Motor Carrier Operating Rights Proceedings—How Do I Lose Thee?

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I. Introduction

As even the most casual observer of the Interstate Commerce Commission [ICC] is aware, recent trends (both judicial and administrative) have dramatically modified the standards pursuant to which the Commission examines applications for motor carrier operating authority. The long-standing *Pan-American*[1] and *Novak*[2] considerations have been replaced by enhanced reliance on increasing competition whenever and wherever possible. To many, however, this emphasis on competitive considerations is merely backdoor deregulation by administrative fiat, without the benefit of legislative approval.

There was a time when the Interstate Commerce Commission granted *and* denied operating rights applications, but recently it seems that the Commission has resolved to grant all but a token number of applications

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1. Pan-American Bus Lines Operation, 1 M.C.C. 190, 203 (1936) is a seminal case establishing three common law criteria for determining "public convenience and necessity":

> The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

Pan-American is often coupled with All-American Bus Lines, Inc., Com. Car. Applic., 18 M.C.C. 755, 776-77 (1939) which establishes the Commission's responsibility to evaluate whether the advantages of the proposed service to the shipping public outweigh the actual or potential disadvantages to existing carriers. These two cases, along with John Novak Contr. Car. Applic., 103 M.C.C. 555 (1967), are among the most commonly cited ICC decisions.

2. John Novak Contr. Car. Applic., 103 M.C.C. 555, 558 (1967) requires that shippers and consignees supporting an application must, at a minimum, meet the following standards if applicant is to make a *prima facie* showing of need:

> Those supporting the application should state with specificity the transportation service which they believe to be required.
>
> The shippers and consignees supporting applications for authority to transport property should identify clearly the commodities they ship or receive, the points to or from which their traffic moves, the volume of freight they would tender to applicant, the transportation services now used for moving their traffic, and any deficiencies in existing service.
>
> Those supporting an application for authority to transport passengers should indicate the frequency with which they would use the proposed service and should identify any transportation services now available and the inadequacies believed to exist in such service.

The Novak criteria have also been accepted in the common carrier context. *E.g.*, F&W Express, Inc. (Memphis, Tenn.), 129 M.C.C. 48, 63 (1977) and Jerry Lipps, Inc., Ext.—Pipe, 110 M.C.C. 113, 118 (1969).

unless it is absolutely prohibited from doing so by some condition precedent to its consideration on the merits of public convenience and necessity. Enunciated standards for proof of public convenience and necessity appear to have changed dramatically, but close observation reveals that only the probable outcome of the proceedings has really changed. Whether the Commission gives lip service to the "traditional" adequacy of existing service doctrine, or applies the "modern" standard of increasing and improving competition, it can, and always has been able to, rationalize a grant or denial of any application consistent with the statutory requirement of public convenience and necessity. The idea that *Pan-American* and *Novak* have been bent, massaged, warped, abandoned, violated, or ignored is certainly of interest from an academic perspective when observing the tortuous trail followed by the ICC to justify wholesale, seemingly indiscriminate grants, but verbose and inconsistent rationalizations and mental gymnastics are not instructive if the end result is always a grant.

While the ICC's recent preoccupation with competitive considerations has increased both the number of motor carrier operating rights applications and the percentage of grants of authority,[3] it probably would be premature to state that the ICC has abdicated all control over the granting of operating rights by embracing an open door philosophy. The "candy store" may be open, but in order to receive a grant of authority, a motor carrier must still do more than request the authority and point to the resulting increase in competition.

3.

	Fiscal Year 1975	Fiscal Year 1976	Fiscal Year 1977	Fiscal Year 1978	Fiscal Year 1979
Motor Carrier Operating Authority Cases Disposed of by ICC	5,818[1]	6,800[2]	7,815[2]	9,828[2]	12,944[4]
Percent Granted in Whole or in Part on Merits Only	86%[3]	80%[3]	86%[3]	96%[4]	98%[4]

1. INTERSTATE COMMERCE COMMISSION, ANNUAL REPORT, 103 (1977).
2. INTERSTATE COMMERCE COMMISSION, ANNUAL REPORT, 96 (1978).
3. 43 Fed. Reg. 56979 (1978).
4. Surina, Interoffice Memorandum, Interstate Commerce Commission, Disposition of Motor Carrier Operating Rights Applications (November 6, 1979).

This data was obtained from several sources and may not be strictly consistent on a statistical basis, but it does serve to represent the clear trend at the ICC of granting increasing percentages of an increasing number of applications. The percentage of total applications granted would be substantially lower if dismissed and withdrawn applications also were considered.

The genesis of this article was the not always idle curiosity that spawned the question: Is there any way to persuade the Commission to deny an operating rights application on the merits? If so, where lies the true line of distinction between grant and denial? Notwithstanding the barrage of rationalizations unleashed upon participants in operating rights cases, where does the public interest lie? Does the Commission really seek to discover (regardless of "old" or "new" stated standards) whether a grant will improve service, have no effect, or dilute and diminish service available to the public, or is the Commission merely going through the motions to grant virtually every application possible in a rush to *de facto* deregulation of entry?

That relaxed standards have evolved during the last several years is apparent, but no one seems to have examined the circumstances under which an operating rights application can and will be denied by the Commission. There are still substantial requirements that must be met by any carrier before new authority will be granted. Clear avenues of attack remain open to protestants, although applicant's burden certainly has been diminished at the expense of protestants' in proceedings of this type. While applicant can rely to a much greater extent on the concept of increased competition, protestants, if they are to prevail, must begin to develop more thoughtful and sophisticated evidentiary presentations.

This article will not attempt to review the historic allocations of the burdens of proof and persuasion between applicants and protestants,[4] and will only sketch the recent judicial and administrative developments that have led to the ICC's present position on the importance of competition in operating rights proceedings. This article will emphasize arguments that continue to be available to protestants and which, in many circumstances, could lead to a denial of the application. Principally, this will be accomplished by analyzing that remaining trickle of operating rights proceedings that have resulted in a denial based on the merits, along with the numerous cases granting operating authority which comment on the failures of protestants to establish the requisite harm to the public interest necessary for the denial of an application.[5]

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4. *See generally* TRANSPORTATION LAW INSTITUTE, OPERATING RIGHTS APPLICATIONS (1969), and TRANSPORTATION LAW INSTITUTE, OPERATING RIGHTS - SUBSTANTIVE LAW (1976).

5. As an additional disclaimer, the authors have chosen not to focus on the problems of specialized and truckload general commodities carriers as hypothetical protestants, but will assume that applicant and protestants are less-than-truckload general comodities motor common carriers; however, the practical effect of this decision is minimal and is made merely for convenience in handling the subject matter. In most, if not all, circumstances, the protest considerations discussed within would be appropriate regardless of the type of application. *But see* Ex Parte No. MC-135, Master Certificates and Permits (Notice of intent to open rulemaking), 44 Fed. Reg. 57,139 (1979), in which the ICC will consider easing licensing requirements in certain specialized areas of for-hire transportation.

II. The Road to Competition

Although the Commission has ostensibly followed the tripartite weighing process of *Pan-American* and the minimum support standards of *Novak* in deciding operating rights cases, considerations of protecting existing carriers and, perhaps, at least a little carelessness on the part of the ICC gradually deteriorated the *Pan-American* criteria. By the early 1970's, the sole test seemingly was adequacy of existing service. Once an existing carrier showed it was "fit, willing and able" to move freight for which applicant had obtained shipper support, and once the existing carriers demonstrated that some diversion of their present traffic could result and revenue would be lost, the application would, in all probability, be denied. The presumption weighed heavily that existing carriers were entitled to all the freight they could handle adequately.[6] Once adequacy of existing service and potential diversion of traffic were established, there was literally no course of action or evidence that applicant could present to the Commission to convince it that the proposed authority should be granted. If, for instance, a shipper suggested that it needed more efficient or expeditious service, the Commission would determine whether the shipper truly *needed* the service or whether it would merely be a convenience.[7] In hotly contested proceedings, it was unusual for shippers' testimony to be accepted totally, as the Commission, in its quest to protect existing carriers from destructive competition, often substituted its judgment for that of the supporting shippers with respect to the adequacy of existing motor carrier service.[8] At times the cards seemed to be stacked against applicants; protection of existing carriers was the overriding implicit policy of the Commission.

This is not to say the benefits of competition were never considered. In a number of cases, the Commission weighed competition along with the ability of existing carriers to move, in an adequate manner, the freight in question and found increased competition to be in the best interests of the

6. *E.g.*, Colonial Fast Freight Lines, Inc., Ext. - Kosciusko, 121 M.C.C. 840, 846 (1975); Dealers Transit, Inc., Ext. - Elec. Precipitators, 119 M.C.C. 429,432 (1974); Carl Edin Cloud, Jr., Com. Car. Applic., 115 M.C.C. 77, 79 (1972); Olson Transp. Co., Ext. - Animal Fats, 107 M.C.C. 165, 188 (1967); C&D Oil Co. Contr. Car. Applic., 1 M.C.C. 329, 332 (1936).

7. *E.g.*, P.C. White Truck Line, Inc. - Ext., Atlanta, Ga., 120 M.C.C. 824, 843-44 (1974) [hereinafter cited as P.C. White I]. The four year span between P.C. White I and P.C. White Truck Line, Inc., Ext. - Atlanta, Ga., 129 M.C.C. 1 (1978) [hereinafter cited as P.C. White II] represents an almost revolutionary period in Commission thinking on motor carrier entry regulation as seen by the differences in analysis and outcome of this same application after remand in P.C. White Truck Line, Inc. v. I.C.C., 551 F.2d 1326 (D.C. Cir. 1977) [hereinafter cited as P.C. White]. *See also* Trans-American Van Serv., Inc. v. United States, 421 F. Supp. 308, 314 (N.D. Tex. 1976); Associated Transp., Inc. - Purchase, Speedway Transports, 55 M.C.C. 428, 434 (1948); Commercial Car., Inc. - Lease - Boutell, 40 M.C.C. 345 (1945); note 79 *infra*. *Accord*, Gra-Bell Truck Lines, Inc., Ext. - Coloma, 115 M.C.C. 872, 880-81 (1972).

8. *Id.*

public.[9] A decision rendered in 1964 by a federal district court, *Nashua Motor Express, Inc. v. United States*,[10] often cited by applicants and occasionally adopted in principle by the Commission, held that competition, as well as several other considerations, including adequacy of existing service, could be considered in determining the public convenience and necessity. In *Nashua*, inadequacy of existing service was found to be satisfactory grounds for granting an application, but the absence of inadequate service, standing alone, was not sufficient to bar granting an application.[11] Thus, solicitious consideration of the benefits of competition in the late 1970's cannot be seen solely as a complete reversal of previous policy.

All in all, though, the Commission for many years seemed to shunt aside the stated balancing test of *Pan-American* in a manner which was slanted strongly in favor of protecting existing carriers from new or increased competition. While paying lip service to the *Pan-American* standards, the true standard seemed to be that "existing carriers should normally be allowed the right to carry all traffic which they can adequately, efficiently, and economically handle in territories served by them in order to foster sound economic conditions in the motor carrier industry."[12] No weighing or balancing was taking place. Existing carriers which could transport the subject freight in an efficient and satisfactory manner were almost always able to succeed in their protests. In effect, this attitude amounted to an overwhelming presumption that the benefits of increased competition to the public did not outweigh the harm of revenue and traffic diversion to existing carriers.

A number of Commission proceedings and court decisions considered the benefits of increased competition to the public and held the purpose of the Interstate Commerce Act to be advancing the public interest rather than protecting monopolies of existing carriers.[13] Nevertheless, the present emphasis on increasing competition probably was triggered by the Supreme

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9. *E.g.*, Superior Trucking Co., Ext. - San Francisco, 126 M.C.C. 292, 298-99 (1977); Chickasaw Motor Lines, Inc., Ext. - Regular Routes from Memphis, Tenn., 121 M.C.C. 476, 479 (1975); Patterson Ext. - York, Pa., 111 M.C.C., 645, 650 (1970).

10. 230 F. Supp. 646, 652-53 (D.N.H. 1964). *See also* Trans-American Van Serv., 421 F. Supp. 308, 321-24 (N.D. Tex. 1976).

11. 230 F. Supp. 646, 652-53 (D.N.H. 1964). *See also* Trans-American Van Serv., 421 F. Supp. 308, 324, (N.D. Tex. 1976). *Cf.* Warren Transp., Inc. v. United States, 525 F.2d 148, 149 (8th Cir. 1975); Lemmon Transp. Co. v. United States, 393 F. Supp. 838, 841 (W.D. Va. 1975); Superior Trucking Co., Ext. - Agric. Mach., 126 M.C.C. 292, 297 (1977).

12. C&D Oil Co. Contr. Car. Applic., 1 M.C.C. 329, 332 (1936). *See also* note 6 *supra*.

13. Interstate Commerce Commission v. J-T Transp. Co., 368 U.S. 81, 87 (1961); United States v. Dixie Highway Exp., 389 U.S. 409, 411 (1967); Trans-American Van Serv., Inc., Ext. - Off Highway Vehicles, 126 M.C.C. 609, 616 (1977); Milne Truck Line, Inc., Ext. - San Francisco, 121 M.C.C. 149, 163 (1975). *Accord*, note 9 *supra*. *See also* United States v. Drum, 368 U.S. 370, 374-75 (1962).

Court in *Bowman Transportation v. Arkansas-Best Freight System*.[14] This decision, however, merely upheld the right of the Commission to weigh the benefits of competition, along with any other reasonable factors, in reaching its judgment as to what best served the public interest.[15] While many recent cases mandating consideration of the benefits of competition seemingly rely on *Arkansas-Best Freight* as a trend-setting decision, the Court merely acknowledged that the ICC had already weighed the benefits of competition in the underlying proceeding,[16] and simply affirmed the appropriateness of the Commission's finding.[17]

In *Arkansas-Best Freight*, the Supreme Court accepted the argument that benefits to consumers would result from applicant's proposal, and then examined the potential adverse effect on protestants.[18] The Court discerned no serious adverse effects and determined that it was reasonable to grant the authority because consumer benefits outweighed the detriment suffered by existing carriers.[19] The Court's holding was that the Commission "*could conclude* that the benefits of competitive service to consumers might outweigh the discomforts existing certificated carriers could feel as a result of new entry."[20] Later, the Court reiterated: "The Commission, of course, is *entitled to conclude* that preservation of a competitive structure in a given situation is overridden by other interests."[21]

Although there is substantial language in *Arkansas-Best Freight* and other decisions that the primary obligation of the ICC is not to protect existing certificate holders and that existing carriers do not have a property right in their traffic,[22] *Arkansas-Best Freight* did nothing more than allow the Commission to continue its deliberations in the traditional manner. No great upsurge in grants of authority based on advancing the public interest through increased competition resulted directly or immediately from this decision.[23]

In a pivotal 1977 case, *P.C. White Truck Line, Inc. v. I.C.C.*[24], the District of Columbia Circuit held that the Commission, under *Pan-American*, must consider the benefits of competition before denying an application.[25]

14. 419 U.S. 281 (1974) [hereinafter cited as Arkansas-Best Freight].
15. *Id.* at 293-94, 298.
16. *Id.* at 292, 297.
17. *Id.* at 298.
18. *Id.* at 292.
19. *Id.* at 292, 293.
20. *Id.* at 298 [emphasis added].
21. *Id.* at 298-99, citing U.S. v. Drum, 368 U.S. 370 (1962) [emphasis added].
22. *Id.* at 298. *See* Schaeffer Transp. Co. v. United States, 355 U.S. 83, 90-91 (1957); Trans-American Van Serv., 421 F. Supp. 308, 321 (N.D. Tex. 1976); Lang Transp. Corp. v. United States, 75 F. Supp. 915, 930-31 (S.D. Cal. 1948). *See also* note 13 *supra*.
23. *See generally* note 3 *supra*.
24. 551 F.2d 1326 (D.C. Cir. 1977).
25. *Id.* at 1329.

The Court believed the Commission had examined only the adequacy of existing service and had failed to weigh competing interests as required by *Pan-American*.[26] The Court also pointed out that *Arkansas-Best Freight* "recognized the relevance of increased competition in assessing the public interest."[27] In its initial deliberations, the ICC found that the "grant of the instant application would result in the wasteful duplication of existing services and creation of excessive capacity without a concomitant benefit to shippers or receivers,"[28] but the Court concluded that nothing in the Commission's report was "specifically referable to competition,"[29] and remanded the proceeding to the Commission for analysis of the benefits of competition. In its haste to require that competition be considered, the Court overlooked or ignored the *Arkansas-Best Freight* conclusion that the Commission "could consider" the benefits of competition when balancing appropriate factors pursuant to *Pan-American*,[30] and exaggerated the Supreme Court's conclusion concerning the relevancy of competitive considerations.

Sawyer Transport, Inc. v. United States,[31] a case which goes hand-in-hand with *P.C. White* in extending the *Arkansas-Best Freight* holding, determined that a contract carrier application[32] cannot be denied solely on the basis of adequacy of existing service. The Court found nothing to suggest

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26. *Id.* at 1328, 1329.

27. *Id.* at 1328. Recent decisions have continued recognizing the benefits of competition and considerations other than adequacy of existing service. *See generally, e.g.*, May Trucking Co. v. United States, 593 F.2d 1349 (D.C. Cir. 1979); Appleyard's Motor Transp. Co., Inc. v. I.C.C., 592 F.2d 8 (1st Cir. 1979); Neidert Motor Serv., Inc. v. United States, 583 F.2d 954 (7th Cir. 1978). *But see* Willis Shaw Frozen Exp., Inc. v. I.C.C., 587 F.2d 1333, 1338 (D.C. Cir. 1978) holding that the Commission should guard against over-supply and accompanying deterioration of service.

28. P.C. White I, 120 M.C.C. 824, 848 (1974).

29. P.C. White, 551 F.2d at 1328, n.10. How could the Commission phrase a stronger renunciation of the proposed service than this language? Apparently, to pass muster in this Court, the Commission must entitle a section of its decision, "Discussion of Possible Competitive Benefits." The Court did not specifically find the Commission's decision arbitrary and capricious, or without substantial evidence; rather it merely substituted its view of what considerations should be balanced in the decision-making process for those of the Commission. *But see* Arkansas-Best Freight, 419 U.S. 281, 285 (1974), and Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), holding that such a substitution is not an appropriate standard of review. *See also* Arkansas-Best Freight, 419 U.S. at 285-86, for the proposition that if the court can discern a rational connection between its decision and the evidence, remand is not appropriate, even if the agency's decision is not of complete clarity. Query whether the Court misinterpreted Arkansas-Best Freight or was merely striving to develop new law in this area? Perhaps the decision would have been clearer had a more complete analysis been attempted. *See generally* Trans-America Van Serv., 421 F. Supp. 408 (N.D. Tex. 1976), for a more thorough analysis of this issue.

30. Arkansas-Best Freight, 419 U.S. at 298-99.

31. 565 F.2d 474, 478 (7th Cir. 1977).

32. Query whether many protests to this proceeding would even be allowed under recently adopted protest standards? *See* 43 Fed. Reg. at 50,911, 60,278, 60,288, (1978) [to be codified in 49 C.F.R. 1100.247(k),(l)] and *see* notes 89-106 *infra*, and accompanying text.

that competitive benefits had been considered by the ICC,[33] and noted that adequacy of service constitutes only one element of *Pan-American*.[34] Although this decision concedes that the benefits of competition can be overridden by other factors,[35] *Sawyer Transport* and *P.C. White* extend the permissive analysis of the benefits of competition that was set forth in *Arkansas-Best Freight* to a mandatory requirement, and even seem to intimate that substantial weight should be accorded the benefits of competition in most circumstances—in effect substituting the judgment of the Court for that of the Commission.[36]

Highland Tours, Inc., Common Carrier Application[37] stressed, in this post-*P.C. White* proceeding,[38] that the *Pan-American* criteria remain unchanged and have been followed consistently by the Commission. In this proceeding, competition had not yet risen to its present position of preeminence and was still somewhat submerged in the Commission's deliberations.[39] The Commission found, however, that diversion caused by a one bus carrier such as Highland Tours would not harm large, established carriers and granted the application.[40] This rationale of limited damage to existing carriers could be seen as the beginning of a trend in which the Commission, while clinging to the *Pan-American* framework, dramatically increased the weight it accorded the presumed benefits of competition and lessened its reliance on the harm caused by diversion of traffic and revenue loss to existing common carriers.[41]

On remand, the ICC in *P.C. White II* ended all doubts that protestants could succeed in blocking operating rights applications merely by showing traffic diversion and alleging that they could adequately handle the freight.[42] Rather than focusing on the adequacy of existing service and analyzing whether supporting shippers truly "needed" overnight service, as

33. 565 F.2d at 478.

34. *Id.*

35. *Id.* at 478-79.

36. *See generally* note 29 *supra*.

37. 128 M.C.C. 595, 599 (1977), *aff'd sub nom* Greyhound Lines v. United States, No. 78-1313 (D.C. Cir. 1979).

38. P.C. White and progeny were not cited in this decision.

39. 128 M.C.C. at 598-99.

40. *Id.*

41. *See generally* 43 Fed. Reg. 50,909, note 6 (1978). By this rationale, it is almost impossible for any application to harm a large carrier to such an extent that it would not be able to continue operations. Query whether a more pertinent test would be harm to the large existing carriers in the relevant marketplace? Even if its overall operations were not impaired, there would be no improvement in service if one carrier withdrew from the market and simply was replaced with another. Also, a small application may not harm a large competitor's overall operations, but the aggregate of numerous small applications certainly could. There seems to be no recognition in ICC thinking of this possibility. *See* notes 253-64 *infra*, and accompanying text.

42. P.C. White II, 129 M.C.C. 1, 8-9 (1978).

it had previously done,[43] the Commission noted that more expeditious movements of goods would "benefit the conduct of their [shippers'] business operations."[44] Answering protestants' arguments that the application would result in traffic diversion,[45] that the existing service was adequate, and that they could transport the commodities in question,[46] the Commission stated that more than this must be considered in determining whether a sufficient showing of harm had been made by protestants.[47] Still relying on the *Pan-American* criteria, the Commission held that it must also weigh "[t]he benefit to the public of the availability of an applicant's service . . . against the real or potential adverse effect on existing carriers and the repercussions this may have on their service to the public."[48]

The meaning of *P.C. White II* is clear. Increased competition is presumed to be in the public interest, and protestants seeking to overcome this policy favoring increased competition must now assume a greater evidentiary burden and be much more specific in pinpointing the injury that will befall them (and, more importantly, the shipping public) if the application is approved. A mere allegation of possible revenue loss will not satisfy this burden; protestants must show, at a minimum, that their operations would be jeopardized, as would their corresponding ability to serve the public.[49]

In *Liberty Trucking Co., Extension—General Commodities*,[50] a decision which clarified the Commission's present interpretation of the evidentiary burdens borne by applicant and protestants, even more emphasis was placed on the benefits of competition. Still, the basic *Pan-American* framework, although slightly restated to highlight competitive considerations,[51] remained the tool utilized by the Commission in its decision-making process.[52] Once public need has been demonstrated by an applicant,[53] prot-

43. *See* note 7 *supra*. *See also* Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation, 43 Fed. Reg. 56,978, 56,980 (1978) in which the Commission is giving added weight to the "needs and wishes" of supporting shippers.

44. 129 M.C.C. at 9.

45. 129 M.C.C. at 5, 8-9, n.2, where protestants merely introduced evidence concerning the number of shipments, total weight, and total revenues that would be subject to diversion.

46. *Id.* at 6.

47. *Id.*

48. *Id.*

49. *Id.* at 9. *Accord*, *e.g.*, May Trucking Co. v. United States, 593 F.2d 1349, 1356 (D.C. Cir. 1979); Northwest Transp. Serv., Inc., Ext. – Colo., 128 M.C.C. 622, 625-26 (1977).

50. 130 M.C.C. 243 (1978) [hereinafter cited as Liberty I].

51. *Id.* at 245. The third and most crucial Pan-American test was redefined as "[w]ill the proposed service cause protestants to suffer competitive harm of such a degree as to outweigh the benefits to the public?" When compared to the original Pan-American criterion of "whether [the public need] can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest" (1 M.C.C. 190, 203), it is clear that increased competition has been delineated by the Commission as a major, if not overriding, component in ascertaining the elusive "public interest."

52. *Id.* at 244-47.

estants must show that they can satisfy that need.[54] Protestants must also assume the burden of demonstrating "an interest worthy of regulatory protection from competition."[55],[56] As in *P.C. White II*,[57] this evidentiary burden is to convince the Commission that new competition "is likely to materially jeopardize existing carriers' ability to serve the public."[58] The burden in *Liberty I*, however, was made even greater than was expressed in *P.C. White II* because the Commission found it "quite possible that the benefits of heightened competition and new or improved service may outweigh the potentially substantial harm to protestants."[59] Thus, the specter of bankruptcy or withdrawal of existing carriers from the relevant market may not be sufficient to overcome the presumed benefits of increased competition to the public.

Drawing from its discussion of protestants' evidentiary burden in *P.C. White II*, the Commission restated that more than mere revenue loss would have to be demonstrated by protestants desiring to halt an application designed to increase competition.[60] Not only must protestants show "substantial" traffic diversion and "material" revenue loss, but they must also demonstrate precisely how or why the authorization of competing service would cause these losses.[61] Finally, the loss must affect protestants' oper-

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53. *Id.* at 244.

54. *Id.* at 245.

55. *Id.* at 246. *Accord*, Consolidated Freightways Corp. of Del., Ext.-Phoenix, 108 M.C.C. 379, 384 (1969). *See generally* notes 224-64 *infra*, and accompanying text, for discussion on how to demonstrate such an interest.

56. In commenting on the emerging standard that "an interest worthy of regulatory protection from competition" must be demonstrated by protestants, Commissioner Stafford, in dissent, noted that the Liberty I language "makes a mockery of our stated intention to weigh and balance the competing interests in these application proceedings," and that increased competition almost seems to be the sole criterion for granting authority. Liberty I, 130 M.C.C. at 249.

Almost any application for operating authority would increase competition at least in the short-run, by injecting another carrier into the relevant transportation market. If Commissioner Stafford's dissent accurately states present Interstate Commerce Commission policy, then the Commission almost completely has abdicated its authority to differentiate between helpful and harmful increases in competition. This seeming *de facto* deregulation and complete reliance on increased competition in the decision-making process is not consistent with the original holding in P.C. White, 551 F.2d 1326, 1329 (D.C. Cir. 1977), in which the Court reversed the Commission on the basis that it had not exercised its "power to weigh the competing interests." Perhaps, in the future, courts will become concerned with this *de facto* deregulation which soon may become an abuse of the integrity of the Commission's decision-making process. *See* Argo-Collier Truck Lines Corp. v. United States, No. 77-3373 (6th Cir. December 13, 1979), pp. 9, 10. *See generally* East Texas Motor Freight Lines, Inc. v. United States, 593 F.2d 691, 699-700 (5th Cir. 1979) (Ainsworth, dissent). *See also* Barnes Freight Lines, Inc. v. I.C.C., 569 F.2d 912, 923-24 (5th Cir. 1978).

57. P.C. White II, 129 M.C.C. 1, 9 (1978).

58. 130 M.C.C. at 246.

59. *Id.*

60. *Id.*

61. *Id.*

ations in a manner that would be injurious to the public.[62]

In *Colonial Refrigerated Transportation, Inc., Extension—Florida to 32 States*,[63] the Commission backed away somewhat from the emerging proposition that increased competition *per se* was adequate grounds for granting an operating rights application. This decision differentiated between cases in which competition already exists and those in which new carriers are necessary to inject the elements of competition into the relevant market. The Commission noted that the traffic in question was highly sought and already the recipient of responsive service.[64] It found that granting this application would not yield significant quality improvements over existing service.[65]

With respect to the benefits of increased competition, the Commission believed that "the evidence of record [does not] suggest that the effect of applicant's competition would be to spur existing carriers to provide better service for shippers in the involved market."[66] Furthermore, the Commission held that the proposed service might result in "unhealthy competition which could impair operations of existing carriers contrary to the public interest."[67]

Thus, in balancing the benefits of increased competition to the public against the destructive impact of the application on existing carriers, the Commission seems to find that if service is already responsive, and if competition already exists, additional competition *per se* will not yield better service to the shipping public and could, at least in some circumstances, cause substantial harm to the operations of existing carriers.[68] When this situation occurs, *Liberty I*'s newly enunciated tripartite test will not favor granting an application unless applicant can point to some innovative or improved service and/or greater efficiency or fuel economy that applicant proposes to offer. The Commission, then, is willing to recognize (at least occasionally) that excess capacity caused by the entry of new carriers into an already competitive market can lead to unsettling transportation conditions and a "disruption of the orderly flow" of freight.[69] The benefits of competition *per se* seem to be outweighed when this occurs.[70]

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62. *Id.*
63. 131 M.C.C. 63 (1979).
64. *Id.* at 66, 68, 69.
65. *Id.* at 68.
66. *Id.* at 69.
67. *Id.*
68. *Id.* at 70.
69. *Id. See also* Sam Tanksley Trucking Inc., Ext.-Holland Heating and Air Conditioning, 129 M.C.C. 470, 473 (1977), and cases cited therein.
70. The courts also are apparently willing to recognize the dangers of oversupply, and that increasing the number of carriers in a given transportation market will not automatically promote the public interest. Willis Shaw Frozen Express, Inc. v. I.C.C., 587 F.2d 1333, 1338 (D.C. Cir. 1978).

In response to the howls of protest and the cries of anguish that accompanied petitions for reconsideration of *Liberty I*, the Commission attempted to alleviate fears caused by what it considered "misconceptions" arising from the original decision.[71] The ICC reiterated that it was not abandoning the *Pan-American* criteria, reversing the burdens of proof, or making competition the sole consideration in its deliberations.[72] The Commission further stated that applicants have an absolute burden to establish a *prima facie* need for the proposed service. Once this has been done, protestants must demonstrate both their conflicting interest and their ability to fulfill the public need. At this point, and only after these burdens have been met, protestants will have an opportunity to demonstrate that the public interest is best served by protecting the conflicting interest.[73]

All doubt is ended. Despite the Commission's statement that it is not abandoning *Pan-American*, the traditional method for determining the outcome of motor carrier entry applications is no longer operational. Increased competition is now presumed to be in the public interest to a much greater extent than previously articulated.[74] Mere conflicting authority coupled with traffic abstracts showing speculative revenue losses will not suffice to deny an application.[75] The core of *Pan-American* has always been to advance the public interest, but the ICC now holds that this is entirely separate and distinct from protecting existing common carriers from competition.[76] In *Liberty II*, the Commission reaffirmed its earlier position that the benefits of competition and improved service may outweigh even substantial harm to protestants,[77] and stated that it "will not deny the public the benefits of an improved service or heightened competition merely to protect the inefficient or to insulate existing carriers from more vigorous competition."[78]

While the Commission professes not to have altered the long-standing

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The same circuit that decided P.C. White held in a multiple-application situation that the Commission "must grant authority only to the extent that the public requires a particular service, guarding against oversupply which could result in deterioration rather than improvement of service."

71. Liberty Trucking Co., Ext., Gen. Commodities, 131 M.C.C. 573, 574 (1979) [hereinafter cited as Liberty II].

72. *Id.* at 574.

73. *Id.* at 574-75.

74. *Id.* at 576.

75. *Id.* at 575. *See also* Superior Trucking Co., Inc. Ext.–Agric. Machinery, 126 M.C.C. 292 (1977).

76. *Accord,* Arkansas-Best Freight, 419 U.S. 281, 298 (1974). *Accord*, note 13 *supra.*

77. 131 M.C.C. at 575, 576. *See also* May Trucking Co. v. United States, 593 F.2d 1349-56 (D.C. Cir. 1979); Appleyard's Motor Transp. Co. v. I.C.C., 592 F.2d 8, 11 (1st Cir. 1979). Atlanta-New Orleans Motor Freight Co. v. United States, 197 F. Supp. 364, 370 (N.D. Ga. 1961); Norfolk Southern Bus Corp. v. United States, 96 F. Supp. 756, 761 (E.D. Va. 1950), *aff'd mem* 340 U.S. 802 (1951); P.C. White II, 129 M.C.C. 1, 9 (1979); Chief Freight Line Co., Ext.–Dallas, 126 M.C.C. 794 (1971); Milne Truck Lines, Inc., Ext.–San Francisco, 121 M.C.C. 149, 165 (1975).

78. 131 M.C.C. at 576.

burdens of proof in operating rights proceedings,[79] it has firmly placed the presumed benefits of competition in an exalted position to which they had not often been raised in the *Pan-American* weighing process. This public interest presumption in favor of increased competition means that protestants must resort to more sophisticated evidentiary presentations than once were necessary in order to establish an interest worthy of regulatory protection. Although this increased evidentiary standard may seem to leave protestants defenseless, it is an approach to which they can adjust. Some important considerations and protections for protestants attempting to formulate new strategies remain, and will be discussed.[80]

Another shock may be in store for protestants, however, because the Commission has recently altered the standards of proof in operating rights proceedings.[81] The ICC is already giving added weight to the "needs and wishes" of supporting shippers, and its decisions clearly presume that increased competition may spur motor carriers to provide more efficient, cost effective service.[82] In order to focus more intensely on the issue of the benefits and disadvantages of increased competition in a given case, the Commission recently replaced the tripartite *Pan-American* criteria with a new two-pronged test in common carrier applications:[83]

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79. 131 M.C.C. at 574-75. *Contra*, Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation 43 Fed. Reg. 56,978-80 (1978), in which the Commission states:

> Although the Commission has become more liberal in granting motor carrier applications, it has still, up to now, been following entry control policies which have changed but little since the advent of federal regulation. Today, the flood of applications has made it virtually impossible for the Commission to give more than passing attention to each, and has made well-informed, precise motor carrier entry regulation difficult, if not impossible.
>
> In responding to these changing conditions and developing service needs, the Commission has recently tended to give added weight to the needs and wishes of those supporting motor carrier applications. It has also given more weight to the benefits of competition, recognizing it as an effective form for regulating prices and service quality.

See also Consolidated Carriers, Inc., Com. Car. Applic., 131 M.C.C. 104, 109 (1978) for a statement concerning the I.C.C.'s desire to encourage new entrants into the motor carrier industry.

80. *See generally* notes 120-223 *infra*, and accompanying text.

81. Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60,296 (1979). The rules do not appear to endanger the ability of existing common carriers to protest new applications; quite the contrary, they seem to make the evidentiary burden on protestants somewhat less than it formerly was by removing the perfunctory requirement that protestants demonstrate they are able to provide the service in question. This decreased burden, however, normally would not have an advantageous effect on the final determination of the application. The discussion accompanying the proposed rules clearly evinces the Commission's intent to apply the new test in a manner consistent with granting at least as high, and perhaps an even higher, percentage of applications as at present 44 Fed. Reg. 60,297-99 (1979). When in excess of 95 percent of all decisions on the merits presently are granted, it remains to be seen whether an increase would be possible.

82. 43 Fed. Reg. 56,978-80 (1978). *See also* note 7 *supra*; Pulaski Highway Express, Inc., Ext.-Elkton, 130 M.C.C. 147, 151 (1978); B. J. McAdams, Inc., Ext.-Frankfort Textiles, 129 M.C.C. 182, 188 (1978); Pacific Intermountain Exp. Co., Ext.-Off Route Points, 126 M.C.C. 866, 871 (1977).

83. This new policy is based on the premise that the motor carrier industry generally is well

(1) The applicant must demonstrate that the operation proposed will serve a useful public purpose responsive to a public demand or need.

(2) The Commission will grant authority commensurate with the demonstrated purpose unless it is established by those opposing the application that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to an extent contrary to the public interest.[84]

This new standard effectively eliminates the second *Pan-American* test which requires that the Commission consider "whether this [proposed public] purpose can and will be served as well by existing lines or carriers." Protestants will be protected in their attempts to prevent oversupply in a given market by the second test, which presumably will be interpreted similarly to the third *Pan-American* criterion it replaces. Protestants will continue to have the burden of proving that the addition of a new carrier to a relevant market would not be in the public interest.[85]

Given the trend in favor of increased competition, coupled with the recently adopted protest standards,[86] there really is no reason for continued reliance on the second *Pan-American* test in the Commission's procedural framework. This criterion adds very little substantive data to the record because, presumably, protestants would not spend time and money to litigate an operating rights application if they were not interested in suitably handling the freight subject to applicant's new proposal. Also, only carriers which have transported, or at least formally solicited, the freight in question and which possess the necessary equipment and facilities for performing the service will be able to file protests pursuant to the new intervention standards, unless good cause is shown.[87] Thus, the second *Pan-American* criterion is no longer needed for the benefit of applicant, and removing it probably will not diminish those few protections presently afforded protestants. The changes merely reiterate the Commission's presumption of and emphasis on the benefits of increased competition to the public, and simply allow the ICC to focus more clearly on the advantages

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managed, profitable, and competitive, and capable of absorbing over 8,000 grants of operating authority yearly (now approaching 13,000 annually, *supra* note 3) in an effort to keep pace with the "apparently never-ending need for new motor carrier services." 43 Fed. Reg. 56,979 (1978). As entry controls have changed little in the past forty years, the Commission believes itself unable to continue making informed judgments about each application it receives. These new standards are more in accord with the Commission's reinterpretation of its legislative mandate to favor eased entry controls and are more consistent with the recent, accelerating trend recognizing the benefits of increased competition to this financially healthy industry 44 Fed. Reg. 60,298-99 (1979); 43 Fed. Reg. 56,979-80 (1978).

84. 44 Fed. Reg. 60,299 (1979). Under these changes, the Commission will grant *bona fide* contract carrier applications unless protestants can establish that "such a grant would endanger or impair their operations to an extent contrary to the public interest." 44 Fed. Reg. 60,298 (1979).

85. *Id.* at 60,299-300.

86. *See* notes 89-106 *infra*, and accompanying text.

87. 43 Fed. Reg. 50,911, 60,278 (1978) [to be codified in 49 C.F.R. 1100.247(k) and (1)].

and disadvantages of increased carrier entry into a given market. While these revisions in the standards of proof do not seem to be a further erosion of existing evidentiary burdens, this revamped analysis does not offer any solace to protestants, and there is nothing contained in it which would hint at a softening of Commission policy toward the benefits of competition to the public.[88]

III. Requirements for Viable Protests

A. *Intervention—Out, Damned Protestants!*

The Commission has recently promulgated rules which, in some instances, may limit protests to operating rights applications for permanent authority.[89] In order to intervene and protest an application without leave of the ICC,[90] a carrier[91] must now be able to demonstrate that it:

> (1) Is authorized to perform any of the services which the applicant seeks to perform;
>
> (2) Has the necessary equipment and facilities for performing that service; and
>
> (3) Has performed a service within the scope of the application either (i) for those supporting the application, or (ii) where the service is not limited to the facilities of particular shippers, from and to or between any of the involved points.[92]

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88. *See* note 83 *supra*. Because these new policy considerations do not change substantively the *Pan-American* test as it is presently perceived by the Commission, the authors will continue to refer to the *Pan-American* criteria, although, strictly speaking, they have been abolished by the ICC in this proceeding.

89. Ex Parte 55 (Sub-No. 26), Protest Standards in Motor Carrier Application Proceedings, 43 Fed. Reg. 50,908, 50,911 (1978) and 43 Fed. Reg. 60,277 (1978) [to be codified in 49 C.F.R. 1100.247(e), (k), (l), and (m)].

90. 43 Fed. Reg. 50,911 (1978) [to be codified in 49 C.F.R. 1100,247(k)(3)].

91. Intervention in motor carrier proceedings without leave is accomplished for rail and water carriers by meeting the same tests that would be applicable for motor carriers. 43 Fed. Reg. 50,910 (1978). Carriers which, under joint-line operations, move freight subject to the application may protest without leave. 43 Fed. Reg. 60,278 (1978).

92. 43 Fed. Reg. 50,911, 60,278 (1978) [to be codified in 49 C.F.R. 1100.247(k)]. An original plus one copy of the protest must be filed within thirty days after the date notice of the filing of the application is published in the *Federal Register*. The protest also must be served on applicant. The protest must set forth the specific grounds for the protest and include a copy of all pertinent authority, along with a statement of each protestant's interest in the proceeding. Finally, the protest should not allege generally the issues involved, but must state specifically the facts, matters, and other items relied on in the protest. The protest need not be verified. 43 Fed. Reg. at 50,909 (1978) [to be codified in 49 C.F.R. 1100.247(e)(1), (2), and (3)].

Substantiation of the necessary showing need not accompany petitions to intervene, but petitions to intervene without leave should set forth clearly the traffic handled by protestants that would be subject to diversion under applicant's proposal. Petitioners should be prepared to document, by means of business records, that the necessary requirements for a petition to intervene without leave have been met. 43 Fed. Reg. 50,909 (1978). *See* 43 Fed. Reg. 50,912 (1978) for a sample "Petition To Intervene Without Leave" [to be codified in 49 C.F.R. 1100.247, Appendix I].

In all likelihood, the most troublesome requirement to file without leave will be demonstrating that protestants have "performed a service within the scope of the application."[93] Protestants must have carried any commodity named in the application between any of the points for which applicant requests authority.[94] Most importantly, transportation of named commodities between listed locations under common carrier authority does not satisfy the requisite test to intervene without leave in a contract carrier application.[95] Thus, common carriers can intervene only with leave in contract carrier applications, and vice versa.[96]

Parties who cannot intervene without leave may file petitions to intervene with leave,[97] and a response, if any, to this petition is filed under an expedited procedure.[98] In considering whether to grant intervention, and under what terms[99] the Commission will weigh, *inter alia*:

(1) The nature, if any, of the petitioner's right under a statute to be made a party.

(2) The nature and extent of the property, financial, or other interest of the petitioner, including petitioner's service capabilities and the extent, if any, to which petitioner (A) has solicited the traffic or business of those supporting the application, or (B) where the identity of those supporting the application is not included in the published application notice, has solicited traffic or business identical to any part of that sought by applicant within the affected marketplace.

(3) The effect of the decision which may be rendered upon the petitioner's interest.[100]

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93. 43 Fed. Reg. 50,911, 60,278 (1978) [to be codified in 49 C.F.R. 1100.247(k)(3)].

94. 43 Fed. Reg. 50,910 (1978). There seems to be no minimum limitation on the number of protestants' shipments corresponding to the sought authority.

If the sought authority is regular route authority which could be tacked with applicant's existing authority, the *Federal Register* notice must so state. The purpose of this requirement is to alert potential protestants to the expanded scope of the application. *See generally* 43 Fed. Reg. 60,278 (1978). Thus, it would appear that a carrier which had transported freight to or from any point for which authority was sought to or from any point located within applicant's existing tackable authority would meet the "within the scope of the application" test.

95. 43 Fed. Reg. at 50,910 (1978). The converse of this rule is equally applicable.

96. Although common carriers cannot protest contract applications without leave to intervene, such leave will normally be granted if protesting carriers raise, in a substantial manner, the issue of whether applicant has sought the correct form of authority. 43 Fed. Reg. 50,910 (1978). This prevents a thinly veiled common carrier application from escaping scrutiny due to its contract carriage label.

97. 43 Fed. Reg. 50,911 (1978) [to be codified in 49 CFR 1100.247(1)]. Except where inconsistent, the provisions of 49 C.F.R. 1100.247(e) relating to requests for oral hearing, cross-examination, and so on, apply to the new protest standards. *See* 43 Fed. Reg. 50,911, 60,277-78 (1978) [to be codified in 49 C.F.R. 1100.247(e)(9), (k)(4), and (1)(4)].

98. 43 Fed. Reg. 50,911 (1978) [to be codified in 49 C.F.R. 1100.247(1)(1)].

99. The Commission may limit the scope of a petitioner's participation in an operating rights application proceeding. 43 Fed. Reg. 50,911 (1978) [to be codified in 49 C.F.R. 1100.247(1)(3)].

100. 43 Fed. Reg. 50,911 (1978) [to be codified in 49 C.F.R. 1100.247(1)(2)].

These considerations seem to be based on allowing intervention when a protestant's interest would otherwise be unrepresented. The purpose for the rule seems to be one of culling protestants who would merely "me too" other parties for which the Commission recognizes a stronger interest in participating during the proceeding.[101]

While these rules could limit intervention by parties allowed to participate in past proceedings,[102] their purpose is not to ignore private interests, but rather to develop a threshold test for determining which private interests will add to the decision-making process. The ICC, then, will exercise with discretion its informed judgment concerning other interests which may, in a particular instance, advance the state of the record.[103] The goal is simply to evaluate, at an early stage, the need of each protestant to intervene, while not precluding the development of a record that will reflect the potential competitive impact and other considerations which must be weighed by the Commission.[104]

The prospective protestant should beware. The rules are new, and are unknown in their effect at the present time. Clearly they are designed to limit the Commission's inquiry to the narrowest issues possible and to

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101. Given the emphasis in the "intervention without leave" regulations on actually having moved traffic or performed a service within the scope of the application, it is likely that the solicitation of freight from a supporting shipper, if known (or, if unknown, traffic within the scope of the application), will be pivotal in the Commission's decision on intervention if leave is required.

A carrier seeking to intervene on the basis of solicitation efforts should include in its petition a synopsis of all such attempts. Normally, solicitations must be accomplished by means of direct contact with a shipper and must be recurring in nature. Naturally, a company such as a passenger carrier or household goods mover which cannot identify its potential customers directly could rely on indirect solicitations. The expenses incurred in solicitation efforts should be set forth, as should pertinent data concerning the carrier's operations which relate to the degree of its involvement within the scope of the application. 43 Fed. Reg. 50,909 (1978).

As with petitions without leave, documentation need not accompany the petition, but protestants should be able to substantiate all claims at the hearing, if challenged, with records kept in the ordinary course of business. 43 Fed. Reg. 50,909 (1978). Solicitation efforts alone, however, do not guarantee that leave to intervene will be granted; the balancing test of whether, after weighing all relevant factors, the protestant has demonstrated a real interest in the traffic covered by the application still must be met. 43 Fed. Reg. 50,909 (1978).

Samples of "Petitions to Intervene With Leave" are provided in 43 Fed. Reg. 50,913 (1978) [to be codified in 49 C.F.R. 1100.247, Appendices II and III].

Any applicant or potential protestant/intervenor may appeal an intervention decision within ten days after its service date. Accompanying briefs may not exceed ten pages, and responses, if any, may be filed within five days of the service date of the appeal. The ten page limitation also applies to these responses. For purposes of the appeals process only, the date on which the material is postmarked will govern the time limitations. 43 Fed. Reg. 50,911, 60,277-78 (1978) [to be codified in 49 C.F.R. 1100.247(m)].

102. Compare these new rules with the old protest standards [49 C.F.R. 1100.247(e) (1978)] in which any interested person was allowed to protest under much less stringent guidelines than are currently articulated by the ICC.

103. 43 Fed. Reg. 50,908 (1978).

104. *See* 43 Fed. Reg. 50,908, 50,910 (1978).

lessen the administrative burden that the ICC faces when it must conduct extremely lengthy hearings in which numerous lawyers repetitively argue and cross-examine witnesses.[105] Also implicit in these standards is the Commission's distaste for what it feels are gratuitous, and perhaps superfluous, protests entered by carriers with little or no present connection to the involved freight, whose sole purpose is to introduce another time-consuming stumbling block into the administrative process in an attempt to protect existing authority which may be fully developed only at some future date.[106] The ability to intervene is obviously crucial to protestants and, given recent developments, should not be taken for granted. Caution and care should be exercised in preparing petitions to intervene, both with and without leave.

B. *The Second Pan-American Criterion—Carriers Doth Protest Too Much, Wethinks.*

In addition to meeting the recently prescribed protest guidelines, potential protestants should also be capable of supplying evidence to convince the Commission that the second *Pan-American* criterion[107] has been satisfied. While this second requirement has largely been ignored in recent decisions, and its lack of apparent significance is demonstrated by the reform of the *Pan-American* criteria (which seemingly eliminates the requirement entirely, at least from the procedural framework),[108] it is still crucial, from a substantive standpoint for protestants to develop the strongest possible case regarding their ability to satisfy a demonstrated service need. Threshold intervention should not be denied because the second *Pan-American* test is not established at the outset, but no protestant can expect to be successful if its willingness and ability to handle the subject freight cannot be documented with some specificity.[109]

In the past, when the ICC accepted the premise that existing carriers were entitled to all traffic they could transport adequately, economically, and efficiently within the scope of their authorities before a new competitive service would be authorized,[110] a showing of the adequacy of existing service was almost always deemed sufficient to preclude a grant of new operating authority.[111] Under the present trend, in which the desires of

105. *Id.*

106. *Id.*

107. The second criterion is "whether this purpose can and will be served as well by existing lines or carriers." Pan-American Bus Lines Operation, 1 M.C.C. 190, 203 (1936).

108. *See* notes 81-88 *supra*, and accompanying text.

109. *See generally* Ex Parte 55 (Sub-No. 26), note 89 *supra*. Also, a protestant should have the necessary equipment and facilities to perform the service in question. 43 Fed. Reg. 50,911, 60,278 (1978) [to be codified in 49 C.F.R. 1100.247(k)(2)].

110. *See* note 6 *supra*.

111. *See* notes 6, 7, and 12 *supra*.

supporting shippers are given substantially greater weight,[112] the Commission seems loathe to determine the level of service that shippers truly need, and generally is unwilling to substitute its judgment for that of shippers. It becomes apparent, then, that it is no longer a viable strategy for existing carriers to attempt to contradict shipper statements as to their need for extremely efficient, specifically tailored service by showing that the shippers desire but do not really need the service levels they request. Protestants must focus on the service actually provided, and their attempts to satisfy shippers' reasonable transportation requirements, rather than attempting to saddle supporting shippers with the obligation of "proving" their service needs. The adequacy of existing service is now important only to the extent that it relates to the demonstration of a public need. Effectively, the burden has been shifted from requiring protestants to show the adequacy of existing service to forcing protestants to establish that the proposal would not yield a public benefit.[113]

Because demonstration by applicant of a service benefit is a threshold test,[114] it is vital that protestants establish, with much care, the existing level of service and attempts, if any, to introduce new, more responsive services into the relevant transportation market. At a minimum, traffic studies, including loss and damage data, transit times, availability of appropriate equipment, responsiveness to increased needs, availability of other carriers, and so on should be introduced, as should data attempting to offset the *Novak* evidence and any other indications of service deficiencies introduced by supporting shippers on behalf of applicant.[115] While only in a rare case will existing service be found adequate for the professed needs of shippers,[116] it is still absolutely crucial that the advantages to shippers offered by applicant's "hearing room" proposal be negated to the extent possible by evidence of what protestants presently are accomplishing in the "real world" of transportation. Even if protestants are unable to demonstrate that their existing service can totally satisfy the established service need, they may be able to force a denial of the application at the next stage

112. *See* note 82 *supra*.

113. *Compare generally* Liberty I, 130 M.C.C. 243 (1978), Liberty II, 131 M.C.C. 573 (1979), and P.C. White II, 129 M.C.C. 1 (1978), *with* P.C. White I, 120 M.C.C. 824 (1974), *and* note 6 *supra*. *Cf.* Liberty II, 131 M.C.C. at 574. The first two Pan-American criteria have become hopelessly intertwined and the second criterion has been submerged by the Commission's analysis of whether the proposed new service will satisfy a demonstrated public need. Naturally, the only way the Commission can determine if a public need has been demonstrated is to weigh the needs of shippers, as stated in their testimony, against the evidence submitted by protestants concerning the quality of service presently provided.

114. *See* note 177 *infra*.

115. *See* note 117 *infra*, and accompanying text. *See generally* notes 197-216 *infra*, and accompanying text.

116. *E.g.*, Colonial Refrigerated Transp., 131 M.C.C. 63, 66, 68, 69 (1978). *See also* Pre-Fab Transit Co. v. United States, 595 F.2d 384, 389 (7th Cir. 1979).

in the decision making process by minimizing the benefits derived from the proposed service and proving harm to the shipping public.[117]

The first and second *Pan-American* criteria are now so intertwined that only one standard truly remains—does the evidence taken as a whole establish a public need for the proposed service—and the Commission's new burden-of-proof rules[118] merely recognize this already existing combination. Because there remains no reason to analyze the two criteria separately, they will be examined in tandem.[119] This review is inserted merely to emphasize the necessity of going far beyond the evidence required to intervene without leave in an operating rights proceeding if a viable protest is to be mounted. Intervention is the first, and easiest, step in the protest process. Specificity with respect to all aspects of existing service within the scope of the application should be an integral part of all protests.

IV. Applicant's Burdens—Depth and Breadth

Given that the ICC's thinking is completely dominated by the perceived benefits of increased competition and the presumption that freer entry and increased competition is consistent with the public interest, is there hope for budding protestants? The question must be answered affirmatively, although a strongly worded caveat should be added. Protests should no longer be attempted by the fainthearted or the weak-willed. Once potential protestants have met the newly-adopted protest standards,[120] they must be much more diligent in developing substantial evidence showing harm to the shipping public from increased competition.

Potential protestants will also have to pick and choose their protests more carefully if they desire success. A market which is served by only one or a very limited number of carriers is not likely to be a fruitful area for protestants.[121] Additionally, protestants may not be able to win a denial of the entire application, but may be successful in having its scope reduced so that it will not be as onerous to existing carriers.[122] The possibility of pro-

117. If, for instance, the public benefits arising from the proposed service are slight, and if protestants can demonstrate that they and the shipping public will suffer competitive harm from the grant of the application, the third Pan-American criterion will call for a denial of the application. *See, e.g.*, P.C. White II, 129 M.C.C. 1, Liberty I, 130 M.C.C. 243, Liberty II, 131 M.C.C. 573 and Colonial Refrigerated Transp., 131 M.C.C. 63. To the extent that the benefits to the public are seen by the ICC as minimal, it will be much easier for protestants to establish that the competitive harm from granting the application outweighs the benefits to the public.

118. *See* note 89 *supra*.

119. *See generally* notes 195-223 *infra*, and accompanying text.

120. *See* note 89 *supra*.

121. When only a limited number of carriers serve a market, it seems more probable that the addition of a new carrier would stimulate new and improved services than in a market that is also served by numerous carriers. *Accord*, Colonial Refrigerated Trans., 131 M.C.C. at 68. *See also* Red Arrow Freight Lines, Inc., Ext.–North Tex., 131 M.C.C. 232, 239 (1979).

122. Approximately 5.5 percent of all motor carrier operating rights applications are reduced in

tests remains an incentive for applicant to limit its proposals to the area it truly is willing and able to serve efficiently, rather than attempting to broaden the application in an effort to "stockpile" authority which can be developed at a later date. The "chilling effect" of the expense, both in time and money, of fighting a protest is as great on applicant as is the expense of filing the protest upon existing carriers.[123]

While the approval rate of at least part of the requested authority is approaching 99%, a substantial increase from the traditional 80-85% levels,[124] protestants who adapt to the Commission's new burden of proof and develop evidence in a manner suitable for these standards can still be effective.

Even under present conditions, the ICC may authorize persons to provide transportation services only if the Commission finds that:

> (1) the person is fit, willing, and able (a) to provide the transportation to be authorized by the certificate, and (b) to comply with this subtitle and regulations of the Commission; and
>
> (2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.[125]

Aside from embellishing briefs with general pronouncements concerning the goals of transportation policy,[126] the main thrust of protestants' arguments clearly must be to demonstrate that the applicant is not "fit, willing, and able" to provide the proposed service and to comply with existing reg-

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scope by the Commission or result in conditional grants. Many others are withdrawn by applicant (approximately 4 %). Surina, Interoffice Memorandum, Interstate Commerce Commission, Disposition of Motor Carrier Operating Rights Applications (November 6, 1979). The percentage of protested applications which result in reduced authority or conditional grants would be much higher.

123. The writers do not intend to intimate that frivolous protests or protests filed merely to delay the granting of new authority should be condoned, but rather are asserting that the perceived threat of a protest will weigh heavily on applicant while formulating the scope of its application if it believes that a protest might be a viable alternative for existing carriers under certain conditions.

124. *See* note 3 *supra*.

125. 49 U.S.C. § 10922(a) (1978). 49 U.S.C. § 10923(a) (1978) contains equivalent provisions for contract carrier licensing.

126. The Interstate Commerce Act, which is designed to ensure "the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States," requires, in part, the Interstate Commerce Commission:

> (1) to recognize and preserve the inherent advantage of each mode of transportation;
>
> (2) to promote safe, adequate, economical, and efficient transportation;
>
> (3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
>
> (4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;
>
> (5) to cooperate with each State and the officials of each State on transportation matters; and
>
> (6) to encourage fair wages and working conditions in the transportation industry.

49 U.S.C. § 10101 (1979).

ulations, and/or that the future public convenience and necessity does not require the proposed service.

In order to establish that applicant is not "fit, willing, and able," protestants can attack the operational and/or financial feasibility of the proposal[127] and can attempt to have applicant labeled a "rogue carrier"—one which is unable or unwilling to comply with existing rules and regulations—by the Commission or its Bureau of Investigations and Enforcement [BIE].[128] These fitness and feasibility considerations attempt to force a finding by the ICC that even if the public interest requires a proposed service, applicant should not be allowed to satisfy the need because its proposal is not an efficient, financially feasible one, or because applicant cannot be expected to comply with regulatory policies designed to protect the public.

The statutory standard of "present or future public convenience and necessity" has generally been evaluated by means of the aforementioned three-part *Pan-American* test.[129] Under these criteria, as restated in *Liberty I and II* and modified in Ex Parte No. MC-121,[130] applicant must first set forth a public need for or benefit from the proposed service. Once this has been done, protestants assume the burden of proving the proposed service will cause competitive harm of such a degree as to outweigh the benefits to the general public.[131] Each of these aspects of "present or future public convenience and necessity" will be discussed in turn in the following sections, with emphasis on present trends, and the positions accepted by the ICC in recent operating rights proceedings.

A. "Fit, Willing and Able"

Fitness, perhaps the most overlooked point of attack available to protestants, can also be among the most effective. It is difficult to imagine a more satisfactory strategy of opposition than one which would entangle a carrier with the ICC's fitness procedures. These provisions are designed to protect the public from carriers who are unable or unwilling to comply with appropriate ICC or Department of Transportation [DOT] rules and regulations. Although these requirements do not relate to the merits of the application, all applicants for operating authority must meet this two-part test before authority can be granted.[132] It does not matter that a public need

127. *See generally* notes 138-182 *infra*, and accompanying text.

128. *See* notes 138-158 *infra*, and accompanying text.

129. Pan-American Bus Lines Operation, 1 M.C.C. 190, 203 (1936).

130. Liberty I, 130 M.C.C. 243, 245 (1978); Liberty II, 131 M.C.C. 573, 574, 575 (1979); and 44 Fed. Reg. 60,299 (1979), respectively.

131. Liberty I, 130 M.C.C. at 246; Liberty II, 131 M.C.C. at 575. *See also* note 77 *supra*.

132. *E.g.*, Saia Motor Freight Line, Inc., Ext.–Dallas, 131 M.C.C. 660, 661 (1979); Pulaski Highway Express, Inc., Ext.–Elkton, 130 M.C.C. 147, 151 (1978); Midwest Emery Freight Sys-

exists; the carrier must prove itself "fit, willing, and able," and cannot use strong evidence of need presented by shipper witnesses to "bootstrap" the application to success.[133] The contemporary liberalization of entry requirements in other areas does not seem to have eroded traditional fitness doctrines; applicant still has the undiminished burden of proving fitness.[134]

Although DOT or BIE can intervene in any proceeding to argue that applicant is not "fit, willing, and able,"[135] protestants may independently challenge applicant's fitness.[136] Applicant continues to bear the burden of proving fitness regardless of which party raises the issue.[137]

1. The "Rogue Carrier"

The Commission regulates a massive and ever expanding conglomeration of large and small carriers, contract and common carriers, freight forwarders and brokers, and rail and water carriers. The only way the system can work smoothly and properly is to be self-policing.[138] The ICC cannot actually supervise each and every transportation activity, and must rely to a large extent on the good faith of the various carriers. Carriers that violate the expected norms of this benign regulation should be and often are dealt with severely. In a recent Fifth Circuit decision, the Court ordered the Commission to institute a fitness investigation because a carrier had, in a single instance, submitted false evidence.[139] There is little doubt that the Com-

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tem, Inc., Investigation and Revocation of Certificates, 124 M.C.C. 105, 118 (1975). Normally, the Commission determines public need for the service before examining the carrier's ability to provide the service in a safe and satisfactory manner. *E.g.*, Pulaski Highway Exp., Inc., Ext.-Elkton, 130 M.C.C. 147, 151 (1978); Distributor's Serv. Co., Ext.-Ford and Ford Products, 118 M.C.C. 322, 323 (1973). *But see* Cross-Sound Ferry Serv., Inc. v. I.C.C., 573 F.2d 725, 731 (2nd Cir. 1978), upholding the Commission's ability to close the record on public need while determining fitness.

133. Pulaski Highway Express, Inc., Ext.-Elkton, 130 M.C.C. 147, 151 (1978); Watkins Motor Lines, Inc., Ext.-To Four States, 120 M.C.C. 92, 101 (1974); Metler Hauling & Rigging, Ext.-Loudon County, Tenn., 117 M.C.C. 557, 559-60 (1972); Midwest Emery Freight System, Inc., Investigation and Revocation of Certificates, 124 M.C.C. 105, 118-19 (1975). *But see, e.g.*, Autolog Corp. Ext.-16 States, 131 M.C.C. 494 (1979), where the Commission continued the steadily increasing trend of granting applications for a limited duration when the fitness of the carrier is seriously, but not irreparably, questioned. This practice is especially prevalent in cases involving new carriers or extensive expansions of new or innovative services. *Accord*, United Agricultural Transp. Assoc. of America Marketing Co-Op Com. Car. Applic., 120 M.C.C. 67, 76 (1974); Distributors Serv., Co., Ext.-Food and Food Products, 118 M.C.C. 322, 330 (1973).

134. *See* notes 132 and 133 *supra*.

135. 49 C.F.R. § 1067.4, § 1067.5 (1978).

136. Kissick Truck Lines, Inc., Ext.-Iron and Steel Articles, 125 M.C.C. 183, 191 (1976); W. J. Digby, Inc., Ext.-Western States, 123 M.C.C. 461, 508 (1973).

137. *Id. See also* Speedway Carriers, Inc., Ext.-Pesticides, 128 M.C.C. 60, 65 (1977); Watkins Motor Lines, Inc., Ext.-To Four States, 120 M.C.C. 92, 101 (1974).

138. Atlas Transit, Inc., Ext.-Lonoke, Ark., 120 M.C.C. 708, 717 (1974). United Agricultural Transp. Assoc. of America Marketing Co-op Com. Car. Applic., 120 M.C.C. 67, 78 (1974).

139. Barnes Freight Line, Inc. v. ICC, 569 F.2d 912, 923 (5th Cir. 1978).

mission can and will continue to deny applications when an unabated pattern of violations of Commission policy occurs.

If applicant is labelled a "rogue carrier," one that operates in blatant disregard of Commission rules and regulations, protestants may prevail in having the application denied. The simplest way to accomplish this objective is to bring the power of the fitness flagging procedures[140] to bear. Once a threshold occurrence triggers the procedures,[141] no certificates or authority shall issue to applicant until its fitness has been resolved in a selected proceeding.[142]

As has been mentioned, both DOT and BIE can intervene in any application proceeding.[143] Where this occurs, much of the burden of raising fitness deficiencies will be removed from protestants and assumed by the agencies. Additionally, the intervention of these two, presumably neutral, agencies gives the imprimatur of official recognition to the existence of a fitness problem. It must be remembered, however, that fitness flagging is usually a general proceeding, while specific fitness issues must be invoked in an individual proceeding.[144]

Assuming no agency is willing to intervene on the basis of applicant's fitness, protestants should explore whether applicant has committed any major violations of agency rules, regulations, or applicable law.[145] The

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140. 49 C.F.R. § 1067 (1978). *See generally*, McDevitt, *Procedural Due Process and ICC Fitness Flagging: A History and the Resultant 1976 Procedures*, 8 TRANSP. L.J. 309 (1976).

141. 49 C.F.R. § 1067.2 (1978) allows the:

> (a) Institution of a formal Commission investigation into alleged violations of law that reasonably appear to bear on applicant's fitness, willingness, and ability to conduct regulated carrier operations and to conform to the provisions of the Interstate Commerce Act and the requirements, rules, and regulations of the Commission or the Department of Transportation.
>
> (b) Participation by the Bureau of Investigation and Enforcement or the Department of Transportation to develop a record concerning fitness in an application proceeding seeking operating authority or approval of a transfer under Section 5 of the Interstate Commerce Act.

49 C.F.R. 1067.3 (1978) sets forth the standards for denial if there is probable cause for believing that fitness standards cannot be met:

> (a) Past uncorrected or other significant violations denoting an indifference by the applicant towards lawful standards of behavior, or a pattern of neglect of its duties towards the public that betokens a refusal voluntarily to meet its duties under the Interstate Commerce Act or
>
> (b) Flagrant and persistent disregard of pertinent provisions of the Interstate Commerce Act or the requirements, rules, and regulations of the Commission or DOT (rather than, for instance, a bona fide difference of opinion or interpretation regarding applicant's rights).

142. *See* note 135 *supra*.

143. *Id*.

144. CRST, Inc. Purchase (Portion)-Lee Bros., Inc., 127 M.C.C. 328, 330-31 (1978). *See generally* 49 C.F.R. § 1067 (1978).

145. *E.g.*, (1) Operating without appropriate authority; (2) violating ICC or DOT rules and regulations; (3) violating state rules and regulations; (4) violating terms of existing tariffs; (5) extending credit excessively; (6) failing to file all necessary reports and documents; (7) engaging in illegal leasing activities; (8) submitting false statements; (9) violating gateway restrictions; (10) violating

mere fact that a carrier has committed one or more violations, however, does not automatically preclude a finding that it is "fit, willing, and able." In ascertaining whether applicant has successfully met its statutory burden, the Commission is guided by the standards recently reflected in *Pulaski Highway Express, Inc., Extension–Elkton, Ky.*[146] The ICC considers the nature and extent of the violations, any mitigating factors, whether applicant's conduct is in flagrant and persistent disregard of the law, applicant's sincere efforts to correct past mistakes, and whether applicant is both willing and able to comply with all applicable requirements in the future.[147] Negative fitness findings are not considered as punitive actions, designed to penalize a carrier for its past misdeeds, but rather are imposed to assure that the public is adequately protected.[148] Finally, civil penalties do not wipe the slate clean, and the carrier must continue to show the steps taken to rectify its problems.[149]

2. The "I Think I Can" Carrier

A new carrier, or one that seeks to increase dramatically the scope of its operations, may propose large scale services and may actually produce adequate shipper support of the need for such services, but may not be able to carry out operations as proposed after authority is granted due to financial or other business limitations. The ICC still requires any applicant to provide the totality of services for which it requests authority, and this "I Think I Can" carrier should be scrutinized as to its ability to do so.[150] While

common control or dual operations provisions of law; (11) failing to remit COD payments promptly; (12) delaying in processing loss and damage claims; and (13) expending excessive sums of money entertaining shippers and consignees.

146. Pulaski Highway Express, Inc., Ext.–Elkton, 130 M.C.C. 147, 152 (1978). *See also* Distributors Serv. Co., Ext.–Food and Food Products, 118 M.C.C. 322, 329 (1973), and cases cited therein. *See generally* 49 C.F.R. § 1067.3 (1978), note 141 *supra*.

147. *Id.* It usually is considered particularly egregious if the violations with rules and regulations designed to protect the safety of persons using the nation's transportation system. *E.g.*, Speedway Carriers, Inc.,–Ext.–Pesticides, 128 M.C.C. 60, 66 (1977); Frigid Food Exp., Inc., Ext.–Floor Covering, 106 M.C.C. 259, 261 (1967); Com. Car. Applic., 96 M.C.C. 100, 103 (1964). Equally important is a sincere effort to correct past mistakes. This could include such measures as bringing in new management, firing or reprimanding employees, instituting new controls or procedures, and, most importantly, avoiding new violations. Failure to take these actions may lead the Commission to conclude that a continuous and notorious pattern of unlawful conduct has developed and that applicant is unable to carry out its future operations in a lawful manner. Boyd Bros. Transp. Co., Inc., Ext.–Farm Equipment and Gypsum, 129 M.C.C. 528, 533 (1978); Kissick Truck Lines, Inc., Ext.–Iron and Steel Articles, 125 M.C.C. 183, 192-193 (1976).

148. Midwest Emery Freight System, Inc.–Investigation and Revocation of Certificates, 124 M.C.C. 105, 118 (1975); Metler Hauling and Rigging, Inc., Ext.–Loudon County, Tenn., 117 M.C.C. 557, 560 (1972); McRay Truck Line, Inc., Ext.–Forty-eight States, 111 M.C.C. 602, 607 (1970).

149. United Van Lines, Inc., Investigation and Revocation of Certificate, 121 M.C.C. 86, 95 (1975).

150. *See generally* 49 U.S.C. § 10922(a)(1) (1979), note 125 *supra*.

present size alone is not a determinative element,[151] the carrier must have access to necessary equipment and terminals to transport commodities in the manner depicted in its transit studies (if any are presented). Unrealistic transit studies and claims of impossibly quick delivery merit lengthy consideration by protestants and should be pointed out to the Commission.[152] Furthermore, the prospective carrier must demonstrate that it either understands and can comply with the Commission's regulations or is capable of so doing prior to commencement of its proposed operations.[153] Finally, applicant must demonstrate an ability to provide adequate transportation services, such as pickup and delivery and processing of damage claims, as well as carriage to final destination, for all freight for which it requests authority. A carrier cannot request wide-ranging authority with the knowledge that it will actually concentrate on certain commodities or types of freight to the exclusion of others.[154]

In addition to these factors, applicant must also prove that it has adequate experience to perform the proposed operations[155] and that it has access to sufficient capital to provide service over all its routes.[156] The mere fact that current assets do not exceed current liabilities will not be sufficient to have the application denied if the carrier is a young, vigorous one with an innovative service and an attractive operating ratio.[157] The ICC may also opt for granting a limited-term certificate, which effectively gives the carrier a period of time, usually several years, to prove to the Commission that it is "fit, willing, and able" to provide the service.[158]

3. *Operational Fitness*

The Commission is obligated to promote, among other things, activities that encourage efficient transportation conditions.[159] An equally impor-

151. United Van Lines, Inc., Investigation and Revocation of Certificate, 121 M.C.C. 86, 95 (1975). See *also* Consolidated Car. Inc., Com. Car. Applic., 131 M.C.C. 104, 108 (1979); David W. Hassler, Inc., Ext.-Petroleum Products, 128 M.C.C. 864, 870 (1978).

152. *Cf.* Saia Motor Freight Lines, Inc., Ext.-Dallas, 130 M.C.C. 409, 425 (1978).

153. Consolidated Car., Inc., Com. Car. Applic., 131 M.C.C. 104, 109 (1979).

154. O'Nan Transp. Co., Inc., 131 M.C.C. 353, 360-61 (1979). *See generally* 49 U.S.C. § 11101 (1978). *Cf.* Colonial Refrigerated Transp. Inc., Ext.-Northeast to Southeast, 124 M.C.C. 650, 658 (1976), and cases cited therein.

155. A.W. Shipwash Com. Car. Applic., 1 M.C.C. 710, 711 (1937). *But see* United Agricultural Transp. Assoc. of America Marketing Co-op Com. Car. Applic., 120 M.C.C. 67, 76 (1974), in which the ICC rejected arguments about fitness deficiencies.

156. Consolidated Car., Inc., Com. Car. Applic., 131 M.C.C. 104, 108 (1979). Normally, the Commission determines whether the carrier can provide the proposed service without jeopardizing its financial health. The ICC typically will examine the firm's working capital levels, debt/equity ratios, and other measures of financial well-being to decide if monetary constraints will hinder the carrier's service.

157. Autolog Corp. Ext.-16 States, 131 M.C.C. 494, 496 (1979).

158. *See* note 133 *supra*.

159. *See* note 126 *supra*. *See also* General Policy Statement Concerning Motor Carrier Li-

tant policy objective is to assure that a strong, economically viable system of carriers is maintained throughout the nation.[160] Translating these general prescriptions into specific requirements relating to grants of operating authority, the Commission requests that evidence be adduced describing how equipment to be employed in the proposed operation will be returned to its point of origin. Resulting empty or partially empty vehicle movements must be disclosed, along with statistics relating to the total mileage and number of vehicles involved, and other factors concerning operational feasibility.[161]

Of course, merely requesting information concerning operational feasibility and deadhead miles is quite different from actually denying an application by affording such evidence determinative weight. The energy crisis, however, spurred the Commission to reiterate standards which seem to make operational feasibility a condition precedent to the issuance of authority. In its "General Policy Statement Concerning Motor Carrier Licensing Procedures (Operational Feasibility),"[162] the ICC took great pains to point out that a "balanced evaluation" of the operational feasibility of each new motor carrier operation must be made before authority could be granted.[163]

Protestants should be able to convince the Commission that strong reasons exist for denying applications which result in wasted fuel, and deadhead or under-utilized miles. Applicant seems to have the burden of demonstrating that it has made every effort to minimize deadhead miles through trip-leasing or transporting exempt commodities on the backhaul

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censing Procedures (Operational Feasibility), 38 Fed. Reg. 32,856 (1973). *Accord*, Rogers Cartage Co., a Corp.–Ext.–Liquid Acids and Chemicals, 110 M.C.C. 139, 147 (1969).

160. General Policy Statement (Operational Feasibility), 38 Fed. Reg. 32,856 (1973).

161. *Id.*

162. *Id.*

163. *Id.* While a careful analysis of operational feasibility has long been integrally intertwined with motor carrier licensing procedures [*See also* United Agricultural Marketing Transp. Assoc. of America Marketing Co-op Com. Car. Applic., 120 M.C.C. 67, 74 (1974); Ex Parte No. 55 (Sub-No. 8), Motor Com. Car. of Property, Routes and Serv. (Petition for the Elimination of Gateways by Rulemaking), 119 M.C.C. 530, 555 (1974); Stone Lines, Inc., Contr. Car. Applic., 54 M.C.C. 310, 312 (1952); Bos Truck Lines, Inc., Ext.–Boston, Mass., 48 M.C.C. 50 (1948)], the Commission recognized that it had gradually, and perhaps inadvertently, allowed its requirements in this area to diminish. It hoped that this new (presumably stringent) policy would return operational feasibility to a higher level of visibility in operating rights proceedings. General Policy Statement (Operational Feasibility), 38 Fed. Reg. 32,856 (1973).

Additional support for the proposition that the ICC has made, or at least should make, operational feasibility a condition precedent to grants of authority can be found in recent legislation. *See generally* 42 U.S.C. § 6362 (1977). As is stated in the legislative history of this Energy Policy and Conservation Act, Pub. L. 94-163, "[t]he agencies are instructed to exercise, to the greatest extent possible, their authorities to prevent or minimize the inefficient use of petroleum products, coal, natural gas, electricity, and other forms of energy. . ." 2 *U.S. Code Cong. & Ad. News* 1975, p. 1837-38. Query whether the ICC's response in 49 C.F.R. §§ 1106.2, 1106.4 (1978) meets this mandate.

movement, or showing that the new authority, when coupled with existing routes, provides a more efficient fronthaul-backhaul fit.[164] Additionally, applicant seemingly should have to establish that it has made every reasonable attempt to minimize deadhead and under-utilized miles by designing a routing strategy that eliminates as much excess mileage as possible.[165]

If applicant does not supply the required information regarding operational efficiency, protestants can move to have the proceeding dismissed and the application denied because of lack of compliance with Commission requirements.[166] If, however, applicant provides appropriate data which demonstrates that empty or partially empty mileage will occur and/or that deadhead movements are an inherent attribute of the proposal (or if protestants believe this to be the case), several avenues of attack should be available.[167]

After arguing that recent fuel shortages and long term policy considerations mandate that all agencies take appropriate steps to minimize wasted fuel, protestants could emphasize the actual amount of fuel that will be wasted should the proposed authority be granted.[168] To the extent new service siphons freight from existing carriers and causes their under-utilized

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164. *See* note 159 *supra*.

165. *Id.*

166. *Id. See also* ICC Form OP-MCB-95, Application for Temporary Authority for Motor Common and Contract Carriers under Section 210a[a] of the Interstate Commerce Act, which states, at page 7:

> The National Transportation Policy declared by the Congress requires that this Commission, among other things, promote efficient and economical two-way operations which eliminates or minimizes the cost of empty vehicle movements, and which benefits the carriers as well as the shipping and traveling public. Applicants seeking temporary authority are expected to submit information indicating how equipment is expected to be returned to an origin point, and other data relating to the operational feasibility of the proposed operation. If empty or partially empty vehicle movements will result from the grant of authority, applicant will be expected to disclose the mileage and number of vehicles involved, as well as designate where such empty vehicle operations will take place. Attachments with the information requested must be certified by applicant.

167. Applicant may present a routing study which purports to demonstrate the number of deadhead miles that will occur from the institution of the proposed service. Protestants should examine quickly the accuracy of this study, and also should determine whether the number of underutilized miles traveled (the percentage of total available space that must, of necessity, be empty during some portion of the route due to applicant's inability to pick up freight en route which would replace the freight delivered) in a particular application is in excess of the percentage of deadhead miles. Also, it may be possible to show that the routing scheme selected by applicant to minimize deadhead mileage does not reflect accurately the routing the trucks actually will use. Protestants certainly should demand that the operating study reflect the true characteristics of the movement in question.

168. In the case of a regular route common carrier, this argument should be particularly compelling because these carriers have made commitments to provide service over a given route at specified intervals. Until the route is abandoned, the trucks will continue to run, and use approximately the same amount of fuel, no matter how much or how little freight is available to them. *See generally* Transp. Activities of Brady Transfer and Storage Co., 47 M.C.C. 23 (1947), defining regular routes as repetitive in character, with a fixed pattern of departures and arrivals.

miles to increase, fuel consumption must rise and operational efficiency must fall when the totality of services within the scope of the proposal is considered.[169] In many instances, applicant may attempt to meet its burden by merely asserting that trip-leasing and backhaul of exempt commodities will be attempted whenever possible. Protestants should inquire as to what commodities will be available and when, and who has been contacted regarding trip-leasing. Backhauls will not be obtainable to and from many areas due to the historical imbalance of inbound and outbound freight.[170] In such situations, the simple assertion that deadhead miles will be avoided should be deemed insufficient by the Commission.

As always, every ointment has its fly, and this strategy of attacking operational feasibility is no exception. In recent decisions, the Commission has held that operational efficiencies can be used only as a mitigating factor weighing in favor of granting an application, and generally cannot be used as a reason for denying one.[171] This issue has not often been discussed, and then only in a peripheral manner to the more substantive problems

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169. Existing regular route common carriers should attempt to show not only that applicant's proposal is inefficient but also that the fuel efficiency of existing carriers would be lessened.

170. The Florida peninsula, for instance, receives much more freight than it ships to other areas. *See generally* Colonial Refrigerated Transp., Inc., Ext.-Fla. to 32 States, 131 M.C.C. 63, 70 (1978), for recognition of this historic imbalance. *Cf.* Saia Motor Freight Lines, 130 M.C.C. 409, 424 (1978). *But see* Midwest Haulers, Inc., Ext.-Fresno, Cal., 130 M.C.C. 187, 202 (1978), stating that the unavailability of back-haul freight due to a traffic imbalance in the general flow of commerce generally should not serve as a basis for denying an application where need for the proposed service has been established. *See also* Timlaph Corp. of Va., 129 M.C.C. 367, 380 (1978).

171. Joseph Moving and Storage Co., Inc., d/b/a St. Joseph Motor Lines, Ext.-Southeastern Bonded Warehouses, Inc., 131 M.C.C. 561, 571 (1979); MDI, Inc., Long Prairie, MN Contract Car. Applic., 129 M.C.C. 346, 352-53 (1978). *But see* General Policy Statement Concerning Motor Carrier Licensing Procedures (Operational Feasibility), *supra* note 159, although the Commission seemingly attempts to modify the clear intent of this statement in Joseph Moving. In response to arguments concerning the operational feasibility of the proposal, the Commission stated:

> The Administrative Law Judge denied the application as either a contract or common carrier on the additional ground of operational feasibility, reasoning that the service sought would necessarily incur substantial deadhead operations. He analyzed the sample routings provided by the shipper and concluded that the deadhead mileage is a significant percentage of the foward haul. We believe that this conclusion was based on a misinterpretation of the evidence, and is contrary to the intent of the policy statement in (sic) operational feasibility (footnote omitted). The Commission's policy is intended to be applied as an equitable factor militating in favor of granting applications where an applicant shows that efficient traffic movements on return are a part of its proposal. It is not intended to serve generally as a basis for denying an application where a need has been established for the proposed service, but where backhaul traffic may be unavailable or where return traffic movements are otherwise not possible (citation omitted).

131 M.C.C. at 570-71.

Joseph Moving and MDI, Inc., perhaps more than any other recent holdings, can be seen as the ICC's attempt to use competitive considerations to justify granting any and all applications even if it necessitates ignoring issues of operational feasibility which are mandated by law and the Commission's own pronouncements. The Commission's logic, more than the granting of the application itself, can be seen as a substantial setback to any rational policy of fuel conservation. Thinking

raised by protestants and answered by applicant,[172] but the holding seems inescapably illogical.[173] Perhaps, on further consideration, the ICC or the courts may find that operational efficiency is not a one-way street. Although the Commission may not always so find, it should have an obligation to promote efficiency by denying, as well as granting, applications.[174] Certainly, protestants should not fail to take advantage of operational feasibility arguments because of this flimsy precedent.

While this discussion is not designed to be a complete analysis of the fitness issue, it does set forth many points that should be considered by protestants. Although fitness problems will not yield a denial on the merits of an application, they remain a viable method to short circuit the process so that the public need for applicant's proposed service is not the dispositive factor.[175] In appropriate circumstances, fitness is an easy, efficient, and often successful method of protesting an operating rights application, and it should not be casually rejected as a strategy without proper consideration of its merits.

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such as this can only exacerbate the existing fuel shortage that seems likely to plague the United States for years to come.

By its holdings, the Commission seems to have made considerations of fuel consumption a one-way street. Fuel efficiency and operational feasibility can be rewarded, but, says the Commission, fuel waste and operating atrocities cannot be punished. This position is patently absurd and logically cannot be the case. If increasing fuel efficiency by obtaining a better fit between inbound and outbound traffic to lessen deadhead mileage is an "equitable factor militating in favor of granting applications," then it seems likely, as well as logically consistent, that increased deadhead miles and greater fuel consumption, along with lowered efficiency, would have to be factors militating against an application.

The Commission seems to have relegated operating efficiency, which should be a condition precedent to grants of authority, to the status of a flip-flopping afterthought. In these instances, at least, the Commission's pronouncement that it must make a "balanced evaluation of the operational feasibility of each proposed new or additional motor carrier operation" seems to be idle chatter, and the "balanced evaluation" is merely a one-sided, cursory glance.

It should be hoped that, in the future, the Commission will understand that National Transportation Policy cannot be turned on and off like a faucet. In the past, the ICC has recognized its obligations to consider operational feasibility and deadhead miles before granting applications, and it must weigh these factors in all applications–not just those applications which tend to increase operational efficiency. While the goal of administratively dictated deregulation may be foremost in the individual Commissioner's mind, the mandates of Congress and the needs of the public should not be ignored. In light of the existing fuel crunch, plain common sense, not to mention existing laws and Commission regulations, mandates that the ICC consider operating economies and diseconomies before granting or denying applications for operating rights.

172. Joseph Moving, 131 M.C.C. 561 (1979); MDI, Inc., Long Prairie, MN Contr. Car. Applic., 129 M.C.C. 346 (1978).

173. *See generally* note 171 *supra*.

174. *Id. Cf.* 49 USC § 10101(a)(2), (3) (1979).

175. *See* notes 132 and 133 *supra*.

B. *Better, Cheaper Or More Efficient*

Although the Commission has presumed that increased entry and competition will lead to improved service,[176] it has not retreated from the long standing proposition that applicant must first demonstrate that the proposed service will advance the public interest.[177] In the past, this has meant that applicant had to prove that it could provide a service superior to that of existing carriers, and that shippers needed this new, improved service.[178] Normally, this burden was met by introducing an operating proposal that improved existing service in terms of speed, efficiency, fuel consumption, damage claims, equipment, shipment tracing, daily pickups, and/or single-line service, among others.[179] The Commission recently amended its rules so that the level of rates can also be considered when deciding if an application is in the public interest.[180]

Although the requirement that applicant demonstrate that its proposed service meets a useful public purpose does not seem to have been eroded, the Commission appears to have become less than vigilant in assuring itself that this criterion has been met.[181] A good deal of carelessness seems to have been accepted in this phase of many operating rights proceedings.[182] This article will not deal with specific issues of what, in the past, has constituted a useful public purpose, but it will examine recent trends with respect to the burdens that applicant must meet in demonstrating public need and/or benefit, and deal specifically with the issue of whether increased

176. *E.g.*, Liberty Trucking II, 131 M.C.C. 573, 576 (1979); *See also* 43 Fed. Reg. 50,909 (1978) and Ex Parte No. MC-116, Change of Policy; Consideration of Rates in Operating Rights Application Proceedings–General Policy Statement, 359 ICC 613, 44 Fed. Reg. 10,064, 10,065 (1979).

177. *E.g.*, Ace Motor Freight Inc., Ext.–Refractories, 131 M.C.C. 610, 621 (1979); Liberty Trucking II, 131 M.C.C. 573, 574-75 (1979); Midwest Haulers, Inc., Ext.–Fresno, Calif., 130 M.C.C. 187, 196 (1978). *See also* 44 Fed. Reg. 60,299 (1979).

178. *E.g.*, Terminal Transport Co., Inc., Ext.–Mich. Points, 111 M.C.C. 343 (1970); Fernstorm Storage and Van Co. Ext.–Nationwide Serv., 110 M.C.C. 452 (1969). This is not to imply that demonstration of inadequate service was the only method of gaining Commission approval, because other considerations such as the presence of a monopoly, the need for single line service, following the traffic, emergency and seasonal needs, growth of the transportation market, need for special equipment, future needs, and balancing existing operations were considered by the ICC. Still, most applicants attempted to demonstrate the inadequacy of existing service as an integral part of their presentation.

179. *See* note 4 *supra*.

180. 44 Fed. Reg. 10,067, 10,068 (1979) [to be codified in 49 C.F.R. 1100.247(n)]. The Commission generally has not considered reduced intra-modal rates in operating proceedings unless existing rates were so high as to constitute an embargo. Any party aggrieved by rate levels was expected to challenge the justness and reasonableness of the rates in a complaint proceeding. Rate evidence has been utilized only to demonstrate the unique nature of the proposed service. 44 Fed. Reg. 10,065 (1979), and cases cited therein.

181. *See generally* notes 195-223 *infra*, and accompanying text.

182. *Id.*

competition *per se* is an adequate public interest consideration for granting new authority.

1. Reliance on Rates[183]

In recognition of the benefits inherent in all phases of competition, the Commission recently has adopted a policy that rate considerations properly may be raised to determine whether a common carrier proposal for permanent authority is in the public interest.[184] While the ICC has often been asked to consider rate differentials in a surreptitious manner under the guise of applicant's proposal to offer a "no frills" or more economical service, rate considerations traditionally did not figure prominently in Commission thinking.[185] Quality of service has been the make or break issue, with cost evidence deemed only to be of peripheral importance, but these new rules formalize consideration of rate levels in operating rights proceedings.[186]

Whether raised by protestants or applicant, the rate issue is important at two phases in the proceeding. In the first phase, during which the Commission determines whether the public interest requires the proposed service, lower rates can be the basis for approval of applicant's proposal.[187] Protestants also may introduce rate considerations at this point, or may re-

183. Query whether rate considerations often will be advanced as the required public benefit, given the ICC's obvious trend of invariably holding that an improved service has been demonstrated by applicant. Perhaps rate reductions will become a necessary evil for applicant to obtain shipper support.

184. 44 Fed. Reg. 10,067 (1979) [to be codified in 49 C.F.R. 1100.247(n)].

185. 44 Fed. Reg. 10,065 (1979).

186. *Id.* While rates will be merely one factor considered, this change is designed to increase the range of services presently available to shippers and to promote innovation in pricing strategies. 44 Fed. Reg. at 10,065 (1979). Reliance on rates is optional and may be raised by either party. If protestants raise the issue, applicant will not be forced to respond if it bases its application on the inadequacy of existing service or other independent grounds. Thus, protestants cannot force applicant into relying on rate considerations in the proceeding.

An applicant which chooses to place its proposed rates in issue must give notice of this reliance and publish its tentative rates in the Federal Register. Furthermore, applicant must meet the burden of proving that the public convenience and necessity requires the proposed service, but does not have to prove that the rates are just, reasonable, and otherwise lawful. Applicant's evidence should relate to the efficiency of its proposed operation, expected productivity increases, and the factors which make these rates possible. The evidence should also compare the tentative rates with existing rates, list attempts, if any, by supporting shippers to negotiate lower rates with existing carriers, and show that the carrier's financial well-being will not be jeopardized by the lower rates. In granting an application, the Commission is not prejudging the lawfulness of the rates.

The Commission is empowered to force carriers to fulfill their commitment to charge the tentative rates. To facilitate this goal, the ICC expressly can require that certain rates be charged, limit the terms of a certificate to an appropriate period, or require periodic reports. The Commission can force rate holddowns, or revoke the authority upon violation of the rate agreement, but it can also grant relief as it deems appropriate if Ex Parte increases are granted or if sudden unexpected cost increases occur. 44 Fed. Reg. 10,067, 10,068 (1979) [to be codified in 49 C.F.R. 1100.247(a)].

187. *See generally* 44 Fed. Reg. 10,064-068 (1979) [to be codified partially in 49 C.F.R. 1100.247(n)].

but applicant's rate evidence, in order to show that the proposed service does not constitute a rate improvement over existing service. Even if applicant and protestants choose not to rely on cost evidence, protestants can still cross-examine supporting shippers on the issue of whether their reason for supporting the application is based on rate considerations rather than the need for improved service.[188]

Protestants, at this point, should attempt to show that the proposed rates are predatory, that they will harm applicant financially and weaken the overall fabric of the common carrier industry. While applicant may assert that lower rates are due to increased productivity and efficiency, protestants should point out that lower rates may be due to "cream skimming," or inadequate equipment and facilities.[189] Protestants could demonstrate that the reduced costs claimed by applicant will result from skimping on safety programs and equipment, unfairly low wages, failure to meet insurance requirements and other rules and regulations set up to protect the public, and by the increased utilization of owner-operators who, as they are paid a percentage of gross tariff revenues, may be forced to assume a large portion of any proposed rate reduction.[190] As no mention has been made about protestants' burden of proof, except that the weight of the rate evidence will vary on a case-by-case basis, it seems likely that protestants will have to accept the considerable burden of proving that applicant cannot or should not be allowed to meet its proposed commitment.[191]

Once the issue of whether the application presents a public benefit has been decided, the Commission should also consider the rate issue with respect to the third *Pan-American* criterion—will the new service impair the existing operations of carriers contrary to the public interest. Naturally, applicant will argue that evidence of lower rates proves the existing rate structure to be noncompetitive and unduly high, and that an influx of new carriers may spur desirable competition in that particular transportation market.[192] Protestants, on the other hand, must establish that the reduced rates result from applicant's failure to fulfill all of its common carrier obligations, and that the rate reductions do not stem from increased productivity or efficiency. Protestants must point out clearly that reduced rates are not in the public interest if they result in inferior service, unfair wages, unsafe

188. *Id.* at 10,066.

189. *Id.*

190. *Id.* at 10,066-67.

191. *See generally* Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60,299 (1979), in which the Commission states that it will grant applications that serve a useful public purpose unless protestants can meet the burden of establishing that entry of the new service into the market would endanger existing operations in a manner contrary to the public interest.

192. 44 Fed. Reg. 10,065 (1979).

operating conditions, or unreasonably low payments to owner-operators.[193]

Rate considerations, then, can be a valuable tool with respect to the two remaining *Pan-American* tests. While the arguments introduced at each stage will be primarily the same, protestants should recognize the benefits of challenging applicant's rate pronouncements as they relate to the public need for the service and as they relate to impairing the operations of existing carriers contrary to the public interest.[194]

2. *The Prima Facie Public Benefit—Totality of the Evidence*

An applicant for operating authority has the burden of presenting a *prima facie* case that the proposed authority represents a public benefit.[195] This first *Pan-American* criterion normally is met by the introduction of shipper support statements which comply with the minimum requirements of *Novak*.[196] While applicant may base the need for its proposal on the inadequacy of existing service, traditionally a main point of contention in these proceedings, the ICC can grant an application without finding existing services to be inadequate by holding that the proposal offers the public improved transportation services that protestants are "unable or unwilling" to match.[197] This benefit to the public can be demonstrated by showing that a public need exists for the expansion of higher quality service into the relevant marketplace, or that the proposed service will yield operating economies and efficiencies to the carrier which will advance the public interest.[198] The public benefit can be found on the basis of present or future service needs in the relevant transportation market.[199] A public benefit is easier to demonstrate now because the Commission is being much

193. *Id.* at 10,066-67. Under certain conditions, the ICC is statutorily mandated to prescribe minimum common carrier transportation rates if it believes that rates are unreasonably low and not in the public interest. *See, e.g.*, 49 U.S.C. § 10704(b)(1) (1978). 49 U.S.C. § 10704(c)(1) (1978) contains similar authority for contract carrier rates.

194. *See* note 181 *supra*. To the extent that the public benefit of applicant's proposed lower rates can be minimized, protestant should have a lessened burden of demonstrating that the harm to existing carriers and their ability to serve the public outweighs the benefits of applicant's new service.

195. *See* note 177 *supra*.

196. *See* note 2 *supra*. *See also* 44 Fed. Reg. 60,299 (1979).

197. *E.g.*, Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646, 652-53 (D.N.H. 1964); Moore Transp. Co., Inc., Ext.-Trailers Nationwide, 129 M.C.C. 190, 193 (1978); Chipper Cartage Co., Inc., Ext.-Iowa, 128 M.C.C. 264, 268 (1977).

198. *E.g.* Red Arrow Freight Lines, Inc., Ext.-North Tex., 131 M.C.C. 232, 240 (1979); Smith's Transfer Corp., Conversion, 130 M.C.C. 218, 222 (1978); Sam Tanksley Trucking, Inc., Ext.-Holland Heating and Air Conditioning, 129 M.C.C. 470, 472 (1977).

199. 49 U.S.C. § 10922(a)(2) (1979). *Also* note 125 *supra*. *See* also, *e.g.* Appleyard's Motor Transp. Co., Inc. v. I.C.C., 592 F.2d 8, 10 (1st Cir. 1979); Tri-State Motor Transit Co. v. United States, 570 F.2d 773, 777 (8th Cir. 1978), and cases cited therein; Consolidated Motor Exp., Inc., Ext.-Ky. Counties, 131 M.C.C. 629, 630 (1979); Longview Motor Transport Inc., Ext.-Gilmore Corners, Wash., 129 M.C.C. 499, 501-02 (1978).

more solicitious of shippers' perceived requirements and is not second-guessing their needs, as opposed to their desires, for improved service.[200] If applicant proposes, and shippers support, a quicker, safer, more convenient, economical or efficient, or single-line service which cannot be matched by the services of existing carriers, a public need ordinarily is found to have been demonstrated.[201]

A minimum *prima facie* showing is the presentation of evidence of support that generally complies with the *Novak* standards.[202] Additionally, the support must still encompass the entire breadth of the application.[203] If the thrust of the public need is that existing service is not adequate, and if this is proven by evidence of lengthy delays in transit, equipment shortages, inability to pick up or deliver at necessary intervals, excessive damage claims, and the like, applicant will in all probability be successful because the Commission will conclude that increased competition is necessary to provide the shipper with adequate service.[204]

Normally, the Commission does not explicitly conclude that existing service is inadequate,[205] but instead finds that the public benefit standard has been met by the proposed institution of a higher quality service more tailored to the needs of the shippers than is currently offered.[206] The standards in this instance have become so loose that, quite frankly, it is almost impossible for applicant to fail in conceptualizing a service that is more responsive to shippers' needs than existing service.[207] Applicant need

200. *See* note 82 *supra*.

201. *See* note 198 *supra*.

202. *See* May Trucking Co. v. United States, 593 F.2d 1349, 1352-53 (D.C. Cir. 1979); Appleyard's Motor Transp. Co., Inc. v. I.C.C., 592 F.2d 8, 11-12 (1st Cir. 1979); Ex Parte No. MC-121, note 191 *supra*, 44 Fed. Reg. at 60,299.

203. *E.g.*, May Trucking Co. v. United States, 593 F.2d 1349, 1352-53 (D.C. Cir. 1979); C&H Transp. Co., Inc., v. I.C.C., 589 F.2d 565, 571-73, 577 (D.C. Cir. 1978); *cert. den.*, — U.S. —, 99 S. Ct. 1222 (1979). See Consolidated Motor Exp., Inc., Ext.-Ky. Counties, 131 M.C.C. 629, 630 (1979); Lemmon Transport Co., Inc., Ext. Catlettsburg, Ky., 131 M.C.C. 76, 79 (1978).

204. *E.g.*, Ace Motor Freight, Inc., Ext.-Refractories, 131 M.C.C. 610, 621-622 (1979); Red Arrow Freight Lines, Inc., Ext.-North Tex., 131 M.C.C. 232, 239-40 (1979); Midwest Haulers, Inc., Ext.-Fresno, Cal., 130 M.C.C. 187, 199-200 (1978).

205. *E.g.*, Ace Motor Freight, Inc., Ext.-Refractories, 131 M.C.C. 610, 621 (1979); Lemmon Transport Co., Inc., Ext.-Catlettsburg, Ky., 131 M.C.C. 76 (1978); McLean Trucking Co., Ext. McCrory, Ark., 130 M.C.C. 880 (1978); Saia Motor Freight Line, Inc., Ext.-Dallas, 130 M.C.C. 409 (1978), Moore Transp. Co., Inc. Ext.-Trailers Nationwide, 129 M.C.C. 190 (1978). This trend is consistent with Ex Parte No. MC-121, note 191 *supra*, 44 Fed. Reg. at 60,299, which recently abolished the "adequacy" of existing service as an issue in operating rights proceedings.

206. *E.g.*, Appleyard's Motor Transportation Co., Inc. v. I.C.C., 592 F.2d 8, 10 (1st Cir. 1979); Saia Motor Freight Line, Inc., Ext.-Dallas, 130 M.C.C. 409, 418, 419-421 (1978); B.J. McAdams, Inc.-Ext. Frankfort Textiles, 129 M.C.C. 182, 187 (1978).

207. More pickups and deliveries, desire for single-line service, need for equipment better suited to shipper's demands, easier shipment tracing, lower rates, desire to phase out present private carrier operations, fewer claims, faster service, more reliable service, need for one carrier to

merely examine existing service and if it is found lacking in any respect,[208] arguments can be formulated by shippers concerning their needs for an improved service. Additionally, applicant can frequently show that the grant of authority would yield increased operating efficiency and a strengthened financial position by filling up backhauls or reducing circuity, thus possibly fulfilling the public need requirement, given the strong presumption that increased competition is in the public interest.[209] Naturally, all shippers need quicker, more reliable freight service and additional backup carriers so that inventories can be kept lower and profits increased; such support is not difficult to secure for most applications.

This analysis has not been constructed to argue for a return to the traditional standard of determining whether a shipprer truly "needed" improved service or whether it was merely "desired,"[210] but rather to point out the seemingly hopeless position in which protestants are often placed. Applicant can prove public need by introducing an operating proposal that ostensibly is superior in any respect to the actual service protestants have been performing, or one which improves applicant's efficiency. It is practically impossible for the demonstrated service of protestants to match the service merely proposed, but not yet delivered, by applicant. The Commission has accepted so many different types of "hearing room" operating proposals as constituting a public benefit that it is very difficult to imagine an instance in which a public benefit could not be found.[211]

Only infrequently has applicant failed to satisfy this *prima facie* public need test.[212] Ordinarily this occurs when evidence concerning the need for the transportation services is highly speculative or does not support the entire breadth of the application. Occasionally, however, the Commission still will find that no substantial benefit has been proven, that the existing service is adequate in all respects, and that the application does not represent

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serve entire marketing area, reduced circuity, more balanced operations, greater operating efficiency, more responsive service, and shipper's desire not to rely on a single carrier, to name a few, have been given by the ICC as reasons for granting applications. Certainly, these are all legitimate shipper needs and desires and, if truly done by the new carrier, will improve the nation's transportation system, at least in the short-run. The Commission, however, is granting applications on the basis of mere assertions regarding better or more efficient service, and is not truly scrutinizing applications, either before or after the fact, to make sure that the proponents truly are providing the service alleged in the hearing room. So long as operating proposals are not outrageously excessive or impossible, the ICC seems willing to accept them at face value. *See, e.g.*, Red Arrow Freight Lines, Inc., Ext.-North Tex., 131 M.C.C. 232, 240 (1979).

208. *Id.*

209. May Trucking Co. v. United States, 593 F.2d 1349, 1356 (D.C. Cir. 1979); Liberty II, 131 M.C.C. 573, 575 (1979); Midwest Haulers, Inc., Ext.-Fresno, Cal., 130 M.C.C. 187, 200 (1978).

210. *See* note 82 *supra*.

211. *See* note 207 *supra*.

212. *See* note 221 *infra*.

an innovative operating plan or improvement over existing service.[213]

In *Colonial Refrigerated Transport, Inc. Extension–Florida to 32 States*,[214] the Commission held that the relevant transportation market was already highly competitive, and that applicant had failed to demonstrate a public benefit. Applicant based its proposal on the need of some Florida shippers for additional refrigerated equipment during harvest seasons, and on their desire for single-line service. Also, applicant suggested that increased operating efficiencies would result from lessened empty backhauls if the authority were approved.[215] The ICC denied the application on the basis that equipment shortages were very sporadic, and that existing interline service was substantially equal to proposed single-line service. Finally, the Commission noted the extreme desirability of backhaul freight from the Florida peninsula due to the historic imbalance of freight to and from the area, and stated that the presumed benefits of increased competition could not be so readily accepted when the relevant market was already highly competitive.[216]

While *Nashua, Liberty I and II, P.C. White II*, and others stress that increased competition can be considered as a public benefit factor in the Commission's weighing process, proceedings such as *Colonial Refrigerated* demonstrate that the ICC has not reached the stage of granting applications solely on the basis of increased competition. Clearly, almost any application will yield at least a short-term increase in competition, but a diminished *Novak* requirement has been retained,[217] as has the necessity of demonstrating a benefit arising from the proposed service.[218] Although the possibility that competition *per se* could be the basis for a grant of authority has been discussed by the Commission[219] and intimated by the Courts,[220] a finding of actual benefits continues to be made before granting applications. In those few cases in which no benefit is found or in which adequate support is not presented, the Commission has not been willing to grant the application solely on the basis of increased competition.[221] The

213. *See* note 116 *supra*.

214. Colonial Refrigerated Transp., Inc.–Ext.–Fla. to 32 States, 131 M.C.C. 63, 67-70 (1978).

215. *Id.* at 65, 68.

216. *Id.* at 69, 70.

217. *See generally* notes 177 and 196 *supra*.

218. *See generally* notes 177, 178, 179, and 180 *supra*.

219. And seemingly rejected. *See generally Liberty II*, 131 M.C.C. 573, 574-75 (1979); Colonial Refrigerated Transport, Inc. Ext.–Fla. to 32 States, 131 M.C.C. 63, 69-70 (1978); Sam Tanksley Trucking, Inc., Ext.–Holland Heating and Air Conditioning, 129 M.C.C. 470, 473 (1977); Ex Parte No. MC-121, note 191 *supra*, 44 Fed. Reg. at 60,299 (1979); Ex Parte No. MC-116, note 176 *supra*, 44 Fed. Reg. at 10,065 (1979). *But see* Liberty II, 131 M.C.C. at 576-77, and case cited therein (Stafford, dissent).

220. Barrett Mobile Home Transport, Inc. v. I.C.C., 567 F.2d 150, 153, n.14 (D.C. Cir. 1977).

221. *E.g.*, Colonial Refrigerated Transport, Inc., Ext.–Fla. to 32 States, 131 M.C.C. 63 (1978).

presumption that increased competition is usually in the public interest weighs heavily on the Commission, however, and this, coupled with the slightest evidence of the existence of a public benefit from an operating proposal, is sufficient to satisfy applicant's burden.

Although this newly espoused ICC standard of granting operating rights proposals on the basis of a "public need" while finding that existing service is adequate seems quite removed from pre-1976 decisions which invariably elevated the adequacy of existing service to very high levels of importance,[222] the recent trend represents not so much a reversal of former policy as a redefinition of "adequacy of existing service." Unfortunately, the Commission, when it decided to stop second-guessing the service needs alleged in shippers' statements,[223] apparently felt that it was necessary to relax the "public need" test, while not explicitly rejecting the traditional adequacy tests. The tests are merely one and the same, however, because a determination that public need has been established for a new service is clearly equivalent to a finding that existing carriers simply are not providing adequate transportation services. It is a contradiction in terms to say that existing transportation services are adequate, and then to find that a public need is not being met.

The Commission, in its wisdom, recognizing that conditions in the transportation industry have changed during the last forty years, has adopted a new entry policy which, it believes, will advance the public convenience and necessity. For this it cannot be faulted. It can be faulted, however, for hiding its policy of relaxing the standards of "adequacy of existing service" under the rubric of public benefit. The Commission has succeeded for three years in muddying the waters of operating rights proceedings with this additional verbiage, attempting to rationalize its recent decisions with older ones, when all that was needed was a straightforward statement that adequacy of existing service was going to be examined much more closely, and that statements of shippers as to their need for new service and shortfalls in existing service would be accorded greater weight.

C. *In Harm's Way—Robbing Peter to Pay Paul.*

1. *Preliminary Protest Considerations*

Undoubtedly, to be successful, protestants simply must convince the Commission that the public benefit demonstrated by applicant is outweighed by the competitive harm to existing carriers, and that this harm

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Accord, O.N.C. Freight Systems, Relocation of Interchange Point, No. MC-71459 (Sub-No. 67), served February 9, 1979; (Appellate Division 1); Smith & Solomon Trucking Co., Ext.–Aluminum Cans, No. MC-59264 (Sub No. 65), served December 18, 1979 (Appellate Division 1).

222. *See* notes 5 and 12 *supra*.

223. *See* note 7 *supra*.

would jeopardize or negate the ability of existing carriers (along with applicant) to satisfy the public need.[224] This weighing test, expressed as in the third *Pan-American* criterion and only slightly modified by *Liberty I and II* and Ex Parte No. MC-121, realistically represents the only chance for protestants to prevail on the merits in an operating rights proceeding.

As this article has developed, the mere showing by protestants of revenue loss and the possible diversion of existing traffic are no longer sufficient to prevent the issuance of new operating authority for the inauguration of a service deemed to constitute a net public benefit.[225] Protestants must go beyond demonstrating possible revenue loss and traffic diversion, and prove with some specificity how the diversion would injure them and consequently destroy their ability to serve the public.[226] Harm to existing carriers is relevant in the weighing process only to the extent that it detracts from protestants' ability to serve the public,[227] because the Commission's responsibility is to advance the public interest, not to protect existing carriers from the effects of competition.[228]

While the Commission, even in the pre-1978 "good old days," traditionally granted an average of 80% of all applications, protestants today face much longer odds of success.[229] Greater care will have to be exercised in deciding when and where to protest applications. Protestants which intend merely to voice their opposition to an application by introducing general data concerning the total amount of traffic subject to diversion, asserting that existing service is adequate, and then gracefully withdrawing from active participation in the proceeding have virtually no liklihood of success.[230] Protestants, in today's regulatory climate, must be able and willing to analyze their operations in a detailed manner to determine how, when, and where their ability to serve the public will be harmed by a grant

224. Liberty II, 131 M.C.C. 573, 574, 575 (1979). *See also* note 77 *supra*.

225. *See* note 75 *supra*.

226. *E.g.*, May Trucking Co. v. United States, 593 F.2d 1349, 1356 (D.C. Cir. 1979); Liberty II, 131 M.C.C. 573, 575 (1979). *See* notes 240-264 *infra*, and accompanying text.

227. *See* note 77 *supra*. *See also* Ex Parte No. MC-121, note 191 *supra*, 44 Fed. Reg. at 60,298-299, and cases cited therein.

228. *See* note 13 *supra*. *See also* Arkansas-Best Freight, 419 U.S. 281, 298 (1974); May Trucking Co. v. United States, 593 F.2d 1349, 1356 (D.C. Cir. 1979); Appleyard's Motor Transp. Co. v. ICC, 592 F.2d 8, 11 (1st Cir. 1979); Hilt Truck Line, Inc. v. United States, 532 F.2d 1199, 1203 (8th Cir. 1976); Northwest Transp. Serv., Inc., Ext.-Colo., Ariz., and N. M. Points, 128 M.C.C. 622, 625-26 (1977); Highland Tours, Inc., Com. Car. Applic., 128 M.C.C. 595, 603 (1977).

229. *See* note 3 *supra*. During fiscal year 1979, 98.4 % of all applications decided on the merits resulted in full or partial grants of authority. Of that 98.4%, all but 4.3% represented total grants of authority. Surina, Interoffice Memorandum, Interstate Commerce Commission, Disposition of Motor Carrier Operating Rights Applications, (November 6, 1979).

230. *See* note 125 *supra*. A lack of continuing interest detracts from the weight of the evidence. *E.g.*, Moore Transp. Co., Inc., Ext.-Trailers Nationwide, 129 M.C.C. 190, 192-93 (1978); AAA Transfer, Inc., Ext. Cargo Container, 120 M.C.C. 803, 804 (1974).

of the proposed authority. In all probability, protestants will have to invest the same time and effort into examining their operating capabilities and determining the true scope of the resulting harm, if any, from the new authority as applicant will in developing its operating proposal.[231] Once protestants decide that they are willing to meet this expenditure of time and resources, the chances of a successful protest will be greatly enhanced.

2. When not to Protest

There are some instances, however, when prudent protestants may not wish even to consider the possibility of a protest. If there is substantial shipper unrest in a given market, and the likelihood is great that the Commission would find existing service inadequate in some respect, the application almost assuredly will be granted on the basis that existing service deficiencies highlight the need for increased competition.[232] Additionally, if a monopoly currently exists so that a shipper has access only to one carrier,[233] or if a relevant transportation market is so dominated by one carrier that the other smaller carriers are effectively forced to follow the transportation practices of the dominant carrier,[234] it will be extremely difficult to convince the Commission that the public interest would not be served by a grant of the proposed authority. If protestants presently do not transport large portions of the freight subject to the application, or if existing carriers "lack enthusiasm" for the freight,[235] competitive harm to existing carriers will be almost impossible to establish. This is especially true if the shippers have found it beneficial to utilize private carriage, and support the application so that they can switch to common carriage.[236]

If a large increase in expected freight traffic occurs due to general economic growth or the location or expansion of an industry in a transportation market, ICC policy is not to deny carriers operating in reasonable proximity

231. Why should a carrier even consider protesting? Would it be more advantageous to seek new authority rather than to fight an uphill struggle to deny another carrier competing authority? Perhaps a carrier presently may have a sound, economical, and efficient operating system. While it may not desire to expand, it would prefer not to see its present authority eroded.

232. *See* note 204 *supra*. But could this poor service be the result of too much, rather than too little, competition in the relevant marketplace? *See generally* notes 240-264 *infra*, and accompanying text.

233. Red Arrow Freight Lines, Inc., Ext.–North Tex., 131 M.C.C. 232, 239 (1979); note 116 *supra*.

234. Saia Motor Freight Line, Inc., Ext.–Dallas, 130 M.C.C. 409, 423 (1978).

235. *See* note 151 *supra*. *Also*, Interstate Commerce Commission v. J-T Transport Co., 368 U.S. 81, 91 (1961); May Trucking Co. v. United States, 593 F.2d 1349, 1355 (D.C. Cir. 1979); Saia Motor Freight Line, Inc., Ext.–Dallas, 130 M.C.C. 409, 421 (1978); Overnite Transportation Company, Ext.–Cincinnati, Ohio–Portsmouth, Ohio, 129 M.C.C. 291, 294 (1978).

236. B. J. McAdams, Inc., Ext.–Russellville Frozen Foods, 130 M.C.C. 294, 296 (1978); Overnite Transp. Co., Ext.–Cincinnati, Ohio–Portsmouth, Ohio, 129 M.C.C. 294, 299 (1978); Moore Transp. Co., Inc., Ext.–Trailers Nationwide, 129 M.C.C. 190, 193 (1978).

thereto the right to compete for this new traffic even though they presently do not have the requisite authority.[237] Finally, if protestants are large both in size and scope of operations vis-a-vis applicant, the Commission may grant the proposed authority on the basis that the harm to protestants is unlikely to be so substantial as to jeopardize their operations.[238] This precedent would seem to give small carriers the right to move, with impunity, into almost any territory presently served by large carriers; however, this statement is somewhat misleading because the Commission has begun recognizing that harm can occur not only to the overall financial fabric of existing carriers, but can also crop up in individual markets.[239] The overall financial viability of a large carrier might not be threatened by a single grant of authority, but its ability to perform in a given market conceivably could be threatened by the entry of even a small carrier. This latter argument merits careful scrutiny and consideration by large carriers.

3. *Potentially Successful Protests*

Both the courts and the Commission have recognized the possibility that oversupply can occur in a given transportation market, and that the benefits of increased competition would not outweigh the harm to the public in such an instance.[240] Additionally, the introduction of a new carrier into an already competitive market would not tend to bring about improved transportation services, and could cause disruptions to the existing transportation system, with accompanying harm to the shipping public.[241] Thus, the concept of destructive competition is not foreign to the courts or the Commission. With the proper presentation of appropriate evidence,

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237. McLean Trucking Co., Ext.-McCrory, Ark., 130 M.C.C. 880, 888 (1978), and cases cited therein.

238. *E.g.*, Red Arrow Freight Lines, Inc., Ext.-North Tex., 131 M.C.C. 232, 240-41 (1979); Saia Motor Freight Line, Inc., Ext.-Dallas, 130 M.C.C. 409, 422-423 (1978). That a small carrier could jeopardize the system-wide operations of a large, national carrier through the grant of one application is highly unlikely, but a more appropriate inquiry by the ICC should focus on the relevant transportation marketplace and determine if the grant would harm protestants' service over that particular route.

239. Colonial Refrigerated Transp., Inc., Ext.-Fla. to 32 states, 131 M.C.C. 63 (1978); Sam Tanksley, Inc., Ext.-Holland Heating and Air Conditioning, 129 M.C.C. 473 (1977); Jones Truck Line, Inc.-Purchase (Portion)-Deaton, Inc., 127 M.C.C. 428, 436 (1978); Ex Parte No. MC-121, note 191 *supra*, 44 Fed. Reg. at 60,299-300.

240. *E.g.*, Willis Shaw Frozen Food Exp., Inc. v. ICC, 587 F.2d 1333, 1338 (D.C. Cir. 1978); Liberty II, 131 M.C.C. 573, 574 (1979); Sam Tanksley Trucking, Inc., Ext.-Holland Heating and Air Conditioning, 129 M.C.C. 470, 473 (1977), and cases cited therein. *Cf.*, Arkansas-Best Freight, 419 U.S. 281, 299 (1974); Jones Truck Line, Inc.-Purchase (Portion)-Deaton, Inc., 127 M.C.C. 428 (1978). (Transfer applications are decided pursuant to 49 U.S.C. § 10926 and 49 U.S.C. §§ 11341 *et seq*, rather than 49 U.S.C. §§ 10921 *et seq*, as in the normal common carrier operating rights application process. The standards may differ slightly.)

241. *Id.*

findings such as these could become more than interesting footnotes in ICC critiques.

Although identifying the traffic subject to diversion and estimating the maximum revenues that could be lost clearly is not satisfactory evidence that existing carriers would be competitively harmed, contrary to the public interest, in their ability to serve the public,[242] this data continues to represent the starting point for protestants. After identifying this maximum potential diversion, protestants will have to break down the gross data to establish representative points of diversion and list shipments likely to be diverted.[243] For this step, it will be necessary to superimpose the proposed operating plan over the level of existing service in a relevant market and attempt to make a reasoned analysis of the likely outcome. In a case with several protestants, a consolidated brief may be necessary to cover this important concept.

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242. *See* note 75 *supra*. When protesting, a carrier should include:

(1) A precise description of its pertinent operating authority;
(2) A description of the type and amount of equipment and facilities that it has available to meet the avowed purpose of the application;
(3) A discussion of its present operation, including a description of the specific service it is providing those supporting the application;
(4) The amount of traffic which it has handled that would be subject to diversion to the applicant if the authority sought is granted, and the impact of that diversion on its profitability;
(5) A description of the probable impact on operations which are directly competitive with the service which the applicant proposes;
(6) A statement concerning other adverse impacts of a grant of authority on its business generally and on the public such as:
    (a) Need to close particular terminals or other facilities;
    (b) The number of employees that would be furloughed or dismissed;
    (c) The imbalance of its operations and other inefficiencies;
    (d) Its ability to continue its existing service to the public due to a reduction in total business, loss of particular traffic in a geographic area, or other factors; and
    (e) Effects on fuel efficiency.

Ex Parte No. MC-121, note 191 *supra*, 44 Fed. Reg. at 60,299-300 (1979).

243. *Id. See also* Jones Truck Lines, Inc.–Purchase (Portion)–Deaton, Inc., 127 M.C.C. 428, 436 (1978) holding that:

> There are several types of proof a protestant might submit to substantiate its projected traffic losses. It might establish the size of the relevant transportation services market which the transaction would effect. Then it might establish whether the relevant transportation services market is static, expanding, or contracting. A protestant could also show its market share and how much of the demand is being met by existing competitors. When this evidence is considered along with the vendors' projected increase in revenues, a basis for the projection is demonstrated. In pursuing this line of proof, protestant might offer the opinion of qualified economists and other experts.
>
> A protestant might also show a causal connection between a sudden decrease in its revenues attributable to the relevant transportation market and the revenues generated by the buyer while holding temporary authority. In this regard, we expect that holders of temporary authority will live up to their common carrier obligations and fully use such authority. Where the buyer fails to use its temporary authority, the protestants could establish that the applicants are not operationally fit to consummate the transaction. Our insistence that the applicant exercise the temporary authority will afford protestants a means to show harm. *Cf.* No. MC-F-12787.

Naturally, the courts and the Commission recognize that any data dealing with the future has to be speculative to a degree,[244] but protestants should endeavor to construct these projections by means of a reasoned approach. For instance, all carriers face the same general economic conditions—driver wages, fuel and equipment costs, and so on—and there is no reason to think that, on an overall basis, one prudently operated carrier is substantially more efficient than any other or that transit times for similar services will differ markedly. Thus, in estimating traffic diversion, a reasonable assumption might be that, for any given future shipment, a shipper is likely to select the carrier which can pickup and deliver that particular freight most conveniently.[245]

If an existing less-than-truckload [LTL] carrier makes three regular runs per week to a location, and a new carrier proposes an additional three or more runs per week to that location, it might be reasonable to assume that the existing carrier will lose half its present freight. If the existing carrier operates on Monday-Wednesday-Friday schedule, a new carrier would, in all probability, choose to pickup and deliver on the alternate days. Other things being equal, the freight available on those days would be diverted to the new carrier.

Once a reasoned analysis of the potential diversion at representative points has been attempted, protestants will have to establish how this diversion will affect existing operations and harm the shipping public.[246] While applicant can demonstrate that its proposal will increase its efficiency or improve service to the public, protestants must show that this perceived benefit is merely "robbing Peter to pay Paul"—that resulting inefficiencies to existing carriers, or cutbacks by these carriers in the level of service to shippers in the area, offset the benefits of the proposal. For example, if three carriers offer direct LTL service between two points, the addition of another carrier may cause the present direct freight to be relegated to a break-bulk operation by existing carriers, and perhaps even by applicant itself, if the amount of freight available to each carrier is diluted to such an extent that it is inefficient for all carriers to provide direct service. In this instance, the grant will yield a diminution in the quality of service available to the public. This type of showing must be the heart of any protest that attempts to deny an application on its merits.

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244. *See* note 199 *supra*. Also, present operations of applicant under temporary authority can be used by protestants to demonstrate. *Id*.

245. This is not to intimate that past experience, shipper loyalties, rate agreements, consignee preferences, and the like do not enter into the selection of a carrier; but for analyzing expected future trends in erosion of business due to a new entry in the relevant transportation market, it would not be unreasonable to assume that, "other things being equal," the shipper would select the most convenient and (presumably) quickest pickup and delivery for the shipment.

246. *See* notes 77, 224, 226, and 227 *supra*.

In the case of a small carrier whose existing territory is being eroded by a larger carrier's application, protestants might show that the relevant diversion represents such a significant portion of the small carrier's total revenues that its overall ability to serve the public would be crippled. This may cause a cutback in the totality of existing services. The injury to shippers served by the small carrier, but not subject to the new carrier's authority,[247] may offset the public benefit previously established by applicant. Despite its desire to increase entry of new carriers, the Commission at times still seems somewhat more solicitous and protective of small existing carriers and often is willing to grant them some relief from an application that could be overwhelming.[248] To some extent, this policy also is reflected in the ICC's acceptance of less than "crystal clear" evidence of the effects of the potential diversion once the protesting carrier has established that it is subject to substantial diversion.[249]

Rather than the overall crippling of protestants' operations, a more normal situation will be one in which the ability of protestants to compete in the relevant transportation market is impaired as a result of new entry.[250] Protestants must show specifically how the grant of authority would promote inefficiency and waste and destroy protestants' ability to compete, with accompanying public harm.[251] As has been indicated, protestants must first establish that their present service is efficient, because the Commission will not deny the public the benefits of increased competition in order to protect the monopolies of inefficient carriers.[252] After this has been accomplished, protestants typically should argue that granting this authority would cause excess capacity in the relevant transportation market and force existing carriers to cut back on the service they presently offer.[253] These service de-

247. For instance, a new carrier requests authority between points A and D, via C. An existing carrier that also serves A and D, but via B, might be able to demonstrate that it would be forced to withdraw from the market if the new authority becomes effective. Shippers from B should be asked to testify concerning the harm that would befall them as a result of increased competition between A and D, but decreased service to B.

248. *E.g.*, Saia Motor Freight Linc, Inc., Ext.-Dallas, 130 M.C.C. 409, 422-23 (1978).

249. *Id. See generally* Sam Tanksley Trucking, Inc. Ext.-Holland Heating and Air Conditioning, 129 M.C.C. 470 (1977). This approach may reflect an understanding by the Commission that smaller carriers do not have the financial resources to develop the data desired by the ICC. Also, the Commission may grant a limited term certificate so that it can analyze the effect of the new grant of authority on small competing carriers. *E.g.*, Saia Motor Freight Line, Inc., Ext.-Dallas, 130 M.C.C. 409, 423 (1978). Perhaps this is implicit recognition that the public (especially shippers relying on these small carriers) will not be served properly if certain carriers are forced into bankruptcy.

250. The Commission has begun recognizing this problem. *See* note 239 *supra*.

251. *See* notes 49, 77, 224, 226, and 227 *supra*. *See also* Jones Truck Lines Inc.-Purchase (Portion)-Deaton, Inc., 127 M.C.C. 428, 435 (1978); New Dixie Lines, Inc.-Control-Jocie Motor Lines, Inc., 75 M.C.C. 659, 668 (1958).

252. *See* note 77 *supra*.

253. *See generally* note 239 *supra*.

clines may substantially harm some shippers and may promote inefficiencies, fuel waste, and increased circuity in the operations of existing carriers, all contrary to the public interest.[254]

A large carrier may not be able to establish that its overall operations would be impaired if the ICC grants a small carrier conflicting operating rights, but it may be able to prove that its ability to compete in the relevant transportation market would be destroyed. A large carrier may transport profitably enormous volumes of freight in the Los Angeles-New York transportation market, and this operation might not be jeopardized by a grant of authority to a small truck line competing over the carrier's Chattanooga-Baton Rouge route. These markets, however, are operated independently, and the mere fact that increased competition between Chattanooga and Baton Rouge will not damage the Los Angeles-New York market or the carrier's overall operations should not be dispositive of the issue. Each of the carrier's terminals is an autonomous, independent economic unit and will be operated only so long as an appropriate return on investment is maintained. Los Angeles-New York freight is economically irrelevant to the question of whether increased entry will damage or curtail a carrier's Chattanooga-Baton Rouge traffic contrary to the public interest.

If an application is supposed to benefit both the public and applicant by increasing the latter's efficiency or balancing its traffic, protestants should attempt to show that this balancing will cause a corresponding imbalance to their traffic, and will simply increase applicant's efficiency at the expense of their efficiency. In the many areas in which trucks are forced to deadhead home due to a lack of back-haul freight, there is no net gain in efficiency to the overall transportation system from a new back-haul balancing proposal.[255] If this freight already is highly sought (*i.e.*, if competition already exists), there is no benefit to the public from a grant that results in an oversupply of carriers and a disruption of the services of existing carriers.[256]

In order to show that this excess capacity will occur, protestants could compare the present or future needs of the transportation market with existing services.[257] It is also appropriate to compare the size of applicant's

254. *See* notes 159-194 *supra*, and accompanying text.

255. *See* notes 166-174 *supra*, and accompanying text. *But see* Joseph Moving, 131 M.C.C. 561 (1979), for the proposition that decreased circuity and fuel consumption and increased operational efficiency can be used to grant applications, but increased circuity and fuel consumption and decreased operational efficiency cannot be the basis for a denial. *See also* Saia Motor Freight Lines, Inc., Ext.-Dallas, 130 M.C.C. 409, 424 (1978); Midwest Haulers, Inc., Ext.-Fresno, Cal., 130 M.C.C. 187, 202 (1978), and cases cited therein for the proposition that historic imbalances of freight normally should not be the basis for denying an application.

256. *See* note 240 *supra*.

257. *See* note 199 *supra*. If the present or future needs of the transportation market can be used as the basis for a grant of authority, the present or future needs of the market also should be

operation with those of existing carriers.[258] Naturally, if the market is an expanding one, it will be more difficult to show that excess capacity is likely to occur.[259] Data showing the current market share of the various existing carriers also can be helpful in establishing that competition already exists for the freight and that the introduction of another carrier would not bring about service improvements.[260]

In terms of the effect of increased competition on the operations of existing carriers, cost studies and other evidence should be introduced to show monetary losses, laid off employees, cutbacks in service, resulting deadhead traffic miles, idle equipment, inefficient terminal operations due to reduced traffic, and a generally declining financial condition, if applicable.[261] Finally, it may be appropriate to supplement this data with the testimony of shippers not served by the new carrier, which would establish the harm these shippers would suffer if their service from existing carriers was reduced because of economic forces resulting from this application.[262]

For the purposes of illustrating these considerations, assume a traffic market in which seven carriers currently compete from point A to point D. Each makes one run per week between the points, leaves A with a full load, and returns from D with a full load. Five of the carriers pick up and deliver freight to point B en route, while two have authority to deliver to point C en route to D. Daily overnight service is available between A and D, while the service to B is overnight five times weekly and to C is overnight twice weekly. In order to balance its traffic, a new carrier proposes to serve A and D once a week, with a stop off at B en route. The transportation market from A to D is relatively stable. The transportation service presently is adequate to all locations. One of the two carriers hauling to point C has the smallest terminal facility at point A, and is barely breaking even on its service between A, C, and D.

This carrier might argue that the introduction of new service would di-

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appropriate as reasons to deny an application. For instance, the amount of available freight in some locations may shrink, or new inter- or intra-modal competition for the freight may arise.

258. Saia Motor Freight Line, Inc., Ext.-Dallas, 130 M.C.C. 409, 422 (1978). *See also* David W. Hassler, Inc., Ext.-Petroleum Products, 128 M.C.C. 864, 870-71 (1978).

259. Lemmon Transport Co., Inc., Ext.-Catlettsburg, Ky., 131 M.C.C. 76, 80 (1978); Colonial Refrigerated Transp., Inc., Ext.-Fla. to 32 States, 131 M.C.C. 63, 70 (1978); Longview Motor Transport, Inc., Ext.-Gilmore Corners, Wash., 129 M.C.C. 499, 501-02 (1978).

260. *Cf.* Colonial Refrigerated Transportation, Inc., Ext.-Fla. to 32 States, 131 M.C.C. 63, 69 (1978); Saia Motor Freight Line, Inc., Ext.-Dallas, 130 M.C.C. 409, 421-24 (1978).

261. *See* Sam Tanksley Trucking, Inc., Ext.-Holland Heating and Air Conditioning, 129 M.C.C. 470, 473 (1977); Jones Truck Lines, Inc.-Purchase (Portion)-Deaton, Inc., 127 M.C.C. 428, 436 (1978); Ex Parte No. MC-121, note 191 *supra*, 44 Fed. Reg. at 60,299-300. If applicant is operating under temporary authority, these factors should be reasonably easy to pinpoint. *Accord*, Overnite Transp. Co., Ext.-Cincinnati., Ohio-Portsmouth, Ohio, 129 M.C.C. 294, 299 (1978). In many instances, however, projections will again have to be made.

262. *See* notes 244-254 *supra*, and accompanying text.

vert approximately one-seventh of its present freight from A to D to the new carrier. Fixed costs of its point A terminal remain constant and, in a small operation, its variable costs may not fall proportionately to the decline in freight.[263] Because of its current financial status, the carrier would not be able to absorb this loss, and would have to curtail its weekly service between A and D, holding up each truck until a full load was obtained. This lessened service would necessitate reducing the number of its employees and limiting terminal operations. As service further erodes, more freight will be diverted to other carriers which provide a more regular service. At that point, the carrier might be forced to withdraw from the market entirely. In either event, service to point C would deteriorate markedly, and shippers from that location could be called upon to testify concerning their need for at least twice weekly service, and the problems that disruption of existing service would cause.

In this situation, a compelling case seems to have been made for the denial of the application, or at least for restrictions to it. Good service presently is available from A to D, and there is little, if any, benefit to the public from the proposal. The harm to the existing carrier and to its shippers quite clearly outweighs any possible advantages of introducing a new carrier into the market place. A logical extension of this analysis may even demonstrate that applicant itself could be harmed by the grant and its subsequent inefficient operations.[264]

This simplified example by no means represents all the arguments that can be made by protestants, and is inserted merely as an illustration. In actual situations, however, protestants should be able to protest with some degree of success if they are willing to adopt a more sophisticated and comprehensive approach to the problem of proving that the harm caused to existing carriers and shippers from oversupply and excess competition often outweighs the benefits of the proposal. Protestants will have to consider the economic ramifications of operating rights applications and attack them on that basis, rather than relying on the traditional adequacy of service considerations.

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263. For instance, in a terminal operation with only one local driver, variable expenses would not fall proportionally if a reduction in available freight caused the driver to be idle part of the time. His salary would be constant, vehicle costs would remain nearly constant, and so on, but revenues would fall.

264. If applicant cannot function economically and efficiently in the relevant market due to existing overcapacity brought about by its entry into the market, it would be harmed by the grant. While a business normally should be allowed to make its own judgments, and succeed or fail on the basis of its officers' acumen, rather than the dictates of a government agency, this premise must be tempered in instances in which the exercise of applicant's judgment would lead to disruptions and shipper problems in the transportation market.

V. O, ICC, ICC! Wherefore Art Thou ICC?—Comments and Conclusions

The loosening of entry standards by the ICC cannot be perceived solely as an example of deregulation by administrative fiat, rather than by Congressional authorization. The Commission has not totally abolished entry standards (although it may be getting close), but merely is interpreting them differently than it did in the run-of-the-mill pre-1978 operating rights proceeding (if, indeed, the Commission was ever as protective as critics claim). The presumption now favors increased competition as being in the public interest, rather than protection of existing carriers. The ICC is choosing not to second-guess the business judgments of shippers as to their transportation needs, and is giving much greater weight to their testimony.[265]

There still are substantial constraints to motor carrier entry; they merely differ from those pre-1978 Commission imposed barriers to entry. The cost of applying for additional authority remains a factor. Filing fees, professional services, in-house development of operating proposals, and support therefor require substantial outlays of time and money. Frequently, there is also an excessive time lag between initial application submission and ultimate issuance of authority. Obtaining shipper support for the entire breadth of the application may be difficult, and applicants may be somewhat hesitant to initiate a battle for new authority when other contract or common carriers also would be able to apply for authority at a later date and cause overcrowding in a market that currently seems reasonably ripe for additional service. Applicants may find it necessary to tailor their proposals to avoid the expense and time consumed by a more comprehensive, but protested application, as opposed to the relatively quick granting of a limited, but uncontested application. Finally, financial institutions may be much more reluctant to loan carriers money as they recognize the increased financial risks that accompany greater entry freedom.

There continue to be numerous Department of Transportation, Department of Energy, and Interstate Commerce Commission rules and regulations pertaining to safety and fitness that must be complied with prior to the institution of new operations. Additionally, the chance of failure still lingers. The Commission has shown itself, on occasion, willing to listen to protestants' arguments concerning the harm caused by new authority. If protestants are willing to adopt a more sophisticated approach in attacking operating proposals, the number of grants may well shrink. The Commis-

265. Under the new Commission policy of giving great weight to the needs of shippers and not second-guessing these needs (*see* note 82 *supra*), it would seem that shipper testimony of possible service problems if an existing carrier is forced to withdraw from the relevant transportation market should be given great weight by the ICC.

sion has always granted a large proportion of applications for authority, however, and the present trend is not likely to moderate dramatically in the immediate future.

With the prodding of protestants who accept the burden of introducing much more specific evidence of harm into the record, the Commission should begin to look more at each individual situation in the involved transportation market and move away from the presumption that competition *per se* usually advances the public interest. The Commission should undertake a continuing study to explore the effects of new grants on existing service levels. This can be accomplished if the ICC will utilize conscientiously its available tools of limited term grants and true scrutiny of protestants' and applicant's presentations.

The Commission seriously examines only those applications in which protestants demonstrate harm. Although limiting consideration to those situations is not totally unreasonable, the ICC should move away from its present put-out-the-fire crisis management style and attempt to consider, in a more critical manner, the public benefit proposed by each application. The cumulative impact upon existing carriers that results from numerous different, small infringements on their current level of business merits greater ICC attention. The Commission truly will have a crisis on its hands if it does not act until a major carrier topples in Lilliputian fashion from the weight of many small applications. The Commission should recognize that operational efficiency is a two-way street. If it is to be used as a reason for granting applications, it should also be used to deny them if inefficiencies such as wasted fuel result therefrom. Allowing entry to carriers on the basis of flimsy, highly speculative efficiency or service benefits without careful consideration of the potential side effects may not truly benefit the public.

This is not to intimate that protestants should passively await a change in present ICC policy. Protestants must affirmatively shoulder the burden of bringing these issues to the Commission's attention in appropriate proceedings. Protestants will have to exercise greater care and increased diligence in their protests, and will have to determine, in a judicious manner, those applications in which telling arguments can be presented feasibly. Public convenience and necessity cases will have to become cost and economically oriented proceedings, with an intensified financial sophistication, and can no longer be argued in the traditional adequacy of existing service manner.

The Commission clearly has the right to adopt a policy of greater entry freedom and to experiment with the transportation market, but it may not abdicate its administrative duties by granting all applications on the basis of increased competition; nor may the Commission stack the decision making deck in a manner which makes successful protests an impossibility. Such actions would seem to be a clear abuse of the administrative process, for

the Commission would be making its decisions on the basis of a predetermined, all-encompassing criterion, rather than on the evidence presented. A continuation of this policy is certainly not consistent with *P. C. White* and other decisions which mandate that the Commission consider *all* relevant factors before reaching a decision. Factors other than competition also merit consideration. In its attempts to comply with court edicts, the ICC now seems to be violating the requirements of those very decisions. This policy is rapidly approaching an abuse of the administrative process and should be carefully and thoughtfully reconsidered by the Commission.

At least one court already believes that the ICC has overstepped its authority by granting applications solely on the basis of increased competition. In *Argo-Collier Truck Lines Corp. v. United States*,[266] the Sixth Circuit recognized that an ICC decision would be arbitrary and capricious if based solely on the advantages of increased competition, and in total disregard of other national policies and regulatory considerations articulated by Congress. Whether this decision portends increased judicial scrutiny of the ICC's reliance on increased competition in operating rights proceedings should be apparent during the early years of this decade as more recent grants of operating authority are examined by the courts.

Future ICC policy somehow will emerge from the present uncertainty. The Commission currently is sinking into a morass of ever increasing motor carrier applications, whose sheer weight prevent *Federal Register* notice in a reasonable time and absolutely preclude rational review. The present Alice in Wonderland regulation should be halted, either by some judicious denials, or by abolition of the Commission. Certainly there is no need for regulation and a regulatory framework filled with red tape and pitfalls for the unwary if its ultimate function is to act as a middleman by publishing summary grants in the *Federal Register* and to rubber stamp all proposals. It does seem clear that the ICC cannot allow itself to become a parasitic shell agency, and must choose between rational regulation or some clearly defined systematic abdication of a viable role in transportation entry regulation.

Transportation costs represent a very small part of the delivered cost of most goods. Nevertheless, effective transportation is essential for almost every business. Continuity of and access to transportation are vital, and the touchstone of any transportation regulatory system should be to avoid disruption and confusion in the marketplace of transportation services. The Commission's willingness to jeopardize the operations of some existing carriers in order not to deprive the public of the purported benefits of increased competition could lead to disruptions unless other carriers can take up the slack in such situations and the ICC can act with unusual rapidity in sanc-

266. No. 77-3373 (6th Cir. December 13, 1979), pp. 9, 10.

tioning additional carriers. The possibility also exists that service to smaller communities may be substantially reduced, or may become dramatically more expensive. Either of these occurrences would have the effect of forcing more and more businesses into the larger transportation centers, an urban migration which may be contrary to the intent of the Commission and other federal policies.

The final question, however, is whether the present system of eased entry produces a better, more efficient and effective transportation system which meets the needs of shippers and the public. Will safety standards erode as more and more smaller and less experienced truckers flood various markets? Can the Commission react quickly enough to prevent service deficiencies when carriers withdraw from certain markets? Will other carriers be available, with necessary equipment and facilities, when disruptions occur? In all likelihood, the ICC does not know whether overall service will be improved and prices minimized by this new policy, and neither does anyone else. The Commission, and outside analysts as well, need to reflect on the present trend and attempt more than superficial, after the fact rationalizations for it. The present system may be an improvement, or it may turn out to be unsatisfactory in some as yet undetermined aspects. At the present time, the questions remain unanswered.