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ANTITRUST CONSIDERATIONS IN MOTOR CARRIER MERGERS†

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I. The Applicable Statutes

Unification of separate independent business enterprises in a single organization may raise important questions of antitrust policy. The entity which emerges may have acquired, as a result of such unification, a market position of such significance that a substantial lessening of competition or even the creation of a monopoly becomes not only possible but probable. This would be apparent whenever opportunities for buyers of the products or services of the new single unit to shop freely, and to make independent decisions as to prices, channels of purchases and selection of suppliers were to be seriously curtailed, or where such curtailment could be expected in due course.[1] On the other hand, unification may lead to lower costs and increased efficiency, and may even enhance competition by permitting smaller firms to consolidate their resources in order to increase their ability to engage in rivalry with larger firms. These considerations are reflected in section 7 of the Clayton Act which declares unlawful the acquisition of the whole or any part of the stock or assets of a corporation engaged in interstate commerce, "where in any line of commerce in any section of the country, the effect of such acquisition may be sub-

†This is one of several articles which will be integrated into a text on "Competition in the Regulated Industries" to be published by Little, Brown & Company (Trade Regulation Series, S. Chesterfield Oppenheim, Editor). A previous article, "Competition Versus Regulation: The Agricultural Exemption in the Motor Carrier Act," appeared in 11 Vand. L. Rev. 543 (1958). The special problem of motor-carrier mergers involving control by a railroad (under the proviso of section 5(2)(b) of the Interstate Commerce Act) will be treated in a later article.

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1 FTC: Report on Corporate Mergers and Acquisitions 184 (May 1955).

stantially to lessen competition, or to tend to create a monopoly."[2] This was intended "to cope with monopolistic tendencies in their incipiency."[3] Therefore, "the section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended."[4]

Section 11 of the Clayton Act provides that "authority to enforce compliance with" this so-called anti-merger law by common carriers subject to the Interstate Commerce Act is vested in the Interstate Commerce Commission, but the attorney general is authorized to intervene in such proceedings before the Commission.[5] However, section 5(2)(a) of the Interstate Commerce Act provides:

> "It shall be lawful, with the approval and authorization of the [Interstate Commerce] Commission . . . "(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise. . . ."[6]

If the Commission, after notice and hearing, finds that the proposed transaction "will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications . . . found to be just and reasonable."[7] Thereafter, all participants in a transaction thus authorized "shall be . . . relieved from the operation of the antitrust laws . . . in so far as may be necessary to enable them to carry into effect the transaction to be approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transactions."[8]

[2] 38 Stat. 731 (1914), as amended, 64 Stat. 1125-1128 (1950), 15 U.S.C. (1952) §18. The 1950 amendment broadened the section by adding acquisition of the assets of another company. For discussion of other changes of the original wording see REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 117 (1955) (hereinafter cited REPORT).

[3] S. Rep. 1775, 81st Cong., 2d sess. (1950), quoted in REPORT 117.

[4] United States v. E. I. DuPont de Nemours & Co., 353 U.S. 586 at 589 (1957). For a list of cases involving mergers under the Sherman Act, see REPORT at 115.

[5] 38 Stat. 734 (1934), 15 U.S.C. (1952) §21.

[6] 54 Stat. 905 (1940), 49 U.S.C. (1952) §5(2)(a).

[7] 54 Stat. 906 (1940), 49 U.S.C. (1952) §5(2)(b).

[8] 54 Stat. 908-909 (1940), 49 U.S.C. (1952) §5(11). The 1950 amendment of §7 of the

II. ACCOMMODATION BETWEEN ANTITRUST AND REGULATORY POLICIES

This complicated statutory scheme requires an accommodation of the philosophy of competition embodied in the antitrust laws with the philosophy of regulation by the Interstate Commerce Commission. It indicates that at some point the two may become irreconcilable, and that in such a case the Commission may approve transactions which, without such approval, would violate the antitrust laws. In short, the Commission seems to be authorized to give its blessing to mergers with anti-competitive effects if it finds such mergers "consistent with the public interest." This statement demonstrates, of course, that the "public interest" with respect to mergers in a regulated industry such as motor carriers may have to be measured by other than antitrust standards ordinarily applicable to interstate commerce.

All of these problems were presented to the Supreme Court in *McLean Trucking Co. v. United States,*[9] where the Court was asked to set aside an order of the Commission which had authorized consolidation of seven large motor carriers of property into Associated Transport, Inc. The Commission found great benefits would result from the proposed unification: "More efficient and greater utilization of equipment, and corresponding reduction in consumption of motor fuel and tires," "a higher load factor on vehicles," "a large reduction in the number of trucks required for peddler runs and for pick-up and delivery service at terminal points," and "extension of scientific maintenance and safety programs."[10] Vehicles could be more easily shifted from one part of the system to another to meet seasonal demands; separate terminals could be consolidated at some points; at others a "rearrangement of use" of terminals, one for in-bound and one for out-bound traffic, would reduce congestion and bring about substantial economies. Poor terminals would be replaced by satisfactory ones.

Clayton Act, note 2 supra, explicitly states that nothing contained in that section shall apply to transactions duly consummated pursuant to authority given by the Interstate Commerce Commission.

[9] 321 U.S. 67 (1944).

[10] Associated Transport, Inc.—Control and Consolidation—Arrow Carrier Corp., 38 M.C.C. 137 at 143 (1942). A prior attempt at large scale consolidation by these parties was disapproved in the Transport Co. case, 36 M.C.C. 61 (1940), because of failure to simplify corporate structure and excessive consideration. See Meck and Bogue, "Federal Regulation of Motor Carrier Unification," 50 YALE L. J. 1376 (1941).

Through movement of freight would reduce loss and damage claims, expedite service and eliminate the complications arising from interchange of vehicles between independent connecting carriers. "Substantial savings" could also be made in general and administrative expenses and by the new firm's "ability to obtain necessary financing at lower cost."[11]

But what about the effect on competition? Concededly, this merger would create "the largest common carrier of property by motor vehicle in the United States,"[12] a vertical "end-to-end consolidation from points in the far South to New England," with routes "extending over 24,338 miles"[13] as the result of the unification of carriers operating in the South with Northern Lines. In fact, "there would be no other single carrier authorized to operate throughout the territory . . . between Boston and New Orleans."[14] The merger was, also, a horizontal one in that some of the parties were in competition with each other in the same territory where they owned duplicating facilities.[15] Hence, the Antitrust Division and others opposed the merger on the ground that it would unduly restrain competition in the motor carrier industry. The Commission acknowledged that "substantial competition exists between certain of the carriers involved" which would be eliminated by consummation of the proposal. But section 5 of the Interstate Commerce Act was not intended to permit approval of "only such transactions as would not result in an 'unreasonable' restraint of competition within the meaning of the antitrust laws. . . ." Instead, the Commission read into the specific reference to antitrust the congressional intent that it is authorized "to permit unifications which would, except for such approval, result in restraining competition contrary to the antitrust laws, where the disadvantages of such restraint are overcome by other advantages in the public interest"[16] such as those found in this case. Moreover, a detailed an-

[11] 38 M.C.C. 137 at 144-145 (1942). The gross revenues of Associated Transport have been increasing every year and are still the largest among carriers of general freight. But its net revenues have declined since 1950. See MOODY'S 1957 TRANSPORTATION MANUAL, p. 1371. In the third quarter of 1956 fifty other carriers had higher nets. S. Hearings Before Select Committee on Small Business (Trucking Mergers and Concentration), 85th Cong., 1st sess., p. 9 (1957). See also id., pp. 103, 104, 152.

[12] 38 M.C.C. 137 at 161 (1942).

[13] 321 U.S. 67 at 71 (1944).

[14] 38 M.C.C. 137 at 160 (1942).

[15] Id. at 144; REPORT 289.

[16] 38 M.C.C. 137 at 150 (1942). *Accord*, Consolidated Freightways, Inc.—Purchase—Pacific Intermountain Express Co., 38 M.C.C. 577 at 591 (1942) (Acquisition of certain

alysis of the New England, Middle Atlantic and Southern regions[17] demonstrated that "there would remain ample competitive motor-carrier service throughout the territory involved" in addition to rail, contract carrier and freight forwarding services.[18]

The majority of the Supreme Court fully approved. The Court observed that section 5 of the Interstate Commerce Act was "not only a more recent but a more specific expression of policy"[19] than antitrust legislation.[20] In fact, "the premises of motor carrier regulation posit some curtailment of free and unrestrained competition."[21] The provision for administrative grant of immunity from the antitrust laws took into account the fact that rate regulation was a "safeguard against the evils attending monopoly."[22] Hence, the Commission was "not bound . . . to accede to the policies of the antitrust laws so completely that only where 'inadequate' transportation facilities are sought to be made 'adequate' by consolidation can their dictates be overborne by 'the public interest.' " On

operating rights in Idaho, Montana, Utah and Nevada approved against objections of Antitrust Division to virtual monopoly of vendee in the West. Vendor and vendee operated 383 miles over the same highway. Remainder of the routes (667 miles) sought to be purchased were complementary to vendee's routes. Vendee would have competition from at least one other motor carrier at all points).

[17] 38 M.C.C. 137 at 151-159 (1942).

[18] Id. at 159-160. The Commission also pointed out that "there are a number of large systems of motor carriers of property in existence at present . . ." and that due to the ease of entry and the advantages of small carriers because of "their ability to render a more personalized service . . . monopoly is little to be feared at this stage of the development of the trucking industry." Id. at 161. As to the danger of "diversion of interchange traffic now delivered by the carriers involved to other connecting lines" the Commission observed that the traffic diverted from connecting carriers to the combined new enterprise would be equalized by traffic which would be diverted from the applicant to others. Id. at 162. See the discussion of this aspect of the case in Schwartz, "Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," 67 HARV. L. REV. 436 at 446-447 (1954).

[19] 321 U.S. 67 at 79 (1944).

[20] As noted in note 8 supra, the 1950 amendment of the "anti-merger" section of the Clayton Act explicitly acknowledged the supremacy of the Commission in approving merger proposals.

[21] 321 U.S. 67 at 83 (1944). The quoted statement is documented by a footnote referring to the legislative history of the Motor Carrier Act of 1935. See 1934 REPORT OF THE FEDERAL COORDINATOR OF TRANSPORTATION, H. Doc. No. 89, 74th Cong., 1st sess., p. 13: "It may be taken as settled that there is no substantial body of opinion in the country in favor of permitting competition to reign in the transportation field free and without restraint." See, also, statement of Commissioner Eastman in "Regulation of Interstate Motor Carriers," Hearing before Subcommittee of House Committee on Interstate and Foreign Commerce on H.R. 5262 and 6016, 74th Cong., 1st sess., p. 24 (1935) (hereinafter cited as House Hearings): ". . . there is now a tremendous oversupply of transportation facilities and there has been an extraordinary increase in transportation competition."

[22] 321 U.S. 67 at 85 (1944).

the other hand, the antitrust laws are not wholly inapplicable.[23] The Court defined the Commission's task as requiring it to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy."[24]

The Court found unassailable the Commission's performance of this "complex task" in this instance.

The dissent of Justice Douglas urged that "administrative authority to replace the competitive system with a cartel should be strictly construed." Consequently, particular mergers or consolidations should be permitted only upon an affirmative finding "that the policy of the Transportation Act would be thwarted" by withholding such permission.[25]

The disagreement between the majority and the dissent in the *McLean Trucking Co.* case thus involves the standard of legality by which the Commission shall judge the public interest in merger applications.[26] The dissent would resolve all doubts in favor of antitrust policy and thus create a presumption requiring disapproval of mergers with anti-competitive effects, subject to rebuttal. The majority merely demands that the Commission consider anticompetitive effects as one of several factors which it must weigh before reaching a decision. Obviously,[27] under this view approval of mergers is infinitely easier than it would have been had the dissent prevailed. In this connection it has been noted that antitrust problems with respect to motor carrier consolidations may be intensified because entry into the industry is restricted.[28] Without such restriction, competition and the low cost of entry for newcomers would be an adequate safeguard against monopoly. But, in view of the certificate requirements of the act, "the principal motivation for most acquisitions is the desire to obtain additional operating rights" previously granted to other carriers.[29] The ques-

[23] Id. at 86.

[24] Id. at 87.

[25] Id. at 93-94.

[26] See SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION, LEGAL AND RELATED MATERIALS 102 (1952).

[27] In view of the Court's tendency not to disturb administrative decisions based on expert knowledge of the regulated industries.

[28] 49 U.S.C. (1952) §§306-309.

[29] The Attorney General's Committee (REPORT 266) comments: "Were motor carrier

tion of the competitive effect of such combined rights is thus likely to arise in most merger cases.

In so far as the merger approved in the *McLean Trucking* case is concerned, "substantial" curtailment of competition between the carriers involved was admitted. But, as noted above, the Commission took great pains to explain that "ample" competition remained. Consequently, the merger might have been defensible if the Sherman Act alone had been applicable.[30] In fact, thirteen years after the Supreme Court rejected the request of McLean Trucking Company to set aside this consolidation, that company itself had become so prosperous as to apply for listing of its stock on the New York Stock Exchange.[31] Its fears about the effect of the merger thus proved groundless. In any event, it would be an over-simplification to conclude from the *McLean Trucking* case that the Commission's job merely consists of balancing adverse effects on competition against favorable results of improved service, lower costs, and so on, and to approve the merger if it feels that the latter outweigh the former. The task is more complicated because, as the Supreme Court noted in the *McLean Trucking* case,[32] federal motor carrier regulation was not intended to eliminate all competition, but only excessive or wasteful competition. Hence, an additional inquiry into the question as to how much competition has been or will be restrained, and how much will survive, and whether the latter will be a sufficient barrier against the detrimental effects of monopoly, seems inevitable in merger cases. It is hardly necessary to add that this increases immeasurably the difficulties and unpredictabilities of the outcome in each case[33] and the range of discretion to be exercised by the Commission.

entry unrestricted, rarely, if ever, would a consolidation raise important antitrust problems."

30 Compare United States v. Columbia Steel Co., 334 U.S. 495, 530 (1948) (elimination of competition between participants to a merger held not unreasonable). Again, Justice Douglas dissented. Under the more severe tests of §7 of the Clayton Act, as amended, the case for the merger would have been more difficult.

31 "Milestone Looms for Truckers," N.Y. TIMES, Aug. 22, 1957, p. 38:2. The company operates in 17 states and has 4000 stockholders. Estimated gross income in 1957: $29,000,000. Approval of the application would make this the first Motor Freight Carrier so listed. McLean Trucking Co. was incorporated in 1940, four years before the Supreme Court decision. By 1951, its operating revenues amounted to $13,613,000. In 1956 this had grown to $21,414,000. MOODY'S 1957 TRANSPORTATION MANUAL, pp. 1377, 1378.

32 Note 21 supra.

33 See KOONTZ AND GABLE, PUBLIC CONTROL OF ECONOMIC ENTERPRISE 179-180 (1956): "Regulation [of Transportation] as Monopolies while insisting on Competition:—Perhaps it is in the public interest to promote competition, while at the same time placing

The problem of reconciling antitrust with regulatory policies is, perhaps, even more dramatically illustrated in the case of *Allied Van Lines, Inc.*, the largest mover of household goods in the country. Allied was incorporated in 1928 for the purpose of solving the back-haul problem. "Because of the character of the traffic, it was difficult for either the warehousemen-carriers or their drivers to arrange return loads and the ratio of empty to loaded vehicle-miles became burdensomely high."[34] Accordingly, Allied entered into contracts with independent motor carriers of household goods who were classified as "agents" and grouped in two classes: "(1) booking or non-hauling agents, who solicit and record shipments for transportation in Allied's name but do not supply any equipment or perform any physical transportation, and (2) combined booking and hauling agents, commonly referred to simply as hauling agents, who . . . also supply equipment for the transportation of designated shipments in Allied's name." In 1944, Allied had 272 booking agents and 354 hauling agents in 47 states.[35] Pursuant to these contracts

> ". . . hauling agents agreed to register with Allied all shipments moving over 100 miles booked by them, haul loads booked by Allied and other nonhauling agents, and maintain at least one van bearing Allied's name, color and design. Nonhauling agents entered into similar contracts but did not agree to transport loads or maintain equipment. Uniformity of soliciting, booking, and dispatching was assured by issuance of all shipping papers in Allied's name and pursuant to its rules and regulations. . . . Allied assumed final responsibility to the public for all loss and damage, but this was charged back against the particular agent if responsibility for damage could be so traced."[36]

Hauling agents received 96 percent of the line-haul revenue for shipments booked and hauled by them, the balance going to Allied as a service charge. The share of booking agents ranged from 20 to 25 percent. Settlements were made monthly with all

obstacles to the free play of competitive forces in an industry, such as transportation, where competitive excesses might impair the entire economy. But the inconsistency should be recognized and its manifestations in controls carefully weighed."

34 Allied Van Lines, Inc., Common Carrier Application, 46 M.C.C. 159 at 162 (1946).
35 Id. at 166.
36 Allied Van Lines, Inc.—Purchase—Evanston Fireproof Warehouse—Control, 40 M.C.C. 557 at 562-563 (1946).

agents.[37] Drivers, helpers and mechanics were hired and paid by the "agents."[38]

After enactment of the Motor Carrier Act most of Allied's agents received individual "grandfather" operating authorities from the Commission.[39] But the position of Allied itself was not clear. In 1943 the Commission denied Allied's application for approval of its agreements with its agents pursuant to section 5(1) of the Interstate Commerce Act which authorizes approval of contracts by common carriers "for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof," upon a finding that such pooling "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition."[40] The Commission held that these agreements went beyond mere "pooling" in that they effected complete surrender to Allied by the individual motor-carrier "agents" of their power to control their future operations, and Allied as their principal would assume the status of a common carrier.[41] Subsequently, the Antitrust Division, which had opposed the pooling application, filed a complaint against Allied charging violation of section 1 of the Sherman Act. The result was a consent decree which required cancellation of Allied's contracts with its agents and enjoined Allied and all of its agents from maintaining or furthering any arrangements with others, from agreeing upon rates and practices with any carrier or warehouseman except by establishing joint rates for interline shipments over connecting routes, from making uniform rates or practices, allocating territory, leasing equipment to Allied and from conditioning dealings of Allied with carriers upon their refraining from dealing with others. Plaintiff was authorized to petition for dissolution of the Allied System, and the court retained jurisdiction for that purpose.[42]

[37] Id. at 563. For further details see Allied Van Lines, Inc.—Pooling, 39 M.C.C. 287 at 296-297 (1943).

[38] 40 M.C.C. 557 at 560 (1946).

[39] 46 M.C.C. 159 at 166 (1946). Section 206 of the Motor Carrier Act [49 Stat. 551 (1935), 49 U.S.C. (1952) §306] provides that "if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 . . . and has so operated since that time . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation. . . ."

[40] 54 Stat. 905 (1940), 49 U.S.C. (1952) §5(1).

[41] 39 M.C.C. 287 at 306 (1943). Competition between the "pooling" carriers had been eliminated by the plan. Id. at 304.

[42] United States v. Allied Van Lines, Inc., National Furniture Warehousemen's Assn.,

Shortly thereafter the Commission denied Allied's application for a certificate of public convenience and necessity as a common carrier by motor vehicle of household goods.[43] It again held that Allied was not a common carrier, since it "does not own any vehicles and does not contemplate so doing and . . . does not have funds with which to provide itself with equipment, and facilities with which to conduct a nation-wide transportation system." Hence, Allied was merely "a device" in the hands of its members, who compete with each other. Such common control afforded undesirable opportunities for unfair competition, unjust discriminations and preferences between shippers and consignees.[44] Moreover, discontinuance of Allied would not be detrimental to the public, because there are "a large number of carriers authorized to transport household goods over large portions of the country and there are several nation-wide operators. . . . Many carriers, both large and small, have successfully conducted household-goods operations without the aid of a superimposed holder of a blanket certificate such as Allied is seeking."[45] Finally, the antitrust consent decree was referred to in support of the conclusion that Allied's proposed operations are not required by present or future public convenience and necessity.[46]

This virtual death sentence of Allied was nullified less than three months later by the Commission's approval of Allied's proposal to purchase the operating rights of 326 of its hauling agents for $1. Each transferor would purchase one share of Allied stock at a price of $10 a share, with the result that ownership of Allied would pass to its former hauling agents. A so-called noncarrier agency agreement would be entered into between Allied and the transferors, pursuant to which Allied agreed to employ each transferor as its agent. Allied would insure and compensate each transferor and would lease all vehicles meeting its specifications.[47] The transferors would lose their operating rights and, thus, cease to be interstate motor carriers. Consequently, they could not resume rendering service if they should discontinue their connection with Allied.[48] The Commission now found that the transaction was

(Civil Action No. 44-C-30, N.D. Ill., Dec. 28, 1945) 1944-1945 CCH Trade Cas. ¶57,427.

[43] 46 M.C.C. 159 (1946).

[44] Id. at 200, 201 and cases there cited.

[45] Id. at 205.

[46] Id. at 206, 207.

[47] 40 M.C.C. 557 at 563-565 (1946).

[48] Id. at 610.

covered by the language of section 5(2)(a)(i) of the Interstate Commerce Act permitting authorization for "a person which is not a carrier [such as Allied] to acquire control of two or more carriers,"[49] would permit integration of a cooperative nation-wide system, remove any question of illegality under the antitrust laws and terminate expensive litigation.[50]

With respect to competition the Commission noted that its approval would "give permanence to substantially the same arrangement that originated in 1928," which "always had the competition of numerous carriers, large and small, Nation-wide and local."[51] Hence, "elimination of some competition among the transferor-applicants . . . is not the controlling consideration."[52] The transaction would be in the public interest since "adequate competition" would remain.[53] The antitrust decree would be wiped out by the Commission's approval, pursuant to section 5(11) of the Interstate Commerce Act; indeed, this was sanctioned by precedent. In *United States v. Southern Pacific Company*,[54] the Supreme Court directed "that a decree be entered severing the control by the Southern Pacific of the Central Pacific by stock ownership or by lease." Subsequently, the Commission approved such a lease,[55] with the result that the Supreme Court's decision was superseded by legalization of a previously unlawful relationship between the two railroads.[56]

The Commission's approval of the *Allied Van Lines* consolidation was criticized by two dissenting members[57] and by more recent commentators[58] who were understandably bewildered by the aston-

[49] Id. at 583.

[50] Id. at 596.

[51] Id. at 592. The other Nation-wide carriers of household goods are Aero Mayflower Transit Co., United Van Lines, Inc., North American Van Lines, Inc. and Greyvan Lines, Inc. Id. at 589. The problem of competition is discussed at 588-594.

[52] Id. at 592.

[53] Id. at 594.

[54] 259 U.S. 214 at 241 (1922).

[55] Control of Central Pacific by Southern Pacific, 76 I.C.C. 508 at 516 (1923): "When by our order based upon broad considerations of the public interest we in effect grant relief against antitrust laws, . . . we are exercising a power which the statute gives to us alone. Evidence as to public benefits to be derived from common control of competing carriers, which would be immaterial in a prosecution under the Sherman Act, might be entirely pertinent in a proceeding before us. . . ."

[56] United States v. Southern Pacific Co., (D.C. Utah 1923) 290 F. 443.

[57] 40 M.C.C. 557 at 610-612 (1946).

[58] Adams and Hendry, "Trucking Mergers, Concentration, and Small Business: An Analysis of I.C.C. Policy, 1950-1956," Appendix to S. Hearings Before Select Committee on Small Business (Trucking Mergers and Concentrations), 85th Cong., 1st sess., pp. 338-343 (1957). (This Appendix is hereinafter cited as Adams Report.)

ishing jump from total condemnation to total approval of operations different in legal forms but identical in practical effect. Yet, the approval decision followed closely the rationale of the Supreme Court in the *McLean Trucking* case. Creation of a large entity, the largest of its kind, would produce tangible benefits, and competition would remain alive, although the elimination of the competition among the formerly independent members of the combination had been condemned as violative of the antitrust laws.[59] Consequently, the Commission's approval was in accordance with existing law as to mergers. It was also induced by reasons of administrative and economic preference for supervising one instead of 326 certificate holders,[60] and this attitude—also demonstrated by the Commission's treatment of Allied's principal competitors[61] —rather than the debatable technicality that prior to consolidation Allied was not a "common carrier" within the meaning of the act[62] may explain the apparent inconsistency in the dispositions of Allied's applications for a certificate and for authority to merge. Indeed, the nature of household-goods transportation was thought to justify and even require participation in large groups of wide territorial coverage in order to lick the return-load problem, and

59 Even under the antitrust laws cooperative arrangements by a multitude of small firms may be condemned though comparable in effect to the lawful activities of one single large firm. See the Brandeis dissent in American Column & Lumber Co. v. United States, 257 U.S. 377 at 419 (1921). Compare Appalachian Coals, Inc. v. United States, 288 U.S. 344 at 374 (1933).

60 In the Associated Transport case, 38 M.C.C. 137 at 162 (1942), the Commission said that "the legislative history of section 5 indicates a clear Congressional intent to encourage unifications. . . ." The Adams Report, note 58 supra, points out (p. 337) that due to subsequent acquisitions of operating rights the number of stockholder-agents of Allied reached 625 by mid-1956. See Allied Van Lines, Inc.—Purchase—Allen, 45 M.C.C. 751 (1947) (purchase of rights of 47 motor-vehicle common carriers); Allied Van Lines, Inc.—Purchase—Johnston, 50 M.C.C. 273 (1948) (purchase of rights of 6 carriers); Allied Van Lines, Inc.—Purchase—Albrent Freight and Storage Corp., 50 M.C.C. 653 (1948) (purchase of 4 carriers); Allied Van Lines—Purchase—Cold Spring Storage Co., 58 M.C.C. 101 (1951) (purchase of 6 carriers). The Adams Report criticizes the Commission for its failure to understand the impact of the Allied System on the market (p. 343). But the Commission dealt with that problem explicitly as shown in notes 51-53 supra.

61 They are United Van Lines and North American Van Lines, organized along lines similar to Allied. Geitz Storage & Moving Co., Inc.—Investigation of Control—United Van Lines, Inc., 65 M.C.C. 257 (1955), reversing 55 M.C.C. 649 (1949) (operations of United Van Lines approved, in spite of pooling agreements unlawfully entered into without prior Commission approval; benefits of coordinated activities held to outweigh restraint on competition between United and its agents, and preservation of United deemed necessary to offer competition to other major van lines). See Adams Report, note 58 supra, pp. 343-348. *Accord,* North American Van Lines, Inc.—Investigation of Control, 60 M.C.C. 701 (1955). See Adams Report, note 58 supra, pp. 348-350.

62 For the Commission's interpretation of the statutory definition in 49 U.S.C. (1952) §303(14), see 46 M.C.C. 159 at 189-197 (1946).

the existence of several such groups competing with each other is deemed to protect the public against monopolistic abuses.[63] However, it may not always work out that way. In 1956 the leading moving and storage companies consented to the entry of a decree forbidding them to "fix, stabilize or tamper with price quotations to the U.S. Government for interstate movement of household goods of military personnel."[64] The antitrust weapon was, thus, used as a supplement to regulatory supervision. But this intrusion of the Sherman Act was short-lived. A 1957 amendment of section 22 of the Interstate Commerce Act now authorizes the commission to approve agreements relating to quotations of rates or charges to the United States Government for transportation of persons or property; such approval shall relieve the parties from antitrust liability in the same manner as provided in the Reed-Bulwinkle Act of 1948 for rate agreements generally.[65]

In any event, some crucial questions remain: How much competition is deemed necessary to protect the public against the evils of monopoly, how much is irrelevant, and how much is intolerable?[66] And is there a regulatory philosophy which may furnish guideposts for solving these problems? The search for even tentative answers, if there are any, requires a survey of the commission's leading merger decisions.[67]

III. THE GREYHOUND MERGERS

Greyhound Corporation is the largest motor carrier of passengers in the United States. It was organized in 1926, and operates

[63] Testimony of O. Clarke, chairman of I.C.C., in S. Hearings Before Select Committee on Small Business (Trucking Mergers and Concentrations), 85th Cong., 1st sess., p. 48 (1957). There are in addition to the large systems, numerous independent interstate and intrastate carriers of household goods. Statement by Clardy, id. at 167. See Adams Report, note 58 supra, pp. 227-228, on the structure of the Household Movers Industry.

[64] United States Aero Mayflower Transit Co., (S.D. Ga. 1956) 1956 CCH Trade Cas. ¶68,526. The government did not consent, but did not appeal.

[65] 71 Stat. 564 (1957), 49 U.S.C. (Supp. V, 1958) §22(2). The Reed-Bulwinkle Act is to be found at 62 Stat. 472 (1948), 49 U.S.C. (1952) §5(b).

[66] See Adams Report, note 58 supra, pp. 355-356.

[67] From enactment of the Motor Carrier Act to Nov. 1, 1955, the Commission received 6,123 merger applications involving motor carriers. I.C.C. Administration of the Motor Carrier Act, S. Hearings Before Select Committee on Small Business, 84th Cong., 1st sess., p. 329 (1955) (hereinafter cited as Small Business Hearings). From Nov. 1, 1955 to Oct. 31, 1956 there were 379 such applications. I.C.C. 70TH ANN. REP. 78. The Commission commented (at 75-76) on the continuing trend of the development of motor carrier systems through purchases and mergers. Since the 1920's many individual small scale operators then in the majority have died or sold out. See also I.C.C. 71ST ANN. REP. 53-56 (1957).

nearly 6,000 buses over certificated routes approximating 100,000 miles, thus accounting for about one half of intercity bus business.[68] In 1956 it had total assets in excess of $251,000,000 and gross revenues in excess of $238,000, operated over 505,000,000 bus miles and 9,371,000,000 passenger miles.[69]

In 1936 the Commission approved unopposed merger applications of 22 of the constituent companies of the Greyhound System.[70] It described Greyhound Corporation as "a single proprietary holding company" embracing "groups of subsidiary companies operating bus lines practically throughout continental United States."[71] The plan for a national system had been developed along three lines: "(1) Autonomous regional operation; (2) uniform national policies and centralized control of common functions and standards; and (3) coordination, wherever possible, with other forms of transportation." From its inception, the system grew by acquisitions of many large and small companies.[72]

Subsequently, many applications for approval of additional acquisitions by Greyhound were presented to the Commission. Some of these were denied because of the dominant position of the Greyhound System and the resulting danger of a bus monopoly in the area. Thus, in *Illinois Greyhound Lines—Purchases—The Southern Ltd., Inc.*,[73] Southern operated "over routes complementary to those of members of the Greyhound system, but . . . competitive with the latter between Chicago and Paducah, between Chicago and Evansville, and between Chicago and Terre Haute and Vincennes. . . . If the purchase [of Southern] were approved, Greyhound Companies would operate over all of the most direct routes between Chicago and Evansville and Chicago and Paducah, whereas no other motorbus company would be authorized to oper-

68 "Building a Highway Empire," BUS. WEEK, March 16, 1957, p. 175.

69 United States v. Greyhound Corp., Civil Action No. 57-C-1107, Complaint No. 2, (N.D. Ill., June 27, 1957). Greyhound also operates Greyvan, a household moving company, Greyhound Post Houses (restaurants), motels and a rent-a-car service. It has six operating divisions (Eastern, Southeastern, Great Lakes, Northland, Florida and Northwest), four domestic (Pacific, Southwestern, Atlantic and Richmond), and two Canadian subsidiaries. Net income in 1955 was $13,800,000. BUS. WEEK, March 16, 1957, p. 175 at 176, 178, 179.

70 Greyhound Mergers, 1 M.C.C. 342 (1936). The individual operating companies were absorbed by the major geographical subsidiary groups.

71 Id. at 343.

72 Id. at 346. As to subsequent merger decisions, see especially Greyhound Mergers 1948 and 1949, 55 M.C.C. 237 and 56 M.C.C. 238, and Eastern Canadian Greyhound—Control and Merger, 55 M.C.C. 189 (1948).

73 38 M.C.C. 641 (1942).

ate over any such routes between those points."[74] A passenger could still travel from Chicago to Evansville via LaFayette and Terre Haute, using three different carriers other than Greyhound, and he could travel circuitously on non-Greyhound Lines between Chicago and Paducah, but this would not be too attractive. Hence, elimination of the "substantial two-line competition . . . heretofore . . . afforded by the independent existence of Southern with its direct lines to Chicago . . . would give the Greyhound Companies an advantage impossible to meet."[75] Eight members of the Commission thought this would not be in the public interest. A later purchase by Greyhound of a 40 percent stock interest in Southern was declared unlawful and divestiture ordered on the ground that even such a minority interest would give Greyhound monopolistic power.[76]

This decision was followed in *Southwestern Greyhound Lines, Inc.—Merger—Arkansas Motor Coaches, Ltd., Inc.*[77] In that case, the Antitrust Division, in opposing the merger, observed that "the Greyhound Companies have the only integrated national bus system." It urged "that, if monopoly in the industry is to be avoided, a definite policy to prevent the Greyhound Companies from acquiring independent operations, which otherwise could some day be molded into an independent competitive bus system, should be established."[78] A protesting bus company (Missouri-Pacific Transportation) invoked the *Illinois Greyhound* case, and the Commission, in accepting that decision as controlling precedent, noted that there the last remaining bus competition was to be eliminated by merger, while in the present case one of two competitors would remain. Nevertheless, the same considerations

[74] Id. at 647.

[75] Id. at 648. The majority found no benefits which would offset "the harmful effects resulting from restraint of competition." The dissenters thought that the benefit of through one-line service should control.

[76] The Greyhound Corporation—Investigation of Control—The Southern Limited, Inc., 45 M.C.C. 59 (1946). At pp. 70-71, reference is made to a contractual arrangement by which Southern utilizes Greyhound terminals; denial of this privilege "could cripple" Southern, hence, Greyhound should not be given power to control Southern. See also Dollar Lines—Purchase—United Stages System, 40 M.C.C. 63 (1944) (acquisition of control by Greyhound of small second-class duplicating service as a competitive "fighting ship" denied).

[77] 39 M.C.C. 721 (1944), affirming 39 M.C.C. 243 (1943).

[78] Id. at 727. The argument referred to Trailways as a start in the development of a competitive system, having "the vulnerability of all loose associations in competition with integrated systems."

required denial of Southwestern's application. Said the Commission:

> "The Trailways Companies east of the Mississippi River do not have the territorial coverage, facilities, or schedules equal to those maintained by Greyhound Companies in that territory; nor, in the aggregate, do they have financial resources comparable to those of Greyhound. If the merger were consummated, such small advantage as now accrues to Missouri Pacific Transportation and Coaches by reason of their somewhat more desirable route west of Memphis would be canceled by the latter's coverage of both routes and the elimination of Coaches. While Missouri Pacific Transportation would continue to be largely dependent on Greyhound Companies to receive its passengers moving north, south, and east of Memphis, it would no longer be likely to receive traffic from Greyhound Companies for movement over this route. It is also worthy of comment that the result of elimination of Coaches as an independent competitor would leave the field solely to a railroad-controlled motor bus company and to Greyhound. Such a narrowed competitive situation, which already has largely been brought about in territory west and north of Texarkana and Little Rock and in other sections of the country through the steady elimination of independent motor bus companies by railroads, on the one hand, or Greyhound, on the other, is not productive of the healthiest possible passenger-transportation conditions."[79]

But what about offsetting benefits to the public? The Commission conceded that some advantage through routing over a somewhat more direct and desirable route would result for "that part of the public which travels via Greyhound," but this was outweighed by restraint of competition. The merger would permit Greyhound to drive another wedge into local territory by absorption of a relatively small operator who "has been familiar with the transportation needs of the numerous small points on its routes" and served them satisfactorily. Hence, "preservation of the existing competitive situation is more likely to result in efficient local service at points served by Coaches and this applicant than would be the case if Southwestern Greyhound were permitted to serve this additional territory."[80]

[79] Id. at 731-732. The "steady elimination of independent motor bus companies" could, of course, not have taken place without Commission approval.

[80] Id. at 732-733.

Antitrust considerations also prevailed in *Southeastern Greyhound Lines—Control—Lewisburg Bus Lines, Inc.,*[81] wherein Division 4 denied authority to acquire control of three independent bus lines operating in Alabama, Georgia, Florida and Tennessee. It found the purpose of these acquisitions was "the desire of Southeastern to protect itself from the growing competition of Trailways, through elimination of the independence of the three carriers and securing an effective monopoly in this territory, and to preserve its present profitable control of north-south traffic."[82] On reconsideration, the Commission affirmed, but permitted a merger of two of the bus lines sought to be acquired by Southeastern in order to enable them to offer more effective competition with the Greyhound System.[83] Similarly, New England Greyhound Lines was not allowed to purchase some of the operating rights of Short Line because this "would cause other established services, for the first time, to be faced with the aggressive competition of a Greyhound Company on traffic movements" between several New England cities.[84] Short Lines primarily served several points in Connecticut; Greyhound would join the routes purchased with its interstate network and thus present a mortal threat to Short Lines' local competitors, whose financial situation was anyway precarious.[85] Hence, a majority of Division 4 denied Greyhound's application in spite of testimony that Greyhound proposed to add early morning and late evening runs not heretofore available and desired by some persons in the area.

In other cases Greyhound's acquisitions were approved in the face of vigorous antitrust objections. A significant number of these

81 40 M.C.C. 375 (1946).

82 Id. at 386. The evidence as to "possible improvements in service" was deemed not sufficient to offset this.

83 45 MC.C. 185 (1946). Greyhound's application for control of the third carrier had been withdrawn. The result of this decision could be compared to recent mergers of independent automobile manufacturers (Nash-Hudson and Studebaker-Packard) undertaken for the purpose of saving the independents' survival in their competitive struggle with the big three.

84 The Greyhound Corporation—Control; New England Greyhound Lines, Inc.—Purchase (Portion)—The Short Line, Inc., 59 M.C.C. 197 at 224 (1953).

85 The theory of the opinion is not as clear as those discussed earlier. It is said that approval of the application would completely change "the competitive balance in the area" (id. at 226) and create "an oversupply of transportation service." (id. at 227) The latter would, from an antitrust point of view, be irrelevant; but the former expresses the policy of §7 of the Clayton Act. Compare The Greyhound Corporation—Control; Pacific Greyhound Lines—Control and Merger—Geronimo Lines, Inc., 56 M.C.C. 415 (1950) [merger of Pacific Greyhound and Geronimo, an intrastate carrier, disapproved

decisions either reversed prior denials by a single division of the Commission, or represented the views of a majority from which individual commissioners dissented. A good illustration of this intense struggle about the role of competition is the early case of *Richmond Greyhound Lines, Inc.—Control—Peninsula Transit Corporation.*[86] Greyhound's and Peninsula's operations were competitive between Washington and Richmond, Petersburg and Norfolk, although Greyhound carried more through traffic. Peninsula concentrated on local traffic from and to Baltimore, Washington and Richmond and many points not served by Greyhound or any other carrier.[87] There was railroad and water transportation in the area.[88] Yet, national advertisers for the Greyhound system testified that "none of the other areas [served by the Greyhound system] exceed the territory served by the Peninsula Transit Corporation in the variety and attractiveness of its appeals."[89] A representative of a community publicity and tourist organization in Norfolk explained that it was "almost impossible to get into that city unless you take a bus or cross the water on the bridge." Hence, he was "extremely anxious" to have access to the city "kept wide open for a competitive line to come in." He had no objection to National Trailways, or any one else other than Greyhound, but insisted it ought not "be locked up in one company."[90] Other motor carriers, all members of Trailways, protested on similar grounds, and even Peninsula's president, although he preferred to sell out, admitted that his company could maintain competition with Greyhound and give good service.[91] Greyhound, in reply, referred to a lowering of its operating costs and improvement of service which would result from the merger and, generally, contended that "bus competition is usually injurious rather than beneficial to the public and, . . . because a substantial competitor of motor as well as rail carriers is the private automobile, . . . [the Commission] should . . .

and divestiture ordered of control unlawfully acquired; held that the proviso of 49 U.S.C. (1952) §306(1) exempting duly authorized intrastate carrier from the requirement of obtaining an I.C.C. certificate for interstate operations does *not* exempt such carriers from the requirements of §5 relating to mergers. Id. at 433].

[86] 5 M.C.C. 394 (1938), affd. in 35 M.C.C. 555 (1940), revd. 36 M.C.C. 747 (1941).
[87] 5 M.C.C. 394 at 395 (1938).
[88] 35 M.C.C. 555 at 560 (1940).
[89] Id. at 561.
[90] Id. at 562. Similar views were expressed by the town council of Virginia Beach.
[91] Id. at 563.

give consideration only to public benefits resulting from applicant's control of Peninsula and ignore the fact that approval of the application would permit applicant to acquire its sole bus competitor and . . . result in a bus monopoly."[92]

Two members of Division 5 rejected this plea in language ringing with anti-monopoly fervor:

> ". . . in the absence of a plain declaration to that effect, it would be unreasonable to find that Congress intended, in the construction of the phrase 'consistent with the public interest,' that appropriate consideration should not be given by us to the factor of competition. Otherwise, it would seem that every application under Section 213 [now section 5] would have to be approved by us upon a showing by applicant therein that it had a reputation for rendering good service, that it could pay the purchase price, and that the latter was not excessive. By such a yardstick, the Greyhound interests, because of their present position and formidable and ever-increasing financial resources, would be able to proceed with ease to absorb as many of the country's bus lines as they desired. In that connection an officer of the parent corporation stated: 'I don't think that we want to own all the bus lines * * * 20 percent would be a reasonable amount for other bus lines to have * * * we would like to avoid taking those we would lose money on.' Although these statements were later disclaimed as facetious, they nevertheless are entitled to consideration in the light of the continuous expansion of the Greyhound System during the last 10 years."[93]

A year later the full Commission reversed and approved the merger. They emphasized Greyhound's proposal "to provide modern equipment and improve service through elimination of coach changes, transfer of baggage, ticket reissuance, and through better spacing of schedules and their coordination with . . . those of other Greyhound Companies. There would also be made available such benefits of membership in the Greyhound system as accrue from the Greyhound Management Company . . . which . . . coordinates the activities and policies of the various Greyhound Companies

[92] Id. at 564.

[93] Ibid. The report concluded that, in case of approval, future efforts to correct an undesirable monopolistic bus situation by authorizing a new operator would be foredoomed to failure. Id. at 566. Commissioner Eastman dissented (id. at 567-570) on grounds later adopted by the whole Commission.

in matters of financing, accounting, safety, traffic, fares, advertising, legal matters, terminal and garage construction, labor relations, personnel training, new operations, and purchases of equipment, parts, supplies and insurance."[94] Another Greyhound subsidiary developed tours by bus to historical points in Virginia, which would be nationally advertised by special folders. Some of Peninsula's fares would be reduced; drivers would be paid higher wages and economies made possible by unification would increase earnings. More than 60 witnesses from various communities served by Peninsula had testified at further hearings in support of the application.[95] The traveling public should not be deprived of all these benefits merely because "some elimination in competition" would "possibly" result.[96] However, competition with other modes of transportation and with other bus lines outside of Norfolk would remain.[97] Moreover, Greyhound offered to sell to Carolina Coach Company, one of the protestants, Peninsula's route south of the James River between Petersburg and Suffolk; this "would afford means of providing competitive bus service between Richmond and Norfolk," and approval of Greyhound's acquisition of Peninsula was, therefore, conditioned upon that sale.[98]

The contrast between this final report extolling the blessings of the Greyhound System and the prior report which warned against the evil consequences of letting that monster grow bigger could hardly be more drastic. Yet, even the final report, like Commissioner Eastman's dissent in Division 5, purports to pay its respect to the competitive ideal: (1) There can be no real monopoly, as long as there are railroads, passenger boats and, particularly,

[94] 36 M.C.C. 747 at 750-751 (1941).

[95] Id. at 751.

[96] Id. at 750.

[97] Ibid. "Except between Richmond and Petersburg, 23 miles, Peninsula provides the only motorbus service over its routes, approximately 600 miles, and, of the many points served, only the terminal points of Baltimore, Washington, Richmond, Petersburg, Suffolk and Norfolk have competitive bus service. Upon approval herein, these points would continue to have such service except Norfolk. . . ."

[98] See Carolina Coach Co. of Virginia—Purchase—Richmond Greyhound Lines, Inc., 38 M.C.C. 347 (1942), approving the purchase by Carolina Coach Co. and rejecting a claim by Virginia Stage Lines which wished to purchase the same operating rights. The offer of Stage Lines did not meet the terms of the condition in the previous case. A subsequent complaint was dismissed in Virginia Stage Lines v. United States, (W.D. Va. 1942) 48 F. Supp. 79.

private automobiles competing with bus lines;[99] (2) the monopolistic effect of the acquisition in a specific area can be avoided or, at least, mitigated by restrictive conditions such as the sale by the vendee of some of the routes of the vendor to a protestant carrier; hence (3) competition among bus lines, though lessened, is not eliminated. This is enough to warrant approval if—and this seems crucial—(4) the increased efficiency of performance believed to result from the acquisition is deemed to outweigh presumptive perils of monopoly.

The last two points in this rationalization of the final *Richmond Greyhound* decision attempt to comply with the standards approved by the Supreme Court in the *McLean Trucking Co.* case.[100] On the other hand, it is difficult, if not impossible, to reconcile them with the *Illinois* and *Southwestern Greyhound* cases discussed above.[101] In any event, the latter are outnumbered by decisions following the *Richmond Greyhound* pattern, which, as a practical matter, seem to turn on the finding that substantial advantages to be derived from the consolidation justify not a complete destruction of all competition, but a sacrifice of a substantial part of it which would not be allowable under the antitrust laws.[102]

99 MOODY'S 1957 TRANSPORTATION MANUAL (p. a26) gives the following figures (in millions of passenger miles and percentage of total):

	1946	1956
Railroads	66,262 (18.72%)	28,350 (4.13%)
Buses	25,576 (7.73%)	24,900 (3.63%)
Air lines	5,910 (1.67%)	25,700 (3.75%)
Private automobiles	253,570 (71.70%)	605,000 (88.24%)

100 See text at notes 9-19 supra.

101 See text to notes 73-79 supra. The final report in the Southwestern case was issued 11 months after the McLean decision; the dissenting opinion of Justice Douglas referred with approval to the original Richmond Greyhound case, and deplored the reversal. See 321 U.S. 67 at 94 (1944). See also Meck and Bogue, "Federal Regulation of Motor Carrier Unification," 50 YALE L. J. 1376 at 1393-1397 (1941).

102 Greyhound Corp.—Control—Southeastern Greyhound Lines, 57 M.C.C. 123 (1950) [integration of Greyhound with Southeastern Greyhound and acquisition of control of Alaga Coach Line, Inc., approved on the ground of economies in operating costs, safer operations, etc. (id. at 150-155)]. "Effective" competition in the territory was assured by the grant of a certificate to Trailways (id. at 140-141), and approval was conditioned by Greyhound's obligation to "maintain and keep open the present existing junctions and gateways, and that any terminal and traffic arrangements now in effect between Southeastern and non-Greyhound carriers shall be continued. . . ." (id. at 155) A vigorous antitrust dissent by Commissioner Lee (id. at 158-167) cited the Illinois and Southwestern cases and noted the absence of evidence in the record that Trailways had begun operations or, if it had, actually provided effective competition. (id. at 165) Mr. Lee also referred to the fact that control of Southeastern had already been acquired by Greyhound without waiting for Commission approval and that this should not be condoned. Northland Greyhound Lines, Inc.—Purchase—M. M. Liederback, 25 M.C.C. 109 at 112 (1939), reversing 5 M.C.C. 123 and 215 (1937). Liederback operated only small buses of old design; unlike

Particularly noteworthy is *Greyhound Corporation—Control—Florida Motor Lines Corporation*[103] wherein the majority gave Greyhound authority to buy the dominant bus line in Florida, which had twice as many route miles and twice as much equipment as all other Florida bus lines combined. Greyhound, which already operated in Florida, intended to use this purchase to facilitate transfer of equipment from the North to Florida during the winter tourist season. Florida was Greyhound's principal connecting carrier; hence, Greyhound urged that the merger "will merely continue an arrangement existing over a long period and consequently will not deprive the opposing intervenors of any traffic heretofore enjoyed, but, through national advertising and other traffic promotional methods more travel by motorbus would be generated for all carriers."[104] Greyhound contended that "its very size has permitted it to make substantial contributions to the industry as a whole through pioneering in the design and construction of motorbusses, the improvement of lubricants, fuels, and tires, national advertising, and . . . improved station and terminal facilities." Denial would "freeze or throttle" its normal growth

Northland, he had no intrastate rights. Purchase would thus improve service. Competition of railroads and private automobiles is a sufficient protection against extortionate fares, and regulatory commissions may always admit newcomers if things should get out of hand. Commissioners Lee and McManamy dissented on the grounds that the merger would give to Greyhound a monopoly of the only through bus routes between Minneapolis and Chicago via Wisconsin, vendor's schedule would be eliminated, and Greyhound's fare was 20 percent higher than that of vendor. *In both cases there were no protestants, and this fact is stressed in both reports.*

See also Greyhound Corp.—Control—Eastern Michigan Motorbusses, 36 M.C.C. 413 at 417 (1941), reversing 25 M.C.C. 483 at 489 (1939). Prior report had approved merger of operating rights and properties of Great Lakes Motor Bus Co. into Eastern Michigan Motorbusses and acquisition by Eastern Michigan Transportation Corp. of control of the two merged companies, but denied Greyhound's application for permission to acquire from Eastern Michigan Transportation the stock of E. M. Motorbusses: "The effect of . . . [Greyhound's] acquisition would be to add a fourth Greyhound-controlled bus line operating between Detroit and Toledo, and a second such line . . . between Detroit and Kalamazoo, with no organized competition over the latter route between Detroit and Battle Creek, other than the one railroad which owns a substantial stock interest in Central [Greyhound]. . . . It is conceivable that the combined efforts of these subsidiaries and friendly rail interests would be concentrated as a powerful influence in blocking any independent efforts to provide effective competition." The full Commission reversed because Greyhound already had a 43.4% interest in Eastern Michigan Transportation and there was "no appreciable competition" between Motorbusses, primarily an intrastate carrier, and the other Greyhound subsidiaries referred to by Division 5 which handle only interstate traffic. The elimination of Transportation, a mere holding company, and acquisition of direct stock control of Motorbusses by Greyhound, would, therefore, not affect the existing competitive situation.

[103] 45 M.C.C. 83 (1946).

[104] Id. at 89.

and expansion.[105] The mere assertion of such dire consequences for Greyhound, coupled with the statement that closer alinement with Greyhound would bring substantial advantages in economical use and maintenance of equipment and "refinements" of better service, apparently swayed the majority to grant the application, which had much public support in Florida in spite of the admitted fact that Florida Motors had been "efficiently managed."[106]

The dissent emphasized that the alleged "substantial advantages" were "couched in such broad general terms as to amount to a blank check to Greyhound to acquire any operation which it wants."[107] Certainly, the report does not reveal much economic evidence supporting the finding of "substantial advantages." Moreover, Florida Motors was at the end rather than in the middle of Greyhound's routes, and, therefore, "more readily adapted to complete independence of action with reasonable prospects of continued successful operation . . ." than the lines involved in the *Illinois* and *Southwestern Greyhound* cases whose absorption by Greyhound was denied on anti-monopoly grounds.[108] The dissent thus clearly proved inconsistency with those earlier decisions. In any event, the quantity and quality of competition which remained after this merger was, probably, smaller than in most other cases.

The Commission itself has not been insensitive to the charge of inconsistency. In *Greyhound Corporation—Control and Merger —Maine Central Transportation Company,*[109] Division 4 allowed Greyhound to acquire Maine Central which was operating at a loss, and to assume liability for its notes. Vendor's deficit had been borne by its parent railroad. The Antitrust Division and other bus lines opposed the merger, invoking the *Illinois* and *Southwestern* cases. The report, citing *McLean,* notes that the protesting carriers had presented no evidence that the proposed transaction "would appreciably worsen their position, financially, or prevent them from fulfilling their common-carrier responsibilities," and that Greyhound was willing to accept a condition requiring it to maintain and keep open the present use of its terminals by other motor-bus companies for the sale of tickets and interchange of passengers. The *Illinois Greyhound* case was distinguished on the

105 Id. at 87-88.
106 Id. at 93.
107 Id. at 95.
108 Id. at 96-97.
109 11 CCH Fed. Car. Cas. ¶33,570 (1956).

ground that it epitomized the Commission's policy "to deny proposed unification where monopoly in a section would be created or extended," but denials on that basis were called for only when "there was an affirmative showing that the available traffic would support competitive operations, particularly as to long distance movements." The declining traffic in the Maine Central territory made such a showing impossible.[110] This distinction correctly reflects the basic policy of the Motor Carrier Act to guard against excessive competition by preventing oversupply of transportation.[111] Hence, it may be regrettable that this has not been consistently applied. Indeed, in both the *Florida* and *Richmond Greyhound* cases mergers were approved in spite of such an "affirmative showing." Perhaps that showing was disregarded in those cases because of the strong public support in favor of the applications.

Of course, a failure by protesting carriers to show how a proposed merger would harm their operations would usually indicate the merger would have no anti-competitive results and, therefore, require approval even under the anti-merger provision of the Clayton Act.[112]

Greyhound's continuous expansion was thus fostered by the Commission's merger decisions.[113] Presumably there can be no

110 In *accord:* Southwestern Greyhound Lines, Inc.—Purchase—R. W. Lee, 36 M.C.C. 753 at 756 (1941), Commissioner Porter dissented; The Greyhound Corp.—Purchase—B. C. Motor Transportation, Ltd., 60 M.C.C. 643 (1954).

111 See House Hearings, note 21 supra, p. 27.

112 A good example is Greyhound Corp.—Control; Pacific Greyhound Lines, 50 M.C.C. 123 (1947) (approval of acquisition of two independent bus lines). Protestant objected that it would be cut off from all connections except Greyhound, but the routes of the two independents were not competitive and there was no substantial interchange between them and protestant. Simplification of corporate structure as a ground justifying merger: Greyhound Corp.—Control; Southwestern Greyhound Lines—Control—Northeastern Missouri Greyhound Lines, 50 M.C.C. 441 (1948), 55 M.C.C. 540 (1949); Greyhound Corp.—Merger—West Ridge Transportation Co. etc., 56 M.C.C. 349 (1950); Greyhound Corp.—Control; Pacific Greyhound Lines—Control, 65 M.C.C. 347 (1955). See also Pan-American Greyhound Lines—Control and Merger—Pan-American Bus Lines, 38 M.C.C. 433 (1942); Greyhound Corp.—Control—Pacific Greyhound Lines—Control—Oregon Motor Stages, 55 M.C.C. 321 (1948) (purchase of 25% stock interest involving actual power of control approved *in the absence of any protest*). Prior to Commission approval, all interested parties must be given an opportunity to be heard, 49 U.S.C. (1952) §5(2)(b). The absence of protestants may, therefore, justify the inference that competitors, if any, would not feel prejudiced by the acquisition. Compare United States v. U.S. Steel Corp., 251 U.S. 417 at 449 (1920).

113 For a detailed account of all Greyhound acquisitions see MOODY'S 1957 TRANSPORTATION MANUAL, pp. 1298-1300. See also County of Marin v. United States, 356 U.S. 412 (1958). (Greyhound's proposed transfer of commuter service to newly-organized subsidiary not an acquisition within §5).

quarrel with the policy of having strong and efficient nation-wide systems of bus carriers for intercity traffic.[114] However, the question arises as to whether this policy has not been carried too far because there is no other integrated bus system comparable to Greyhound.[115] In fact, during 1955 the Greyhound System received gross operating revenues amounting to about 62 percent of the annual gross realized by all Class I intercity bus operators and Greyhound buses accounted for approximately 65 percent of the passenger miles of Class I carriers.[116] This dominant position of Greyhound[117] was the basis of a complaint by the Antitrust

[114] The declaration of the "National Transportation Policy" in §1 of the Transportation Act of 1940, 54 Stat. 899, note preceding 49 U.S.C. (1952) §301 states that "sound economic conditions in transportation" should be fostered "to the end of developing, coordinating and preserving a national transportation system by water, highway and rail . . . adequate to meet the needs of commerce of the United States. . . ." For a detailed account of the legislative history see OPPENHEIM, THE NATIONAL TRANSPORTATION POLICY AND INTER-CARRIER COMPETITIVE RATES 4-15 (1945).

[115] The National Trailways Bus System is a voluntary association of 42 independent intercity motorbus carriers operating in 44 states and operating in 1955 over 73,368 route miles. Its "principal purpose is to assist its members in more effectively competing with the Greyhound system." 59 M.C.C. 233 at 235. See TAFF, COMMERCIAL MOTOR TRANSPORTATION, rev. ed., pp. 598, 599 (1955). Transcontinental Bus System, Inc., a member of Trailways, incorporated in 1947, conducts long-line and local motorbus operations in the Midwest, Mid-South, Southwest and Far West. Its numerous acquisitions are described in MOODY'S 1957 TRANSPORTATION MANUAL, p. 1313, and 50 M.C.C. 193 (1947); 50 M.C.C. 305, 525 (1948); 55 M.C.C. 31 (1948); 57 M.C.C. 323 (1951); 59 M.C.C. 233 at 235 (1953) (Antitrust Division's objection withdrawn when applicant-vendee agreed that presently existing routes, junctions and gateways be maintained); 59 M.C.C. 491 (1953) and 60 M.C.C. 157 (1954). The following comparative data for 1956 are from Moody's at 1301 and 1314:

	Transcontinental	*Greyhound*
Buses owned	938	5,879
Bus Miles Operated	79,765,368	506,852,266
Miles of routes	33,436	97,819
Gross operating revenues	$27,309,318	$243,858,608
Net	$ 1,005,086	$ 29,883,147

[116] Complaint (paragraph 7) in United States v. The Greyhound Corporation, Civil Action No. 57-C-1107, filed June 27, 1957 in N.D. Ill. Class I intercity bus carriers are those with annual gross operating revenues of $200,000 or more; they do not normally compete with smaller operators whose certificated routes are few and short. Passenger miles means the number of miles travelled by all passengers in buses operated by such carriers.

[117] For an additional example of the Commission's awareness of monopoly dangers see West Coast Bus Lines, Ltd., Common Carrier Application, 41 M.C.C. 269 at 285 (1942) (dissatisfaction with Greyhound's service ["Two accounts were given of continued driving, by both Greyhound and Dollar Lines, in excess of 50 miles through several stops without cleaning up after a passenger had become ill and vomited in a bus. A resident of Ashland, Ore., traveling to San Francisco over Greyhound . . . on arrival late at night found that his baggage had apparently been put off in Oakland. Notwithstanding, Greyhound employees indifferently refused to do anything about it until the next day. . . . Several instances of passengers left behind at mealstops were described."] resulted in granting of certificate to West Coast).

Division charging Greyhound with violations of section 2 of the Sherman Act. The consent decree entered in June 1957[118] forbade Greyhound to limit or prevent any person from selling buses to any third person,[119] to divide territories with any other bus operator, to seek or knowingly receive prices, or services in connection with the purchase of buses or fuel which are not available to other bus operators, to condition the use by a bus operator of any Greyhound-owned or controlled terminal upon an agreement to refrain from competing with Greyhound or discriminate against any bus operator in the provision of usual terminal services, to have more than one-third representation on the board of directors of the National Bus Traffic Association, the major rate bureau in the intercity bus business, and to evict any bus operator from any Greyhound terminal on grounds other than non-compliance with reasonable tenancy agreements. In this manner the Department of Justice sought to prevent abuse[120] of the power inherent in Greyhound's bigness after the Interstate Commerce Commission had permitted Greyhound to grow to its present size.

All told, it seems clear that the majority of the Commission seemed inclined in the *Greyhound* cases to attach greater significance to present "substantial benefits" of integration than to potential future evils of monopoly, and that it was willing to pay the price of considerable diminution of competition for bringing

118 1957 CCH Trade Cas. ¶68,756.

119 The complaint had charged that Greyhound "entered into contracts with General Motors which conferred upon the defendant exclusive and preferential rights to the purchase of buses manufactured by General Motors . . . in exchange for commitments by defendant . . . to purchase a certain percentage of its total bus requirements from General Motors." In 1955 an action for damages by Greyhound against General Motors for delivery of defective buses was settled. Greyhound's president was quoted as saying that he was "not tied to the apronstrings of any bus manufacturer." BUS. WEEK, March 16, 1957, pp. 179, 180. New long-distance passenger buses are being manufactured by Mack Trucks, Inc. which hope to compete with General Motors for a Greyhound order. N. Y. TIMES, Dec. 12, 1957, p. 52:2. A complaint against General Motors for attempted monopolization of the manufacture of buses is pending in the Eastern District of Michigan, United States v. G.M., Civil No. 15816. Apparently arrangements between General Motors and Greyhound made in the late 1920's required Greyhound to take 75% of its buses from G.M. The problem of monopolistic domination of a carrier by a leading manufacturer of transportation equipment was involved in C. & R. Trans., Inc.—Control—Keeshin Freight Lines, Inc., 60 M.C.C. 173 at 200 (1954) (Fruehauf Trailer Co. permitted to become principal preferred stockholder in reorganized and enlarged Keeshin System subject to conditions: Fruehauf not to dispose of its stock without prior Commission approval, no person affiliated with Fruehauf to serve as director, officer or employee of the carrier, and charter provisions requiring consent by 70% of preferred stock for certain corporate actions shall be cancelled).

120 The consent decree contains, of course, no admission of law violations on the part of Greyhound.

about what it believed to be such benefits. In some instances, the findings in this respect were vague or disputable;[121] certainly, without elaborate and specific economic evidence relevant to this crucial point, accommodation of antitrust and regulatory policies becomes a meaningless abdication of the former in favor of the latter. However, the Commission has always been aware of its obligation to undertake such an adjustment and, at least in some situations, resolved the conflict in favor of competition. Perhaps, the contradictions noted above were inevitable in the absence of more specific legislative directions.

IV. END-TO-END TRUCKING MERGERS

In reply to a questionnaire submitted to it in 1955 by the Senate Select Committee on Small Business, the Commission referred to merger applications by motor carriers of property as follows: "It is not believed that the number involving substantially competing carriers is large. *The typical transaction is the merger or unification of connecting carriers.*"[122]

Cooperation between such carriers is usually called "interlining." Either loaded equipment is leased by the orginating carrier to a carrier having authority in the area of the shipment's destination, or the shipment is transferred physically from the truck of the initial carrier to the truck of the connecting carrier for delivery at destination by the latter.[123] This practice often causes delay; at times shipments are misplaced, and there are loss or damage claims. Hence, carriers engaged in substantial interlining between themselves may wish to eliminate these difficulties by instituting through-service; this could be done most effectively by unification of their separate and independent enterprises in what the Supreme Court in the *McLean Trucking* case called an "end-to-end consolidation."[124] Although this would create a different entity with normally greater strength than that possessed by its constituent

121 The Florida case, text to note 107 supra; the Liederback case, note 102 supra. Compare the detailed findings on this point in the McLean Trucking case, text to notes 10 and 11 supra.

122 Small Business Hearings, note 67 supra, p. 330. Emphasis supplied.

123 Adams Report, note 58 supra, p. 358.

124 Note 13 supra. See also 38 M.C.C. 137 at 144 (1942): "The carriers involved [in the merger challenged by McLean Trucking Co.] at present interchange a substantial amount of freight between themselves and with other carriers." For a detailed enumeration of the inefficiency and inexpedience of interlining, see Adams Report, note 58 supra, pp. 358-361.

parts prior to unification, the nature of the operation would remain substantially the same as before except for the improvement resulting from through-service. By contrast, unification of carriers with no or negligible previous interchange arrangements would present a very different picture of an entirely new service where none had existed before. The danger of diversion of traffic from competitors is likely to be greater in the latter type of merger than in the former; indeed, in the former there might be only little or no diversion. Of course, under the *McLean Trucking* formula the Commission must determine whether public advantage from improved performance made possible by a merger is more important than reduction of competition, if any; hence, we might expect that end-to-end consolidations of interlining carriers could be approved more readily than other mergers.

These considerations are reflected in the leading case of *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, Inc.*[125] Pacific, hereafter referred to as P.I.E., was in 1950 operating over 10,513 regular routes in the area between the California coast and Chicago and St. Louis. It owned 756 units of equipment, had leased 79 additional units for long-term use. It maintained terminals in most of the cities in its territory, and the average length of its hauls was 1500 miles. Its average shipment weighed 660 pounds, and its operating revenue had increased from $1,000,000 in 1941 to $14,000,000 in 1949.

The Keeshin System, which P.I.E. sought to acquire, covered 15,560 miles in territory extending from Minneapolis, Des Moines and St. Louis to Boston and Washington, D.C. It owned 1,412 units of equipment, and the average length of its haul was 215 miles. Its operating revenues were smaller than those of P.I.E., but substantial.[126]

The two systems come together in Chicago and St. Louis, but the volume of freight interchanged between them was "negligible." However, P.I.E. interlined considerable freight with Keeshin's motor carrier competitors who opposed the merger. There was no doubt that all east-bound freight delivered by P.I.E. to these protestants at Chicago and St. Louis would be lost by them in case

[125] 57 M.C.C. 341 (1950), affd. 57 M.C.C. 467 (1951).

[126] $10,500,000 is the figure for 1950 given in the Adams Report, note 58 supra, p. 43. Net income after taxes for P.I.E. and Keeshin in 1949 was $1,000,755 and $142,834 respectively. 57 M.C.C. 341 at 347 and 351 (1950).

of approval;[127] by the same token, P.I.E. would be in a position to divert to itself west-bound traffic which it now receives from eastern carriers.[128] The twelve protesting motor carriers indicated that this would disrupt the competitive balance in their eastern territories; some of them explicitly stated that they could not survive these inevitable consequences of the proposed merger.[129] Similarly, protesting railroads competing with P.I.E. and Keeshin expressed apprehension that the transaction would deprive them of vitally needed transcontinental traffic.[130]

The Commission denied approval on the ground that the proposal

> "goes beyond a mere unification of the operations of two going concerns, with the elimination of interchange formerly carried on between them. As stated, there has been no appreciable amount of traffic interchanged between P.I.E. and the Keeshin Companies. To the extent that P.I.E. would institute a single-line, single ownership, through operation between points now served by it and points now served by . . . Keeshin . . . it would be a new competitive service, not distinguishable, to this extent, from an extension of its service through securing new operating authority. It would be a new service competitive with existing carriers operating wholly within the respective territories now served by P.I.E. and . . . Keeshin . . . , depriving those carriers of traffic which they now transport and interchange, and would also be competitive with existing carriers which operate between points in the territory served by P.I.E. on the one hand, and points in territory served by . . . Keeshin . . . on the other, through the rendition of a through service not heretofore available."[131]

The denial was affirmed on reconsideration. The Commission noted that "public interest" under section 5 was not necessarily identical with the requirement of "public convenience and necessity" under section 207 of the Interstate Commerce Act[132] for

127 57 M.C.C. 341 at 379 (1950).

128 Id. at 376.

129 Id. at 371-377.

130 Id. at 368-371. The American Trucking Associations took the position that the railroads are not entitled to protection against motor carrier competition, 57 M.C.C. 467 at 468 (1951).

131 57 M.C.C. 341 at 379, 380 (1950).

132 49 U.S.C. (1952) §307. A real distinction is pointed out in McLean Trucking Co. v. United States, 321 U.S. 67 at 78, 79 (1944) (inadequacy of existing service is *not* a prerequisite for approval of a merger, but, usually, must be shown before certificates may be granted to newcomers).

grants of certificates; the statement in the prior report that authorization of this merger would be tantamount to certification of an extension of service for P.I.E. should, therefore, not be understood as blurring the distinction. Rather, it was intended to stress the Commission's duty in merger cases

> "to consider . . . if such proposed new unified service would adversely affect to any substantial extent the continuance, efficiency, and economy of existing carrier services, to the detriment of the public, whether it would result in offsetting advantages to the public and whether approval or disapproval would more nearly conform with the policy of Congress declared in the national transportation policy."[133]

In this instance, elimination of interchange expense and delay, reduction in insurance costs and other economies and greater job security for employees[134] were deemed insufficient to offset the threat to other efficient motor carriers by consolidation of two so dissimilar operations as P.I.E. and Keeshin. Commissioner Knudson suggested in a concurring opinion that the creation of a transcontinental trucking system run by what would become "one of the nation's largest and most powerful motor carriers" was disturbing in its effects "upon certain well-developed American concepts . . . relating to so-called 'antitrust policies.' "[135]

Although the anti-merger law was not mentioned, and the two companies sought to be merged were not in competition with each other, the denial of P.I.E.'s application was based on the idea that a new service would be created with the probability, nay certainty, of a substantial lessening of competition in the eastern territory served by Keeshin. The evidence as to the diversion of traffic with possibly lethal effects of the transaction on the protesting motor carriers was ample, and the Commission considered it thoroughly. In other words, on this record it was easy to conclude that the showing as to the anti-competitive effects outweighed advantages to shippers from the institution of through service; *indeed, there was no shipper support for this application.*

The Commission has been charged with erosion of the doctrine of this case by subsequently permitting P.I.E., already a leader in

[133] 57 M.C.C. 467 at 470 (1951).

[134] Id. at 359-361.

[135] Id. at 474. Mr. Knudson observed that no such system existed in 1940 when the national transportation policy was declared. Greyhound did exist then. See text at note 70 supra.

the industry,[136] to acquire several carriers operating in its western territory.[137] However, the Commission's reports in those later P.I.E. cases indicate that there was support by the shippers and no evidence as to adverse effect of the transactions there proposed on competing protestants.[138] In fact, section 5 cases involving other companies seeking to institute single-line through service have followed the *P.I.E.-Keeshin* doctrine by denying approval in analogous situations.[139] The notion that a proposed unification would

[136] In the third quarter of 1956, P.I.E. occupied second place in gross earnings and first place in net earnings among general freight carriers. S. Hearings Before Select Committee on Small Business (Trucking Mergers and Concentrations), 85th Cong., 1st sess., p. 8 (1957).

[137] Adams Report, note 58 supra, p. 262, and cases discussed on pp. 262-270. See also pp. 225, 226.

[138] The most important of these mergers was P.I.E.—Control—West Coast Fast Freight, Inc., 60 M.C.C. 301 at 318-319 (1954), Adams Report, note 58 supra, pp. 263, 264. Protestants proposed restrictions to preclude interlining between vendor and vendee at points served by protestants, which applicants accepted. Some of the companies acquired were not carriers of general freight. In MC-F-5984 (Adams Report, pp. 264, 265), protestant was a large carrier, whose size and financial strength was deemed sufficient to enable it to make the necessary adjustments. In MC-F-6199 (Adams Report, pp. 268, 269) it was said "that the mere apprehension by competing carriers that they might lose some traffic does not alone warrant denial. . . ." The protests of railroads in all these cases were disregarded. Shippers supported the applicants.

[139] E. W. King—Control; The Mason & Dixon Lines, Inc.—Purchase—W. D. Sartain and J. R. O'Guin, 60 M.C.C. 331 at 353, 354 (1954), reversing prior report in 58 M.C.C. 301 (1952) (authority to purchase operating rights denied; not every shipper entitled to direct single-line service to all points when prompt service is being provided). "Cook [protestant] not only would lose the westbound traffic it now receives from Mason & Dixon, which, during the first 6 months of 1952, aggregated almost 940 tons, but most of the traffic moving between Nashville and Memphis, constituting 48 per cent of its system tonnage and 48 per cent of its system gross operating revenues . . . would become vulnerable to Mason & Dixon's solicitation." Similar figures were given as to other protestants. Fay V. Watson—Control; Watson Bros. Transport Co.—Purchase (Portion)—West Coast Fast Freight, Inc., 57 M.C.C. 745 at 759 (1951); A. B. Crichton, Sr.—Control; Super Service Motor Freight Co.—Purchase (Portion)—Hayes Freight Lines, Inc., 60 M.C.C. 389 (1954) (denying purchase of operating rights on authority of P.I.E.—Keeshin case). Complaint by applicant-vendee dismissed in Super Service Motor Freight Co. v. United States and I.C.C., 10 F.C.C. 80,995 (M.D. Tenn. 1955) [plaintiff wanted to purchase a portion of Hayes' rights to obtain direct single-line through-service between eastern points and Memphis, via Nashville, to alleviate congested terminal conditions at Nashville. Div. 4 approved (57 M.C.C. 715), the full Commission reversed (58 M.C.C. 137), then reversed itself and reinstated the approval, but finally, on the basis of detailed evidence adduced by new protestants, denied (60 M.C.C. 389)]. These vacillations indicate the desirability for immediate protests and presentation of evidence by all affected competitors. Cf. Denver-Chicago Trucking Co.—Purchase—Boulder Truck Service, Inc., 12 CCH Fed. Car. Cas. ¶33,802 (1956) (fact that interlining developed between applicants subsequent to commencement of negotiations for sale of rights deemed irrelevant. Protests by railroads serving all points in the territory held sufficient, even in absence of showing of possible losses); J. E. Faltin—Purchase (Portion)—C. B. Gray, 50 M.C.C. 364 at 370 (1948); E.W.A. Peake—Control; Consolidated Freightways, Inc.—Purchase (Portion)—Arrowhead Freight Lines, 59 M.C.C. 165 at 184 (1953): "Vendee, a financially stronger carrier than vendor, which has performed a limited service in the territory and

bring about a radical change of service which would threaten competition was also stressed as a ground for denying applications by regular-route vendees and vendors operating over irregular routes.[140]

As noted above, these denials rest on the factual determination or, rather, prognostication in each case that competitors as a group could not long survive consummation of the transaction and that the reasonable needs of shippers are taken care of. At this point, the antitrust policy of section 7 of the Clayton Act and the regulatory purpose of the Interstate Commerce Act to prevent oversupply of motor-carrier service seem to coincide: The elimination of competitors would lead to monopoly, and, until that is achieved, the struggle among rivals for the available business would become so fierce that service would deteriorate. The Commission has the duty to prevent this.

over the routes involved, would doubtless conduct a more aggressive operation and attract substantial traffic now enjoyed by [protestants], which they can ill afford to lose. No evidence was submitted which would indicate that vendee expects to develop new sources of tonnage and it is therefore logical to conclude that the traffic anticipated would be diverted from protestants and other carriers operating in the area." For more recent decisions involving Consolidated Freightways and numerous pending applications for approval, see I.C.C. 70th ANN. REP. 77, and 71st ANN. REP. 55. See also Amer. Red Ball Transit—Purchase—B & H Transfer and Storage, 9 CCH Fed. Car. Cas. ¶32,408 (1952). Evidence shows "that intervenors, especially Rocky Ford, cannot well afford to lose any of the business they now enjoy, particularly California freight destined to Eastern points." The case is criticized in Adams Report, note 58 supra, pp. 371-373. Among the protestants were most of the major nationwide van lines, who did not need protection, and a carrier should not be denied to take the risk of competition. The latter ground may be inconsistent with the regulatory theory of the act to prevent excessive competition from oversupply of transportation. The former, in connection with the sentence quoted above, may indicate that the Commission feared the destruction of smaller competitors; in any event, the Commission's explanation should have been more elaborate on this point.

140 Shein's Express—Purchase (Portion)—W. Stillwell, 56 M.C.C. 711 at 714 (1950): "Vendees have been interlining with connecting carriers at Philadelphia between 30,000 and 60,000 pounds of south-bound traffic per day . . . were the transaction to be . . . consummated, existing carriers would lose substantially all of the traffic now received by them from vendees at Philadelphia. . . ." Appeal against denial dismissed in Shein v. United States, (D.C. N.J. 1951) 102 F. Supp. 320 (vendee-plaintiff proposed radical change in vendor's pattern of operations; plaintiff could not have qualified for certificate of convenience and necessity, should not attain same end by indirection through merger). In *accord:* Falwell v. United States, (W.D. Va. 1946) 69 F. Supp. 71, affd. per curiam 330 U.S. 807 (1947) [complaint to set aside I.C.C. order (40 M.C.C. 439) dismissed]; Houff Transfer, Inc. v. United States, (W.D. Va. 1952) 105 F. Supp. 851. The Commission defined carriers with irregular routes radial service as persons undertaking transportation "from a fixed base point or points or places located within such radial area as shall have been . . . authorized . . . or from any point within such radial area to such carrier's fixed base point or points." Regular route service is transportation between fixed termini. Falwell v. United States, supra, 69 F. Supp. at 77. See 49 U.S.C. (1952) §304(b) authorizing the Commission to establish "reasonable classifications . . . of groups of carriers."

It follows that mergers or purchases of operating rights will be approved in those cases where no threat to the survival of protesting competitors is found,[141] and this, as noted earlier, is likely, though not limited to situations where interlining of traffic between vendor and vendee preceded their application. Thus, in *Baltimore Transfer Co. v. I.C.C.*[142] plaintiffs' complaint to set aside approval of a purchase was dismissed. Vendee, Quinn Freight Lines, "one of the larger motor carriers operating along the Eastern Seaboard" as a common carrier of general commodities over regular routes from Boston to Baltimore, transported volume shipments destined to Washington, D.C., Richmond, and other points in Virginia. Vendors' (Neale and Wadkins) routes covered the territory from Baltimore to Virginia. Half a million pounds a week, amounting to one fifth of vendee's total tonnage moving south through Baltimore, was there interlined with one of the vendors; hence, the proposed purchase would eliminate delays, losses and damage. Shippers supported the application, but plaintiffs, carriers competing with vendors, protested; they urged that their service was adequate, they could accommodate additional freight and would lose substantial traffic. Observing that competition in the territory was substantial, but that vendors' operations have had little consequence for plaintiffs-protestants, the court said:

> "The opposing carriers do not serve directly a very large portion of the area in the five Virginia counties embraced in Neale's certificate. They have no interline freight with vendors and not much with Quinn, the vendee, Brooks [one of the plaintiffs] having received only some 80,000 pounds from the latter between January 1 and June 30, 1951. Complete data was not given with respect to the volume of New England

141 In J. W. Ringsby—Control; Ringsby Trucklines, Inc.—Control—Northern Transportation Co., 58 M.C.C. 594 at 598 (1952), the Commission said: "We do not consider the views expressed in the PIE case as necessarily requiring denial of every section 5 application, merely because a single-line through service would result, and because competing carriers contend that they would be adversely affected by such a service. The right to perform single-line through service results from every physical unification of rights where a common point is served. Each case can and must be determined on the basis of the evidence of record, and where . . . the record affirmatively establishes that the proposed plan of operations would meet a public need and that the public interest would best be served by the proposed common control, the application may properly be approved, especially where the competing carriers have failed to establish that their operations or services would be prejudiced to any material degree."

142 (D.C. Md. 1953) 114 F. Supp. 558, affd. per curiam 346 U.S. 890 (1953), rehearing den. 347 U.S. 908 (1954).

> tonnage which East Coast and Transfer [the other plaintiffs] interline. Out of more than three and one-half million pounds transported by Brooks to or from Richmond, on three days in 1951, only a little more than 100,000 pounds originated at or was destined to points in Connecticut, Massachusetts and Rhode Island. The bulk of vendee's tonnage originates in Massachusetts, and the opposing carriers have shared very little in the portion moving into vendors' territory."[143]

Under these circumstances, while it was "quite likely that Quinn, the vendee, being an aggressive carrier, will divert some freight from the opposing carriers, this fact alone is not sufficient reason for denying the application; and weighing the evidence on both sides the *Commission stated it was not convinced that operations by Quinn, the vendee, under the unified rights would so hurt the opposing carriers as to impair their ability to continue performing their obligations as common carriers.*"[144]

Indeed, the court endorsed the Commission's rejection of plaintiffs' contention that the proposed transaction would not be in the public interest because it would take some business away from them: "As to this, suffice it to say that it is not inconsistent with the public interest if, in order to provide the public with improved service, such would affect adversely the revenue of a protesting carrier."[145]

The distinction between adverse effect on protestants' revenues on the one hand and impairment of ability to continue as common carriers on the other seems to be crucial; the former is con-

[143] 114 F. Supp. 558 at 563. On p. 562 the court, summarizing the (unreported) findings of the Commission, states that plaintiff Transfer "would be subject to substantial competition from vendee," but that Transfer has been successful in spite of "substantial carriers whose routes practically parallel its own."

[144] Id. at 563. Emphasis added.

[145] Id. at 564-565, citing Trans-American Freight Lines, Inc.—Purchase—H. D. Gorman, 5 M.C.C. 712 (1938); Super Service Motor Freight Co.—Purchase—Selman & Junkins, 45 M.C.C. 432 (1947) and N.C. Purdie Corp.—Purchase (Portion)—Hoffman's Motor Transportation, 57 M.C.C. 790 (1951). The court also approved the granting of temporary authority to Quinn pursuant to §210a(b) of the Interstate Commerce Act in view of the fact that Neale had died and his widow was unable to carry on the trucking business. The purchases approved in Eastern Freightways, 60 M.C.C. 133 at 136 (1954), and Anderson Motor Service v. United States, (E.D. Mo. 1957) 151 F. Supp. 577 at 581, were similarly motivated. Truckers in their fifties and sixties with all their assets tied up in the business frequently try to sell out to other lines. See S. Hearings Before Select Committee on Small Business (Trucking Mergers and Concentrations), 85th Cong., 1st sess., p. 160 (1957). See also Stone's Express Co. v. United States, (D.C. Mass. 1954) 122 F. Supp. 955, dismissed as moot 350 U.S. 906 (1955) [limitation of temporary authority to maximum duration of 180 days (49 U.S.C. (1952) §310a(b)) not superseded by Administrative Procedure Act §9b. 5 U.S.C. (1952) §1008(b)].

sistent with a finding that the proposed end-to-end unification *increases* while the latter *lessens* competition.[146] Accordingly, the Commission has rationalized its approval of numerous acquisitions of this type on the theory that opposing carriers are not entitled to immunity from competition; hence, their protests have no merit when, in addition to the obvious advantage to shippers resulting from elimination of interlining, present and potentially available business in the area is sufficient to stimulate them into making the necessary adjustments to a more vigorous competitive situation.[147]

146 See the explanation by Dr. Adams that vertical or end-to-end mergers may either increase or lessen competition in S. Hearings, note 145 supra, p. 205.

147 Anderson Motor Service, Inc. v. United States, (E.D. Mo. 1957) 151 F. Supp. 577 at 581 (protestants' efficiency shown by low operating ratios and rising profits); Wasie—Control; Merchants Motor Freight, Inc.—Purchase (Portion)—Bridgeways, Inc., 60 M.C.C. 229 at 278-280 (1954) (P.I.E. case distinguished, support by numerous shippers, active and continuous interlining, protestant motor carriers had improved their operating ratios and increased their assets, protests by railroads (pp. 269-271) disregarded); Sutherland & Palmer—Control; Middle Atlantic Trans. Co.—Purchase (Portion)—United Trucking Co., 7 CCH Fed. Car. Cas. ¶31,936 (1950) (competitors are large, in five months of vendee's operation under temporary authority intervenors had lost only one account); Prucka—Purchase (Portion)—Overnite Express, Inc., 57 M.C.C. 69 at 76 (1950) (usual formula that some competing carriers will lose some traffic when a larger or more aggressive carrier takes over operations of a smaller one); Interstate Motor Lines—Control and Merger—Great American Dispatch, Inc., 58 M.C.C. 775 (1953) (not a "new" service because of substantial interlining between vendor and vendee, no adverse effect on protestants); Arkansas Motor Freight Lines—Purchase (Portion)—Smock Transp. Co., 55 M.C.C. 701 (1949) and A. B. Crichton—Control; Super Service Motor Freight Co.—Purchase—Selman & Junkins, 45 M.C.C. 432 (1947) (same, no evidence that available traffic would not support single-line through service in addition to services of other carriers, "some increase in competition in the area may result"); Keeshin—Control; Conklin Truck Line, Inc.—Purchase—Wilhelm Transport Co., 59 M.C.C. 763 at 775-776 (1954) (merger between carriers connecting at Chicago approved in spite of very little previous interlining between vendor and vendee; protestants would face new competition only at some points); Mid-Continent Freight Lines—Purchase—Hanson Motor Express, Inc., 65 M.C.C. 312 (1955) (vendee's regular routes connected with those of vendor for the eastbound delivery of specified commodities at 6 towns and for westbound delivery of general commodities at the same towns. "[V]endee now authorized to deliver and pick-up shipments at St. Louis and the principal points served by vendor, . . . acquisition of the rights of vendor would not permit it to render any greater service at St. Louis. . . ." P.I.E. case distinguished, protestants' operations have been increasingly profitable, their fears are "speculative and conjectural"); Wieck—Control; St. Louis-Nashville Freight Lines—Purchase (Portion)—Ziffrin Truck Lines, 59 M.C.C. 339 (1953) and Navajo Freight Lines—Purchase—M. M. Comstock, 11 CCH Fed. Car. Cas. ¶33,657 (1956) (protestants larger than vendee, hence their objections seem groundless); Dalby—Control; T.I.M.E., Inc.—Purchase (Portion)—W. O. Harrington, 60 M.C.C. 381 at 387 (1954), reversing 59 M.C.C. 621 (1953), Commissioner Mahaffie dissenting (no interlining prior to beginning of merger-negotiations, but *"increased competition would be likely to stimulate all carriers in this area toward a more efficient and improved service and thereby attract additional traffic over comparatively new and desirable routes to the ultimate benefit of all participating carriers"*). Emphasis added. Ringsby Truck Lines, Inc.—Control—Northern Transport Co., 58 M.C.C. 594 at 598 (1952), affirming 58 M.C.C. 235 (1952) (failure of protestants to show material prejudice); D.C. Hall Co.—Purchase—

By the same token, railroads have no standing to complain about approval of a motor-carrier acquisition on the sole ground that "the motor carriers . . . as a combination under joint control with adequate financial backing, offer stronger competition to the railroads than they did previously."[148]

The difficulty of determining in many cases whether approval of a proposed acquisition would merely make things tougher for competitors rather than threaten them with extinction should be

Hall and Hall Transport, Inc., 70 M.C.C. 233 (1956) (same); Watson Brothers Transp. Co.—Purchase (Portion)—Powell Brothers Trucklines, 57 M.C.C. 661 at 671 (1951) (vendor's rights not dormant when he operated "on a scale commensurate with its financial resources, facilities, and the traffic tendered to it." Protestants "ability to continue to perform their common-carrier obligations" not affected); Garrett Freightlines, Inc.—Purchase—The Moab Garage Co., 58 M.C.C. 757 at 772-773 (1953) (protestants' operating ratios, revenues and connections with other carriers found such as to preclude serious detriment to them). Finding of Div. 4 that vendee could not bear financial burdens of the transaction reversed in 59 M.C.C. 615 at 618 (1953); Boyd Truck Lines, Inc.—Purchase—Denver-Limon-Burlington Transfer Co., 65 M.C.C. 433 (1955), modifying 65 M.C.C. 75 (1955) (prior report approved purchase subject to condition that unified rights should exclude right to transport shipments originating at Kansas City, destined to Denver or points beyond, or originating at Denver destined to Kansas City. On reconsideration, majority eliminated this condition on the ground that opposing carriers do not need this protection. P.I.E. was one of the protestants. Bruce Motor Freight, Inc.—Purchase—Pittsley, 65 M.C.C. 563 (1955) (purchase approved subject to concurrent cancellation of some of the acquired rights and condition barring vendee from utilizing rights for transportation between Chicago, Twin Cities and St. Louis); Trans-American Freight Lines—Purchase (Portion)—Allen Motor Lines, 65 M.C.C. 163 (1955), reversing 59 M.C.C. 695 (1953) (purchase approved with restrictions as to territory in spite of absence of prior interlining between applicants, shippers complain about delays and loss due to interchange and protestants, "substantial and well established carriers," should be stimulated by increased competition to render improved service); Baggett Transportation Co.—Purchase—Hunt Freight Lines, 70 M.C.C. 169 (1956) (purchase approved with restrictions to protect competitors handling satisfactorily all available traffic between Chattanooga and Atlanta, detailed discussion of precedents to the effect that restrictions on operating rights in §5 cases "tend to create problems of interpretation and operating complications" and should not be imposed "unless clearly justified"). See also Moland—Purchase—Saunders and Welty, 39 M.C.C. 321 at 326 (1943), reversing 38 M.C.C. 625 (1942), on the basis of new evidence as to competitive conditions in the area. In Clyde—Control; Service, Inc.—Purchase (Portion)—Yeary Transfer Co., 59 M.C.C. 517 at 527 (1953), a purchase of interstate rights of a connecting carrier which had interlined substantial traffic with vendee approved against the objection that the transaction would result in separation of vendor's interstate and intrastate rights. The Commission's jurisdiction under §5 to entertain applications by interstate carriers for authority to purchase properties of a carrier operating physically within one state but whose activities involve transportation in interstate commerce between places within such state under an intrastate certificate was sustained in Baggett Transportation Co. v. United States, (N.D. Ala. 1953) 116 F. Supp. 167.

[148] Atchison, Topeka & Santa Fe Ry. Co. v. United States, (E.D. Mo. 1955) 130 F. Supp. 76 at 79, affd. per curiam 350 U.S. 892 (1955), rehearing den. 350 U.S. 943 (1956). The court observed (at p. 78) that there were no allegations of present or threatened financial injury. Alton Ry. Co. v. United States, 315 U.S. 15 (1942), was distinguished on the ground that it involved a Commission order granting *new operating rights.*

obvious. A good illustration is *St. Johnsbury Trucking Co.—Purchase—Hinsch Transportation Co.*[149] That transaction involved common carrier operations in New England, New York and northern New Jersey. Vendor, who sought to sell because of poor health and recurring deficits, operated between the New York-New Jersey area and Boston, where it interchanged most of its traffic with one of the protestants and only "occasionally . . . some shipments with vendee."[150] Much of its tonnage was transported in semitrailers loaded on railroad flatcars. Vendee's operations were conducted principally north of Boston and Springfield, where it interchanged with other carriers. This has not been satisfactory with respect to less than truckloads, and approval of the purchase would enable vendee to institute through-service from northern New England to New Jersey. Moreover, vendor's preponderant northbound traffic could be balanced with vendee's predominant southbound shipments.[151] Representatives of nine shippers with plants in Maine, Vermont and New Jersey supported the application.[152]

Numerous competing motor carriers appeared in opposition, submitting operating statistics as to revenues and expenses. Division 4 devoted ten printed pages of its report to a summary of these data.[153] Only two of the protestants admitted that they had no reason to fear losses.[154] One other showed that since the grant of temporary authority to vendee[155] it had "lost 80 percent of the traffic moving to and from vendee's northern New England area to points in the area served under vendor's rights. . . . A maximum of 20 percent of its equipment is now idle."[156] Most of the opposing carriers had high operating ratios, and many could handle more traffic. All claimed that an entirely new service would be established. Accordingly, a majority of Division 4 denied the application on the ground that "intense competition" exists in the area, "carriers have expended their energy and resources in developing

149 59 M.C.C. 419 (1953) (approval denied in 2-1 decision); reversed and approved, subject to conditions 59 M.C.C. 747 (1954), modified 60 M.C.C. 129 (1954), complaint dismissed M. & M. Transportation Co. v. United States, (D.C. Mass. 1955) 128 F. Supp. 296, affd. per curiam 350 U.S. 857 (1955).

150 59 M.C.C. 419 at 427 (1953).

151 Id. at 428-429.

152 Id. at 431-434.

153 Id. at 434-444.

154 Id. at 435 and 437.

155 See Stone's Express Co. v. United States, (D.C. Mass. 1954) 122 F. Supp. 955.

156 59 M.C.C. 419 at 440-441 (1953). The figures quoted in the text pertained to M. & M. Transportation Co., which later sued to set aside the approval, note 149 supra.

facilities to handle all available traffic, and . . . they are rendering an adequate service," and "are entitled to protection against . . . a new service. . . ."[157]

On reconsideration, the full Commission said that "most of the carriers had increased their operating revenues and net income in 1948, and it does not appear that they have or would lose sufficient traffic as a result of the transaction to affect materially their operations. . . . [T]he traffic in the territory is ample to support continuation of a part of vendor's operations as unified with those of vendee, as well as the operations of competing carriers."[158] Accordingly, the application was approved on the condition that all operating rights not used by vendor should be cancelled.[159] The subsequent complaint of the protestant carrier most affected by the transaction was dismissed on the usual ground that there was substantial, though conflicting evidence to support the Commission's findings, and strict consistency with its prior decisions was not required of the Commission.[160]

The reversal of the initial report of Division 4 was not based on new evidence. Hence, the bare statement of diametrically opposite conclusions drawn from the same record by the full Commission is regrettable because of its failure to explain "why the change of attitude came about"[161] after the delay and expense of protracted hearings and rehearings. That change involved the key question of the Commission's economic regulation: *"How does it determine the limits of permissible competition?"*[162] To be sure, a reasoned answer is not necessary where the evidence seems conclusive that protestants would be destroyed or that their ability to continue as common carriers would not be affected, as in the *Baltimore Transfer Co.* case discussed above.[163] But in *St. Johns-*

157 Id. at 445-446.

158 59 M.C.C. 747 at 758-759 (1954).

159 Id. at 759, 761, 762. The condition was later made more strict by requiring cancellation of all of vendor's operating rights except those which "would permit an operation between vendee's existing rights in northern New England, on the one hand, and on the other, points in the involved New York-New Jersey area." 60 M.C.C. 129 at 130 (1954). Thus, the Commission met the protestants half-way. See Adams Report, note 58 supra, pp. 294-296.

160 M. & M. Transportation Co. v. United States, (D.C. Mass. 1955) 128 F. Supp. 296 at 301, and cases cited. *Accord,* Anderson Motor Service v. United States, (E.D. Mo. 1957) 151 F. Supp. 577 at 581.

161 Adams Report, note 58 supra, p. 356. The criticism quoted in the text referred to another decision, but is repeated throughout the report.

162 Ibid. Emphasis added.

163 See text at note 143 supra. The evidence in the McLean Trucking case was also clear on this point.

bury Trucking Co. reasonable men differed about the evaluation of the evidence as indicated by the different results reached by Division 4 and the full Commission. The Federal Motor Carrier Act was intended to prevent "over-competition" leading to depressed rates, or deterioration and ultimate disappearance of services, but not intense or "constructive" competition.[164] Hence, the ultimate rejection of the protests of St. Johnsbury's competitors presented an opportunity to elucidate the Commission's approach in close cases as to how it defines both concepts, what criteria, if any, it uses to distinguish the latter from the former and what evidence protestants must present in order to convince the Commission that an oversupply of motor-carrier service is threatened. The Commission has been criticized for its failure to develop a clear, practical and consistent philosophy with respect to these difficult questions;[165] its interpretation of section 5 in general terms, as approved in the *McLean Trucking Co.* case, certainly does not help solving specific, complicated and ambiguous situations.

On the other hand, it should be remembered that both the

[164] Statement of Commissioner A. F. Arpaia, Small Business Hearings, note 67 supra, p. 166. Commissioner Owen Clarke, testifying before the Senate Select Committee on Small Business (Trucking Mergers and Concentrations), 85th Cong., 1st sess., p. 101 (1957), said: "If it [competition] results in more economical and better service to the public by increasing competition, then we are for it. If increasing competition adversely affects the quality of service and the price of the service, then, in following out the national transportation policy, we are opposed to increased competition in those instances . . . there are two kinds of competition: Constructive competition and destructive competition. The national transportation policy explicitly states we should prohibit or prevent what might be called destructive competition."

[165] Adams Report, note 58 supra, passim. Testimony of Dr. Adams in S. Hearings Before Select Committee on Small Business (Trucking Mergers and Concentrations) 85th Cong., 1st sess., p. 133 (1957). Law and Ingham Trans. Co.—Purchase (Portion)—Woodberry, 11 CCH Fed. Car. Cas. ¶33,278 (1955), is an example of inconsistency as pointed out in the Adams Report, pp. 270-275, 284, 285. On facts similar to St. Johnsbury, application of a small carrier was denied; applicants urged that protestants had failed to show their volume of traffic or their shippers which might be subject to competition by vendees, nor any actual losses during temporarily authorized operations by vendee. Division 4 was satisfied by the fact that protestants' operating ratios had become less favorable. Compare Wheaton Van Lines, Inc.—Purchase (Portion)—Carleton [authority for vendee (operating in 30 states) to purchase small trucker owning 5 pieces of equipment denied three times on the ground that reactivation of sporadically exercised rights would result in new service] 58 M.C.C. 814 (1952), 60 M.C.C. 415 (1954), 65 M.C.C. 331 (1955), reversed and granted, 4 Commissioners dissenting, 65 M.C.C. 781 (1956) (mere apprehensions of competing carriers no ground for denial in absence of proof that additional competition would seriously impair their services; competition among household goods carriers different from other industries since individual shippers may make long-distance move only once or twice in a life-time; vendor's sporadic operations were consistent with his resources). See Adams Report, note 58 supra, pp. 350-356, for a detailed account of this case.

total ton-miles of regulated carriers of property and the truckers' percentage of that total increased spectacularly in recent years.[166] At the same time, full or partial approvals of section 5 applications outnumbered denials by 3 to 1.[167] Hence, the Commission may be correct in claiming that "many of these mergers have added to the efficiency of the trucking industry"[168] and, in fact, brought about "increased competition" by making "a single company which has greater stability and dependability from a financial standpoint better able to compete with the thousands of other motor carriers and railroads."[169] However, this does not dispense with the desirability of furnishing clearer directional lines as to where the line should be drawn between excessive and reasonable competition.

V. ACQUISITION OF DORMANT OPERATING RIGHTS

The question whether to protect competitors against destructive competition or expose them to constructive competition has been particularly troublesome in the determination of applications for authority to acquire control or purchase operating rights of a vendor who has not exercised all or some of his rights or has rendered sporadic services only for some time.[170] It is settled that cessation of operations does not necessarily or automatically cause a revocation or lapse of an operating authority previously granted

[166] I.C.C. 70th ANN. REP. 45 (Nov. 1, 1956): "The increase of 18.1% in ton miles from 1949 to 1955 for the railroads . . . compares with increases of 56.8% for regulated motor carriers. . . ." The railroads' ton miles increased 86.3% from 1939-1955, but their share of the total declined from 62.4% to 49%. Motor vehicle tonnage during the same period increased 328%, and . . . share of the total rose from 9.7 to 17.7%. Id., p. 43. Total intercity ton-miles (all modes of transportation) were as follows: 543.5 billion (1939), 915.8 billion (1949), 1,277.8 billion (1955), id., p. 44. It is estimated that in 1957 intercity trucks hauled 260 billion ton-miles of freight, 6 billion more than in 1956. N.Y. TIMES, Jan. 6, 1958, p. 97:1: "Trucks capture 19% of freight." Comparison of 1955 with 1956 shows percentages of total ton-miles: railroads decreased from 49.41 to 48.22; motor carriers increased from 17.7 to 18.66. I.C.C. 71st ANN. REP. 10 (1957).

[167] From the enactment of the Motor Carrier Act through 1955 the Commission granted 4,510 and denied 1,216 applications. Small Business Hearings, note 67 supra, p. 329. During the period Nov. 1, 1955 to Oct. 31, 1956, 271 applications were granted and 50 denied. I.C.C. 70th ANN. REP. 78 (1956).

[168] Commissioner Mitchell in S. Hearings, note 165 supra, p. 103.

[169] Commissioner Clarke, id. at 102.

[170] Some of the rights of vendor in the St. Johnsbury Trucking Co. case were dormant; text to note 159 supra; rights are not considered as "dormant" when operations thereunder were on a scale commensurate with the carrier's facilities. See Watson Brothers Transp. Co.—Purchase (Portion)—Powell Brothers Truck Lines, 57 M.C.C. 661 (1951).

by the Commission.[171] Consequently, the holder of dormant rights may either himself resume their exercise or sell them. If he does the latter, the problems discussed above with reference to acquisition of active rights take on added complexity because other carriers are likely to claim that they have filled the void which occurred when vendor ceased operations by expansion of their own facilities. Substantiation of such a claim may have the double-barrelled effect of showing that shippers do not need such a purchase and that competitors could not long survive its consummation; opposing carriers might even invoke the *P.I.E.-Keeshin* doctrine that vendee is seeking the institution of a new service.

The Commission has denied many applications for the purchase of dormant rights. A significant illustration is *Herrin Transportation Co. v. United States*.[172] Herrin sought authority to purchase the operating rights of vendor which had conducted no operations for over a year. The transaction was intended to enable Herrin to institute a single-line service; twenty shippers and consignees and three of Herrin's connecting carriers supported it. Other shippers supported the protestants. Two successive Hearing Examiners recommended denial because "to permit vendee to institute the service authorized by vendor's certificate in this highly competitive area [between New Orleans and Mobile] would have the effect of imposing a penalty on intervenors . . . at a time when available traffic is diminishing." In addition, "the revenue which the intervenors derive from handling interline shipments is essential to their operations. The diversion of a substantial amount of this traffic to vendee would no doubt impair their ability to continue their present service. The evidence adduced

171 General Transportation Co. v. United States, (D.C. Mass. 1946) 65 F. Supp. 981, affd. per curiam 329 U.S. 668 (1946) [approval of purchase of dormant rights sustained: revocation can be effectuated only in accordance with the procedure set forth in §212(a), 49 U.S.C. (1952) §312(a) of the act; plaintiff's argument that vendor had ceased to be a common carrier since it no longer held itself out to the general public (49 U.S.C. (1952) §303(a)(14) rejected]. *Accord:* Quaker City Bus. Co.—Purchase—Blackhawk Line, 38 M.C.C. 603 at 606 (1942); Powell Bros. Truck Lines, Inc.—Purchase—John B. Bryan, 39 M.C.C. 11 at 17 (1943): "Regular-route common carriers . . . are not called upon to transport traffic between each and every combination of points which they are authorized to serve, and to require a continuity of operation in this respect would destroy a carrier's flexibility of service contrary to the declaration of policy in the act. . . . The mere nonuser by Bryan of his right to operate between St. Louis and Kansas City did not extinguish his right to do so." Complaint dismissed in Byers Transport. Co. v. United States, (W.D. Mo. 1943) 49 F. Supp. 828.

172 (E.D. La. 1952) 108 F. Supp. 89, affd. per curiam 344 U.S. 925 (1953).

by shippers . . . indicates a preference for the proposed through service more than it shows a real need. . . ."[173]

Division 4 granted approval on the ground of need and lack of a showing that existing carriers would be "materially" affected, but the full Commission agreed with the examiners and reversed.[174] The court refused to interfere, observing that there was a rational basis for the denial and the weighing of conflicting evidence was the job of the Commission.[175] Again, the Commission had not elaborated its reasons for resolving the conflict one way rather than the other, although its reversal of the prior report on the same record should have been explained by such elaboration. Yet, the relatively large size of the vendee and the finding by the examiners as to the disastrous effect of the proposal on competing carriers rendering satisfactory service plausibly support this and similar denials.[176] Hence, it would appear that acquisition of dormant rights is governed by the same principles as acquisition of active rights. However, other applications, including some by small vendees, relating to dormant or little used rights have also been denied on the ground that no need had been shown for what would be, in effect, a new service in spite of the fact that in some cases vendee had considerable shipper support. These reports do not even refer to specific evidence as to the repercussions, if any, such a purchase would have on competitors.[177]

173 108 F. Supp. at 92.

174 Herrin Transportation Co.—Purchase—Mobile Express, 57 M.C.C. 523 at 532 (1951), revd. 58 M.C.C. 59 (1951).

175 108 F. Supp. at 94-95.

176 McLean Trucking Co.—Purchase—D. J. Black, 12 CCH Fed. Car. Cas. ¶33,731 (1956); Pacific Intermountain Express—Purchase—Browning Freight Lines, 58 M.C.C. 629 at 638 (1952); Shein's Express—Purchase (Portion)—Central Jersey Motor Lines, 59 M.C.C. 534 at 548-549 (1953) (vendor's operations not active or continuous, no record of interlining between parties, serious threat to existing carriers, no evidence of shipper support). See also L. Nelson & Sons Transport. Co.—Purchase—White's Express & Transfer Co., 59 M.C.C. 675 at 679 (1953); American Red Ball Transit Co.—Purchase—B & H Transfer & Storage Co., 9 CCH Fed. Car. Cas. ¶32,408 (1952).

177 Interstate Motor Freight System—Purchase—Wesson Co., 55 M.C.C. 222 (1948); A. A. O'Connor—Purchase—McCullough Trucking Co., 12 CCH Fed. Car. Cas. ¶33,708 (1956) (Comr. Mitchell dissented on the ground that protestants had made no case against this "sale of rights by a small business man"). Loo-Mac Freight Lines—Purchase (Portion)—Gordons Transports, 55 M.C.C. 196 at 201 (1948) (refers only to "possible adverse effect" of resumption of operations by new carrier on existing carriers); Kenosha Auto Transport Corp.—Purchase—Frey and Witt, 55 M.C.C. 76 (1948) (vendor never conducted any business, purchase of "bare" certificate disallowed); Transcon Lines—Purchase (Portion)—Anderson Motor Service Co., 56 M.C.C. 521 at 534, 549, 555 (1950) (much shipper support, but protestants are large and efficient operators, traffic in area is decreasing, new service not justifiable). *Accord:* Liberty Motor Freight Lines—Purchase—Tumbleson, 59 M.C.C. 581 (1953); Groendyke Transport—Purchase—Foree Trans. Co., 10 CCH Fed. Car. Cas. ¶32,841

The total picture is, thus, confused on several accounts: If vendee is a small carrier, or if protestants are larger than the applicants, serious threats to the competitive survival of existing carriers do not seem likely. Moreover, some reports imply that *serious* consequences need not be shown, and that the applicants have the burden of proof as to the public interest. Indeed, in *Ratner—Control—Tompkins Motor Lines*[178] an individual who controlled three motor carriers sought to acquire control of a vendor whose rights had not been exercised to any appreciable extent with respect to certain specified commodities. In denying the application, two members of Division 4 said:

> "Most protestants have indicated the volume of their traffic in the considered territory, and although they have not detailed specifically the traffic which they believe would be lost to such proposed operations, their evidence is sufficient to show that they would be adversely affected thereby. The burden of showing that the proposed coordinated operations would meet a public need and would be consistent with the public interest is upon applicant. In the instant proceeding, that showing has not been made."

A divided three-judge court affirmed, saying that "the use of these words . . . are unfortunate and do not correctly state the law," but "a mere play of words" should not destroy the finding that the proposed acquisition

> ". . . would create a new service in an area already adequately served by motor carriers, and that such new service could draw additional traffic only from existing carriers to the detriment of said existing carriers. . . . The term 'public interest' as used in Section 5 clearly embraces the interest of competing carriers. Their interest and that of the general public is the same in preventing uneconomic transportation. The entry of plaintiff into the area would disrupt the competitive bal-

(1953). Eclipse Motor Lines, Inc.—Purchase—McMaster Bros. Transfer, Inc., 59 M.C.C. 609 at 614 (1953) (railroad opposition successful because of "complete absence of any evidence showing a need for the reinstitution of service"); Willers, Inc.—Purchase (Portion)—Everson, 10 CCH Fed. Car. Cas. ¶32,973 (1953) (burden of proof not met by applicants); Atkinson & Sons—Purchase—Kellman, 11 CCH Fed. Car. Cas. ¶33,705 (1956). See also Von Der Ahe Van Lines—Purchase—Swornstedt Storage & Van Co., 60 M.C.C. 593 at 608, 610 (1954) (acquisition to enable vendee to add six new states to its radial rights where its connecting carriers are too slow. All large Van Lines opposed; "possible adverse effect" on them by this new service held to outweigh public benefits). See critical comment in Adams Report, note 58 supra, pp. 374, 375. As to denials of applications for purchase of dormant rights see Adams Report, pp. 281-286 (small carriers) and 300-303 (large carriers).

[178] 70 M.C.C. 251, 12 CCH Fed. Car. Cas. ¶33,799 (1956).

ance with harmful effect on the competing carriers without compensatory benefits to the public. . . ."[179]

It would seem, then, that "the law" as distinguished from some carelessly written reports requires a showing of inevitable damage to opposing carriers.[180] But, as noted above, many denials do not elaborate *how much* of such damage, if any, must be shown to prevent approval of a purchase intended to revitalize dormant or little used rights. On the other hand, in numerous other cases approval was granted because the Commission concluded, sometimes on reconsideration, that there was a reasonable continuity of service and competitors would be able to continue unimpaired services even at the risk of some losses.[181] These decisions imply that only pretty convincing evidence of oversupply of transporta-

179 Ratner v. United States, (S.D. Ill. 1957) 12 CCH Fed. Car. Cas. ¶81,164, affd. per curiam 356 U.S. 368 (1958).

180 Denver-Chicago Trucking Co. v. United States, (D.C. Colo. 1953) 9 CCH Fed. Car. Cas. ¶80,846 (protestant's failure to appear at hearing deemed waiver of objection to purchase application).

181 Shapiro—Purchase—Kasen, 56 M.C.C. 755 at 763 (1950) (small vendee wishing to buy out a carrier which has not been an active competitor of protestants. "Some of the truckload traffic which might be lost by them to vendees was available to them only because of the inavailability of needed satisfactory less-than-truckload service"). Adlay Express Co.—Purchase—Savage Truck Line, 65 M.C.C. 457 (1955) (acquisition by larger carrier approved on condition that dormant parts of vendor's authority be cancelled; expanding traffic in territory thought to enable protestants to make adjustments). (Adams Report, note 58 supra, pp. 296, 297); Holland Transportation Co.—Purchase—Th. Apicella, 56 M.C.C. 157 (1949) (vendor had leased its rights to lessee which became insolvent, receiver conducted no operations, no proof submitted by protestants that their functions as common carriers would be impaired). Wheaton Van Lines, Inc.—Purchase (Portion)—Carleton, 60 M.C.C. 415 (1954), denial affd. 65 M.C.C. 331 (1955), revd. 65 M.C.C. 781 (1956) (four dissents). See note 165 supra. Howard Van Lines, Inc.—Purchase (Portion)—McHugo Transfer Co., 60 M.C.C. 57 (1954) (vendee, large household goods carrier in 29 states, wished to buy some operating rights of Washington carrier to avoid circuitous transportation to Pacific Northwest. Eleven motor-carriers of household goods, including the nation-wide systems, opposed, pleading that they would lose tonnage). See Adams Report, note 58 supra, pp. 362-363. Shipper witnesses supported the application. Id., pp. 359-362. Division 4 denied approval because vendors, prior to agreement, had performed limited operations only, new service would be established and competitors are entitled to protection. Reversed, 12 CCH Fed. Car. Cas. ¶33,874 (1957) (vendors' operations increased subsequent to purchase agreement). Watkins Motor Lines—Purchase—Peninsula Corp., 10 CCH Fed. Car. Cas. ¶32,980 (1953), reversing 58 M.C.C. 355 (1952) (operations by vendor had been limited prior to vendee's exercise of temporary authority, and supporting shippers appeared at rehearing. Purchase of operating rights as to canned goods approved in absence of showing of "serious" effect on competitors. Vendors unused rights to transport numerous other commodities cancelled). For other cases of approval conditioned on cancellation of a part of vendor's operating rights see Roy Brothers Transport. Co.—Purchase—Maliar, 65 M.C.C. 339 (1955), and DeVenne—Control—Allman Transfer & Moving Co., 65 M.C.C. 211 (1955), 65 M.C.C. 661 (1956). Adams Report, note 58 supra, pp. 281, 299, 300. Mid-Continent Freight Lines—Purchase—Hanson Motor Express, Inc., 65 M.C.C. 312 (1955), and Adams Report, note 58 supra, pp. 297-299 (cessation of operation for 11 months does not create dormancy, but rights not exercised for several years shall be cancelled. Protestants must show "with some particularity" that they cannot adjust to additional competition). Clifford Skipworth—Purchase—

tion threatening maintenance of service and survival of competitors as a group should be recognized as justification for denial.

VI. HORIZONTAL MERGERS

The trucking mergers, consolidations, acquisitions of stock or assets or purchases of operating rights discussed above involved transactions between connecting carriers. "Horizontal" unifications of carriers operating in the same general territory[182] seem to be less frequent by comparison. They do not offer the advantages of replacing interlining with single-line through service and complementing existing route patterns. Moreover, horizontal unifications would remove competition between vendor and vendee and might thereby undermine the competitive strength of other carriers serving the same area.

The Commission has shown awareness of these problems. For instance, in 1946 it authorized Converse Trucking Service, a common carrier of heavy machinery in the Pacific Northwest, to lease for five years the operating rights of Mitchell as to transportation of general commodities. Mitchell had been running only one or two vehicles a day between Portland and San Francisco, and wished to confine his activities to intrastate operations in Oregon. Converse believed that due to its greater resources it would conduct interstate operations over the same route more profitably than Mitchell, particularly because the lease would enable Converse to transport a wider range of commodities. The Commission approved, finding that lessee would provide a better service than lessor and protesting competitors would not be seriously affected.[183]

Prior to expiration of this lease, Converse and Mitchell filed application under section 5 seeking approval for the purchase of

Rutherford Freight Lines, Inc., 39 M.C.C. 741 (1944) (protestants' reference to discontinuance of vendor's operations and their ability to handle all available business disregarded). Commissioner Miller dissented, citing Gregg Cartage & Storage Co. v. United States, 316 U.S. 74 at 83 (1942): ". . . any substantial interruption of one carrier's service tends to result in expansion of other facilities to meet the continuing needs of shippers and thus to cause overcrowding if the suspended service is resumed." In that case a grandfather application was denied because applicant's services were interrupted during the statutory period. Superior Trucking Co.—Purchase—Moore, 13 CCH Fed. Car. Cas. ¶34,284 (1958) (sporadic nature of vendor's operations, due to specialized nature of its authority, no bar to approval). *Accord,* Dennis Trucking Co.—Control—Johnson Tranfer, 13 CCH Fed. Car. Cas. ¶34,295 (1958), modifying 70 M.C.C. 741 (no evidence offered by protestants).

182 Definition by Dr. Adams, S. Hearings Before Select Committee on Small Business (Trucking Mergers and Concentrations), 85th Cong., 1st sess., p. 204 (1957). Dr. Adams cited as an example an acquisition by a railroad-controlled truck line. See Adams Report, note 58 supra, pp. 306-308 as to the special problems of such transactions.

183 Converse—Lease—Mitchell, 40 M.C.C. 452 (1946).

the leased rights. At the same time, four interstate truckers operating over the same routes sought to purchase the Mitchell rights from Converse, together with the physical property of Converse used in the leased operations. Converse indicated that its operations under the lease had been unprofitable and it needed the proceeds from the proposed sale to the four truckers to pay pressing obligations and secure working capital for its heavy-hauling operations which it planned to retain. Although these applications were supported by four shippers, the Commission, nevertheless, denied, because the case presented "the novel situation of four of the largest competing motor carriers operating between Portland and San Francisco conceiving a plan, and joining together in its execution, for the elimination of the actual competition which they have experienced in the past from service rendered under Mitchell's operating rights; and, perhaps, of greater importance from their standpoint, the potential competition which might be supplied in the future should the operating rights come into the hands of a new and more aggressive operator. ... The plan is obviously one to restrain competition through concerted action of the vendees as a group."[184]

Subsequently, Converse improved operating results by closing its rented terminal in Portland and by other economies. It then applied again for permission to buy the Mitchell rights, and, this time, the four truckers who had participated in the previous proceeding as proposed buyers opposed the application. They conceded that Converse "has not been and is not now a serious competitive factor in the territory covered by the leased rights," but voiced grave concern lest "vendee might sell the rights to a new and more aggressive operator, in which event they would stand to lose traffic and revenue which they cannot afford to do." The Commission, rejecting their protest, pointed out that if the new application were to be denied, the leased rights would revert to Mitchell who would offer the same competition to protestants.[185] An even stronger reason, although not articulated in the report, was that the protests against the purchase of the leased rights had no merit because protestants' fears as to the future were mere speculation and any future acquisition of the rights by some powerful new buyer would anyway have to be approved by the Commission.

The denial of the first and approval of the second *Converse* pur-

184 Converse—Purchase—Mitchell, 56 M.C.C. 299 at 307-308 (1950).
185 Converse—Purchase—Mitchell, 57 M.C.C. 551 at 558-559 (1951).

chase application would seem to imply that horizontal unification proposals will be scrutinized as to their effect on competition. But it is hard to generalize from the first *Converse* denial where disappearance of all competition was the aim of the parties. By contrast, *Dalby Motor Freight Lines, Inc.*[186] involved a horizontal acquisition motivated by reasonable business purposes. Dalby wished to acquire Webb's operating rights between Denver and Amarillo, Texas, which duplicated Dalby's authorized operations except that Dalby had no intrastate rights and no authority to serve certain off-route points named in Webb's certificate. Webb was on the brink of receivership, and wished to retire from the business; Dalby's operations over the considered route were also unprofitable. Approval would enable Dalby to offer a better balanced and more complete service and bring about considerable economies by eliminating duplication of expenses. In granting approval, the Commission said:

> "Applicant would be the only motor carrier of property operating over the entire route, but there are other such carriers operating over segments of the same route, and a rail carrier affords service to all principal points. The record does not indicate that continuance of separate competitive operations by applicant and vendor is warranted by the available traffic."[187]

This decision is in accord with the basic legislative intention of preventing oversupply of transportation. Hence, under the *McLean Trucking Co.* doctrine it correctly applies section 5 in spite of the fact that competition between the parties was terminated. But even under section 7 of the Clayton Act this acquisition may have been lawful if the Commission's above-quoted language meant that Webb was in such straits as to preclude the probability of his being able to continue in business.[188] The transaction was unopposed and there was no other buyer of Webb.

The problem of horizontal unifications has, apparently, most frequently been raised in cases involving common control of duplicate operations. Thus, in *Florman—Control—Automobile Convoy Co.*[189] the Commission denied an application for purchase of the stock of a carrier engaged in operations duplicating

[186] Dalby Motor Freight Lines, Inc.—Purchase—Webb, 35 M.C.C. 619 (1940).
[187] Id. at 622.
[188] See Justice Stone's dissent in International Shoe Co. v. FTC, 280 U.S. 291 at 306 (1930).
[189] 35 M.C.C. 521 (1940).

those of applicant over a considerable territory. Vendee's principal stockholder desired to sell to his brother a portion of vendor's stock; hence, he intended to maintain the separate corporate entities of vendee and vendor rather than effectuate a merger of the two corporations. Under common control they would "use common terminals, repair, maintenance, . . . accounting facilities, and operating personnel, which would result in a material reduction in the operating expenses of each." Ignoring these advantages, the Commission held that creation of multiple corporations rendering similar or identical services was uneconomical and incompatible with the policy of encouraging corporate simplification. Moreover,

> "Common control of separate entities authorized to engage in substantially duplicate operations affords opportunity for unfair competition and for unjust discriminations and preferences between shippers and consignees as to rates and practices. . . . Applicant contends that the application should be approved unless we find that preferences or discriminations will actually result. . . . Our consideration is not so limited and necessarily includes weighing the possible effect of the transaction upon the industry and the general public."[190]

This rule has been followed in other cases, sometimes accompanied by the suggestion that the parties might consider merger.[191] In

[190] Id. at 524.

[191] Franko—Control—White Star Trucking Co., 36 M.C.C. 527 (1941) (no opposition, but denied on the authority of Florman "without prejudice to the submission by the parties of a revised plan under which the properties of Franko Brothers and White Star would be unified through purchase, merger, or consolidation"); *accord:* Conklin Truck Line, Inc.—Purchase—Bushroe, 37 M.C.C. 467 at 472 (1941) (argument that unification not practical because of possible loss of intrastate certificates brushed aside); H & K Motor Transportation, Inc.—Control—C. & L. E. Truck Co., 36 M.C.C. 23 at 28 (1940) (denial and suggestion to merge); Textile Transportation, Inc.—Purchase—Textile Transportation Corp., 38 M.C.C. 256 (1942) (extension of common control over operations which would be competitive except for the fact of common control denied); Western Motor Freight, Inc.—Purchase—Helphrey and Luft, 37 M.C.C. 692 (1941) (same); Suwak—Control—Trolley Transfer Service, Inc., 39 M.C.C. 753 (1944) (same); Eick—Control—Alma Lines, Inc., 38 M.C.C. 15 (1941) (same); Marion Trucking Co.—Investigation of Control—E. E. Mills Trucking Co., 59 M.C.C. 567 at 575 (1953) (same, order to terminate control unlawfully acquired and exercised); Associated Transport—Control and Consol.—Arrow Carrier Corp., 36 M.C.C. 61 at 86-87 (1940) (large horizontal merger disapproved for failure to present satisfactory plan to accomplish "singleness of title"); Darling—Control—Brumm Transit, 11 CCH Fed. Car. Cas. ¶33,310 (1955); Chippewa Motor Freight—Control—Metza, 12 CCH Fed. Car. Cas. ¶33,999 (1957). See also Great Lake and Texas Motor Transport—Lease—Crawford, 39 M.C.C. 493 at 498 (1943), and Elliott Bros. Trucking Co. v. United States, (D.C. Md. 1945) 59 F. Supp. 328 at 334. Compare Ballard & Skellet Van Lines—Consol., 58 M.C.C. 539 at 551-552 (1952). Van Company was formed by Ballard and Skellet companies whose rights were duplicating. All three would be managed in a common interest: Van would take over interstate operations, buy the rights and

some few instances the Commission insisted that a merger be accomplished concurrently with or in a short period after stock acquisition. There was no evidence of adverse effects on competition in the territory.[192] When there is such evidence, the application will be denied on general grounds.[192a]

Significantly, the prohibition against common control of duplicating operations has not been applied when substantial differences in the nature of the operations of vendor and vendee compelled the conclusion that the parties were not competing with each other.[193] Approval was also granted where vendor's discontinuance was imminent due to distressed finances and illness and old age of its officers,[194] or when it was feasible to eliminate partial duplications of the services involved.[195]

properties of Ballard and Skellet and sell some of the latter to Watson. Van would serve the same territory embraced in the rights of Skellet and Ballard and "permit Watson to render a duplicate independent service in the same territory." Denied with the suggestion that Ballard and Skellet "should be unified in a single operation, with duplications eliminated, and without the creation of an additional competitive operation." Although the report, regrettably, does not state that the additional competition would threaten the protesting carriers, this may have been implied and would justify the result. The principal basis for the denial seems to have been the pyramiding of an additional corporation upon the existing ones. The criticism of the decision in Adams' Report, note 58 supra, pp. 366-371, overlooks that point.

192 Munroe and Arnold–Merritt Express, Inc.–Control–Beacon Fast Freight Co., 57 M.C.C. 539 at 547 (1951) (application for common control with promise that merger would follow within 15 months denied, merger should be concurrent); Steffke Freight Co.–Purchase–Albrent Freight and Storage Corp., 70 M.C.C. 321 (1957); Fitterling Transport Co.–Control–Shippers Dispatch, 39 M.C.C. 595 at 600 (1944) (merger to take place within 90 days after purchase of stock; twenty motor carriers were competing with applicants). Signal Harbor Service, Inc.–Purchase–Stordor Express, 38 M.C.C. 247 at 248 (1942). Standard Freight Lines–Merger–Bates Motor Transport, 40 M.C.C. 41 (1945), approved a merger of two companies operating out of the same terminal with some duplications in operating rights which would be eliminated.

192a Heavy Haulers, Inc.–Purchase (Portion) Billy Baker Co., 13 CCH Fed. Car Cas. ¶34,246 (1958), reversing 70 M.C.C. 365.

193 Hayes–Control–Terminal Transfer, CCH Fed. Car. Cas. ¶30,581 (1943) (vendee in long-haul traffic, vendor in local cartage operations; general manager of vendor to be given "added incentive" by participation in stock ownership; perhaps this was a "conglomerate" merger). See also Ryder System, Inc.–Control–Miller Motor Line of N.C., 12 CCH Fed. Car. Cas. ¶33,800 (1956) (acquisition and maintenance under common control by Ryder of two trucking firms approved: intention of creating vast system irrelevant for present case, operations of vendors different from those of prosperous and growing protestant), petition for reconsideration pending. The expansion program of the Ryder System is discussed in I.C.C. 71st ANN. REP. 55 (1957).

194 Ramos–Control–Overland Transfer Co., 35 M.C.C. 9 (1939). Dalby Motor Freight Lines, notes 186-188 supra.

195 Standard Freight Lines, Inc.–Merger–Bates Motor Transport, 40 M.C.C. 41 (1945); Lebovitz–Control–Connecticut Motor Lines, Inc., 59 M.C.C. 104 at 108 (1953), reversing 58 M.C.C. 487 (1952) (approved on condition that operating authority of vendee be modified to preclude transportation of any traffic between Philadelphia and New York, when such traffic originates at and is destined to those points); Davidson–Purchase–

With respect to the related problem of interlocking individual interests the Commission adopted similar policies. Noteworthy, in this respect, is *W. W. Brown—Purchase—W. W. Brown.*[196] Brown and his four partners sought to buy the rights and property of Saginaw Transfer Co. of Saginaw, Michigan. The partnership was not a carrier, but each of the partners owned stock interests, some controlling ones, in other carriers. Brown himself had purchased the Saginaw Transfer Co. which the partnership wished to have transferred to it for operation by a corporation to be organized. The routes of all the carriers involved coincided at many points. Citing the *Florman* case, the Commission denied, adding that ". . . the practice of creating interlocking interests in various carriers . . . should be discouraged. Such practice is contrary to the Commission's policy of encouraging corporate simplification, creates conflicting interests and divided responsibility, makes it difficult to ascertain where control actually lies in particular instances, and is not conducive to maintenance of healthy competition between carriers and the rendition by them of efficient and adequate service to the public."[197]

The decisions discussed above reflect the Commission's concern about the anti-competitive consequences of horizontal unifications. Indeed, it would seem that such concern is stronger than with respect to end-to-end mergers. The potentiality of danger to existing carriers rendering efficient service in the same territory as the proposed horizontal combination may be greater than the peril of monopoly inherent in end-to-end mergers. On the other hand, the smaller number of horizontal applications may suggest that such transactions are less attractive to the industry. End-to-end and horizontal mergers may, of course, be combined in one transaction, as in the *McLean Trucking Co.* case, but this does not seem to be typical.

Campbell, 40 M.C.C. 333 (1945) (vendor would cancel operating rights between points served by vendee). See also Baggett—Control—Walker Hauling Co., 65 M.C.C. 522 (1955); Atlantic Freight Lines—Purchase—Shipley, 40 M.C.C. 183 (1945), and Lincoln Transport Systems, Inc.—Control—Boss-Linco Lines, Inc. and Faxlines, 70 M.C.C. 205 (1956), for unconditional approvals.

[196] 39 M.C.C. 373 (1943).

[197] Id. at 377. Cited and followed in Dobbs—Control—Van Hooser, 39 M.C.C. 647 at 654 (1944), modified 40 M.C.C. 804, and Peerless, Inc.—Control—Karst Freight Lines, 39 M.C.C. 683 at 696 (1944). See also Columbia Terminals Co.—Issuance of Notes, 40 M.C.C. 288 at 294 (1945) [§10 of Clayton Act (15 U.S.C. (1952) §20) applicable to issuance of notes by corporation controlling three contract carriers and several lessors of equipment; issuance authorized only after competitive bidding].

CONCLUSION

The soundness of the considerations on which Federal Motor Carrier Regulation rests has frequently been questioned. There is much support for the proposition that motor carriers, unlike railroads, are not natural monopolies because minimum and fixed investments are relatively small and, therefore, economic regulation of an essentially competitive industry is unwarranted.[198] To the adherents of this view "regulated competition is a misnomer"[199] because "competition without freedom of entry is competition in an incubator."[200]

This controversy is outside the scope of the present discussion. Rather, the survey in the preceding pages attempted to analyze and interpret the decisions on the basis of existing law which reflects the assumption that a public utility-type regulation is needed in order to prevent excessive competition. Charges against the Commission of discrimination against small carriers[201] and fostering a "dramatic increase" in trucking concentration[202] overlook the fact that the Commission has no explicit or unquali-

198 Testimony of Paul Stevens, Small Business Hearings, note 67 supra, pp. 213-218, and James C. Nelson, id. at 235, 236: "The so-called public utility industries generally require a large minimum investment and much fixed investment, with the additional result that economies of utilization . . . can be obtained by allowing additional business to go to existing firms up to the point where least-cost utilization of a given plant is achieved. . . . Fixed investments and thus fixed costs are small because the truckers do not have to provide their own rights-of-ways. . . . Moreover, their terminal investments do not impose high fixed costs . . . investment in equipment . . . is in relatively short-lived and small-scale units . . . trucking, by its inherent nature is well organized as a highly competitive rather than a monopolistic industry." See also Pegrum, "The Economic Basis of Public Policy for Motor Transport," 28 LAND ECONOMICS 244 at 252-258 (1952). S. Hearings Before Small Business Committee (Trucking Mergers and Concentration), 85th Cong., 1st sess., pp. 54, 91, 125, 221 (1957).

199 Pegrum, "The Economic Basis of Public Policy for Motor Transport," 28 LAND ECONOMICS 244 at 258 (1952).

200 Id. at 254.

201 See Adams Report, note 58 supra, pp. 276-303, 333-350 (discussing condonation of unlawful unified operations without prior Commission approval, acquisition of dormant rights and mergers of carriers of household goods). Cf. North American Van Lines—Purchase (Portion)—Creston Transfer Co., 13 CCH Fed. Car. Cas. ¶34,255 (1958) (right to transport pianos, organs and organ benches excluded from approval of acquisition of authority by North-American in order to protect small carrier of these goods operating seven vehicles). Unifications involving an aggregate number of 20 or less vehicles are not subject to section 5 [49 U.S.C. (1952) §5(10)], but to the Commission's rules on Transfer of Operating Rights, Title 49, Part 179, C.F.R. (1949, 1958 Supp.), issued pursuant to 49 U.S.C. (1952) §312(b); authority sustained in United States v. Resler, 313 U.S. 57 (1941). In 1956 there were 994 such applications, of which 157 were denied for lack of fitness. All others were granted. S. Hearings, note 198 supra, p. 112.

202 S. Hearings, note 198 supra, p. 111: The Adams Report, note 58 supra, shows that, in 1954, 4.7% of the carriers had 63% of the revenue. Chairman Clarke replied that this was "infinitesimal," since the largest carrier had less than 2% of the business.

fied mandate to prevent concentration. The real quarrel of the critics, as Professor Jaffe suggested,[203] is, therefore, with Congress for failing to provide for such specific mandate, or with the Supreme Court for failing to resolve the conflict between section 7 of the Clayton Act and section 5 of the Interstate Commerce Act along the lines suggested by the dissent in the *McLean Trucking Co.* case. As noted in Part II above, the majority opinion in that case directed the Commission merely to consider competition as an important factor in each case, but to subordinate it to concentration if it finds the latter more conducive to insure efficient transportation. This makes the Commission's job much more difficult than that of the antitrust enforcement agencies. The latter, in the free segment of the economy, owe undivided allegiance to only one sovereign: section 7 of the Clayton Act.

Our discussion of the cases demonstrates, I submit, that the Commission has considered competition in each case.[204] On the whole, its performance of this task has been more convincing in the trucking field than with regard to intercity buses. The Greyhound mergers examined in Part III show contradictions in treatment which, in some instances, emphasizes the perils of monopoly, while praising the unmatched power of the system in others. In the latter group of cases, "consideration" of competition sometimes may have given way to disregard for competition. The trucking cases, on the other hand, show a more consistent pattern. In the first place, there is no single integrated and predominant giant comparable to Greyhound; the structure of the trucking industry with its many large carriers is thus much sounder. Secondly, we observed that the majority of substantial unifications were of the end-to-end or vertical type. They offer such obvious advantages as substitution of through service for the hazards of interlining that a prima facie case in their favor[205] often appears plausible. At

[203] Jaffe, "The Independent Agency—A New Scapegoat," 65 YALE L. J. 1068 at 1072 (1956).

[204] Statement of Commissioner Mitchell, S. Hearings, note 198 supra, p. 115. The Senate Select Committee on Small Business admonished the Commission to do so, to keep records of §5 cases, and to evaluate generally the level of concentration in the industry. S. Rep. 1441, 85th Cong., 2d sess., p. 8 (1958).

[205] The Adams Report, note 58 supra, pp. 309-315, 378-384, challenges the Commission's assumptions that increased size means greater efficiency. This criticism may have general validity and deeper analysis of the problem by the Commission would, certainly, be desirable. Yet Dr. Adams observes "that high tonmile costs seem related to short hauls." Id. at 314. Is this not an implied admission of the case for end-to-end mergers?

least, those advantages appeared in many cases substantial enough to warrant approval pursuant to the *McLean Trucking Co.* formula. No comparable case can be made for horizontal mergers, and the Commission's attitude toward such transactions[206] is helpful for the preservation of competition.

Consideration of competition in trucking merger cases has proceeded on the theory that unifications should be prevented only when they would impair the ability of competitors to continue as common carriers. This is consistent with the idea of "regulated" or "controlled" competition. It is assumed that competition is a desirable stimulant, but only up to a peril point beyond which it begins to destroy itself. That approach may, after all, not differ very radically from the notion that some mergers would lessen or destroy competition while others would not. Hence, the concept of "regulated" competition may, at least with respect to mergers, be less outlandish than its opponents believe. In any event, the Commission's theory demonstrates its concern for competition.

Obviously, theories must stand the test of practical application. As pointed out in Part IV above, the Commission has been criticized for its failure to spell out general standards or criteria for determination of the crucial question whether ability of competitors to continue as common carriers will be impaired or whether they could stand adjustments to stiffer competition.[207] This criticism seems justified: insufficient elaboration of the basis for the conclusions reached and vacillation shown by reversals of prior opinions indicate that in a not insignificant number of reports the point may have been decided merely by intuitive ad hoc judgment. Surely, the Commission could do better than that.

Apparently, the Commission is not unaware of this deficiency. Indeed, in *Pacific Intermountain Express—Control and Merger—Union Transfer Co.*, decided on February 26, 1958,[208] Division 4 reopened proceedings on a merger application on the ground that applicants had "offered no evidence showing the possible effect which . . . [the merger] will have on the present traffic pattern of . . . [competing] carriers." Particularly, P.I.E. had not dis-

206 Although McLean Trucking involved both vertical and horizontal mergers, it is doubtful whether approval would have been granted without the vertical nature of the transaction. The Supreme Court emphasized the end-to-end feature.

207 See note 162 supra, and text thereto.

208 12 CCH Fed. Car. Cas. ¶34,243 (1958).

closed what volume, if any, it had interlined with carriers other than vendor moving to and from points served by vendor. The volume interlined between the applicants had been insignificant. Referring to section 7 of the Clayton Act and quoting that part of the *McLean Trucking Co.* opinion which admonished the Commission "to consider the effect of the merger on competitors and on the general competitive situation," the division said:

> "The serious responsibility which the Congress has imposed upon us in these proceedings cannot be properly discharged upon records such as this. . . . Nor are we relieved of this responsibility by the fact that many of the competing carriers refrained from intervening and introducing evidence. If that were true, monopolies could develop merely from inaction by competing carriers, and applications would be granted by default. The burden is upon applicants to submit the necessary evidence, . . . particularly in respect of the possible effect upon competing carriers. For example, the record is devoid of evidence showing the extent to which the additional long-haul through service from Chicago, Minneapolis and St. Paul to the West Coast by Pacific Intermountain might reduce the opportunities for balance between short-haul and long-haul traffic of the numerous carriers serving the same territory, thereby substantially lessening their opportunity to maintain presently satisfactory service to the public.
>
> "The time has come when the carriers and the public should be put on notice that this Commission expects applicants in Section 5 proceedings to support their proposals in keeping with the legislative standards as interpreted by the Supreme Court. . . ."

The effect of this opinion on the future cannot be predicted. Yet, its holding that the absence of protest by competitors will henceforth not be considered as favorable to proposed acquisitions by large carriers like P.I.E. is novel, and the general tone of the report may herald a change of climate adverse to mergers. The pending "unusually large" unification applications of Consolidated Freightways and others[209] afford ample opportunity to the Commission to reveal its thinking. It is to be hoped that this will lead to the much needed careful analysis as to where and how the elusive line is to be drawn between "constructive" and "destructive" competition.

[209] I.C.C. 71ST ANN. REP. 55 (1957).