The Competitive Access Debate: A "Backdoor" Approach to Rate Regulation

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I. Introduction

The past decade has been a time of dramatic change in the transportation business in this country; change that had its genesis in the enactment by the Congress of major legislation deregulating the trucking, airline, and railroad industries.[1] In each case, Congress followed the clear public policy of replacing the heavy hand of Federal economic regulation with the invisible hand of the free market. Rather than ongoing Government involvement in the transportation economy, Congress determined that rates and prices for transportation should be set in the marketplace, with the Government role limited to approving specific transactions and remedying anticompetitive behavior.[2]

Since economic regulation was for much of this century an integral part of the transportation industry, it is not surprising that this fundamental change generated considerable controversy and debate, both during consideration of the three legislative proposals and in their subsequent implementation. Now, the passage of time has provided some perspective from which to consider the effects of deregulation and to analyze both

1. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); Airline Deregulation Act of 1978, Pub L. No. 95-504, 92 Stat. 1705 (1978); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).
2. *See* National Transportation Policy, 49 U.S.C. § 10101(a) (1982).

its achievements and its shortcomings. Such an analysis is particularly critical in light of the efforts in the Congress over the past couple of years to roll-back the reforms of deregulation and once again involve the Federal Government in the business of regulating transportation.[3]

The purpose of this article is to examine railroad deregulation by reviewing the regulatory system of the pre-Staggers era, the reforms of the Staggers Act and its implementation, and the recent legislative efforts to reregulate the rail industry.

II. Background: The Pre-Staggers Era

To evaluate fairly the public policy merits of the current debate over the reregulation of the rail industry, it is necessary to first look back to the pre-Staggers Act era, when the industry was characterized by a lack of price competition among carriers, practices of rate equalization and open routing, and heavy regulatory intrusion by the Federal Government into almost all aspects of the rail business. This combination of factors created an economic and operational climate that contributed to the bankruptcy of several major railroads and threatened the financial stability of the entire national rail system.

The system of Federal rail regulation was in effect for more than 80 years and at its height was both pervasive and complex. The system was one of near total rate regulation, with the Interstate Commerce Commission ("Commission") exercising significant control over the rates railroads charged their customers. Moreover, the system was incredibly overburdened. There were literally millions of different rates published and on file with the Commission.

One of the significant features of the regulatory system that is particularly relevant to today's debate is the concept of rate equalization and open routing. "Rate equalization" meant that the same rate applied equally on all routes between a particular origin and destination over which the traffic could possibly move. For example, if there were 50 routes between Atlanta and Cincinnati, rail transportation over those routes was offered to shippers at the *exact same rate*, without regard to the actual cost of providing the service. This rate equalization extended both to single line rates, where only one carrier was involved in the movement, and to joint rates, where two or more carriers were involved in the movement over a "through route" at a single published rate (with each participating carrier receiving a "division" of the published rate).

"Open routing" was a practice whereby through routes were required to be made available on practically all possible combinations of

3. *See, e.g.*, S. 676, The Consumer Rail Equity Act, 99th Cong., 2d Sess. (1986) and H.R. 3051, The Airline Passenger Protection Act of 1987, 100th Cong., 2d Sess. (1987).

railroad tracks between a particular origin and destination, regardless of efficiency or associated cost.

In the pre-Staggers era, most intercity traffic was subject to joint rates. Many joint rates were established in rate-making cartels, called rate bureaus, which had a statutory immunity from the antitrust laws. Once a joint rate was established, changes in that rate or in its divisions could occur only with the concurrence of all participating carriers or pursuant to a lengthy proceeding before the Commission.

During this era, the Commission played a vigilant role in maintaining the policies of rate equalization and open routing. The Commission used its authority under 49 U.S.C. § 10705 to prescribe and maintain joint rates and through routes. Under this provision, the Commission has the authority to require a rail carrier to enter into joint rates and through routes whenever "desirable in the public interest,"[4] and to suspend proposed joint rate and route cancellations whenever not "consistent with the public interest."[5] In addition, the Commission until recent years required the consolidated carrier in a rail merger to keep open all existing through routes, even though that carrier could provide single line service as a result of the merger.[6] Finally, the Commission used what was known as the "commercial closing doctrine" to prevent a rail carrier from lowering its rates on a particular route on the theory that such rate reduction would effectively "close" all the higher-priced routes between the same points.

In essence, what existed in the pre-Staggers era was a regulatory system that precluded rate competition among rail carriers, because *all* rates between a particular origin and destination were the same on *all* routes. There were two devastating effects of this system. First, joint rates were typically set at levels that protected the least efficient carriers and routes; rail carriers with more efficient routes and the capacity to offer lower rates were precluded from offering those rates. One result of this was that rail rates were not competitive with other, less regulated modes of transportation, such as trucks and barges, and the rail industry lost significant market share to those other modes. Second, the joint rate system and the extreme difficulty of increasing divisions frequently resulted in rail carriers participating in joint movements that did not cover their variable costs or provide a fair return. This in turn greatly restricted the ability of carriers to attract the capital necessary to maintain and revitalize existing rail plant and equipment.

Some statistics serve to illustrate the harmful effects of this regulatory system. First, the decline in market share experienced by the rail industry

4. 49 U.S.C. § 10705(a)(1) (1982).

5. 49 U.S.C. § 10705(e) (1982).

6. These requirements were known as the "DT & I Conditions."

was staggering. Railroads carried twice as much in intercity ton miles of freight in 1947 as they did in 1979. In 1947, railroads carried 3 times as much traffic as trucks; by 1979, trucks were carrying 50 percent more tonnage.[7] A comparison of Census of Transportation data for 1963 and 1972 shows a decline in rail market share over the period in chemical traffic, machinery, meat and dairy products, and almost every other commodity group.[8] In many cases, the rail market share in 1972 was slightly more than one-half of what it was in 1963. Across the board, railroads were locked in a regulatory straightjacket that prevented them from competing effectively with trucks and barges. This was a disastrous situation for the rail industry in particular and the Nation's transportation system in general.

Second, the rail industry presented a dismal picture in the late 1970's in terms of return on investment and ability to attract capital. The rate of return on investment between 1966 and 1979 was never more than *3 percent*.[9] The rail industry rate of return on equity was 1.55 percent in 1978, compared to a rate of 8.6 percent for barges and 17.2 percent for trucks.[10] The rail industry rate of return on net worth was 1.3 percent in 1978, compared to a total manufacturing rate of 15.9 percent, a rate of 12 percent for public utilities, and a rate of 8.2 percent for all transportation.[11]

This problem was compounded by the enormous capital needs and the severe capital shortfall of the rail industry. In 1978, the Department of Transportation issued a report estimating that between 1976 and 1985 the industry would have a capital shortfall of between $13.1 and $16.2 billion.[12]

Finally, the problems created by extensive rail regulation were not placed exclusively on the carriers; shippers dependent on rail transportation were also unable to take advantage of the benefits of competition and a free market. For example, due to rate equalization, shippers that used an efficient single line route could not receive the lower rates that would have been available in a deregulated environment. Further, shippers

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7. *Staggers Rail Act of 1980, Report of the Committee on Interstate & Foreign Commerce on H.R. 7235*, H.R. REP. NO. 1035, 96th Cong., 2d Sess. (1980) (hereinafter cited as HOUSE REPORT).

8. *Id.* at 38. For chemical traffic, railroads hauled 62 percent of the ton miles in 1963 but only 44 percent in 1972. For machinery, railroads hauled 52 percent of the ton miles in 1963 but only 38 percent in 1972. For meat and dairy products, the rail ton mile haul was 47 percent in 1963 and dropped to 28 percent in 1972.

9. *Id.* at 35.

10. *Id.* at 36.

11. *Id.* at 98.

12. *A Prospectus for Change in the Freight Railroad Industry*, U.S. Department of Transportation, Report to the Congress, 1978.

could not negotiate and enter into contracts with railroads, and therefore could not benefit from the inherent rate reductions that accompany long term commitments of traffic. Finally, the ultimate harm to shippers was the deterioration or loss of service resulting from the extreme financial distress of the rail carriers.

To conclude, it is not an overstatement to say that this archaic Federal regulatory structure played a major role in the ultimate financial collapse in the 1970's of a significant portion of the rail industry in the United States. In the Northeast, seven railroads filed for bankruptcy, including many giants of a once proud industry—the Penn Central, the Erie Lackawanna, the Reading, the Lehigh Valley, the Central of New Jersey, the Lehigh & Hudson River, and the Ann Arbor. The demise of these carriers created a transportation crisis in the northeast and midwest, and raised the specter of significant American industries being left with no rail transportation. The severity of the problem caused the Congress to create Conrail out of the ashes of the bankrupt carriers and to spend over $7 billion to restore life to the northeast freight rail system. In the midwest, two major carriers, the Milwaukee Railroad and the Rock Island, also fell victim to bankruptcy, creating the need for further Federal Governmemt intervention and financial support.[13]

This financial crisis had an additional critical affect at the Federal level: it forced Congress to take a hard look at the system of rail regulation, and to take dramatic steps toward the deregulation of the rail industry, beginning with the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976[14] ("4R Act") and culminating in the Staggers Rail Act of 1980[15] ("Staggers Act").

III. Reforms of the Staggers Act

A. The Basic Principles

The Staggers Rail Act of 1980 was designed to complete the deregulatory efforts that began with the 4R Act and to consummate a dramatic shift in both Government regulatory policies and the rail industry's freedom to operate in the marketplace. The key policies of the Staggers Act, as stated in the new Rail Transportation Policy, were "to minimize the need for Federal regulatory control over the rail transportation system" and "to allow, to the maximum extent possible, competition and the de-

13. *See* Milwaukee Railroad Restructuring Act, Pub. L. No. 96-101, 93 Stat. 736 (1979); Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 (1980).

14. Pub. L. No. 94-210, 90 Stat. 31 (1976).

15. Pub. L. No. 96-448, 94 Stat. 1895 (1980).

mand for services to establish reasonable rates."[16]

The cornerstone of these efforts was the deregulation of railroad rates. Under the Staggers Act, rail carriers are permitted to establish rates free from Government regulation unless the carrier has market dominance over the transportation.[17] If market dominance exists, then the rate must be reasonable, and the Commission has jurisdiction to determine reasonableness.[18] The economic model that served as the underpinning for the Staggers Act is that competition and market forces, in most cases, can be relied upon to establish reasonable rates; but where competition and market forces are absent, the Government has a regulatory role to assure that rates are reasonable.

By allowing competition and the demand for services to establish rates, the Staggers Act took a giant step toward dismantling the rate equalization system described above and all its inherent inefficiencies. In addition, Congress in the Staggers Act recognized the debilitating impact on the industry's financial health of "the proliferation of uneconomic routes"[19] under the existing joint rate system, and specifically provided rail carriers with additional joint rate cancellation and surcharge flexibility.[20] The new joint rate provisions were designed to assure that carriers participating in a joint rate would either be able to earn revenues equal or greater than 110 percent of variable costs or to close routes that were not providing this level of earnings.[21] After the enactment of the Staggers Act, many carriers used their new found authority of cancellation and surcharges to free themselves from noncompensatory joint rates.

A further significant advance made by the Staggers Act was the codification of the right of rail carriers and shippers to enter into contracts.[22] The contract provision was viewed as serving the interests of both rail carriers and shippers by reducing uncertainty about long term market and service conditions.[23] The Congress considered the establishment of contract rates to be a "significant aspect of the new freedom allowed rail carriers to market rail transportation more effectively,"[24] and accordingly

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16. *See* 49 U.S.C. § 10101(a)(1)-(2) (1982).

17. *See* 49 U.S.C. § 10709(a) (1982).

18. *See* 49 U.S.C. § 10701(a) (1982).

19. H.R. REP. No. 1430, 96th Cong., 2d Sess. 111 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4110 (hereinafter cited as CONFERENCE REPORT).

20. *See* 49 U.S.C. § 10705(a) (1982).

21. CONFERENCE REPORT, *supra* note 19, at 111, 112.

22. *See* 49 U.S.C. § 10713 (1982). Prior to the Staggers Act, contracts had been permitted on a limited basis by a November, 1979 decision of the Commission. This Commission decision, however, had a number of restrictions and uncertainties and had not been widely relied upon to any great extent.

23. HOUSE REPORT, *supra* note 7, at 57.

24. CONFERENCE REPORT, *supra* note 19, at 100.

intentionally limited the Commission's jurisdiction for disapproving contracts.

Taken together, the significant deregulation of rail rates, the new flexibility of carriers to escape uneconomic joint rates and routes, and the ability to negotiate and enter into contracts effectively removed the heavy cloak of Government regulation and rate equalization that had brought the industry to near financial collapse. In combination, these reforms altered the very nature of the rail industry and gave new economic life to the railroads.

B. The Benefits to Shippers

The flexibility afforded carriers under the Staggers Act to adjust rates in response to market demands, to cancel inefficient through routes, and to enter into contracts has also had significant economic benefits on the shipping community. In the 1981 to 1986 period following enactment of the Staggers Act, rail rates decreased in constant dollar terms by 5.1 percent.[25] Coal rates dropped almost 5 percent over the last two years, and are now at their lowest point since 1981.[26] Average grain rates decreased 12 percent over the last two years and plummeted 28 percent since 1980.[27]

The ability to enter into contracts accounts for the significant decline in grain rates. A recent Commission report to Congress estimates that 63 percent of all grain tonnage moves under contract.[28] The market for grain transportation is shared to a surprisingly large extent with other transportation modes. In fact, the Commission's report identified that in 1985 60 percent of all grain moved via truck or barge, an indication that the rail industry faces stiff competition in competing for grain traffic.[29] Contracting has enabled carriers and grain shippers to establish terms and conditions of rail service based on mutual agreement rather than regulatory intervention. As a result, carriers are in a better position to offer competitive rail rates to shippers. This is indeed true for the transportation by rail of other commodities as well.

The Staggers Act has also had a marked effect on rail carriers' earnings and ability to reinvest in their systems. Deferred maintenance is no longer a problem, with capital investment totalling almost $8 billion since

25. *Hearings on the Staggers Rail Act Before the Subcomm. on Transp., Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987) statement of William H. Dempsey, President, Association of American Railroads, at 41.

26. *On Track, A Railroad Industry Report*, Vol. 1, No. 5 (April 1-15, 1987) at 1.

27. *On Track, A Railroad Industry Report*, Vol. 1, No. 3 (March 1-16, 1987) at 1.

28. Ex Parte No. 387 (Sub. No. 959), *Report to Congress: Contract Rate Competitive Impact Report—Grain Shippers*, February, 1987, at 2.

29. *Id.* at 3.

1980.[30] As a result, carriers are able to provide efficient, reliable, and high quality service to shippers. Yet, despite an increase in earnings, the railroads' return on net investment has been modest, indicating that competitive pressures have held down rail rates.[31]

C. THE EMERGING DEBATE: COMPETITIVE ACCESS

Most of the debate regarding railroad deregulation, both during the consideration of the Staggers Act and in the following years, has centered around the issues of rate reasonableness, market dominance, and rerevenue adequacy. However, considerable attention has been paid of late to the concept of "competitive access," which has been defined as the availability of facilities owned by one rail carrier for services provided by or in conjunction with another rail carrier.[32] However, as envisioned by the reregulation forces, this "availability" is not obtained pursuant to an agreement reached in the market by willing parties, but rather is a remedy imposed by the Commission.

As the term has come to be understood, competitive access includes three separate concepts: the prescription of joint rates, the granting of terminal trackage rights, and the granting of reciprocal switching rights.[33]

1. JOINT RATES

The Commission has the authority under 49 U.S.C. § 10705 to prescribe joint rates and through routes when "it considers it desirable in the public interest." As discussed above, in the pre-Staggers era the joint rate provisions were used by the Commission primarily as a means for insuring rate equalization and open routing. After the Staggers Act and its greater freedom to cancel joint rates and impose surcharges, these provisions have taken on a new and different role as a device for rail carriers or shippers to force a new entrant into a particular transportation market through the prescription of joint rates. Although the statutory standard for prescription remains the test of "desirable in the public interest," the Commission has articulated a more detailed analytic framework in its Intramodal Rail Competition regulations, discussed *infra*.

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30. *Hearings on the Staggers Rail Act Before The Subcomm. on Commerce, Transp., and Tourism of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 324 (1986) (statement by William H. Dempsey, President, Association of American Railroads).

31. In the one year period ending June 30, 1987, the carriers' return on net investment was 2.89%, despite record gains in traffic. *On Track, A Railroad Industry Report*, Vol. 1, No. 21 (December 1-31, 1987) at 1.

32. *See* Marshall and Cook, *Issues of Cost Recovery in the Debate over Competitive Access*, 15 TRANSP. L. J. 9 (1986).

33. Although all three matters are dealt with here in the context of the Staggers Act, only reciprocal switching and joint rates were actually included in that Act. Terminal facilities had an earlier origin in the Interstate Commerce Act.

2. *Terminal Facilities*

The Commission has the authority, under 49 U.S.C. § 11103 to require terminal facilities owned by one rail carrier to be used by another rail carrier if the Commission finds that use "to be practicable and in the public interest without substantially impairing the ability of the carrier owning the facilities or entitled to use the facilities to handle its own business." The access to terminal facilities may include access to main line tracks for a reasonable distance outside of the terminal.

Primary responsibility for establishing the conditions and compensation for use of the facilities involved rests with the carriers, but if they are unable to agree the Commission may establish those terms under the principles controlling compensation in condemnation proceedings.

3. *Reciprocal Switching*

The Staggers Act added new language to 49 U.S.C. § 11103 granting the Commission the authority to require rail carriers to enter into reciprocal switching agreements where "it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service."

Similar to the terminal access provision, the carriers involved in reciprocal switching are responsible for establishing the switching terms and conditions, but the Commission may act if the parties are unable to agree.

This provision was included in the Staggers Act because while the Commission clearly had the power to order joint use of terminal facilities, its power to order reciprocal switching was "less clear."[34] The legislative history indicates the standard to be used by the Commission for reciprocal switching was the same as that applied in determining whether to order joint use of terminal facilities.[35] The Conference Report accompanying the Staggers Act, in discussing this provision, noted that "in areas where reciprocal switching is feasible, it provides an avenue of relief for shippers where only one railroad provides service and it is inadequate."[36]

Considering these three competitive access provisions in the context of the Staggers Act, it is clear that they were essentially unconnected to the issue of rail rates. The question of rates was addressed through the concepts of market dominance and rate reasonableness. These access provisions were, on the other hand, more in the nature of "housekeeping" tools available for improving service to shippers and preserving

34. *See* House Report, *supra* note 7, at 67.
35. Conference Report, *supra* note 19, at 116.
36. Emphasis added. *Id.*

competition. It is simply inconsistent with the overall statutory scheme of the Staggers Act and its legislative history to utilize these access provisions as a "backdoor" means for the regulation of rail rates. Yet, there is little question that stripped of the rhetoric, the ultimate goal of the so-called Consumers United For Rail Equity (CURE) group[37] and other reregulation forces is to lower rail rates, and as discussed *infra*, they are quite willing to engage in whatever statutory contortions may be necessary regarding the competitive access provisions in order to achieve that end.

IV. The Implementation of Staggers: Actions of the Commission

A. *Competitive Access Regulations*

In October 1985 the Commission adopted regulations to govern competitive access determinations.[38] These regulations developed from an agreement entered into between the Association of American Railroads (AAR), the National Industrial Transportation League (NIT League), and the Chemical Manufacturers Association (CMA). This joint proposal was presented to the Commission in a petition for rulemaking. The regulations ultimately issued made some modifications to the joint proposal, based in part on a proposal submitted by a coalition of smaller carriers known as Railroads Against Monopoly (RAM), but the regulations largely reflect the consensus reached between the parties. The rulemaking proceeding constituted a deliberate effort by the Commission to achieve "cooperation and consensus among the contending parties to the maximum extent possible."[39] The regulations were recently upheld on appeal to the United States Court of Appeals for D.C.Circuit in *Baltimore Gas and Electric Company v. United States*.[40]

The regulations are designed to "facilitate efforts to ensure reasonable competitive access where needed"—giving shippers "more routing alternatives, while at the same time promoting competition among railroads."[41] The regulations impose new procedures for the cancellation of a through route or joint rate and set substantive standards for assessing cancellations, as well as for prescribing or establishing a through route or joint rate and reciprocal switching agreements. The regulations do not, however, address the issue of the granting of terminal trackage rights, based on the Commission's judgment that such rights are rarely sought

37. The CURE group is a coalition largely composed of utilities and coal companies, but also includes Consumer Federation of America and some chemical and agricultural concerns.

38. Ex Parte No. 445 (Sub-No. 1), *Intramodal Rail Competition*, 49 C.F.R. § 1144.1-1144.6 (October 29, 1985).

39. *Id.* at 2.

40. 817 F.2d 108 (D.C. Cir. 1987).

41. Ex Parte No. 445 (Sub-No. 1), *supra* note 38, at 15.

and that the regulations are sufficient to provide ample competitive access through joint rates, through routes, and reciprocal switching where necessary. The Commission preferred to consider such terminal trackage rights requests on a case by case basis using existing law.[42]

1. *Cancellations: Notifications, Explanation, and Justification*

Section 1144.1 of the regulations requires carriers to give 45 days notice of a proposed cancellation of a joint rate or through route. "Any affected party" may ask the carrier for an explanation of the effect of the cancellation on that party and, if the route or rate is actively used or participated in by that party, a justification for the cancellation. The requested information, including pertinent mileage and cost data, must be supplied within 10 days of the request, unless an alternate time period is mutually agreed to by the parties. The regulations specifically provide that a failure to provide information necessary to determine if the proposed cancellation meets the criteria for suspension and/or investigation of the cancellation may be treated as an admission against interest.

2. *Cancellation and Prescription: Negotiation*

A party that intends either to challenge a cancellation of a joint rate or through route *or* to seek the prescription of a joint rate, through route, or reciprocal switching agreement must attempt to engage in negotiations to resolve the dispute. However, the regulations provide that a failure to participate in negotiations does not waive the party's right to seek further remedies either contesting the action or seeking affirmative relief. Arbitration of the dispute is specifically referenced as an alternative for dispute resolution, in lieu of adjudication of the dispute before the Commission.

As described by the Commission, the provisions for explanation, justification, and negotiation afford sufficient notice of a proposed cancellation to allow shippers and carriers to assess the impact of the cancellation and to take action to protect their interests.[43] The provisions are designed to promote cooperation and, to the extent parties are able to work together, minimize the need for the Commission's regulatory control.[44]

3. *Cancellation: Standards for Suspension*

The Commission is empowered to suspend a proposed cancellation of a joint rate or through route under 49 U.S.C. § 10707(c)(1). Suspension of a cancellation is temporary in nature, lasting only until the Com-

42. *See* 49 U.S.C. § 11103(a) (1982).
43. Ex Parte No. 445 (Sub-No. 1), *supra* note 38, at 3.
44. *Id.* at 4.

mission makes a determination of whether the cancellation is lawful. In that sense, suspension is similar to a temporary restraining order or preliminary injunction, with the review on the merits occurring in the subsequent determination of the "lawfulness" of the cancellation.

Section 10707(c)(1) of Title 49 sets forth the factors that must be met in order for a suspension to be granted. These factors are:

(1) it is "substantially likely" that the protesting party will prevail on the merits; and
(2) without suspension, the proposed rate change will cause substantial injury.

Specific criteria are included in section 1144.3(c) of the regulations to be used in determining whether the above factors have been met. If some but not necessarily all of these criteria are satisfied, the Commission may opt not to suspend the cancellation but still initiate an investigation, *or* note to investigate at all. If all the criteria are met, the Commission must suspend the cancellation of a joint rate and through route *and* investigate the lawfulness of the cancellation. The criteria require a showing by the protesting party that:

(1) the cancellation would eliminate effective railroad competition for the affected traffic. In considering this criterion a rebuttable presumption demonstrating the elimination of effective railroad competition can be raised based on evidence showing either: (a) the mileage on the route to be cancelled is not more than that on a feasible alternative rail route; or (b) the cost of operating on the route to be cancelled is not more than that of any feasible alternative rail route; and
(2) the protesting shipper (or carrier) has used or would use the route or rate to meet a significant portion of its current or future transportation needs (or for purposes of a carrier, a significant amount of traffic).[45]

The Commission considered suspensions to be appropriate in cases in which the above criteria are demonstrated because, in the absence of suspension, shippers or carriers in those cases would face rate increases or reductions in service which could lead to a loss of traffic and injury to their business during the Commission proceeding to determine the lawfulness of the cancellation.[46] The Commission found suspension to be justified in these cases in order to guard against this harm—a harm which cannot be easily remedied by refunds or future access.[47]

The presumption created was proposed by RAM and adopted by the Commission to give "protestants added protection by reducing the evidentiary burden on them."[48]

45. *Id.*
46. *Id.*
47. *See* Ex Parte No. 445 (Sub-No. 1), *supra* note 38, at 4.
48. *Id.* at 6.

4. CANCELLATION: INVESTIGATIONS

The statutory standard governing the determination of whether a proposed cancellation of a joint rate or through route is lawful is whether it is "consistent with the public interest."[49] The Commission's regulations specify that a cancellation of a joint rate or through route will be adjudged to be contrary to the public interest if it is contrary to the competition policies of 49 U.S.C. § 10101(a) or is otherwise anticompetitive. The Commission will consider "all relevant factors" in making this determination, including:

(1) the revenues of the railroads involved generated by the affected traffic and route;
(2) the efficiency of the route and its costs of operation;
(3) the rates charged or sought to be charged; and
(4) the revenues, post-cancellation, and costs of the affected traffic and route; the ratios of those revenues and costs; and circumstances relevant to any difference in those ratios. (A proviso is included which states that a mere loss of revenue to an affected carrier does not suffice as a basis for finding that a cancellation is anticompetitive.)[50]

The regulations specifically exclude any consideration of product competition in determining whether a cancellation is anticompetitive. Product competition is generally regarded as the competition presented by the availability of product that can be substituted for the product presently being shipped to the receiver. This form of competition is typically included in a determination of the competitiveness of a given market.[51] Product competition is examined in a market dominance proceeding since it is a significant factor which affects the railroad's ability to price its services and set rates. However, the Commission appeared to defer to the parties' agreement, which excluded consideration of product competition. In justifying exclusion, the Commission also commented that product competition is typically a "less direct" form of competition with a more tangential nexus to the injury complained of, and is less relevant in determining whether another carrier should have access to the shipper transporting the "primary" product.[52] Moreover, the Commission found that, as compared to other forms of competition, product competition tends to be more difficult to demonstrate and the least often shown to be an effec-

49. 49 U.S.C. § 10705(d) (1982).

50. *See* Ex Parte No. 445 (Sub-No. 1), *supra* note 38, at 6-7.

51. *See* Ex Parte No. 445 (Sub-No. 1), *supra* note 38, Commissioner Strenio, Commenting. Commissioner Strenio is of the opinion that it is unsound policy to refuse to consider evidence on product competition that is relevant. Further, any shipper concerns regarding proof of product competition could have been addressed by shifting that burden to the railroads, as was done for purposes of geographic competition, according to the Commissioner. Andrew J. Strenio, Jr., *Preserving Rail Regulatory Reform*, 1 Regulatory Reform Issue 3, n.4.

52. Ex Parte No. 445 (Sub-No. 1), *supra* note 38, at 8.

tive constraint on rates.[53]

However, the regulations provide that geographic competition will be considered in the Commission's competitive analysis. Geographic competition is generally regarded as that competition presented by the existence of a different source for the same product. However, the burden of proof on geographic competition determinations is on the rail carrier and must be demonstrated by "clear and convincing evidence"—a higher level of proof than is typically used in Commission proceedings. This treatment of geographic competition is consistent with the Commission's market dominance guidelines.[54]

Finally, the regulations provide that if a cancellation is shown to be anticompetitive, the "revenue inadequacy" of a carrier cannot be used to justify the cancellation. Revenue adequacy is an important concept in the statutory and regulatory framework that governs the rail industry, as part of the overall goal of improving the financial health of rail carriers.[55] Consequently, revenue adequacy is used in the determination of the reasonableness of rail rates.[56] However, in the context of competitive access, the regulations make clear that revenue inadequacy is not justification for an anticompetitive cancellation of a joint rate or through route. The Commission noted that this is consistent with the language of 49 U.S.C. § 10705(a)(3), which provides that the Commission may not prescribe a joint rate or through route to assist a participating carrier to meet its financial needs.[57]

5. *Prescription: Standards*

The Commission has the authority to prescribe joint rates and through routes when it considers that action "desirable in the public interest."[58] Similarly, the Commission may require rail carriers to enter into reciprocal switching agreements if such agreements are "practicable and in the public interest, or where such agreements are necessary to provide competitive rail service."[59] The Commission's regulations require a rate,

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53. *Id.*

54. *See*, *id.* at 7, n.6, *citing* Ex Parte No. 320 (Sub-No. 3).

55. 49 U.S.C. § 10101(a) (1982), which sets forth the Rail Transportation Policy, states that in regulating the railroad industry, among other items, it is the national policy to "promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission." *See also*, Staggers Rail Act of 1980, Pub. L. No. 96-448, § 3, 94 Stat. 1895, 1897 (1980), which states that the purpose of the Act is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system.

56. 49 U.S.C. § 10701(a)(b)(3) (1982).

57. Ex Parte No. 445 (Sub-No. 1), *supra* note 38, at 7.

58. 49 U.S.C. § 10705(a)(1) (1982).

59. 49 U.S.C. § 11103(c)(1) (1982).

route, or agreement to be prescribed or established if two criteria are met:

(1) the prescription or establishment is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101(a) or is otherwise anticompetitive (and otherwise satisfies the statutory criteria described above); and

(2) the protesting shipper (or rail carrier) has or would use the rate, route or agreement to meet a significant portion of its current or future rail transportation needs (or, in the context of a rail carrier, for a significant amount of traffic).[60]

"Relevant factors," including cost and revenue information similar to that delineated in the investigation section,[61] are required to be considered by the Commission in determining whether prescription is necessary to remedy or prevent an anticompetitive act. Other enumerated considerations track those included for investigation of cancellations of joint rates and through routes: eliminating the consideration of product competition; switching and increasing the burden of proof regarding geographic competition; and eliminating revenue inadequacy as a basis for denying a prescription.

B. Midtec

Great attention has been focused by the proponents of reregulation on the *Midtec* proceeding before the Commission.[62] The prolonged nature of that proceeding was created in part by the fact that the Commission was concurrently working on its Intramodal Rail Competition regulations. Access was ultimately denied in the *Midtec* case based on the absence of evidence that the carrier acted in an anticompetitive manner. Moreover, the shipper involved enjoyed service from another competing transportation mode, as well as from the rail carrier which was seeking *increased* access. It appears that the objection which formed the basis of the proceeding was not to "monopolistic practices" harming a "captive" shipper, but rather was simply a desire by the shipper for another direct rail competitor in the market, as part of an effort to lower its rates. A brief review of the *Midtec* case follows.

Midtec, a paper shipper served by the Chicago and North Western Transportation Company (CNW), sought to have the Soo Line Railroad Company (Soo) serve its mill through the imposition of a reciprocal switching agreement under 49 U.S.C. § 11103(c) and use of the CNW's terminal facilities under § 11103(a). In *Midtec I*, the Commission denied

60. Ex Parte No. 445 (Sub-No. 1), *supra* note 38, at 8.

61. 49 C.F.R. § 1144.4(b) (1986).

62. *Midtec Paper Corporation v. Chicago & North Western Transportation Company*, 1 I.C.C. 2d 362 (1985) (hereinafter cited as MIDTEC I). Subsequent decision 3 I.C.C. 2d 171 (1986) (hereinafter cited as MIDTEC II).

the requested relief, finding that a grant of terminal access or reciprocal switching did not meet the statutory public interest standard. Specifically, it determined that the request for access was simply a preference for the opportunity to obtain lower rates, as opposed to a showing that service rendered was inadequate and impaired Midtec's ability to compete. The Commission also found that the imposition of a reciprocal switching agreement would not be necessary to provide competitive rail service due to substantial intermodal competition from motor carriers and joint rail-truck movements, as well as geographic competition from other sources of supply. The consideration of intermodal competition by the Commission was a reversal of its prior position, in which it had ignored forms of competition other than that existing between rail carriers.

The Commission's analysis in *Midtec I* had been criticized since its examined, in part, the reasonableness of the rail rates charged by the CNW. Specifically, the Commission stated:

> Having failed to show that CNW is market dominant, Midtec has not shown that the pertinent CNW rates are unreasonably high. Thus, it has failed to establish the predicate of its request for relief.[63]

Yet, the Commission noted in its decision that *the sole basis for the shipper's allegations* in seeking increased access was the unreasonableness of the rates charged—not that existing service was inadequate or that the rail rates charged were noncompetitive with motor carrier rates. Despite the focus of these allegations, any inference raised by *Midtec I* that a market dominance and rate reasonableness analysis would be used in competitive access proceedings was expressly overruled in the Commission's subsequent decision in *Midtec II*.

Following closely on the heels of the parties' appeal of the *Midtec I* decision to the D.C. Circuit Court of Appeals, the Commission requested remand of *Midtec I* for reconsideration in light of the issuance of its regulations governing Intramodal Rail Competition.[64] Although remand was requested and granted, relief was again denied by the Commission after full reexamination. The Commission's analysis in *Midtec II* follows the framework adopted by the regulations, focusing on evidence of anticompetitive conduct or abuse, and considering any evidence of inadequate service or excessive prices as constituting conduct which is inconsistent with the competition policies of 49 U.S.C. § 10101(a).

In conducting its analysis in *Midtec II*, the Commission regarded the "key issue" to be whether CNW had acted in an anticompetitive manner. The inquiry focused on whether CNW had exerted market power to ex-

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63. MIDTEC I, *supra* note 62, at 364.

64. In a decision dated October 31, 1985, the Commission determined that the *Midtec I* proceeding should be reopened and reconsidered, on the basis that the rulemaking proceeding bore materially on the issues in the *Midtec I* case.

tract unreasonable terms on through movements or whether its monopoly position enabled it to render inadequate service to the shipper.[65]

However, neither Midtec nor Soo submitted information necessary to examine allegations that CNW had refused to offer Midtec competitive rates and service. The Commission made significant note of the absence of data on costs, revenues, rates, divisions and efficiency of routings, which were necessary to determine whether access had been granted on reasonable terms. This information is specifically referenced in the Commission's regulations as relevant to the Commission's determination of whether a failure to grant access is anticompetitive.

On this point, the Commission stated:

> As previously noted, our rules emphasize several categories of specific information for evaluating the types [of] allegations made here as they relate to a possible abuse of market power. These categories include the revenues of the involved railroads, the comparative efficiency of routings, the comparative cost/revenue ratios for the carriers, and the rates sought to be charged. Despite the fact that this proceeding was reopened specifically for consideration under the new rules, complainants, on whom the burden of proof rests, have not submitted any of the specific evidence called for. There are no numbers in the record to give substance to complainants' allegations.[66]

Rather, the Commission noted evidence submitted by CNW which demonstrated CNW's willingness to alter routing at the request of Soo, and to develop competitive rates and service, including rate reductions granted Midtec by CNW for woodpulp and paper traffic.[67]

According to evidence submitted, Midtec, although directly served by only one railroad, uses a combination of rail, motor, water carrier and intermodal service, with CNW participating in slightly over 60% of its traffic.[68] In fact, some of these rail movements were through movements—either joint or combination rates—in which Soo participated. This led the Commission to comment:

> Complainants have not alleged that CNW has refused to grant access; rather they object to the terms under which it has been or will be granted. Specifically, they allege "a refusal to offer competitively based rates and services." Thus it is appropriate to focus on the terms under which through service has been offered and the quality of service that CNW has provided. (Footnote

65. *See* MIDTEC II, *supra* note 62. The focus of the Commission's inquiry on reciprocal switching was the same used in examining whether the public interest required the imposition of terminal trackage rights. As noted by the Commission, while the regulations do not cover terminal trackage rights, the underlying public interest test is the same as that governing reciprocal switching and the analysis should be similar. Specifically, the Commission regarded "a focus on anticompetitive conduct (or the imminent threat of it)" to be an appropriate, but not necessarily the exclusive inquiry in terminal trackage rights determinations. *Id.* at 178.

66. *Id.* at 182.

67. *Id.* at 183.

68. *See id.* at 175-176. *See also*, Appendix I to MIDTEC II.

omitted.)[69]

In the absence of evidence of anticompetitive behavior, the Commission viewed the proceeding as one in which Midtec simply sought to increase the presence of a second railroad in the market. The Commission found it inappropriate to intervene in a situation in which no competitive failure occurred, commenting:

> There is a vast difference between using the Commission's regulatory power to correct abuses that result from insufficient intramodal competition and using that power to initiate an open-ended restructuring of service to and within terminal areas solely to introduce additional carrier service.[70]

This analysis is consistent with prior statements of the Commission that in cases in which joint terminal use is sought, some actual necessity or compelling reason for that use must be demonstrated, beyond a mere desire for additional access that would be convenient or desirable.[71]

Consequently, the record, as characterized by the Commission, showed no abusive or anticompetitive conduct, but rather demonstrated that CNW's service had been responsive and adequate. The Commission did comment that the "behavior of the respondent railroad is likely to have been affected by the notoriety attending this proceeding" and warned that "[s]hould the conduct of the respondent railroad deteriorate, or should the behavior of any other carrier exhibit anticompetitive abuse or other offense to the standards of the Interstate Commerce Act, we will grant relief."[72]

Midtec has appealed the Commission's decision to the D.C. Circuit Court of Appeals.[73]

V. THE CURE ATTACK: ACCESS AND USE ON DEMAND

As discussed, the reforms of the Staggers Act have been a resounding success in achieving the desired goals of promoting efficient rail service, reducing unnecessary and stifling regulation, and fostering the financial health of the rail industry. It is evident that the shipping community has also benefited from these reforms, in terms of stability in rates, efficient and reliable service, and flexibility through contracting to fashion terms and conditions of service in accordance with particular needs.

Unfortunately, a group of coal producers and large utilities—the

69. MIDTEC II, *supra* note 62, at 177.

70. *Id.* at 174.

71. *See* MIDTEC I, *supra* note 62, *quoting* Jamestown Chamber of Commerce v. Jamestown, Westfeld and N.W. Ry. Co., 195 I.C.C. 289 (1933), and *citing* Delaware and Hudson Ry. Co. v. Consolidated Rail Corp., 367 I.C.C. 718 (1983), *rev'd on other grounds*, 1 I.C.C. 2d 362 (1985). *See also* Central States Enterprises, Inc. v. I.C.C., 780 F.2d 664, 678 (7th Cir. 1985).

72. MIDTEC II, *supra* note 62, at 174-175.

73. *See*, Midtec Paper Corp. v. Chicago and N.W. Transp. Co., No. 39021, I.C.C. Slip Opinion, May 7, 1987.

CURE group—have proposed legislation to unravel the achievements of deregulation. This group, faced with cheaper foreign sources of coal and the plummeting cost of oil, is seeking to alter the framework of rail rate regulation and competitive access determinations. This effort has one basic goal: to reduce rail rates for coal.

Any mandated reduction in rates for a specific commodity would have a destructive effect on the rail carriers' ability to differentially price. Any such mandated reduction would require rail carriers to increase rates on other traffic. As a result, traffic subject to intermodal competition would shift to other transportation modes where it could move at lower rates, leaving the rail carriers with less market share and decreased sources of revenue to cover their costs. Any contribution made by those shippers to capital and operating costs would be lost, forcing carriers to make up that shortfall through rate increases on the remaining traffic to the extent competitive pressures permit. The ultimate effect would be a loss of the ability to differentially price rail service, resulting in rate increases, lost traffic, decline in revenues, lost jobs, and deterioration in service—the same litany of woes, it should be noted, that characterized the rail industry in the days of significant Government regulation.

A. The CURE Legislation

Section 9 of the Consumer Rail Equity Act,[74] would create new standards for prescribing joint rates, use of terminal facilities, and establishment of reciprocal switching agreements.

1. Joint Rates

Section 9(a) would add a requirement to current law that any rail carrier providing service under a single line or joint line rate on a particular category of traffic between an origin and a destination must, upon the request of another carrier, a shipper, or a receiver, participate in "at least one competitive joint rate" or publish "a competitive proportional rate." A rate is conclusively deemed competitive if the ratio of revenue to variable costs realized is no higher than that realized on the carrier's single line rate or its existing joint rate.

2. Terminal Facilities

Section 9(b)(1) would require the Commission, upon request of any "interested rail carrier, shipper, receiver or other party directly impacted" to mandate use of terminal facilities by another rail carrier if it is practica-

74. H.R. 1393 was introduced in the House of Representatives on March 4, 1987 by Congressman Rick Boucher (D-Va.). In the Senate, S. 676, was introduced by Senator Jay Rockefeller (D-W.Va.) on March 6, 1987.

ble and "necessary for the provision of alternative competitive rail service" or otherwise in the public interest, without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business. Current law does not require the Commission to direct the use of terminal facilities, nor does it include the quoted standard for granting use. The Commission would be required to take final action on a request within 180 days after its filing. Finally, this section also would alter the current standard for compensation, which is that applicable to compensation in condemnation proceedings, to one based on the cost incurred by the owning carrier, including variable costs, an allocated share of fixed costs, and a reasonable return. If the parties are unable to agree on compensation, the Commission would establish compensation within 90 days of the request.

3. Reciprocal Switching

Section 9(b)(2) would require the Commission, upon petition of any interested rail carrier, shipper, receiver, or other party directly impacted to establish the compensation for reciprocal switching at a level not to exceed the market dominance threshold level (presently a revenue to variable cost percentage of 180%), unless the carrier demonstrates that a higher level is reasonable and necessary. This would replace current law which permits the parties to establish the conditions and compensation of a reciprocal switching agreement, and under which the Commission's authority to establish such agreements is discretionary in nature.[75]

Section 9(b)(2) would prohibit a carrier from cancelling a reciprocal switching agreement except on a minimum of 45 days notice, unless a showing could be made that the continuation of reciprocal switching is not practical or is unnecessary to provide alternative competitive rail service. The Commission would be required to suspend the proposed cancellation if it determines that a shipper has or would utilize such reciprocal switching for a significant portion of its current or future transportation needs.

Similarly, the Commission would be directed to require carriers to enter into reciprocal switching agreements, upon petition of any interested rail carrier, shipper, receiver, or any other party directly impacted, if it finds such agreements to be practicable and in the public interest or necessary to provide alternative competitive rail service. The Commission would be required to act on a petition within 180 days of its filing.

Finally, section 9(b)(2) would require the Commission to ignore the revenue adequacy of a carrier and "the alleged existence of competition other than rail competition between the origin and destination of the traffic involved."

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75. 49 U.S.C. § 11103(c)(1) (1982).

B. *Critique of the CURE Legislation: "The CURE for the Hypochondriac"*

1. *Joint Rates*

Section 9(a) of the CURE bill would mandate that a rail carrier establish on request a joint or proportional rate for any traffic movement at a certain prescribed level. This provision would effectively require carriers to establish rates on any requested route, regardless of its efficiency. Moreover, the rate established must be set at an arbitrary, fixed level, without regard to the demands of the market and costs of service on that route. In effect, this provision undermines the carrier's ability to set rates competitively in accordance with its costs and the demand for the service. If pricing is artificially set, it would adversely affect a rail carrier's ability to differentially price its services for its remaining traffic.[76] It will also adversely affect a carrier's ability to price its competitive traffic at a level conducive to retaining its market share, as compared to that share enjoyed by other transportation modes. If competitive traffic is lost, the remaining shippers suffer not only in terms of rates—as they must shoulder a greater proportion of the fixed costs—but also in terms of the quality of service they will receive.

The thinking embodied in § 9(a) is oblivious to the fact that other forms of competition exist in transportation markets, even if direct rail to rail competition does not. Alternate transportation modes and other sources of supply for commodities do effectively constrain rail carriers' ability to set rates, yet are not considered for purposes of setting joint rates under this section. Moreover, section 9(a) is unnecessary, given the Commission's recent issuance of regulations which seek to address the cancellation and prescription of joint rates and through routes. Relief is therefore available to shippers and connecting carriers to prevent, through suspension, and to remedy, through investigation and prescription of rates and routes, anticompetitive behavior by rail carriers.

Perhaps the most alarming fact about section 9(a) is the apparent intent to return to the system of rate equalization and open routing that existed prior to the enactment of the Staggers Act. As discussed, this system promoted inefficient routing of traffic and uneconomic rates, and provided artificial support for costly, noncompetitive routes and unjustified cross-subsidization of traffic. To return to a system that was character-

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76. As explained in the AAR's *Compendium Summarizing and Analyzing the Proposed CURE Bill, A Critique of the Proposed C.U.R.E. Bill*, Attachment at 5, if a shipper attacks price levels through the competitive access provisions of the Interstate Commerce Act, where there is no showing of anticompetitive conduct, it is evidence of an effort on the part of a shipper to destroy differential pricing by attempting to drive down rail rates through forced direct rail to rail competition.

ized by heavy Government interference and uniform pricing for rail services—a system that nearly crippled the rail industry and harmed railroads, shippers, and the consuming public—is short sighted and ill conceived public policy.

2. *Terminal Facilities*

Section 9(b)(1) of the CURE bill would require the Commission to mandate the use of terminal facilities on request and would alter the standard used to determine the circumstances under which use should be required. Every facility could be subject to the requirements of this section, once it is found that use of the facility is "necessary for the provision of alternative competitive rail service." Once again, the presence of other competitive forces is ignored. The effective constraint presented by intermodal competition on the pricing of rail services is specifically eliminated as a consideration in determining whether such use should be granted.

Required use on demand by any "party directly impacted" under this provision undermines the carrier's ability to earn an adequate return on its investment and to stimulate further capital investment in facilities. As articulated by one commentator:

> Unless the owning railroad is fully compensated, competitive access will simply be an euphemism for the uneconomic subsidization of the entrant by the owning carrier, ultimately resulting in the owner becoming unable to maintain the facility which is the subject of the access.[77]

This is particularly troublesome, since section 9(b)(1) also alters the standard for fixing compensation to be paid to the owning carrier. This section moves away from the current standard—that controlling compensation in condemnation proceedings—to one which would simply compensate the owning carrier for costs incurred by the use.[78]

The competitive access provisions of the CURE bill are designed to increase the number of competitors in a given market as part of an overall effort to reduce rates. This presents two major concerns. First, a deliberate effort to promote the entry of individual competitors, as opposed to generally enhancing competition, is directly contrary to the objectives of the antitrust laws and traditional interpretation by the courts and the De-

77. Marshall and Cook, *supra* note 32, at 20.

78. The Association of American Railroads argues that this standard may constitute a taking without just compensation in that it would not take into account the full terminal costs incurred by the owning carriers, nor would it include revenues lost by the owning carrier due to the loss of market share to the carrier entering the market. *Hearings on the Rail Industry and the Staggers Act Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, Science and Transp., 100th Cong., 1st Sess. (1987)*, statement by William H. Dempsey, President, Association of American Railroads at 34.

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partment of Justice.[79] Secondly, a competitor should not be given access on demand simply in order to secure lower rates in instances in which the rate charged is not determined to be unreasonably high.[80] A carrier which enters a market relying on the use of another's track and facilities will have lower costs, and thus will be able to charge a lower rate. This unfairly undercuts the owning carrier, reducing its traffic base and its revenues and contribution toward investment, and unfairly subsidizes the new entrant.

3. *Reciprocal Switching*

Section 9(b)(2) requires the Commission to establish reciprocal switching agreements and to fix the level of compensation at the threshold used by the Commission for jurisdictional purposes in rate proceedings. The burden would be on a carrier to establish that a higher level of compensation would be both reasonable and necessary. The regulatory intrusion of the Commission where there is no evidence of anticompetitive behavior coupled with an arbitrary setting of terms and conditions for switching would adversely affect the pricing of services and would, as discussed above, lead to a loss of revenues and market share.

The language of section 9(b)(2) would require the Commission to suspend the cancellation of a reciprocal switching agreement, if a shipper would use the switching for a significant portion of its transportation needs. This standard for suspension borrows from the Commission's regulations on suspension standards for cancellation of joint rates and through routes, but in so doing only adopts half of the standard. Specifically, it eliminates from consideration whether the cancellation would eliminate effective rail competition for the affected traffic.[81]

Under section 9(b)(2), cancellations would be prohibited and reciprocal switching agreements *must* be established by the Commission in instances where switching is necessary to provide "alternative" competitive rail service. Accordingly, section 9(b)(2) amends the current discretionary standard to one which requires the Commission to provide

79. *See* Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962), which found Congressional intent inherent in antitrust policy to be the protection of competition, not competitors. As noted by Marshall and Cook in *Issues of Cost Recovery in the Debate over Competitive Access*, 15 TRANSP. L. J. 9, at 13, the Commission's Intramodal Rail Competition regulation focused on "preservation or enhancement of efficiency and competition, not the preservation or enhancement of particular competitors."

80. *See* Marshall and Cook, *supra* note 32, at 13, n.20. "The issue raised by . . . requests for access intended to defeat lawful rates is whether, and if so, when, a rate that meets the maximum rate reasonable criteria can nonetheless be anticompetitive. If this issue is resolved in the affirmative, it must be determined whether relief should come in the form of a lower rate or a grant of access."

81. *See* 49 C.F.R. § 1144.3(c) (1986).

for switching and turns on the promotion of "alternative" rail service. This standard appears to require the introduction of another direct rail competitor, regardless of the existing level of competition present in the market.[82]

Finally, section 9(b)(2) directs the Commission, in making its reciprocal switching and terminal facilities determinations, to disregard the revenue adequacy of carriers and any competition other than direct rail competition that may exist for the movement of the traffic at issue. Such an inquiry is akin to conducting the proceeding with blinders on—it ignores the true nature of the competitive market and unfairly hampers the carriers' ability to compete for transportation services by pricing in a manner that will attract and retain traffic. This constitutes nothing more than an attempt by the CURE coalition to manipulate and artificially construct an analysis which will with certainty render a result in its favor.

C. Status of Reregulatory Efforts

In the current Congress, several hearings have been held in both the Senate[83] and the House of Representatives[84] on the CURE legislation and the financial health of the rail industry. While formal consideration in the Senate Committee on Commerce, Science and Transportation did not occur in the first session of the 100th Congress, markup did occur in the House Subcommittee with jurisdiction over rail legislation. On November 5, 1987, the House Subcommittee on Transportation, Tourism and Hazardous Materials, approved for consideration by the full Committee on Energy and Commerce, legislation modeled after the CURE bill.[85]

Section 9 of the legislation addresses the competitive access issue. Section 9(a) adopts essentially the same language as the CURE bill on joint rates, requiring a railroad to participate in an alternative joint rate with a connecting carrier on request of a shipper, receiver, or carrier for the movement of any traffic. The joint rate so established would be effectively capped at the existing single line rate. No showing of inadequate

82. In noting that this provision would ignore the presence of even direct transportation competition in the market, the AAR in their testimony, *supra* note 78, at 36, comments that the Commission's concern in competitive access determination should more properly be the prevention of anticompetitive conduct and the assurance of competition in instances where it is required by the public interest.

83. *Hearings on the Rail Industry and Staggers Act Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, Science and Transp.*, 100th Cong., 1st Sess. (1987).

84. *Hearings on the Staggers Rail Act Before the Subcomm. on Transp., Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987).

85. The Subcommittee vote was 9 (aye) to 6 (no).

service, excessive pricing or anticompetitive behavior need be made to support the request for the joint rate.

Section 9(b)(1), relating to terminal facilities, sets two standards similar to those included in the CURE legislation under which access to terminal facilities could be granted. The first requires the Commission to find that the use is practicable and that there is "no alternative competitive transportation service available". Under the second standard, the Commission could require use on finding that the use is otherwise in the public interest but would not substantially impair the rail carrier's ability to handle its own business.

Under the first standard, the Commission would not be required to consider whether the use was necessary to provide alternative competitive *rail* service by the entering carrier, as specified in the CURE bill. Rather, the Commission would be required to find that no alternative competitive *transportation* service was available. Although this language appears to require consideration of existing transportation competition,[86] additional language in section 9(b) provides that the fact that a shipper has used or is using alternative transportation service does not, by itself, demonstrate that the alternative transportation is economically feasible. Although unclear, it appears that this provision requires the Commission to determine if existing transportation competition is competitive on an economic basis, in effect requiring that alternative transportation to be at the same or a lower cost in order to be considered "competitive." In conducting its competitive analysis, the Commission is prohibited from considering the existence of product and geographic competition, and is also precluded from examining whether the rail carrier involved is revenue adequate, as in the CURE bill. Still missing from the Commission's inquiry under this language would be any consideration of whether the railroad presently providing service acted in an anticompetitive manner or provided inadequate service to the shipper. Thus, this provision in effect provides a "remedy" without necessitating that a showing be made that harm occurred, and also suffers from the same criticism applicable to the CURE bill that it facilitates relatively free access in order to put a downward pressure on rates, and will result in diminishing the railroads' return on investment.

Section 9(b)(2), relating to reciprocal switching, is likewise very similar to the CURE bill, requiring the Commission to establish reciprocal switching agreements if it is practicable and in the public interest or is

86. Section 9(a) of the Subcommittee bill defines the term "terminal" to include without limitation any rail facilities used, or which could practicably be used, for the interchange of cars between rail carriers at the time the request for access is made. The term "terminal facilities" is defined to include without limitation all tracks and other rail facilities needed to serve points within twelve miles of any terminal.

necessary to provide alternative competitive transportation service.[87] If the Commission is requested to prescribe the compensation for reciprocal switching, section 9(b)(2) caps the compensation at the then current jurisdictional threshold,[88] unless the carrier can demonstrate that a higher level of compensation is reasonable and necessary. Cancellation of reciprocal switching agreements must be preceded by 45 days notice, unless the carrier can show that the continuation of reciprocal switching is not practicable or its unnecessary to provide alternative competitive transportation service. A cancellation would be suspended if the shipper involved had utilized or would utilize the service for a significant portion of its transportation needs.

While the legislation appears to adopt some aspects of the Commission's regulations, it does so only in part. The suspension standard is similar to a portion of that adopted by the Commission, leaving out a requirement that a showing be made that the proposed cancellation would eliminate effective railroad competition for the affected traffic.[89] Further, all that need be shown to require the Commission to prescribe a reciprocal switching agreement is that it is necessary to facilitate "alternative" competitive transportation service. *Any* new entrant into a market by its mere presence necessarily provides "alternative" service. Again, no anticompetitive conduct need be shown for a switching agreement to be prescribed, in effect granting access on the mere desire of a shipper or carrier.

Finally, by effectively capping the compensation for reciprocal switching at the jurisdictional threshold, the Commission would be not only setting rail pricing but would be doing so in a manner that is arbitrary and unresponsive to market demands. The burden would be placed on the carrier to justify a higher amount, requiring with certainty a regulatory proceeding and Commission determination on the matter. This is "reregulation" in its truest form.

Section 9(b)(3) of the Subcommittee bill prohibits the Commission from considering the revenue inadequacy of a rail carrier and the existence of either product or geographic competition in assessing whether the use of terminal facilities or reciprocal switching should be provided or maintained. Although this language would seemingly permit the Commission to examine the existence of intermodal competition in the market, it

87. Section 9(b) of the CURE bill requires the Commission to establish reciprocal switching agreements if it is practicable and in the public interest or is necessary to provide alternative competitive *rail* service, which in effect excludes the consideration of intermodal competition.

88. The jurisdictional threshold is used for purposes of determining whether the Commission has jurisdiction over a rate charged by a carrier claimed to be unreasonable. *See* 49 U.S.C. § 10709(d)(2) (1982).

89. *See* 49 C.F.R. § 1144.3 (1986).

would direct the Commission to conduct a competitive analysis which ignores the financial strength of a carrier to compete for market share and to withstand the loss of traffic to a new entrant. In addition, it ignores any competition posed by alternate sources of supply and substitute products for the commodity being shipped, even if those competitive alternatives are an effective constraint on rail rates.

Finally, section 9(b)(3) of the Subcommittee bill exempts Class II and Class III railroads from the requirements of the reciprocal switching and terminal facilities provision. This provision was probably designed to mitigate the concerns of smaller rail carriers which were concerned about loss of traffic, revenues, and market share to competing carriers resulting from the grant of access. It appears that the Subcommittee has been responsive to those concerns, but ignored or simply dismissed similar concerns of the larger railroads.

VI. Conclusion

In evaluating the public policy merits of the CURE legislation, consideration should be given to George Santayana's admonition that those who do not understand history are doomed to repeat it. In the pre-Staggers era, two of the critical factors that emerged as contributing to the financial crises in the rail industry were the proliferation of uneconomic rates and routes, imposed or kept in place by Government regulation, and the carriers' extremely low rate of return and inability to attract capital to make needed investments. There should be no mistake that the system of reregulation reflected in the CURE legislation, with its emphasis on the prescription of joint rates and the nearly unfettered use of other carriers' tracks and facilities, poses an enormous risk of returning to a regulatory system that embodies many of the same flawed public policies which the Staggers Act sought to overturn.