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Cornish F. Hitchcock

Transportation Consumer Action Project

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REGULATORY REFORM IN THE INTERCITY BUS INDUSTRY

Cornish F. Hitchcock*

Something is wrong with the intercity bus industry.

- In some markets, taking the bus can be as expensive, if not more so, than flying or taking the train.¹

- Federal regulation has limited the ability of carriers to engage in direct competition or to offer innovative services and fare options.²

- Bus service to small communities has been steadily declining across America.³

- Over the past decade, the financial health of the bus industry has eroded steadily, and bus ridership today lags below levels attained in 1970.⁴

- Bus travel is less comfortable than flying or going by train and a lot less popular.⁵

Thus, while Greyhound's commercials may claim "it's such a pleasure to take the bus," Trailways probably comes closer to the mark in observing that passengers "would prefer to travel by plane, automobile, or even truck, if given the chance, and will pay a premium to do so."⁶

This troubled situation is a matter of great concern because

* Director, Transportation Consumer Action Project, Washington, D.C.; B.A., 1972, University of Chicago; J.D., 1975, Georgetown University. A different version of this Article was presented as testimony before the Subcommittee on Surface Transportation of the U.S. House of Representatives Committee on Public Works and Transportation on June 3, 1981. The views expressed in this Article are those of the author and are not necessarily the views of the Transportation Consumer Action Project.

1. See text accompanying notes 70-71 *infra*.

2. See pt. II B *infra*.

3. See notes 112-20 and accompanying text *infra*.

4. See pt. II D *infra*.

5. The 5.6 square feet of space available to bus passengers, on an average, is 60 to 80% of the average space afforded commercial airline passengers; train passengers get 3 to 6 times as much room as bus passengers. SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 95TH CONG., 1ST SESS., INTERCITY DOMESTIC TRANSPORTATION SYSTEM FOR PASSENGERS AND FREIGHT 335 (Comm. Print 1977) [hereinafter cited as SENATE STUDY]. In addition, bus travel was the only form of transportation rated negatively by the public in a Harris poll. *Id.* at 338.

6. Comments of Trailways, Inc., at 19, Entry Flexibility, Regular Route Passenger Service, 45 Fed. Reg. 1,434 (comment time extended Jan. 7, 1980) (ICC Ex Parte No. MC-133).

the intercity bus industry constitutes a critically important means of transportation in this country. Bus companies carry more people each year than either the airlines or Amtrak.⁷ Bus riders consist disproportionately of the elderly, minorities, the young, and the poor — members of the society who least can afford to travel.⁸ Furthermore, bus companies serve 14,600 communities, roughly 14,000 of which receive no other intercity public transportation; in contrast, the airlines offer scheduled service to approximately 650 points, while Amtrak operates among 550 communities.⁹ Finally, as American dependence upon high-priced petroleum continues, bus travel takes on greater importance because it is the most fuel-efficient form of intercity transportation.¹⁰

Whether anything can be done to improve intercity bus transportation will depend ultimately on the industry itself, especially how it responds to shifting consumer demands. In order for the industry to gain the flexibility needed to improve public service, however, an important first step is congressional reform of economic regulation of the industry. Since 1935, the Interstate Commerce Commission ("ICC") has been deciding what firms can enter the industry, specifying the routes those firms can serve and the permissible fares and levels of service to be offered on those routes. Unfortunately, ICC regulation has been unduly rigid, contributing significantly to the high fares, limited competition, declining service patterns, and poor financial health of the industry. The current system of economic regulation has benefited neither the industry nor the public; it is time for a change.

Over the past four years Congress has adopted laws to "deregulate," or at least reform, economic regulation of the airline,¹¹ trucking,¹² rail,¹³ and household-goods moving industries.¹⁴ Be-

7. AMERICAN BUS ASS'N, AMERICA'S MOST FUEL EFFICIENT PASSENGER TRANSPORTATION SERVICE 2 (1981) [hereinafter cited as 1981 ABA REPORT].

8. *Id.* See also E. Pinkston, The Intercity Bus Transportation Industry 132-35 (unpublished Ph.D. dissertation, Yale University) (1975).

9. 1981 ABA REPORT, *supra* note 7, at 2.

10. U.S. DEP'T OF TRANSPORTATION, INTERCITY BUS SERVICE IN SMALL COMMUNITIES 6 (1980) [hereinafter cited as DOT SMALL COMMUNITY STUDY].

11. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. (Supp. III 1979)).

12. Motor Carrier Act of 1980, 49 U.S.C.A. §§ 10101-11901 (West Supp. 1981).

13. Staggers Rail Act of 1980, 49 U.S.C.A. §§ 10705-10713 (West Supp. 1981).

14. Household Goods Transportation Act of 1980, 49 U.S.C.A. §§ 10734, 10934, 11110 (West Supp. 1981). In non-transportation industries, Congress has adopted economic regulatory reform laws affecting natural gas, Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. IV 1980), and interstate banking, Depository Institutions and Mon-

cause these industries were subject to the same sort of economic regulation¹⁵ as the intercity bus industry, the question arises whether similar reforms in ICC control over bus transportation should be made, and whether any unique attributes of the industry counsel a different approach. The inquiry is especially timely because the United States House of Representatives has recently passed the Bus Regulatory Reform Act of 1981, designed to reform ICC economic regulation of the intercity bus industry.¹⁶

etary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 U.S.C. (Supp. IV 1980)).

15. This Article discusses only economic or "cartel-type" regulation of the bus industry: the ICC's determinations of what fares can be charged, what companies can serve what routes, and which firms can enter the industry. The Article does not address safety regulation, which presumably would continue under the Bureau of Motor Carrier Safety ("BMCS") in the U.S. Department of Transportation. Earlier "deregulation" bills take a similar approach. The Airline Deregulation Act of 1978 affected only the Civil Aeronautics Board's route and rate determinations for domestic airlines, without modifying safety regulation carried out by the Federal Aviation Administration ("FAA"). Similarly, the Motor Carrier Act of 1980 did not modify truck safety regulation by the BMCS, and the Staggers Rail Act of 1980 did not change rail safety regulation by the Federal Railroad Administration.

The distinction is important because "deregulation" is a term somewhat porous in meaning. In the first place, cartel-type regulation of the sort traditionally practiced by the ICC and CAB often is lumped together with health, safety, environmental, and other "social" regulation of the sort practiced by the FAA, Food and Drug Administration, Environmental Protection Agency, and other federal agencies. This commingling is unfortunate, because the two are fundamentally different in character. In structurally competitive industries, the former sort of regulation can stifle competition and raise prices paid by the public, often in the name of preventing "discrimination" and preserving "stability in the marketplace." The latter type of regulation, however, attempts to save lives and prevent injuries through the adoption of rules and standards that force companies to internalize costs paid by the public. For instance, standards requiring a company to decrease emissions of air pollutants may reduce death and illness from respiratory illnesses; compliance costs are assumed by the company and presumably passed along to the public, which presumably saves money it would otherwise spend on health care.

The term "deregulation" also can be misleading because, even if cartel-type regulation is abolished for a particular industry, the industry still remains subject to tax, antitrust, securities, environmental, criminal and other laws — all regulating business conduct. For analytical clarity, rather than talking in terms of "deregulating" an industry, it would be preferable to speak of "decartelizing" or replacing cartel-type regulation with "marketplace regulation" that allows the marketplace to determine what services may be offered, what markets may be entered, and what prices may be charged. If marketplace regulation is to replace cartel-type regulation, there must be a recognition that market failures will remain, which should be corrected. Even Adam Smith acknowledged that a tendency towards monopoly is an inevitable part of a free market. The antitrust laws and prohibitions against unfair and deceptive practices have traditionally been used in the United States to correct market failures, and such antitrust enforcement must play a key role in any conversion from cartel-type regulation to marketplace regulation. See pt. IV *infra*.

16. H.R. 3663, 97th Cong., 1st Sess., 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981). As introduced in a different form on May 21, 1981, H.R. 3663 embodied regulatory reform proposals of the ICC and, along with H.R. 3662, supported by the American Bus Association, was considered in hearings during May and June 1981. See *Hearings on*

This Article will analyze the economic structure of the intercity bus industry and the type of service received by the public under the present regulatory scheme. It will then discuss what regulatory reforms could improve service, how these issues are addressed in the recent House-passed bill, and what further legislative reforms should be made.

I. THE INTERCITY BUS INDUSTRY: AN ECONOMIC OVERVIEW

A. Industry Structure

The intercity bus industry comprises 1,330 firms, which operated 21,900 buses and earned operating revenues of nearly \$2 billion in 1980.¹⁷ These statistics do not, however, tell the full story; economic concentration, particularly concentration of revenues, "is overwhelming in the bus industry."¹⁸ Of the industry's 1,330 firms, 46 large interstate Class I carriers — those earning at least \$3 million annually — accounted for 71% of all passenger revenues in 1979.¹⁹ In 1979, the last year for which figures are available, these large Class I carriers operated 89% of "regular-route" passenger miles and earned 92% of the revenues from this service.²⁰ By contrast, most of the roughly 1,250 smaller Class II and Class III carriers²¹ garnered much less revenue from regular-route service than from charters and special tours²² —

H.R. 3662 & 3663 Before the Subcomm. on Surface Transportation of the House Public Works and Transportation Comm., 97th Cong., 1st Sess. (May 28 & June 3, 1981) [hereinafter cited as House Bus Hearings] (because transcripts of these hearings have not yet been printed, page citations will be to the witnesses' prepared statements).

17. 1981 ABA REPORT, *supra* note 7, at 5. Of these, roughly 850 are ICC-regulated interstate carriers. H.R. REP. NO. 334, 97th Cong., 1st Sess. 21 (1981) [hereinafter cited as HOUSE REPORT].

18. ICC BUREAU OF ECONOMICS, THE INTERCITY BUS INDUSTRY: A PRELIMINARY STUDY 45 (1978) [hereinafter cited as ICC PRELIMINARY STUDY].

19. HOUSE REPORT, *supra* note 17, at 53, table 4.

20. MANAGEMENT ANALYSIS CENTER, INC., DEREGULATION OF THE INTERCITY BUS INDUSTRY 12-13 (1981) [hereinafter cited as MAC DEREGULATION STUDY]. "Regular-route" service is scheduled service offered between specified points over specified highways, and may include stops at intermediate points.

21. Class I carriers have operating revenues in excess of \$3 million annually; Class II carriers have operating revenues between \$1 million and \$3 million; and Class III carriers have operating revenues of less than \$1 million. DOT SMALL COMMUNITY STUDY, *supra* note 10, at 3.

22. MAC DEREGULATION STUDY, *supra* note 20, at 12. "Charter" service involves transportation of a preexisting group of passengers between a common origin and destination, e.g., a bus chartered to take a football team to and from a game. "Special" or "tour" service is similar to charter service, but the carrier forms the group, such as when

service that constitutes only a small part of Class I carriers' operations.²³ In a very real sense, then, the industry is highly segmented: Class I carriers principally provide scheduled regular-route service, while smaller companies specialize in charters and tour service.

Among the 46 large Class I carriers, only Greyhound and Trailways have nationwide route systems, and these two firms dominate the industry. In 1980, they captured 81% of Class I carrier revenues, Greyhound earning 59% and Trailways 22%.²⁴ In comparison, the third largest intercity carrier, Carolina Coach Co., earned less than 2% of total Class I carrier revenues in 1980.²⁵

This great market concentration might be explained on grounds of economic efficiency if the bus industry were characterized by large fixed costs which would create significant economies of scale and barriers to entry.²⁶ There exists no evidence, however, of high fixed costs in the intercity bus industry. For instance, depreciation and amortization comprised less than four percent of the operating expenses of Class I carriers in 1978 and 1979,²⁷ and new buses, the principal industry expense, cost only about \$120,000 apiece in 1981.²⁸ Moreover, a substantial market exists for less expensive, used buses.²⁹

The presence of so many small bus carriers provides the most compelling evidence, buttressed by several economic studies,³⁰

a company sponsors a sightseeing tour for which members of the public purchase tickets. SENATE STUDY, *supra* note 5, at 95-96. Bus companies also provide "package express" service as part of their regular-route service in order to move small packages.

This Article will primarily discuss regular-route service. For a discussion of the other types of services, see ICC PRELIMINARY STUDY, *supra* note 18, at 9-11. See also INTERSTATE COMMERCE COMM'N, REPORT OF THE BUS INDUSTRY STUDY GROUP, chs. I, IV & V (1979) [hereinafter cited as ICC BUS STUDY GROUP REPORT].

23. MAC DEREGULATION STUDY, *supra* note 20, at 12. In 1979, for instance, Class II and III carriers earned only 8% of the revenues from regular-route service, but captured 61% of the revenues for charters and tour services. *Id.*

24. *Id.* at 16. These figures include Greyhound Lines, Inc.'s five wholly owned Class I subsidiaries and Trailways, Inc.'s 13 wholly owned Class I subsidiaries.

25. HOUSE REPORT, *supra* note 17, at 22.

26. See R. LIPSEY & P. STEINER, ECONOMICS 267-69 (6th ed. 1981); E. MANSFIELD, MICROECONOMICS: THEORY & APPLICATIONS 345-46 (2d ed. 1975).

27. AMERICAN BUS ASS'N, AMERICA'S MOST FUEL EFFICIENT PASSENGER TRANSPORTATION SERVICE 29 (1980).

28. Statement of Theodore C. Knappen, Sr. Vice President, Trailways, Inc., at 9, in *House Bus Hearings*, *supra* note 16.

29. Comments of the Council on Wage and Price Stability, at 5, Entry Flexibility, Regular Route Passenger Service, 45 Fed. Reg. 1,434 (comment time extended Jan. 7, 1980) (ICC Ex Parte No. MC-133).

30. See *id.* at 3-6; E. Pinkston, *supra* note 8, at 15-22; Fravel, *Returns to Scale in the U.S. Intercity Bus Industry*, in PROCEEDINGS — 19TH ANNUAL MEETING 551-60 (Trans-

that there are no significant economies of scale in the intercity bus industry. Indeed, one Department of Transportation survey indicated that many small intercity bus companies had average costs significantly *lower* than Greyhound,³¹ and even the American Bus Association has agreed that "small, regular route carriers can compete successfully with larger carriers."³² Thus, concentration in the bus industry cannot be attributed to economies of scale or other market factors. Rather, the two-firm industry dominance has been engendered by regulatory policies which have promoted development by looking favorably on mergers and acquisitions while discouraging new entry.

B. Industry Development

The intercity bus industry began in the early 1900's when various entrepreneurs began using "buses" — closely resembling elongated sedans — to transport passengers throughout urban areas, into suburbs, and beyond to other cities.³³ As automobile transportation grew in popularity, so did bus travel, and this development led to improved roads, providing further impetus to expansion. Entry into the industry cost little, and by World War I hundreds of very small bus companies were offering local and regional service throughout the country.³⁴

As the industry expanded, state regulation began, first in Pennsylvania in 1914. Some states wanted to ensure passengers' safety. Other states, concerned more with the wear and tear on their highways, restricted the size and weight of motor vehicles. By 1930, every state except Delaware had imposed some form of regulation on bus companies.³⁵

State regulation had a significant impact on the industry,

portation Research Forum 1978).

Pinkston suggests, however, that there may be advantages to a large scale of operations from a marketing standpoint, especially on longer distance travel, where passengers will wish if at all possible to stay on the same bus for the full length of the trip. Even if such through-service is not available, a larger company benefits from size in its ability to plan schedules to minimize layovers. Furthermore, the larger the carrier, the less likely it will be that a passenger will have to go to a separate terminal to change buses, or to deal with more than one company in handling tickets. E. Pinkston, *supra* note 8, at 22-25.

31. See generally U.S. DEP'T OF TRANSPORTATION, NATIONAL TRANSPORTATION TRENDS & CHOICES (TO THE YEAR 2000) (1977).

32. Comments of Am. Bus Ass'n, at 9a, Entry Flexibility, Regular Route Passenger Service, 45 Fed. Reg. 1,434 (comment time extended Jan. 7, 1980) (ICC Ex Parte No. MC-133).

33. ICC PRELIMINARY STUDY, *supra* note 18, at 1.

34. *Id.*

35. E. Pinkston, *supra* note 8, at 6.

which by 1925 had grown to 6,500 companies operating over 7,800 routes.³⁶ State commissions decided to treat the bus industry as a public utility or regulated monopoly³⁷ by promoting stability as a major goal of the system. State regulators hoped to avoid direct competition, which they thought would result in buses operating with too many empty seats, higher costs, and poor service at fluctuating rates.³⁸ Thus, they generally denied entry into territories already served "adequately" by another company — and even if existing service were found "inadequate," the incumbent carrier usually was provided the opportunity to improve service before another company could operate on the route.³⁹

Given this approach, it should not be surprising that the 1920's witnessed many mergers between bus companies, because the regulators considered carrier size to be an indicator of financial stability and commitment to providing common-carrier service.⁴⁰ Furthermore, the demand for expanded long-haul service compounded the trend toward concentration of the industry, as small companies, typically operating 100 miles or less, found merger to be an easy means to meet this demand.⁴¹ Between 1926 and 1928 alone, the number of bus companies declined from 4,040 to 3,610, even though route miles, bus miles, passengers carried, and operating revenues all were growing.⁴² In this climate the Motor Transit Corp. — the predecessor of Greyhound Lines, Inc. — was formed in September 1926, as a holding company capitalized at \$10 million.⁴³

The Corporation grew rapidly in the late 1920's, owing to generally favorable economic factors, a capable management, and the financial strength and complementary nature of the bus companies absorbed into its system.⁴⁴ Greyhound, the name formally adopted in 1930, also took advantage of the prevailing regulatory climate, persuading state agencies to let it acquire or control bus companies falling within their jurisdiction.⁴⁵ Internal

36. *Id.* at 5-6.

37. B. CRANDALL, *THE GROWTH OF THE INTERCITY BUS INDUSTRY* 91-92 (1954).

38. ICC PRELIMINARY STUDY, *supra* note 18, at 2.

39. E. Pinkston, *supra* note 8, at 7. See generally Jones, *Origins of the Certificate of Public Convenience and Necessity: Development in the States, 1870-1920*, 79 COLUM. L. REV. 426 (1979).

40. ICC PRELIMINARY STUDY, *supra* note 18, at 2. A common carrier holds itself out to provide transportation to all passengers on a nondiscriminatory basis.

41. *Id.* at 2-3.

42. *Id.*

43. *Id.* at 3.

44. *Id.*

45. SENATE STUDY, *supra* note 5, at 82-83.

expansion was facilitated further by a 1925 Supreme Court ruling that state agencies had no jurisdiction to regulate economic activities of interstate bus companies.⁴⁶

Greyhound's strategy produced handsome returns. In 1927 and 1928, the company expanded as far east as New York and as far west as Kansas City. Within another year, it acquired authority to serve the western United States, and by 1934, it had obtained authority to operate to points in Canada. Internal growth, continued acquisition, and eventual consolidation into operating divisions within the company continued for another twenty years.⁴⁷

A number of small regional carriers sought to counter Greyhound's emerging national network by devising a system of integrated operating practices. In February 1936 they formed the National Trailways Bus System, whose member carriers agreed to accept each other's tickets for interline travelers, consolidate terminals and coordinate schedules, increase joint supervision of equipment and personnel, and adopt a common logotype for their operations and advertising. Within this group, one company — Trailways, Inc. — became dominant, and the National Trailways system grew into the second largest intercity bus operation.⁴⁸

The National Trailways carriers were not alone in reacting to Greyhound's advances. Beginning in the late 1920's, state agencies pressed for federal regulation over motor carriers.⁴⁹ These sentiments drew support from the ICC, the regulator of the railroads for over forty years, which recommended in 1928 that Congress enact a scheme of federal regulation for the bus industry.⁵⁰ Congress responded in 1935 with the Motor Carrier Act,⁵¹ requiring the ICC to regulate interstate shipping rates, fares, routes, and services offered by both trucking and intercity bus companies.⁵²

During the rest of the 1930's, the ICC, like the state regula-

46. *Buck v. Kuykendall*, 267 U.S. 307 (1925). See also *Bush Co. v. Maloy*, 267 U.S. 317 (1925). While invalidating economic regulation of interstate carriers, the Court upheld state regulation of motor carrier safety.

47. ICC PRELIMINARY STUDY, *supra* note 18, at 3.

48. *Id.* at 5.

49. SENATE STUDY, *supra* note 5, at 83.

50. *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, 746 (1928).

51. Ch. 498, 49 Stat. 543 (1935) (current version at 49 U.S.C.A. §§ 10521-10529 (West Supp. 1981)).

52. Carriers in business on June 1, 1935, were generally able to obtain an ICC certificate of operation under "grandfather" provisions of the Motor Carrier Act, 49 U.S.C. § 306(a)(1) (1976) (repealed 1978), and some 3,000 bus companies received certificates in this fashion, SENATE STUDY, *supra* note 5, at 95.

tory bodies before it, took a favorable stance toward mergers and acquisitions of bus companies as a means of fostering economic stability. Thus, "[b]y the late 1930s, the economic structure of the bus industry had essentially evolved into its present form."⁵³ The carriers enjoyed substantial prosperity during World War II, when auto travel was restricted.⁵⁴ After the war, consolidations and mergers continued at a brisk pace, with the number of bus companies declining from 2,480 to 1,150 between 1950 and 1960.⁵⁵ The number of vehicles in operation during the 1950's fell by 3,500, to 20,970, and passenger miles did not reach their 1952 peak of 24.7 billion again until 1967.⁵⁶ Over the past twenty years, then, the bus industry has remained virtually stagnant, while other forms of public intercity transportation have shown impressive gains.⁵⁷

II. ICC REGULATION OF THE BUS INDUSTRY

A. Fares

The ICC has the responsibility to ensure that intercity bus fares are "reasonable."⁵⁸ Bus companies embody fare changes in "tariffs" filed with the Commission before the fares are scheduled to take effect.⁵⁹ Upon complaint or upon its own initiative, the ICC can suspend a proposed fare for seven months.⁶⁰ The ICC has authority to cancel a fare for being too low, too high, unduly preferential, or unjustly discriminatory, and additionally can itself prescribe a lawful rate.⁶¹

Bus companies can file tariffs either individually, or through the National Bus Traffic Association ("NBTA"), a "rate bureau" that serves as the tariff-publishing agent for almost 400 carriers who combined earn nearly ninety percent of intercity bus reve-

53. SENATE STUDY, *supra* note 5, at 3.

54. See C. TAFF, *COMMERCIAL MOTOR TRANSPORTATION* 496 (5th ed. 1975).

55. ICC PRELIMINARY STUDY, *supra* note 18, at 15.

56. *Id.*

57. Intercity travel has risen 300% since 1950, while bus miles are up only 20%, and the percentage of regular-route passenger miles has actually dropped 33% over the past 30 years. Whereas in 1950, the intercity bus accounted for 4.5% of all intercity travel, its share in 1979 had dwindled to 1.8%. Statement of Arthur D. Lewis, President, American Bus Ass'n, at 7-8, in *House Bus Hearings*, *supra* note 16.

58. 49 U.S.C.A. § 10701(a) (West Supp. 1981).

59. *Id.* § 10762.

60. 49 U.S.C.A. § 10708 (West Supp. 1981).

61. *Id.* § 10704(a)(1).

nues.⁶² NBTA, though, is more than a trade association publishing tariffs on its members' behalf. Under the Reed-Bulwinkle Act,⁶³ NBTA members enjoy immunity from the antitrust laws to engage in collective discussions and votes regarding fare levels they wish to propose to the ICC for its approval. Although bus companies remain free to file their own fare changes based upon individual costs, prevalent faresetting practice calls for NBTA members to discuss, agree upon, and submit to the ICC "general rate increases" whereby all participating carriers agree to raise their fares by a certain percentage.⁶⁴

Differently put, bus companies set their fares much the same way that OPEC members set the price of crude oil. Such price fixing would be a per se violation of the antitrust laws for non-regulated companies, and it "obviously lessens price competition and imposes unnecessary costs on consumers."⁶⁵

Congress gave careful consideration to collective fixing of truck rates in 1980 during debate on the Motor Carrier Act. In voting to end antitrust immunity for collective setting of "single-line" rates and to make certain procedural reforms in the processing of new rate proposals in the trucking industry,⁶⁶ the House Committee on Public Works and Transportation disapproved collective ratemaking, concluding that it "inherently tends to result in rates that will be compensatory for even the least efficient motor carrier participating in the rate discussions. When this happens, consumers lose the benefit of price competition."⁶⁷ The Committee also noted a "serious problem" in the closed nature of the rate bureau proceedings, where rate proposals are voted on behind closed doors, creating the opportunity for rate bureau employees largely to control the process.⁶⁸

Similar conclusions apply as well to collective determination of bus fares. While the intercity bus industry has substantially lower operating costs than either Amtrak or the airlines⁶⁹ —

62. SENATE STUDY, *supra* note 5, at 89.

63. 49 U.S.C.A. § 10706 (West Supp. 1981).

64. SENATE STUDY, *supra* note 5, at 89.

65. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 209 (1979). *See also* *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213 (1966).

66. A "single-line" rate is charged for transportation performed solely by one carrier over its own route system, in contrast to a "joint-line" or "interline" rate for transportation performed jointly by two or more carriers. *See* 49 U.S.C.A. § 10706(b)(1) (West Supp. 1981).

67. H.R. REP. No. 1069, 96th Cong., 2d Sess. 27, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2283, 2309 [hereinafter cited as MOTOR CARRIER ACT HOUSE REPORT].

68. *Id.*

69. 1981 ABA REPORT, *supra* note 7, at 5.

neither of which sets fares collectively with competitors — bus fares are not substantially lower than the cost of flying or taking the train. The failure of bus carriers to offer fares that reflect their cost advantage over other modes of public intercity transportation severely indicts the industry's collective ratemaking approach. Standard bus fares generally are slightly lower than train or plane fares, but a comparison of specific fares offered by Greyhound, Amtrak, and the airlines demonstrates that even this minor differential is not always in evidence.⁷⁰

- Between Denver and Salt Lake City, for example, the one-way Amtrak fare is \$56, compared to the one-way Greyhound coach fare of \$57.60. A one-way airline ticket costs only \$60.

- On long-distance routes, the balance is even more skewed. For instance, it costs \$117.60 for a 15-day excursion bus ticket between New York and Los Angeles; the trip takes 47 hours, and passengers must buy food for two days. By contrast, Capitol Airlines offers a \$154 regular and a \$129 standby fare, for a journey requiring one-eighth the time.

- Finally, in a possible harbinger of things to come, a new airline, People Express, advertises air fares that are lower than bus fares in the same markets.⁷¹

The Reed-Bulwinkle Act charges the ICC with ensuring that rate bureau price fixing is conducted in a manner consistent with the national transportation policy.⁷² Not until the 1970's, however, did the Commission adopt rules to regulate rate bureau operations.⁷³ This cursory approach by the ICC has two distinct effects. First, analysts have concluded that bureau procedures stifle competition and independent rate setting.⁷⁴ This occurs

70. These fares are based on a telephone survey conducted by the author in late May 1981. See also MAC DEREGULATION STUDY, *supra* note 20, at 18, table III-13. Federal subsidies have helped keep Amtrak fares at these comparable levels, but this situation is soon likely to change. Congress recently emphasized reducing Amtrak subsidies through such measures as raising fares, reducing management costs, and raising productivity. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1172, 95 Stat. 357, 688 (amending 45 U.S.C. § 501a (Supp. III 1979)).

71. Cf. N.Y. Times, Nov. 15, 1981, § 10, at 2 (\$59 New York-Florida fare).

72. The national transportation policy is spelled out at 49 U.S.C.A. § 10101 (West Supp. 1981). The pertinent provision of the Reed-Bulwinkle Act is now codified at 49 U.S.C.A. § 10706(b)(2) (West Supp. 1981). Technically speaking, rate bureau members draw up agreements on how the rate bureau will operate, and those agreements are filed with the ICC. Once approved, the bureau operations as authorized by agreement are immunized from the antitrust laws.

73. See Rate Bureau Investigation, 351 I.C.C. 437 (1976). See generally SENATE COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS., FEDERAL RESTRAINTS ON COMPETITION IN THE TRUCKING INDUSTRY: ANTITRUST IMMUNITY AND ECONOMIC REGULATION 84-88 (Comm. Print 1980) [hereinafter cited as JUDICIARY REPORT].

74. JUDICIARY REPORT, *supra* note 73, at 64-69.

because the required public notice of independent rate filings alerts the rate bureaus and deprives the carrier independently proposing a fare of a competitive edge. Furthermore, bureaus themselves can protest independently filed fares, even should no carrier object to the proposal. The analysts have found the second major implication of lax ICC control over rate bureaus, closely related to the first, to be that bureau employees, rather than the carriers themselves, actually control the ratemaking process.⁷⁵

If the ICC has done little to control rate bureau procedures, it has done even less to control the end product: proposed fares. Between 1935 and 1973, the ICC conducted only three investigations of bus fare levels. In the first two investigations (in 1951 and 1970), the Commission allowed the full increases sought, while the third (in 1973) led to approval of a three percent increase instead of the five percent hike sought by the industry.⁷⁶ It staggers the mind to imagine that over a thirty-eight-year span only three fare hikes were deemed worthy of investigation, and only one was found excessive.⁷⁷

For a brief period in the mid-1970's, the ICC did scrutinize requested rate hikes more closely, and even set some proposed increases at least partially aside.⁷⁸ From 1979 through the third quarter of 1981, however, the Commission has rubberstamped all but one industry request for a general rate increase, paving the way for fares to rise at least 57%, even though carrier costs did not rise this much and the consumer price index rose only 35% during the same period.⁷⁹ Furthermore, ICC fare regulation apparently has failed to protect rural bus users from paying higher fares than urban bus riders; fares paid, for instance, by

75. MOTOR CARRIER ACT HOUSE REPORT, *supra* note 67, at 27.

76. SENATE STUDY, *supra* note 5, at 89-90.

77. *See id.* at 89-91; DOT SMALL COMMUNITY STUDY, *supra* note 10, at 12-13. This discussion does not apply to ICC permit applications for a "contract carrier" to serve only a limited number of customers. *See* 49 U.S.C.A. § 10923 (West Supp. 1981).

78. *See* MAC DEREGULATION STUDY, *supra* note 20, at 4. If the ICC fails to exercise its statutory right to investigate and suspend proposed passenger rates, *see* 49 U.S.C.A. § 10708 (West Supp. 1981), the rates become effective within 30 to 45 days, or sooner under special circumstances. *See* DOT SMALL COMMUNITY STUDY, *supra* note 10, at 12; MAC DEREGULATION STUDY, *supra* note 20, at 4.

79. *See* ICC Office of Special Counsel, Protest and Petition for Suspension and Investigation, at app. B, Increased Passenger Fares and Express Rates: Nat'l Bus Traffic Ass'n, Suspension Case No. 70526 (ICC Sept. 28, 1981) (ICC approved seven general rate increases from Feb. 1979 through Sept. 1981); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CPI DETAILED REPORT 3 (Sept. 1981) (Sept. 1981 consumer price index at 279.3); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-79-218, NEWS (March 23, 1979) (Feb. 1979 consumer price index at 207.1).

riders in 38 small communities across America were 11% above the national average.⁸⁰

B. Licensing and Entry Policy

Historically, an intercity bus company has been able to gain ICC approval to operate along specific routes in one of three ways: (1) by applying for a certificate granting new or expanded authority;⁸¹ (2) by obtaining a certificate under the "grandfather" provision of the 1935 Motor Carrier Act;⁸² or (3) by merging with or acquiring control of an existing carrier, or purchasing an ICC certificate from another carrier.⁸³ This discussion will focus upon applications for authority, the most important means whereby new carriers can enter the industry and existing companies can expand their routes and services.

1. *The statutory standard and early interpretations*— In order to obtain an ICC certificate for new or expanded operating authority, an applicant must prove first that it is "fit, willing, and able"⁸⁴ to provide the transportation while obeying ICC rules, and second that the service "is or will be required by the present or future public convenience and necessity."⁸⁵ This standard has been rigidly interpreted by the ICC to prevent the entry of any new competition that could cause existing carriers to lose revenue along the route in question. In the seminal case of *Pan-American Bus Lines Operation*,⁸⁶ the ICC set forth a standard designed to ensure that new operating grants would not impair the financial stability of existing carriers. Under this standard, the ICC would evaluate "public convenience and necessity," for purposes of granting a new operation or service, according to three factors: (1) whether the proposed transportation would "serve a useful public purpose, responsive to a public demand or need"; (2) whether existing service could adequately meet this public purpose; and (3) whether the proposed new operations or service would "endange[r] or impai[r] the operations

80. SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, 95TH CONG., 2D SESS, INTERCITY BUS SERVICE IN SMALL COMMUNITIES 4 (Comm. Print 1978) [hereinafter cited as SENATE SMALL COMMUNITY STUDY].

81. 49 U.S.C.A. § 10922 (West Supp. 1981).

82. 49 U.S.C. § 306 (1976); see notes 51-52 and accompanying text *supra*.

83. If one carrier wishes to merge with or acquire control of another carrier, it generally must receive prior approval from the ICC. 49 U.S.C.A. § 11343 (West Supp. 1981).

84. 49 U.S.C.A. § 10922(a)(1) (West Supp. 1981).

85. 49 U.S.C.A. § 10922(a)(2) (West Supp. 1981).

86. 1 M.C.C. 190 (1936).

of existing carriers contrary to the public interest."⁸⁷ Thus, ICC policy has placed great emphasis on preventing diversion of revenues from incumbent carriers, thereby limiting passengers' ability to choose between competing companies.⁸⁸

Promoting the financial stability of corporations that perform useful public services may have been an appropriate federal policy objective during the Depression, but thirty years later, with a robust economy, the ICC still fretted over "duplication" of service and the impact which competition could have on the balance sheets of existing carriers. For example, in 1965 the Commission expressed concern that proposed new service between Boston and Rochester would allow two companies to compete directly, albeit over different routes, adding that "such a result is not looked upon with favor unless the evidence shows a need for the additional service, without any material harm to existing carriers."⁸⁹

2. *Recent entry policy*— Starting in the mid-1970's, the ICC adopted a series of reforms designed to liberalize this restrictive entry policy for motor carriers of both passengers and freight traffic. Perhaps the most significant shift in approach came in 1979 with a policy statement modifying the forty-three-year-old *Pan-American* test for judging route applications. While the Commission retained the requirement that the proposed operation "serve a useful public purpose responsive to a public demand or need," it reversed the presumption — implicit in the *Pan-American* approach — against extensions of service, stating that operating authority consistent with the public purpose would be granted "unless it is established by parties opposing the application that the entry of a new carrier into the field would endanger or impair operations of existing common carriers to an extent contrary to the public interest."⁹⁰

During the same period, the Commission used two proceedings involving the Liberty Trucking Co. to erect high barriers to

87. *Id.* at 203.

88. For instance, in one 1938 case the ICC allowed New England Greyhound Lines to buy the property and operating rights of some smaller regional lines. The Commission noted that the acquisitions would "promote economical operation" by eliminating "much duplicate and wasteful mileage. In 1936 the departure times of applicant and vendors coincided with seven schedules. Applicant proposes to eliminate such duplication, thus obtaining a higher load factor." *New England Greyhound Lines, Inc.*, 15 M.C.C. 536, 540 (1938).

89. *Eastern Mass. St. Ry.*, 101 M.C.C. 410, 414 (1965).

90. *Policy Statement on Motor Carrier Regulation*, 44 Fed. Reg. 60,296 (Oct. 19, 1979), *review denied sub nom. Assure Competitive Transp., Inc. v. United States*, 635 F.2d 1301 (7th Cir. 1980).

protestants alleging diversion of revenues. No longer would it be adequate for a carrier protesting an application for new service to show "mere evidence of revenues it may lose to [the] applicant." Rather, a protestant would be required to demonstrate "why or how authorization of a competitive service will lead to substantial traffic diversion and material revenue loss" at such levels that "the new competition is likely to materially jeopardize existing carriers' ability to serve the public."⁹¹ Differently put, a protestant essentially would have to prove that a grant of new authority would cause serious harm not only to the affected route, but systemwide.

In addition to these substantive changes, procedural reforms were enacted to help streamline ICC proceedings. As a means of simplifying applications for new authority and reducing the filing of frivolous protests, the Commission limited the automatic right to intervene in licensing cases to those carriers with a stake in the outcome. Protests could be lodged only by carriers that had authority to provide the service in issue, or that had offered to serve the community in question during the past twelve months.⁹²

These ICC initiatives provide carriers with their best opportunity in years to obtain new authority. In previous times, though, the ICC has favored existing carriers — principally Greyhound and Trailways — at the expense of smaller and newer companies, not to mention the public. Between 1960 and 1970, the ICC considered only 130 new authority applications and denied a significant number: 36% of the regular route and 44% of the charter applications.⁹³ Between 1975 and 1977, the ICC received only 49 bus applications, mostly for scheduled regular-route service. Of these, 33 came from companies other than Greyhound or the Trailways system. Yet the ICC granted only 33% of the applications from smaller companies, while authorizing nearly 88% of the Greyhound and Trailways requests.⁹⁴ Between 1976 and

91. Liberty Trucking Co., 130 M.C.C. 243, 245-46 (1978), *review denied*, 131 M.C.C. 573 (1979); *review denied sub nom.* Assure Competitive Transp., Inc. v. United States, 629 F.2d 467 (7th Cir. 1980).

92. Protest Standards in Motor Carrier Application Proceedings: Special Rules, 43 Fed. Reg. 50,908 (Nov. 1, 1978), *modified*, 43 Fed. Reg. 60,277 (Dec. 27, 1978), *aff'd sub nom.* American Trucking Ass'ns, Inc. v. United States, 627 F.2d 1313 (D.C. Cir. 1980). Congress adopted this standard in the Motor Carrier Act of 1980, 49 U.S.C.A. § 10922(b)(7)(A) (West Supp. 1981), while the regulation's current version is at 45 Fed. Reg. 86,792 (1980) (to be codified at 49 C.F.R. § 1100.252(d)(5)).

93. SENATE STUDY, *supra* note 5, at 97.

94. *Financial Condition of the Intercity Motor Bus Industry: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 11 (1977).

1978, the Commission received only 84 applications for regular-route authority. Only five came from new companies, and all of these were granted; most others came from companies seeking modest extensions of existing authority, a strategy designed to minimize opposition from incumbent carriers.⁹⁵

Given the low economic entry barriers in the industry, and the thousands of small carriers that existed before and after the imposition of federal regulation,⁹⁶ it is beyond question that "in the absence of ICC regulation, more carriers would have entered the industry or expanded their operations."⁹⁷ While ICC policy has relaxed slightly in recent years, the difficulties involved in obtaining new authority still are so great that, according to the American Bus Association, a growing number of bus companies are offering new service without ICC approval, making the number of passengers being illegally transported a significant percentage of total traffic.⁹⁸

C. *Exit Policy and Adequate Service*

1. *Legal framework*— The ICC creates substantial difficulties for carriers desiring to operate new routes, yet does little to preserve service that it does license, despite the general policy notion that exit should be restricted in regulated industries to ensure the provision of service.⁹⁹ Bus companies can leave a market by (1) filing an application with the ICC,¹⁰⁰ (2) simply stopping service in anticipation that there will be no protest, or (3) reducing service to a point where it becomes so inconvenient that no one travels by bus. Although carriers frequently drop service,¹⁰¹ the available evidence suggests that ICC procedures frequently are bypassed. The ICC itself has candidly admitted that under the present system "formal action with regard to interstate regular route service is limited to the handling of situations after the fact,"¹⁰² and a 1977 study prepared for the Department of Transportation found "no significant [number of] applications to discontinue interstate regular route service."¹⁰³

95. DOT SMALL COMMUNITY STUDY, *supra* note 10, at 10.

96. See notes 17-42 and accompanying text *supra*.

97. SENATE STUDY, *supra* note 5, at 97.

98. Comments of Am. Bus Ass'n, *supra* note 32, at 10.

99. See C. PHILLIPS, *THE ECONOMICS OF REGULATION* 79 (rev. ed. 1969).

100. 49 U.S.C.A. § 10925(b) (West Supp. 1981).

101. See notes 112-20 and accompanying text *infra*.

102. ICC BUS STUDY GROUP REPORT, *supra* note 22, at 37.

103. DOT SMALL COMMUNITY STUDY, *supra* note 10, at 11.

Thus, formal ICC mechanisms for controlling exit policy apparently have played only a marginal role in preventing the discontinuation of service by authorized carriers.¹⁰⁴

The most effective barrier to exit has been the insistence of state regulatory bodies that a bus company continue to serve the intrastate portion of an interstate route, even when the ICC has authorized abandonment of the interstate route.¹⁰⁵ While such policies have short-term consumer benefits, they also produce a balkanized transportation policy under which a federal agency permits certain service to end while a state agency requires part of that service to continue.¹⁰⁶ The result seems contrary to the congressional goal of a national transportation policy.¹⁰⁷

Even restrictive state exit policies, however, cannot ensure the provision of good service. Bus companies can effectively exit from a market, even though nominally offering service, simply by dropping frequencies or scheduling their departures and arrivals at such inconvenient hours that service deteriorates. A downward spiral follows; as service worsens, ridership declines even further.¹⁰⁸ Although the ICC does have legal authority to regulate the adequacy of bus service,¹⁰⁹ regulations in this area were not adopted until 1977, and those dealt mostly with consumer protection issues¹¹⁰ and did nothing to regulate schedul-

104. SENATE STUDY, *supra* note 5, at 104; SENATE SMALL COMMUNITY STUDY, *supra* note 80, at 8.

105. See HOUSE REPORT, *supra* note 17, at 24-27, 53-55.

106. See statement of Marcus Alexis, Acting Chairman, ICC, at 15, in *House Bus Hearings*, *supra* note 16; SENATE SMALL COMMUNITY STUDY, *supra* note 80, at 8.

107. 49 U.S.C.A. § 10101 (West Supp. 1981); *cf.* *Kassel v. Consolidated Freightways Corp.* 101 S.Ct. 1309 (1981) (Iowa statute that limited operation of twin trailers in Iowa struck down as a burden on interstate commerce; all surrounding states permitted twin trailers to operate within their borders). See also NATIONAL TRANSP. POLICY STUDY COMM'N, NATIONAL TRANSPORTATION POLICIES THROUGH THE YEAR 2000, at 248 (1979).

108. SENATE STUDY, *supra* note 5, at 104. By allowing service to deteriorate, the incumbent carrier still remains in a position to add new frequencies if traffic increases, and also can protest new entry by another carrier. DOT SMALL COMMUNITY STUDY, *supra* note 10, at 12.

109. 49 U.S.C.A. § 11101(b) (West Supp. 1981).

110. 49 C.F.R. pt. 1063 (1980). Even if viewed as consumer protection rules, the ICC rules are paltry, particularly when compared with the protections available for other modes of travel. For example, the ICC limits bus company liability for lost or damaged luggage to \$250 per passenger, a sum which cannot begin to compensate a passenger for the ordinary contents of two suitcases. The limits for Amtrak and domestic air travel, by contrast, are \$500 and \$750, respectively.

Furthermore, airline and Amtrak passengers have long been able to purchase excess value coverage to increase the carrier's liability for lost or damaged luggage. In 1979, the ICC proposed a rule to let bus passengers obtain such coverage, effective January 1, 1980. Before the rule took effect, however, the ICC bowed to an industry request to postpone the effective date. It took the Commission 16 months before the rule was re-issued, with an effective date in May 1981. The industry once again asked for a delay,

ing or to prescribe minimum service levels. Thus, while intercity bus carriers may operate among 14,600 communities across America,¹¹¹ that figure gives no accurate indication of the quality of service provided.

2. *Small community service*— One of the philosophical underpinnings of the ICC's "tight entry, tight exit" policy is the need to protect and ensure service to small communities across America. The theory, traditionally applied in a public utility context, posits that service between major points is profitable enough to "cross-subsidize" unprofitable service to small and rural points which would go unserved if the carrier were not compelled to serve profitable and unprofitable routes alike.¹¹²

this time for 90 days (or until after the peak summer season had passed), and once again the ICC granted the request. See *Practices of Motor Common Carriers of Passengers — Checked Baggage Liability Provisions*, 132 M.C.C. 560, *effective date deferred*, 46 Fed. Reg. 27,343 (1981) (to be codified at 49 C.F.R. § 1064.1). See generally DOT SMALL COMMUNITY STUDY, *supra* note 10, at 13.

111. 1981 ABA REPORT, *supra* note 7, at 2.

112. It has been suggested, somewhat more persuasively, that there are cross-subsidies between charter, special, and package-express service, on the one hand, and regular-route service, on the other. To the degree such subsidies exist in a regulated environment, they would probably exist in a less regulated environment as well, without affecting the quality or availability of service to rural communities.

For example, the argument has been made that charter and special services have been more profitable than regular-route service. See E. Pinkston, *supra* note 8, at 29-33. This may occur because such services can be operated more efficiently, in that it is easier to concentrate on the most lucrative markets and to operate such services with a higher percentage of seats filled.

Until 1967, the ICC automatically awarded charter and special-tour authority when it awarded regular-route authority, and it was not unusual for companies to apply for the latter in order to obtain the former supposedly "incidental" authority. See ICC PRELIMINARY STUDY, *supra* note 18, at 10. Although carriers were obligated to perform regular-route operations in order to keep their charter and tour authority, the ICC deemed once-weekly service sufficient in this regard. *Id.* In 1966, however, Congress amended the law to eliminate this practice and to require that applicants for charter and special authority request and prove the need for this service separately. See 49 U.S.C.A. § 10932(c) (West Supp. 1981).

Thus, some carriers today find themselves forced to operate regular-route service in order to maintain authority for charter and tour services. But for these carriers, running a limited amount of regular-route service should not be burdensome, because the marginal cost of operating such service, over and above their profitable charter and tour business, should be fairly low. So long as regular-route revenues exceed the marginal costs of offering such service, such operations make economic sense and would not necessarily be discontinued in a less regulated environment. Service that turns a profit, albeit a lower profit than other service, is not truly "subsidized," and likely would be continued under a deregulated regime.

Several other factors suggest that cross-subsidization between types of service is not crucial to maintaining adequate levels of rural service. In the first place, Class I carriers concentrate on regular-route service, while smaller carriers focus on charters and tours. In 1980, charters and tours accounted for only 14.6% of Class I carrier earnings, and 78% of all charter and tour revenues were earned by carriers other than Greyhound and Trailways. HOUSE REPORT, *supra* note 17, at 53. This high degree of segmentation sug-

This approach, however, has not worked in the bus industry — either in theory or in practice. Little empirical evidence can be discovered to suggest that certain routes cross-subsidize others, or that rural points would go unserved but for ICC regulation. In the first place, it is virtually impossible, from an analytical standpoint, to tell which routes cross-subsidize each other.¹¹³ Second, a major element of traditional public utility regulation — forced service to rural points — is absent in the intercity bus industry. The laxness of ICC exit policy places few practical restrictions on companies wishing to abandon or reduce unprofitable service.¹¹⁴ It is probable that bus companies serve routes not because of ICC compulsion, but because the service makes economic sense by feeding rural passengers onto long-haul routes or otherwise fitting into a carrier's overall route network.¹¹⁵

gests that charter service is only a small part of regular-route carriers' business, and there is no hard evidence to suggest that it keeps them operating on otherwise unprofitable routes.

In addition, it has been suggested that package express is more profitable than regular-route service. While that may be true, it does not indicate a true cross-subsidy, because the two services cannot be severed. ICC PRELIMINARY STUDY, *supra* note 18, at 9-10. Package express necessarily moves on a bus carrying passengers; thus the two services are more appropriately considered in tandem.

113. ICC PRELIMINARY STUDY, *supra* note 18, at 9-10. The complexities of finding cross-subsidies are formidable. The Senate study neatly summarized the methodological problem:

Consider, for example, a hypothetical bus line from the small community of Elkton, Md., through Wilmington, Del., to Philadelphia, Pa. Suppose that on a typical bus run 10 people ride the full route from Elkton to Philadelphia, two ride only the Elkton-Wilmington segment, and 20 ride the Wilmington-Philadelphia segment. If the route segments are viewed separately, the Elkton-Wilmington segment, with just 12 passengers, look [sic] unprofitable, while the Wilmington-Philadelphia segment, with 30 passengers, seems considerably more lucrative. Yet, if the bus company were to drop its Elkton-Wilmington service — assuming it could obtain approval by the regulatory authorities to do so — it would risk losing the 10 passengers on the Wilmington-Philadelphia run who embarked in Elkton. Because they would have to find alternative service from Elkton to Wilmington to catch the bus there, these passengers would be inclined to switch modes for the entire trip, if that were feasible. The Wilmington-Philadelphia segment would be left with only 20 passengers, which at best would be only marginally profitable. Thus, it frequently does not make sense to disaggregate a transportation system into its component parts in attempting to determine the profitability of different routes. In this hypothetical case, the company must decide whether its overall profit position is better with or without the unprofitable segment. The complexity of this determination grows exponentially with the number of towns served; even with the aid of the largest, newest computers, the cross-subsidization issue is a difficult one to resolve.

SENATE SMALL COMMUNITY STUDY, *supra* note 80, at 18-19. See also E. Pinkston, *supra* note 8, at 13-62; ICC PRELIMINARY STUDY, *supra* note 18, at 93-96.

114. See text accompanying notes 99-104 *supra*.

115. This has, in fact, been admitted by a Greyhound executive, who said that "a

Despite almost fifty years of pervasive regulation, the network of rural service in this country forms a patchwork quilt.¹¹⁶ Roughly 23% of all communities in the country that have a population between 2,500 and 10,000 receive no direct bus service under the current regulatory regime, although effective service is available to all but 9% of these communities after taking account of service to points less than 10 miles away.¹¹⁷

The quality and quantity of this service, however, can vary widely. Some communities receive daily service, some receive less than daily service, and some receive no service at all.¹¹⁸ One study of service patterns to 38 small communities across America found the median number of departures each week to be 50 passengers, ranging from a low of 3 to a high of 800. Arrivals also averaged 50 passengers per week, with a range of 3 to 900, although most tended to be under 105.¹¹⁹

The ICC's failure to assure service to small communities is hard to overstate. During the 1970's, the Commission allowed bus companies to abandon service to over 1,800 communities across America.¹²⁰ *Bus companies have been dropping service, on an average, roughly at the rate of 15 towns every month over a ten-year period.* When coupled with the ICC's restrictive entry policy, which keeps new companies out, this regulatory scheme cannot be said to have provided good bus service for the people of rural America.

good many" of the company's unprofitable routes would be continued under less regulation "because they are good feeders . . . or they fit into the route structure in other ways." Pace, *Talking Business*, N.Y. Times, Jan. 13, 1981, at D2, col. 1.

116. Bus service to Breezewood — a community of 2,500 people in south-central Pennsylvania — cogently illustrates the lack of a cohesive pattern in rural bus transportation. Breezewood stands at the junction of three major highways and is used by Greyhound as a key stopping point on the carrier's east-west routes. As a result, over two dozen bus routes service Breezewood daily. In contrast, halfway between Pittsburgh and Breezewood on U. S. route 30 is the town of Ligonier, also having a population of 2,500. Ligonier receives bus service only on Friday, when two buses leave for Pittsburgh and one returns. DOT SMALL COMMUNITY STUDY, *supra* note 10, at 15.

Admittedly, some communities may not enjoy improved service as a result of regulatory reform in the intercity bus industry. If this indeed occurs, though, it would result from market forces in the deregulated environment rather than the inefficiencies of ICC regulation.

117. DOT SMALL COMMUNITY STUDY, *supra* note 10, at 3.

118. *Id.* at 15.

119. SENATE SMALL COMMUNITY STUDY, *supra* note 80, at 5.

120. MAC DEREGULATION STUDY, *supra* note 20, at 22; DOT SMALL COMMUNITY STUDY, *supra* note 10, at ii.

D. The Financial Health of the Industry Under the ICC Regime

The combination of OPEC-style price hikes, restrictive entry, and declining service may explain why passengers are flocking to the airlines, Amtrak, or their automobiles, and consider taking the bus only as a last resort. Historically, the ICC has been generous to existing carriers at the expense of the traveling public, but ironically, that generosity has not translated into a financially healthy industry. In 1979, the president of the American Bus Association spoke of the "long term erosion of [the bus industry's] viability,"¹²¹ and the statistics bear him out. The industry's operating ratio — operating expenses as a percentage of operating revenues — worsened from 90.1 in 1970 to 93.1 in 1980,¹²² and between 1971 and 1977 return on equity declined from 16.1% to 8.4%.¹²³ From 1968 to 1978, the bus industry's net operating revenues plummeted 38%, while passenger miles on Class I regular-route travel decreased 15%, and the number of passengers fell 27%.¹²⁴ The only exceptions to this downward trend came in 1974 and 1979-1980, when soaring energy prices and the scarcity of gasoline led consumers to take the bus in increasing numbers; nonetheless, bus ridership is less today than it was in 1970.¹²⁵ This bleak picture makes clear that ICC regulation of the intercity bus industry serves the best interests of neither the public nor the industry; the time for a change has come.

III. PROPOSALS FOR LEGISLATIVE REFORM

This Article's central thesis is that the traveling public, not to mention the carriers themselves, would benefit from the substitution of marketplace competition for ICC-cartel regulation of the intercity bus industry. As a general proposition, this substitution would require four major changes in present federal regulation of the bus industry. First, there must be an end to anti-trust immunity for collective setting of bus fares and rates, a

121. AMERICAN BUS ASS'N, AMERICA'S MOST FUEL EFFICIENT PASSENGER TRANSPORTATION SERVICE 1 (1979) [hereinafter cited as 1979 ABA REPORT].

122. HOUSE REPORT, *supra* note 17, at 52.

123. MAC DEREGULATION STUDY, *supra* note 20, at 13.

124. 1979 ABA REPORT, *supra* note 121, at 29.

125. 1981 ABA REPORT, *supra* note 7, at 5. See also N.Y. Times, Oct. 30, 1980, at D1, col. 3.

step that would promote greater price competition. Second, there must be open entry for all "fit, willing, and able" bus companies — those that can meet federal safety and insurance requirements — to allow carriers to operate any type of service over any route without first seeking ICC permission. Third, ICC exit policy must be reformed to require carriers seeking to leave a market to notify the affected communities, enabling them to search for a replacement carrier or to make arrangements for keeping the incumbent on the route. While this would constitute more regulation over exit than the ICC exercises presently, it should be seen as a transitional device designed to aid smaller communities and could be phased out as new carriers surface to provide additional bus service. Finally, to promote uniformity in the system, there must be federal preemption over the intrastate portions of interstate service, if not full preemption of all state control over intrastate service.

The Bus Regulatory Reform Act of 1981, passed recently by the House of Representatives, makes some reforms along these lines but does not go far enough. The Act abolishes antitrust immunity for the collective setting of some fares, but carriers still can collectively set "general rate increases" that raise fares industry-wide by a fixed percentage. With regard to entry, carriers must still go through cumbersome ICC proceedings every time they want to add a new route, although the standards could make it somewhat easier to obtain this new authority. The bill makes no change, however, in the Commission's current lax policy on exit, and state regulation of the industry is preempted only to the extent that carriers can appeal to the ICC if a state agency makes an adverse ruling on the intrastate portion of an interstate route.

Thus, greater efforts at reform are needed. The following sections will propose and explain detailed recommendations for reform in the key areas of fares, entry, and exit, will comment on the impact of such reforms upon rural service, and will analyze the provisions of the recent House-passed bill in each of these areas.

A. *Fares*

1. *Collective ratemaking*— Congress should, effective immediately, repeal antitrust immunity for collective discussion and voting on bus fares, including general rate increases. Such collective price fixing has significantly boosted fares to the public, and

over the past forty-six years the ICC has proven itself unable to monitor fares effectively.¹²⁶ Considering the disparity between the unit costs of individual carriers,¹²⁷ it makes no sense to allow the setting of uniform rates that do not reflect each carrier's costs.

Such a reform would replace overt price collusion with price competition, to the benefit of the public. In this area, the House-passed bill makes some reforms, notably by ending, effective January 1, 1984, antitrust immunity for collective setting of "single-line" fares — those offered by a single carrier operating between two points.¹²⁸ This would end the most blatant type of horizontal price fixing; for example, Greyhound and Trailways could no longer agree on the fare each would charge for service between New York and Washington. Beginning January 1, 1984, the House-passed bill also limits immunity for "joint-line" fares — those offered by two or more companies for connecting service between two points. Under this provision, carriers would enjoy antitrust immunity to discuss and set joint-line fares only if each could individually "practicably participate" in offering the service in question.¹²⁹

While the House-passed bill thus goes further than the Motor Carrier Act of 1980,¹³⁰ it is still deficient in its treatment of ratemaking because it continues antitrust immunity for general rate increases. This is a significant omission, in light of the industry tradition and preference for across-the-board general rate

126. See text at notes 75-80 *supra*.

127. See E. Pinkston, *supra* note 8, at 15-16. Pinkston's study, drawing on 1972 data, found that average costs per bus-mile ranged from \$0.45 to \$4.10, and that the variation was not correlated with output. Of the 72 carriers surveyed, 39 had average costs between \$0.60 and \$0.80 per bus-mile. Interestingly, Greyhound's average cost was on the high side, at \$0.86 per bus-mile. *Id.* at 17-18.

A more recent analysis, performed by the Council on Wage and Price Stability and based on 1978 data, surveyed the costs per bus-mile of 43 Class I carriers and found a range from \$0.90 to \$3.70 per bus-mile. Again, there was no correlation between this extreme variation and output: 31 carriers had costs below \$1.40, and 12 carriers (including Greyhound) had costs above that level. Comments of the Council on Wage and Price Stability, *supra* note 29, at 4.

Even among the industry giants, there are disparities in costs. In the first quarter of 1981, Greyhound's total operating expense was \$1.986 per bus-mile, a figure 12% higher than Continental Trailways' cost of \$1.7666 per bus-mile. ICC Office of Special Counsel, Protest and Petition for Suspension and Investigation, *supra* note 79, app. B, at 4.

128. H.R. 3663, 97th Cong., 1st Sess. § 10(b)(4), 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) (adding new 49 U.S.C. § 10706(b)(3)(E)).

129. *Id.*; see notes 66-68 and accompanying text *supra*.

130. The Motor Carrier Act of 1980 ends immunity for collective setting of single-line truck rates on January 1, 1984. 49 U.S.C.A. § 10706(b)(3)(D) (West Supp. 1981). Immunity continues, however, for discussions and voting on joint-line rates and general rate increases.

hikes, the staggering level of ICC-approved rate hikes, the dominance of regular-route service by only two firms, and the fact that carriers can seek fixed-percentage increases in fares despite wide disparities in their costs. Elimination of antitrust immunity for the setting of general rate increases, thus requiring individual fares to be tailored to specific carrier costs, would greatly benefit the public.

2. *Zone of pricing freedom*— The House-passed bill creates a zone of pricing freedom within which individual fares can be offered without the risk that they will be suspended by the ICC as “unreasonable.”¹³¹ The zone extends as high as ten percent above and twenty percent below the rate in effect one year earlier. In addition, the ICC is given authority to extend, for the public benefit, the upper and lower limits of this zone by ten percent should it find actual and potential competition sufficient to control fares.¹³² All rates within the zone of pricing freedom are subject to the antitrust laws and must be filed individually, not as a result of collective action.¹³³

While a zone of pricing freedom can benefit the public by keeping the ICC from blocking innovative or competitive fares, such a zone must be carefully crafted and linked to the degree of actual and potential entry which would be available to keep rates in line. The House-passed bill fails to do this; it allows too much upward pricing flexibility too quickly, without enough new entry. Under the House provision, fares could increase as much as forty-four percent in two years.¹³⁴ Given the two-firm dominance in the industry, reasonable limits on upward pricing flexibility must be maintained in the short term. If existing entry regulation is not relaxed significantly, the very real possibility arises that bus companies will try to boost fares higher than they would otherwise — and without the spur of new competition to keep fares in line.

A better approach, taken in the Airline Deregulation Act of 1978,¹³⁵ would link upward pricing flexibility to new entry. That

131. H.R. 3663, 97th Cong., 1st Sess. § 11(a), 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) (adding new para. 4 to 49 U.S.C. § 10708(d)).

132. *Id.* (adding new para. 5 to 49 U.S.C. § 10708(d)).

133. *Id.* § 11(b) (applying 49 U.S.C. § 10708(d)(4) to bus fares).

134. Suppose the fare in effect on the date of enactment of this bill was \$20. If a carrier takes advantage of the 10% upward zone and the ICC has, in addition, authorized an additional 10% zone on top of that, the fare could go up 20%, to \$24. That \$24 would then be the base for increases in the second year, and another 20% hike could raise the fare to \$28.80 — 44% above the level two years earlier.

135. Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered §§ of 49 U.S.C. (Supp. III 1979)).

Act set a baseline for judging the reasonableness of air fares, which the Civil Aeronautics Board ("CAB") was directed to adjust at least twice yearly for inflation.¹³⁶ The statute created a zone of pricing freedom five percent above and fifty percent below the baseline, within which fares could not be suspended as "unreasonable"¹³⁷ — although for the first three years the CAB was directed to make route awards under less stringent standards¹³⁸ and procedures.¹³⁹

The Act was careful to allow full entry freedom before giving the airlines significant pricing flexibility. After December 31, 1981, the CAB loses authority to issue to financially "fit, willing and able" carriers certificates that specify the routes to be operated.¹⁴⁰ Only a full year after losing control over entry will the Board be deprived of all power to suspend or reject fares as unreasonable.¹⁴¹

This format is preferable because it assumes that distortions in carrier route systems fostered by regulation may have produced reservoirs of monopoly power that could take three to four years for market forces to correct. By phasing in entry freedom before pricing freedom, Congress limited the ability of air carriers with monopoly power in particular markets to exploit their advantage by raising prices to unreasonable levels while knowing that, as a practical matter, new entry was unlikely in the short term.¹⁴² In contrast, the House-passed bill for deregulation

136. Airline Deregulation Act of 1978, § 37(a), 49 U.S.C. § 1482(d) (Supp. III 1979) (amending Federal Aviation Act § 1002(d)).

137. *Id.*

138. Instead of being "required by" the public convenience and necessity, new service merely had to be "consistent with" the public convenience and necessity. *Id.* § 8, 49 U.S.C. § 1371(d)(1)(A) (Supp. III 1979) (amending Federal Aviation Act § 401(d)(1)(A)). In addition, the burden of proving inconsistency with the public convenience and necessity was shifted to protestants. *Id.* § 14, 49 U.S.C. § 1371(d) (Supp. III 1979) (adding new para. 8 to Federal Aviation Act § 401(d)). Airlines were also allowed to enter one new route each year without first obtaining CAB approval. *Id.* § 12, 49 U.S.C. § 1371(d) (Supp. III 1979) (adding new para. 7 to Federal Aviation Act § 401(d)).

139. Procedures were streamlined for airlines wishing to operate "dormant" authority issued to but not used by another airline. *Id.* § 12, 49 U.S.C. § 1371(d) (Supp. III 1979) (adding new para. 5 to Federal Aviation Act § 401(d)). Before this reform, airlines could successfully protest applications to serve routes where they were authorized to operate but were not doing so.

The Act also streamlines route cases by allowing written submissions to be used extensively instead of oral hearings. *Id.* § 21, 49 U.S.C. § 1371 (Supp. III 1979) (adding Federal Aviation Act § 401(p)). Finally, the Act removes "closed door" restrictions which prevented airlines from discharging passengers at intermediate stops on a flight. *Id.* § 16, 49 U.S.C. § 1371 (Supp. III 1979) (adding Federal Aviation Act § 401(e)).

140. Federal Aviation Act § 1601(a)(1)(A), 49 U.S.C. § 1551(a)(1)(A) (Supp. III 1979).

141. *Id.* § 1601(a)(2), 49 U.S.C. § 1551(a)(2) (Supp. III 1979).

142. The Airline Deregulation Act attempted to minimize such short-term profiteer-

lating the bus industry does not tie pricing freedom to entry. The bill grants an immediate ten-percent zone of upward pricing freedom, even though entry still will be determined on an expensive and time-consuming case-by-case basis. Moreover, notwithstanding the connection between pricing flexibility and entry freedom, a ten-percent upward zone is overgenerous, given that many routes are served by only one carrier, and that two companies dominate regular-route service.

The best approach in this area would be for Congress to end route regulation immediately, while implementing a scheme of increased pricing flexibility. This pricing scheme should establish as baseline fares those in effect one year earlier, and should create a statutory zone, reaching five percent above and fifty percent below the baseline, within which fares cannot be suspended as "unreasonable."¹⁴³ The ICC should not have authority to alter the upper boundary of this zone,¹⁴⁴ and all ICC control over rates should cease four years after enactment. During the four-year transition period, carriers would remain free to seek fare changes falling outside the zone, which would have to be justified as "reasonable." The four-year period would allow carriers to take advantage of entry reforms to rationalize their route systems in ways that could lead to a more competitive system, justifying the subsequent removal of federal controls over intercity bus fares.

ing, in contrast to air cargo deregulation legislation passed one year earlier. See Pub. L. No. 95-163, 91 Stat. 1278 (codified in scattered §§ of 49 U.S.C. (Supp. III 1979)). The cargo law decontrolled rates upon enactment, but barred new entry into the industry for one year. *Id.* §§ 17(a), 18, 49 U.S.C. §§ 1388(a)(3), 1482 (Supp. III 1979) (adding Federal Aviation Act § 418(a)(3), and amending *id.* § 1002). Not surprisingly, the existing cargo carriers promptly boosted their prices, and Congress was careful not to put the cart before the horse a second time. See *Aviation Regulatory Reform: Hearings on H.R. 11145 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong., 2d Sess. 147 (1978) (testimony of CAB Chairman Alfred E. Kahn). See also *Impact of Airline Deregulation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 54-55 (1979) (statement of CAB Chairman Marvin S. Cohen).

143. These are the limits created by the Airline Deregulation Act. See Federal Aviation Act § 1002(d)(4), 49 U.S.C. § 1551(d)(4) (Supp. III 1979).

144. The Airline Deregulation Act gives the CAB authority to change the downward, but not the upper, limit under the Federal Aviation Act, § 1002(d)(7), 49 U.S.C. § 1482(d)(7) (Supp. III 1979). By contrast, the ICC can adjust both the upper and lower limits of the zone of pricing freedom for truck rates. 49 U.S.C. § 10708(d)(2) (West Supp. 1981).

B. Entry

The public interest would best be served if Congress were to end, effective immediately, ICC regulation over entry into markets and over decisions regarding the kinds of services to be provided in those markets. The ICC properly should retain only the role of requiring new companies to prove they are financially "fit, willing and able" to provide whatever type of bus service they choose to offer.¹⁴⁵ No sound economic reason exists for obligating a bus company to undergo cumbersome ICC procedures every time it seeks to add communities or services to its route structure.

1. *The entry barrier presented by ICC procedures*— The major flaw of the House-passed bill is its requirement that the ICC continue issuing new authority on a case-by-case basis. Every time a carrier wants to expand operations, no matter how modestly, it must apply for and receive permission from the ICC. ICC procedures can themselves be a major entry barrier, particularly for small companies, and may explain why so few companies apply for new authority. An applicant for new authority must pay a \$350 filing fee,¹⁴⁶ and probably a minimum of \$1,000 for the necessary assistance of counsel. Even should no protests be filed, the Commission may determine that the applicant has not demonstrated sufficient public need for the new service and thus deny the application in part, if not entirely. If, however, a carrier does protest, or if the Commission decides to require oral hearings, the bill for legal fees increases while the chances of success diminish. Furthermore, disgruntled protesters still can go to court if an applicant is successful before the ICC, consuming more time and money, and possibly depriving the public of new service in the interim.¹⁴⁷

145. The House-passed bill adds a statutory gloss to the definition of "fit, willing and able" by stating that the term "includes, among other things, financial fitness, operational fitness, and safety fitness." H.R. 3663, 97th Cong., 1st Sess. § 6(b)(1), 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) (adding 49 U.S.C. § 10922(c)(7)). To promote safety, § 18(b) of H.R. 3663 sets minimum insurance levels of \$5 million for vehicles with a capacity of more than 15 passengers and \$1.5 million for vehicles with a capacity of 15 passengers or less. The Secretary of Transportation may, after a rulemaking proceeding, cut those levels in half, but only for a two-year transitional period. In addition, § 22 of H.R. 3663 would amend 49 U.S.C. § 10925(d) to let the ICC, upon request of the Secretary of Transportation, suspend the certificate if the Commission finds that such carrier has been "conducting unsafe operations which are an imminent hazard to public health or property."

146. 49 C.F.R. § 1002.2(d), pt. I(3) (1980).

147. Evidence in bus licensing cases tends to consist of statements by members of the

Such a system can deter all but the most affluent, the most determined, or the most litigious, and it should come as no surprise that the ICC receives only a handful of bus applications each year.¹⁴⁸ In fact, the impact of present procedures in deterring new entry can be seen clearly in the industry's response to an emergency order issued by the ICC in mid-1979 as a reaction to the Iranian oil embargo and subsequent gasoline scarcity.¹⁴⁹ The Commission allowed bus companies to initiate service that summer to any point they chose, simply by filing a form. During the three months that the interim procedures were in effect, the ICC received half as many applications for new authority as it had received in the previous three years.¹⁵⁰ This actual experi-

public either that (1) existing service is poor and if new service were allowed, the individuals supporting the application would use it, or (2) existing service is adequate and would be impaired if new service were authorized. It is hard to imagine how such statements are helpful to the ICC in predicting whether new service should be authorized, and it is even harder to imagine the usefulness of having that testimony presented at an oral hearing, subject to cross-examination. As the Commission observed:

The very nature of [evidence in bus licensing cases] is that it will be generalized. The testimony is often given by laymen, the service needed is nonrepetitive in nature, and often includes leisurely travel for which a future need or commitment cannot directly be stated.

We see little reason to subject unsophisticated passenger witnesses to extensive cross-examination in routine cases merely to drive home a point the Commission has recognized for years — the nature of passenger travel is such that even rather unspecific predictions by potential users are difficult.

Rules Governing Applications for Operating Authority, 45 Fed. Reg. 86,771, 86,783 (Dec. 31, 1980) (ICC Ex Parte No. 55 (Sub-No. 43)).

The difficulties — and expense — of such proceedings are illustrated in a recent decision in which Greyhound challenged an application by Trailways Tamiami to operate between Atlanta and Orlando. Tamiami obtained 423 public witnesses in favor of the new service, and Greyhound lined up 390 opponents. After a 19-day hearing at which 327 of these witnesses testified, an ICC board granted the application. Another year was consumed by Greyhound's appeal to the full Commission, and yet another year by Greyhound's unsuccessful court appeal. *Greyhound Lines, Inc. v. ICC*, [1981] FED. CARR. REP. (CCH) ¶ 82,956 (D.C. Cir. Oct. 9, 1981).

148. See notes 93-98 and accompanying text *supra*. For example, during July 1981, the ICC published 1551 applications in the Federal Register for authority to operate as a motor carrier of freight, compared to only 79 applications for passenger authority. Of these latter applications, 44 were for regular-route authority, 1 sought charter authority, and 34 were for authority as a broker.

149. 44 Fed. Reg. 30,810 (1979).

150. See Comments of U.S. Dep't of Transportation, at 4, Entry Flexibility, Regular Route Passenger Service, 45 Fed. Reg. 1,434 (comment time extended Jan. 7, 1980) (ICC Ex Parte No. MC-133). See generally Comments of the Council on Wage and Price Stability, *supra* note 29, at 7-9.

New services proliferated during this period. Greyhound carried 190,000 passengers on 9 new routes, Trailways hauled 3,800 riders over 5 new routes, and at least 11 other carriers began new service. Furthermore, diversity and innovation abounded for service to small and large communities alike. For example, Jack Rabbit Lines started service to Onida and Agar, South Dakota, whose populations were respectively 689 and 142. Latin Express began service aimed at Spanish-speaking passengers between points in Florida

ence with an open entry regime suggests that ending ICC entry controls, except for inquiries into fitness, would be the most effective and speediest method of injecting new competition into the industry, providing the public with new service, including service to rural America, and giving bus companies the operational flexibility to realign route systems in the most economically rational way.

2. *Reforms in entry policy made by the House bill*— As noted, the House-passed bill does not go this far, for it still requires carriers to apply for new authority and prove fitness every time they want to add new service. Nonetheless, the bill does provide some substantial reforms of present practices. Current ICC procedures place an affirmative burden on applicants to prove that new service is “required by the present or future public convenience and necessity.”¹⁵¹ The House-passed bill eases this burden by: (1) replacing the “public convenience and necessity” criterion with a “public interest” standard,¹⁵² which the committee report indicates is to be “interpreted as a lower barrier to entry than the ‘public convenience and necessity’ test”;¹⁵³ (2) requiring only that the proposed service be “consistent with” public convenience and necessity, rather than “required by” such public purpose; and (3) shifting the burden of proof to protestants, in effect creating a presumption that approval of new service is in the public interest.¹⁵⁴ Protests against applications for new authority can be made only by carriers that actually serve the market or that would otherwise be affected directly by the application;¹⁵⁵ furthermore, the Commission can award new authority merely on a showing of fitness, without regard to “public interest,” when a point is not receiving bus service or the new authority would replace abandoned service.¹⁵⁶

and the Northeast. Town Tour Fun Bus Company offered new luxury service — featuring meals, stereo, and card tables — between Orange County, California, and Las Vegas. *Id.* at 8-9.

151. 49 U.S.C.A. § 10922(a)(2) (West Supp. 1981); see 45 Fed. Reg. 86,771, 86,776, 86,789-93 (1980) (to be codified at 49 C.F.R. §§ 1100.251-.252).

152. H.R. 3663, 97th Cong., 1st Sess. § 6(b)(1), 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) (adding new 49 U.S.C. § 10922(c)(1)) (authorizing the Commission to grant a certificate to fit, willing and able carriers unless it finds “on the basis of evidence presented by any person objecting to the issuance of the certificate, that the transportation to be authorized by issuance of the certificate is not consistent with the public interest”).

153. HOUSE REPORT, *supra* note 17, at 29.

154. *Id.*

155. H.R. 3663, 97th Cong., 1st Sess. § 6(b)(1), 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) (adding new 49 U.S.C. § 10922(c)(8)).

156. *Id.* (adding new 49 U.S.C. § 10922(c)(5)).

While these reforms thus track the provisions of the Motor Carrier Act of 1980 with respect to freight,¹⁵⁷ they make one important step forward. Although the Motor Carrier Act shifted the burden of proof to protestants with respect to "public convenience and necessity," applicants for new trucking authority still must make some showing that the new service would "serve a useful purpose, responsive to a public demand or need."¹⁵⁸ As a practical matter, this requires applicants to obtain affidavits of support from shippers, receivers, trade associations, public officials, or others in order to get approval for authority from the ICC.¹⁵⁹ The House-passed bill places no such requirement on applicants for new bus service — an important step, because contested bus route cases in the past usually have involved battles between bus company lawyers in developing batteries of members of the public to support or oppose the application,¹⁶⁰ even though such evidence had little practical value to the Commission.¹⁶¹

3. *Potential negation of the House-passed entry reforms*— While the reforms discussed thus far offer the potential for easier entry into the industry and onto specific routes, that potential could be negated if the Commission adopts narrow interpretations of the very vague statutory language such as "public interest" or "fit, willing and able." Several provisions in particular could be interpreted to make the burden of proof easier for protestants asserting that the proposed new service would divert revenues or traffic away from them in a manner contrary to the "public interest." The House-passed bill states that diversion of revenues or traffic from incumbent carriers shall not by itself be sufficient to deny an application.¹⁶² Nonetheless, the application may be denied if issuance "would impair, contrary to the public interest, the ability of the [incumbent] carrier to provide a substantial portion of the regular-route passenger service which the carrier provides."¹⁶³

Viewed in its most favorable light, this provision codifies the *Liberty Trucking* standard,¹⁶⁴ which allows companies to protest successfully if they can show that the proposed service threatens

157. Pub. L. No. 96-296, 94 Stat. 793, § 5 (amending 49 U.S.C. § 10922).

158. 49 U.S.C.A. § 10922(b)(1) (West Supp. 1981).

159. MOTOR CARRIER ACT HOUSE REPORT, *supra* note 67, at 14.

160. HOUSE REPORT, *supra* note 17, at 29.

161. *See* note 147 *supra*.

162. H.R. 3663, 97th Cong., 1st Sess. § 6(b)(1), 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) (adding new 49 U.S.C. § 10922(c)(3)).

163. *Id.*

164. *See* note 91 and accompanying text *supra*.

not merely their continued operation on the route in question, but rather their continued existence. Approached from this perspective, the provision represents a salutary means for protecting small carriers from Greyhound, while allowing such carriers to expand. After all, allowing Greyhound to serve a route could conceivably destroy a smaller carrier, while the converse seems highly unlikely: granting a small carrier authority to compete with Greyhound on a particular route may hurt Greyhound in that market, but would not threaten Greyhound's continued existence.

The danger remains, however, that this language will not be so narrowly construed. The committee report states that this provision will prevent regular-route carriers from being "crippled by new applications who apply for excessively narrow grants of authority designed to 'skim' the most lucrative traffic."¹⁶⁵ Similarly, the bill instructs the ICC to consider as pertinent to the "public interest" whether granting the application would have an impact on small communities,¹⁶⁶ and the committee report suggests that applications could be denied if the new authority would siphon off lucrative traffic that subsidizes less profitable small-community service.¹⁶⁷ In addition, the ICC is supposed to consider "any significant adverse impact" that granting an application would have on commuter bus operations;¹⁶⁸ again, the committee report suggests that incumbents could successfully protest on the ground that new charter service would diminish peak-hour traffic and force cutbacks in commuter service.¹⁶⁹

4. *The bill's solicitude for small carriers and rural service*— These provisions are a far cry from open entry for all fit carriers. By allowing incumbents to argue that new service would permit "cream skimming," the House bill assumes the existence of cross-subsidies between various routes, a questionable assumption in light of available evidence.¹⁷⁰ Moreover, the bill seems to assume that small carriers need protection against larger carriers — particularly Greyhound — even though the American Bus Association has stated that smaller bus companies can compete successfully with larger companies¹⁷¹ and even though smaller

165. HOUSE REPORT, *supra* note 17, at 31.

166. H.R. 3663, 97th Cong., 1st Sess. § 6(b)(1), 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) (adding new 49 U.S.C. § 10922(c)(4)(B)).

167. HOUSE REPORT, *supra* note 17, at 31.

168. H.R. 3663, 97th Cong., 1st Sess. § 6(b)(1), 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) (adding new 49 U.S.C. § 10922(c)(4)(E)).

169. HOUSE REPORT, *supra* note 17, at 31.

170. See notes 112-15 and accompanying text *supra*.

171. See note 32 and accompanying text *supra*.

companies appear to have lower average costs than Greyhound.¹⁷² According to one survey, the estimated average expense per bus-mile for Class I carriers was \$1.40 in 1978, compared to only \$1.00 for Class II and III carriers. The significance of this disparity becomes apparent upon examination of 58 routes identified by Trailways as unprofitable. The average loss per bus-mile stood at \$0.44, with a range from \$0.09 to \$1.28, suggesting that a number of "loss" routes in fact could be serviced at a profit by lower cost carriers, obviating the need for subsidies.¹⁷³

These data suggest that no need exists for denying applications out of fear for injury to smaller carriers or service to rural communities. By specifically sanctioning protests on these grounds, the House-passed bill should strengthen the hands of incumbent carriers and, by making the applications process more expensive, may deter applications for new authority. These data also indicate that an open-entry policy for all fit carriers would be the best antidote for poor service, particularly to rural America. A small regional carrier can probably provide good service at lower cost than larger national carriers, and in addition, may have the commitment to serving the region and a specialized knowledge of its needs. In fact, one study of service to rural communities found that in the short term "service to small towns seems no more threatened than that to larger cities. In fact, based upon the available financial data, it appears that the industry is healthier in rural areas than in highly urbanized areas."¹⁷⁴ Companies operating in the Southwest, which tends to be rural, showed greater profitability than firms in the more urbanized North Atlantic States,¹⁷⁵ and service at many small Southwestern communities was so frequent that abandonment seemed unlikely if exit policy were also revised.¹⁷⁶ Another study of service in Florida, where economic regulation ended abruptly and totally in July 1980, showed that free entry had caused no apparent harm to smaller firms; fifteen carriers other than Greyhound or Trailways were surveyed, and eight felt very strongly that they would or already had improved their market positions because of new opportunities provided since the end of intrastate regulation.¹⁷⁷

172. See notes 30, 31 & 127 and accompanying text *supra*.

173. DOT SMALL COMMUNITY STUDY, *supra* note 10, at 37.

174. SENATE SMALL COMMUNITY STUDY, *supra* note 80, at 35.

175. *Id.* at 19.

176. *Id.* at 22.

177. Statement of Marcus Alexis, Acting Chairman, ICC, at 7, in *House Bus Hear-*

C. *Exit*

Exit policy should be reformed to recognize that intercity bus travel forms part of a national transportation system and should be treated as such. Federal preemption of intrastate routes and rates is needed, not to enable federal regulation to replace state regulation, but for the purpose of allowing federal *non-regulation* to displace state regulation. At the same time, sound exit policy would recognize the legitimate, useful role that state and local governments can play if a community or region is threatened with the loss of service.

The House-passed bill does not wholly preempt state exit regulation of intrastate routes.¹⁷⁸ Instead, it requires that bus companies continue to seek approval from state regulatory agencies before either dropping entirely the intrastate portion of interstate service or reducing the frequency of such service to less than one trip per weekday.¹⁷⁹ If the state agency denies the application or fails to act within 120 days, the carrier can appeal to the ICC.¹⁸⁰ Local parties can object to the discontinuance of service,¹⁸¹ and the bill directs the ICC to honor those protests if it finds that discontinuance or reduction is "not consistent with the public interest" or that continuing the service would not constitute an "unreasonable burden on interstate commerce."¹⁸² The House-passed bill makes no change in the current law on

ings, supra note 16. See generally Interstate Commerce Comm'n, Commission Studies of Florida Motor Carrier Deregulation: An Interim Report 3-9 (April 1981) [hereinafter cited as ICC Fla. Deregulation Report].

178. In the area of exit, there is limited preemption of fares and entry on the intrastate portions of ICC-authorized interstate routes. The carrier must still seek approval from the state regulatory agency, but H.R. 3663 would let the carrier appeal adverse decisions to the ICC if the request is denied or not decided within a certain period of time. In the entry area, the House-passed bill could be used to eliminate so-called "closed door" restrictions which block intrastate service. For example, a carrier may serve the Boston to Cleveland route, with intermediate stops at Rochester and Syracuse, but be unable, because of state regulation, to carry local passengers between Rochester and Syracuse. Section 6 of H.R. 3663 would add a new 49 U.S.C. § 10922(c)(2) to allow appeals to the ICC if requests to serve such intrastate legs are denied by the state agency. See HOUSE REPORT, *supra* note 17 at 33-34.

Section 17 of H.R. 3663 would amend 49 U.S.C. § 11501 to enable the ICC to overturn state rate decisions on such intrastate legs as well, in response to complaints from the industry that state agencies keep the fares on these legs below fares on interstate legs of similar distance. See HOUSE REPORT, *supra* note 17, at 21-27 & 44-46.

179. H.R. 3663, 97th Cong., 1st Sess. § 16(a), 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) (adding 49 U.S.C. § 10935(a)).

180. *Id.*

181. *Id.* (adding 49 U.S.C. § 10935(c)).

182. *Id.* (adding 49 U.S.C. § 10935(e)).

exit from interstate routes, which can be accomplished simply by filing an application to amend the certificate granting the authority.¹⁸³

An earlier provision of the House-passed bill, proposed by the ICC, offered a better approach to exit reform. That proposal would simply have preempted state regulation of exit on intrastate portions of interstate routes,¹⁸⁴ and required the ICC to adopt a notice and substitution procedure for dealing with a proposed abandonment of either interstate or intrastate service.¹⁸⁵ Under this procedure, a bus company wishing to discontinue service would be required to give notice to the ICC, the pertinent state agency, and the affected communities.¹⁸⁶ Such notice would be intended to let the affected parties make arrangements to retain the service, find a substitute carrier, or make plans for the abandonment.

Under the ICC's proposal, service could be abandoned if no protest were filed, but a protest received within thirty days would require the carrier within fifteen days to furnish the ICC and any protestants with an estimate of additional revenues or subsidies needed to continue service, along with supporting data on traffic, revenue, and other information needed to calculate an adequate subsidy level.¹⁸⁷ Thereafter, the carrier could abandon service within thirty days unless (1) the ICC found further investigation to be needed in order to decide if the incumbent or another carrier could continue the service or (2) the carrier received an offer of financial assistance, presumably in the form of a differential operating subsidy.¹⁸⁸ In the latter case, if the carrier did not accept the offer within another thirty days, the Commission could either allow discontinuance or order the carrier to continue operations for another sixty days. If no agreement was reached by the end of that sixty-day period, the bus company could then discontinue service.¹⁸⁹

The ICC's suggested approach has a number of desirable fea-

183. 49 U.S.C. § 10925 (Supp. III 1979).

184. Section 14(b) of H.R. 3663, 97th Cong., 1st Sess. (1981), as originally proposed by the ICC, would have added a new 49 U.S.C. § 11101(d) to prohibit states from regulating discontinuance or scheduling of service along interstate portions of interstate routes. In addition, § 15(b) of that version would have amended 49 U.S.C. § 11501(b) by setting minimum standards that state regulatory agencies must follow if they wish to retain authority to regulate intrastate levels of passenger fares and express rates.

185. H.R. 3663, 97th Cong., 1st Sess. § 14 (1981) (adding 49 U.S.C. § 11101(d), (e)).

186. *Id.* (adding 49 U.S.C. § 11101(e)(2)).

187. *Id.* (adding 49 U.S.C. § 11101(e)(3)).

188. *Id.* (adding 49 U.S.C. § 11101(e)(4)).

189. *Id.* (adding 49 U.S.C. § 11101(e)(5)).

tures. First, it forces the ICC to take a more active role in monitoring abandonment of service. Second, it prevents abrupt and total cessation of service, and — when viewed in conjunction with the open entry reforms suggested in this Article — allows the substitution of new carriers that may offer better service than the existing carrier. Finally, it gives state and local agencies, which are closely attuned to local transportation needs, the opportunity to find a substitute carrier or to pay for local service that cannot be economically justified but which local groups believe should be continued. Nine states presently support intercity bus service through direct subsidies,¹⁹⁰ and several states operate or fund specialized bus service for people with particular needs such as the elderly or the handicapped.¹⁹¹ In addition, Congress has authorized a grant program for transportation assistance in rural and small urban areas,¹⁹² although the cost structure of bus firms may in fact make such subsidies unnecessary as a practical matter.¹⁹³

IV. ANTITRUST AND THE INTERCITY BUS INDUSTRY

The antitrust laws curb anticompetitive activities in all industries not subject to ICC-type economic regulation. Any proposal for reducing ICC control over the bus industry must consider whether, in light of the skewed industry structure engendered by regulation, the antitrust laws could suffice to curb anticompetitive conduct in the industry should it be immediately deregulated.¹⁹⁴ Perhaps Greyhound's dominance would enable it to take advantage of deregulation and drive smaller companies out of business through monopolistic practices.¹⁹⁵ Perhaps smaller companies would be better protected — and competition thus enhanced — if, at least for a transition period, Greyhound were subject to certain regulatory restraints on anticompetitive prac-

190. MAC DEREGULATION STUDY, *supra* note 20, at 25 (California, Iowa, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, and West Virginia). See generally DOT SMALL COMMUNITY STUDY, *supra* note 10, at 34-35; ICC PRELIMINARY STUDY, *supra* note 18, at 101-04.

191. Statement of William L. McCracken, Sr. Vice President, Greyhound Lines, Inc., at 11-12, in *House Bus Hearings*, *supra* note 16.

192. Federal Public Transportation Act of 1978, § 313, 49 U.S.C. § 1614 (Supp. III 1979).

193. See notes 113-16 and accompanying text *supra*.

194. See note 15 *supra*.

195. For a detailed statement of these concerns, see Comments of Trailways, Inc., *supra* note 6, at 37-143.

tices that would extend beyond the protections afforded by the antitrust laws against anticompetitive practices.

The answer to these legitimate concerns is that the antitrust laws — enforced through private lawsuits and by federal agencies — can be relied upon by Congress as a full substitute for ICC control over the intercity bus industry. Small bus companies can compete with the giants because of their generally lower costs and because the industry lacks the characteristics of a natural monopoly.¹⁹⁶ Absent federal regulation, the intercity bus industry would exist in a structurally competitive organization and should be subjected to the antitrust laws in the same fashion as “nonregulated” firms. The fears of overreaching by the largest carriers appear to be unwarranted on purely economic grounds.

That smaller carriers have little to fear in the way of monopolistic behavior is suggested by the experience in Florida, where all regulation of intrastate bus operations ceased in July 1980.¹⁹⁷ Greyhound has not monopolized service, and indeed, smaller companies perceive deregulation as a significant opportunity for expansion.¹⁹⁸ Similarly, fears were expressed during debates on the Airline Deregulation Act that the trunk airlines would swamp the smaller companies, but in fact, the regional airlines are prospering while their larger competitors are losing market shares.¹⁹⁹

Immediate reliance upon the antitrust laws represents the best way to ensure a maximum of competition along with vigorous strictures on anticompetitive behavior. As an alternative, however, Congress could phase-in full reliance on the antitrust laws by maintaining, at least for a few years, certain express restrictions on carrier conduct, particularly that of Greyhound. Such an alternative approach would respond to the concerns of smaller carriers that feel threatened by their larger competitors, giving them a transition period within which to realign their route structure and position themselves in the marketplace. The drawback of such a plan, though, is its maintenance of restrictions on the ability of larger carriers to respond to public need in situations that might force some smaller companies out of business. Moreover, the Florida experience suggests there is no such need to protect smaller companies from predatory or anticompe-

196. See notes 26-32, 127 and accompanying text *supra*.

197. See note 177 and accompanying text *supra*.

198. See text accompanying notes 177 *supra* & 230 *infra*.

199. See AIRLINE DEREGULATION: THE EARLY EXPERIENCE 91-157, 213-34 (J. Meyer & C. Oster eds. 1981). See generally U.S. GENERAL ACCOUNTING OFFICE, THE CHANGING AIRLINE INDUSTRY: A STATUS REPORT THROUGH 1980, at 26 (CED-81-103) (1981).

titive activities.

Against this background, then, consideration can be given to specific anticompetitive activities that Greyhound might engage in by exercising its monopoly power. This will involve evaluation of how such conduct would be regulated under the antitrust laws, and what sort of short-term restraints Congress might seek to enact or retain if it preferred to defer immediate reliance on the antitrust laws.

A. *Setting Predatory Fares or Rates*

Defining a predatory fare is difficult at best,²⁰⁰ and discussions of predatory pricing in case law and the literature have suffered from the "failure to delineate clearly and correctly what practices should constitute the offense, and exaggerated fears that large firms will be inclined to engage in it"; allegations of predatory pricing often ignore "the possibility that the alleged predator's cost is . . . more than covered by his price."²⁰¹ Areeda and Turner posit that predatory pricing makes economic sense only if (1) the putative predator has greater financial staying power than its competitors and (2) the predator has substantial chance that its losses will be exceeded by the profits to be earned after the competition is destroyed.²⁰²

In the intercity bus industry, where fixed costs are relatively low and entry barriers could be significantly reduced by regulatory reform, it is doubtful that Greyhound could engage in predatory conduct. This seems particularly true if, as the evidence suggests, Greyhound's costs are higher than its smaller competitors.²⁰³ Even if Greyhound were to force out a competitor on a particular route through cut-rate pricing, the ease of entry under a deregulated environment would make it very difficult for Grey-

200. For example, the Airline Deregulation Act of 1978, § 2(a)(2), defined "predatory" as "any practice which would constitute a violation of the antitrust laws as set forth in [the first § of the Clayton Act, 15 U.S.C. § 12 (1976)]." 49 U.S.C. § 1301(35) (Supp. III 1979).

201. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975) (footnotes omitted) [hereinafter cited as Areeda & Turner]. See also Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Areeda & Turner, *Scherer on Predatory Pricing: A Reality*, 89 HARV. L. REV. 891 (1976); Scherer, *Some Last Words on Predatory Pricing*, 89 HARV. L. REV. 901 (1976). For a fuller discussion of destructive competition, see F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 198-206 (1970).

202. Areeda & Turner, *supra* note 201, at 698.

203. See note 127 *supra*.

hound to avoid new competition that would siphon off potential monopoly profits. Moreover, considering that Greyhound faces the possibility of new competition not just on a few routes, but throughout its system, it seems highly doubtful that predatory pricing would or could make economic sense for Greyhound for any sustained period.²⁰⁴ Clearly, some smaller companies could be hurt should Greyhound cut its prices. However, simply lowering fares to meet competition need not violate the antitrust laws²⁰⁵ — and indeed could have substantial public benefit — so that a general fare reduction might still be legal under the antitrust laws if Greyhound earns a profit.²⁰⁶

Because predatory pricing likely would not emerge absent ICC controls, there seems no need to provide a special remedy for smaller bus companies. If, however, Congress wishes to retain transitional protection in this area, the ICC could be authorized, upon complaint or its own initiative, to suspend, investigate, or cancel fares as predatory, even if they fall within the zone of pricing freedom. This approach was taken in the House-passed Bus Regulatory Reform Act of 1981,²⁰⁷ as well as both the Airline Deregulation Act²⁰⁸ and the Motor Carrier Act of 1980.²⁰⁹

B. Entering a Market and Driving Out a Competitor

If ICC entry controls for fit carriers were ended immediately, as this Article recommends, Greyhound would not violate the antitrust laws simply by entering a new route, even if the incumbent withdrew. Similarly, Greyhound could have a "monopoly" on a route that would not necessarily be illegal and might even benefit the public, for example, by establishing through-service on a single carrier. It seems unlikely, moreover, that a court reviewing a monopolization claim would consider a single city-pair route or even the surrounding region to be the relevant market,

204. See Areeda & Turner, *supra* note 201, at 698-99. In recent congressional testimony, Greyhound called predatory pricing in the bus industry "foolish, if not suicidal." Statement of William L. McCracken, Sr. Vice President, Greyhound Lines, Inc., at 34, in *House Bus Hearings*, *supra* note 16.

205. See, e.g., *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714, 726 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

206. See *Telex Corp. v. International Bus. Machs. Corp.*, 510 F.2d 894, 926 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

207. H.R. 3663, 97th Cong., 1st Sess. § 11, 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) (amending 49 U.S.C. § 10708).

208. 49 U.S.C. § 1482(d)(4) (Supp. III 1979).

209. 49 U.S.C.A. § 10708(d)(4) (West Supp. 1981).

absent more egregious conduct on the part of Greyhound.²¹⁰

Under an open entry regime, some "bridge carriers" likely would be absorbed into larger companies or would decide to go out of business, but this would not necessarily be contrary to the public interest. Bridge carriers are usually small companies providing direct service between two points, while entry restrictions under ICC regulations often required a larger carrier to operate between those points only in a longer, more circuitous way.²¹¹ Artificially reserving such direct service to bridge carriers does keep smaller companies in business, but it obviously can make travel more difficult and time-consuming for passengers who would be forced to switch to a bridge carrier to obtain the most direct route between two points.

As a transitional measure, Congress could limit open entry by Greyhound — and possibly Trailways as well — by allowing smaller companies to file protests under the *Liberty Trucking* standard:²¹² Greyhound could be denied a route if its entry threatened to drive the incumbent out of business. This approach presents serious drawbacks if maintained in effect for too long, because it could prevent Greyhound, or Trailways, from developing efficiencies that would benefit the public. The House-passed bill could be narrowly construed as allowing the *Liberty Trucking* standards of protection, although the bill's language creates the risk that new authority could be denied on other less appropriate grounds as well.²¹³

C. Refusing to Cooperate With Competitors

1. Interline Service— Bus companies traditionally engage in a

210. In light of Greyhound's national route network, national fare system, and national planning, it can be argued that the relevant market for monopolization claims in intercity bus service is national under the doctrine of *United States v. Grinnell Corp.*, 384 U.S. 563, 575 (1966). Even with a national market, however, there may be regional submarkets in which violations occur. For example, a three-state region was the area in which anticompetitive conduct was found to exist in *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated and remanded on other grounds*, 437 U.S. 322 (1978).

211. This was the situation in *Mt. Hood Stages v. Greyhound*, 555 F.2d 687 (9th Cir. 1977), *vacated and remanded on other grounds*, 437 U.S. 322 (1978), where Mt. Hood was a "bridge carrier" operating direct service between Klamath Falls and Biggs, Oregon, while Greyhound operated more roundabout service that would have caused passengers to ride 110 more miles on a San Francisco-Spokane trip than if they switched to Mt. Hood. For a discussion of the special situation of bridge carriers, see ICC Bus Study Group Report, *supra* note 22, at 34-35.

212. See note 91 and accompanying text *supra*.

213. See notes 163-69 and accompanying text *supra*.

variety of cooperative activities designed to facilitate passenger travel. For example, they offer "interline" service, allowing passengers to make connections between routes that may not be served by one carrier. Such interlining is facilitated if carriers lease their terminal space to others, quote each other's fares, and make scheduling information about other lines available to passengers. Given the nature of intercity bus transportation, in a deregulated environment such practices would in all probability be continued voluntarily, for economic reasons, particularly if carriers realign their route structures to achieve greater efficiencies. Suppose, for example, that in a less regulated environment Greyhound's route system and high cost structure make it advisable to concentrate on long-haul markets and to drop marginal or short-haul service, which presumably would be picked up by lower-cost regional carriers. Greyhound would then be more dependent on the passenger "feed" provided through these smaller companies, so that its own economic interests would dictate voluntary interlining.

If, however, Greyhound refused to interline, an affected carrier could receive monetary and injunctive relief under the anti-trust laws — provided that Greyhound were acting with an anti-competitive purpose and had the power to originate a substantial amount of traffic at the points in question. So the court held in *Mt. Hood Stages, Inc. v. Greyhound Corp.*,²¹⁴ where Greyhound tried to drive a competing carrier out of business by, inter alia, refusing to interline. Moreover, the conclusion that Greyhound could violate the antitrust laws by refusing to interline is consistent with other decisions requiring a firm with requisite market power to refrain from using that power to preserve or extend its market share.²¹⁵

214. 555 F.2d 687 (9th Cir. 1977), *vacated and remanded on other grounds*, 437 U.S. 322 (1978).

215. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (utility's refusal to wholesale power to or allow the use of transmission lines by municipal distributors found violative of the Sherman Act); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (refusal by sole newspaper in area to accept advertisements from retailers also advertising with competing radio station held illegal); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (refusal to supply wholesaler with goods at other than retail prices held unlawful); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945) (refusal by sole manufacturer of material to sell to distributor so that distributor could compete for government contract held a violation of § 2 of the Sherman Act).

Thus, Greyhound's use of its dominant market power to bar a competitor from the market by refusing to deal might be a violation of the antitrust laws. See *Crew, Do Antitrust Laws Provide a Feasible Alternative to Regulation?*, 47 ICC PRAC. J. 673, 681 (1980).

An alternative to immediate reliance on the antitrust laws to ensure adequate interlining would be retention of that portion of the Interstate Commerce Act making interlining mandatory for bus companies.²¹⁶ Indeed, the House-passed bill does not alter bus companies' obligations to construct through-routes and joint fares. This approach guarantees the continued existence of interline service, which often makes economic sense²¹⁷ and will likely be provided in any event, particularly if large carriers emphasize longer routes and rely on smaller carriers to operate "feeder" service.

2. *Terminal access*— Access to Greyhound terminals by competing carriers raises related problems, because interlining requires that passengers be able to catch connecting buses quickly and conveniently. The fear has been expressed that Greyhound might attempt to deter interlining or steer passengers toward its own service by limiting access to its terminals.²¹⁸

This problem is somewhat more difficult than questions of interlining, particularly because bus terminals, unlike airports, are privately owned and are subject to legitimate space limitations. Various decisions, however, suggest that the antitrust laws obligate Greyhound to make its terminals available to competing carriers. Under the "bottleneck theory" of antitrust liability,²¹⁹ "a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it."²²⁰ For example, in *United States v. Southwestern Greyhound Lines, Inc.*,²²¹ Greyhound and other bus companies operated a terminal used by a small, local line. The local line was evicted from the bus terminal after it arranged with another carrier to offer competing interstate service. While the district court acknowledged that Greyhound had no obligation to accept any carrier as a tenant, nonetheless the eviction of the local bus line, motivated by anticompetitive animus, was found to be a violation of the antitrust laws.²²²

216. 49 U.S.C. § 10703(a)(3) (Supp. III 1979).

217. See text following note 213 *supra*.

218. See HOUSE REPORT, *supra* note 17, at 49.

219. See *Mid-Texas Communications Sys., Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980).

220. *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979).

221. [1953] Trade Cas. 68,355 (N.D. Okla.).

222. See also *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952) (wholesaler tenant's eviction from building owned by other wholesalers in most convenient location held unlawful); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912) (carriers' prevention of competing carrier's use of railroad terminal held violative of Sherman Act where geographic constraints limited city to only one station); *Associated Press v. United States*, 326 U.S. 1 (1945) (asso-

Thus, case law clearly suggests that Greyhound has a duty to deal with its competitors on a reasonable and nondiscriminatory basis in allowing them to use terminal space, and can be liable for failure to do so. Indeed, by the terms of a 1957 consent decree that ended an antitrust suit brought by the Justice Department, Greyhound is enjoined from discriminating against "a bus operator, using a terminal owned or controlled by [Greyhound] in the provision of usual terminal services and facilities . . . including, but not limited to, the sale and issue of tickets, the routing of passengers, and the dissemination of travel information."²²³

While terminal access for smaller carriers may be adequately ensured by the antitrust laws, the problems presented by access to competitors' facilities deserve thorough examination. The House-passed bill directs the Secretary of Transportation and the ICC to investigate the ownership, location, and adequacy of bus terminals in providing passenger service.²²⁴ This study should be highly useful in determining what steps, if any, Congress should take in this area. It may well be true that the 1957 consent decree — combined with the "bottleneck theory" of antitrust liability — adequately protects smaller carriers. On the other hand, there may be the need for a mandatory access provision of the sort that already exists for the railroads.²²⁵ At this stage, more information is needed.

3. *Proscription of unfair practices under the Interstate Commerce Act*— Aside from refusing to interline or barring competitors from terminals, Greyhound might engage in other anticompetitive actions, such as routing traffic around a bridge carrier to drive it out of business, refusing to quote an interlining carrier's fare, or arranging schedules to preclude connections. While such actions may be an illegal refusal to deal, upon a proper showing of Greyhound's dominance and anticompetitive purpose, they may also be proscribed under a provision of the Interstate Commerce Act requiring that a "practice related to transportation or service provided by a carrier . . . must be reasonable."²²⁶ Although broadly worded, the ICC could use this section more vigorously to prosecute and deter "unfair or deceptive practices or unfair methods of competition" in the same way those practices

ciation's bylaws restricting competitors of members from membership found unlawful).

223. *United States v. Greyhound Corp.*, [1957] Trade Cas. 73,086, 73,089 (N.D. Ill.).

224. H.R. 3663, 97th Cong., 1st Sess. § 26, 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981).

225. See 49 U.S.C.A. § 11103 (West Supp. 1981).

226. *Id.* § 10701(a).

are proscribed for "nonregulated" industries by section 5 of the Federal Trade Commission Act.²²⁷ As part of full deregulation, Congress could transfer to the FTC the authority to regulate such anticompetitive practices in the intercity bus industry, creating a remedy for small carriers injured by any unfair practices.²²⁸

CONCLUSION

Deregulation of the intercity bus industry will go a long way toward improving service to passengers. The Bus Regulatory Reform Act of 1981, passed recently by the House of Representatives, makes some changes but does not go far enough. If anything, this is one area where Congress could start catching up with the states. In July 1980, Florida became the first state to end public utility-style intrastate regulation of transportation companies, and the voters of Arizona overwhelmingly approved a similar approach in November 1980.²²⁹ Although the Florida experience is too new to draw any definitive conclusions, an ICC study reported in April 1981 that: (1) Greyhound and Trailways had increased their total weekly scheduled miles by eight and seven percent, respectively; (2) carriers were experimenting with new fare options; (3) charter service had improved, and bus companies were using their equipment more efficiently; and (4) where service losses occurred due to shifts in regular-route service, either another carrier entered the market, another carrier remained in the market, or another carrier was providing service to a nearby community.²³⁰

ICC regulation of the intercity bus industry developed during the 1930's, when assuring the financial stability of American

227. 15 U.S.C. § 45 (1976 & Supp. IV 1980).

228. In this connection, it should be noted that private antitrust litigation, while expensive and time-consuming, is always available. In the leading case of *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated and remanded on other grounds*, 437 U.S. 322 (1978), Greyhound was found to have attempted to run Mt. Hood out of business by refusing to quote Mt. Hood's fares to potential interline passengers, by arranging schedules that routed passengers around Mt. Hood's more direct bridge service, by refusing to distribute Mt. Hood's schedules in Greyhound stations, and by ending interline service with Mt. Hood. Because of the novel legal issues in the case, Mt. Hood did not recover damages for over a decade. Nonetheless, the treble-damage award was \$13.1 million, plus \$1.25 million in attorneys' fees and costs.

229. See MAC DEREGULATION STUDY, *supra* note 20, at 20, 25-26.

230. ICC Florida Deregulation Report, *supra* note 177, at 3-9. See also Washington Post, Dec. 26, 1980, at C6, col. 1; U.S. DEP'T OF TRANSPORTATION, DEREGULATION AND INTERCITY BUS OPERATIONS IN FLORIDA: A PRELIMINARY STUDY 67-69 (1981).

business was a top priority. As America enters the 1980's, however, the challenges are double-digit inflation, a stagnant economy, and an uncertain world oil situation. These problems demand not stifling cartel regulation, but more competition, greater productivity, and increased fuel conservation. Deregulation will not solve all the problems of the intercity bus industry; it will not undo the business cycle or bring down the price of fuel. Yet it will encourage competition by giving the bus industry new operating flexibility and new incentives to innovate, thereby improving service to the travelling public.