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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Bureau of Economics

COMMISSION AUTHORIZED

May 19, 1994

Joseph C. Polking
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: Docket No. 93-23, Advance Notice of Proposed Rulemaking Concerning Section 6(g) of the Shipping Act of 1984

Dear Mr. Polking:

The Federal Maritime Commission recently announced proposed guidelines that discuss how the agency will take account of competitive considerations when assessing agreements in the ocean transportation industry. The staff of the Federal Trade Commission is pleased to have this opportunity to comment on some of the issues involved.[1] These comments are submitted pursuant to the notice at 59 Fed. Reg. 13471 (March 22, 1994), which invited views on the draft guidelines and on previously filed comments.

The proposed guidelines describe the manner in which the FMC proposes to apply section 6(g) of the Shipping Act of 1984, 46 U.S.C. App. § 1705(g). The 1984 Act generally

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[1] These comments represent the views of the Bureau of Competition and the Bureau of Economics of the Federal Trade Commission. They do not represent the views of the Commission itself, or of any individual Commissioner.

exempts agreements in the ocean shipping industry from the antitrust statutes.[2] Such agreements are reviewed by the FMC, which is empowered under section 6(g) to challenge agreements that, "by a reduction in competition," are likely to produce or have produced "an unreasonable reduction in transportation service or an unreasonable increase in transportation cost."[3]

Many different types of agreements are reviewed under this standard. The principal one is the carrier conference, pursuant to which vessel operators in the same trade lane coordinate their services and set common rates. Other types of agreements range from closely-integrated operating consortia among carriers to relatively-nonintegrated discussion agreements between conferences and independent carriers.[4]

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[2] See 1984 Shipping Act § 7, 46 U.S.C. App. § 1706. This section provides that the antitrust laws do not apply to "agreements" filed with the FMC, and also provides that a decision denying antitrust immunity cannot apply retroactively.

[3] This subsection provides:

> Substantially Anticompetitive Agreements — If, at any time after the filing or effective date of an agreement, the Commission determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, it may, after notice to the person filing the agreement, seek appropriate injunctive relief under subsection (h) of this section.

46 U.S.C. App. § 1705(g).

[4] A consortium agreement is a combined operation among ocean carriers that issues its own bills of lading and holds itself out in its own distinct operating name. Discussion agreements involve less structured cooperative working relationships. Other types of agreements can also be found in the maritime industry. Pooling agreements provide for the allocation of cargo carryings or revenue between the members in accordance with an established formula. Space charter agreements permit one carrier to lease space or equipment from another in exchange for specified compensation. The various types of agreements are

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The FMC's draft guidelines for the review of such agreements under section 6(g) identify factors to be considered and describe a general balancing approach.[5] Under the draft guidelines the FMC will first identify the relevant geographic market and then consider such factors as capacity, entry barriers, concentration, rate and service trends, and the type of agreement involved[6] in determining whether enforcement action is warranted.[7] Commenting on this proposal, another federal agency with antitrust jurisdiction, the Antitrust Division of the Department of Justice, suggested that the FMC statement include more specific substantive guidelines patterned after our agencies' Merger Guidelines.[8]

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[4](...continued)
reviewed in greater detail in the Report of the Advisory Commission on Conferences in Ocean Shipping, at 25-27 (April 1992) (hereinafter cited as "ACCOS Report").

[5] The FMC cites the Conference Report on the 1984 Act for the "nature of the section 6(g) standard and the appropriate analysis to be performed pursuant to it," 59 Fed. Reg. at 62,617, citing Conference Report to Accompany S.47, H.R. Rep. No. 600, 98th Cong., 2d Sess (1984) (hereinafter cited as "Conference Report").

[6] The inclusion of this factor on the list suggests that the FMC may believe some types of agreements, which may have different effects than others, call for closer scrutiny. Some possible reasons for such a distinction, such as the degree of integrating efficiencies, are discussed below.

[7] When reviewing agreements that are already in operation, the FMC would also consider information on their actual effects. Although such information is useful, we agree with the Department of Justice that competition analysis already permits a fair assessment of the likely competitive effects of agreements that are proposed but not yet implemented. See Comments of the United States Department of Justice at 15-17. Indeed, post-implementation evidence is subject to difficulties of its own, including the possibility that short-term conduct may be adjusted in anticipation of litigation.

[8] See U.S. Department of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines, 4 CCH Trade Reg. Rep. ¶ 13,104. The Merger Guidelines set out a methodology for defining the relevant market, identifying levels of concentration and market share, identifying likely competitive effects, and considering ease of entry and offsetting consumer
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We agree with the Justice Department that antitrust law, and the Merger Guidelines in particular, provide a well-developed analytical framework for assessing the competitive issues to be evaluated under section 6(g). In addition, we suggest that the antitrust case law applicable to joint ventures may be especially relevant in applying section 6(g). Both section 6(g) and the antitrust analysis of joint ventures involve balancing certain benefits of cooperative ventures against possible harms due to reduction in competition. For example, in the analysis of joint ventures under antitrust law's "rule of reason," procompetitive efficiency benefits — which are also cited as a relevant factor in the legislative history of section 6(g) — are balanced against possible anticompetitive consequences.

The legislative history of section 6(g) indicates that non-competition factors also must be taken into account by the FMC when assessing the permissibility of maritime agreements, and, as a consequence, that antitrust principles may not always be determinative. In this connection, we wish to point out that there may often be a middle ground between challenging the establishment of a shipping conference or other agreement and permitting it to operate without constraint. That is, the FMC may consider challenging ancillary anticompetitive provisions of maritime agreements. Where such action is appropriate, the antitrust analysis of agreements ancillary to joint ventures may provide a useful model.

Finally, we suggest that the FMC may wish to use this opportunity to clarify through the proposed guidelines that section 6(g) applies to "an unreasonable reduction in

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[8](...continued)
benefits as possible mitigating factors. This framework may be useful in assessing the factors that the FMC has identified as important under its own statute.

transportation service [below] or an unreasonable increase in transportation cost [above]" the level at which they would have been in the absence of the agreement. This would mean, for example, that agreements that prevented service increases or rate reductions that would have occurred absent the agreement could be challenged under section 6(g). The methods of competition analysis that have been developed by this agency and the Antitrust Division may provide a useful framework for such evaluations.

Antitrust and the joint venture cases provide useful guidance

Like the Department of Justice, we believe that antitrust analysis in general, and merger and joint venture analysis in particular, are relevant to the issues before the FMC. With only a few exceptions, the rule of reason analysis that is applied to joint ventures under the antitrust laws is analogous to the analysis described in the FMC's Request for Comment as appropriate to proceedings under section 6(g). Joint venture analysis under the antitrust laws involves weighing both the concern, expressed in the text of section 6(g), for preventing unreasonable reductions in competition, and also the concern, articulated in the Conference Report, for recognizing the efficiencies and other benefits to competition that may be attained through cooperative agreements. The antitrust analysis of joint ventures may provide useful precedent for proceedings under section 6(g).[9]

Section 6(g) requires the FMC to assess the competitive effects, either actual or predicted, of the agreements before it. The federal antitrust laws also are concerned with the

[9] Since the Antitrust Division has already described the Merger Guidelines analysis, we will not duplicate that discussion here.

competitive effects of agreements among firms. The Sherman Act[10] applies to agreements among competitors, the Clayton Act[11] applies to acquisitions of stock or assets of a competitor, and section 5 of the FTC Act[12] applies to unfair methods of competition.

Joint venture analysis under the antitrust laws seems particularly relevant to the balancing approach that is called for by section 6(g). Joint ventures are cooperative business enterprises, short of merger or acquisition, that involve integration of some business activities and a sharing of some business risks. Agreements that come before the FMC may be joint ventures. Joint ventures may bring about a mixture of beneficial and harmful effects on competition. For example, a particular joint venture may enable a new product to reach the market but may also eliminate preexisting competition between the participating firms. These factors must be weighed against each other to assess the venture's net competitive effect.

This balancing is carried out, in the typical antitrust case, through the "rule of reason." The rule of reason recognizes that many forms of lawful business conduct restrain trade in some way. A supply contract, for example, may take away the parties' ability to deal elsewhere for a certain period. On its face the Sherman Act forbids every "contract, combination ... or conspiracy, in restraint of trade." From a very early date, however, the courts recognized that this language could not be applied literally. The Supreme Court instead held that the Sherman Act was intended to reach only those agreements that unreasonably

[10] 15 U.S.C. § 1.

[11] 15 U.S.C. § 18.

[12] 15 U.S.C. § 45.

restrict competition.[13] "Reasonableness" in this context is determined through an assessment of the agreement's net effects:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[14]

Thus the rule of reason contemplates a broad inquiry into an agreement's likely effects on competition, including its effects on price and output.

Section 6(g) appears to contemplate an FMC inquiry with quite similar methods and aims. Like a court applying the rule of reason, and relying on the same key concept of "reasonableness," the FMC is to determine whether an agreement is likely to produce "an unreasonable reduction in transportation service or an unreasonable increase in transportation cost." The Conference Report on section 6(g) makes clear that this inquiry involves a weighing of the agreement's costs and benefits:

[13] See Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911) (Act bars only agreements "which were unreasonably restrictive of competitive conditions"). The Court subsequently noted that any other analysis would be unworkable: "Every agreement concerning trade, every regulation of trade, restrains." Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[14] Chicago Board of Trade v. United States, 246 U.S. at 238. Subsequent cases have made clear that rule of reason analysis does not encompass all possible arguments, however, but rather only those that bear on the agreement's competitive effects — that is, whether the agreement "is one that promotes competition or one that suppresses competition." National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 691 (1978).

> [An] aspect of the unreasonableness requirement is that the negative impact upon shippers may be offset by the benefits of an agreement. For example, the competitive harm ensuing from conferences, already diminished by the statutory limitations on conference activity, can and often will be offset by the significant benefits of such activity.[15]

On other occasions, of course, an agreement might not produce sufficient offsetting benefits. In any event, that is a judgment that the FMC is charged with making in each case.

A number of factors are considered in applying a rule of reason analysis to joint ventures under the antitrust laws. The combined market share of the co-venturing parties is highly relevant;[16] however, we agree with the Justice Department that market share alone is not conclusive.[17] Rather, if concentration data preliminarily indicate that the joint venture may have market power, then further examination may be appropriate. The analysis would then turn to such other relevant considerations as whether the venture permits or eliminates significant competition between the parties, such as in pricing and marketing the jointly-

[15] Conference Report at 35.

[16] See, e.g., United States v. Ivaco, Inc., 704 F. Supp. 1409 (W.D. Mich. 1989).

[17] See Horizontal Merger Guidelines, supra n. 8; see also Conference Report at 34 (market share analysis "is only one factor in the Commission's decision calculus").

produced product,[18] and whether the venture eliminates a potential entrant that might otherwise have brought new competition to a highly concentrated market.[19]

An important factor in assessing a joint venture has been whether it involves a substantial, efficiency-enhancing integration of the firms' business conduct. Bona fide integrated joint ventures have been upheld in several well-known cases. In the BMI case,[20] for example, some forty thousand individual composers granted centralized agencies the non-exclusive rights to sell blanket licences to their musical compositions.[21] The Supreme Court was persuaded that, although the blanket licensing eliminated price competition among individual composers, it may have been the only practical way of licensing large selections of works to large consumers of music, such as radio stations. The Court found that the arrangement was "not a 'naked restrain[t] of trade with no purpose except stifling of competition,' but rather accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use."[22] The Court therefore found that the arrangement as so structured might be

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[18] See General Motors Corp., 103 F.T.C. 374 (1984) (the "GM/Toyota" matter). The parties' ability to compete independently with respect to marketing is a factor counting in favor of a venture. An analogous judgment is found in the 1984 Shipping Act, which requires that conference members retain a right of independent action; this provision diminishes to some extent any anticompetitive effects that a conference might create.

[19] See Brunswick Corp., 94 F.T.C. 1174, 1274 (1979), aff'd in part and modified in part sub nom. Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982).

[20] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 20-23 (1979).

[21] The fact that the rights were non-exclusive meant that the composers here, like the co-venturers in GM/Toyota, supra n. 18, had not surrendered all ability to compete individually.

[22] 441 U.S. at 20, quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

permissible under the rule of reason: "Joint ventures and other cooperative arrangements are ... not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all."[23]

In GM/Toyota, the Federal Trade Commission accepted a consent order involving a joint venture for the production of automobiles.[24] The project involved the first and fourth largest automobile companies in the United States and Canada. The then-Chairman of the FTC believed that the joint venture offered several beneficial efficiencies: it would make available a lower-cost production facility, it would increase the total number of small cars available to U.S. consumers at a time when Japanese imports were restricted, and it would be an opportunity for GM to learn Japanese manufacturing techniques.[25] The FTC's order allowed the venture to go forward as the parties had planned, but subject to restrictions on its scope and duration and on the exchange of competitively sensitive information among the parties and the joint venture, to safeguard against anticompetitive effects.[26] The order was

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[23] 441 U.S. at 23.

[24] The Commission did not issue an opinion with the original consent order. General Motors Corp., 103 F.T.C. 374 (1984). The Commissioners issued individual statements explaining their reasons for their actions.

[25] 103 F.T.C. at 387-88 (statement of Chairman Miller); see also id. at 398 (statement of Commissioner Douglas); cf. id. at 399 (statement of Commissioner Calvani) (expressing belief in "substantial procompetitive benefits" although not enumerating them).

[26] For example, the consent order barred the firms from discussing, either with each other or with the joint venture, final prices or marketing plans for the automobiles produced by the venture.

subsequently reopened and vacated on grounds of changed conditions.[27] The market had become less concentrated, new entry and expansion had occurred, GM had developed its own new line of small cars independent of the joint venture, and some of the order limitations were found to have impeded legitimate activity. The Commission concluded that there was no continuing need for restrictions on the scope and duration of the venture and that continuing the restrictions might hinder the venture's ability to respond to consumer demand.

Not all aspects of a joint venture are necessarily permissible merely because some aspects involve bona fide efficiencies. That was the teaching of the NCAA case.[28] This case involved the National Collegiate Athletic Association's regulation of college football, and, in particular, its regulations fixing the number of times that individual schools' games could be telecast during the season and indirectly controlling the prices at which the broadcast rights for those games could be sold. The Supreme Court began by observing that the NCAA itself represented a legitimate joint venture. College football could be produced only by agreeing on common rules, eligibility requirements, and so forth, and the agreements on these terms, like the agreement in BMI, was thus justified as necessary in order to bring out the product in the first place.[29] The specific television restrictions, on the other hand, could not be so justified. The Court concluded that television rights could be sold just as effectively without the NCAA

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[27] See Order Granting Petition To Reopen and Set Aside Order, Dkt. C-3132 (Oct. 29, 1993).

[28] NCAA v. Board of Regents, 468 U.S. 85 (1984).

[29] 468 U.S. at 101-03.

broadcast restriction and, indeed, that "many more" games would be televised in a free market.[30] The NCAA rules were found to be output-restricting rather than output-enhancing.[31]

As cases such as NCAA indicate, when joint ventures incorporate ancillary restraints on price or output, antitrust principles may permit those restraints only to the extent that they are reasonably related to the joint venture and are no broader than necessary to make the venture work.[32] Thus, in BMI, the price uniformity implicit in blanket licenses was necessary if such licenses were to be offered at all, and so the ancillary price restraint was reasonable. In the General Leaseways case,[33] by contrast, the court found a valid joint venture among small truck-leasing firms, but also found that the location clause in their agreement tended to impede competition among the venture's members and was not necessary to the operation of the venture, and so the court enjoined enforcement of that clause.

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[30] Id. at 119.

[31] Id. at 120.

[32] See Brunswick Corp., 94 F.T.C. 1174, 1275 ("such agreements, to be legitimately ancillary to a joint venture, must be limited to those inevitably arising out of dealings between partners, or necessary (and of no broader scope than necessary) to make the joint venture work"), aff'd in part and modified in part sub nom. Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982). Cf. IV P. Areeda & D. Turner, Antitrust Law ¶ 947b (1980) (ancillary agreements "must be shown to be 'reasonably necessary' to the efficient functioning of the venture"). See also Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 224 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987).

[33] General Leaseways v. National Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984).

These precedents may be directly relevant to the FMC. Section 6(g) also seems to contemplate a consideration of efficiencies and an inquiry into whether those could be achieved by some less restrictive[34] means:

> In assessing the benefits of any of these agreements, however, the Commission need not wear blinders. If, in applying its expertise, the Commission establishes that reasonable and commercially proven alternative arrangements will provide most or all of the essential benefits without the same anticompetitive impact, it may weigh this fact in its decision calculus.[35]

In a similar vein the conferees noted that section 6(g) "grants to the Commission the necessary authority to act to stop schemes that go beyond what is necessary to obtain such benefits and cause substantial anticompetitive effects."[36]

The FMC could also examine the subsidiary details of an inter-carrier agreement, even if the agreement as a whole is accepted, since ancillary agreements may cause "an unreasonable reduction in transportation service or an unreasonable increase in transportation cost." In this respect the FMC's analysis would be analogous to that of an antitrust agency considering an agreement ancillary to a joint venture. Indeed, the 1984 Act already provides that certain types of ancillary clauses are forbidden. For example, the statute bans the use of predatory practices

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[34] The 1984 Shipping Act and the antitrust laws are essentially similar in their treatment of this factor. Although both look to see if less restrictive alternatives are available, neither insists that the parties to an agreement rigorously prove that their approach is the single least restrictive option. The legislative history of the Shipping Act, for example, directs the FMC to consider only those less restrictive alternatives that are known and proven, and it specifically notes that the parties are not required to show that a particular restraint was the least restrictive one possible. See Conference Report at 36. In these respects the current law may be somewhat different from that which had prevailed under FMC v. Svenska Amerika Linien, 390 U.S. 238 (1968).

[35] Conference Report at 36.

[36] Conference Report at 33.

and the allocation of shippers among specific carriers.[37] The FMC could ban other agreement terms, not listed in the statute, if they appear unduly anticompetitive after a similar analysis. The Conference Report notes that the "flexible standard [in section 6(g)] permits the Commission to seek an injunction even when an agreement would not violate any of the prohibited acts set forth elsewhere in the bill."[38] The terms that the FMC can challenge may have been expressed as ancillary parts of the basic agreement, or as collateral and formally separate agreements.

Provisions that may limit or burden an individual carrier's ability to take independent action may be worth examination. The right of independent action permits individual members of the conference to depart from the common pricing and offer their own rate or service, on a particular product, with notice to the conference.[39] To the extent that the exercise of that right is inhibited, competition may be deterred. In this context, capacity-limitation agreements or "capacity management programs" may warrant particular examination. These programs typically involve agreements by carriers to leave a certain percentage of their vessel carrying capacity unfilled. By eliminating a certain measure of

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[37] See 1984 Shipping Act § 10(c), 46 U.S.C. App. § 1709(c).

[38] Conference Report at 31.

[39] Provisions allowing the participants in a joint venture to take action independent of the venture have been deemed important to maintaining competition in a number of antitrust cases. See BMI, 441 U.S. at 23-24 (individual composers still retained power to market their works independently); GM/Toyota, 103 F.T.C. at 384 (parties required to develop separate pricing and marketing plans). See also National Bancard Corp. v. VISA USA, Inc., 596 F. Supp. 1231, 1254-55 (S.D. Fla. 1984), aff'd, 779 F.2d 592 (11th Cir.), cert. denied, 479 U.S. 923 (1986); Stratmore v. Goodbody, 866 F.2d 189, 193 (6th Cir.), cert. denied, 490 U.S. 1066 (1989).

useable excess capacity, the agreements may reduce the carrier's ability to respond to any increase in demand that its independent action might generate.

Thus, in short, the antitrust analysis of joint ventures in general, and of ancillary restraints in particular, appears relevant to the FMC's application of the competition standards in section 6(g).

If the FMC wishes to formally incorporate some of the techniques of antitrust joint venture analysis into its own analysis, it might wish to indicate this by adding the following items to the list of factors to be considered in Paragraph B of the draft guidelines section on Pre-implementation Review: "the degree of efficiency-enhancing integration that is achieved through the agreement," and "whether such efficiencies could be achieved through other, known and proven, less restrictive means." If the FMC wishes to specifically consider the competitive effects of ancillary and collateral agreements, it might also include the following sentence at an appropriate point in the guidelines: "The FMC may examine both the effects of an agreement as a whole and the effects of particular terms or collateral agreements."

<u>The special aspects of the 1984 Shipping Act<br>do not preclude a central role for antitrust principles</u>

We recognize that the 1984 Shipping Act differs in some respects from the antitrust laws. Those differences do not appear so great, however, as to preclude a central role for antitrust principles.[40]

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[40] One of these principles is concern for the welfare of consumers. That principle is echoed in the Conference Report, which expresses an intent that section 6(g) should serve "the long-

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As the FMC reviews the competitive effects of maritime agreements, Congress has expressed an intention that it should count as benefits to the industry some factors that would not necessarily be considered under antitrust law. Most notably, Congress has identified "severe rate instability" and "overcapacity" as serious problems for the industry,[41] and has indicated that measures to address these problems will "serve the long-term interests of ocean carriers and shippers."[42] In this respect section 6(g) is different from the Sherman Act, which would normally expect competition — not competitor agreements — to deal with both rate instability and overcapacity.[43] As a result, the interest-balancing analyses performed by the FMC may differ in some of their particulars from those done under the antitrust statutes.

Given the importance of competition in the economy and its benefits to consumers, however, we suggest that the FMC apply antitrust considerations in its analysis to the full extent that the statute permits.

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[40](...continued)
term interests of ... shippers," that is, of the consumers of transportation services, as well as of carriers.

[41] Conference Report at 33.

[42] Conference Report at 33.

[43] See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (Sherman Act case) (non-integrating horizontal combination was unlawful even if it merely "stabilized" market prices).

<u>Section 6(g) should be construed to reach conduct that prevents decreases in rates, as well as conduct that causes increases</u>

The FMC may wish to consider whether the guidelines should state that section 6(g) applies to agreements that prevent rates from dropping, as well as those that cause rates to rise, and to agreements that prevent service from improving as well as those that cause service to deteriorate. An agreement to stabilize prices (or terms of service), like an agreement to raise prices (or reduce service), would result in prices that are above competitive levels (or service that is below competitive levels).

This construction would seem to be consistent with the purpose of the statute to address unreasonable reductions in competition adversely affecting price or service and to permit the agency to assess all the competitive effects of maritime agreements.[44] It might also best apply the letter of the statute, since it essentially involves no more than defining the most relevant baseline from which an unreasonable "increase" in cost or "reduction" in service is to be measured. In the context of section 6(g), these terms seem best understood as referring to changes from the level that would have existed without the agreement.

Some of these issues may be presented, for example, by capacity-management programs, under which the carriers in a particular trade withdraw a certain percentage of their capacity from the market. Although such agreements may not have reduced capacity to a point that

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[44] The congressional concern about overcapacity and rate instability, although certainly relevant in this context, would not seem to bar such an inquiry. That concern may well have been a limited one, focusing on the rapid and unpredictable fluctuations in rates to which shipping has historically been subject, <u>see</u> ACCOS Report at 6, 69-70, rather than reflecting a desire to stand in the way of long-term changes in rates and service reflecting new economic conditions.

has caused rates to rise,[45] they may tend to support rates above competitive levels. The FMC may wish to resolve any uncertainty about the relevance of this factor by declaring that section 6(g) permits consideration of either type of effect on rates.

To make this point explicit, the FMC may wish to amend the first sentence in Paragraph B of the guidelines on Post-Implementation Agreement Monitoring to refer to a reduction in competition "that has increased transportation costs above the level that would otherwise have prevailed or has decreased transportation service below the level that would otherwise have prevailed ... ."

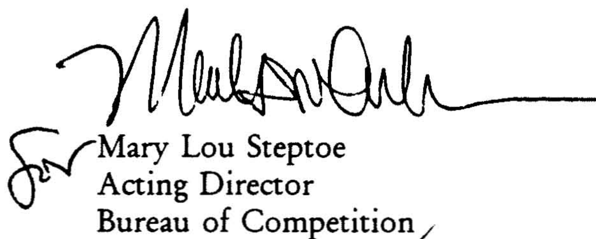
Conclusion

We suggest that the FMC might wish to consider: (1) the relevance of antitrust law in general and merger and joint venture law in particular to the assessment of competitive effects under section 6(g); (2) the possibility that ancillary agreements could be challenged under section 6(g) even for overall agreements that are permissible; and (3) the possibility of expressly announcing that section 6(g) will apply to agreements that tend to prevent rate reductions or service improvements.

[45] This conclusion was stated in the Federal Register notice requesting the current comments. See 58 Fed. Reg. at 62619 n.7 (1993).

We appreciate the opportunity to present these comments, and we hope you find them useful.

Yours truly,



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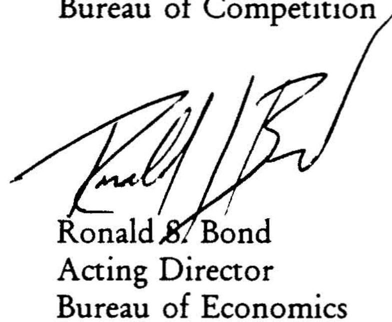

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