

# Collective Ratemaking: A Case Analysis of the Eastern Central Region and an Hypothesis for Analysing Competitive Structure\*

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## I. POLICY GUIDELINES FOR USE IN *EX PARTE* 297

On December 30, 1977, the Interstate Commerce Commission issued an order in *Ex Parte No. 297 (Sub. No. 4)*<sup>1</sup> in which the Commission stated that it desired to review certain findings made earlier relating to the status of various rate bureaus throughout the United States. Essentially, the Commission re-opened all applications which had been issued under section 5a

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1. 43 Fed. Reg. 1666 (1978).

of the Interstate Commerce Act.<sup>2</sup> The Commission indicated concern that there may be certain deficiencies in the various agreements which had been approved in the past and that the purpose of this particular proceeding was to discover those collective ratemaking agreements in which deficiencies existed and to remedy them. The order seeks to bring all collective ratemaking agreements before the Commission for review.

This article discusses the various aspects of collective ratemaking related to the approved agreement held by the Eastern Central Motor Carriers Association. This agreement was approved by the Commission in 1955.<sup>3</sup> The Commission is seeking to ascertain whether the geographic marketplace in the Eastern Central Region is a healthy marketplace, taking special notice of the market effect of collective ratemaking as it interfaces with existing open market pressures.<sup>4</sup> The material which follows centers on the question of whether the marketplace is indeed viable. The apparent task of the Interstate Commerce Commission is to insure that its approval of an agreement for collective ratemaking does not adversely affect the various competitive regulatory pressures which Congress intended co-exist with the pure regulatory pressures which regulation over rates and entry naturally provides. Thus, an approved collective ratemaking agreement acknowledges the coordinated existence of certain open market competitive pressures as well as straightforward regulatory pressures. These two forces are to work in tandem to insure that the public interest is served by workable regulatory competition which should result in a reasonable rate of return on investment as well as a just and reasonable rate structure.

The end results of an effective regulatory system and of an effective open market system are identical. There are four market objectives: fair rates or pricing that is consistent with cost plus a reasonable rate of return, efficiency, innovation, and logical control over market participants or entry. Whether a system is regulatory or open market, or a mixture of both, these objectives remain constant. In the motor carrier industry, the Commission must perform a rather delicate task. It must insure the existence of certain open market pressures and insure the maintenance of certain service obligations by regulatory pressures while at the same time achieving the four goals stated above. By applying both regulatory and open market pressures in tandem, the Interstate Commerce Commission carries forward a long tradition of regulatory agencies which seek to balance regulatory obli-

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2. Section 5a is recodified at 49 U.S.C.A. § 10706 (West Supp. 1979); the Act itself is 49 U.S.C.A. §§ 10101-11916 (West Supp. 1979).

3. 297 I.C.C. 563 (1955). As of this writing the Commission has not yet decided whether it will reapprove the agreement.

4. These include open market pressures from independent action and contract and private-carriage pressure exerted by the potential of any shipper choosing to opt for transportation services other than that which is provided by motor freight common carriage.

gations with open market obligations. The balance is difficult since an overly zealous application of open market pressure is destructive to a highly regulated entity. On the other hand, an excessive regulatory pressure will result in a situation where open market pressures cannot be brought to bear. This too is unhealthy.

In balancing these two market forces, Congress has provided certain policy determinations on which the Commission can operate.<sup>5</sup> One of those decisions is that the *conduct* involved in collective ratemaking, to the extent that such ratemaking is carried out pursuant to an agreement which has been approved by the Interstate Commerce Commission, shall be exempt from the application of the antitrust laws.<sup>6</sup> In conjunction with this exception, the courts and Congress have jealously guarded the right of carriers to participate in their own independent action proceedings. If there is effective collective ratemaking pursuant to an approved agreement and if there is a requisite degree of independent action and if the resultant marketplace is healthy, then the objectives of Congress have been carried out and the objectives of the competitive policies underlying the antitrust laws have been met. The Commission's obligation is no greater than to see that the activity undertaken pursuant to a collective ratemaking agreement is consistent with the approved agreements and to also determine, from time to time, whether the resulting *market structure* allows for growth and meets the general market obligations regarding cost, entry, efficiency, and innovation.

It is not the Commission's responsibility to enter into an analysis of whether the antitrust laws are "more important" than the other considerations found in the national transportation policy.<sup>7</sup> Most certainly, it is not the Commission's function to determine if the service obligations are more or less significant than competitive obligations by redrafting the national transportation policy in an *ex parte* proceeding. Competitive considerations are but one factor to be analyzed in determining whether the public interest has been satisfied pursuant to our stated national transportation policy. It is not the Commission's task in this proceeding to enter into that public interest balancing anew. That is a matter for Congress.

In reviewing the order of December 30, 1977,<sup>8</sup> one might be led to believe that such a balancing between the national transportation policy and antitrust considerations is the task of the Commission. It is not. Competition is a part of the goals of the regulatory process. Indeed, a regulated marketplace is not by definition a noncompetitive marketplace. The marketplace which is involved in this proceeding is a regulated marketplace

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5. 49 U.S.C.A. § 10706 (West. Supp. 1979).

6. *Id.*

7. *Id.* § 10101.

8. 43 Fed. Reg. 1666 (1978).

which has various component parts of competition in the open market context as well as in the regulatory context. If it appears that the marketplace is organizationally diverse, and it appears that it is an innovative and efficient marketplace where consumer prices are reflective of cost plus reasonable rate of return, and it appears that the controls over entry do provide reasonable stimulation, then the marketplace is healthy. If, however, it would appear that the motor carrier industry in any geographic market is non-organizationally diverse, dominated by a small number of carriers or oligopolistic, if it is not innovative, if there are negative service and efficiency ratings and if there is not logical open market or regulatory control over entry, then the marketplace is not healthy. These criteria are painfully simple.

In one major predefined geographic market, the Eastern Central Region, there are 1078 carriers now participating in Eastern Central tariffs, 855 of which submitted revenue questionnaires.<sup>9</sup> The 855 carriers who have incomes from several thousand dollars to over a hundred million dollars are a direct indication of diverse organizational structure. Secondly, the high frequency of independent actions indicate that that particular open market force (independent action) is working well. The percentage of independent action filings appears to be approximately 41% of all filings.<sup>10</sup> As to price, cost, and efficiency, the statement of the shippers and carriers who exist within the defined marketplace indicate little complaint in that area.<sup>11</sup> By maintaining collective ratemaking, a regulatory control over the price structure has been imposed which has prevented major carriers from undercutting and eliminating smaller carriers. Quite simply, that kind of negative competitive pressure has been healthy in the marketplace and has allowed it to flourish.<sup>12</sup>

## II. BASIC LEGAL STANDARDS FOR REVIEW

This proceeding raises a threshold question of legal standards. To as-

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9. These statements are on file at the Commissioner's offices in Washington, D.C. See note 12 *infra*.

10. G. DAVIS & C. SHERWOOD, RATE BUREAUS AND ANTITRUST CONFLICTS IN TRANSPORTATION 72-73 (1975).

11. See note 9 *supra*.

12. There are two important supporting documents on which many of these conclusions are premised. The first is a comprehensive listing of carriers and revenue generated over a set period of time. This is provided to display the structure of the marketplace in terms of the market participants. This document reveals that there are indeed a large number of extremely diverse carriers. The second document is a graph summary of independent action proceedings undertaken in the year 1977. The table suggests a percentage of independent action for the L.T.L. shipments of around 25%. This is a very significant statistic in that it indicates that carriers feel quite able and willing to participate in independent action when the collective ratemaking process does not satisfy their own individualized interest. Success ratios for these proceedings vary from 80% to 90%. See G. DAVIS & C. SHERWOOD, *supra* note 10, at 75.

sess a collective ratemaking agreement, must the ICC relive the debates which surrounded the Reed-Bulwinkle Act<sup>13</sup> thirty years ago? Clearly, the answer is no. Contrary to the Commission's own order initiating this proceeding,<sup>14</sup> the task at hand is not to balance the national transportation policy and the antitrust laws. Rather, the task is to assess whether the competitive obligations which are to be satisfied by both open market and regulated market devices are in fact being met, based on the existing market structure.

The national transportation policy<sup>15</sup> requires an assessment of competition in the regulatory process. It is painfully naive to think that competition does not exist in a regulated marketplace—it simply takes forms different from the basic price competition format, usually seen as efficiency and service competition at the 'conduct'<sup>16</sup> level of assessment and as organizational diversity at the 'structure' level. The task of the Commission is to determine if the existing agreements which have been approved by the Commission over the last thirty years have allowed for the development or maintenance of a healthy marketplace or whether the regulatory pressures and open market forces have not produced or maintained a healthy market. The focus must be centered on *structure*, since the primary conduct, collective ratemaking, is exempt. As to structural analysis, many of the federal government guidelines can be used,<sup>17</sup> as well as the work of structural economic theorists discussed in part IV of this article.

One can look to the overall policies of the Interstate Commerce Act, and especially the national transportation policy statement,<sup>18</sup> to determine the prevailing policies of the Reed-Bulwinkle Act.<sup>19</sup> Such a technical assessment is quite necessary to appreciate the success of the collective ratemaking-independent action potential competition mix in the various designated markets. The market studied for this article is that of the Eastern Central Region, serviced by the Eastern Central Motor Carriers Associa-

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13. Ch. 491, 62 Stat. 472 (1948) (current version at 49 U.S.C.A. § 10706 (West Supp. 1979)).

14. 38 Fed. Reg. 17046 (1973).

15. 49 U.S.C.A. § 10101 (West Supp. 1979).

16. Naturally, one would include in this definition basic coordination as a competitive structure.

17. See, e.g., [1974 - 1] TRADE REG. REP. (CCH) ¶ 4510 regarding market structure analysis which states in part:

(a) General enforcement policy . . . Market structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market . . . [N]ot only does emphasis on market structure generally produce economic predictions that are fully adequate for the purposes of . . . [§ 7, but it] also facilitates both enforcement decision-making and business planning.

18. 49 U.S.C.A. § 10101 (West Supp. 1979).

19. *Id.* § 10706.

tion.<sup>20</sup>

Cases have interpreted the overall policy of the Interstate Commerce Act:

The Act is affected throughout its provisions . . . of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates.<sup>21</sup>

The Transportation Act was designed to protect the public against action which might endanger its interests.<sup>22</sup>

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences . . . to inhibit greater compensation for a shorter than for a longer distance over the same line and to abolish combinations for the pooling of freights.<sup>23</sup>

While these references are devoid of the necessity for maintaining a competitive marketplace, that has been a general obligation of all regulatory bodies since 1890. In *New York Securities Co. v. United States*,<sup>24</sup> an argument was made that the criterion of "public interest" was uncertain. The Court said that:

It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations . . . . Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, the Transportation Act of 1920 was designed better to assure adequacy in Transportation service.<sup>25</sup>

[P]ublic interest . . . is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy, efficiency, and to appropriate provisions and best use of transportation facilities.<sup>26</sup>

As to the question of congressional authority:

The Congress which had power to impose prohibitions in the regulation of interstate commerce, had equal power to foster that commerce by removing prohibitions and by permitting acquisitions of control where that was found to be an aid in the accomplishment of the purposes in view in the enactment of the Transportation Act, 1920.<sup>27</sup>

Thus the Interstate Commerce Act requires more than just a view toward public welfare. The Act *mandates* a test of public interest which includes periodic assessments of market structure and *mandates* consideration and promotion of public interest and welfare in the transporta-

20. Approved agreement, 297 I.C.C. 563 (1955).

21. *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 361 (1943).

22. *Singer & Sons v. Union Pac. Ry.*, 311 U.S. 295, 303 (1940).

23. *Interstate Commerce Comm'n v. Baltimore R.R.*, 145 U.S. 263, 276 (1872).

24. *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932).

25. *Id.* at 24.

26. *Id.* at 25.

27. *Id.* at 25-26.

tion area.<sup>28</sup>

Although the Act gives parties to the agreements approved under 5a relief from operation of the antitrust laws, the exemption is confined to the *conduct* of collective ratemaking. Several recent U.S. Supreme Court cases indicate that qualified immunity or exemption from any antitrust mandate cannot be lightly construed. Indeed an exemption must be both specific and born of apparent and legislatively recognized public need. Immunity will no longer be implied unless there are very unique circumstances involving an exhaustive regulations inquiry where the regulatory body is making a competitive assessment, such as certain federal licensing programs.<sup>29</sup> However, because of the specificity of 5a there is no need to evaluate factors of implied immunity. Likewise, decisions like *United States v. Otter Tail Power Co.*,<sup>30</sup> *Detroit Edison v. Cantor-Seldin*,<sup>31</sup> and *Parker v. Brown*,<sup>32</sup> do not directly apply to Reed-Bulwinkle<sup>33</sup> matters since these cases center on *conduct* by regulated parties which is *outside* of the different exemptions at bar. That fact notwithstanding, the case law on antitrust immunity is worth summarizing. Basically, if a governmental process actively provides regulatory input, if periodic assessments of competitive impact are made, and if Congress has directed immunity for specified conduct in a given area, then the private or public entities subjected to this process shall not be subjected to antitrust enforcement for non-predatory conduct.

It is as clear that the antitrust laws apply to predatory conduct of motor common carriers<sup>34</sup> as it is that they do not apply to conduct enumerated in specified agreements submitted to the Interstate Commerce Commission and approved by that body. This approval is made after assessing the National Transportation Policy,<sup>35</sup> part of which requires an assessment of anti-competitive considerations.<sup>36</sup> If there is apparent discord between the antitrust laws and the specified immunity, the Act merely grants a competent administrative agency the authority to resolve the conflict. This is a fundamental premise of primary jurisdiction. A recent decision has restated this

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28. *Florida East Coast Ry. v. United States*, 259 F. Supp. 993, 1007-08 (M.D. Fla. 1966), citing *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-25 (1932).

29. 42 U.S.C. § 2135 (1976) is a good example of this phenomenon. It requires pre-licensing antitrust review of applications for licenses to construct or operate a utilization or production facility of nuclear power.

30. 410 U.S. 366 (1963).

31. 428 U.S. 579 (1976).

32. 317 U.S. 341 (1943).

33. 49 U.S.C.A. § 10706 (West Supp. 1979).

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

35. 49 U.S.C.A. § 10101(a)(4) (West Supp. 1979).

36. H.R. REP. No. 1100, 80th Cong., 2d Sess. 1855 (1948).

proposition of exposing regulated carriers to competitive obligations while carefully circumscribing that exposure:

This Act left the Antitrust laws to apply with full force and effect to carriers . . . except as to such joint agreements or arrangements between them as may have been submitted to the ICC and approved by that body upon a finding that by reason of furtherance of National Transportation policy as declared in the Interstate Commerce Act, relief from Antitrust laws should be granted.<sup>37</sup>

Naturally, courts have made it clear that the immunity does not extend to activity outside of approved agreement functions. For example, in *Baltimore and Ohio Railroad v. New York, New Haven and Hartford Railway*,<sup>38</sup>

The Esch Car Service Act, when it directed the railroads to get together to establish reasonable rules and regulations for the interchange of freight cars, simply authorized the railroads to establish joint rates. It may have immunized them from a charge of entering into price-fixing agreements illegal per se, but it did not protect other activities proscribed by the Antitrust laws.<sup>39</sup>

The Interstate Commerce Commission is directed to approve only those agreements that come within the criteria set out in the Act, though when it does so, that immunity is complete, if mandated by legislation. In *Riss & Co. v. Association of American Railroads*,<sup>40</sup> the Court confined the parameters of 'approved agreement': "We do not think the Act or any agreement which has been approved under it can be construed as authorizing the use of . . . practices that eliminate competition."<sup>41</sup>

Citing *Atchison, Topeka and Santa Fe Railroad Co. v. Aircoach Transportation Association, Inc.*,<sup>42</sup> the Court finishes the qualification with this language:

A joint act, if combined with the unlawful intent of eliminating a competitor would fall outside of the immunity granted by 49 U.S.C. 5b(9) . . . Antitrust immunity . . . designed to protect ordinary ratemaking in the course of regular business so as to adjust to changing costs and to meet the challenges of outside competition. The protection of 5b(9) could not extend to the use of the power to set rates in concert as part of a *plan or conspiracy to eliminate competition*.<sup>43</sup>

Independent action can also be seen as part of the legal basic standard for competitive assessment. The Reed-Bulwinkle Act<sup>44</sup> preserves the potential of competition in guaranteeing the right of individual action. "The right of independent action is paramount to maintaining the integrity of the

37. *Motor Carrier Traffic Ass'n. v. United States*, 559 F.2d 1251, 1253 (4th Cir. 1977).

38. *Baltimore & O. R.R. v. New York, N.H. & H. Ry.*, 196 F. Supp. 724 (S.D.N.Y. 1961).

39. *Id.* at 740.

40. *Riss & Co. v. Association of Am. R.R.*, 170 F. Supp. 354 (D.D.C. 1959).

41. *Id.* at 361.

42. *Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n.*, 253 F.2d 877, 887 (D.C. Cir. 1958).

43. *Riss & Co. v. Association of Am. R.R.*, 170 F.Supp. 354, 366 (D.D.C. 1959) (emphasis added). These are still uniform standards. However, since there are no "practices that eliminate competition" or "plans or conspiracy" alleged, the standards raise no problem in this case.

44. 49 U.S.C.A. § 10706 (West Supp. 1979).



grant of antitrust immunity."<sup>45</sup> The question of how independent action becomes a part of the regulatory competition is slightly more complex than would first appear. If the regulatory structure provides a competitive format for yardstick competition and efficiency competition, as well as direct contact and private carrier competition, is independent action theoretically unnecessary or merely a sop to antitrust-conscious legislators? The answer to this question is that every regulated industry, even those which are 'completely regulated', e.g., nuclear power generation, contain a mix of regulation as a substitute for competition as well as limited pockets of open-market competition. In the electric utility industry, wholesale-for-resale bulk power exchange pricing is open, providing some competitive pressure, or a pocket of competition. In motor carrier ratemaking, the preservation of independent action provides a similar pocket of competition, though it in no way supplants the regulatory process which is designed to produce the effects of competition while at the same time existing in a regulatory setting.

In 1972, there were 32,922 motor carrier bureau regular and emergency proposals.<sup>46</sup> The 1973 *Annual Report to the ICC* stated that the percentage of independent action filings was in the neighborhood of 28%, indicating heavy open market competitive pressure.<sup>47</sup>

This is particularly significant in light of *Motor Carrier Traffic Association v. U.S.*<sup>48</sup> which should stimulate even greater numbers.<sup>49</sup>

One can conclude that since independent action does present a viable alternative to collective ratemaking, the Commission has actually developed a very sophisticated and effective marketplace which combines open market and regulated activity, in a naturally occurring balance. This is one of the important reasons why the industry enjoys significant organizational diversity. In the Eastern Central Bureau, there are 855 independent common carriers<sup>50</sup> with the classical income distribution pattern indicative of an organizationally diverse market.<sup>51</sup>

Further, the Act itself states that the Commission cannot approve an agreement unless there is accorded to each party the full and unrestrained

45. *Motor Carriers Traffic Ass'n. v. United States*, 559 F.2d 1251, 1255 (4th Cir. 1977).

46. G. DAVIS & C. SHERWOOD, *supra* note 10, at 73.

47. *Id.*, citing RATE BUREAUS AND ORGANIZATIONS ANNUAL REPORT TO THE ICC (1973).

48. *Motor Carriers Traffic Ass'n. v. United States*, 559 F.2d 1251 (4th Cir. 1977).

49. Statistics for the Eastern Central region are on par with the industry, independent action amounting to thirty-five to forty-five percent of filings. These statistics are on file at the Commissioner's offices in Washington, D.C. See note 12.

50. These statistics are on file at the Commissioner's offices in Washington, D.C. See note 12 *supra*.

51. Central to this article is the concept that if the participants in a given marketplace are organizationally diverse, i.e., of varying sizes, revenue patterns, and ownership forms (publicly held, privately held, family-owned, etc.), an assumption can be made that the marketplace is competitive.

right to take independent action either before or after any determination.<sup>52</sup>

Furthermore, this right of independent action preserves competition to an extent in that just having the potential for independent action exerts considerable competitive influence.<sup>53</sup> Looking to the Eastern Central Region, the question of preserving the right of independent action has been closed since the *Motor Carrier Traffic Association*<sup>54</sup> case.

Therefore, when one views the specific exemption granted by Reed-Bulwinkle,<sup>55</sup> combined with the standards used by the Interstate Commerce Commission in approving agreements and the preservation of the right of independent action, it seems natural to conclude that the granted exemption has allowed for the creation and maintenance of a competitively healthy marketplace.

On a different point relating to legal standards, the Commission's order speaks specifically of a national transportation policy-antitrust balancing:

[T]he question as to whether or not an agreement is to be approved involves the accommodation and comparative evaluation by the Commission of two policies, the one, the national transportation policy, the other, the antitrust laws.

Under the standard in [section 5a] Congress entrusts to the Commission the task of applying to particular cases the general formula which Congress finds is determinative of the public interest and directs the Commission to determine whether the advantages to the public interest, through furtherance of the national transportation policy, are such as to outweigh the disadvantages to the public interest intended to be guarded against by the antitrust laws.<sup>56</sup>

As noted earlier, such a policy balance is a matter resolved by Congress and not appropriately before the Commission at this time. However, one must distinguish between the *balancing* required to be employed by the ICC in approving or disapproving agreements, and the initial *balancing* that took place in Congress in granting the immunity in the first place.

In *Georgia v. Pennsylvania Railway*,<sup>57</sup> the Court struck down as illegal collective ratemaking. Congress later formulated the Reed-Bulwinkle Act.<sup>58</sup> This indicated a recognition that carriers cannot respond to all the duties mandated by the Interstate Commerce Act if they are forced to act in an open market setting. It also indicated that Congress recognized the destructive nature of price competition in this particular industry. Thus, it was

52. 49 U.S.C.A. § 10706(c)(2) (West Supp. 1979). See *Baltimore & O. R.R. v. New York, N.H. & H. Ry.*, 196 F.Supp. 724, 732 (S.D.N.Y. 1961).

53. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

54. *Motor Carrier Traffic Ass'n. v. United States*, 559 F.2d 1251 (4th Cir. 1977).

55. 49 U.S.C.A. § 10706 (West Supp. 1979).

56. 43 Fed. Reg. 1666 (1978), quoting H.R. Rep. No. 1100, 80th Cong., 2d Sess. 1856-57 (1948).

57. 324 U.S. 439 (1945).

58. Ch. 491, 62 Stat. 472 (1948) (current version at 49 U.S.C.A. § 10706 (West Supp. 1979)).

in the interest of the national transportation policy that an exemption from the antitrust laws be granted.

Frankly, the balancing should not be phrased in terms of open market or antitrust policy versus national transportation policy. Rather, the Commission should recognize the balancing accomplished by Congress in enacting the Reed-Bulwinkle Act,<sup>59</sup> which juxtaposed a semi-free market setting against a controlled or regulated marketplace where price competition was no longer a factor and where a competent agency reviews the initial agreements, considering national transportation policy and the competitive policies thereunder. If in a given marketplace, open market forces would produce a desirable result, the ICC ought not approve the agreement either initially or in subsequent review; if a regulatory formulation that excludes price competition appears superior, then the agreement should be approved, at which time the exemption would go into effect.

In *Florida East Coast Railway v. United States*,<sup>60</sup> the court was faced with a "head-on collision" between the antitrust laws and the Interstate Commerce Act. The case involved a merger of the Atlantic Coastline Railway Company and the Seaboard Airline Railway Company. The court stated that "all too much time had been consumed in showing a violation of the antitrust laws and too little time devoted to assessing the 'public interest' expressed in the Interstate Commerce Act."<sup>61</sup> In other words, the court was concerned that basic balancing had already been done by Congress, as is the case with section 5a. The *Florida* court goes on to say:

ICC review involves the review of intricate, expert plenary judgment in a highly specialized area of our economy that has long been subject to direct, precise regulations . . . for purposes of national transportation policy. Congress has told us that not all restraints and monopolies which violate antitrust laws are bad . . . . The ICC in its wisdom . . . is to determine which are to be allowed and which are considered bad.<sup>62</sup>

Further, in *Motor Carriers Traffic Association, Inc. v. United States*,<sup>63</sup> the court said: "Congress directed that the Commission should weigh the conflicting demands of the antitrust laws and the surface transportation system, resolving the same by the application of the standard involving national transportation policy."<sup>64</sup>

This phraseology is another way of addressing the same question. The Commission is charged to "weigh the conflicting demands . . .,"<sup>65</sup>

59. *Id.*

60. 259 F.Supp. 993 (M.D. Fla. 1966).

61. *Id.* at 997.

62. *Id.* at 1002.

63. *Motor Carriers Traffic Ass'n. v. United States*, 559 F.2d 1251 (4th Cir. 1977).

64. *Id.* at 1255.

65. *Id.*

but not the broad policy decisions in initial approval of the agreements,<sup>66</sup> nor indeed, at any point thereafter. This never meant, however, that the Commission should establish a scale and balance the national transportation policy and the antitrust laws in a broad scale review. That was a task done by Congress in the debate surrounding Reed-Bulwinkle,<sup>67</sup> and need not be undertaken in this forum.

### III. GENERAL COMPETITIVE PROBLEMS RELATING TO ALL BUREAUS<sup>68</sup>

Within the last five years, courts and administrative agencies in this country have sought to combine functional powers to assure that the ends of the competitive system are met by means which do not necessarily include price competition. As stated in part II, our economy can only function when the ends of reasonable cost, regulation over entry by market forces or by assessments of public convenience and necessity, maximum efficiency, and innovation are met. In the nonregulated sector of the economy, these goals are attained by periodic private-party or governmental application of the antitrust laws coupled with other "normal" competitive pressures such as potential competition. In the regulated sector of the economy, these goals are met by induced competitive pressures as well as the application of regulatory principles regarding rates and entry to the various regulated industries.

The motor carrier industry is not the first industry which has required the application of both a comprehensive regulatory system and antitrust pressures outside of the regulatory system. In the nuclear power field, Congress declared that the agency which regulates nuclear energy production, today the Nuclear Regulatory Commission, may not grant or issue a permit or license to operate if that granting or issuance would "create a situation inconsistent with the antitrust laws."<sup>69</sup> The NRC recently held that the existence of a regulatory structure does not preclude direct application of antitrust principles to areas not specifically exempted.<sup>70</sup> While this decision may be creating waves in the traditional electric utility world, its import should be no shock to the motor carrier world including the rate bureau structure. Competitive consequences in the motor carrier world have been recognized almost since the beginning of motor carrier transit, and well

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66. For initial approval of the Eastern Central Agreement, See 297 I.C.C. 563 (1955).

67. H.R. Rep. No. 1100, 80th Cong., 2d Sess. 1844-60 (1948).

68. The next section of this article draws from testimony prepared for a hearing before the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee. The testimony was not, however, orally presented to the Subcommittee at the scheduled hearing held March 24, 1978.

69. 42 U.S.C. § 2135 (1976). See note 29 *supra*.

70. Atomic Safety Licensing Appeals Board (ALAB) issuance 452, docket 50-329A, 50-330A (1978).

before the existence of the Motor Carrier Act of 1935.<sup>71</sup>

The *Ex Parte No. 297* proceeding does not question the applicability of the antitrust laws to the regulatory system. Instead it seeks to answer some of the questions which the Reed-Bulwinkle Act<sup>72</sup> left open. These questions are not easily answered, particularly if one simply makes glib reference to boilerplate antitrust considerations. It is clear that outside of the Reed-Bulwinkle Act,<sup>73</sup> collective ratemaking between horizontally-aligned competitors is simply inconsistent with the antitrust laws.<sup>74</sup> Thus the rate bureaus exist only by virtue of legislative exemption, within a carefully drawn line of immunity which resulted after substantial congressional inquiry.

Many of the fundamental concerns which have been evidenced by the Commission's order focus on the existence of rate bureaus as well as the right of independent action. Such inquiry seems out of focus based on prior congressional action. Likewise, they appear to focus on the effectiveness of rate bureaus' capacity to establish reasonable and just rates, in conformity with the mandates of the Interstate Commerce Act.<sup>75</sup> Since this responsibility is historically shared by both the bureaus and the Commission, it too seems unjustified. Nonetheless, as to the legitimacy of the collective ratemaking process and the sustained existence of the rate bureaus, my position is easily clarified.

In the last two years, I have become convinced that the abolition of the rate bureau system would create a grossly anti-competitive situation in the motor carrier industry. The "parade of horrors" that would result is well known in the antitrust field. Major motor common carriers, having the capacity to operate for brief periods of time at a cost formula which does not reflect a reasonable rate of return would soon eliminate marginal competitors in a horizontally organizationally diverse marketplace. These eliminations would then be followed by rapid incremental increases in price. A leveling-off would occur in which we would find massive integration at both the horizontal and vertical levels in the motor carrier marketplace. The resultant effect would be a pure oligopoly market setting with little opportunity for systemic or functional coordination or competition and maximum opportunity for over-pricing, inefficiency, and the like. The chaotic conditions that gave birth to the Motor Carrier Act of 1935<sup>76</sup> would not be duplicated, but

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71. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (originally codified at 49 U.S.C. §§ 301-327 (1976); now codified in scattered sections of 49 U.S.C.A. (West Supp. 1979)).

72. 49 U.S.C.A. § 10706 (West Supp. 1979).

73. *Id.*

74. *E.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

75. 49 U.S.C.A. §§ 10101-11916 (West Supp. 1979).

76. Ch. 498, 49 Stat. 543 (originally codified at 49 U.S.C. §§ 301-327 (1976); now codified in scattered sections of 49 U.S.C.A. (West Supp. 1979)).

instead would be substituted with the onerous price consequences of unjustified market power. *Maintenance of the rate bureau system insures that market dominance and the power to exclude competitors by reducing prices in the margin will not be a factor in the diminution of organizational diversity.* This is one of the fundamental reasons for regulation and it has not ceased to exist in the motor carrier world.

The second fundamental question, assuming the rate bureaus continue to exist, is whether those bureaus have the technical capacity to produce efficient rates which are in fact related to the variable cost factors that the law requires. Again, after two years of observation of the motor carrier industry, I have come to the conclusion that the rate bureaus are efficient professional organizations which have the capacity to produce rates which are related to cost plus a reasonable profit. Perhaps indicative of the success ratio, in terms of the antitrust laws, are the 1976 statistics from the Interstate Commerce Commission's annual report<sup>77</sup> relating to concentration in the motor carrier industry. This report concludes that the industry is non-concentrated and enjoys significant intramodal competition as well as intermodal competition. That would not exist if motor freight common carriers utilizing collective ratemaking had been working under a system of cost-excessive tariffs.

The process of ratemaking is an extremely complex process. The function of the rate bureaus in establishing the basic data which becomes the predicate for the approved tariff is vital to the regulated structure. Further, it would be untrue to state that the Interstate Commerce Commission has the technological hardware or legislative mandate to undertake the ratemaking process. The bureaus are ideally constituted to perform this function, and do so adequately.

A final concern of matters common to all bureaus impacting tangentially on this proceeding involves bureau protest of independent action. In light of the correct reading of the independent action portion of section 5a<sup>78</sup> found in the *Motor Carrier Traffic Association*<sup>79</sup> case, it seems clear that bureaus may not protest independent action filings. To do so directly would violate the Fourth Circuit order and to do so indirectly would tempt the application of the sham exception to the Noerr-Pennington doctrine.<sup>80</sup>

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77. I.C.C. NINETIETH ANNUAL REP. 141 (1976).

78. Now 49 U.S.C.A. § 10706(c)(2)(C) (West Supp. 1979).

79. *Motor Carrier Traffic Ass'n. v. United States*, 559 F.2d 1251 (4th Cir. 1977).

80. The Noerr-Pennington doctrine allows competitors to collectively solicit government action without violating the Sherman Act. *Eastern Railroads Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the court carved out the "sham" exception to the doctrine: baseless claims perpetrated for the purpose of securing a monopoly are not protected by the First Amendment and may violate the Sherman Act.

IV. ACADEMIC ANALYSIS AND FURTHER STANDARDS<sup>81</sup>

Perhaps the most well-known 'legal economist' in the antitrust area today is Richard A. Posner. In a law review article published in the *University of Chicago Law Review* in 1971,<sup>82</sup> Posner articulated certain market characteristics which he believed were indicative of an unhealthy market setting. It should be noted that the article was written for the purpose of giving the United States Department of Justice, Antitrust Division; some guidelines for prosecution. These characteristics are not necessarily unique to the nonregulated marketplace. However, like the characteristics enumerated in the introduction of this article, they do form a useful guideline for the Commission's assessment of market "healthiness." As you will recall, I stated that if a marketplace was organizationally diverse, if there was cost related to specific output plus reasonable rate of return, logical control over entry, and an innovative and efficient market setting, then the marketplace was healthy regardless of the balance between regulatory pressure and open market pressures.

In his article, Posner sets out negative market characteristics that are indicative of market collusion in an unhealthy context.<sup>83</sup> The characteristics are: few firms accounting for most sales, inelastic demand at the competitive price, slow entry, standard product, many customers, "the members of the cartel sell at the same level in the chain of distribution," price competition appears more important than other forms of competition, there is a high ratio of fixed to variable costs, demand is static or declining over time, and finally, sealed bidding.<sup>84</sup> Posner suggests that when the market structure reflects these phenomena, the marketplace is in difficult straits.<sup>85</sup> Taking these factors as applicable to regulated markets a brief look at the Eastern Central marketplace indicates that most of these characteristics do not exist. Indeed, by virtue of the maintenance of collective ratemaking, the marketplace is extremely healthy in terms of the number of firms, the elasticity of demand, entry, the absence of price competition, and finally, by virtue of the collective ratemaking process working in conjunction

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81. The following material draws from certain theorists who have expressed opinions on the type of economic regulation discussed in this article.

82. Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500 (1971).

83. Essentially, since the Commission's task is confined to assessment of market structure and not the specific conduct of collective ratemaking, that being exempt, theorists have been selected who have worked in the structural analysis arena. I in no way suggest that any of these theorists necessarily agree with the original Reed-Bulwinkle balancing which allowed for the collective ratemaking immunity. They are simply chosen because they have provided the public with their own independent notions of market viability, and as to those notions, the Eastern Central market appears almost model in most respects.

84. Posner, *supra* note 82, at 516-19.

85. *Id.* at 529.

with the independent action process, there is no problem that would parallel the "sealed bidding" problem which Posner discusses.

Another treatise in the area is the *Economic Regulation of Business* by Thomas Morgan.<sup>86</sup> In the chapter on government regulation and competition, Morgan mentions the Reed-Bulwinkle Act specifically. The mention is brief: "The Reed-Bulwinkle Act, passed in 1948, changed the law in this area to expressly permit "rate bureaus" . . . to discuss and propose rates . . . . Such agreements and discussions leading up to them are *immunized from antitrust liability*."<sup>87</sup>

Morgan goes on to ask whether such agreements are desirable and what constructive contribution can be made by allowing for such collective ratemaking. Again, since the resulting market is healthy, I submit that Morgan's concern is without market justification. While Morgan does not answer these questions, these are the questions asked by the Commission in Question 3 of its main interrogatories in the December 30th Order.<sup>88</sup> However, in terms of a straight legal analysis, Morgan leaves little question as to the issue of immunity and the viability of the Reed-Bulwinkle Act.

Another theorist, Charles F. Phillips, Jr., also addresses the question of the exemption to the antitrust laws provided in the Reed-Bulwinkle Act directly. In his text, *The Economics of Regulation*<sup>89</sup> Phillips gives the following small history:

The new law [the Reed-Bulwinkle Act] was attacked as being anti-competitive, leading to monopoly. It was defended by the railroads and some shippers as necessary to prevent ratemaking from becoming chaotic, since rate bureaus provide a forum where all interested parties can be heard before a rate is charged. Nevertheless, because the Act maintained a right of individual action and left shippers free to bring complaints directly to the Commission [footnote omitted] and *because both carriers and shippers, particularly in the railroad industry, have exercised their independence and right with growing frequency, rate bureaus are less of a monopolistic device than many originally feared.*<sup>90</sup>

When one looks at Eastern Central and finds 2,920 dockets filed by the bureau and 1,194 independent actions in a set period in 1977,<sup>91</sup> it should be clear from the numbers that the impact of independent action is significant indeed.<sup>92</sup> This is particularly true in view of success ratios for

86. T. MORGAN, *ECONOMIC REGULATION OF BUSINESS* (1977).

87. *Id.* (emphasis supplied).

88. 43 Fed. Reg. 1666, 1667 (1978). Question three asks "[W]hether 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."

89. C. PHILLIPS, JR., *THE ECONOMIC REGULATION OF BUSINESS* (1969).

90. *Id.* at 469 (emphasis added).

91. These statements are on file at the Commissioner's offices in Washington, D.C. See note 12 *supra*.

92. *Id.*



independent action filings on the order of eighty to ninety percent.<sup>93</sup>

Of the commentators that have studied the area of government regulation as it applies to the various regulated industries, David Boies and Paul R. Verkuil have recently published a text, *Public Control of Business*,<sup>94</sup> which provides various economic theories and rationales for the idea of regulated collective ratemaking.

As to the specific questions raised by *Ex Parte 297* and the Reed-Bulwinkle Act, Boies and Verkuil are blunt in their language. They conclude that the congressional resolution surrounding 49 U.S.C. § 11702 resolves the question of antitrust liability that was raised in the *Georgia v. Pennsylvania Railroad*<sup>95</sup> decision. Reading the *Georgia* case literally, Boies and Verkuil find total antitrust immunity with only questions of predatory conduct and procedural omissions remaining. They state simply:

Commission approval carries with it relief from the operation of the antitrust laws with respect to conduct of the parties pursuant to the agreement . . . . Several issues remained [after the Reed-Bulwinkle Act], and remain to be worked out. For example, suppose the rate association agreement is not filed with the Commission, and an antitrust complaint arises. . . . Or suppose that the antitrust claim asserts that there is predatory purpose behind the collective ratemaking agreements approved by the Commission that exceeds the scope of § 5b(9) exemption.<sup>96</sup>

Following the theory of Boies and Verkuil, if an agreement has been approved and if the terms of the agreement are carried out in every detail, then there is no antitrust problem and proceedings such as the one presently underway for reassessment become a futile exercise. This is perhaps too extreme a position in view of the national transportation policy. However, if one reads the language in the *Georgia* case, the court states "Congress has not given the Commission comparable authority to remove rate fixing combinations from the prohibition contained in the antitrust laws."<sup>97</sup> By passage of the Reed-Bulwinkle Act, Congress did give that authority to the Interstate Commerce Commission.<sup>98</sup> It did not do so on the stated condition that the Interstate Commerce Commission periodically assess the wisdom of Congress' overall judgment by weighing out the value of regulation and antitrust immunity against the value of antitrust enforcement.<sup>99</sup>

In the interest of not misleading the reader of this article regarding the position of Boies and Verkuil, as to price regulation and collective ratemak-

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93. G. DAVIS & C. SHERWOOD, *supra* note 10, at 75.

94. D. BOIES & P. VERKUIL, *PUBLIC CONTROL OF BUSINESS* (1977). The text is becoming the standard casebook at law schools which teach courses in the regulated industries.

95. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945).

96. D. BOIES & P. VERKUIL, *supra* note 93, at 826.

97. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456 (1945).

98. 49 U.S.C.A. § 10706 (West Supp. 1977).

99. D. BOIES & P. VERKUIL, *supra* note 93, at 826.

ing *outside of specific congressional exemptions* such as the Reed-Bulwinkle Act, the authors come down very heavily on the side of open market forces. At one point in the text,<sup>100</sup> the authors assert that the effect of collective ratemaking and price regulation which prohibits open market price competition is a negative effect, leading to excess spending, wasteful competition, unnecessary utilization of scarce social resources, possibly undue concentration, and finally, and most fervently, higher consumer costs. The economic theories which the authors use to support this position are stated throughout the text. My personal opinion of this listing is that it is a valid analytical tool.

Looking further at the balancing that must be done, preferably by Congress in matters of national importance such as collective ratemaking, one must recognize that we have competing economic strengths to reconcile. On the one hand, there is the benefit of price competition leading to maximization of resources and certain economies, while on the other hand, regulation over pricing accomplished through collective ratemaking insures a fair rate of return as well as "a reasonable" price being set for consumer purposes. The idea that "open market" competition will result in "cut-throat competition" is one which Boies and Verkuil find particularly repugnant as too encroached in traditionalist thinking. In certain marketplaces, the authors project that collective ratemaking and price regulation, more likely than not, result in negative effects and will not stave off negative economies. The authors can be read to suggest that collective ratemaking does not assist in the maintenance of a healthy market. "Thus, an examination of other *oligopolistic* markets, characterized by *high fixed costs* and *perennial excess capacity* does not suggest that destructive price wars are likely."<sup>101</sup> However, these conditions—oligopoly, high fixed costs, perennial excess capacity—are not conditions that exist in the trucking industry. While they may exist in the airline industry and other regulated fields, they do not exist in the motor carrier world. Making their point even more firmly, Boies and Verkuil cite a study entitled *The Economics of Competition in Transportation*<sup>102</sup> as authority for their proposition on the following rationale: "Steel, automobiles, rayon, copper, and other small numbers industries have no rate bureaus yet cut-throat competition does not exist."<sup>103</sup> I have no complaint with this rationale. Indeed, in those marketplaces where concentration is high and there are clear signs of oligopoly the need for collective ratemaking has come to an end. However, in the motor carrier industry concentration is low, there is no oligopoly setting, the marketplace

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100. *Id.* at 373-76.

101. *Id.* at 375.

102. J. MEYER, M. PECK, J. STENGSON, & C. ZWICK, *THE ECONOMICS OF COMPETITION IN TRANSPORTATION* (1964).

103. *Id.* at 251.

is diverse, and the need for some control over the ascertaining of certain minimum price is high. When this is balanced with the possibility of independent action, the Boies and Verkuil analysis becomes applicable in the inverse.

In an industry where there is no evidence of oligopoly, where there are efficiency obligations which are set out in detail by several government agencies; where there is ease of entry, no high fixed cost, little perennial excess capacity, and very real public service obligations, the maintenance of a collective ratemaking system (with certain competitive controls such as independent action) guarantees the maintenance of the organizational diversity of that industry. The cessation of collective price-making capabilities will sound the beginning of the initiation of oligopoly, concentration, and the diminution of organizational diversity. In any event, it is safe to say that even those of the deregulation ilk have concluded that if Congress has gone through the balancing process and determined that the motor carrier industry would benefit from collective ratemaking when that collective ratemaking is balanced by independent action, so long as there is oversight by a competent administrative agency, Congress does not intend for that agency to redo that balancing every few years.

#### A. MARKET STRUCTURE AND THEORY

At this juncture a few thoughts are in order on the marketplace in question. The analysis of Boies and Verkuil regarding the viability of concentrated regulated marketplaces when collective ratemaking exists and the inverse analysis applied to organizationally diverse marketplaces become particularly valid in light of the classical product and geographic market parameters that exist in the motor carrier industry. While it is difficult to come up with a market structure analysis for rate bureaus since a rate bureau is not a competitor dealing in specific service or product that is presently under antitrust scrutiny, a general market analysis can be done simply by looking at the various participants who exist within that structure. The product that is involved in this case is actually ratemaking. The individual motor common carriers that are involved in the collective ratemaking process pursuant to a section 5a exemption are not subject to individual liability for specific collective conduct under the antitrust laws so long as that immunity is in effect. Thus, their conduct is, for all practical purposes, safe from prosecution, though subject to analysis. Naturally, if the Commission should find that any particular rate bureau agreement is no longer valid, then the possibilities of antitrust liability commence with that finding.

As to the market analysis itself, in the Eastern Central region there are, as mentioned earlier, almost twelve hundred market participants who compete at various levels. Many of the market participants are small, privately-held corporations, and a good number of the market participants are large,

publicly-held corporations. There are family corporations, independent partnerships, and almost every other form of corporate ownership imaginable operating common carriers in the region. This diversity itself leads to yardstick competition. In addition to the large numbers and varying organizational structure of the market participants, there is fluctuation in terms of yield, profit, revenue, and other easily identifiable economic indicators.<sup>104</sup> Almost every commentator will agree that there is complete ease of entry in terms of financial acquisition, entry only being restricted by regulatory factors.

Thus the product market looks something like this: a large number of organizationally diverse independent competitors whose entry is controlled by regulation, who have price constraints established only by theories of reasonableness, and price creation methodologies that range from collective ratemaking by a sophisticated non-coercive organization to complete independent action. This marketplace is almost ideal in terms of the textbook definitions of perfect competition. There are a large number of buyers and sellers, a good spread of market knowledge, incentives for innovation and efficiency, little cut-throat pricing, but price controls which are guaranteed (by the Interstate Commerce Act) to produce "reasonable rates."<sup>105</sup> In this market setting, the need for preservation of the collective ratemaking mechanism with control over rate increases as a matter of regulatory obligation and control over rate decreases as a matter of carrier or shipper initiative or Commission initiative seems apparent.

In his text, *Antitrust Analysis*,<sup>106</sup> Professor Areeda lists certain factors which are usually stated as a traditional rationale for the preservation of a cartel. As a general notion, the cartel is supposed to prevent cut-throat competition, avoid concentration, reduce market uncertainty, finance desirable activities, protect quality from debasement, and allow for preservation of needed capacity or service (possibly the notion of public utility obligations) and for orderly contraction.<sup>107</sup> The Areeda listing of factors which suggest the maintenance of a cartel do not necessarily suggest that cartelization, either private cartelization through international agreements or cartelization by domestic governmental regulation, will invariably produce a viable marketplace such as that which exists in the Eastern Central region.<sup>108</sup> However, such prognostication is unnecessary when a viable

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104. These conclusions are drawn from statements on file at the Commissioner's offices in Washington, D.C. See note 12 *supra*.

105. 49 U.S.C.A. § 10701(a) (West Supp. 1979).

106. P. AREEDA, *ANTITRUST ANALYSIS* (1974).

107. *Id.* at 269-75.

108. Indeed, it should be noted in discussing the listing given by Professor Areeda that his textual material questions the typical economic rationalization for the maintenance of a cartel. Most of the factors cited by Areeda can be interpreted in a number of different ways. In his textbook at pages 269-275, Areeda suggests that these traditional economic reasons frequently do not result

competitive marketplace exists and has as one of its essential components collective ratemaking.

Since it is clear that Congress has intended that the specific act of collective ratemaking be immunized from antitrust scrutiny after the approval of an agreement by the Interstate Commerce Commission,<sup>109</sup> then subsequent review of the marketplace, or of market participants, must be directed away from the phenomenon of collaboration in a negative context and directed to the structure of the industry itself. Naturally, this is done with the caveat that if the activity becomes predatory, liability might attach. That caution aside, structural analysis of the marketplace is the function of the Interstate Commerce Commission and is the only proper purpose of *Ex Parte 297*.

#### B. DIRECT APPLICATION OF THEORY

Antitrust analysis under the Sherman Act,<sup>110</sup> as well as analysis under the Clayton Act<sup>111</sup> and the other antitrust laws, always included the following components: first, an assessment of the parties who are or might be subject to the antitrust laws; second, an analysis of the conduct or activity that is involved; third, if there is no conduct or activity, an assessment of the structure of the marketplace; fourth, an assessment of the specific parameters of the geographical market; fifth, if structure is involved, as opposed to conduct, an assessment of that structure in terms of past, present, and future market effect.

For the participants of the collective ratemaking process, the analysis is not complex. The participants in the marketplace are the motor freight common carriers. The conduct that is involved is collective ratemaking. That conduct is immune from antitrust scrutiny as a matter of law. Since this conduct is immune, the structure of the marketplace itself can be analyzed. The marketplace is the market of public transportation services provided by the motor freight common carriers, and the geographic market is the Eastern Central Region. The market impact or market effect of the particular process which is involved can be analyzed by viewing the existing structure of the marketplace, as has been done in this article. The market reveals organizational diversity, yardstick competition, competitive coordination, service efficiency, and reasonable rates as mandated by law—in other words, the earmarks of a viable marketplace.

It is always dangerous to put the cart before the horse and argue that

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in optimal market conditions. However, in the motor carrier world, and particularly in the Eastern Central region, the result of the collective action has been positive and substantiates some of the traditional economic learning regarding the creation of cartels.

109. 49 U.S.C.A. § 10706 (West Supp. 1979).

110. 15 U.S.C. §§ 1-7 (1976).

111. 15 U.S.C. §§ 12-27 (1976).

since the marketplace appears to be healthy, therefore the conduct which is taking place is healthy as well. However that is exactly the kind of reasoning that must be undertaken in this proceeding. If alternative competitive methodologies are going to be imposed on the motor carrier industry, particularly in the area of ratemaking, then Congress must once again decide the question of the meaning of section 5a of the Interstate Commerce Act. Until such time as Congress chooses to do that, the Commission is left with analyzing the effect of carrying out Congress' plan regarding collective ratemaking.

#### V. FINAL THOUGHTS ON MARKET PRESSURE AND CONCLUSION

Viewing the specific regulations which apply to collective ratemaking and the immunity that applies to that process, one must keep in mind the obligations of any carrier who joins a particular tariff agreement. The public service burden which is placed on a common carrier is part of the market analysis that must be used in assessing the overall viability of the marketplace.<sup>112</sup> The regulated common carrier who is a participant in the rate bureau is subjected to these regulatory pressures, as well as being subjected to other competitive forces.

In terms of independent action as a competitive force, it should be stressed that the success of independent action filings is considerable (approximately ninety percent).<sup>113</sup> The shipping public, in the year 1972, incurred over a hundred million dollars in expenses for transportation services pursuant to independent action filings. This is more than ten percent of the total expenses incurred under all tariffs.<sup>114</sup>

Beyond independent action as a competitive force, it would be error not to take into account other natural competitive forces which have a conclusive impact on the relevant market participants. As was suggested earlier, the number of private carriers and contract carriers is constantly growing. Likewise, shippers who have not elected to use private carriage maintain the capacity to utilize private carriage should the rates created by the collective ratemaking process become excessive. On the same plane, common carriers who do not belong to tariff bureaus exert a competitive force that has rarely been dealt with in the literature in this field. Further, shipper involvement in the ratemaking process, whether by direct participation in a bureau or by shipper-created information which is fed into the technological systems of the bureaus, form a balance in the collective decisionmaking process itself.

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112. See, e.g., Ex Parte No. MC-77 (Sub-No.2), Restrictions on Service by Motor Common Carriers, 126 M.C.C. 303 (1977), and 129 M.C.C. 71 (1978).

113. G. DAVIS & C. SHERWOOD, *supra* note 10, at 75.

114. *Id.* at 77.

The competitive forces just enumerated form those pockets of competition mentioned earlier which, along with the regulatory competitive pressure, have created a viable marketplace. While it is clear that having a competitive and healthy marketplace is part of the national transportation policy, that "does not mean that all possible methods of competing in the economic process must be tolerated nor that all private economic regulations should be prohibited."<sup>115</sup>

The majority of economic theorists discussed above take the position that price-fixing and collective ratemaking are basically anticompetitive methodologies which do not result in satisfaction of public interest obligations. Recognizing that the theorists, among them Areeda, Boies and Verkuil, and Posner, have this economic-political philosophy regarding price-fixing, and recognizing further that most of their theory is formulated for non-regulated markets, it is necessary to justify why my conclusions are as they are. I have concluded that the marketplace which exists in the Eastern Central region is a viable and healthy marketplace. My conclusion is based on the fact that the market as it presently exists, outside of any theoretical permutations regarding economic structure, has a sufficient number of organizationally diverse carriers and good mix in ownership patterns. The cost-to-consumer, efficiency, and innovation assessments are all positive.

Could it be that the theory projected by the principal legal and economic experts in the trade regulation field is improper? I would contend that while the theory projected by Professor Areeda and others in the field is valid and accurate, it simply cannot be imposed on a regulated but organizationally diverse marketplace comprised of numerous participants. That is to say, theories of cartelization and price-fixing apply almost solely to those marketplaces confronted with oligopoly or situations where a single entity has achieved dominance or monopoly. In those markets where there is a large number of market participants, these theories are not uniformly applicable. A recent study by Glaskowsky, O'Neil and Hudson on motor carrier regulations has concluded that, "Views regarding *effective marketplace competition* are wholly pragmatic. Workable economic theories of motor carrier transport competition are tested and proved in the *marketplace*, and nowhere else."<sup>116</sup> The Glaskowsky study goes on to note:

There is no question that there exists a fundamental policy conflict between the original antitrust policies concerning collective ratemaking actions and the transportation needs of the economy. The record is clear that resolution of this conflict in favor of partial carrier relief from the antitrust laws was reached after

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115. FORTMAN, THEORY OF COMPETITION POLICY 246 (1966).

116. N. GLASKOWSKY, B. O'NEIL, & D. HUDSON, MOTOR CARRIER REGULATIONS: A REVIEW AND EVALUATION OF THREE MAJOR CURRENT REGULATORY ISSUES RELATING TO THE INTERSTATE COMMON CARRIER TRUCKING INDUSTRY 57 (1976) (emphasis added).

extremely thoughtful and thorough consideration of the issue. The record shows that no alternative exists which would adequately satisfy the market information needs of the shipping public. The potential for abuse of the immunity privilege is obvious, however, so it's necessary that collective activities be closely monitored to insure strict compliance with high standards of concern for the public interest.<sup>117</sup>

This close monitoring to which Glaskowsky refers is what I have called a periodic assessment of *market structure*, but not of immunized *conduct*.

The legal requirements which follow from section 5, part a(9)<sup>118</sup> regarding antitrust immunity, are clear. The law simply provides that if an approved agreement is enforced, then antitrust immunity shall attach to the *process* of collective ratemaking. That immunity does not prevent periodic administrative review of the market structure which has resulted. Such review is taking place in *Ex Parte No. 297*. Should the Commission find, based on competent economic data, that the marketplace has become dominated by a single or small group of carriers or that the marketplace is reflective of anticompetitive patterns that redound to the consumer's dramatic disadvantage, then the Interstate Commerce Commission would be justified in taking close examination of the particular agreement that is involved. In the market studied, no such structure appears. It is my hope that the Commission will study each of the various markets in the manner suggested.

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117. *Id.* at 60.

118. Now 49 U.S.C. § 10706 (West Supp. 1979).