



Suite 1437
55 East Monroe Street
Chicago, Illinois 60603
(312) 353-8156

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
CHICAGO REGIONAL OFFICE

June 28, 1990

COMMISSION AUTHORIZED

Mr. Glen McKay
Assistant Director
Division of State Audit
Tennessee Comptroller of the Treasury
Suite 1500
James K. Polk State Office Building
Nashville, Tennessee 37243-0264

Dear Mr. McKay:

The staff of the Federal Trade Commission's Chicago Regional Office and Bureau of Economics are pleased to have this opportunity to respond to your request for comments regarding the statutes, rules and regulations of the Motor Carrier Division of the Public Service Commission.¹ In general, we believe that relaxing economic regulation of trucking would benefit consumers and competition by increasing choices, improving service and reducing prices for the transportation of goods.

I. INTEREST AND EXPERIENCE OF THE STAFF OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission ("FTC") is an independent federal agency charged with enforcing Section 5 of the Federal Trade Commission Act.² Section 5 prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.³ In fulfilling the FTC's mandate to enforce the consumer protection and antitrust laws of the United States, the staff of the FTC often submits comments, upon request, to federal, state, and local governmental bodies to help them assess the implications for competition and consumers of pending policy issues. In enforcing the FTC Act, the staff of the FTC has gained substantial experience in analyzing the impact of both private and governmental trade restraints and their effects on consumers and competition.

¹ These comments are the views of the staff of the Chicago Regional Office and Bureau of Economics of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

² See 15 U.S.C. §§ 41-58.

³ 15 U.S.C. § 45.

Mr. Glen McKay

Page 2

The staff of the FTC has studied the deregulation of trucking and the benefits resulting from an increased reliance on market forces at both the federal⁴ and state⁵ levels. In addition, the Bureau of Economics of the FTC has published a report on trucking deregulation.⁶ The Bureau of Economics has published additional studies concerning the effects of regulating

⁴ See Comments of the staff of the FTC on Pricing Practices of Motor Common Carriers of Property Since the Motor Carrier Act of 1980, Ex Parte No. MC-166, before the Interstate Commerce Commission (January 1983); Supplementary Comments of the Bureaus of Competition, Consumer Protection and Economics of the FTC on the Exemption of Motor Contract Carriers from Tariff Filing Requirements, Ex Parte No. MC-165, before the Interstate Commerce Commission (1983); D. Breen, Bureau of Economics, FTC, Regulatory Reform and the Trucking Industry: An Evaluation of the Motor Carrier Act of 1980, submitted to the Motor Carrier Ratemaking Study Commission (March 1982).

⁵ See letter from Thomas B. Carter, Director, Dallas Regional Office, FTC, to Raymond A. Bennett, Director, Transportation/Gas Utilities Division, Railroad Commission of Texas (October 2, 1989); letter from Thomas B. Carter, Director, Dallas Regional Office, FTC, to the Honorable Hugh D. Shine, Texas House of Representatives, concerning tow truck regulation (April 18, 1989); testimony of James A. Langenfeld, Deputy Director for Antitrust, Bureau of Economics, FTC, before the Public Utilities Commission of California, concerning the impact of deregulation on the trucking industry (October 27, 1988); letter from John Mendenhall, Acting Director, Cleveland Regional Office, FTC, to the Honorable Frank Sawyer, Ohio House of Representatives, concerning contract carrier motor freight rates (February 16, 1988); letter from Janet Grady, Director, San Francisco Regional Office, FTC, to the Honorable Rebecca Morgan, California Senate, on legislation to repeal the Public Utility Commission's authority to set contract motor carrier freight rates (December 31, 1987); Comments of the staff of the FTC to the Legislative Audit Council of South Carolina on possible restrictive or anticompetitive practices in South Carolina's Public Service Commission statutes (September 29, 1987); Statement of the staff of the FTC on economic deregulation of trucking to the House and Senate Transportation Committees, Washington State Legislature (March 7, 1985).

⁶ Diane S. Owen, Deregulation in the Trucking Industry, FTC Bureau of Economics Staff Report (May 1988).

the entry of competitors into other industries.⁷ Recently, the FTC ruled that a regional multistate trucking rate bureau violated the antitrust laws by fixing the rates of its members.⁸ These activities regarding trucking regulation and competition policy generally have provided the staff of the FTC with experience in analyzing the potential effects of trucking deregulation.

II. TRUCKING DEREGULATION

A. ARGUMENTS ADVANCED IN SUPPORT OF REGULATION

Trucking regulation, including legal restraints on motor carrier rates, originally was partially intended to help protect the regulated railroads from competition from the then-unregulated, and expanding, trucking industry. It also was designed, in part, to support the trucking industry by restricting competition during the depression of the 1930's.⁹

In our experience, those who support continued rate-setting and other regulation of motor carriers usually advance four major arguments. They argue that regulation will prevent predatory pricing, forestall destructive competition, maintain safety, and ensure service to small communities. As discussed below, however, a number of empirical studies have concluded that none of these rationales supports the contention that continued regulation of common motor carriers is either necessary or desirable.¹⁰

⁷ See, e.g., A. Mathios & R. Rogers, The Impact of State Price and Entry Regulation on Intrastate Long Distance Telephone Rates, FTC Bureau of Economics Staff Report (November 1988); R. Rogers, The Effect of State Entry Regulation on Retail Automobile Markets, FTC Bureau of Economics Staff Report (January 1986).

⁸ New England Motor Rate Bureau, Inc., FTC Docket 9170, 5 Trade Reg. Rep. (CCH) ¶ 22,722 (August 18, 1989), appealed, No. 89-1963 (1st Cir. argued March 6, 1990).

⁹ Nelson, "The Changing Economic Case for Surface Transport Regulation," in Perspectives on Federal Transportation Policy (James C. Miller III, ed. 1975).

¹⁰ These arguments have been discussed and dismissed in a number of studies. See generally Weinstein & Gross, Transportation and Economic Development: The Case for Reform of Trucking Regulation in Texas, Center for Enterprising, Southern Methodist University (Feb. 1987); Breen, supra note 4; Diane S. Owen, supra note 6.

1. Predatory pricing

A common argument advanced in support of rate regulation is that such regulation will prevent predatory pricing. The principal thrust of this argument is that larger, better financed companies will attempt to drive out competitors by selling trucking services below their average variable costs. The surviving firms will then raise their prices above the competitive level, eventually recouping their losses and increasing their profits.

This argument is usually applied to industries with high entry barriers and high sunk costs. The trucking industry comprises two distinct segments. One involves shipments of 10,000 pounds or more (truckload, or TL, shipments), and the other involves shipments of less than 10,000 pounds (less-than-truckload, or LTL shipments). Truckload shipments usually go from shipper to consignee without intermediate handling; the truck itself is the only equipment needed. Because trucks are highly mobile and can be transferred quickly, sunk costs are probably minimal in the TL segment.¹¹ Although LTL shipments often are transported to break-bulk facilities before reaching their destinations, any sunk capital costs associated with warehousing can be reduced significantly by leasing, rather than owning, terminal facilities.

If a predator tried to raise its prices to noncompetitive levels, other firms should enter or re-enter the market, taking business away from the predator and forcing prices back to competitive levels. Predatory pricing is therefore unlikely to succeed. Since predation is unlikely to be profitable or successful, motor carriers are not likely to attempt it. In 1987, the General Accounting Office joined the Interstate Commerce Commission, the Motor Carrier Ratemaking Study Commission, and the Department of Justice in concluding that predation is unlikely to occur as a consequence of trucking deregulation.¹² The Supreme Court has stated that "predatory

¹¹ T.E. Keeler, "Deregulation and Scale Economies in the U.S. Trucking Industry: An Econometric Extension of the Survivor Principle," 32 J. of Law and Econ. 229, 250 (1989).

¹² United States General Accounting Office, Trucking Regulation: Price Competition and Market Structure in the Trucking Industry, pp. 8-10 (Feb. 1987). The positions of the ICC, MCRSC, and DOJ are discussed in the GAO report.

Although it has been argued that the LTL segment of the trucking industry has high entry barriers and high sunk costs,

(continued...)

pricing schemes are rarely tried, and even more rarely successful."¹³

For these reasons, predatory pricing in the trucking industry appears to be little more than a theoretical possibility.¹⁴ In any event, firms that attempt to engage in predatory pricing would also be subject to public and private antitrust enforcement actions.

2. DESTRUCTIVE COMPETITION

Proponents of trucking regulation also argue that deregulation of motor carriage rates will lead to "destructive competition." Destructive competition may occur in industries characterized by fluctuating demand, relatively high sunk costs, and a high ratio of fixed to total costs. These conditions are likely to create excess capacity and considerable pressure to cut prices when demand falls. If price competition exists, prices may persist below the total cost of providing services because the sunk nature of costs makes capacity adjustments difficult. Firms facing such losses may, as a result, try to reduce costs by skimping on service, to the detriment of customers.

Conditions conducive for destructive competition are not likely to exist in the trucking industry. Fixed costs comprise only a small percentage of total costs, which include such

¹²(...continued)

the GAO report concluded that entry barriers in LTL trucking, the most significant of which include sunk costs involved in providing terminals, financial capital requirements for effective entry, and impediments to entry imposed by state regulation, are only "moderate." at p. 18; Diane S. Owen, supra note 6, at 13.

¹³ Matshushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, at 589-590 (1986), citing R. Bork, *The Antitrust Paradox*, 149-56 (1978); Areeda & Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 Harv. L. Rev. 697, 699 (1975); Easterbrook, "Predatory Strategies and Counterstrategies," 48 U. Chi. L. Rev. 263, 268 (1981); Koller, "The Myth of Predatory Pricing -- An Empirical Study," 4 Antitrust L. & Econ. Rev. 105 (1971); McGee, "Predatory Price Cutting: The Standard Oil (N.J.) Case," 1 J. L. & Econ. 137 (1958); McGee, "Predatory Pricing Revisited," 23 J. L. & Econ. 289, 292-94 (1980).

¹⁴ For a review of the modern theoretical literature on predatory pricing, see J. Tirole, *The Theory of Industrial Organization*, Cambridge: MIT Press (1988) chs. 8 & 9.

variable costs as labor and fuel expenses. Trucks are highly mobile assets, suggesting that they may be transferred readily and easily from less profitable to more profitable geographic markets in response to fluctuations in demand, or sold or leased to other operators. Therefore, destructive competition in the trucking industry seems unlikely.¹⁵

3. SAFETY

Another argument that has been advanced is that deregulation will have an adverse effect on safety in the trucking industry, because carriers facing stiff competition in rates or service will neglect maintenance, delay replacement of vehicles, and overwork drivers. Although opponents of deregulation have cited statistics showing an increase in the average age of trucks on the road and a greater frequency in reported accidents involving truckers, other studies have shown that safety has not been compromised following deregulation.¹⁶ For example, a study of truck safety in California was "unable to prove the hypothesis that CPUC [California Public Utilities Commission] economic regulation of trucking is significantly and positively linked to improved highway safety."¹⁷ In any case, reduced safety is not a necessary consequence of price and entry deregulation; nor do regulated motor carriage rates ensure that profits will be spent to ensure safe truck operations. Directly addressing a state's legitimate safety concerns, through vigorous enforcement of safety regulations, may be more effective in promoting safety than indirectly addressing those concerns through economic regulation.¹⁸

4. PRESERVING SERVICE TO SMALL COMMUNITIES

Some proponents of trucking regulation have argued that deregulation will result in loss of service to smaller communities, because motor carriers will find it unprofitable to serve

¹⁵ See A. Kahn III, 2 Economics of Regulation 178 (1971), in which the author states, "[D]oes trucking have the economic attributes of an industry subject to destructive competition? It would be difficult to find one less qualified."

¹⁶ Diane S. Owen, supra note 6, at 18-21; Weinstein & Gross, supra note 10, at 50-51.

¹⁷ California Public Utilities Commission & California Highway Patrol, AB 2678 Final Report on Truck Safety, Joint Legislative Report, 3 (Nov. 1987).

¹⁸ See also infra note 61.

small markets unless they are guaranteed a fair return on investment. Studies of the effect of trucking deregulation at the federal and state levels, however, have not revealed any significant deterioration in service to small communities.

A series of surveys conducted between 1980 and 1985 by the U.S. Department of Transportation found that a large majority of shippers in rural areas reported either no change or an improvement in the quality of service after partial deregulation of interstate trucking by the Motor Carrier Act of 1980.¹⁹ These findings are consistent with those of a 1982 Interstate Commerce Commission study, which found that federal deregulation had resulted in lower prices, less damage, and often more service options for shippers in small communities.²⁰ Similarly, in a survey following deregulation of intrastate trucking in Florida, 65 per cent of respondents in small communities expressed a preference for deregulation, with 30 per cent expressing no preference.²¹ A study of the Texas trucking market concluded that small Texas communities would not lose service in a deregulated environment because common carriers have found such service to be profitable.²²

B. BENEFITS OF DEREGULATION

A number of states have already deregulated intrastate rates as well as eased entry restrictions into the intrastate trucking industry. The experiences of these states attest to the benefits to consumers and competition produced by trucking deregulation.

¹⁹ Pub. L. No. 96-296, 94 Stat. 793 (1980). See U.S. Dept. Transp., Third Follow-Up Study of Shipper-Receiver Mode Choice in Selected Rural Communities, 1982-3 (1986); U.S. Dept. Transp., Fourth Follow-Up Study of Shipper-Receiver Mode Choice in Selected Rural Communities, 1984-5 (1986).

²⁰ Interstate Commerce Comm., Small Community Service Study (1982).

²¹ Beilock & Freeman, "Motor Carrier Deregulation in Florida," 14 Growth and Change 31-41 (1983).

²² Pustay, "Interstate Motor Carrier Regulation in Texas," The Logistics and Transportation Review, vol. 19, no. 2 (1984), quoted in Weinstein & Gross, supra note 10, at 49. Noting individual entry petitions for common carrier operating authority, as well as a resale market for existing authority, the study found that these indications of willingness to serve small communities suggested that carriers would provide the service voluntarily, "even in the absence of regulation."

California, for example, experimented with partial economic deregulation of trucking from 1980 to 1986. During that time entry was virtually free, and rates, though regulated, were flexible.²³ The result was lower rates with no loss in service.²⁴

A study of trucking in New Jersey concluded that deregulation worked well in that state.²⁵ According to a study by W. Bruce Allen, shippers were satisfied with the available service, rates were about ten percent lower than they would have been under regulation, and intrastate carriers have prospered.²⁶

Florida trucking was deregulated so quickly that truckers and shippers had no opportunity to prepare for it. Nonetheless, according to one study, a year after deregulation, 88 percent of shippers, as well as 49 percent of truckers, supported it. Most shippers thought that service levels remained constant and that rate fluctuations had posed no difficulties. Only a few shippers converted to private carriage;²⁷ many more such shippers' conversions might have been expected if "destructive competition" had resulted in a large reduction in the number of truckers.²⁸ Likewise, a 1982 U.S. Department of Transportation

²³ Carriers were permitted to change rates, after a short waiting period, without having to show the change was cost-justified. There was no waiting period to match a competitor's rate.

²⁴ Simmerson, "Analysis of The Impact of Deregulation of the General Freight Trucking Industry," Investigation No. 84-05-048, California Public Utilities Commission, 20-21 (Aug. 10, 1984) (based upon survey by CPUC of 239 general freight carriers and survey by California State University, Hayward, Institute of Research & Business Development of 596 shippers.)

²⁵ Allen, Lonergon & Plane, Examination of the Unregulated Trucking Experience in New Jersey, U.S. Dept. of Transportation (July 1979).

²⁶ Allen, Statement Before the National Commission for the Review of Anti-Trust Laws and Procedures (January 22, 1979).

²⁷ Private carriage refers to those situations where the motor carrier is owned by the shipper.

²⁸ Freeman, "A Survey of Motor Carrier Deregulation in Florida: One Year's Experience," ICC Practitioners Journal, at 51 (Nov.-Dec. 1982).

study²⁹ found that 90 percent of Florida shippers believed that post-deregulation service was at least as good as service before deregulation and 30 percent reported improvements. A majority of these shippers (58 percent) perceived that deregulation had held down rates. Finally, economists Blair, Kaserman, and McClave found that Florida's deregulation of intrastate trucking led to a 15 percent average reduction in motor carrier rates.³⁰

The experience of other states is consistent with that of California, New Jersey and Florida. For example, in Wisconsin, 67 per cent of shippers were satisfied with deregulation and only six per cent were dissatisfied. Seventy-three per cent said that rate information was as readily available after deregulation as before. Carriers were evenly divided on the question of deregulation. Those with increased profits tended to favor deregulation, while some of those opposing deregulation were concerned about the loss of the asset value of their certificates of convenience and necessity.³¹

In Maryland, intrastate household goods movers were not regulated. A study conducted in that state in 1973-1974 revealed that the then-regulated interstate household goods carriers charged 27 per cent to 67 per cent more than unregulated intrastate carriers for comparable moves.³²

Oregon deregulated the shipping of certain building materials in 1980. The results of this action were examined in two separate surveys by the Legislative Research Office of the Oregon Legislature.³³ All parties surveyed agreed that deregulation increased the number of carriers in the market. According to one survey, almost all shippers and most of the truckers with prior authority to carry these products believed

²⁹ Statement of Matthew V. Scocozza, Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, Before the Subcommittee on Surface Transportation, U.S. House of Representatives (June 20, 1984).

³⁰ Blair, Kaserman & McClave, "Motor Carrier Deregulation: The Florida Experiment," 68 Rev. Econ. & Stat. 159 (1986).

³¹ Wisconsin Office of the Commissioner of Transportation, Deregulation of Wisconsin Motor Carriers (July 1983).

³² Breen, "Regulation and Household Moving Costs," Regulation, 53 (Sept.-Oct. 1978).

³³ Unpublished surveys conducted by the Oregon State Legislature's Legislative Research Office (1984).

that trucking rates had decreased. None of the groups surveyed believed that general rate levels had increased as a result of deregulation.

The deregulation of intrastate trucking appears not to have had the adverse impact on competition or consumers that had been predicted by many critics of deregulation. In fact, deregulation has been beneficial both to the industry and to consumers.³⁴ In light of these experiences, you may wish to consider whether Tennessee consumers might benefit from the adoption of similar measures.

III. TENNESSEE REGULATION OF MOTOR CARRIERS

The Tennessee Public Service Commission ("PSC") is granted the power and authority to promote and conserve the public interest and convenience and is charged with the duty to regulate and supervise motor vehicle transportation over the state highways.³⁵ The statutory scheme and PSC regulations may harm consumers, however, by restricting the entry of firms into motor carrier transportation, by providing a mechanism through which existing carriers can impede the entry of new carriers, and by restraining rate flexibility.

A. MARKET ENTRY RESTRICTIONS

1. MOTOR COMMON CARRIERS

A motor carrier is required to obtain a certificate of public convenience and necessity to operate as a common motor carrier in Tennessee. The statute enumerates various factors that the PSC must consider in determining whether a certificate

³⁴ A recent study of federal deregulation of surface freight transportation (trucking and railroads) estimated that deregulation benefits shippers, and ultimately consumers, approximately \$20 billion annually through reduced rates and improved service. The net welfare gain to the economy as a whole is somewhat less - \$16 billion annually - because deregulation reduces the profits of some carriers and reduces the wages of some workers. Still, the overwhelming conclusion is that deregulation provides substantial, ongoing benefits. See, Winston, Corsi, Grimm, and Evans, *The Economic Effects of Surface Freight Deregulation*, Washington: The Brookings Institution (1990).

³⁵ Tenn. Code Ann. § 65-15-101.

should be issued.³⁶ The statute also provides that a hearing be held prior to issuing the certificate, during which interested parties may provide testimony for or against issuing the certificate. Carriers already operating in the territory proposed to be served by the applicant are designated by statute as interested parties.

The provisions relating to certificates of public necessity and convenience may impede competitive entry in two ways. First, the statutory factors that the PSC is required to consider may be overly broad and therefore may make obtaining certificates unduly burdensome to potential new entrants. For example, the statute requires that the PSC consider the public demand or need for the proposed service and the effect the proposed service may have on existing transportation service. In an unregulated market, public demand or need for a particular service is shown through consumers' willingness to pay for the service, and producers are

³⁶ Tenn. Code Ann. § 65-15-107. Certificates of convenience and necessity -- Interstate permits. No motor carrier can lawfully "operate or furnish service as a common carrier between points within this state without"... a certificate "declaring that public convenience and necessity will be promoted by such operation." In determining whether certificates should be issued, the PSC is required to consider eight factors:

- [1] "the transportation service being furnished by any railroad, street railroad or motor carrier on the route or in the territory in which the applicant proposes to operate,
- [2] the service to be rendered and/or capable of being rendered by the applicant,
- [3] the financial condition and character of the applicant,
- [4] the character of the highways over which said applicant proposes to operate and the effect thereon and upon the traveling public using said highways,
- [5] the public demand or need for the service proposed,
- [6] the likelihood of the proposed service being permanent and continuous,
- [7] the effect which such proposed service may have upon other transportation service being rendered,
- [8] and all other pertinent facts."

rewarded with higher sales and greater profits when they meet these needs efficiently. The statutory scheme requires the PSC to substitute its judgment on public demand or need for a decision that can be made through the competitive marketplace.³⁷ Likewise, the statute requires that the PSC substitute its judgment for that of the marketplace with respect to which service or bundle of services consumers wish to purchase. Relaxing these provisions would likely make the market for transportation services more responsive to consumer demands and enhance consumer choice.³⁸

Second, the statute may create a mechanism through which existing carriers can impede the entry of competition into the market for transportation services. The statute requires that the PSC hold a hearing before issuing certificates of convenience and necessity.³⁹ By definition existing carriers serving a territory are interested parties who may offer testimony for or against issuing a certificate to a proposed carrier. Existing carriers have incentives to hamper the entry of new suppliers of transportation services into the markets that they serve. These carriers could use the hearing process to raise the costs that potential new entrants face, increase their own profits, and

³⁷ Under rare circumstances, which appear unlikely to arise in the trucking industry, unrestricted entry could reduce welfare. For a discussion of when these conditions can arise (and a discussion of why entry restrictions are rarely justifiable) see Baumol, Panzar, and Willig, *Contestable Markets and the Theory of Industry Structure*, New York: Harcourt, Brace Jovanovich, Inc. (1982), pp. 221-224.

³⁸ Federal trucking regulation has been partially relaxed. The Interstate Commerce Commission ("ICC") is required to issue an interstate motor common carrier certificate if the applicant is able to provide the service, to comply with ICC law, and, on the basis of evidence offered in support of issuing the certificate, if the proposed service would serve a useful public purpose, unless evidence offered against issuance demonstrates that issuing the certificate is inconsistent with the public convenience and necessity. 49 U.S.C. § 10922 (b) (1). Thus, the burden of proof is placed upon opponents of a proposed service. In fact, federal law prohibits the ICC from finding "the diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity." 49 U.S.C. § 10922 (b) (2). We understand that in practice federal certificates are rarely denied.

³⁹ Tenn. Code Ann. § 65-15-107.

reduce industry output and consumer welfare.⁴⁰ In some cases, incumbent firms could potentially block entry altogether. The potential use of the regulatory scheme to impede entry by new competitors would likely be reduced if protesting carriers were required to demonstrate that issuing a certificate to a new entrant would not benefit the public.⁴¹

2. CONTRACT HAULERS

By statute, Tennessee requires that contract haulers obtain permits.⁴² Unlike common carriers that provide service to all potential shippers in the territory served, contract haulers ship goods under agreements with specific shippers to particular destinations.⁴³ Shippers may benefit from being able to reach agreements with contract haulers to provide services tailored to shippers' particular needs rather than having to rely on the more generalized services offered by common carriers. Reducing any difficulties associated with obtaining contract hauler permits would likely increase the opportunities available to consumers of transportation services to choose the particular combinations of price and quality of service that best serve their needs.

Tennessee's requirements for contract hauler permits may have the anticompetitive potential of providing common carriers

⁴⁰ See Salop and Scheffman, "Raising Rivals' Costs," 73 Amer. Econ. Rev. 267 (1983).

⁴¹ Our analysis applies as well to permits required for interstate transportation. See Tenn. Code Ann. § 65-15-107 (b) (requiring interstate permits and hearings on the issuance of permits). It should be noted that the factors that the PSC is required to consider in deciding whether to issue interstate permits are less inclusive than the factors enumerated for intrastate certificate determinations. This difference may make it more difficult to obtain intrastate permits than to obtain interstate certificates.

In addition, the current regulatory scheme may provide interstate trucking firms located in other states with a competitive advantage over interstate truckers located in Tennessee. If regulatory burdens are less in other states, out-of-state firms may choose to locate break-bulk facilities or terminals elsewhere, or may decide not to offer services in Tennessee.

⁴² Tenn. Code Ann. § 65-15-108.

⁴³ See, e.g., Tenn. Code Ann. § 65-15-102 (a) (definition of contract hauler).

with the means to inhibit the entry of contract haulers into the marketplace. In determining whether to issue a contract hauler permit, the PSC is required to consider, among other things, transportation services being offered by common motor and rail carriers and other contract haulers in the territory proposed to be served.⁴⁴ The PSC may refuse to issue a contract carrier permit if it appears that the proposed operation of the applying contract carrier will impair the efficient public service of a common carrier operating in the same territory.⁴⁵ Existing common carriers have incentives, irrespective of public benefit, to restrict the entry of possible competitors, including contract haulers. If too much weight is given to the concerns of common carriers, as opposed to the shippers that they serve, entry may be impeded. Some shippers may find that contract carrier service is the most efficient method of shipping their goods. These efficiencies, which may lead to lower shipping rates and, ultimately, lower prices to consumers,⁴⁶ may not be realized if entry by contract haulers is impeded.

3. REGULATION OF SALES, TRANSFERS AND DISCONTINUANCE OR ALTERATION OF SERVICE

Tennessee regulates the sale and transfer of intrastate certificates of public convenience and necessity and interstate permits.⁴⁷ Under the PSC's regulations, the sale or transfer of a certificate or permit is not permitted without the approval of

⁴⁴ Tenn. Code Ann. § 65-15-108 (b).

⁴⁵ Id.

⁴⁶ By contrast, the ICC will issue a federal motor contract carrier permit if it finds that the proposed carrier is able to provide the proposed service, comply with applicable law and the proposed service is or will be consistent with the public interest. 49 U.S.C. § 10923 (a). The ICC is required to consider the nature of the proposed transportation service, the effect that granting the permit would have on protesting carriers and whether that effect would be contrary to the public interest, the effect that denying the permit would have on the applicant, the shippers, or both, and the changing needs of shippers. 49 U.S.C. § 10923 (b) (3). In addition, federal law limits the carriers who may protest a permit application. 49 U.S.C. § 10923 (b)(4). The factors enumerated for consideration in federal law recognize that contract carrier service may provide a useful method for shippers to meet their transportation needs.

⁴⁷ Tenn. Code Ann. § 65-15-107 (d).

the PSC.⁴⁸ The selling carrier is required to notify all interested or affected motor carriers who may file protests or objections to the proposed sale.⁴⁹ The PSC will not act on a proposed sale until a petition has been on file at least twenty days.⁵⁰

We agree that the PSC, prior to approving the sale or the transfer of an existing certificate or permit, has a legitimate interest in considering whether the proposed transaction might raise concerns, such as permitting the purchaser to exercise anticompetitive market power or compromising safety. Nonetheless, the breadth of these requirements may unnecessarily increase the costs associated with sales and transfers and may potentially assist competitors in obstructing efficient sales or transfers. The resulting costs may make the entry of new competitors into the market and the exit of inefficient firms from the market more difficult. Both factors may contribute to inefficiencies that could be reflected in higher prices and lower quality and variety of service than would be found absent the requirements.

Tennessee common carriers also need approval to discontinue or alter service.⁵¹ The regulations provide that a carrier can alter or discontinue its service only after providing notice to interested parties thirty days in advance. Furthermore, any affected party can protest the change and request that the PSC hold a hearing prior to approving the discontinuance or alteration.⁵² These rules may benefit shippers by providing them a period of time to locate alternative shipping arrangements after a carrier chooses to discontinue or to alter service.⁵³ These rules also may impose substantial costs, however, by imposing potentially lengthy delays on existing carriers wishing to adjust to changing market conditions by discontinuing unprofitable

⁴⁸ Tenn. Comp. R. & Regs. tit. 1220, ch. 2-1-.05.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Tenn. Code Ann. § 65-15-112, Tenn. Comp. R. & Regs. tit. 1220, ch. 2-1-.08.

⁵² Id.

⁵³ Note, however, that the ease with which firms can physically enter and exit particular trucking routes suggests that, over time, normal market forces (absent regulatory barriers) would be likely to provide alternatives to shippers.

service or modifying service offerings to increase profits. You may wish to consider whether, on balance, these rules impose net costs by diminishing the market's responsiveness to changing consumer demands and needs for transportation services.

B. RATE REGULATION

The motor carrier statutes prohibit unjust and unreasonable freight rates and authorize the PSC to set rates.⁵⁴ Rates may be filed with the PSC either collectively through a ratemaking bureau or independently by individual firms.⁵⁵ The PSC has promulgated rules governing the filing of rate changes.⁵⁶ Rate increases and the filing of rates lower than those of competitors must be justified to the PSC and are subject to competitor and shipper objections.

The PSC's rules require written, public notice of tariff schedules and of changes in rates.⁵⁷ Public disclosure of a proposed rate increase might enhance the likelihood that firms will set rates at anticompetitive levels by, for example, facilitating tacit agreement to follow competing firms' rate increases.⁵⁸ This may be more likely on routes which are served by only a few firms, and may be further encouraged by provisions which permit trucking firms to file rates collectively.

The filing of rates that are lower than those of competitors⁵⁹ must be accompanied by (1) a document demonstrating that

⁵⁴ Tenn. Code Ann. § 65-15-119.

⁵⁵ Tenn. Comp. R. & Regs. tit. 1220, ch. 2-1-.11. We note that, under some circumstances, collective ratemaking may raise antitrust concerns. See New England Motor Rate Bureau, Inc., supra note 8.

⁵⁶ Tenn. Comp. R. & Regs. tit. 1220, ch. 2-1-.12.

⁵⁷ Tenn. Comp. R. & Regs. tit. 1220, ch. 2-1-.09, and .12.

⁵⁸ See Posner, Antitrust Law: An Economic Perspective, Chicago: University of Chicago Press (1976), pp. 135-147.

⁵⁹ Tenn. Comp. R. & Regs. tit. 1220, ch. 2-1-.12. The filing of rate reductions which are not lower than the rates of a competitor are not subject to this provision. Such rates require only fifteen days notice. Rates which meet but are not lower than the rates of a competitor may become effective on one day's notice.

the rate is compensatory;⁶⁰ (2) a statement by the issuing officer that the rate will be applied in a non-discriminatory manner; and (3) a statement by the issuing officer assessing whether the proposed rate will diminish the carrier's ability to comply with Federal Motor Carrier Safety Program Standards.⁶¹

This system may reduce competition by discouraging competitive pricing because carriers seeking to lower prices must justify those prices in public and in advance, thereby potentially dissipating some of the profits that they might otherwise have obtained. Similarly, potential new entrants, who may seek to offer lower rates than existing carriers, may be deterred from doing so.

The PSC's rules do not appear to require that the PSC itself set motor carrier rates. The rules appear to provide private firms some pricing discretion. These rules, however, appear likely to inhibit pricing flexibility because they tend to delay price changes and to increase the costs of implementing them. As a result, procompetitive pricing may be discouraged, to the ultimate detriment of Tennessee consumers.

IV. CONCLUSION

The trucking industry has been partially deregulated at both the federal and state levels. Deregulation appears to have brought lower prices and higher quality service to shippers. Arguments against deregulation appear to have been largely unfounded. In particular, relaxing regulations that impede market entry and that limit rate flexibility appear to have been beneficial to consumers and to competition. The connection between safety and economic deregulation has not been

⁶⁰ To the extent that this requirement is aimed at preventing destructive competition and predatory pricing, it seems not to be well founded. See supra pp. 4-5.

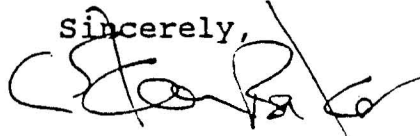
⁶¹ Tennessee has a legitimate interest in promoting safety on its highways. As we discussed earlier, economic deregulation has not been shown to reduce safety. See supra p. 6. Rather than attempting to address this concern through economic regulation, a direct approach seems preferable. Current statutory and regulatory provisions require that carriers submit to regular safety inspections and comply with all federal safety standards. See Tenn. Code Ann. § 65-15-113; Tenn. Comp. R. & Regs. tit. 1220, ch. 2-1-.20. Through provisions such as these, Tennessee has promoted its understandable safety interests directly. We believe that consumers and competition in Tennessee will be best served if Tennessee continues to promote safety directly.

Mr. Glen McKay
Page 18

established, and, in any event, economic regulation is not likely to be an efficient way to improve safety. We believe that eliminating or scaling back economic regulation of trucking is likely to result in significant benefits for Tennessee consumers.

We appreciate this opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Steven Baker", written over a horizontal line.

C. Steven Baker
Director