

THE REGULATORY COMMISSIONS AND SMALL BUSINESS

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And while the House of Peers withholds
Its legislative hand,
And noble statesmen do not itch
To interfere with matters which
They do not understand,
As bright will shine Great Britain's rays
As in King George's glorious days.

W. S. GILBERT, IOLANTHE

The independent regulatory commission ranks among America's least felicitous experiments in economic statecraft. Here, under the guise of public convenience and necessity, the government alienates a portion of its sovereignty to a private corporation through a grant of privilege. The grantee, although ostensibly a chosen instrument for the effectuation of some public purpose, actually is an independent proprietor, free to pursue his profit interests, make his own decisions, and circumvent as best he can the feeble restraints of the police power. This private-management-public-regulation hybrid makes for inflexibility, rigidity, and duplication of effort. More important, it invites corruption of the government itself. It creates a situation where private profit depends as much on the ability to influence the regulatory authority as on success in the market place. Executive talent is diverted from the task of organizing efficient operations to the task of influencing "public relations." The public pays the costs, while the regulating authority, at best, does little but obstruct.¹

The public grant of private privilege is not a modern phenomenon. Long ago, under the Tudors and Stuarts, such grants led to abuse and corruption, the raising of prices and deterioration of quality, restraint of trade and prosecution of interlopers, dispensation with statute law, and extortion. Sometimes the Crown used its prerogative to grant monopolies²

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¹ Cf. WALTER ADAMS & HORACE M. GRAY, *MONOPOLY IN AMERICA* 39-72 (1955); EUGENE STALEY, *WORLD ECONOMY IN TRANSITION 186-87* (1939). See also HENRY C. SIMONS, *A POSITIVE PROGRAM FOR LAISSEZ-FAIRE* (1934).

² HAROLD G. FOX, *MONOPOLIES AND PATENTS* 70 (1947). See also WALTON HAMILTON, *PATENTS AND FREE ENTERPRISE* 1-23 (TNEC Monograph No. 31, 1941).

for purely mercenary reasons, attempting to obtain either a cash payment or a share of the profits from the grant or dispensation. In the hands of the corrupt courtiers, the system of monopolies, designed originally to foster new arts, tended to become degraded into a system of plunder, for the holders of monopolies in some cases knew nothing of the arts and acted in the widest spirit of exploitation and extortion. In some cases the monopolies were sold to companies of merchants, who enhanced the price to the utmost ability of the purchaser. In practice, commercial operations were hampered by a number of the grants [and] . . . the tendency was towards a concentration of power in corporate hands, until free competition was practically destroyed, and almost all commodities were in the hands of a favoured few, who fixed prices, terms and conditions, on such bases as would return them the greatest profit. Of necessity the general body of the citizenry suffered.

In time, this network of mercantilist privilege was swept away by the tide of economic liberalism, and commercial freedom was accepted as a sounder principle for organizing society. The pretense—Adam Smith wrote and public opinion agreed—that monopoly charters for corporations “are necessary for the better government of the trade, is without foundation. The real and effectual discipline which is exercised over a workman, is not that of his corporation, but that of his customers.”³ Competition, not regulation, is the keystone to economic welfare. Government interference with the individual’s choice of occupation or trade⁴

is a manifest encroachment upon the just liberty of both the workman, and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper. To judge whether he is fit to be employed, may surely be entrusted to the discretion of the employers whose interest it so much concerns. The affected anxiety of the law-giver lest they should employ an improper person, is evidently as impertinent as it is oppressive.

After the lapse of a century, however, the liberal tide receded. New men, with a perhaps blunted perspective of history, chose to put musty wine in old bottles. In an age dominated by conservatives who had nothing to conserve and liberals hating liberty, they again turned to a system of state-created and state-protected privilege. Under the traumatic impact of the Great Depression, Americans accepted a new mercantilism which brought wide segments of the economy under the certification requirements of independent regulatory commissions.⁵ Old commissions were given broader jurisdiction, new commissions were created, and “public convenience and necessity” became the shibboleth of the day.

To be sure, the regulatory statutes of the 1930’s did not sanction the total abandonment of competition. The standards which were set up to guide administrative action (“public interest” and “public convenience and necessity”) were indefinite, but as the Supreme Court squarely held, there can be “no doubt that competition is a

³ ADAM SMITH, *THE WEALTH OF NATIONS* 129 (Mod. Lib. ed. 1937).

⁴ *Id.* at 122.

⁵ See, e.g., Natural Gas Act, 52 STAT. 824 (1938), 15 U.S.C. § 717f (1952), as amended, 63 STAT. 501 (1947), 47 U.S.C. § 214 (1952); Motor Carrier Act, 49 STAT. 551 (1935), 49 U.S.C. § 307 (1952); Civil Aeronautics Act, 52 STAT. 987 (1938), 49 U.S.C. § 481d (1952); Federal Communications Act, 48 STAT. 1083 (1934), 47 U.S.C. § 307a (1952); Transportation Act of 1940, 54 STAT. 950 (1940), 49 U.S.C. § 153 (1952).

relevant factor in weighing the public interest.”⁶ In the transportation industry, said the Court, Congress has not made the antitrust laws “wholly inapplicable,” nor has it authorized the regulatory agency “to ignore their policy.”⁷ In short, Congress provided for the regulation of competition, not for its elimination by administrative fiat.

Nevertheless, the effect of these regulatory statutes, regardless of congressional intent, was to narrow competitive opportunity and curtail market rivalry. Whereas the goal of antitrust policy was to promote competition by maintaining a large number of competitors, preserving freedom of entry, and preventing all sorts of coercive and collusive restraints on free market processes, the regulatory statutes—as interpreted by the commissions—generally worked in the opposite direction. The Interstate Commerce Commission, in particular, regarded the Motor Carrier Act⁸ as a mandate for wholesale restriction of entry, generous approval of mergers, and patient toleration of rate-fixing. It adopted policies which are clearly restrictionist, anti-competitive, and protective. It concerned itself not so much with the protection of the public, as with the protection of the industry it is supposed to regulate. The impact of these policies has not only been prejudicial to the broad public interest, but has hit the small businessman with differential severity.⁹

Small business is peculiarly vulnerable to strangulation by regulation. It is often incapable of coping with (1) the time, cost, and red tape inherent in the administrative process; (2) the use of the administrative process as a weapon of competitive harassment; (3) differential or discriminatory standards followed by the regulatory authority; (4) regulatory restrictionism and suppression of competition; and (5) undue identification between regulators and regulatees. These handicaps are only illustrative of a more basic problem, viz. the inability of small business to battle on two fronts. In those regulated industries where there are no substantial economies of scale and where, in the absence of entry restrictions, small business could hold its own, the threat to survival is more administrative than economic. A small firm may be able to surmount the challenges of the market place, and yet be unable to withstand a hostile regulatory bureaucracy. It may win the battle of managerial efficiency and market rivalry, only to be destroyed by “administrative expertise.”

I

TIME, COST, AND RED TAPE

As any poker-player knows, the fellow with a bankroll has the advantage. He can withstand temporary adversity. If some of his gambits fail, the chances are

⁶ FCC v. R.C.A. Communications, Inc., 346 U.S. 86, 94 (1953).

⁷ McLean Trucking Co. v. United States, 321 U.S. 67 (1944).

⁸ 49 STAT. 551 (1935), 49 U.S.C. § 307 (1952).

⁹ Cf. Select Committee on Small Business of the Senate, *Competition, Regulation, and the Public Interest in the Motor Carrier Industry*, S. REP. No. 1693, 84th Cong., 2d Sess. 27-28 (1956).

that others will succeed. He has staying power. He can wait for the big moment. He can play without fear that a streak of bad luck will bankrupt him and put him out of the game permanently. The rules of the contest may be neutral, but the outcome is not unrelated to the resources of the participants.

The importance of delay and costliness of proceedings before regulatory commissions was forcefully demonstrated in recent hearings before the Senate Small Business Committee.¹⁰ One witness reported that he had applied to the ICC in 1946 for authority to transport radioactive materials in interstate commerce. The hearing examiner had recommended that the application be approved. He had found that competent witnesses, including the traffic manager for the Atomic Energy Commission, supported the application. The hearing examiner concluded that there were "no other motor carriers engaged in this service," that this was "the first application for such authority," that no one questioned the applicant's "ability, financial or otherwise, to perform the proposed service," and that there was "no question of the need by shippers" for the transportation of radioactive materials requiring special handling.¹¹ Despite these findings by the examiner, filed in October 1947, division five of the Commission rejected the application. The applicant was informed that the Commission was formulating rules for the safe interstate transportation of radioactive materials, and that "as soon as such regulations are prescribed, an effort will be made to dispose of the . . . application as promptly as possible."¹² As of December 1955, however, the applicant was still waiting. After a lapse of nine years, in public testimony, a Commission official still expressed doubt "whether radioactive materials are yet a commodity that moves freely in commerce."¹³ The Commission was still not prepared to act—despite the applicant's willingness to gamble on the existence of sufficient demand for his service, testimony by several shippers as to the need for such service, and the Atomic Energy Commission's recommendation that the rights be granted.

At the same hearings, another small company (operating six tractors, nine semi-trailers, and three pickup trucks) related its experience in applying for additional authority to serve the towns of Boaz (population 3,078) and Albertville (population 5,037). According to the applicant, shipper witnesses told the ICC that¹⁴

. . . there was no direct motor carrier service afforded by the large motor carriers between these points and Chattanooga and Birmingham. They also testified that it takes from 3 to 10 days to obtain freight service between these points and Chattanooga and Birmingham by those large motor carriers which now provide any service at all. None of the opposing motor carriers offered to provide direct service to Albertville and Boaz from either Chattanooga or Birmingham although many of them operate between Chattanooga and Birmingham regularly. The opposing motor carriers which have operating authority to serve Albertville or Boaz either serve these points by a circuitous route or interline the

¹⁰ *Hearings Before the Select Committee on Small Business of the Senate on the Administration of the Motor Carrier Act by the Interstate Commerce Commission As It Affects Small Truckers and Shippers*, 84th Cong., 1st Sess. (1955).

¹¹ *Id.* at 433-35.

¹² *Id.* at 200.

¹³ *Id.* at 432.

¹⁴ *Id.* at 93-94.

traffic with a second carrier. This evidence led the joint board which heard the case to recommend the grant of authority to Bee Line to serve both Albertville and Boaz without restriction. The Commission, division 5, initially denied all authority to these points on the ground that these towns have "limited transportation needs" and that the service was not shown to be "so inadequate as to justify a grant of additional authority." On reconsideration, the Commission, division 5, denied authority at Boaz and between Albertville and Birmingham on the ground that the service of Roadway Express, Inc., was not shown to be inadequate even though the evidence of record demonstrates and the Commission's report shows that Roadway would handle such traffic through its Gadsden terminal, in effect interchanging with itself at Gadsden.

After 4½ years of proceedings, which cost the applicant more than \$1,400, the Commission finally granted him limited authority to serve Albertville, but steadfastly refused to approve the extension of service to Boaz.

In the airline industry, 164 applications for regular trunk line passenger certificates were submitted to the Civil Aeronautics Board since 1938. Of these, 126 applications were either withdrawn or withered on the vine before a determination could be made. Not one of these applications was approved. Of the twenty-one non-scheduled carriers which applied in the combined *Transcontinental Coach* case,¹⁵ only four survived till the end of the proceedings. "We are small businessmen," one of them told a congressional committee. "We cannot afford to pay the fabulous attorney fees to have a lawyer present at this hearing every day that it has been going on for six months now. . . . They are slowly chopping our heads off while that is going on."¹⁶ Significantly enough, none of the four survivors made the grade. After twenty years of regulation, and despite a 4,000 per cent increase in traffic, there are four fewer trunk lines than when the Civil Aeronautics Act¹⁷ was passed.

The large firm does not face these handicaps. It can afford to be persistent—in the hope, or with the knowledge, that it will eventually master the labyrinthine regulatory maze. The case of Allied Van Lines, the nation's largest carrier of household goods, is not atypical.¹⁸ Beginning in 1942, Allied filed a series of four applications with the ICC in an effort to validate the nation-wide operations which it had conducted prior to the Motor Carrier Act. At first, Allied suffered a number of serious reverses. In 1943, the Commission rejected Allied's pooling proposal.¹⁹ In 1945, to terminate antitrust proceedings by the Department of Justice, Allied was forced to accept a consent decree under which the Allied system was, for practical purposes, dissolved.²⁰ Individual Allied agents were free to make interline arrangements with one another (like any other carrier could), but Allied's co-ordinating role, and its power to make co-ordination effective, were precluded. Finally, in February 1946,

¹⁵ *Transcontinental Coach-Type Service Case*, 14 C.A.B. 720 (1951).

¹⁶ Bendiner, *The Rise and Fall of the Nonskeds*, *The Reporter*, May 30, 1957, p. 32.

¹⁷ 52 STAT. 973 (1938), 49 U.S.C. §§ 401-681 (1952).

¹⁸ Adams & Hendry, *Trucking Mergers, Concentration, and Small Business: An Analysis of I.C.C. Policy 1950-56*, in *Hearings Before the Select Committee on Small Business of the Senate on Mergers and Possible Growth of Concentration in the Trucking Industry*, 85th Cong., 1st Sess. 211 333-43 (1957).

¹⁹ *Allied Van Lines, Inc.—Pooling*, 39 M.C.C. 287 (1943).

²⁰ *United States v. Allied Van Lines, Inc., et al.*, Civil No. 44-C-30 (N.D. Ill. 1945).

the Commission denied Allied's application for "grandfather" rights, as well as the application for a certificate of convenience and necessity.²¹ Allied seemed to have reached the end of the trail. It appeared that the Allied system was illegal in its conception and operation, that it was unfranchised, and that the Commission did not consider it a necessary or desirable element in the nation's transportation network. Then, in April 1946, the Commission, in effect, reversed its earlier Allied rulings, set aside the court's judgment in the antitrust proceedings, and approved Allied's operations on a nation-wide basis.²² The Commission recognized that

Insofar as competitors are concerned, it is doubtful that they will perceive any marked difference in Allied's operations after approval than before. . . .²³

Approval of the instant transaction would unquestionably give permanence to substantially the same arrangement that originated in 1928 and has grown to its present stature through a trial and error process. . . .²⁴

This is the fourth proceeding before us in which Allied Van Lines, Inc., has sought authority to continue substantially the same operations in which it has been engaged for many years. . . .²⁵

Despite some changes in form and detail, there has been no change in substance in the new Allied plan of organization and operation. . . .²⁶

The ability of a powerful applicant to persist in pushing its proposals had obviously paid off. Early reverses did not bankrupt or discourage the applicant. On essentially the same economic facts, the Commission was eventually persuaded to reverse itself and to approve the application.²⁷

The evidence on this score is rather conclusive. It shows that, in an administrative jungle, without *stare decisis* and *res adjudicata*, the firm with financial and market power has a clear advantage. Its operational efficiency may be no greater than that of its smaller rivals, but its power to sustain litigation efforts and expenses is unquestionably superior. Even if the law were enforced with intelligence and impartiality—an assumption not always consistent with the facts—the small business man would be seriously handicapped.

II

THE ADMINISTRATIVE PROCESS AND COMPETITIVE HARASSMENT

Much of the red tape and delay in administrative proceedings is due to the almost unlimited rights of intervention and protest which the commissions accord to parties with an only remote interest in a particular case. The right of protest is, of course, a safeguard for regulated firms against arbitrary and capricious administrative decisions. However, the exercise of this right is an expensive process—the cost of

²¹ Allied Van Lines, Inc., Common Carrier Application, 46 M.C.C. 159 (1946).

²² Evanston Fireproof Warehouse—Control—Allied Van Lines, Inc., 40 M.C.C. 557 (1946).

²³ *Id.* at 585.

²⁴ *Id.* at 592.

²⁵ *Id.* at 609-10 (concurring opinion of Commissioner Lee).

²⁶ *Id.* at 611 (dissenting opinion of Commissioner Alldredge).

²⁷ Further evidence to support this generalization is detailed in Adams & Hendry, *supra* note 18, at 343-50.

representation in prolonged proceedings can quickly become prohibitive—and in practice, the frequent use of this right becomes a luxury which only the largest companies can afford. Because of this, the right of protest has come to be used mainly by those firms which, by virtue of their size and financial resources, are least likely to be harmed by competitive pressures. Their frequent appearance as protestants suggests that the protests are a coercive and harassing weapon which they alone can use readily and which they can use to prevent the entry of new, or the growth of existing, competitors.

According to testimony before the Senate Small Business Committee, the delay, harassment, and bedlam which protests can cause at administrative hearings are unbelievable. An ICC practitioner told the Committee that at one hearing before a commission examiner, there²⁸

were so many attorneys intervening that we had to move from a small to a large courtroom in the Federal courthouse. At one point, there were so many objections being made between the time a question was asked and a ruling by the examiner that by the clock it took more than 45 minutes. Under these circumstances it was impossible to present any testimony.

The practitioner's client told the Senate Small Business Committee:²⁹

The procedure of the ICC . . . permits and even encourages all carriers to intervene and participate in all proceedings involving any other carrier, regardless of whether or not there is any clear or direct relation between the purpose of the hearing and the interest of the intervening carriers. Since the large carriers can and do maintain legal staffs simply for the purpose of carrying on such endless litigation before the ICC and since the small carriers cannot afford such uneconomic extravagance, this procedure by itself gives the large carriers a powerful weapon simply because of their size and wealth and which is completely unrelated to any principle. Furthermore, while the ICC complains that it is overloaded it actually multiplies its own work by making its own proceedings much longer and more complicated than they should be because of this unrestricted right of intervention. In our own case, this procedure has resulted in such confusion and harassment that it has actually prevented any orderly presentation of evidence. I think it is fair to say that *the procedures which the ICC has established present the small carrier with a type of modern ordeal by litigation.*

Not only is the large company in a more advantageous position than its smaller rivals for utilizing—indeed, perverting—the protest machinery, but it can do so with greater assurance of success. This emerges from a sample study of twenty-seven section five proceedings, decided between May 1951 and June 1955, and involving motor carriers of household goods.³⁰ The applicants in fourteen of these cases were

²⁸ *Hearings*, *supra* note 10, at 42.

²⁹ *Id.* at 47. (Emphasis supplied.) Other witnesses informed the Committee that certain motor carriers in New England are banded together in an organized group, generally represented by one attorney. Apparently, the attorney is retained on a monthly or yearly basis and is under instruction to protest every extension application which may remotely affect any of the participating carriers. As a result, the record is clogged with testimony which "is repeated over and over and over, in case after case, almost by rote, by professional witnesses" appearing for these organized protestants. *Id.* at 95.

³⁰ Adams & Henry, *supra* note 18, at 329-32.

"large" companies (gross revenues in excess of \$2,500,000 in 1953); the applicants in thirteen cases were smaller carriers. In all, a total of forty-four carriers intervened as protestants to the applications. Nine of these appeared as protestants in three or more proceedings, while thirty-five carriers appeared in no more than two proceedings. Viewed differently, the forty-four protestant carriers intervened 123 times, but the nine carriers who appeared three or more times accounted for eighty-one interventions—almost two-thirds of the appearances in opposition.

The nine protestants appearing so consistently were, with one exception, among the twenty-five largest household goods carriers in the country, and six of nine ranked among the ten largest movers. Not only did these nine carriers intervene more often than all other protestant carriers taken together, but they intervened more often against their small than their "large" competitors. Seventy-two and eight-tenths per cent of their protests were against small firms, and only 27.2 per cent against "large" carriers. This was not true of other carriers appearing in protest. They divided their interventions against "large" and small rivals in roughly equal proportion (54.8 per cent and 45.2 per cent, respectively).

Finally, it is noteworthy that the protests directed against smaller carriers were strikingly successful. Of the protested proceedings in the sample, two-thirds involved small carrier applications, and of these, only twenty per cent received Commission approval. One-third of the protested cases involved "large" carrier applications, and of these, sixty per cent were approved. Thus, the "large" carriers had an advantage on two counts: (a) a smaller percentage of their applications was protested; and (b) even when protested, a larger percentage of their applications received Commission approval.

From this study, Professor Hendry and the writer concluded that a few large firms—at least in this segment of the trucking industry—have the financial power to carry on a continuous campaign of protest against their smaller competitors, and that this campaign is an admirable device for curbing the growth of the small firm. This type of competition via the administrative process is fully as important as competition in the market place. As Commissioner Mitchell concedes, many interventions "are not real protests—they are delaying actions."³¹ They are a competitive weapon of harassment to which the small firm is peculiarly vulnerable, and against which it may well be defenseless.³²

³¹ Speech of ICC Commissioner Richard F. Mitchell before the Eighteenth International Convention of the Motor Carriers Lawyers Association, quoted in *Transport Topics*, May 28, 1956, p. 4. In this connection, former CAB Chairman Ross Rizley observed: "Private rights must be respected, but when protection of private interest reaches such a point that, for any case of reasonable size to reach decision, it takes months and months of hearings, and reams of irrelevant, repetitive, and frequently incompetent evidence; when it takes time, energy, and money spent on pressures to override the evidence introduced; when proceedings grow like cancer because of the need for protecting peripheral private rights . . . when all these elements combine, we lose sight of the basic reason for our existence, which is to assure to the public of the United States . . . an adequate, safe and successful air transportation system." *Some Personal Reflections After Eight Months As Chairman of the Civil Aeronautics Board*, address before the Chamber of Commerce, Enid, Oklahoma, Nov. 18, 1955.

³² By way of a remedy, one small business man has suggested that "carriers protesting an application

III

DIFFERENTIAL AND DISCRIMINATORY REGULATORY STANDARDS

To the small businessman, regulation is more than a procedural challenge. The delay, costliness, red tape, and competitive harassment inherent in the administrative process are formidable handicaps, but these are compounded by the latitude of agency discretion and the frequent failure to use such discretion in a uniform, nondiscriminatory manner.

The ICC's merger policy toward motor carriers is a case in point. This policy, according to a content analysis of section five decisions, is vague, vacillating, and inconsistent—with the Commission apparently imposing a "double standard" in judging the merger applications of large and small carriers.³³ What is embraced in one opinion as the natural and inevitable result of the economic facts of life is rejected in another as not demonstrably in the public interest. Where the fears of competitors are glibly dismissed in one instance, the plight of competitors assumes decisive significance in another. When the Commission is intent on approving a merger application, it finds that nothing has been adduced to show the transaction is "contrary to the public interest." When the Commission wishes to deny an application, the standards shift and the merger is rejected because the transaction was "not shown to be in the public interest." The first test represents an effective rear-guard action by the Commission against protests; the second puts the full burden of proof on the applicant, with the necessary volume and quality of proof somehow always beyond his reach.

On the issue of "unlawful operations,"³⁴ for example, the ICC condemned a small carrier for merging without prior Commission approval and for failure to terminate the unlawful arrangement even after a control investigation was instituted. The Commission denied the merger application because the transaction had not been shown to be in the public interest—despite evidence that applicants were providing a less-than-truckload service for small shippers unmatched by the giant protestants. Said the Commission:³⁵

There is little evidence in this record to justify the actions of respondents in accomplishing the common control of these carriers without our authority, or which would warrant our sanctioning such control at this late date. There can be no doubt that the individuals concerned were aware of the provisions of the act. . . . [Nevertheless, even] after entry of the order of investigation, although an application for authority under section 5 was filed, the parties took no steps to end the relationship and operating practices which clearly amounted to control and management in a common interest, and, indeed, in the face of that order and after the first hearing, the remainder of the stock was purchased.

should be required to prove through their records that a definite injury would be sustained, and a hypothetical assumption on their part would not enable them to participate. They should prove that a given percentage of their business is or would be affected, and this percentage should be such that they would definitely prove a substantial interest in the case." *Hearings, supra* note 10, at 446-47.

³³ *Adams & Hendry, supra* note 18, at 218-19.

³⁴ *Id.* at 276-80.

³⁵ *Cortland Fast Freight—Purchase—Korten*, 60 M.C.C. 321, 329 (1954).

In effect, applicants would have us ignore the unlawful control which has now continued for some years, and authorize the merger on the basis of the evidence presented, which is largely based on the unlawful control and the operations thereunder and directed primarily to the merger. The real issue is whether the common control of these carriers should be sanctioned under the circumstances presented. In our opinion, this record shows such a flagrant disregard for the law that divestiture should be ordered.

By contrast, the Commission reprimanded, but did not condemn three of the four largest household goods carriers for the identical offense. North American Van Lines had engaged in unlawful control and pooling without prior Commission approval and had failed to terminate these arrangements when a control investigation was instituted.³⁶ United Van Lines had been in continuing violation from 1947 to 1955 and had wilfully ignored at least one prior Commission finding of unlawful conduct.³⁷ Allied had been in violation for at least three years and had continued operating in the face of a consent decree providing for the virtual dissolution of the Allied system.³⁸ Yet, the Commission ultimately approved all three applications—not because they were shown to be *consistent* with the public interest, but because they were not shown to be *contrary* to the public interest.³⁹

With respect to the competitive impact of merger proposals, the Commission set up similarly inconsistent criteria. It approved numerous large carrier acquisitions on the grounds that the resulting increase in competition would yield public benefits without injuring protestant carriers. According to the Commission,⁴⁰

Protestants generally are apprehensive that if the proposed transaction is approved and consummated they would lose some of their traffic to vendee. Their fears are based upon the opinion expressed by their representatives and there is no evidence of record such as exhibits or statistics supporting those opinions. The extent to which these carriers claim their operations would be affected is speculative and conjectural and in the absence of a showing with some particularity how much traffic they would lose or to what degree their operations would be harmed, their apprehensions may be accorded little weight in determining the issues here presented. It is probably true that the transaction will cause (and the operations under temporary authority no doubt have already caused) some readjustments in competitive relations of carriers, and an intensification of competition between points in the territory of vendor. This almost always occurs, to a greater or lesser degree, when the purchasing carrier is stronger financially, and from the standpoint of equipment and facilities, than the selling carrier; but we are not convinced that any of the protestant carriers would be unable to meet the added competition without serious impairment of their existing services. . . .

In considering small carrier mergers, by contrast, the Commission tends to emphasize the adequacy of existing service, to show solicitude for the welfare of large and established carriers, and to express ominous misgivings about the future

³⁶ North American Van Lines—Investigation of Control, 60 M.C.C. 701, 748, 751, 753 (1955).

³⁷ Geitz Storage & Moving Co.—Investigation of Control, 65 M.C.C. 257, 290, 293, 294-95 (1955).

³⁸ See *supra* notes 19, 20, 21, and 22.

³⁹ Adams & Hendry, *supra* note 18, at 279.

⁴⁰ Mid-Continent—Purchase—Hanson, 11 Fed. Carr. Cas. 212, 215 (1955).

stability of the industry.⁴¹ In underscoring the protective role of regulation, the Commission characteristically argues that⁴²

We have stated in numerous cases that part of the burden of proof which applicants must meet in these proceedings to support a finding that a proposed purchase will be consistent with the public interest is to establish the traffic needs in the territory covered by the rights proposed to be purchased and the nature and scope of the service which has been rendered under those rights. . . . In the instant case, no evidence whatsoever was adduced showing a need for operations under the considered rights. . . . In the absence of evidence showing a need for the additional service by vendee, and where, as here, other carriers have expended their money and energy in developing facilities to handle all available traffic, they are entitled to protection against the establishment of what would be tantamount to a new service in competition with them. To permit a revival of service by vendee under rights presently having no real going-concern value in the considered territory would not foster sound economic conditions among the existing carriers and would not be consistent with the public interest.

In small carrier mergers, interestingly enough, the primary burden of proof seems to rest with the applicant while, in large carrier acquisitions, the burden seems to shift to protestants. In both instances, the position of the small firm is somewhat less than enviable.

Most serious, from the viewpoint of small business, is the Commission's reluctance to consider merger proposals in the light of antitrust criteria.⁴³ The Commission seems not only to tolerate, but to succor and encourage giant consolidations. Its chairman, in fact, told the Senate Small Business Committee that concentration in the trucking industry should go⁴⁴

a lot further than it has gone. While there obviously has been a certain amount of concentration, in my personal opinion, there hasn't been enough concentration. We need more concentration than has occurred if we are going to have a healthy, vigorous motor-carrier industry.

And again:⁴⁵

As I have stated, in our opinion or at least in my opinion, we need more concentration than we have had, so there is no reason to be alarmed about it at this stage of the game. It is like the history of the railroads.

⁴¹ The ICC's "double standard" toward large and small carriers is dramatically illustrated by the Commission's rationale in *St. Johnsbury Trucking Co.—Purchase—Hinsch*, 59 M.C.C. 419 (1953), 59 M.C.C. 747 (1954); and *Law & Ingham—Purchase—Howe* (decided July 1, 1955). On a similar set of facts involving the New England area, the Commission reached diametrically opposite decisions. Only after the Senate Small Business Committee hearings exposed the utter inconsistency of the ICC's position did the Commission—at least in this instance—reconsider and reverse its ruling with respect to the small carrier.

⁴² *Willers, Inc.—Purchase (Portion)—Everson*, 10 Fed. Carr. Cas. 222 (1953).

⁴³ For a comprehensive analysis of this problem, see Fulda, *Antitrust Considerations in Motor Carrier Mergers*, 56 MICH. L. REV. 1237 (1958). See also Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

⁴⁴ *Hearings*, *supra* note 18, at 111.

⁴⁵ *Id.* at 112.

Perhaps this predilection is a key to the Commission's merger policy. It may explain the Commission's receptivity to ambitious merger programs and its apparent disregard of growing concentration. It may explain the phenomenal success of giants like Pacific Intermountain Express in merger proceedings before the Commission. An examination of section five dockets between 1950 and 1955 shows that the Commission employed vague, vacillating, inconsistent, and sometimes contradictory, standards to sanction PIE's acquisitions.⁴⁶ In some cases, the vendors were in financial difficulty, while in others, they could easily have survived as separate entities. In some cases, the merger involved connecting rights, while in others, it covered duplicating rights, and hence resulted in the elimination of some competition. In one case, the Commission approved an acquisition because the resulting routes would be too circuitous to affect the competitive balance in the area.⁴⁷ In subsequent proceedings, it allowed PIE to buy rights which reduced, if not eliminated, this circuitry.⁴⁸ In some cases, the Commission granted its approval on the ground that competitors would not be adversely affected, while in others it simply declared that more intense competition is a good thing. On the one hand, the Commission approved mergers because they would enable PIE to improve its service, while, on the other hand, it assured protestants that their competitive position vis-à-vis PIE would remain undiminished.⁴⁹ The rationale of each decision may have been different, but the end result was unmistakable.

This inconsistent treatment of a given carrier at different times, or different carriers at the same time, somehow yields a pattern of favoritism toward large and established regulatees. Behind the façade of administrative expertise, the Commission seems to be able to reach almost predetermined conclusions by subtle variations in the application of regulatory criteria. Inconsistency permits individual commissioners to decide cases more on whim and caprice than on the basis of settled principles. But inconsistency is not only an ICC malaise. It infects other regulatory commissions, in perhaps epidemic proportions, and produces similar effects. Thus, the Federal Communications Commission, according to a content analysis of some sixty television cases—⁵⁰

appears to have made decisions which are diametrically opposed both to the standards which it itself has developed and to its own decisions in other contemporaneous cases.

In addition, there has been observed a tendency in the Federal Communications Commission in recent years to modify the weight given to the different criteria developed by it. Such modification has been in the direction of diminishing the importance of criteria such as local ownership, integration of ownership and management, and diversification of control of the media of mass communications (all of which tend to favor the small newcomer, without established broadcasting interests) and magnifying the weight given to the

⁴⁶ Adams & Hendry, *supra* note 18, at 261-70.

⁴⁷ Pacific Intermountain Express—Control—West Coast Fast Freight, 60 M.C.C. 314 (1955).

⁴⁸ Pacific Intermountain Express—Control—Orange (decided Feb. 16, 1956).

⁴⁹ Adams & Hendry, *supra* note 18, at 270.

⁵⁰ *Excerpts from Report of the House Subcommittee Criticizing the F.C.C.*, N.Y. Times, Jan. 23, 1958, p. 14, col. 4.

criterion of broadcast experience (which tends to favor the large established company, with extensive existing broadcast interests). . . .

In a number of recent cases, indeed, the experience factor has tended to be all but conclusive. The result has been a growing number of decisions which increase the already pronounced tendency toward concentration of ownership in the broadcast field.

The arena may be different, but the issues are the same. Here, as in other regulated industries, small business may solve the technological and economic challenge of the market place. It may even break through the bureaucratic cobwebs of administrative procedure. But how can it penetrate the regulatory mentality which, in the midst of inconsistency, consistently tends to favor entrenched interests.

IV

REGULATORY RESTRICTIONISM AND SUPPRESSION OF COMPETITION

The tendency to favor entrenched interests derives from a protective philosophy—a “going concern” theory of regulation. Faced with a large, powerful, and successful enterprise, a commission is reluctant to tamper with it. To order a drastic change in the affairs of smaller firms seems to offer less of an obstacle—perhaps, because the fear of mistakes is less when the magnitude of the possible error is smaller. Whatever the reason, the very existence of a large, established firm—its presence as a going concern—seems to improve its claim to administrative protection.⁵¹

This protective philosophy is partly of legislative origin. It is rooted in the statutory authorization for techniques which the antitrust laws proscribe in other industries, viz. the control of prices and the restriction of entry.⁵² Prices are made subject to the minimum as well as maximum rate powers of a commission. Entry is restricted through the imposition of certification requirements. Those already in the field are given a preferred position by the grandfather clauses, which assure established firms the right to continue in operation. All other firms must not only convince the regulatory agency that they are fit, willing, and able to render adequate service, but also that such service is required by “public convenience and necessity.” In effect, newcomers must show that entry will not make the industry too competitive to maintain rates and profits at a level deemed desirable for the protection of the industry.

Within this broad legislative mandate, the commissions have considerable administrative discretion, and they tend to use such discretion toward protectionist ends. The ICC, for example, has utilized its minimum rate powers “both to protect the railroads from motor carrier competition as well as to safeguard the motor carrier industry from ‘destructive’ competition within its own ranks.”⁵³ It has used its certification powers to impose an almost insurmountable burden on applicants for

⁵¹ Adams & Hendry, *supra* note 18, at 350.

⁵² Cf. the excellent statement of John Paul Stevens, a member of the Attorney General’s National Committee to Study the Antitrust Laws, before the Senate Small Business Committee, in *Hearings, supra* note 10, at 213-15.

⁵³ ATT’Y GENERAL’S NAT’L COMM. TO STUDY THE ANTITRUST LAWS, REPORT 265 (1955) [hereinafter cited as ATTORNEY GENERAL’S REPORT].

new operating authority, extension of existing authority, alternate route privileges, and elimination of backhaul restrictions.⁵⁴ Repeatedly, the Commission has emphasized that where existing carriers have expended their energy and resources in developing facilities to handle all available traffic, and where their service is adequate, they are entitled to protection against the establishment of a new, competitive operation. In some cases, the Commission has even espoused the doctrine that adequate rail service is sufficient ground for denying the inauguration of a competing truck service.⁵⁵ Most pernicious, however, is the Commission's theory that shipper need is to be measured in physical rather than economic terms—*i.e.*, as long as existing carriers are physically capable of performing a given service, prospective competitors are to be denied entry—even if their service is cheaper, better, and more efficient.⁵⁶ The implications of this for small business are too obvious for comment.

The Civil Aeronautics Board, at least until recently, has followed a similarly restrictive and protective policy. Despite a 4,000 per cent increase in air travel between 1938 and 1956, the Board has not allowed a single new passenger trunk line carrier to enter the industry. According to a former CAB chairman,⁵⁷

In every instance thus far in which the Board has found that additional and competing passenger trunkline services on high density segments are required by the public convenience and necessity it has concluded that the objectives of the act would be better served by the award of the route to a carrier already holding certificate authority than to a new company.

According to Judge Rizley, this restrictive entry policy reflects an "undue shift of emphasis from public convenience and necessity to the seeking and protection of private carrier rights."⁵⁸ It explains, in part, why eighteen years after regulation was instituted, the grandfather carriers still earn roughly ninety per cent of all commercial revenues in the industry.⁵⁹

Symptomatic of the Board's solicitude for established regulatees is its policy toward the nonscheduled airlines. The "nonskeds" were denied entry into the industry because the Board feared the probable diversion of traffic from established carriers, the effect of such diversion on existing load factors, and the subsequent subsidy drain on the federal treasury.⁶⁰ The fact that these fears were largely unfounded; that irregular competition provided a yardstick for measuring the possibilities of profitable, unsubsidized service; that such yardstick competition could be an adjunct to conventional regulatory controls; that the "nonskeds" offered promo-

⁵⁴ Cf. Select Committee on Small Business of the Senate, *Competition, Regulation, and the Public Interest in the Motor Carrier Industry*, S. REP. No. 1693, 84th Cong., 2d Sess. 2-14 (1956).

⁵⁵ This is the testimony of the Chief of the Antitrust Division, Dep't of Justice, in *Hearings*, *supra* note 10, at 138-39.

⁵⁶ *Id.* at 186-88.

⁵⁷ Quoted in Antitrust Subcommittee of the House Committee on the Judiciary, *The Airlines Industry*, H.R. REP. No. 1328, 85th Cong., 1st Sess. 102-03 (1958) [hereinafter cited as REPORT ON AIRLINES].

⁵⁸ Address by Ross Rizley, *supra* note 31.

⁵⁹ REPORT ON AIRLINES 74.

⁶⁰ Transcontinental Coach-Type Service Case, 14 C.A.B. 720 (1951).

tional competition which tapped formerly untapped markets rather than diverted traffic from the certificated carriers; in short, that the "skimming of the cream" complaint against the "nonskeds" had little substance is only further evidence of protective restrictionism.⁶¹ It reflects an administrative milieu hostile to entry and competition—a milieu in which there is little place for the enterprising, innovating, small business newcomer. Incidentally, it also reflects a scheme of values where protection of the regulatee takes precedence over promotion of the public interest.⁶²

This regulatory protectionism has other ramifications. In some cases, it implies not only a restrictive entry policy, a toleration of price-fixing arrangements, and a promotion of mergers, but also administrative efforts to suppress the competition of unregulated substitutes. "The temptation," as Lucille Keyes observes,⁶³

is to make the path of the regulative agency easy; to eliminate the uncertainties arising from outside competition by empowering these agencies to suppress it; and thus also to soothe the feelings of possibly outraged regulatees who may complain of having to serve two masters: the commission and the competitive market.

Regulation is contagious. Its logical consequence is the systematic suppression of outside competition—or, at least, the constant harassment of unregulated, irregular, exempt, or unlicensed interlopers.⁶⁴

The administrative decisions and legislative recommendation of the ICC illustrate this proposition. The Commission fought for the Motor Carrier Act of 1935 in order to protect railroads from the unregulated competition of the trucking industry.⁶⁵ It supported the Transportation Act of 1940⁶⁶ to protect the railroads from

⁶¹ Adams, *The Role of Competition in the Regulated Industries*, 48 AM. ECON. REV. PROC. 527, 539-40 (1958).

⁶² Professor Marver Bernstein has observed that regulation by independent commissions "tends to destroy rather than promote competition. The historical tradition of commissions is anticompetitive. Their basic methods, especially their reliance upon the case-by-case approach, place small-business firms at a disadvantage. The growing passivity of the commissions' approach to regulation and the inconvenience of dealing with large numbers of firms strengthen the commissions' tendency to identify their view of the public interest with the position of the dominant regulated firms. In short, regulation of particular businesses by independent commission stacks the cards against the small competitive firm and weakens the force of competition." *Hearings on Monopoly Problems in Regulated Industries, Airlines, Before the Antitrust Subcommittee of the Committee on the Judiciary of the House*, 84th Cong., 2d Sess. 64 (1956).

⁶³ Keyes, *The Protective Functions of Commission Regulation*, 48 AM. ECON. REV. PROC. 544, 546 (1958).

⁶⁴ The nonscheduled airlines, according to the Senate Small Business Committee, "have managed to survive since 1948 in spite of constant harassment: The CAB's ever-narrowing interpretation of its regulations; new regulations designed to limit the 'nonskeds' almost entirely to noncommon carrier operations; vigorous enforcement activities and regulatory actions which will, if unchecked, inevitably eliminate them within a year or two; and a campaign possibly inspired by major airlines to discredit them in the public mind." Select Committee on Small Business of the Senate, *Role of Irregular Airlines in United States Air Transportation Industry*, S. REP. NO. 540, 82d Cong., 1st Sess. 5 (1951). The Committee's prediction on the demise of the "nonskeds" came true—at least with respect to North American Airlines, the most powerful carrier group in the "nonsked" category.

⁶⁵ The Motor Carrier Act was the culmination of a determined legislative campaign by the railroads and the ICC (which acted as their spokesman) to stifle unregulated competition. In its annual report for 1932, the Commission conceded that "there is substantially no demand for public regulation of the charges of motor trucks to protect shippers against exorbitant or discriminatory charges. The demand has been chiefly from the railroads, and for the prescription of minimum rather than maximum charges." 46 ICC ANN. REP. 20 (1932). Despite this admission, and despite the strong opposition of the major

the unregulated inland water carriers.⁶⁷ It pleaded with Congress to "clarify" the status of private and contract motor carriers in order to shield certificated firms from troublesome rivals. Most dramatically, it sought to narrow and emasculate the agricultural exemption under which motor vehicles hauling ordinary livestock, fish, or agricultural commodities (not manufactured products thereof) were exempt from the entry, rate, and route restrictions of the ICC.⁶⁸

In attacking the agricultural exemption, the Commission at first proclaimed the "poisoned vehicle" doctrine, which made the vehicle, not the commodity, the test for the exemption.⁶⁹ Next, the Commission embraced the "channels of commerce" theory, which held that the exemption covers only the first haul from farm to market.⁷⁰ Then, the Commission announced a number of restrictive commodity interpretations under which redried tobacco leaf, dressed poultry, shelled nuts, nursery stock, flowers and bulbs, and frozen fruits and vegetables were held to be manufactured goods, rather than agricultural commodities.⁷¹ Finally, the Commission adopted a "trip leasing" regulation, which would have nullified the exemption for agricultural haulers who used single-trip or backhaul leases to achieve full utilization of equipment and consequent economy of operation.⁷² These attempts to cur-

farm organizations and most shipper groups, the ICC consistently endorsed legislation to bring unregulated segments of the transportation industry under its control. See Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L. J. 467, 478-81 (1952); see also REPORT ON AIRLINES 265.

⁶⁸ 54 STAT. 950 (1940), 49 U.S.C. § 153 (1952).

⁶⁷ Here, as in the case of motor carrier regulation, the farm organizations, the shippers, and the majority of the water carriers themselves were strongly opposed to regulation. The ICC, the Federal Coordinator of Transportation, and the railroads were strongly in favor of regulation. See Huntington, *supra* note 65, at 479.

⁶⁸ Interstate Commerce Act II, § 203(6)(b), 52 STAT. 1029 (1938), as amended, 66 STAT. 479, 49 U.S.C. § 303(b) (1952).

⁶⁹ Monark Egg Corp. Contract Carrier Application, 26 M.C.C. 615 (1940); Norman E. Harwood Contract Carrier Application, 47 M.C.C. 597 (1947). The "poisoned vehicle" doctrine was struck down by the courts in ICC v. Dunn, 166 F.2d 116 (5th Cir. 1948); ICC v. Service Trucking Co., 91 F. Supp. 533 (E.D. Pa. 1950), *aff'd*, 186 F.2d 400 (3d Cir. 1951).

⁷⁰ Monark Egg Corp. Contract Carrier Application, 44 M.C.C. 15 (1944). Seven years later, the Commission itself rejected the "channels of commerce" theory in Determination of Exempted Agricultural Commodities, 52 M.C.C. 511 (1951).

⁷¹ Determination of Exempted Agricultural Commodities, 52 M.C.C. 511 (1951); ICC v. Yeary Transfer Co., 104 F. Supp. 245 (E.D. Ky. 1952), *aff'd*, 202 F.2d 151 (6th Cir. 1953); ICC v. Kroblin, 113 F. Supp. 599 (N.D. Iowa 1953), *aff'd*, 212 F.2d 555 (8th Cir. 1954), *cert. denied*, 348 U.S. 836 (1954); East Texas Motor Freight Lines v. Frozen Food Express, 351 U.S. 49 (1956); Consolidated Truck Service v. United States, 144 F. Supp. 814 (D. N.J. 1956); Florida Gladiolus Growers Ass'n v. United States, 106 F. Supp. 525 (S.D. Fla. 1952); Home Transfer & Storage Co. v. United States, 141 F. Supp. 599 (W.D. Wash. 1956), *aff'd*, 352 U.S. 884 (1956).

⁷² *Ex parte* MC-43, Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675 (1951). Perhaps the Commission's reason for adopting a rule so destructive of the agricultural exemption is best revealed in a colloquy which took place in the district court in American Trucking Ass'n v. United States, 344 U.S. 298 (1953). The attorney for the Commission was asked if it was wasteful for a truck to bring an exempt load from Florida to the north and then return empty, to which he replied—with commendable candor: "It does seem uneconomical in requiring it to go back empty but they can. The difficulty comes, I think, in letting it come up in the first place." Quoted in minority opinion, *id.* at 332. For a discussion of the implications of this order, see *Hearings*, *supra* note 10, at 116-18, 124, 108-09; 252-53; 53-54; 177-82.

tail unregulated competition were consistently defeated—both in the courts and in Congress. According to Judge Graven,⁷³

There are two features that stand out most predominantly in the voluminous legislative history relating to amendments made or proposed to Section 203(b)(6). One feature is that every amendment that Congress has made to it has broadened and liberalized its provisions in favor of exemption and the other feature is that although often importuned to do so, Congress has uniformly and steadfastly refused or rejected amendments which would either directly or indirectly have denied the benefits of the exemptions. . . .

The Transportation Act of 1958,⁷⁴ however, reversed this unidirectional trend. In response to persistent ICC requests, Congress subjected to regulation a number of agricultural commodities theretofore considered exempt.⁷⁵ In addition, Congress responded to industry and ICC pressures to narrow the exemption of private carriers⁷⁶ and the scope of contract carriers.⁷⁷ Regulation was tightened with respect to competitive elements within the industry and extended to previously unregulated

⁷³ *ICC v. Kroblin*, 113 F. Supp. 599, 630-31 (N.D. Iowa 1953). For an analysis of the legislative and judicial history of the agricultural exemption, see also Fulda, *The Agricultural Exemption in the Motor Carrier Act Should Not Be Repealed*, 43 VA. L. REV. 677 (1957); Fulda, *Competition Versus Regulation: The Agricultural Exemption in the Motor Carrier Act*, 11 VAND. L. REV. 543 (1948); U.S. DEP'T OF AGRICULTURE, *THE AGRICULTURAL EXEMPTION IN INTERSTATE TRUCKING* (Marketing Research Rep. No. 118, 1957).

⁷⁴ § 7(a), 72 STAT. 573, 49 U.S.C.A. § 303 (Supp. 1959).

⁷⁵ Frozen fruits, frozen berries, and frozen vegetables were specifically removed from the exempt category. Not content with this partial victory, however, the certificated carriers are now demanding similar action with respect to fresh and frozen dressed poultry, shelled peanuts, frozen milk and cream, and powdered milk. According to the railroads, "continuation of such processed or manufactured commodities in a special status exempt from regulation clearly is of no provable significant benefit to farmers, while the effect on regulated carriers, whose rates must be published and cannot readily be adjusted to meet the rates of their unregulated competitors, can only be detrimental. Failure of Congress to roll back the scope of the exemption to its original and only justifiable purpose [the initial movement from farm to market] leaves still another major transportation problem unresolved." AMERICAN ASSOCIATION OF RAILROADS, *TRANSPORT TALLY II-12* (1958). Here, once again, is an admission that the certificated carriers, especially the railroads, cannot fight unregulated substitutes by economic measures and that they need protective legislation to hold their own in the transportation market. Ironically enough, these carriers demand protection from competition, while at the same time claiming competitive superiority. Apparently, they intend to demonstrate this superiority through the legislative extinction of their "inferior" rivals. Until this happens, however, the exempt carriers shall continue to furnish embarrassing proof that competition in trucking makes for better, cheaper, and more efficient service. See, e.g., U.S. DEP'T OF AGRICULTURE, *INTERSTATE TRUCKING OF FRESH AND FROZEN POULTRY UNDER AGRICULTURAL EXEMPTION* (Marketing Research Rep. No. 224, 1958).

⁷⁶ Under the Transportation Act of 1958, § 8(c), 72 STAT. 574, 49 U.S.C.A. § 303(c) (Supp. 1959), no person engaged in any business enterprise other than for-hire transportation shall "transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person." According to its sponsors, this provision is designed to stop the practice of buying and taking title to goods in one location to sell them at a price, including a charge for transportation, at another location.

⁷⁷ Under a 1958 amendment to the Interstate Commerce Act, contract carriage by motor vehicle is limited to for-hire transportation performed under contract for one person or a limited number of persons, under terms and limitations laid down by the ICC. 72 STAT. 573 (1958), 49 U.S.C.A. § 303(a)(15) (Supp. 1959). Previously, contract carriers were free, within the scope of their authority, to serve any number of shippers. Another amendment requires contract carriers to file with the Commission their actual, rather than minimum, rates or charges.

⁷¹ STAT. 343 (1957), 49 U.S.C.A. § 318(a) (Supp. 1959). The purpose, according to the railroads, was to limit the freedom of contract carriers "to undercut the rates of common carriers at will." ASSOCIATION OF AMERICAN RAILROADS, *op. cit. supra* note 75, at 19.

substitutes. Once again, it was demonstrated that regulation breeds regulation, that it cannot tolerate competition from within or without, and that vested interests—once they have been established—will insist on the protection and extension of their privileges.

In a sense, this is inevitable. Once a commission is given the power to dispense private privilege, it is almost compelled to validate the financial values predicated on such privilege, and does so by suppressing competition wherever possible. The only escape from this dilemma is to abolish the power of privilege and, where economically and technologically feasible, to place greater reliance on the regulatory machinery of competition. This is the only defense which small business has against treatment as an economic interloper and outlaw.

V

UNDUE IDENTIFICATION BETWEEN REGULATORS AND REGULATEES

One other factor may explain the discrimination, restrictionism, and protectionism so frequently associated with regulation. This is the tendency of many commissioners to identify so closely with the industries they regulate, that the "regulatees wind up doing the regulating."⁷⁸ In its mildest form, such identification results in subordination of the public interest to private privilege; in its most virulent form, it results in influence peddling and corruption.

The average commissioner is not immune from human frailty and ambition. Appointed for only a limited term of office, he is concerned with his future. Whether he plans to remain in government service or to enter private practice, his career depends, in large measure, on the industry he is supposed to regulate. If he wants to be reappointed by the President and confirmed by the Senate, the industry's support is an undeniable, and perhaps decisive, asset. If he is not reappointed or if he decides to retire, his professional future lies almost certainly with the industry. In any event, the commissioner is aware of the experience of his predecessors. He knows that the industry's enemies seldom go unpunished, and that mavericks and nonconformists must seek other than tangible rewards.⁷⁹ And so, quite naturally and perhaps imperceptibly, an accommodation of views takes place.

⁷⁸ Remark attributed to Senator Burton K. Wheeler, and quoted in BLAIR BOLLES, *How to GET RICH IN WASHINGTON* 23 (1952). After its investigation of the airline industry, the Senate Small Business Committee found "reasonable grounds for concluding that there exists a certain identity of interest between the CAB and the more firmly established portion of the industry. Such identity of interest is not infrequent between Government regulatory bodies and those subject to their regulation." Select Committee on Small Business of the Senate, *Role of Irregular Airlines in United States Air Transportation Industry*, S. REP. No. 540, 82d Cong., 1st Sess. 2 (1951).

⁷⁹ Some commissioners are unquestionably able and dedicated men, but ability and devotion are no guarantee of personal success. A commissioner who unswervingly defends the public interest and enforces the law without fear or favor takes a calculated risk. He must be prepared for the consequences—a possibly abrupt end to his official career. James M. Landis, for example, a CAB chairman and noted jurist, was denied reappointment for opposing the merger of Pan American with American Overseas Airlines. Leland Olds, an FPC chairman, who had spent a lifetime promoting natural gas conservation, was denied Senate confirmation because his opinions were unpalatable to powerful natural gas interests and their protagonists in Congress. CAB Commissioner Joseph Adams, an able and devoted public servant, was not reappointed because he was so indiscreet as to support a more competitive certification

This accommodation of views is facilitated by the informal and nonjudicial atmosphere surrounding the relation between the regulated and their regulators.⁸⁰ Some commissioners engage in constant fraternization with individuals and corporations who appear as litigants before their agency. Some have had their room, board, and other expenses paid by the regulated industry while attending industry conventions.⁸¹ Some have had *ex parte*, off-the-public-record discussions with litigants about pending cases and have, at least in some instances, referred to the merits of these cases.⁸² Members of the FCC have received free service contracts for their personal television, radio, and hi-fi sets from a company which is no stranger to litigation before the commission.⁸³ One FCC commissioner has been indicted for allegedly accepting a bribe in the award of a Miami television channel, and a former FCC chairman has not found it improper to be approached by various parties in a Boston television case. These men, he reported to a congressional committee, did not want to influence him or do anything wrong; they just wanted to tell him what fine fellows they were.⁸⁴

This is not the kind of milieu which inspires confidence in quasi-judicial decision-making. If a federal judge engaged in the foregoing practices, he would be consid-

policy and the allocation of routes to "have not" carriers. Other commissioners, by contrast, with more ambivalent records and more sympathetic understanding of their regulatees, have found the going easy. Their reappointment and confirmation were seldom debated, and their economic future upon separation from government service was rarely in doubt. Thus, Owen D. Clarke, an ICC chairman and articulate spokesman for the certificated giants, resigned to accept the vice-presidency of the C & O Railroad. His ICC colleague, Robert W. Minor, turned down a seven-year reappointment to become vice-president of the New York Central Railroad. In these, as in other cases, there is some question whether the personnel of regulatory commissions look upon their positions as a public trust or merely as a convenient stepping stone to lucrative employment in the industry they are supposed to regulate.

⁸⁰ Most commissions have formulated principles of practice designed to preserve a judicial atmosphere. The CAB's rules, for example, state: "300.2 *Hearing Cases—Improper Influence*. It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases—

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

(b) It is likewise improper that there be any private communications on the merits of the case to a member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case." 14 C.F.R. § 300.2 (1956).

⁸¹ *Excerpts from Report of the House Subcommittee Staff Criticizing the F.C.C.*, N.Y. Times, Jan. 23, 1958, p. 14, col. 1.

⁸² The Subcommittee on Legislative Oversight found that in the *Miami Channel 10* case "several *ex parte* contacts on behalf of two of the principal contenders for the license were made or attempted to be made both by persons who did, and by persons who did not, participate in the presentation or preparation for presentation of the case before the examiner." Special Subcommittee on Legislative Oversight of the House, *Interim Report on the Federal Communications Commission*, H.R. REP. No. 1602, 85th Cong., 2d Sess. 16 (1958). In the airline industry, the famous Denny-Tipton conversation has raised similar questions of improper influence. See REPORT ON AIRLINES 147-59, esp. 149 and 157.

⁸³ *Excerpts from Report of the House Subcommittee Staff Criticizing the F.C.C.*, N.Y. Times, Jan. 23, 1958, p. 14, col. 1.

⁸⁴ 104 CONG. REC. 7253 (daily ed. May 6, 1958).

ered unfit to continue in office. For a judge to accept favors from a litigant would be a gross violation of judicial ethics; and for a litigant to offer such favors, a grave impropriety. It is inconceivable that a judge would permit the parties in a pending case to come in and tell him what fine fellows they are. Such *ex parte* relationships are not only improper, but they offend a basic canon of American administrative law, viz. "the exclusiveness of the record." They do violence to a decision-making process based entirely on evidence presented in open hearings and contained in a public record.⁸⁵

For small business, the implications are far from sanguine. The small firm must keep its nose to the grindstone. It must fight the daily vicissitudes of the market place to assure survival. It has neither the resources nor the public-relations machinery to exercise proper or improper influence. Regardless of its moral inclinations, it cannot compete for the minds and souls of individual commissioners. It cannot offer lucrative jobs, nor can it guarantee effective political support. It can only hope for the appointment of commissioners who have the wisdom, integrity, devotion, and perseverance to resist the fleshpots of temptation. But hope, in this context, is not always an effective weapon.

CONCLUSION

Regulation by independent regulatory commissions has not turned out to be the new, flexible, creative control instrument envisaged by the philosophers of the administrative process. Even in the absence of venality and corruption, regulation has come to suffer from deep-seated institutional infirmities which militate against the competitive entrepreneur and dynamic innovator. The cost and delay of proceedings; the harassment by powerful protestants; the slavish adherence to technicalities; the pharasaical devotion to a case-by-case approach; the sacrifice of substance for form; the use of differential, inconsistent, and often discriminatory standards; the adoption of restrictive and protective policies; the undue identification with established interests; the petulant defense of the status quo; the sensitivity to organized pressures; the pervasive distrust of large numbers—these have become the hallmark of the regulatory process. Lacking boldness of vision, and beset by an anti-competitive bias, a bureaucratic rigidity, and an annoyance with the forces of change, the commissions have generally been hostile to the newcomer, the challenger, the innovator. As a result, the regulated industries have not been a favorable habitat for small business.

This problem, while vexing, is not insoluble. A reappraisal of the regulatory experiment in the light of experience may well indicate that (1) in inherently com-

⁸⁵ To prevent such *ex parte* relationships, the Subcommittee on Legislative Oversight has recommended legislation "... (2) to require that any Commissioner or staff member receiving an *ex parte* communication shall place such communication (or a memorandum stating the circumstances and substance of such communication if such communication was made orally) in the public record in the case; and (3) to provide that the Secretary of the Commission shall transmit to each party a copy of such communication or memorandum." Special Subcommittee on Legislative Oversight of the House, *supra* note 82, at 17.

petitive industries, where there are no substantial economies of scale, gradual but total deregulation is both feasible and desirable;⁸⁶ (2) in industries where some regulation is necessary, the commissions should be compelled by specific mandate "to promote competition and diversification to the maximum extent practicable";⁸⁷ in some of these industries, commissions should be directed to approve entry applications, except where such approval can be shown to be contrary to the public interest—i.e., the presumption should be in favor of entry, and the burden of proof, in case of denial, should be on the commissions, not the applicant;⁸⁸ and finally (3) in industries where some regulation is necessary, combinations and collusive practices should not be immune from antitrust attack, unless the commissions can show that

⁸⁶ The trucking industry, for example, possesses none of the "natural monopoly" characteristics normally associated with such public utilities as local gas, water, and light companies. In fact, recent trucking studies cast serious doubt on the correlation between giant firm size and operating efficiency. Other factors than size seem to be more directly related to adequate service at low cost. The alleged economies of scale are apparently no more than the figment in a bureaucratic imagination. See Roberts, *Some Aspects of Motor Carrier Costs: Firm Size, Efficiency, and Financial Health*, 32 LAND ECON. 228 (1956); NEW ENGLAND GOVERNORS' COMMITTEE ON PUBLIC TRANSPORTATION, *MOTOR FREIGHT TRANSPORT FOR NEW ENGLAND: A REPORT TO THE NEW ENGLAND GOVERNORS' CONFERENCE* (Rep. No. 5, 1956); Pegrum, *The Economic Basis of Public Policy for Motor Transport*, 28 LAND ECON. 244 (1952); and "Statement by Professor Dudley F. Pegrum, Professor of Economics, University of California, Los Angeles, to the Senate Small Business Committee on the Effects of Regulation on Small Business," in *Hearings, supra* note 10, at 465.

⁸⁷ In the airline industry, the regulatory mandate in Civil Aeronautics Act § 2(d), 52 STAT. 980 (1938), 49 U.S.C. § 402(d) (1952), calls for the promotion of competition only "to the extent necessary to assure the sound development of air transportation." The Celler Committee, after a rather thorough investigation of the industry, recommended that Congress direct the CAB to consider competition "to the maximum extent practicable," rather than "to the extent necessary." This shift of emphasis, the Committee said, "would tend to overcome the protectionist bias" in airline regulation. See REPORT ON AIRLINES 267. Other observers have found that the industry's technological and economic characteristics do not justify the CAB's pervasive entry restrictions. E.g., LUCILLE S. KEYES, *FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION* (1951); Maclay & Burt, *Entry of New Carriers into Domestic Trunkline Air Transportation*, 22 J. AIR L. & COM. 131 (1955). Lucille Keyes has suggested that Congress "promptly provide for the abolition of entry control geared to the protection of carrier revenues." She feels that "this aim can be most satisfactorily accomplished through a Congressional policy declaration affecting the working criteria of the regulatory agency rather than through outright rescission of the certification requirement itself." Keyes, *A Reconsideration of Federal Control of Entry into Air Transportation*, 22 J. AIR L. & COM. 192, 201-02 (1955). Also noteworthy in this connection are the following conclusions of the Brownell Committee: "All other factors being equal, the policy of the antitrust laws would clearly favor competition by two to service by one. If, therefore, the statutory standard of 'public interest' gives any effect at all to antitrust policy, in a case in which all other factors neutralize one another, it should require a regulatory agency to resolve such an issue in favor of competition rather than monopoly." ATTORNEY GENERAL'S REPORT 267. "Even in areas where Congress has adopted the policy that 'competition may [not] have full play, we feel that unless Congress has expressly provided to the contrary, the regulatory guide consistent with the 'public interest' . . . must 'include the principles of free enterprise which have long distinguished our economy.' It is no longer subject to challenge that 'competition is a relevant factor in weighing the public interest.'" *Id.* at 269.

⁸⁸ The Senate Small Business Committee has recommended that the Interstate Commerce Act § 307, 49 STAT. 551 (1935), 49 U.S.C. § 307 (1952), be amended to direct the ICC to issue motor carrier certificates "if it is found that the applicant is fit, willing, and able properly to perform the service proposed . . . and unless there is clear and convincing evidence that the proposed service . . . is not or will not be required by the present or future public convenience and necessity." Select Committee on Small Business of the Senate, *Competition, Regulation, and the Public Interest in the Motor Carrier Industry*, S. REP. NO. 1693, 84th Cong., 2d Sess. 28 (1956). The Committee suggested a similar change with respect to the permit requirements governing contract carriers. *Ibid.* It is significant that even Secretary of Commerce Sinclair Weeks, a persistent spokesman for regulatory restrictionism, endorsed this suggested change. See *Hearings, supra* note 10, at 310.

in particular cases, a specific exemption would yield affirmative benefits to the public.⁸⁹ Of course, these proposals cannot be applied across the board and must be adapted to the technological and economic peculiarities of individual industries. They do point, however, to a reorientation of regulatory policy toward expansionary instead of restrictionist goals. They imply acceptance of competition as a basic, though rebuttable, presumption underlying the regulatory mechanism. For small business, they mean not special privileges or class legislation, but genuine equality of opportunity.

⁸⁹ Implementation of this recommendation would imply, for example, repeal of the Reed-Bulwinkle Act, 62 STAT. 472 (1948), 49 U.S.C. § 5b (1952), and a resolution of the "primary jurisdiction" problem. On the latter issue, see ATTORNEY GENERAL'S REPORT 278-87.