Elimination of Gateways in Section 5(2) and 212(b) Proceedings*

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I. INTRODUCTION

Public awareness of the energy crisis has led federal agencies to take measures which encourage the conservation of fuel. As part of this effort to save energy and under its broad powers to regulate the motor carrier industry,[1] the Interstate Commerce Commission has promulgated gateway elimination regulations to reduce fuel consumption and increase operating efficiency.

The term "gateway" is used to describe the point at which an *irregular-route* common carrier combines or "tacks" two *separate* and *unrestricted* grants of operating authority. The "gateway" is the point common to each grant of authority. By tacking authorities an irregular-route common carrier can perform a through transportation service between the points in one authority and those in another.

The need for the elimination of gateways became apparent as irregular-route carriers obtained successive grants of authority through

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1. *See* American Trucking Assoc. v. United States, 344 U.S. 298 (1953)

purchase or direct grant, because many operations involved circuitous routings and more direct operations would be in the public interest. For this reason the Commission applied the gateway elimination regulations to transactions under section 5(2) of the Interstate Commerce Act. Section 5(2) provides that where the Commission finds a proposed purchase of irregular-route motor carrier operating authority will be consistent with the public interest an order approving the transaction will be entered, "subject to such terms and conditions and such modifications as it will find to be just and reasonable."[2]

II. BACKGROUND

On November 23, 1973, the Commission issued its Notice of Proposed Rulemaking and Order on Gateway Eliminations.[3] The Notice proposed regulations affecting the tacking and joining of currently held separate irregular-route authorities at a common point of service—a "gateway"—by a single carrier and applying to all future applications for irregular-route authority. These proposed regulations would have prohibited the tacking of all grants of irregular-route authority and would have "pertain[ed] not only to applications for new or enlarged operating rights but also to transfer and acquisition applications."[4]

A. THE GATEWAY ELIMINATION RULES

The Commission issued its *Gateway Elimination Report*[5] containing the final gateway and tacking rules and regulations on February 25, 1974. The gateway rules apply only to irregular-route motor carrier operations, and their salient features are as follows:

> (1) No carrier holding irregular-route authority, however acquired, can tack two or more grants of such authority except as provided.[6]
>
> (2) When a movement over a gateway route is 300 miles or less from origin to destination, the carrier may, but it is not required to, terminate such gateway operations.[7] (300 mile rule).
>
> (3) When a movement over a gateway route exceeds the distance between the origin and destination points over the most direct route available by 20% or less, the carrier must file a "letter-notice", notifying the agency of its desire to conduct direct operations if it wishes to continue providing that service. (20% rule).[8]
>
> (4) When a carrier desires to continue service between an origin and destination point when the movement over the gateway route is more

2. 49 U.S.C. § 5(2)(b) (1970).
3. Ex Parte No. 55 (Sub-No. 8), 119 M.C.C. 170 (1973).
4. *Id.* at 197 n.12.
5. Ex Parte No. 55 (Sub-No. 8) 119 M.C.C. 530 (1974).
6. 49 C.F.R. § 1065.1(a) (1976).
7. *Id.* § 1065.1(b).
8. *Id.* § 1065.1(a)(3),.1(d)(1)(i).

than 20% greater than the distance over the most direct route available, it must file an application for approval to operate a direct route. Pending a final determination, the circuitous service may be continued.[9]

(5) When operations over the most direct route available are approved by the Commission either by the letter-notice or application procedure, the carrier is required to offer the through service to the public.[10]

Briefly stated, the adopted rules enable irregular-route carriers to avoid gateways and operate over the most direct highway distance between the points to be served. However, when the gateway operations are involved, a carrier has to discontinue such operations, unless it has filed an appropriate application seeking direct service authority. Nevertheless, existing operations can be continued pending disposition of the application for direct authority.

Although the Gateway Elimination Rules do not specifically relate to acquisition proceedings under sections 5(2) and 212(b),[11] the Commission's report provides for the situation where a carrier seeks to extend its operations through the purchase of another carrier's rights. If the possibility of tacking is involved, then the acquiring carrier is required to provide notice in the transfer application of such tacking possibilities and to show that such operations are required by the public convenience and necessity.[12] The Commission reasoned that such a showing "will allow irregular-route . . . carriers to utilize acquisitions and mergers[13] as a means of growth and at the same time will eliminate, to the extent required by the present or future public convenience and necessity, unnecessary fuel-wasting circuity."[14]

B. The ICC Policy Statement

On December 4, 1974, the Commission issued its *Policy Statement*,[15] which clarified the procedures for handling applications under sections 5(2) and 212(b) of the Interstate Commerce Act in those situations where the joinder of separate irregular-route rights is proposed.

The *Policy Statement* discussed three situations relating to pending sections 5(2) and 212(b) applications involving a joinder of separate unrestricted segments of irregular-route authority. The first dealt with those applications which had been decided and consummated that were filed before November 23, 1973, in which a certificate of public

9. *Id.* § 1065.1(b).
10. *Id.* § 1065.1(a).
11. 49 U.S.C. §§ 5(2), 312(b) (1970).
12. Ex Parte No. 55 (Sub-No. 8) 119 M.C.C. 530,552-53 (1974).
13. The gateway rules do not apply to commonly controlled carriers as they join their respective authorities at interchange points. *Id.* at 556.
14. *Id.* at 553.
15. 39 Fed. Reg. 42,958 (1974).

convenience and necessity had not been issued. In this situation, the applicant was given 60 days from issuance of the certificate to file a letter-notice or an OP-OR-9 application pursuant to the Gateway Elimination Rules.[16]

The second situation dealt with applications filed before November 23, 1973, but not yet decided. In this situation, the parties had (a) 60 days from December 4, 1974, to file a letter of intent to tack and eliminate any resulting gateways and (b) 60 days from the date of consummation to file an OP-OR-9 application pursuant to the Gateway Elimination Rules.[17]

The third situation dealt with applications filed after November 23, 1973, at any stage of the administrative process for which no certificate had yet been issued. In this situation, the parties were given 60 days from December 4, 1974, to file (a) supplemental evidence showing a need for tacking and (b) an OP-OR-9 application pursuant to the Gateway Elimination Rules.[18]

The *Policy Statement* also discussed future section 5(2) and 212(b) applications, that is, those filed after December 4, 1974. It indicated that, in applications filed under section 5(2) or 212(b), the parties would be required to submit evidence with the application to justify tacking of separate irregular-route authorities and to file a directly related OP-OR-9 application for the elimination of the gateway and the initiation of direct through operations.[19] The *Policy Statement* also made it clear that the failure to seek and justify elimination of the gateway would result in the imposition of a "no tacking" restriction.[20]

Although the *Policy Statement* generally clarified application procedures for section 5 and 212(b) applications, confusion surrounded applications which were pending on the date the *Policy Statement* was issued.[21] This necessitated the adoption of a flexible posture by the

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* Prior to the adoption of the Commission's Gateway Elimination Rules, the Commission ordinarily did not impose tacking restrictions in acquisition proceedings under section 5 of the Act in the absence of evidence showing that protestants required such protection. Penn Yarn Express, Inc.—Purchase—Van Transport Lines, Inc., 87 M.C.C. 365 (1961).

21. *E.g.*, the statement was dated Dec. 3, 1974, served Dec. 4, 1974, and published in the *Federal Register* on Dec. 9, 1974. A question arose as to when the 60-day period for filing gateway applications in pending proceedings terminated. To clear up the confusion, the Section of Finance took the position that the period began on the date of publication, December 9, 1974, and terminated on February 10, 1975.

Fees were also at issue. It was decided that when an applicant files a directly related gateway application, *and* the section 5 or 212(b) application has not been consummated, no fee will be charged. If the transaction has been consummated a filing fee of $350 is necessary.

Commission in handling those applications, as can be seen in several informal decisions. For example, for section 5 applications that were pending on petition or exception, the section 5 proceeding, where possible, was held in abeyance until the gateway application was ripe for disposition.[22] The proceedings were consolidated to expedite the entire proceeding and to insure continuity. Likewise, proceedings were consolidated where section 5 applications were filed, but where no decision had been rendered.[23]

III. Decisional Law

The Commission's Report, Regulations and *Policy Statement* have resulted in a body of decisional law. Some highlights of decisional law concerning gateway elimination applications which are related to section 5 and 212(b) applications follow.

A. Critical Filing Dates

The Regulations[24] and the *Policy Statement* provide that an applicant may file a letter-notice or OP-OR-9 application to eliminate those gateways resulting from an acquisition application which has been filed, decided and consummated on or before November 23, 1973, within 60 days after the issuance of the certificate resulting from the purchase.[25] While there is no report or order on point, this interpretation appears reasonable in the light of the language of the above mentioned regulation section.[26] The *Policy Statement* also provides that in proceedings filed before but not decided until after November 23, 1973, an OP-OR-9 application must be filed within 60 days of consummation of the finance proceeding.[27]

B. Evidence

In the *Policy Statement*, the Commission stated that the criteria to be followed generally for the elimination of gateways created by the approv-

22. H.M.E. Motor Express, Inc.—Purchase (Portion)—Treadway Express, Inc., No. MC-F-12215 (ICC Order, Div. 3, Sept. 25, 1975).

23. Consolidation would result in two ways: (1) Under modified procedure verified statements in both the section 5 and the gateway case would be accepted, and, after all statements were in, the case would be consolidated; (2) With an unopposed section 5 case both applications would be consolidated after the gateway application was ripe.

24. 49 C.F.R. § 1065(d)(1)(iii) (1976).

25. Standard Motor Freight, Inc.—Purchase—Madison Transp., 60 M.C.C. 249 (1955).

26. *See* Branch Motor Express Company—Purchase—Suter, Inc., 116 M.C.C. 842 (1974); Ashworth Transfer, Inc.—Purchase—Willcox and Fowkes, 90 M.C.C. 107 (1962).

27. 30 Fed. Reg. 42,958 (1974). The *Statement* provides that in proceedings filed before but not decided until after November 23, 1973, an OP-OR-9 application be filed within 60 days of consummation of the finance proceeding. Red Wing Refrigerated, Inc.—Purchase (Portion)—Express, Inc., No. MC-F-11776 (ICC Order Div. 3, Acting as an App. Div., Aug. 5, 1974).

al of the section 5 or section 212(b) application are those enunciated in *Childress-Elimination Sanford Gateway* [28] and *Maryland Transportation Co. Extension-Specified Commodities*.[29] These criteria require an applicant to introduce into the record evidence through (1) an abstract showing a substantial number of shipments through the involved points or (2) supporting shipper statements indicating that the public convenience and necessity requires the direct service by elimination of the involved gateways.[30] The applicant is also required to show that approval of the gateway application would not create a new service or a different service which would materially improve the applicant's competitive position.[31]

1. Abstract of Shipments

Under the *Childress criteria*, those applicants who relied on past operations would have to submit with the OP-OR-9 application an abstract of shipments showing substantial operations through the involved points. Although a section 5 application also requires an abstract of shipments to be submitted, it is not necessary for the applicant to submit two separate abstracts.[32] A single abstract is permissible, provided that the abstract is in proper form and incorporates operations through the points involved in the gateway elimination applications for the required period.[33]

2. Substantial Number of Shipments

The Commission has taken varying positions about what is required for a showing of a substantial number of shipments. Review Board Number 2 has asserted that "authority (to eliminate a gateway) will be approved in each case in which the evidence of record demonstrates that applicant transported 24 or more shipments from one origin State to a single destination State through the pertinent gateways."[34] Review Board Number 5, also, appears to have adopted the "24 shipment Rule."[35] However, in the past the Commission, Division 1, has found one shipment a month to be the standard for the minimum amount of traffic

28. 61 M.C.C. 421 (1952).

29. 83 M.C.C. 451 (1960).

30. Jerry Lipps, Inc.—Purchase—Pascagoula Drayage Co., 122 M.C.C. 885 (1977).

31. James H. Hartman & Son, Inc.—Purchase—Piedmont, 122 M.C.C. 580 (1977); Youngstown Cartage Co.—Control & Merger, 122 M.C.C. 593 (1976).

32. *Compare* Interstate Commerce Commission, Form OP-F-44 (briefly described in 49 C.F.R. § 1003.1 (1976)) *with* 49 C.F.R. § 1065.1(d)(2)(i), (ii)(B) (1976).

33. *Id*. This would avoid needless duplication and effort.

34. Int'l. Transp., Inc., Extension—Gateway Elimination, No. MC-113855 (Sub.-No. 293G) (ICC Order of Further Proceedings, Review Bd. No. 2, April 19, 1976).

35. Keim Transp., Inc.—Purchase (Portion)—Romans Drywall Express Inc., No. MC-F-12506 (ICC Order, Review Bd. No. 5, July 2, 1976).

that would be considered substantial.[36]

While the "24 shipment Rule" appears to represent one view, the rule is too rigid. If an applicant introduces evidence of 23 shipments, the application would be denied. It is incongruous that the present and future public convenience and necessity will be found where there are 24 shipments but will be absent because there are only 23. It seems that the better criteria would be for the Commission to take into account the commodities involved, the character of the area served in terms of population and industry, the amount of traffic transported through the gateway, and the financial and material capabilities of the carrier. In May, 1977, the Commission did revise the "test" to reflect a less rigid approach, stating that the "24 shipment Rule" did not constitute an appropriate test of substantiality.[37]

3. Shipper Support

Question IV of application form OP-OR-9 and Rule 247(b) of the Commission's Rules of Practice require an applicant to indicate whether its application will be supported by shippers, or others, who will present evidence about their need for the service proposed.[38] Question IV continues:

> If the answer is Yes, applicant must attach to this application one or more certifications of support which shall be prepared in the form prescribed in the appendix to the instructions accompanying this application form.... Except for good cause shown, no application depending upon the sup-

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36. Ringle Express, Inc., Extension—Gateway Elimination, No. MC-119641 (Sub.-No. 125G (ICC Order, Div. 1, Acting as an App. Div., Feb. 9, 1976); Leonard Bros. Trucking Co., Inc., Extension—Gateway Elimination, No. MC-19227 (Sub.-No. 202G) (ICC Order, Div. 1, Acting as an App. Div., Feb. 13, 1976).

37. Report on Reconsideration in Groendyke Transp., Inc., Extension—Gateway Elimination, 126 M.C.C. 571 (1977). In Groendyke, the Commission stated:

> While the overall volume between these points is relatively low, applicant has demonstrated that it is an efficient and effective competitor for the involved traffic, and our grant of authority is not likely to result in any substantially enhanced ability on its part to handle that traffic.
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> The involved gateway elimination rules were enacted . . . to eliminate . . . unnecessary miles being traveled by motor common carriers of property operating through gateways over irregular routes. . . . In our opinion the review board's grant of authority will further that end without adversely affecting the competitive balance in the areas considered.
>
> Finally, . . . [an] examination of Commission records reveals that numerous grants of authority have been approved upon a showing of fewer than 24 shipments during the 2-year base period. A mechanical rule such as 24 shipments in a 2-year period would not constitute an appropriate test of substantiality as that term is used in *Childress*. Any decisions to the contrary are erroneous and are hereby expressly overruled.

Id. at 576-77. *Cf.* New Dixie Lines, Inc.—Control—Jocie Motor Lines, 75 M.C.C. 659 (1958) (with respect to dormant operating rights).

38. Anderson Trucking Serv., Inc.—Purchase—Jenkins Truck Line No. MC-F-12623 (ICC Order, Div. 3, Acting as an App. Div., Feb. 2, 1977).

porting evidence of public witnesses will be accepted for filing unless it is accompanied by the certificates of support of such witnesses. . . .[39]

The requirement of shipper certification is designed to insure that the application will be supported and is filed with a bona fide intention of prosecuting it to its final conclusion. Furthermore this information facilitates a determination about the manner in which the application should be processed: if a hearing is to be held, it permits the allocation of sufficient hearing time to accommodate the expected number of shipper witnesses. Certification also provides information to actual or potential protestants so that they can better decide their positions in the matter and can prepare their presentations; thus resulting in more expeditious disposition of the proceeding.[40]

The Gateway Elimination Rules permit applicants to present evidence in the form of data relating to actual operations or in the form of statements from supporting shippers.[41] The *Policy Statement* clearly indicates that in all future section 5 proceedings which are related to gateway elimination applications, the applicant will be held to the usual Commission procedure regarding the submission of evidence.[42] In those proceedings, where an applicant relies on evidence in the form of statements from supporting shippers, the requirements established by *Schaeffer Extension—New York City*[43] and incorporated in Rule 247 are applicable.[44]

Form OP-OR-9 and Rule 247 require that where there has been noncompliance with the certification requirements, the testimony of public witnesses upon whose behalf certificates have not been timely filed will not be permitted, absent a showing of good cause for failure to comply.[45]

In keeping with due process considerations, the purpose of the *Schaeffer* Rules, among other things, is to provide a degree of information to protestants, so that they can make adequate preparation for cross-examination.[46] Good cause appears to exist where (a) the applicant's failure to comply with the Commission's rule was due to uncertainty[47] or (b) the protestants have not been prejudiced.[48]

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39. Interstate Commerce Commission, Form OP-OR-9 (rev. ed. 1975).

40. Schaeffer Extension—New York City, 106 M.C.C. 100, 102 (1967). *See also* General Rules of Practice—Rule 247, 120 M.C.C. 670 (1974).

41. 49 C.F.R. § 1065 (1976).

42. 39 Fed. Reg. 42,958 (1974).

43. 106 M.C.C. 100 (1967).

44. *See* Pittsburgh & N.W. Trucking Co.—Control & Merger, 109 M.C.C. 56 (1969), and Gray Moving & Storage, Inc.—Purchase-Warner, 122 M.C.C. 316 (1967).

45. Anderson, *supra* note 32.

46. 106 M.C.C. 100, 102 (1967).

47. Anderson Trucking Serv., Inc.—Purchase—Bay, 122 M.C.C. 673 (1977).

48. Tennessee, Carolina Trans., Inc. Ext.—Memphis, 113 M.C.C. 711, 713, 714 (1971); Mid-American Lines—Purchase—Five J. Motor Services, 109 M.C.C. 755 (1971).

C. Operations Under Temporary Authority

1. Gateway Elimination Applications

Under *Childress*, a gateway elimination application may be approved if the applicant is actually transporting a substantial volume of traffic between the points involved and the elimination of the gateway will not materially improve the applicant's competitive position to the detriment of existing carriers.[49]

In evaluating the evidence of past operations under temporary authority, Review Board Number 5 has held that operations under temporary authority will not suffice to meet the criteria of the *Childress* case.[50] Nevertheless, Division 3 has considered evidence of operations under temporary authority to be of probative value (1) to show the ability of a carrier to provide the service, and (2) to indicate the volume of traffic involved and the effect of a grant on existing carriers, provided that there is other supporting evidence.[51] However, where no additional evidence was introduced, the Division, like the Review Board, has denied the gateway application.[52] Where additional evidence was introduced, the gateway application has been granted.[53]

The traditional view has been that evidence of service rendered under temporary authority, although not conclusive, is admissible and properly considered with other evidence to determine whether the transaction and unified service will be in the public interest.[54] Recently the Commission has adopted a more flexible approach and has approved an application largely on the basis of traffic handled under temporary authority where there was also evidence of a public need for the service.[55] This modern approach is more realistic because operations under temporary authority are particularly pertinent when they are of long standing and afford a means of determining whether the service resulting therefrom has had any destructive effect on the operations of protesting carriers.

Once temporary authority is authorized under section 210a(b) it is "extended" until the decision in the permanent application is administra-

49. Anderson Trucking Serv., *supra* note 40, at 683.

50. Stevens Van Lines, Inc.—Control and Merger—Hammel Moving & Storage, Inc., No. MC-F-12211 (ICC Report and Order, Review Bd. No. 5, Feb. 4, 1976).

51. Riteway Express, Inc.—Purchase—A. Knorr's Express, Inc., No. MC-F-12338 (ICC Decision and Order, Div. 3, Dec. 8, 1976).

52. Jerry Lipps, Inc., *supra* note 28.

53. Cent. Transfer Co.—Purchase—Metropolitan Freight Carriers, Inc., No. MC-F-12224 (ICC Order, Div. 3, Acting as an App. Div., May 14, 1976); Ohio Express, Inc. Purchase—Alfred Trogani, No. MC-F-12526 (ICC Order, Div. 3, Acting as an App. Div., Jan. 14, 1977).

54. Standard Motor Freight, Inc.—Purchase—Madison Transp., 60 M.C.C. 249 (1955).

55. Branch Motor Express Co.—Purchase—Suter, Inc., 116 M.C.C. 842 (1974). *See* Ashworth Transfer, Inc.—Purchase—Willcox and Fowkes, 90 M.C.C. 107 (1962).

tively final in accordance with section 558 of the Administrative Procedure Act.[56] The length of time that it takes to make a case administratively final is primarily controlled by the applicant. If it is desirable, an applicant can operate under temporary authority for a lengthy period, and this period can be used by the applicant to demonstrate that a public need exists for tacking and elimination of the gateway.

Were the Commission either to prohibit the introduction of such evidence or to refuse to consider such evidence, it would be reversing prior Commission decisional law[57] and, more importantly, it would be failing to consider public need.

2. *Tacking Temporary Authority*

Except as provided, the Commission's Gateway Elimination Regulations prohibit tacking by an irregular-route carrier of two separate and unrestricted grants of its authority at a service point common to each.[58] However, this prohibition does not apply to operations under temporary authority.

When temporary authority under section 210a(b) of the Act is granted, the lessee is, in effect, occupying a position somewhat similar to that of a trustee of lessor's operating authority in protecting the integrity of the properties and the furnishing of adequate and continuous service to the public pending final determination by the Commission of the "permanent" application. After temporary authority is consummated, the service the lessee performs is not unlike an interline service. As the *Gateway Elimination Report* defined tacking as a combining by a carrier of its own authority to provide a through service, operations conducted under temporary authority pursuant to section 210a(b) of the Act do not come within the ambit of the Gateway Elimination Rules, because no gateways are created.[59]

D. Gateways Which May Be Eliminated

Two proceedings have discussed the gateway elimination problem and reached different results. The proceedings are *Gray Moving &*

56. 5 U.S.C. § 558(c)(1970). The Commission has modified its regulations concerning temporary authorities, 49 C.F.R. § 1101 (1976), with respect to the duration of temporary authorities issued under sections 210 a(b) or 311(b) of the Act. Under the modified regulations, temporary authorities are no longer "extended" but will automatically continue in force until the corresponding permanent application is finally determined. 42 Fed. Reg. 28,201 (1977).

57. Overnite Transp. Co.—Purchase—Alabama Highway Express, 116 M.C.C. 527 (1974).

58. 49 C.F.R. § 1065.1(a)(1976). *See* text accompanying notes 6, 7.

59. Superior Trucking Co., Inc.—Purchase(Portion)—Daniel Hamm Drayage Co., Inc., No. MC-F-11318 (ICC Order, Div. 3, May 15, 1974); Riteway Express, Inc.—Purchase—A. Knorr's Express, Inc. (First National State Bank of New Jersey, Attorney in Fact), No. MC-F-12338 (ICC Order, Div. 3, Feb. 6, 1975).

Storage, Inc.—Purchase-Warner,[60] and *C. and H. Transportation Co., Inc.—Purchase (Portion)—A.A. Martin Transportation Co., Inc.*[61]

In the *Gray* case, the applicant sought to eliminate the Utah gateway (the points of joinder were Weber and Box Elder Counties, Utah) and provide direct service to thirty-three states and the District of Columbia. In considering only the elimination of the gateway resulting from the joinder, at a common point, of the authority to be acquired with a specific grant of authority held by the vendee, the Division found only four states involved. Based on this analysis the Commission, Division 3, stated:

> For those reasons we would grant the application under section 207. However, it shall be granted only to the extent which the request relates to the section 5 proceeding. In a related proceeding we must consider only those gateways created in connection with the section 5 authorization. . . . Here, the section 5 proceeding created the Utah gateways by authorizing the tacking of Gray's certificate in No. MC-112070 (Sub-No. 8) with Warner's certificate in No. MC-51170. We will permit, therefore, direct service between these two certificates only. Should other gateways between Gray's subnumbered certificates be eliminated in accordance with the procedures under the Gateway case, it is possible that the authority in the form requested in this application could result. However, those matters must be determined independently.[62]

In the *C. and H.* case, a different result was reached. Division 3 stated:

> that pursuant to the Commission's Special Gateway Elimination Procedure. . .consideration will be given herein to the elimination of all gateways in the various grants of C & H's authority which would enable C & H to provide a through service between points in the operating authority held by C & H on the one hand, and on the other, points in the Martin authority which C & H has been authori[zed] to acquire.[63]

The gateway elimination rules and regulations were adopted to promote economical and efficient motor carrier operations, without altering the existing competitive balance, by authorizing direct service instead of circuitous gateway operations. The primary goal of the Commission's gateway rules is to reduce fuel consumption[64] and increase operating economies and efficiencies.[65] Thus, the administrative process may best be served, other factors being considered, if the entire gateway matter is resolved contemporaneously with the section 5 application.[66]

60. 122 M.C.C. 316 (1976).
61. No. MC-F-12213 (ICC Order, Div. 3, Acting as an App. Div., Mar. 12, 1976).
62. Gray Moving and Storage, *supra* note 37, at 331.
63. C. and H. Transp. Co., *supra* note 57, at 2.
64. Paramount Movers, Inc. Extension—Gateway Elimination, 125 M.C.C. 388 (1976).
65. Interstate Motor Freight Sys. Extension—Moline, Ill., 125 M.C.C. 754 (1976).
66. Keith Fulton & Sons, Inc.—Purchase—R. Doughty Sons Co., Inc., No. MC-F-12729 (Dissent of Richard Krock) (ICC Order, Review Bd. No. 5, Aug. 30, 1976); Overnite Transp.

E. Specific Applications of the Gateway Rules

In several proceedings, applicants have asserted that (1) many of the gateways through which they operate come within the 20% rule;[67] (2) many proposed through movements could be performed without Commission approval of gateway eliminations under the 300 mile rule;[68] and (3) they may continue to join irregular-route authorities and perform the through movements without seeking approval for elimination of the gateways where operation through the gateway involves minimal or no circuity.[69]

In rejecting the argument that movements over gateway routes which involve less that 20% circuity may be eliminated by the filing of a "letter-notice", Division 3 has stated:

> That the use of letter-notices to facilitate the elimination of gateways involving 20% or less circuity . . . was merely an initial procedural distinction which applied only to elimination of gateways between irregular route certificated authorities issued to the carrier-applicant . . . pursuant to an application pending before the Commission on or before November 23, 1973, ...[70]

In rejecting the argument that movements of 300 miles or less fall within the 300 mile exemption of the Gateway Elimination Regulations,[71] Division 3 has stated:

> That the purpose of the 300 mile exemption was to enable carriers to *continue* to tack separate irregular route operating authorities not specifically restricted against tacking [that were] held by an individual carrier at the time of the promulgation of the exemption in situations involving movements of 300 miles or less, . . . the exemption . . . states, "Except . . . on movements of 300 miles or less . . . a common carrier by motor vehicle *authorized* to transport property . . . is prohibited from joining any of *its* irregular route certificated authorities on and after the effective date of this regulation . . .." [The exemption] has no applicability in situations

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Co.—Purchase—Issy Lepchitz D/B/A King Fast Freight No. MC-F-12803 (ICC Order, Review Bd. No. 5, Mar. 3, 1977).

67. Reisch Trucking & Transp. Co., Inc.—Control & Merger—Deal Motor Lines, Inc., No. MC-F-12444 (ICC Corrected Order, Div. 3, Acting as an App. Div., Feb. 13, 1976); C. and H. Transp. Co., *supra* note 57.

68. All Island Delivery Serv., Inc.—Purchase—Emmis Trucking Co., Inc., No. MC-F-12335 (ICC Order, Div. 3, Acting as an App. Div., Mar. 30, 1976) Pinter Bros., Inc.—Purchase (Portion)—Westchester Motor Lines, Inc., No.—(ICC Report and Order, Review Bd. No. 5, Aug. 13, 1976).

69. Don-Dee Trucking Corp.—Purchase—Sharkies Trucking Serv., No. MC-F-12280 (ICC Order, Review Bd. No. 5, July 3, 1975) *See* H.M.E. Motor Express Co., Inc.—Purchase (Portion)—Treadway Express, Inc., No. MC-F-12215 (ICC Order, Div 3, Acting as an App. Div., Sept. 25, 1976).

70. Reisch Trucking and Transp. Co., *supra* note 63 (citation omitted); Lee Way Motor Freight, Inc.—Control and Merger—Loving Truck Lines, Inc., No. MC-F-11768 (ICC Decision and Order, Div. 3, Oct. 31, 1975).

71. 49 C.F.R. § 1065.1(b) (1976).

> where the subject irregular route operating authorities . . . [were] not held by an individual carrier on the effective date of the regulation . . . .[72]

In rejecting the assertion that movements involving zero circuity are exempt from the gateway regulations, the Commission has stated:

> That the [Gateway Elimination] [R]egulations prohibit the tacking of any irregular route certificated authorities unless the requirements of those regulations are met; that zero or minimal circuity in operations through a gateway does not exempt a through operation performed by tacking of irregular route authority as a result of approval of a section 5(2) application, from compliance with those regulations.[73]

The *Gateway Elimination Report*,[74] provides that where one existing carrier seeks to extend its irregular-route operating authority through the purchase of additional irregular-route authority, the applicant shall be required to give notice in the application with respect to such tacking possibilities *and* to prove that the present or future public convenience and necessity requires that those authorities be tacked or joined. Thus, if the present and future public convenience and necessity can be shown by the filing of a directly related application sufficient to warrant tacking of two authorities, then the Commission may authorize tacking.[75]

F. Transferability Aspects of Gateway Authority

Under the gateway elimination rules, a carrier could file a letter-notice, obtaining letter-notice rights, where the certificated irregular-route authorities which created the gateway were issued to the *carrier* pursuant to an application proceeding pending before this Commission on or before November 23, 1973, and where the direct mileage between the origin and destination to be served exceeded 80 percent of the distance between those points via the gateway. Where movements through the gateway embraced a greater degree of circuity than 20 percent, the rules required the carrier to file a Sub-G (OP-OR-9) application and obtain "G" rights.[76]

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72. Gale Delivery, Inc.—Purchase—Portion)—Express, S.D.Z., Inc., Irving Klein, Trustee, No. MC-F-12120 (ICC Orders, Div 3, Acting as an App. Div., Apr. 9, 1976 and Nov. 23, 1976) (emphasis added).

73. Reisch Trucking and Transp. Co., *supra* note 63.

74. Ex Parte No. 55 (Sub-No. 8), 119 M.C.C. 530, 552-53 (1974).

75. Clarkson Bros. Machinery Haulers, Inc.—Purchase (Portion)—Fred Lockridge (Eunice M. Lockridge, Administratrix D/B/A Lockridge Transfer Company, No. MC-F-12007 (ICC Order, Div. 3, Acting as an App. Div., Aug. 23, 1974); Hughes Refrigerated Express, Inc., Transferee and W.W. Hughes, Mary L. Hughes, Administratrix D/B/A Hughes Refrigerated Express, Transferor, No. MC-FC-75979 (ICC Order, Div. 3, Acting as an App. Div., Mar. 21, 1977); Bulkmatic Transport Company—Purchase (Portion)—Keller Transfer Line, Inc., No. MC-F-12746 (ICC Order, Review Bd. No. 5, Jan. 14, 1977); Brown Transport Corporation—Purchase—Hartman Trucking Company, Inc., No. MC-F-12818 (ICC Order, Review Bd. No. 5, Feb. 20, 1977).

76. *See* text accompanying notes 8-9 *supra*.

1. Before Maxwell Co.

In one proceeding, the vendor had secured a letter-notice from the joinder of rights part of which it sought to sell and part of which it would retain. The Commission, Review Board Number 5,[77] in dismissing that portion of the directly related application concerned with the letter-notice "rights" stated:

> that the authority in No. MC-14659 (Sub-No. E-1) is an integral part of the operating rights embraced in certificate No. MC-14659 and subs thereto and is not severable and transferable from . . . underlying irregular route authority . . . .[78]

Consistent with this reasoning the Commission, Division 3, authorized the sale of letter-notice "rights" where the vendee acquired all of the underlying authority of vendor.[79]

2. After Maxwell Co.

By petition filed October 10, 1975, the Maxwell Co. sought a declaratory order interpreting and answering certain issues raised by the Gateway Regulations.[80] Maxwell Co. requested a ruling from the Commission as to whether operating authorities (letter-notice "rights" and "G" rights) created under the gateway elimination rules could be severed from the underlying authorities that gave rise to their creation. The Commission in holding that such rights may be transferred stated:

> Over the years, the Commission has developed a body of general principles governing the transfer of operating authorities under sections 5(2) and 212(b) of the act, and it is to these principles that we now turn. Despite the number of separate authorities that a carrier holds authorizing operations between two specified points, the carrier is deemed to hold only one right to operate between the two points. *H.P. Welch Co.—Purchase—E.J. Scannell, Inc.*, 25 M.C.C. 558 (1939). And, when a carrier seeks to transfer certain of its operating authorities to another carrier, it is improper for it both to transfer and to retain essentially duplicating operating authorities. However, a sale and retention of operating rights between the same points may be approved where such rights authorize service over different routes or with different intermediate points, constitute a separate operation, cover the transportation of different commodities, or provide a completely different service.[81]

Thus, where a carrier seeks to sell letter-notice "rights" or "G" rights or its standard certificates, approval of the application will depend upon

77. Sanborn's Motor Express, Inc.—Purchase (Portion)—O'Donnell's Express, No. MC-F-12683 (ICC Order, Review Bd. No. 5, May 7, 1976). The proceedings are presently pending on petition.

78. *Id.*

79. Continental Van Lines, Inc.—Purchase—Moving Corp. of America, Inc., No. MC-F-12560 (ICC Decision and Order, Div. 3, Jan. 11, 1977).

80. Maxwell Co., Petition for Declaratory Order, 126 M.C.C. 166 (1976).

81. *Id.* at 169.

whether the transaction will result in a duplication of service contrary to Commission decisional law.

IV. Conclusion

The Commission's *Gateway Elimination Report* states that the Gateway Elimination Rules were adopted to enable carriers "to operate in a more efficient, economic and fuel saving manner" and "to eliminate such gateway operations as may result in inefficiencies and wasteful expenditures of time, money, effort and precious fuel." The primary goal of these rules is to reduce significantly fuel consumption. To this end the adopted rules and regulations provide for tacking and the elimination of gateways created by the joinder of irregular-route authorities. The regulations prohibit the tacking of irregular-route authorities, with certain exceptions (notably on movements of 300 miles or less, or where the carrier's certificated authorities specifically authorize tacking or joinder), but provide means by which a carrier may seek authority to operate directly between origins and destinations formerly served via a gateway. However, the fuel conservation goal can be achieved only when an applicant files a gateway application, and presents the evidence needed for the Commission to determine the necessity for direct operations.