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## Transportation Regulation and Innovation: The Dial-A-Bus\*

J. Michael Hines\*\* and David W. Sloan\*\*\*

### I. INTRODUCTION

There is today a growing recognition that inadequate public transportation contributes significantly to a broad variety of metropolitan-urban problems. Although dispersal of economic and social activities throughout the metropolitan area has made access to an automobile a prerequisite to good employment, economic and social mobility and the enjoyment of public and private services and amenities, a significant portion of the population, including the poor, the old, the young and the housewife, do not generally have such access. Concomitant to dependence upon the automobile is an increase in pollution and congestion.

In the face of this growing crisis, public transportation service and ridership is declining while the costs are increasing. The technology of public transportation has remained constant for over 50 years, comprising flexibly routed but expensive taxicabs and fixed-route buses and rail cars. This static industry is constrained by a rigid and confusing regulatory system. The result is a lack of any significant response to changing consumer needs and an absence of innovation in technology, management and service.

Public awareness of American transportation problems has led to certain positive responses, including congressional measures to provide assistance and funds for research and development and state and local creation of Departments of Transportation and Metropolitan Transit Authorities.

A specific example is research and development on the Dial-a-Bus (DAB) system. This system, which has many manifestations, aims to fill the gap between fixed-route bus transportation and taxis. The concept envisions a fleet of small vehicles, centrally controlled, which can be dispatched along any and all local streets in response to telephoned service requests. The vehicles

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\* This article results from research done by the authors for the CARS project at the Massachusetts Institute of Technology in 1969 and 1970.

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would be routed so as to pick up and deposit passengers at the exact locations they desire.

In its most sophisticated version, DAB would have a large fleet, monitored by a computer and radio communications system as well as location sensors throughout the area in such a way that the vehicles would be dynamically rerouted along optimum routes as service requests were telephoned to the computer. Its most limited version would involve one small vehicle manually routed by a central dispatcher. The system could meet demands for travel from one origin to many destinations, many origins to one destination or many origins to many destinations. It is hoped that it would serve travel needs in a low-density residential area, provide service between the radial arms of a public transit system, serve as a feeder service to line-haul rail and bus transit and meet a variety of other local and neighborhood needs. The United States Department of Transportation has funded research and development into this concept and is presently supporting its demonstration in New Jersey.<sup>1</sup>

Using the DAB as an example, this article examines federal and state regulatory systems and their impact upon innovative public transportation services. Section II investigates existing systems of regulatory classification and exemption. In discussing the federal system, the classification of regulated carriers and the exemptions available to carriers of passengers are analyzed. Special emphasis is given to services which might be provided by DAB. In addition, the section surveys the approaches toward classification and exemption adopted by state regulatory legislation. The relationship of DAB to these statutes is considered. Finally, the need for consumer-oriented innovation in public transportation and the inadequacy of present institutional and regulatory structures are described. An "experimental exemption" from regulation is proposed to encourage the testing and implementation of new technological and service concepts.

Section III assumes that DAB would not qualify for any exemption from regulation, thus focusing on the problem of acquiring permission to operate. This section is essentially advocacy, anticipating some of the obstacles a DAB application would meet at state law and marshalling arguments and authorities to overcome them. Finally, the article considers the developing federal law as it would affect a DAB. While it would be very unlikely that a DAB would attempt to operate solely in interstate com-

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1. NEWSWEEK, Sept. 28, 1970, at 59.

merce, federal law can provide persuasive analogies since it is more fully developed through litigation, much state law is patterned after it and, most importantly, operations similar to DAB have recently been considered by the Interstate Commerce Commission (ICC) and the federal courts.

## II. SYSTEMS OF CLASSIFICATION AND EXEMPTION

### A. THE FEDERAL SYSTEM

The federal regulatory system is important in its direct applicability to the DAB or any other innovative service implemented in an interstate metropolitan area. It is also important in that it serves as a model for much state transportation law. The Motor Carrier Act of 1935 (hereinafter referred to as MCA), as amended,<sup>2</sup> governs the operation of motor carriers of both passengers and property and lodges the responsibility for their regulation with the ICC.<sup>3</sup>

#### 1. Definition of "Interstate"

To determine whether a given service is covered by federal law, it must first be established that it is "interstate" within the meaning of the MCA. According to 49 U.S.C. § 303(a) (10), "The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle . . . ." The usual federal practice is to develop rules and standards for passenger carriers by analogy from those governing carriers of goods. However, the two types of carrier are treated somewhat differently in defining "interstate commerce."

The interstate status of a carrier of property derives from the "essential character of the movement" in which it is participating.<sup>4</sup> The primary determinant of this character is the "fixed and persisting transportation intent of the shipper at time of shipment," which will control unless there is a significant interruption in the continuity of movement of the goods.<sup>5</sup> The partici-

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2. 49 U.S.C. § 301 *et. seq.* (1964).

3. *Id.* § 302(a).

4. *Baltimore & O. S.W. R.R. v. Settle*, 260 U.S. 166, 170 (1922).

5. See J. GUANDOLO, *TRANSPORTATION LAW* 651 (1965) [hereinafter cited as GUANDOLO] (emphasis added). See also *Atlantic Coast Line R.R. v. Standard Oil Co.*, 275 U.S. 257, 268-69 (1927); *North Carolina Util. Comm'n v. United States*, 253 F. Supp. 930, 933-34 (E.D.N.C. 1966); *Leamington Transp. Ltd., Common Carrier Application*, 81 M.C.C. 695,

pation of several different carriers and modes in a given shipment of goods is not sufficient to disturb the continuity of movement requisite for ICC jurisdiction.<sup>6</sup>

It is usually immaterial whether a carrier's vehicles actually cross state lines.<sup>7</sup> Certain cases of local delivery service, however, where there was no common control of the goods throughout the entire interstate trip, have been held to be beyond the reach of the ICC.<sup>8</sup> An illogical or bad-faith routing between points in one state through a second state will not succeed as a subterfuge to avoid state regulation.<sup>9</sup>

Passenger carriers are subject to a narrower definition of interstate than the above definition for property carriers. The intention of a carrier's passengers to "ship" themselves out-of-state usually does not characterize it as "interstate." In *Greyhound Lines, Inc. v. Allen*,<sup>10</sup> ad hoc and charter groups were carried along routes completely within California to towns straddling the Nevada border. The admitted destinations of virtually all passengers were Nevada gambling casinos in the towns, to which passengers generally walked. The ICC found the carrier to be beyond its jurisdiction stating:

[T]he Commission has consistently held that regardless of the intention of any passenger to continue or complete an interstate journey, a carrier of passengers operating wholly within a single State, selling no through tickets, and having no common arrangements with connecting out-of-State carriers, is not engaged in transportation in interstate or foreign commerce.<sup>11</sup>

The Supreme Court has not gone so far as the Commission in limiting the definition of interstate passenger carriage. *United*

699 (1959) (the service is not to be tested mechanically, but the totality of the circumstances surrounding the transportation must be weighed).

6. *Dallum v. Farmers' Co-operative Trucking Ass'n*, 46 F. Supp. 785, 788 (D. Minn. 1942). See also *State Corp. Comm'n v. Bartlett & Co.*, 338 F.2d 495 (10th Cir. 1964), *cert. denied*, 380 U.S. 964 (1965) (the temporary storage of grain prior to out-of-state shipment does not break the continuity of movement from the original shipping point); *Great N. Ry. v. Thompson*, 222 F. Supp. 573 (D. N.D. 1963) (transfer of goods from a railroad's cars to its trucks does not disrupt continuity of movement).

7. See, e.g., *Earle v. Brink's, Inc.*, 54 F. Supp. 676, 678 (S.D.N.Y. 1943).

8. See, e.g., *Borough Express, Inc. v. Schoenbaum & Hermelin Express, Inc.*, 46 Misc. 2d 959, 260 N.Y.S.2d 563 (1965); *Roseweb Frocks, Inc. v. Rose*, 52 N.Y.S.2d 901 (1945).

9. See *Leonard Express, Inc. v. United States*, 298 F. Supp. 556 (W.D. Pa. 1969); *Pennsylvania Pub. Util. Comm'n v. Hudson Transp. Co.*, 88 M.C.C. 745 (1962), *aff'd*, 219 F. Supp. 43 (D. N.J. 1963).

10. 99 M.C.C. 1 (1965). See also *Midwest Transp., Inc., Common Carrier Application*, 98 M.C.C. 362 (1965); *Moore Service, Inc., Extension*, 89 M.C.C. 180 (1962).

11. 99 M.C.C. at 4 (1965).

*States v. Yellow Cab Co.*<sup>12</sup> involved the taxicab carriage of passengers from their homes to interstate rail terminals. The Court stated that the limits of a particular kind of commerce must be set by practical considerations and that the movements involved here were not "an integral part of interstate transportation."<sup>13</sup> Using this "integral part" test, the Court has found that an intra-District of Columbia carrier, whose clientele was comprised largely of Virginia commuters, was within the ICC's jurisdiction.<sup>14</sup> However, there appear to be no cases in which the Supreme Court has considered the Commission's view as expressed in *Greyhound Lines, Inc. v. Allen*. The Supreme Court cases are older and the *Allen* analysis has controlled many situations and can probably be relied upon by a DAB operator.

## 2. State-Federal Jurisdictional Problems

Congress has not exhausted its constitutional power to regulate motor carriers in interstate commerce. The MCA states, "Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business . . . ."<sup>15</sup> A state may tax carriers as compensation for the use of its highways, enforce vehicle safety regulations and registration provisions and require licensing of drivers.<sup>16</sup> The federal courts, however, have construed the MCA broadly to reach all those who are "in substance" engaged in interstate transportation for hire.<sup>17</sup>

State officers may not interpret the conditions of an ICC operating authority or attempt to modify its regulatory terms.<sup>18</sup> Nor may a state refuse a federally-certificated carrier permission to conduct its operations on its roads.<sup>19</sup> Finally, if a carrier has both intra- and interstate activities, it will be fully subject to state regulation to the extent of its intrastate operations.<sup>20</sup>

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12. 332 U.S. 218 (1947).

13. *Id.* at 230-33.

14. *United States v. Capital Transit Co.*, 338 U.S. 286 (1949).

15. 49 U.S.C. § 302(b) (Supp. IV, 1969).

16. *See, e.g.*, *Buck v. California*, 343 U.S. 99 (1952); *Maurer v. Hamilton*, 309 U.S. 598 (1940); *People v. Learnard*, 305 N.Y. 495, 114 N.E.2d 9 (1953).

17. *See, e.g.*, *ICC v. Interstate Auto Shippers, Inc.*, 214 F. Supp. 473 (S.D.N.Y. 1963); *ICC v. Dudgeon*, 213 F. Supp. 710, 714 (S.D. Cal. 1961), *cert. denied*, 372 U.S. 960 (1963).

18. *Andrew G. Nelson, Inc. v. Jessup*, 134 F. Supp. 221 (S.D. Ind. 1955).

19. *See, e.g.*, *Ex parte Truelock*, 139 Tex. Crim. 365, 140 S.W.2d 167 (Ct. Crim. App. 1940).

20. *Eichholz v. Pub. Serv. Comm'n*, 306 U.S. 268, 273 (1939); *Leonard Express, Inc. v. United States*, 298 F. Supp. 556 (W.D. Pa. 1969).

### 3. Classification of Regulated Carriers

a. *Compensation.* The MCA subjects all carriers to the regulation of hours and safety.<sup>21</sup> In addition, it creates two categories of carriers, "common" and "contract," which must also submit to economic regulation. Once a carrier has been characterized as "interstate," the classification into which it falls must be determined. These classifications are defined as follows:

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property . . . for compensation, whether over regular or irregular routes . . . .

The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate . . . commerce, for compensation . . . under continuing contracts with one person or a limited number of persons . . . .<sup>22</sup>

A threshold question is whether "compensation" is present.<sup>23</sup> This does not require an element of profit but only the reimbursement of expenses.<sup>24</sup> Services which have been found to be "for compensation" include a non-profit shippers' association<sup>25</sup> and an auto drive-away service in which a broker brought together drivers and car owners for a fee.<sup>26</sup> Compensation also may include benefits such as the saving of a license fee<sup>27</sup> or the ability to utilize idle equipment.<sup>28</sup> Thus it appears that any exchange of value, although indirect, will bring a carrier within one of these two classes.

b. *Common Carriers.* A common carrier is characterized by a "holding out" of its services indiscriminately to the general

21. 49 U.S.C. § 304(a) (1) (1964).

22. *Id.* § 303(a) (14), (15). Section 15 goes on to state that the required contracts shall be either:

(a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

23. *Id.* § 303(c).

24. *Schenley Distillers Corp. v. United States*, 61 F. Supp. 981, 987-88 (D. Del. 1945), *aff'd*, 326 U.S. 432 (1946).

25. *Shippers Cooperative, Inc. v. ICC*, 308 F.2d 888, 892 (9th Cir. 1962); *ICC v. International Shippers Ass'n of New Jersey, Inc.*, 249 F. Supp. 66, 69 (D. N.J. 1965), *aff'd per curiam*, 363 F.2d 878 (3d Cir. 1966).

26. *Orleman v. United States*, 219 F. Supp. 945, 946-47 (E.D. Mich. 1963).

27. *Pitchenik and Kramer, Contract Carrier Application*, 34 M.C.C. 353, 355 (1942).

28. *Monarch Associates, Inc., Common Carrier Application*, 107 M.C.C. 277 (1968).

public or to a class thereof.<sup>29</sup> Common carriers must receive a certificate of public convenience and necessity from the ICC before they may commence operations. They are subject to detailed economic regulation, may not discontinue service without Commission approval and have a duty to serve all who come forward with a reasonable demand for service.<sup>30</sup> In return, however, common carriers are protected from competition by the certification process.

The class of common carriers, in addition to regularly scheduled bus lines and taxicabs, has been held to include charter party service and tour buses,<sup>31</sup> a drive-away service bringing together car owners and people willing to drive them to a specified destination,<sup>32</sup> an agency which arranged groups for car pools and then leased vehicles to them,<sup>33</sup> limousine service,<sup>34</sup> chauffeur service<sup>35</sup> and door-to-door transportation of passengers and their baggage in sedan-type vehicles, between a city and a resort, on a nonscheduled basis over irregular routes.<sup>36</sup> Flexible, irregular route common carriers are defined by the ICC to be "special operations."<sup>37</sup>

c. *Contract Carriers.* A contract carrier is one which operates under a limited number of contracts which delineate specialized services designed to meet the needs of each contractor.<sup>38</sup> Such a carrier must obtain a permit from the ICC which involves economic and service regulation<sup>39</sup> but does not require that the carrier serve all comers. To qualify for a permit, an applicant must show that his service involves not a public dedication of

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29. 49 U.S.C. § 303(a) (14) (1964). See also Craig, *Contract Carrier Application*, 31 M.C.C. 705 (1941); 13 C.J.S. *Carriers* § 530 (1939).

30. See, e.g., Kauffman, *Extension of Operations*, 30 M.C.C. 517 (1941).

31. *Fordham Bus Corp. v. United States*, 41 F. Supp. 712 (S.D. N.Y. 1941).

32. *ICC v. AAA Con Drivers Exch., Inc.*, 340 F.2d 820 (2d Cir.), cert. denied, 381 U.S. 911 (1965).

33. *Monarch Assoc., Inc., Common Carrier Application*, 107 M.C.C. 277 (1968).

34. *Tri-State Coach Lines, Inc., Common Carrier Application No. MC 129038* (1969); *Arrow Line, Inc. v. United States*, 256 F. Supp. 608 (D. Conn. 1966).

35. *Adams, Common Carrier Application*, 94 M.C.C. 290 (1963).

36. *Nudelman, Common Carrier Application*, 22 M.C.C. 275 (1940), reconsidered, 28 M.C.C. 91 (1941).

37. See, e.g., *Michaud Bus Lines Inc., Extension*, 100 M.C.C. 432 (1966).

38. E.g., *Costello v. Smith*, 179 F.2d 715, 718 (2d Cir. 1950); *Pregler, Extension of Operations*, 23 M.C.C. 691, 694-95 (1940).

39. 49 U.S.C. § 309 (1964).



facilities but merely specialization to meet the distinct needs of a limited number of individuals or groups.<sup>40</sup>

The ICC has found that nonprofit shippers' associations, serving only their members, fall within this category.<sup>41</sup> It has, however, only rarely granted contract carrier permits to carriers of passengers, finding as a rule, that they are common carriers. The carriage of Mexican farm workers,<sup>42</sup> and, in some cases, the transportation of groups of employees to their work places,<sup>43</sup> have been classified as contract carrier services.

#### 4. Exemptions

a. *Private Carrier.* The MCA establishes the class of private carriers of property as follows:

The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who . . . transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is . . . in furtherance of any commercial enterprise.<sup>44</sup>

Such carriers, transporting their own goods incidental to a primary nontransportation business, are subject only to the safety and hours regulation of section 304. This type of carriage comprises the fastest growing segment of the transportation industry.

Apparently the only case in which the Commission has found a carrier of passengers to be "private" and outside the regulatory scope of the Act is *Kratzenberg*,<sup>45</sup> in which the carrier rented his car and his personal services as a chauffeur on a month-to-month basis. Given this single case, and the ICC's practice of requiring certificates for passenger carriers, it appears that any carriage extending beyond the private needs of a family will be within the regulatory boundaries of the Act. A carrier can be freed from economic regulation only to the extent it can comply with one of the specific exemptions described below.

b. *Section 303(b), Exemptions.* Section 303(b) defines several specific exemptions from all the regulatory provisions of the

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40. Craig, Contract Carrier Application, 31 M.C.C. 705 (1941).

41. Shippers Cooperative, Inc. v. ICC, 308 F.2d 888 (9th Cir. 1962).

42. Bracero Transp. Inc., 100 M.C.C. 359 (1966).

43. Alexandria, B. & W. Co., 78 M.C.C. 655 (1959); Columbia Park Maintenance Club, Inc., Common Carrier Application, 49 M.C.C. 870 (1949).

44. 49 U.S.C. § 303(a)(17) (1964).

45. 27 M.C.C. 141 (1940).

Act except those of section 304. These cover vehicles used solely for the transportation of school children and teachers, "taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini," hotel vehicles used exclusively as transportation for patrons of the hotel between hotels and local common carrier stations, vehicles used by farmers to transport agricultural commodities and supplies, motor vehicles operated by a cooperative association as defined in the Agricultural Marketing Act and vehicles used exclusively for the transportation of livestock, fish and other designated commodities, the distribution of newspapers and transportation of persons or property incidental to transportation by aircraft. In addition, section 303 (b) (8)-(10) provides three further exemptions, unless the Commission finds that the national transportation policy requires that they be reduced or eliminated. These exemptions are for transportation within a municipality and the "commercial zone" adjacent to it, casual or occasional transportation for compensation by any person not engaged in transportation by motor vehicle as a regular occupation of business and the emergency towing of disabled vehicles.

c. *Taxicabs.* This exemption encompasses any "bona fide taxi service" which is not conducted over regular routes or between fixed termini. The ICC has stated that "taxicab service as that term is generally understood is essentially a *local* service . . . . Congress . . . intended to partially exempt only those operations which are conducted within a municipality and its immediate environs . . . ."<sup>46</sup> Thus transportation within 25 or 30 miles of a given municipality has been held to be within the exemption while trips of 75 miles and over have been found to be charter service.<sup>47</sup>

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46. Whitman's Black & White Cab Co., Common Carrier Application, 47 M.C.C. 737, 741 (1948).

47. See Leonard, Common Carrier Application, 48 M.C.C. 852 (1948) (exemption for operations within 25 mile radius of base); Bisbee, Common Carrier Application, 18 M.C.C. 175 (1939) (applicant operating a taxi service between Fremont, Ind. and numerous points in Michigan and Ohio, within 30 miles of Fremont, held to be exempt). Compare D & M Taxi Co., Common Carrier Application, 96 M.C.C. 439, 446 (1964) (although distances involved were only 28 miles, ICC found that the development of intervening communities placed Ft. Dix and McGuire Air Force Base outside the "immediate environs" of Philadelphia); Whitman's Black & White Cab Co., Common Carrier Application, 47 M.C.C. 737 (1948) (interstate taxi operations originating in Birmingham, Ala., over routes longer than 75 miles, held nonexempt).

The words "bona fide" are used to distinguish taxi operations from charter and special operations conducted in small vehicles.<sup>48</sup> Thus the carriage of athletic teams in taxi vehicles<sup>49</sup> and limousine services<sup>50</sup> are outside the exemption.

d. *Incidental to Aircraft.* An exemption is granted to carriers of property or passengers incidental to aircraft transportation in section 303(b)(7a). The regulations governing this exemption are in *Motor Transportation of Passengers Incidental to Transportation by Aircraft*.<sup>51</sup> These require that the passenger have an immediate prior or subsequent movement by air and that the transportation be within the union of an area encompassing a 25 mile radius around the airport and all the commercial zones which intersect this 25 mile radius. The ICC has the power to expand this exempt area if factual circumstances so warrant.<sup>52</sup>

e. *Commercial Zones.* The MCA exempts transportation within contiguous municipalities and their adjacent "commercial zones."<sup>53</sup> These zones are defined explicitly for most large metropolitan areas in Part 1048 of the *Code of Federal Regulations*. For smaller cities and towns the commercial zone comprises the central municipality, all towns contiguous to that base and all unincorporated areas and parts of towns within a radius of from two to five miles of the boundary of the base, depending on its population. When commercial, industrial or demographic conditions warrant, however, the ICC may redefine a commercial zone accordingly.<sup>54</sup>

The exemption extends only to the boundaries of a zone so

48. Whitman's Black & White Cab Co., Common Carrier Application, 47 M.C.C. 737, 740 (1948).

49. Peters, Common Carrier Application, 23 M.C.C. 611 (1940).

50. Bevacqua, Common Carrier Application, 73 M.C.C. 751 (1957).

51. 95 M.C.C. 526 (1964).

52. See, e.g., Hatom Corp., Common Carrier Application, 88 M.C.C. 653 (1962); Teterboro Motor Transp., Inc., Common Carrier Application, 47 M.C.C. 247, 255 (1947).

53. 49 U.S.C. § 303(b)(8) (Supp. IV, 1969) exempts:

[t]he transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage . . . to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction . . . .

54. 49 C.F.R. Part 1048 (1970).

defined and routes within overlapping commercial zones may not be added.<sup>55</sup> Unless specifically limited, an ICC authority to serve a municipality is valid within the adjacent commercial zone.<sup>56</sup> This exemption is intended to cover all local transportation in interstate commerce, not merely those carriers whose routes cross state lines.<sup>57</sup> However, it may be voided if the transportation is under the common control or management of another carrier which may perform continuous carriage to a point outside the zone.<sup>58</sup>

Also, the carrier must conduct a corresponding intrastate business, in full compliance with the relevant state laws, over the routes which it uses in its interstate activity.<sup>59</sup> For example, if a person transports passengers, within a commercial zone, from point X in state 1 to point Y in state 2, he must obtain intrastate operating authority from state 1 for his routes from X to the state line and likewise from state 2 for routes between the border and Y. In addition, he must actually conduct intrastate operations along his routes between X and Y and the state line.

Section 302(c) provides a similar exemption for transportation within the "terminal area" of another carrier, provided it is under an agreement with that carrier. For the carriage of goods, the terminal area is coextensive with the commercial zone of the municipality but for passenger services it is confined to the actual limits of the town.<sup>60</sup>

f. *Section 304(a) (4a), Certificate of Exemption.* Section 304(a) (4a) makes it the duty of the Commission to determine if the services of a petitioning carrier "lawfully engaged in operation solely within a single State," do not "substantially . . . affect" uniform regulation and implementation of the national transportation policy. Upon such a finding, the ICC may grant the carrier a "certificate of exemption."<sup>61</sup> This exemption af-

55. Commercial Zones and Terminal Areas, 46 M.C.C. 665 (1946).

56. *Ex parte* No. MC-37, 54 M.C.C. 21 (1952).

57. Commercial Zones and Terminal Areas, 46 M.C.C. 665 (1946).

58. *E.g.*, Greyhound Corp., Investigation, 84 M.C.C. 169 (1960). *But see* Potomac Edison Co., Determination of Status, 48 M.C.C. 266, 270 (1948) (in spite of common control, the ICC upheld an exemption where the applicant proposed a purely local service with no through tickets, joint rates or interchange of passengers with the commonly controlled carrier).

59. *A.B. & W. Transit Co. v. D.C. Transit System, Inc.*, 83 M.C.C. 547, 551 (1960).

60. Commercial Zones and Terminal Areas, 54 M.C.C. 615 (1952).

61. 49 U.S.C. § 304(a) (4a) (1964). The section also provides that the ICC is to:

determine, upon its own motion, or upon application by . . . any

fords an alternative method of carrying on interstate commerce, under regulation, without the burden of federal compliance where the carrier's interstate operations are not substantial.<sup>62</sup>

The exemption is based first on the premise that the carrier's operation is essentially local; thus it is necessary that its activities be completely within one state. A second assumption is that the carrier will be regulated by state authorities. Exemptions have been denied where state authority has not been obtained<sup>63</sup> or was not required.<sup>64</sup> The Commission may deny a certificate of exemption if it would give the applicant a competitive advantage.

A similar but more limited exemption may be granted under section 306(a)(6)-(7). This exemption applies only to common carriers and is available only if the carrier is lawfully engaged in operation solely within a given state, without any interest in out-of-state carriers. Further, it must have obtained a certificate of public convenience and necessity for intrastate operations from a state board under standards similar to those governing the ICC.

*g. Free or Reduced-Rate Transportation.* Section 317(b) provides that sections 1(7) and 22 shall apply to common carriers by motor vehicle. These sections permit common carriers of passengers to offer free or reduced-rate transportation to various categories of people, including inmates of hospitals and charitable institutions, "indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals or societies" and to municipal governments for the transportation of indigent persons.

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other party in interest, whether the transportation in interstate . . . commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature . . . as not substantially to affect . . . uniform regulation by the Commission . . . in effectuating the national transportation policy . . . . Upon so finding, the Commission shall issue a certificate of exemption which . . . shall exempt such carrier or class of motor carriers from compliance with the provisions of this chapter, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof . . . . [W]here a motor carrier has become exempt . . . as provided in this subparagraph, it shall not be considered to be a burden on interstate . . . commerce for a State to regulate such carrier with respect to the operations covered by such exemption.

62. International Ry. Exemption Application, 44 M.C.C. 789, 793 (1945); Slocum, 30 M.C.C. 169, 172 (1941).

63. Miller Exemption Application, 41 M.C.C. 783 (1943).

64. Winter Exemption Application, 32 M.C.C. 679, 684 (1942).

The case law deals primarily with the terms under which passes can be granted and the duties which will be owed by carriers to passengers riding under these provisions. In *McGowan, Common Carrier Application*,<sup>65</sup> however, the ICC held that a carrier serving only clients of charitable institutions was not within the purview of the Act.

h. *Temporary Authority.* The Commission has the discretion to grant, without a hearing, temporary operating authority to common or contract carriers “[t]o enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need . . . .”<sup>66</sup> The carrier must make a strong showing of both urgent need and unavailability of adequate alternative service.<sup>67</sup> This type of authority may continue up to 180 days but does not create a presumption in favor of the issuance of a permanent authority. The carrier’s operations under a temporary authority are subject to all the provisions of the Act.<sup>68</sup>

##### 5. *Status of DAB*

Most manifestations of DAB would be classified by the ICC as “special operations.” In *Asbury Park-N.Y. Transit Corp. v. Bingler Vacation Tours, Inc.*,<sup>69</sup> the Commission said that this category was “a catchall classification which may include almost anything which is neither charter service . . . nor one of the ‘usual’ operations of ordinary regular-route common carriers of passengers.”<sup>70</sup> Such operations are common carriage requiring a certificate of public convenience and necessity.<sup>71</sup> Section 3(b), above, contains a variety of examples of carriers with irregular routes and schedules and unconventional service ideas, all of which were classified as common carriers or special operations.

It is conceivable that some DAB applications would be contract carriage. Others that were highly localized might qualify

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65. 33 M.C.C. 888 (1942).

66. 49 U.S.C. § 310a(a) (1964).

67. See, e.g., *Black Ball Freight Service v. United States*, 298 F. Supp. 1006 (W.D. Wash. 1969); *Acme Cartage Co. v. United States*, 290 F. Supp. 453 (W.D. Wash. 1968).

68. 49 U.S.C. § 310a(c) (1964).

69. 62 M.C.C. 731 (1954), *aff’d*, *Bingler v. United States*, 132 F. Supp. 793 (D. N.J.), *aff’d*, 350 U.S. 921 (1955). See also *Michaud Bus Lines, Inc.*, 100 M.C.C. 432, 443 (1966).

70. 62 M.C.C. at 739 (1954).

71. *Fordham Bus Corp. v. United States*, 41 F. Supp. 712 (S.D. N.Y. 1941).

for a commercial zone exemption or a certificate of exemption and be remanded to state regulation. The "aircraft" exemption would apply to DAB plans providing service from many private homes to a single airport. Finally, free charity-based services such as a DAB system serving one or several hospitals, would be beyond ICC jurisdiction.

## B. STATE AND LOCAL SYSTEMS

Based on a selective study of state regulatory systems, this section will examine the scope of state regulation and exemptions therefrom. An attempt will be made to relate the general scheme to DAB operations and transit innovations in general.

### 1. *Scope of State Regulation*

No state appears to exempt any carrier from safety and equipment standards, proper licensing and requirements of financial responsibility. The exemptions to be studied are from economic regulation, including the control of rates, levels of service, schedules and routes.

The general state pattern follows a two-step process. First, the outer boundaries and overall scope of the state commission's jurisdiction are established. Second, specific exemptions within these bounds are promulgated. Thus a carrier may be exempted either by being left outside the commission's authority or by falling under a specific exception to its general power.

a. *The Federal Model.* The most limited grant of power encountered provides the Commission solely with jurisdiction over "common carriers" or carriers which are "public utilities." Such a carrier is generally defined to be one "[w]hich, as a regular business, undertakes for hire to carry all persons, within certain limitations, who may apply for passage, and holds itself out as engaged in such business."<sup>72</sup> Delaware, for example, provides for regulation of public utilities, defined as:

every individual, partnership, association, corporation, joint stock company, . . . or . . . association of individuals . . . (commonly called a "Cooperative") . . . that . . . operates . . . any railroad, street railway, traction railway, motor bus, electric trackless trolley coach, [or] taxicab . . . for public use.<sup>73</sup>

Carriers falling within this definition must obtain a certificate

72. 13 C.J.S. *Carriers* § 530 (1939). See also *Illinois Highway Transp. Co. v. Hantel*, 323 Ill. App. 364, 55 N.E.2d 710 (1944); *Motor Haulage Co. v. Maltbie*, 293 N.Y. 338, 57 N.E.2d 41 (1944).

73. DEL. CODE ANN. tit. 26, § 101 (Supp. 1968).

of public convenience and necessity from the Public Service Commission, but no others need an official operating authority.<sup>74</sup>

The next stage of boundary expansion brings contract carriers within the Commission's mandate. This copies the federal model and is followed in many states.<sup>75</sup> "Contract carrier" is defined in various ways, however, and at least two patterns can be identified. The first follows the Motor Carrier Act by defining this class as those carriers offering specialized services to a limited number of persons under specific arrangements.<sup>76</sup> A more typical scheme classifies as "contract" all carriers for compensation which are not "common."<sup>77</sup>

The states following the latter approach require common carriers to obtain a certificate of public convenience and necessity before commencing operation. Some states also require contract carriers to get certificates,<sup>78</sup> while others follow the federal model, requiring permits for contract carriage.<sup>79</sup> The standards which must be met to obtain these operating authorities are discussed in detail below,<sup>80</sup> but in general a stronger showing of public need is required to obtain a certificate. Both types of authority involve direct economic regulation by the Commission.

b. *Non-Federal Classification Systems.* Other states define the jurisdictional scope of their regulatory commissions by combining a group of classifications. Such systems are often highly articulated and complex. New York, in addition to a series of categories of carriers of property, has established the class of "common carrier" for non-motor vehicle common carriers<sup>81</sup> and "omnibus corporation" for motor vehicle common carriers.<sup>82</sup> Although the latter class is defined in terms of fixed routes, the Public Service Commission has the power "to establish . . . such just and reasonable classifications of carriers . . . included in the term 'omnibus line' as the special nature of the services performed by such carriers . . . shall require . . ."<sup>83</sup> New York's

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74. *Id.* § 162.

75. *E.g.*, GA. CODE ANN. §§ 68-503 to -603 (1967); MICH. COMP. LAWS ANN. ch. 475 (1967); PA. STAT. ANN. tit. 66 (1959); S.D. COMPILED LAWS ANN. ch. 49 (1967).

76. *E.g.*, S.D. COMPILED LAWS ANN. § 49-2-1 (1967).

77. *E.g.*, MICH. COMP. LAWS ANN. § 475.1(j) (1967); PA. STAT. ANN. tit. 66, § 1102(7) (1959).

78. *See* GA. CODE ANN. § 68-504 (1967).

79. *See* MICH. COMP. LAWS ANN. § 476.1 (1967).

80. *See* Section III *infra*.

81. N.Y. PUB. SERV. LAW § 2(9) (McKinney Supp. 1970).

82. *Id.*

83. *Id.* § 61(12-a).



system also includes the category of "contract carrier of passengers by motor vehicle," which includes all motor vehicle services for compensation other than "omnibus lines."<sup>84</sup> Common carriers and omnibus corporations must obtain certificates while contract carriers need permits.<sup>85</sup>

New Jersey has the following six categories for transportation services: "autobus," "charter bus operation," "special bus operation," "taxicab," "jitney" and "autocab."<sup>86</sup> The first three may not operate without certificates from the Board of Public Utilities Commissioners while the latter three cover primarily local services regulated at the municipal level. Other states with complex systems of this nature are California, Massachusetts and Illinois.

Some states (including New York and New Jersey) also require common carriers to obtain a municipal consent or franchise from each town in which the service will be offered. Consents, permits and certificates are all detailed regulatory documents.

## 2. Classification

a. *Compensation.* Many states have effectively extended the boundaries of their regulatory systems to include all passenger transportation services for compensation. In such states the presence of compensation becomes a threshold question.

In *Chauncy v. Kinnaird*,<sup>87</sup> the Kentucky Court of Appeals held that a share-the-expense car pool in a private automobile was not the type of "commerce" demanding regulation under the Kentucky public carrier statute. The court reasoned that the passage of value to pay the costs of a trip of mutual convenience, where the transportation was incidental to a primary purpose, was trivial and represented no evasion.

The Pennsylvania Superior Court also follows this reasoning. In *Philadelphia Association of Wholesale Opticians v. Public Utilities Commission*,<sup>88</sup> while upholding the statutory exemption of a co-operative delivery service, the court stated obiter: "If three neighbors . . . hire a chauffeur . . . to drive their children to and from school and divide the expenses incident thereto among themselves . . . without any profit or compensation to any of them, it is nobody else's business."<sup>89</sup>

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84. *Id.* § 2(32).

85. *Id.* §§ 63-d, 63-k & 63-n(1).

86. *See* N.J. STAT. ANN. § 48:4-1 *et seq.* (1969).

87. 279 S.W.2d 27 (Ky. Ct. App. 1954).

88. 152 Pa. Super. 89, 30 A.2d 712 (1943).

89. *Id.* at 100, 30 A.2d at 718 (*dictum*).

Any service which goes beyond these very private, incidental operations, however, probably will be classified as one involving compensation. For example, a 16 member group which operated a small bus for its own members' commutation on a share-the-expense basis was held by the Supreme Court of Washington to be "in the business of . . . transporting persons, for compensation . . ."<sup>90</sup>

In general, value need not pass from the passengers to the carrier in order to constitute "for hire" carriage. Payment by an employer to the carrier for the transportation of his employees to and from work,<sup>91</sup> or by a landlord for his tenants,<sup>92</sup> will suffice. The benefit to the carrier can also be indirect, as in the case where the owner of an apartment building or a housing development provides a service to his tenants or residents and receives his reward through enhanced rents or property values.<sup>93</sup>

b. *Statutory Categories.* Once a new carrier establishes that it is within the bounds of a Commission's jurisdiction, it is faced with two questions of classification. The first task is to determine its statutory categorization; the second is to analyze its eligibility for an exemption.

Given the variety of statutory definitions, it is difficult to develop any generalizations which will provide a reliable guide for a specific carrier. If a state follows the federal model, Section I above may provide helpful analogies. Otherwise, some tentative statements are possible, and illustrative examples may be useful.

Traditional fixed-route and fixed-schedule bus operators are always in the common carrier classification or its equivalent (e.g., "omnibus" in New York or "autobus" in New Jersey). Taxicabs and jitneys are also common carriers but are generally regulated locally. Charter bus services appear to be classified as either common or contract carriers unless the state has a specific category for these modes; limousine services are treated similarly. Tour bus trips, arranged by the carrier, are common carriage but may fall into a "special operations" classification.

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90. *Horluck Transp. Co. v. Eckright*, 56 Wash. 2d 218, 221, 352 P.2d 205, 206 (1960).

91. *E.g., Short Line, Inc. v. Quinn*, 298 Mass. 360, 10 N.E.2d 112 (1937).

92. *E.g., Surface Transp. Corp. v. Reservoir Bus Lines, Inc.*, 271 App. Div. 556, 67 N.Y.S.2d 135 (1946).

93. *See, e.g., Columbia Transit Co.*, 55 P.U.R.3d 555 (N.J. Bd. of Pub. Util. Comm'rs, 1964); *Lockbourne Manor, Inc.*, 50 P.U.R.3d 271 (N.J. Bd. of Pub. Util. Comm'rs, 1963).

State classification systems are based primarily on vehicle size, route patterns and service area. None of the statutes manifests much solicitude for technological change. There are, however, examples of classification of carriers with innovative service or organizational concepts which may illuminate the problems of DAB.

c. *Services Operated by Employers or Employees.* In *Horluck Transportation Co. v. Eckright*,<sup>94</sup> a group of employees of a single employer operated a small bus for their own convenience in commuting. The Supreme Court of Washington held that the group was not a common carrier but an "auto transportation company" which, under Washington law, also needed a certificate. The court declined, however, to issue an injunction while the group petitioned for a certificate; it further suggested that the Commission might find that such carriers could qualify for a certificate under more lenient standards than those for a common carrier.

In a memorandum dealing with car pools for compensation, the Connecticut Public Utilities Commission stated that such arrangements are contract carrier services subject to limited business regulation, including the setting of minimum rates so as to protect common carriers.<sup>95</sup>

Various courts have held that persons who, under contract with an employer, pick up workers at specified points and carry them to and from work are contract carriers.<sup>96</sup> Massachusetts and New Jersey, on the other hand, have categorized such services as common carriage.<sup>97</sup> The Appellate Court of Illinois reached the latter result and enjoined an uncertificated carrier who indiscriminately gave contracts to any rider who claimed he was an employee at one of four plants. The carrier then modified his operation by entering formal contracts with the employees who wanted his service and then carrying only those who could so identify themselves. The Commission held that this did not violate the injunction and was, in fact, a private contract

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94. 56 Wash. 2d 218, 352 P.2d 205 (1960).

95. *Livery Service*, 2 P.U.R. (n.s.) 387 (Conn. Pub. Util. Comm'n 1933).

96. See, e.g., *Illinois Highway Transp. Co. v. Hantel*, 323 Ill. App. 364, 55 N.E.2d 710 (1944); *Baltimore & A. R.R. v. Lichtenberg*, 176 Md. 383, 4 A.2d 734 (1939).

97. *Short Line, Inc. v. Quinn*, 298 Mass. 360, 10 N.E.2d 112 (1937); *Doskovitch v. Board of Pub. Util. Comm'rs*, 103 N.J.L. 570, 138 A. 110 (Sup. Ct. 1927) (employee bus between town and plant is an "autobus").

service outside its jurisdiction.<sup>98</sup>

d. *Transportation Clubs.* Another common type of specialized service involves commutation for a club, the members brought together only by common areas of residence and work. In *Hill's Jitney Service, Inc. v. Stiltz, Inc.*,<sup>99</sup> the members of such a club paid dues and a monthly or daily fare to the club which, in turn, paid a flat monthly fee in advance to the carrier. The Commission found that this was not a "public utility" since membership was limited in size and thus was not subject to regulation at all under Delaware law.<sup>100</sup> The Commission indicated, however, that the club might become a public utility if it failed to keep its membership sufficiently limited.

In a similar case in New York, where each member paid a flat monthly assessment whether he rode or not, the New York Supreme Court found that the group had sufficient "common purpose" to form a bona fide "charter party."<sup>101</sup> Although the bus ran daily on a fixed route and schedule, and club membership was largely unrestricted, the court felt that the Commission was within its discretion to find this to be a charter operation, lawfully run under a contract carriage permit.

On similar facts, however, the Appellate Division of the Superior Court of New Jersey upheld a Commission classification of "autobus," refusing to call a daily operation over fixed routes for an indefinite future a "charter operation." The court found a legislative intent to establish a comprehensive scheme of control over autobus service, allowing exemptions only where specifically granted.<sup>102</sup>

In *Chicago North Shore and Milwaukee Railway v. North Shore Transit Club*,<sup>103</sup> the respondent was organized to meet the transportation needs of domestic workers living on the south side of Chicago and working in north shore suburbs. The club was very loose in structure and was organized by an entrepreneur who did not personally use the service. Members had only

98. *Jacksonville Bus Line Co. v. Watson*, 344 Ill. App. 175, 100 N.E. 2d 391 (1951).

99. 23 P.U.R.3d 461 (Del. Pub. Serv. Comm'n 1958).

100. See DEL. CODE ANN. tit. 26, § 101 (Supp. 1968).

101. *In re Rockland Transit Corp. v. Public Serv. Comm'n*, 29 Misc. 2d 909, 221 N.Y.S.2d 1010 (Sup. Ct. 1961).

102. *Public Serv. Coord. Transp. v. Super Serv. Bus Co.*, 82 N.J. Super. 371, 197 A.2d 700 (1964). See also *Eley Bus Co.*, N.J. Bd. Pub. Util. Comm'rs No. 673-121 (1967); *Trenton & Mercer County Traction Corp. v. Trenton*, 97 N.J.L. 84, 116 A. 321 (Sup. Ct.), *aff'd*, 98 N.J.L. 297, 119 A. 31 (1922) (the act is a comprehensive scheme of regulation).

103. 46 P.U.R.3d 381 (Ill. Comm. Comm'n 1962).

to identify themselves to a "liaison"; there were no dues or other indicia of membership organization and no formal contracts with the riders. The Commission found that a "public use" was established when "service is available on equal terms to everyone in that community or in that class or part of the community."<sup>104</sup> It then distinguished this service from those in the *Hantel* and *Jacksonville* cases,<sup>105</sup> as well as the specifications of "private contract carriage" set forth in a previous commission order.<sup>100</sup> It found the "club" to be a public utility requiring a certificate of public convenience and necessity.

e. *Services Restricted by Residence.* A third type of restricted service is one offered to the residents of a building or development, usually by the proprietor. The Pennsylvania courts have held that such services are not public utilities and are beyond the jurisdiction of the Commission, provided the recipients are a well-defined group limited in both character and size.<sup>107</sup> However, in New York and New Jersey, services of this type, even when limited, have been found to be common carriage.<sup>108</sup>

f. *Organizations Serving Their Clients.* A similar situation arises when organizations operate services for their clients. A common example is school bus operation, usually subject only to local regulation. Courts have held that these are common carriers if they accept all students of given schools.<sup>109</sup> Similarly, in *State ex rel. Public Utilities Commission v. Nelson*,<sup>110</sup> the Supreme Court of Utah held that an operator who carried guests under contract with a camp was a contract carrier outside the Commission's jurisdiction. Although the route paralleled that of

104. *Id.* at 389.

105. *Jacksonville Bus Line Co. v. Watson*, 344 Ill. App. 175, 100 N.E.2d 391 (1951); *Illinois Highway Transp. Co. v. Hantel*, 323 Ill. App. 364, 55 N.E.2d 710 (1944).

106. *Cavallo Bus Lines, Inc.*, 96 P.U.R. (n.s.) 621 (Ill. Comm. Comm'n 1952).

107. *Drexelbrook Assoc. v. Public Util. Comm'n*, 418 Pa. 430, 212 A.2d 237 (1965); *Aronimink Transp. Co. v. Public Serv. Comm'n*, 111 Pa. Super. 414, 170 A. 375 (1934). See also *State ex rel. North Carolina Util. Comm'n v. McKinnon*, 254 N.C. 1, 118 S.E.2d 134 (1961).

108. *Surface Transp. Corp. v. Reservoir Bus Lines, Inc.*, 271 App. Div. 556, 67 N.Y.S.2d 135 (1946); *Columbia Transit Co.*, 55 P.U.R.3d 555 (N.J. Bd. of Pub. Util. Comm'rs 1964); *Lockbourne Manor, Inc.*, 50 P.U.R.3d 271 (N.J. Bd. of Pub. Util. Comm'rs 1963).

109. *Public Serv. Comm'n v. Columbo*, 118 N.Y.S.2d 873 (Sup. Ct., Special Term 1952) (the class of students is not a sufficiently limited segment of the public). See also *Illinois Comm. Comm'n v. Galvin*, 50 Ill. App. 2d 67, 194 N.E.2d 374 (1963).

110. 65 Utah 457, 238 P. 237 (1925).

a certificated common carrier, the court based its finding on the fact that there was no willingness to serve all who applied for carriage. The Utah Code has since been amended to regulate contract carriers of passengers.<sup>111</sup>

g. *Small-scale Services.* Many small-scale, specialized transportation services have been before the commissions and the courts. A limousine service operating between La Guardia Airport and Manhattan, under contract with certain airlines and the city, was held to be an omnibus line in *Public Service Commission v. Grand Central Cadillac Renting Corp.*<sup>112</sup> In New Jersey, a carrier who, using seven-passenger vehicles, picked up patrons at their homes in response to telephone calls and took them to Times Square, was held to be an "autobus."<sup>113</sup> Similar services, however, have been found to be contract carriers in other states.<sup>114</sup> On-call livery or limousine services have also been found to be both taxicabs<sup>115</sup> and private services exempt from local taxi regulation.<sup>116</sup>

Auto rental services, in which the lessee drives the car and controls its routes while the lessor retains responsibility for maintenance, generally have been held to be contract carriers.<sup>117</sup>

Recreation Lines, Inc., operated a small-group limousine service between Manhattan and local race tracks. Passengers were publicly solicited but they had to make appointments and could be picked up only at a terminal or another pre-arranged point. Only people who had made the outbound trip or had made reservations were brought back. Routes were determined by passenger needs. The Public Service Commission granted the carrier a contract permit and the Appellate Division affirmed. The court felt that the contract carrier statute's required find-

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111. UTAH CODE ANN. §§ 54-6-1 & 54-6-8 (1963).

112. 273 App. Div. 595, 78 N.Y.S.2d 550 (1948).

113. *Nutley-Times Square Serv., Inc. v. Board of Pub. Util. Comm'rs*, 109 N.J.L. 289, 162 A. 124 (Sup. Ct. 1932) (the Board had to classify this interstate carrier in order to apply the proper safety regulations and the court upheld its classification).

114. *E.g.*, *Realty Purchasing Co. v. Public Serv. Comm'n*, 9 Utah 2d 375, 345 P.2d 606 (1959).

115. *Chasteen v. Decatur*, 21 Ill. App. 2d 496, 158 N.E.2d 446 (1959).

116. *See, e.g.*, *People v. Cassese*, 43 Misc. 2d 869, 251 N.Y.S.2d 540 (Westchester County Ct. 1964); *People v. Pfingst*, 1 Misc. 2d 890, 148 N.Y.S.2d 640 (N.Y.C. Magis. Ct. 1956); *People v. Sullivan*, 199 Misc. 524, 103 N.Y.S.2d 503 (Ct. Spec. Sess. N.Y.C. 1951).

117. *See, e.g.*, *Mecham Pontiac Corp. v. Williams*, 94 Ariz. 144, 382 P.2d 558 (1963); *Louisville Taxicab & Transfer Co. v. Blanton*, 305 Ky. 178, 202 S.W.2d 433 (1947); *People v. S & E Motor Hire Corp.*, 29 N.Y.S.2d 105 (Ct. Spec. Sess. N.Y.C. 1941).

ing of "transportation of a group for a common purpose, under a special agreement" was supported by substantial evidence.<sup>118</sup>

In *In re Joe Galik*,<sup>119</sup> however, the California Railroad Commission found the carrier to be a common carrier. Galik operated a sedan type vehicle between San Francisco and Los Angeles, soliciting passengers on the street and in hotels. The Commission stated that fixed routes and schedules were not necessary to constitute common carriage: frequent operation between fixed points was held sufficient. Ignoring "contracts" which the carrier executed with a straw man after it had organized a group, the Commission found a public holding out rather than a charter service.

### 3. Exemptions

a. *General*. All the state statutes surveyed include some partial or total exemptions from economic regulation. Exemptions are generally of two types—those which delegate the responsibility for regulation to the municipal or metropolitan level and those which provide a complete exemption from regulation. These may arise from either the statutory definitions or specific statutory provisions. Most are based on the character of the service offered and a few arise from the structural organization of the carrier. In addition, most statutes provide for temporary operating authorities.

State exemptions include the private carriage of one's own goods without compensation, the carriage of a variety of agricultural and other commodities in their raw state, the exemption of properly organized agricultural cooperatives, commercial zone and terminal area exemptions for operations in municipalities and contiguous areas, services operated by municipalities, casual operations, the carriage of school children, church buses, hotel and airport buses, taxicabs and jitneys.

b. *Intergovernmental*. Most states offer partial exemptions empowering their municipalities to play a coordinate regulatory role. In Pennsylvania, for example:

Each city may regulate the transportation . . . of passengers . . . for pay, within the limits of the city . . . . The city may impose reasonable license fees, make regulations for the operation of vehicles, the rates to be charged . . . and may designate

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118. *In re Recreation Lines, Inc. v. Public Serv. Comm'n*, 7 App. Div. 2d 20, 179 N.Y.S.2d 1001 (1958).

119. *Joe Galik, d/b/a Acme Travel Assoc.*, 20 P.U.R. (n.s.) 303 (Cal. R.R. Comm'n 1937).

certain streets upon which such vehicles . . . must be operated.<sup>120</sup>

In New Jersey, the "local" types of carriers (taxicabs, jitneys and autocabs) are regulated primarily by the towns, with the Board of Public Utilities Commissioners playing a supervisory role. Autobuses, on the other hand, must obtain a municipal consent before they can apply to the Board for a certificate.<sup>121</sup> Given this interlocking of regulatory authority, it is vital that a new carrier consult both the municipal corporation statutes and the transportation or public utility statutes of its state.

Another type of exemption from state regulation is achieved by delegation to metropolitan authorities. In Pennsylvania, for example, these authorities have broad power to design and operate mass transportation facilities, exempt from the Public Service Commission's jurisdiction within the metropolitan area but subject to it outside.<sup>122</sup> Such authorities have control over "transportation systems" which include "all property . . . useful for the transportation of passengers for hire, . . . as well as the franchises, rights and licenses therefor, including rights to provide group and party services: Provided, That such term shall not include taxicabs."<sup>123</sup> Furthermore, "[t]he authority shall determine by itself exclusively, after appropriate public hearing, the facilities to be operated by it, the services to be available to the public, and the rates to be charged therefor."<sup>124</sup> Other states do not grant such broad certification and regulatory powers to their metropolitan authorities, but these represent another level of government whose requirements must be met by new carriers.

This type of authority also may provide a carrier an opportunity to be shielded from both state and local regulation and, in effect, to go unregulated at the sufferance of the authority. There have also been exemptions at the local level whereby livery or limousine services were allowed to operate free of the economic and service regulations imposed on taxicabs.<sup>125</sup>

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120. PA. STAT. ANN. tit. 53, § 4511 (1957).

121. N.J. STAT. ANN. § 48:4-3 (1969).

122. PA. STAT. ANN. tit. 66, § 2004 (Supp. 1970).

123. *Id.* § 2003(a) (8). Pennsylvania is different than most states in that the Commission retains primary jurisdiction over taxicabs. *Hoffman v. Public Serv. Comm'n*, 99 Pa. Super. 417 (1930). In other states this is a closely guarded local prerogative.

124. PA. STAT. ANN. tit. 66, § 2004(d) (9) (Supp. 1970).

125. *See, e.g.,* *People v. Cassese*, 43 Misc. 2d 869, 251 N.Y.S.2d 540 (Westchester County Ct. 1964); *People v. Sullivan*, 199 Misc. 524, 103 N.Y.S.2d 503 (Ct. Spec. Sess. N.Y.C. 1951). *But see* *Chasteen v. Decatur*, 21 Ill. App. 2d 496, 497, 158 N.E.2d 446, 447 (1959) (a livery service was found to be within the statutory definition—"A taxicab is . . . a vehicle



c. *Specialized Services.* Illinois provides an example of an exemption based on the nature of a carrier's service since the statute has no provision for the regulation of contract carriers of passengers. The *Hantel*<sup>126</sup> and *Jacksonville*<sup>127</sup> cases classify carriers of employees of specific plants who have prior contracts with their passengers as "private contract carriers" beyond the jurisdiction of the Commission.<sup>128</sup>

On the other hand, Pennsylvania appears to grant an exemption based on the cooperative organization of a carrier. The Pennsylvania statute states that "Contract Carrier by Motor Vehicle" shall not include "any bona fide agricultural cooperative association transporting property exclusively for the members of such association on a nonprofit basis . . ." <sup>129</sup> In addition, it requires a *public utility* to obtain a certificate of public convenience and necessity before it may commence operation.<sup>130</sup> Thus the statute, by its terms, excludes agricultural cooperatives from common carrier status.

That they may also be exempt from regulation as contract carriers is supported by the Superior Court's reasoning in *Philadelphia Association of Wholesale Opticians v. Public Service Commission*.<sup>131</sup> The court found a cooperative delivery service to be excluded from both the common carrier and the contract carrier provisions of the statute. The court reasoned that section 1310 of title 66 empowers the Commission to set minimum rates for contract carriers *if it finds them necessary* to promote the policy of protection of common carriers enunciated in that provision. Given this limited regulatory mandate, the court said:

[T]he compensation, rates, etc., thus to be prescribed [under section 1310] are not applicable to a situation such as this, where the members of a cooperative association simply divide among themselves the cost or expenses of the operations, without profit to them or any of them. . . . And if nine or ten persons . . . requiring special and individual delivery service, use a nonprofit business corporation, of which they are all members, . . . to act as their agent in furnishing transportation to them and to

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for hire by passengers not having any fixed route or schedule"—and therefore subject to local taxi regulation).

126. *Illinois Highway Transp. Co. v. Hantel*, 323 Ill. App. 364, 55 N.E.2d 710 (1944).

127. *Jacksonville Bus Line Co. v. Watson*, 344 Ill. App. 175, 100 N.E.2d 391 (1951).

128. *See also Hill's Jitney Service*, 23 P.U.R.3d 461 (Del. Pub. Serv. Comm'n 1958) (a limited employee service was held to be other than a common carrier and thus outside the Commission's jurisdiction).

129. PENN. STAT. ANN. tit. 66, § 1102(7) (6) (Supp. 1970).

130. *Id.* §§ 1121-22.

131. 152 Pa. Super. 89, 30 A.2d 712 (1943).

nobody else, . . . without profit or compensation to any of them, that . . . is . . . not subject to the regulation of the Public Utility Commission . . . ."<sup>132</sup>

This reasoning has not been tested for a cooperative passenger service or for an organization with a larger number of members.<sup>133</sup> However, it might provide a basis for the exemption of certain types of DAB service.

d. *Temporary Authority.* Most state commissions are authorized to grant temporary operating authorities. Generally these are of limited duration and may be granted only to meet a seasonal or emergency need. Such an authority usually does not exempt a carrier from regulation, nor does it create a presumption in favor of the grant of permanent authority. Emergency is generally narrowly defined and does not include the need for experimentation and innovation.

#### 4. *Status of Dial-a-Bus*

A transit innovator, unless sponsored by a government body such as a state department of transportation or a transit authority, will have to comply with a state regulatory system. This will probably be similar to the systems described above.

Certain conclusions can be made regarding the relationship of DAB to this general framework. A many-to-many service, open to the general public or a limited class thereof, would fall within the state's "common carrier" category. A feeder service or an operation serving all employees of a given plant likewise probably would be common carriage.

By limiting its clientele as, for example, by entering into contracts with specific employees or the members of some other group with a common interest, DAB might achieve an exemption in some states, including Illinois and Delaware. In others it would be allowed to operate under the less onerous regulation of a contract carrier permit. In still others, such as New Jersey, even this limited service would be common carriage. Smaller-scale operations such as this would not fully utilize the DAB technology. If they could qualify for exemptions or more lenient regulation, however, they would provide considerable leeway for innovation and experimentation with new service and management concepts.

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132. *Id.* at 100-01, 30 A.2d at 718.

133. In *Aronomink Transp. Co. v. Public Serv. Comm'n*, 111 Pa. Super. 414, 170 A. 375 (1934), a limited service to two apartment buildings having 800 tenants was held to be exempt.

It is possible that in a given state it would be advantageous for political or other reasons to avoid state regulation in favor of metropolitan or local control. This might be achieved by qualifying for a municipal or commercial zone exemption, by coming within a "taxicab" definition or by operating under the aegis of a public authority.

No state regulatory system explicitly recognizes the need or provides encouragement for technological and service innovation. In practice, classification schemes tend to obstruct change, and the available exemptions either delegate regulatory authority or are of limited scope. The next section proposes a new regulatory concept—the experimental exemption—to meet this problem.

### C. THE EXPERIMENTAL EXEMPTION

This section first describes the need for innovation and demand-oriented market mechanisms in the passenger transportation industry. It then outlines an "experimental exemption" which would foster technological and managerial innovation and result in a more balanced system with a greater range of consumer options.

#### 1. *The Need for Innovation and Market Response*

In the Department of Housing and Urban Development report, *Tomorrow's Transportation*, the following criticism appears:

Major railings of the entire urban transportation system today are lack of both change and capacity for change, resulting in a restricted choice of ways for people to get around the city and the metropolitan area. The common characterization of urban transportation modes as a blunt dichotomy between public rail transit and the private automobile is far too simple. Cities are the most pluralistic places in modern society; their citizens need a wide range of travel services, a mix of transportation services carefully designed to meet their varying travel needs.<sup>134</sup>

This observation suggests several needs for public transportation which the present system has not met.

The first of these arises from the role of transportation in the problems of the poor. A variety of studies has shown that inadequate public transportation is an important obstacle to the attempts of the urban poor to find satisfactory employment and

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134. U.S. DEP'T OF HOUSING & URBAN DEV., URBAN TRANSP. ADMIN., *TOMORROW'S TRANSPORTATION* 7 (1968).

achieve residential, social and economic mobility.<sup>135</sup> "Reverse commute" bus schemes have failed to attract and hold ridership, largely due to limitations of present technological and service concepts. Such buses are unable to travel quickly to a large number of destinations and cannot be scheduled with sufficient flexibility to allow people to work second shifts or overtime. However, people have used these buses as a means for finding a better job and then have made other arrangements, usually car pools, for commuting. Thus, these schemes provide an example of both the weakness of present technology and the importance and beneficial aspects of new transportation ideas.

In addition, new consumer-oriented transit services would contribute to community control and minority economic development in poverty areas. They would provide both employment and opportunities for local management and entrepreneurship.

Another unmet transportation need is represented by the problems of the "transit poor," people who for various reasons have inadequate mobility. This group includes but is not confined to the poverty-stricken. It also embraces the aged and the young, the handicapped, nondrivers, drivers without access to a car and people not provided with a minimum of public transit.<sup>136</sup>

Still another set of unmet needs results from changed residential patterns in metropolitan areas. Low density suburban development produces demands for interracial trips and door-to-door service. The dispersal of employment and shopping centers accentuates the need for flexible routing. The high level of transport service provided by the automobile cannot be matched by present transit modes. In addition, the extension of line-haul facilities into suburban areas requires the development of new feeder services.

In addition, there are undoubtedly other needs hidden within the "latent demand" for transportation—the trips never made. Experiments suggest that the best way to reach this demand is

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135. See, e.g., J. McCONE, *VIOLENCE IN THE CITY: AN END OR A BEGINNING, A REPORT TO THE GOVERNOR'S COMMISSION ON THE LOS ANGELES RIOT* (1965); D. Gurin, *The Physical Mobility of the Poor: An Introductory Overview*, 1969 (Master's Thesis, Harvard Univ. Grad. School of Design); Haar, *Transportation and Economic Opportunity*, 21 *TRAFFIC QUARTERLY*, Oct. 1967; Kain & Meyer, *Transportation and Poverty, THE PUBLIC INTEREST*, Winter 1970; Wohl, *The Urban Transportation Problem: A Brief Analysis of Our Objectives and the Prospects for Current Proposals*, 1970 (material prepared for course in Introduction to Urban Legal Studies, Harvard Law School).

136. Gurin, *supra* note 135, at 16.

dramatically to improve the level of service.<sup>137</sup>

A final impetus for transportation innovation is the critical need to reduce automobile usage. The problems of pollution and congestion make this imperative and yet ridership on traditional transit modes continues to decline. To offer public alternatives which can match the convenience, flexibility and status of the private car will require significant improvement of both vehicles and management and a revolution in service concepts.

In the face of this growing need for transportation, however, public transit has remained largely unchanged. The hardware of surface passenger transportation has remained essentially the same for 50 years, comprising the automobile, the bus and the railway car. As Schneider points out:

The very words "mass transportation" have created much of the problems facing the transit industry, for "mass" implies a homogeneous demand which can be accommodated by a standardized product. Yet we know that in every other aspect of urban life, heterogeneity is the rule. . . .

Yet, what of the transit industry? It, for the most part, continues to offer relatively standardized boxes on . . . wheels for all . . . rich and poor, worker and shopper, young and old.<sup>138</sup>

The present period appears to be a significant turning point, however, in that a variety of new ideas is being suggested and studied, including the hovercraft, different types of dual-mode vehicles, personal transit schemes, automated highways, moving sidewalks and sophisticated communication and vehicle-control schemes. Some of these plans require large-scale research and development efforts. Some do not, however, and a more competitive and innovative climate would foster the generation of new concepts and applications.

## 2. *Present Institutional Framework for Innovation*

Achieving better, more comfortable service, however, is largely dependent on an environment conducive to management innovation and market responsiveness. That this need implies institutional responses in order to foster transit innovation has been recognized by government. The HUD report, *Tomorrow's*

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137. *E.g., Lessons for CARS from Peoria, Flint, and Mansfield*, Massachusetts Institute of Technology Project CARS, Memo CARS-DOT-19, Cambridge, Mass. (Jan. 19, 1970).

138. L. Schneider, *Marketing Urban Mass Transit*, Jan. 14, 1970, (paper delivered at the Annual Meeting of the Highway Research Board) at 1.

*Transportation*, states, "An improved institutional framework—legal, financial, governmental, and intergovernmental—is needed to eliminate rigidities and anachronisms which prevent the adoption of new technologies and methods."<sup>139</sup> On the state level, Pennsylvania, for example, has also recognized that "there exists in the urban and suburban communities in metropolitan areas, traffic congestion and serious mass transportation problems because of underdeveloped, uncoordinated obsolete mass transportation facilities . . . ."<sup>140</sup>

To meet this problem, many states have created metropolitan transportation authorities with comprehensive powers. Several other states have established departments of transportation. This approach has at once both potentials and dangers. Such agencies are suitable for assuming control of a failing system of commuter railroads or line-haul buses. They also may be the best response to the need for large scale hardware research and development. Many of the problems outlined above, however, are diverse, small-scale transit needs. Their solution requires specialized service concepts, not large infusions of capital. An example is a medicar service operated by a hospital in Nassau County, New York. Using two nine-seat minibuses, the service carries 300 patients per week, 40 percent of the hospital's total outpatients, at a cost of \$16,800 per year.

It is unlikely that an authority or department will be able to respond on this scale, with this type of sensitivity to local needs, throughout a complex and various state or metropolitan area. In fact, as the operator of the large scale line-haul carriers, these agencies may become actively hostile to innovative, specialized operations.

Moreover, present regulatory systems, which tend to require certificates of all passenger carriers and provide only limited exemptions, obstruct change. In order to develop imaginative management and services, market mechanisms must be allowed to operate. The danger is described by Schneider:

In the name of coordinated metropolitan transportation, a sort of perverse conglomerate will emerge. Independent suburban bus companies and the remaining central city private transit operations will be purchased with public funds . . . . The most uneconomic labor practices and compensation schemes will remain as the efficient smaller companies are swallowed up . . . .<sup>141</sup>

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139. U.S. DEP'T OF HOUSING & URBAN DEV., *supra* note 134, at 7.

140. PA. STAT. ANN. tit. 66, § 2002(a) (Supp. 1970).

141. Schneider, *supra* note 138, at 4.

The Pennsylvania legislature seems to be pointing in this direction when it finds:

[t]hat the foregoing conditions cannot be effectively dealt with by private enterprise under existing law . . . and are beyond remedy or control by governmental regulatory processes; . . . .

That it is desirable that the public transportation systems in the metropolitan areas be combined, improved, extended and supplemented by the creation of authorities . . . .

That it is intended that such authorities cooperate with and/or acquire existing transportation facilities that private enterprise and government may mutually provide adequate transit facilities . . . .<sup>142</sup>

This point of view overlooks the promotional power of an exemption from regulation. In the District of Columbia, for example, taxi service is largely unregulated and a large, cheap fleet of taxis exists, while service in medallion-system cities like Boston is critically deficient.<sup>143</sup> The inhibiting quality of the present regulation is also illustrated by the efforts of members of the Roxbury community in Boston to establish flexible neighborhood minibuses services.<sup>144</sup>

### 3. *The Experimental Exemption*

The scheme proposed here would compel a Commission to exempt from economic regulation a transportation service based on a new concept in technology, management or service. While the exemption was in force, the carrier would be able to experiment, modifying rates, termini, service levels and so on, in order to determine the optimum methods for implementing the innovations. If the service proved viable, the commission would have to grant permanent operating authority.

This section will consider four aspects of such an exemption: criteria for eligibility, actual operation during the experimental period, measurement of success or failure and transition to regulated status.

An applicant would first have to show that his proposed service involved a new concept in either hardware, management or service for his geographical area of operation. Standards for measuring "newness" should be developed so as to provide maximum latitude for experimentation without allowing the unregulated duplication of existing services. While management and

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142. PA. STAT. ANN. tit. 66, § 2002(c), (f) & (h) (Supp. 1970).

143. Kain & Meyer, *supra* note 135, at 86.

144. Interview with Charles Grigsby, President, Transcom Lines, Inc., and member of the Governor's Task Force on Transportation, in Boston, Mass., 1970.

service innovations will be difficult to evaluate, they are critical to achieving a flexible, demand-responsive transportation system. Thus the requirements in these areas should be lenient. The fact that a carrier and its management will be headquartered in the neighborhood to be served, for example, might be an important factor in considering an application for exemption.

In addition to new ideas, an applicant should be required to demonstrate his financial responsibility and his compliance with state and local safety, registration and licensing laws.

Two problems of public protection should be considered before an exemption is allowed. First, if an experiment fails, passengers who have relied on the service may be hurt. Thus it is important that the experimental nature of the service be publicly known. People may be unwilling, however, to sacrifice their existing arrangements for a temporary, albeit superior, service. A carrier's experiment might fail, although there is a viable demand, simply because it is experimental. One solution to this difficulty might be a requirement that the applicant establish a membership corporation. All passengers would then understand both the nature of the service and that its success was dependent upon their patronage. Their willingness to join, perhaps at some cost, would indicate the demand for the service, the existence of which might be a criterion for the granting of an exemption.

A second problem arises from the experimenter's effect on existing carriers. A carrier might lose ridership and incur costs during an exemption period and then be forced to accommodate the same riders if the experiment were to fail. As a solution, an applicant might be required to provide a bond.

Once granted, an exemption should be conditioned so as to make experimentation as fruitful as possible. Ideally, it would endure as long as there was any hope of finding a workable service combination. The period should be long enough to allow the carrier to overcome the normal losses of a new business. The fact that the operations will incorporate new concepts and technology argues for a longer period of time to allow the experimenter to determine the best way to package, market and manage his service. A period of two years seems reasonable.

Another problem arises from multiple applications for exemptions in the same service area. Assuming all applicants are qualified and offer different services, their exemptions should



be granted. This is consistent with the goal of exposing all carriers to the discipline of market mechanisms.

During the period of the exemption the Commission should not interfere with the carrier's operations. He must be allowed to identify needs and discover the cost-service mix which will meet consumer demand and make his service successful. Certain financial reports and evaluative data are all that should be required.

The measurement of success or failure involves difficult factual determinations. It should be tied to the experimental goals of the carrier. Thus an entrepreneur might be judged on the profitability of his operations. A service designed to achieve non-commercial objectives, however, should be evaluated by other standards. The generation of new demand might be an important factor. Two showings which should probably be required in any context are the existence of a permanent demand for the service and the carrier's capacity to continue operations.

Since this article assumes that total deregulation is not a politically available alternative, procedures for a successful carrier's transition to a regulated status must be considered. To prevent operators from making a quick profit from their exemption and then abandoning service, the Commission should be able to compel carriers to continue.

Regulation following an exemption should be as flexible as possible to avoid converting a successful experiment into an unsuccessful service. Rates might be tied to the cost per unit of transportation, measured in ways which are sensitive to the specialized services involved. The Commission should not intervene with regard to the carrier's management and staffing policies, nor should it regulate service levels. The system should encourage further experimentation by a successful innovator, perhaps by creating a presumption in favor of granting him an exemption for a subsequent untried concept. At the same time, however, a Commission might have to relax its standards for service discontinuance by inefficient competitors.

### III. ACQUIRING OPERATIONAL AUTHORITY

The preceding sections of this paper have examined the scope and rationale of present exemptions from state and federal economic regulation of motor carriers, noting and analyzing arguments in favor of exemption for the several possible manifestations of DAB. In addition, a new exemption in favor of experimental operations was proposed.

The focus now shifts to the problem of acquiring the right to operate: that is, assuming that no exemption from the regulatory jurisdiction is available, how does one proposing a new experimental service convince the regulatory body that he should be allowed to operate?

## A. STATE AUTHORITIES

### 1. *Public Convenience and Necessity*

State statutes restricting entry into the motor carrier industry, as well as entry into the transportation or public utility fields generally require that a certificate authorizing the operation shall not issue unless the regulatory commission finds that the operation is required by the "public convenience and necessity." There are, of course, many variations on this basic theme. In New Jersey the certificate will issue if the proposed operation is "necessary and proper for the public convenience and properly conserves the public interests,"<sup>145</sup> while in New York it must be shown that the operations are or "will be required by the present or future public convenience and necessity."<sup>146</sup> At the federal level, the Motor Carrier Act of 1935 established a "public convenience and necessity" standard.<sup>147</sup>

A few states have the statutory standard that the certificate will issue if the operations are "in the public interest," but the interpretation has been that "the phrase is either synonymous with public convenience and necessity or includes the latter phrase."<sup>148</sup> Oregon has a similar standard, interpreted to be less restrictive than "public convenience and necessity," in order to provide less protection for existing carriers than the conventional standard.<sup>149</sup>

The public "convenience" cannot be circumscribed to the extent of holding the term "necessity" to mean an essential requisite.<sup>150</sup> In an early but leading case in Rhode Island, the

145. N.J. STAT. ANN. § 48:2-14 (1969).

146. N.Y. PUB. SERV. LAW § 63(1) (McKinney 1955).

147. "[A] certificate shall be issued to any qualified applicant . . . if it is found . . . that the proposed service . . . is or will be required by the present or future public convenience and necessity . . . ."

49 U.S.C. § 307(a) (1964).

148. *Maine Central Transportation Co.*, 10 P.U.R.3d 489 (Maine Pub. Util. Comm'n 1955).

149. *Mt. Hood Stages, Inc. v. Hill*, 243 Ore. 283, 413 P.2d 392 (1966).

150. *Mulcahy v. Public Serv. Comm'n*, 101 Utah 245, 117 P.2d 298 (1941). See also *Michigan-Wisconsin Pipeline Co.*, 67 P.U.R. (n.s.) 427 (1947) (necessity is not used in its lexicographical sense of *indispensably*

court stated that convenience meant not indispensable but "reasonably requisite."<sup>151</sup> The phrase has an interpretive gloss (where separate statutory provisions do not expressly so provide) that consideration must be given to the possible impact of decreased patronage on existing carriers. Perhaps the best statement of the various considerations involved in a determination of public convenience and necessity was that given by the Interstate Commerce Commission in the first bus case decided under the Motor Carrier Act of 1935:

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 applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.<sup>152</sup>

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*requisite*); *New England Greyhound Lines, Inc.*, 54 P.U.R. (n.s.) 498 (Conn. Pub. Util. Comm'n 1944) ("reasonably necessary" is sufficient).

151. *Abbot v. Public Util. Comm'n*, 48 R.I. 196, 136 A. 490 (1927). Other state definitional approaches to public convenience and necessity follow a similar pattern:

[The word] "necessity" means a public need, without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or wholesome pleasure, or both—without which the people generally of the community are denied, to their detriment, that which is enjoyed by other people generally, similarly situated.

*Oklahoma Transp. Co. v. State*, 198 Okla. 246, 177 P.2d 93 (1947), quoting from *Chicago, R.I. & P.R.R. v. State*, 126 Okla. 48, 258 P. 874 (1927).

The statute does not require that the service be indispensable; it is sufficient if the service is "needful and useful to the public . . ." *Eagle Bus Lines v. Illinois Comm. Comm'n*, 3 Ill. 2d 66, 119 N.E.2d 915 (1954).

Cf. *San Diego & Colo. Ferry Co. v. Railroad Comm'n*, 210 Cal. 504, 511, 512, 292 P. 640, 643 (1930): "If it is of sufficient importance to warrant the expense of making it, it is a public necessity. . . . A thing which is expedient is a necessity. . . . Inconvenience may be so great as to amount to a necessity. . . . A strong or urgent reason why a thing should be done creates a necessity for doing it."

That all such "definitions" are of little use is also well recognized. The phrase "must be construed and considered according to the whole concept and purpose of the act. As to what constitutes 'public convenience and necessity' must fundamentally have references to the facts and circumstances of each given case as it arises, as the term is not, and was not intended to be, susceptible of precise definition." *Utah Pac. R.R. v. Public Serv. Comm'n*, 103 Utah 459, 135 P.2d 915 (1943).

152. *Pan American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936). The rationale of the "public convenience and necessity" requirement in federal legislation has been stated to be "to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest." *Texas & N.O. R.R. v. Northside Belt Ry.*, 276 U.S. 475, 479 (1928).

a. "Adequacy"—*The Conventional View*. A finding that the existing service is "adequate" is a complete negation of "necessity" for the proposed service.<sup>153</sup> This terminology unfortunately results in considerable conceptual confusion since the two crucial conflicting factors, potential benefit from the new service and potential economic harm to existing service tend to be subsumed under the conclusory finding of "adequacy of existing service."

The obfuscation of these central considerations typically redounds to the benefit of existing carriers. What is unusual is that this result is often enforced by the courts against an unwilling Commission. In *Lake Shore Motor Coach Lines, Inc. v. Bennet*,<sup>154</sup> the Utah Commission had certified an additional carrier providing pick-up and delivery service for newspapers and motion picture films. Although there was ample testimony by potential customers of their desire for the frequent service<sup>155</sup> and although the Commission had not found that existing carriers would be adversely affected, the court reversed the grant of authority, ruling that "public convenience and necessity" required a specific, affirmative showing and finding by the commission that the existing service was in some way "inadequate."<sup>156</sup>

153. *Schmunk v. West Neb. Express*, 159 Neb. 134, 65 N.W.2d 386 (1954).

154. 8 Utah 2d 293, 333 P.2d 1061 (1958).

155. The court was not impressed by such evidence, reasoning:

Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing the mere generality that some members of the public would like and on occasion use such type of transportation service. In any populous area it is easy enough to procure witnesses who will say that they would like to see more frequent and cheaper service. *Id.* at 297, 333 P.2d at 1063.

Similarly, the Supreme Court of Mississippi has held that the testimony of four businessmen that they were dissatisfied with the speed of existing service was not "substantial evidence" of existing service so as to justify the authorization of a competitor. *Campbell Sixty-Six Express v. Delta Motor Line*, 218 Miss. 198, 67 So. 2d 252 (1953).

156. Such a result would be required in some states where a finding of inadequacy of existing service is explicitly commanded by statute rather than by interpretation of "public convenience and necessity." For example, in *Seaboard Airline R.R. v. Commonwealth*, 193 Va. 779, 71 S.E.2d 146 (1952), the court distinguished ICC cases on the ground that federal laws contained no provision like VA. CODE ANN. § 56-281 (1950), which specifically prohibited granting a certificate unless it was proved that the existing carrier was providing inadequate service.

However, such statutory provisions tend to be interpreted to facilitate new certifications. *See, e.g., State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 134 S.E.2d 689 (1964); *Atlantic Greyhound Corp. v. Commonwealth*, 196 Va. 183, 83 S.E.2d 379 (1954).

Such a restrictive attitude by court or Commission is common, but not universal. As the Supreme Court of Rhode Island noted, "Protecting existing investments . . . from even wasteful competition must be treated as secondary to the first and most fundamental obligation of securing adequate service for the public."<sup>157</sup> New Jersey courts similarly have refused to follow the strict interpretation of "adequacy," ruling that disadvantages to existing carriers may only be weighed in the balance against ultimate public advantages.<sup>158</sup>

As pointed out earlier, the enactment of a "public interest" standard for granting authority has been interpreted as a deliberate rejection of the protective "adequacy" rules associated with the "public convenience and necessity" standard.<sup>159</sup> In addition, the Maryland Public Service Commission, in consideration, among other factors, of the past and prospective economic growth of the state, recently changed its policy in interpreting the statutory standard "public welfare and convenience" from one of "regulated monopoly" to "regulated competition." The court approved both the change in stated policy and the result that adequacy of existing service was no longer a conclusive factor.<sup>160</sup>

b. *"Adequacy" and Pricing.* The prices of the existing and proposed services are typically ruled irrelevant to the question of "adequacy of existing service" and hence irrelevant in a certification proceeding on the ground that the Commission has separate independent authority to assure that rates are just and reasonable.<sup>161</sup> In jurisdictions where prices are relevant, the proposed lower rates must be proven compensatory and must have a reasonable prospect of long-run stability.<sup>162</sup> In any event, a

157. *Breen v. Division of Pub. Util.*, 59 R.I. 134, 135, 194 A. 719, 720 (1937) quoting from 3 O. POND, PUBLIC UTILITIES § 746 (4th ed. 1932). *Accord*, *Pacific Southwest Airlines*, 75 P.U.R.3d 508 (Calif. 1968).

158. *See* Application of Greenville Bus Co., 17 N.J. 131, 110 A.2d 122 (1954). *Accord*, *Elk River Bus Co.*, 74 P.U.R. (n.s.) 503 (W. Va. Pub. Serv. Comm'n 1948).

159. *See* text accompanying notes 148-49 *supra*.

160. *Maryland Transp. Co. v. Public Serv. Comm'n*, 253 Md. 618, 628-29, 253 A.2d 896, 902 (Md. Ct. App. 1969).

161. *See, e.g.*, *Fox*, Application Nos. 3156-59, Decision No. 9707, 1937 P.U.R. Annual 55,217 (Colo. Pub. Serv. Comm'n 1937). *But see* *Maryland Transp. Co. v. Public Serv. Comm'n*, 253 A.2d 896 (Md. Ct. App. 1969), where a Maryland statute expressly provided that in the issuance of certificates of "public welfare and convenience" the commission should consider the rate to be charged. MD. ANN. CODE art. 78, § 33(a) (1957).

162. *Mountain Stage Line*, Decision No. 45599, Application Nos. 31917 *et al.*, 1951 P.U.R. Annual 222 (Cal. 1951). *See also* *Service Gas Co.*, 15 P.U.R. (n.s.) 202 (Pa. Pub. Serv. Comm'n 1936).

showing of lower prices alone is rarely sufficient to sustain a grant of authority.<sup>163</sup> It has been held, however, that although rates should not ordinarily be considered as an element of convenience and necessity, the Commission must consider them where the proposed rates were as much as 46 percent under those of existing carriers.<sup>164</sup>

c. *First Chance*. Having determined that the existing service is in some manner inadequate, the question arises whether the Commission should give the existing carrier an opportunity to cure the inadequacy before certifying the application of a potential competitor. Some states provide by statute that the existing carrier must be given a specified period to provide any needed service.<sup>165</sup> Such statutes are designed to protect existing carriers from "undue and ruinous competition" from competitors who seek "to serve the same territory and thus deprive them of that which was theirs, rightfully acquired under a previously granted certificate."<sup>166</sup> There is considerable division among the states as to the wisdom of first-chance rules, whether established by statute or by interpretation of "public convenience and necessity."<sup>167</sup> Since the result of these rules is to give the existing carrier the first chance without consideration of the potential economic impact of certifying the applicant, their only justification is some policy of "fairness" to existing carriers. A better solution is to leave to the Commission the discretion to decide on a case-by-case basis whether the existing carrier should get a "first chance."<sup>168</sup> The possibility that a new

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163. *West Suburban Transp. Co. v. Chicago & W.L. R.R.*, 309 Ill. 87, 140 N.E. 56 (1923); *Fornarotto v. Public Util. Comm'rs*, 105 N.J.L. 28, 143 A.T.L. 450 (Sup. Ct. 1928).

164. *Airway Motor Coach Lines*, 35 P.U.R. (n.s.) 411 (Utah Pub. Serv. Comm'n 1940). In the case of traditional public utilities such as gas and electric companies the applicant who offers lower rates is sometimes used to force lower rates from existing operators. See, e.g., *Quinn*, 8 P.U.R. (n.s.) 134 (Colo. Pub. Util. Comm'n 1935), where authority was granted to the present operator subject to the condition that unless he should make effective the rates proposed by another applicant the latter's petition for operating authority would be reopened.

165. E.g., VA. CODE ANN. § 56-281 (1950).

166. *Virginia Stage Lines v. Commonwealth*, 185 Va. 390, 397, 38 S.E.2d 576, 580 (1946).

167. Such rules exist in Arizona, Colorado, Florida, Illinois, Louisiana, Mississippi, Montana, Nebraska, North Carolina, South Dakota, Texas, West Virginia and Virginia, while Pennsylvania, Rhode Island, Utah, Wisconsin and federal authorities are to the contrary. See citations in D. LOCKLIN, *ECONOMICS OF TRANSPORTATION* 694-95 (6th ed. 1966).

168. "Should such new service be rendered by existing carriers or by the new applicant . . . [w]hich in the opinion of the commission will

carrier may be certified provides both an incentive to existing carriers to maintain and develop their service and encouragement to outsiders for the development of new ideas and service techniques.<sup>169</sup>

## 2. *Response to Innovation*

The response of state Commissions and courts to proposals for new or different transportation service has varied widely. In a recent Nebraska case a bus company proposed to provide an express service for passengers and some freight items between points presently served by a single carrier operating only a local service. The Commission granted the application, finding that public convenience and necessity required the service and that the new operation was not likely to be detrimental to the existing service.<sup>170</sup> The declared statutory policy was to promote "efficient service," without "undue preferences or advantages, and unfair or destructive competitive practices."<sup>171</sup> The court, however, stated:

The only reasonable effect of this would be to permit passengers and shippers of express . . . a choice between transportation schedules . . . . Since [protestant] operated over this distance only local schedules . . . which were slower than those of [applicant], this would give rise to a conclusion that patrons and shippers would ordinarily and reasonably resort to the facilities of the [applicant] . . . .

These incidents could not well be considered as anything less than unfair and destructive competition within the meaning of the legal principles set forth herein. This is true since the evidence discloses preponderantly that the facilities of [protestant] were good, the operating conditions satisfactory, and that the capacity was more than sufficient. . . .

It may well be said that the traffic situation . . . presented elements of inconvenience, but not in the light of the evidence of conditions and circumstance of true necessity as that term must be applied to common carriers or public highways.<sup>172</sup>

The court accordingly vacated the grant of the certificate as arbitrary and capricious. Not only was the existing carrier en-

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best subserve the public convenience and necessity and welfare?" In determining this issue the Commission was directed to consider the effect on existing facilities, their investments and taxes, the effect on the economic, industrial, social and intellectual life of the territory to be served and the development of resources. *Mulcahy v. Public Serv. Comm'n*, 101 Utah 245, 261, 117 P.2d 298, 305 (1941).

169. D. HARPER, *ECONOMIC REGULATION OF THE MOTOR TRUCKING INDUSTRY* 109-10 (1959).

170. *Application of Greyhound Corp.*, 178 Neb. 9, 131 N.W.2d 664 (1964).

171. *Id.* at 14, 131 N.W.2d at 668.

172. *Id.* at 16-17, 131 N.W.2d at 669.

titled to a first chance to provide adequate service, but the "reasonable and necessary" interchanges and transfers of the local service could not support a claim of inadequacy. Moreover, the duplication of lines of transportation would be authorized "only for compelling reasons."<sup>173</sup>

This incredibly restrictive interpretation—that existing "adequacy" must bar a new and different service—should be contrasted with the view taken by the Utah Supreme Court in *Mulcahy v. Public Service Commission*.<sup>174</sup> There an applicant who proposed only additional common carrier trucking service was opposed by existing truckers and railroads. Taking the view that the statute should be applied so as to encourage improvements in service,<sup>175</sup> the court sustained the grant of a certificate stating:

To be adequate [the existing services] must safeguard the people generally from appreciable inconvenience . . . . And if a new or enlarged service will enhance the public welfare, increase its opportunities, or stimulate its economic, social, intellectual or spiritual life to the extent that the patronage received will justify the expense of rendering it, *the old service is not adequate*.<sup>176</sup>

*Greyhound* and *Mulcahy* represent the extremes of state policy on innovation. In the vast majority of states the policies are more ambiguous and their exposition less clearly articulated. Moreover, much of the judicial language can be seen as surplusage, sustaining the Commission's exercise of discretion. The occasional inconsistency of Commission policy statements may be explained in part by the theory that state Commissions, like the ICC,<sup>177</sup> are result-oriented, the statement of policy being an afterthought to the substantive decision on certification.

a. *Inter-Modal Competition and Adequacy*. The states have naturally been most receptive to new applicants where the differences in service were extreme—that is, in terms of traditional modal classifications of rail, water, land and air carriers. Modal differences, based on an emphasis on the medium of travel, are thus different in kind from service differences, for example,

173. *Id.* at 19, 131 N.W.2d at 670.

174. 101 Utah 245, 117 P.2d 298 (1941).

175. *Id.* at 251, 117 P.2d at 300.

176. *Id.* at 252-53, 117 P.2d at 301 (emphasis added). This language was quoted with approval in *Clintonville Transfer Line v. Public Serv. Comm'n*, 248 Wis. 59, 21 N.W.2d 5 (1945). The court in *Mulcahy* was clearly going full steam, even to the extent of citing *Marbury v. Madison* for the independent power of the executive branch (the Commission here).

177. See text accompanying notes 229-37 *infra*.



as between taxi and street buses. Nevertheless, modal differences and "mere" service differences are both generalizations subject to continuing technological change. The futility of viewing them as ultimate analytical tools for regulation seems adequately demonstrated by hovercraft<sup>178</sup> and DAB, respectively.

It is instructive, nevertheless, to consider these modal competition cases, because DAB seems to be the "most different" new service idea to appear in public passenger transportation since buses began to compete seriously with street railways in the 1920's. Moreover, the difficulties of urban public transportation systems today are analogous to the woes of the dying street railways at that time.

In these terms, the best state court decision construing "public convenience and necessity" in the context of a new mode of transportation is a 1929 Virginia case<sup>179</sup> where an electric railway contested the award of a certificate to a motor bus company. The court said:

The ability to carry in some manner all who apply for passage is not necessarily the touchstone. . . . [I]t is sufficient if there is a public demand for bus service in preference to other means of transportation. When people generally wish to travel in this way, they should be permitted to do so, and it is no sufficient answer to say that other carriers, in other ways, stand ready to give the necessary service.<sup>180</sup>

The court recognized that the railway was in serious financial difficulty, receipts having steadily decreased since the end of World War I. The court reasoned, however, that these difficulties were due in part to the increasing competition of private cars, and "[t]he promise of relief depends upon the growth of Hopewell, to which easy flow of traffic must always . . . contribute."<sup>181</sup> Virginia policy had not been to curtail competition; the railroad investors "took their chances":<sup>182</sup>

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178. Sarisky, *The Law and an Unprecedented Mode of Transportation: The Hovercraft*, 16 J. OF PUB. LAW 138 (1967).

179. *Petersburg, Hopewell & City Point Ry. Co. v. Commonwealth ex rel. State Corp. Comm'n*, 152 Va. 193, 146 S.E. 292, 67 A.L.R. 931 (1929). This case is distinguishable from ordinary application of the "public convenience and necessity standard" because it involved a Virginia statute providing that the existence of a carrier in a territory would not alone be sufficient cause to deny a certificate but could be considered in limiting the number of vehicles the applicant could offer. *Id.* at 203, 146 S.E. at 294, 67 A.L.R. at 935.

180. *Id.* at 205, 146 S.E. at 295, 67 A.L.R. at 936.

181. *Id.* at 202, 146 S.E. at 294, 67 A.L.R. at 935.

182. Motor vehicle operators had to acquire certificates but under Virginia laws, unlike federal law after 1920, railroads were free to

We have to concede that, in industrial development, the law of the survival of the fittest is not to be gainsaid. Stage coaches and canals were in many instances a total loss, made so by railroads, which in their turn clashed with interurban electric lines, and now both are facing the automobile in its varied forms. . . . Should the time come when airplanes are preferred by a substantial part of the public, this preference, in its turn, will have to be heeded. They, too, will have then become a necessary public convenience, not to be put aside because buses can carry all who wish to go.<sup>183</sup>

Substantially the same line of reasoning was followed by a New Jersey court in 1935.<sup>184</sup> The opinion pointed out that the proposed bus service was of a different character than that afforded by the railroad, concluding that "if railroads 'are entitled as public utilities to protection against destructive competition, it should be a competition with a service which they have been giving.'"<sup>185</sup>

Similarly, in *Union Pacific Railroad Co. v. Public Service Commission*,<sup>186</sup> the Utah Supreme Court sustained the grant of authority to a motor common carrier of goods against the railroad's argument that its own service was "adequate." Emphasizing the flexible door-to-door service offered by the trucker,<sup>187</sup> the opinion relied on the same sort of historical developmental principle as did the Virginia court in *Petersburg*:

[C]onvenience and necessity are found, and consist largely, in the changing conditions and demands of the times. There was a time when the covered wagon, river scow, and pony express fairly well served the public needs, but as they became inadequate there arose a need for railroad facilities. So too a railroad may function well as railroad transportation and yet in the very nature of things not adequately serve the need of the community.<sup>188</sup>

### 3. *Encouraging Innovation, Less Than Modal Differences, and Arguments for DAB*

The leading state case on the need to encourage innova-

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parallel each other as they wished. *Id.* at 202, 146 S.E. at 294, 67 A.L.R. at 935.

183. *Id.* at 206, 146 S.E. at 295-96, 67 A.L.R. at 937.

184. *West Shore R.R. v. Board of Pub. Util. Comm'rs*, 13 N.J. Misc. 180, 177 A. 93 (Sup. Ct.), *aff'd*, 116 N.J.L. 191, 183 A. 180 (Ct. Err. & App. 1935).

185. 13 N.J. Misc. at 182, 177 A. at 94.

186. 103 Utah 459, 135 P.2d 915 (1943).

187. For examples of willingness to assess modal advantages and disadvantages in contexts other than certification see *Chicago R.R. v. Commerce Comm'n ex rel. C.M.C. Co.*, 336 Ill. 51, 167 N.E. 840 (1929); *City of Bayonne v. Board of Pub. Util. Comm'rs*, 126 N.J.L. 396, 19 A.2d 809 (Sup. Ct. 1940).

188. 103 Utah at 465-66, 135 P.2d at 918.

tion is *Motor Transport Co. v. Public Service Commission*.<sup>189</sup> The case itself was addressed, strangely enough, only to the need for competitive, identical common motor carrier service in order to encourage improvements, so that everything it says about innovation applies *a fortiori* where the applicant is presently offering a different service. In reply to the protestant's argument that any inadequacy could be cured by order, the Commission said:

Service orders cannot take the place of management initiative or require the exercise of such initiative in experimentation and service improvements designed to follow closely the changing current of traffic needs. Management alone can pioneer this field and create a service which is above minimum standards and better even than "reasonably adequate."<sup>190</sup>

While the Commission had earlier adopted a conventional "adequacy" interpretation of the statute, and it was conceded by all that the existing carriers were giving "reasonably adequate" service so that a service complaint could not be prosecuted against it, the court nevertheless sustained the administrative ruling that the existing service "has failed to meet the test of the public interest and public convenience and necessity in this broader sense . . . ." <sup>191</sup> The court took the view that the statute did not create any presumption for or against monopoly or competition,<sup>192</sup> so that the Commission was free to choose which would best serve the public interest.<sup>193</sup>

Some state courts, at certain times, have made encouragingly strong statements in favor of *different* service, even though of the same mode as the existing service. In *Mulcahy v. Public Service Commission*, for example, the court said:

The statute should be so construed and applied as to encourage rather than retard mechanical and other improvements in appliances and in the quality of the service rendered the public . . . .<sup>194</sup>

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189. 263 Wis. 31, 56 N.W.2d 548 (1953).

190. *Id.* at 36, 56 N.W.2d at 550.

191. *Id.* at 39, 56 N.W.2d at 551. The court in an earlier opinion had cited the extremely liberal standard in the *Union Pacific Railroad* case. See text accompanying note 186 *supra*.

192. Some state courts had apparently taken the view that statutes requiring certificates for operation were based on a theory of "regulated monopoly." *But see* *Union Pac. R.R. v. Public Serv. Comm'n*, 103 Utah 459, 466, 135 P.2d 915, 918 (1943) ("regulated competition is as much within the provisions of the act as is regulated monopoly").

193. However, one of the statutory duties of the Commission was to "prevent unnecessary duplication of service." 263 Wis. at 37, 56 N.W.2d at 551. See WIS. STAT. ANN. § 194.18 (1957).

194. 101 Utah 245, 251, 117 P.2d 298, 300 (1941). The statement was made in the context of a proposal for merely "additional" service. See

Beyond statements of policy, there seems to be rather general agreement that whatever "adequacy of existing service" may mean, it means less where the proposed service has distinctive characteristics. Commissions and courts in certification proceedings commonly discount existing adequacy when they distinguish between local and through service,<sup>195</sup> common carrier and express service<sup>196</sup> and livery service and route buses.<sup>197</sup> Moreover, it has been suggested (with direct application to DAB) as a general principle that the doctrine of adequacy must apply less strictly to any *irregular route* transportation service, even though the proposed and existing services are identical.<sup>198</sup> The corollary that prices are irrelevant in a certification proceeding is clearly inapplicable where the service is different, and a rate differential itself, if sufficiently large, may result in a "different service."<sup>199</sup>

It should be noted that this approach to adequacy may apply even though the existing transit system is operated by a public authority. In a recent California case<sup>200</sup> the court held that the Los Angeles Metropolitan Transit Authority statute did not preclude the Public Utilities Commission from certifying a special bus service from a limited number of pickup points to the Dodger

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also *Kansas Transp. Co. v. State Corp. Comm'n*, 202 Kan. 103, 105, 446 P.2d 766, 769 (1968) ("It is sufficient to show that the existing service is not of such a type or character which satisfies the public need and convenience . . . ."); *Petersburg, Hopewell & City Point Ry. v. Commonwealth ex rel. State Corp. Comm'n*, 152 Va. 193, 203, 146 S.E. 292, 295, 67 A.L.R. 931, 935 (1929) ("When more convenient and adequate service is offered to the public it would seem that necessity requires such public convenience should be served.")

195. *Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175 (1927). *Accord*, *Greyhound Lines, Inc. v. Public Util. Comm'n*, 68 Cal. 2d 406, 438 P.2d 801, 67 Cal. Rptr. 97 (1968).

196. *In re United Parcel Service, Inc.*, 256 A.2d 443 (Me. 1969).

197. *Dion v. Public Util. Comm'n*, 24 Conn. Supp. 403, 192 A.2d 46 (Sup. Ct. 1963).

198. *See, e.g.*, *Application of Young*, 171 Neb. 784, 789-90, 107 N.W.2d 752, 756 (1961):

While the . . . [adequacy doctrine] would apply rather strictly to cases involving applications for authority to operate buses within a city or in regular route service between cities and generally to regular route freight lines, it would, however, have very limited authority to operate irregular route authority.

*See also Northern Pac. Transp. Co. v. Public Util. Comm'n*, 69 Wash. 2d 472, 418 P.2d 735 (1966).

199. *Airway Motor Coach Lines*, 35 P.U.R. (n.s.) 411 (Utah Pub. Serv. Comm'n 1940). *See also Louisiana-Nevada Transit Co.*, 30 P.U.R. (n.s.) 40 (F.P.C. 1939).

200. *Los Angeles Metro. Transit Auth. v. Public Util. Comm'n*, 52 Cal. 2d 655, 343 P.2d 913 (1959).

baseball park if "public convenience and necessity" so required.<sup>201</sup> The certification was sustained on the grounds that the area and its transportation system were still growing and developing, that the authority was not yet ready to supply all the service that might be required, especially of a specialized variety, and that the private carrier, unlike the authority, would not be hampered by statutory geographical restrictions.<sup>202</sup>

Finally, a "first chance" interpretive rule should not apply when the proposed service is significantly different from existing service since the existing carrier is likely to lack the equipment, knowledge and desire to provide the different service. For this same reason, the question has been raised only seldom.<sup>203</sup> Similarly, first chance statutes have been held not applicable where the proposed service is different.<sup>204</sup>

The proposition that a Commission must weigh the public benefits likely to follow from a proposed new service against the probability and seriousness of the impact on existing services in assessing "public convenience and necessity" seems on its face entirely correct and entirely obvious. Nevertheless, some courts still reject this view.<sup>205</sup> The backwardness of the transportation industry generally and the fact that the motor carrier passenger industry has been almost entirely free of major innovations indi-

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201. The result of course depends on the statute involved. The California statute did not speak in explicit terms of exclusive authority for the public body. Compare the Massachusetts Bay Transit Authority statute, MASS. ANN. LAWS ch. 161 A, § 3 (1970) entitled "Additional Powers"[:] "(i) To provide *mass transportation service*, whether directly, jointly or under contract, on an *exclusive basis* . . ." (emphasis added).

202. However, to the extent that DAB serves a pick-up and distribution function supplemental to a scheduled route service, efficiency considerations alone suggest that the route carrier should get first chance to provide the coordinated service.

The ICC, for example, has always been receptive to the claims of railroads to provide their own pick-up and delivery motor service. Thus, in *Missouri Pac. R.R., Extension of Operations*, 41 M.C.C. 241, 243, the Commission granted such a railroad application:

[W]e believe it to be neither the policy of Congress nor the proper function of the Commission to retard any form of progress in transportation which will serve the public interest. Public convenience and necessity require the increased economy, frequency and flexibility resulting from the coordinated service in such a case.

203. See, e.g., *West Bros. v. H & L Delivery Service, Inc.*, 220 Miss. 323, 70 So. 2d 870 (1954).

204. *Corporation Comm'n v. Pacific Greyhound Lines*, 54 Ariz. 159, 94 P.2d 443 (1939); *Greyhound Lines, Inc. v. Public Util. Comm'n*, 9 Ohio 2d 187, 224 N.E.2d 761 (1967).

205. See, e.g., *Application of Greyhound Corp.*, 178 Neb. 9, 131 N.W. 2d 664 (1964), discussed at text accompanying notes 170-73 *supra*.

cates that state regulatory commissions are apt to be even less receptive. The problem is complicated by the fact that the statutory basis of regulation in many states has not been revised in many decades.<sup>206</sup>

It appears, therefore, that the primary task of a DAB applicant is to convince the administrative body of the worth of the developmental approach<sup>207</sup> illustrated in the preceding section. If the theory can be established, it can then be shown that DAB could fill the gap in public transportation between high cost individualized service by taxis and inflexible route service by existing transit systems. The applicant could argue that this gap has become increasingly important with the progressive dispersal of urban areas, the continuing trend toward suburban industrial locations with resulting suburb-suburb trip demand patterns, and the growing pressure to restrict the use of private autos in urban areas.

## B. PERSPECTIVES FROM THE FEDERAL EXPERIENCE

### 1. *Use of Competition to Induce Service Improvements*

The Interstate Commerce Commission has long held the belief that one of the major ways to develop new and improved passenger service is to encourage strong competition among carriers. To this end it has often received favorably proposals for new types of service. For example, in *Pan American Bus Lines Operation*,<sup>208</sup> the first bus case decided under the Motor Carrier Act of 1935, the applicant proposed an expansion of its New York-Miami service. The company provided free pillows, ice-water and porters who doubled as tour guides. In addition, no change of buses was required and baggage was checked only once. The service also featured stops at several tourist attractions en route. Pan American contended on this evidence that

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206. For example, the hearing examiner for the Rhode Island Department of Public Utilities is of the opinion that no irregular route passenger carrier other than taxis could be certified under existing Rhode Island law. His department's rules and regulations are presently being revised for the first time since 1923. Interview with Mr. Riley, hearing examiner, Rhode Island Department of Public Utilities, in Providence, R.I., Aug. 29, 1969.

207. "The necessity to be provided for is not only the existing urgent need, but the need to be expected in the future, so far as may be anticipated from the development of the community, the growth of industry, the increase in wealth and population, and all the elements to be expected in the progress of a community." *Campbell v. Illinois Comm. Comm'n*, 334 Ill. 293, 296, 165 N.E. 790, 792 (1929).

208. 1 M.C.C. 190 (1936).

it had tapped a new market and that 70 percent of its passengers formerly traveled by means other than common carrier motor vehicle.<sup>209</sup> The Commission agreed that Pan American's traffic was largely "newly created traffic rather than business taken from other carriers" and that the application involved "a new and distinctive form of service, better adapted to long distance through service than that which protestants had theretofore maintained . . . ."<sup>210</sup> (A DAB-type operation could of course make closely analogous arguments with respect to its impact on route-buses and rail transit on the one hand and taxis on the other.) In answer to the objection that the Commission should require existing carriers to provide any additional "necessary" service prior to granting certificates to new carriers, the Commission replied, "[p]ublic regulation can enforce what may be called reasonable standards of safe, continuous, and adequate service, but it can hardly be expected to take the initiative in experimentation and the development of new types of service."<sup>211</sup> The Commission stated that the grant of certification was influenced by its view that the motor bus service was a "new and developing industry" and that the operation would "in any event serve a useful experimental purpose."<sup>212</sup> In *Santa Fe Trails Stages, Inc.*,<sup>213</sup> the ICC reiterated its concern with fostering new and improved passenger service and stated its working principle that effective competition was a necessary precondition of that goal. The Commission there granted certification to a competing bus line, reasoning that "[r]egulated monopoly is not a complete substitute for competition. The latter fosters research and experimentation and induces refinements in service which are not likely otherwise to be accomplished."<sup>214</sup> The Commission came very close to establishing a presumption that a service which faced no competition could not be "adequate," saying, "we might very reasonably say that where there is ample traffic a dominant existing service without any effective competition is not all that experience has taught that the public needs for its best interests and consequently is not an adequate service."<sup>215</sup>

The results of both these cases however, and the strong Commission language used therein must be seen in the light of the

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209. *Id.* at 193.

210. *Id.* at 208.

211. *Id.* (emphasis added).

212. *Id.* at 210.

213. 21 M.C.C. 725 (1940).

214. *Id.* at 748.

215. *Id.*

dominant factor of the intercity motor-bus industry—the Greyhound Corporation. The Commission, in response not only to Greyhound's overwhelming size relative to its competitors but also to its extremely aggressive competitive tactics,<sup>216</sup> has always been receptive to competitive applications. Nevertheless, the Commission also has decided in favor of a proposed competitive service when Greyhound was not involved, even when the protesting carrier was operating at a deficit.<sup>217</sup>

The Commission's policy of encouraging competition to induce service improvements, while said to be most pronounced in bus cases,<sup>218</sup> is certainly not limited to that field, as "[i]t has been [the Commission's] view that in order to develop a healthy transportation system in a territory, a certain degree of competition should be encouraged."<sup>219</sup>

Such language accords with the fact that the ICC, unlike some state commissions, has never felt bound by a "first chance" rule that existing carriers should be accorded an opportunity to provide any additional service found to be required by public convenience and necessity.<sup>220</sup> The federal courts have con-

216. See, e.g., C. FULDA, COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION 88-89 (1961):

There was also a second-class cut-rate service run with obsolete equipment by Dollar Lines, a Greyhound subsidiary, from San Francisco to Portland, and by Independent Stages, a North Coast subsidiary, from Portland to Seattle, and return. Both were maintained by their parent corporations "solely as fighting ships wherewith to meet and discourage competition."

The methods adopted in pursuit of these objectives included insufficient schedules and intentional crowding; people were told that they could not buy tickets, ticket holders were refused passage and advised to wait or go over to Greyhound, reservations were not honored, employees were discourteous, baggage was misplaced.

The situation Fulda describes led to West Coast Bus Lines, Ltd., Common Carrier Application, 41 M.C.C. 269 (1942), *rev'g* 32 M.C.C. 619 (1942), *dismissed sub nom.* North Coast Transp. Co. v. United States, 54 F. Supp. 448 (N.D. Cal.), *aff'd per curiam*, 323 U.S. 668 (1944).

217. Norfolk S. Bus Co. v. United States, 96 F. Supp. 756 (E.D. Va.), *aff'd per curiam*, 340 U.S. 802 (1950). However, this case is distinguishable because it involved not an ordinary route-extension application but the lifting of a "closed door" restriction on existing operations which "could be justified only in unusual circumstances." Moreover, it was not shown that the protestant's deficit was associated with this particular route.

218. See C. FULDA, *supra* note 216.

219. Associated Transports, Inc., Extension—Kansas, 54 M.C.C. 528, 529 (1952). *Accord*, Balch & Martin Motor Express, Common Carrier Application, 47 M.C.C. 75, 78 (1947).

220. See, e.g., Auclair Transp., Inc. v. United States, 221 F. Supp. 328 (D. Mass. 1963), *aff'd per curiam*, 376 U.S. 514 (1964) (the Commission's opinion in *Auclair* is Railway Express Agency, Inc., Extension—Nashua,



sistently sustained the Commission's view that certification of additional carriers was a permissible alternative to enforcing the duty of existing carriers to provide adequate service. In *Davidson Transfer and Storage Co. v. United States*,<sup>221</sup> the Commission had found that refrigerated truck service between New York and Washington was repeatedly delayed or improperly refrigerated, particularly with regard to small shipments. The court affirmed the Commission's certification of an additional carrier, saying:

We think that one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to compel adequate service . . . . The conception that the public must wait while the Commission exercises its statutory powers fortified by orders of court, to compel existing carriers to do what they should do, is one which does not commend itself to common sense and the public interest.<sup>222</sup>

While the Commission may seem to have adopted a protective attitude, especially toward railroads and other common carriers of goods, in recent years, the courts have generally been hostile to any tendencies away from competitive goals. In *Nashua Motor Express, Inc. v. United States*,<sup>223</sup> the court reversed the Commission's denial of a certificate to a potentially competitive common carrier trucker, reasoning that the Commission was incorrect in relying on adequacy of existing service and in failing to consider other essential elements of "public convenience and necessity" such as the desirability of competition, improved service and different kinds of service. The court took the position that the Commission had established a rule of law that inadequacy of existing service was a necessary element to any grant of certification. "While there is some authority for this view . . . we feel that the better rule is embodied in the more numerous cases to the contrary."<sup>224</sup>

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N.H., 91 M.C.C. 311 (1962) ); *Lang Transp. Corp. v. United States*, 75 F. Supp. 915 (S.D. Cal. 1948).

221. 42 F. Supp. 215 (E.D. Pa. 1941, as amended Jan. 8, 1942), *aff'd per curiam*, 317 U.S. 587 (1942).

222. 42 F. Supp. at 219, 220.

223. 230 F. Supp. 646 (D.N.H. 1964).

224. *Id.* at 652. *Accord*, *Younger Bros. v. United States*, 289 F. Supp. 545 (S.D. Tex. 1968).

Federal administrative decisions emphasizing the importance of developing new kinds of service to meet future needs are not limited to the Interstate Commerce Commission. *American Airlines, Inc. v. CAB*, 192 F.2d 417 (D.C. Cir. 1951) was a controversy over the CAB's certification of four air carriers of property only. At the time there were no cargo-only air carriers, and the project involved new aircraft design, new promotion methods, new arrangements of schedules, etc. *Id.* at 420. Although the intervening combination carriers argued

2. *New or Different Service, Intermodal Competition and the "Adequacy" Doctrine.*

The reasoning of the cases in the preceding section, that certifications should be granted in order to establish competition which will then induce service improvements, of course suggests that, *a fortiori*, where a new service such as DAB is already in existence and being presently offered by an applicant, the existing service can not be "adequate."

The Supreme Court endorsed this line of reasoning in *United States v. Pierce Auto Freight Lines, Inc.*,<sup>225</sup> by sustaining the Commission's finding of "inadequacy" of present service where the present service involved interchanges and the applicant proposed to operate a single through line service.

Moreover, whatever importance might be assigned to the adequacy of existing service, it was clear that the factor carried least weight where the potential competitor was another mode. In *Alabama Great Southern Ry. v. United States*,<sup>226</sup> a water carrier applied for authority to carry loaded railroad box cars between Savannah and other ports.<sup>227</sup> The protesting railroads asserted the adequacy of rail service to Savannah. The court

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that the factual evidence of record would not justify the certification of any *all-cargo* carriers, the CAB, relying largely on its own expertise, concluded that there was "an existing potential domestic traffic for air freight of not less than one billion ton-miles annually." *Id.* at 422. The court rejected the combination carriers' argument that the Board could look only to the evidence of record to justify the certificate, quoting with approval from the Board's opinion:

[W]e cannot agree with the contention that the issue of public convenience and necessity in the present case is to be resolved solely on the basis of past and current facts. . . . Our decision must also take into account . . . broad considerations of future welfare related to the development of a new type of air commerce which until a comparatively recent time has received little attention. *Id.* at 421.

Similarly, in *Tennessee Gas Pipeline Co.*, 73 P.U.R.3d 1 (F.P.C. 1968), the Federal Power Commission granted a certification of public convenience and necessity to construct high-capacity pipeline facilities for the transportation of off-shore gas even though they assumed that such gas, not yet attached, could be made available only at prices higher than those at which gas could presently be purchased on shore, finding that early developments of the off-shore reserves and their attendant transportation facilities was in the public interest.

225. 327 U.S. 515 (1946).

226. 103 F. Supp. 223 (E.D. Va. 1952).

227. Although this case involved an application and certification of *temporary* authority, the court asserted that "[e]xistence of other service is but one element to be considered. In this regard reason allows no distinction between temporary and permanent certificates." *Id.* at 227.

sustained the grant of certification, ruling that water carriers could not be foreclosed merely because there were existing motor, rail or air carriers "physically capable" of providing service. The existence of other service was only one element to be considered:

Perhaps there may be circumstances in which the presence of transportation other than water carriage can be found to satisfy every need. But certainly it cannot be so held until the National purpose to foster a merchant marine, the Nation's policy to develop and preserve "a national transportation system by water, highway, and rail", and the area's reliance upon the water to provide it employment and industry as well as transportation, especially carriage of the kind afforded peculiarly by ships, have been weighed and discarded as unattainable or impracticable. Service, not simply transportation, is the stipulation of the statute.<sup>228</sup>

The confusion and difficulty experienced by the Commission in attempting to adapt the adequacy of existing service test in a multimodal context, as well as the resulting vacillation, can be seen in a case arising soon after the *Alabama* case. In *A. J. Metler Extension*,<sup>229</sup> the Stauffer Chemical Co. had built a plant at Lowland, Tennessee, 50 miles from Knoxville, for the production of sulfur-based chemical products. The crude sulfur used by the plant originated in Louisiana and was moved to Knoxville by barge, thence to the plant at Lowland by railroad cars. The applicant, A.J. Metler, proposed to build his own dock facility at Knoxville and transport the sulfur by dumptruck-type vehicles from there to the plant. Stauffer and Metler introduced evidence of several advantages of the motor carrier operation. For example, the trucks could dump the sulfur directly into process, thus eliminating the need for large storage facilities and extra handlings necessitated by rail service. The motor carrier vehicles could arrive continually while rail shipments tended to arrive in large blocks of cars at a time. The plant's rail spur and storage facilities were not adequate to accommodate the numbers of cars and the volume of sulfur thus involved. Finally, the trucks could arrive more predictably. The transit time of individual rail cars for the 50 mile trip had varied from one to ten days, thus necessitating keeping rented unloading cranes and other equipment on hand for indefinite periods.

Division 5 of the Commission apparently found that there was "no convincing evidence on this record that the [rail carriers] . . . would not meet the shipper's reasonable transporta-

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228. *Id.*

229. 62 M.C.C. 143 (1953) (second report on reconsideration).

tion requirements.”<sup>230</sup> Upon reconsideration, the full Commission affirmed the division’s conclusion stating that Stauffer’s preference for the motor service was “predicated upon its ‘desire’ to obtain reduced transportation costs and to promote certain operating efficiencies in its plant rather than upon a showing of any real deficiency in the transportation service offered by existing [rail] carriers.”<sup>231</sup>

The two major deficiencies of the “adequacy of existing service test” in a multimode context were thus glaringly revealed. First, there is no common denominator on which to assess the “adequacy” of existing service against a proposed *different* service. It is not surprising, therefore, that “adequacy” becomes only a conclusory label, reflecting the decision that the certification will not be granted. Second, the Commission in administering the “adequacy” test in numerous cases involving only one mode had applied the conventional doctrine that prices of the proposed and existing service were irrelevant in a certification proceeding.<sup>232</sup> This doctrine made perfectly good sense in that context since the Commission had separate power to assure that rates were just and reasonable.<sup>233</sup> Moreover, it seems entirely reasonable for the Commission to adopt such a doctrine on the grounds that it would be very unlikely that an applicant desiring to provide the same service as existing carriers with the same types of equipment would be willing or able in the long run to live up to his claims in a certification proceeding that he would offer significantly lower rates. These justifications of the doctrine are wholly inapplicable in a multimode situation.

From this report, on reconsideration referred to above, Metler filed an appeal in the federal district court. After the Justice Department indicated some uncertainty that the decision could be successfully defended, the Commission issued a second report on reconsideration. Upon the same record the Commission granted the certificate, citing its duty under the National Transportation Policy to preserve the inherent advantages of each

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230. *Id.* at 149 (dissenting opinion). The division 5 decision, without opinion, is noted at 53 M.C.C. 823.

231. 61 M.C.C. 335, 340 (1952) (first report on reconsideration).

232. For example, the comparative level of rate structures cannot be considered as a basis for denial of authority sought any more than it could be so considered in support of a grant of authority. Freight Transit Co., Extension, 78 M.C.C. 427, 432 (1958).

233. “If the sole dissatisfaction stems from the belief that rates of existing carriers are unjust or unreasonable, appropriate relief is available under other provisions of the Interstate Commerce Act.” Carl Subler Trucking, Inc., Extension, 77 M.C.C. 707, 713 (1958).

mode<sup>234</sup> and finding upon reexamination that it was in fact impractical for Stauffer to use the railroad and that "in the circumstances here present the rail service is insufficient and inadequate reasonably to meet the shipper's need . . . ."<sup>235</sup>

Nevertheless, the Commission strove mightily to preserve the traditional adequacy concept stating:

Given a limited amount of traffic and an existing carrier of whatever mode which needs it more or less urgently, the question whether a competing service shall be authorized turns upon the question as to the relative or comparative adequacy of the existing service.<sup>236</sup>

Thus the Commission attempted to subsume the factor of economic impact on the existing carrier, an important but separate consideration, under the overburdened rubric of adequacy. Similarly, it gave lip service to the associated doctrine of price irrelevancy saying only that "[a]lthough costs definitely are not the *controlling consideration influencing the shipper*, the overall cost of the proposed barge-motor movement would be somewhat lower than either barge-rail or all-rail . . . ."<sup>237</sup> The Commission had thus succeeded in delaying a fullscale judicial test of the "adequacy" doctrine for a few more years—until 1957.

### 3. *Erosion of the Adequacy Doctrine and its Price-is-Irrelevant Corollary by the Higher Federal Courts*

Despite the relatively unrestrictive attitude of the Commission toward the certification of competitive passenger service illustrated by such cases as *Pan American Lines* and *Santa Fe Trails Stages*, it maintained a very protective stance with regard to common carriers of property, as illustrated by the *Metler* case. This difference in policy seems to result from a set of factors. Most important, one purpose of economic regulation of the motor carrier industry has been to protect the railroads,<sup>238</sup> not only by restrictions on entry but also by minimum rate regulation. The railroads have of course not desired to be protected from the loss of their passenger traffic—quite the contrary. A second major reason for promoting passenger carriage competition is the overriding domination of the industry structure by Greyhound. Moreover, the intercity motor carrier passenger industry has

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234. See note preceding 49 U.S.C.A. § 1 (1959).

235. 62 M.C.C. at 148.

236. *Id.*

237. *Id.* at 147 (emphasis added).

238. See A. FRIEDLAENDER, *THE DILEMMA OF FREIGHT TRANSPORTATION REGULATION* (1969); D. LOCKLIN, *supra* note 167, at 666.

been expanding so rapidly, due in part to the railroad default and the resulting captive market, that entry restrictions have not been necessary to preserve the stability of existing firms. Finally, the Commission may have been more responsive to competitive and innovative pressures in the passenger carriage industry simply because the political impact, in terms of persons directly affected, is much greater.

The cases discussed in this section trace the federal courts' attack on these protective attitudes toward transportation of goods. This development is very important for two reasons. The federal regulatory analogy to the situation of a DAB applicant before a state regulatory commission is not the bus-line application for competitive intercity authority but the common property carrier application which threatens the railroad service. In each case there is an existing carrier providing an essential service to a more or less captive traffic; the existing urban transit lines, like the railroads and unlike intercity buses, are experiencing traffic declines and usually are operating at a deficit, often with public subsidy. The DAB applicant offers not a similar, directly competitive service but a faster, more flexible, door-to-door service at significantly different prices—precisely the virtues offered by motor vehicle common carriers of goods as compared to railroads. Therefore one can expect the concerns and reactions of regulatory bodies to a DAB application to be very similar to those of the ICC to a motor common carrier of property application opposed by the railroads. More importantly, these cases provide the only instances in which the federal courts, especially the Supreme Court, have considered in any depth the adequacy and price-is-irrelevant rules as analytical and regulatory concepts.

The *Metler* case, as pointed out above, had revealed the major difficulties of these doctrines. Their use in that kind of intermodal property carriage context finally came up for consideration in *Schaffer Transportation Co. v. United States*.<sup>230</sup> Schaffer applied for a certificate to transport granite by truck from points in South Dakota and Vermont. Only rail service was presently available between all the points sought to be served by Schaffer. Division 5 of the Commission granted the certificate, relying on testimony by shippers that the truck service would produce fewer delays and allow them to expand their markets and sales, ship faster and maintain lower inventories. It was common

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239. 355 U.S. 83 (1957).

practice for the shippers to hold back and consolidate shipments of less than a carload so that they could take advantage of the lower carload rates. The shippers were also eager to equalize the competitive disadvantage they suffered compared to other granite producers who did have truck service.<sup>240</sup>

The full Commission, however, reconsidered and with four members dissenting, denied the application finding that the only real deficiency of rail service warranted by the record was that it was too slow. And this delay was the fault of the shippers' own action in delaying small shipments in order to get the lower rates. The Commission's decision was a conventional statement of the "adequacy" concept:

We have carefully considered applicant's arguments to the contrary, but are forced to conclude that the service presently available is reasonably adequate. The evidence indicates that the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service. It is well established that this is not a proper basis for a grant of authority. . . .<sup>241</sup>

The Supreme Court felt that the Commission had fallen from grace since the final *Metler* report and quoted language from that decision to the effect that "relative or comparative adequacy" of the existing service was the significant consideration when competitive goals were being accommodated with stability goals.<sup>242</sup> In a terse opinion by Chief Justice Warren, it then exploded both major tenets of the adequacy doctrine, ruling that the Commission had failed to give weight to the "inherent advantages" of the truck service, contravening the direction in the National Transportation Policy to administer the Interstate Commerce Act so as to "recognize and preserve the inherent advantages" of each mode,<sup>243</sup> and that rates could never be irrelevant in an intermodal competition situation since "[t]he ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize."<sup>244</sup>

There are two primary reasons why this rationale justifying

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240. *Id.* at 86.

241. *Id.* at 89.

242. *Id.* at 90.

243. *Id.* at 89.

244. *Id.* at 91. Justice Frankfurter dissented on the ground that the declaration of policy conveyed "a most generalized point of view" so that the decision did not violate those standards given the "massive experience" to be attributed to the Commission in this case. *Id.* at 94, 95.

certification of a new or different service would be of limited usefulness to a DAB type operation seeking certification from a state commission. First, the Supreme Court was able to rely on the statutory direction to "recognize and preserve the inherent advantages" of each mode. While some states have a very similar policy declaration,<sup>245</sup> most do not. That language was only added to the federal statute in 1940,<sup>246</sup> so there has been little opportunity for the usual duplication process at the state level. Nevertheless, although a number of states, such as Alabama and New Jersey, have no statutory transportation policy at all, most have language calling for a "balanced," "most efficient" or "coordinated" transportation system,<sup>247</sup> on the basis of which an applicant could make arguments analogous to those in *Schaffer*.

The second major reason for *Schaffer's* limited usefulness is that it was a case of clear modal competition. While there seems to have been little administrative or judicial thought given to the definition of "mode," it is generally assumed that there are only four—rail, motor, water and air.<sup>248</sup> Thus, while a DAB applicant would have such significant differences from conventional motor passenger carriers that the policy of deemphasizing the adequacy of existing service would seem fully applicable, such an approach would have little support in a policy declaration in terms of "modes." A few states, however, have policies even more favorable to a DAB applicant than the federal statute, since they speak of preserving inherent advantages "among carriers," with no limitation to modes.<sup>249</sup>

These difficulties with using the *Schaffer* rationale have been alleviated, however, by several cases decided since then. In *ICC v. J-T Transport Co.*,<sup>250</sup> the Commission had denied a motor contract permit on the ground that the applicant had failed to prove the inadequacy of existing common carrier motor services. The opinion of the Court, focusing on the statutory definition of a contract carrier as one who *inter alia* meets the "distinct need

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245. See, e.g., IND. ANN. STAT. § 47-1214 (1966); N.Y. PUB. SERV. LAW § 63-i(1) (McKinney 1955).

246. See note preceding 49 U.S.C.A. § 1 (1959).

247. E.g., LA. REV. STAT. § 45.161 (1950); ME. REV. STAT. ANN. tit. 35, §§ 1551 & 1555 (1964); MICH. COMP. LAWS ANN. § 475.2 (1966); MISS. CODE ANN. § 7633 (1956).

248. See *Reddish v. ICC*, 368 U.S. 81, 135 (1961) (Frankfurter, J., concurring).

249. See, e.g., ARK. STAT. ANN. § 73-1755 (1947); ILL. ANN. STAT. ch. 95-1/2, § 282.1 (Smith-Hurd 1958); KY. REV. STAT. ANN. § 281.590 (1963).

250. 368 U.S. 81 (1961).



of each individual customer,"<sup>251</sup> reversed on the ground that the Commission was thus unwarranted in placing on the applicant the burden of proof as to inadequacy of the existing services.<sup>252</sup> Moreover, the Commission was similarly unwarranted in indulging the presumption that the services of the existing carriers would be adversely affected by the loss of "potential" traffic, where they had not handled that traffic before.<sup>253</sup> The relation of a DAB operation to existing passenger carriers is closely analogous to the relationship between contract and common carriers in this case. Although a DAB applicant in most instances would be classified a common carrier because it would be willing to provide its services to anyone who requested them and although *J-T Transport* is distinguishable because of the particular federal statutes involved, he could argue that the new, distinctive nature of the service and the fact that many of its customer trips would be newly generated rather than siphoned from the traffic of existing carriers should relieve him of the burden of proving the inadequacy of existing service and that in any event "adequacy of existing service" should be less important where the proposed service is significantly different.

With regard to the "price-is-irrelevant" doctrine the Court went further. In the companion case, *ICC v. Reddish*,<sup>254</sup> the Commission had denied a contract carrier permit on the conventional ground that the shippers' primary desire was for lower rates. The Court ruled, quoting from *Schaffer*, that the rates were a factor entitled to weight in determining the need for the new service. Therefore, "[b]y analogy, contract carriage may be more 'economical' than common carriage by motor or rail within the framework of the national transportation policy . . ." <sup>255</sup> The Court continued the analogy by citing the Commission's own decision<sup>256</sup> to the effect that a shipper's need for more economical carriage would be considered if the existing carriers' rates were so high as to be prohibitive. A DAB applicant thus could cite this case as authority for the proposition that, if the service is different, the rates are relevant factors in determining the ade-

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251. *Id.* at 88, citing 49 U.S.C.A. § 303 (a) (15) (1959).

252. *Id.* at 90.

253. *Id.* at 89. Justice Frankfurter, joined by Justices Harlan and Stewart, dissented, *Id.* at 93, arguing that the Commission's discretion in carrying out the policy of protecting common carriers made the presumption permissible.

254. *Id.* at 81.

255. *Id.* at 91.

256. Herman R. Ewell, Extension—Philadelphia, 72 M.C.C. 645 (1957).

quacy of existing service and need for the new service. Moreover, this case, unlike *Schaffer*, rests on the national transportation policy to "promote . . . *economical* . . . service," a provision similar to that found in many state declarations of policy.<sup>257</sup>

Therefore, the two major objections to using the *Schaffer* argument on behalf of DAB—that DAB is not a separate "mode" and that *Schaffer* rested on the "preserving inherent advantages" language—have been substantially removed.

The judicial attack on the "adequacy" and "price-is-irrelevant" doctrines begun in *Schaffer* was pushed to the next logical development by the Fourth Circuit in 1963 in a passenger carriage case, *Alexandria, Barcroft and Washington Transit Co. v. Washington Metropolitan Area Transit Commission*.<sup>258</sup> The Transit Commission, which began operations in 1961, was created by the terms of a transit regulation compact entered into by Maryland, Virginia and the District of Columbia. The Commission granted a certificate of convenience and necessity to one Franklin to provide charter service to charitable and publicly supported groups on the ground that the rates of existing charter carriers were so high as to be generally out of reach of groups like the YMCA and Little League. Franklin planned to keep his rates lower by using inexpensive school bus-type vehicles.

The court's opinion, sustaining the grant of the certificate to Franklin, is remarkable in several respects. First, the court demonstrated its sensitivity to the unique transportation problems of urban areas, as compared to the essentially inter-city transportation dealt with by the ICC:

The creation of the Transit Commission was one of the steps taken by Congress in the realization that regulation of mass transit in a large metropolitan area requires solutions specifically tailored to the area's special needs. It is, therefore, to be reasonably expected that the Transit Commission, in the exercise of its administrative functions, may establish regulations and a body of law by case decisions that will differ from those of public bodies regulating transportation.<sup>259</sup>

Second, even though both the applicant and existing carriers were charter services, so that both *Schaffer* and *J-T Transport* were distinguishable, the court ruled that the rate differential itself was so great "as to make the service proposed by the applicant a completely different one," citing by analogy the *J-T* case.<sup>260</sup> This argument would be very important to a DAB ap-

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257. See statutes cited at note 249 *supra*.

258. 323 F.2d 777 (4th Cir. 1963).

259. *Id.* at 779-80 (emphasis added).

260. *Id.* at 781.

plicant attempting to overcome objections that the only useful feature he could offer as against existing taxis would be a lower price. Again analogous to a DAB situation, the court pointed out that the competitive effect of the new certificate would be minor since most of the applicant's traffic would be newly generated.

Finally, it is significant that the court reached this result in spite of the fact that the terms of the transit compact were comparable to the most protective of state statutes providing that:

no certificate shall be issued to operate over the routes of any holder of a certificate until it shall be proved . . . that the service rendered by such certificate holder, over such route, is inadequate to the requirements of the public necessity and convenience.<sup>261</sup>

#### 4. *Recent Developments in ICC Attitudes Toward Distinctive Passenger Service and DAB-Like Operations*

In *D.C. Transit System, Inc. Extension—Limousine service between Washington D.C. and New York, N.Y.*<sup>262</sup> the applicant proposed to offer non-stop service for persons and their baggage between National Airport in Washington and International Airport in New York. The seven-passenger limousines would offer air conditioning, reclining seats, desk-type trays, telephones and dictating machines. Division 1 of the ICC found that “[a]lthough the features which applicant would offer might be attractive to a limited portion of the traveling public, we are not persuaded that they are so distinctive as to transform what is essentially a regular-route, point-to-point operation into a new and distinctive type of service.”<sup>263</sup> Having assimilated the proposed operation to an ordinary bus service, the Commission found that existing non-stop reserved-seat service between New York and Washington (*not* the airports) was adequate and that certification would jeopardize this existing service.<sup>264</sup>

It is useful to contrast the *D.C. Transit* case with a later application to provide a special service arising in 1964.<sup>265</sup> The proposed operation involved non-scheduled, door-to-door, eight passenger limousine service between Worcester County, Massachusetts and race tracks and bingo games in New Hampshire and

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261. *Id.*

262. 81 M.C.C. 737 (1959).

263. *Id.* at 744.

264. Strangely, the only authority cited by the Commission was the *Pan American* case, where the application to provide special services was granted. See text accompanying notes 208-12 *supra*.

265. *Trailways of New England, Inc. v. United States*, 235 F. Supp. 509 (D.D.C. 1964).

Rhode Island. The opposing bus companies did not propose to offer door-to-door service and their charter operations were performed only with large buses, making a trip carrying only eight persons uneconomical. The Commission was sustained by the district court in its grant of certification. The Commission's grounds were that the new service was significantly different, "necessarily involving a different rate structure," and that the ability of the existing carriers to maintain their regular routes would not be impaired.<sup>266</sup>

The Commission's characterization notwithstanding, the new operation in this case is no more "distinctive" than the new operation in *D.C. Transit*. Both cases turn on the Commission's judgment as to the seriousness of the impact on existing carriers. It is certainly proper for this judgment to be the decisive factor in either of these cases, but the Commission seems loath to rely on it too heavily.

In a 1966 case involving a proposed operation more like DAB than any other application we are aware of,<sup>267</sup> the Commission went too far in bolstering its decisions by characterizing different service as not really different. The Arrow Line, Inc., proposed to offer a door-to-door, non-stop passenger service from any point in Hartford County, Connecticut, to any point in New York City. Anyone who requested the service, presumably by telephone, would be picked up by a seven-passenger limousine, with routing and pickups scheduled to meet the patron's desires as closely as possible.

In proceedings in which Greyhound and other regular-route scheduled bus operators appeared in opposition, the Commission denied the application, quoting the language from the *D.C. Transit* case that although the features offered might be desirable to a portion of the public, "we are not persuaded that they are so distinctive as to transform what is essentially a regular-route, point-to-point service into a new and specialized type of motor carrier operation for which there is a public demand."<sup>268</sup>

The district court reversed on appeal, ruling that the Commission's opinion was so ambiguous that the applicant was not sufficiently informed of the reasons for the denial. The court indicated uncertainty that the Commission had fulfilled its function of balancing the benefits of the new service against the com-

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266. *Id.* at 513.

267. *Arrow Line, Inc. v. United States*, 256 F. Supp. 608 (D. Conn. 1966).

268. *Id.* at 610.

petitive impact on existing service. In this connection the court, citing Commission decisions, stated its view of the balancing process:

[I]n resolving such conflicting considerations, there is, indeed, leeway given the Commission. However, it has been the practice to emphasize the economic impact when the proposed features are closely approximated by existing services, and, on the contrary, when the application does suggest a truly new and desired concept to run the risk of some loss of business to established operations.<sup>269</sup>

The court distinguished *D.C. Transit* not only on service characteristics but also on the ground that while the fare differential in that case had been "modest," in the present case the \$13-16 fare proposed by the applicant (as compared to \$3.95 for an ordinary Hartford-New York bus trip) was "ostensibly not competitive with existing bus lines, even combined with taxi fares."<sup>270</sup> The court concluded that despite the Commission's finding that the proposed operation was "essentially . . . an over-the-road service between major population centers," it had not justified its apparent disregard of the distinctive service features of the proposal.<sup>271</sup>

On remand the certificate was granted, the Commission concluding that the service was distinctive, that a public need for it had been shown and that existing service would not be significantly affected.<sup>272</sup> More importantly, however, the Commission reaffirmed *D.C. Transit*, distinguishing it on the basis that while the unscheduled, door-to-door, territorial service in this case was truly "different" from ordinary bus service, the luxury limousine service involved there, even though it apparently eliminated a trip between the city and the airport on each end of the trip, was not.

The standards set out by the court and the Commission's opinion on remand in *Arrow* were reaffirmed in a case illustrating closely another possible application of the DAB concept—the carpool-lease arrangement with customers doing the driving.<sup>273</sup> The proposed operation involved soliciting residents of northern New Jersey desiring to commute to Manhattan, forming them into groups and then "leasing" a nine-passenger limousine to the group at a per person, per week rate. The applicant leasing com-

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269. *Id.* at 611.

270. *Id.*

271. *Id.* at 612.

272. 103 M.C.C. 195 (1966).

273. *Monarch Associates, Inc., Common Carrier Application*, 107 M.C.C. 277 (1968).

pany furnished gasoline credit cards and commuter toll books, filled vacancies in the group, picked up the vehicle periodically for maintenance and insured the vehicle. The Commission ruled that while the operation was not exempt from regulation as a mere vehicle leasing operation,<sup>274</sup> the service was nevertheless so distinctive and useful that a certificate should be granted. In a litany of the claimed advantages of DAB, the Commission recognized the following beneficial and distinctive attributes of the service:

- reduction in commuter time of approximately one hour each way;
- door-to-door service;
- weekly or monthly fare payment;
- elimination of transfers;
- no crowding;
- assured seat;
- fitness for handicapped persons unable to use conventional mass transportation, and
- flexibility in choosing least congested routes on a day-to-day basis.

The Commission stated the applicable rule that “[w]here, as here, the proposed service differs materially from that provided by the mass transportation media in the area, the authority sought has been granted.”<sup>275</sup> Significantly, the Commission concluded that public convenience and necessity required certification *without any mention* of either the comparative fare levels or the economic impact on existing carriers. By focusing on a standard of material difference to the exclusion of competitive effects, the Commission reached the opposite extreme from its analytical approach in *D.C. Transit*.<sup>276</sup> On principle, this is surely an oversimplification, for a “materially different” service could not be certificated freely if the foreseeable result were that essential fixed route mass transit service would be discontinued or could operate only with an unacceptably high public subsidy.<sup>277</sup> Such

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274. For a discussion of this case in regard to issues of classification and exemption, see text accompanying notes 28 & 33 *supra*.

275. 107 M.C.C. at 284.

276. Such an approach is reminiscent of that stated in *West Shore R.R. v. Board of Pub. Util. Comm'rs*, 13 N.J. Misc. 180, 182, 177 A. 93, 94 (Sup. Ct. 1935): “[I]f railroads ‘are entitled as public utilities to protection against destructive competition, it should be a competition with a service which they have been giving.’”

277. *But see Petersburg, Hopewell & City Point Ry. v. Commonwealth ex rel. State Corp. Comm'n*, 152 Va. 193, 146 S.E. 292 (1929), discussed in text accompanying notes 179-83 *supra*.

a result would be at odds with the Commission's own avowed rule, since *Pan American Lines* in 1936, to consider "whether . . . [the] public purpose . . . 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."<sup>278</sup>

5. *Conclusion—Arguments for DAB from the Federal Regulatory Experience*

In summary, a DAB applicant could urge the following propositions to a state department of public utilities or court on the basis of federal authority in analogous situations:

(a) The ICC has recognized the beneficial and distinctive features of DAB-type door-to-door service and in recent decisions has considered it to be entitled to a certificate, in one instance without any consideration of the economic impact on existing carriers (*New England Trailways, Arrow Lines, Monarch Associates*).

(b) In any event, the effect on existing carriers is deemphasized where the new service is "materially different" (*Schaffer, J-T Transport, Alexandria, Arrow Lines*).

(c) Whatever may be the standards of "differentness" required to bring the results of (a) and (b), a door-to-door service such as DAB has consistently qualified under the ICC "material difference" standard (*New England Trailways, Arrow Lines, Monarch Associates*).

(d) Price differentials are relevant to the issues of public need and present "adequacy" when the proposed service is different (*Schaffer, J-T Transport, Arrow Lines*). Moreover, the fact of a price differential may be sufficient alone to make a service "different" (*Alexandria*).

(e) The federal courts have recognized that the distinct transit needs of urban areas justify rules and analytical approaches different from those developed by the ICC and state regulatory bodies in typical intercity and over-the-road transportation cases (*Alexandria*).

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278. *Pan American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936).