insignificant. Demand analyses show that the utilization of scrap steel is virtually unresponsive to price, as technological limitations on furnace inputs constrain the substitutability between steel scrap and iron ore. Recycling aluminum offers considerable energy savings, but the unresponsiveness to price and the small proportion of rail costs to total price means freight rates have negligible impacts on scrap.
This general conclusion was reached even though it was acknowledged that producers relying exclusively on scrap materials are significantly affected by transportation rates, and even though maintenance of a constant disparity between scrap and iron ore rates (as opposed to the growing disparity between these rates) would have prevented the 12,653,000 net ton decrease in scrap consumption which occurred from 1966 to 1975. It implies that congressional fears of rate discrimination against recyclables are unfounded.

C. The New ICC Regulations

Apparently the ICC has now accepted its full responsibilities under NEPA, as the regulations in effect throughout the SCRAP controversy have been supplanted by new regulations. Three major changes from the prior regulations merit particular attention. First, the new rules distinguish among various classes of ICC actions: 1) those which normally require impact statements, 2) those which may require impact statements but normally do not, and 3) those in which environmental issues normally are not present. A second modification is that though carriers filing applications must still submit environmental information, the information required varies according to which of the above-described categories is applicable. And thirdly, the revised regulations seek to have a draft EIS prepared prior to evidentiary hearings.

Thus, the first step in the Commission's section 102(2)(C) process occurs when a shipper makes an application before the Commission. He must at this point decide in which category of actions his application fits. If it is a rail line construction, commuter fare increase, discontinuance of passenger trains, or a merger, control, or consolidation of two or more Class I railroads, it is an action which normally requires an EIS, and the applicant must submit a Detailed Environmental Impact Report (DEIR), which is

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103. Id. at 9-12 to 9-17.
104. 49 C.F.R. § 1100.250 (Oct. 1972 ed.).
105. 49 C.F.R. §§ 1108.1-20 (1976). The rulemaking proceeding (Ex Parte No. 55 (Sub-No. 4)) in which these new regulations were promulgated was instituted in response to the Second Circuit's decisions in *Green County* and *Harlem Valley*, both of which called into question the adequacy of the ICC's NEPA procedures. Just as these proceedings were getting underway, however, the Supreme Court handed down its decision in SCRAP II. Though the decision left many questions about NEPA unanswered, its result indicated that the Commission's regulations arguably complied with NEPA. As a result a number of parties involved in Ex Parte No. 55 asserted that no new regulations were necessary, 352 I.C.C. 451, 454 (1976). Nevertheless, the Commission decided that new regulations would be more appropriate.
106. 49 C.F.R. § 1108.8(d) (1976).
107. Id. § 1108.9.
108. Id. § 1108.10.
109. Id. § 1108.8(d).
110. Id. § 1108.12.
similar in scope to an EIS. If instead the proposed action relates to line abandonments or acquisitions, railroad mergers, trackage rights proceedings, general rate increases, water carrier certification, cases involving recyclables, a Supplemental Environmental Evaluation (SEE) must be filed. A SEE is in effect a watered-down DEIR, with a format somewhat similar to that of an EIS. All other actions require a statement from the applicant indicating the presence or absence of any environmental impact resulting from the proposed action. Additionally, other parties to the proceeding may file statements alleging or denying the presence of environmental impacts, though they must be prepared to support the allegation with specific data.

The second step of the process requires determination by the ICC of whether or not the action is "major" and "significant" enough to trigger NEPA's EIS requirements. For proceedings not requiring a DEIR or a SEE, the initial procedural order will normally include a Summary Environmental Negative Declaration (SEND) prepared by the Commission's environmental affairs staff which indicates that the action is not a major federal action significantly affecting the quality of the human environment. A SEND is subject to further evaluation and may be replaced by an EIS, or, where appropriate, an Environmental Threshold Assessment Survey (TAS), which is in effect a more detailed SEND. If the Commission decides that an EIS is required, a draft is prepared and circulated for comment by other agencies.

The final statement is to "accompany the proposal through the Commission's review process" and except for when statutory time limitations prevent it, a final EIS will be made available to the public at least fifteen days prior to that portion of any oral hearings relating to the impact statement.

On the whole, these new regulations appear both to facilitate compliance with NEPA and to relieve some of the burdens currently placed on applicants before the Commission. As was noted by the Commission:

[U]ncertainties which currently exist with regard to the nature and scope of environmental information to be filed with each type of application will

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111. In investigation and suspension or a formal docket case involving recyclables, the SEE need not be filed until thirty days after service. Id. § 1108.12(b)(2).
112. Id. § 1108.9(a)(2).
113. Id. § 1108.12(b). Additional information is required for rail abandonment applications.
Id. § 1108.12(c).
114. Id. § 1108.12(d).
115. Id. § 1108.12(e).
116. Id. § 1108.14.
117. Id. § 1108.10(b).
118. Id.
119. Id. § 1108.13.
120. Id. § 1108.14.
121. Id. § 1108.14(e).
122. Id. § 1108.16(d).
123. Id. § 1108.16(b).
be substantially eliminated. The existing rules provide that whenever a
significant environmental impact is found or alleged all parties shall file
detailed environmental impact statements. The adopted rules, on the
other hand, require the filing of a detailed environmental impact report
(which is similar in scope to an impact statement) only if the particular
action has been previously identified in proposed rule 1108.8(d) as nor-
mally requiring an impact statement. 124 Consequently, applicants before the Commission will be able to more readily
develop environmental expertise in those areas most likely to have a
significant impact upon the environment. They will no longer have to waste
time and money researching potential impacts which will clearly be insignif-
icient. In addition, since the rules now specify the type of information re-
quired to be submitted, applicants may prepare DEIR's and SEE's with more
certainty that they will be adequate.

NEPA considerations should also be better served. Early preparation of
a final EIS will certainly facilitate environmentally conscious decision-making
and better inform interested parties as to the impacts that can be expected
to result from the action. Also, accurate classification designed to indicate
which of the ICC's actions are likely to have significant environmental impact
will help focus attention on problem areas and direct energies to their
solution.

However, a cautionary note should be injected. As SCRAP II indicated,
the ICC need not prepare impact statements prior to hearings. Neverthe-
less, the Commission decided that it would be wiser to investigate environ-
mental problems fully at the outset of actions in order to prevent delays once
proceedings are in progress. 125 Furthermore, the Administrative Procedure
Act 126 may require that the EIS be available during adjudicatory proceed-
ings. 127 The Commission acknowledged this fact 128 and weighed it heavily in
its decision to require final impact statements to be completed before oral
hearings. However, there may be situations where the final EIS will not be
available prior to significant points in the decision-making process. But
since these are limited to occasions where statutory time limits require
expeditious action, they should not be much of a problem. 129

125. Id. at 460-61.
127. 5 U.S.C. §§ 552, 554. In view of the fact that the APA requires decisions in adjudicat-
ory proceedings to rest on a well-developed record, and NEPA requires that environmental
factors be considered in agency decision-making, where adjudicatory proceedings are held
"the impact statement should be treated as evidence, subject to cross-examination, and be
placed in the record along with the other evidence." Ex Parte No. 55 (Sub-No. 4), 352 I.C.C.
451, 460 (1976). SCRAP II did not present this problem because there a rulemaking
proceeding was involved and the APA does not pose as strict requirements in rulemaking
proceedings as it does in adjudicatory proceedings.
128. Id.
129. Note that Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971),
indicated that NEPA duties may be excused when there is a clear statutory conflict between
NEPA and another statute.
The only other potential problem area of the Commission's current regulations is the classification of cases involving recyclable commodities as cases which do not normally require an EIS. 130 The Commission explained this by indicating that its past experience with recyclables leads it to conclude that neither rate increases nor other types of actions involving recyclables have any significant impact upon their use. 131 This conclusion would not be troubling if the legislative history of the 4-R Act, noted above, did not indicate Congress' intent that the transportation of recyclable commodities should receive special attention by the Commission. However, since the ICC's expertise in matters of transportation regulation far exceeds that of Congress, we may trust that its conclusions are justified.

IV. CONCLUSIONS

Other agencies have had greater success implementing NEPA than the ICC has. The nature of this difference can be better understood by looking at three points: 1) each agency's past experience with cost-benefit analysis and environmental assessment, 2) the nature of each agency's decision-making processes, and 3) each agency's conception of its primary responsibility.

The DOT, for example, has in the past been required to consider "environmental" factors in its assessments. Section 4(f) of the Department of Transportation Act of 1966 requires the Secretary of Transportation not to approve any highway project which will use parkland unless there is no feasible and prudent alternative, and unless all possible steps are taken to minimize harm to that parkland. 132 The ICC, on the other hand, has primarily been concerned with economic impacts analyzed according to congressional directives. Also, the DOT has often been engaged in cost-benefit analysis, whereas the ICC follows rather narrow statutory tests when deciding on an issue. Experience has greatly benefited the DOT and made its transition into NEPA procedures rather painless. In comparison to agencies such as the DOT, then, the ICC was disadvantaged in two ways: it had little experience in dealing with "environmental" factors, and it was less accustomed to sweeping cost-benefit analysis.

Secondly, the manner in which decisions are reached differs greatly among agencies. For instance, the DOT makes its investigations and assessments using primarily its own resources, while the ICC is to a large extent dependent upon adversary proceedings and must balance the special interests involved. Thus, DOT personnel seek all the facts to be used in cost-benefit analysis and are mindful that it is DOT money that is being spent. In regulatory proceedings, however, the facts considered are usually

130. 49 C.F.R. § 1108.9 (1976).
131. See Ex Parte No. 55 (Sub-No. 4), 352 I.C.C. 451, 464-65 (1976). The DOT's experience with NEPA has been much less traumatic than that of the ICC, largely because of its previous experience with cost-benefit analysis generally and environmental issues specifically.
those presented by the parties. Often these parties are restricted to interested carriers, none of whom care to raise difficult environmental issues or who are concerned enough about them to perform the requisite research.

Finally, each agency's conception of its responsibilities differs. The DOT considers its NEPA duties equal to its other responsibilities. But the ICC has always considered itself an adjudicator-regulator, an entity designed to decide controversies relating to the transportation of commodities and goods. The fair and efficient movement of these items is the ICC's primary goal. NEPA duties are considered less important than the issues of economic regulation.

It is too early to tell how environmental concerns will fare under the new ICC regulations, but it is safe to say that the Commission has made great strides in adequately adjusting to NEPA's requirements. It is not likely that the SCRAP history will be repeated with some new issue, for the ICC seems to be developing an "environmental outlook." Under the new regulations environmental issues will be scrutinized more closely by the ICC, although it remains to be seen whether they will substantively affect its regulatory decisions.
Elimination of Gateways in Section 5(2) and 212(b) Proceedings*

GERALD M. BOBER**

I. INTRODUCTION

Public awareness of the energy crisis has led federal agencies to take measures which encourage the conservation of fuel. As part of this effort to save energy and under its broad powers to regulate the motor carrier industry,1 the Interstate Commerce Commission has promulgated gateway elimination regulations to reduce fuel consumption and increase operating efficiency.

The term "gateway" is used to describe the point at which an irregular-route common carrier combines or "tacks" two separate and unrestricted grants of operating authority. The "gateway" is the point common to each grant of authority. By tacking authorities an irregular-route common carrier can perform a through transportation service between the points in one authority and those in another.

The need for the elimination of gateways became apparent as irregular-route carriers obtained successive grants of authority through

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1. See American Trucking Assoc. v. United States, 344 U.S. 298 (1953)
purchase or direct grant, because many operations involved circuitous routings and more direct operations would be in the public interest. For this reason the Commission applied the gateway elimination regulations to transactions under section 5(2) of the Interstate Commerce Act. Section 5(2) provides that where the Commission finds a proposed purchase of irregular-route motor carrier operating authority will be consistent with the public interest an order approving the transaction will be entered, "subject to such terms and conditions and such modifications as it will find to be just and reasonable."2

II. BACKGROUND

On November 23, 1973, the Commission issued its Notice of Proposed Rulemaking and Order on Gateway Eliminations.3 The Notice proposed regulations affecting the tacking and joining of currently held separate irregular-route authorities at a common point of service—a "gateway"—by a single carrier and applying to all future applications for irregular-route authority. These proposed regulations would have prohibited the tacking of all grants of irregular-route authority and would have "pertain[ed] not only to applications for new or enlarged operating rights but also to transfer and acquisition applications."4

A. THE GATEWAY ELIMINATION RULES

The Commission issued its Gateway Elimination Report5 containing the final gateway and tacking rules and regulations on February 25, 1974. The gateway rules apply only to irregular-route motor carrier operations, and their salient features are as follows:

(1) No carrier holding irregular-route authority, however acquired, can tack two or more grants of such authority except as provided.6

(2) When a movement over a gateway route is 300 miles or less from origin to destination, the carrier may, but it is not required to, terminate such gateway operations.7 (300 mile rule).

(3) When a movement over a gateway route exceeds the distance between the origin and destination points over the most direct route available by 20% or less, the carrier must file a "letter-notice", notifying the agency of its desire to conduct direct operations if it wishes to continue providing that service. (20% rule).8

(4) When a carrier desires to continue service between an origin and destination point when the movement over the gateway route is more

3. Ex Parte No. 55 (Sub-No. 8), 119 M.C.C. 170 (1973).
4. Id. at 197 n.12.
5. Ex Parte No. 55 (Sub-No. 8) 119 M.C.C. 530 (1974).
7. Id. § 1065.1(b).
8. Id. § 1065.1(a)(3), 1(d)(1)(i).
than 20% greater than the distance over the most direct route available, it
must file an application for approval to operate a direct route. Pending a
final determination, the circuitous service may be continued.9

(5) When operations over the most direct route available are ap­
proved by the Commission either by the letter-notice or application proce­
dure, the carrier is required to offer the through service to the public.10

Briefly stated, the adopted rules enable irregular-route carriers to
avoid gateways and operate over the most direct highway distance
between the points to be served. However, when the gateway operations
are involved, a carrier has to discontinue such operations, unless it has
filed an appropriate application seeking direct service authority.
Nevertheless, existing operations can be continued pending disposition
of the application for direct authority.

Although the Gateway Elimination Rules do not specifically relate to
acquisition proceedings under sections 5(2) and 212(b),11 the Commis­
sion's report provides for the situation where a carrier seeks to extend its
operations through the purchase of another carrier's rights. If the possi­
bility of tacking is involved, then the acquiring carrier is required to
provide notice in the transfer application of such tacking possibilities and
to show that such operations are required by the public convenience
and necessity.12 The Commission reasoned that such a showing "will
allow irregular-route . . . carriers to utilize acquisitions and mergers13 as
a means of growth and at the same time will eliminate, to the extent
required by the present or future public convenience and necessity,
unnecessary fuel-wasting circuity."14

B. THE ICC POLICY STATEMENT

On December 4, 1974, the Commission issued its Policy State­
ment,15 which clarified the procedures for handling applications under
sections 5(2) and 212(b) of the Interstate Commerce Act in those situa­
tions where the joinder of separate irregular-route rights is proposed.

The Policy Statement discussed three situations relating to pending
sections 5(2) and 212(b) applications involving a joinder of separate
unrestricted segments of irregular-route authority. The first dealt with
those applications which had been decided and consummated that
were filed before November 23, 1973, in which a certificate of public

9. Id. § 1065.1(b).
10. Id. § 1065.1(a).
13. The gateway rules do not apply to commonly controlled carriers as they join their
respective authorities at interchange points. Id. at 556.
14. Id. at 553.
convenience and necessity had not been issued. In this situation, the applicant was given 60 days from issuance of the certificate to file a letter-notice or an OP-OR-9 application pursuant to the Gateway Elimination Rules.16

The second situation dealt with applications filed before November 23, 1973, but not yet decided. In this situation, the parties had (a) 60 days from December 4, 1974, to file a letter of intent to tack and eliminate any resulting gateways and (b) 60 days from the date of consummation to file an OP-OR-9 application pursuant to the Gateway Elimination Rules.17

The third situation dealt with applications filed after November 23, 1973, at any stage of the administrative process for which no certificate had yet been issued. In this situation, the parties were given 60 days from December 4, 1974, to file (a) supplemental evidence showing a need for tacking and (b) an OP-OR-9 application pursuant to the Gateway Elimination Rules.18

The Policy Statement also discussed future section 5(2) and 212(b) applications, that is, those filed after December 4, 1974. It indicated that, in applications filed under section 5(2) or 212(b), the parties would be required to submit evidence with the application to justify tacking of separate irregular-route authorities and to file a directly related OP-OR-9 application for the elimination of the gateway and the initiation of direct through operations.19 The Policy Statement also made it clear that the failure to seek and justify elimination of the gateway would result in the imposition of a "no tacking" restriction.20

Although the Policy Statement generally clarified application procedures for section 5 and 212(b) applications, confusion surrounded applications which were pending on the date the Policy Statement was issued.21 This necessitated the adoption of a flexible posture by the

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16. Id.
17. Id.
18. Id.
19. Id.
20. Id. Prior to the adoption of the Commission's Gateway Elimination Rules, the Commission ordinarily did not impose tacking restrictions in acquisition proceedings under section 5 of the Act in the absence of evidence showing that protestants required such protection. Penn Yarn Express, Inc.—Purchase—Van Transport Lines, Inc., 87 M.C.C. 365 (1961).
21. E.g., the statement was dated Dec. 3, 1974, served Dec. 4, 1974, and published in the Federal Register on Dec. 9, 1974. A question arose as to when the 60-day period for filing gateway applications in pending proceedings terminated. To clear up the confusion, the Section of Finance took the position that the period began on the date of publication, December 9, 1974, and terminated on February 10, 1975.

Fees were also at issue. It was decided that when an applicant files a directly related gateway application, and the section 5 or 212(b) application has not been consummated, no fee will be charged. If the transaction has been consummated a filing fee of $350 is necessary.
Commission in handling those applications, as can be seen in several informal decisions. For example, for section 5 applications that were pending on petition or exception, the section 5 proceeding, where possible, was held in abeyance until the gateway application was ripe for disposition. The proceedings were consolidated to expedite the entire proceeding and to insure continuity. Likewise, proceedings were consolidated where section 5 applications were filed, but where no decision had been rendered.

III. DECISIONAL LAW

The Commission’s Report, Regulations and Policy Statement have resulted in a body of decisional law. Some highlights of decisional law concerning gateway elimination applications which are related to section 5 and 212(b) applications follow.

A. CRITICAL FILING DATES

The Regulations and the Policy Statement provide that an applicant may file a letter-notice or OP-OR-9 application to eliminate those gateways resulting from an acquisition application which has been filed, decided and consummated on or before November 23, 1973, within 60 days after the issuance of the certificate resulting from the purchase. While there is no report or order on point, this interpretation appears reasonable in the light of the language of the above mentioned regulation section. The Policy Statement also provides that in proceedings filed before but not decided until after November 23, 1973, an OP-OR-9 application must be filed within 60 days of consummation of the finance proceeding.

B. EVIDENCE

In the Policy Statement, the Commission stated that the criteria to be followed generally for the elimination of gateways created by the approv-

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23. Consolidation would result in two ways: (1) Under modified procedure verified statements in both the section 5 and the gateway case would be accepted, and, after all statements were in, the case would be consolidated; (2) With an unopposed section 5 case both applications would be consolidated after the gateway application was ripe.
al of the section 5 or section 212(b) application are those enunciated in Childress-Elimination Sanford Gateway 28 and Maryland Transportation Co. Extension-Specified Commodities 29. These criteria require an applicant to introduce into the record evidence through (1) an abstract showing a substantial number of shipments through the involved points or (2) supporting shipper statements indicating that the public convenience and necessity requires the direct service by elimination of the involved gateways.30 The applicant is also required to show that approval of the gateway application would not create a new service or a different service which would materially improve the applicant's competitive position.31

1. Abstract of Shipments

Under the Childress criteria, those applicants who relied on past operations would have to submit with the OP-OR-9 application an abstract of shipments showing substantial operations through the involved points. Although a section 5 application also requires an abstract of shipments to be submitted, it is not necessary for the applicant to submit two separate abstracts.32 A single abstract is permissible, provided that the abstract is in proper form and incorporates operations through the points involved in the gateway elimination applications for the required period.33

2. Substantial Number of Shipments

The Commission has taken varying positions about what is required for a showing of a substantial number of shipments. Review Board Number 2 has asserted that "authority (to eliminate a gateway) will be approved in each case in which the evidence of record demonstrates that applicant transported 24 or more shipments from one origin State to a single destination State through the pertinent gateways."34 Review Board Number 5, also, appears to have adopted the "24 shipment Rule."35 However, in the past the Commission, Division 1, has found one shipment a month to be the standard for the minimum amount of traffic

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28. 61 M.C.C. 421 (1952).
33. Id. This would avoid needless duplication and effort.
that would be considered substantial.36

While the "24 shipment Rule" appears to represent one view, the rule is too rigid. If an applicant introduces evidence of 23 shipments, the application would be denied. It is incongruous that the present and future public convenience and necessity will be found where there are 24 shipments but will be absent because there are only 23. It seems that the better criteria would be for the Commission to take into account the commodities involved, the character of the area served in terms of population and industry, the amount of traffic transported through the gateway, and the financial and material capabilities of the carrier. In May, 1977, the Commission did revise the "test" to reflect a less rigid approach, stating that the "24 shipment Rule" did not constitute an appropriate test of substantiability.37

3. Shipper Support

Question IV of application form OP-OR-9 and Rule 247(b) of the Commission's Rules of Practice require an applicant to indicate whether its application will be supported by shippers, or others, who will present evidence about their need for the service proposed.38 Question IV continues:

If the answer is Yes, applicant must attach to this application one or more certifications of support which shall be prepared in the form prescribed in the appendix to the instructions accompanying this application form....

Except for good cause shown, no application depending upon the sup-

37. Report on Reconsideration in Groendyke Transp., Inc., Extension—Gateway Elimination, 126 M.C.C. 571 (1977). In Groendyke, the Commission stated:

While the overall volume between these points is relatively low, applicant has demonstrated that it is an efficient and effective competitor for the involved traffic, and our grant of authority is not likely to result in any substantially enhanced ability on its part to handle that traffic.
The involved gateway elimination rules were enacted ... to eliminate ... unnecessary miles being traveled by motor common carriers of property operating through gateways over irregular routes. ... In our opinion the review board's grant of authority will further that end without adversely affecting the competitive balance in the areas considered.

Finally, ... [an] examination of Commission records reveals that numerous grants of authority have been approved upon a showing of fewer than 24 shipments during the 2-year base period. A mechanical rule such as 24 shipments in a 2-year period would not constitute an appropriate test of substantiability as that term is used in Childress. Any decisions to the contrary are erroneous and are hereby expressly overruled.

porting evidence of public witnesses will be accepted for filing unless it is accompanied by the certificates of support of such witnesses. . . 39

The requirement of shipper certification is designed to insure that the application will be supported and is filed with a bona fide intention of prosecuting it to its final conclusion. Furthermore this information facilitates a determination about the manner in which the application should be processed: if a hearing is to be held, it permits the allocation of sufficient hearing time to accommodate the expected number of shipper witnesses. Certification also provides information to actual or potential protestants so that they can better decide their positions in the matter and can prepare their presentations, thus resulting in more expeditious disposition of the proceeding. 40

The Gateway Elimination Rules permit applicants to present evidence in the form of data relating to actual operations or in the form of statements from supporting shippers. 41 The Policy Statement clearly indicates that in all future section 5 proceedings which are related to gateway elimination applications, the applicant will be held to the usual Commission procedure regarding the submission of evidence. 42 In those proceedings, where an applicant relies on evidence in the form of statements from supporting shippers, the requirements established by Schaeffer Extension—New York City 43 and incorporated in Rule 247 are applicable. 44

Form OP-OR-9 and Rule 247 require that where there has been noncompliance with the certification requirements, the testimony of public witnesses upon whose behalf certificates have not been timely filed will not be permitted, absent a showing of good cause for failure to comply. 45

In keeping with due process considerations, the purpose of the Schaeffer Rules, among other things, is to provide a degree of information to protestants, so that they can make adequate preparation for cross-examination. 46 Good cause appears to exist where (a) the applicant's failure to comply with the Commission's rule was due to uncertainty 47 or (b) the protestants have not been prejudiced. 48

43. 106 M.C.C. 100 (1967).
45. Anderson, supra note 32.
46. 106 M.C.C. 100, 102 (1967).
C. Operations Under Temporary Authority

1. Gateway Elimination Applications

Under Childress, a gateway elimination application may be approved if the applicant is actually transporting a substantial volume of traffic between the points involved and the elimination of the gateway will not materially improve the applicant's competitive position to the detriment of existing carriers.49

In evaluating the evidence of past operations under temporary authority, Review Board Number 5 has held that operations under temporary authority will not suffice to meet the criteria of the Childress case.50 Nevertheless, Division 3 has considered evidence of operations under temporary authority to be of probative value (1) to show the ability of a carrier to provide the service, and (2) to indicate the volume of traffic involved and the effect of a grant on existing carriers, provided that there is other supporting evidence.51 However, where no additional evidence was introduced, the Division, like the Review Board, has denied the gateway application.52 Where additional evidence was introduced, the gateway application has been granted.53

The traditional view has been that evidence of service rendered under temporary authority, although not conclusive, is admissible and properly considered with other evidence to determine whether the transaction and unified service will be in the public interest.54 Recently the Commission has adopted a more flexible approach and has approved an application largely on the basis of traffic handled under temporary authority where there was also evidence of a public need for the service.55 This modern approach is more realistic because operations under temporary authority are particularly pertinent when they are of long standing and afford a means of determining whether the service resulting therefrom has had any destructive effect on the operations of protesting carriers.

Once temporary authority is authorized under section 210a(b) it is "extended" until the decision in the permanent application is administra-

49. Anderson Trucking Serv., supra note 40, at 683.
tively final in accordance with section 558 of the Administrative Procedure Act. The length of time that it takes to make a case administratively final is primarily controlled by the applicant. If it is desirable, an applicant can operate under temporary authority for a lengthy period, and this period can be used by the applicant to demonstrate that a public need exists for tacking and elimination of the gateway.

Were the Commission either to prohibit the introduction of such evidence or to refuse to consider such evidence, it would be reversing prior Commission decisional law and, more importantly, it would be failing to consider public need.

2. **Tacking Temporary Authority**

Except as provided, the Commission's Gateway Elimination Regulations prohibit tacking by an irregular-route carrier of two separate and unrestricted grants of its authority at a service point common to each. However, this prohibition does not apply to operations under temporary authority.

When temporary authority under section 210a(b) of the Act is granted, the lessee is, in effect, occupying a position somewhat similar to that of a trustee of lessor's operating authority in protecting the integrity of the properties and the furnishing of adequate and continuous service to the public pending final determination by the Commission of the "permanent" application. After temporary authority is consummated, the service the lessee performs is not unlike an interline service. As the *Gateway Elimination Report* defined tacking as a combining by a carrier of its own authority to provide a through service, operations conducted under temporary authority pursuant to section 210a(b) of the Act do not come within the ambit of the Gateway Elimination Rules, because no gateways are created.

**D. Gateways Which May Be Eliminated**

Two proceedings have discussed the gateway elimination problem and reached different results. The proceedings are *Gray Moving &

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56. 5 U.S.C. § 558(c)(1970). The Commission has modified its regulations concerning temporary authorities, 49 C.F.R. § 1101 (1976), with respect to the duration of temporary authorities issued under sections 210 a(b) or 311(b) of the Act. Under the modified regulations, temporary authorities are no longer "extended" but will automatically continue in force until the corresponding permanent application is finally determined. 42 Fed. Reg. 28,201 (1977).


Storage, Inc.—Purchase-Warner, and C. and H. Transportation Co., Inc.—Purchase (Portion)—A.A. Martin Transportation Co., Inc.

In the Gray case, the applicant sought to eliminate the Utah gateway (the points of joinder were Weber and Box Elder Counties, Utah) and provide direct service to thirty-three states and the District of Columbia. In considering only the elimination of the gateway resulting from the joinder, at a common point, of the authority to be acquired with a specific grant of authority held by the vendee, the Division found only four states involved. Based on this analysis the Commission, Division 3, stated:

For those reasons we would grant the application under section 207. However, it shall be granted only to the extent which the request relates to the section 5 proceeding. In a related proceeding we must consider only those gateways created in connection with the section 5 authorization. . . . Here, the section 5 proceeding created the Utah gateways by authorizing the tacking of Gray's certificate in No. MC-112070 (Sub-No. 8) with Warner's certificate in No. MC-51170. We will permit, therefore, direct service between these two certificates only. Should other gateways between Gray's subnumbered certificates be eliminated in accordance with the procedures under the Gateway case, it is possible that the authority in the form requested in this application could result. However, those matters must be determined independently.

In the C. and H. case, a different result was reached. Division 3 stated:

that pursuant to the Commission's Special Gateway Elimination Procedure . . . consideration will be given herein to the elimination of all gateways in the various grants of C & H's authority which would enable C & H to provide a through service between points in the operating authority held by C & H on the one hand, and on the other, points in the Martin authority which C & H has been author[ized] to acquire.

The gateway elimination rules and regulations were adopted to promote economical and efficient motor carrier operations, without altering the existing competitive balance, by authorizing direct service instead of circuitous gateway operations. The primary goal of the Commission's gateway rules is to reduce fuel consumption and increase operating economies and efficiencies. Thus, the administrative process may best be served, other factors being considered, if the entire gateway matter is resolved contemporaneously with the section 5 application.

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60. 122 M.C.C. 316 (1976).
62. Gray Moving and Storage, supra note 37, at 331.
64. Paramount Movers, Inc.—Extension—Gateway Elimination, 125 M.C.C. 388 (1976).
E. Specific Applications of the Gateway Rules

In several proceedings, applicants have asserted that (1) many of the gateways through which they operate come within the 20% rule; 67 (2) many proposed through movements could be performed without Commission approval of gateway eliminations under the 300 mile rule; 68 and (3) they may continue to join irregular-route authorities and perform the through movements without seeking approval for elimination of the gateways where operation through the gateway involves minimal or no circuity. 69

In rejecting the argument that movements over gateway routes which involve less that 20% circuity may be eliminated by the filing of a "letter-notice," Division 3 has stated:

That the use of letter-notices to facilitate the elimination of gateways involving 20% or less circuity . . . was merely an initial procedural distinction which applied only to elimination of gateways between irregular route certificated authorities issued to the carrier-applicant . . . pursuant to an application pending before the Commission on or before November 23, 1973. . . . 70

In rejecting the argument that movements of 300 miles or less fall within the 300 mile exemption of the Gateway Elimination Regulations, 71 Division 3 has stated:

That the purpose of the 300 mile exemption was to enable carriers to continue to tack separate irregular route operating authorities not specifically restricted against tacking [that were] held by an individual carrier at the time of the promulgation of the exemption in situations involving movements of 300 miles or less, . . . the exemption . . . states, "Except . . . on movements of 300 miles or less . . . a common carrier by motor vehicle authorized to transport property. . . is prohibited from joining any of its irregular route certificated authorities on and after the effective date of this regulation . . . ." [The exemption] has no applicability in situations


71. 49 C.F.R. § 1065.1(b) (1976).
where the subject irregular route operating authorities . . . [were] not held by an individual carrier on the effective date of the regulation . . . 72

In rejecting the assertion that movements involving zero circuity are exempt from the gateway regulations, the Commission has stated:

That the [Gateway Elimination] [R]egulations prohibit the tacking of any irregular route certificated authorities unless the requirements of those regulations are met; that zero or minimal circuity in operations through a gateway does not exempt a through operation performed by tacking of irregular route authority as a result of approval of a section 5(2) application, from compliance with those regulations. 73

The Gateway Elimination Report 74 provides that where one existing carrier seeks to extend its irregular-route operating authority through the purchase of additional irregular-route authority, the applicant shall be required to give notice in the application with respect to such tacking possibilities and to prove that the present or future public convenience and necessity requires that those authorities be tacked or joined. Thus, if the present and future public convenience and necessity can be shown by the filing of a directly related application sufficient to warrant tacking of two authorities, then the Commission may authorize tacking. 75

F. TRANSFERABILITY ASPECTS OF GATEWAY AUTHORITY

Under the gateway elimination rules, a carrier could file a letter-notice, obtaining letter-notice rights, where the certificated irregular-route authorities which created the gateway were issued to the carrier pursuant to an application proceeding pending before this Commission on or before November 23, 1973, and where the direct mileage between the origin and destination to be served exceeded 80 percent of the distance between those points via the gateway. Where movements through the gateway embraced a greater degree of circuity than 20 percent, the rules required the carrier to file a Sub-G (OP-OR-9) application and obtain "G" rights. 76

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74. Ex Parte No. 55 (Sub-No. 8), 119 M.C.C. 530, 552-53 (1974).
76. See text accompanying notes 8-9 supra.
1. Before Maxwell Co.

In one proceeding, the vendor had secured a letter-notice from the joinder of rights part of which it sought to sell and part of which it would retain. The Commission, Review Board Number 5, in dismissing that portion of the directly related application concerned with the letter-notice "rights" stated:

that the authority in No. MC-14659 (Sub-No. E-1) is an integral part of the operating rights embraced in certificate No. MC-14659 and subs thereto and is not severable and transferable from . . . underlying irregular route authority . . .

Consistent with this reasoning the Commission, Division 3, authorized the sale of letter-notice "rights" where the vendee acquired all of the underlying authority of vendor.

2. After Maxwell Co.

By petition filed October 10, 1975, the Maxwell Co. sought a declaratory order interpreting and answering certain issues raised by the Gateway Regulations. Maxwell Co. requested a ruling from the Commission as to whether operating authorities (letter-notice "rights" and "G" rights) created under the gateway elimination rules could be severed from the underlying authorities that gave rise to their creation. The Commission in holding that such rights may be transferred stated:

Over the years, the Commission has developed a body of general principles governing the transfer of operating authorities under sections 5(2) and 212(b) of the act, and it is to these principles that we now turn. Despite the number of separate authorities that a carrier holds authorizing operations between two specified points, the carrier is deemed to hold only one right to operate between the two points. H.P. Welch Co.—Purchase—E.J. Scannell, Inc., 25 M.C.C. 558 (1939). And, when a carrier seeks to transfer certain of its operating authorities to another carrier, it is improper for it both to transfer and to retain essentially duplicating operating authorities. However, a sale and retention of operating rights between the same points may be approved where such rights authorize service over different routes or with different intermediate points, constitute a separate operation, cover the transportation of different commodities, or provide a completely different service.

Thus, where a carrier seeks to sell letter-notice "rights" or "G" rights or its standard certificates, approval of the application will depend upon

78. Id.
81. Id. at 169.
whether the transaction will result in a duplication of service contrary to Commission decisional law.

IV. CONCLUSION

The Commission’s Gateway Elimination Report states that the Gateway Elimination Rules were adopted to enable carriers “to operate in a more efficient, economic and fuel saving manner” and “to eliminate such gateway operations as may result in inefficiencies and wasteful expenditures of time, money, effort and precious fuel.” The primary goal of these rules is to reduce significantly fuel consumption. To this end the adopted rules and regulations provide for tacking and the elimination of gateways created by the joinder of irregular-route authorities. The regulations prohibit the tacking of irregular-route authorities, with certain exceptions (notably on movements of 300 miles or less, or where the carrier’s certificated authorities specifically authorize tacking or joinder), but provide means by which a carrier may seek authority to operate directly between origins and destinations formerly served via a gateway. However, the fuel conservation goal can be achieved only when an applicant files a gateway application, and presents the evidence needed for the Commission to determine the necessity for direct operations.
A Thinking Person's Guide to Entry/Exit Deregulation in the Airline Industry

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Federal economic regulation touches virtually every industry in the United States. Advocates of free enterprise have challenged vigorously every governmental attempt to expand the scope of its control over economic activity causing a never ending controversy over the efficacy and, indeed, the propriety of regulation. Among the most controversial...

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1. Every rule of law, whether promulgated by the legislative, judicial, or executive branch of government has an economic effect which arguably could bring it within the definition of "economic regulation." However, for the purposes of this article, "economic regulation" refers to the type of law which seeks to impose direct controls on a particular aspect of economic activity. See Shenefield, Regulation and Deregulation—Where Do We Stand, 45 ANTITRUST L.J. 244, 245 n.2 (1976) (for a consistent, albeit more limited definition). This regulation comes in myriad forms, ranging from general to specific applicability. Examples of the former include minimum wage laws and securities laws. Regulation of specific applicability includes that of rail, highway, and interstate gas transportation.

"An industry may be regulated for a variety of economic and noneconomic reasons, but, basically, regulation is applied when it is felt that private enterprise cannot be relied on to provide adequate service at a reasonable price." C. PHILLIPS, THE ECONOMICS OF REGULATION 44 (1965) [hereinafter cited as PHILLIPS]. This concern is reflected in the regulation of the airline industry. 49 U.S.C. § 1302(c) (1970). See test accompanying note 27 infra.

2. The efficacy of economic regulation is challenged whenever it is thought that regulation cannot achieve the desired results which initially prompted regulation. Such a challenge might have been levied at the minimum price regulation of milk which, although state and not...
regulatory legislation was the Civil Aeronautics Act of 1938 (CAA).  

The enactment of the CAA came at a time when the commercial airline industry was still in its infancy.  

The value of a comprehensive national air transport system was readily apparent.  

Impatient to realize this value, Congress responded to a perceived inability of the competitive market system to create such a transportation system.  

The Civil Aeronautics Board (CAB) became the tool for implementing the regulatory scheme that Congress had created to replace the free market. The purpose of this scheme was to build a transport system better suited to the public interest than the existing system.

The propriety of regulation refers to the philosophical justification of economic regulation in a free society. At the very least, the efficacy of regulation must be demonstrated and not assumed in order to be justified. However, such a demonstration will only justify regulation to those who challenge its propriety if the alternatives to regulation are shown to infringe upon individual freedom.

One of the most articulate attacks on such regulation can be found in F. Hayek, The Road to Serfdom (1944) (the author argued that the steady imposition of government control through economic regulation is a course of action which, if not reversed, leads to a totalitarian state in which individual freedom is completely eliminated). See also M. Friedman, Capitalism and Freedom (1962); 122 Cong. Rec. H4389 (daily ed. May 13, 1976) (President Ford extolled the virtues of deregulation as preventing unnecessary infringement on individual choice). While the author does indeed challenge the propriety of most economic regulation, the details of that challenge are beyond the scope of this article.


4. In the seventeen years following the enactment of the CAA, industry revenues increased 4000 percent. Maclay & Burt, Entry of New Carriers into Domestic Trunkline Air Transportation, 22 J. AIR L. & COM. 131, 147 (1955) [hereinafter cited as Maclay & Burt].

5. 83 Cong. Rec. 6635 (1938) (recognizing the value of air transportation and the need for regulation to help it develop).

6. As one commentator put it, the lack of growth "was attributed largely to the failure of the Federal Government up to that time to provide the machinery to encourage and regulate the use of aircraft in commerce." Hester, The Civil Aeronautics Act of 1938, 9 J. AIR L. 451 (1938).

7. It was felt that unimpeded competition among the air carriers "tend[ed] to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest . . . ." S. REP. No. 1661, 75th Cong., 3d Sess. 2 (1938). See also 83 Cong. Rec. 6627 (1938) (Sen. Copeland characterized the aviation situation as chaotic and sought devices for protecting routes); id. at 6635 (Sen. McCarran felt that air transport could have a healthy development only if the competitive bidding process for awarding routes was replaced by a system which awarded routes to those who were best qualified to operate economically.
The system that developed under the guidance of the CAB constitutes the most "comprehensive air transportation network in the world." The system that developed under the guidance of the CAB constitutes the most "comprehensive air transportation network in the world." Thousands of communities have access to commercial flights which can transport people to distant points around the globe. Nevertheless, the entire regulatory scheme enveloping the airline industry has been the subject of considerable criticism. Critics have challenged the underlying economic premises which precipitated the original legislation. Economists are surprisingly unanimous in the belief that the present regulatory scheme has resulted in a less efficient, more expensive mode of transportation than could exist without that scheme. While these economists may disagree with respect to the correct form that any changes should take, regulatory change in the direction of greater reliance on competition seems inevitable.

This article seeks to formulate an objective framework for analyzing the issue of deregulation. Although it focuses on aspects of the regulatory system that govern entry and exit, the analysis should be adaptable to other contexts as well. The suggested framework is designed to be


11. In the past two years, a number of legislative proposals which would change the present regulatory scheme governing the airline industry have been introduced into Congress. See text accompanying notes 162-176 infra. Significantly, the CAB itself authored one of these proposals. See note 163 infra. This suggests that even if no legislative proposal is enacted, the CAB will alter its policy to reflect present congressional concern. In doing so, it will lean more towards reliance on competitive market forces to accomplish the goals of airline regulation and less on its regulatory powers. Indeed, the CAB has already liberalized charter restrictions, and further liberalization which increases reliance on competition is likely. Altschul, Friendlier Elements: For Airlines the Political and Financial Skies are Clearing, Barrons, May 16, 1977, at 9, 24.

12. For instance, such an analysis might prove helpful in testing the continued viability of interstate trucking regulation.
"policy-neutral" so that any desired policy objectives of economic regulation may be tested under such an analysis. In particular, such an analysis should prove helpful in analyzing the viability of CAB fare deregulation.\textsuperscript{13}

At the outset, the existing regulatory structure is outlined. The first step in the analysis identifies the public policy goals generally posited in justification of regulation of airlines, and the specific objectives sought by entry/exit regulation. The economic premises underlying these goals are then identified and examined for validity. The basic question asked is this: "Is regulation the most efficient method\textsuperscript{14} to attain the objectives sought by that regulation?" If the answer is in the affirmative, then the specific type of regulation must be examined in the process of maximizing the desired goals. If, on the other hand, the answer is in the negative, then alternative methods for deregulating the entry/exit aspects of the industry must be examined.

\section*{THE REGULATORY SCHEME}

The primary regulatory mechanisms that Congress gave the CAB to deal with the problems that precipitated regulation were control over fares\textsuperscript{15} and control of the entry/exit aspects of the industry.\textsuperscript{16} This article

\begin{itemize}
  \item \textsuperscript{13} Although this article does not analyze that issue, much of the research done in preparation of this paper suggests that the premises of fare regulation contain the same fallacies that exist in entry/exit regulation.
  \item \textsuperscript{14} Efficient allocation and utilization of natural resources arguably constitutes a common "goal" in both a regulated and an unregulated economy. To the extent that particular "goals" exist in an unregulated economy, this common goal is helpful in searching for the optimum form of individual coexistence and the proper balance of governmental control with individual freedom. Presumably, if society accepts the goal and knows which of the opposing economic structures (pervasive administrative regulation versus basic reliance on market forces) is best suited for attaining that goal, then the determination of the proper regulatory structure will be a simple one. The fallacy in this argument is, of course, that society can accept a particular goal and, indeed, that such a common goal can be found. See text at note 56 infra.
  \item \textsuperscript{15} The current statutory authority for airline fare control is found in the Federal Aviation Act. Air carriers are required to establish "just and reasonable individual and joint rates, fares, and charges . . . ." 49 U.S.C. \textsection\textsection 1374(a)(1) (1970). CAB regulations are more detailed with respect to what a carrier may consider in establishing rates. See 14 C.F.R. \textsection\textsection 221.1-250, 399.30-.44. Furthermore, the Board is authorized to prescribe rates whenever it is "of the opinion" that rates are or will be "unjust or unreasonable." 49 U.S.C. \textsection 1482(d) (1970).
  \item \textsuperscript{16} The author recognizes that regulation of fares is inextricably intertwined with control over entry. New entrants must be able to offer consumers the tangible benefits of equivalent service at lower prices, in order to induce consumers to switch affiliations from less efficient established carriers. "Without rate flexibility . . . . freedom of entry [and exit] would simply increase the level of excess capacity without producing lower prices." \textit{Subcommittee on Administrative Practice and Procedure of the Comm. on the Judiciary, 94th Cong., 1st Sess., Report on Civil Aeronautics Board Practices and Procedures} 97 (Comm. Print 1975) [hereinafter cited as Comm. Print]. Because of the interdependence of price and entry, it may be difficult to realize the full advantages of competition if only one of these controls is deregulated.
\end{itemize}
The apparent simplicity disappears upon examination of the procedural steps for obtaining a certificate. A written application containing information and proof required by Board regulation must be submitted to the Board. One need only examine the records in CAB route decisions to ascertain the complexity of the route application procedure. The Board is required to set the application for public hearing and to "dispose of such application as speedily as possible."

The goals of airline regulation

The Act's declaration of policy articulates Congress' express purposes for enacting the CAA and defines the "public convenience and necessity":

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation sys-

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17. See note 15 supra.
19. Id. at § 1371(d)(1).
20. Id. Some of the apparent simplicity disappears upon an examination of the statutory definition of "public convenience and necessity." See text accompanying note 27 infra.
21. Id. at § 1374(a).
22. Id. at § 1371(j). The Board can make such a finding only upon application of the air carrier, after notice and a hearing.
23. The primary informational requirements may be found in 14 C.F.R. § 201.4 (1977).
26. 49 U.S.C. § 1371(c) (1970). In view of the recent "route moratorium" in which the Board failed to set route applications for hearings, see text at note 38 infra, it is questionable whether the Board has complied with this mandate in all instances.
The task of seeking the proper balance of these various considerations was left initially and primarily to the Civil Aeronautics Board. The only limitation on the CAB's power to interpret the statute is the limited judicial review available under the act.\(^{28}\)

While Congress perhaps can be characterized as benevolent for articulating its general goals in regulating the airline industry, a close examination of those goals reveals the seeds of future controversy. Specifically, which of these potentially contradictory goals should be subordinated and which should be maximized, and in what circumstances should these priorities change?\(^{29}\) Standards for setting priorities among these goals are not even hinted at in the statute. Thus, as could have been expected, implementation of this contradictory statutory language has brought about results that were feared explicitly by opponents of the original legislation. Certain members of Congress feared that, in exercising its authority, the regulators would effectively eliminate entrepreneurial ingenuity by preventing new firms from entering the industry.\(^{30}\) The Act's "grandfather clause" automatically granted the requi-


\(^{28}\) Any order of the Board is reviewable by the United States Circuit Courts of Appeals. 49 U.S.C. § 1486(a) (1970). However, findings of fact by the Board are conclusive if supported by substantial evidence. Id. at § 1486. In view of the vast discretion granted to administrative agencies by Congress, it is likely that the CAB's broad discretionary power was not a congressional oversight.

\(^{29}\) See R. CAVES, AIR TRANSPORT AND ITS REGULATORS: AN INDUSTRY STUDY 127 (1962) [hereinafter cited as CAVES]. "These are multiple objectives . . . with inconsistent optimization levels—i.e., optimization of the whole cannot be achieved through optimization of the separate parts. Therefore, the regulators must select a priority of goals which would take precedence over other goals." LEISTER, supra note 10, at 51-52.

\(^{30}\) Time and again in the debates over the Civil Aeronautics Act one can find reference to a fear that certificates of public convenience and necessity would be used to preclude pioneers in aviation from entering the industry. See 83 CONG. REC. 6729, 6851-52 (1938) (remarks of Sens. McCarran, King, Crowley, and Truman); Comm. Print, supra note 15, at 81-82.
site certificates to the existing air carriers, thereby conclusively presuming that the public convenience and necessity required the existing carriers to continue operations. Critics of this legislation were mollified only by continued assurances of the legislation's proponents that complete preclusion of new entry would be an abuse of authority. "The legislative history of the 1938 Act reveals clearly that the intent of Congress was not to close entry..." It was felt that administrators of this legislation could be trusted not to contravene so blatantly the Congressional intent of keeping the industry open to new entrants.

Unfortunately the fears of these critics have been realized. "Since its inception, the Board has authorized no 'long haul' or 'trunkline' scheduled domestic passenger service by any new air-transport company (i.e., any company that did not originally qualify for certification under the grandfather clause) . . . ." While new entry into established trunkline route segments has been permitted, the grandfather carriers constituted the sole beneficiaries of these route awards. Although new carriers have obtained certificates to operate regionally, none of these has been permitted to expand its regional operations into the trunkline markets. Whenever additional trunkline service was thought necessary, the routes were awarded to the grandfather trunkline carriers. In fact, the original group of grandfather carriers has dwindled to the ten trunkline carriers that are left today. Clearly, this has not been the result of a wilful abuse of discretion on the part of the certificating authority. The CAB has never

32. Comm. Print, supra note 15, at 253 (appendix B); Maclay and Burt, supra note 4, at 137-38.
33. See note 30 supra.
34. In 1965, the "airlines were classified into four groups: 11 trunk, 13 local service, 3 all-cargo, and 13 supplemental carriers." JORDAN, supra note 10, at 14, citing CAB, Air Carrier Analytical Charts and Summaries VII-4, 19, 31, 32 (Dec. 31, 1965).
36. Maclay and Burt, supra note 4, at 132. Originally, 16 carriers were certificated. Those carriers that left the market all did so via merger with other carriers. JORDAN, supra note 10, at 15 n.6, 23.
37. See, e.g., Chicago-Milwaukee-Twin Cities Case, 29 C.A.B. 901 (1959) (North Central's application to provide nonstop service in the pertinent markets was denied in favor of trunkline carriers).
adopted, an explicit policy precluding all new entry. Rather, it is the result of a plausible interpretation of the elusive concept "public convenience and necessity."

Turning from these general congressional policy goals to the more specific economic objectives sought by entry/exit regulation, it is useful to ascertain why industry spokesmen and other commentators are concerned with deregulation. These concerns have been summarized recently by the Senate Subcommittee on Administrative Practice and Procedure. One concern is that unregulated competition would foster monopolistic practices by enabling predatory pricing by the large existing carriers. The fear here is that large airlines such as United would reduce prices below their costs, "thereby driving other carriers from these markets." Another concern suggests that an unregulated market would result in wasteful or destructive competition. The more plausible theory of destructive competition finds its basis in the "cyclical nature"

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38. Arguably, such a policy was in fact adopted between 1969 and 1975 through what has come to be known as the "route moratorium." This was an informal policy articulated only through speeches made by several Chairmen of the CAB and enforced through tacit adherence to this "policy" by CAB staff. These speeches are unavailable. The propriety of adopting such a policy is discussed at length in Comm. Print, supra note 15, at 84-87.

39. The contradictory nature of the various objectives creates a broad range of interpretation within which the CAB can reasonably justify its decisions. For instance, while the CAB must promote competition "to the extent possible," it may very reasonably decide that competition will impair the achievement of other goals which it perceives as more important, such as the promotion of "adequate" service. Thus, virtually any decision that operates to the detriment of competition is legitimate if it promotes a different objective. See generally H. Friendly, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 74-105 (1962) (hereinafter cited as FRIENDLY).


41. Id. at 58-59.

42. Id. at 58, citing CAB Hearings, supra note 8, at 585 (prepared statement of Harry Wexler, senior vice president, Continental Airline). For a more detailed analysis of predatory pricing behavior, see F. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 273-78 (1970); Scherer, Predatory Pricing and the Sherman Act: A Comment, 89 Harv. L. Rev. 869 (1976); Areeda & Turner, Scherer on Predatory Pricing: A Reply, 89 Harv. L. Rev. 891 (1976); Scherer, Some Last Words on Predatory Pricing, 89 Harv. L. Rev. 901 (1976) (the respective authors debate their theories on the proper antitrust approach to predatory pricing); Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975) (the article which triggered the debate between Scherer, and Areeda and Turner noted above).

43. Comm. Print, supra note 15, at 60. "Cutthroat competition may occur when investment in plant and equipment is large, fixed, and specialized and when competing firms have unused capacity." Phillips, supra note 1, at 40.

44. The other suggests that competition will cause all airlines to reduce all prices to variable costs, thereby precluding any recovery of fixed costs. Comm. Print, supra note 15, at 60.

Any one or a combination of a number of results may follow from such severe competition. One possibility is continuance of the low rates so long that bankruptcy may occur. However, long before this will occur, the service offered by the firms will
of the airline industry.\textsuperscript{45} In periods of low demand, competition to fill excess capacity would result in "lowering prices to variable costs."\textsuperscript{46} An inability to meet fixed costs "would lead [the airlines] to ground, lease or sell aircraft, suspend operations . . . and lay off employees."\textsuperscript{47} The costs of increasing service once demand began to climb again are thus characterized as wasteful.\textsuperscript{48}

Another concern voiced by industry representatives is a fear of reduced service to small communities. The argument generally divides into two theories: loss of the "cross subsidy" and "cream skimming."\textsuperscript{49} The former theory comes from the notion that excess profits are earned by trunkline carriers on some routes and are used to cover costs on unprofitable routes.\textsuperscript{50} Competition on the profitable routes would reduce profits and eliminate the ability to subsidize unprofitable routes. The cream skimming argument resembles the cross subsidy argument because it is feared that new competitors will operate only in the more profitable routes, and will drive down revenues earned in those markets.\textsuperscript{51} This reduction will result in an inability to cover total overhead costs on marginally profitable routes, ultimately requiring a shrinking of the air transport system. Tied to this fear is the concern that competition will destroy the complex national airline network.\textsuperscript{52} The final concern is that competition will cause lower profits, resulting in the deterioration of safety and the inability to finance new aircraft.\textsuperscript{53}

From these concerns emerge a number of economic objectives which are sought by those who would continue entry/exit regulation. First, advocates of continued regulation seek to maintain a comprehensive network of airline service to small communities as an element of the national air transport system. Second, regulatory advocates seek to maximize safety of the airlines. Third, they seek to take advantage of certain market structure characteristics perceived to exist in the airline industry, such as economies of scale derived from full utilization of facilities and operations involving high fixed costs. Consumers would

\begin{itemize}
\item \textsuperscript{45} Comm. Print, supra note 15, at 60.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id. at 63-70.
\item \textsuperscript{50} Id. at 63-68.
\item \textsuperscript{51} Id. at 69-70.
\item \textsuperscript{52} Id. at 71-73.
\item \textsuperscript{53} Id. at 73-74.
\end{itemize}
thereby receive the benefits normally thought to accrue from public utility regulation. Finally, continuously improving airline technology is sought through regulation.

Arguably, at least, all of these objectives are laudable. All reflect a policy to benefit the consumer by acting as solutions to problems that are thought to exist in the unregulated arena. However, before those objectives are sought actively through regulatory mechanisms available to the CAB, the underlying assumptions must be scrutinized for validity. If those assumptions are invalid, the otherwise laudable objectives fail to justify continued regulation.

SCRUTINIZING THE BASIC ASSUMPTIONS

Service to Small Communities

Advocates of entry/exit regulation argue that less regulation would eliminate or substantially reduce service to small communities. This argument assumes that present service to such communities would be

54. Public utilities generally are created to take advantage of scale economies, particularly in the case of "natural monopolies." As total costs increase, unit costs decrease. Regulation is justified to prevent such organizations from exploiting these scale economies by charging excess prices, or in order to prevent competition from stifling growth to the point where organizations take advantage of scale economies. Cf. CAB, Materials Relative to Competition in the Regulated Civil Aviation Industry, 1956, Transmitted to the Select Senate Comm. on Small Businesses, 7-8 (Comm. Print 1956)(CAB referred to air transport industry as public utility), cited in FRIENDLY, supra note 40, at 97.

55. "The airlines argue that the increased riskiness that competition would introduce into their business would make it difficult to place firm orders for aircraft; thus aircraft production would decline and the rate of technological advance would slow down." Comm. Print, supra note 15, at 74.

56. Assuming that such "problems" exist in that arena, it is not at all clear that they should be characterized as "problems." Such a characterization assumes that specific objectives exist in an unregulated, free market which are incapable of attainment by that market. It is generally assumed, in making such a characterization, that "the purpose of regulatory policy...is to stimulate and substitute the effects of competition and give the consumer the benefits which he would derive from a system of competition." PHILLIPS, supra note 1, at 19. However, it is contended by the author of this article that such objectives do not exist; rather, the free market is the starting point, a kind of natural order. Competition in such a market results in an efficient allocation and utilization of resources, but efficiency is not the goal of competition. While the most efficient allocation may be the goal sought by an attempt to implement the model of perfect competition, the unregulated market cannot be characterized as a model of perfect competition. Among other things, that model assumes the existence of perfect information, something which cannot exist given the reality of less-than-perfect human beings. Id. at 32. Another assumption of the perfect competition model that does not reflect reality is the idea that "there are no obstacles preventing complete mobility of resources, both into and out of an industry." Id. The very existence of the credit market demonstrates the reality of such obstacles. Thus while the model of perfect competition may have objectives which coincide with some of the objectives sought by regulation, such objectives do not exist in an unregulated market which neither actively seeks to emulate the model of perfect competition nor does anything to affirmatively prevent its attainment.
uneconomical in a more competitive atmosphere, and that these routes are in some way subsidized by regulation. Thus, it must be determined if this assumption is correct.57

In seeking a solution to this inquiry, the logical starting point is the industry itself. A representative of United Air Lines, Andrew de Voursney, recently stated that an “immediate effect [of entry/exit deregulation] would be the neglect or abandonment of economically marginal routes: smaller cities, low traffic density sectors, etc.”58 “Economically marginal routes” presumably refers to those routes which do not turn a sufficient dollar profit to justify continued service59 in the event of entry/exit deregulation.60 A simple study61 was offered in support of this claim. In evaluat-

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Even where a coincidence of objectives does exist, though, complete identity of objectives sought by regulatory advocates and free market advocates is improbable. Air safety regulation exemplifies this idea. Regulatory advocates seek the “highest degree of safety” possible. 49 U.S.C. § 1302(b) (1970). While this unquestionably benefits all consumers as a group, not all consumers may be willing to pay the price of obtaining the “highest” degree of safety if a lower priced safety level were available. Free market advocates would say that the degree of safety which should be sought is that which consumers will pay for voluntarily.

57. This analysis operates within the parameters of the identified economic goals of the present regulatory scheme. However, a threshold inquiry into the justification of promoting service to small communities as a positive goal of regulation is appropriate. Regulation can be justified by this goal only if the goal is valid and if the goal could not be obtained without regulation. For the sake of argument, the latter will be assumed.

The argument used to justify this as a valid goal starts from the premise that these communities provide net benefits to society as a whole which in turn warrants a return of this value to the communities in the form of a subsidy. In economic terms, society as a whole (here personified as air travelers in other markets) receives a benefit from the small community for which it should pay. Similarly, the direct benefit that these communities receive in the form of air service is worth less than the direct cost of providing that service. Thus, the direct cost of that service is equal to some lower dollar figure plus the intangible value that the community bestows upon society.

The benefit that such communities bestow upon society generally consists of providing a convenient home for a particular economic enterprise which is seeking cost advantages not available elsewhere in order to survive economically. One such advantage is derived from airlines which are required to service such communities at a loss. Thus, in the case of the present regulatory scheme, other air travelers are subsidizing this economic enterprise. As Caves points out, it hardly seems equitable that a grandmother flying from New York to Los Angeles to visit her grandchildren, should subsidize “well-off businessmen travelling between small towns.” Caves, supra note 29, at 436. Thus, justification of the goal of service to small communities is questionable.

58. CAB Hearings, supra note 8, at 631 (prepared statement of Andrew de Voursney). It would appear that United has changed its view somewhat subsequent to the Hearings. United’s president recently “declared that ‘regulation worked well for nearly 40 years, but it’s not working well today’ and came out for a new regulatory law. The CAB’s failure to award United significant new routes may have had some impact on that carrier’s thinking.” Altschul, Friendler Elements: For Airlines the Political and Financial Skies are Clearing, Barrons, May 16, 1977 at 9.

59. In other words, these routes do not generate sufficient revenue to operate at a profit. It is generally thought that unprofitable operation mandates termination.

60. Accounting systems frequently do not include other factors which may outweigh the
ing United's 1974 scheduled passenger operations, Mr. de Voursney concluded that 163 of the airline's 327 non-stop city pairs were unprofitable routes with a net loss of $142 million. Mr. de Voursney then concluded that the 20 million passengers using the profitable routes must have paid an average of $7.10 apiece as a direct cross subsidy of the unprofitable routes. Ultimately, United concluded that 68 of 147 unprofitable routes would be considered for deletion in the event of entry/exit deregulation. United admitted that such deletion would not necessarily result in total elimination of service to the communities in question. Yet, it implied that the remaining service, or any new service which tried to respond to United's abandonment would be much less than that provided by United prior to deregulation.

It seems curious that United or any other airline would plead termination of service on routes that lose money, in attempting to prevent deregulation. Such a position contravenes on its face, at least, United's rational interest in maximizing profits. It is reasonable to assume that United has not adopted an altruistic attitude by donating service to small communities. Indeed, if one accepts the premise that United seeks to maximize profits, one might conclude that United's apparent altruism constitutes nothing more than a smokescreen disguising the true effect that regulation has on United's total profit picture. Perhaps the true effect is to cause minimal losses in these markets, while creating windfall profits because of the protectionist tendency of regulation in more lucrative markets.

lack of dollar profits in the decision of route abandonment. See CAB Hearings, supra note 8, at 636 (letter to Sen. Kennedy from Andrew de Voursney dated Feb. 28, 1975). For instance, many routes act as "feeders" for other more lucrative routes. In analyzing the net income of particular routes, an accountant might simply isolate the direct revenues and costs generated by that route. While such treatment is well within the bounds of accepted accounting principles, a more sophisticated treatment might attempt to allocate the costs and revenues of a group of routes to yield a more accurate reflection of the reasons that an airline might not abandon a seemingly unprofitable route. Since the feeder line is providing additional revenue for another route, part of the cost for operating the feeder would be allocated to the more profitable route in analyzing route net incomes. By so reducing the feeder's costs, its net income increases and the increase may well indicate a profit instead of a loss.

61. The characterization of "simple" is Mr. de Voursney's. Id.
62. Id. at 635.
63. This figure was computed by dividing the loss of $142 million in the unprofitable routes by the number of passengers who flew in the profitable routes. Id. at 636.
64. Id. at 637 (From a table entitled "Classification of Loss Markets" in a letter to Stephen M. Breyer from William R. Nesbit) (April 29, 1975).
65. See id.
66. "Economic theory assumes that producers endeavor to maximize profits ... with profits serving as a proxy for the utilities of individual decision makers whose interests are, implicitly, thought to be identified with those of the owners of the firm." Jordan, supra note 10, at 59.
67. "[CAB] entry protection has been sufficient to enable the grandfather carriers to retain about nine-tenths of total domestic air service, despite a 250-fold increase in total traffic since
In addition to United's speculations, Eastern Airlines has considered the routes that it might abandon should entry/exit deregulation become a reality. Eastern claimed to have 200 routes that benefited from cross subsidy, 160 of which were domestic routes. Before a nationwide television audience, the President of Eastern, Frank Borman, claimed that many of Eastern's routes would be abandoned under total deregulation. Mr. Borman presumably felt that all 160 were candidates for abandonment.

Finally, the most exhaustive study of the effect of entry/exit deregulation on unprofitable domestic routes by industry representatives to date comes from the Air Transport Association of America (ATA). In summarizing the ATA's analysis, Dr. George W. James, Senior Vice President of Economics and Finance for the ATA stated:

[O]ur analysis shows that under deregulation scheduled air service might be eliminated or substantially reduced on 1,820 nonstop routes throughout the nation. . . . Currently, trunk carriers serve 994 non-stop routes. Of these 372 could be candidates for elimination under deregulation, while nearly all of the remaining 622 could experience sharp curtailment of service. . . .

From the vantage point of the industry, which possesses the greatest financial interest in the deregulation decision, deregulation will result in substantially reduced service to communities which are incapable of supporting directly trunkline air service that is presently furnished to such communities.

Perhaps in recognition of the self-serving nature, of these studies, recipients of the studies have not left industry claims unscrutinized. Rather, each study has been subjected to independent analysis to test the accuracy of predictive mechanisms used by the particular study and the validity of the predictions themselves. At the very least, the conclusions of the independent analysts varied substantially from the conclusions of the industry analysts.

1938. . . . [I]t is difficult to imagine their retaining this level of industry share without direct regulatory intervention.” DOUGLAS & MILLER, supra note 35 at 113 (footnote omitted). See id. at 112, 115-16; LEISTER, supra note 10, at 44; Comm. Print, supra note 15, at 98; CAB Hearings, supra note 8 at 93-94 (testimony of Alfred E. Kahn); 121 Cong. Rec. S 22,656 (daily ed. Dec. 18, 1975) (remarks of Sen. Percy).


69. Id.

70. “Consequences of Deregulation of the Scheduled Air Transport Industry,” CAB Hearings, supra note 8, at 141-378. In a letter which accompanied this report when it was submitted to the Subcommittee, Dr. George James stated that “this information may represent the first aggregate analysis of its kind.” Id. at 140 (Letter to Sen. Kennedy from George W. James) (April 25, 1975).

71. Id. at 140.

72. See text between notes 65 and 69 supra.
In scrutinizing the 58 city pairs that United claimed were unprofitable and subject to abandonment, the Subcommittee on Administrative Practice and Procedure reduced the list to “29 route segments . . . that might be viewed as the beneficiaries of cross subsidy.” It eliminated four routes because they were flown to “position aircraft,” 17 others because they were flown for their “traffic generating ability,” and eight others because they consisted of routes that were less than 60 miles in length. The Subcommittee thought it “inconceivable that trunkline service is needed on [such] routes . . . .” The 29 route segments that might be abandoned in the event of deregulation accounted for “about one-half of 1 percent of United’s total domestic revenue passenger miles. United lost $5.5 million serving them.

The Subcommittee also scrutinized the ATA’s study. “[C]areful scrutiny of that study . . . confirm[ed] that it [was] fatally flawed.” The model used by the ATA in computing the effect of deregulation was based on the behavior of a monopolist in a fixed price market. “In fact, the real world without regulation would not be inhabited by an airline monopoly or a cartel. It would be a highly competitive world with flexible prices, . . . .” The economists who evaluated the study were unanimous in their conclusions concerning this flaw. As James C. Miller III of the Council of Economic Advisers stated, “the model is incapable of simulating competition.” Rather, it is “capable of simulating [only] price-regulated monopoly, but not free and open competition.”

Eastern Airlines’ allegations concerning deregulation’s effect on its behavior were studied by an independent financial analyst. He reach-
ed conclusions similar to those reached by the independent observers of the United Airlines and ATA studies. His analysis was "restricted to a consideration of the possibility of abandonment. The simple criteria utilized [was] to examine the question as to whether the service provided in each segment is required by CAB regulation. If not, Eastern is free to abandon the segment irrespective of regulatory reform."\textsuperscript{84} The analysis initially points out that Eastern "has already dropped 24 of the 160 unprofitable segments without any proceedings before the Board . . . ."\textsuperscript{85} Of the remaining Eastern routes, "only 20 segments include[d] a point in danger of falling below minimum adequate service . . . . [O]f these 20, 12 segments received service in excess of the minimum. Eastern presumably provides service in excess of the minimum only if the segment is, in the relevant sense, profitable."\textsuperscript{86} Of the eight remaining routes, the analyst concluded that one could be dropped at Eastern's discretion because it had only been added in 1974, three had sufficiently high load factors to "be profitable in normal times," and three others were served by competitors' voluntary service. Thus, the analyst concluded that "cross-subsidies may be required to continue certificated service over only three of those segments."\textsuperscript{87}

The above analyses of the industry position on the effect of entry/exit deregulation indicate at the very least that deregulation will not have so devastating an effect on service to smaller communities as is claimed. Undoubtedly, the industry stance has been colored in part by a desire to protect the presently entrenched market position of the trunkline carriers. Given that many of the presently unprofitable route segments may be abandoned without Board acquiescence,\textsuperscript{88} one can reasonably con-

\textsuperscript{84} Id. It should be noted that service cannot be abandoned completely without Board approval. Such approval may be obtained only upon a Board finding that the abandonment is within the public interest. 49 U.S.C. § 1371(j) (1970). Pursuant to that section, the CAB has promulgated regulations for the temporary suspension of service, 14 C.F.R. §§ 205.1-205.12 (1976), but even this requires Board approval. 14 C.F.R. § 205.6 (1976).

When the analyst refers to abandonment of service here, he speaks of Eastern's ability to reduce or expand its service of a particular city according to the conditions placed on its certificate by the Board, and pursuant to the authorization in 49 U.S.C. § 1371(e) (1970). Thus, Eastern's certificate gives it substantial discretion to adjust capacity, "subject only to the minimum level of service . . . . [M]inimum adequate service appears to imply at least one or two daily flights from and to a named point." 122 Cong. Rec. S12, 983-84 (daily ed. Aug. 2, 1976). Thus, so long as each city served by Eastern has two incoming and two outgoing flights per day, Eastern may terminate all additional flights according to the term of its certificate.

\textsuperscript{85} "All of these 24 segments were dropped without abandoning Eastern service to any point." 122 Cong. Rec. S12, 984 (daily ed. Aug. 2, 1976).

\textsuperscript{86} Id.

\textsuperscript{87} Id. at S12, 983.

\textsuperscript{88} While unprofitable route segments may be so terminated if the certificate gives management discretion over capacity decisions to specific cities, complete abandonment of service to a city requires Board approval. See text at and accompanying note 86 supra.
clude that regulation does not result in the degree of trunkline subsidization of small community service that the industry claims it does. And even where subsidization does occur, it is not at all clear that such subsidization would be lost upon terminating regulation. Although dollar losses exist in such routes when examined in isolation, such dollar losses may be offset by "feeder" revenues which those routes provide for other, more lucrative routes.99

It is for similar reasons that the "cream skimming" effect, which industry representatives fear would cause them to reduce small community service, does not hold up as a sufficient basis for regulation. It is feared that competition will reduce existing air carriers' abilities to cover overhead costs. However, the Subcommittee on Administrative Practice and Procedure cites examples of other highly competitive industries which in some instances reduce prices to variable costs and yet are still able to cover total overhead costs.90 As long as overhead can be recovered from some set of sales, service will be provided.91 While one might argue that a reduction in total revenues would render the existing carriers incapable of meeting present overhead costs, such costs would probably decrease if those airlines were required to operate more efficiently under the rigors of competition.92 Furthermore, new entrants in

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Trunk</th>
<th>Western</th>
<th>Local Service</th>
<th>Total Pacific</th>
<th>CCA</th>
<th>PSA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>$9,100</td>
<td>$11,100</td>
<td>$7,000</td>
<td>$8,600</td>
<td>$6,100</td>
<td>n.a.</td>
</tr>
<tr>
<td>1951</td>
<td>9,800</td>
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<td>7,600</td>
<td>7,800</td>
<td>n.a.</td>
<td>7,800</td>
</tr>
<tr>
<td>1954</td>
<td>12,600</td>
<td>13,000</td>
<td>9,300</td>
<td>11,800</td>
<td>8,900</td>
<td>n.a.</td>
</tr>
<tr>
<td>1955</td>
<td>12,900</td>
<td>14,600</td>
<td>8,600</td>
<td>11,000</td>
<td>8,900</td>
<td>n.a.</td>
</tr>
<tr>
<td>1957</td>
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<td>14,800</td>
<td>9,600</td>
<td>12,600</td>
<td>8,900</td>
<td>n.a.</td>
</tr>
<tr>
<td>1959</td>
<td>15,300</td>
<td>19,900</td>
<td>10,700</td>
<td>13,400</td>
<td>8,900</td>
<td>n.a.</td>
</tr>
<tr>
<td>1962</td>
<td>18,800</td>
<td>25,700</td>
<td>14,000</td>
<td>16,400</td>
<td>8,900</td>
<td>n.a.</td>
</tr>
<tr>
<td>1963</td>
<td>19,700</td>
<td>26,200</td>
<td>14,700</td>
<td>17,300</td>
<td>8,900</td>
<td>n.a.</td>
</tr>
<tr>
<td>1964</td>
<td>21,000</td>
<td>26,700</td>
<td>15,700</td>
<td>17,600</td>
<td>8,900</td>
<td>n.a.</td>
</tr>
<tr>
<td>1965</td>
<td>22,200</td>
<td>26,100</td>
<td>16,300</td>
<td>18,000</td>
<td>8,900</td>
<td>n.a.</td>
</tr>
</tbody>
</table>

89. See text at and accompanying note 60 supra.
90. The examples include hardware stores, grocery stores, and department stores. Comm. Print, supra note 15, at 60.
91. Id. at 69.
92. Jordan offers the following table in support of his conclusion that increased competition would compel more effective utilization of resources and would motivate airlines to obtain "substantially greater output per employee ...." Jordan, supra note 10, at 223.

It is for similar reasons that the "cream skimming" effect, which industry representatives fear would cause them to reduce small community service, does not hold up as a sufficient basis for regulation. It is feared that competition will reduce existing air carriers' abilities to cover overhead costs. However, the Subcommittee on Administrative Practice and Procedure cites examples of other highly competitive industries which in some instances reduce prices to variable costs and yet are still able to cover total overhead costs. As long as overhead can be recovered from some set of sales, service will be provided. While one might argue that a reduction in total revenues would render the existing carriers incapable of meeting present overhead costs, such costs would probably decrease if those airlines were required to operate more efficiently under the rigors of competition. Furthermore, new entrants in

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</table>

Id. at 219 (footnotes omitted).
the most lucrative routes would also have overhead costs which must be recovered to continue operations.\textsuperscript{93} If such carriers reduce fares to variable costs, they will be required to maintain higher fares elsewhere. “There is no particular reason to believe that new entrants on particular routes will, in general, in the long run, be able to fly at lower costs than existing efficient carriers.”\textsuperscript{94} Hence, the “cream skimming” argument ignores the realities that new entrants in lucrative markets would be required to operate under, and in doing so, overestimates the reduction in overall service offered to small communities which \textit{might} be caused by an inability to recover overhead costs.\textsuperscript{95}

The inability of industry representatives to present persuasive reasons for disregarding the conclusions of the independent analysts,\textsuperscript{96} coupled with the presumption that their arguments contain some self-serving bias,\textsuperscript{97} suggests that the independent analysts’ conclusions are correct.\textsuperscript{98} At the very least, the evidence does not indicate that regulation promotes service to small communities by enabling otherwise infeasible

\begin{itemize}
  \item \begin{itemize}
    \item \textsuperscript{93} \textit{Comm. Print}, supra note 15, at 69.
    \item \textsuperscript{94} \textit{Id}.
    \item \textsuperscript{95} A group of competitive firms operating on the fringe of a market may skim the cream from flights of established firms: This is only possible, however, where there are some excess profits to be gained. But the availability of these profits indicates a monopoly restriction of flights and output. On balance, therefore, the fringe operators serve to increase flights and output to the competitive level. \textit{DeVany, Is Efficient Regulation of Air Transportation Possible?}, in \textit{PERSPECTIVES}, supra note 10, at 85, 90.
    \item \textsuperscript{96} Dr. James of the ATA attempted to meet the criticism of the ATA study. \textit{CAB Hearings}, supra note 8, at 380 (Letter from George W. James to Sen. Edward M. Kennedy) (May 8, 1975). He made three points: (1) he suggested that criticism of the ATA study arose because of the Subcommittee’s inability to articulate the precise nature of its request; (2) he claimed that the study was in fact based upon the present market structure, which he characterized as competitive, and not on the behavior of a monopolist; and (3) he claimed that the study may underestimate the effect of deregulation because of the possibility that “deregulation would encourage a heavier concentration on the more productive city-pair markets and less service in the managerial markets.” \textit{Id}.
    \item \textsuperscript{97} The first point is largely irrelevant to the criticism because even though the Subcommittee’s request was not articulated precisely, the criticism stated that the study was not what it purported to be. The second point is unpersuasive because while some competition does exist presently, that competition is restricted by Board entry policy and does not include the possibility of new air carriers offering more efficient service than the present carriers. Similarly, by basing the model on the present regulatory structure, the model necessarily cannot include the possibility of new carriers picking up routes that would be abandoned. This is true because under the present structure such carriers must first go through the Board. The final point is unpersuasive because of the evidence presented below that concentration of service in the industry would not occur. \textit{See text at and accompanying notes 122-124 infra}. For a more detailed description of the ATA’s response to criticism of its model, \textit{see REPORT TO CONGRESS ON ATA STUDY}, supra note 80, at 19-32 (official statement of ATA responding to GAO criticism).
    \item \textsuperscript{98} \textit{See text accompanying notes 65-68 supra}.
  \end{itemize}
\end{itemize}
subsidization from more profitable routes. Hence, the premise that present service to small- and medium-sized communities is subsidized by entry/exit regulation cannot be relied upon to justify continued regulation.

Safety

The second economic objective sought by regulation is maintenance of the highest level of safety possible. In order to justify entry/exit regulation, it must be shown that this objective is impeded where no such regulation exists. The premise, then, is that less regulation, results in a lower level of safety to the consumer.

The reasoning which leads to the conclusion that increased competition will decrease safety goes as follows. Profits in the regulated industry are higher than would exist in an unregulated industry. Increasing competition in the regulated industry would result in a lowering of profits to a point closer to the unregulated equilibrium point. This lowering of profits results in industry attempts to cut costs. These actions then cause the amount previously spent to insure a high level of safety to be reduced. This reduction in safety expenditure results in a more dangerous industry. Therefore, a reduction in regulation will result in a less safe industry.

The Subcommittee on Administrative Practice and Procedure took a neutral position with respect to the effect of entry/exit deregulation on safety. Because "safety is the concern of the Federal Aviation Administration, not the Civil Aeronautics Board," it was presumed that the FAA could maintain its safety standards regardless of any changes made with respect to the CAB's power to control entry and exit. In the context of the industry argument regarding deregulation's effect on safety, the FAA,

Professor Jordan's study. He states that the ability of intrastate carriers to maintain profitable operations in minor markets "shows that CAB-type regulation is not a necessary condition for airline service to be provided in low-density markets, and it challenges the internal subsidy argument that the CAB needs to protect the trunk carriers from competition in profitable, high-density markets so that service will be provided in low-density markets." JORDAN, supra note 10, at 131-32.

99. Another commentator's economic analysis supports the conclusion that very little actual subsidization presently occurs which would be eliminated by deregulation. Keeler, Airl ine Regulation and Market Performance, 3 BELL. J. OF ECON. AND MANAGEMENT SCIENCE 399, 422 (1972) [hereinafter cited as Keeler]. This study has been updated and expanded by the United States Comptroller General. GENERAL ACCOUNTING OFFICE, LOWER AIRLINE COSTS PER PASSENGER ARE POSSIBLE IN THE UNITED STATES AND COULD RESULT IN LOWER FARES, CED 77-34 (Feb. 18, 1977, Report to Congress) [hereinafter cited as LOWER AIRLINE FARES].

100. The first objective was service to small communities. The order of discussion of these objectives is not meant to reflect a hierarchy of objectives.

101. Regulation enables maintenance of an artificially high price level.

102. Competition reduces the artificially high price level, and in turn reduces profits.

under the Subcommittee's reasoning, could prevent all cost cutting by the airlines in the area of safety.\textsuperscript{104} This would be accomplished by requiring the same safety standards as are presently required. As long as the FAA enforced such requirements uniformly, safety costs would become a mere constant on both sides of the equation used in weighing the costs and benefits of deregulation.

Additional evidence, however, suggests that even this neutral position grants too much credence to the industry syllogism that more competition results in less safety. While it was initially felt that excessive competition among air carriers "tends to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest;,"\textsuperscript{105} it would appear that this belief was unjustified. As two commentators note,

[Historically, there has been no correlation between the economic soundness of an air carrier and its safety record. Despite a thin operation margin and high subsidy local service carriers and small trunks like Colonial have a better safety record than the Big Four. Other industries where safety is equally important have combined safety regulations with a policy of complete freedom of entry \textit{e.g.}, manufacture of serums and vaccines, dispensing of prescriptions by drug stores, carrying and freezing of fruits and vegetables, meat processing and distribution.\textsuperscript{106}]

The maintenance of high levels of operational safety in the airline industry would seem to be a prerequisite to continued economic existence, particularly in a market characterized by freer entry. If one accepts the presumption that airlines operate for the purpose of making a profit, then it follows that almost all decisions, including those concerning safety, will be designed to maximize profits. In scrutinizing safety decisions with this goal in mind, airline management will try to predict the effect of cutting safety costs. The effect of decreased safety is increased risk of fatality. However, any fatality could prove to be the demise of the airline, particularly where a new entrant may offer an immediate substitute service to the consuming public. Not only do such fatalities result in expensive litigation, they also raise public wariness of the airline in question. Both expensive litigation and loss of customers to other airlines result in lower profits. Thus, decisions which lower the risk of fatalities, such as those which increase safety, are likely to be perceived by management\textsuperscript{107} as fully consistent with profit maximization.\textsuperscript{108} At the very least, it would seem that safety and free entry are not mutually exclusive.

\textsuperscript{104} See Cortz, \textit{A Case for Grounding the CAB}, 84 \textit{Fortune} No. 1, at 66, 146 (1971).

\textsuperscript{105} S. REP. No. 1661, 75th Cong., 3d Sess. 2 (1938).

\textsuperscript{106} Maclay & Burt, \textit{supra} note 4, at 133 n.6. As with the airlines, it is fully consistent with corporate self-interest to maintain high levels of safety in those industries. See Keeler, \textit{supra} note 99, at 423. Failure to do so could result ultimately in corporate bankruptcy due to expensive litigation. See text accompanying note 107 \textit{infra}; but see text at note 107 \textit{infra}.

\textsuperscript{107} An alternative analysis leads to a different conclusion. It is possible that fatalities...
An examination of Professor William Jordan's study comparing the regulated interstate airline industry with the relatively unregulated California intrastate airline industry supports this conclusion.109 Jordan points out that between 1949 and 1965 the two markets operated under essentially identical safety regulations. While Jordan readily admits that it may be inappropriate to draw definite conclusions from his comparison,110 he does conclude that

the complete absence of fatal accidents by PSA [Pacific Southwest Airlines] during 16 years of unregulated operations, and by California Central/Coastal during their 8 1/2 years of existence, does indicate that economic regulation is not a necessary condition for airline safety, while the varying experiences of individual certificated carriers show that such regulation is not a sufficient condition for superior safety performance.111

In fact, because one California carrier was removed from the market by a single crash which raised the intrastate fatality rate above the interstate fatality rate,112 one might reasonably conclude that the CAB's strict control over entry/exit decreases rather than increases safety in the industry.

Finally, Jordan points out that the inability of new carriers to offer substitute service to the consuming public after an air crash eliminates the opportunity for consumers to manifest objectively their concern would not significantly reduce an airline's profits. Such would be the case where the market is safety inelastic; a significant lowering in safety levels does not result in significantly lower revenues. Safety inelasticity would exist if consumers had no safer alternative to choose from, were incapable of evaluating safety levels of different airlines (through lack of information or through lack of effective comparative standards and abilities), or were unwilling to pay the price necessary to maintain high levels of safety. The lack of alternative service cannot be relied on here, since such a lack is caused at least in part by regulatory barriers to entry. Similarly, consumer unwillingness to 'purchase' the "highest" safety levels should not be relied on since such collective unwillingness would be a clear indicator of the true nature of the "public interest." Thus, this analysis is persuasive only to the extent that consumers lack information or a comparative mechanism to make an informed choice regarding safety.

108. See JORDAN, supra note 10.
109. Id. at 51.
110. "[T]he small volume of traffic for the California intrastate carriers relative to that of the certificated carriers may well make it improper to compare their passenger fatality rates." Id. at 52.
111. Id. at 52-53.
112. 85 lives were lost in one crash of a Paradise Airlines airplane. "Paradise accounted for less than one-half of one percent of all RPM [revenue passenger mile] carried by the California intrastate carriers during these years but provided 93 percent of the total passenger fatalities." Id. at 51. The cause of this crash was unascertainable. The statistics compiled by Jordan from various sources indicate the precise effect that this crash had on the fatality rate per 100 million passenger miles flown:
Passenger Fatalities and Fatality Rates
Trunk, Local Service, and California Intrastate Carriers
Scheduled Domestic Service, 1949-1965

<table>
<thead>
<tr>
<th>Carrier Group</th>
<th>Number of Passenger Fatalities</th>
<th>Total Revenue(^{b}) Passenger Miles (000)</th>
<th>Passenger Fatality Rate per 100 Million RPM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trunk</td>
<td>1,809(^{c})</td>
<td>402,736,593</td>
<td>0.45</td>
</tr>
<tr>
<td>Local Service</td>
<td>151</td>
<td>16,392,377</td>
<td>0.92</td>
</tr>
<tr>
<td>California Intrastate</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All Carriers</td>
<td>87</td>
<td>3,254,630(^{d})</td>
<td>2.67</td>
</tr>
<tr>
<td>Excluding Paradise</td>
<td>6</td>
<td>3,240,710(^{d})</td>
<td>0.19</td>
</tr>
</tbody>
</table>

\(^{a}\) Includes both revenue and nonrevenue passengers.
\(^{b}\) Nonrevenue passenger-miles are not available for the California intrastate carriers.
\(^{c}\) 108 passenger deaths occurring in dynamite/sabotage accidents are excluded.
\(^{d}\) Partially estimated.

Id. at 50. The load factors for the intrastate carriers during this period were substantially higher than for the interstate carriers. Since this gives rise to the possibility of a greater number of fatalities per crash, it suggests that more reliance can be placed on Jordan's speculations than Jordan was willing to concede. See text accompanying note 110 supra. Jordan presents a table of those load factors in the following form:

Average Annual Passenger Load Factors for the Certificated and California Intrastate Carriers Scheduled Service, 1946-1965

<table>
<thead>
<tr>
<th>Year</th>
<th>First Class</th>
<th>Coach</th>
<th>Total Cert. Local Service</th>
<th>Total Intrastate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1949</td>
<td>58.7</td>
<td>70.2</td>
<td>28.2</td>
<td>66.9</td>
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<tr>
<td>1950</td>
<td>61.2</td>
<td>74.2</td>
<td>31.5</td>
<td>73.9</td>
</tr>
<tr>
<td>1951</td>
<td>68.9</td>
<td>74.5</td>
<td>37.4</td>
<td>69.0</td>
</tr>
<tr>
<td>1952</td>
<td>65.3</td>
<td>75.6</td>
<td>37.5</td>
<td>65.9</td>
</tr>
<tr>
<td>1953</td>
<td>62.2</td>
<td>72.8</td>
<td>38.6</td>
<td>67.1</td>
</tr>
<tr>
<td>1954</td>
<td>61.2</td>
<td>68.2</td>
<td>42.2</td>
<td>69.2</td>
</tr>
<tr>
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<td>62.3</td>
<td>67.6</td>
<td>45.2</td>
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<tr>
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<td>62.4</td>
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<td>45.8</td>
<td>75.7</td>
</tr>
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<td>59.4</td>
<td>65.1</td>
<td>45.2</td>
<td>80.6</td>
</tr>
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\(^{a}\) Some local service carriers operated small amounts of coach service in 1952-53 and from 1956 to early 1965.
\(^{b}\) Partially estimated, includes all services.

Id. at 202.
about safety.\textsuperscript{113} Presumably, if consumers were as safety conscious as Congress or the CAB believes them to be, new entrants would rapidly obtain part of a negligent airline's market under a system of freer entry.\textsuperscript{114} Bankruptcy provides a natural culling mechanism for removing undesirable firms from a competitive market.\textsuperscript{115} No certified trunkline carrier has ever gone bankrupt.\textsuperscript{116} Continued regulation on the basis of safety, then, substitutes Congress' imperfect judgment on the public's safety desires for the more precise indicator of public concern over safety: the exercise of the economic franchise to choose an airline on the basis of its safety record.\textsuperscript{117}

Arguably, the California experience indicates that entry/exit competition results in the maintenance of higher rather than lower safety standards. At best, safety should not weigh one way or the other in evaluating the justification for and necessity of entry/exit regulation. Thus, the concern of regulation advocates about safety cannot be used to justify continued entry/exit regulation.

\textit{Economies of Scale}

Economies of scale, which are based on large fixed investment requirements, have caused a perceived market structure which forms the basis for the objective of maximizing the airlines' natural monopoly.

\begin{itemize}
  \item \textsuperscript{113} See note 145 \textit{infra}.
  \item \textsuperscript{114} \textit{But see} text at note 107 \textit{supra}.
  \item \textsuperscript{115} This is true to the extent that consumers can make an informed choice to use certain airlines based on safety factors. \textit{See} text at and accompanying note 107 \textit{supra}.
  \item \textsuperscript{116} One might argue that the bankruptcy of a major trunkline carrier should not be allowed to occur because it would substantially interfere with the adequacy of trunkline air service. However, it is less than clear that such interference would result from bankruptcy. The California intrastate market has witnessed a number of bankruptcies with no significant interference in service. New carriers inevitably filled any gap left by the bankrupt carrier. \textit{Comm. Print, supra} note 15, at 99. The only factor that might mitigate the comparison value of the interstate and intrastate markets here is the existence of high entry barriers in the markets serviced by a bankrupt trunkline. \textit{See} text at and accompanying notes 125-138 \textit{infra}.
  \item \textsuperscript{117} The truly democratic nature of the unregulated marketplace becomes apparent upon further analysis. At the very least, a majority of individuals whose price/safety preferences coincide, will be able to obtain the degree of safety that they want. Individuals who find themselves in the minority also may be able to satisfy their preferences. For example, suppose 60 percent of the consumers in any given market prefer lower prices to the highest level of safety while the other 40 percent prefer the opposite. What prevents the coexistence of two services, with one satisfying the desires of each group? The only conceivable factor that would prevent this would be the inability of the market to support more than one service. However, in such an instance, one would fail because of the other's ability to attract more passengers who generate revenue. The exercise of this choice by consumers more accurately reflects the public interest than a situation where the CAB's requirements reverse the decision of the consuming public. On the other hand, if both can coexist, are not the interests of more members of the public satisfied than would be the case with a prescribed safety level?
\end{itemize}
It is felt that by granting the airlines partial monopolies through limitation of entry into various markets, they will be able to "serve a market at a lower average cost than several competing firms [could]." Any given airline will be able to offer such service at the lower cost only to the extent that those economies of scale and high barriers to entry exist. If they do not, this natural monopoly objective cannot be used to justify regulation of the entry/exit aspects of the airline industry.

Industry representatives have voiced the belief that airlines of sufficient size could operate at lower average costs than smaller carriers, and that high initial investment requirements effectively bar entry. They have been unable to produce empirical economic evidence to support such a proposition. These allegations sound very similar to the numerous allegations voiced in Congress prior to the enactment of the CAA over the existence of cutthroat or destructive competition. Although the inability to present empirical economic data in support of this proposition might have been acceptable in 1938 when the science of economics was less well developed, unfounded allegations cannot be readily accepted any longer. In fact, if economic evidence to the contrary can be presented, it should lay to rest any lingering doubt that the air transport industry should be regulated on the basis of vague notions of public utility theory.

118. Phillips discusses natural monopolies as follows:

The regulated industries are frequently referred to as "natural" monopolies. It is clear that monopolization is not a universal characteristic of the regulated industries. On the contrary, these industries commonly operate under conditions of imperfect competition. Finally, economic conditions are constantly changing. New technology may dictate either larger or smaller optimum-size plants; substitute products or services may be developed. What is natural at one period of time, therefore, may become quite unnatural at another.

119. See id. at 61-62. The original Civil Aeronautics Act of 1938 apparently was justified on three grounds by its proponents:

(i) past "destructive competition which the testimony [then before Congress] showed to be now underway;" (ii) a fear of future "[dis]orderly development" caused by future "destructive competition;" and (iii) "the recognized and accepted principles of regulation of public utilities, particularly as applied to other forms of transportation," which apparently refers to regulation of the railroads and the ICC.
Such contrary economic evidence appears to exist. Professor Jordan’s analysis is perhaps the most incisive. With respect to economies of scale, Jordan states:

If only very large airlines had been able to survive while providing low-fare service, this would provide evidence that economies of scale exist in the airline industry. The fact is, however, that the smallest of airlines introduced low-fare service and that at least one of these managed to survive while achieving operating ratios and returns on stockholder equity comparable or superior to those of the much larger certificated carriers operating under substantially higher fares per mile. This indicates that there are no significant economies of scale in domestic air transportation that cannot be achieved by a carrier operating four or five aircraft of a suitable type over a small route structure. It follows from this that without regulation the U.S. airline industry would probably consist of many small carriers rather than a few large ones. 122

In fact, Jordan concludes that in the absence of entry/exit regulation, there would be approximately 100 to 200 trunkline and local service carriers serving a market which is presently served by approximately 20 carriers. 123

Professor Richard Caves draws similar conclusions concerning the lack of significant scale economies in the airline industry. In comparing medium; small, and local carriers’ costs to those of the top four airlines in 1958, Caves concludes that “diseconomies of . . . scale afflict, if at all, only the smallest of the domestic trunklines.” 124 Thus, it would seem that advocates of regulation mistakenly rely on the argument that the airline industry is characterized by high economies of scale.

history surrounding the act, the Subcommittee on Administrative Practice and Procedure reached the following conclusion:

In light of these considerations the Subcommittee can only conclude that to the extent that Congress in 1938 intended to restrain free competition in the airline industry, its judgment was based primarily upon evidence of past or potential “destructive competition” which evidence appears in retrospect to have been without any substantial foundation.

Id. at 212 (emphasis omitted). Hence, it would appear that the allegations before Congress which were accepted as true and then relied upon to justify that legislation were in fact, empty. See also 83 Cong. Rec. 6635 (1938) (where no evidence was referred to in charging the industry with “vicious” competition; remarks of Sen. McCarran); S. Rep. No. 1661, 75th Cong., 2d Sess. 2 (1938) (similar unsupported allegations with respect to safety).

122. JORDAN, supra note 10, at 195. Accord De Vany, Is Efficient Regulation of Air Transportation Possible?, in PERSPECTIVES, supra note 10, at 85, 89; PHILLIPS, supra note 1, at 26; see LEISTER, supra note 10, at 50.

123. CAB Hearings, supra note 8, at 453; contra id. at 100, 117 (George W. James gives reasons why he believes concentration would result).

124. CAVES, supra note 29, at 57. In comparing costs of other carrier groups relative to costs of the Big Four (American, United, Eastern, and TWA) in 1958, Caves found that the Big Four had costs of 100.0, the medium-sized carriers (Braniff, Capital, Delta, National, and Northwest) had costs of 97.4, the small lines (Continental and Northeast) had costs of 101.6, and the local service carriers had costs of 187.9. CAVES, supra note 29, at 58. With respect to the small lines, it
In his barriers-to-entry analysis of the airline industry, Caves uses the structure presented in Bain's *Barriers to New Competition* and narrows the focus to three criteria: economies of scale, product differentiation, and absolute cost barriers.\(^{125}\) Economies of scale have been dealt with above,\(^{126}\) and Caves concludes that with the exception of safety, product differentiation\(^{127}\) has very "little significance as a general feature of market structure in the airlines."\(^{128}\) Hence, the existence of barriers to entry depends upon Caves' absolute cost barriers. Caves defines that term as "elements which place the costs of the new carrier above those of existing carriers at any given scale of operation . . . ."\(^{129}\)

Caves found only one important absolute cost barrier: "capital requirements that are large in comparison to the capital-rationing practices enforced by lending institutions."\(^{130}\) He argues that this characteristic makes it easier for established firms to obtain needed capital than it is for new firms. In reaching this conclusion, he assumes the existence of a minimum efficient size—a minimum optimal scale of operations.\(^{131}\) Furthermore, he assumes that "capital-rationing practices of lending institutions" would operate to deny a new firm such large quantities of

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2. See text accompanying note 122 supra; but see Caves, supra note 29, at 88 (here, Caves concludes that there is a minimum optimal scale of operations for trunkline carriers, thereby implying the existence of some scale economies).

3. By "product differentiation," Caves refers to the consumer's ability to evaluate a product of a given industry (here, the service of the airlines) and to choose on the basis of tangible factors between competing products. Caves, supra note 29, at 88. Apparently, the greater the ability to choose between competing products, the lesser the significance that product differentiation has with respect to barriers to entry. Caves excepts safety from the insignificance of this category because of a perceived traveller inability to evaluate statistically the relative safety of various airlines.

4. When considered as a possible source of barriers to new competition . . . [safety] becomes . . . significant. The new airline, particularly if it seeks business on the basis of low price and relatively spartan service, might well face a disadvantage due to consumer suspicion of its safety, whether objective information warranted it or not. . . . [T]he question before us is whether an existing certified carrier would have a product differentiation over a new one or alternatively, with no certification, whether a carrier with a well-known history of regular operation would have such an advantage. In this setting the product-differentiation advantage of an existing carrier would probably be small or transient or both.

5. Id. at 88-89.

6. Id. at 88.

7. Id. at 89.

8. Id.

9. Id.

10. Id.

11. Implicit in this assumption is the existence of significant scale economies in the airline industry. Yet Professor Jordan's study and Caves himself conclude that such economies of scale cannot be attributable to the airline industry. See text accompanying notes 122-124 supra. If Jordan is correct, then this assumption may be invalid.
capital.\textsuperscript{132} The evidence offered in support of these assumptions, however, is weak. Caves implies that the difficulty encountered by existing airlines in obtaining capital would be magnified with respect to a new entrant.\textsuperscript{133} He offers no empirical evidence to support this speculation.\textsuperscript{134}

Indeed, a persuasive counter-argument can be speculated. Although an inexperienced new entrant would undoubtedly encounter obstacles in seeking capital sufficient to enable it to immediately operate on the same scale as United Airlines, this seems beside the point. With respect to barriers to entry, so long as profitable operations can be attained on a small scale, no logical obstacle prevents a new entrant from gradually building itself into a major competitor. At the outset of such a climb, that entrant’s capital requirements would be substantially lower than those of the Big Four. Furthermore, the difficulty encountered by the large airlines in obtaining capital could work to the advantage rather than the disadvantage of new, small entrants. This difficulty is thought, in part, to be based on the risk involved in obtaining profitable routes. The nature of the size of large airlines indicates that they would be more risky because of less flexibility in adapting to changing market demands, whereas the smaller firms could adapt quickly, particularly under conditions of freer entry. This adaptability should make it easier for the smaller competitors to maximize profits, a factor that would be viewed with favor by any money lender.

Additionally, “the fact that the federal government felt it necessary to assist the financing of the local-service carriers by means of a guaranteed-loan program,”\textsuperscript{135} is also used by Caves to justify his conclusion that barriers to entry are high. This fact’s logical relevance to absolute cost barriers is tenuous at best. The subsidization of local service carriers is irrelevant in an analysis of trunkline carriers’ capital requirements because of the inherent differences in the markets served.

Finally, it would appear that the rate of return on capital in the airline industry is very close to the average rate of return earned by all active corporations.\textsuperscript{136} Although one might argue that deregulation could lower

\textsuperscript{132} CAVES, supra note 29, at 89.
\textsuperscript{133} See LEVIN, supra note 124, at 89 (who supports Caves conclusion but also offers no evidence).
\textsuperscript{134} CAVES, supra note 29, at 91.
\textsuperscript{135} Id.
\textsuperscript{136} Dr. Thomas Keeler concluded that the pretax rate of return on airline capital was 12 percent, while the General Accounting Office concluded it was only 10.5 percent. LOWER AIRLINE FARES, supra note 99, at 23-25. Keeler’s explanation for this difference was that “the set of approximate adjustments he made to consolidate aggregate corporate financial and income statements for all active corporations” differed somewhat from the GAO’s disaggregation adjustments. Id. at 25. At any rate, both conclusions put the airline rate close enough to the average rate to make the differences de minimus for the purpose of analyzing capital cost barriers to entry.
that return, a recent study by the General Accounting Office which examined deregulation's probable impact on fares suggests a contrary conclusion. Thus, airlines should have no more or less difficulty in obtaining capital than similarly situated non-regulated industry firms. Cave's ultimate conclusion, then, that the airline industry has moved into Bain's category of an industry with "substantial barriers" is at best unsupported. Since evidence to the contrary exists, the better conclusion is that significant barriers to entry do not exist.

The inability to characterize the airline industry market structure as containing significant economies of scale and barriers to entry removes the justification for applying natural monopoly and public utility concepts to that industry. The absence of these characteristics renders it impossible for the larger airlines to operate at lower average costs than the smaller airlines. Thus, the objective of establishing airlines' natural monopoly capabilities cannot be accomplished through entry/exit regulation.

Technological Advancement

The final economic objective sought by advocates of continued regulation is the promotion of technological advancement in the airline industry. In one sense this goal is related to the promotion of safety, for as the technology improves, so does the ability to maintain safe operations. The premise that underlies the proposition that regulation will better enable attainment of this goal is that a reduction in profits, which arguably would accompany increased competition, also reduces the resources that can be devoted to airline technology.

Improved airline technology is financed by airline manufacturers through profits earned on the sale of airline equipment. Clearly such technology is directly affected by the profitability of air carriers. Only if such carriers can afford to purchase new equipment will those manufacturers have sufficient profits to finance research and development.

Once again, Professor Jordan's study suggests that this process is not advanced by entry/exit regulation. Jordan points out that while the

137. Id. at 23-26.
138. CAIiS, supra note 29, at 91.
139. See text accompanying notes 118-124, supra.
140. Levin states:
The [Civil Aeronautics] Act combines regulation of a public utility nature with a mandate to promote civil aviation. It is this combination of promotion and regulation of an industry which does not possess the "natural monopoly" characteristics of most public utilities which complicates the administration of the Civil Aeronautics Act.

LEdIN, supra note 124, at 51.
141. See note 55 supra.
The present CAB regulatory scheme has created a cartel, that cartel is imperfect because it does not allocate industry profits according to a prearranged plan. Related to this imperfection is the CAB's failure to control service quality competition. This failure, in fact, has resulted in intense competition by the airlines with respect to services according to Jordan. This competition in effect has consumed any "excess" profits that might have been earned through the establishment and maintenance of a price above the price that the competitive market would have sustained. Hence, the artificially high profits which theoretically could have been used in purchasing new equipment, thereby promoting improved technology, were merely transformed into artificially high service levels. What this implies is that the regulated airlines have not in fact earned profits which are higher than would be earned in a competitive market. Rather, their gross revenues have been higher than the gross revenues in a competitive market. The excess expense which reduced these profits to a normal level went to improved service quality, and not improved technology.

Since the excess profits which would theoretically be used to advance airline technology are virtually nonexistent in the regulated market, it is difficult to argue that regulation is needed to continue rapid advancement of airline technology. Excess revenues which might be available from the regulated industry are completely consumed by service competition between regulated firms. Hence, the final economic objective used to justify entry/exit regulation is not necessary for attainment of any of the goals sought by regulation. The answer to the question, "is regulation necessary to attain the objectives sought by regulation?" is "no." Therefore, alternative methods for deregulating entry/exit aspects of the industry must be examined to discover a way to maximize the desired objectives.

**DEREGULATION: THE ALTERNATIVES**

Much of the empirical economic evidence examined in the previous

143. Id. at 229.
144. Id.
145. See id. at 34-56.
The relevant question is whether the extra quality [which is purchased with the higher interstate price] is worth the extra cost. . . . [I]t appears that the unregulated California markets come much closer to matching service quality and price with passenger preferences. . . . Thus, it would appear that the major cost of regulation is a non-optimal price-quality mix.

DOUGLAS & MILLER, supra note 35, at 145-46.

146. The excess profits have not gone to the purchase of new equipment and hence aircraft manufacturers have not been the beneficiaries of the excess revenues available in the regulated economy. They are the chief innovators with respect to airline technology.

147. DOUGLAS & MILLER, supra note 35, at 178.
sections of this article has been available for some time. For example, Professor Jordan published his incisive study in 1970, almost coinciding with the commencement of the CAB's "route moratorium." This raises the question of how the CAB could justify the policy of not setting route applications for hearings in light of the overwhelming evidence that consumers would be the direct beneficiaries of new entry. Ironically, Professor Jordan suggests that the congressional intent was to protect existing carriers from the rigors of competition, which, if true, could provide justification for such a route moratorium. This is in fact what the CAB has done in implementing its statutory mandate over its 39 year history; the CAB has protected the market positions of grandfather

148. See text at note 38, supra.

149. The answer to this question is elusive due to the "secrecy and . . . highly improper procedures" surrounding the formulation of the "route moratorium." Comm. Print, supra note 15, at 86. Apparently, the various CAB Commissioners who recognized this policy were responding to industry suggestions that airlines needed an opportunity to digest new routes which had recently been awarded. They were also responding to perceived financial difficulties of the airlines. CAB Hearings, supra note 8, at 652, 653 (testimony of G. Joseph Minetti, member, CAB). No explicit justification was ever found necessary because the route moratorium was "a policy decision by the Chairman, taken without hearings or formal consultation with other members . . . ." Comm. Print, supra note 15, at 87.

One might think that judicial review of such a policy would have obviated the problem. However, reasons for the lack of such review are obvious.

The combination of (a) the Board's practice of determining the merits of a route case on the procedural motion for an expedited hearing, (b) its refusal to hold a hearing on the matter of a general change in route policies, and (c) the Board's claim that its failure to grant hearings are simply a matter of controlling its own docket, . . . make judicial review difficult—or impossible—to obtain. Moreover, any carrier successful in proving that the Board wrongly changed its route policy without a hearing, or challenging the Board's decision successfully in some other way, would obtain as judicial relief only an order for a new hearing before a now-hostile Board. Since the standards used by the Board in granting route awards are so vague, it is unlikely that the carrier could force the Board to award it a route. Thus there was little incentive to mount a court challenge.

Id. at 88.

150. Jordan's analysis goes as follows:

There is abundant evidence that air transportation is not a natural monopoly—that is, that there are few, if any economies of scale available in nonregulated airline operations. This and other data provide good reason to believe that the nonregulated, open-entry airline market structure would approach a competitive market structure, thereby maximizing overall consumer benefits while yielding efficiency in production and exchange. It follows that if Congress believed that the public interest should be equated with consumer benefit, Congress would have adopted a policy of nonregulated open entry for the airlines. But instead Congress enacted the Civil Aeronautics Act of 1938, and then, after observing twenty years of CAB performance during which entry was largely closed, it left the CAB's economic regulatory powers essentially unchanged when enacting the Federal Aviation Act of 1958. This demonstrated that Congress believed the CAB's performance to have been appropriate and believed that the public interest included more than consumer benefits.

Perspectives supra note 10, at 60-61.

Two flaws in Jordan's analysis render his conclusion with respect to Congressional intent incorrect. First, the data which demonstrates that the airline industry approaches a competitive
carriers to the virtual exclusion of all others.\textsuperscript{151} Given the statutory mandate of promoting the public interest, is the CAB's policy fulfilling this mandate?

An examination of the statutory definition of "public convenience and necessity"\textsuperscript{152} leads to the conclusion that a route moratorium would be justifiable under the statute had the Board followed proper procedures in formulating such a policy.\textsuperscript{153} That definition is broad enough so that the concept can be interpreted reasonably to mean almost anything. No standards are given to the CAB to formulate a proper adaptation of the air transportation system to present and future needs of commerce.\textsuperscript{154} Advantages which are inherent in an air transport system by definition should exist without the aid of governmental planning. Sound economic condition is not defined in the CAA.\textsuperscript{155} Protecting existing carrier's market positions is not necessarily inconsistent with adequate, economical, and efficient service.\textsuperscript{156} Although competition is mentioned as a goal, it is required only to the extent necessary for the sound development of an air transport system properly adapted to the needs of market structure was not convincingly available until Jordan published his study in 1970, 12 years after the enactment of the Federal Aviation Act of 1958. Second, while that Act left the economic regulatory powers of the CAB virtually intact, such a reenactment of provisions was to "be considered as an absolute neutral factor in any question of interpretation which may arise in the future." Air Transportation Development and Airspace Problems, H.R. Rep. No. 2360, 85th Cong., 1st Sess., reprinted in, [1958] U.S. CODE CONG. & ADMN. NEWS 3750, 3755. This probably should be taken as an indicator that Congress simply did not reexamine economic regulation in the 1958 legislation. Its concern was focused elsewhere. Thus Jordan's reliance on statutory reenactment as evidence of Congressional acquiescence in a protectionist policy is misplaced.

\textsuperscript{151} See note 67 and accompanying text supra.
\textsuperscript{152} See text accompanying note 27 supra.
\textsuperscript{153} Looking to that definition, the CAB could have determined that new routes were presently inadvisable in order to maintain "sound economic conditions" in air transportation. The possibility that carriers were suffering financial difficulties at that time lends credence to such an argument. See note 149 supra.
\textsuperscript{154} It seems an awesome burden to place on anyone the task of predicting something as unpredictable as the "future needs of commerce!"

One might argue that the CAB could have exercised its discretion more appropriately, and its failure to do so thus constitutes an improper exercise of discretion. Such an argument, however, is circular because a determination of what is "proper" necessarily depends on the decision maker's personal opinion. Clearly two people can reasonably arrive at quite different conclusions given the same information. To a large extent, such opinions will depend on the philosophical and political orientation of the decision maker.

\textsuperscript{155} If we define "sound economic conditions" in a given line of business to mean the permanent profitability of every firm in that line, then there is little doubt that one way of promoting these conditions (though not of assuring them) is the use of governmental power to quash any serious competition, both from new firms and among the fortunate incumbents.

\textsuperscript{156} Often, the effect of a CAB decision is to protect existing carriers while the CAB justifies the decision on other legitimate grounds. "[T]he Board . . . in almost all [cases] in which it has
commerce and is prohibited to the extent that it is perceived as destructive or unfair.\textsuperscript{157} And finally, promotion of a cartel is not inconsistent with development of civil aeronautics.

The basic problem stems from the vagueness of the congressional intent to promote the public interest through the use of a public convenience and necessity standard.\textsuperscript{158} By itself, this standard is objectively undefinable.\textsuperscript{159} what may be in the interest of one segment of the public may undercut completely the interests of another segment of the public.\textsuperscript{160} Congress apparently recognized this because it attempted to define the term in an objective manner. Unfortunately, as the foregoing discussion indicates, its “objective” definition embodies inherently inconsistent and subjective terms. The inability for the CAB to simultaneously maximize all elements of the definition leaves open the possibility that widely disparate interpretations could occur from period to period, while still remaining consistent with the statutory language. Yet the foregoing analysis indicates that the results of such inconsistent interpretations bear little relation to the economic objectives sought by regulation, and vary substantially from the concerns of Congress when it enacted the CAA.

The initial portion of this article identified and analyzed the economic objectives which generally are considered as reasons for regulating. However valid a congressional pursuit these objectives may be,\textsuperscript{161} it also has been seen that the objectives are not necessarily achieved by entry/exit regulation, and that the vagueness of the statutory language permits continued pursuit of these objectives through regulation despite an inability to achieve them. New legislation is required to prevent further pursuit of economic objectives through statutory language which can be interpreted legitimately to effectively undermine those very objectives.

Congress presently is aware of this need, as evidenced by a variety of recent legislative proposals that would alter existing airline regulation. These proposals are divisible into two categories: one type would con-
tinue the need for a certificate of public convenience and necessity but would redefine "public convenience and necessity" to make explicit a congressional intent to promote competition through freer entry policies; the other type would eliminate the concept of public convenience and necessity and only require that carriers obtain a certificate of fitness. In seeking an effective deregulatory proposal\textsuperscript{162} an examination of these two types proves useful.

The proposals which retain the requirement of a certificate of public convenience and necessity typically include a redefinition of that term. Those proposals contain many similar elements in the redefinitions. However, the following elements of various redefinitions exemplify the variances of the pending bills:

- The phased and progressive transition to an air transportation system which will rely on competitive market forces to determine the variety, quality, and price of air services, through the facilitation and promotion of entry and potential entry of new carriers into all phases of air transportation, meaningful price competition, and optimal carrier efficiency . . . .\textsuperscript{163}
- Reliance on entry of new carriers to provide a variety of efficient and innovative low-cost transportation services . . . .\textsuperscript{164}
- The reliance on entry or potential entry of new carriers into all phases of air transportation to provide the stimulus for the provision of efficient and innovative air transportation with a meaningful price competition and optimal carrier efficiency. (4) The continued access of rural or isolated areas to the Nation's air transportation network with direct Federal assistance where appropriate . . . .\textsuperscript{165}
- The encouragement of new carriers; (5) The provision of a variety of adequate economic, and low-cost services by air carriers . . . .\textsuperscript{166}

In addition to offering substantive changes in the definition of public convenience and necessity, some of these proposals would change the weight that the CAB must place on that term in deciding whether or not a certificate will be issued. A bill introduced by Senator Cannon in 1976 would have required that a certificate be issued to a new applicant "unless . . . such transportation [was] not required by the public con-

\textsuperscript{162} Deregulation here does not necessarily refer to complete abandonment of regulation of the airline industry. While such a situation might be justifiable and even advisable in the long run, it is clear that such a proposal would presently be politically infeasible. Thus, it is probable that deregulation will come through implementation of gradual steps.


venience and necessity."¹¹⁶⁷ Arguably, this language would create a rebuttable presumption in favor of a route applicant that a route was required by the public convenience and necessity. This presumption would be rebutted by a showing on the part of an opponent to the route application that the public convenience and necessity did not require the granting of this route. An alternative interpretation, however, would read this language as not shifting any burden of proof away from the applicant. The use of the double negative, "unless . . . not," is sufficiently ambiguous as to allow both interpretations.

The 1977 Cannon-Kennedy proposal would also require issuance of a certificate without demanding a showing that the public convenience and necessity required such issuance. Rather, the Board would be required to issue the certificate "unless the Board finds that such transportation is not consistent with the public convenience and necessity."¹¹⁶⁸ Again, it would appear that this proposal would create a presumption of consistency with the public interest, although it is conceivable that the use of the double negative could result in a contrary presumption.

Changing the weight attached to the public convenience and necessity from an affirmative "requirement" to a mere showing of "consistency" offers the CAB an opportunity to loosen its entry policy. Unfortunately, "consistency," "requirement," and perhaps even "unless inconsistent" are all sufficiently ambiguous terms, when used in conjunction with public convenience and necessity, to lessen considerably the impact that these legislative changes would have on CAB policies in the long run. The language is vague enough to permit the CAB not to take this opportunity to loosen its entry policy and still remain within the parameters of the present or even proposed statutory language. The CAB could effectively interpret these terms to preclude new entry without abusing its authority.

These proposals become no more helpful when read in conjunction with the redefinitions of public convenience and necessity discussed above. Even the most explicit of definitions includes the safety valve of "among other things,"¹¹⁶⁹ thereby offering the CAB an opportunity to use its own criteria for defining the term. Neither the statute nor any of the proposals state the amount of "consideration" that the CAB must afford to the statutory criteria. Thus, the proposed changes retain much of the

¹¹⁶⁹. All of the proposals included language such as this: "the Board shall consider the following among other things, as being in the public interest." 123 CONG. REC. S2487, S2489 (§ 5) (daily ed. Feb. 10, 1977) (emphasis added).
inherent vagueness of the present statutory language,\textsuperscript{170} and thereby leave open the possibility for coexistence of widely disparate policies which bear little relationship to the concerns of Congress.

The only legislative proposal to date that would have eliminated the requirement of considering the elusive public convenience and necessity in a route application proceeding was S. 3364, introduced in 1976 by Senator Kennedy at the close of the Subcommittee hearings concerning the CAB.\textsuperscript{171} That bill provided for a four-year transition period\textsuperscript{172} to a system which would have mandated that the CAB issue a “certificate of fitness” to any carrier capable of demonstrating that it was “fit, willing, and able to perform the air transportation applied for.”\textsuperscript{173} Since this requirement presently exists, air carriers and potential air carriers can look to past Board decisions interpreting this relatively objective language for guidance in meeting this requirement. More importantly, however, this virtually eliminates CAB discretion to restrict entry and exit\textsuperscript{174} for economic reasons in the airline industry.\textsuperscript{175} In effect, then, this certificate of fitness can be equated with an operating license of a business which must be granted if the applicant can show that it is objectively capable of performing the proposed service.

This legislative proposal provides an example of what should be sought in eliminating entry/exit regulation from the airline industry. First, its elimination of the presently required showing of public convenience and necessity cuts to the heart of present regulatory problems. It removes the CAB’s ability to roam at will on a broad range of interpretation in which it can justify virtually any entry/exit policy which it deems to be within the public interest at that moment—from completely closed to completely free entry. Second, the resulting system under such a proposal would be much better adapted to maximization of the economic goals sought through present regulation. This is evidenced by entry/exit regulation’s inability to induce significant service to small communities, its inability to provide for a safer or more technologically advanced

\textsuperscript{170} See notes 152-160 \textsuperscript{supra}.
\textsuperscript{171} 122 CONG. REC. S6295 (daily ed. May 3, 1976).
\textsuperscript{172} Id. at S6297 (Subtitle IV-C).
\textsuperscript{173} Id. (Subtitle IV-B §§ 451(a), 451(d)). Section 451(d) provides: “The Board shall issue a certificate of fitness upon a finding that the applicant is fit, willing, and able to perform the air transportation applied for.” Id.
\textsuperscript{174} Section 460 provides that “each air carrier may reduce, increase or otherwise alter the level of air service, or cease all air service to a point it is authorized to serve.” Id. at S6300.
\textsuperscript{175} In addition to this substantive limitation of discretion, this act would have provided for an expedited application process where a certificate would be granted automatically if the CAB failed to act on an application within 180 days. Id. at S6297 (§ 451(c)). This procedure would substantially lessen the CAB’s ability to operate under an informal route moratorium. See note 39 \textsuperscript{supra}.
industry, and its inability to capitalize on non-existent market structure characteristics. These failings would not exist under competitive conditions. Finally, the four-year transition period would enable an orderly change from a highly-regulated to a significantly less-regulated market structure. It would mitigate the fear of chaos caused by sudden change while at the same time acting as a controlled experiment to test the theory that greater competition will benefit consumers more than regulation does. Thus, such a proposal offers an opportunity to maximize the goals sought by economic regulation of the airline industry, and also provides a forum in which the effect of greater competition on consumers can be ascertained more accurately than under the present scheme.

CONCLUSION

This article has sought to develop an objective framework within which the issue of entry/exit deregulation of the airline industry may be dealt with effectively. It was seen that the underlying economic premise thought to justify economic regulation of entry/exit aspects in the airline industry proved to be invalid. Furthermore the available economic evidence leads most economists to conclude that the airline industry approximates a competitive market structure. That being the case, the logical conclusion is that Congress should lean heavily toward revamping its regulation of the airline industry so that the beneficial elements of the competitive market may operate freely.

A number of pending or past legislative proposals have been examined briefly. Only one of those proposals offers an efficacious solution to the problems caused by present regulation, because it was the only proposal that eliminated the concept of the public convenience and necessity from certification requirements. Additionally, its transition period offers economists an opportunity to evaluate the precise effects of deregulation, and, if necessary, seek legislative solutions to unforeseen problems. Most importantly, the proposal's increased reliance on competitive market forces will better enable the consumer to reap the full benefits that necessarily will accrue from competition for the transportation dollar.

176. A word of caution in evaluating the effects of freer entry/exit during this period is necessary. Any system attempting to mix regulation and competition undoubtedly will contain some imperfections. In evaluating the results obtained under such a system, the analyst should be exceedingly careful to avoid attributing problems to the existence of either the regulatory or the competitive elements. The fact may be that the problems arise specifically from the mix rather than from the separate elements. If problems are mistakenly attributed to the wrong cause, any solution geared to eliminating that cause will create greater problems than existed previously.
A Review and Critique of the CAB's Domestic Passenger-Fare Investigation: Docket No. 21866-8, the Rate of Return

RICHARD D. GRITTA*

INTRODUCTION

On April 9, 1971, at the conclusion of Phase 8 of the Domestic Passenger-Fare Investigation¹ (DPFI), the Civil Aeronautics Board (CAB) set the "fair rate of return," or so-called cost of capital, to the U.S. domestic air carriers at 12.0%, increasing that return from the 10.5% standard determined in the 1960 General Passenger-Fare Investigation (GPFI).² In doing so, the Board weighed expert testimony which sought to set that return as low as 10.5% and as high as 13.5%. The purpose of this article is to review the evidence and the CAB methodology used in setting the 12.0% return and to argue that sound testimony urging a higher return was rejected incorrectly.

The rate of return will be defined first. Then the article will examine in detail the CAB specification of that return, the testimony and evidence on

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1. CIVIL AERONAUTICS BOARD, DOMESTIC PASSANGER-FARE INVESTIGATION, 673-758, (1970-1974) (Phase 8, The Rate of Return, Docket No. 21866-8, CAB Order No. 71-4-58 (April 9, 1971)) [hereinafter cited as DPFI]. Phase 8 also considered the rate of return to the local service carriers. This article, however, will deal exclusively with the trunklines.

I. THE RATE OF RETURN

In economic theory, all the factors of production, land, labor, capital, and management, have required returns. The returns to land are rents; to labor, wages; and to management, salaries. The return to capital, or the cost of funds, is called the cost of capital. In public utility economics, this cost is referred to as the "fair rate of return."

The "fair rate of return" under regulation has been defined as, "that percentage which when applied to the investment rate based will return enough in current dollars to cover fixed charges on debt and preferred stock and will provide a 'fair and reasonable' compensation to common equity holders."\(^4\)

This return must meet three fundamental economic criteria. It must be:

1. sufficient to enable a regulated industry to attract new capital at a reasonable cost,
2. sufficient to enable a regulated industry to maintain its credit standing and financial integrity,
3. commensurate with returns being earned on investments in other industries facing corresponding risks.\(^5\)

The proper specification of this return is critical to carrier profitability, because this return is an important input into the total dollar required revenue, itself a determinant of fare levels.\(^6\) If an industry cannot earn a "fair rate of return," or if that return is not properly set, that is, not

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3. Lest the reader be persuaded that this article will argue for higher fares, this caution must be made. A higher return does not necessarily imply higher fare levels as will be argued in the conclusion of the article.

4. *Domestic Passenger Fare Investigation*, Docket No. 21866-8, Exhibit BE-T-1 at 5 (testimony of Victor H. Brown) [All the exhibits are hereinafter cited as part of the DPFI, Docket No. 21866-8]. Note that these exhibits are not included in the CAB orders which made up the final report, but are part of the record under Docket No. 21866-8. These exhibits are available in the CAB Public Reference Room, Washington D.C., or from the author's files.

5. Id. The final criterion was well established in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944).

6. The cost of capital as an input into the total dollar revenue required (R) can be stated as follows:

\[ R = O + r(V-D) \]

where O represents normal operating costs, \( r \) is the rate of return, and \( V \) and \( D \) are the gross value of property and the accrued depreciation on that property, respectively. Obviously, if the rate of return is not properly specified, the total dollar required returns will either be understated.
commensurate with risks and returns in other industries (criterion 3), then investors will avoid that industry and invest elsewhere. The industry will find itself unable to raise funds at a reasonable cost and, therefore, incapable of attracting the capital necessary for expansion (criterion 1). The net result will be the financial deterioration of the industry and its member firms (criterion 2).

In practice, the "fair rate of return" is defined as the weighted average of the costs of debt (long-term bonds) and equity (common stock), using as weights the proportion of those sources of funds to total capital.7 That is,

\[
\text{Cost (in percent)} \times \text{Weight} = \text{Weighted Cost}
\]

The cost of debt capital is deemed to be the “embedded” or historical cost of debt, while the cost of common equity is the required rate of return that stockholders' are demanding.8

In Phase 8, the CAB set the rate of return at 12.0%. Using the above methodology, the Board derived that return as follows:9

\[
\begin{align*}
\text{Debt} & = 6.20\% \times 0.45 = 2.79\% \\
\text{Equity} & = 16.75\% \times 0.55 = 9.21\% \\
& = 12.00\%
\end{align*}
\]

Furthermore, the Final Examiner, Whitney Gillilland ruled that:

1. The cost of debt shall be based on the present embedded cost with no allowance for costs related to future debt financing.
2. Convertible debt should be recognized as debt rather than equity and their recognized cost should be based on their coupon rate.
3. In view of the unsoundness of the actual industry average debt ratio (50% debt and 40% equity), a hypothetical ratio shall be employed.
4. A single rate of return should be established for the domestic truckline industry as a whole.10

The Board thus rejected testimony by witnesses Victor H. Brown (for the Bureau Counsel), J. Rhoades Foster (representing Braniff, Continental, National, and Western), and David A. Kosh (representing American,

or overstated. See Davis & Swimmer, A Methodological Approach for Evaluating Transportation Rate Increases, 40 ICC Prac. J. 310 (1973).  
7. W. Weston & E. Brigham, Managerial Finance 605-06 (5th ed. 1975). Preferred stock is usually included in the calculation where it is a significant source of funds. It is a very small part of airline total capital and as a result, preferred stock is excluded from the Board's formula.
8. The latter cost is a function of dividend yields and investor expectation of growth in the future. It is therefore difficult to estimate as will be brought out later in this article.
9. DPFI, supra note 1, at 673 (CAB Order No. 71-4-58 at 1).
10. Id.
Delta, Eastern, Northwest, TWA, and United), as well as the recommendations of Harry H. Schneider, the Initial Examiner, seeking to set the return in the range of 10.5%-13.5%. Table I summarizes the calculations as submitted by these four.\textsuperscript{11} The following three sections outline their testimony on the key inputs, the cost of debt and equity, and on the capital structure to be employed in the weighting process.

**A. **\textbf{The Cost of Debt}

The embedded cost of debt is defined as the dollar amount of interest divided by funded debt (long-term debt plus current portions due), and its estimation is usually objective and non-controversial.\textsuperscript{12} As evident from Table I, however, the estimates for the costs of debt capital ranged from 5.7\% to 7.6\%:

<table>
<thead>
<tr>
<th></th>
<th>7.0%-7.6%</th>
<th>7.0%</th>
<th>6.9%</th>
<th>6.2%</th>
<th>5.7%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foster</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Initial Examiner</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kosh</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Final Examiner</td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Brown</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The breakdown by carrier are listed on Table II as presented by Brown, Foster, and Kosh. The calculations employed by Gillilland and Schneider were for aggregate groups and are too detailed to be presented here.\textsuperscript{13}

The range of estimates on the Table is the result of two separate controversies. The first concerned the problem of how to treat convertible bonds, (that is, bonds which could be converted into common stock at the bondholder's option). The second centered on the extent to which future financing costs should be included in the embedded cost of debt capital.

At the low end, Brown argued for a cost of 5.7\% based on the acutal embedded cost of debt as of December 31, 1969, with \textit{no} adjustment for future financing costs. In addition, Brown contended that convertible bonds should be included at their coupon rates, reasoning that there

\textsuperscript{11} Two of the three expert witnesses input one specific figure. J. Rhoades Foster, however, estimated the rate of return as a range from 12.2\%-13.9\% over the years 1969-1973. \textit{See DPFI, Docket No. 21866-8, Exhibit FA-1 at 44} testimony of J. Rhoades Foster. The figure on Table I is his range for the year 1971 as of the date that he testified. When asked to input one figure, Foster set that return as 13.0\%, the mid-point of his range for 1971. It should be noted here that the total range of 10.5\%-13.5\% input by the different witnesses is highly significant to the air carriers. An incremental 1\% return on the rate base of the trunklines ($9.6 billion in 1970 and $13.7 billion by 1976) is a very sizable incremental profit.

\textsuperscript{12} It is derived from historical data and thus does not normally involve the subjective estimates inherent in specifying the cost of equity. For an example of the calculation of the embedded cost of debt capital, \textit{see id}. J.C-K-Exhibits at 1 (exhibits of David A. Kosh).

\textsuperscript{13} \textit{See DPFI, supra} note 1, Apps. A \& B.
## TABLE I

The Cost of Capital to the U.S. Domestic Airlines Docket No. 21866-8, Domestic Passenger-Fare Investigation

<table>
<thead>
<tr>
<th></th>
<th>Cost of Capital</th>
<th>Capital Structure</th>
<th>Weighted Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>BROWN:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Debt</td>
<td>5.7%</td>
<td>59</td>
<td>3.4%</td>
</tr>
<tr>
<td>Equity</td>
<td>16.0%</td>
<td>41</td>
<td>6.6%</td>
</tr>
<tr>
<td></td>
<td>adjustment¹</td>
<td></td>
<td>10.0%</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>10.5%</td>
</tr>
</tbody>
</table>

| FOSTER:  |                  |                   |                 |
| Debt     | 7.0%            | 45                | 3.1%            |
| Equity   | 17%-19%         | 55                | 9.4%-10.4%      |
| Total    |                 |                   | 12.5%-13.5%     |

| KOSH:    |                  |                   |                 |
| Debt     | 6.9%            | 40                | 2.7%            |
| Equity   | 18.0%           | 60                | 10.3%           |
| Total    |                 |                   | 13.5%           |

| SCHNEIDER: |                |                   |                 |
| Debt      | 7.0%           | 40                | 4.2%            |
| Equity    | 17.0%          | 40                | 6.8%            |
| Total     |                 |                   | 11.0%           |

¹ Brown arbitrarily added 0.5% to his estimate as an adjustment for future conditions.
² Foster actually used a range of estimates for the cost of equity capital and therefore derived the total cost of capital as a range. He also employed a range of debt costs (7.0%-7.6%) to include financing costs in the future. His estimate for 12/31/71 is the 7.0% above. (See Table II, especially footnote 3).

**SOURCE:** DPFI, Docket No. 21866-8, Exhibit BE-133 at 1, Exhibit FA-1 at 44, JC-K-Exhibit at 29, cited in, CAB Order No. 71-4-58 (Appendix D).
TABLE II
The Embedded Cost of Debt Capital to the U.S. Domestic Airlines
Docket 21866-8, Domestic Passenger-Fare Investigation

<table>
<thead>
<tr>
<th></th>
<th>BROWN(^1)</th>
<th>KOSH(^2)</th>
<th>FOSTER(^3)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Cost of Debt</td>
<td>Cost of Debt</td>
<td>Cost of Debt</td>
</tr>
<tr>
<td></td>
<td>12/31/69</td>
<td>12/31/70</td>
<td>12/31/69</td>
</tr>
<tr>
<td>AMERICAN</td>
<td>4.8%</td>
<td>5.3%</td>
<td>4.9%</td>
</tr>
<tr>
<td>EASTERN</td>
<td>5.2%</td>
<td>6.3%</td>
<td>5.9%</td>
</tr>
<tr>
<td>TWA</td>
<td>5.5%</td>
<td>6.2%</td>
<td>5.6%</td>
</tr>
<tr>
<td>UNITED</td>
<td>6.4%</td>
<td>6.0%</td>
<td>5.6%</td>
</tr>
<tr>
<td>BRANIFF</td>
<td>6.1%</td>
<td>6.2%</td>
<td>6.0%</td>
</tr>
<tr>
<td>CONTINENTAL</td>
<td>4.9%</td>
<td>6.3%</td>
<td>5.5%</td>
</tr>
<tr>
<td>DELTA</td>
<td>7.2%</td>
<td>8.0%</td>
<td>8.0%</td>
</tr>
<tr>
<td>NATIONAL</td>
<td>5.7%</td>
<td>7.1%</td>
<td>6.9%</td>
</tr>
<tr>
<td>NORTHWEST</td>
<td>6.7%</td>
<td>7.5%</td>
<td>7.0%</td>
</tr>
<tr>
<td>WESTERN</td>
<td>6.9%</td>
<td>7.4%</td>
<td>7.1%</td>
</tr>
<tr>
<td>BIG 4</td>
<td>5.5%</td>
<td>6.6%</td>
<td>5.5%</td>
</tr>
<tr>
<td>OTHER 6</td>
<td>6.2%</td>
<td>7.4%</td>
<td>—</td>
</tr>
<tr>
<td>TOTAL</td>
<td>5.7%</td>
<td>6.9%</td>
<td>5.8%</td>
</tr>
</tbody>
</table>

1 With no adjustments for future financing costs.
2 Adjusted for 10% increase in future financing costs on new debt and 8.25% on debt refinanced in 1970.
3 Adjusted for future financing costs which would drive up the embedded cost of debt capital computed by Foster as follows:

<table>
<thead>
<tr>
<th></th>
<th>(Incl. Conv.)</th>
<th>(Excl. Conv.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>12/31/71</td>
<td>6.6%</td>
<td>7.0%</td>
</tr>
<tr>
<td>12/31/72</td>
<td>6.9%</td>
<td>7.3%</td>
</tr>
<tr>
<td>12/31/73</td>
<td>7.2%</td>
<td>7.6%</td>
</tr>
</tbody>
</table>

Foster's range of estimates into the future for the cost of debt is therefore 7.0%-7.6%.

was little likelihood of their conversion in the foreseeable future.\textsuperscript{14} Although Brown admitted that future financing costs could be included in
the cost of debt, he rejected this approach on two grounds. First, he
believed that the reliability of estimates of interest rates for more than six
months in the future was open to question. Second, he felt if future rates
exceeded current embedded costs, their inclusion would yield “windfall”
profits to the carriers.\textsuperscript{15}

Kosh defined the cost of debt capital as being composed of two
elements: the embedded cost of outstanding debt and the cost of
additional debt to be raised in the near term.\textsuperscript{16} In arriving at the total cost,
he therefore adjusted the embedded cost of December 31, 1970 for a
rate of 8.25\% to reflect refinancing of debt maturing in 1970 and for
10.0\% for additional debt to be floated in that year.\textsuperscript{17} Kosh also argued,
in opposition to Brown, that to fail to consider the future costs of debts
would be to understate returns necessary to ensure the financial health
of the industry. Further, Kosh excluded the cost of convertible debt in his
estimate on the grounds that to include them would distort the true cost
of debt capital. He reasoned that the actual dilution in stockholders’
equity, when conversion took place, would be significant. His estimate
with convertible debt included was 6.5\%.

The final expert witness, J. Rhoades Foster, argued for a 7.0\%-7.6\%
range as the best estimate of the cost of debt.\textsuperscript{18} He computed the final
estimates based on the embedded cost adjusted for future financing
costs which he estimated would drive the embedded cost to 7.0\% by
1971 (6.6\% including convertibles) and 7.6\% by 1973 (7.2\% with con-
vertibles). (See Table II, especially footnote 3). Foster thus agreed with
Kosh about the need to consider future financing costs and the impact of
convertible debt as equity.

Schneider, the Initial Examiner, took a compromise view. Relying on
Brown’s testimony, he asserted that convertible debt should be treated
as debt and included at the coupon rate on that debt. However, he also
found the Kosh and Foster arguments about future costs convincing and
in effect accepted Foster’s 7.0\% estimate.\textsuperscript{19} In doing so, he strongly
rejected Brown’s arguments concerning the subjectivity of future financ-

\begin{thebibliography}{19}
\bibitem{14} \textit{DPPI}, Docket No. 21866-8, Exhibit BE-T-1 at 7 (testimony of Victor H. Brown).
\bibitem{15} \textit{Id.} at 8.
\bibitem{16} \textit{Id.} JC-K-Testimony at 10 (testimony of David A. Kosh).
\bibitem{17} Kosh pointed to recent increases in general interest rates and specifically to an 11\%
bond offering (in 1971) by American as indicative of developing trends in capital costs. \textit{Id.} at
10-11, JC-K-Exhibit at 1, and App. at 1-4.
\bibitem{18} \textit{Id.} Exhibit FA-1 at 8-16, Exhibit FA-2 and Schedule 1 at 1-11.
\bibitem{19} \textit{DPPI}, \textit{supra} note 1 at 716-19 (CAB Order No. 71-4-58, App. D at 41-48) (Excerpts,
from the Initial Decision by Harry H. Schneider).
\end{thebibliography}
ing costs saying, "While it is conceded that the determining of future trends in borrowing and debt costs involve to a large extent areas of judgment, nevertheless the issues in this case involve rate making and specifically encompass the reasonably foreseeable future costs of debt."\(^{20}\)

The Final Examiner, Whitney Gillilland, set the cost of debt capital at 6.2%. He defined his return as the actual embedded cost of debt as of December 31, 1970. He thus accepted Schneider's finding that convertible debt be treated as debt, but rejected the Initial Examiner's claim that future financing costs be considered.\(^{21}\)

**B. THE COST OF EQUITY**

The cost of common equity can be defined in financial theory as the rate of return that stockholders, in the aggregate, except from their investment.\(^{22}\) Its estimation in practice is difficult and subjective because the cost necessarily deals with stockholder expectations concerning future growth in returns.

Three basic methods have been employed in regulatory hearings to arrive at a good proxy for this expected rate of return. They are:

1. The earnings yield or earnings/price ratio approach.
2. The comparative earnings or "opportunity cost of capital" method.
3. The discounted cash flow (DCF) technique.

All the witnesses at the proceedings dismissed the first method as inapplicable to the airline industry as a technique for setting the level of returns.\(^{23}\) Witnesses Brown and Foster employed the second approach.


\(^{21}\) Gillilland did so on the grounds that he was recommending an "optimal" or "hypothetical" capital structure and that therefore to employ future costs was inconsistent. His 6.2% estimate differed from Brown's 5.7% only in that Gillilland advanced the calculation of the cost of debt capital to 1970. See DPFI, supra note 1, at 684 (CAB Order No. 71-4-58 at 18).

\(^{22}\) J. WESTON & E. BRIGHAM, supra note 7, at 548.

\(^{23}\) Under this method, the cost of common equity is considered to be approximated by the industry's (or firm's) average earnings/price ratio over some time period. The earnings/price ratio method is widely used in public utility hearings where the earnings/price ratios are more stable. Foster dismissed airline earnings/price ratios, however, as too variable to be used as estimators of the cost of equity capital to the carriers. That the earnings/price ratio approach can be used to show shifts in equity costs was not denied, however. See DPFI, Docket No.
while Kosh used the third methodology. Their estimates can be seen on Table I. In sum, these estimates for the cost of equity range from 16.0%-19.0%:

<table>
<thead>
<tr>
<th></th>
<th>Rate of Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foster</td>
<td>17.0%-19.0%</td>
</tr>
<tr>
<td>Kosh</td>
<td>18.0%</td>
</tr>
<tr>
<td>Initial Examiner</td>
<td>17.0%</td>
</tr>
<tr>
<td>Final Examiner</td>
<td>16.75%</td>
</tr>
<tr>
<td>Brown</td>
<td>16.0%</td>
</tr>
</tbody>
</table>

The comparable earnings approach assumes that the greater the attendant investment risk, the greater the expected return must be in order to attract new equity capital. This approach incorporates the concept that because all companies must compete in the same market place for capital, regulated companies should earn at least the same return on book equity as industries with comparable risk.24 (This flows from criterion 3 above).

Brown used the comparable earnings approach and again, (as in the case of the cost of debt), entered the lowest estimate of the cost of equity. Brown’s 16.0% return was derived from the historical correlation between risks and returns on book equity for different industry groupings. He justified his approach on the grounds that an analysis of this relationship would provide an indication of the rate of return necessary to float new equity capital if future conditions did not deviate significantly from the historical period analyzed.

For his study, Brown selected four composite groups: The Moody’s 125 Industrials, the Moody’s 24 Electric Utilities, the Standard and Poor’s 3 Telephone Companies, and the Standard and Poor’s 11 Gas Utilities.25 Risks measured were business risk, financial risk, profitability risk and investor reaction. Brown used log-linear regressions (“least-squares” fits) to compute trends, stability, and growth in earnings, returns on equity, dividends, and returns on sales.26 His ultimate conclusion was that investment in the airline industry was greater in risk than it is in the electric, gas, and telephone utilities but approximately equal in risk to the Moody’s 125 Industrials. Breaking down the composite industrials into 15 sub-groups, he arrived at the following average (1960-1969) rates of return on equity:

---

21866-8, Exhibit FA-1 at 25, BE-T-1 at 13-14. Later in this article the earnings yield will be used to show increases in the cost of equity capital over time.

24. Id. Exhibit BE-T-1 at 10.

25. Brown argued that just to compare airline returns with other regulated industries would be to introduce a circularity problem. The earnings of other regulated groups might be too high or low. Id. at 17. For a list of the firms used by Brown, see Id. Exhibit BE-131 at 1-4.

26. Brown’s evidence on risk and return measures is much too detailed to be presented here. See DPFJ, Docket No. 21866-8, Exhibits BE-T-1, BE-102, BE-103.
Basing his conclusion on a risk-return trade-off, Brown maintained that the carriers were equal in investment risk to the Motor Vehicle Manufacturers and that therefore they should be entitled to earn the same return. Table III shows his comparison. As the Motor Vehicle Manufacturers had

**TABLE III**

The Cost of Equity Capital to the U.S. Domestic Airlines
Evidence of Victor H. Brown Docket 21866-8, Domestic Passenger-Fare Investigation

<table>
<thead>
<tr>
<th></th>
<th>Stability Indices in %</th>
<th>Return on Equity</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EPS¹</td>
<td>ROE²</td>
</tr>
<tr>
<td>Motor Vehicle</td>
<td>68.8</td>
<td>69.6</td>
</tr>
<tr>
<td>Manufacturers</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Domestic Big Four</td>
<td>60.1</td>
<td>64.1</td>
</tr>
<tr>
<td>Airlines</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Domestic Eleven</td>
<td>68.3</td>
<td>80.4</td>
</tr>
<tr>
<td>Airlines</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Brown’s Estimate of the cost of equity = 15.9 = 16.0%  

¹ The Stability Index is a measure of the variability around a log-linear trend line for the 1961-1969 time horizon for each of the above variables. It therefore directly measures risk. 
² EPS is earnings per share on common stock. 
² Stability of the return on average common equity. 
³ Stability of dividends per share. 
⁴ Stability of the return (net profit after taxes) on sales. 
⁵ Number of decreases from preceding year in earnings per share as a percent of total possible decreases. 
⁶ Return (net profit after tax) to average common equity as a proxy for the cost of capital of equity. 

an average return on equity of 15.9%, Brown set the cost of equity capital to the airlines at 16.0%. 27

Foster followed a similar methodology with a different sample to arrive at a cost of equity of 17.0%-19.0%. 28 He chose as samples for comparative purposes, the largest 10 electric utilities, the next 12 largest electrics, 9 gas pipelines, 11 food processors, and 10 trucking firms. He noted the following average returns (1965-1969) for the groups:

<table>
<thead>
<tr>
<th>Group</th>
<th>Average Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>largest 10 electrics</td>
<td>12.5%</td>
</tr>
<tr>
<td>next 12 largest electrics</td>
<td>13.5%</td>
</tr>
<tr>
<td>gas pipelines</td>
<td>14.8%</td>
</tr>
<tr>
<td>11 food processors</td>
<td>13.9%</td>
</tr>
<tr>
<td>10 truckers</td>
<td>16.1%</td>
</tr>
</tbody>
</table>

SOURCE: Exhibit No. FA-1 at 42.

Foster then contrasted, inter alia, financial risk and operating risk factors for the air carriers with these groups. These factors were: (1) The rate of capital turnover, (2) the net income to revenue ratio, (3) the operating ratio, (4) the intensity of competition, (5) the sensitivity of revenue changes to changes in economic activity, and (6) the labor costs as a percent of total costs. Using these indicators, Foster demonstrated that the variability in earnings and related factors for the trunklines was far greater than for any of the above groups. The variability of trunkline earnings, for example, was 6-15 times greater than that of the electric utilities, 3.5-6.5 times greater than that of the gas pipelines, and somewhat greater than that of the trucking firms. From this data, relying heavily on the truckers as a base, Foster concluded that true carrier returns to equity were in the 17.0%-19.0% range. 29

The final expert witness, David A. Kosh, employed the discounted cash flow (DCF) method in estimating the cost of equity capital at 18.0%. 30 From financial theory, Kosh argued that the stockholders' desired rate of return ($k_e$) is the cost of equity capital. This return is expressed: 31

$$ P = \sum_{t=1}^{n=\infty} \frac{D(1+g)^t}{(1+k_e)^t} = \frac{D}{k_e - g} $$

27. Id. Exhibit BE-T-1 at 32.
28. Id. Exhibit FA-1 at 24-43, especially 40-43.
29. Foster maintained that "the investment risk of the truckers is far greater than that of the electric utilities so that the truckers are more directly comparable with the trunklines." Trucker returns had been as high as 23.3% over the 1965-1969 period, so Foster used their 16.1% (average for 1965-1969) return as the base. He concluded, however, that "this conclusion (as to an airline equity cost of capital of 17%-19%) is necessarily the result of an exercise of judgment." Id. at 42.
31. This formulation is based on a fundamental stock valuation model. Financial theory holds that the price of a share of common stock, $P$, is equal to the present value of dividends to be received in the future. Stockholders, of course, expect these dividends to grow at some rate, $g$, in the future. The price of a share of common stock can be shown to equal (assuming a long time horizon):

$$ P = \sum_{t=1}^{n=\infty} \frac{D(1+g)^t}{(1+k_e)^t} = \frac{D}{k_e - g} $$
where \( \frac{D}{P} \) is the dividend yield on the common stock (dividends per share/stock price) and \( g \) is the rate of growth that investors expect in those dividends. Kosh estimated that the dividend yields for the carriers were the 1967-1969 average yields, and he derived \( g \) by computing a log-linear regression fit ("least-squares" fit) on dividends, earnings, and book value per share over the 1957-1969 period. Due to instability in earnings and dividends for several of the carriers, Kosh employed the growth in book value as a proxy for the growth in dividends per share in these cases. Table IV shows the resulting 18.0% return.

**TABLE IV**

The Cost of Equity Capital to the U.S. Domestic Airlines Evidence of David A. Kosh Docket 21866-8, Domestic Passenger-Fare Investigation

<table>
<thead>
<tr>
<th></th>
<th>Growth</th>
<th>Average Dividend Yield</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Dividends Per Share</td>
<td>Book Value Per Share</td>
<td>1967-</td>
<td>1969</td>
<td></td>
<td></td>
</tr>
<tr>
<td>American</td>
<td>13.9%</td>
<td>13.9%</td>
<td>2.9%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TWA</td>
<td>13.2%</td>
<td>13.2%</td>
<td>2.0%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>United</td>
<td>13.3%</td>
<td>13.3%</td>
<td>2.4%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Braniff</td>
<td>13.5%</td>
<td>13.5%</td>
<td>2.0%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Continental</td>
<td>16.4%</td>
<td>16.4%</td>
<td>2.5%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delta</td>
<td>23.9%</td>
<td>20.6%</td>
<td>1.4%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>National</td>
<td>21.6%</td>
<td>21.6%</td>
<td>1.0%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northwest</td>
<td>19.4%</td>
<td>20.0%</td>
<td>1.2%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Western</td>
<td>11.8%</td>
<td>11.6%</td>
<td>2.6%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Big 3</td>
<td>13.5%</td>
<td>13.5%</td>
<td>2.4%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other 6</td>
<td>17.7%</td>
<td>17.3%</td>
<td>1.8%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>16.3%</td>
<td>16.0%</td>
<td>2.0%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\[ k_e = \frac{D}{P} + g \]

\[ k_e = 2.0% + 16.0% \]

\[ k_e = 18.0% \]

\[ \frac{D}{P} \]

1 Growth is the compound rate of growth in dividend per share over the period, 1957-1969 (or 1963-1969 for TWA, United, and Braniff). It is based on log-linear trend line fitted to the raw data. Because of erratic data for American, TWA, United, Braniff, Continental, National, and Western, Kosh used growth in book value per share as a proxy for the growth in dividends per share in those cases.

2 The average dividend yield is the arithmetic mean for the years, 1967-1969, adjusted by 15% for the costs of financing.


Solving for \( k_e \), the resulting cost of equity capital model is:

\[ k_e = \frac{D}{P} + g \]

For a good discussion of the model and its limitations, see J. WESTON & E. BRIGHAM, supra note 7, at 548-49.

32. Kosh argued that the growth in book value per share was a good proxy for the growth
To confirm his estimation of the cost of capital, Kosh employed a cross-check. Using a sample of electric firms, gas pipelines, gas distribution companies, water utilities, truckers, independent telephone companies, and AT&T, he computed the cost of equity capital using the above formulation. In addition, he calculated a variability index for the rate of return on book equity for each firm and industry grouping and correlated risk with return (using a log-linear regression). Kosh found a significant positive correlation between the variability in rates of return and the level of those returns. This methodology suggested a cost of equity to the carriers of 17.3%, which was very close to the 18.0% derived directly, and thus it served as a confirmation of that estimate.

Schneider, the Initial Examiner, set the cost of equity capital at 17.0%, ruling that while the exact specification of this cost was a matter of judgment, (and that therefore all techniques should be considered), Brown's estimate of 16.0% was too low and Kosh's 18.0% was too high. Schneider's major arguments against Kosh's testimony stemmed from his uneasiness with use of the DCF technique in an industry with the volatility of the airlines, and with Kosh's use of the growth in book value per share as a proxy for the growth in dividends per share. In addition, the Initial Examiner ruled that Kosh's cross-check approach was too subjective. Schneider criticized Brown's use of the Motor Vehicle Manufacturers 15.9% return on equity as the most comparable to that of the air carriers, because clearly the group was somewhat lower in risk. Schneider favored Foster's evidence, (and mindful of the fact that 17.0% was a compromise mid-point between the 16.0% and 18.0% inputs), and set the return on equity at 17.0%

In the Final Decision, Whitney Gillilland allowed a 16.75% return. Like Schneider, he felt that Brown's estimate was on the low side, but, unlike Schneider, he was strongly influenced by Kosh's methodology. Specifically, Gillilland overruled the Initial Examiner's finding as to Kosh's evidence. He found no problem with the assumptions made by Kosh regarding the growth in book value as a proxy for the growth in dividends per share. Further he held that the cross-check variability study used by Kosh was a valid aid in verifying the cost of equity.

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33. For data on the firms, see Id. at 17-21.
34. id. at 21.
35. DPF, supra note 1, at 719-20 (CAB Order No. 71-4-58, App. D at 48-49) (Excerpts from the Initial Decision by Harry H. Schneider).
36. Id. at 721. (CAB Order No. 71-4-58, App. D at 50-53)
37. Id. at 720-26 (CAB Order No. 71-4-58 at 50).
38. Id. at 685-86 (CAB Order No. 71-4-58 at 20-21).
39. Id. at 684-86 (CAB Order No. 71-4-58 at 19-32).
C. THE CAPITAL STRUCTURE

While there was much discussion concerning the costs of debt and equity, and while the witnesses did differ somewhat in their estimates of both components, the most intense debate in Phase 8 of the DPFI centered on the appropriate weighting system or capital structure that should be used in arriving at the final estimate of the overall "fair rate of return." It is the differences in the weights of debt and equity which produced the largest proportion of the differences in the total return.41

The weights from Table I are summarized below:

<table>
<thead>
<tr>
<th></th>
<th>Debt</th>
<th>Equity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kosh</td>
<td>40%</td>
<td>60%</td>
</tr>
<tr>
<td>Foster</td>
<td>45%</td>
<td>55%</td>
</tr>
<tr>
<td>Final Examiner</td>
<td>45%</td>
<td>55%</td>
</tr>
<tr>
<td>Initial Examiner</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>Brown</td>
<td>60%</td>
<td>40%</td>
</tr>
</tbody>
</table>

Brown testified that the actual capital structure (as of December 31, 1969) was the preferable weighting system for the proceeding on the grounds that it did represent the objective existing structure, and that it bore some relationship to the data employed in the cost of capital calculations based on the historical analysis.42

Foster also argued for the actual capital structure, but with a subtle difference. He maintained, consistent with his plea to exclude convertible debt from the cost of debt capital calculation, that convertible debt should be treated as equity in the weighting system. This treatment was proper, Foster reasoned, because:

1. The issuer believed they would become part of equity.
2. A contrary treatment would perpetuate inadequate earnings.
3. It would permit a reduction of debt, because even a 45/55 debt/equity ratio includes too much debt in relation to the capital structures typical of utility and industrial groups, including in the latter for example manufacturers which had debt ratios of about 20.0% for 1969, although their earnings are stated to be generally more stable than those of the airlines.
4. Indebtedness should be kept as a level which maintains flexibility of financial policy under adverse conditions.43

40. The reason was that Gilliland was about to employ "optimal" capital structure weights as discussed infra.
41. One could, for example, accept Brown's estimates of 5.7% and 16.0% for the costs of debt and equity, respectively, but use Kosh's weights (40% debt and 60% equity). The return thus would be derived as 11.68%, almost 1.5% higher than Brown recommended.
42. DPFI, Docket No. 21866-8, Exhibit BE-T-1 at 15.
43. Id. Exhibit FA-1 at 16-23, Exhibit FA-2.
Adjusting the actual capital structures on December 31, 1969 for convertible debt as equity, the "actual" structure as derived by Foster was 45% debt and 55% equity.

Kosh broke completely with CAB tradition regarding the trunklines, (as actual weights had been employed in the 1960 GPFI), and with the other witnesses at the DPF. He maintained that sound regulation should be based on the "optimal" capital structure. "Optimal" was, in his definition, that capital structure which would provide capital at the minimum cost consistent with the safety of the investment.\(^{44}\) Any other ratio, he argued, would result in such low earnings that it would: (1) Make it impossible to improve the capital structure, and (2) cause volatile earnings on equity which would render it more difficult to attract equity capital. Ultimately, volatile earnings would push the carriers into more and more debt finance, spelling the financial ruin of many and actually pushing fare levels up in the future.\(^ {45}\) In the long-run, both the carriers and the consumer would lose.

Having argued for an "optimal" capital structure ratio, Kosh turned to an estimate of what was "optimal" for the carriers. He reasoned that the interest coverage ratio (operating profit/interest) was the best overall measure of safety and that the "optimal" debt weight should be based on its effect on coverage ratios given the effects of revenue instability on coverage.\(^{46}\) Kosh maintained that the airlines should have the same protection against a decline in coverage below minimum levels as was available to the electric utilities. Arguing that the electric utilities needed a coverage ratio of at least 2:1 under the most adverse circumstances, (the 2:1 coverage criterion is often used by states in determining whether securities are eligible for legal investment by fiduciary institutions, etc.), Kosh used variability measures to contrast the airlines to the electric companies and arrived at a coverage ratio of 4.9:1. At this coverage, the carriers would have the same coverage protection against declines in revenues as the electrics would have at a 2:1 ratio.\(^ {47}\) Working backwards, Kosh found that for the air carriers such a coverage supported an "optimal" structure of 40% debt and 60% equity.\(^ {48}\)

\(^{44}\) Id. JC-K-Testimony at 28.

\(^{45}\) Id. at 28-29.

\(^{46}\) The entire mechanics of Kosh's arguments is complex and very detailed. Suffice it to say, that his logic is tight-knit and convincing from an empirical standpoint. See id. at 32-38 and JC-K-Exhibit at 23-28.

\(^{47}\) Id. JC-K-Testimony at 31.

\(^{48}\) Actually, Kosh argued for a range of capital structures of 30%-35%-40% debt depending on the treatment of leased aircraft. He maintained that if leased aircraft were included in the rate base, a proper debt/equity ratio for the carriers was 40% debt and 60% equity. If leasing were excluded, the "optimal" debt ratio would be lowered to 30%-35% in debt. Leasing was excluded from the rate based after Kosh's testimony had been heard at the conclusion of
The Initial Examiner, Harry H. Schneider, rejected the evidence on capital structure presented by both Foster and Kosh. In specifying weights of 60% debt and 40% equity, the actual capital structure of the industry, he dismissed Foster's treatment of convertible debt as equity, citing the Board's earlier rejection of this idea in the Local Service Class Subsidy Rate Investigation and precedent set by other regulatory commissions. Concerning the use of the "optimal" capital structure urged by Kosh, Schneider also cited precedent by the Board in the 1960 GPFI, when the CAB had rejected Kosh's arguments for a 25%-30% debt component. Furthermore, Schneider pointed out that an examination of cases decided since 1960 indicated that in no case did a regulatory body use a hypothetical structure containing more debt than actually existed.

The decision of the Final Examiner reversed Schneider's ruling against the use of the "optimal" capital structure. In doing so, Gillilland declared,

We have concluded that the sounder course, in light of all present circumstances affecting the industry, is to utilize an optimal capital structure of 45% debt and 55% equity which will strike a reasonable balance between the actual capital structure, the interest in maintaining a reasonable amount of low cost debt capital, and the interest in maintaining a soundly financed industry. Our determination is based on the following considerations. First, there is no doubt that the present capital structure of the industry as a whole is so heavily weighted with debt as to jeopardize the financial stability of many of the carriers, and that the ratio will have to improve if the industry is to obtain capital on reasonable terms. Second, the policy of using the so-called actual capital structure can only serve to perpetuate the present unsound structure. . . . And finally, we believe

Phase 2 of the DPFI. See Civil Aeronautics Board Policy Statement, Docket No. 21866-2 (September 10, 1970). Thus, Kosh's debt ratio of 40% would be a high estimate in his opinion. See DPFI, Docket No. 21866-2, JC-K-Testimony at 38.

49. DPFI, supra note 1, at 726-28 (CAB Order No. 71-4-58, App. D at 60-66) (Excerpts from Initial Decision by Harry H. Schneider).


52. Schneider cited the following cases: Southern Bell Telephone & Telegraph Co. v. Louisiana Public Service Comm'n, 118 So. 2d 372, 376, 380-82 (La. 1960); In Re AT&T Co., 9 F.C.C.2d 30, 83-85 (1967). Kosh had presented cases supporting the use of an "optimal" ratio. Reopened Delta C&S Mail Rate Case, 28 C.A.B. 820 (1939); South Carolina Generating Co., 19 F.P.C. 855 (1958); Riverton Consolidated Water Co., 140 A.2d 114 (Pa. Super. Ct. 1958). Schneider, however, rejected these cases on the grounds that special problems of a subsidiary were involved in the Riverton case and that the other cases involved subsidiaries of parent companies whose capital structure was employed for the subsidiary. For a complete discussion, see DPFI, supra note 1, (CAB Order No. 71-4-58, App. A, especially n.128).

53. DPFI, supra note 1, at 676-77 (CAB Order No. 71-4-58 at 5).
that the use of an optimal structure is more appropriate when dealing with a wide range of carriers whose actual capital structures vary widely and where, as here, the actual structure is clearly unsound.

Citing the possibility of future debt finance by the industry as remote, and acknowledging the seriousness of the situation that found several carriers no longer meeting the legal requirements for investments of insurance companies, (who have historically purchased a large portion of airline debt), the Final Examiner used the *Rate of Return, Local Service Carriers Investigation* as a precedent for employing a lower debt ratio than actual in the case of the trunklines.\(^54\) To employ the actual capital structure would do no more "than freeze the financial structures of the carriers into an undesirable mold."\(^55\)

Gillilland, in weighing what the level of the optimal ratio should be, settled on somewhat of a compromise. Kosh had argued for a 40% debt ratio, (and actually for as low a ratio as 30%-35%—see footnote 45), and while the Final Examiner found his arguments convincing, he reasoned that a 45% debt ratio fell at a reasonable point within the range of the actual carriers ratios (33%-74%) and would represent a fair balance between the actual ratio (60% debt) and a theoretical optimal.\(^56\)

II. CRITIQUE OF THE CAB APPROACH

Phase 8 of the *DPFI* went far in attempting to recognize the changing conditions that affected the airline industry in the decade after the 1960 *GPFII*, and in raising the "fair rate of return" from the 10.5% to 12.0% to reflect those changing conditions. It can be argued, however, that the Board did not go far enough.\(^57\) Specifically, it can be asserted that:

(1) The overall rate was set too low in 1971.

\(^{54}\) In that case, the CAB held that, "the use of a 70% debt ratio would . . . create a substantial obstacle in the way of the reduction of debt ratios to more manageable proportions." 31 C.A.B. 685, 689 (1960).

\(^{55}\) Gillilland also pointed out that the carriers' high debt/equity ratios were not the result of management imprudence in the use of debt finance. Rather, they were the result of "high capital requirements combined with inadequate levels of earnings to support the maintenance of satisfactory equity ratios." Therefore, he argued that they could not be blamed for their own plight. See *DPFI, supra* note 1, at 678 (CAB Order No. 71-4-58 at 8).

\(^{56}\) Id. at 681-82 (CAB Order No. 71-4-58 at 14).

\(^{57}\) In reading the Initial and Final Decisions, one gets the definite impression that the examiners realized the industry was on the brink of serious trouble and the overall "fair rate of return" would have to be increased to recognize the sharply increased risk levels in the industry, but they were reluctant to increase that return too much. The 12.0% return therefore seems to be a kind of compromise. The important point, however, is that a regulatory body, such as the CAB, cannot change the reality of sharply increased risks perceived by investors (at least in the short run) and the probability of financial ruin, no matter at what level it sets the "fair rate of return". All that it can do is to try to specify that return which is commensurate with the real riskiness of the industry.
(2) As time has passed that return has become even more obsolete but no adjustment has been made.

(3) The specification of one rate of return for all the carriers has discriminated against the higher risk carriers.

Each point will be taken up in order.

A. THE RETURN SET TOO LOW

The contention that the Board erred in understating the true cost of capital to the trunklines is based on three separate points:

(1) The embedded cost of debt was set too low.

(2) The cost of equity capital was likewise understated.

(3) The “optimal” amount of long-term debt was incorrectly input at too high a level—45% debt.

Concerning the cost of debt capital (point 1), the Final Examiner correctly rejected the exclusion of convertible bond interest from the calculation of the embedded cost, as a means of increasing this cost. Gillilland, however, should not have reversed the Initial Examiner’s conclusion that future debt costs were properly to be included in the final estimation. The Board itself, in fact, in the GPFI had recognized that to the extent “that current and future trends would reasonably affect the embedded cost of debt, it was proper and necessary to reflect such trends.” To fail to recognize the tightening state of the capital markets in the 1970’s and the carriers' heavy demands for funds during that period was to fail to properly specify the true cost of debt capital. On this basis, Foster’s estimates of the embedded cost adjusted for future conditions (but with convertibles included) ranging from 6.6% in 1971 to 7.2% in 1973, or Kosh’s 6.5% (with convertibles), seemed proper and should have been allowed.

The estimation of the cost of equity capital (point 2) was also set too low. Both examiners seemed to be preoccupied with 16.0%-18.0% as the limits on the high and low side (Brown versus Kosh). Treating both estimates as if they were valid barriers, the Initial and Final Examiners

\[ \text{Note 21 supra.} \]

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\[ \text{Note 21 supra.} \]

A. THE RETURN SET TOO LOW

The contention that the Board erred in understating the true cost of capital to the trunklines is based on three separate points:

(1) The embedded cost of debt was set too low.

(2) The cost of equity capital was likewise understated.

(3) The “optimal” amount of long-term debt was incorrectly input at too high a level—45% debt.

Concerning the cost of debt capital (point 1), the Final Examiner correctly rejected the exclusion of convertible bond interest from the calculation of the embedded cost, as a means of increasing this cost. Gillilland, however, should not have reversed the Initial Examiner’s conclusion that future debt costs were properly to be included in the final estimation. The Board itself, in fact, in the GPFI had recognized that to the extent “that current and future trends would reasonably affect the embedded cost of debt, it was proper and necessary to reflect such trends.” To fail to recognize the tightening state of the capital markets in the 1970’s and the carriers' heavy demands for funds during that period was to fail to properly specify the true cost of debt capital. On this basis, Foster’s estimates of the embedded cost adjusted for future conditions (but with convertibles included) ranging from 6.6% in 1971 to 7.2% in 1973, or Kosh’s 6.5% (with convertibles), seemed proper and should have been allowed.

The estimation of the cost of equity capital (point 2) was also set too low. Both examiners seemed to be preoccupied with 16.0%-18.0% as the limits on the high and low side (Brown versus Kosh). Treating both estimates as if they were valid barriers, the Initial and Final Examiners
then proceeded to specify the return at 16.75% and 17.0%, very close to the middle of the witnesses' range. Both estimates, however, were biased downward by the methodology which Brown and Kosh used to derive them. As to the former's evidence, Brown completely excluded the top 10% (in terms of rates of return on book equity) of the industrials and in particular, he excluded the Chemical Group with its 18.2% average rate of return. He also contrasted the Motor Vehicle Manufacturers to the air carriers when, in fact, the carriers were clearly higher in risk (see Table IV). Finally, the risk measures that Brown used biased the airline stability indices downward, because he excluded both Eastern and TWA (as a result of negative data), the highest risk carriers, from his analysis. Thus, his 16.0% return cannot meaningfully be considered as the lower boundary of the cost of equity.

A very similar bias is contained in Kosh's DCF evidence on air carriers. Due to negative and erratic data, Kosh excluded Eastern, thus understating the true required return. Rather than representing a high barrier, the 18.0% return he derived probably more closely approximated the true cost. In any case, his cross-check estimate of 17.3%, and Foster's data arguing for a return in the 17.0%-19.0% range, clearly indicated that the true return on equity was higher than that input by

---

62. Gillilland subtracted 0.25% from the Initial Examiner's estimate of the cost of equity of 17% (thus arriving at his input of 16.75%) because he reasoned that since he was using "optimal" weights which were lower than the actual capital structure weights (40% debt/60% equity versus an actual 60% debt/40% equity) the cost of equity should be decreased somewhat. The key question therefore centers on whether the cost of equity will decline as the debt/equity ratio is decreased. Under normal circumstances, a significant decrease in the debt ratio would result in a decrease in the cost of equity. However, the airline industry debt burden is so high compared to what is normal, that it is doubtful that a decrease to 45% debt ratio would affect equity costs much, if at all. Kosh presented evidence that it would not. See id. at 28-29.

63. The list of industrial firms on page 9 of this article (from Brown's Exhibit BE-131 at 1-3) is only a partial listing of all the firms used by the witness. Other groups, having returns ranging from -7.9% to 45.2%, were arbitrarily excluded by Brown from that Exhibit. He utilized only the middle 80% of his sub-sample, dropping the top and bottom 10% of the firms (in terms of rates of return on equity). Brown also proceeded to arbitrarily eliminate the Chemical and Allied Products Group with its 18.2% average return. No justification was given for any of the exclusions. The elimination of the Chemical Group is particularly suspect since it is clear from Table IV that Brown's next comparative group (the Motor Vehicle Manufacturers Group) is clearly less risky than the air carriers. See id. Exhibit BE-T-1, at 30, JC-K-Rebuttal Testimony at 3-4.

64. Brown's risk indicators were computed using the Standard and Poor's variance formula which is log-linear in form. Since a log-linear regression cannot be run on negative data, TWA and Eastern had to be excluded in several cases. The net effect of excluding these two carriers was to further bias the estimates downward. For the formula, see id. Exhibit No BE-T-103 at 1-2.

65. This is because the estimate of g, the compound rate of growth in dividends expected by investors, is the result of a log-linear regression.
Gilliland in the Final Decision. A range of 17.0% to 17.5% at the minimum would have seemed proper and should have been found so.66

Finally, the controversy over the weighting system (point 3) was resolved in favor of using too much debt in the final calculation. Gilliland did go a long way in allowing the use of the "optimal" capital structure, but he failed to set properly that "optimal." Again, as above, he seemed to be preoccupied with a range between the actual capital structures of the carriers. Kosh's testimony was intrinsically powerful in its argument for no more than 40% debt.67 Research by this author would support a debt ratio even lower than Kosh's 40%. In a study of risk and return, it was found that the airline industry's after-tax profitability was explosively volatile and that therefore a debt ratio approximating that of the average of industrial firms was more appropriate. That ratio was in the 20%-30% range.68 In any event, 40% would seem to be the maximum debt ratio consistent with safety and should have been used.

Having specified the minimum cost of debt (6.5%) and equity (17.0%), and having argued for a weighting system of 40% debt and 60% equity, the final estimate of the overall cost of capital arrived at thus becomes:

\[
\begin{array}{ccc}
\text{Cost} & \times & \text{Weight} & = & \text{Weighted Cost} \\
\text{Debt} & 6.5\% & \times & .4 & = & 2.60\% \\
\text{Equity} & 17.0\% & \times & 6 & = & 10.20\% \\
\text{Total} & & & & = & 12.80\%
\end{array}
\]

This return is almost a full 1% above that allowed by the Board in the Final Decision, and it should be noted, is a conservative estimate of the true cost of equity capital to the carriers.69

66. Data generated by this author in a study published in this Journal would tend to argue for a return greater than 16.0%. While not strictly comparable (because the study spanned the years, 1964-1974), the results were suggestive. The author used mean rates of return on book equity versus a variability measure on those rates of return. In that study, the airlines, with lower rates of returns, had higher risk measures than any of the industrial, utility, or other groups, including one group with a 16.2% return. The sample included those firms utilized by Brown in his study. See Gritta, Profitability and Risk in Air Transport, 7 Transp. L.J. 197 (1975).

67. Kosh reasoned that if leasing were excluded from the rate base then the proper debt ratio for the industry was below 40%. See note 48 supra.

68. The author worked again with the same sample of firms as in the Brown study because it was the broadest cross-sectional study submitted. Instead of using interest coverage ratios, as Kosh had, debt ratios and computed measures for business and financial and total risk were employed. See Gritt, An Unresolved Issue in Setting the Cost of Capital to the U.S. Domestic Airlines, 41 J. Air. L. & Cov. 65(1975).

69. The reader is left to assess the changes in the cost of capital, as the costs of debt and equity are increased. Certainly, both Kosh's 13.5% and Foster's 13.0%-13.5% are not over-estimates of the true "fair rate of return", given the above evidence.
B. THE RATE OF RETURN OVER TIME

Economic and financial conditions do change over time. In the long-run, changes in the capital markets may operate to substantially alter the cost of capital to a firm or industry. Interest rates may increase or decrease, thus significantly affecting the cost of debt capital, and investor expectations may be altered, thus changing the cost of equity. Regulatory bodies, such as the CAB, must therefore be cognizant of such changes and their impact on capital needs and costs. To permit too high a return to the carriers in the face of easing capital market conditions would be to injure the public interest. To fail to adjust rates of return upward in the light of tightened conditions would be to harm the financial condition of the carriers. The failure of the CAB to provide for changing circumstances is a major flaw in the CAB regulatory approach as formulated in the DPFI.

TABLE V

<table>
<thead>
<tr>
<th></th>
<th>Embedded Cost of Debt Capital</th>
<th>Cost of Common Equity Capital</th>
</tr>
</thead>
<tbody>
<tr>
<td>AMERICAN</td>
<td>4.0%</td>
<td>5.0%</td>
</tr>
<tr>
<td>EASTERN</td>
<td>5.0%</td>
<td>6.4%</td>
</tr>
<tr>
<td>TWA</td>
<td>4.2%</td>
<td>6.8%</td>
</tr>
<tr>
<td>UNITED</td>
<td>5.3%</td>
<td>6.7%</td>
</tr>
<tr>
<td>BRANIFF</td>
<td>5.7%</td>
<td>7.5%</td>
</tr>
<tr>
<td>CONTINENTAL</td>
<td>7.6%</td>
<td>8.0%</td>
</tr>
<tr>
<td>DELTA</td>
<td>8.8%</td>
<td>8.6%</td>
</tr>
<tr>
<td>NATIONAL</td>
<td>3.3%</td>
<td>8.8%</td>
</tr>
<tr>
<td>NORTHWEST</td>
<td>2.3%</td>
<td>11.2%</td>
</tr>
<tr>
<td>WESTERN</td>
<td>7.4%</td>
<td>7.0%</td>
</tr>
<tr>
<td>BIG 4</td>
<td>4.6%</td>
<td>6.2%</td>
</tr>
<tr>
<td>OTHER 6</td>
<td>5.9%</td>
<td>8.5%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>5.4%</td>
<td>7.6%</td>
</tr>
</tbody>
</table>

1 Defined as interest/debt (long term debt x current portion maturing) as of 12/31/70 and 12/31/76. As the purpose of this exhibit is to show trends in cost components, no estimation of future financing costs has been included in the figures.

2 The cost of equity has been estimated by computing the average earnings/price yields for the two four year periods. The earnings/price ratio is simply the reciprocal of the price/earnings ratio, used by many analysts as a crude measure of the cost of equity capital. Again, as the purpose of this exhibit is to show trends, the use of the E/P ratio is relevant.

SOURCE: All costs are computed from raw data in airline Annual Reports and from data contained in the Value Line Investment Survey.
Table V presents data for the air carriers’ costs of debt and equity for the period after the 1971 decision. (Care must be exercised, however, in interpreting the exhibit. These figures do not suggest the level of the cost of debt and equity, but only the direction of those costs over time. The actual calculation of the embedded cost of debt is far more complicated and requires data which is not available to this writer. In addition, as noted previously, earnings/price yields are not suitable in the air transportation industry as estimators of the level of the cost of equity. Average ratios over time, however, do indicate trends in this cost.)

The Table contains some interesting data. Embedded costs of debt have risen by an average of over 2.0% to the ten carriers over the seven year period. This has largely been the result of tight monetary policies by the Federal Reserve System in the mid-1970's and the sagging credit ratings of airline debt. Likewise, earnings/price ratios have increased quite sharply as a comparison to the 1967-1970 ratios shows. The average earnings yield for the ten carriers has increased by 7.5%. The following "spot" (or instant) ratios, as of August 22, 1977, indicate that the trend has continued to date:

<table>
<thead>
<tr>
<th>Airline</th>
<th>Yield</th>
</tr>
</thead>
<tbody>
<tr>
<td>American</td>
<td>25.0%</td>
</tr>
<tr>
<td>Eastern</td>
<td>25.0%</td>
</tr>
<tr>
<td>TWA</td>
<td>25.0%</td>
</tr>
<tr>
<td>United</td>
<td>12.5%</td>
</tr>
<tr>
<td>Braniff</td>
<td>16.7%</td>
</tr>
<tr>
<td>Continental</td>
<td>14.3%</td>
</tr>
<tr>
<td>Delta</td>
<td>14.3%</td>
</tr>
<tr>
<td>National</td>
<td>3.1%</td>
</tr>
<tr>
<td>Northwest</td>
<td>14.3%</td>
</tr>
<tr>
<td>Western</td>
<td>14.3%</td>
</tr>
<tr>
<td>Average</td>
<td>16.5%</td>
</tr>
</tbody>
</table>


In sum, both debt and equity costs appear to be significantly higher than those measured in 1971. If therefore, it is assumed that the “fair rate of return” was properly specified in 1970-1971, it is debatable whether that return was still a relevant standard for the carriers by the mid-1970's. Certainly, the CAB’s failure to monitor economic developments as related to capital costs is notable, as is their failure to provide a mechanism to adjust returns to changing conditions. In rejecting pleas to reconvene

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70. Some financial analysts, in fact, compute the cost of equity as the earnings yield (E/P) + g. See, e.g., M. FINDLAY & E. WILLIAMS, AN INTEGRATED ANALYSIS FOR MANAGERIAL FINANCE 163 (1970).

71. Earnings yields (E/P ratios) are very high today because airline stock prices are very depressed. Investors perceive the industry as very speculative and this has resulted in a lack of interest in airline common stocks.
hearings in the future, Whitney Gillilland ruled that such a approach was impractical. He was wrong in this finding.

C. THE SINGLE RATE OF RETURN

The final problem with the CAB specification of the rate of return revolves around the Final Examiner’s ruling that, “A single rate of return should be established for the domestic trunkline industry as a whole.” The application of “one rate of return” to all the carriers implies a homogeneity of risks within the industry, because it is only if all the carriers are equivalent in risk that the same “fair rate of return” can be properly applied to all. To the extent that sharp risk differentials do exist intra-industry (because of economic variables, differences in route structures, and different levels of competition), they must be compensated for in setting the “fair rate of return.” Failing to do so discriminates against the higher risk carriers, which are those airlines most in need of higher returns.

Table VI isolates two important measures of the major types of risks facing any firm. Business risk (or operating risk) stems from competitive factors such as the industry’s vulnerability to economic cycles. It is the volatility of operating profits experienced by a firm as revenues change. Financial risk encompasses both the risk of insolvency and the increased variability in returns to common stock resulting from the commitment to pay a fixed charge, interest, which does not vary as operating profits change. Business risk can be measured by the operating ratio and financial risk can be gauged by the debt ratio. High operating ratios and high debt ratios indicate greater risk exposure. Two popular meas-

72. Actually, board members Minetti and Murphy argued for an ongoing review of the rate of return. See DPFI, supra note 1, at 741, 747 (CAB Order No. 71-4-58, dissenting opinion).

73. The various witnesses and the examiners did compute the cost components for the “Big 4” and the “Other 6”, but these figures were always combined to arrive at one rate of return for all. They were not employed to suggest differential returns to the different groups of carriers.

74. This notion is well grounded in financial theory and is often referred to as the “homogeneous risk class assumption”. See Modigliani & Miller, The Cost of Capital, Corporation Finance, and the Theory of Investment, 48 AM. ECON. REV. 261 (1958).

75. See text accompanying notes 4, 5 (economic criterion number 3).

76. The operating ratio (operating expenses/operating revenues) directly measures the variability in operating profit as revenues change. The relationship can be expressed in the following formula:

\[ \frac{\text{% change in operating profit}}{\text{1-oper. ratio}} = \frac{1\%-\text{Tax Rate}}{1} \]

For example, if the firm’s tax rate is 48%, and if the operating ratio is 80%, then a 1% change in revenues will result in a 2.6% change in operating profits. (That is, 2.6%=1%(1-48)/(1-80)). As the operating ratio increases, the volatility in operating profits is increasing. If the operating ratio is 88%, then operating profits will change by 4.2% for every 1% change in revenue; if 95%, by 10.0%, etc. For a full discussion, see DPFI, Docket No. 21688-8 JC-K-Exhibits at 27-28.
ures of rates of return are included in the exhibit. 77

TABLE VI
Risk and Rates of Return to the U.S. Domestic Airlines

<table>
<thead>
<tr>
<th>Business Risk</th>
<th>Financial Risk</th>
<th>Returns</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Operating Ratio¹</td>
<td>Debt Ratio¹</td>
</tr>
<tr>
<td>AMERICAN</td>
<td>92.1% (5)</td>
<td>64.1% (3)</td>
</tr>
<tr>
<td>EASTERN</td>
<td>101.7% (1)</td>
<td>70.5% (1)</td>
</tr>
<tr>
<td>TWA</td>
<td>97.9% (2)</td>
<td>65.5% (2)</td>
</tr>
<tr>
<td>UNITED</td>
<td>94.3% (3)</td>
<td>56.7% (6)</td>
</tr>
<tr>
<td>BRANIFF</td>
<td>92.5% (4)</td>
<td>57.0% (5)</td>
</tr>
<tr>
<td>CONTINENTAL</td>
<td>87.8% (8)</td>
<td>60.4% (4)</td>
</tr>
<tr>
<td>DELTA</td>
<td>84.9% (9)</td>
<td>43.6% (9)</td>
</tr>
<tr>
<td>NATIONAL</td>
<td>88.1% (7)</td>
<td>48.3% (8)</td>
</tr>
<tr>
<td>NORTHWEST</td>
<td>84.7% (10)</td>
<td>39.3% (10)</td>
</tr>
<tr>
<td>WESTERN</td>
<td>88.7% (6)</td>
<td>48.4% (7)</td>
</tr>
</tbody>
</table>

¹ Defined as the average (mean) ratio for each carrier for the years, 1960-1969. The Operating Ratio is the ratio of operating expenses to operating revenues. The Debt Ratio is the ratio of long-term debt to total capital (long-term debt + equity). Ranks in risk are in parentheses. A higher rank means greater risk exposure.

² Defined as the average (mean) ratio for each carrier for the years, 1960-1969. The Rate of Return is the actual rate of return on invested capital, as defined by the CAB. Profit Margin is the rate of return on sales (profit after taxes/sales). Ranks in returns are in parentheses. A higher rank measures a higher return.

SOURCE: All ratios are computed from raw data contained in the HANDBOOK OF AIRLINE STATISTICS (1969 & 1973 eds.).

The Table (columns 1 and 2) clearly demonstrates that the industry is not homogeneous in risk. (Ranks in risk are in parentheses). Significant risk differentials do exist between the carriers, with airlines such as Eastern and TWA much higher in risk than Northwest and Delta. Operating and debt ratios for Eastern are 101.7% and 70.5%, respectively, while for TWA they are 97.9% and 65.5%. Contrast these to the ratios of 84.9% and 43.6% for Delta, 84.7% and 39.3% for Northwest, and 88.7% and 48.4% for Western. The dichotomy of the "Big Four" and the "Other Six" established in the 1960 GPfi seems inappropriate. The average operating and debt ratios of the "Four" (96.5% and 64.2%) are significantly above those of the "Six" (87.8% and 49.5%). The implicit assumption of intra-industry homogeneous risk made by the CAB is therefore questionable. 78

77. For a more complete definition of business and financial risk and their causes, see Gritta, Risk and the 'Fair Rate of Return' in Air Transportation, 13 TRANSP. J. 41 (1974).

78. It is interesting to note that most airline analysts and the CAB have long viewed the so-called "Big 4" (American, Eastern, United, and TWA) as less risky than the smaller "Other 6" carriers.
How the failure to recognize these risk differentials in 1960 has affected carrier returns can be seen from a correlation of past financial performance (1960-1969) of the carriers with the risk measures in Table VI. Financial theory, suggests that risk and return should be positively correlated. That is, high returns should be compensation for greater risk exposure. But correlations for the carriers are strongly negative. The correlation coefficient between the rate of return and profit margin ratios, on the one hand, and the operating ratio, on the other, are -0.94 and -0.89, respectively. The correlation coefficients between the rate of return and profit margin ratios and the debt ratio are -0.90 and -0.89. (All are statistically significant at the .01 level). Carriers higher in risk therefore have lower returns. In each case, the negative correlations run counter to those expected. The CAB assumption behind the "one rate of return" thus clearly violates both sound financial theory and the requirement that there be a "fair rate of return." 80

CONCLUSION

This article has surveyed and critiqued the CAB specification of the 12.0% "fair rate of return" to the domestic air carriers. The expert testimony presented in Phase 8 of the Domestic Passenger-Fare Investigation was analyzed in detail and it was found that the CAB understated the true return, that it has failed to adjust that return as changing conditions have warranted, and that it improperly employed a single rate of return for all the carriers despite significant intra-industry risk differentials. In sum, it can be argued that the 12.0% return set by the Board in 1971 did not then, and does not now, meet the three fundamental criteria for a "fair rate of return." The effects of this misspecification can be seen in the poor financial performance of the industry. The carriers are still overburdened with debt, actual rates of return have been sub-par and highly volatile, and several carriers have experienced severe financial pressures in recent years. 81

79. These correlations are the result of linear regressions run on operating ratios and rates of return, operating ratios and profit margin ratios, etc. In statistical testing, a finding of significance at the .01 level, indicates that the probability of error (in holding that there is a significant correlation, when in fact there is none) is 1 in 100.

80. See text accompanying note 5 supra (discussion; fundamental economic criteria). It runs counter to the mandate in the Federal Aviation Act of 1958, as amended, to take into consideration in rate-making, "the need of each carrier for revenues sufficient to enable such carrier under honest, economical, and efficient management, to provide adequate and efficient air carrier service." 49 U.S.C. § 1482(e) (1970).

81. TWA, in fact, came very close to defaulting on a series of its long-term bonds. Eastern and Pan Am have also had to endure severe liquidity crises in the mid-1970's. For a general discussion of the industry's debt burden and solvency problems, see Gritta, Debt Finance and Volatility in Rates of Return in Air Transport, 6 TRANSP. L.J. 73 (1974); Gritta, Solvency and Financial Stress in Air Transportation, 6 TRANSP. L.J. 139 (1974).
What can be done to correct this situation? First, a higher "fair rate of return" must be recognized as reality. The industry is extremely risky and in order for it to attract the capital necessary to finance future growth, investors must perceive the opportunity to earn returns commensurate with risks. To "attract capital at a reasonable cost" overall industry risk levels will have to be reduced. If investors cannot earn adequate returns, or if risk levels are not decreased in line with returns, the industry's situation will only worsen and carrier financial positions and credit standings will deteriorate further. However, the recognition of a higher rate of return does not, and should not, mean higher fares. In fact, higher fare levels in the current economic environment would be counter-productive. Evidence strongly suggests that the price elasticity of demand for air travel is highly elastic.\(^{82}\) Thus, fare increases would merely serve to injure new traffic generation, which is a necessary ingredient for improving the financial health of the industry. Rather, the CAB must act to increase profitability via other means: its new route awards and merger policies and its competitive strategies. By eliminating excessive competition in over-certified markets, and by restricting entry into new markets, carrier rates of return could be increased without fare increases (and possibly with fare reductions). In addition, overall risk levels caused by the excess competition would be decreased.\(^{83}\)

Finally, potential mergers could be analyzed in light of effects on over-competitive markets.

Second, a mechanism must be provided by which the "fair rate of return" can be appraised and revised as necessary. The evidence above demonstrates that such a review is important. Much of the data necessary for a complete analysis of component costs, and other factors, is now available to the Board. Therefore, continuous monitoring of capital market conditions would not be that difficult or expensive. Input on current conditions could be constantly submitted (as is cost data currently), and would be useful in decision-making on fare increases, route awards, and other matters. Such an approach is superior to the "fire-fighting" approach of a major DPFI or GPFI every ten years. The latter involves massive commitments of time and resources.

\(^{82}\) The Board itself uses a price elasticity of demand equal to -0.7 in its fare level computations. Thus, a 10% fare increase would result in a decline in traffic of 7.0%! And evidence presented in Phase 7 of the DPFI suggests an elasticity of demand of -1.25. See DPFI-Phase 7, Fare Level, Docket No. 21866-7, at 521 (CAB Order No. 71-4-59, 71-4-60).

\(^{83}\) Gill and Bates have identified the degree to which a carrier faces competition as an important determinant of cost levels; F. GILL & G. BATES, AIRLINE COMPETITION 519 (1949). By reducing overall competitive levels, costs would be decreased (via the elimination of duplicative advertising, and other costly promotional gimmicks). This decrease in cost levels would decrease overall risk because unstable costs are one key element in business risk. In addition, the restoration of profits therefrom would allow the carriers to decrease their debt burdens and further indirectly decrease the long-run cost of capital.
Third, the problem of differential risks must be resolved in a fair manner. While the carriers themselves have been responsible in part for their own problems, there can be no doubt that the risk differentials evident in Table VI are not strictly subject to carrier control. Indeed, through its past competitive strategies, the CAB has contributed to the problem and therefore must bear part of the burden to correct the situation. Any solution to this problem will be complex, however, for if differential rates of return are proper, in practice their implementation will be difficult. Differential returns would imply differential fare levels, but for carriers in direct competition this would be impossible. Instead, the CAB might recognize these risk differentials in other ways. New route awards and merger policies could be utilized as a means of balancing and reducing overall intra-industry risks, thereby attacking the problem at its root causes.

The airline industry faces a challenge as it approaches the next decade. Many carriers are weak and all are confronted now with huge demands for funds at a time when conditions are unfavorable. In the period 1977-1985, these demands will total $32.5 billion. In the face of this challenge, if several of the weaker carriers are to survive, and if all are to prosper, the CAB must act to restore the industry’s lost profitability. This restoration must start with recognition of the true risk-return reality confronting the carriers. Unless the Board comes to terms with this problem, it may well find itself presented with a crisis similar to that of Penn-Central.

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84. That the carriers were not to blame for the high debt levels evident on Table VI was readily admitted by Gilliland. See note 55 supra. And the failure of the CAB competitive strategy in the 1960’s has been blamed by some as the cause of the very high business risk in the industry. The CAB attempted to drive fares down via an increase in competition. One senior official, however, admitted that the strategy only served to injure carrier financial positions! Personal Interview, August 17, 1970, at the CAB. (Further information as to the official involved is in the author’s files).

85. ECONOMICS EVALUATION DIVISION, BUREAU OF ACCOUNTS AND STATISTICS, CIVIL AERONAUTICS BOARD, AIRLINE EQUIPMENT NEEDS AND FINANCING THROUGH 1985 (1976).

86. It is interesting to note in conclusion that when Kosh predicted some severe financial problems for the industry in 1970 should the rate of return not be based on an “optimal” capital structure, the Initial Examiner found his remarks “totally devoid of support” and concluded that such references were reflective of a “parade of horrors” and should be disregarded. The subsequent liquidity crises at TWA, Eastern, and Pan Am, however, have demonstrated that the industry is not immune to a bankruptcy. For Kosh’s remarks, see DPFI, Docket No. 21866-8, JC-K-Testimony at 25. For Schneider’s reply, see DPFI, supra note 1, at 741 (CAB Order No. 71-4-58, App. A, dissent at 1) (Excerpts from the Initial Decision by Harry H. Schneider). For a bankruptcy model applied to air transport, see Gritta, Solvency and Financial Stress in Air Transportation, 6 TRANSP. L.J. 140 (1974).
Plotting The Return of *Isbrandtsen*: The Illegality Of Interconference Rate Agreements

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A steamship conference is a voluntary agreement between ocean common carriers "formed so that the members may agree upon rates and certain other competitive practices."1 Private conference agreements arose in the late 1800s when ocean carriers came to realize that survival under a purely competitive environment was far too demanding to be further tolerated.2 To eliminate such competition conference members not only agreed upon rates, but also frequently allocated sailing times, and on occasion even pooled earnings. The agreements permitted the conference members to dominate the relevant trade,3 control if not eliminate competition, and insure that each member received a reasonable profit on its operations.4

Although blatantly anticompetitive, conference proponents did and do argue that the conferences benefit the immediate consumer, the

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3. In fact the Commission defines a conference to include "an agreement which will or could reasonably be expected to cause the parties to become a dominant force in the trade covered by the arrangement." 46 C.F.R. § 522.2(1) (1976). See *United States Department of Justice, Report on the Regulated Ocean Shipping Industry* 25-27 (1977) [hereinafter cited as Ocean Shipping].

importer/exporter who ships goods on the member lines. Because demand for tonnage can vary but the supply of that tonnage in the short term is relatively fixed, conferences were considered necessary to eliminate "cut-throat competition." During periods of slack demand, unrestrained competition destroys weaker lines, thereby creating a shortage of supply when demand later picks up. This continuing boom-to-bust cycle subjects shippers to widely varying rates and unpredictable sailing schedules, injuring a shipper's efforts to maintain predictable stable business relationships with his customers overseas. Although many observers have criticized this economic model justifying the conference monopoly, Congress at least has accepted it.

Congress did not, however, accept the anticompetitive abuses which resulted from the unrestrained use of the private conference system. In its review of the conference system in 1914, Congress' Alexander Committee cited and condemned such conference abuses as discriminatory pricing between shippers, "deferred rebate" plans designed to force shippers to use conference lines exclusively, and "fighting-ships"—a conference-subsidized "loss-leader" whose function was to eliminate nonconference competition by charging abnormally low rates on the nonconference line's routes. These abuses presented Congress with a dilemma: Should the antitrust laws be applied with full vigor to the conferences? Banning the conferences from U.S. foreign commerce would eliminate the abuses, but presumably the benefits of stability in the maritime industry would be eliminated as well.

Seeking the best of both worlds, Congress passed the Shipping Act of 1916 in order to grant antitrust immunity to the ocean conference system, as well as to subject the conferences to a regulatory scheme.


7. See note 5 supra.


9. ALEXANDER REPORT, supra note 5, at 304, 307, 313.

that would eliminate anticompetitive conference abuses.\textsuperscript{11} Through section 15 of the Shipping Act an agreement between carriers approved by the Federal Maritime Commission would not be subject to antitrust attack.\textsuperscript{12} Such immunity, however, was granted upon the condition that cited abuses would be properly controlled. The principal purpose of the Shipping Act was not to immunize the ocean carrier industry from the antitrust laws, but rather to create a mechanism whereby antitrust policies could be practically applied to what Congress considered to be the unique economic circumstances of the maritime industry. The Act requires the Federal Maritime Commission to enforce antitrust purposes;\textsuperscript{13} and thereby in effect creates a partnership between the Commission and the courts for the purpose of subjecting the conferences to appropriate antitrust restrictions.\textsuperscript{14}

What specific antitrust restrictions are considered appropriate is of course subject to varying opinion. The Commission’s view of what anticompetitive practices are permissible under the Shipping Act may deviate from the intent of the drafters. The Commission’s attitude frequently favors anticompetitive carrier policies.\textsuperscript{15} The Shipping Act, on the other hand, protects shippers, not carriers, and was designed by Congress to create and preserve a competitive ocean carrier environment. The courts also have demonstrated sensitivity to the need for regulated but competitive transportation industries.\textsuperscript{16} Where Commission practices create unwarranted immunity from competition, the courts, in the exercis-
cise of their partnership role, should redefine the Act for the Commission in order to preserve competition within the industry.

To this end the analysis below examines the antitrust standards required by the Shipping Act in terms of one specific conference practice: interconference rate agreements. The analysis maintains that the Commission has improperly favored such anticompetitive arrangements, and raises the spectre that Isbrandtsen may yet return.

THE ISBRANDTSEN DECISION

The landmark decision Federal Maritime Board v. Isbrandtsen, Inc.\(^\text{17}\) made three important contributions to judicial review of Maritime Commission decision making:

1. It clearly established that the purpose of the Shipping Act was to prevent monopolistic practices, not sanctify them;

2. That to accomplish this purpose the courts can redefine the governing statute by reasoning from the statute and its legislative history; and

3. That the antimonopolistic intent of the Act served to protect independent nonconference carriers, as well as shippers, from the abuses of the conference system.

Despite the 1961 Shipping Act Amendments\(^\text{18}\) which overturned the Isbrandtsen decision, with the possible exception of the antitrust rights of nonconference carriers,\(^\text{19}\) the basic principles of Isbrandtsen remain in force today.

Isbrandtsen was an independent nonconference carrier\(^\text{20}\) serving the Japan-Atlantic trade in competition with the Japan-Atlantic and Gulf Freight Conference. By the early 1950s, through a practice of consistently undercutting Conference rates, Isbrandtsen had captured 30% of the trade.\(^\text{21}\) The Conference was forced to retaliate. Initially the Conference cut its own rates; but Isbrandtsen only followed suit\(^\text{22}\) riding under the...
Conference rate "umbrella" and thereby maintaining its competitive price advantage. 23 In response the Conference proposed a dual rate agreement as a means of fighting off Isbrandtsen. 24 The Conference hoped that the dual rate contract would force shippers to use Conference lines exclusively. Isbrandtsen naturally challenged (before the Commission and before the courts) 25 the proposed agreement creating dual rate contracts. The culmination of the litigation, if not the dispute, was the Isbrandtsen decision. 26

Citing anticompetitive motive, the Isbrandtsen Court overturned the Maritime Board's approval of the Conference's dual rate agreement. 27 The purpose of the Shipping Act, the Court reasoned, was to permit conference agreements but to eliminate conference abuses as well. 28 Although competition between conference members could be limited within the scope of the Act, "practices designed to destroy the competition of independent carriers" were "flatly outlaw[ed]" 29 by Congress. The Court cited section 14(3) of the Shipping Act which barred the conferences from resorting to "other discriminating or unfair methods." 30 This provision represented a catchall restriction created to prohibit any conference device aimed at stifling independent carrier competition. 31 Not-

24. A dual rate contract is essentially an exclusive dealing-tying arrangement in violation of the antitrust laws. In exchange for signing a contract in which the shipper pledges to ship only on conference lines, the conference grants the shipper a special discount "contract" rate which is below the normal rates charged the shipper who occasionally employs nonconference vessels. The sole purpose of the dual rate contract is to combat, and quite possibly eliminate, nonconference carrier competition by removing the rate umbrella, the unified rates that nonconference competitors can undercut. Few, if any, independents have sufficient sailings to serve all the needs of their shipping customers. Thus the shipper must always use some conference capacity. By signing the dual rate contract the shipper is assured that all shipments will be at a "discount." By not signing the dual rate contract only shipments made on the independent lines will receive "discounts." Unless the independent can offer such a substantial discount to its shippers so as to offset the "penalty" the shipper incurs when he must employ conference capacity, the independent will not be able to successfully compete. See American Export Isbrandtsen Lines, Inc. v. FMC, 380 F.2d 609, 617-18 (D.C. Cir. 1967); Dodds, Legality of Shipper Tying Arrangements in Ocean Commerce, 23 U. Pitt. L. Rev. 933 (1962).

In the Isbrandtsen case the proposed contract rate for exclusive patronage offered a 9 1/2 percent discount, roughly equal to the margin at which Isbrandtsen had been undercutting the conference. FMB v. Isbrandtsen Co., Inc., 356 U.S. 481, 483, 485 (1958).
25. For a brief history of the litigation, see Engle Report, supra note 1, at 8-9; Dodds, supra note 24, at 945-46.
ing the close similarity between the dual rate contract at issue and deferred rebates\(^{32}\) specifically outlawed by the Act,\(^ {33}\) the Court held the agreement unlawful because it constituted a dual rate contract "employed as a predatory device[].\(^ {34}\)

The Court argued that its ruling did not make dual rate contracts illegal per se; only those contracts which were designed to inhibit outside competition were illegal. The Court pointed to the Board's own findings approving the conference's dual rate agreement:

Since the Board found that the dual-rate contract of the Conference was "a necessary competitive measure to offset the effect of non-conference competition" required "to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in this trade," it follows that the contract was a "resort to other discriminating or unfair methods" to stifle outside competition in violation of § 14 [para. 3].\(^ {35}\)

If a dual rate contract were designed without anticompetitive intent, it would be permitted.\(^ {36}\)

Although commentators recognize the Court's intent to avoid a per se holding, in practical effect the Court barred all dual rate contracts.\(^ {37}\) Every dual rate contract has the purpose of combating or "stifling" competition by nonconference lines.\(^ {38}\) Thus under the Court's test it would have been hard to create a dual rate contract that would survive the Court's standard of legality.

In this manner the Court's decision broadly redefined the Shipping Act. The Court first determined that the Act was designed primarily to eliminate anticompetitive and discriminatory abuses within the confer-

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32. Deferred rebates are similar to dual rate contracts except that the shipper gets his exclusive dealing discount in the form of a later rebate rather than a direct price reduction at the time of sale. Since the conference pays the rebate only after the shipper has demonstrated compliance with the contract over a certain length of time, the penalty for failure to comply, the accumulated rebate owed to the shipper, can become so prohibitive that a free choice by the shipper has been lost. See FMB v. Isbrandtsen Co., Inc., 356 U.S. at 493-95; McGee, supra note 6, at 232-36. See also note 9 supra.


34. 356 U.S. at 499.

35. ld. at 493.

36. ld. at 495.

37. Auerbach, supra note 23, at 245-51, in highlighting the Court's express forbearance of a per se rule, nonetheless states that the Court's distortion of the Maritime Board's findings may amount in fact to a per se rule. Similarly, Justice Frankfurter, who argued that the Court's holding was barred by the doctrine of primary jurisdiction, based his argument on the premise that the Court had outlawed dual rate contracts per se. FMB v. Isbrandtsen Co., Inc., 356 U.S. at 517 (Frankfurter, J., dissenting).

38. "[E]very effective dual-rate contract used by a conference is intended, and reasonably likely and tends to cause nonconference lines either to join the conference using the contract or to leave the trade for happy hunting elsewhere." ENGLE REPORT, supra note 1, at 21.
ence system. This protection was to be afforded nonconference competitors as well as shippers. The Court suffered little embarrassment in augmenting the Act to preclude dual rate contracts, a device which Congress itself had not expressly prohibited.

Spurred by the outraged conferences, Congress stayed, and then in 1961 overturned, Isbrandtsen. Congress, did not, however, reject the procompetitive policies upon which the Court had relied in barring dual rate contracts. These procompetitive assumptions remain available to future courts for future redefinitions of the Shipping Act. With the exception of the specific Isbrandtsen holding concerning dual rate contracts, the broad procompetitive principles of Isbrandtsen continue intact because these principles are founded upon the original Shipping Act itself.

THE SHIPPING ACT AND THE 1961 AMENDMENTS

Although the Shipping Act of 1916 granted conferences a limited immunity from the antitrust laws, it did so for the purpose of protecting American shippers from the abuses of the ocean monopoly system as it then existed. The Act represented a trade-off: limited antitrust immunity was permitted so that the conferences could be regulated. The fundamental purpose of that legislation remained antimonopolistic: it was designed to protect the shippers from cartel malpractices. Although protecting carriers from competition to a limited extent by permitting

39. "The Isbrandtsen case was a shock for the conference interests," particularly because the new test was designed to protect nonconference lines and thereby threatened the whole conference system. Lowenfeld, "To Have One's Cake . . ."—The Federal Maritime Commission and the Conferences, 1 J. MARITIME L. & COM. 21, 35 (1969). As the Senate Report states: "The Supreme Court in deciding Isbrandtsen thus cast substantial doubt on the legality of the thousands of dual-rate contracts then being used by more than half the 113 inbound and outbound conferences serving U.S. ports." ENGLE REPORT, supra note 1, at 9.

40. See note 26 supra; Gordon, supra note 5, at 96 n.20; Dodds, supra note 24, at 948-49.

41. For a review of the legislative history of the 1961 Amendments see Lowenfeld, supra note 39, at 34-40; Gordon, supra note 5, at 95-99; Dodds, supra note 24, at 949-56.

42. Gordon, supra note 5, at 92-94. The Alexander Committee believed that authorizing conferences was the only means of preserving "competition." ALEXANDER REPORT, supra note 5, at 416; text at note 150 infra.

43. BONNER REPORT, supra note 5, at 4-5; Gordon, supra note 5, at 94-95; Lowenfeld, supra note 39, at 26. The Alexander Report clearly stated that conferences would be permitted only so long as their abuses were controlled: "the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision." ALEXANDER REPORT, supra note 5, at 417.

44. "The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of." ALEXANDER REPORT, supra note 5, at 418.
conferences to operate, the principal goal of the 1916 Act was to "condemn[] in no uncertain terms a long line of anticompetitive practices" engaged in by the shipping cartels.\textsuperscript{45} Thus, in granting the conferences antitrust immunity, "Congress intended to tolerate only the minimum anticompetitive behavior necessary to preserve an essentially competitive structure in the maritime industry. . . ."\textsuperscript{46}

The 1961 Amendments did not alter the basic purpose behind the Shipping Act—to prohibit monopolistic abuses. Rather, the Amendments were designed to preserve only that limited monopoly expressly permitted by the 1916 Act, the conferences themselves. The basic premise of the 1961 legislation was that without the dual rate contract the conferences could not survive,\textsuperscript{47} and without the conferences the shipping industry would turn to chaos, injuring American shippers.\textsuperscript{48}

The debate in the Senate over the proper phrasing of the dual rate amendments illustrates Congress' concern for the survival of the conferences. The original House Bill's dual rate provision permitted dual rate contracts only "if the Board finds that the proposed conference system is not intended, and will not be reasonably likely to cause the exclusion of other carriers from a given trade."\textsuperscript{49} In effect the House Bill endorsed the \textit{Isbrandtsen} decision.\textsuperscript{50} The Senate Commerce Committee deleted this provision, arguing that every dual rate contract has the intent of excluding nonconference competition.\textsuperscript{51} When Senator Kefauver, through an amendment on the Senate floor, attempted to reinstate the House language, Senator Engle responded as follows:

The Kefauver Amendment would take us up the hill, we would authorize these conference systems, and then we would turn around, march down the hill, and deauthorize them. In my opinion, under this language, it would be impossible for any honest Commissioner of the Federal Maritime Commission to authorize a conference system at all. He simply could not do it with that language in the bill.\textsuperscript{52}

As Senator Engle phrased it, the issue was whether or not the Congress

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\item \textsuperscript{45} \textit{Celler Report}, supra note 8, at 381.
\item \textsuperscript{46} \textit{Seatrain Lines, Inc. v. FMC}, 460 F.2d 932, 940 (D.C. Cir. 1972), aff'd, 411 U.S. 726 (1973).
\item \textsuperscript{47} \textit{Bonner Report}, supra note 5, at 3-4. "Most shippers agreed with the position of the Alexander committee and the present Merchant Marine Committee that conferences were desirable and that a tying device such as the dual rate system was necessary to preserve their integrity." \textit{Id.} at 4.
\item \textsuperscript{48} \textit{Engle Report}, supra note 1, at 6-8, 10; \textit{Bonner Report}, supra note 5, at 12; 107 \textit{Cong. Rec.} 19305 (1961) (Statement of Sen. Engle).
\item \textsuperscript{49} \textit{Bonner Report}, supra note 5, at 2-3.
\item \textsuperscript{50} \textit{Gordon}, supra note 5, at 97.
\item \textsuperscript{51} \textit{Engle Report}, supra note 1, at 20-23.
\item \textsuperscript{52} 107 \textit{Cong. Rec.} 19420 (1961).
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wanted a conference system at all, for without effective dual rate contracts the conferences would not survive.\textsuperscript{53}

Consequently, the 1961 Amendments never deviated from the traditional antitrust policies implicit in the 1916 Shipping Act. As Senator Engle himself stated: "While we rejected certain proposals made by the Department of Justice, we did so with the conviction that their rejection worked no harm whatever to important principles of sound antitrust doctrine."\textsuperscript{54} The House Bonner Committee Report strongly implied that the only exception to the antitrust laws permitted by the Act is the conference itself: "The conference . . . is permitted to exist only as an exception to the antitrust laws of the United States, and such exception is granted only because of the peculiar nature of ocean transportation, and provided certain conditions are met."\textsuperscript{55} The antitrust immunity granted by the Amendments was only that minimum necessary to preserve the conference system.\textsuperscript{56} Although overturning \textit{Isbrandtsen}, the 1961 Amendments in effect reinacted the procompetitive, proshipper, policy of the original 1916 Shipping Act.\textsuperscript{57} Designed to preserve only the conference system, the ultimate rationale was the protection of the American shipper.\textsuperscript{58} Although a study of the legislative history also reveals a distinct emphasis on preserving the profitability of American flag vessels,\textsuperscript{59} this policy too is grounded on a desire to protect the American shipper.\textsuperscript{60}

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\item \textsuperscript{53} 107 CONG. REC. 19420, 19333 (1961) (Statements of Sen. Engle); ENGLE REPORT, \textit{supra} note 1, at 22. In fact Senator Engle criticized the Justice Department's support of the Kefauver "exclusion" Amendment as a plot to eliminate the conferences:

The Justice Department does not support conference arrangements. It is against conference arrangements. The language proposed by the Justice Department would defeat conference arrangements and would make it impossible to have conference arrangements. That is the reason I said in my opening remarks, as well as in the remarks made to my committee: We must decide whether or not we want a conference system, we must not do things which will deauthorize the conference system and destroy it.

\item \textsuperscript{54} 107 CONG. REC. 19305 (1961).

\item \textsuperscript{55} BONNER REPORT, \textit{supra} note 5, at 5.

\item \textsuperscript{56} Lat’n America/Pacific Coast Steamship Conf. v. FMC, 465 F.2d 542, 551-52 (D.C. Cir.), \textit{cert. denied}, 409 U.S. 967 (1972).

\item \textsuperscript{57} Thus, after analyzing the 1961 Amendments, the District of Columbia Circuit determined that the new dual rate provisions did not bar a shipper from seeking a volume discount. In upholding a U.S. Government provision requiring competitive bidding for certain of its shipments, the court dismissed the carriers' argument that this system would unduly injure the carriers. "On this premise we are confronted only with hobgoblins conjured up by an industry that is subsidized yet seeks to avoid the impact of effective competitive bidding." American Export Isbrandtsen Lines, Inc. v. FMC, 380 F.2d 609, 620 (D.C. Cir. 1967).

\item \textsuperscript{58} Gordon, \textit{supra} note 5, at 90, 99.

\item \textsuperscript{59} The basic argument advanced by conference supporters was that with Isbrandtsen's defection to the conferences, every American flag carrier would be operating within the conferences. These U.S. carriers needed the conferences as, despite their subsidies, the costs
Illustrative of the continued concern over anticompetitive abuses, the Amendments added a number of provisions with the express purpose of protecting the shipper. The Amendments require the prior publication of rates, notice of change of those rates, and conference adherence to published rates. Significantly the Amendments gave the Commission authority to disapprove rates which "it finds to be so unreasonably high or low as to be detrimental to the Commerce of the United States." And finally, dual rate contracts, like all other agreements, were subjected to the demand that they not be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors." As one commentator stated: "In language and impact, the Bonner Act amendments of 1961 are surely the most explicit congressional statement to date of the identity of the national interest with the interests of American exporters and importers."

THE PUBLIC INTEREST AND SERIOUS TRANSPORTATION NEED

The courts' interpretation of another provision added by the Amendments reiterates the legislators' concern for the shippers. The 1961 Bill expressly incorporated "the public interest" into those factors which the Commission must consider in determining whether or not to approve an

for the U.S. carriers was so high that they required the protection of the conference in order to survive against low-cost nonconference competitors. Therefore, to protect the conferences was to protect the U.S. lines. ENGLE REPORT, supra note 1, at 2-3; 107 CONG. REC. 19306, 19421 (1961); FEDERAL MARITIME COMMISSION, STAFF ANALYSIS OF STUDY OF THE REGULATED OCEAN SHIPPING INDUSTRY CONDUCTED BY THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE 13 (1977) [hereinafter cited as STAFF ANALYSIS]. It has been argued, however, that it makes more sense to increase the subsidy and use American vessels as a tool to break-up the high priced conference cartels.


60. The theory is that the presence of American flag lines protects American shippers from discrimination at the hands of foreign flag interests, 107 CONG. REC. 19426 (Statement of Sen. Engle).

This is the only rationale for protecting American flag lines that makes sense given the economics of the ocean carrier industry which penalizes operators with high labor costs. As Gordon states: the United States is much more a nation of shippers than a nation of steamship operators—this is the only conception of the national interest which is capable of providing a meaningful rationale for American shipping policy." Gordon, supra note 5, at 92. Senator Kefauver attacked this rationale on the Senate floor, arguing that since the bulk of the conferences are foreign dominated, the American minority will lack sufficient clout to exert any influence on behalf of U.S. shippers. 107 CONG. REC. 19359, 19425 (1961).


This affirmative antitrust interpretation of the public interest standard was that the agreement discriminated against it, and should have been approved by the Commission before it was implemented. The Commission had declined to take jurisdiction over the agreement.

In requiring the Commission to review the agreement the Court relied upon the Commission's duty to apply the antitrust laws under "the public interest" standard of section 15. The Commission had argued that by passing on the mechanization fund agreement it would give that agreement unwarranted immunity from the antitrust laws. The Court disagreed: "[I]n deciding whether to approve an agreement, the Commission is required under section 15 to consider antitrust implications." 70 This affirmative antitrust interpretation of the public interest standard was repeated later in FMC v. Seaboard Lines, Inc. to support the Court's argument that the Shipping Act granted only minimum antitrust immunity to the conferences. 71

The Court's holding that the "public interest" standard commands Commission consideration of antitrust policies raises the question of whether the Court can also use the "public interest" to substantially reconstruct the Shipping Act—as the Isbrandtsen Court had done with dual rate contracts and the "other discriminating or unfair methods" language of the old statute. To date the Court has applied the public interest rule only in primary jurisdiction cases. In both instances the Court used the antitrust requirement to insure that the agreements at

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69. The agreement was designed to alleviate the hardship on the labor force resulting from the reduction in jobs caused by mechanization of the industry. Id. at 264-65.
70. Id. at 273-74. In the view of Chief Justice Burger, whenever a statute grants an industry antitrust immunity, the regulators of that industry are required to consider antitrust policies when granting that immunity. Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 389, 407 (Burger, C.J., dissenting).
71. "We have construed the 'public interest' standard contained in the Act as requiring the Commission to consider the antitrust implications of an agreement before approving it." 411 U.S. 726, 739 (1973). Seaboard applied this test to determine that the Shipping Act did not grant the Commission jurisdiction to approve merger agreements between carriers. See text accompanying notes 148-151 infra.
issue would receive maximum feasible antitrust review. In Volkswagenwerk, the Court subjected to the Commission’s antitrust inspection a labor-related agreement which otherwise may have escaped antitrust scrutiny altogether.72 In Seatrain the Court used the rule to deny the Commission jurisdiction over carrier mergers, specifically subjecting such mergers to the full impact of section 7 of the Clayton Act.73 These holdings only follow the modern trend limiting immunity from the antitrust laws to the narrowest extent possible.74 The question of the impact of the public interest—antitrust standard on the scope of the Court’s ability to restructure the operation of the Shipping Act, rather than to merely define the outer limits of that Act, remains unanswered by the Court.

72. "While the paths of antitrust and the Shipping Act policies have sometimes diverged, those of labor and antitrust have consistently collided head-on." Pacific Maritime Ass’n v. FMC, 543 F.2d 395, 401 (D.C. Cir. 1976), cert. granted, 97 S.Ct. 1172 (1977). The Pacific Maritime court went on to distinguish Volkswagenwerk, holding that a mech fund agreement established by collective bargaining was not subject to Maritime Commission jurisdiction. Volkswagenwerk was intended to cover an agreement between employers, not an agreement between employees and their employers.


74. For example, Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) held that ratemaking agreements not submitted to the Commission for approval were subject to the antitrust laws. Pacific Westbound, one of the defendants in the treble damages action, argued that the Shipping Act of 1916 "repealed all antitrust regulation of the rate-making activities of the shipping industry." Id. at 216. The Court rejected the argument, stating that the Act extended immunity only to rate agreements actually approved by the Commission; unapproved agreements would be subject to antitrust attack:

We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry.

Id. at 218. The circuit court had ruled that two earlier Supreme Court decisions, Far East Conference v. United States, 342 U.S. 570 (1952) and United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932), had granted to the Maritime Commission exclusive jurisdiction over the legality or illegality of shipping rate agreements. Since the Shipping Act gave the Commission a remedy to deal with unapproved agreements, the circuit court determined that that remedy must be exclusive. 336 F.2d 650 (9th Cir. 1964). See Latta, Primary Jurisdiction in the Regulated Industries and the Antitrust Laws, 30 U. Cinn. L. Rev. 261, 266-67 (1961); Fremlin, Primary Jurisdiction and the Federal Maritime Commission, 18 Hastings L.J. 733, 753-69 (1967).

The doctrine of primary jurisdiction was probably first expressed in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 427 (1907). The doctrine has been applied in a number of instances to preclude antitrust suits challenging regulated activity, see, e.g., Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973); McLean Trucking Co. v. United States, 321 U.S. 67 (1944). However, as with the Carnation case above, the courts consistently limit antitrust immunity to the narrowest practicable under the regulatory scheme. "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy." United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 (1963). See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Silver v. New
In an effort to develop a likely answer one must initially examine FMC v. Aktiebolaget Svenska America. Svenska involved in part the validity of the Commission's own antitrust test expressed in the decision from which Svenska appealed, Investigation of Passenger Travel Agents: "The parties seeking exemption from the antitrust laws for their agreement must demonstrate that the agreement is required by a serious transportation need, or in order to secure important public benefits." The Court found this construction of the statute entirely reasonable:

By its very nature an illegal restraint of trade is in some ways "contrary to the public interest," and the Commission's antitrust standard, involving an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of the public interest.

Consequently, a determination that a proposed agreement violates antitrust laws is in itself substantial evidence warranting denial of the agreement as contrary to the public interest. It is incumbent on the agreement proponents to overcome this presumption by demonstrating a serious transportation need for the agreement.

Clearly Svenska granted the Commission broad authority to disapprove agreements when they violate antitrust laws. Does the Svenska decision, when read in conjunction with the public interest—antitrust requirement, also limit the Commission's authority to approve agree-

75. 390 U.S. 238 (1968).
77. FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 244 (1968).
78. Id. at 245.
79. According to the Supreme Court an antitrust violation is itself substantial evidence warranting determination that the agreement is contrary to the public interest. "[O]nce an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is "contrary to the public interest," unless other evidence in the record fairly detracts from the weight of this factor." Id. at 245-46.

Compare the above language with the circuit court's determination of the substantial evidence required: "We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles . . . ." An antitrust violation alone cannot support a finding that the agreement is contrary to the public interest. 351 F.2d 756, 761 (D.C. Cir. 1964).

Since, under the Supreme Court's rule, the antitrust violation itself creates its own substantial evidence that the public interest is harmed, the Commission's discretion to enforce antitrust policies is virtually unfettered. Note, Accommodations of Antitrust Law and Ocean Shipping, 4 Tex. Int'l L. Forum 393 (1968). See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974).
ments when they violate the antitrust laws? Must the Commission apply its transportation need test to all agreements infringing the antitrust laws?

Normally all that is required to support the Commission's approval of an agreement is substantial evidence that the agreement complies with the Shipping Act.\textsuperscript{80} However, that finding must be applied against the proper statutory principle.\textsuperscript{81} If the Shipping Act requires that the Commission examine antitrust policies, is not the Commission's serious transportation need test required by the statute as well?\textsuperscript{82}

The \textit{Svenska} decision, in holding that the Commission could employ its antitrust test, did so by ruling that the Commission could consider antitrust standards.\textsuperscript{83} However, the Commission must apply antitrust standards.\textsuperscript{84} The Commission itself apparently views its test as required by the public interest element of the statute. In the \textit{Mediterranean Pools Investigation}, the forerunner to \textit{Travel Agents}, the Commission stated:

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[T]he question of approval under section 15 requires (1) consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws insofar as consistent with the regulatory purpose of the Shipping Act . . . . [P]resumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act.\textsuperscript{85}
\end{quote}

Given that the \textit{Seatrain} Court, subsequent to \textit{Svenska}, determined that the public interest standard requires the Commission to apply antitrust policies, and that the Commission views antitrust policies as requiring some affirmative showing of regulatory need, is not the Commission's need test thereby required by the statute itself?

The Commission's consistency supports the hypothesis that the Shipping Act requires the serious transportation need test. The Commis-

\begin{footnotesize}
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\item \textsuperscript{80} The need to demonstrate substantial evidence is set out at 5 U.S.C. § 706(2)(E) (1970). Substantial evidence requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). See Consolo v. FMC, 383 U.S. 607 (1966); American Export-Isbrandtsen Lines, Inc. v. FMC, 389 F.2d 962 (D.C. Cir. 1968). \textit{See also} Anglo-Canadian Shipping Co. Ltd. v. FMC, 310 F.2d 606 (9th Cir. 1962).
\item \textsuperscript{81} Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412-13 (1971); Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976); Papercraft Corp. v. FTC, 472 F.2d 927 (7th Cir. 1973). \textit{See Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436 (1954).}
\item \textsuperscript{82} \textit{See generally} United States v. First National City Bank, 386 U.S. 361 (1967).
\item \textsuperscript{83} \textit{See text at note 77 supra.}
\item \textsuperscript{84} \textit{See text accompanying notes 68-71 supra.}
\item \textsuperscript{85} The Mediterranean Pools Investigation, 9 F.M.C. 264, 290 (1966).
\end{itemize}
\end{footnotesize}
sion has repeatedly adopted and applied the specific language quoted by the Svenska court.86

Agreements would be contrary to the public interest and therefore unapprovable unless they are "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."87 "Valid regulatory purpose" defines what may constitute a permissible "transportation need" or "public benefit."88 In stressing the demanding nature of its test, the Commission has stated:

It is not enough that there exists some transportation need or some public benefit, there must exist a serious transportation need or an important public benefit. Further, in addition to the existence of a serious transportation need or an important public benefit, the agreement proffered for Commission approval must be necessitated by that serious transportation need or necessary to secure that important public benefit. (emphasis in original)89

This statement by the Commission of its serious transportation need test strongly implies that a conference not only must demonstrate a serious transportation need, but also must demonstrate that its agreement is the least anticompetitive alternative available to meet that need.

Consequently, even if not required by the statutory public interest standard itself, the Commission's own precedential authority may have established "serious transportation need" as an unalterable standard of agency review. Normally agencies are not governed by stare decisis;90 however, when an agency deviates from prior policies and standards that transgression will be examined closely to insure that the agency's new direction is in compliance with the applicable law.91 In particular, once an agency has developed its interpretation of a statute, it cannot ignore that interpretation to the detriment of the antitrust laws.

86. The Svenska Court consolidated somewhat the language of Passenger Travel Agents before it appeared in published form. The Svenska language is what the Commission generally cites in its opinions. See text at note 87 infra.


90. See, e.g., In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

91. Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577, 584-86 (D.C. Cir. 1969). Similarly, if the Commission has consistently viewed a certain procedure as violating the Shipping Act the court will give weight to that fact in upholding the Commission's denial of an agreement. Pacific Coast European Conference v. FMC, 537 F.2d 333, 338 (9th Cir. 1976). See
For example, in *Continental Air Lines, Inc. v. C.A.B.*, 92 the court held the Civil Aeronautics Board to its prior rule that certification of a competing carrier is required by the Aviation Act when sufficient traffic exists to support the increased competition. In so ruling the court stated:

We place substantial reliance on this view of the role of competition both because of the particular respect due a "contemporaneous construction of a statute by men charged with the responsibility of setting its machinery in motion" and because the Board "has from the outset consistently taken" that position.93

The Maritime Commission has contemporaneously and consistently interpreted the public interest standard as requiring the "serious transportation need" test.94 Arguably Commission precedent alone has established "serious transportation need" as a virtual rule of law.

Judicial review of other C.A.B. and I.C.C. decisions illustrates the process whereby what begins as a discretionary transportation need test can solidify into a mandatory rule of law. *United States v. C.A.B.*95 addressed a Justice Department attack on the C.A.B.'s antitrust standard,96 the original version of the Maritime Commission's own antitrust "need" test.97 The Justice Department argued that an agreement could not be in the public interest unless "the end sought cannot be achieved at all in a less competitive way."98 The court upheld the Board's standard citing *Svenska's* approval of the Maritime Commission's test.99 However, the court remanded the dispute to the C.A.B. because it failed to follow the evidentiary requirements embodied in its antitrust—serious transportation need—test: "[I]t is essential in the face of an antitrust claim that the Board's approval (pursuant to section 412(b)) rest upon a sufficient justification for tolerating the restraint."100

In an earlier decision cited by *United States v. C.A.B.*, *American Importers Ass'n v. C.A.B.*101 voiced the same requirement. The American Importers Association challenged an order of the C.A.B., granting approval to an agreement filed by the International Air Transport Association. In remanding the issue to the Board for a more detailed assessment

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91. 473 F.2d 168 (D.C. Cir. 1972).
93. Id. at 954-55.
94. The transportation need test arose in 1966 (see text at note 76), five years after the words "public interest" were amended into the Shipping Act (see text at note 67).
95. 511 F.2d 1315 (D.C. Cir. 1975).
97. Investigation of Passenger Travel Agents, 10 F.M.C. 27, 35 n.7 (1966).
98. 511 F.2d at 1320.
99. Id. at 1322.
100. Id. at 1324-25, quoting American Importers Ass'n v. CAB, 473 F.2d 168, 172 (D.C. Cir. 1972).
of anticompetitive factors the court cited the precedential authority of the C.A.B.'s serious transportation need test, and the Supreme Court's approval of that similar test in Svenska. The court concluded that, in effect, the C.A.B. was required to follow its serious transportation need test: "In view of [past Board action], it is essential in the face of an antitrust claim that the Board's approval rest upon a sufficient justification for tolerating the restraint."103

Litigation over the competition policies to be applied by the I.C.C. in granting new certificates of public convenience and necessity exhibits a similar solidification into law of agency antitrust standards. In upholding I.C.C. action granting new certificates the courts have consistently held that an existing carrier cannot prevent new competition by demonstrating that the shipping public was already adequately served, if the Commission finds that new capacity would nonetheless be in the public interest. A recent Texas district court decision now interprets this rule as requiring a showing of transportation need by the existing operators in order for a certificate application to be denied. "The presumption that competition will aid in the attainment of the objectives of the National Transportation Policy must be 'overridden by other interests.'"106

INTERCONFERENCE RATE AGREEMENTS

The assessment of the legal significance of the serious transportation need test is more than an academic exercise. The Travel Agents—serious transportation need test is used by the Maritime Commission to judge the validity of agreements under the requirements of section 15. Since all agreements subject to Commission approval under the Shipping Act must meet section 15 standards107 once the transportation need test attains a legal status, every express requirement of the Ship-

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102. Id. at 171-72.
103. Id. at 172.
ping Act must be read in conjunction with the additional requirement of demonstrating a serious transportation need. In the case of interconference rate agreements the resulting burden of proof on the conferences becomes so great that in practical effect interconference rate agreements become illegal per se, or at least nearly so.

Interconference agreements obtain particular importance because very often they effectively eliminate the last vestiges of competition in a given shipping market. A conference agreement normally is limited to a single trade, with traffic in one direction between groups of geographically proximate ports. Although a conference agreement eliminates competition between conference members in the trade covered by the agreement, it does not eliminate all competition between conference lines. To the extent that a shipper has the option of using multiple trades, for example shipping from a Gulf port instead of an East Coast port, the conferences serving each of those areas must compete for that shipper's business. An interconference rate agreement eliminates this conference competition in the broad shipping market.

The amended Shipping Act permits interconference agreements only to the extent that each conference preserves a right of independent action:

[N]o agreement between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, shall be approved, nor shall continued approval be permitted, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference retains the right of independent action.

If interconference agreements must embody a real, practical right of independent action, then these agreements must preserve practical incentives to file independent rates. If an agreement must maintain such incentives to "defect", how can the agreement also be so essential to the conferences that it satisfies the Commission's requirement that "it be


109. Through the coordination of conference actions, shippers may be precluded from obtaining rates which reflect natural geographic advantages; rates may remain abnormally high, in the absence of independent competition; and further, fail to respond promptly to economic changes; large lines with multiconference representation may exert undue influence over rates and other matters by virtue of multiple participation in such agreements; concentration of power in the hands of common chairmen may put shippers at tremendous disadvantage in the bargaining process over rates and other conditions of carriage; and regulation may be rendered more difficult because the close relationship fostered by interconference arrangements have [sic] encouraged informal understandings that have not been filed with or approved by the Commission, as well as other violations of the shipping laws.

necessitated by [a] serious transportation need or necessary to secure [an] important public benefit."111 Or, conversely, if an agreement performs such a valuable function as to be required by a serious transportation need, realistically it must be so rigid that any practical right of independent action has been lost.

The extent to which the combined impact of the serious transportation need test and the independent action requirement foreclose interconference rate agreements turns on what is in fact required by "independent action." At present interconference rate agreements receive no extraordinary scrutiny only because the Commission has consistently failed to attach significant meaning to independent action. Should the Commission begin to follow the actual intent of Congress and apply independent action as the antimonopolization weapon it was designed to serve, an opposite result will be reached.

Essentially there are three possible interpretations of independent action:

(1) Independent Action embodies only the bare legal right of one conference to set a rate independent of another conference, even though the conferences have agreed to set rates jointly.

(2) Independent Action requires the same as (1) above with the added provision that one conference cannot coerce the compliance of the other.

(3) Independent Action requires the same as (1) and (2) above with the added requirement that the economics of the market place cannot be such that it precludes the exercise of a conference's independent action right. In other words if an interconference rate agreement results in monopolization so complete that neither conference would face a situation that would prompt the adoption of an independent rate, then independent action has been lost just as surely as if the words had been physically stricken from the agreement.

The Senate debates during consideration of the 1961 Shipping Act Amendments apparently would indicate that the toothless standard of paragraph (1) represents the true meaning of independent action. The senators read the words "independent action" in their literal sense, thereby interpreting the requirement as granting only a legal right not to agree in all decisions that were to be made jointly.112 In campaigning for a total prohibition of interconference agreements, Senator Kefauver rightly pointed out that such a bare legal requirement offered no deterrent whatsoever to monopolistic combinations by conferences: "All 110 of the cartels in the Shipping of the United States could, under the bill,

111. See text at note 89 supra.
112. See ENGLE REPORT, supra note 2, at 16-17.
join together in a supercartel to fix rates for all foreign commerce.'\textsuperscript{113} Senator Engle, the principal advocate of conference policies and floor leader of the Senate version of the 1961 Amendments, really did not address this criticism. In Senator Engle's view the independent action requirement would not necessarily control the abuses of interconference agreements; rather the general public interest standards which section 15 applies to all conference agreements would serve this function.\textsuperscript{114} Rather than viewing independent action as a restraint on the conferences, Senator Engle saw the clause as authorizing interconference practices in the nature of those that had been approved by the old Maritime Board.\textsuperscript{115}

Fortunately, Senator Engle's view represents a gross distortion of the true intent of the entire Congress. Unfortunately, the Commission has adopted the Senate's interpretation of independent action.\textsuperscript{116} Such attention to the Senate history is misplaced; it was the House, not the Senate, that drafted the independent action clause.\textsuperscript{117} It was substantially the House language of this clause that emerged from the joint committee.\textsuperscript{118} Therefore it is the events in the House, the events which prompted the clause, not the overheated Kefauver-Engle debates, that define independent action.

The House drafted the independent action requirement expressly to curtail the abuses of interconference agreements. The House worked on the premise that interconference agreements are presumptively not preferred by the Shipping Act: "Under the Shipping Act as originally enact-

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\item \textsuperscript{113} 107 \textsc{Cong. Rec.} 19413 (1961).
\item \textsuperscript{114} Senator Engle cited the newly amended section 15 as the tool by which joint conference agreements were to be controlled. Should abuses surface, "the Commission has the right to disapprove of the conference and not permit the conference to operate. Joint conferences as well as single conferences must operate under these rules." 107 \textsc{Cong. Rec.} 19414 (1961).
\item \textsuperscript{115} "As of October 1959, there were nine interconference agreements approved by the Board and its predecessors. We are not seeking to authorize something new. We simply refuse to deauthorize something which has been going on over a great number of years." 107 \textsc{Cong. Rec.} 19412 (1961).
\item \textsuperscript{116} See text accompanying notes 167-68 \textit{infra}; United States Mediterranean Trades Agreement, 11 \textsc{F.M.C.} 188, 194 (1967).
\item \textsuperscript{117} \textsc{Bonner Report}, \textit{supra} note 5, at 40.
\item \textsuperscript{118} The House bill stated that no conference contract could be approved by the Commission which authorized agreements between carriers or conferences of carriers serving different trades that would otherwise be naturally competitive unless in the case of agreements between carriers, each carrier, or in the case of conferences, each conference retains the right of independent action. The Senate struck out this provision. The Senate receded from its position with an amendment, accepted by the House conferees, limiting the prohibition on carrier agreements to carriers not members of the same conference. H.R. \textsc{Rep. No. 87-1}, 87th \textsc{Cong.}, 1st \textsc{Sess.} 8 (1961). This last amendment only clarifies a statement in the House \textsc{Bonner Report} that the independent action requirement does not apply to agreements between carriers of the same conference. \textsc{Bonner Report}, \textit{supra} note 5, at 10.
\end{itemize}
ed, it was never contemplated that conferences would be permitted, directly or indirectly, to form superconferences that, by cartelizing the cartels could completely negate geographic advantages of industry and even eliminate competition offered by alternative routings. 119 Nonetheless, there were at least 25 such agreements operating at the time that the 1961 legislation was considered. 120 It was to at least limit these agreements, if not to abolish them altogether, that the interconference independent action requirement was passed:

One reason for the insertion of this provision is the present situation existing in the operation of the joint agreement between the Pacific Westbound and Far East Conference whereby each conference exercises, in effect, a veto power over action by the other conference on specific rate applications by shippers. 121

By expressly condemning the Pacific Westbound/Far East Conference, Agreement No. 8200, as violating the independent action requirement, the House mandated that the clause be employed to curtail, not sanction interconference agreements. Independent action therefore demands investigation of the practical realities of the operation of the joint agreement, not just the legal right not to participate in a given monopoly rate. To construe the clause otherwise is to frustrate its stated purpose of eliminating interconference abuses.

Specifically, the House intended the condemned Pacific Westbound/Far East Conference Agreement to define the breadth of independent action. Agreement 8200 was to serve as an anticompetitive model. The House singled out Pacific Westbound and Far East not because those two conferences were the only "wrongdoers" which required restraint, but because Pacific and Far East were the only wrongdoers that the House was then aware of. Focusing more specifically on the dual rate contract, neither the House nor the Senate had made a detailed inquiry into interconference agreements and consequently the House was unprepared at that time to conclusively abolish all interconference agreements: 122 "Since there are some 25 other agreements between the conferences about which no complaint is in the record, it seemed appropriate to the committee to restrict only the abuse reported rather than to strike down other joint agreements that appear to be functioning properly." 123 The general validity of all interconference agreements was appropriate for study by the Maritime Agencies at a later date. 124 Absent such

119. Celler Report, supra note 8, at 386-87. See text at note 179 infra.
120. Bonner Report, supra note 5, at 10.
121. Id. at 9-10 (emphasis added).
122. See Gordon, supra note 5, at 102-05, commenting on the failure of Congress to establish specific guidelines of legality with respect to independent action.
124. Celler Report, supra note 8, at 386. Cf. Engle Report, supra note 1, at 17 (advocating such a review by the Commission on a case-by-case basis).
a general condemnation of interconference agreements, the Pacific Westbound/Far East pact nevertheless establishes minimum standards of independent action against which all interconference agreements must be judged.

THE AGREEMENT 8200 STANDARDS

An examination of Agreement 8200 lays to rest the notion that the mere presence of a legal right to independent action satisfies the statutory prerequisites for interconference agreements. As the House Committee language implies, the Agreement failed to satisfy the needs of independent action because the practical, as distinguished from the legal effect of the agreement gave each conference "a veto power over action by the other conference on specific rate applications by shippers."125 Legally, no such veto power existed. With some exceptions, each new rate proposed by one conference had to be approved by the other before it could go into effect.126 However, each conference had the right to institute its own desired rates if it found that conditions required the same.127 In other words the Pacific Westbound/Far East agreement contained an independent action provision at the time the House condemned the agreement for failing to satisfy independent action requirements.

This result baffled James A. Dennean, Chairman of the Far East Conference. Testifying before the Senate Subcommittee, the Chairman stated:

This [independent action] provision, we believed, would certainly bring our agreement within the exception to the prohibition of interconference agreements to H.R. 6755.

125. See text at note 121 supra. 
126. If 70 percent of the traffic to the Orient originates from the ports of the requesting conference, then, with the concurrence of the other conference, that commodity will be a local initiative item not subject to the joint agreement. However, in order for a conference to establish a new rate on the remaining items, the concurrence of the other conference is required. Celler Report, supra note 8, at 69-70. See Hearings Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine & Fisheries, 86th Cong., 1st Sess. 388-90 (1959) (statement of James A. Dennean).
127. Article Second of the Agreement provides in part: 
Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect. ... [Thereafter] the notifying group may ... make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or violation of this agreement. Celler Report, supra note 8, at 70 n.66; Steamship Conference/Dual Rate Bill: Hearings Before the Subcomm. on Merchant Marine & Fisheries of the Senate Comm. on Commerce, 87th Cong., 1st Sess. 298 (1961) (statement of James A. Dennean) [hereinafter cited as Senate Hearings].
Since the House Committee apparently believed that H.R. 6755 would proscribe agreement No. 8200, it must either have considered article Second [the independent action clause] . . . not to amount to a retention by each conference of the right of independent action, or have been unaware that the provisions of article Second were included in the agreement.128

The Senate Committee Report as well states that under its interpretation of independent action Agreement 8200 could be permitted.129

Did the House condemn Agreement 8200 unaware of its independent action provision? Such an oversight is not likely. Before the report was published the Justice Department had argued to the Committee that the independent action provision would do nothing to prevent interconference agreements such as the outbound Asian trades pact.130 Moreover, in the final analysis it is immaterial whether the Bonner Committee was actually aware of Article 2 at the time it condemned Agreement 8200. As will be discussed below, the Committee censured the "operation" of the Agreement and the abuses that resulted.131 The technical legal structure employed to implement such abuses is irrelevant because the Committee intended to proscribe specific conduct. By announcing the abuses of the joint agreement the House precluded any definition of independent action addressed solely to the provisions of the governing joint conference contract.

Quite possibly the House censured Agreement 8200 only because it found that other practices of the two conferences unduly inhibited the use of their independent action clause. Each conference "in effect" held a veto power over the other. Was the independent action provision insufficient to overcome the "coercive" impact of agreement provisions requiring that each conference approve the rate proposals of the other?

The Celler Committee report, which analyzed Agreement 8200 based in part on the House Bonner Committee hearings, gave no indication that there were extraordinary circumstances that would deter either of the conferences from exercising its independent action right if either had wanted to. "Section 2 of the agreement, . . . does provide for freedom of action by either of the conferences upon furnishing specific notice to the other although this right has generally not been exercised."132 The right was not normally used because there was no need to

128. Senate Hearings, supra note 127, at 298.
129. ENGEL REPORT, supra note 1, at 17.
131. See text accompanying notes 136-143.
132. CELLER REPORT, supra note 8, at 70. Presumably the membership vote required to exercise independent action would be no greater than the percentage approval needed to
use it. The Celler Committee cited the testimony of William C. Galloway, Chairman, Pacific Westbound Conference:133 "In 1958, for example, of 113 requests by Far East for concurrence, 104 were approved by Pacific Westbound. By the same token, 120 out of 130 requests made by Pacific Westbound were concurred in by Far East Conference."134 Since the two conferences were already in such substantial agreement one would not expect that the independent action provision would be used.135

Congress, therefore, must have defined independent action in terms of the market analysis test posited above. Generally, enterprises change rates to maximize profits to the extent permitted by competition. Competition spawns rate innovation. Conversely, monopoly profits deter rate innovation. Therefore the practical independent action test becomes: Given the parties' control of the market would one expect that one conference would defect from a jointly established monopoly rate? Or, given the market impact of the remaining competition, is there an incentive for a conference to establish a rate independent of its partner?

The market dominance definition of independent action emerges from the legislative history itself. If the inquiries of Congressman Drewry can be taken as typical of the concerns of the entire committee136 the condemned "veto power" was only one aspect of a much broader evil: the combination of the two conferences into a supercartel that dominated the outbound Asian trade. Mr. Drewry focused on the degree to which rate decision making was centralized,137 the extensive overlap in membership between the two conferences,138 and the unified ratemaking system which thereby resulted.139 Exhibiting identical market structure concerns, other members of the Bonner Committee, and later the Celler Committee, criticized the monopoly profits which the joint agreement apparently generated.140 Similarly, the Justice Department, in de-

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133. Steamship Hearings, pt. 3, supra note 132, at 1216-17.
134. Celler Report, supra note 8, at 70 n.66.
135. Id.
136. See questions of Congressman Glenn, Steamship Hearings, pt. 2, supra note 132, at 405.
137. Id. at 412.
138. Id. at 414.
139. Id. at 412-15.
140. Quoting the testimony of Mr. Finnesey of the American President Lines:

As you are aware, the Joint Agreement between the Far East Conference and Pacific Westbound Conference has been extremely beneficial to members of both coasts in
nouncing Agreement 8200, ignored the so-called “veto power” and instead condemned the supercartel aspect of the Agreement which eliminated competition, thereby eliminating the shipper’s freedom of choice. Moreover, in the one instance where a Congressman quizzed one of the two Conferences on the operation of their “veto power”, he did so for the purpose of determining if the veto power was in fact only a conference subterfuge to avoid the rate demands of shippers, thereby enforcing monopoly pricing: With the “veto” one conference could approve a lower rate, satisfying its shippers, confident that the other conference would reject that rate. Finally the House Bonner Committee Report itself cited Agreement 8200 as only “one reason” for requiring independent action, thereby indicating that condemned conduct would not be limited to the specific devices employed by Agreement 8200.

The market dominance test of independent action not only conforms to the history behind the Bonner investigation, but also is the only test that meets the broader requirements of the Shipping Act itself. The Shipping Act in general, and the independent action requirement in particular, were designed by Congress to protect the interest of shippers. Congress permitted conferences only to afford the lines some minimum protection from excessive competition. The Alexander Committee never authorized total monopolization of a shipping market. If anything the Alexander Report expressly excoriated such total dominance. The Alexander Committee authorized conferences with the

 maintaining the highest level of rates in the history of the conferences. It is felt by the majority of the memberlines [sic] if we did not have this agreement the present level of rates would be some 25% or more lower than they are today. (emphasis supplied by the Committee)

CELLER REPORT, supra note 8, at 71. See Steamship Hearings, pt. 3, supra note 132, at 1229-30. (questions of Congressman Casey).

142. Congressman Zincke asked Mr. Galloway, President of the Pacific Westbound Conference, the following question: do you have any knowledge of any situations in which action favorable to the shipper was taken by the Westbound Conference and was rejected by the Far East Conference with the common members of each conference voting inconsistently in those conferences? Mr. Galloway responded that the anonymous voting methods employed by the conferences prevented him from answering the question. Steamship Hearings, pt. 3, supra note 132, at 1251.
143. See text at note 121 supra.
144. The BONNER REPORT, condemning the veto power over shipper proposals, indicates as much. Id. See text accompanying notes 42-46 supra.
145. See text accompanying notes 54-56 supra.
146. ALEXANDER REPORT, supra note 5, at 304-07. Conference lines are apt to become increasingly powerful within their respective areas, even to the extent of controlling the tramp traffic, until their limited monopoly of to-day will become practically unrestricted. It is argued that this tendency has been
express assumption that the conferences would prevent complete monopolization of the trades. The conferences served to avoid rate wars that "inevitably" would lead to the dominance of the few lines that could survive prolonged and repeated periods of slack demand.\textsuperscript{147} Such concern for concentration of the industry demands a test of independent action that focuses on the market dominance of the contracting conferences.

Considering the Alexander Committee's desire to deter monopoly, the market dominance test is only a logical extrapolation of the Supreme Court's \textit{FMC v. Seatrain Lines, Inc.},\textsuperscript{148} decision on interconference agreements. \textit{Seatrain} held that mergers between carriers were not subject to Commission approval, and therefore could not obtain the antitrust immunity which flows from such approval. The case turned principally on the distinction between the ongoing relationships embodied in conference agreements subject to Commission approval, and the permanent integration which results from merger, the latter inappropriate for Commission consideration.\textsuperscript{149} However, the rationale employed to reach this result applies to the interconference—-independent action question as well. Examining the history of the 1916 Shipping Act, the Supreme Court concluded:

Thus, the Committee chose to permit continuation of the conference system, but to curb its abuses by requiring government approval of conference agreements. It did so because it feared that if conferences were abolished, the result would be a net decrease in competition through the mergers and acquisition-of-assets agreements that would result from the unregulated rate wars. . . . The Committee gave the Commission power to insulate certain anticompetitive arrangements in order to prevent outright mergers."\textsuperscript{150}

Because the Alexander Committee sought to prevent concentration in the industry, the Commission could not be granted authority to approve apparent in various trades and that, when the monopoly is complete, the lines will appropriate the advantages gained to themselves.

\textit{Id.} at 306.  
147. To terminate existing [conference] agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership.  
\textit{Alexander Report, supra} note 5, at 416; \textit{Ocean Shipping, supra} note 3, at 56. This same desire to prevent monopoly was employed by conference proponents in support of the 1961 Amendments: "[H]istory proves that open-rate competition in the international ocean common carrier industry leads to a much more monopolistic situation." \textit{107 Cong. Rec. 19308} (1961) (Statement of Sen. Butler).  
150. \textit{411 U.S. at 738-39}.
mergers and clothe these mergers with antitrust immunity: "We simply cannot believe that Congress intended to require approval of the very arrangements which, as the legislative history clearly shows, it wanted to prevent."\textsuperscript{151} If Congress wished to avoid anticompetitive mergers, surely anticompetitive interconference agreements, which arguably result in even greater real economic concentration, must also be viewed with suspicion. The only independent action test that addresses industry concentration is an examination of market dominance, not legal formalisms.\textsuperscript{152} Indeed such a practical assessment of the probability of rate initiatives would seemingly be required as well by the Commission's duty to consider antitrust policies when judging an agreement's compliance with the public interest.

Consequently, the legislative history commands that the Bonner Committee's condemnation of "veto power" require more than a provision for the legal right to establish an independent rate; as noted above both conferences had such a legal right anyway.\textsuperscript{153} The veto power proscribed by the Committee can only be that veto power which results when dominance of a market becomes so complete that the incentive to compete and establish an independent rate could never outweigh the incentive to cooperate. Once all effective competition has been eliminated, the incentive to exercise independent action has been eliminated as well. Absent competition that would divert traffic, in the long run the mutually determined monopoly rate will always be more profitable than competition.

\textbf{The I.C.C. and Independent Action}

The experience with the Interstate Commerce Commission's independent action requirement for motor carrier and railroad rate bureaus illustrates the dependence of independent action on practical economic incentives to establish an independent rate. The Reed-Bullwinkle Act had granted antitrust immunity to rail and motor carrier rate bureaus only if these bureaus permitted the member carriers to exercise a right of independent action.\textsuperscript{154} To foster this right the courts have narrowly construed any additional legal requirements which would impinge on the exercise of the right of independent action.\textsuperscript{155}

\textsuperscript{151} \textit{Id.} at 739.

\textsuperscript{152} Traditionally antitrust examinations always require an inspection of the practical impact of a contract, not the technical way in which it is structured. \textit{See, e.g.,} Continental TV, Inc. v. GTE Sylvania, Inc., 97 S. Ct. 2549, 2556 (1977).

\textsuperscript{153} \textit{See text accompanying notes} 127-129 \textit{supra}.


\textsuperscript{155} Ajayam Lumber Corp. v. Penn Central Transp. Co., 487 F.2d 179 (2d Cir. 1973) (actual notice is all that is required to exercise one's right of independent action; one need not comply with alleged formal prerequisites). \textit{See also} Cincinnati, New Orleans & Texas Pacific Ry.
Significantly, the recent Fourth Circuit decision, *Motor Carriers Traffic Ass'n, Inc. v. United States*, has apparently adopted the general proposition that independent action must be viewed in the light of practical economic incentives to file an independent rate. *Motor Carriers Traffic Ass'n* resulted when, after a broad review of motor carrier rate bureaus, the Interstate Commerce Commission determined that in the future it would not grant antitrust immunity to rate bureaus which protested the independent action rate proposals of any of their member carriers. The plaintiff objected, claiming that the Commission's decision deprived the rate bureaus of its constitutional first amendment right, and their express statutory right, to protest rate filings. Yet, the court ignored the Associations' protests, focusing instead on those circumstances which would retain the individual carrier's incentive to file independent rates:

To permit a rate bureau to protest the proposals of a member individually so chills the individual proposal that it stands little chance of adoption, while providing the opportunity for misuse of the bureaus as policing agencies against individual action. We agree with the Commission that "it is necessary to limit the bureaus' right to protest in order to foster independent action. The right of independent action is paramount to maintaining the integrity of the grant of antitrust immunity."

This position elicited a dissenting opinion which argued that the outright prohibition of the bureaus' statutory right to protest individual rates was unwarranted given the few protests actually filed by the bureaus.

Although isolating practical economic incentives, *Motor Carriers Traffic Ass'n* does not in itself stand for the market dominance definition of independent action posited for the maritime conferences. To date market analysis has not been needed to insure a practical right of independent action for members of the motor carrier conferences. As Professor Hilton describes the economics of the independent action provision, the incentive to file an independent rate varies directly with the number of members of the rate agreement. The more members in the agreement, the smaller the monopoly gain available to each member and proportionally the greater the potential profits available to a defector willing to undercut the rate bureau. The greater the number of mem-

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157. Id. at 7.
158. Id. at 10.
159. Id. at 19.
bers, the more difficult it is for the rate bureau to maintain rate discipline.\textsuperscript{161} As one would expect, in his comparison of rail and motor carrier rate bureaus Professor Hilton discovered that motor carrier conferences suffered a proportionally greater number of independent action challenges to their rate proposals than did the rail rate bureaus which had fewer but larger members.\textsuperscript{162}

Reasoning from Hilton's finding, if independent action is in fact tied to market analysis of economic incentives, then one would anticipate efforts to stiffen the independent action requirements for railroads. The Railroad Revitalization and Regulatory Reform Act of 1976\textsuperscript{163} accomplished this very result. Anticipating the Fourth Circuit's decision with respect to motor carriers, the Act prohibited in part any railroad rate bureau action designed to protest an independent rate.\textsuperscript{164} But more importantly, the Reform Act absolutely prohibited a carrier's participation in a rate agreement concerning routes in which that carrier did not actually participate.\textsuperscript{165} The Congress drafted these provisions with the intent of fostering actual rate innovation: "[W]e are concerned that the scope of rate adjustments processed through rate bureau procedures has had an inhibiting effect on rate innovation and that measures to encourage initiative in rate making and greater competition among carriers of the same mode are necessary."\textsuperscript{166} These Amendments evidence that independent action must be judged in terms of real economic incentives to offer rate innovations, not the bare legal right not to monopolize. If the same market requirements created for the railroads also were applied to agreements between the maritime conferences, every such interconference agreement would be absolutely banned because no conference duplicates the port-to-port traffic of the other.\textsuperscript{167}

\textsuperscript{161} Id. at 1216.
\textsuperscript{162} Id. at 1216-17.
\textsuperscript{164} Id § 208, adding 49 U.S.C. § 5c(5)(a) (West Supp. 1977).
\textsuperscript{166} S. Rep. No. 94-499, 94th Cong., 1st Sess. 15 (1975). As the Conference Report also states, the Bill "reforms the Commission's regulation of rate bureaus . . . , the changes, designed to make the railroad industry more competitive, restrict the types of agreements that can be made by rate bureaus, require Commission approval and periodic review of agreements . . . ." S. Rep. No. 94-595, 94th Cong., 2d Sess. 135 (1976).
\textsuperscript{167} As the statute requires, no railroad can participate in a rate agreement unless it serves the point to point traffic that the rate covers. 49 U.S.C. § 5c(5)(a) (West Supp. 1977). See note 165 supra. The similar concept in the maritime industry is the trade, traffic between two groups of geographically proximate ports. The Reform Act, applied to the maritime industry, would therefore bar agreements between trades as those agreements would set rates between carriers not serving the route to which the rate applies. Since conferences rarely duplicate the trades of other conferences, interconference rate agreements would be prohibited entirely.
INDEPENDENT ACTION AND THE MARITIME COMMISSION

Despite such clear indications that independent action at minimum requires an examination of the actual operation or potential operation of an independent action provision, the Commission has strictly limited its investigations to legal formalisms. When the Pacific Westbound/Far East Agreement 8200 came before the Commission for approval, the Commission overruled the Hearing Examiner's finding that in practice the Agreement lacked a right of independent action:

Section 15 provides a standard for approval of agreements based on the contents of the agreements. In the instant case, the agreement creates a "right" of independent action after certain preliminary notices to the other party. The Examiner, however, considered that the facts of the operation of the agreement are controlling, rather than the bare provisions of the agreement, relying on selected excerpts from House Report 498, 87th Cong., 1st Sess., pp. 9-10 which in turn refer to how a joint agreement "has operated." We believe that Congress was only restricting the authority to approve agreements when it enacted P.L. 87-346, and was not establishing standards by which to judge the operations of agreements. 

Upon an initial examination of an agreement between conferences, we are confined to a determination as to whether or not the agreement provides for the right of independent action. That is all the statute requires. And, Agreement No. 8200 meets the statutory requirement in specific terms.169

In this fashion the Commission expressly rejected the weight of authority cited above.

As a result, the Maritime Commission's use of the legal right test of independent action begs for litigation. An example is the Commission's adoption of the Hearing Examiner's endorsement of the United States—Mediterranean Trades Interconference Agreements.170 In that instance the two contracting conferences, the Gulf and North Atlantic conferences, contained a common membership of 65 and 68 percent, respectively, of the member carriers of each conference.171 Not even market analysis is required to determine that any right of independent action

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169. Id. at 561. The Commission continued on to qualify its statement with the following: This is not to say, however, that in the future we would be confined to "the four corners" of an agreement in a subsequent proceeding to determine whether an agreement should be reapproved, modified, or disapproved. It could well be that actual operations under an agreement, subsequent to our initial approval, might show that the agreement was being carried out in a manner as to make it detrimental to the commerce of the United States or contrary to the public interest. Then disapproval would be in order.
Id. The Commission will also require that the independent action provision be set out in writing.
In re Joint Agreement Between Five Conferences in the North Atlantic Outbound/European Trade, 10 F.M.C. 299 (1967).
170. 11 F.M.C. 188 (1967).
171. Id. at 190-91.
would be illusory under such conditions of overlapping membership. With the same people controlling two-thirds of each conference it is difficult to imagine how one conference would come to disagree with the other to the extent that it would exercise its right of independent action. In fact, the Examiner pointed to the extensive common membership to support his argument that competition will be changed little by permitting the conferences to do publicly what they probably did covertly already: "The common members of each conference necessarily know everything that has occurred in the other conference, in theory and usually in practice; and it would be absurd to expect any one of them to knowingly and intentionally to compete with itself."172

The Examiner summarily dismissed Hearing Counsel's arguments that "the agreement would create a 'super conference' which would negate the geographic advantages of industry and eliminate competition."173 The agreement at issue "would create no more of a super conference . . . than any of the 49 all-inclusive conferences already existing."174

The point of course is not whether the Mediterranean Trades agreements actually would create a superconference more extensive than any of the others, but whether one legally can create a "superconference" absent a meaningful right of independent action. The Commission itself has held that even within one conference, where ratemaking extends to more than one trade, an independent action provision is required.175 Therefore it is immaterial whether a superconference is created by internal integration or by interconference agreement. Where more than one trade participates in ratemaking decisions, independent action is required. Whether such independent action exists depends upon whether, after considering the competition so eliminated by the combination of the trades, there remains sufficient competition to spur defections from the pricing decisions of the multitrade alliance.

Anyone aware of the minor impact of nonconference competition on the current conference trades,176 will readily recognize that a conscientious

172. Id. at 197.
173. Id. at 196.
174. Id.
175. In re U.S. Atlantic & Gulf/Australia-New Zealand Conference, 9 F.M.C. 1 (1965). The circuit court later remanded to the Commission stating that it was inconsistent to, on the one hand, permit two trades in one conference and then, on the other hand, to claim that the two trades are distinct for purposes of independent action. In so ruling the court expressly refused to address the scope and definition of the independent action requirement. U.S. Atlantic & Gulf/Australia-New Zealand Conf. v. FMC, 364 F.2d 696 (D.C. Cir. 1966). See Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System, 14 F.M.C. 172 (1970), aff'd, Latin America/Pacific Coast Steamship Conf. v. FMC, 465 F.2d 542 (D.C. Cir. 1972) which denied the use of one dual rate contract extending over more than one trade.
176. OCEAN SHIPPING, supra note 3, at 190-200.
tious application of the economic incentive test of independent action would prohibit virtually all interconference rate agreements. As noted above, the Commission must apply the serious transportation need test to all agreements, including interconference rate agreements. The need that "justifies" such interconference agreements is the rate stability that results by eliminating competition.\textsuperscript{177} However, the independent action requirement prohibits combinations of the trades where the agreement so eliminates competition that the incentive to establish independent rates is lost. Therefore, absent nonconference competition so significant that the stability of a particular trade is threatened, no interconference rate agreement can simultaneously satisfy the demands of both independent action and serious transportation need.

Conference proponents will protest that surely Congress did not intend to abolish all interconference agreements, otherwise Congress would have passed a provision to that effect. As amply noted Congress did not go that far. However, Congress did intend to prevent interconference agreements where the practical effect is to eliminate all competition. The purpose behind the 1961 Amendments, and its principal provisions addressing the dual rate contract, was not to promote conferences but rather to insure their survival.\textsuperscript{178} In examining interconference agreements, the initial reaction of the Bonner Committee was to abolish them altogether. Indeed a preliminary draft of the Bill did just that.\textsuperscript{179} With Agreement 8200 serving as a model, Congress required independent action in order to prevent monopolization of a shipping market to the extent accomplished by Agreement 8200 in the outbound Asian trade.

Such a conclusion can hardly be considered extraordinary when viewed in the light of the Railroad Revitalization and Regulatory Reform Act of 1976. Analogizing to the maritime industry, the Reform Act would absolutely prohibit all rate agreements between more than one trade.\textsuperscript{180} In other words, had the same rules been devised for the maritime industry, interconference agreements and multiple trade conferences would be banned entirely.

Indeed the basic rationale behind the Reform Act is even more compelling when applied to the maritime industry. The railroad conferences integrate a somewhat limited number of relatively large carriers,
and thereby demand unusual standards of independent action. The interconference agreements integrate a small number of large cartels, not carriers. Whether an intertrade agreement is between conferences or members of the same conference, as far as the individual carrier is concerned there is never a right of independent action. Once a conference has set a rate no line can deviate from that rate without suffering penalties or leaving the conference altogether. 181 Considering this absolute restraint on carrier action, one would expect that the Reform Act's ban against rate making by nonparticipating carriers would be even more applicable to the maritime industry, not less so. 182 Although unique foreign policy considerations may require suffering maritime conferences which deny their members independent action rights, international considerations do not demand the complete monopolization which results when the same denial, in a practical sense, is applied to multitrade agreements.

**Conclusion**

In conclusion recall that the purpose of the Shipping Act is to protect shippers. In the final analysis, therefore, the Shipping Act is designed to encourage predictable, reasonable, and nondiscriminatory rates. 183 To this end Congress granted the Commission the authority to disapprove any rate which "it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." 184 Unrestrained monopoly pricing cannot yield anything but unreasonable rates detrimental to United States commerce, that is, rates that are detrimental to the United States shipping industry. 185 The Commission has been direct-

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182. To avoid the analogy conference proponents would have to argue that the independent action clauses employed in joint conference agreements have been used with greater procompetitive impact than have the independent action clauses employed in the railroad industry. In defending against the Justice Department's attack on interconference agreements, the Commission has stated:

The independent action clause is required in any rate agreement between a conference and others and, in the staff's experience, is utilized quite frequently. Thus, the extension of "conference monopoly" through rate agreements is more a theoretical than practical possibility.

STAFF ANALYSIS, supra note 59, at 15. Unfortunately, the Commission fails to describe what it means by "quite frequently."

183. "The Commission shall by order . . . disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors . . . ." 46 U.S.C. § 814 (1970).


185. See text accompanying notes 140-142 supra.
ed to reject such rates, as well as agreements which yield such harmful conditions.\textsuperscript{186} Therefore, to forestall such monopoly pricing independent action must require an examination of interconference domination of the shipping market. Indeed the antitrust immunity conferred by Commission approval of a joint agreement requires no less.\textsuperscript{187}

Conscientious application of a market dominance— independent action test will almost certainly cause the death of interconference rate agreements. The antitrust measures of the Shipping Act must be read together. The public interest element of section 15 requires the Commission to apply antitrust policies. As the Commission itself admits, antitrust policies require that advocates of anticompetitive restraints demonstrate a serious transportation need for those restraints. The independent action requirement for interconference agreements forbids agreements which immobilize prices through market dominance. Since the typical rate stability justification for the need requirement is prohibited by the independent action requirement, interconference agreements must be presumptively illegal. This analysis of the antitrust standards of the Shipping Act invites the courts to reapply the methods of \textit{Isbrandtsen} and curtail interconference rate agreements, restraints which the public interest does not need to tolerate.


\textsuperscript{187} In criticizing the Commission for failing to monitor the reasonability of rates charged by the conferences, Congress noted: “If this immunity is to continue, strict surveillance must be maintained by the Federal Maritime Commission to protect the public interest. If the conference system cannot withstand public scrutiny, it is not entitled to antitrust immunity and should be discontinued.” \textsc{Joint Economic Committee, Report on Discriminatory Ocean Freight Rates and the Balance of Payments}, S. Rep. No. 1, 89th Cong., 1st Sess. 5 (1965).

For analyses of the failure of the Commission to aggressively address the problem of unreasonable or discriminatory rates see Gordon, \textit{supra} note 5; Lowenfeld, \textit{supra} note 39; Note, \textit{Rate Regulation in Ocean Transport: Developing Countries Confront the Liner Conference System}, 59 Cal. L. Rev. 1299 (1971).
I. INTRODUCTION

For the first time in the history of rail transportation in the United States, a single railroad entity is responsible for providing a unified, nationwide, intercity rail passenger service. As the bearer of that responsibility, the National Railroad Passenger Corporation—known as Amtrak—is unique.\(^1\) Not surprisingly, many of the problems it is required to confront are also unique in rail transportation. Perhaps the single most difficult and intractable problem—and the one most fundamental to its operation—is that of track availability and condition.

Under the Rail Passenger Service Act\(^2\) (the Act), Amtrak is required...
to operate a basic national rail passenger system and to provide modern, efficient, fast and comfortable service over this system. In order to provide the necessary service, Amtrak is empowered to "acquire . . . or contract for the use of, physical facilities, equipment, and devices necessary to rail passenger operations." More specifically, Amtrak is authorized to "contract with railroads or with regional transportation agencies for the use of tracks and other facilities . . . on such terms and conditions as the parties may agree." If the parties are unable to agree, then, upon the request of Amtrak, the Interstate Commerce Commission is required, within ninety days, to order "the use of tracks or facilities . . . by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable. . . ."


In this Act Congress has declared that:

modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country; that rail passenger service can help to end the congestion on our highways and the overcrowding of airways and airports; that the traveler in America should to the maximum extent feasible have freedom to choose the mode of travel most convenient to his needs; [and] that to achieve these goals requires the designation of a basic national rail passenger system and the establishment of a Rail Passenger Corporation for the purpose of providing modern, efficient intercity rail passenger service.


3. 45 U.S.C. § 501 (1970). The basic system was predetermined by Congress on the advice and recommendations of the Secretary of Transportation as to routes, end points to be served and basic service characteristics. See id. § 521.


5. Id. § 562(a). Any railroad so contracting was thereby to be relieved of its entire responsibility for the provision of intercity rail passenger service upon payment to Amtrak of fifty percent of its fully allocated passenger service deficit for 1969, payable in three equal annual installments. Id. § 561(a)(2).


7. The only passenger rolling stock which was available for Amtrak to acquire when it began its operations on May 1, 1971 was surplus equipment owned by the erstwhile passenger railroads. Three thousand surplus passenger cars used by 24 railroads prior to May 1, 1971 were offered for acquisition. Of these Amtrak selected 1,200, plus 100 luxury coaches, 244 overnight coaches, 288 sleeping cars, 50 lounge cars and 140 dining cars. ANNUAL REPORT OF NATIONAL RAILROAD PASSENGER CORPORATION 18-20 (1971) [hereinafter cited as ANNUAL REPORT].

8. Amtrak provides intercity rail passenger service over approximately 26,000 route miles and now owns a small portion of the track on which it operates. Pursuant to an option granted under the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 791 (d) (Supp. V 1975) as amended by Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 705(b), 90 Stat. 31 (1976), Amtrak purchased approximately 620 miles of track in the Northeast Corridor between Washington, D.C. and Boston, Mass. This included 455.9 miles of main line track and two spurs between New Haven, Conn. and Springfield, Mass. (60.7 miles), and Schenectady and Harrisburg, Pa. (103.6 miles). Also purchased were 6.8 miles of track.
for the acquisition of the former and the use of the latter. The major issues in these negotiations have been Amtrak's right of access to railroad owned track and the condition of the track, or level of track utility. These issues give rise to a fundamental question: whether a national rail passenger system can function effectively when it has no statutory right of access to rail rights-of-way but must negotiate such rights and the costs of the attendant service provided. The purpose of this article is to review the apparent anomaly which arises from the requirement that a statutory obligation to provide rail passenger service be fulfilled by contractual means.

II. AMTRAK'S INITIAL NEGOTIATIONS

Under section 401(a) of the Act, Amtrak was required to assume responsibility for operating the basic system, beginning on May 1, 1971. The Incorporators were confirmed by Congress in early January, 1971 and the Secretary of Transportation's final report on the basic system was not completed until late January 1971. At most the Incorporators had four months in which to negotiate, draft and execute contracts of exceptional complexity. The Incorporators concluded that they had no practical alternative but to secure contractual rights to the services which only the railroads could provide. This meant contracting between Schenectady and Hoffmans, N.Y. and 12.2 miles of right-of-way without track from Post Road to Rensselaer, N.Y. See generally 45 U.S.C.A. § 851(a) (West 1972 & Supp. 1977).


9. Both are governed by Amtrak's contracts with the operating railroads under which the latter have agreed:

"to provide [Amtrak], over Rail Lines of Railroad, with the services requested by [Amtrak], for or in connection with the operation of [Amtrak's] Intercity Rail Passenger Service," NRPC Agreement, note 22 infra, § 3.1; "to provide [upon request] modified or additional service," id. § 3.2; "to provide and furnish all labor, materials, equip­ment and facilities necessary to perform the services to be provided [pursuant to the foregoing]," id. § 3.3; "[to maintain] Rail Lines of Railroad used in [Amtrak's] Intercity Rail Passenger Service . . . at not less than the level of utility existing on the date of the beginning of such use." id. § 4.2.


11. The President of the United States, with the advice and consent of the Senate, was required to appoint not fewer than three incorporators. They were authorized to take all necessary steps to establish the Corporation, including the filing of articles of incorporation, as approved by the President, and to serve as the board of directors for 180 days following the date of enactment of the Act. 45 U.S.C. § 542 (1970).

12. ANNUAL REPORT, supra note 7, at 3-4.


14. ANNUAL REPORT, supra note 7, at 3-4.

15. Id.
with the railroads both for the actual operation of the trains themselves and for the provision of the necessary tracks and facilities which had remained the property of the railroads. The alternative to contractual agreement on the provision of tracks and facilities would have been an application to the Interstate Commerce Commission for an order which would fix terms and compensation. In the opinion of the Incorporators, recourse on a broad scale to the ICC, with the inevitable delays and appeals which could be expected to follow, would have resulted in a chaotic situation preventing Amtrak from fulfilling its obligation to commence service on May 1, 1971.\footnote{Id.} This concern was evidently seized upon by the railroads, since the Incorporators have reported that the negotiations were conducted under a continuing threat (never carried out) of a suit to compel Amtrak to comply with its statutory obligation to relieve the railroads of their responsibility for operating their own rail passenger services, but without contemporaneous contracts.\footnote{Id. at 4.} Presumably the railroads sought to strengthen their negotiating position by this means—taking advantage of the Incorporators' reluctance to seek an ICC determination.

A. ACCESS TO TRACKS OF CONTRACTING RAILROADS

In their negotiations with the operating railroads the Incorporators originally sought trackage rights for a term of 99 years. These rights were to be held in common with the owning railroad on all rail lines of every category whether owned, leased, controlled or operated by the railroad, together with all roadway appurtenances (and other operating facilities) usable for intercity rail passenger service. Coupled with this was a prohibition on transfer or abandonment of any lines or operating rights (except to another contracting railroad) unless there was a reservation of Amtrak’s rights or unless Amtrak was given a right of first refusal.\footnote{The Negotiation of the Amtrak Contract 67 (July 31, 1971). This is a history prepared by the contracting railroads.} The railroads, on the other hand, only wanted to provide necessary rail service over their lines for a period of two years, without the grant of any property rights to Amtrak or any restriction on abandonment or disposal.\footnote{Id.}

The Incorporators argued that Amtrak could not carry out its statutory mandate to provide a national rail passenger system unless it could be assured of permanent access to the necessary rail rights-of-way.\footnote{Id. at 4.} Furthermore, such trackage rights had to be available from the outset in order to avoid the delays and uncertainties of obtaining them through

\begin{footnotes}
\item[16] Id.
\item[17] Id. at 4.
\item[18] The Negotiation of the Amtrak Contract 67 (July 31, 1971). This is a history prepared by the contracting railroads.
\item[19] Id.
\item[20] Id.
\end{footnotes}
application to the ICC. The railroads, on the other hand, objected to a grant of permanent trackage rights to Amtrak as an encumbrance on their title which would be further clouded by any grant of a first refusal option. The railroads also argued that such rights were not required by section 402 of the Act.\textsuperscript{21}

In the final resort the parties agreed that the contracting railroads would not dispose of or abandon any rail lines used in Amtrak's initial service beginning on May 1, 1971, or in service initiated thereafter, for so long as such use continued or for the duration of the contract, whichever is shorter. Rail lines were defined as including all rights-of-way and real properties appurtenant thereto which constitute a contracting railroad's trackage, "whether owned, leased or otherwise held" and which are "used in connection with the actual operation of Intercity Rail Passenger Trains."\textsuperscript{22}

B. LEVEL OF TRACK UTILITY

As to maintenance, the Incorporators had originally proposed that the railroads maintain their tracks at the level of utility existing on the date of commencement of Amtrak's use of such tracks or on the date notice of intended use was given.\textsuperscript{23} The railroads, which had wanted to maintain their rail lines at the lower level of utility required by freight service, countered with an offer to maintain the May 1, 1971, level of utility for all lines used in Amtrak service, provided that the contract was to be for a limited term of 26 months.\textsuperscript{24} A compromise was reached when the parties agreed that the level of utility which the contracting railroads would maintain at their own expense for a term of 25 years, would relate to track condition "existing on the date of the beginning of such use."\textsuperscript{25} The cost formula under which the railroads were to be compensated for providing services in general would be renegotiable and could become effective on and after July 1, 1973.\textsuperscript{26}

\textsuperscript{21} Id. at 68.
\textsuperscript{23} The Negotiation of the Amtrak Contract, supra note 18, at 69.
\textsuperscript{24} Id.
\textsuperscript{25} NRPC Agreement, supra note 22, § 4.2.
\textsuperscript{26} Id. § 5.4. This provided, \textit{inter alia}, for a surcharge of 5% of the costs of service in lieu of undetermined "avoidable costs" which included compensation for use of the rail lines. Thus,
This represented a significant step forward since the railroads had originally proposed that the cost of all maintenance-of-way, including upgrading or improvement, be at the sole expense of Amtrak and that upgrading or improvement be permitted only if it did not interfere with or impair other operations of the contracting railroad.27 The Incorporators, on the other hand, believed that the costs of additional maintenance relating to upgrading or improvement should be allocated between passenger and other services, and that Amtrak should have the right to make improvements on its own initiative.28 The railroads rejected both these suggestions.29 However, a further compromise was reached which permitted Amtrak to require a contracting railroad to modify or improve its rail lines, at Amtrak’s expense, to the extent that the cost of modification and the cost of additional maintenance resulting from improvement was not otherwise reimbursed under the cost/payment provisions of the contract.30

C. ACCESS TO JOINTLY-OWNED TRACKS

Lack of time prevented the Incorporators from negotiating separate agreements to deal with problems peculiar to joint trackage and joint terminals. Accordingly, for an interim period between May 1, 1971 and July 1, 1973, Amtrak agreed to pay contracting railroads the costs (exclusive of costs of ownership) reasonably and necessarily incurred by them under their existing contracts relating to joint terminals, as well as similar costs in connection with the use of joint trackage to the extent that it was solely related to intercity rail passenger service.31

With the approach of July 1, 1973, it became necessary for Amtrak to negotiate directly with the terminal companies for continued right of access to joint terminal tracks. In the case of the Washington Terminal Company and the St. Louis Terminal Company the parties were unable to reach agreement and applications were eventually filed with the ICC pursuant to section 402(a) of the Act.

In the Washington Terminal case32 Amtrak filed its application on August 9, 1974, and the ICC issued its decision and order on July 30, 1975.33 In the St. Louis Terminal case, Amtrak filed its application on July there was no provision for payment of a fee or a return on investment in respect of such lines. See also ANNUAL REPORT, supra note 7, at 5, in which the Incorporators estimated that even a minimum fee of 1% of the total estimated annual operating costs of $200 million would exceed, between May 1, 1971 and July 1, 1973, Amtrak’s total start-up costs. A similar result would have been produced by a return on investment of 4-6%.

27. The Negotiation of the Amtrak Contract, supra note 18, at 71.
28. Id.
29. Id.
30. NRPC Agreement, supra note 22, § 4.3 and Appendix A.
31. Id. § 4.4.
33. In this decision the Commission stated, “In recognition of the 90 day time limit for a
3, 1975, and the ICC issued its decision and order on April 22, 1977. The ICC effectively determined, in both cases, that Amtrak should be placed on an equal footing with other users of the respective facilities. While such a determination might have been predictable, it was one which Amtrak had strongly resisted in order to preserve the contractual principle under which Amtrak reimbursed a contracting railroad only for its share of direct terminal operating costs which were solely related to intercity rail passenger service.

III. CONTRACTUAL ACCESS RIGHTS

A. DISPUTES INVOLVING MISSOURI PACIFIC

The Amtrak Improvement Act of 1973 required Amtrak to develop and operate international service between the United States and Mexico. This involved instituting service from St. Louis via Little Rock, Texarkana, Dallas and Forth Worth to Laredo, Texas, to connect with National Railways of Mexico at Nuevo Laredo. Amtrak was already operating a basic system service between St. Louis and Kansas City pursuant to its NRPC Agreement with Missouri Pacific Railroad Company. Amtrak requested Missouri Pacific to operate additional service from St. Louis to Laredo, pursuant to the terms of section 3.2 of the Agreement. Missouri Pacific refused on the grounds that a section of the route between Texarkana, Arkansas and Fort Worth, Texas, involved tracks owned by the Texas and Pacific Railway Company.

The new international service was scheduled to commence on March 13, 1974, but planning and preparation between Amtrak and Missouri Pacific had begun eighteen months earlier. On March 13, responsive order to the application prescribed by section 402(a), a special modified procedure on an expedited basis has been followed.” Id. at 87.

34. National R.R. Passenger Corp. and Terminal R.R. Ass'n of St. Louis, 348 I.C.C. 901 (1977). Unlike the Washington Terminal case, no lip service was paid to the 90 day time limit in this case.

35. But see NRPC Agreement, supra note 22, § 4.4 which provided that Amtrak would pay any increased allocation in joint terminal costs resulting from reduction in use of such terminals on May 1, 1971 and which also provided that while Amtrak was, in general, not to be liable for any of the costs of employee protection, it would pay such costs to the extent that they arose from any increase in the number of job positions in existence on April 30, 1971. See also, In re Risk of Liability—Jointly-Owned Terminals, NAP Case No. 15 (Mar. 5, 1974), in which the National Arbitration Panel (see note 42 infra) held that Amtrak should not be required to pay liability and insurance expenses assessed against the operating railroads by the Washington Terminal Company. This became moot when fifty percent of the stock of the Washington Terminal Company was transferred to Amtrak as part of the April 1, 1976 conveyance of Northeast Corridor properties (see note 8 supra). The remaining 50% is held by The Chessie System.


37. In re Request for Additional Services, NAP Case No. 23 (Dec. 6, 1974).

38. Id.

39. Id.
1974, Missouri Pacific informed Amtrak that it would not provide the service requested between Texarkana and Fort Worth.\textsuperscript{40} In order to protect the interests of passengers, Amtrak obtained a temporary restraining order from the United States District Court for the Western District of Missouri.\textsuperscript{41} On the same day Amtrak filed a Demand for Arbitration before the National Arbitration Panel.\textsuperscript{42} Thus, international rail service between the United States and Mexico was inaugurated. Pending arbitration, the service continued to be operated pursuant to a service order issues by the ICC\textsuperscript{43} at the request of Amtrak under section 402(c) of the Act.\textsuperscript{44}

In view of Missouri Pacific's reluctance to arbitrate, Amtrak combined with its request for a temporary restraining order a request for an order to compel arbitration.\textsuperscript{45} This was denied by the District Court which was reversed on appeal to the United States Court of Appeals for the Eighth Circuit.\textsuperscript{46} The latter remanded the case to the District Court for entry of an order to require arbitration.\textsuperscript{47}

At a hearing before the National Arbitration Panel,\textsuperscript{48} Amtrak argued that since Texas and Pacific was a wholly owned subsidiary of Missouri Pacific,\textsuperscript{49} the tracks in question fell within the definition of rail lines in section 4.1 of the NRPC Agreement.\textsuperscript{50} The National Arbitration Panel, however, found that Missouri Pacific's rail lines, as defined in section 4.1 of the Agreement, did not include the rail lines of Texas and Pacific and that Missouri Pacific was not required under the terms of section 3.2 of the Agreement to provide services to Amtrak over the latter.\textsuperscript{51} Consequently, Amtrak filed an application under section 402(a) of the Act.

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. The National Arbitration Panel (NAP) is a permanent tripartite panel established by agreement between Amtrak and its contracting railroads. Arbitration may be granted on demand of either party. One-half of the cost of maintaining the panel is borne by the contracting railroads jointly through the Association of American Railroads and one-half is borne by Amtrak.
\textsuperscript{43} I.C.C. Service Order No. 1179 (Mar. 21, 1974).
\textsuperscript{44} Section 402(c) authorizes the ICC to require a railroad to make tracks available if such action is deemed by the ICC "to be necessary in an emergency." 45 U.S.C. § 562(c) (Supp. V 1975).
\textsuperscript{45} NRPC v. Mo. Pac. R.R., 501 F.2d 423,425 (8th Cir. 1975).
\textsuperscript{46} Id. at 429.
\textsuperscript{47} Id.
\textsuperscript{48} In re Request for Additional Services, NAP Case No. 23 (Dec. 6, 1974).
\textsuperscript{49} At that time Missouri Pacific owned 96.5% of the stock of Texas and Pacific and the respective Boards of Directors had nine members in common. See Missouri Pac. Ry.—Merger—T&P and C&EI, 348 I.C.C. 414 (1976) in which the ICC authorized the merger of T&P into its parent company, Missouri Pacific Railroad Company.
\textsuperscript{50} Section 4.1 defines a railroad's rail lines as "all of its rights of way . . . which constitute its trackage, whether owned or leased or otherwise held, and all of its rights to use such properties of others . . . ."
\textsuperscript{51} In re Request for Additional Services, NAP Case No. 23 (Dec. 6, 1974).
requesting the ICC to fix just and reasonable compensation for services and use of tracks to be provided by Texas and Pacific.\(^{52}\)

Relying on section 402(a) of the Act, Amtrak argued before the Commission that Texas and Pacific was entitled only to the incremental costs of providing service, including the use of tracks and facilities.\(^{53}\) Texas and Pacific, on the other hand, argued that "just and reasonable" compensation under the Act must include all the costs of providing services, compensation for use of its property and a reasonable profit.\(^{54}\) Texas and Pacific, therefore, submitted proposed compensation figures related to train and engine crew wages, crew meals and lodgings, fuel, equipment inspection and servicing, station maintenance and utilities, track and roadbed maintenance, train movement service, supervision, property taxes, station rent and return on investment.\(^{55}\) After considering both arguments the Commission arrived at a series of compromise figures.\(^{56}\)

B. UNION PACIFIC

In a more recent case, Amtrak and the Union Pacific Railroad Company jointly applied to the ICC under section 402(a) of the Act for an order to fix just and reasonable compensation to be paid by Amtrak for services, and use of tracks and fixed facilities to be provided by Union Pacific.\(^{57}\)

This matter arose out of the renegotiation of Union Pacific's NRPC Agreement which had been amended in 1974 to modify the cost reim-

\(^{52}\) Amtrak and the Texas and Pac. Ry., 348 I.C.C. 645 (1976).

\(^{53}\) Id. at 646.

\(^{54}\) Id. at 649.

\(^{55}\) Id. at 653-55.

\(^{56}\) For Example, Texas and Pacific calculated its maintenance-of-way and structures expense at $3.58 per train-mile. Applying this rate to Amtrak's 6,448 train-miles per month, the railroad calculated Amtrak's share of that expense at $23,084 per month. Amtrak, on the other hand, took the weighted average maintenance-of-way cost per thousand gross ton-miles that it paid to its contracting railroads under amendments to its agreements with them, i.e., $0.2897 per gross ton-mile, and applied that figure to the 190,848 gross ton-miles generated per trip by Amtrak's train. This produced a figure of $55 per trip or $1,430 per month. The ICC would not accept the Texas and Pacific figure "because it rests on the assumption that track and roadbed expenses for a line vary with the number of train-miles run over it." At the same time the Commission stated: "we are not inclined to accept Amtrak's figure either." The Commission then acknowledged that it was difficult to develop a generally applicable formula primarily due to lack of sufficient empirical data and the absence of scientific theory from which to equate track depredation to the myriad of independent variables which cause it. The Commission expressed the view that the most equitable figure was to be found by dividing Texas and Pacific's total cost of maintenance-of-way, amounting to $19,849,000, by its 1974 gross ton-miles of 21,073,519,000. This produced a cost per gross ton-mile of $0.0009417 which, multiplied by Amtrak's 190,848 gross ton-miles, resulted in a cost per trip of $179.72 or $4,673 per month based on 26 trips per month. Id. at 661.

bursement provisions of the original 1971 Agreement. In 1976, Amtrak proposed that incremental costs be determined through cost identification and standardized costs for billing in other words, flat-rating. Union Pacific, however, asserted that it was entitled not only to incremental costs for services provided but also to incremental costs related to Amtrak's use of its tracks and other facilities, plus additional compensation based on the quality of service provided.

With particular reference to track condition, Amtrak contended that maintenance-of-way expenses are not reimbursable costs under the NRPC Agreement. Asserting that this was a matter of interpretation under the Agreement, Amtrak requested the Commission to defer action on track maintenance costs pending a decision of the National Arbitration Panel, which had been requested to confirm that it was Union Pacific's obligation under the Agreement to maintain the level of utility of its tracks at its own expense.

Relying on the language of section 402(a) of the Act, the Commission took the position that any order which it might issue thereunder requiring the use of tracks by Amtrak must be conditioned upon payment of compensation fixed by the Commission. Therefore, it disregarded the pending arbitration and fixed the level of compensation in accordance with the formula developed in the Texas and Pacific matter discussed above.

C. OTHER CASES

The question of access has also been the subject of disagreement and consequent arbitration between Amtrak and its contracting railroads on a number of other occasions. It has been held, for example, that a contracting railroad's obligation to provide service is limited to service

58. NRPC Agreement § 5.1 originally provided for reimbursement of "those [categories of] expenses described in Appendix A [of the Agreement] reasonably and necessarily incurred by Railroad which are solely for the benefit of Intercity Rail Passenger Service. . . ." A surcharge of 5% for "avoidable costs" not so included was allowed. See also note 26 supra. The 1974 agreement modified the reimbursement provisions and added incentive/penalty provisions.
60. Id. at 930-31.
63. Id. (the order, issued May 8, 1977, is attached but is unpagd). However, in response to a Petition for Reconsideration on June 15, 1977, the Commission, Fin. Docket No. 28165 (ICC Order, Div. 3, Aug. 24, 1977), modified its earlier Order to provide that no compensation would be payable by Amtrak unless Union Pacific obtained a favorable arbitration decision. In that event, compensation for track and roadbed maintenance would be payable in accordance with the guidelines contained in the ICC Order of May 6, 1977, 348 I.C.C. 926. In re Maintaining Level of Utility, NAP Case No. 39 (Sept. 8, 1977) [Order of Dismissal], states that Amtrak and Union Pacific "jointly moved for dismissal of the case on the ground that all the issues in dispute between them herein, have been settled."
over its own rail lines (as contractually defined) and does not extend to the lines of any other railroad.\(^64\) Similarly, it has been held that a contracting railroad is not required to provide service even over its own lines if they are located outside the United States,\(^65\) nor over the lines of an (essentially) wholly owned subsidiary.\(^66\) However, a contracting railroad may be required to provide service over any of its rail lines, notwithstanding the fact that a particular line might not have been previously used for passenger service.\(^67\)

IV. TRACK UTILITY—CONTRACTUAL AND REGULATORY INTERPRETATION

A. NATIONAL ARBITRATION PANEL DECISIONS

Section 4.2 of the NRPC Agreement provides that a contracting railroad shall maintain those of its rail lines used in Amtrak operations “at not less than the level of utility existing on the date of the beginning of such use.” The National Arbitration Panel has held that this requires tracks to be maintained “in such a way as to allow the accomplishment of the agreed upon (i.e., May 1, 1971) schedules with a reasonable degree of passenger comfort.”\(^68\) The award in that case\(^69\) therefore ordered the railroad in question, the Illinois Central Gulf, to make the necessary repairs at its own expense in order to restore the level of utility in conformity with the Panel’s decision.\(^70\)

In a companion decision in the same arbitration, the Panel reaffirmed those findings as to the Trustees of the Property of Penn Central Transportation Company and ordered that the Penn Central lines in question be restored by the Trustees.\(^71\) However, the United States District Court for the Eastern District of Pennsylvania (the Reorganization Court) denied a petition by Amtrak to enforce the award.\(^72\) This denial was affirmed by the United States Court of Appeals for the Third Circuit.\(^73\) At the same time the Court of Appeals directed the Reorganization Court to “join the Consolidated Rail Corporation (Conrail) under Rule 719 and

\(^{64}\) In re Commissary Consolidation, NAP Case No. 4 (Oct. 24, 1972).
\(^{66}\) In re Request for Additional Service, NAP Case No. 23 (Dec. 6, 1974). See text accompanying notes 48-51.
\(^{67}\) In re Chicago-Cincinnati Service, NAP Case No. 29 (Nov. 7, 1974).
\(^{68}\) In re Level of Rail Utility, NAP Case No. 11 (Dec. 4, 1974).
\(^{69}\) Id.
\(^{70}\) This award was confirmed, Misc. No. 74-23 (D.D.C. Mar. 11, 1975).
\(^{71}\) In re Level of Rail Utility, NAP Case No. 11 (Feb. 3, 1976).
to proceed to the question of any enforcement of the arbitration Award or the claim on which it is based taking into consideration any defenses that may be raised by the trustees [of Penn Central] in accordance with the opinion of this Court.\textsuperscript{74}

\section*{B. ICC Track Standards}

In July of 1974, the ICC instituted a rulemaking proceeding to develop federal regulations governing track standards for carriers providing intercity rail passenger service.\textsuperscript{75} This action was pursuant to section 801 of the Rail Passenger Service Act, as amended in 1973, which provides that: “The Commission shall promulgate, within 60 days [from November 3, 1973], and shall from time to time revise such regulations as it considers necessary to provide adequate service, equipment, tracks, and other facilities for quality intercity rail passenger service.”\textsuperscript{76}

The notice of proposed rulemaking announced that the proceeding would comprise two parts. First, the ICC would establish a track standard which would require the restoration of intercity track used in rail passenger service to the level existing on May 1, 1971, the date on which Amtrak began its operations.\textsuperscript{77} Second, the ICC would establish higher track standards for certain corridors in order to permit high-speed passenger operations in excess of 110 miles per hour.\textsuperscript{78}

\subsection*{1. Track Maintenance—Minimum Standards}

In determining the form of the regulation requiring track to be maintained at the May 1, 1971 level, the principal issue was whether to adopt the language of the National Arbitration Panel in defining the term “level of utility” (as used in the NRPC Agreement), or to adopt alternative language proposed by the contracting railroads. The Panel, having

\begin{itemize}
  \item \textsuperscript{74} Id. at 179. Under the provisions of the Regional Rail Reorganization Act of 1973 and the Railroad Revitalization and Regulatory Reform Act of 1976 the Consolidated Rail Corporation acquired the rail properties of Penn Central Transportation Company, with transfer effective April 1, 1976. The Northeast Corridor portion of the properties were simultaneously reconveyed to Amtrak. See note 8 \textit{supra}.
  \item \textsuperscript{75} Adequacy of Intercity Rail Passenger Service—Track, Ex Parte No. 277 (Sub. No. 2) (July 3, 1974).
  \item \textsuperscript{77} Id. at 6-7.
  \item \textsuperscript{78} Id. at 6-7.
\end{itemize}
decided that level of utility "is reflected and embodied in the schedules agreed upon,""79 held that the contracting railroad must maintain its rail lines "in such a way as to allow the accomplishment of the agreed-upon schedules with a reasonable degree of regularity and with a reasonable degree of passenger comfort.""80 The contracting railroads argued that this definition was "neither objective nor reasonably ascertainable,""81 and proposed that the Commission require the railroads to maintain their tracks "so as to permit a similar train, under similar circumstances, to complete a run between terminals in the same elapsed time now as it would in 1971.""82

The Commission found the Panel's definition to be more reasonable. They expressly stated that they did not intend to disturb the decisions and awards of the Panel with respect to Penn Central and Illinois Central Gulf, nor to interfere with the operation of the NRPC Agreement or its arbitration provisions.83

In adopting the Panel's definition of level of utility for incorporation in its regulations, the Commission expressed its expectation that in any enforcement proceedings under its new trackage regulations, slow orders\textsuperscript{84} in effect on May 1, 1971 and at the time of such proceedings would be relevant considerations for the Commission.\textsuperscript{85} The Commission also decided to retain the Panel's reference to reasonable passenger comfort, noting that while it might not be readily determinable, adherence to schedules would be of small consolation to a passenger without it. At the same time, the Commission made it clear that it would turn a jaundiced eye on any hair-splitting discussion of the matter in future enforcement proceedings.\textsuperscript{86}

2. Track Maintenance—High Speed Standards

The ICC did not issue regulations governing high-speed corridor operations, apparently on the grounds that the promulgation of such regulations would be a significant federal action within the meaning of the National Environmental Policy Act of 1969.\textsuperscript{87} In deferring such action

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\textsuperscript{79} Adequacy of Intercity Rail Passenger Service—Track, 348 I.C.C. 518, 572 (1976).
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 573.
\textsuperscript{83} Id. at 574. Even if the proposed alternative definition had been adopted, Amtrak would still be free to pursue its contractual remedy of arbitration in the event that it believed the May 1, 1971 level of utility was not being maintained.
\textsuperscript{84} A "slow order" is a term of art referring to a reduction in the maximum permissible speed on a given stretch of track imposed either by the operating railroad or by a regulatory authority for reasons of safety.
\textsuperscript{85} 348 I.C.C. 518, 574 (1976).
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 575.
indefinitely, the ICC also commented that the question of high-speed service is "inevitably a political one."88 The Commission referred to the tortuous course of passage of the Railroad Revitalization and Regulatory Reform Act of 197689 which provides $1.6 billion for upgrading of the Northeast Corridor for high-speed service.90 Describing this as a compromise figure which was adopted only with considerable difficulty, the Commission expressed the opinion that the cost of upgrading the entire Washington-Boston corridor to permit speeds of 110 m.p.h. might not be possible without the expenditure of many hundreds of millions of dollars more.

V. THE CLOUDED FUTURE OF TRACK ACCESS AND UTILITY

The problems of track access and utility have not yet been fully addressed by Congress from the perspective of the needs of a national rail passenger system. Nevertheless, under the Railroad Revitalization and Regulatory Reform Act of 1976 the Secretary of Transportation is required to conduct a comprehensive study of "the American railway system."92 This is to include "a showing of the potential cost savings and of possible improvements in service quality which could result from

88. Id. at 571.
91. 348 I.C.C. 518, 571-72 (1976). The Commission also expressed the opinion that the Northeast Corridor, being the most suitable for high speed operations, was likely to be the first one in the country to be so developed. Other corridors, it was thought, would probably be developed only for lower maximum speeds "most likely DOT class 4 or 5." Id. This would presumably be Federal Railroad Administration (FRA) class 4 or 5. See 49 C.F.R. § 213.9 (1976). The regulations provide for the following maximum allowable operating speeds, so long as all prescribed engineering requirements are met:

<table>
<thead>
<tr>
<th>Class of Track</th>
<th>Freight Trains</th>
<th>Passenger Trains</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class 1 track</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td>Class 2 track</td>
<td>25</td>
<td>30</td>
</tr>
<tr>
<td>Class 3 track</td>
<td>40</td>
<td>60</td>
</tr>
<tr>
<td>Class 4 track</td>
<td>60</td>
<td>80</td>
</tr>
<tr>
<td>Class 5 track</td>
<td>80</td>
<td>90</td>
</tr>
<tr>
<td>Class 6 track</td>
<td>110</td>
<td>110</td>
</tr>
</tbody>
</table>

Id. § 213.9(a). See also INTERSTATE COMMERCE COMMISSION'S REPORT TO THE PRESIDENT AND THE CONGRESS: EFFECTIVENESS OF THE RAIL PASSENGER SERVICE ACT 6 (1977) [hereinafter cited as ICC REPORT TO THE PRESIDENT], which states:

Since the costs of improvements to above the May, 1971 level are the responsibility of Amtrak and thus ultimately the Federal Government's, the Commission declined further formal action at the time, pending Congressional resolution of the major policy and financing questions entailed in the numerous expenditures involved in such an upgrading program.

92. Pub. L. No. 94-210, § 901, 90 Stat. 31 (1976). The Rail Services Planning Office of the ICC is also conducting a study "with a view toward developing a program for further long term upgradings in accordance with section 801 of the Rail Passenger Service Act." See ICC REPORT TO THE PRESIDENT, supra note 91, at 6 (in footnote).
restructuring the railroads in the United States"93 and "an assessment of the extent to which common or public ownership of fixed facilities could improve the national rail transportation system."94 In addition, the Rail Rehabilitation Act of 1977 has been introduced in the House.95

In view of the fact that Congress has allotted a period of two years, beginning February 5, 1976, for the Department of Transportation to conduct the above study,96 it seems unlikely that early action will be taken on the pending bill. However, because the study will address the possibility of common or public ownership of fixed facilities, it may be of interest to review the principal provisions of the proposed act.

A. THE PROPOSED RAIL REHABILITATION ACT

In its declaration of findings and purpose the bill holds "that modern, efficient rail service is essential to interstate commerce and to national defense; that the international energy crisis requires more intensive use of fuel-economic freight and passenger trains; that better utilization of existing rail rights-of-way is more compatible with the environment . . . than . . . expansion of facilities for other modes of transportation; that many railroad tracks and roadbeds have greatly deteriorated in recent years [resulting in] inferior railroad transportation for both freight and passengers . . .;97 that rehabilitation of tracks and roadbeds will provide substantial public benefits through improved rail freight and passenger service; that both the efficiency and quality of railroad service and the economic utilization of the railroad plant can be improved by freer access by rail carriers to rail lines and facilities they do not own."98

1. Development of an Interstate Railroad System

In order to achieve the purposes of the proposed act, the Secretary of Transportation would be authorized to designate an Interstate Railroad System. This would be administered by a new agency to be created within the Department of Transportation and named the Federal Rail Property Administration. With certain specified exclusions the Interstate Railroad System would initially encompass all rail lines operated by

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94. Id. § 901(4).
97. An indication of the magnitude of the problem may be found in an ICC report on deferred maintenance and delayed capital improvements issued during the month of March, 1977. This report stated that a survey of more than 48,000 miles of track found slow orders as low as 5-10 m.p.h. in effect; that more than 4.6 million tons of rail required replacement; that more than 47.5 million new crossties were needed; and that more than 210 million board-feet of bridge and switch ties are over age.
98. H.R. 8819, supra note 95, § 101.
railroad companies within the United States on the date of enactment. Also included would be all rail lines owned, leased or otherwise controlled by domestic railroad companies and which are out of service on the date of enactment except lines abandoned or taken out of service pursuant to the Interstate Commerce Act. In addition, lines outside the United States which are operated by a railroad company that operates primarily within the United States would be included if they are deemed essential to the System by the Secretary of Transportation. 99

The bill specifies the information which is to be provided to the Secretary within ninety days of enactment by all rail carriers. 100 and time schedules are provided for the development of an Initial System, 101 an Intermediate System, 102 and a Final System. 103 Following their designation by the Secretary, the Initial and Intermediate Systems would each be the subject of public hearings conducted by the Rail Services Planning Office of the ICC. Thereafter, the Secretary would designate the Final System which would be deemed approved by Congress unless disapproved by either House within sixty days. In the latter event provision is made for submission of a Revised System. 104 However, assuming approval on the first submission, the minimum period in which the Final System could become effective would be a little less than twenty-two months following the date of enactment of the proposed act. It may be noted in passing that notwithstanding any changes which may be made during the process of designating the Final System, the System must include rail lines conveyed to Consolidated Rail Corporation (ConRail) and to Amtrak on April 1, 1976 pursuant to the Regional Rail Reorganization Act of 1973. 105

2. Rehabilitation and Maintenance

The Secretary of Transportation would also be required to develop and publish a program of rehabilitation, capital improvements and maintenance (including future maintenance standards) for all rail lines in the System. 106 The entire program would be required to be scheduled for

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99. Id. § 202.
100. "Rail carrier" includes any railroad company; mail express, or less-than-carload rail freight carrier; state, regional or local transportation agency; the National Railroad Passenger Corporation; and any other private rail passenger carrier. Id. § 102(10).
101. Id. § 202(c).
102. Id. § 205(a).
103. Id. § 208(a).
104. Id. § 208(d).
105. Id. § 210.
106. Id. § 209(a). Section 205(a) designates the following future maintenance standards:
   1. Rail lines with no overhead traffic (i.e., freight traffic carried over a line on which it neither originates nor terminates):
      10 miles or less in length—FRA Class I.
completion within twelve years from the date of enactment\textsuperscript{107} with the costs of rehabilitation and capital improvements to be borne by the proposed Federal Rail Property Administration.\textsuperscript{108}

Within three years of enactment, the Secretary of Transportation and the Secretary of the Army would be required jointly to undertake a study of the long-term capital needs for modernization of signal systems, line relocation, tunneling, highway grade crossing elimination, electrification and other major upgrading of the System. A full report would then be made with recommendations for appropriate "legislative, administrative and other action."\textsuperscript{109}

3. The Final System

Upon approval of the Final System, railroad companies\textsuperscript{110} would be permitted to transfer to the proposed Federal Rail Property Administration, and the Administration would be authorized to acquire, rail lines and other transportation property within the System.\textsuperscript{111} The Administration would then be authorized to lease such property back to the former owning railroad for a maximum term of twenty-five years, subject to renewal upon certification of fitness by the ICC.\textsuperscript{112} Such leases would provide, \textit{inter alia}, for payment of a user charge\textsuperscript{113} and for maintenance by the leaseholding railroad in accordance with Federal Rail Property Administration standards, subject to a fine of $1,000 per day per mile of track improperly maintained.\textsuperscript{114}

The leaseholding railroad would, in general, have exclusive operating rights,\textsuperscript{115} except that the terms and conditions of existing agreements

\begin{itemize}
  \item between 10 and 50 miles in length—FRA Class II
  \item 50 miles or more in length—FRA Class III
  \item Rail lines with overhead traffic: highest speeds operated at anytime since January 1, 1935
  \item Rail lines longer than 10 miles and more than 10 million gross ton miles—FRA Class IV
  \item All lines with more than 20 intercity passenger trains—FRA Class IV
  \item Boston, Mass.—Washington D.C. Corridor—150 m.p.h.
  \item More than 2 intercity passenger trains—FRA Class III
\end{itemize}

See also note 91 supra.

107. \textit{id.} § 209(b).
108. \textit{id.} § 304.
109. \textit{id.} § 209(c)—209(d).
110. "Railroad company" means any class I or class II railroad, including the Consolidated Rail Corporation and switching and terminal companies, as designated by the Interstate Commerce Commission and subject to Part I of the Interstate Commerce Act, together with all subsidiaries, affiliates and leased lines of such railroads. \textit{id.} § 102(12). A class I railroad is a carrier having annual railway operating revenues of $10 million or more. A class II railroad has less than $10 million. 49 C.F.R. § 1201(1-1) (1976).
111. H.R. 8819, \textit{supra} note 95, § 302(a).
112. \textit{id.} § 302(b).
113. \textit{id.} § 302(b)(3) and § 402.
114. \textit{id.} § 302(b)(4) and § 305.
115. \textit{id.} § 302(b)(1).
for joint usage of rail properties would remain in force, unless terminated by mutual consent of the parties with the concurrence of the Federal Rail Property Administration.\textsuperscript{116} In addition, the Administration would be empowered to grant bridge traffic rights subject to payment of a user fee by the bridge railroad to the leaseholding railroad.\textsuperscript{117} The Administration would also be empowered to grant operating rights to Amtrak or to a state, regional or local authority for the operation of passenger service over leased lines so long as such operation "does not materially impair the operations of the leaseholding railroad."\textsuperscript{118} Furthermore, although the Administration "may specify operating rules to give passenger trains priority over freight trains when appropriate"\textsuperscript{119} it must require the grantee to make full compensation to the leaseholding railroad "for all costs resulting from the operation of passenger service . . . including the cost of delays to freight trains because of the passenger train operations."\textsuperscript{120}

\textbf{B. ANALYSIS OF THE PROPOSED RAIL REHABILITATION ACT}

Although one of the principal purposes of the proposed act is to improve rail freight and passenger service by providing operators with easier access to rail lines and facilities which they do not own, the act appears to preserve the present inferior status of passenger service. First, where the leaseholding railroad is primarily a freight operator (as is likely to be the case in most instances), the Administration must satisfy itself that a grant of operating rights to a passenger operator will not materially impair freight operations. Second, even when such a determination is made, passenger trains are to have no priority over freight trains as of right but only "when appropriate." Thus, the act fails to provide, unequivocally, that the comfort and convenience of people shall take precedence over the shipment of freight. Furthermore, even if given priority, it is clear that passenger trains over most of the national route system would be limited to sixty miles per hour maximum speed, with only the most heavily used tracks capable of supporting speeds of up to eighty miles per hour.\textsuperscript{121} Third, the unlimited reimbursement provisions permit the leaseholding railroad, in effect, to determine the costs of operation of passenger service. In the case of Amtrak this will, in turn, directly affect the level of federal subsidy.

\begin{footnotes}
\item[116] Id. § 302(b)(7)(A).
\item[117] Id. § 302(b)(7)(B). "Bridge traffic" means any traffic carried by a railroad which neither originates nor terminates on the railroad, but is received from and delivered to another carrier for further movement. Id. § 102(4).
\item[118] Id. § 302(b)(7)(B).
\item[119] Id. (emphasis added).
\item[120] Id. § 302(b)(7)(C).
\item[121] See note 106 supra.
\end{footnotes}
VI. CONCLUSION

Amtrak's operating rights over the lines of the operating railroads, and the compensation which it must pay those railroads, is governed by contractual terms negotiated and renegotiated since 1971 and interpreted, defined, and confirmed by numerous arbitration and judicial decisions and ICC determinations. The process has been complex, difficult, and costly. The tendency of some of the operating railroads to construe their contractual obligations narrowly in an effort to limit or restrict Amtrak's right to operate over their tracks is a constant factor. Experience in the cases referred to above indicates that although disputed access can be obtained through the ICC under section 402(a) of the Rail Passenger Service Act if it is "necessary to carry out the purposes" of the Act, or under section 402(c) if access is required in order to meet an emergency, the cost is high in both time and money.

In addition, the question of developing and paying for improved track which would be superior to the May 1, 1971 level of utility remains largely unresolved. It is interesting to note that while the ICC took no action to regulate track standards for high-speed operations in its 1976 rulemaking proceedings, it made pointed reference to the provisions of the NRPC Agreement which permit Amtrak to request track upgrading beyond the May 1, 1971 level at its own expense.122 Equally significant are the Commission's comments on the political nature of the question and its views on the considerable cost of developing high-speed tracks.123

The proposed Rail Rehabilitation Act of 1977 appears to be a modest attempt to address the problems of access and level of track utility. To the extent that the proposed Interstate Railroad System might permit, the national rail passenger system would obtain access to the necessary rail lines by federal grant of operating rights rather than by contractual negotiation. At the same time, the condition of such rail lines would be rehabilitated and improved at public expense, thus enabling improved passenger service to be provided. However, this would be allowed only to the extent that it did not interfere with the movement of freight,124 and if movement occurred at relatively moderate speeds.125 On the other hand, the proposed act, as presently drafted, requires the payment of full compensation to the leaseholding railroads for all costs resulting from the operation of passenger service, including the cost of

123. See notes 88 & 91 supra.
124. See note 120 supra.
125. See notes 91 & 106 supra. Except in the Boston, Mass.—Washington D.C. corridor, the proposed act does not provide for any track of FRA class 6 level which permits maximum speeds of 110 m.p.h. Modern rolling stock, of which Amtrak's Turboliners and Metroliners are examples, are capable of speeds significantly in excess of 110 m.p.h.
any resultant delays to freight trains. Thus, the act would tend to negate
existing Amtrak contracts and raise the spectre of renewed uncertainty
by exposing Amtrak, once again, to interminable argument and negotia-
tion with the operating railroads as to what elements of cost may be
properly included in "full compensation." This would be likely to lead to
increased cost of operation and increased need of federal subsidy.
Rather than providing for such broad and unlimited compensation, the
proposed act should provide that operating rights granted to passenger
operators, like those to be granted to bridge railroads, be subject to a
fixed user charge. A middle ground might be found in those cases where
a leaseholding railroad's own operating rights were subject to an existing
agreement for joint usage. In such cases the compensation to be paid by
the passenger operator pursuant to such contract would govern.

The anomaly referred to at the outset—that of attempting to fulfill a
statutory obligation by contractual means—would be partially removed
by the proposed act to the extent that the national rail passenger system
would obtain statutorily assured operating rights. However, it would also
have the contradictory effect of creating a further anomaly in which the
operating costs of the system would be, to some extent, determined by
leaseholders of federal property. Thus, it remains to be seen whether the
fundamental problem of track availability and condition can be resolved
by adding yet another regulatory layer to those which already exist.126 A
national rail passenger system needs modern well-maintained roads on
which to run if it is to provide modern, efficient, fast, and comfortable
service just as the highly developed and generally efficient truck and bus
transportation systems do. Like trucks and buses, its access to such
roads should be certain, economically acceptable, and provide no les-
ser priority of movement.

126. These regulatory layers consist of the congressional transportation committees, the
various agencies and offices of the Department of Transportation and the Interstate Commerce
Commission, the congressional appropriations committees, the Office of Management and
Budget and the General Accounting Office.
Transit Funding Under The Urban Mass Transportation Act

Since World War II mass transit ridership and net revenues have dropped precipitously, and fare box revenues have become inadequate to support operations.\(^1\) Correspondingly, an outside infusion of financial aid has become essential for continued service. In response to this need for financial assistance the Urban Mass Transportation Act of 1964 (UMT Act) was enacted, and as amended has provided funds for operating and capital expenses. These funds have enabled numerous cities to maintain mass transit service despite the staggering deficits which typify such operations.\(^2\)

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Appropriations increase yearly to maintain and expand transit service,\textsuperscript{3} as viable transportation systems are considered vital to the health and welfare of urbanized areas. Such systems are thought to foster important values: the preservation of the social and physical environment, the conservation of energy and other scarce resources, and the

\textsuperscript{3} The following table indicates total spending under Urban Mass Transportation Administration (UMTA) programs for the years 1965-1976:

<table>
<thead>
<tr>
<th>Year</th>
<th>Program level (millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1965</td>
<td>$69.2</td>
</tr>
<tr>
<td>1966</td>
<td>91.6</td>
</tr>
<tr>
<td>1967</td>
<td>157.9</td>
</tr>
<tr>
<td>1968</td>
<td>135.2</td>
</tr>
<tr>
<td>1969</td>
<td>174.0</td>
</tr>
<tr>
<td>1970</td>
<td>161.6</td>
</tr>
<tr>
<td>1971</td>
<td>401.9</td>
</tr>
<tr>
<td>1972</td>
<td>604.0</td>
</tr>
<tr>
<td>1973</td>
<td>978.5</td>
</tr>
<tr>
<td>1974</td>
<td>1,080.2</td>
</tr>
<tr>
<td>1975</td>
<td>1,525.0</td>
</tr>
<tr>
<td>1976</td>
<td>1,918.9</td>
</tr>
</tbody>
</table>

\textit{1978 Appropriations Hearings, supra} note 2, at 348. The 1975 total includes urban systems' and interstate substitution grants, while the 1976 total includes only interstate substitution grants. \textit{Department of Transportation and Related Agencies for 1977: Hearings Before a Subcomm. of the House Comm. on Appropriations}, 94th Cong., 2d Sess. pt. 2, at 730 (1976) (1975 urban systems grants); \textit{1978 Appropriations Hearings, supra} note 2, at 389 (interstate substitution grants).
promotion of more efficient and less costly transportation. Societal assimilation of these values virtually ensures that mass transportation will be funded, especially when reinforced by favorable results such as the modest, yet sustained, increase in ridership since 1973.

The prominent role of mass transportation in the shaping of the urban environment bears out the importance of the financing available under the UMT Act. This is compounded by the fact that all federal appropriations for mass transit are regulated by the Act. The following analysis is offered to facilitate a general understanding of this regulatory process. First, the legislative history of the Act will be examined to ascertain the general funding policies which have evolved. Second, the mechanics of the funding process under the Act will be considered. Third, the administration of the Act will be viewed in the judicial and administrative perspective. This inquiry will be limited to the funding of mass transportation systems under the UMT Act and unless related to this process other issues will escape scrutiny.

I. LEGISLATIVE HISTORY

Although President Kennedy had vigorously endorsed mass transit funding, the UMT Act of 1964 was hardly a popular piece of legislation. It was somewhat of a surprise when the bill did pass, albeit by a slight margin, as numerous Republicans defied the position of the Republican Policy Committee which had firmly opposed the mass transportation


6. Funds available for mass transit under 23 U.S.C. §§ 103(d)(4), 142 (Supp. V 1975), interstate substitution and urban systems funds, respectively, are administered through the urban mass transportation fund with the federal share in such projects specified in section 4(a) of the UMT Act, 49 U.S.C. § 1603(a) (Supp. V 1975). See generally note 111 para. 2 infra.


8. See G. SMERK, supra note 1, at 53-56. The UMT Act of 1964 took a rather tortuous course before it "found its way onto the 'must' list of legislation." A massive lobbying effort, joining previously disparate interests into a coalition, was required before the Johnson Administration and the House would consider the bill. The House Speaker, John McCormack, then had to be coaxed into placing the bill on the calendar for consideration on the floor because he feared it would be defeated. Id.
the need for a long-term commitment of funds for mass transit.

thought that the trust fund approach would furnish the long-term stability needed to satisfactorily resolve the twofold problem. 10

was not until the Urban Mass Transportation Assistance Act of 1970 (the Assistance Act of 1970) amended the UMT Act that federal funding reached significant proportions. 11

A. THE 1970 AMENDMENTS

During the hearings and debates on the Assistance Act of 1970 two major issues surfaced: the need for a meaningful level of spending and the need for long-term commitment of funds for mass transit. 13 Much of the discussion focused on the possibility of creating an urban transportation trust fund to finance an expanded program. It was commonly thought that the trust fund approach would furnish the long-term stability and monies needed to satisfactorily resolve the twofold problem. 14 How-


11. See H.R. REP. No. 1487, 89th Cong., 2d Sess. 15-16 (1966) (individual statement of Rep. Fino accompanying the report). Rebuffed in his attempts to increase funding, Rep. Fino charged that the 1966 amendments to the UMT Act did not provide a sufficient level of funding, that "sliced any way you will, the Mass Transportation Act Program is still 'small potatoes'." Id. at 15.


ever, the Nixon Administration opposed this method of financing and a contract authority approach was approved as a compromise.\footnote{15}

The Assistance Act of 1970 initiated a twelve-year, $10 billion commitment to mass transportation, of which $3.1 billion in contract authority was authorized over a five-year period.\footnote{16} In the events leading to its passage mass transit had become a "safe issue" politically, one which was in the common interest of previously competing groups.\footnote{17}

\section*{B. The 1974 Amendments}

Notwithstanding the increased level of funding, widespread dissatisfaction persisted after the 1970 amendments to the UMT Act. Numerous legislators felt mass transit was still inadequately funded.\footnote{18} In addition, there was growing sentiment favoring the allocation of funds to defray operating deficits as well as capital costs.\footnote{19} In hearings held on

Limited Highway Trust Fund monies now are available for mass transit applications through urban systems funding, 23 U.S.C. § 142(e)(2) (Supp. V 1975). However, insignificant amounts have been used for mass transit under this provision. See note 111 para. 2 infra.

\footnote{15} 1970 House Hearings, supra note 1, at 94-95 (statement of Sen. Harrison Williams). President Nixon rejected the recommendations of the Transportation Task Force which he had created to study the financing issue. The task force had endorsed the trust fund approach. \textit{Id.} Apparently, the Administration felt that a trust fund could be funded only by user tax revenues, \textit{id.} at 109-110, and opposed funding through an auto excise tax, \textit{id.} at 94. Therefore, it found the trust fund method was not feasible given the decline in mass transit passengers. \textit{Id.} at 110.

The contract authority technique permitted the Secretary of DOT "to incur binding obligations" up to a statutorily prescribed limit before actual appropriations were made. 49 U.S.C. § 1603(c) (1970 & Supp. V 1975).

\footnote{16} Pub. L. No. 91-453, §§ 1, 3(b), 84 Stat. 962, 965 (codified at 49 U.S.C. §§ 1601(a), 1603(c) (1970)).

\footnote{17} G. Smerk, supra note 1, at 80; Smerk, Development of Federal Urban Mass Transportation Policy, 47 Ind. L.J. 249, 291 (1972).

"Safe issue" or not, interest groups were still unwilling to make sacrifices for the mass transit cause. For example, the auto industry was quick to oppose a version of the urban transportation trust fund which would have been financed by the "temporary, war emergency," auto excise tax. See 1970 House Hearings, supra note 1, at 606 (statement of Thomas C. Mann, President of the Auto Manufacturers Association).


By 1972 more than 100 such bills were pending before a House Subcommittee. \textit{Urban Mass Transportation: Hearings Before the Subcomm. on Housing of the House Comm. on Banking and Currency, 92d Cong., 2d Sess. 1} (1972) (remarks of Rep. Barrett).
this issue, Senator Harrison Williams (D-N.J.) felt compelled to castigate the Nixon Administration for its uncooperative attitude.\textsuperscript{20} Nevertheless, the Administration continued to maintain that the operating deficit problem was the responsibility of local governments.\textsuperscript{21}

Despite the Administration’s opposition, both the Senate and the House passed bills which provided for operating assistance and increased spending.\textsuperscript{22} It was recognized that without such assistance the nation’s transit systems might cease operations.\textsuperscript{23} However, it became clear that the new Ford Administration was to have the last word when the House voted to recommit the conference report. The inability of the House to approve the conference report was largely attributable to the Administration’s disaffection with the report’s operating assistance section.\textsuperscript{24} The conferees reconvened and conducted a hearing in an attempt to accommodate the Administration’s concerns.\textsuperscript{25} Somehow an acceptable version, incorporating an operating assistance provision, was formulated.\textsuperscript{26} With President Ford’s approval, the Urban Mass Transportation Assistance Act of 1974 passed easily.\textsuperscript{27}

II. FUNDING REQUIREMENTS UNDER THE ACT

In its present form the UMT Act provides mass transit with funds for capital and operating expenses pursuant to sections 3 and 5, respec-

These sections are the backbone of the Act and spell out the procedural and substantive requirements to be met before funds will be forthcoming. The influence of other sections on funding can be seen when related to sections 3 and 5.

Section 3 authorizes "grants or loans to assist . . . in financing (1) the acquisition, construction, reconstruction, and improvements of facilities and equipment for use . . . in mass transportation service . . . and (2) the establishment and organization of public or quasi-public transit corridor development corporations or entities." The approval of funds for these purposes is contingent upon a finding by the Secretary that the applicant has "the legal, financial, and technical capacity to carry out the proposed project . . . ." The applicant must be a public agency at either the state or the local level; and funds cannot be used for ordinary operating expenses or "procurements utilizing exclusionary or discriminatory specifications." Finally, before financial assistance can be rendered, the interests of private transit operators must be considered, and the applicant must agree not to compete with private charter and school bus operations.


The other provisions which provide funds include: section 9 grants for technical studies, 49 U.S.C. § 1607a (1970), section 10 grants for managerial training programs, id. § 1607b, section 11 grants for research and training in urban transportation problems, id. § 1607c, section 16 grants to public bodies and nonprofit corporations to help meet the special needs of the handicapped and elderly, 49 U.S.C. § 1612(b) (Supp. V 1975), and section 17 assistance to Consolidated Rail Corporation, 49 U.S.C.A. § 1613 (West Supp. 1977).

30. See text accompanying notes 42-45 infra.


32. Id. § 1602(a)(1)(A).

33. Id. § 1602(a)(1). A private transit company may obtain equipment and facilities under section 3 if a public entity applies on its behalf. Section 3(e) mandates that private companies participate "to the maximum extent feasible" when financial assistance is rendered for "mass transportation facilities or equipment in competition with, or supplementary to," existing mass transit service. Id. § 1602(e). Likewise, section 4(a) conditions section 3(a) financial aid on the development of coordinated urban transportation systems which "shall encourage to the maximum extent feasible the participation of private enterprise." Id. § 1603(a). See generally Comptroller General, Report to Congress, Private Companies Should Receive More Consideration in Federal Mass Transit Programs (1976).


Section 5 authorizes the approval of projects for the "acquisition, construction and improvement of facilities and equipment for use . . . in mass transportation service" and "the payment of operating expenses to improve or to continue such service . . . ." Funds are apportioned under this section to "urbanized areas," in accordance with a statutory formula based on total population and population density. Aside from a subsection which stipulates the maximum fare to be charged the elderly and handicapped, the section closely parallels section 3.

Other provisions of the UMT Act protect the interests of employees affected by such assistance, require assessment of environmental factors, and prescribe that special efforts be made to meet the transportation needs of the elderly and handicapped. These provisions specifically apply to financing under section 3 and section 5.

If the applicable requirements are met, up to 50% of the operating costs and 80% of the capital costs of the applicant's project can be defrayed by the Act. These funds are available under section 3 for

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Section 3 also requires that the development of projects in "urbanized areas" be "based on a continuing comprehensive transportation planning process. . . ." 49 U.S.C. § 1602(a)(2) (Supp. V 1975). "Urbanized areas" under this section (to be distinguished from section 5) are "of more than fifty thousand population." Id. Exhaustive regulations specifying how this process is to operate have been promulgated. See 49 C.F.R. §§ 613.100-204 (1976); 23 C.F.R. §§ 450.100-320 (1977). Moreover, applicants for funds "to finance the . . . construction . . . or improvement of facilities or equipment which will substantially affect a community" must afford "an adequate opportunity for public hearings pursuant to adequate notice," and must consider the "economic and social effects of the project and its impact on the environment. . . ." 49 U.S.C. § 1602(d) (1970). See generally Ridley v. Blanchette, 421 F. Supp. 435 (E.D. Pa. 1976).

38. "Urbanized areas" are areas "so designated by the Bureau of Census. . . ." Id. § 1604(a)(3). This definition applies only to section 5. Id. § 1604(a).
40. Id. § 1604(m).
41. E.g., section 5(i) is almost identical to section 3(a)(1)(A) insofar as it requires "legal, financial, and technical capacity to carry out the project" on the part of the applicant. Id. § 1604(i). Furthermore, the provisions of section 3 which pertain to private transit companies and private bus operations are expressly made applicable to section 5. See 49 U.S.C. §§ 1602(e)-1602(g) (1970 & Supp. V 1975) (which make the requirements applicable to the entire Act).
43. Id. § 1610.
capital assistance on a discretionary basis,\textsuperscript{47} and under section 5 for capital and operating assistance based on the population formula. In reality, almost no capital assistance has been sought under section 5 because of the tremendous operating deficits which beset mass transit operations.\textsuperscript{48}

\section{III. Administration of the Act}

The federal aid program created by the UMT Act entails pervasive regulation. Checks and balances have evolved under the Act to ensure that the various interests affected by such aid are not unduly impacted. The administration of these laws and regulations, whether by a court or by the Urban Mass Transportation Administration (UMTA),\textsuperscript{49} further delineates the funding process.

\subsection{A. Judicial Review}

Parties initiating litigation pursuant to the UMT Act generally have sought declaratory and injunctive relief. A declaration of the rights of the parties is sought so that an injunction premised on those rights can be requested. Typically, a private citizen or group seeks to enjoin the disbursement of funds to a transit agency. The substantive requirements of the Act thereby exert considerable influence on the administration of funds. The more controversial requirements—those involving the rights of the handicapped and the interests of private companies—will be considered following a discussion of standing, which has proven to be more than a perfunctory threshold matter.

\subsubsection{1. Standing}

As the early cases construing the UMT Act reveal, there is no express provision for standing in the Act.\textsuperscript{50} Therefore, a finding that a

\textsuperscript{47} There is a minor exception to this provision with respect to the short term use of funds. Section 3(h) permits the use of funds for operating expenses with up to one-half the assistance rendered “if the secretary finds that effective arrangements have been made to substitute and, by the end of the fiscal year following the fiscal year for which such sums are used, make available an equal amount of state or local funds. . . .” \textit{Id.} \S 1602(h).

\textsuperscript{48} Approximately 94\% of the section 5 formula grants were used to offset operating expenses. \textit{Congressional Budget Office, U.S. Congress, Urban Mass Transportation: Options for Federal Assistance} x (1977) [hereinafter cited as \textit{Budget Options}].

\textsuperscript{49} UMTA is one of the “operating administrations” which compose the Department of Transportation (DOT). 49 C.F.R. \S 1.3(b)(6) (1976). It “[i]s responsible for (1) Exercising the authority vested in the Secretary [DOT] for developing comprehensive and coordinated mass transportation systems. . . . (2) Administering urban mass transportation programs and functions; and (3) Assuring appropriate liaison and coordination with other governmental organization[s] with respect to the foregoing.” \textit{Id.} \S 1.4(g).

given issue is unreviewable effectively denies standing to a party seeking judicial relief.\textsuperscript{51} The rationale in such cases is that the party does not have an interest "within the zone of interests protected" by a "relevant" statute because the relevant statute, the UMT Act, precludes judicial review.\textsuperscript{52}

\textit{Pullman, Inc. v. Volpe}\textsuperscript{53} illustrates the standing problems created by the Act. Pullman, Inc., a disappointed bidder on a contract for the manufacture of rail commuter cars, brought suit to enjoin the awarding of the contract to General Electric Co. (GE) on the ground that the GE bid did not conform with the prescribed specifications and that Pullman should have been awarded the contract as the lowest responsive bidder.\textsuperscript{54} The court declined consideration of the merits holding that, in view of the technical expertise required and lack of statutory language to the contrary, the question of bid conformity was committed to UMTA’s discretion.\textsuperscript{55}

In \textit{Pullman}, standing was denied because no language conferring rights on competing bidders was discernable in the Act.\textsuperscript{56} However, the issue is not as easily decided when substantive rights are explicit in the Act; a denial of standing emasculates those rights.\textsuperscript{57} Moreover, in the latter case the issues are more capable of judicial resolution and the legislative intent establishing positive rights is more apparent. Undoubtedly judicial review is more likely where specific rights are protected on the face of the Act.

The lack of statutory language also has necessitated a separate determination as to standing on those matters which are found to be reviewable. This has not deterred the courts in recent mass transit cases; an effort to give meaning to the overt language of the Act is being made.\textsuperscript{58} Yet, the apparent willingness of the courts to give effect to the

\begin{thebibliography}{9}
\bibitem{54} \textit{Id.} at 435.
\bibitem{55} \textit{Id.} at 436-39.
\bibitem{56} \textit{See id.} at 439-40.
\bibitem{57} \textit{Lloyd v. Regional Transp. Auth.}, No. 75-C-1834 (N.D. Ill. Mar. 16, 1976), rev’d, 548 F.2d 1277 (7th Cir. 1977); text accompanying notes 69-73 \textit{infra}.
\bibitem{58} \textit{Bradford v. Chicago Transit Auth.}, 537 F.2d 943 (7th Cir. 1976), holding that a school bus company had a protected interest against "illegal competitors" under sections 3(g)
This has occurred despite the legislative command that: 59

2. Rights of the Mobility Handicapped

Efforts by the mobility handicapped to assert their rights under the UMT Act have resulted in numerous actions joining municipal transit agencies, UMTA, and the Department of Transportation (DOT) as parties.60 The problem has been that buses which are inaccessible to the handicapped and elderly are purchased using UMT Act grant monies. This has occurred despite the legislative command that:

elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured.

Therefore, the issue that is being litigated is whether the “special efforts” requirement of the Act has been faithfully executed.62 The problems

and 49 U.S.C. § 1602a(b) (Supp. V 1975) of the UMT Act, provisions which restricted competition by an UMTA grantee with existing school bus companies; Ridley v. Blanchette, 421 F. Supp. 435 (E.D. Pa. 1976), holding that local residents could rely on section 3(d) of the UMT Act, a provision requiring public hearings for consideration of the social, economic and environmental effects of a project, to establish standing. See generally Inman Park Restoration, Inc. v. UMTA, 414 F. Supp. 99 (N.D. Ga. 1976), where the court indicated that since the requirements of both section 4(f) of the Department of Transportation Act (DOT Act), 49 U.S.C. § 1653(f) (1970), and section 102(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(C) (1970), were contained in section 14 of the UMT Act it saw “no reason not to apply the rules set out by the Supreme Court in Overton Park to the review of agency actions under 14(c).” 414 F. Supp. at 130. Since Overton Park v. Volpe, 401 U.S. 402 (1971), provides for at least minimal judicial review under section 4(f) of the DOT Act, the Inman analysis may be helpful to that extent.

59. Warth v. Seldin, 422 U.S. 490 (1975). See also Urban Alliance v. Bi-State Dev. Agency, 531 F.2d 877 (8th Cir. 1976) (Assoc. Justice Tom C. Clark, U.S. Supreme Court, Retired, sitting by designation), where plaintiffs were denied standing to enjoin UMT Act assistance, notwithstanding their allegations of violations of the Civil Rights Act, because they failed to allege they would be personally injured.


which have arisen in interpreting this language are largely due to delayed promulgation of regulations on the subject. 63

A helpful discussion of the special efforts question in light of the regulations can be found in Bartels v. Biernat. 64 The court there noted that "[t]he statute does not allow the County to wait until the perfect solution is found" although "the technology necessary to implement some of the proposed solutions ... is not fully advanced .... " 65 It went on to issue a permanent injunction restraining the acquisition and operation of new mass transit vehicles which cannot be utilized by the handicapped, but with a proviso. The proviso allowed for the "immediate purchase of such vehicles" if the "failure of the system would result without their purchase" so long as "all diligence is being used to plan, design and implement facilities ... which can be effectively utilized by mobility handicapped individuals." 66

Bartels attempted to balance realistically the limitations of current technology and the rights of the handicapped; future cases and administrative developments should refine this analysis. 67

3. Interests of Private Companies

Ostensibly, private enterprise also is protected by the UMT Act. Section 3 incorporates safeguards against "unfair" competition, 68 and prohibits the use of funds "to support procurements utilizing exclusionary or discriminatory specifications." 69 Judicial interpretation of these provisions is unclear and is perhaps best characterized as being case-by-case.

For example, in South Suburban Safeway Lines, Inc. v. City of Chicago, 70 the Seventh Circuit held that while section 3 did indicate a concern for private transit operators, it was not intended to prohibit competition, and that the determination as to whether financial assistance should be granted was committed to agency discretion. As a %

63. See United Handicapped Fed'n v. Andre, No. 76-1369 at 8 (8th Cir. June 21, 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1278 (7th Cir. 1977). The special efforts provision was adopted as part of the Assistance Act of 1970, and regulations implementing this policy were not issued until mid-1976. 41 Fed. Reg. 18,239 (1976) (codified at 49 C.F.R. §§ 609.1-.25, 613.204 (1976)).
65. Id. at 232.
66. Id. at 233.
68. 49 U.S.C. §§ 1602(e), 1602(g), 1602a(b) (1970 & Supp. V 1975). "Unfair" competition may result between a subsidized entity and a private company without UMT Act aid.
69. Id. § 1602(a)(1).
70. 416 F.2d 535, 539 (7th Cir. 1969).
result, South Suburban lacked standing to challenge a grant to the Chicago Transit Authority.  

Conversely, in Bradford School Bus Transit v. Chicago Transit Authority the same court held that a private school bus company did have standing and that the competition issue was reviewable. This decision was based on provisions of section 3 with arguably identical import as those in South Suburban, and although the court purportedly distinguished the case on its facts, its failure to overrule South Suburban is puzzling.

Another case, AM General v. DOT, is potentially an analogue to both South Suburban and Bradford. The court in AM General permitted the use of mass transit funds to purchase buses with specifications which only one manufacturer had developed, despite statutory language forbidding the use of funds for procurements using “exclusionary or discriminatory specifications.” The court’s justification for the decision was that it was in keeping with the policy of the UMT Act to encourage product improvements, and that AM General was fully apprised of the technology being developed and simply chose not to offer a competitive product. The provision of the Act calling for assistance “in the development of improved mass transportation facilities, equipment, techniques, and methods” was thus reconciled with the provision which forbade “exclusionary or discriminatory specifications.” The facts were crucial in resolving the issue and bear out the court’s efforts to abide by the meaning of the Act.

In summary, courts in more recent cases such as Bradford and AM General seem less hesitant to grapple with the legislative intent of the UMT Act. This is in contrast to the South Suburban type of analysis which

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71. The court went on to decide the merits against South Suburban regardless. Id. at 539-40.
72. 537 F.2d 943, 945-49 (7th Cir. 1976).
76. Id. at 1179-80.
77. 49 U.S.C. § 1602(a)(1) (Supp. V 1975). The case is possibly an analogue of South Suburban on this point; on the surface the court ignores the statutory language and defers to UMTA.
would tend to defer consideration of the statutory language. Unfortunately, other cases supporting this conclusion are few, and are too scarce to lend predictability to judicial actions.

B. **THE URBAN MASS TRANSPORTATION ADMINISTRATION (UMTA)**

Administrative developments are often coextensive with judicial action. As noted earlier, administrative regulations have been used to fashion remedies in the litigation involving the rights of the handicapped. Nevertheless, in most instances UMTA would be the first governmental body to act since it is responsible for the administration of the UMT Act. The Administrator of UMTA is delegated the rulemaking authority which is vested in the Secretary (DOT) by the Act in order to carry out its purposes.

Under the direction of the Administrator the agency influences the funding process on what could be termed formal and informal levels. Formal actions are those which generally have a legally cognizable effect, such as rulemaking; informal actions would include any other actions the agency takes, such as issuing policy statements and advising potential grant applicants.

1. **Formal Actions**

On the formal level, rulemaking has had readily appreciable effects. For example, notwithstanding the time and effort required, all urban transportation projects funded by UMTA must be developed through an elaborate planning process. Comprehensive transportation planning is required for "urbanized areas" under the Act and regulations have been promulgated to implement these planning directives. Unless the planning procedures specified in the regulations are followed, no funds can be obtained.

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83. See text accompanying notes 63-66 supra.
86. These definitions attempt to parallel the Administrative Procedure Act, with formal action being equated to "agency action". See 5 U.S.C. § 551(13) (1970). Note that even strictly informal communications can become relevant in subsequent litigation and thereby affect the outcome of a given case. See AM General v. DOT, 433 F. Supp. 1166 (D.D.C. 1977). Policy statements may have legal effect and hence be reviewable if deemed "final agency action." E.g. Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).
88. 49 U.S.C. §§ 1602(a)(2), 1604(g), 1604(l) (Supp. V 1975). "Urbanized areas" are defined differently under each section, see notes 36 para. 2, 38 supra.
The significance of rulemaking in relation to transit financing has been demonstrated in *County of Los Angeles v. Coleman*, which involved a challenge to rulemaking authority. The case arose when Los Angeles County discovered that planning procedures blocked its eligibility for highway and mass transit funds. The county had submitted its project requests to the area “metropolitan planning organization” (MPO), but the MPO failed to make submissions to the State of California and the Secretary (DOT); as a result, the county’s requests were not included in the “annual element” required by the regulations prior to funding. In an attempt to rectify the situation the county sought an order to compel the Secretary to consider its project requests. It alleged that the planning regulations were unconstitutional and contrary to the intent of Congress insofar as they precluded the direct submission of project requests to the Secretary. However, the court disagreed, and although it recognized the hardship imposed on the county, it upheld the regulations. Accordingly, the Secretary’s rulemaking with respect to those regulations was legitimated.

Formal actions other than rulemaking also may affect funding. An example is the decision of Secretary Brock Adams to mandate the Transbus, a standard size bus with a low floor, ramp, and wide door to allow for boarding by wheelchair-bound passengers. The Transbus mandate reverses a prior decision, and “will apply to all procurements containing vehicle specifications approved by UMTA, issued for bid after September 30, 1979.” This mandate requires radical changes in bus specifications and design, and is likely to revolutionize the current bidding-funding scenario.

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92. *Id.* at 499. MPO submission of an annual element is required by 23 C.F.R. § 450.318(a) (1977). The annual element contains the following: descriptive material on each project; estimates of the total costs and of the federal funds to be obligated during the program year; proposed sources of funds; an identification of the recipient and the public agencies carrying out the projects.
93. *Id.* at 497, 500.
94. *Id.* at 500-03.
95. Whether the pertinent regulations are upheld or overruled, as issued or as applied, they have an impact on funding. Generally aid is given or withheld based upon compliance with regulations existing when the application for assistance is made. Therefore, the prospect of a legal victory—after protracted litigation—is unappealing if the transit system collapses in the interim. Nevertheless, the availability of injunctive relief may temper the impact of the regulations. See generally Bartels v. Biernat, 405 F. Supp. 1012 (1975) (preliminary injunction issued enjoining the purchase of mass transit vehicles on behalf of mobility handicapped).
97. *Id.* at 12-13, 123 Cong. Rec. at S10,565.
98. *Id.* at 1, 123 Cong. Rec. at S10,562.
99. *Id.* at 2, 123 Cong. Rec. at S10,563 (emphasis added).
100. See *id.* at 10, 123 Cong. Rec. at S10,564.
2. **Informal Actions**

Informal actions taken by UMTA can be equally important. An "informal" effort to ensure that private companies are aware of their potential eligibility for aid could slow the massive shift toward public ownership of transit systems.\(^{101}\) Conceivably, more private companies might continue or expand transit operations if they were subsidized.

The general opinions of UMTA also carry weight. On a given issue, the support of the executive branch as verbalized by UMTA can streamline the route to congressional approval, while its opposition may make it difficult or impossible to obtain approval.\(^{102}\) To be sure, UMTA's lobbying activities and opinions may take on a formal character if the laws which are enacted reflect concessions that have been made to UMTA.

UMTA or DOT opinions can be crucial whether or not laws which align with their views are enacted. Policy statements are often opinions which merely await judicial recognition of their legally binding effect.\(^{103}\) Perhaps the most important pronouncement of this kind is the recent DOT *Policy Statement on Major Mass Transportation Investments*.\(^{104}\) The *Statement* was drafted to inform urban areas of the issues considered in federal decisions so that funds might be allocated more efficiently. It generally provides that:

> federal support will be available only for those alternatives which the analysis [of transportation alternatives] has demonstrated to be cost effective, where effectiveness is measured by the degree to which an alternative meets the locality's transportation needs, promotes its social, economic, environmental, and urban developmental goals, and supports national aims and objectives.\(^{105}\)

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\(^{101}\) There are indications that such an effort is contemplated and may be underway. See COMPTROLLER GENERAL, REPORT TO CONGRESS, PRIVATE COMPANIES SHOULD RECEIVE MORE CONSIDERATION IN FEDERAL MASS TRANSIT PROGRAMS 24-27, (Dec. 10, 1976) (reply from DOT to the Report: Appendix I). Recall that this type of effort is required by the Act, see note 33 supra. To this end UMTA has issued a proposed Statement of Policy on Paratransit which requires the participation of private companies. See 1978 Appropriations Hearings, supra note 2, at 695 (UMTA response to additional questions submitted by Rep. Conte). Recent private participation is evidenced in a first time grant to private bus operators in New York City. Dept. of Transportation, News Release No. 77-21 (April 13, 1977).

See generally G. SMERK, *supra* note 1, at 135-40 (historical chronology of events in the shift from private to public ownership), 141 (statistics: movement to public ownership).

\(^{102}\) See, e.g., text accompanying notes 19-27 *supra*. The Administration's views are regularly aired at the yearly appropriations hearings when UMTA justifies its budget submission. E.g. 1978 Appropriations Hearings, *supra* note 2.

\(^{103}\) See note 86 *supra*.

\(^{104}\) 41 Fed. Reg. 41,513-14 (1976). "Major mass transportation investments" for purposes of the *Statement* are those which involve "new construction or extension of a fixed guideway system (rapid rail, light rail, commuter rail, automated guideway transit) or a busway . . . ." *Id.* at 41,513.

To implement this general provision, the Statement outlines specific policy areas which directly relate to the planning requirements found in the DOT-UMTA regulations. By delineating the factors to be considered under each policy area, it further explains the skeletal guidelines prescribed by these regulations. Thus, the “informal” opinions set forth in the Statement seem to be inseparable from the “formal” regulations.

The overall effect of the Statement is to give the UMT Act program a perceptible direction in terms of policy, something which has been lacking. When the interaction between the applicant, UMTA, and the courts is considered in light of the laws and regulations, the policy position taken by DOT is of paramount importance.

CONCLUSION

The UMT Act has undergone substantial change since its inception. As a practical matter, the various prescriptions enunciated in the Act have become increasingly important. The number of legal actions has swelled, reflecting a growing awareness of the rights upon which funding is conditioned. Political forces and internal pressures generated by the aid program have been influential. Nevertheless, despite the adjustments and changes, the lofty goal of establishing sound urban mass transportation systems continues to be elusive, and the underlying problems still exist. While it is clear that money alone cannot solve these problems, the financing of mass transit is still very much a part of the overall problem. It seems certain that mass transit will require drastically increased amounts of federal aid.

107. E.g., an evaluation of alternatives “should assess each alternative’s capital and operating costs; ridership attraction; capital and operating efficiency and productivity; effects on modal choice, level of automobile use, environmental impacts and energy consumption; impact on land use and development patterns; extent of neighborhood disruption and displacement; job creation impact . . . .” 41 Fed. Reg. 41,513 (1976).
108. See G. SMERK, supra note 1, at 250-56.
109. See text accompanying notes 50-58, 76-81. The spending on major mass transportation projects, as defined supra note 104, is a substantial portion of UMTA spending. For example, through fiscal year 1980 about 70% of the capital grants are budgeted for rail transit, “split about evenly between completely new rail systems and improvements and extensions to existing rail networks.” BUDGET OPTIONS, supra note 48, at 4.
110. See Verbit, The Urban Transportation Problem, 124 U. PA. L. REV. 368, 488 (1975); G. SMERK, supra note 1, at 256-66.
111. UMT Act spending for capital improvements since Feb. 1965 (as of Feb. 28, 1977) totals $6.84 billion. 1978 Appropriations Hearings, supra note 2, at 415. Uncommitted contract authority at year end 1976 totalled approximately $9.4 billion, id. at 391, of which $3.4 billion is to be disbursed under section 5 and probably will be used for operating deficits. See note 48 supra. The net result is that roughly $13 billion has been or will be spent on mass transit under
Alternative funding strategies to meet the projected needs are being continually evaluated. Legislation is before Congress which is designed to broaden the UMT Act, and Congress has already created a National Transportation Policy Study Commission to assist in developing a comprehensive program. The DOT is also studying the mass transit financing issue in conjunction with transportation policy in general. Moreover, trust fund financing is being discussed anew. Hopefully, progress will be made toward integrating the financial, technological and social elements of the urban transportation problem. The limited success the existing program. This amount pales in the face of much higher estimates of the capital spending still required. See e.g. DEPARTMENT OF TRANSPORTATION, 1974 NATIONAL TRANSPORTATION REPORT III-12 (1974) ($23.2 billion required for 1972-1980, $63.7 billion for 1972-1990 (in 1971 dollars)). See also 1970 House Hearings, supra note 1, at 111 (remarks of John A. Volpe, Secretary of DOT) (Volpe conceded that the $10 billion Assistance Act of 1970 was only a beginning). Given that mass transit operations are generally insolvent it is clear that governmental funds will be relied upon heavily to meet capital costs. Since the UMT Act can be expected to cover up to 80% of these costs under 49 U.S.C. §§ 1603a, 1604(e) (Supp. V 1975), substantially increased appropriations are required.

Supplemental funds for mass transit are available under 23 U.S.C. §§ 103(e)(4), 142 (Supp. V 1975). Amounts utilized under the section 142 urban systems program have been inconsequential. See BUDGET OPTIONS, supra note 48, at x; COMPTROLLER GENERAL, REPORT TO CONGRESS, WHY URBAN SYSTEM FUNDS WERE Seldom USED FOR MASS TRANSIT 3 (March 18, 1977) (as of June 1976, only $74 million or 3% of the authorized urban systems funds were used for mass transit). In contrast section 103(e)(4) interstate transfer grants have reached $775 million per year, 1976 Appropriations Hearings, supra note 2, at 391, and seem likely to increase, see id. at 391. Congress anticipates completion of the interstate highway system by Sept. 30, 1990, see 23 U.S.C.A. § 101(b) (West Supp. 1977), hence funds may be available until then under section 103(e)(4). In any case, additional appropriations will be required despite the supplemental sources of aid, especially when general inflationary trends are considered. See 1976 Appropriations Hearings, supra note 2, at 909-10 (statement of B.R. Stokes, Executive Director, American Public Transit Association).

See S. 208, 95th Cong., 1st sess., 123 Cong. Rec. S10,579-81 (daily ed. June 23, 1977). After passage by the Senate the bill includes: $4.75 billion in new grant authority for section 3 of which the first $400 million annually is reserved for bus acquisitions, $295 million to supplement section 5 operating assistance funds, and a provision that the $500 million set aside for rural areas in 1974 may be used for operating as well as capital expenses. See id.


See e.g., Dep't of Transportation, News Release No. 33-77 (Feb. 25, 1977); Dep't of Transportation, News Release No. 27-77 (Feb. 10, 1977). Interestingly, a tension of sorts seems to be developing between the Administration and Congress over policy formulation. The National Transportation Policy Study Commission is evidence of this as it is primarily a legislative body. Furthermore, Sen. Harrison Williams has introduced S. 208 extending the UMT Act program before the Administration has been able to develop its own approach. See note 112 supra.

of the UMT Act in financing mass transit attests to the overwhelming magnitude and complexity of the problem.116

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DOT has issued a policy statement on Major Urban Mass Transportation Investments which is the result of a past study of the urban transportation problem. The policy outlined requires a detailed evaluation of the multifarious aspects of the problem. See text accompanying notes 104-09 supra.
Friends of the Earth v. Carey:
Enforcing the Clean Air Act

I. INTRODUCTION

II. THE CASE

III. THE ISSUES

A. RENUNCIATION OF A TRANSPORTATION CONTROL PLAN
   1. The 1970 Clean Air Amendments
   2. Intent of the Statute

B. STATE SOVEREIGNTY
   1. Brown v. EPA
   2. The Commerce Clause

C. THE CITIZEN SUIT PROVISION

IV. CONCLUSION

In Friends of the Earth v. Carey [Friends III], the Court of Appeals for the Second Circuit handed down perhaps the most definitive ruling concerning the Clean Air Act since the enactment of the 1970 Amendments. The holding of the case indicates that transportation control plans, as outlined in the Clean Air Act, are enforceable against the states and local governments.

I. INTRODUCTION

Congressional attempts to deal with air pollution were initiated in 1955 with the passage of the first air pollution control act. That Act recognized the growing problem of air pollution and asked the states to take primary responsibility for its prevention and control. Several similar

3. Under 42 U.S.C. § 1857c-5(a)(2)(B) (1970), the states were authorized to include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls" (emphasis added). The 1977 Amendments to the Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 (1977), altered this section to read as follows: "including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D)."
acts were passed in the ensuing 15 years, but it was not until the passage of the 1970 Amendments to the Clean Air Act that federal policy was dramatically altered.

The 1970 Amendments eliminated state discretion in meeting the responsibility of reducing air pollution. Instead, the states were commanded to draft State Implementation Plans (SIPs) for the prevention and control of air pollution within a mandated period of time. Included in the mandatory SIP preparation was a transportation control plan designed to reduce the levels of vehicular pollutants in the cities.

Pursuant to the 1970 Amendments, New York City, with State assistance, drafted a transportation control plan with the full support of the Lindsay Administration. At the time, carbon monoxide pollution in the City had risen well above the level of acceptability as defined by federal health standards. In studying the plan, which was designed to meet the primary air quality standards as promulgated by the Environmental Protection Agency (EPA) Administrator in 1971, the City concluded that motor vehicles were responsible for 95% of the carbon monoxide emissions, 65% of the hydrocarbon emissions, and 50% of the photochemical oxidants in the New York metropolitan area. The plan also determined that the controls on new automobile emissions ordered by section 202 of the Clean Air Act would only achieve about 40% of the reduction in pollutants necessary to fulfill the EPA's primary air quality standards.

6. 42 U.S.C. § 1857c-5 (1970). The states were commanded to "adopt and submit" to the Environmental Protection Agency a plan to implement the national primary ambient air quality standards within nine months after promulgation of such standards by the Administrator. The standards were initially promulgated in 1971. See 40 C.F.R. § 50.1-11 (1975).
8. Although the "Friends" litigation is primarily a proceeding against New York City, Friends II and Friends III name [Hugh] Carey, the Governor of New York State, as defendant. The State was a party defendant, but all court references to the State apply to the City as a municipality of the State. Furthermore, the State of New York did not seek to renge on the City's implementation plan. See Reply Brief for Plaintiffs-Appellants at 40, Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977).
9. By July, 1975, carbon monoxide levels in New York City had increased 25% since pre-plan days, and were then five times the level set by federal health standards. "These violations were significantly harmful to public health." Friends of the Earth v. Carey, 535 F.2d 165, 171 (2d Cir. 1976).
11. See Friends of the Earth v. EPA, 499 F.2d 1118, 1121 (2d Cir. 1974).
13. Friends of the Earth v. EPA, 499 F.2d 1118, 1121 (2d Cir. 1974).
Therefore, pursuant to section 110(a)(2)(B) of the Clean Air Act, New York prepared transportation controls for the City that consisted of four basic stages for a reduction in air pollutants.

The primary stage, designed to meet the original 1975 deadline and approved by the EPA, would reduce taxicab cruising as well as achieve reductions in parking places in Manhattan business districts and daytime freight movements. Expanded use of exclusive bus lanes, increased bus service, and the imposition of tolls on certain bridges into Manhattan were also approved.

The second stage was the maintenance stage, which included strategies aimed at preserving the 1975 air quality levels achieved by the primary stage. The third, the contingency stage, designed as an alternative if the primary stage should fail, would ban all private automobiles from Manhattan's business districts. The fourth consisted of secondary strategies thought to be beneficial but in need of further study.

Upon EPA approval of the primary stage in June, 1973, a 1975 compliance date was set. However, because of a worsening economic crisis, the City refused to implement the plan.

The City's refusal caused several environmental groups to initiate suit seeking the City's implementation of the transportation control plan. The ensuing "Friends" litigation produced three appellate court decisions, the most recent of which, Friends of the Earth v. Carey [Friends III], will stand as the final judicial word on the case. The October 17, 1977 Supreme Court ruling denied certiorari to Friends III.

In Friends III, the City argues that the 1970 Clean Air Act Amendments are not a mandatory directive to the states, and therefore, failure to implement the transportation control plan is not a violation of the statute. An analysis of this issue involves a discussion of the legislative history and a careful reading of the applicable sections of the statute.

The City further argues that EPA enforcement of a state-drafted

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15. New York City's original compliance date to meet the primary ambient air quality standards as set by the Administrator was May 31, 1975, which included a nineteen-month extension for meeting both the photochemical oxidants and the carbon monoxide standards. See 38 Fed. Reg. 16,560-61 (1973). See also, Friends of the Earth v. EPA, 499 F.2d 1118, 1121 (1974). A previously granted two-year extension pushing the compliance date back to May 31, 1977 was rescinded in Natural Resources Defense Council v. EPA, 475 F.2d 968 (D.C. Cir. 1973).
16. Friends of the Earth v. EPA, 499 F.2d 1118, 1121 (2d Cir. 1974).
17. Id.
20. Friends of the Earth was the only named plaintiff in Friends I. For a list of plaintiffs in Friends III, see note 25 infra.
implementation plan is an unconstitutional infringement on state sovereignty. Analysis of this issue involves a discussion of Brown v. EPA.\textsuperscript{22}

Finally, the citizen suit provision\textsuperscript{23} must be examined; this provision was the vehicle through which plaintiffs initiated Friends III.

II. THE CASE

The initial Second Circuit opinion in the chronology was Friends of the Earth v. EPA [Friends I].\textsuperscript{24} In Friends I, some of the plaintiffs in Friends III\textsuperscript{25} brought suit seeking review of New York’s transportation control plan on two grounds: first, plaintiffs argued that the plan was ambiguous because the proposed strategies did not indicate precisely what actions would be taken by the City and second, plaintiffs argued that the plan did not comply with the requirements of 110(a)(2)(B) “that it contain emission limitations, schedules and timetables for compliance with such limitations.”\textsuperscript{26}

The Friends I court upheld the four strategies of the plan in all material aspects while ordering the EPA Administrator to “explain further his determinations regarding the parking ban strategies, the necessary assurances concerning funding and personnel, and the twenty percent ban on taxicab cruising.”\textsuperscript{27} Immediate implementation of the plan was not ordered since the court found that jurisdiction in the case rested on section 307(b)(1) of the Clean Air Act,\textsuperscript{28} which restricted review to the correctness of the Administrator’s approval of a state plan. Nevertheless, the court held that:

Congress has provided in the Clean Air Act specific measures for enforcing the plan. Under § 110 the Administrator can promulgate a revised plan if the original plan proves to be inadequate and the state refused to act. Under § 113 . . . the Administrator can bring suit . . . to enforce his orders or an implementation plan . . . Under § 304 . . .

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    \item 22. 521 F.2d 827 (9th Cir. 1975). In Brown, the Court of Appeals for the Ninth Circuit held that the Constitution would not permit the EPA to force a state to implement a federal air quality implementation plan, Brown’s relationship to Friends III will be discussed, as will other recent Supreme Court decisions dealing with the issue of state sovereignty. E.g., National League of Cities v. Usery, 426 U.S. 833 (1976); Fry v. United states, 421 U.S. 542 (1975).
    \item 24. 499 F.2d 1118 (2d Cir. 1974).
    \item 27. 499 F.2d 1118, 1129 (2d Cir. 1974).
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private citizens, subject to whatever constraints the Eleventh Amendment may provide, can bring suit in the district courts to enforce implementation plans.29

Pursuant to section 304,30 plaintiffs then brought suit in District Court for the Southern District of New York, and sought an injunction against the defendants for their failure to implement the transportation control plan submitted by the City and approved by the EPA in accordance with section 110 of the Clean Air Act.31 However, the court, noting the "highly technical nature of . . . the proof and the remedy sought,"32 held that sufficient expertise was lacking and denied plaintiffs request for a mandatory injunction.

On appeal, the Second Circuit reversed the district court's ruling in Friends of the Earth v. Carey [Friends II].33 The court held that according to the statute, "a plan, once adopted by a state and approved by the EPA becomes controlling and must be carried out by the state."34 The court then ordered partial summary judgment be granted in favor of the plaintiffs, thereby enforcing the four strategies of the plan. In remanding the case, the Court of Appeals directed the district court to conduct hearings to insure that New York City was complying in all aspects with the air quality control plan.35

On remand, the district court modified the partial summary judgment against defendants previously entered by the Court of Appeals in Friends II.36 Plaintiffs again appealed to the Second Circuit, which resulted in Friends of the Earth v. Carey [Friends III].37 In Friends III plaintiffs sought to enforce the transportation control plan for the metropolitan New York area, the four strategies of which were drafted by the State and City of New York and approved in Friends I.

III. THE ISSUES

A. RENUNCIATION OF A TRANSPORTATION CONTROL PLAN

1. The 1970 Clean Air Act Amendments

Pursuant to the 1970 Clean Air Act Amendments the Administrator of the EPA is directed to publish proposed regulations prescribing a
national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria had been issued prior to that date. The primary standards are designed for the protection of public health while the secondary standards are aimed at the protection of public welfare. A reasonable time is allowed for comment after which the Administrator is directed to promulgate the standards.

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38. "Ambient air" is defined as outdoor air used by the general public. See Train v. Natural Resources Defense Council, 421 U.S. 60, 65 (1975).

AIR QUALITY STANDARDS

Section 109 of the Clean Air Act is amended by adding the following new subsection at the end thereof:

(d)(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 108 and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 108 and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 108 and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

(b) Section 109 of such Act is amended by adding the following new subsection at the end thereof:

(c) The Administrator shall, not later than one year after the date of the enactment of the Clean Air Act Amendments of 1977, promulgate a national primary ambient air quality standard for NO\(_2\) concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 108 (c), he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

42. 42 U.S.C. § 1857c-4 (a)(1)(B)
Under section 110 of the Clean Air Act, the states, following notice and public hearing, and within nine months after promulgation of an air quality standard, are to adopt and submit to the Administrator a plan to implement those standards—both primary and secondary—in each air quality region of the state. \(^{43}\) Within four months after the date required for submission of a state plan, the Administrator is to approve or disapprove the plan on the basis of eight listed criteria. \(^{44}\) Primary standards are to be

\(^{43}\) "Air quality region" is defined under 42 U.S.C. § 1857c-2(c) (1970) as follows. "The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards."

\(^{44}\) The eight listed criteria under this section of the Clean Air Act as adopted in 1970 read as follows:

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions, (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard of the availability of improved or more ex-
implemented "as expeditiously as practicable," but in any case within three years of the Administrator's approval of the plan. Secondary standards are to be implemented within a reasonable time.

A state can revise its implementation plan under section 110(a)(3) of the Act. The Administrator will approve the revised plan if it meets the requirement of the eight listed criteria in section 110(a)(2) and is adopted by the state after a reasonable notice and public hearing. Section 110(a)(3) is, therefore, an available tool for state revisions by the states themselves within the guidelines of the promulgated standards.

Perhaps the most controversial part of the Clean Air Act is section 110(c)(1) which sets forth three conditions under which the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.


(2) Section 110(a)(2)(B) of such Act is amended by striking out "land-use and" and by inserting after "transportation controls" the following: "air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D)"

For other amendments to section 110, see 91 Stat. 685 (1977).


46. Id.

47. 42 U.S.C. § 1857c-5(a)(3) (1970). The 1977 Amendments to the Clean Air Act amend this section by adding the following paragraph:

"(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator in the case of a plan (or portion thereof) promulgated under this subsection because one or more exemptions under section 118 (relating to Federal facilities), enforcement orders under section 113(d), suspensions under section 110(f) or (g) (relating to temporary energy or economic authority) or orders under section 119 (relating to primary nonferrous smelters) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, extension, or variances had been granted."

48. Id. § 1857c-5(a)(3)(A)

49. 42 U.S.C. § 1857c-5 (c)(1) (1970). The 1977 Amendments to the Clean Air Act amend this section by adding the following sentence at the end thereof: "Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 121 (relating to consultation) or the consultation process required under such section 121 shall not be required to be promulgated before the date eight months after such date required for submission." Pub. L. No. 95-95, § 108(d)(1), 91 Stat. 685 (1977). Section 121 of the 1977 Amendments to the Clean Air Act provides as follows: "In carrying out the requirements of this Act requiring applicable implementation plans to contain — (1) any transportation controls, air quality maintenance plan requirements or preconstruction review of direct sources of air pollution. . . the State shall provide a satisfactory process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any Federal land manager having authority over Federal land to which the State plan applies, effective with respect to any such requirement which is adopted more than one year after the date of enactment of the Clean Air Act Amendments of 1977 as part of such plan. Such process
trator can prepare and promulgate an implementation plan for a state: (1) if a state fails to submit an implementation plan within the nine-month period prescribed in the statute, (2) if the plan is not in accordance with the requirements as set forth in section 110(a)(2) of the Act, and (3) if a state fails to submit revisions within the time prescribed under the statute. Section 110(c)(1) represents a distinct break with the past practice of merely encouraging the states to implement controls over air quality. Here, for the first time, Congress has provided for the prevention and control of air pollution whether or not the states will carry the burden themselves. Furthermore, it is on the strength of section 110(c)(1) that Brown based its constitutional claim of federal interference with state sovereignty.

Another important section of the statute is section 110(e)(1) under which the Administrator is authorized to extend the three-year compliance period. A two-year extension will be granted if the state cannot justifiably achieve the national standards within that time, but only if interim compliance measures are reasonable under the circumstances. The Clean Air Act provides for federal enforcement of these provisions under section 113 if "any person" is in violation of an implementation plan. Under the Act, the term "person" includes a state, a municipality, and a political subdivision of a state. The Administrator is required to notify the appropriate person or state, and if such violation continues past thirty days, the Administrator may issue an order demanding compliance with the requirements or bring a civil action.

Finally, section 307 of the Act provides for judicial review of the Administrator's action in promulgating the national primary and secondary ambient air quality standards as well as a review of the Administrator's action in approving or promulgating any implementation plan. Any such petition for review must be filed within thirty days from the date of such promulgation under the statute.

2. Intent of the Statute

The 1970 Amendments to the Clean Air Act represented a clean severance with the past practice of voluntary state compliance in controlling air pollution. The initial legislation in this area, the 1955 Air Pollution Control Act, was merely a recognition by Congress that air

shall be in accordance with regulations promulgated by the Administrator to assure adequate consultation. Such regulations shall be promulgated after notice and opportunity for public hearing and not later than 6 months after the date of enactment of the Clean Air Act Amendments of 1977. Id. § 121.

52. 42 U.S.C. § 1857 h(e). See Brown v. EPA, 521 F.2d 827, 834 (9th Cir. 1975).
pollution endangered public health and welfare. This Act declared it to be the policy of Congress to protect the primary responsibilities and rights of the states and local governments in controlling air pollution, and authorized the Surgeon General to support research and aid states in the control and prevention of air pollution.\textsuperscript{54}

In contrast, the Air Quality Act of 1967\textsuperscript{55} represented a congressional shift from the 1955 status of recognizing the problem to a position of \textit{encouraging} the states to cooperate with local governments for the prevention and control of air pollution. As in the 1955 Act, Congress determined that this ambitious project was the primary responsibility of state and local governments. Although the federal role was slightly enhanced due to a grant of limited powers of supervision, the enactment of the 1967 Air Quality Act did not fundamentally alter the state \textit{voluntary} role in the prevention and control of air pollution.

However, voluntary measures were ineffective and with the enactment of the 1970 Clean Air Act Amendments, Congress clearly terminated the non-mandatory approach. Congress sought:

\begin{quote}
[T]o speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again. The Air Quality Act of 1967 and its predecessor acts have been instrumental in starting us off in this direction. A review of achievements to date, however, makes abundantly clear that the strategies which we have pursued in the war against air pollution have been inadequate in several important respects, and the methods employed in implementing those strategies often have been slow and less effective than they might have been.\textsuperscript{56}
\end{quote}

The 1970 Amendments, characterized by some observers as "taking a stick to the states,"\textsuperscript{57} unquestionably eliminated state discretion with regard to meeting their responsibility of controlling air pollution. As the Supreme Court later commented, "for the first time they [the states] were required to attain air quality of specified standards, and to do so within a specified period of time."\textsuperscript{58} A program of compelled state action\textsuperscript{59} thus replaced the previously unchallenged voluntary approach and terminated a fifteen-year period of congressional nudging that failed to produce consistent or comprehensive state programs to deal with air pollution.

\begin{footnotes}
\item[59] Memorandum of Law for Plaintiffs-Appellants at 32, Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977).
\end{footnotes}
Against this background of legislative history, New York City seeks to renounce its self-designed and properly approved transportation control plan. The City's avenue of review is contained in section 307 of the statute, authorizing judicial scrutiny of the Administrator's action in promulgating the national primary and secondary ambient air quality standards. Section 307 also provides for review of the Administrator's action in approving an implementation plan. However, the time period within which review must be sought under section 307 is only 30 days.

The Administrator promulgated the national primary and secondary ambient air quality standards in April, 1971, and New York City's transportation control plan was approved in June of 1973. Plainly, therefore, section 307 of the Act is no longer an available remedy for the City.

Furthermore, section 307, because it allows for due process, has been held to be a "bastion of enforceability." If the 1970 Amendments are to be interpreted as outdistancing their predecessor acts as their legislative history unequivocally indicates, then allowance of the City to renege on a properly implemented transportation control plan would defeat the mandatory nature of the Amendments. Clearly, therefore, an analysis of the 1970 Clean Air Act Amendments leads to the conclusion that New York's transportation control plan is enforceable against the City.

B. STATE SOVEREIGNTY

1. Brown v. EPA

The constitutional issue raised in Friends III is whether federal enforcement of New York's transportation control plan is an impermissible interference with state sovereignty. The absence of a definitive ruling on the constitutional aspects of this problem caused New York to rely on Brown v. EPA, in which the Ninth Circuit found state sovereignty

60 See Friends of the Earth v. EPA, 499 F.2d 1118, 1120 (2d Cir. 1974).
61 Upon EPA approval of the plan in 1973, New York was granted a nineteen-month extension for meeting both the photochemical oxidants and carbon monoxide emissions. See Friends of the Earth v. EPA, 499 F.2d 1118, 1123 (2d Cir. 1974).
63 521 F.2d 827 (9th Cir. 1975). For similar holdings to Brown see Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975); Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975). For a case with a contrary holding regarding federal enforcement of implementation plans against the states, see Pennsylvania v. EPA, 509 F.2d 246 (3d Cir. 1974). The Supreme Court did consider Brown v. EPA, 431 U.S. 99 (1977). Due to the fact that the Administrator had repealed his regulations, citing their need for reform, the case was considered moot.
infringement where the federal government drafted a transportation control plan for state implementation.

In the 1976 District Court ruling in the Southern District of New York, the court reasoned that the *Friends II* interpretation of section 304 of the Clean Air Act, permitting a citizen or the EPA to bring suit requiring the State or City to enforce a state-promulgated transportation control plan posed “the same constitutional hurdles as those suggested” in the *Brown* case.

In *Brown*, California brought suit against the Administrator of the EPA to prevent the latter’s promulgation of a transportation control plan for the State. California’s initial transportation control plan had been invalidated on the grounds that it did not provide for attainment and maintenance of the national standards for photochemical oxidants. Under section 110(c)(1) of the Clean Air Act, the Administrator is required to prepare and promulgate an implementation plan for a state when the state’s plan is not in accordance with federal requirements. At issue in *Brown*, however, is whether the EPA may impose upon the State, federal policy decisions designed to implement transportation control plans locally and through imposition of sanctions, require the State to enact and enforce appropriate measures to implement the federal plan.

The interpretation of section 110(c)(1) and the issue in *Brown* are distinctly different. The former is a permissible exercise of federal government power through the enforcement of pollution control standards on the citizenry under the commerce clause. The latter, because of the Administrator’s action in forcing the State to adopt federal regulations, raises questions of an infringement of state sovereignty under the Tenth Amendment.

The court in *Brown* interprets the Act as not permitting such federal intrusion into state sovereignty “except to the extent that the pollution might be caused solely by a source or activity controlled by the state.” In other words, the court held that “a state may decline, without becoming liable to sanctions, to undertake a program of control suggested by the Administrator.” Therefore, the constitutional issue raised in *Brown*.

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67. U.S. Const. art. I, § 8, cl. 3.
68. U.S. Const. amend. X.
69. 552 F.2d 25, 36 (2d Cir. 1977). This quote is a summary of the “Friends III” court’s interpretation of *Brown* v. EPA.
70. *Brown* v. EPA, 521 F.2d 827, 840 (9th Cir. 1975).
is whether federal promulgation of transportation control plans for local
[state] enforcement is an impermissible interference with state
sovereignty.

The Friends III court, however, held its case to be clearly distin-
guishable from Brown. In Friends III the State of New York undeniably
promulgated its own transportation control plan, which is in contrast to
the federally promulgated plan at issue in Brown. Furthermore, the court
in Friends III regarded the New York case as one of "cooperative
federalism"71 in which Congress had defined achieveable standards of
air quality while the State had made the policy and procedural determina-
ations in accordance with section 110 of the Clean Air Act.

2. The Commerce Clause

Congress is equipped with the necessary power under the com-
erce clause to enact national standards of air pollution prevention and
control.72 Air pollution is unquestionably interstate in character and con-
gressional action is in the interest of public health and welfare.73 The
constitutional issue presented to the court in Friends III is whether the
admittedly valid exercise of authority under the commerce clause
nevertheless impermissibly interferes with the integral governmental
functions of a state and its local governments.74

The most recent Supreme Court decision dealing with this issue is
National League of Cities v. Usery.75 At issue in Usery was the constitu-
tionality of the 1974 Amendments to the Fair Labor Standards Act,76
which extended the coverage of its minimum-wage and maximum-hour
provisions to almost all public employees of state and local govern-
ments. Disregarding four decades of precedent,77 the Court, in a 5-4
decision, held that the Constitution barred Congress from regulating
interstate commerce where the net result would be a drastic interfere-
ance with integral state and local governmental functions. The Court held that
the Tenth Amendment limited federal power because:

[T]here are attributes of sovereignty attaching to every state government
which may not be impaired by Congress, not because Congress may lack
an affirmative grant of legislative authority to reach the matter, but be-

71. 552 F.2d 25, 37 (2d Cir. 1977).
72. See Gibbons v. Ogden, 22 U.S. (Wheat.) 1, 6 L. Ed. 23 (1824); Heart of Atlanta Motel,
74. 552 F.2d 25, 37 (2d Cir. 1977).
75. 426 U.S. 833 (1976).
77. See Fry v. United States, 421 U.S. 542 (1975); Maryland v. Wirtz, 392 U.S. 183 (1968);
cause the Constitution prohibits it from exercising authority in that manner.\textsuperscript{76}

In applying this principle the \textit{Friends III} court adopted the \textit{Usery} balancing test that weighed the reason for the exercise of the federal commerce power against the extent of usurpation of state policymaking or invasion of integral state functions. The court in \textit{Friends III} concluded that:

The present case presents neither an interference with integral governmental functions of the City, nor a usurpation of State or City decisionmaking. On the contrary, the Plan reflects State and City policy decisions to be carried out by them according to their own dictates rather than those of the federal government.\textsuperscript{79}

The court pointed out the fact that under section 110(a)(2) of the Clean Air Act, the Administrator is required to approve a state plan which satisfies the standards set by the federal government for attainment and maintenance of air quality.\textsuperscript{80}

Finally, the court approvingly cited \textit{Fry v. United States}\textsuperscript{81} as an analogous case to \textit{Friends III}. In \textit{Fry}, which is distinguished by the court in \textit{Usery}, the Economic Stabilization Act of 1970,\textsuperscript{82} which authorized a presidential action to freeze wages and prices during a particularly critical period of inflationary turmoil, was upheld on the grounds that "effectiveness of federal action would have been drastically impaired"\textsuperscript{83} if state employees were excluded from the Act. The \textit{Friends III} court found the federal action in \textit{Fry} consistent with the federal enforcement of the transportation control plan. The rationale was that (1) both concerned a serious problem to national well-being calling for collective federal action, (2) both involved programs limiting interference with state sovereignty, and (3) both preserved state policymaking.\textsuperscript{84}

Therefore, the \textit{Friends III} court concluded that the balancing test proposed in \textit{Usery} weighed in favor of the exercise of the federal commerce power by finding that New York's forced compliance with the

\textsuperscript{76} 426 U.S. 833, 845 (1976). However, the Usery court was not unaware of the need for federal power in dealing with environmental issues as Justice Blackmun's concurring opinion noted: "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in such areas as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." \textit{See} 426 U.S. at 856 (emphasis added).

\textsuperscript{79} 552 F.2d 25, 37 (2d Cir. 1977). An argument by New York City claiming interference with integral governmental functions through the imposition of transportation controls is without merit. Transportation policy implementation in the City has long been considered a cooperative effort between local and federal authorities.


\textsuperscript{81} 421 U.S. 542 (1975).


\textsuperscript{83} 421 U.S. 542, 548 (1975).

\textsuperscript{84} 552 F.2d 25, 39 (1977).
approved transportation control plan did not constitute an invasion of its integral state functions.

C. THE CITIZEN SUIT PROVISION

The plaintiffs initiated *Friends II* and *Friends III* under the citizen suit provision of the Clean Air Act. The section is an available citizen tool to force compliance with the national ambient air quality standards against either a person who is in violation of such standards, or against the Administrator if he should fail in enforcing the standards. However, the City argues that the statute is unenforceable against it, and therefore that the use of section 304 is an improper utilization of the citizen suit provision.

Clearly, the provision is a recognition by Congress of both the urgency of the battle against air pollution and the necessity of uniting federal, local, and state governments if positive results are to be forthcoming. In adopting the measure, the Senate noted that the federal agencies had been "notoriously laggard" in abating pollution and requesting control measures. Congressional intent in enacting the provision is precisely set forth in the legislative history.

In enacting § 304 of the 1970 Amendments, Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests. Fearing that administrative enforcement might falter or stall, the citizen suit provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.

Nevertheless, heavy opposition to section 304 had been voiced during the congressional hearings on the bill. Opponents emphatically argued that section 304 would hopelessly overburden the courts with

85. See text accompanying notes 30-37 supra.
86. The interpretation of section 304 in *Friends III* suggests that a citizen suit is a viable methodology to compel enforcement of New York's transportation control plan. However, section 304 sets out three situations where the citizen suit applies: suits against any person who has violated an emission standard, suits to enforce an administrative or state order, and suits to compel enforcement of a nondiscretionary function of the Administrator. Strangely enough, the citizen suit in *Friends III* fails to fall within any of the above-listed criteria. Rather, in *Friends III*, the court, in relying heavily on the policy considerations behind the Clean Air Act Amendments of 1970, has given section 304 an expansive interpretation with the apparent intention of deferring to congressional wishes. See generally, text accompanying notes 86-102 infra; Judge Duffy's opinion in *Friends of the Earth v. Carey*, 422 F. Supp. 638 (S.D.N.Y. 1976).
environmental litigation. However, an analysis of section 304 dispels that apprehension.

Initially, section 304(b) requires the plaintiff to give a 60-day notice prior to the commencement of suit and bars suit if the EPA Administrator or the state is diligently prosecuting a civil action to require compliance with the applicable standard. This section, the most subtle and yet the most revealing of the legislature's intent, is clearly designed to encourage administrative action in the enforcement of the Act. Absent that, a citizen or citizens group is permitted to initiate legal action to force compliance with provisions of the Act.

Secondly, section 304(d) provides that "the court . . . may award costs of litigation . . . to any party, whenever the court determines that such award is appropriate." The express purpose of the Clean Air Act of 1970 is the protection of the general health and welfare of the public. The citizen suit provision is an extension of that intention rather than a tool to be used for individual gain. The section contains no provisions for awarding damages to the individual but rather courts will only award attorneys' fees for a citizen suit when the suit itself is in the public interest.

Furthermore, the legislative history of the provision makes clear that groups filing harassing citizen suits will bear the burden of legal fees for the party against whom the suit is brought as well as covering their own costs. These built-in checks on citizen suits should discourage all but the most obvious litigation, thereby leaving the courts free of an onslaught of citizen-initiated suits.

Finally, section 304 is not a class-action provision since a suit may only be brought to enforce provisions of the Act or requirements that are established as a result of the operations of the Act.

It is fair to say, therefore, that the citizen suit provision of the statute is a major and innovative section of the Clean Air Act designed to

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96. Id. at 64-65.
99. It is significant to note that section 304 of the Clean Air Act Amendments of 1970, 42
further insure the mandatory nature of the 1970 Amendments. In addition, traditional jurisdictional barriers to citizen actions, such as standing and amount in controversy have been discarded by section 304 in furtherance of congressional intent that the provision be a readily available tool.\textsuperscript{101}

Clearly, \textit{Friends III} is just the type of fact situation envisioned by the Congress. Reasonable and purposeful citizen suits used to require compliance with the provisions of the Act when state or administrative action is not forthcoming or clearly inadequate should result in successful and legally productive litigation.\textsuperscript{102}

\section*{IV. CONCLUSION}

The \textit{Friends III} decision has concluded that the 1970 Amendments to the Clean Air Act are a mandatory directive to the states and that state-drafted transportation control plans are enforceable against the states. Furthermore, \textit{Friends III} has met the complex question of state sovereignty and decided that no interference occurs as long as federal enforcement is directed at the citizenry and not at the states.

While the \textit{Friends III} decision seems straightforward, its ties with \textit{Brown v. EPA} are unavoidable. The Supreme Court's consideration of \textit{Brown} last May left unanswered questions.\textsuperscript{103} In short, the Supreme Court deferred consideration of the sovereignty issue and vacated the judgments of the respective courts of appeals on the grounds that the

\textsuperscript{101} See note 86 supra.

\textsuperscript{102} .431 U.S. 99 (1977). A more recent case dealing with the issues presented in \textit{Brown} is District of Columbia v. Costle, 10 Envir. Rep. (BNA) 1590 (D.C. Cir. 1977). \textit{Costle} is a continuation of the litigation begun in District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975) in which the court upheld in part and vacated in part transportation control regulations promulgated by the EPA Administrator. As outlined in \textit{Costle}, the EPA modified its regulations following the May, 1977 decision in \textit{Brown}, by removing "(1) requirements that the states adopt regulations, (2) references to state legislative activity, and (3) certain details concerning implementation of the program and other administrative concerns." See 42 Fed. Reg. 30,504, 30,507-09 (1977). On the basis of these new regulations, the court in \textit{Costle} holds the District of Columbia litigation regarding implementation of the disputed regulations to be moot.

\textit{Brown} and \textit{Costle} lead to an obvious conclusion that the sensitive issue of state sovereignty, argued so strongly in these cases, is now moot. As alluded to in \textit{Costle}, the EPA Administrator has promulgated new regulations for the implementation of transportation control plans more in line with federal power under the commerce clause. It would therefore seem to follow that transportation control plans (and the larger question of air quality control plans) are enforceable against the states regardless of the initial drafters. This conclusion presupposes that the amended EPA regulations fall within the Administrator's power to enforce a thorny question in light of recent history. For additional references to this ruling, see generally District of Columbia v. Costle, 10 Envir. Rep. (BNA) 2022 (D.C. Cir. 1977).
EPA, which had directed the states to implement the federally-promulgated regulations through state legislation, had withdrawn its regulations citing their need for modification.

Last August, Justice Thurgood Marshall considered New York City's plea for a stay of enforcement in Friends of the Earth v. Beame\(^{104}\) pending the Supreme Court's decision to grant certiorari to Friends III. Justice Marshall held that New York's "nonchalance" in filing for certiorari and for a stay, deflated their argument that irreparable harm would befall New York City if the plan were enforced.\(^{105}\) Furthermore, Justice Marshall found the City's argument that further economic hardship would plague the City if it were required to implement the transportation control plan was negated by economic benefits from the plan such as the enhanced attractiveness of the City from the reduction in air pollution and faster delivery times for trucks resulting from the parking ban strategy. Justice Marshall also doubted the likelihood of the Court granting the case certiorari.\(^{106}\)

Marshall's prognosis was correct as the Court refused to grant certiorari to Friends III in October, 1977, thereby affirming the decision of the Court of Appeals.\(^{107}\) The New York question, therefore, is settled. The

\(^{104}\) 10 ENVIR. REP. (BNA) 1421 (1977).  
\(^{105}\) id. at 1422.  
\(^{106}\) Id.  
\(^{107}\) See 46 U.S.L.W. 3258 (U.S. Oct. 18, 1977). However, with the passage of the 1977 Amendments to the Clean Air Act, the powers of the Governor under section 110(c) 42 U.S.C. § 1857 c-5(c) (1970), have been increased with respect to the additional parking strategy and the bridge toll strategy. The relevant sections provide that:

(4) In the case of any applicable implementation plan containing measures requiring—

(C) The reduction of the supply of on-street parking spaces, the Governor of the State may, after notice and opportunity for public hearing, temporarily suspend such measures notwithstanding the requirements of this section until January 1, 1979, or the date on which a plan revision under section 110(a)(2)(i) is submitted, whichever is earlier. No such suspension shall be granted unless the State agrees to prepare, adopt, and submit such plan revision as determined by the Administrator.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated form such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after the date of the enactment of this subparagraph, be revised to include comprehensive measures (including the written evidence required by part D), to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,
City's self-designed transportation control plan is enforceable against it. Likewise, the application of the state sovereignty issue borrowed from Brown is not a defense to state-designed implementation plans. Once approved, state plans are enforceable against the state or municipality, and the citizen suit provision is an available legal remedy to force state compliance.

However, because of the continued uncertainty surrounding the Brown litigation, implementation of transportation control plans will continue to lag. Those states which drafted their own transportation control plans should be aware that the “Friends” litigation has upheld the mandatory nature of the 1970 Amendments. On the other hand, states which neglected to draft plans, or whose plans failed to comply with the statute, are still without a clear precedent. Hopefully, a definitive ruling concerning the latter group will be forthcoming in the not-to-distant future.

Michael D. Doubleday

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.


Therefore, the suspended on-street parking strategy and the terminated bridge toll strategy will be subject to comprehensive measures (i) and (ii) above.
Ethyl Corporation v. EPA: Continuing Development of a Relaxed Burden of Proof in Public Health Controversies

The degradation of the environment and the corresponding impact on public health has been one of the most urgent and controversial policy problems of the last ten years. In addition to condemning the increasingly noticeable effects of pollution, many Americans feel that prevention of nature's destruction and of the depletion of resources has become an established social value. Despite this widespread public concern, the initial legal responses to the problem were haphazard and uncoordinated. As a result, environmental, energy, and resource law is only beginning to develop into a coherent body of law.

The constantly increasing energy demand of the United States is related closely to this pollution problem. This interaction is focused, in this casenote, on the automobile. The rapid development of automobile technology, combined with an apparently abundant and easily accessible supply of oil, allowed most Americans to purchase at least one car which could be operated at rather low cost. As a result, our society became dependent on automobiles and trucks for the major portion of personal and freight transportation. Today a substantial segment of all American economic activity is related to transportation, in general, and therefore to the consumption of energy.

In 1973, the "oil crisis" occurred and adjustments to the lack of reliable sources of oil are still taking place. During President Carter's administration, the most significant proposal to date has concerned the problem of energy and the need for a new Department of Energy.\(^1\) This is a typical example of another trend of recent years: increased promotion of the public interest by public organizations and governmental agencies, such as the Environmental Protection Agency, with the result being more regulatory activities in a greater number of areas than ever before.

As the subject of this note, the *Ethyl Corp. v. EPA*\(^2\) opinion is viewed more broadly as an outcome of the environment-versus-energy debate of the 1970's, because the case was essentially policy-based rather than


simply an exposition of narrow technical and legal questions. Protection of health and environment was found to be more compelling in this case than continued availability of high octane, leaded fuel for motor vehicles. The implication of Ethyl was that it was possible for the gasoline industry to continue producing high quality fuel, without the necessity of developing unreasonably expensive changes in manufacturing technology, while also protecting the public health.

In Ethyl, four gasoline manufacturers petitioned the United States Court of Appeals for the District of Columbia for review of regulations which were promulgated by the Environmental Protection Agency (EPA) Administrator on November 28, 1973. The regulations required manufacturers of gasoline containing lead additives to substantially reduce the lead content of their products over a five-year period. The primary focus of Ethyl was on the question of the quantum of scientific evidence necessary to regulate lead emissions from gasoline, pursuant to the Clean Air Act. The court ruled, in the majority opinion by Judge Skelly Wright, that for controversies which involve public health, the burden of proof should be relaxed from the traditional standard, which required the establishment of a preponderance of evidence based on scientific fact. The old rule stated that regulatory action could only occur on the basis of actual danger to the public health or welfare, not probable danger.

Ethyl was an important case because it authoritatively delineated the rule which was to be applied in extremely complex environmental cases. This rule was the culmination of a trend which began at least eight years before the rule was announced in Ethyl, and it probably will be a guiding principle in future regulation of public health. This note will present the main elements of Ethyl, the legislative history of relevant provisions of the Clean Air Act, and the trend of similar cases which preceded and followed Ethyl.

I. PROOF MAY BE PRECAUTIONARY RATHER THAN CONCLUSIVE

Section 211(c)(1)(A) of the Clean Air Act Amendments of 1970 granted the Administrator of the EPA the power to regulate "any fuel or fuel additive...if any emission products of such fuel or fuel additive will endanger the public health." Of all the main sources of human lead

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exposure, the most easily controlled is airborne lead because about ninety percent of it is derived from automotive vehicle emissions. Eradication of this source can occur by taking the lead from gasoline through a relatively simple process. Following three public comment periods, the EPA Administrator determined that automotive emissions from leaded gasoline create a significant risk of harm to the public health. He promulgated regulations which required a reduction in the lead content of leaded gasoline.

Four gasoline manufacturers alleged in separate actions that the Administrator misinterpreted and incorrectly applied the statutory standard upon which regulation was based, and that the scientific evidence which supported regulation was inconclusive. They also alleged that due process of law had been violated by the Administrator because new scientific studies were relied upon after the third comment period, and he did not request further comment at that time. In the initial opinion of a panel of the United States Court of Appeals for the District of Columbia, the court ruled in favor of the manufacturers after consolidating the actions. However, this opinion was vacated when an order was issued which granted rehearing en banc. On March 19, 1976 the court issued its final opinion. In a 5-4 decision, the court held that section 211(c)(1)(A) mandated a threshold decision by the EPA Administrator which is precautionary in nature. According to Judge Wright, the “will endanger” standard meant that if harm to the public health is merely threatened, regulation could occur, and there was no need to await actual harmful effects:

The meaning of “endanger” is not disputed. Case law and dictionary definition agree that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need ever occur. Regulatory action may be taken before the threatened harm occurs, indeed, the very existence of such precautionary legislation would seem to demand that regulatory action precede, and, optimally, prevent, the perceived threat.

The Administrator could therefore take preventive action against emission products of gasoline or gasoline additives on the basis of probable effects. A significant threat was all that needed to be shown.

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7. Ethyl Corp. v. EPA, 541 F.2d 1, 9 (D.C. Cir. 1976). The other main sources are food and lead paint.
8. Note 5 supra.
10. 541 F.2d at 13. See also Carolina Environmental Study Group v. United States, 510 F.2d 796, 799 (1975); and Note, Inminent Irreparable Injury: A Need for Reform, 45 S. CAL. L. REV. 1025, 1055-57 (1972) [hereinafter cited as Inminent Injury], (discussion of allowing a “margin-of-safety” in public health cases).
“Significance” was based on factual data and scientific studies utilized by the Administrator. The studies included evidence which showed that 40 micrograms of lead per 100 micrograms of blood indicated a health danger. Children were especially susceptible to this danger. The significance of the threat was based also on the fact that America’s largest cities contained lead concentrations which were more than 2,000 times as great as those in the mid-Pacific Ocean area, and that “airborne lead is directly absorbed in the body through respiration to a degree that constitutes a significant risk to public health.” This definition may have been less demanding than a standard of absolute probability of harm, but it was more demanding than a small amount of evidence indicating a risk of harm.

The court stated that a case-by-case analysis was the proper method for the Administrator to utilize, and that public health may be endangered both by a lesser risk of a greater harm or a greater risk of a lesser harm. “Endangerment” was a question of policy which should not be limited by the rigor required for solutions to questions of fact, according to the opinion. If the Administrator made a rational assessment based on suspected, rather than entirely conclusive, relationships between facts, the assessment was valid:

Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, we will not demand rigorous step-by-step proof of cause and effect. Such proof may be impossible to obtain if the precautionary purpose of the statute is to be served.

11. 541 F.2d at 38.
12. Id. at 18.
13. Id. at 28. This is the result of the risk (or cost)-benefit analysis mandated by section 211(c)(2)(B) of the Clean Air Act, which was promoted in several law review articles. The Administrator must have balanced the risk of harm against the benefit of the item whose manufacture causes pollution. Several authors recommended consideration of the risk of harm as a quantifiable cost of technology. See also Burger, Regulation and Health: How Solid is Our Foundation?, 5 ENVIR. L. REP. (ELI) 50179 (1975) (analysis of the reasons for low quality in scientific information used in regulatory decisionmaking, its effects, and suggestions for making improvements); Gelpe and Tarlock, The Uses of Scientific Information in Environmental Decisionmaking, 48 S. CAL. L. REV. 371, 427 (1974); Green, supra note 3; Karstadt, Protecting Public Health from Hazardous Substances: Federal Regulation of Environmental Contaminants, 5 ENVIR. L. REP. (ELI) 50165, 50173-74, (suggested several relevant criteria to use in applying Judge Wright’s risk test, i.e., how severe is the harm and what is the risk?); Kraus, Environmental Carcinogenesis: Regulation on the Frontiers of Science, 7 ENVIR. L. 83, 104-12, 124-34 (1976); 25 CATH. U. L. REV. 178 (1975); Note, Reserve Mining—The Standard of Proof Required to Enjoin an Environmental Hazard to the Public Health, 59 MINN. L. REV. 893, 922 (1975) [hereinafter cited as Proof to Enjoin]; Imminent Injury, supra note 10 at 1051; and Note, Review of EPA’s Significant Deterioration Regulations: An Example of the Difficulties of the Agency—Court Partnership in Environmental Law, 61 VA. L. REV. 1115, 1150-58 (1975) [hereinafter cited as Deterioration Regulations].
Moreover, other provisions of the Clean Air Act, such as sections 108, 109, 110, or 202, did not prohibit the Administrator from taking regulatory action with respect to lead additives.

The proper scope of judicial review of administrative actions was also an important issue dealt with in the decision. Agency determinations such as those of the EPA were presumed to be valid, and the standard of review was whether these determinations were "rational and based on consideration of the relevant factors." In applying this standard, Judge Wright found that the Administrator allowed adequate criticism and comment before he issued the final rule. Although this rule was based on new...
Theories which were somewhat different from those on which the originally proposed regulations were based, it was validly promulgated.\textsuperscript{20} Furthermore, the Administrator's use of predictions based on experimental calculations and bolstered by clinical and epidemiological studies was plainly within the scope of the precautionary "will endanger" standard.\textsuperscript{21} In the court's opinion, it was not necessary that lead additives endanger public health in and of themselves. These additives could be "properly considered together with all other human exposure to lead."\textsuperscript{22} Although airborne lead may not have been the most significant factor affecting blood lead levels, the Administrator made a sound conclusion that airborne lead was a significant factor. The determination that children with high blood lead levels were significantly affected by the lead in dust which falls from automobiles was properly based on studies used by the EPA Administrator.\textsuperscript{23}

The major dissenting opinion was written by Judge Wilkey and concurred in by two other judges. It was essentially the same opinion which was issued by the earlier majority, before the final rehearing \textit{en banc} was granted. Its primary conclusion was that the Administrator failed to allow adequate notice and comment under the Administrative Procedure Act\textsuperscript{24} during the period of formulation of the regulations, particularly with respect to new scientific studies on which he relied. To the three dissenting judges, a "meaningful opportunity for informed public comment" was not allowed.\textsuperscript{25} Furthermore, the majority's attempt to distinguish actual from potential harm, and risk from fact, only confused the issues and ratified arbitrary and capricious speculations made by the Administrator.\textsuperscript{26} Judge Wilkey argued that the best proof of potential harm was events which had occurred in the past, from which logical assessments could be made rather than mere hunches. Congress directed the Administrator to consider "all relevant medical and scientific evidence,"\textsuperscript{27} thus mandating a factual judgment rather than a policy judgment. Finally, Judge Wilkey contended that the data on which the Administrator relied did not support a conclusion that a significant portion of the general urban population, not occupationally exposed to lead, had elevated levels of blood lead.\textsuperscript{28} The Administrator "acted

\begin{itemize}
\item \textsuperscript{20} 541 F.2d at 48.
\item \textsuperscript{21} Id. at 43.
\item \textsuperscript{22} Id. at 29.
\item \textsuperscript{23} Id. at 43-46.
\item \textsuperscript{24} 5 U.S.C. § 553 (1970).
\item \textsuperscript{25} 541 F.2d at 85.
\item \textsuperscript{26} Id. at 95-96.
\item \textsuperscript{27} Id. at 96.
\item \textsuperscript{28} Id. at 102-03.
\end{itemize}
arbitrarily in choosing among the data relating to a possible correlation between air and blood lead levels," and in some instances did not explain why he so chose.

In Judge Wilkey's dissent, the essence of the majority opinion, which set forth the concept of a less restrictive burden of proof, was treated secondarily to procedural matters. The majority held that the Administrator did not need to allow further comment after the newer studies were introduced, because the essential basis of his proposed action remained unchanged and the new studies only added information to that which already existed. Moreover, in Judge Wright's opinion, this was what Congress actually intended with the provision that the Administrator consider "all relevant medical and scientific evidence" before taking final action. If he had allowed further comment, the process could have gone on indefinitely. Furthermore, it was the quantum of scientific evidence in health and environmental controversies to which the Administrator's action and this legal decision were directed. The dissent not only shifted the focus of the case, according to the reasoning of the majority, but it also overlooked the outcome of the congressional process which mandated regulation on the basis of threatened, though unproven, harm.

II. THE CLEAN AIR ACT AMENDMENTS OF 1970

The legislative history of the Clean Air Act Amendments of 1970 seemed to establish conclusively that the Administrator was authorized not only to regulate fuel additives, but also to do so without making specific factual findings. Preceding the enactment of the amendments of 1970, Richard Nixon, in the President's Message on the Environment, called for administrative power to regulate fuel composition and additives. Generally, his administration approved of the proposed amendments and, in particular, called for enactment of the Senate version, which was less restrictive because it allowed the Secretary of Health, Education and Welfare power to regulate fuel without making conclusive, specific factual findings. This authority was transferred to the EPA Administrator in the enacted statutes.

As the EPA set out in its Petition for Rehearing: "The House version of Section 211 required that a determination of endangerment be based on 'specific findings' derived from the evidence. [This restriction did not survive in section 211. Its] deletion was meant to have significance." 32

29. Id. at 105.
30. Id. at 48.
The deletion was made despite the fact that strong doubts were expressed throughout the hearings on the real danger of lead additives.\textsuperscript{33} One of the major proponents of the Clean Air Act, Senator Edmund Muskie, indicated the primary reasons for the adoption of the Senate version: "[B]road environmental, esthetic and health considerations underlying the enactment of this legislation . . . should be kept in mind in making these determinations."\textsuperscript{34} The fact that the requirement of specific findings would probably make implementation of the fuel control authority ineffective was another primary reason for its exclusion from the enacted bill.\textsuperscript{35}

Furthermore, it was the intention of Congress to allow the Administrator to make a policy judgment in assessing the significance of risks of harm. This judgment was not intended to be made on the basis of factual evidence alone. Predictions based on inconclusive information were not necessarily a less reliable methodology than those based on historical facts, although they did entail new difficulties. According to a widely-recognized authority:

\begin{quote}
\textbf{[T]he problems of properly using and applying the [scientifically complex] information are substantively no different than the problems of using and applying other types of definite information. In fact, information of this type will generally identify future harms with certainty, and not only the risks of future harms. . . . [T]he presumption that indefinite future harm cannot outweigh present harm is invalid and must not be used as a basis for decisionmaking.}\textsuperscript{36}
\end{quote}

Eliot Richardson, Secretary of Health, Education and Welfare, indicated his support of the provision which relaxed the burden of proof when the Senate bill was in conference,\textsuperscript{37} and Secretary of Transportation John Volpe noted that fuel standards probably would not adversely affect transportation safety.\textsuperscript{38}

In response to the problem surrounding policy-versus-fact determinations, and to the Ethyl opinion in particular, Congress considered revising section 211 in 1976-77 to clarify that the Administrator has broad discretion in matters such as these. The difficulty of establishing conclusive information on health effects was relevant to this proposal, although the revision was not included in the recently enacted Clean Air Act Amendments of 1977.\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at S42,386 (daily ed. Dec. 18, 1970). See Portland Cement Ass'n v. Ruckelshaus, 486 F.2d at 381-82 (D.C. Cir. 1973).
\item \textsuperscript{35} 116 CONG. REC. H192,217-18 (daily ed. June 10, 1970). See also Burger, \textit{supra} note 13 at 50182.
\item \textsuperscript{36} Gelpe and Tarlock, \textit{supra} note 13 at 420; \textit{Proof to Enjoin, supra} note 13 at 914-15. See also 1975 UTAH L. REV. 581, 588, n 65 (1975).
\item \textsuperscript{37} 116 CONG. REC. S42,391 (daily ed. Dec. 18, 1970).
\item \textsuperscript{38} H.R. REP. NO. 91-1146, 91st Cong., 2d Sess. 882 (1970).
\end{itemize}
III. A DECADE OF CASE LAW DEVELOPMENT

Dating back to the sixties, the United States Court of Appeals for the District of Columbia has been instrumental in formulating new approaches in the area of the quantum of scientific proof required to sustain administrative action. This court and others have upheld the rule of a relaxed burden of proof in several public interest disputes. In Ethyl, the court permitted the administrator of a government agency to take regulatory action on the basis of negative health effects which were not entirely conclusive. The decision was a continuation of a development that arose in numerous other cases, and in several legislative enactments of the last ten years. Some of these cases and statutes are set out in this section in order to illustrate the trend.

A. AUTOMOTIVE PARTS AND ACCESSORIES ASSOCIATION v. BOYD (1968) 40

In this case, Judge McGowan of the United States Court of Appeals for the District of Columbia held that safety standards pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 41 were not invalid, despite the lack of specific and detailed findings and conclusions which traditionally had issued from formal proceedings. 42 These standards required that new passenger automobiles be factory-equipped with front seat head restraints. 43 According to Judge McGowan, the benefits of restraints outweighed the risks, such as possible decreased driver visibility. 44

In relation to Ethyl, this decision was important because it was one of the earlier United States Court of Appeals for the District of Columbia
decisions which dealt with the burden of proof question, and it allowed the Federal Highway Administrator the discretion to make a policy judgment in the interests of public safety. Conclusive factual evidence concerning the risk of injury without head restraints, and the benefits of factory installation, was not required. This determination was significant because it indicated that the court applied a less demanding burden of proof rule in a public safety dispute, although it occurred before enactment of the Clean Air Act Amendments of 1970 and was related to transportation safety rather than health and environment.

Regulation in Auto Parts was based on a provision in the Safety Act which allowed the Secretary of Transportation to issue safety standards for motor vehicle equipment, and to require manufacturers to adhere to those standards.\textsuperscript{45} This section of the Act was typical of the public interest attitude which was prevalent in subsequent public health and welfare statutes, such as the Clean Air Act Amendments of 1970. Here, the court ruled that absent a requirement of "specific findings" in the statute, the Federal Highway Administrator had the authority to take action to protect public safety.

\textbf{B. Amoco Oil Company v. EPA (1974)}\textsuperscript{46}

This opinion, written by Judge Skelly Wright, upheld EPA regulations\textsuperscript{47} which prohibited the use of leaded gasoline in automobiles with catalytic converters. These regulations also required national marketing of at least one grade of unleaded gasoline, pursuant to sections 211(c) and (d) of the Clean Air Act.\textsuperscript{48} Furthermore, when regulations dealt with questions which were essentially of a policy-making nature, predictions of matters which were "on the frontiers of scientific knowledge" could have been based merely on sufficient reasoning and explanation. Conclusive factual findings were not necessary.\textsuperscript{49} "[A] rule-making agency necessarily deals less with 'evidentiary' disputes than with normative conflicts, projections from imperfect data, experiments and simulations,

\textsuperscript{45} (Supp. III 1968) (amended 1974) (current version at 15 U.S.C. §§ 1391(2)-(4), 1397(a) (1970 & Supp. V 1975)). The decision also set forth rules for the scope of judicial review which were cited in several other cases, including some which will be discussed in this casenote. As will be shown, most of the cases which dealt with public health and safety involved procedural as well as substantive issues.

\textsuperscript{46} 501 F.2d 722 (D.C. Cir. 1974).

\textsuperscript{47} EPA Regulation of Fuels and Fuel Additives, 40 C.F.R. § 80 (1973).


educated predictions, differing assessments of possible risks, and the like. The process is quasi-legislative in character. . . . 50

Central to Amoco was the question of the quantum of scientific proof necessary to protect public health and the environment. The case dealt with a section of the Clean Air Act which was directly related to the one at issue in Ethyl, and lead emissions were again the problem. Moreover, Amoco was relied upon to a greater extent by the petitioners in Ethyl than any other decision. Judge Wright took part in both Ethyl and Amoco within the same time period (1973-74), and his view was almost identical in the two cases. In both decisions he held that when the EPA Administrator promulgated a rule, Congress intended to require only a reasonable, adequately explained determination.

C. 50

Society of the Plastics Industry, Inc. v. Occupational Safety and Health Administration 51

In Plastics, the United States Court of Appeals for the Second Circuit ruled that regulations promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act (OSHA) were valid. These regulations prohibited a certain level of exposure of workers to vinyl chloride. The Secretary was required by law to protect the workers even though the evidence was not conclusive on the carcinogenic tendency of vinyl chloride, according to the majority opinion.

[T]he ultimate facts here in dispute are "on the frontiers of scientific knowledge," and, though the factual finger points, it does not conclude. Under the command of OSHA, it remains the duty of the Secretary to act to protect the workingman, and to act even in circumstances where existing methodology or research is deficient. 54

With this case a trend became apparent, because the decisions upholding regulations which prevent probable harm to public health were rendered more frequently. Ethyl was the culmination of this trend when it was decided the following year. Once again, the statute in question sought to protect public health and working people in particular, although it did not specifically authorize the Secretary of Labor to act without specific findings or pursuant to a less demanding burden of proof. However, in Plastics the court held that where the facts are "on the frontiers of scientific knowledge," conclusive scientific determinations need not be made by the Secretary. The similarity to Ethyl was strong since both cases involved public health, and the same standard was

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50. 501 F.2d at 735.
51. 509 F.2d 1301 (2d Cir. 1975).
52. 29 C.F.R. § 1910.93q (1974).
54. 509 F.2d at 1308.
adopted for reviewing the quantum of proof. In fact, the petitioners in Ethyl utilized Plastics in their Supplemental Brief.55

D. ENVIRONMENTAL DEFENSE FUND, INC. v. EPA (1975)56

In this case, the United States Court of Appeals for the District of Columbia, Judge Leventhal writing, held that the EPA's order suspending the registration and prohibiting the manufacture and sale of pesticides was a reasonable exercise of discretion. The order was issued pursuant to the Federal Environmental Pesticide Control Act of 1972.57 A provision in the Act allowed suspension of the registration of a pesticide when an "imminent hazard" to public health existed. This provision was similar to the "will endanger" portion of the Clean Air Act, and here again the issues centered on interpretation of the term. In Environmental Defense Fund (EDF), the majority concluded that the evidence was sufficient to support the EPA's finding that an "imminent hazard" existed.58 This evidence included data that showed the pesticides aldrin and dieldrin to be carcinogenic in mice and rats, and also indicated a causal connection between pesticide use on plants and its ingestion by humans.

[T]he function of the suspension decision is to make a preliminary assessment of evidence, and probabilities, not an ultimate resolution of difficult issues. We cannot accept the proposition . . . that the Administrator's findings [are] insufficient because controverted by respectable scientific authority. It [is] enough at this stage that the administrative record contain[s] respectable scientific authority supporting the Administrator.59

EDF was another United States Court of Appeals for the District of Columbia decision of recent vintage which interpreted the provisions of yet another public interest law. This time the statute dealt with the controversial issue of the regulation of pesticides. EDF was a further development of the less restrictive burden of proof rule. Regulatory action was upheld when based on substantial evidence. Judge Leventhal found that imminent hazard need not occur at a time of crisis only,

56. 510 F.2d 1292 (D.C. Cir. 1975).
58. 510 F.2d at 1298-1303. 7 U.S.C. § 136d(c)(1) states: "If the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, he may, by order, suspend the registration of the pesticide immediately."
but rather it "is enough if there is substantial likelihood that serious harm will be experienced during the year or two required in any realistic projection of the administrative process." 60

E. RESERVE MINING COMPANY V. UNITED STATES (1975) 61

In Reserve Mining, the Eighth Circuit Court of Appeals ruled that discharge of tailings into Lake Superior called for precautionary measures to abate the pollution problem and its corresponding health effects. 62 The majority held that the Federal Water Pollution Control Act (FWPCA) mandated such measures, 63 although it stated that the discharges were not an "imminent" danger. The court also concluded that the studies presented were not conclusive with respect to carcinogenic effects. 64

Reserve Mining is one of the most widely recognized cases in environmental law. It involved pollution in both water and air and highly complex scientific questions. On-land disposal of the tailings was only recently initiated, two years after the main decision presented herein.

According to the FWPCA, the United States must have shown that water pollution was violating state water quality standards and "endangering the health or welfare of persons." 65 This was another ambiguous public interest law term, which was found to require the same relaxed showing of proof as in Ethyl:

[W]e believe that Congress used the term "endangering" in a precautionary sense, and therefore, evidence of potential harm as well as actual harm comes within the purview of that term. We are fortified in this view by the flexible provisions for injunctive relief which permit a court "to enter such judgment and orders enforcing such judgment as the public interest and the equities of the case may require." 66

The court also heavily quoted Judge Wright's dissent from Ethyl in the panel decision of January 28, 1975. In Reserve Mining, under the terms

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61. 514 F.2d 492 (8th Cir. 1975).
62. Id. at 528.
64. 514 F.2d at 529. However, due to the economic necessity of Reserve Mining Company's continued operation, inter alia, the court refused to issue an injunction, and the opinion has been criticized by some authors. See generally 1975 DET. C. L. REV. 335 (1975); 60 IOWA L. REV. 299 (1974); Proof to Enjoin, supra note 13 at 917-22; 1975 UTAH L. REV. 581, 591 (1975).
of the FWPCA, the court reinforced the view that conclusive health effects are not required before preventive action can be taken.

F. NATIONAL ASPHALT PAVEMENT ASSOCIATION v. TRAIN (1976)67

Judge McGowan, of the United States Court of Appeals for the District of Columbia, upheld the EPA Administrator’s issuance of standards of performance68 for asphalt concrete plants under the Clean Air Act.69 According to Judge McGowan, decisions of policy did not require the same type of proof as certain factual questions, and a reviewing court should not use the substantive rigor appropriate to factual questions.70 “[T]he Administrator’s evaluation of those risks involves questions which are ‘particularly prone to uncertainty,’ and as a result ‘the statute accords the [Administrator] flexibility to assess [those] risks and make essentially legislative policy judgments. . . .”71

National Asphalt was a post-Ethyl opinion by the District of Columbia Circuit Court. Like Ethyl, National Asphalt involved the Clean Air Act. A heavy reliance was placed on Ethyl by Judge McGowan here, and Auto Parts was also cited. This case was essentially a repeat of Ethyl because the EPA Administrator used the concept that asphalt plant pollution was a nationwide contributor to the air pollution problem. He pointed out that asphalt plant pollution appeared to be contributing significantly enough to require administrative action. In his opinion this was true, despite the fact that the level of “significance” of this stationary source in relation to other sources and in relation to the entire national problem could not be determined with absolute certainty. One important distinction between National Asphalt and Ethyl was that the former involved different provisions of the Clean Air Act because a stationary source was involved rather than a moving source.72

A noticeable trend has taken place in the area of quantum of proof in public interest cases, with the United States Court of Appeals for the District of Columbia leading the way. Regulatory action may now be taken on the basis of suspected health effects which appear to have (had) considerable past, present, or future impact. Absolute, conclusive proof is no longer required.

67. 539 F.2d 775 (D.C. Cir. 1976).
70. 539 F.2d at 783.
71. Id. at 783, quoting Ethyl Corp. v. EPA, 541 F.2d 1, 24, 26 (D.C. Cir. 1976) cert. denied, 426 U.S. 941 (1976).
IV. CONCLUSION

When viewed in the light of legislative history and the consistent interpretations of other cases and statutes, Ethyl seems to be simply one of many cases which stands for a new black letter rule of law. However, one of the most important aspects of Ethyl is that it sets out the rule on the quantum of scientific evidence in an authoritative manner. In terms of the environment-versus-energy debate, Ethyl seems especially relevant compared to the other cases discussed herein, and to environmental and transportation law generally, in its resolution of a problem which is characteristic of the American way of life. This problem is the continued availability of high octane, leaded fuels for the operation of our methods of transportation, as against the necessity of protecting the environment. Leaded fuel was devised and developed as the motor car industry evolved. Over the years, high performance of auto engines had also become a social value of some significance. The United States Court of Appeals for the District of Columbia found that protection of health and environment was at least equally valuable as continued availability of our traditional form of leaded fuel.

Ethyl changed the law not only in terms of applying a social value of recent origin, but also in terms of revising the rules of proof in cases which involved the public health. Today, the EPA Administrator may make a judgment based primarily on public "policy" considerations which are authorized by statute, rather than solely on "fact" determinations which are derived from conclusive evidence. Ethyl applied the relaxed burden of proof rule in a compelling manner, by relating the facts to previous decisions of a similar nature and by utilizing the court's prodigious research and writing talents. Before the late 1960's, the required quantum of proof was a preponderance of evidence, in which a stricter burden of proof was placed on a party who took action against another in nuisance, federal common law, or for issuance of an injunction. In the 1970's, the problems dealt with in environmental protection and public health cases were new and unique, requiring new approaches to the law.

The social value that was promoted in Ethyl was reasonable since it was a reflection of the value's increased importance to society. Ten years ago, there was very little consciousness in this country of the vastness of pollution and energy problems, and Ethyl, as well as the cases preceding it, has had an impact on this lack of awareness. The change in rules of proof was also reasonable because it was one method of adequately protecting this kind of unquantifiable value, which pos-

73. This standard has not been replaced in all cases. See note 63 supra.
sessed a long period of latency before noticeable effects occurred. Indeed, public health and the environment would have been severely imperiled if regulation occurred only after harmful effects had already taken their toll, as the court recognized.

The development of a less stringent burden of proof in cases involving agency regulations to protect public health is a positive trend which is necessary in civilized society. The record thus far seems to show that agency officials, entrusted with the discretion to make public health choices, have usually made wise decisions. The main difficulty, however, may occur when agency officials decide more on the basis of personal bias than on reasoned consideration of all the scientific evidence. This is a particularly acute problem for decision-makers in our modern society, which requires vast amounts of fuel and other "dangerous" products to continue progressing economically. The ultimate dilemma is how much value should be placed on protection of health and environment, as against the need for energy and other necessities.

R. Douglas Taylor

74. See also Pedersen, supra note 19 at 49-50; Sive, Foreward: Roles and Rules in Environmental Decisionmaking, 62 IOWA L. REV. 637, 640 (1977); 84 YALE L.J. 1750, 1759-68 (1975).
Death Knell for "Free Trade" Immunity:  

Complete Auto Transit, Inc. v. Brady

Courts have applied two competing theories in evaluating the permissibility of state taxation of the transportation industry engaged in interstate commerce. First, it has been held that under the commerce clause of the United States Constitution the interstate commerce should receive "free trade" immunity from state taxation and, second, that interstate commerce should be made to "pay its way."

1. Complete Auto Transit, Inc. v. Brady

On March 7, 1977, in Complete Auto Transit, Inc. v. Brady, the United States Supreme Court announced a decision which heralds acceptance of the "pay" concept and rejection of the "free trade" view. This may result in significant changes in the law of state taxation of interstate commerce and have major effects on the transportation industry.

Complete Auto Transit, Inc. (Complete Auto), a Michigan corporation operating in every state except Hawaii and Alaska, transported motor vehicles by motor carrier for General Motors Corporation on a contract basis. Motor vehicles were shipped by rail to Jackson, Missis-

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1. U.S. Const. art. I, § 8, cl. 3 states that "[t]he Congress shall have power: . . . To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

2. [T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. This limitation on State power does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. Freeman v. Hewit, 329 U.S. 249, 252 (1946); quoted in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 n. 7 (1977).

3. "It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. 'It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.' Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938)." Colonial Pipeline Co. v. Traigle, 421 U.S. 100, 108 (1975), quoted in Complete Auto Transit, Inc. v. Brady, 430 U.S. at 288 (1977).


5. Id. at 276.
Mississippi from assembly points outside the state. In Jackson they were loaded onto Complete Auto's trucks for delivery to General Motors' dealers throughout Mississippi.

Although Complete Auto had been operating in Mississippi since early 1960, it was not until 1971 that the state assessed taxes and interest for 1968 through 1971. The taxes were assessed pursuant to sections 10105 and 10109(2) of the Mississippi Code of 1942 which respectively provide:

There is hereby levied and assessed and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be. . . .

Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this state, there is hereby levied, assessed, and shall be collected, a tax equal to five percent of the gross income of such business. . . .

Complete Auto paid the tax under protest and sought a refund.

At the trial court level, Complete Auto argued that its activities were only one part of an interstate movement, and therefore the taxes which were levied were unconstitutional because they were applied to operations in interstate commerce. Although recognizing that other state taxes can be levied on interstate commerce as long as they are non-discriminatory, Complete Auto, relying on Spector Motor Service, Inc. v. O'Connor, argued that a state privilege tax, even if non-discriminatory, is an impermissible direct burden on and a forbidden regulation of interstate commerce because the privilege of conducting interstate business is not subject to the sovereign power of a state.

In reply the Mississippi State Tax Commission argued that the taxed activities were wholly intrastate, and that the tax was not a privilege tax like that at issue in Spector, but rather a sales tax. Furthermore, the Tax Commission argued that there was no possibility of cumulative burdens on interstate commerce, or repetition by other states of the tax on Complete Auto's activities because the only transactions taxed were those which had taken place entirely within Mississippi state borders.

Although the Mississippi Supreme Court did not expressly find that

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6. Id. at 277.
Complete Auto's operations in Mississippi involved interstate commerce, it upheld the assessments on the basis of the absence of cumulative burdens or repetition.

Complete Auto appealed the decision to the United States Supreme Court, and the Court seized the opportunity to clarify its interpretation of the commerce clause. The Court traced the history of state taxation of interstate commerce and concluded that the Spector rule bore no relationship to economic realities.

II. DECLINE OF FREE TRADE IMMUNITY

The Spector rule declares taxation on the "privilege of doing business" as unconstitutional per se, whether or not such taxation is discriminatory in effect. Although this free trade view existed in the nineteenth century, it gained modern recognition in Freeman v. Hewit in which a direct state tax on interstate sales was held unconstitutional per se, even if fairly apportioned and non-discriminatory. The Court admitted that a state could constitutionally tax local manufacture, impose license taxes on corporations doing business in the state, tax property within the state, and tax the privilege of residence as measured by net income, including that derived from interstate commerce. Nevertheless, the Court in Freeman expressed the free trade view that the commerce clause was a limitation on state power: the state was "precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States," and it was "immaterial that local commerce was subjected to a similar encumbrance."

The Court in Complete Auto Transit noted Justice Rutledge's concurring opinion in Freeman in which he asserted that the tax should be judged by its economic effects rather than by its formal phrasing. The United States Supreme Court also noted the absence of a specific finding of fact on the character of Complete Auto's activities: "[t]he Mississippi courts, in upholding the tax, assumed that the transportation is in interstate commerce. For present purposes, we make the same assumption." Complete Auto Transit, Inc. v. Brady, 430 U.S. at 276, n.4.

12. Although the character of Complete Auto's activities was of central importance to the parties, the Mississippi Supreme Court failed to make a specific finding that Complete Auto was engaged in interstate commerce. Instead, the court stated that the case was controlled by cases such as Interstate Oil Pipe Line Co. v. Stone, 203 Miss. 715, 35 So.2d 73 (1948), aff'd 337 U.S. 662 (1949), in which the United States Supreme Court "said in a plurality opinion that it would not pause to consider whether the business . . . was in interstate commerce, for the State had the power to impose the tax involved." Complete Auto Transit, Inc. v. Brady, 330 So.2d 268 (Miss. 1976).

15. Id. at 252.
16. Id.
17. Id. at 270.
Court recognized that commentators have considered Freeman a "triumph of formalism over substance." Additionally, it cited with disfavor later decisions which narrowed the Freeman rule from one of constitutional prohibition to one of draftsmanship because they made a strained distinction between a tax on the "privilege of doing business" and a tax on the "privilege of exercising corporate functions within the State." The latter form of taxation was considered permissible as compensation for protection of local activities by the state.

The prohibition of state taxation on the "privilege" of engaging in interstate commerce was firmly embraced by Spector, in which the facts were similar to those in Complete Auto Transit. Spector Motor Service was a Missouri corporation involved exclusively in interstate motor carriage. Connecticut imposed a "tax or excise upon its franchise for the privilege of carrying on or doing business within the State," because some of its activities originated or terminated there. This tax was measured by apportioned net income and the Court struck it down because "the United States had the exclusive power to tax the privilege to engage in interstate commerce.

The premise upon which Spector was decided, that only the federal government has the power to tax interstate commerce, was ignored by later courts and the case was used only to discourage poor draftsmanship. For example, the Spector rule was applied in Railway Express Agency v. Virginia (Railway Express I) to invalidate an annual license tax for the privilege of doing business in the state. However, when the wording of the state statute was revised to impose a "franchise tax" on "intangible property," the statute was upheld. As the Court points out in Complete Auto Transit, there was actually no difference between the statutes in Railway Express I and Railway Express II in terms of their economic effects.

Spector's vitality waned further in Northwestern Cement Co. v. Minnesota when the Supreme Court upheld a properly drafted statute which would have taxed activity that was exclusively involved in interstate commerce if the tax met a threshold test.

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20. Id. at 96.
25. 430 U.S. at 284.
27. The first part of the test required that there be no discrimination "against interstate commerce either by providing a direct commercial advantage to local business (citations omitted) or by subjecting interstate commerce to the burdens of 'multiple taxation'" and the
The United States Supreme Court's acceptance of the "pay its own way" concept of interstate commerce taxation became evident in its recent decision, Colonial Pipeline Co. v. Traigle. Colonial Pipeline, a Delaware corporation, owned an interstate pipeline which ran through Louisiana. Louisiana assessed a state tax on the "qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form." The United States Supreme Court upheld the tax because it pertained to an aspect of interstate commerce to which the state bore a special relation and because the state bestowed certain powers, privileges, and benefits upon the taxpayer.

Apparently succumbing to the criticisms of commentators, the Supreme Court chose Complete Auto Transit to overrule Spector and to remove the distinction between privilege taxes and other forms of permissible taxes on interstate commerce. It rejected the proposition that interstate commerce is immune from state taxation and firmly embraced the principle that interstate commerce must pay its way.

However, the Court did leave the following defenses to state taxation intact: (1) the activity is not sufficiently connected to the state to justify a tax; (2) the tax is not fairly related to benefits provided to the taxpayer; (3) the tax discriminates against interstate commerce; and (4) the tax is not fairly apportioned. Unfortunately, the rather limited scope of the decision is little consolation when the ramifications of the decision for the transportation industry are analyzed.

III. THE IMPACT OF COMPLETE AUTO TRANSIT

If Complete Auto Transit could be limited to its facts, that is, to transactions taking place solely within one state, then its holding might second part demanded a proper apportionment of the tax to local taxpayer activities forming a sufficient nexus to justify that state's imposition of the tax. Id. at 458.

31. One commentator concluded: "After reading Colonial, only the most sanguine taxpayer would conclude that the Court maintains a serious belief in the doctrine that the privilege of doing interstate business is immune from state taxation." W. Hellerstein, "State Taxation of Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel and Colonial Pipeline," 62 Va. L. Rev. 149, 188 (1976).
32. See note 3 supra.
not be so ominous to those involved in interstate commerce. But the Court's assumption that Complete Auto's operations were interstate rather than intrastate\textsuperscript{33} and the Court's expansive language that interstate commerce must pay its way, strikes a death knell for the "free trade" immunity enjoyed by interstate commerce up to this time.

The \textit{Complete Auto Transit} decision subjects carriers which are engaged in interstate commerce to all of the taxes of every state, municipality, and other local jurisdiction in which they operate unless the presumption of constitutionality which attaches to every tax is surmounted. This will be particularly burdensome for companies like Complete Auto which serve dealers throughout each state in the continental United States. When auditing, accounting, bonding, identification, recording, and reporting are also considered, the costs to the companies and consequent costs to the public are staggering.

The commerce clause delegates regulation of interstate commerce to the federal rather than to the state governments. The reason for this delegation was that city, county, and state taxing power could undermine the basic desire that the United States constitute one integrated economic unit. The problem inherent in state taxation of the type upheld in \textit{Complete Auto Transit} is that such taxes are directed at particular activities, such as transportation, rather than being applied across-the-board. This allows manipulation of taxes to the advantage of local residents, at the expense of non-residents. Because the taxes are direct, the taxpayer is charged with the duty of collecting them for the state. The taxes are usually exacted from the consumer of the goods. Thus the danger lies in the potentiality for strategically located states to exploit their geographical advantages by levying taxes on property which passes through their jurisdiction. It is possible for these states to tailor their tax structures so that the burden will be borne primarily by non-resident consumers of the property.

The sole restraint on the taxing power of a state is a political one imposed by local voters.\textsuperscript{34} While the Mississippi State Tax Commission made the appealing argument that intrastate and interstate carriers were taxed alike and thus treated equally,\textsuperscript{35} such a contention is inaccurate. The intrastate carriers can elect legislators and thereby affect the tax structure, whereas interstate carriers cannot.

The problem of state taxation of interstate commerce is further aggravated by the Eleventh Amendment's preclusion of a citizen of one

\textsuperscript{33} Id. at 276, n. 4.


\textsuperscript{36} U.S. Const. amend. XI, states that "[t]he Judicial power of the United States shall not
state suing another state in federal court. As a result, carriers seeking to challenge a state tax must do so in a state court, which will probably be insensitive to the argument that the carrier is already burdened by taxation from other states. Therefore, the carrier will be required to prove that the tax either discriminates against or overly burdens interstate commerce. The exigencies of the situation would probably prevent a carrier from pursuing expensive, time-consuming, and uncertain remedies in the courts of each of the multiple jurisdictions.

IV. CONGRESSIONAL ACTION

Because the courts have indicated their endorsement of state taxation of interstate commerce, the transportation industry will have to look elsewhere for help in dealing with this problem. Congress appears to be the appropriate body to provide this assistance. In 1959, after the Supreme Court upheld a state tax on a company engaged exclusively in interstate commerce in Northwestern States Portland Cement Company v. Minnesota, Congress quickly took action by enacting Public Law 86-272. This statute set a federal minimum standard which restricted the imposition of state income taxes on interstate commerce and created a commission to formulate proposals for uniformly governing such taxes. While the statute was originally concerned with state net income taxes, it was broadened by Public Law 87-17 to include "all matters pertaining to taxation of interstate commerce by the states . . . or any political or taxing subdivision . . . ." This latter statute was the congressional reaction to the Supreme Court's decision in Scripto, Inc. v. Carson.

be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

40. 75 Stat. 41, § 201.
41. 362 U.S. 207 (1960). In Scripto, a Georgia corporation was required to collect a use tax on behalf of the state of Florida from Florida purchasers of the corporation's products. The corporation had no property, no offices or regular full-time employees in Florida, and it did not stock merchandise or maintain bank accounts in Florida, however, there were ten independent wholesalers or jobbers who solicited sales of the products on a commission basis. The jobbers had no authority to make collections or incur debts. The tax was levied "on the privilege of using personal property" within the state and was collectible from dealers.

The United States Supreme Court, per Justice Clark, citing Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954), stated the test as "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." The Court noted that the tax was non-discriminatory and actually fell upon Florida residents unless the dealer failed to collect it. The Court found the minimum connections by characterizing the wholesalers as
where a use tax was upheld. 43

Congress, rather than the judiciary, is best equipped to handle problems of multistate taxation of interstate commerce. Justice Frankfurter’s dissent in Northwestern States Portland Cement discusses judicial inadequacy in this area:

At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause . . . . We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.

The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power. Congressional committees can make studies and give the claims of individual States adequate hearing before the ultimate legislative formulation of policy is made by the representatives of all the States. The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation’s resources. Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency. 44

Although it appears that Congress has realized the need for uniform standards in this area, such standards are needed now more than ever before. Complete Auto Transit has indicated this need.

Prior to Complete Auto Transit, Congress made several attempts to pass an Interstate Taxation Act which were unsuccessful. Pursuant to Public Law 86-272, a House special subcommittee held hearings on proposed legislation in 1966. 45 In 1968 and 1969, the House passed bills dealing with the subject but both proposals died in the Senate because of pressure from state revenuers. In an effort to head off

salesmen and refusing to differentiate between full-time employees and independent contractors because the difference was “without constitutional significance.”


unfavorable congressional action, many states adopted the Multistate Tax Compact. 48

Most recently the Senate started at the place where the House left off: a Senate subcommittee held hearings 49 in 1973 not only on a proposed Interstate Taxation Act, but also on congressional authorization of the Multistate Tax Compact. In 1975 a bill on an Interstate Taxation Act 50 was introduced in the Senate, as "another of several recent congressional attempts to create a system that reconciles the states' need for revenue with the federal interest in unimpeded interstate commerce," 51 but it was not adopted.

V. CONCLUSION

It is clear that Complete Auto Transit has stripped interstate commerce of much of the protection it once enjoyed from state taxation. If the transportation industry is to be protected in the future, it must find its shield not in the courts, but in Congress. Thus, carriers which are engaged in interstate commerce would be well advised to exert their energies not in the courtroom but in the legislature. Only in this manner can they be assured that they will enjoy continued vitality without the excessive burdens of multistate taxation.

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