Price Competition and the Role of Rate Bureaus in the Motor Carrier Industry*

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The trucking industry has experienced phenomenal growth since the enactment of the Motor Carrier Act in 1935[1] and the passage of the Reed-Bulwinkle Act in 1948.[2] In 1947 the industry earned freight revenues of $2.2 billion; by 1975, that figure had increased to $21 billion. By 1976 intercity trucking (excluding private carriage) accounted for $56 billion out of $98 billion earned by all intercity freight carriers. Investment in trailers in 1947 was $2.8 billion; by 1975 that had increased to $41.8 billion.[3]

The trucking industry's dramatic rise from an adventurous band of one-truck companies in the 1930's to its present prominent status and the contribution of that industry to the nation bears witness to the environment within which the industry has functioned. Regulation has been a major part of that environment. The swift growth of the industry also suggests that yesterday's solutions may not fit today's problems.

Indeed, we have evidence that the trucking industry has grown so fast

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1. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (originally codified at 49 U.S.C. §§ 301-327; now codified in scattered sections of 49 U.S.C.).

2. Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948) (codified at 49 U.S.C.A. § 10706 (West Supp. 1979)).

3. TRANSPORTATION ASS'N OF AMERICA, TRANSPORTATION FACTS AND TRENDS 28 (14th ed., 1978).

that the changes in the regulatory system have not completely kept up. The sale on July 9, 1976, of the operating certificates of two affiliated bankrupt motor carriers—Eastern Freightways and Associated Transport—for *$20.5 million* dramatized the high market value of many certificates today.[4] It indicates that the obligations imposed upon the industry—the duty to provide common carrier service—at present do not appear to constitute an economic burden to the industry commensurate with the economic benefits it receives from limited entry and antitrust immunity for collective ratemaking.

We need either to assert more forcefully the common carrier responsibilities of the industry or to reduce the economic benefits of regulation. We need to achieve a better balance of the two. Our legislative mandate supports that approach. The Interstate Commerce Act[5] provides for a system whereby resources in the trucking industry are allocated not only in response to market forces but also in part pursuant to the judgment of a group of people appointed by the President, confirmed by the Senate, and charged with responsibility of assuring that this vital industry operates in the public interest. These people have historically discharged their responsibilities in the light of broad consideration of social policy, including—but not limited to—purely economic factors.

The specific means which the Commission may pursue to keep regulation current with the present needs of the public deserve mention. Limited entry and collective ratemaking provide the industry with a measure of protection from pure competition,[6] although a measure of competition—in the form of the entry each year of new carriers into the industry, the entry of existing carriers into new markets, and the exercise by the carriers of their right of independent action to set rates individually—has always existed in the motor carrier industry.

The basic premise of surface transportation regulation is that some restraints were placed on competition in transportation so that competition could flourish among non-transportation businesses, individuals and communities throughout the country. We are currently examining whether the restraints should be loosened in the motor carrier industry. As you know, a Staff Task Force has presented the Commission with a list of 39 recommendations to liberalize motor carrier entry and to streamline the Commis-

4. Eastern Associated is not the only example of a certificate being sold for a great deal of money; the situation is widespread, a subject of an ongoing Commission analysis, and a matter of serious concern.

5. 49 U.S.C.A. §§ 10101-11916 (West. Supp. 1979).

6. It is important to note that for purposes of this analysis we are contrasting the existing system with "pure" competition—which in theory would drive prices down to long run marginal cost. However, the market is an imperfect mechanism, and we do not have sufficient knowledge to be able to say whether or to what extent the prices resulting from the operation of market forces in the trucking industry would tend toward long run marginal costs.

sion's regulatory procedures. One of these recommendations—which I discussed in my testimony in October—is now a rulemaking proceeding. On February 8, 1978, the Commission voted to approve its Notice of Proposed Rulemaking and Order in Ex Parte No. MC-116, *Consideration of Rates in Operating Rights Application Proceedings*.[7] In that rulemaking we will be considering the feasibility of authorizing entry into the motor carrier industry based on the commitment to publish and maintain lower rates. This is a concept with substantial implications for the future of competition and regulation in the motor carrier industry, and we will give it our closest attention.

The Commission's Task Force made a number of other recommendations which, if adopted, would ease entry into the industry. We are moving ahead on these recommendations, and I hope we have action on many of them completed by later this year.

The Commission's actions in the area of motor carrier entry are not limited to the Task Force recommendations. As we noted in open conference on February 21, 1978, we are looking for a test case to review current restrictions placed on contract carriers, and at the conference on January 17, 1978, we took up the subject of limitations placed on private carriage. And in its adjudications of individual cases, the Commission has taken some substantial steps. For example, in *Toto Purchasing & Supply Co., Common Carrier Application*,[8] decided March 10, 1978, the Commission struck down a 40-year-old prohibition against granting operating authority to private carriers.

The Commission is also reevaluating its regulations concerning motor carrier rate bureaus. Last October I noted that the Commission would consider whether or not the 4-R Act's[9] new rate bureau regulations for railroads should be applied to motor carriers. On December 30, 1977, the Commission instituted a rulemaking proceeding in Ex Parte No. 297 (Sub-No. 3), *Modified Terms and Conditions for Approval of Collective Ratemaking Agreements Under Section 5a of the Interstate Commerce Act*.[10] There we will consider whether the Commission should (and whether we can) apply the 4-R Act's prohibition against bureau members voting on single line rates or interline rates in which they do not participate, and the 4-R Act's ban on bureau protests of the filings of non-member carriers, to the motor carrier industry.

Now that the Fourth Circuit Court of Appeals has upheld the Commission's order in Ex Parte No. 297, we have set a schedule to review all the

7. 43 Fed. Reg. 7675 (1978) (to be codified in 49 C.F.R. ch. X).
8. 128 M.C.C. 873 (1978).
9. Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801 (1976).
10. 43 Fed. Reg. 1809 (1978) (to be codified in 49 C.F.R. part 1331).

motor carrier industry's outstanding rate agreements in the light of the new Ex Parte No. 297 requirements, and the National Transportation Policy.

These are some of the actions which would increase competition and strengthen the impact of market forces in the trucking industry. We feel that as the trucking industry has grown, it needs protection from these forces less than it did during the period of its growth to its present level of maturity.

But we also feel just as strongly that increased reliance on the market is not the only course of action which we should pursue to assure the continued operation of this industry in the public interest. The Interstate Commerce Act—and the tradition of common carriage upon which it is based—allocates resources on the basis of considerations which differ somewhat from those dictated by the market. Common carriage imposes social responsibilities on carriers, and establishes pricing patterns based on social decisions which can be fairly debated but should not be dismissed out of hand. It requires that whoever holds himself out as a common carrier provide service within the scope of his authority on reasonably equitable terms to all comers.

A key element in this system of government enforcement of common carrier obligations is the prevention of unjust discrimination by carriers among shippers and among communities. Congress felt sufficiently strong about this issue, that, while it gave the railroads substantial ratemaking freedom under the 4-R Act, it kept intact the Commission's authority to police unjust discrimination and undue preference and prejudice.

The marketplace allocates resources without regard to popular notions of equity. In a pure market system, without any economic regulation, a large and powerful shipper could obtain price concessions and preferential service which carriers would not make to smaller shippers. By establishing a system of regulated collective ratemaking, Congress has provided a means by which individual carriers may resist the pressure of powerful individual shippers to establish lower rates on their behalf.[11]

This is not to say that the existing system offers complete protection to

11. Mr. Shenefield took note of the anti-discrimination function of the current regulatory system, albeit in a rather backhand way, in his testimony before the Subcommittee last October. He noted, "Finally, it might be asked, if the system is so bad, why aren't the shippers screaming for relief? After all, they deal directly with the trucking industry, paying those inflated rates. One short answer is that many shippers are more interested in seeing that their competitor doesn't get a better rate than they are in the level of the rate. In other words equal rates are more important to many shippers than lower rates." Mr. Shenefield suggests that lower rates are better than equal rates. Perhaps from a purely antitrust viewpoint that is so. But American society has also favored dispersing economic power among a large number of firms, even where that means foregoing some price reductions which could result from allowing large firms to exploit their scale economies. Total deregulation in the trucking industry would mean one less protection which small shippers have against the economic power of their larger brethren. Perhaps lower consumer prices (if they do in fact occur and continue) would justify that action; perhaps not.

small shippers. The really big shippers have established sophisticated physical distribution systems employing private carriage and thus haul their own products effectively at cost. Independent actions allow some shippers to exert power on certain carriers, though the fact that the rates are subject to shipper protest and usually are not published to apply specifically to one shipper minimizes the potential for discrimination.

I do not suggest that the Commission should—or could—regulate motor carrier rates so as to equalize the price of motor carrier service among all shippers and among all communities. There is a limit to the extent to which we should go in foregoing real economic benefits in order to serve social ends. This is an area where intelligent tradeoffs must be made.

Perhaps when all is said and done, the American public will prefer to take its chances with the potential for increased concentration of economic power among shippers and carriers created by deregulation in its desire to pocket whatever reduction in consumer prices the development of market competition would yield. If the public makes that decision on the basis of reliable information and following an enlightened discussion of the issue, so be it. The point to be noted is that change brings both benefits and drawbacks, and a major drawback of increased competition is the increased potential for discrimination.

The potential for discrimination among shippers carries the threat of increased economic concentration. The potential for discrimination among communities carries the potential for adverse economic and social consequences for the communities which would be subject to discrimination—and, of course, benefits for those communities preferred.

Some care should be taken with this discussion, especially with respect to the use of the term discrimination. What is unjust discrimination to one person is social justice or economic sanity to another.

I doubt that the motor carrier industry carries goods at a rate below the actual costs of transporting the goods to any great extent. But it also appears that carriage to some communities is more profitable than to others. In theory, licensed carriers operating under a common carrier injunction to provide service within the scope of their authorities, and given a certain amount of protection from the rigors of total competition, will not seek to maximize profits on each unit of service. The carriers will tolerate a level of profit on the less lucrative routes which falls below the return the carriers could earn if they invested elsewhere the money needed to provide the service.

That is the theory, and it raises two issues. Is it actually operating and, whether it is or not, should it be?

We know from the fact that dormancy is an issue in many motor carrier finance cases that there are carriers which are not providing service within

the full scope of their authorities. On the other hand, a number of factors—including the concern that dissatisfied shippers will support the applications of new carriers for grants of authority which might embrace desirable as well as undesirable hauls—indicate that carriers are not totally ignoring the obligations of their certificates either. The information which the Subcommittee and the Commission gather from the Continuous Traffic Study[12] ought to shed some light on this issue.

Even if it were assumed that carriers were largely ignoring their common carrier obligations to provide reasonably adequate, non-discriminatory service within the scope of their certificates, that situation would not necessarily suggest a need to deregulate: it can be argued that the more appropriate solution would be to enforce the existing service obligations.

But the issue of whether or not motor carriers are providing nondiscriminatory service to small communities does not get to the more important question: Should small communities—any more than small shippers—have recourse to a regulatory agency to establish their freight rates on some basis other than the market? Why should the shippers and consumers living in Podunk get protection not afforded to the citizens of New York City? On the other hand, the Nation has always asserted that it is in the public's interest that all parts of the country enjoy certain minimum service levels in key areas—power, communication, transportation, etc.—regardless of market considerations. How would service levels to small towns differ under a free market system than under the current system? Would there be any significant difference? A move to uninhibited reliance on the market would be easier to make if we had answers to these questions.

The above concerns—together with our existing statutory mandate—indicate that the Commission needs to take a hard look at whether carriers are meeting their common carrier obligations, and to define those obligations so that they can be practicably enforced. One example of a current Commission initiative in this area is our investigation into discrimination by carriers in their credit practices in Ex Parte No. MC-73, *Regulations for Payments of Rates and Charges*.[13] Another is Ex Parte No. MC-77 (Sub-No. 2), *Regulation Governing Restrictions on Service by Motor Common Carriers*.[14] The Commission is also undertaking new initiatives in the enforcement area, for example, through its actions against weight bumping in the household goods area and by our prosecution of carriers who retain duplicate payments by shippers. We are also reducing the Commission's protectionist role in the enforcement area by advising carriers complaining

12. Ex Parte No. MC-82, New Procedures in Motor Carrier Revenue Proceedings, 339 I.C.C. 324 (1971).

13. 350 I.C.C. 527 (1975).

14. 129 M.C.C. 71 (1978).

about unauthorized carrier operations that their appropriate remedy is self-help.

Another characteristic of motor carrier pricing behavior resulting from regulation is the measure of stability introduced into the process of establishing and maintaining levels of carrier services and rates. While carrier support for such stability can be attributed to the desire to avoid competition, the basis for shipper support must lie elsewhere. Shipper support for a measure of stability in levels of rates and services does exist; Commissioner Clapp and I both heard such views expressed during the field hearings which we conducted on the Staff Task Force recommendations. It seems to be based on a desire by the users of the motor carrier system to be able to make plans for using it with a degree of certainty that it will not exhibit substantial price and service changes within a short period of time.

The desire of carriers and users for a measure of stability is not, however, reason to discourage marketing innovations by aggressive carriers. That sort of initiative ought to be encouraged. For example, we supported the publication of alternative rates for different levels of service—premium, regular and standby—in our report in Ex Parte No. MC-98, *New Procedures in Motor Carrier Restructuring Proceedings*.[15]

As I noted in my testimony last October, the Commission's mandate under the Interstate Commerce Act is to balance the goals of antitrust policy—market competition—with the achievement of the other social policies embodied in the Act. The motor carrier system at present is providing good service to the satisfaction of most of its users. That fact must be given some weight.

But the maturity of the trucking industry and the growing complexity of the demand for motor carrier service dictates that increased reliance be placed upon competition as a tool to assure that the industry performs in the public interest.

We should not move so fast in that direction that we forfeit the opportunity to learn the practical consequences of each step in that direction. And we need to move affirmatively to remedy the scarcity of useful data on the motor carrier industry, in order to enable us to monitor the industry's responses to the changes that lie ahead.

The following sections set forth a discussion of Commission rate regulation in the motor carrier area. They include a review of the history of and current practices of motor carrier ratemaking, with particular focus on cost finding.

15. 49 C.F.R. part 1104 (1977).

II. History of Motor Carrier Ratemaking

A. *Introduction*

When the bill that was later to become the Motor Carrier Act of 1935 was submitted to the Senate for vote, it was accompanied by a report by Senator Burton Wheeler, the Chairman of the Committee on Interstate Commerce. The report stated that passage of the bill was required due to the conditions in the motor carrier industry, which were described as follows:

> In recent years there has been an extraordinary growth of highway transportation. Thousands of miles of hard-surface highways have been developed and are teeming with millions of automotive vehicles. Motor carriers for hire penetrate everywhere and are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to an extreme which tends to undermine the financial stability of the carriers and jeopardizes the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest. The present chaotic transportation conditions are not satisfactory to investors, labor, shippers, or the carriers themselves.[16]

Thirty years later the Committee on Commerce conducted an evaluation of the 1935 Act. In the report of that evaluation, Edwin C. Johnson, former member and chairman of the Interstate and Foreign Commerce Committee, recalled his preregulation experience as a motor carrier owner. The Senator observed that, prior to the passage of the act, the operation of interstate motor transportation was a "homeless and precarious" business; equipment was undependable due primarily to unprofitable operations. The rate structure was "what you could get" and the business was a "gamble with the odds against you."[17]

Commenting on the effect of the 1935 Act, Senator Johnson went on to state:

> No one could have guessed that the passage of this act could have straightened out this frustrated business so completely. The 1935 act brought order out of chaos and did it almost overnight. I know of no single statute on our books that did quite so much for American transportation or business progress generally as did the Motor Carrier Act of 1935.[18]

Today, even some of the severest critics of regulation concede that the United States has, judged by almost any standards, the best and most comprehensive domestic transportation system of any country in the world, and that it is probably the most efficient.[19] The regulated Motor Carrier industry is the backbone of this transportation system. The time since the passage

16. S. Rep. No. 482, 74th Cong., 1st Sess. 1 (1935).

17. The Motor Carrier Act of 1935, An Evaluation of the Motor Carrier Act of 1935 on the Thirtieth Anniversary of its Enactment, 89th Cong., 1st Sess. 1 (1965).

18. *Id.*

19. Pergrum, *Should the ICC be Abolished*?, in G. Davis, Transportation Regulation: A Pragmatic Assessment 51 (1976).

of the 1935 Act has witnessed giant strides in industrial and commercial development with concomitant demands on the motor carrier industry to meet growing transportation needs. Those changes indicate the need for a fresh look at motor carrier regulation.

B. Rate Regulation Provisions of the Act

In reviewing the legislation we find that the regulation of rates is an important part of it. In particular the Act provides:

1. Publication of rates and fares is required and there must be strict observance of tariffs.
2. Rates and fares are to be reasonable and not unjustly discriminatory.
3. Carrier practices and regulations relating to fares and charges are to be just and reasonable.
4. Notice of at least 30 days is required for changes in rates and fares.
5. Proposed rates and fares may be suspended by the Commission for a period not exceeding seven months.
6. The Commission has power to prescribe the maximum, minimum, or actual rate to be charged in lieu of a rate found unreasonable or otherwise unlawful.
7. The Commission has the power to hear complaints and institute investigations pertinent to its Congressional mandate.

These provisions reflect specific objectives of motor carrier rate regulation. For example, the requirement that carriers establish, observe and enforce just and reasonable rates and practices and the prohibition of discrimination among shippers reflects the intention that shippers will pay, and that carriers will receive, a rate that fairly reflects the service rendered regardless of competitive conditions. Undue discrimination against different shippers, points, and territories has historically been proscribed in the transportation field. The antidiscrimination provisions prohibit a carrier from unduly favoring one party or segment of traffic to the detriment of others. The emphasis is on "undue;" a mere difference in rates, standing alone, does not constitute undue discrimination and prejudice.

Small shippers are particularly susceptible to rate discrimination. Through our present system of published rates and antidiscrimination provisions, the small shipper is able to know the transportation situation of its competitors and enforce upon carriers a duty of equitable treatment. Thus, at least insofar as transportation services are concerned, the small shipper is enabled to compete with the assurance that the economic leverage of others, or its lack of it, will not be permitted to unduly prejudice its business endeavor.

The Commission's suspension and investigatory powers and its jurisdiction to hear complaints reflects in part an attempt to encourage rate stability. A stable rate structure is desired by both carriers and shippers. Carriers desire a stable rate structure for business planning purposes, so

that over time they can be reasonably sure of the level of revenues they will receive. A rate structure that is not subject to radical fluctuations and which provides carriers a fair return fosters financially responsible and stable carriers. Shippers find unstable rates to be a disconcerting element in business transactions. For example, future sales often involve calculation of existing freight charges or those expected in the near future. Such calculations are not possible, absent a reasonably stable rate structure.

It should be noted that the Act's rate provisions are concerned primarily with common carriers. Contract carriers are required to publish their rates, and are required to adhere to their published rates. (This is a result of a 1957 amendment. Under the original act they were only required to publish their minimum rates.)

The Act gives the Commission power to prescribe minimum rates for contract carriers. The fact that the Commission cannot prescribe maximum rates and the lesser requirements placed on contract carriers indicate that contract carriers, defined as carriers providing service to a limited number of persons, do not have common carrier obligations to the general public.

Predictably, the question of the proper relationship between common and contract carrier rates arose. Although numerous states, by statute or by policy, require contract carriers to maintain rates no less than those charged by common carriers, this has not been the Commission's policy. The Interstate Commerce Act, amended by the Transportation Act of 1940,[20] as a declaration of policy, requires the Commission to administer the Act so as to recognize the inherent advantages of the various modes of transportation. By being able to select the shipper it will serve and the traffic it will carry, the contract carrier is able to provide service at a lower rate in many instances. This is an inherent advantage of contract carriage, and the Commission, recognizing it as such, has declined to hold contract carrier rates up to the level of common carrier rates.

C. *Broad Trends in the Rate Environment*

Under the Motor Carrier Act of 1935,[21] which became Part II of the Interstate Commerce Act, motor carriers were required to file their initial tariffs and schedules on or before April 1, 1936. The initial tariffs filed by many motor carriers were almost reproductions of the then effective tariffs of the rail carriers.

These initial publications of motor carriers reflected many differences in rates between operators for like services in the same territory. It was only

20. Transportation Act of 1940, ch. 722, 54 Stat. 898 (codified in scattered sections of 49 U.S.C.).

21. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (originally codified at 49 U.S.C. §§ 301-27; now codified in scattered sections of 49 U.S.C.).

after the initial filing of schedules that carriers became aware of the rates and charges of their competitors. In an effort to bring about a more uniform rate structure, a number of carriers voluntarily equalized their rates. This equalization was generally toward lower rates, and ultimately, a number of rate wars commenced.

Consistent with the protectionist philosophy of the time, the Commission stepped in and conducted a number of investigations which resulted in the establishment of minimum rate orders. These orders prescribed a level of rates below which motor common carriers should not go, and produced the desired result of the financial improvement of the motor carrier industry. Minimum rate orders were entered in: (1) Middle Atlantic Territory, (2) Central Territory, (3) New England Territory, (4) Midwestern Territory, and (5) Trunk Line Territory. The Commission's order provided for modifications through petitions, and in fact many such petitions were filed by shippers and carriers alike. These minimum rate orders discouraged rate cutting and made it mandatory for motor carriers to obtain approval of the Commission before the publication of rates lower than the minimum rates prescribed.

Immediately prior to World War II, motor carrier traffic increased, the industry improved financially, and the minimum rate orders were vacated.

The post World War II period has been marked by a growing, rapidly expanding economy and accompanying moderate to severe inflation. The motor carriers have sought to keep up with industrywide cost increases—especially those involving labor—through general rate increase proceedings.

A request for a general increase is based on systemwide revenue needs as opposed to those concerning only particular movements, commodities, or segments of traffic. Unlike ordinary rate proposals, a general increase is normally sought as a percentage increase applicable to all or nearly all rates maintained within a ratemaking territory. In approving or disapproving a request for a general increase the Commission has cited the "rule of ratemaking," which maintains first, that carriers be permitted to charge rates sufficient to meet their revenue needs and to enable them to fulfill their service obligations at the lowest cost consistent with the furnishing of the service.[22]

In 1970 the Commission established formal procedures and evidentiary requirements for general rate increases in Ex Parte No. MC-82, *Proposed New Procedures in Motor Carrier Revenue Proceedings*.[23] This process will be discussed at greater length in Part IV of this testimony.

22. 49 U.S.C.A. § 10704 (West. Supp. 1979).
23. 351 I.C.C. 1 (1975).

III. Commission Ratemaking in the Motor Carrier Industry—Policy and Practice

A. Ratemaking Procedures

The system of ratemaking prescribed by Congress places the initial responsibility upon the carriers to set rates.[24] The regulatory role of the Commission is basically that of a check on carrier ratemaking designed to safeguard the public against unjust and unreasonable rates and practices, unjust discrimination, undue preference or prejudice, and destructive or unfair competition.

Carriers initiate rates by publishing them in tariffs which are filed with the Commission at least 30 days (45 days for general commodities carriers general rate increase proposals) prior to the date they are to become effective, unless a shortened period is authorized by special permission. The rates to be published by the carriers may be agreed upon jointly through the carrier's rate bureau activities or by independent action of the carrier. A protest challenging the lawfulness of the proposed rate may be filed by any person, except that a rate bureau may not protest their carriers' independent actions. Many shippers subscribe to tariff watching services or join associations such as the National Small Shipments Traffic Conference in order to more effectively monitor and/or protest rate actions which affect them.

At this stage of the ratemaking process (*i.e.*, prior to the effective date of the tariffs), the Commission analyzes informally the lawfulness of the protested rate proposal. In the case of a rate proposal that is not protested the Commission may initiate this analysis on its own. In addition, all tariffs are examined for conformity with the Commission rules and regulations pertaining to the filing of tariffs; the Commission's general review of tariff filings is discussed later in this section.

The carrier is given the opportunity to justify the proposal in either event. If it appears that the proposed rates are reasonable and otherwise lawful, they are permitted to become effective without formal investigation. On the other hand, if the opinion is reached that the tariff schedules would result in unlawful rates, we subject them to an investigation. Ordinarily, in such cases, the operation of the investigated schedules would be suspended for the 7 months permitted by law. As an alternative, a rate may be investigated without suspension. Where a proposed increase is not suspended but is investigated and later found unlawful, it is ordered cancelled. The Interstate Commerce Act does not authorize the Commission to require refunds with regard to motor carrier rates.

The initial decision whether to suspend and/or investigate is usually

24. 49 U.S.C.A. § 10702 (West. Supp. 1979).

made by Commission staff experts, members of the Suspension and Fourth Section Board. An additional safeguard is that in every case there is provided an opportunity to appeal this determination to a division of the Commission. Some of the more complex cases, such as motor carrier general increase proceedings, are decided initially by the Commission. In any event, the entire process is completed within 30 days.

After a decision to suspend and/or to investigate, the merits of the tariff are examined in an evidential hearing. In some instances this can be accomplished by the submission of verified statements by the parties and the issuance of an employee board report setting forth findings of fact and conclusions of law. The employee board's findings and conclusions are subject to appeal to the division. Other cases may be assigned for oral hearing before an Administrative Law Judge, although concurrent verified statements may also be required under special procedures. The Administrative Law Judge's decision is also subject to appeal.

After a rate has been allowed to become effective (*i.e.*, not suspended) and not investigated, shippers can challenge its lawfulness by filing a complaint. Such proceedings may result in a finding that the rate is shown to be unlawful and an order requiring its cancellation.

B. Tariff Review

Through its power to examine tariff filings and to suspend and investigate those that appear contrary to law,[25] the Commission provides a considerable measure of protection for the many smaller interests that simply do not have the resources to analyze and protest rate proposals that adversely affect them. These powers permit the Commission to protect the interests of the public in its largest sense, without relying on action by someone immediately affected by a given proposal.

The Commission expends substantial resources in the review of carrier rate filings. All the tariffs filed (approximately 360,000 in fiscal year 1977)[26] are examined for compliance with statutory provisions, Commission orders and tariff filing regulations. All motor carrier general increase proposals are examined in detail and subjected to full review and determination of lawfulness on the merits.

Beyond this, there is a substantive review of all the tariff filings of the major rate bureaus, the specialty carrier bureaus, and individual publications of major carriers. This review of the substance of proposed changes in rates, rules or provisions is effected through the consumer-oriented tariff examination program. The program is designed to compress the Commission's limited tariff expertise resources and focus it on the publications

25. *Id.* § 10704.
26. 91 ICC Ann. Rep. 113 (1977).

which have the broadest application over the traffic moving in the regulated carrier system. This concentration of review recognizes that the individual publications of several thousand small motor carriers have no significant impact on the traffic departments of the thousands of shippers which might utilize their services. The small carrier is in no position to influence the financial stability of a shipper, large or small; the shipper might negotiate price (rate) adjustments with a small carrier, but taken individually or collectively, the tariff publications of the small carriers are simply not significant or influential enough to warrant in-depth examination of each publication. This frees the Commission to focus its tariff examination resources on the rate bureaus and large carriers, as is done via the consumer-oriented tariff examination program. There, the emphasis is on seeking out proposed changes which will *increase* the tariff users' costs.

The review includes, but is not limited to the following:

High less-than-truckload rates that have the economic effect of an embargo on small shipments. Also rates that are of such a high level that they will not move the traffic involved, and thus in effect embargo that traffic.

Minimum charges at high levels require justification. These high minimum charges also have the effect of placing an embargo on the affected traffic.

Exception ratings and commodity rates of motor carriers that result in charges that exceed the classification basis must be accompanied by justification when filed with the Commission.

Pickup or delivery charges that apply only to selective named points.

Arbitrary charges that apply only to selective points.

Joint rates restricted to named points.

Surcharges of any nature that have the effect of increasing the cost to the shipper.

Limitations of liability. Tariff provisions which attempt to relieve the carrier of responsibility for loss or damage.

Additional liability provisions. Tariff provisions which provide that carrier will accept additional liability depending upon payment of additional charges.

Cancellation or increasing of rates to small communities.

Increased rates filed under authority of section 15(8)(b) and 15(8)(c) of the Interstate Commerce Act (Yo-Yo Filing). Verification that the increases do not exceed the increases authorized.

During Fiscal Year 1977 the consumer examining staff reviewed 202,401 publications. Of that number 1,084 were rejected and 3,293 were criticized, *i.e.*, a letter was sent out informing the carrier that the tariff is offensive and asking correction of the offending provision or cancellation

of the tariff.[27] The criticisms also led to 1,182 publications either voluntarily cancelled or amended by affected carriers, among which were 236 publications that involved reductions in motor common carrier service. The staff referred to the Commission's Suspension and Fourth Section Board 405 publications for its consideration and possible suspension. Of that number, 142 were placed under suspension and/or investigation. A number of cases were also referred to the Commission's Bureau of Operations for possible investigation. Finally, 2,752 letters, in addition to the 3,293 criticisms mentioned above, were written to motor carriers requesting justification of proposed cancellations of joint routing provisions, *i.e.*, a reduction in service.

The Commission's tariff review helps to protect the public against unjustifiable charges that would otherwise inflate the rate structure. Obviously, the value of this activity extends beyond the specific tariff filings that are ultimately found unjust and unreasonable. Knowledge by the industry that this monitoring program exists certainly has an inhibiting effect on the filing of tariffs which cannot be justified.

I mentioned that one of the items the consumer unit looks for is additional charges for pickup and delivery service at certain points. Both large urban areas as well as remote locations are often the victims of such charges. At issue here are those methods or devices used by carriers to increase their charges for shipments to and from particular points or areas other than straight forward increases in rates per 100 pounds. Three such devices are often employed by carriers: arbitraries, pickup and delivery charges, and surcharges. Each of these varies slightly in definition, but all result in increased rates for service to and from a particular point by the imposition of charges to be added to class rates without an increase in service.[28] It has been the Commission's view that a proposal to establish charges in addition to class rates without an increase in service is—absent convincing, well supported, special justification—unlawful. The Commission invariably suspends such proposals.

Whether or not a given proposal constitutes new or reduced rates is a matter of tariff interpretation.[29] Under some circumstances, however, pub-

27. *Id.* Some figures were compiled by the Bureau of Traffic, Section of Tariffs, from internal reports and records.

28. In Docket No. 36654, Boyle Brothers, Inc., Petition for Clarification, initial decision served January 13, 1978, pending possible action on appeal, the Commission has decided that in the future it will consider that arbitraries, pickup and delivery charges, and surcharges are *illegally* filed unless they apply in connection with specifically named points, with the publication itself in a tariff that is used to determine class rates. A proposal to establish "delivery charges," for example on all shipments to points in Vermont (by a script clause rather than by reference in connection with the individual points), would be therefore "illegal" and considered for possible rejection. This should more or less eliminate the wholesale application of such charges often called "area arbitaries."

29. Tariff technicalities are significant particularly in the determination of whether or not arbitra-

lication of arbitraries can be clearly determined to be a proposal to establish rates lower than an existing basis.

Unless the proposal appears to be unjust and unreasonable, because of the level of the rates, the Commission generally does not suspend arbitraries that result in genuinely reduced rates, or in rates for application where no current basis of rates exists, simply because of the manner of publication.

When the Commission votes to suspend an arbitrary, a pickup or delivery charge, or a surcharge, it does so because the suspended charge plus the currently existing charge appears above a just and reasonable level.

C. *Reasonableness of Rates*

Since the Interstate Commerce Act does not define just and reasonable rates, the meaning of these terms must be found in decisions of the Commission and the courts. No precise formula has been devised for determining the reasonableness of a given rate on particular traffic; the question is one of fact which calls for the exercise of the Commission's informed judgment. The courts have acknowledged that the Commission has wide latitude and flexibility in judging the reasonableness of rates.

A reasonable rate is one that falls in the "zone of reasonableness," a concept that originated in the field of rail regulation. Thus, one of the most oft-quoted descriptions of the zone of reasonableness is that of Justice Cardozo in *United States v. Chicago, M., St. P. & P. R.R.*

> A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself . . . . We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute . . . . Those tendencies excluded, "a carrier is entitled to initiate rates and, in this connection, to adopt such policy of ratemaking as to it seems best."[30]

The zone of reasonableness concept places a check on the Commis-

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ries are part of a new basis of rates or a basis of reduced rates. Some tariffs, particularly bureau tariffs, may have an un-named point rule which may provide that a mileage basis of arbitraries can be added to currently effective rates to or from a named point. (It is anticipated that the named point used would be the one that would produce the lowest rate.) Where this is so, there is a rate (actually a combination of rates) in effect. A new proposal to establish a through basis composed of the rates to a designated point plus a new arbitrary or scale of arbitraries for different classes would, in all probability, be a "reduced rate" proposal. On the other hand, if the proposal is to establish rates from or to a facility or construction site in an area or at a location that is not a "point," the wording of the tariff's governing provisions may be such that the un-named point rule cannot be used—or the tariff may have no un-named point rule—and the proposal may be a "new rate" proposal. In addition, the existence and use of intermediate application rules must be considered. It is not necessarily true that all carriers party to a tariff could lawfully apply the immediate rules. (Authorized routes, and regular versus irregular route authority, both enter into consideration.)

30. 294 U.S. 499, 506 (1935).

sion's regulatory authority. The zone of reasonableness delineates an area where the market forces and the judgment of management rule. It is only when a rate falls outside the zone that the regulatory authority is permitted to interfere with the normal ratemaking process.

The zone of reasonableness cannot be effectively defined in terms of fixed percentage points in a way that will be applicable to all cases. The zone of reasonableness concept, as applied by the Commission, provides the carriers with broad pricing flexibility which may be even more necessary under present economic conditions than in the past. The Commission's approach has permitted and encouraged the introduction of innovative approaches to ratemaking. While the Commission does have the power to prescribe just and reasonable maximum or minimum rates following a finding that any rate is or would be unlawful, the burden is on the carriers in the first instance to publish their own rates and most go into effect as a matter of course. In order that rate regulation may be responsive to changing economic conditions, the applicable statutory provisions are drafted in general terms. As the Commission stated in the early days of transportation regulation, "[t]he words just and reasonable imply the application of good judgment and fairness, of common sense of justice to a given condition of facts. They are not fixed, unalterable, mathematical terms."[31]

Because of the impracticality of developing a definition of a just and reasonable rate that will fit all situations, the Commission is faced with the task of applying general standards to specific facts. The fundamental principle underlying this function is the protection of the public interest. The term "public interest" in this sense means not only the protection of the public against unreasonable and discriminatory charges but also the interest of the public in the maintenance of an adequate, efficient, and dependable system of transportation.

Although, as previously stated, the determination of the bounds of the zone of reasonableness does not lend itself to mathematical formulas, there are certain indicators of reasonableness which the Commission has employed, including rate comparisons, competitive conditions, and cost of service.

Cost has become an increasingly more significant factor in ratemaking. It used to be said that "value of service"[32] determines the maxima of the zone of reasonableness; cost, the minima; and competition determines the rate to be charged. Increased competition, however, has produced a trend toward cost-oriented pricing. The extent to which the price of a service exceeds its cost is an indicator of whether a rate is too high and exceeds

31. *In re* Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Chesapeake & O. R.R., 22 I.C.C. 604, 624 (1912).

32. A rate just below a level that would dry up demand for the service.

the bounds of reasonableness. The Commission's role in developing improved cost finding is discussed more completely in part IV.

D. Entry Control

The Commission has recently given increased attention to the potential of liberalized entry as a means to improve motor carrier regulation. The recent staff task force study completed July 6, 1977, contained 39 recommendations for improvements in the regulation of interstate trucking.[33] The task force's recommendations covered four broad areas: (1) recommendations involving the application and application proceedings, (2) recommendations directed at facilitating entry by expanding exemptions or easing evidentiary burdens, (3) recommendations which are primarily procedural or are directed at internal Commission operations, and (4) recommendations for further study and analysis including a study of independent truckers and a comprehensive study of motor carrier entry. As of January 31 of this year some action had been taken on 35 of the 39 proposals. Final action on ten of the proposals has resulted in much expedited processing of application proceedings and several legislative proposals. In addition, a number of rulemaking proceedings have been instituted in regard to other proposals to explore their feasibility and to develop standards for their implementation.

One of the task force's proposals related to the introduction of cost/price evidence in application cases and is probably of particular interest to this subcommittee. In response to the task force's recommendation the Commission instituted on February 8, Ex Parte No. MC-116, *Consideration of Rates in Operating Rights Application Proceedings*.[34] Through the proposed rulemaking in Ex Parte MC-116, the Commission intends to develop guidelines for considering rates where the new rates may be the main advantage of the proposed service. The significance of this proceeding can hardly be overemphasized. If rules to implement this concept are adopted, they could profoundly affect price competition in the motor carrier industry.

Another of the task force's recommendations that warrants specific mention is that which would establish limits on the ability of existing carriers to protest applications for new authority. The rules proposed in this proceeding, Ex Parte No. 55 (Sub-No. 26), *Motor Carrier Application Proceedings—Protest Standards*,[35] would, if adopted, limit protests to those filed by carriers who had actually hauled the traffic at issue or had actively solicited it.

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33. Interstate Commerce Comm'n, Improving Motor Carrier Entry Regulation: Report and Recommendation of a Staff Task Force (1977).

34. 42 Fed. Reg. 7675 (1978).

35. 42 Fed. Reg. 59985 (1977), 43 Fed. Reg. 17008 (1978).

E. *New Initiatives in Motor Carrier Rate Regulation: Ex Parte No. MC-98 and Other Proceedings*

Numerous and complex disputes between carriers and shippers come before the Commission on a routine daily basis. Rather than resolve recurring disputes on a case by case basis the Commission, when appropriate, utilizes its broad rulemaking powers in an attempt to resolve the national transportation problems which underlie many of these disputes. A recent example is Ex Parte No. MC-98, *New Procedures in Motor Carrier Restructuring Proceedings*.[36] That proceeding concentrated on problems related to small shipments but also examined rate issues common to the motor carrier industry in general. The transportation of small shipments by motor common carriers is a multifaceted problem. On the one hand, shippers maintain that the rates are too high, in some cases even serving as an embargo; on the other, carriers complain that the rates are too low and even noncompensatory. Some shippers contend that small shipments subsidize larger less-than-truckload (LTL) and truckload (TL) traffic while carriers assert that the larger LTL and TL traffic subsidizes small shipments, and that such overpricing of the larger, more desirable LTL and TL traffic subjects this traffic to diversion to private and contract carriage. Shippers maintain that small shipments are "captive" traffic for the motor carrier industry, subject to the whims of an inefficient but very expensive source of transportation. They complain of poor service generally while carriers assert that they are already losing money on this traffic and that providing better service would only result in further losses.

The notice of proposed rulemaking in MC-98 elicited over 60 pleadings representing approximately 70 parties. This provides an indication of the importance of the issues raised and the interest in them.

Many parties expressed dissatisfaction with the present classification system. As we stated in our Notice of Proposed Rulemaking:[37]

> The present motor carrier LTL rate structure is essentially a copy of the classification-based system developed, and still used, by rail carriers. When regulation was expanded to include motor carriers, it became necessary for the motor carrier industry to publish a rate system of its own. That was done by adopting the rail classification and superimposing the principles underlying that system upon the motor carrier industry. The various individual rate bureaus developed a number of systems for differentiating between the relative transportability of different commodities.[38] At the time, this worked to the advantage of the motor carriers because value of service factors, inherently part of the classification of high value goods, allowed them to attract the most prof-

36. 41 Fed. Reg. 1923 (1976), 41 Fed. Reg. 5690 (1976).

37. 41 Fed. Reg. 1923 (1976).

38. The National Motor Freight Classification generally applies nationally for motor carriers except for within New England. The Coordinated Classification is the motor classification utilized within New England.

itable portion of the LTL traffic from the rails by a skillful matching of rates and service.

A freight classification is a division of groups of the commodities transported by common carriers according to their transportation characteristics in order to assure that all bear a fair share of the transportation burden. Thus, the primary purpose of a freight classification is to assign each article, or a group of articles, to a class according to well-known classification principles which recognize distinctions between the articles from a transportation standpoint, along fairly broad lines.

Characteristics of the commodities which are considered in fixing classification ratings are: shipping weight per cubic foot, liability to damage other commodities with which it is transported, perishability, liability to spontaneous combustion or explosion, susceptibility to theft, value per pound in comparison with other articles, ease or difficulty in loading or unloading, stowability, excessive weight, excessive length, care or attention necessary in loading and transporting, trade conditions, value of service, and competition with other commodities transported. The importance of each of these classification elements varies with each commodity or group of commodities with similar transportation characteristics. The classification of property into groups designed to spread the burden of transportation fairly has never been successfully reduced to formula.[39]

The pleadings revealed a widespread dissatisfaction with the present classification system. Although the rate bureaus defended the system, many shippers and individual carriers strongly criticized it.

A nationwide uniform system of classification of articles transported by rail became effective in 1952 pursuant to Docket No. 28300, *Class Rate Investigation, 1939*.[40] In that proceeding we prescribed a scale of class 100 rates upon which rates for all other classes would be based. A similar system was subsequently adopted by motor carriers. Those articles the transportation of which cost more or less than the cost attributed to class 100 articles were given a separate classification representing a percentage of the class 100 rate. Thus, a shipment of a commodity classed at 35 was transported at 35 percent of the class 100 rate, while a shipment classed at 125 was transported at 125 percent of the class 100 rate. In recent years, the motor carrier industry has departed from that system primarily as a result of general increases and the periodic imposition of weight brackets. Classification, as it was originally conceived, has become distorted, resulting in the anomaly of having a multiplicity of classes for any particular commodity. Articles taking the same class truckload regularly take widely

39. Motor Carrier Rates In New England, 47 M.C.C. 657, 661 (1948). Classification Ratings Based on Density, 337 I.C.C. 784, 797 (1970).

40. 262 I.C.C. 447 (1945), 264 I.C.C. 41 (1945), 268 I.C.C. 577 (1947), 281 I.C.C. 213 (1951), 286 I.C.C. 5 (1952), 286 I.C.C. 171 (1952).

varying classes less-than-truckload with no apparent justification for such differences.

There was not enough evidence in the record in MC-98 for us to determine fully how the present system can be best improved, whether a modification of a density based system modeled after the Coordinated Classification should be adopted nationally, or whether the entire system should be abandoned and a totally new system designed. We therefore found that an investigation into the classification system is warranted, and it will soon be initiated.

In MC-98 numerous shippers expressed dissatisfaction with the quality and quantity of the small shipments service provided by motor common carriers.

In 1967 an Ad Hoc Committee of the Interstate Commerce Commission conducted a study of the small shipments problem.[41] The study was conducted primarily by making a number of investigations of a selected number of service failures. In this respect the shippers involved attended meetings with one or more members of the Committee and fully explained the problems which they faced. Thereafter the carriers named by the shippers were contacted and again either individually or in groups explained the circumstances which surrounded specific service failures.

Another phase of the investigation involved conferences with a number of shipper groups and various organizations of carriers. At these meetings rather than discussing specific occurrences, each group discussed the situation in general, presenting their needs, problems, and opinions of possible solutions to service failures. Other information gathering was accomplished through the receipt of letters from individual shippers and carriers. Data was obtained from information and reports received from both the headquarters and field staffs of the Commission.

Presentations before the Committee indicated that shippers find three major faults with the services of motor common carriers on small shipments: (1) carriers selected the commodity they desire to transport because of its physical characteristics, (2) carriers select shipments on the basis of the volume tendered, and (3) carriers are unable or unwilling to interline in certain circumstances, thereby preventing the through movement of a shipment. Another common complaint is the inability to obtain service from or to small cities or areas not generating large amounts of backhaul traffic.

The practice of selecting and choosing traffic is, of course, a direct violation of a carrier's obligation to transport, without discrimination, all traffic covered by its certificates and tariffs. The justification usually given by a

41. REPORT OF THE AD HOC COMMITTEE OF THE I.C.C. COMPOSED OF COMMISSIONERS MURPHY, WOLRATH AND BROWN, SMALL SHIPMENTS PROBLEM (Nov. 30, 1967).

carrier for its refusal to accept less desirable traffic is that its facilities are overloaded and that the article tendered for transportation might be damaged if held over until a slack period is reached. Carriers ascribe this refusal to accept what they consider to be the less desirable traffic as being simply a matter of good business judgment.

Although it would seem that a carrier could be easily and quickly enjoined from violating the terms of its tariffs, the situation is not susceptible to a simple remedy because of the reluctance of shippers to take direct enforcement action. The position of shippers is understandable, particularly in the case of joint-line traffic where the institution of an enforcement action may result in action by the involved carriers to cancel the joint arrangement. In some instances a complete loss of through service may result.

It is settled that a carrier may not limit services offered in its tariff to something less than that which it is certified to handle.[42] A carrier failing to comply with its published tariff authority and refusing to render service is subject to serious sanctions by the Commission. Accordingly, carriers have been ordered to delete from their tariffs provisions restricting service to less than a carrier's full operating authority.[43]

A carrier or any party acquiring the operating rights of another carrier, whether by consolidation, merger, or sale, also acquires all the rights and all the obligations of the second carrier. Failure to provide the full certified service subjects the acquiring carrier to sanctions. Thus, a carrier not complying with its service obligation may have its certificate suspended or revoked, may be subjected to an order to cease and desist, may have an injunction imposed against it, or may be criminally prosecuted. Failure to meet service obligations is grounds for refusal of an application for a new grant of authority, for acquisition of existing authority via sale, merger, or consolidation, and in denying rate increases.

In spite of general complaints there is some evidence that service levels, on the whole, are adequate. For example, the "hot-line" instituted by the National Small Shipments Traffic Conference was abandoned for lack of genuine service complaints. Also a Department of Transportation study dated December 1975, "Industrial Shipper Survey (Plant Level)," indicated that overall quality of service on small shipments transported by motor carriers is adequate or more than adequate on 98 percent of the

42. Ex Parte No. MC-77, Restrictions on Service by Motor Common Carrier, 111 M.C.C. 151 (1970). As a result of that proceeding we amended 49 C.F.R. by adding thereto § 1307.27 (k) (i) which reads in part as follows: " No provision may be published in tariffs, supplements, or service to less than the carrier's full operating authority or which exceed such authority. Tariff publications containing such provisions are subject to rejection or suspension for investigation."

43. Ex Parte No. MC-77 (Sub-No. 1), Restrictions on Service by Motor Common Carriers, 119 M.C.C. 691 (1974), 126 M.C.C. 303 (1977), *aff'd*, East Central Motor Carriers Association, Inc. v. Interstate Commerce Commission, 571 F.2d 784 (4th Cir. 1978).

shipments.[44] In our report, we stressed that the individual carrier which is guilty of abusing its certificate is liable to prosecution, to being refused permission to sell, consolidate or merge, or being denied a rate increase. However, the shipping public was encouraged to come forward with specific complaints and participate in formal proceedings where evidence of a carrier's failure to meet its obligations will have an impact.

Many parties to the proceeding in MC-98 criticized motor carrier operations as inefficient. We noted that studies to increase productivity are being conducted and that innovative programs are continually being instituted in an attempt to further improve motor carrier service, and we encouraged carriers and shippers to continue to investigate means of expediting the handling of freight and decreasing the costs of providing service.

We intend to study the matter further and consider whether additional proceedings are necessary.

The efficiency of carrier operations is of major concern to us because the Commission, in prescribing just and reasonable rates, is required by section 216(i) of the Act to give due consideration to among other factors:

> the need, in the public interest, of adequate and *efficient* transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and *efficient* management, to provide such service.[45]

Carriers have an obligation to reduce expenses by the exercise of better management.[46]

Thus, we believe that carriers have an obligation to present evidence showing what efforts are being made to offset increased costs by greater efficiency, and we also believe that this area needs to be emphasized in rate proceedings involving small shipments. Accordingly, as a result of MC-98 we now specifically require carriers to submit a brief summary of what steps have been taken, within the year preceding the time of filing for a rate increase to reduce their costs on small shipments to the extent such costs can be reduced.

The information submitted will be considered in determining the merits of a general increase proposal. If it becomes apparent that insufficient steps are being taken to deal with this problem, then further action on our part may become necessary.

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44. OFFICE OF TRANSPORTATION PLANNING ANALYSIS, INDUSTRIAL SHIPPER SURVEY (PLANT LEVEL) (September 1975).

45. 49 U.S.C.A. § 10704 (West. Supp. 1979) (emphasis added).

46. Increased LTL, AQ, and TL Rates, To, From, and Between New Eng. Terr., 329 I.C.C. 244 , 521 (1966); Freight Forwarder General Increase, Transcontinental Terr., 326 I.C.C. 216 (1966); Increased Rates Within Southwest, and Between Colo. and Wyo. and Southwest, 326 I.C.C. 216 (1966); LTC Class Rates and Minimum Charges Between Midwest and Central Terr., 325 I.C.C. 106, 120 (1965).

One of the major innovations in MC-98 is our advocacy of a small shipments tariff.

We believe the establishment of a small shipments tariff to apply to shipments under 500 pounds will encourage rate bureaus and carriers to file such tariffs as well as assist in their drafting. The creation of a small shipments tariff is essential to improving the competitive position of motor common carriers. The publication of these tariffs should bring rates more in line with the cost of service and insert a flexibility into the system designed to cater to the needs of the shipping public.

To assist the carriers in drafting such tariffs we set forth a number of features which we believe should be contained in any small shipments tariff. First, small shipments tariffs must provide separate rates for pickup, and line-haul service.

Pickup and delivery service consists of calling for and collecting freight and receipting therefor from a dock, platform, doorway, or other facility directly accessible to highway vehicles. In the case of LTL shipments this service generally is performed in connection with transportation from or to the premises of the motor carrier's terminal. A motor carrier may perform its own pickup and delivery service, and loading and unloading service, or it may arrange to have it performed by another.

Pickup and delivery constitute a substantial portion of the carrier's expense.

Some shippers of small shipments contended that both shipper and carrier costs can be reduced if shippers and consignees have the option of declining pickup and delivery services, and are willing and able to do their own pickup and delivery. However, the evidence also indicated that many of these shippers and receivers do not presently perform these functions simply because the economic incentive to do so is inadequate.

The Commission wishes to encourage tariffs which provide shippers with an adequate economic incentive to perform these services themselves, if they are so equipped. Such incentives, to be just and reasonable, must be cost based.

In an attempt to accommodate shippers and receivers willing and able to pickup and/or deliver to or from terminals, without penalizing shippers and receivers unable to perform the service themselves, we took two steps in MC-98. First, where allowances are published based on carrier cost we required them to increase whenever there is a rate increase, inasmuch as the cost of pickup and delivery also increases. It is unjust and unreasonable not to give the shippers an allowance which is a true reflection of costs.

The law is well settled that shippers which deliver their own goods to a carrier's loading station or terminal, in lieu of using the available pickup service of the carrier, are entitled to compensation reasonably commensu-

rate with the facilities furnished and the services performed.[47] The owners of the property are rendering a service in connection with the transportation for which they are entitled to a just and reasonable allowance under section 225. An allowance in excess of or far below the shipper's cost would be unjust and unreasonable.[48]

Second, in instances where allowances are not published we will require tariffs setting forth special rates for small shipments to establish two sets of rates: one for pickup and one for line-haul and delivery. Pickup is to be performed at the option of the shipper, the carriers are not relieved from their duty to provide this service. Such a breakout in charges will allow the carrier to tie the charge more closely to the cost of service. For example, the rate for pickup will reflect whether the service is to be performed in a high cost or low cost area. Although many consignees would like the option to perform their own delivery, it is not practical at this time as it may overtax the carriers' terminal facilities which are not designed as warehouses and may subject articles which are stored for consignees to greater risk of loss or damage.

An aggregate or multiple tender rate is an incentive rate given to the shipper upon tendering several shipments to the carrier at one time. These rates are intended to encourage fewer pickup trips thereby decreasing carrier expenses. MC-98 encourages carriers to publish and shippers to use these rates, and the small shipments tariff endorsed contains provisions for aggregate tender rates.

As stated earlier pickup and delivery costs are a substantial portion of a carrier's expense, especially with regard to small shipments. A primary element of this cost is the expense of time required for the vehicle to go from the terminal to the shipper's dock and back again. Travel time is the same, regardless of the number of shipments tendered or their size. Cost differentials do not appear until the carrier actually handles the shipments and the cost is proportionately greater for smaller shipments. It is only logical that if a carrier can pick up two or more small shipments at one time rather than making a trip for each, its expenses will be reduced.

The Commission and the courts have held that reduced rates based on the ability of a shipper to tender large or aggregate shipments are not discriminatory.[49] This is based on evidence establishing that there are differ-

47. *See* United States v. Baltimore & O.R. Co., 231 U.S. 274 (1913); Pickup and Delivery Allowance at St. Louis and Kansas City, 64 M.C.C. 163, 165 (1955).

48. New York Central R.R. v. United States, 199 F. Supp. 955 (S.D.N.Y. 1961); Automobile Parts and Other Articles Within Central Terr., 316 I.C.C. 143, 145 (1962).

49. Central & So. Motor Freight Tariff Ass'n, Inc. v. United States, 273 F. Supp. 823 (D. Del. 1967), *dismissed as moot*, 345 F. Supp. 1389 (D. Del. 1972); Aggregate Class Rates, between Points in the South, Midwest and East, 332 I.C.C. 524 (1968); Aggregate Rates, Rochester, N.Y., to Eastern, Central, and Southern States, 325 I.C.C. 474 (1965); Iron Ore from Cleveland, Ohio, to Ohio and Pennsylvania, 323 I.C.C. 746 (1965); Multiple Shipments from California to Oregon and

ences in the cost of handling single versus aggregated shipments, and that these differences justify differences in rates.

The pleadings restated that shippers often require a carrier to pickup or deliver small shipments daily. Some small shippers do not have large warehousing facilities, and because there is no incentive to withhold today's shipment until tomorrow, they require the carriers to make two trips instead of one. We believe that if shippers are given adequate incentive, they will aggregate their shipments.

In addition to provisions for separate pickup charges and aggregate tender rates, MC-98 provides that small shipments tariffs may, at the option of the carrier, contain provisions relating to discounts for prepayment and prepaid shipments. We believe such tariff offerings will improve the carriers' competitive position on this traffic and we hope carriers will take advantage of this opportunity.

The Commission believes the publication of small shipments tariffs by interested carriers will improve competition among them. However, there are other ways competition and lower rates may be achieved. One of the methods we are studying is released rates. Under released rates a carrier is subject to limited liability. In exchange for a lower rate, shippers "release" the carrier from liability in excess of a certain amount per pound. This system is reputed to benefit the shipper of less valuable commodities. Shippers of commodities of greater value have three choices: (1) they may not release and pay the normal (and higher) rate for the carrier's common law absolute liability; (2) they may release, pay a lower rate and purchase insurance independently; or (3) they may release, pay a lower rate and take the risk and absorb any losses, *i.e.*, self-insure. As a practical matter, the last two options are available only to larger shippers. Small shippers may have difficulty in contracting for this type of insurance or in absorbing the losses, and accordingly may be forced to pay the higher rate.

The value of a commodity transported is an element in ratemaking aside from the risk of loss or damage, because it serves to measure the value of service rendered the shipper. But where rates based on declared or agreed value have been authorized by us, the statute accords shippers the right to understate the value for the purpose of securing a lower rate, and it is clear that if the excess of the unreleased over the released rates is more than the cost of insurance, shippers will ordinarily release the carrier and obtain transit insurance elsewhere. But frequently transit insurance can not be obtained. When it is not available, those shippers who are financially able to do so will assume the risk of loss themselves. The small shipper is less apt to be able to do so and will be compelled to resort to the higher, full

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Washington, 315 I.C.C. 247 (1961); Toilet Preparations from Springfield, Mass., to Middle Atlantic Terr., 310 I.C.C. 528 (1960).

value rate for adequate protection. The alternative rates which would result from the carriers' proposals will thus not work with equal justice to all.

Section 20(11) of the Act[50] restates the common law rules that a common carrier is ordinarily an insurer against loss, damage, or injury to property committed to it for transportation, and declares any limitation of liability or recovery to be unlawful and void. However, this section gives the Commission authority to grant partial exemption from full liability in cases where rates depending upon, and varying with, declared or agreed value would, in our judgment, be just and reasonable under the circumstances.

The purpose of maintaining released-value rates is to accord a shipper the choice of two different rates. Under the higher rate unlimited carrier liability attaches and under the lower the shipper, in consideration for the reduced rate, declares or agrees that in the event of loss or damage the value of the shipment is a sum certain. When such an agreement is made at the time of shipment, the shipper is bound by his declaration and is estopped from claiming or recovering more than the value stated in case of loss or damage.

In the past, before authorizing partial exemption from full liability, we have required a showing that traffic is highly susceptible to loss or damage, and that the commodities involved have a wide range of values making the amount of any claim that may arise difficult to estimate.[51]

The criteria for gaining released rates are: (1) a wide range in value of the commodity making the amount of any claim that may arise difficult to estimate; (2) comparatively high susceptibility of the traffic to loss or damage; (3) a high ratio of claims to freight charges; and (4) a great number and frequency of claims for loss and damage. Other factors have been (5) difficulty of a carrier in obtaining adequate insurance coverage; (6) unreasonably high cost of insurance; and (7) competitive necessity.

The parties have indicated that the major problem with small shipments service is that rates are too high. Many parties have stated that if rates were lower they would find general commodities carriers' service more attractive than available alternatives. One way in which lower rates may be offered is to limit carrier liability. The Commission indicated it lacked sufficient data to authorize blanket released rates for all shipments under 500 pounds based upon the record in Ex Parte No. MC-98. The Commission indicated it was taking two steps to obtain the necessary information. First, we are taking a survey of shippers. The survey is designed to determine shipper attitudes toward released rates and to gauge shippers' present use of released rates, use of transportation alternatives for small

50. 49 U.S.C.A. § 11707 (West. Supp. 1979).

51. Released Ratings on Rates on Engines, 47 M.C.C. 767 (1948); Wearing Apparel, Accessories, Piece Goods—Shulman, Inc., 321 I.C.C. 1 (1963).

shipments, and ease or difficulty with settling claims problems. Second, we are instituting a rulemaking on released rates. The purpose of the rulemaking is to determine the desirability of released rates for shipments weighing 500 pounds and under in connection with a small shipments tariff, and if desirable, what form they should take.

In Ex Parte No. MC-98 we received a great number of comments from shippers which find it difficult to schedule pickup and deliveries. This results in unnecessary congestion part of the day and empty docks the rest of the day. Our analysis of this matter led us to conclude that both shippers and carriers could benefit from scheduling and that carrier failure to attempt to accommodate shippers in this regard may indicate lack of competition in any proceeding where competition is in issue, such as rate disputes, operating authority applications, or sales and mergers of existing trucking operations.

Problems associated with rates on small shipments can also be reduced, we determined, by channelling this traffic to trucking operations geared to it. Whether this is done by carriers that specialize in small shipments, or by carriers that dedicate a division to this traffic is immaterial. What is needed, it was concluded, is expertise, as well as specialized facilities and equipment to make the handling of this traffic more cost effective. Thus, in MC-98 we encouraged carriers to specialize in small shipments and we stated that as a matter of policy we will issue certificates of public convenience and necessity to those who seek to specialize in small shipment traffic.

Recent years have witnessed efforts by motor common carriers to select the traffic they handle through self-imposed service limitations in their tariffs as well as other means. Following is a brief discussion of a number of proceedings, recent or current, where the Commission has acted to provide that the service held out to the shipping public by the regulated carriers conforms in letter and spirit of what is intended by the Interstate Commerce Act.

Over the years the Commission's Bureau of Traffic, Section of Rates and Informal Cases, received hundreds of complaints against carriers, particularly motor common carriers of property, regarding their practice of handling overcharge claims. In many instances the carriers did not *timely* acknowledge such claims, and in some instances never acknowledged them. The Commission has instituted Ex Parte No. 342, *Procedures Governing the Processing, Investigation and Disposition of Overcharge, Duplicate Payment, or Overcollection Claims*,[52] to establish rules for the timely handling and processing of these claims. The proceeding is pending, and it is anticipated that it will be decided next month.

52. 359 I.C.C. 211 (1978).

Duplicate payments have been the subject of recent vigorous enforcement action by the Commission's Bureau of Investigations and Enforcement. Last November the ICC brought a court action against 23 Midwest truckers for withholding more than $4.5 million in duplicate payment from shippers.[53] And this is just the beginning; we have reason to believe that this practice is widespread, and we intend to see that it is stopped. I am happy to report to you that our court actions are proceeding well. To date, the Commission has secured court orders against 14 of the 23 defendant companies wherein the trucking companies have been ordered to make refunds of duplicate payments made to them and hereafter to implement plans to identify and refund duplicate payments. The Commission estimates that the successful conclusion of these 14 court actions should lead to refunds of up to two million dollars to shippers and consumers. Indeed, by these actions the Commission seeks to protect shippers who have lost their capital and consumers who ultimately share in the double payments through higher prices for merchandise.

In the early 1960's motor common carriers began publishing tariff provisions which provided for the application of additional charges on shipments picked up at or delivered to private residences, schools, churches and similar type locations. From that time on, the practice spread nationwide and virtually all carriers published these charges. As a result the Commission's Bureau of Traffic, Section of Rates and Informal Cases, received numerous complaints alleging that the charges were unjust and unreasonable. In response, the Commission, on its own motion, instituted Ex Parte No. MC-97, *Investigation into the Practices of Motor Common Carriers of Property on Residential and Redelivered Shipments*,[54] which resulted in residential delivery charges being prohibited and an order requiring carriers and their tariff publishing agents to cancel any such provisions outstanding. The rationale of the Commission decision is that all classes of shippers and receivers should be treated equally. The Commission's decision was ultimately upheld by the U.S. Court of Appeals. As a result of our action, small consumer's transportation costs were reduced by substantial amounts.

Practices of the household goods moving industry have presented a particular challenge. Post-World War II American society became highly mobile. These trends have created a great demand for household goods moving service and a concomitant concern as to its quality.

The unique, personal nature of household goods moving service has been recognized by the Commission. Shippers of household goods expect

53. Court action was brought against each individual trucker. The figure of $4.5 million was arrived at by adding amounts from individual actions. *See* ICC News, Release 235-77, November 3, 1977. It describes how the ICC went into federal court against 12 companies for illegally retaining 2.3 million dollars.

54. 353 I.C.C. 689 (1977).

good service when moving their personal possessions to a new home and the motor carrier industry has, as it should, encouraged the public to entertain this confidence.[55] The fact that the industry has not always justified that confidence has resulted in a very active role by the Commission with regard to household goods carriers.

The Commission undertook corrective actions in a series of proceedings under Ex Parte No. MC-19,[56] from the early 1960's to the present. In these proceedings the Commission has adopted new and amended rules to govern the practices of household goods carriers intended to assist the shipping public in obtaining more efficient and expeditious movement of his or her possessions. Because the user of household goods services is often an infrequent shipper, new rules were adopted to enable the individual consumer to select rationally from among the various carriers and to know what he or she has a right to expect from the carrier in terms of performance. Performance reports are now required of carriers by the Commission and the carrier must give the prospective customer a copy of its report along with a pamphlet, published by the Commission, setting out the obligations of the carrier and giving general guidance on what the shipper should do to insure a successful move. Further, the Commission, through its field offices, offers its assistance to the shipper in securing remedial action by the carrier should the move go awry.

The household goods moving industry is a prime example of an area where increased and continual regulatory activity is especially required. New problems are always arising and old problems often take new forms. I believe the Commission has exercised the sort of vigilance required by the unique nature of the household goods moving service for the public through its oversight of the industry's practices and contribution to improved consumer awareness of what the act requires of the carriers.

The Commission has recognized that some carriers may attempt from time to time to restrict the availability of their services. Efforts to restrict services are accomplished by tariff publications and are designed to eliminate less profitable traffic or avoid doing business with particular clients and connecting carriers. These service restrictions to say the least are generally contrary to the common carrier obligation to serve the public.

Motor carrier tariffs[57] define what services a carrier holds itself out to the public to perform and the rates at which these services are available. The foundation of these tariffs is the carrier's certificate of public convenience and necessity. Carriers enjoy a degree of freedom to adjust their tar-

55. 96 M.C.C. 196 (1964).

56. Ex Parte No. MC-19 (Sub-No. 33), Practices of Motor Common Carriers of Household Goods (1978).

57. The term "tariffs" is synonymous with the term "schedules," as used in the Interstate Commerce Act.

iffs at their own discretion, subject to the statutory requirements that changes be effected on at least 30-days' notice and subject to possible investigation and suspension by the Commission. Tariffs and tariff modifications must be filed with the Commission and in the manner prescribed in the Commission's regulations. These regulations are part of the *Code of Federal Regulations*. Tariff publications fowarded to the Commission for filing but not conforming with the regulations may be rejected.

In its efforts to preclude unwarranted service restrictions, the Commission has by rulemaking established a regulation[58] requiring a carrier's tariffs to embrace the full scope of its operating authority. The rulemaking proceeding was docketed as Ex Parte No. MC-77, *Restrictions on Service by Motor Common Carriers*, and was concluded in 1970. The regulation makes clear that publications attempting to limit or withhold service will be subject to rejection or suspension. In a subsequent rulemaking proceeding, Ex Parte No. MC-77 (Sub-No. 1),[59] the Commission identified and analyzed the lawfulness of specific, recurrent restrictions. The interpretations set forth in this subsequent proceeding are the guidelines for reviewing tariff publications and rejecting those which create unwarranted restrictions. The guidelines reach both direct and indirect restrictions. An indirect restriction would be a tariff provision which removes the applicability of single-factor through rates for the unfavored traffic, leaving a higher combination of local rates. Although service would be available under the restrictions, the rate levels are so high as to constitute an effective barrier to the movement of the traffic.

Examples of prohibited restrictions are provisions which embargo or which preclude the applicability of single-factor through rates on:

- shipments not delivered by the publishing carrier
- shipments of a particular named commodity
- less-than-truckload shipments
- shipments not meeting unrealistic minimum weight requirements
- shipments not meeting unrealistic packaging requirements

Additionally, the Commission has directed carriers to eliminate tariff provisions which prevent the applicability of class-rates on through movements involving three or fewer carriers.[60]

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58. 49 C.F.R. § 1307. 27(k) (1977).

59. This proceeding was entitled Restrictions on Service by Motor Carriers (Compliance Reports and Interpretations), 119 M.C.C. 691 (1974), 126 M.C.C. 303 (1977), *aff'd*, Eastern Central Motor Carriers Ass'n, Inc. v. Interstate Commerce Commission, 571 F.2d 784 (4th Cir. 1978).

60. The Commission does not have the power to force motor carriers of property to enter into through routes and joint rates although it has sought legislation authorizing it to do so. The Commission believes that joint rates and through routes are desirable because they make more service available to the shipping public at a lower rate. Thus, the Commission discourages carrier actions that adversely affect through routes and joint rates, as is exemplified in this aspect of the decision in Ex Parte No. MC-77 (Sub-No. 1).

These guidelines and prohibitions are intended to assure the availability of a nationwide system of motor common carriers at reasonable rate levels. In Fiscal Year 1977 the Commission's Bureau of Traffic rejected 83 publications as contrary to the Commission's MC-77 regulations. An additional 22 publications were suspended and placed under investigation.

Loss and damage claims are a national transportation problem. The Commission is convinced that a critical part of solving this problem is the creation of an expeditious method of adjudicating these claims. Loss and damage claims are often ignored or unfairly declined, and, for the small shipper especially, the cost of litigation often surpasses the amount of the claims. However, the Commission's successive requests for legislation granting it jurisdiction to adjudicate these claims have not been acted on.

Nonetheless, within the limits of its current Congressional mandate, the Commission is doing what it can to improve loss and damage claims settlement. For example, in *Petition to Institute Proceeding to Amend CFR 1051.1(b)*,[61] we found it necessary and therefore now require "either the address where remittance must be made or the address of the principal place of business of the issuer of the freight to expense bill, or both, at the issuers option," on the freight or expense bill. Prior to institution of this rule shippers often had difficulty in placing loss and damage claims with the carrier responsible for handling the claim within the statutory period of limitations because of the difficulty in ascertaining the proper address. We believe this rule will somewhat facilitate settlement of claims.

IV. Cost Finding and Evaluation of Revenue Need Application in General Increases and Specific Rate Adjustments

A. *Cost Finding: An Overview*

In 1935, when motor carriers engaged in interstate and foreign commerce were brought under the jurisdiction of the Interstate Commerce Commission, the carriers were, for the most part, small and unfamiliar with the intricacies of ratemaking. They displayed little interest in or knowledge of cost finding. Instead, they found it easier to ascertain the established rate of the railroads and adjust them to fit their circumstances. If traffic could more readily be handled by the motor carriers, it was possible to maintain rates at the rail level or slightly higher than the rail rate. If it was found necessary to reduce the rates in order to attract the traffic, that was done. As competition grew in the motor carrier field and the nationwide depression intensified, the rate structure become depressed. Consequently, it became apparent that the method of ratemaking then followed was no longer

61. 355 I.C.C. 61 (1977).

adequate. Of necessity, greater emphasis had to be placed on the cost of performing the service.

In response to a clear need to find a firm starting point for judging the reasonableness of rates, the Commission formally organized the Section of Cost Finding in 1939. The principal function of the Section at that time was to develop cost finding procedures for determining the cost of transporting freight by various modes of transportation. The development of costs was not instantaneous, for transportation industries offer a multitude of services and the task of costing each one is a complex undertaking.

Under regulations, a uniform system of accounting and reporting to the Commission was first required for the motor carriers.[62] This provided data for use in determining the carriers' over all financial stability and revenue need, but it did not provide the necessary information for determining the cost for particular segments or specific movements of traffic. Before data could be developed to satisfy this more specific need, principles had to be developed to allow the segregation and treatment of variable costs, joint costs, and constant costs, and also to weigh the economic significance attached to each. Indeed, there is no easy way of costing individual shipments of different weights and sizes moving over a wide range of distances, and which are transported by vehicles and men involved in performing special services for many commodities at the same time. If you see a truck traveling down the road, it may be loaded with 100 different shipments of different weights. To determine why one of those shipments may cost more per hundred pounds than another when they are all handled in one operation as indicated by the movement of the vehicle, is no easy task. Yet, clearly, no one would dispute that different costs apply to different weight and size shipments, moving different distances.

While the problem of determining costs for ratemaking purposes was difficult, it was not unsurmountable. The first study of note which set forth cost finding methods and principles was published in 1943.[63] This study presented information on rail freight service costs in the various rate territories of the United States. By 1948, procedures for determining costs were well established by the Commission's section of cost finding. Several cost formulas had been developed, and unit costs for both rail and motor were being published each year. Costs developed from these formulas were and still are widely used by the Commission and the industry in determining the reasonableness of rates.

The term "study" appears frequently throughout this testimony. As we use it, "study" may be broad or narrow in its connotation depending on the

62. Most recently revised in Revision of the Annual Report and Uniform System of Accounts for Class I and Class II Motor Carriers of Properties, 42 Fed. Reg. 32,814 (1977).

63. RAIL FREIGHT SERVICE COSTS IN THE VARIOUS RATE TERRITORIES OF THE UNITED STATES, S. DOC. NO. 63, 78th Cong., 1st Sess. (1943).

project to which it applies. Thus, a traffic study is essentially the collection and enumeration of a quantity of data sufficient to portray the characteristics of a particular block or segment of traffic handled by a carrier or group of carriers. A cost study may be the production of regional unit costs through the application of Highway Form A to the expenses and statistics of a regional group of carriers. A cost study may also be the application of unit costs to traffic study data and matching the results with the associated revenues by traffic segment.

Highway Form A and Highway Form B are two of the cost finding formulas developed by the Commission's Cost Finding Section.[64] Highway Form A, *Formula for Determination of Costs of Motor Carrier of Property*, is an 87-page document that separates motor carrier operating expenses, rents, and taxes, excluding income taxes, among four basic functions: line-haul, pickup and delivery, terminal platform, and billing and collecting.[65] It also provides for the determination and distribution of the "cost of capital." After assignment to functions, the expenses are related to service units and unit costs developed. Service units used in these calculations include vehicle-miles, hundredweights involved in pickup and delivery service, hundredweights handled over the platform, and shipments billed.

The expenses and certain statistics used in the formula are obtained from annual reports filed by the Commission by Class I and Class II motor common carriers of general freight. The formula is designed to accommodate the expenses and statistics of carriers which derive an average of 75 percent or more of their revenues from the intercity transportation of general commodities and which have averaged annual gross revenues of $500,000 or more.[66] Carriers whose operations meet these criteria are required to separate certain of their major accounts between line-haul and pickup and delivery work and to report certain supplemental statistics.

In applying Highway Form A, annual report data is supplemented by special study information furnished by the carriers as follows:

> (1) Form 2, traffic analysis, provides percentages for distributing annual shipments and pounds to types of movement and to weight brackets in Highway Form A.
>
> (2) Form 4, pickup and delivery study time, provides time and motion factors for distributing pickup and delivery costs to various weight shipments receiving pickup and delivery service.
>
> (3) Form 7, line-haul trip report study, provides data for computing the round-trip load factor (average load) by length of haul separately for four major weight groups and for all weight groups combined.

64. *See* Rules to Govern the Assembling and Presenting of Cost Evidence, 321 I.C.C. 238 (1963); and Rules to Govern Assembling and Presenting Cost Evidence, 337 I.C.C. 298, 337, 421 (1970) [hereinafter cited as 1970 Rules].

65. *Id.*

66. *Id.*

(4) Form 10, platform study, determines the extent to which shipments for various weights are handled over the carriers' terminal platforms.

(5) Form 11, analysis of peddle-trip operations, provide annual information for use in separating peddle operations between the pickup and delivery portion and the line-haul portion of the trips.

(6) Field reports provide additional accounting information to supplement the accounting and statistical data shown in the carriers' annual reports to the Commission.

As in any system of measurement, the accuracy of the results of our cost studies depends on the integrity of the data fed into them. In this regard, our field audit program plays a twofold role. First, the regular carrier audit insures that the carriers' books of account and other records are correct, uniform and maintained in accordance with Commission-prescribed requirements. In addition, for carriers participating in a regional study, the auditors review their compliance with the special study requirements and assist in resolving any problems which may arise. Headquarters staff thoroughly screen annual, quarterly and special study reports filed with the Commission. Wherever possible, data cells are reviewed and matched against other comparable data for reasonableness and accuracy. As necessary, carriers are requested to verify and/or correct data cells which look questionable. Our data capture system uses internal checks to insure the accuracy of the transfer of data from hard copy reports to the computer. As a result, we have the utmost confidence in the costs published in our regional studies and the results of properly applied Highway Form B's.

Highway Form A is a complex formula and it soon became evident that few, if any, motor carriers could apply the formula, which requires many special and costly studies that must be processed through numerous schedules, forms, and summaries. The problem, therefore, was how to develop specific costs for an individual motor carrier or group of motor carriers involved in supporting rates on traffic movements which do not fit into the general rate structure. Stated differently, traffic hauls which only involve a particular carrier or a small group of carriers may accrue costs that differ from regional average costs. The Commission requires that costs for determining reasonable rates should, to the greatest extent possible, reflect the cost of the carrier or carriers participating in the traffic.[67] This means that individual carrier costs should be developed to estimate the costs applicable to the given traffic.

The Commission's Section of Cost and Valuation developed a cost formula, Highway Form B, *Simplified Procedure for Determining Cost of Handling Freight by Motor Carriers*,[68] whereby a carrier or group of carriers

67. *Id.* at 305.
68. *Id.* at 338, 424.

could develop specific costs applicable to their own operations, as opposed to those average costs developed on a regional or territorial basis.

Highway Form B provides a simplified or shortened procedure so that carriers can readily develop unit costs by services and therefore the costs for specific hauls, without the necessity of making the extensive "special studies" which are required as a part of the more refined Highway Form A used to develop regional or territorial costs. In lieu of these "special studies," the allocation of costs among various sizes of shipments in Highway Form B is achieved by applying cost relationships, developed through the application of Highway Form A, to the average cost for all shipments. Highway Form B procedures provide the means for developing terminal costs at origin, destination and interchange points; adjustment for partial pickup and delivery service at origin and destination; computation of pickup and delivery costs applicable to either a cargo or equipment interchange; adjustment of system average load for length of haul; and adjustment to terminal and linehaul cost to give effect to the density (pounds per cubic foot) of the commodity.

When used properly, Highway Form B can be a useful tool for management because it provides carriers with support for rate proposals, for controlling costs, and for setting future budget estimates. Highway Form B is also used by shippers, competing carriers and other interested parties in protesting rate proposals.

B. Cost Levels

Whether it be Highway Form A or Highway Form B, the products of these formulas are "service unit costs" which, in essence, have been divided between those which are long run variable and those which are constant. The long run variable costs are computed at "90 percent variable," *i.e.*, 90 percent of the carriers' operating expenses and cost of capital (debt and equity) are considered as being directly variable with output—with the remaining 10 percent being, relatively speaking, constant.[69]

Standing alone, however, these service unit costs have no effect, and it is only when they are "applied" to assumed or known transportation movements, of different characteristics, that they have meaning and use. The so-called application of these service unit costs, including the various adjustments that may be possible, to "cost out" any given traffic can provide costs at various levels.

Generally speaking, there are three levels of motor carrier costs which, under various circumstances, are helpful in analyzing and testing the compensatory character of a rate. All three provide the complete cost picture, and all three are necessary on occasion to explain motor carrier rates. (1)

69. *Id.*

The first and lowest cost level consists of those one-way variable expenses which are separable from the joint expenses incurred in the round-trip movement of the equipment. (2) The second level of cost includes the (variable) expenses applicable to the operation as a whole. It embraces those joint expenses such as the round-trip movement of the equipment, which, while of a joint character for an individual segment of the motor carriers' operations, are viewed as a whole. (3) The third level of cost consists of the so-called fully allocated costs which are made up of the (variable) costs plus an apportionment of the constant expenses.

C. Regional Average Costs

To fill the need for regional and territorial motor carrier costs the Commission's Section of Cost and Valuation has published a series of studies which provide territorial unit costs, cost scales, and performance factors based on data of motor common carriers of general commodities operating principally within 13 specified regions or territories.[70]

These studies represent territorial average costs, *i.e.*, they are based on a large group of carriers treated as if they were one large carrier, and are derived from Highway Form A. We attempt to make cost studies for about 1/3 of these regions each year, completing the cycle every three years. In the interim period, these regional studies are updated to a current level, and unit costs and operating factors for all regions are published in one statement each year. This provides comparable cost data for all regions regardless of the year in which the base cost study was conducted. These statements provide a complete explanation of how the costs can be used to develop costs for specific movements of traffic based upon how a given traffic is handled. The studies also provide the Commission with information on motor carrier costs for use in its various regulatory functions and makes available to the public cost information useful to carriers, shippers, traffic organizations, rate bureaus, educators, and others.

Granting that regional cost studies are not the answer to all ratemaking situations, these studies are of great value in measuring the general level of costs in rate proceedings covering large segments of traffic. They are also invaluable in ascertaining the compensatory nature of the rates on shipments that receive average transportation services. However, because they represent the average cost for all shipments falling within various weight brackets, they do not necessarily reflect the cost of specific traffic weighing other than the average or the cost of receiving special services other than the average service accorded all shipments within the weight bracket.

70. The ICC Bureau of Accounts prepares these regional studies on a cyclical basis every three years. An example is ICC Bureau of Accounts, Statement ZC 16-73, Cost of Transporting Freight by Class I and II Motor Carriers of General Commodities (April 1978).

For this reason when costs are desired for a specific shipment with known transportation characteristics which are different from the average, the unit costs developed through Highway Form A are adjusted based on the services actually accorded specific shipments.[71] For example, adjustments can be made for:

(1) Actual platform handling experience. The costs developed in Highway Form A reflect the average platform handling experience for various size shipments. However, in actual practice, some shipments may receive a platform handling at origin, destination or interchange point and some may not. When actual platform experience is known, costs are adjusted accordingly.

(2) Partial pickup and delivery. Methods are provided for adjusting pickup and delivery running and stop costs, and for determining trailer drop and pickup costs.

(3) Density of the commodity transported. Adjustments to pickup and delivery and platform costs are provided to adjust costs reflecting average density of all traffic known to traffic density.

(4) Actual miles of haul. Line-haul costs should be based on the actual miles traveled in transporting the traffic which can be determined by special study of a representative number of trips. In those instances where a study is not made, the miles may be based on the short-line miles from the *Household Goods Carriers' Bureau Agent Mileage Guide*, increased 6 percent for circuity.

(5) Round trip load factor. This is an adjustment to the line-haul cost to reflect the actual round trip load of a specific shipment.

(6) Line-haul density. As in (5), round trip load factors and the resulting line-haul costs are adjusted to reflect density and not weight alone.

(7) Different line-haul running speeds. The line-haul cost per vehicle-mile in Highway Form A reflects the average line-haul running speed for the carriers included in the study. Under certain circumstances the overall cost per vehicle-mile may be adjusted to reflect changes in cost due to speed.

Some point out that ratemaking costs based on the territorial average by weight bracket and distance block fail to recognize carriers whose costs are higher or lower than the average. However, judging rates in terms of average costs tends to hold down the rates and revenues of the high cost carrier, thus providing an incentive for a more economical operation. It also enhances the possibilities of profit for the low cost carrier, rewarding it—some would say unduly—for its efficiencies.

It should not be concluded that average costs preclude the use of individual carrier costs in rate cases. Individual costs are, in fact, preferred.[72] For instance, in adjustments in which several carriers participate, costs developed on an average basis are entitled to weight in the absence of more specific data, in passing on the compensatory character of rates. System average costs of a large group of carriers, reflecting costs of movement of a variety of commodities over a wide area with diverse operating conditions,

71. *See* 1970 Rules, *supra* note 64.

72. *Id.* at 304-05.

cannot be as decisive in determining reasonableness of particular rates on a specific commodity, especially where the proponent has been moving the traffic at rates the same as those proposed for several years under operating conditions similar to those attending to anticipated movement.

If the proponent is primarily a hauler or less-than-truckload traffic, its system average operating expenses do not provide an adequate standard for measuring compensativeness of proposed truckload rates. From the above, it can be seen that the Commission is well aware of the limitation on the use of average costs.

Observers of the Commission's use of the average costs sometimes mistake the role of costs in the Commission's decisions. Rates are not made by combining various ingredients measured according to established formulas. Ratemaking always has been and no doubt always will be a process depending importantly upon the exercise of judgment. The Commission has always tried to remain flexible in its treatment of costs in the belief that only in this way can it arrive at sound and logical conclusions consistent with the National Transportation Policy. On this basis rates have been approved in a number of proceedings which would not have been compensatory under normal costing methods. Yet, costs remain a most important factor. The position taken in the so-called Doyle Report[73] coincides with that of the Commission. Thus, as stated in the report:

> Throughout the course of our examination of transportation policy it has been repeatedly impressed upon us that, while cost is not the sole factor in pricing, it is the only measurable one. Sound cost analysis is an essential pricing tool . . . .

D. *One-Way Costing*

Another controversial area of costing is what is called one-way versus two-way costing or back-haul rates.

For the motor carrier industry to be sound and financially stable, overall rate levels must provide the carriers with adequate revenues to enable them to continue furnishing service. This principle is set forth in section 216(i) of the Act.[74] One application of this principle is that variable costs are found generally indicative of the minimum level of expenses which must be recovered by a carrier in providing particular services. In computing variable costs, the Commission in the past often required the calculation to be on a roundtrip basis.

However, in *Carbon Black from the Southwest to Ind.*,[75] *Ohio & Mo.*,

73. Report of the Committee on Commerce, United States Senate by Its Special Study Group on Transportation Policies in the U.S., S. Rep. No. 445, 87th Cong., 1st Sess. 389 (1961).

74. 49 U.S.C.A. § 10704 (West. Supp. 1979).

75. 325 I.C.C. 138 (1965).

the Commission authorized use of one-way costing. In that proceeding the motor carriers showed that they had lost a substantial volume of carbon blacks traffic over a 2-year period as the result of a reduced rail rate and that a "heavy and chronic imbalance of traffic" existed in the going direction of the proposed rate. In the light of that evidence the Commission approved a proposed rate which exceeded variable costs computed on a *one-way* basis.

There is another situation where the Commission has allowed incremental costing of back-haul traffic. This is where the traffic would not move but for the reduced rates or where the traffic would otherwise move in private carriage.[76]

Carbon Blacks, Aluminum Extrusions, and similar cases subsequent to them, therefore, recognize that transportation conditions may justify one-way costing. We believe that these cases reflect sound policy and will consider whether the use of one-way costing should be expanded.

E. *General Rate Increases*

As discussed in a previous section of this testimony, the post-World War II period has been marked by increasing carrier utilization of general rate increase proposals. As stated there, a request for a general increase is based on systemwide revenue needs instead of those concerning only particular movements, commodities, or segments of traffic. Unlike ordinary rate proposals, a general increase is normally sought as a percentage increase applicable to all or nearly all rates maintained within a ratemaking territory. Recognizing the need for such measures, the Commission has endeavored to ensure that the proceedings are determined in the fairest way possible to both carriers and shippers, balancing the carriers' need to charge rates sufficient to meet their revenue needs and to enable them to fulfill their service mission and the public's entitlement to adequate and efficient service at the lowest cost consistent with the furnishing of such service. Over the past thirty odd years, the Commission, through its decisions in general rate increase proceedings and its overall efforts to develop valid criteria to apply to such proposals, has steadily improved the quality of its considerations in general rate increase proposals.

For a period of time during and following World War II, the Commission relied primarily on the evidence of the operating ratio of carriers in general rate increase proceedings. The term "operating ratio" refers to the ratio of the carrier's operating costs to its total operating revenues. The theory behind the reliance on operations revenues is that because trucking requires low fixed investment, the primary risks of business is involved in operating outlays. An operating ratio of 93 percent was thought appropriate to insure

76. Aluminum Extrusions from Miami to Chicago, 325 I.C.C. 188 (1965).

the viability of carriers. However, in the early 1960's, emphasis began to shift away from the operating ratio as a viable criterion of revenue need. In passing upon the merits of the operating ratio standard in *General Increases—Eastern Central Territory*,[77] the Commission stated:

> Although an operating ratio of 93 percent has been found reasonable in the past, we do not regard such an operating ratio as an immutable standard. In view of the numerous changes which have taken place in the motor carrier industry, we believe this matter should be thoroughly explored in the light of a more complete record developed either in a further hearing in the instant proceeding or in some similar proceeding. At the same time, we believe that the parties, in cooperation with the Commission, should produce all the information required to show the precise effect of transactions between carriers and their subsidiaries or affiliates on carrier operating ratios . . . .

Passing again on the merits of the operating ratio a year later in *General Increases—Middle Atlantic and New England Territories*,[78] the Commission found that: "The mere showing of present operating ratios of above 93 percent without a showing of the factors that make up such a ratio is not sufficient for our purposes . . . ."

The Commission's consideration of general rate increase proposals became more refined. As the Commission moved away from reliance on the operating ratios of the carriers, it started to require various other financial data from the carriers. Cases in 1962 and 1963 stressed the need for more precision in showing the effect of transactions between carriers and affiliates or subsidiaries and more detailed evidence of expense items of representative carriers.[79]

In 1964 an order was issued intended to insure the submission of adequate information in future general rate cases.[80] The order required carriers to provide supporting data for individual representative carriers in the form of various financial ratios relating to overall carrier operations and the specific territories and traffic affected by the rate proposal.

General rate increases came to a virtual standstill for the period immediately following the 1964 order. By early 1967 the motor carriers had been denied seven straight applications over a two-year period primarily on the basis of the lack of representativeness of the sample carriers.[81] As a

77. 316 I.C.C. 467, 481 (1962).

78. 319 I.C.C. 168, 176 (1963).

79. *Id.*; General Increases—Eastern Central Territory, 316 I.C.C. 467 (1962).

80. Prior to the rules adopted in Ex Parte No. MC-82, New Procedures in Motor Carrier Revenue Proceedings, 339 I.C.C. 324 (1971), evidentiary guidelines governing general increase proposals were issued on an ad hoc basis. These determinations are the so-called "big orders." An example of a "big order" is found in Increased Rates and Changes From, To and Between Middle West Territory, 335 I.C.C. 142, at 151-54 (1969).

81. LTL Class Rates and Minimum Charges Between Midwest and Central Territories, 325 I.C.C. 106, 111 (1965); General Increases Between East and Territories West, 329 I.C.C. 626, 640 (1965); Increased Rates Within Southwest and Between Colo. and Wyo. and Southwest, 326

result of *Ringsby Truck Lines, Inc. v. United States*,[82] the Commission undertook to delineate more specifically the evidentiary requirements for general rate increases. This effort was manifested in the so-called Big Order of April 27, 1967.[83] The requirements of the order related to determination of a traffic study, a cost study, affiliate data, and evidence of required operating ratio and desired profit level.

On April 3, 1968, the Commission ordered the motor carriers to produce evidence of:

> [t]he sum of money, in addition to operating expenses, needed to attract debt and equity capital which they require to insure financial stability and the capacity to render service. This evidence should include, without limiting the evidence that may be presented, particularized reference to the respondents' reasonable interest, dividend, and surplus requirements and experienced, projected, and needed rate of return on depreciated investment in transportation . . . .[84]

This order was reaffirmed by the Commission in its decision of June 5, 1969, on *Increased Rates and Charges, From, To, and Between Middlewest Territory*, which stated in part: "The single most important gauge of a motor carrier's ability to attract equity capital is its return of value over and above the values the investors have committed to the enterprise. Two significant measures are the rate of return on stockholders' investment and the rate of return on assets."[85]

The experience of carriers and the Commission under these orders was mixed. The experience, however, highlighted the need for an even more definitive approach to determining the evidentiary criteria for general rate increase cases.

The culmination of this experience was the institution on August 1, 1969, of Ex Parte No. MC-82, *Proposed New Procedures in Motor Carrier Revenue Proceedings*.[86] This proceeding, a major formal rulemaking, gathered substantial input from a wide spectrum of shipper and carrier interests and resulted in the fullest consideration of the subject of general increase cases, carriers' revenue need requirements, and the data necessary to permit rendering of the fairest possible decision.

The proceeding led to the adoption of special rules which apply to the

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I.C.C. 216 (1966); LTL COR Rates Between East and Territories West, 326 I.C.C. 174, 197 (1966); Increased Class and Commodity Rates, Transcontinental, 326 I.C.C. 397, 404-05 (1966); Increased LTL, AQ, and TL Rates, To, From, and Between New England Territory, 329 I.C.C. 244, 248 (1966); Increased Class and Commodity Rates, Transcontinental, 329 I.C.C. 420, 425 (1967).

82. 263 F. Supp. 553 (D. Colo. 1967).

83. *See* note 80 *supra*.

84. Increased Rates and Charges, From, To, and Between Midwest Territory, 335 I.C.C. 142, 152, app. A (1969).

85. *Id.* at 148.

86. 35 Fed. Reg. 13911 (1970).

more significant motor carrier general increases on freight rates and charges. The rules themselves are often referred to as "the MC-82 rules" in reference to the proceeding[87] in which they were adopted.

Our rules governing general increases of motor common carriers of property[88] apply only on the major increases. One of the threshold criteria, for example, is that the increase involved generate more than 1 million dollars in additional revenues. The rules also embrace major restructurings.[89]

The MC-82 rules have been revised twice in the light of suggestions for their improvement by shippers and carriers as well as our own experience with them.[90] Significant further revision is now in process.[91]

The rules are essentially procedural, specifying when, what, and with whom the carriers (or the bureaus acting on their behalf) must file. The carriers are free to supplement the mandatory data with any other data they believe is relevant. The rules ensure that the Commission has before it the minimum data which experience has shown is needed to evaluate whether the proposed increases or restructuring are in fact justified. They ensure that interested shippers and the public-at-large or governmental agencies and bodies wishing to participate[92] also have this data with enough time to oppose the tariff proposal. The rules achieve these objectives in part by requiring that the increase tariff and the entire justification relied on be filed with the Commission and served on interested parties at least 45 days prior to the effective date of the proposed tariff.[93]

The data we require includes (1) a traffic study, (2) a cost study, (3) revenue need information and (4) affiliate data.[94]

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87. Ex Parte No. MC-82, New Procedures in Motor Carrier Revenue Proceedings, 339 I.C.C. 324 (1970) (codified at 49 C.F.R. § 1104 (1977)).

88. Somewhat analogous rules were adopted last year to govern industry-wide increases in bus fares and are codified at 49 C.F.R. § 1104(b) (1977). The Commission is currently exploring the feasibility of adopting comparable rules to govern general increases of other specialized carriers, such as those transporting household goods.

89. Restructurings are widespread rate changes but, unlike general increases, many are downward so that the net increase in revenues may be minor. Typically, they involve increasing rates and charges on smaller LTL shipments (*e.g.*, under 500 pounds) and decreasing rates and charges on larger shipments. The Commission's concern about the impact these restructurings have on the so-called "small shipments" problem led to the institution of Ex Parte No. MC-98, New Procedures in Motor Carrier Restructuring Proceedings, 41 Fed. Reg. 41 Fed. Reg. 1923 (1976).

90. Ex Parte No. MC-82, New Procedures, The Motor Carrier Revenue Proceedings, 340 I.C.C. 1 (1971), 351 I.C.C. 1 (1975).

91. 357 I.C.C. 498 (interim report decided June 9, 1978).

92. Protests and briefs to proposed general increases in rates and in fares have been filed by federal (the Departments of Justice, Transportation, Agriculture, Defense, as well as the Council on Wage and Price Stabilization), state, and local governmental bodies.

93. Because a general increase tariff and its justification are often complex, the 30-day statutory lead time is inadequate.

94. 49 C.F.R. § 1104.2-1104.5 (1977).

1. The Traffic Study

The traffic study is based on the industry's continuous traffic study (CTS)[95] and must be conducted in accordance with specific guidelines to ensure that its conclusions are representative.

The rules specify the study carriers[96] and require that the study be for the most current 12-month calendar year for which the carrier system operating date is available. They require that the study include a probability sampling of the actual traffic handled during identical time periods for each study carrier.

2. The Cost Study

Additionally, the MC-82 rules require a detailed costing of the sampled traffic. The carriers are required to develop service unit costs for each individual study carrier, adjust them by size of shipment and length of haul, and then apply these unit costs to the traffic service units developed from the traffic study. Operating ratios are then derived for the issue traffic by individual weight brackets.

The basic cost analysis performed by our cost analysts, under the MC-82 rules, is confined to the evidence of record. Further, when necessary, underlying workpapers may be requested to support allocation factors or other data which is not clear on the record. Under MC-82 the burden of proof rests with the carriers to support the reasonableness of their proposed rate adjustments. In addition, each case is treated on its particular merits because from case to case, rate relief is sought by the various carriers for different reasons and under varying economic circumstances. Common to most general increase and restructuring proceedings filed under the provisions of Ex Parte MC-82 are various items pertaining to traffic study, frame carriers used, cost study, updating, through versus carried method of costing, density adjustment, and cost revenue comparisons by weight bracket.

More specifically, the items identified above are examined in the following manner:

(1). Justification statements submitted in accordance with Ex Parte No.

95. The CTS is based on a statistical sampling plan prepared by an expert in the field. 49 C.F.R. § 1104.9 (1977) (one of the MC-82 rules) ensures that shippers as well as the Commission have ready access to all underlying data used in the preparation of the materials used by the carriers as their justification, and thus enables the shippers and the Commission to examine the sampling procedures for the traffic study in the event there is reason to question the traffic sampled.

96. The study carriers are those carriers participating in the traffic requirement for allocation expenses between line-haul and pickup and delivery services [*i.e.*, those specified in 49 C.F.R. § 1207 (1977) instruction 27] which participate in one of the motor carrier industry's Continous Traffic Studies (CTS), and which derive $1 million or more in annual operating revenues from this issue traffic or 1 percent or more of the total annual operating revenues of all carriers from the issue traffic.

MC-82 procedures contain financial data, as well as cost data. The pro forma portion of the financial data is based on updated costs developed through the cost study. Consequently, the validity of the methodology employed in developing this cost study must be initially verified to determine the adequacy of this data for cost and financial analysis purposes. If the cost study is found to be deficient, this data is restated, if possible, to correct these deficiencies. When restatement of this data cannot be ascertained, the analysis, which is developed for the Commission, indicates that the justification statement submitted in support of the particular rate proposal is unacceptable for determining the reasonableness of that proposal.

(2). All cost data in the justification statement is also examined for compliance with the requirements established in Ex Parte No. MC-82. Specifically, the traffic study is reviewed to determine if the procedures utilized by respondent carriers in developing this study conform to the prescribed regulations. As a practical matter, the general design of the traffic study has not changed materially since the inception of Ex Parte No. MC-82.

Similarly, the cost study is scrutinized with regard to the method employed in developing costs for the base study year, the present pro forma year, and the restated pro forma year. Particularly, the assignment factors and expense allocations used in the cost study are analyzed with respect to their reliability. In addition, the procedures used in updating labor and nonlabor expenses to both the present pro forma level and the restated pro forma level are examined for their accuracy and theoretical validity.

The specific unit costs of each carrier are applied to the traffic characteristics of that same carrier, i.e., the "each-to-each" costing methodology prescribed in this proceeding. These data are then accumulated using all carriers employed in the cost study. This includes both the more efficient and the less efficient carriers. Thus, this use of all carrier data provides the average transportation costs for the traffic at issue and keys rate levels, insofar as costs are considered, to the average carriers.

(3). The method administered in rerating base year revenues to both the current level and the proposed level is reviewed with regard to its reasonableness and accuracy. Ex Parte No. MC-82 requires that estimates of current revenues should reflect all rates and charges in effect no later than 45 days prior to the date of the tariff filing and that the proposed level should reflect conditions prevailing on the effective date of the rate proposal.

(4). In those instances where respondent carriers submit data on both a "carried" and a "through" basis, the evidence is examined to determine its credibility, accuracy, and compliance with the prescribed procedures. The "through" basis evidence is further analyzed to substantiate the lack of any significant sampling bias. Absent adequate evidence demonstrating that the use of the "through" basis does not result in a substantial sampling

bias, all conclusions based on cost analysis relating to the reasonableness of the rate proposal are predicated solely on "carried" basis data.

(5). Finally, the cost-to-revenue comparison, developed on the basis of the cost study for the individual weight brackets affected by the rate proposal, are thoroughly scrutinized to determine if there is any cost justification for the proposed rate adjustments. Where provable carrier expense increases exceed proposed revenue increases, the rate proposal is considered to be totally cost justified. On the other hand, if the increases in revenues equal or exceed increases in expenses, prior to consideration of the proposed increase, the rate proposal has not been shown to be cost justified. Of course, in between these two extremes are the rate proposals that are only partially cost justified. In these cases, only a certain percentage of the proposed revenue increase is necessary to cover provable expense increases. When this occurs, the exact percentage of the proposed revenue increase that is cost justified is calculated.

Basicially, these cost-to-revenue comparisons are the crux of the cost analysis conclusions. More importantly, however, cost analysis provides one element of input to be considered in rendering a decision.

In addition to analyzing the justification statement initially filed by respondent carriers, protests and replies are also analyzed.

Concomitantly with the "cost analysis" of data in MC-82 type proceedings, the "carriers' revenue need" is also carefully examined and evaluated. "Carrier revenue need" is defined as the revenue generation required to cover operating expenses and provide fair and reasonable returns to the carriers' capital suppliers. To provide safe and reliable service to the shipper, carriers must maintain adequate truck fleets and terminals. Maintenance of adequate plant requires capital which in turn requires adequate income levels to repay borrowing and pay dividends. Revenue and profit levels are revenue need questions which the Commission addresses in each and every general increase case.

If the carriers' data justification is not assailed by any protestant to the tariff in issue, the Commission and Staff, including the Section of Cost and Valuation and the Section of Financial Analysis, closely review the mandatory evidentiary materials. If the supporting data appears weak or marginal, an investigation into the lawfulness of the tariff will be ordered. The effective date may also be suspended for seven months while the investigation is undertaken.

If an investigation is initiated, it will culminate with a Commission decision granting, denying, or approving the increase in part, as the evidence may warrant. In deciding the lawfulness of any particular general increase, the Commission balances the economic and public policy considerations involved, including the need, in the public interest, of adequate and efficient transportation service by motor carriers at the lowest cost consistent with

furnishing of such service and the need of the carriers for revenues sufficient to enable them under honest, economical, and efficient management to provide such service.[97]

The above outline of the MC-82 procedures and our analysis thereunder is only an outline. The procedures themselves are complex and involve some highly technical issues. The complexity of the problems involved in getting probative traffic, cost, and revenue data is reflected to some extent in the size and complexity of our three MC-82 reports to date as well as the large amount of data included in filings by the carriers under the procedures. While we believe that the procedures essentially achieve their objective of providing necessary data to assess the carriers revenue need proposals, we also recognize that further refinement is foreseeable. The MC-82 rulemaking itself is open-ended to facilitate revisions to the rules. Major revisions, in fact, are currently being considered, as has been noted by our report in Ex Parte No. MC-98.

Rate increases not falling within the specific parameters of the MC-82 rules, of course, remain subject to various statutory and Commission procedural requirements designed to ensure that the public is not likely to overlook important tariff changes. These procedural safeguards include the Commission's strict rules governing tariff publication, ensuring that rate changes are clearly identified, requirements which, when coupled with the 30-day statutory lead time accorded by section 217(c) of the Act,[98] ensure that the public has sufficient notice of the proposed tariff and adequate time to file a protest to objectionable changes. These provisions also ensure that the Commission through its Suspension and Fourth Section Board has sufficient lead time to act on the protest. If the circumstances should warrant, section 216(g) of the Act[99] gives the Commission authority to suspend the tariff for seven months while investigating the lawfulness of the proposed rate changes. If found unlawful, the Commission will order the objectionable provision canceled.

F. *Problem Areas*

In the past, the Commission's Section of Cost and Valuation has concentrated its efforts in costing to motor carriers of general commodities. However, specified carrier groups, such as household goods carriers, have come to the forefront due to the traffic volume and magnitude of their rate increase requests, and their impact on the nation's economy. As an indication of their impact, in 1976, specialized carriers generated 40 percent of the revenues of all motor carriers having annual operating revenues of

97. 49 U.S.C.A. § 10704 (West Supp. 1979).
98. 49 U.S.C.A. § 10762 (West Supp. 1979).
99. 49 U.S.C.A. § 10708 (West Supp. 1979).

$500,000 or more.[100]

1. Specialized Carriers

The Commission has found during the course of considering rate increase requests of some of the specialized carrier groups, that the cost evidence has been inadequate. This lack of adequate cost evidence has brought about a need for additional MC-82-type proceedings for these carriers. Such proceedings foster the development of minimal data requirements which (1) impose a scheme of fact presentation on the parties which is both logical and understandable; (2) allows interested parties to study the financial position of the carriers; and (3) allows the Commission to assess and evaluate the revenue needs of the carriers.

The Commission's Section of Cost and Valuation is currently investigating the possibility of a rulemaking proceeding for household goods carriers. Future plans include the development of MC-82-type procedures for both the bulk motor carriers and possibly heavy haulers.

2. Need for New Cost Formulas

The Section of Cost and Valuation has determined that a need exists for special cost allocation formulas for various types of specialized carriers. This need stems from the fact that the operating and accounting characteristics of these particular carriers differ from the operating and accounting characteristics of general commodity carriers, i.e., Highway Forms A or B are not suited to the development of costs for these carriers. Accordingly, the Commission's Section of Cost and Valuation is currently researching reported data, studying the systems of accounts and anticipates meeting informally with certain specialized motor carrier groups to discuss operating characteristics and available industry data. A major problem which must be resolved stems from the fact that many specialized carriers rely on owner-operators to perform the transportation service. In the past, it has been virtually impossible for the carrier to collect and submit reliable cost data for representative owner-operator movements.

3. Field Studies

A natural out-growth of formula development and the subsequent cost computations is the need for special field studies to enhance and refine cost estimates.

100. TRANSPORTATION CONSULTANTS, DIVISION OF DUN AND BRADSTREET, INC., TRINE'S BLUE BOOK OF THE TRUCKING INDUSTRY(1977).

V. Rate Bureau Monitoring

Carrier management initially decides what level of rates it will seek to establish. These rates are published by the carrier and filed with the Commission. Copies of those rates are available for public inspection at each carrier's office and at the Commission. The public availability of these rates tends to assure that shippers, towns, ports and individuals are being charged the right amount and neither receive any special preference nor are the subject of any unjust discrimination.

An individual carrier may publish and file with the Commission its rates in its own tariffs, or have its rates published by an "agency" for its own account or jointly with all carriers willing to establish the same charges.

Agency tariffs are published under the auspices of a rate bureau. Rate bureaus are carrier-owned organizations, formed by agreement between and among regulated common carriers, for the purpose of joint or collective ratemaking activities. Those agreements set forth the procedures for the joint consideration, initiation, and/or establishment of rates, fares, classifications, and certain other related matters applicable to the transportation of property and passengers in interstate or foreign commerce. Section 5a of the Interstate Commerce Act[101] authorizes motor common carriers to apply to the Commission for approval of those agreements, and approval relieves the member carriers from the operations of the antitrust laws.

To warrant Commission approval and hence exemption from the operations of the antitrust laws, a rate bureau agreement must guarantee that members have the full, free, and unrestrained right to take independent action either before or after any determination arrived at through the collective action procedures of the agreement.

Over the years, other conditions have been prescribed, including the following:

(1) All eligible carriers must have a right to become a party to an approved agreement upon the same terms as present members.

(2) No member carrier may be expelled except for nonpayment of dues, and provisions must be made for reinstatement.

(3) The terms of an agreement must be definite and certain, with the procedures for collective action clear and orderly. No open-ended provisions can gain approval.

(4) Ultimate responsibility and power with respect to the determination and establishment of rates must be with the carrier managements, and not with the bureau.

(5) Carriers must be free to publish their own individual tariffs.

(6) There must be adequate carrier representation on committees and reasonable quorums for meetings.

(7) Dues assessment must be correlated to the size of the carrier member.

101. 49 U.S.C.A. § 10706 (West Supp. 1979).

In addition to the enumerated conditions, a rate bureau agreement to be approved by the Commission must provide that any interested person (member carrier, shipper, bureau, etc.) may initiate a rate proposal before the bureau. All collective proposals for new or changed rates and related matters must be docketed and adequate notice given, usually by publication in a transportation journal of national distribution or by docket bulletin of the bureau. Opportunity must be given for any interested person to express his views for or against a proposal either orally or by written representation.

The Commission requires that procedures used during the processing of proposed rate changes must be carefully detailed in the agreement, and that adequate public notice be given at each stage of the collective process and at the time of final disposition. The same strict notice requirements apply for independent action proposals. These safeguards, which are necessary to protect the public interest, are included in all approved agreements.

My prior testimony before this subcommittee last October concerned price competition and the role of rate bureaus in the motor carrier industry. There was much discussion of the Commission's recent rate bureau investigation in Ex Parte No. 297 and the continuing exercise of the Commission responsibilities in the area. Recent Commission actions affecting motor carrier collective ratemaking activities give added emphasis to the significance of the Commission's oversight function.

On July 7, 1977, the Commission, in response to a petition filed by the Department of Justice, instituted Ex Parte No. 297 (Sub-No. 2), *Notification of Rate Proposals Following Prior Independent Action*[102] to determine whether to adopt a rule proposed by the Department of Justice. The Department of Justice had alleged that rate bureaus were concealing and modifying independent action rates without the consent or knowledge of the carriers which had established the rates through independent action. The rule proposed by the Department of Justice would require rate bureaus to notify affected member carriers of proposed changes and cancellations of independent action rates and would prohibit rate bureaus from changing such rates for the account of any carrier without first obtaining the carrier's written consent.

In response to the proposed rule, the Commission received comment from 48 shippers and carriers as well as from the Department of Justice. Public comment on the proposal revealed that modifications, and cancellations of motor carrier independent action rates without notice to the carriers which had established those rates, can and do occur. Changes of this nature are caused by the inadequacy of notice to carriers, docketing practices of rate bureaus, and carrier inattentiveness. These practices infringe upon

102. 42 Fed. Reg. 35175 (1977).

the right of independent action. Comment also revealed that notice to shippers and interested parties of proposals to change motor carrier and rail independent action rates are inadequate, and that motor carriers, shippers and others interested are often accorded insufficient time to reply to these proposals. These practices violate the right to notice and the right to be heard in the rate bureau setting.

With these problems in mind, the Commission adopted a rule[103] that will do three things: (1) require that motor carriers, shippers and other interested parties be accorded notice of proposals to change or cancel rates established by independent action, (2) require that the parties be allowed a minimum of fourteen days to reply in person or in writing to proposals to change or cancel independent action rates, and (3) require that motor carrier rate bureaus obtain the written consent of carriers before changing or cancelling independent action rates in which they are participating. In addition, the rule defines key terms such as "independent action," "adequate notice," "rate bureau," and "rate."

The rule will also make an exception. It will release rate bureaus from complying with the notice and consent requirements of the rule when proposing changes in independent action rates pursuant to a general rate increase or rate restructuring. The exception is made because general rate increases and rate restructurings do not affect the efficacy of the right of independent action. Nor do they deprive carriers, shippers and other interested parties of their right to notice, because changes of this nature are widely publicized well before the fact.

The rule is scheduled to take effect ninety days after publication in the Federal Register. The evidence of record and Commission knowledge of rate bureau operations indicates that rate bureaus will be able to comply with the rule if given sufficient time to prepare to do so. Thus, the rule will address genuine problems in current rate bureau practices detrimental to carriers, shippers and consumers without unduly hampering rate bureau operations.

Last October, I indicated that the Commission had developed some experience in applying the provisions of section 208 of the 4-R Act[104] to rail rate bureaus, and would consider whether those provisions should be applied to motor carrier rate bureaus. On December 30, 1977, the Commission instituted a rulemaking proceeding on its own motion in Ex Parte No. 207 (Sub-No. 3), *Modified Terms and Conditions for Approval of Collective Ratemaking Agreements Under Section 5a of the Interstate Commerce Act*, to determine whether the prohibitions on collective ratemaking contained in section 5b of the Act should be adopted as additional terms

103. 43 Fed. Reg. 55251 (1978).

104. Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801 (1976).

and conditions on the approval or continued approval of collective ratemaking agreements subject to section 5a of the Act. Section 5a of the Act governs collective ratemaking among freight forwarders, water carriers and motor carriers.

The provisions in section 5b of the Act to be studied prohibit participation in agreements with respect to, or any voting on, single-line rates, or on joint-line rates unless the participating or voting carrier can practicably participate in the interline movement. Section 5b also prohibits any agreements which provide for joint action to protest or seek suspension of any rate filed by any carrier, whether it belongs to the rate bureau or not.

These prohibitions allow for two exceptions: voting on general rate increases or decreases, and on broad tariff changes. The Commission will study whether these exceptions should be adopted, as well as whether parallel behavior should be prima facie evidence of a violation of section 5a.

More than 100 persons have notified the Commission of their intent to participate in this proceeding and a procedural schedule for comments has been established.

In addition to these rulemaking proceedings the Commission issued an order on December 30, 1977, in Ex Parte No. 297 (Sub-No. 4), *Reopening of Section 5a Application Proceedings to Take Additional Evidence*, requiring that carrier members of all currently approved collective ratemaking agreements under section 5a of the Act submit additional evidence to demonstrate that those agreements should continue to have Commission approval. The reopening order also applies to all applications pending Commission approval (excluding rail agreements now subject to section 5b of the Act).

The Commission instituted this proceeding to re-examine all agreements presently approved under section 5a to determine whether these agreements still satisfy the standard of review set forth in paragraph (2). Pursuant to paragraph (7) of section 5a, the Commission is taking additional evidence to determine whether previously approved agreements (excluding agreements now subject to section 5b of the Act) still satisfy the requirements of the Act. The Commission will incorporate this evidence with revisions proferred under Ex Parte No. 297, as well as any other revision the parties in each proceeding wish to submit, to determine whether such agreement should continue to have the approval of the Commission. Approval of agreements found not to conform to section 5a will be discontinued as will approval of agreements for which no evidence is filed.

Parties to collective ratemaking agreements are required to submit evidence consistent with their burden of proof. Other interested parties, such as shippers, ultimate consumers and public interest groups, the Federal Trade Commission and the Department of Justice were invited to participate in the proceedings. The latter two government agencies were particu-

larly invited to comment on the anti-competitive effects of the agreements under consideration. Evidence submitted by all parties in any proceeding must be relevant to one of these three issues:

(1) Whether the agreement enhances one or more national transportation policy goals,

(2) Whether the agreement will harm interests intended to be protected by the antitrust laws, and,

(3) Whether the benefits the agreement confers on the public interest from the standpoint of the national transportation policy outweigh the harm the agreement will do to the public interest intended to be protected by the antitrust laws.

It was concluded in Ex Parte No. 297 that rate bureaus served a useful function in ratemaking. However, we are aware that most of the section 5a agreements were approved by the Commission more than 15 years ago. The substantial changes in the trucking industry during that period suggest a need to determine whether all previously approved agreements are still necessary and whether they still conform with the standard set forth in paragraph (2) of section 5a and the public interest. In this regard, the Commission has established a staggered procedural schedule for the filing of additional evidence by the rate bureaus which will bring all currently approved and pending section 5a agreements before the Commission within one year from the date of service of the order in this proceeding, January 6, 1978.

As noted in my prior testimony, the motor carrier rate bureau regulations issued by the Commission in Ex Parte No. 297 were challenged by three different bureaus before the United States Court of Appeals for the Fourth Circuit, in Richmond, Virginia. The challenged regulations included: (1) the prohibition against rate bureau protests of independent action proposals before the Commission; (2) the prohibition against shipper-affiliated carriers serving on the bureaus' boards of directors or rate committees without prior Commission approval; and (3) the prohibition against profit-making by rate bureaus.

On July 21, 1977, the Fourth Circuit handed down its decision. The three-judge panel's decision sustaining the regulations in an opinion by the late Mr. Justice Clark was unanimous on two of the three issues; one judge dissented on the question of protests against independent action proposals. Petitions for rehearing were denied except with respect to the question of protests against independent action proposals. Upon further hearing on November 8, 1977, the Commission's finding concerning that question was sustained by a majority of the Court.

Although a petition for certiorari was subsequently filed with the Supreme Court concerning the prohibition against shipper-affiliated carriers serving on the bureau's board of directors or rate committees without prior Commission approval, no stay was entered and the Commission, by order

dated January 23, 1978, reinstated the effectiveness of this prohibition and has resumed processing shipper-affiliated carrier applications.

There is no question that a carrier which is affiliated with a shipper may become a member of an approved ratemaking organization. The concern expressed by the Commission in Ex Parte No. 297 is the role that a shipper-affiliated carrier plays. Although the Ex Parte No. 297 investigation did not reveal any pattern of undue shipper influence over affiliated carriers, the Commission was still concerned about the apparent conflict of interest and the possibility that shipper-affiliated carriers would represent the interests of their affiliated shippers and not the interests of the carrier industry when serving on rate bureau committees. The Commission was convinced that affiliation with a shipper could cause the objectivity and fairness of even the best-intentioned carrier representatives to suffer when considering rate questions in the light of their particular shipper-affiliates' interests. Accordingly, the Commission concluded that a carrier member of a bureau, which is affiliated in any way with a shipper may not serve on a bureau's board of directors, general rate committee, or any other committee which has the effect, either directly or indirectly, on the ratemaking function of the bureau without specific prior Commission approval.

Consistent with our oversight responsibility we are continuing our rate bureau monitoring program which is designed to ensure carrier compliance with approved ratemaking agreements and with the rules and regulations of Ex Parte No. 297. Subsequent to my testimony of last October, three rate bureau investigations have been conducted:

1. *Eastern Central Motor Carriers Association, Inc.* Investigation conducted December 5, 1977, through December 23, 1977, at Akron, Ohio.
2. *Middlewest Motor Freight Bureau.* Investigation conducted January 23, 1978, through February 2, 1978, at Kansas City, Kansas.
3. *New England Motor Rate Bureau, Inc.* Investigation conducted March 6, 1978, through March 17, 1978, at Burlington, Massachusetts.
4. *Central States Motor Freight Bureau.* Investigation commenced April 17, 1978, at Chicago, Illinois. Now in progress.

The reports of our investigatory teams revealed substantial compliance with the approved agreements and with Ex Parte No. 297. However, several problem areas which appear common to many motor carrier agreements were disclosed. For example, we note that, with but few exceptions, the same members and/or companies have been represented on the governing and ratemaking committees of the bureaus investigated for the past five years. The carriers usually cite economics as the prime reason for the lack of more widespread participation. Since members of rate bureau boards and committees serve without pay and are not ordinarily reimbursed by the bureau for expenses incurred in attending meetings, in many instances only the larger carriers (Class I) actively participate in the activities of various bureaus. Future investigations and Ex Parte No. 297 (Sub-No. 4)

will examine this and similar problems such as low quorum requirements, in an effort to insure that a small group of member carriers could not exercise a dominant role in rate matters.

Our investigation also revealed that some shippers were critical of one bureau's use of so-called "canned or coded" disposition notices. These shippers stated that the reasons given for disposition were not detailed enough to allow someone totally unfamiliar with a docket to understand the reasoning behind a given disposition. In Ex Parte No. 297, the Commission expressed its concern regarding the lack of information as to the justification for the disposition of ratemaking proposals, and required that public notice of recommended final disposition by rate bureaus contain the reasons for the action taken. The involved bureau will be required to amend its present practice concerning disposition notice to reflect the Commission's directive.

In addition to these formal investigations, personnel from the Bureau of Operations and attorneys of the 5a/5b Unit attended General Rate Committee meetings of the Steel Carriers' Tariff Association, Inc. at Pittsburgh, Pa., and the Central States Motor Freight Bureau at Chicago, Illinois, on January 4, 1978, and January 10, 1978, respectively.