Recent Decisions of the Interstate Commerce Commission*

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This compilation of significant motor carrier proceedings decided during the past year was prepared by the Office of Proceedings' Section of Operating Rights under the supervision of Section Chief J. Patterson King and Assistant Section Chief Michael Erenberg.

As this paper goes to press, decisions are imminent in several rule making proceedings which are of considerable concern to you. One is Ex Parte No. MC-96, Entry Control of Brokers, in which the proposal—first

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advanced by the Commission's Blue Ribbon Staff Panel—was to lower the barriers to entry by brokers (passenger as well as freight brokers).

Another such proceeding is Ex Parte No. 55 (Sub-No. 24), Revised Rules of Practice. Under section 305 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act)[1] the Commission was given 360 days to submit to Congress an initial proposal setting forth its Rules of Practice for dealing with railroad matters. Following that, the Administrative Conference was to have sixty days to submit to Congress and the Commission its comments and recommendations as to the proposed rules. Thereupon, the Commission would have thirty days to consider the comments and submit a final proposal for Congressional approval. In all, Congress provided 450 days for the development of the final proposal.

While the 4-R Act deals primarily with railroads, you will recall that the Commission in 1975 had begun a revision of its Rules of Practice as they affect all modes. It was our hope at that time to complete the project by early 1976, and the Motor Carrier Lawyers Association very graciously and industriously pitched in to help with an analysis and comments under great pressure from us in late 1975. But by the time the final product could be prepared, we had the new requirements of the 4-R Act.

At any rate, I shall be prepared to discuss with you the initial and the interim documents issued by the Commission in Ex Parte No. 55 (Sub-No. 24) to the extent you may consider such discussion helpful and appropriate.

The Office of Proceedings maintains a Reference Services Branch under the supervision of Mr. Jack Long. You may wish to consult with that branch, for annotations and digests reflecting the Commission's recent decisions in significant cases. You can also find there a wealth of information on older cases. Research routes may be through case citation, descriptive words and phrases, annotations by statute, and other means.

Some of the personnel in the branch have had long service and have a penchant for remembering factual situations in important cases. I have found that they frequently can zero in on a case with merely a hazy description of the significant facts and the general time period in which the decision was rendered.

One of the services maintained is a citer which is comparable to service of Shepard. I invite you to consult the Reference Services Branch and to keep up with the more recent developments through its Advance Bulletins on annotated cases and statutory changes. The Branch is located in Room 6367. Its telephone numbers are: (202) 275-7221, 275-7143 and 275-7119.

Needless to say, all Sections of the Office of Proceedings are at your service for such consultation as we are in a position to provide. They are always ready to assist you, your clients, and the general public in finding ways to expedite proceedings and improve the regulatory processes.

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

I. FOREIGN COMMERCE

The key decision relating to foreign commerce issued by the Commission since last year's meeting was that in *J.W. Allen—Investigation of Operations and Practices*.[2] In that proceeding the Commission instituted an investigation on its own motion to determine whether respondents were engaging in foreign commerce without proper authority. Respondents were transporting bananas from Galveston to Fort Worth, Texas. The motor carrier transportation was immediately subsequent to the movement of the bananas by an oceangoing vessel. Respondents argued that there were two distinct and separate movements, one by ship from the foreign country to the port of Galveston, and the other by motor carrier from Galveston to Fort Worth. The factual circumstances were strikingly similar to those in the *Melburn*[3] case which was discussed under this topic last year. Respondents also argued that the water movement to Galveston was in private carriage, and that the subsequent transportation within Texas by respondents was the initial movement of the bananas by a for-hire carrier.

The Bureau of Enforcement argued that the transportation was in foreign commerce. It considered the situation similar to two cases[4] involving water-rail movements which arose under Part I of the Interstate Commerce Act.[5] Respondents countered that argument by asserting that the Commission's regulatory responsibilities were different under Part II.[6]

The Commission applied the rule of the fixed and persisting transportation intent of the shipper at the time of shipment. It recognized shipper's intent that the bananas move beyond Galveston and considered the subsequent single-state movement to be one of continuous foreign commerce. This conclusion was in conformity with the decision in *Melburn*.

Having concluded that the considered transportation of bananas from Galveston to Fort Worth was in foreign commerce, the Commission then considered respondents' contention that the transportation was not subject to economic regulation by the Commission because of the principles regarding single-state transportation subsequent to private carriage established in the *Single-State* case.[7] The Commission stated that the question was not whether the movement of bananas was commerce or even foreign commerce, but rather whether it was a form of commerce which Congress had subjected to federal regulation. The Commission further stated that in determining the application of Part II of the Act, transportation begins for that purpose when the merchandise has been placed in the hands of a for-hire

2. 126 M.C.C. 336 (1977).
3. Melburn Truck Lines (Toronto) Co. Common Carrier Application, 124 M.C.C. 39 (1975).
4. Southern Produce Co. v. Denison & Pac. S. Ry. Co., 165 I.C.C. 423 (1930), and Long Beach Banana Distrib. v. Atchison T. & S.F. Ry. Co., 407 F.2d 1173 (9th Cir. 1969).
5. 49 U.S.C. §§ 1-27 (1970).
6. *Id.* §§ 301-327.
7. Motor Transp. of Property Within a Single State, 94 M.C.C. 541 (1964).

motor carrier, and that the fixed and persistent intent test for determining whether interstate or foreign commerce is involved, does not depend on whether the carrier rendering the transportation service is subject to federal regulation. The Commission concluded that the controlling question under the *Pennsylvania*[8] and *Single-State* cases is whether the for-hire motor carriage wholly within one state has been preceded or followed by a movement in private carriage. It determined that the prior water movement was in private carriage, and that respondents' motor movement thus was not subject to federal regulation.

II. Parcel Carriers

The bankruptcy estate of REA Express, Inc., has been involved in two significant and related Commission proceedings during the past year. In *Brada Miller Freight System, Inc. v. Rexco, Inc.*,[9] four complaint actions and two petitions attacking the remaining REA operations and operating authority were consolidated for hearing. The complainant motor carriers challenged the lawfulness of REA's Rexco Division operations, the only operations being performed by the bankrupt carrier. The petitioner, the American Trucking Associations, Inc., sought dismissal of the REA application for permanent authority to operate under the so-called "Hub" system and revocation of the corresponding "Hub" temporary authority.[10] The Commission ordered its Bureau of Enforcement to participate and help to develop the record in the complaint proceeding.

In a finance proceeding, *Alltrans Express U.S.A., Inc.—Contract to Operate and Purchase REA Express, Inc.*,[11] the Commission dealt with a request by Alltrans Express U.S.A., Inc., under section 210a(b) of the Interstate Commerce Act,[12] for temporary authority to lease REA's operating rights pending determination of Alltrans' application under section 5(2) of the Act.[13] Under that section, Alltrans requests approval of its agreement with REA for a long-term lease and ultimate purchase of the REA operating rights and substitution as applicant in all pending REA application proceedings. The "Hub" temporary authority and corresponding "Hub" permanent authority application at issue in the complaint proceeding constitute the primary properties involved in the Alltrans-REA proposed transaction in the finance proceeding.

By order of November 3, 1976, in the finance proceeding, the Commission determined that it would hold in abeyance the request by Alltrans under section 210a(b) pending the outcome of the REA complaint proceeding. In so doing, the Commission invoked its discretion under section 17(3) of the

8. Pennsylvania R.R. v. Public Util. Comm'n, 298 U.S. 170 (1936).
9. No. MC-C-8862 (Nov. 17, 1976).
10. The Hub system consists of 24 major receiving and dispatching points located throughout the country, linked by a network of line-haul routes.
11. No. MC-F-13003.
12. 49 U.S.C. § 310a(b) (1970).
13. *Id.* § 5(2).

Act to "conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[14]

Under an expedited procedure, the Commission issued the initial decision in the complaint case based on the record certified to it by the presiding Administrative Law Judge. In its decision entered November 17, 1976, the Commission included a cease and desist requirement against the Rexco operations, finding them to be inconsistent with express service and "totally unlawful." Furthermore, the Commission found that the REA "Hub" application should be dismissed for want of prosecution under Rule 247(f)[15] of the Commission's General Rules of Practice and that the corresponding "Hub" temporary authority should be revoked. The Commission found that statements made by REA in other proceedings repudiating the operating economy and efficiency of the "Hub" concept for distribution of express traffic demonstrated that REA did not intend to promptly prosecute its "Hub" application in accordance with Rule 247(f). The "Hub" temporary authority was cancelled by operation of law upon dismissal of the "Hub" application. Nevertheless, the Commission also found that the unlawful operation conducted under the "Hub" temporary authority warranted revocation thereof irrespective of the dismissal of the corresponding "Hub" application. On reconsideration, this decision was unanimously affirmed by the Commission in its order of January 28, 1977.

The Commission also denied Alltrans' section 210a(b) request in an order issued simultaneously with its decision on reconsideration in the complaint case. The Commission, noting its determination in the complaint proceeding, found that withholding the sought 210a(b) authority would not result in destruction of or injury to the motor carrier properties involved or interfere substantially with their future usefulness. In this regard, the Commission also cited statistics which showed "a dramatic erosion of REA service" in the decade prior to REA's shutdown.

Meanwhile, REA sought and obtained an order of the United States Court of Appeals for the Second Circuit staying the effective date of the Commission's November 17 decision in the complaint case pending judicial review in that court.[16] A noteworthy facet of the decision was that the court rendered it even though the appellant had simultaneously filed a petition for reconsideration with the Commission. A dissenting judge said that the matter was not administratively final; and he also noted the lack of a showing of irreparable harm.

While the possibilities for a resurrection of REA's historic nationwide express service have been dwindling, United Parcel Service (UPS) has been attempting to broaden the scope of its small package service. By a

14. *Id.* § 17(3).
15. 49 C.F.R. § 1100.247(f) (1976).
16. REA Express, Inc. v. United States, No. 76-4278 (2d Cir., filed Dec. 17, 1976).

petition filed November 17, 1976,[17] UPS is seeking to remove from its common carrier authority a weight restriction which prohibits transportation of packages whose aggregate weight exceeds 100 pounds from one consignor to one consignee on any one day. Protests have been received by several motor carriers as well as the Local and Short Haul Carriers National Conference. By order of February 1, 1977, this proceeding has been designated for oral hearing.

III. PASSENGERS

In several instances during the past year, the Commission has had occasion to determine whether or not particular operations are subject to economic regulation. In one proceeding,[18] the question was raised whether certain operations constituted private carriage not subject to regulation or whether they constituted for-hire transportation. The applicant was a travel agency which arranged air and ocean tour services. Its proposal was to provide connecting ground transportation for its customers between their homes and various airports and steamship piers. An administrative law judge concluded that this type of transportation was not for hire, and recommended that the application be denied. On exceptions, Division 1 determined that the proposed transportation was in fact for-hire carriage, and thus that it required operating authority from the Commission. The Division also determined that the transportation was common carriage rather than contract carriage, since applicant's tour services as a travel agency were held out to the general public, even though the regulated transportation services specifically under consideration would only be offered to actual tour customers. Finally, since the transportation could involve aspects of either special or charter operations in differing circumstances, the authority granted was framed so as to include both types of operation.

In another case,[19] the question was presented whether similar motorbus transportation within a single state in connection with interstate air tours constituted transportation in intrastate or interstate commerce. Although the tour services as a whole clearly embraced air travel in interstate or foreign commerce, Division 1 concluded, on the basis of the Commission's determination in *Motor Transportation of Passengers Incidental to Air*,[20] that the bus transportation does not require operating authority from the Commission as long as the motor carrier does not sell or honor through tickets with the air carrier nor maintain any common arrangement with the air carrier involved. Therefore, the travel agents arranging these interstate air tours and the connecting single-state motor transportation are not brokers subject to regulation by the Commission.

17. No. MC-115495 (Sub-No. 3).
18. All World Travel, Inc., Common Carrier Application, 126 M.C.C. 243 (1977).
19. Wisconsin-Michigan Coaches, Inc., 124 M.C.C. 448 (1976).
20. 95 M.C.C. 526, 536 (1964).

Insofar as the so-called incidental-to-air exemption of section 203(b)(7a) is concerned, I might mention in passing at this point that the exempt zone for Chicago's O'Hare Airport has recently been expanded to embrace a somewhat larger area in Indiana.[21]

Section 203(b)(1) of the Act provides another exemption from the Commission's regulatory jurisdiction: namely, the transportation of school children and teachers to or from school. The question arose in this regard whether the exemption would embrace the transportation of school children to or from boarding schools at the beginning and end of vacation periods.[22] Division 1 concluded that, even though the transportation might be only between the boarding school and a public transportation terminal (rather than the students' homes) and though the parents would reimburse the school for the transportation charges, there was nothing in the Act to deny the applicability of the exemption in this situation. Fundamentally, it was concluded that the plain language of the statute clearly embraces this type of transportation, and that past Commission decisions to the effect that field trips would qualify under the exemption only if sponsored and supervised by school authorities do not limit the applicability of the statutory exemption in this situation.

Turning now to proceedings involving determination of applications for operating authority, we find that the Commission has dealt with significant issues in connection with most of the various types of operating authority pertinent to passenger carriers. In a regular-route application proceeding,[23] Division 1 drew a distinction between local and long-haul transportation services. Applicant was a long-haul Mexican carrier seeking authority to cross the international boundary into the United States for the purpose of making connections at the terminals of an American carrier. The protestant provided a frequent local service across the border following essentially the same route. The Division concluded that, although there was no showing that protestant's service was in any way inadequate for the prevalent local traffic crossing the border, applicant's proposed operations would be an improved service for long-haul passengers, for whom protestant's service would not be particularly responsive. Therefore, the authority sought was granted based upon the substantial differences between applicant's proposed manner of operation and that of protestant.

In an application for charter authority,[24] the Division found that, although the services of one protestant were not responsive to the particular needs demonstrated by the supporting witnesses, two other protestants did provide a service substantially similar in nature to that proposed by applicant. The Commission did consider the evidence of four travel agencies in sup-

21. Exempt Zone (Passengers) - Chicago, Ill., O'Hare, 126 M.C.C. 332 (1977).
22. Dufour Brothers, Inc. - Declaratory Order, 126 M.C.C. 1 (1976).
23. Transportes Monterrey Common Carrier Application, 126 M.C.C. 46 (1976).
24. Holiday Transp., Inc., Common Carrier Application, 125 M.C.C. 720 (1976).

port of the application, on the grounds that they were in a position to reflect the transportation needs of the public. Nevertheless, the application was denied because of the untried services of the two protestants.

Another application for charter authority[25] was granted, however, in a situation where the protestants were shown to be unable to provide a flexible service on short notice. In this case, Division 1 concluded that a grant of authority would not result in any appreciable harm to the protestants, whereas the public was entitled to a service capable of meeting the short-notice needs of the supporting witnesses.

The Commission has also had occasion to deal with several aspects of the regulation of passenger brokers. In one proceeding,[26] the question presented was whether certain tour services were being arranged for compensation, such that they would be subject to the regulatory provisions of section 211 of the Act. Defendant in this complaint proceeding claimed to be arranging bus tours as a hobby on a non-profit basis. However, Division 1 found that compensation did exist because some of the monies received from the tour passenger were used to cover advertising expenses and other items not attributable to a single particular tour. Accordingly, it was concluded that operations for compensation are not necessarily those which are conducted at a profit, and defendant was ordered to cease and desist from conducting unauthorized brokerage activities.

In dealing with an application for authority to operate as a broker,[27] Division 1 authorized the granting of a license in a situation where it concluded that such a grant would introduce a beneficial competitive element in the tour market considered. Applicant proposed a highly personalized service of distinctive quality which drew a loyal clientele who found other services not well suited to their particular needs. In granting the application, the Division concluded that applicant was unlikely to gain an undue competitive advantage over existing services.

In another broker application,[28] however, Division 1 considered a circumstance in which the broker applicant was affiliated with a motor common carrier of passengers which was itself authorized to conduct sightseeing and pleasure tour services. Although the Division concluded that a need for the broker's proposed services had been demonstrated, the fact of the affiliation with a carrier raised issues related to those currently under consideration by the Commission in the rulemaking proceeding in Ex Parte No. MC-93.[29] Although it was decided that the fact of applicant's affiliation with a motor carrier did not warrant denial of the application in the particular circumstances presented, the grant of authority was nonetheless limited so

25. Robinson Common Carrier Application, 126 M.C.C. 180 (1976).
26. Millenburg Tours, Inc. v. Hofmeister, 124 M.C.C. 297 (1976).
27. Goodman - Broker Application, 125 M.C.C. 223 (1976).
28. Peter Pan World Travel, Inc. - Broker Application, 125 M.C.C. 728 (1976).
29. Passenger Brokers Affiliated with Motor Carriers, 120 M.C.C. 656 (1974).

as to prevent the applicant broker from operating tours duplicative of those which could be conducted by its motor carrier affiliate under its own authority.

Two rulemaking proceedings affecting passenger carriers are also worthy of note at this time. In one,[30] the Commission considered a petition for modification of its existing smoking regulations so as to enlarge the smoking section on buses from twenty percent to fifty percent of the available seating capacity. Upon consideration of statistical evidence presented by the National Association of Motor Bus Owners, a majority of the Commission concluded that an increase in the size of the smoking section to thirty percent of the seating capacity was warranted. It concluded that the evidence of the number of non-smoking passengers who were traveling with smokers did not necessarily justify the entire increase sought. Rather, it decided that the lesser increase approved was all that was warranted by the statistical evidence presented.

In the other rulemaking proceeding,[31] the Commission considered a petition to modify its regulations concerning the transportation of special or chartered parties so as to permit the transportation of certain non-identical groups of passengers as if they constituted a single round-trip movement. The Commission found that there were certain circumstances in which movements of military personnel so coincided that they could physically be handled by a single carrier except for the fact that the carrier might not be authorized to originate charter traffic at one of the origin points involved. As a result, it could occur that two carriers might have to deadhead equipment in opposite directions for lack of authority to complete the return movements. In order to reduce this deadhead mileage and encourage a concomitant saving in fuel, the Commission promulgated amended regulations which permit charter carriers to treat as a single round-trip movement two one-way movements of non-identical passengers under arrangement with the same chartering party. The resulting fuel savings and efficiency in operations were believed to outweigh any possible detriment to other carriers.

IV. Commercial Zones and Terminal Areas

In December 1976, the Commission promulgated new rules and regulations concerning commercial zones and terminal areas in the final report in its rulemaking proceeding Ex Parte No. MC-37 (Sub-No. 26).[32] Before discussing the specific rules adopted, a brief background discussion is appropriate.

30. Smoking on Interstate Busses, 125 M.C.C. 522 (1976).
31. Regulations, Special or Chartered Party Serv., 125 M.C.C. 10 (1976).
32. Commercial Zones and Terminal Areas, [1977] 3 Fed. Carr. Rep. (CCH) ¶ 36,804.

A. Background Information

Ordinarily, the interstate movement of passengers or property by motor carriage is subject to economic regulation by this Commission. There are certain types of motor carrier operations, however, which Congress has decided to exclude from such regulation. Section 203(b)(8) of the Interstate Commerce Act establishes one such area of exempt motor carrier operations by excluding from economic regulation transportation that is "wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities." It must be pointed out that this exemption does not apply to local cartage operations when such transportation is performed under common control, management, or arrangement for the continuous carriage of a shipment to or from a point outside the limits of a particular municipality or its commercial zone. In other words, when the local transportation is part of, or incidental to, a line-haul service, the exemption of section 203(b)(8) is withheld.

In this context, however, section 202(c) comes into play. This section, which was added by amendments to the Act in 1940 and 1942, speaks of "terminal areas" and complements the commercial zone exemption by excluding from direct economic regulation the transfer, collection, and delivery performed within the terminal areas of line-haul carriers in connection with line-haul services. Thus, "the combined effect of sections 202(c) and 203(b)(8) is partially to exempt from regulation all local motor transportation, in interstate or foreign commerce, within commercial zones or terminal areas."[33]

While it is apparent from these sections of the Act that Congress intended to exempt motor carrier transportation in urban areas from regulation by this Commission, the geographic extent of these exemptions was not specified. The responsibility for making such determinations was left to this Commission as one of its duties in administering the provisions of the Act. Recognizing that a commercial zone exists about every municipality in the United States, the sheer impossibility of specifically defining on a case-by-case basis both the commercial zone limits at every city and the terminal area of each carrier at each of its authorized service points dictated the necessity of formulating some general guidelines in this area. The initial rulemaking on this matter was Ex Parte No. MC-37, initiated in the mid-1940's.

The creation of general guidelines in this area involved three primary tasks: (1) developing a general method for establishing commercial zone limits at all municipalities; (2) defining by general rule the geographic limits of carriers' terminal areas; and (3) construing motor carrier operating authorities which utilize municipalities in their territorial descriptions. The first

33. Commercial Zones and Terminal Areas, 46 M.C.C. 665, 669 (1946).

undertaking was dealt with in 1946.[34] The latter two were the subjects of Commission decisions in 1948[35] and 1952.[36]

The following regulatory scheme emerged: (1) a population-mileage formula was adopted for determining commercial zone limits;[37] (2) the terminal area of a motor carrier or freight forwarder at a particular municipality was determined to be coextensive with the limits of the commercial zone of that municipality, although a carrier's terminal area may not extend beyond the territorial limits of the particular motor carrier's or freight forwarder's operating authority; and (3) with respect to the construction of operating authorities, motor carrier authority to serve a particular municipality, unless otherwise territorially limited, was construed as authority to serve all points and places which are in the commercial zone of that municipality. Provision was also made for interested persons to petition the Commission to define the limits of a particular commercial zone. Since the promulgation of the original population-mileage formula, petitions have been filed to determine specifically forty-three commercial zones. The usual case involves efforts by an interested party or parties to have an industrial park or a similar commercial location included in the commercial zone of a particular city.

B. *Ex Parte No. MC-37 (Sub-No. 26)*

The above-described commercial zone regulations remained intact since their inception. Recognizing that changes have occurred in the location of business and industrial activity since the development of commercial zone regulations in the mid-1940's, the Commission instituted, on its own motion, a rulemaking proceeding to re-examine the population-mileage formula in light of contemporary demographic and industrial location patterns. Over 400 parties—motor carriers, motor carrier associations, freight

34. Commercial Zones and Terminal Areas, 46 M.C.C. 665 (1946).
35. Commercial Zones and Terminal Areas, 48 M.C.C. 418 (1948).
36. Commercial Zones and Terminal Areas, 54 M.C.C. 21 (1952).
37. A commercial zone consists of a "base municipality," contiguous municipalities, and [a]ll other municipalities and all unincorporated area within the United States which are adjacent to the base municipality as follows:

(1) When the base municipality has a population less than 2,500 all unincorporated areas within two miles of its corporate limits and all of any other municipality any part of which is within two miles of the corporate limits of the base municipality,

(2) When the base municipality has a population of 2,500 but less than 25,000, all unincorporated areas within 3 miles of its corporate limits and all of any other municipality any part of which is within 3 miles of the corporate limits of the base municipality,

(3) When the base municipality has a population of 25,000 but less than 100,000, all unincorporated areas within 4 miles of its corporate limits and all of any other municipality any part of which is within 4 miles of the corporate limits of the base municipality, and

(4) When the base municipality has a population of 100,000 or more all unincorporated areas within 5 miles of its corporate limits and all of any other municipality any part of which is within 5 miles of the corporate limits of the base municipality.

49 C.F.R. § 1048.101 (1976).

forwarders, local interests, labor unions, and governmental agencies—filed written representations during the interim stage of this rulemaking. On January 12, 1976, the Commission published an interim report in Ex Parte No. MC-37 (Sub-No. 26),[38] wherein certain tentative proposals were made for expanding the then existing commercial zone limits to account for increased business and industrial activity in suburban areas. An effort was also made to simplify the general plan of commercial zone rules and regulations in order to eliminate certain confusing situations which have arisen in the past. In arriving at this set of interim proposals, the Commission endeavored to give fair and proper consideration to the views expressed by all participating parties.

An additional sixty day period was set aside for comment on the proposals contained in the interim report and for submission of additional economic and demographic data on proper limits for incorporation in a revised population-mileage formula.

Upon careful analysis of the additional economic and demographic data, the Commission concluded that they substantiated the findings of the interim report that there is a definite trend toward increasing suburban commercial and residential activity.[39] The population levels for central cities are generally stable or declining slightly, while outlying areas are experiencing rising populations. Many factors have contributed to the shift in economic activity from the central city to the suburbs—availability and expense of land, need for new and larger facilities, urban congestion—and these reasons indicate that suburban activity is a necessary and inevitable outgrowth of the central city. The profile of the modern-day city indicates that there is an evolving location pattern for metropolitan economic activity. The central city remains the home of administrative, financial, and service functions, activities which are compatible with multi-storied environments in concentrated urban centers. Manufacturers, wholesalers, and retailers, prime users of transportation services, are migrating to suburban locations, where land is available for single-story industrial plant technology. Improved communication and transportation networks facilitate the movement to the suburbs and permit a greater degree of commercial integration between city and suburb.[40]

The main finding of the final report is that the population-mileage formula adopted in the 1940's does not accurately describe the area of business and industrial activity existing about modern-day cities.

The following population-mileage formula, which was tentatively proposed in the interim report, was adopted:[41]

38. Commercial Zones and Terminal Areas, 124 M.C.C. 130 (1975).
39. [1977] 3 FED. CARR. REP. (CCH) at ¶ 36,804.03.
40. *Id.* at ¶ 36,804.04.
41. *Id.* at ¶ 36,804.05.

Population of Base Municipality	Mileage (measured from municipal limits)
Less than 2,500	3 miles
2,500 - 24,999	4 miles
25,000 - 99,999	6 miles
100,000 - 199,999	8 miles
200,000 - 499,999	10 miles
500,000 - 999,999	15 miles
1 million and up	20 miles

The final report also affirmed the rule that the limits of the terminal area of a motor carrier or freight forwarder at any municipality authorized to be served are coextensive with that municipality's commercial zone.[42] Consequently, the geographic scope of the section 202(c) exemption for pickup and delivery service will be determined by reference to the expanded population-mileage formula set forth at 49 C.F.R. § 1049.2 as defining the geographic extent of section 202(c) pickup and delivery service at unincorporated communities.[43] It decided that motor carrier terminal area limits at unincorporated communities should be determined by reference to the following population-mileage formula:[44]

Population	Miles (Airline mileage from Post Office)
Less than 2,500	3
2,500-24,999	4
25,000 and up	6

The post office continues to be the central point from which the radius is measured for unincorporated communities. Where there is no post office, the generally recognized business center is the only alternative central point. The final report affirmed the traditional rule of construction that certificates and permits authorizing service at unincorporated communities confer implied authority to serve points encompassed by the revised population-mileage formula applicable to unincorporated communities.[45]

On the issue of freight forwarder terminal areas, the Commission found that the evidence did not warrant departure from the long-standing rule that the commercial zones of municipalities and the terminal areas of motor carriers and freight forwarders should be geographically coextensive.[46] While recognizing that such a rule is not mandated by statute, the Commission found that the benefits of administrative simplicity and public comprehension gained through uniform treatment of the geographic scope of

42. *Id.* at ¶¶ 36,804.06-.07.

43. In the original report in Ex Parte No. MC-37, former Division 5 found that the term "municipality" as used in section 203(6)(8) includes only cities, towns (except New England-type townships), villages, and boroughs which are generally recognized as such by appropriate legislative action and which have local self-governments. 46 M.C.C. at 679-81.

44. [1977] 3 FED. CARR. REP. (CCH) at ¶ 36,804.06 n.44.

45. *Id.* at ¶ 36,804.06.

46. *Id.* at ¶ 36,804.07.

commercial zones and terminal areas are substantial, and that such treatment also has certain functional benefits. Freight forwarders often utilize local cartage firms operating pursuant to the section 203(b)(8) exemption to effectuate collection and delivery services. Disparate areas of operation would force those truckers and forwarders to separate shipments according to distance and would generally interfere with the flexibility of the operations. There could also be some difficulty in monitoring the operations of exempt motor carriers serving nonidentical geographic areas under sections 202(c) and 203(b)(8).

The Commission accorded certain cities[47] special treatment. These cities have individually determined commercial zones which would contract in some manner under the new population-mileage formula. The Commission redescribed the zones for these cities along readily identifiable lines, so as to eliminate any unintended contraction of existing commercial zone limits. The Commission also codified zone limits for certain "Twin Cities"[48] and "Consolidated Governments".[49] Finally, the Commission restored the commercial zone exemption to Los Angeles, St. Louis, Missouri—East St. Louis, Illinois and New York City.[50] It also restored the exemption to New Jersey and New York municipalities which are within the New York City commercial zone, and described an area in New Jersey which will share the limits of the New York City commercial zone on shipments having a prior or subsequent movement by rail or water.[51]

While the size of commercial zones is a matter of economic fact determined without regard to public transportation needs or competitive impact on existing carriers, the evidence submitted in this rulemaking was compelling that zone expansion would be in the public interest.[52] Zone expansion will enhance the ability of motor carriers to adjust more quickly to shipper migration to outlying areas and to the emergence of new suburban markets.

47. Albany, N.Y.; Beaumont, Tex.; Charleston, S.C.; Charleston, W. Va.; Lake Charles, La.; Pittsburgh, Pa.; Pueblo, Colo.; Ravenswood, W. Va.; Seattle, Wash.; and Washington, D.C. *Id.* at ¶ 36,804.11.

48. St. Louis, Mo.-East St. Louis, Ill.; Kansas City, Mo.-Kansas City, Kans.; Davenport, Iowa, and Rock Island and Moline, Ill.; Minneapolis-St. Paul, Minn.; Bluefield, Va.-W. Va.; Bristol, Va.-Tenn.; Delmar, Del.-Md.; Harrison, Ohio-West Harrison, Ind.; Junction City, Ark.-La.; Texarkana, Ark.-Tex.; Texhoma, Okla.-Tex.; and Union City, Ind.-Ohio. *Id.* at ¶ 36,804.15.

49. These are cities which have consolidated all, or substantially all, of their governmental and corporate functions with the governmental and corporate functions vested in the counties in which such municipalities are located and have created a new governmental entity combining these functions. *Id.* at ¶ 36,804.12.

50. *Id.* at ¶¶ 36,804.08-.10. The exemption provided by section 203(b)(8) had previously been removed, either partially or completely, with respect to these cities. *See* Los Angeles, Calif., Commercial Zone, 3 M.C.C. 248 (1937) and 114 M.C.C. 86 (1971) and Commercial Zones and Terminal Areas, 51 M.C.C. 676 (1950); New York, N.Y., Commercial Zone, 1 M.C.C. 665 (1937) and 2 M.C.C. 191 (1937) and Commercial Zones and Terminal Areas, 53 M.C.C. 451 (1951); and St. Louis, Mo.-East St. Louis, Ill., Commercial Zone, 1 M.C.C. 656 (1937).

51. This area in New Jersey is described as follows: points in New Jersey south of Interstate 495 and New Jersey Highway 3, east of the Garden State Parkway, and north of the Raritan River.

52. [1977] 3 FED. CARR. REP. (CCH) at ¶ 36,804.17.

Terminal area expansion will result in more single-line service, thus improving the transportation service being offered the shipping public and benefiting long-haul motor carriers. No doubt some short-haul regulated carriers will suffer some traffic diversion due to increased competition from exempt carriers and loss of some interline traffic to long-haul carriers. This adverse effect is outweighed, however, by the abundant evidence presented by suburban shippers concerning their difficulties in obtaining prompt and dependable motor service.

A prime objective of the plan of federal economic regulation of interstate motor carriage "is to assure that shippers will be provided with a healthy system of motor carriage to which they may resort to get their goods to market."[53] On the basis of the extensive shipper testimony presented in this proceeding, the Commission determined that this objective was not being met under the outdated commercial zone rules and regulations, and that, therefore, the new rules and regulations are warranted.

The new regulations promulgated in Ex Parte No. MC-37 (Sub-No. 26) were scheduled to become effective March 29, 1977. Several interested parties have filed petitions for stay of the effective date and/or reconsideration. These petitions have been assigned high priority and are presently under consideration. A court action involving this proceeding has been filed in the United States Court of Appeals for the Ninth Circuit.[54]

V. Household Goods

Almost a million shipments of household goods are handled in interstate commerce by motor common carriers of household goods during the peak season between April 1 and October 31 each year. The transportation of household goods has more impact on the direct consumer than any other category of transportation. No segment of the trucking industry has been more stringently regulated by the Commission than the motor common carriers of household goods. If the needs of the people of this Nation are to be met, further improvements must be effected.

During 1976, without impairing the ability of the household goods carriers to provide adequate, economical, and efficient service, a number of regulations were adopted to assure that the average householder shipping most valued possessions continues to get all the protection this Commission can afford in the transactions with the household goods carriers.

The Commission regulations served March 1, 1976: (1) prohibit motor common carriers of household goods from limiting their liability for loss and damage for so-called "articles of extraordinary value," unless such articles are listed by the shipper on the shipping documents; (2) no longer allow these carriers to exclude liability for loss or damage due to strike, lockouts,

53. United States v. Drum, 368 U.S. 370, 374 (1961). *See also* Keller Industries, Inc.-Declaratory Order, 107 M.C.C. 75 (1968).

54. Short Haul Survival Comm. v. United States, No. 77-1070 (9th Cir., filed Jan. 10, 1977).

labor disturbances, riots, etc.; and (3) require the carriers, when settling claims for loss and damage, to use the replacement cost of that lost or damaged item as a base to apply a depreciation factor in order to arrive at the current actual value of the item.[55]

To further protect the consumer, the Commission in Ex Parte No. MC-19 (Sub-No. 24)[56] codified its findings in Ex Parte No. MC-19 (Sub-No. 13).[57] This new rule prohibits household goods carriers from collecting any freight charges, including charges for accessorial and terminal service, when shipments of the household goods under the first proviso of the definition of household goods[58] are totally lost or destroyed in transit. The new rule also provides that a carrier shall not collect that portion of the published freight charges which corresponds to the percentage of the shipment lost or destroyed.

By order served January 12, 1977, in *Practices of Motor Carriers (Advertising)*,[59] the Commission took its first step in its attempt to eliminate deceptive and misleading advertising by carriers holding no authority from this Commission. These carriers often obtain an order for service by promising services which they are not authorized to perform and fail to disclose that they are not responsible for these services. The new regulations require motor common carriers of household goods in interstate or foreign commerce and their agents to disclose, in each advertisement as defined by the Commission,[60] the name and certificate or docket number of the carrier under whose operating authority the potential customer's shipment will be transported.

VI. Water Carriers

During the past year the Commission has continued to expeditiously decide applications for water carrier authority. During this time it has handled applications involving many of the major river systems and coastal areas of the United States. For example, applicants sought authority to serve

55. Practices of Motor Common Carriers of Household Goods (Limitations of Liability), 124 M.C.C. 395 (1976).

56. Practices of Motor Carriers of Household Goods (Collection of Freight Charges on Household Goods Shipments Lost or Destroyed), 126 M.C.C. 250 (1977).

57. Petition For Declaratory Order - Household Goods, 114 M.C.C. 176 (1971).

58. "Household goods" are defined as:

> (1) personal effects and property used or to be used in a dwelling when a part of the equipment or supply of such dwelling; (2) furniture, fixtures, equipment, and the property of stores, offices, museums, institutions, hospitals, or other establishments, when a part of the stock, equipment, or supply of such stores, offices, museums, institutions, hospitals, or other establishments; and (3) articles, including objects of art, displays, and exhibits, which because of their unusual nature or value require the specialized handling and equipment usually employed in moving household goods.

49 C.F.R. § 1056.1(a) (1976).

59. 126 M.C.C. 130 (1977).

60. 41 Fed. Reg. 11,326 (1976) (to be codified in 49 C.F.R. § 1056.1(e)).

points on the Gulf Coast,[61] Mississippi River,[62] West Coast,[63] East Coast,[64] various Alaskan rivers,[65] St. Croix River, Missouri River, and White River.[66]

The Commission has been concerned with the effect of water carrier operations on the environment. In this regard it ordered that an environmental impact statement be prepared before deciding whether to grant an applicant authority to operate a ferry vessel across Long Island Sound between New London, Connecticut and Greenport, New York.[67] Division 1 concluded that the evidence of service failures, involving waits of up to six hours, showed the inability of protestant to meet the needs of the public. It also concluded that applicant's operation would generate sufficient passenger traffic to justify two carriers. Next, the Division considered environmental impact, and concluded that the proposed operations would not have such a deleterious effect as to warrant denial of the application. Because a number of problems had to be resolved before operations could be undertaken, applicant was granted a term certificate for a three-year period, after which it must show it is in fact operating. The proceeding is now pending on petitions for reconsideration.

In another proceeding,[68] the Commission considered five applications for authority on the Columbia-Snake River system. Part of the Snake River is in the Wild and Scenic Rivers system, and several environmental groups registered great concern. After due consideration on the merits, it was determined that no need existed for service over that portion of the Snake River within the Wild and Scenic Rivers system.

The Commission has continued to police the operating rights of authorized water carriers to make sure they are providing service under the rights issued them. The Bureau of Enforcement (now, Bureau of Investigations and Enforcement) brought an action alleging that a carrier was not using its rights to fully meet the transportation needs of the public along its authorized waterway.[69] After hearing, it was determined that the carrier was operating and that its authority was not dormant. Thereupon, the proceeding was dismissed. That type of proceeding tends to induce water carriers to solicit all water traffic available and not merely hold paper rights which do not serve the public's need for sufficient and efficient water transportation services.

61. Childress Shipping, Inc., Common Carrier Application, No. W-1300 (Nov. 8, 1976).
62. Blaine F. Claypool Common Carrier Application, No. W-1308 (Nov. 8, 1976).
63. Prudential Lines, Inc., Common Carrier Application, No. W-1293 (May 4, 1976).
64. Allied Container Service, Inc., Contract Carrier Application, No. W-1296 (Aug. 13, 1976).
65. Artic Lighterage Co. Common Carrier Application, No. W-1299 (Sub-No. 1) (May 24, 1976).
66. Ohio Co. Extension—Black Warrior River, No. W-414 (Sub.-No. 10) (Apr. 26, 1976).
67. Mascony Transport & Ferry Serv., Inc., Init. Opers., 353 I.C.C. 60 (1976).
68. Western Transportation Co., Extension—Snake River, No. W-303 (Sub-No. 1) (Jan. 5, 1977). This case embraced four other applications.
69. Igert—Investigation and Revocation of Certificates, No. W-C-27 (Sept. 2, 1976).

Finally, the Commission considered an exemption application[70] where the applicant engaged in construction jobs along the Atlantic and Gulf of Mexico coastlines. The proposed operation was found to be contract carriage under a demise charter and therefore susceptible of being found exempt. But, to be exempt, the proposal must not be in substantial competition with existing authorized service. Inasmuch as the proposed service was one which protestants could individually or jointly provide, the Commission determined that it would be competitive with existing services, and therefore the exemption application was denied.

VII. Property Brokers

Although applications for licenses as a broker in arranging transportation of property by motor carrier are infrequent, the Commission has recently decided two significant proceedings involving household goods brokers, the first such applications to come before the Commission since 1961.

One applicant, McEvoy,[71] sought to operate as a broker at New York City arranging the transportation of household goods by motor vehicle between points in the United States. In addition to choosing the proper carrier for transporting household goods, McEvoy promised to provide a service where she would aid small c.o.d. shippers in various facets of their moving experience and provide needed information to them regarding their moves. The Commission indicated its sympathy with the plight of household goods shippers and referred to its past efforts at aiding them through its household goods regulations,[72] but found that the proposed operation would not be consistent with the public interest and the national transportation policy. The Commission concluded that applicant would choose only household goods carriers willing to pay her fee, rather than the most suitable carriers available. Moreover, applicant's provision of nonbrokerage services was found to interfere with the Commission's efforts to supply household goods shippers with clear and accurate information about their moves[73] and would obstruct rather than enhance the shipper-carrier relationship. The application was denied.

In the second proceeding,[74] applicant proposed a service similar to that proposed in *McEvoy*. The Commission found some carrier support and a more sophisticated organization behind applicant, but the same deficiencies as existed in *McEvoy* and it denied the application. More specifically, the Commission noted that while applicant intended to aim its service at corporate clients, it would not be precluded from serving any shipper, large

70. Diamond Manufacturing Co. Exemption Application, No. W-1285, Ex. (Mar. 26, 1976).
71. McEvoy Broker Application, 124 M.C.C. 32 (1975).
72. Transportation of Household Goods in Interstate or Foreign Commerce, 49 C.F.R. Part 1056 (1976).
73. Bop 103, *Summary of Information for Shippers of Household Goods* and Public Advisory No. 4, *Lost or Damaged Household Goods.*
74. Exec-Van Systems, Inc.—Broker Application, No. MC-130236 (Nov. 9, 1976).

or small, and its operations would thus have a potentially detrimental effect on the implementation of the Commission's household goods regulations.

VIII. General Rules of Practice

During the past several years the Commission, pursuant to a recommendation by its Blue Ribbon Staff Panel in 1975, has undertaken an evaluation of its Rules of Practice with the aim of updating, clarifying, and improving them. A number of the Panel's recommendations were the subject of separate consideration prior to the past year, and have been implemented. During the past year, in two such separate rulemaking proceedings, major revisions were made. In Ex Parte No. 55 (Sub-No. 14),[75] the Commission amended certain rules dealing with operating authority to provide that, for publication in the *Federal Register*, the applicant shall submit with its application a caption summary of the authority sought, that extensions of time for filing pleadings will be granted only in the most extraordinary circumstances, that discovery would be available in modified procedure cases only upon petition, and that verified statements in modified procedure cases under Special Rule 247[76] will have to comply with a specified format. At the same time, the Commission proposed additional revisions of Rule 247 to provide that the due dates for filing verified statements would be automatically fixed to occur from the date of the publication in the *Federal Register*.

In Ex Parte No. 55 (Sub-No. 19),[77] the Commission revised the content requirements and page limitations on petitions for reconsideration. All petitions for review filed after December 29, 1976, require a three-page preface setting forth the specifications of error, relief sought, and the argument in summary form. The preface must be a succinct, but accurate and clear, condensation of the matters raised on petition. It is suggested that such preface precede all other matter presented in the petition. In addition, the Commission imposed a ten-page limitation (except in extraordinary circumstances and upon leave granted) upon petitions for reconsideration in cases wherein a division has already considered either exceptions or a prior petition for appellate review.

In addition, the Commission appointed a Special Staff Committee on Rules to undertake a comprehensive review of the entire body of the Rules of Practice. Revised Rules of Practice were compiled, designed to clarify and simplify existing rules and make Commission procedure more efficient.[78] The rules were set forth in a Notice of Proposed Rulemaking[79]

75. 125 M.C.C. 790 (1976). For a discussion of this proceeding, *see* article p. 37 *infra*.
76. 49 C.F.R. § 1100.247 (1976).
77. 125 M.C.C. 790 (1976).
78. Subsequently, the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, charged the Commission with a duty to review and revise its Rules of Practice in the rail area.
79. Ex Parte No. 55 (Sub.-No. 24), 41 Fed. Reg. 49, 282 (1976).

published November 8, 1976, and written comments from the general public were invited. Some thirty-eight comments from a variety of parties, including the Motor Carrier Lawyers Association, were submitted. The proposed revisions were, in the main, well received. The major areas of inquiry and criticism concerned computation methods and page and time limitations, the appearance of employee-representatives in the dual capacity of advocate and witness, protests against publications, discovery, bench decisions, interventions, oral argument in lieu of briefs, administrative appeal from first decisions of a division or the Commission, the number of counsel per side at oral argument, and compliance with the Railroad Revitalization and Regulatory Reform Act of 1976.

The Commission, on March 4, 1977, issued an interim report and order,[80] generally reaffirming the proposed rules, but with important revisions, particularly with respect to the timeliness of pleadings, dual participation of employee-representatives, and the powers of Administrative Law Judges to dismiss applications. Further comments by parties to the rulemaking have been permitted.

IX. Fitness Flagging Procedures

As a result of certain developments in the area of fitness flagging procedures, notably a special internal staff committee study completed in July 1975, the findings of the Commission's Blue Ribbon Staff Report, and the decisions in *North American Van Lines, Inc. v. ICC*[81] and *North American Van Lines, Inc. v. United States*,[82] the Commission instituted a rulemaking procedure, in Ex Parte No. 55 (Sub-No. 23),[83] for the purposes of adopting appropriate procedures for the determination of the circumstances that would raise a flagging issue and of setting forth standards to be applied in determining whether a fitness flag is to be raised. Notice of the proposed rulemaking was published in the *Federal Register* of August 9, 1976.[84] The proposed rules were adopted by the Commission on an interim basis pending final resolution of the rulemaking proceeding.

Briefly, under the new procedures, the Commission's Bureau of Investigations and Enforcement (BIE) may no longer intervene in application proceedings on its own; such participation shall be only by order of the Commission or the appropriate Division, upon request of BIE, and based upon a determination as to whether its participation, if approved, could result in a negative fitness finding. In the order approving such participation, or in a separate "show cause" order, procedures would be set forth affording applicant an opportunity to show cause why its other pending applications should not be flagged (i.e., authority not issued pending resolution of the

80. [1977] 3 Fed. Carr. Rep. (CCH) ¶ 36,817.
81. 386 F. Supp. 665 (N.D. Ind. 1974).
82. 412 F. Supp. 782 (N.D. Ind. 1976).
83. 125 M.C.C. 739 (1976).
84. 41 Fed. Reg. 33,307 (1976).

fitness issue in the selected application proceeding). The order would also notify applicant in general of the statutes, requirements, rules, and regulations allegedly violated and of the general substance of the allegations made and would identify all pending applications (called designated applications) in which flagging is to be considered. BIE or, on safety matters, the Department of Transportation (DOT) would then be required to advise applicant in writing of all matters of fact and law to be asserted with sufficient particularity to make clear the violations alleged and the nexus alleged to exist between those violations and other pending applications as to which flagging is being considered. Applicant would be afforded an opportunity to submit written representations to show why all or any of its pending designated applications should not be flagged, and BIE or DOT would have an opportunity to respond. The issuance of the order would temporarily bar issuance or authority or consummation as to any designated application.

Within 75 days of issuance of the show cause order, the Commission is required to issue its order determining whether flagging is warranted. Failure of an applicant to respond to the show cause order results in a flagging of its pending applications, notice of which will be formally given. On the other hand, failure of the Commission to issue a flagging order within the prescribed 75-day period results in the discontinuance of the flagging proceeding. The show cause order is not subject to a petition for reconsideration within the Commission. The flagging order is subject to a petition for such review, and, if denied, is appealable to the courts.

New applications during this time by the same applicant would by notice be added to the list of designated applications in which the question of flagging has been raised in the show cause proceeding. If the show cause proceeding has already been resolved to flag pending applications, applicant would be required to petition the Commission to have a new application excluded from flagging (failure to petition shall be construed as a waiver). An administratively final adverse fitness finding in the selected application shall result in denial of the application in the selected proceeding and all designated pending flagged applications.

In subsequently filed applications, the applicant will be expected (and required) to establish its fitness as in any ordinary proceeding, except that the Commission may take official notice of the prior adverse fitness finding.

By report and order of March 7, 1977,[85] the Commission adopted the proposed rules, with minor revisions.

During the period when the rules were in effect on an interim basis, show cause orders were issued affecting some twenty-five carriers, resulting in the flagging of seventeen such carriers. Five flagging proceedings were discontinued, and three are pending. In a number of cases, particular applications were removed from flagging for good cause shown. The Com-

85. [1977] 3 FED. CARR. REP. (CCH) ¶ 36,812.

mission has met its own deadline in each proceeding, and, in only one case did an applicant fail to respond. Our experience thus far indicates that these new procedures are efficient.

X. Contract Carriers

Over the past year the Commission has further clarified the criteria for qualification as a contract carrier. In one proceeding,[86] Division 1 considered all of the pending applications of Bass Transportation Company. Some of these had previously been the subject of an order or report determining that a grant of authority would put Bass in the position of serving more than a limited number of persons.

The report discussed the historical background of section 203(a)(15) of the Interstate Commerce Act as it is now phrased. It noted that while Commission policy generally has been to consider service for more than six or eight persons or shippers as service for more than a "limited number of persons," this is not a rigid rule, and the legislative and historical background suggests that the guiding purpose in determining what constitutes a "limited number of persons" in a given situation is the policy of keeping contract carriage limited in nature. The Division further inferred from the legislative history that the concern which prompted the limited-number-of-persons restriction was not simply contract carriers holding contracts with too many persons, but their being able to provide service for too many entities and thus approximating the service of a common carrier.

This concern, the Division reasoned, renders it both appropriate and necessary to consider the size and organizational structure of conglomerate shippers where divisions and subsidiaries maintain independent operations and may be the actual parties receiving transportation benefits. The report stated that divisions and subsidiaries could be considered as "persons" under the definition in section 203(a)(1) of the Act, and that the Commission is under no obligation to consider the parent rather than one of its divisions or subsidiaries as the proper "person" to be considered in evaluating whether a carrier's operations would be for a limited number of persons.[87]

Furthermore, the decision in Administrative Ruling No. 76,[88] by defining a shipper as the entity which controls the carrier selection and the routing of shipments, precludes the Commission from automatically counting a conglomerate parent as the contracting person. Even the inability of a division or subsidiary to legally contract in a given situation would not change this viewpoint, since the parent could contract on its behalf and the division or subsidiary could still be considered the "person" being served.

As a further corollary of the principle that the "six or eight persons" rule is not rigid, the report stated that the organizational size of a person or

86. Bass Transp. Co., Extension—St. Louis, Mo., 125 M.C.C. 233 (1976).
87. *Id.* at 243.
88. 117 M.C.C. 433 (1972).

shipper was a relevant factor in determining how many persons a contract carrier could serve.[89] Service for a number of conglomerates, for example, could not be viewed as conforming to the criterion in the same degree as service for the same number of small shippers. The number of conglomerates or larger shippers which a contract carrier serves would tend to reduce the total number of persons it would be permitted to serve.

The Division then examined the organizational structure of each of the shippers Bass served or sought to serve and found that many more entities were involved than was apparent on the face of the existing permits. This was considered to be more than a limited number of persons, and the pending applications were treated as ones for common carrier authority. Where a need for service was found, the proceedings were held open pending final disposition of Bass' applications for conversion of its existing contract carrier authority.[90]

The decision in *Fast Motor Service, Inc., Extension—Metal Containers*,[91] also aided in clarifying the "limited number of persons" criterion. Fast Motor Service held authority to serve seven shippers or persons, five of which were in the container industry and used applicant's service to ship metal and glass containers. Applicant sought to serve an additional container shipper. Division 1's report noted the specialized service required by shippers in the container industry. It stated the principle that where a contract carrier provides little in the way of a specialized service, it must show a real devotion to a very limited number of selected shippers. In other words, the number of shippers which a contract carrier would be permitted to serve will ordinarily diminish as the degree of specialization in physical services diminishes. In this particular case, the fact that most of the shippers served had similar requirements and were furnished a similar specialized service acted in favor of an increase in the number of persons applicant could serve.

In *Conalco Contract Carrier, Inc., Contract Carrier Application*,[92] Conalco, a wholly-owned subsidiary of Consolidated Aluminum Corporation, proposed to conduct contract carrier operations previously performed by Consolidated's private fleet. It planned to make these operations more feasible by serving a second shipper, American Olean Tile Company, in backhaul service. Division 1, in its report, rejected the arguments of protestants and other parties that to allow such a conversion from private to contract carriage would be contrary to the Commission's duty to protect regulated public carriers. The Division stated that it would not automatically deny such a conversion on policy grounds simply because the private carrier operations are extensive and the reason for the conversion is to reduce empty

89. 125 M.C.C. at 245.
90. *Id.* at 258-59.
91. 125 M.C.C. 1 (1976).
92. 125 M.C.C. 361 (1976).

backhauls by serving an additional, unrelated contracting shipper.[93] These factors would not be relevant from a policy standpoint as long as the transportation proposal is bona fide and the applicant is actually offering to become a regulated contract carrier.

The report went on to determine whether Conalco would qualify as a contract carrier under the alternative criteria of section 203(a)(15). It found that Conalco would not be assigning equipment to the exclusive use of each supporting shipper under the meaning of that section, because the trailers were to float throughout the system to be used by whichever shipper needed them.[94] In particular, it appeared that in some situations Olean would be dependent for equipment on the termination of vehicles in the area delivering shipments for Consolidated. Such a situation would violate the requirement that a contracting shipper be assigned equipment to meet its demonstrated needs, be able to view the equipment as its own, and be free from competing for equipment with other shippers. It also indicated that the backhaul service for Consolidated would interfere with the necessary assignment of vehicles to Olean. Comparison of the factual situation in this proceeding with those in other contract carrier cases involving reciprocal backhauls demonstrated that the evidence presented by Conalco was not sufficiently specific and detailed to provide assurance that the movements for each shipper would not have a detrimental or delaying effect on the availability of vehicles assigned to meet the transportation requirements of the other.[95]

In examining whether Conalco proposed a service designed to meet the distinct needs of each supporting shipper, the Division noted that Consolidated's desire to reduce its empty movements in private carriage by having applicant transport Olean's traffic in backhaul movements was the evident need expressed by Consolidated and the primary purpose for both the filing of the application and the proposal to serve Olean. The Division stated that the reduction of a shipper's empty backhauls could not per se be considered as meeting the "distinct need" test, since the statute contemplates the furnishing of a transportation service designed to meet the distinct needs of the customer receiving the service, whereas here Conalco sought to meet one shipper's need by furnishing a transportation service not to it but to another.[96] In addition, since Conalco would now be bearing the transportation responsibilities rather than Consolidated's private fleet, the reduction of deadhead miles would be a benefit accruing to Conalco and meeting its needs rather than those of Consolidated. Nevertheless, the Division felt that the predominance of the backhaul issue would not negate other legitimate expressed needs of the individual shippers.[97] Since such

93. *Id.* at 365-66.
94. *Id.* at 368.
95. *Id.* at 369.
96. *Id.* at 370.
97. *Id.*

needs existed in this proceeding, and since Conalco would be providing a service designated to meet them, Conalco qualified as a contract carrier under this criterion.

XI. Other Important Operating Rights Cases

The Commission has rendered a number of significant decisions in the operating rights area. During the past year, significant developments have taken place with regard to shipper-carrier affiliation. Division 1, in denying the application in *Stanley Amsden Common Carrier Application*,[98] reaffirmed the Commission's policy of withholding grants of operating authority to individuals or firms engaged in a principal business other than transportation. It was determined that the relationship between applicant's lumber production business and his proposed for-hire transportation, rather than being one arising from common control or management, was such that applicant would have a clear competitive advantage over other transportation firms because of the large volume of traffic available from his mill. This potential for preferential treatment would be at the disadvantage of competing lumber mill operations, none of which supported the application.

A portion of the authority sought in *Aycock, Inc., Common Carrier Application*,[99] was similarly denied because applicant, an installation contractor, failed to demonstrate that adequate provisions or special circumstances exist for safeguarding against preferential treatment between it and its commonly-controlled shipper. With regard to the remainder of the application, the Division found that applicant's proposed heavy-hauler type operation between points in twenty-two states constituted private carriage within the scope, and in the furtherance, of a primary business enterprise other than transportation. That part of the application was accordingly dismissed. In applying the primary business test, the Division observed that ninety percent of the business consisted of activities other than over-the-road transportation and that the majority of the capital investment was devoted to service other than transportation. Also considered important were Aycock's holding itself out as an installation contractor and limiting its bidding to contracts requiring a minimum of transportation.

In *Shippers Truck Service, Inc.—19 States*,[100] the issue was whether the Administrative Law Judge's consideration of applicant's minority ownership as a determining factor in the public convenience and necessity was appropriate. In denying the application, the Commission concluded that the consideration of racial factors was not consistent with recent court decisions and prior Commission rulings. Specifically, the Commission cited *NAACP v. Federal Power Commission*,[101] where the Supreme Court held that the FPC's

98. 124 M.C.C. 856 (1976).
99. 124 M.C.C. 536 (1976).
100. 125 M.C.C. 323 (1976).
101. 425 U.S. 662 (1976).

statutory obligation to act in the "public interest" was intended only to relate to the Commission's supervision of the production and sale of electric energy and natural gas and was not a directive to consider racial factors and other extraneous considerations unrelated to its fundamental jurisdiction. The Commission also referred to the decision of the United States Court of Appeals for the Sixth Circuit in *O.J. Transport Co. v. United States*,[102] in which the court concluded that the Interstate Commerce Commission was not statutorily required to "consider minority ownership as a separate factor in determining public convenience and necessity . . . ."[103]

In light of these decisions, the Commission reaffirmed its view that "our prior policy of considering racial and ethnic factors only when they relate to the nature of the transportation service proposed by an applicant, and the public's need for that service, is correct."[104] As an example of that policy, the Commission referred to grants of authority where the supporting shippers or public users were members of an ethnic group requiring a carrier with knowledge of their language.

The Commission strongly rejected the argument that racial or ethnic factors can never be pertinent in determining public convenience and necessity. It concluded, however, that applicant had not related its service proposal to the needs of the public but had merely argued for a grant of authority predicated on the race of applicant's owner. And it ruled that an improper basis for a grant of authority. It also concluded that the extensive nature of applicant's illegal operations, its persistence in operating unlawfully, and the lack of mitigating circumstances made it unlikely that applicant would operate in the future in compliance with the Interstate Commerce Act and the applicable federal rules and regulations and therefore rendered it unfit.

In *Kissick Truck Lines, Inc., Ext.—Iron and Steel*,[105] Division 1 found applicant unfit on the basis of flagrant and persistent misconduct in disregarding its certificates and the provisions of the Act immediately following civil forfeiture claims made against it for similar misconduct. Applicant, a motor common carrier whose officers had considerable experience in the motor transportation industry, had been operating under its pertinent certificate for approximately thirteen years. It claimed that unlawful operations conducted subsequent to settlement of the civil forfeiture claims were undertaken on advice of counsel.

Advice of counsel, even if precisely followed, is not an absolute defense to a violation of the Act. But Division 1 did recognize that when a party which has erred seeks, in good faith, the guidance of capable counsel who, after evaluating all the facts fully and honestly placed before him, gives rea-

102. 536 F.2d 126 (6th Cir. 1976). For a discussion of this case, *see* p. 211 *infra*.
103. 536 F.2d at 133.
104. 125 M.C.C. at 330.
105. 125 M.C.C. 183 (1976).

sonable advice for the future, and there is significant improvement in conduct, the party ought not be viewed as having such a proclivity for wrongdoing that subsequent transgressions be cast in the worst possible light. In the considered proceeding, however, the record was silent as to whether applicant sought, in good faith, such advice. Applicant's unsubstantiated claim could not serve to militate against a finding of unfitness under the facts and circumstances as developed in the record.

In a consolidated proceeding entitled *Tri-State Motor Transit Co.*,[106] four applicants sought common carrier authority to transport radioactive and non-radioactive waste materials requiring special disposition for ecological purposes, and containers and equipment used in the transportation or disposition of such commodities, between six specified disposal facilities on the one hand, and, on the other, points in the United States, subject to an "originating at—destined to" restriction. Two motor common carriers opposed the applications. The Administrative Law Judge recommended that the applications be denied. On exceptions, Division 1 reversed the decision.

The Division concluded that protestants were unable to provide the required service and that, based on the nature of the involved commodities, there was a need for the services of all four applicants. The supporting shipper required carriers with specialized knowledge, radiation detection equipment and protection gear, and specially trained personnel. The Division further concluded that size-and-weight authority was not sufficient to handle the majority of the involved commodities, even though most of them were transported in large containers.

In *Builders Transport, Inc.,—Particleboard*,[107] the petitioner sought a declaratory order which would affirmatively find that motor carrier authority to transport "lumber" and "lumber products" embraces authority to transport particleboard. In the alternative, petitioner requested that appropriate proceedings be instituted for the purpose of enlarging lumber haulers' authority based upon their past "good faith" transportation of particleboard. In opposing the declaratory relief sought, protestant maintained that it has long been recognized that the commodity description "lumber" or "lumber products" does not include particleboard and, consequently, there could not have been a good faith transportation of particleboard by petitioner.

In denying the request, Division 1, after analyzing the supporting evidence submitted by one shipper and two motor carriers operating in the Northwest, found controlling pertinent Commission's decisions which in the past interpreted the involved commodities. The Division concluded that since these decisions involved analogous facts, particleboard may not be transported pursuant to "lumber" authority. It was further found that, al-

106. 125 M.C.C. 343 (1976).
107. 124 M.C.C. 850 (1976).

though particleboard is included in the description "wood products", it is not included within "lumber products" authority, since it is not considered to be a derivative of lumber. Petitioners' request for alternative relief was denied because of the lack of appropriate application and public support for extension of authority.