

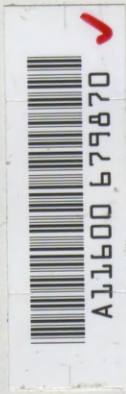
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COMPETITION IMPROVEMENTS ACT OF 1979, S. 382

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HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 382

MARCH 6, 20, AND MAY 22, 1979

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COMPETITION IMPROVEMENTS ACT OF 1979, S. 382

TUESDAY, MARCH 6, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 9:30 a.m. in room 2228, Dirksen Senate Office Building, Washington, D.C., Hon. Edward M. Kennedy (chairman of the committee) presiding.

Senators present: Kennedy, DeConcini, and Heflin.

Also present: David Boies, chief counsel and staff director; Susan McDermott, counsel; and Peter Chumbris, minority consultant.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. We will come to order.

The Committee on the Judiciary today opens hearings on S. 382, the Competition Improvements Act. The objective of this bill is to end the massive and costly inefficiencies within the regulated sectors of our economy that have been caused by decades of governmental indifference to the proper role of competitive market forces within the regulatory framework. This bill will provide governmental regulators with a competitive standard against which agency actions must be tested and justified.

Excessive Government regulation of business has become a national problem of immense proportion. Legislators, administrators, judges, scholars, reformers, and most importantly, the public at large, increasingly want to know whether governmental programs continue to justify their tremendous costs. Commonsense and everyday economics demand a correlation between what we pay and what we get. But no such demand has been made of our powerful regulatory agencies until now. These agencies' actions and orders, purportedly issued to protect the public, have actually cost the public undetermined billions in higher prices, excessive Government expenditures and untold lost business opportunities without a substantial corresponding public benefit. The public indictment against uncontrolled excesses of regulation is strong and well documented. Regulation today is simply costing too much.

But "costing too much" does not mean that no cost is worth the return. In the critically important areas of health and safety, we have agreed as a responsible society to support added costs to promote public health and safety. What we have a right to demand, however—indeed a duty to demand—is that all regulatory activity be directed to achieve its goal in the most efficient manner possible. This should be the focus of today's debates on Government regulations.

The Competition Improvements Act is founded on the fundamental economic tenet that free-market competition, protected by vigorous enforcement of the antitrust laws, is the most effective way to protect consumers, promote efficiency and spur innovation. Exceptions from this general rule have historically been limited. They have been made, however, where there has been evidence of the unworkability of competition or when a clearly recognized paramount social objective, such as the protection of health, safety, or the environment was sought.

Thus, regulatory systems have been established only to correct specific and narrowly defined defects in the usual healthy atmosphere of a free and competitive market.

Regulation should never be seen as a mandate to ignore the continued value of and public commitment to the needed presence of competitive market forces within most of the regulated industries. Indeed, competition should be perceived of and used as a "regulatory tool." But this has generally not been the case. The past decision to impose regulation on a particular industry has not addressed the question of the appropriate role of competition. The time to correct this omission is long overdue.

The Competition Improvements Act squarely addresses the problem of Government regulations which unnecessarily impede competition. The act charges every regulator with the responsibility of systematically considering competitive issues. The bill creates a clear antitrust standard against which proposed agency actions must be tested. The bill further prohibits the imposition of anticompetitive regulations unless the agency involved finds that the regulation is essential to accomplish an overriding statutory purpose and that there is no less anticompetitive means to accomplish that purpose.

Today's hearing begins consideration of the Competition Improvements Act in the 96th Congress. The bill's predecessor, S. 2028, was extensively studied in the 94th Congress. Based on a record created by 4 days of hearings during that Congress, the Judiciary Committee favorably reported S. 2028. In the 95th Congress, the bill became S. 2625.

The provisions of the bill were also closely examined by President Carter's National Commission for Review of the Antitrust Laws and Procedures. The Commission devoted an entire chapter of its report to the issue of regulatory inattention to competitive issues. More specifically, the chapter is, in most part, a detailed discussion of S. 2625, the Competition Improvements Act of 1978.

The recommendation concludes that Congress should enact legislation to require increased consideration of competitive issues in regulatory decisionmaking and, specifically, that the legislation should adopt the principles contained in S. 2625.

I will ask that the bill be printed in the record, together with a summary of its major provisions—adapted from the Judiciary Committee report of the 94th Congress. Additionally, so that the record reflects the comprehensive and important views of the President's National Commission for Review of the Antitrust Laws and Procedures, I will ask that the chapter of the Commission's final report concerning S. 2625 also be included.

[The material referred to above appears in the appendix.]

Senator KENNEDY [continuing]. Let us turn to our distinguished witnesses this morning. Our first witness today is Marvin S. Cohen, Chairman of the Civil Aeronautics Board. Chairman Cohen is in the unique position of presiding over the first deregulation of a major industry in our country. He has observed firsthand the impact that increased competition within the airline industry has brought.

Welcome, Mr. Chairman.

Mr. CHUMBRIS. Mr. Chairman.

Senator KENNEDY. Yes.

Mr. CHUMBRIS. May I reserve the right for each of the minority Senators to submit an opening statement? We would provide you with it, sir.

Senator KENNEDY. We will certainly welcome those comments, of course. We are delighted to welcome your general counsel, Mr. Bakes. He has been a long-time associate of this committee, a knowledgeable figure on the issues of competition and the airline industry, and a good friend. We are delighted you are here.

STATEMENT OF MARVIN S. COHEN, CHAIRMAN, CIVIL AERONAUTICS BOARD

Chairman COHEN. Thank you, Mr. Chairman.

I appreciate this opportunity to give the views of the Civil Aeronautics Board on the Competition Improvements Act of 1979. I don't think there is much question that competition was an undernourished plant at the CAB until just a few years ago. But given some sunlight and encouragement, it has produced impressive benefits for both consumers and the industry. I do not know whether all other industries are as ripe for a thorough-going transition to competition as the airline industry was, but I suspect a few of them are, and the others could use at least a good dose of competition. The Competition Improvements Act will help on both scores.

Our Nation's economic system is based on a belief that the open market is the best regulator. Any substitution of Government regulation should be reviewed to make sure that resulting distortions to the market are not worse than the original problem, and that if competition must be hedged in, it is done carefully and cautiously. As I understand it, that is what S. 382 is all about. It is the same approach that the CAB has been using for about 2 years. The well-publicized results of our policies speak for themselves, and they make a good case for applying the same process governmentwide.

We at the CAB have been living under a self-imposed "Competition Improvements Act" for some time. Well before the Airline Deregulation Act, the Board, under Chairman John Robson, began flirting with competitive principles, and under former Chairman Alfred Kahn that flirtation grew into a passionate and notorious love affair. The Federal Aviation Act of 1958 essentially directed the CAB to regulate in the "public interest" and in accordance with the "public convenience and necessity." The general policy statement of the Act contained a variety of factors that the agency was required to consider in determining the public interest. We were supposed to "foster sound economic conditions" in the industry, to promote the airline industry, and to avoid "destructive competitive practices," on the one

hand, and were still to make sure that the Nation's air service was "efficient" and "economical," and that consumers were charged "reasonable" prices. "Competition" was only to be considered "to the extent necessary to assure a sound air transportation system."

Of course, the Airline Deregulation Act has since made the competitive mandate both clear and preeminent, but not so long ago the agency was laboring under the more contradictory and ambiguous mandate I have just described. It was in that statutory context that the CAB—without the benefit of new legislation—began applying competitive principles to some of its major decisions and eventually to all activities.

There are three fundamental points I would like to make about the usefulness of the Competition Improvements Act approach in our experience. First, the injunction of section 3(a) to consider less anti-competitive alternatives has been applied voluntarily to all areas of Board activity. The results from the public's viewpoint have been generally quite good and certainly better than the results of regulation when competition was not taken seriously. Second, the absence of a firm statutory basis to allow us to choose the least anticompetitive alternatives in discharging our regulatory responsibility was an impediment to sound and prompt decisionmaking. With the eventual passage of the Airline Deregulation Act, which provides a firm legal basis for procompetitive decisions, we will thankfully never know just how serious the legal impediment might have been. And finally, the 40-year absence of a vigorously procompetitive set of CAB policies was costly to the public and was due in part to the absence of a legal and judicially reviewable requirement to choose the least anticompetitive means among the various alternatives.

Senator KENNEDY. I suppose that the question is, if you were able to do it within the CAB, why not let other agencies develop their own criteria to apply to their particular situations? Do we need a new statute in order to get greater consideration of competition in agency decisionmaking?

Chairman COHEN. I think we were taking some chances. I wasn't there then. I went on the CAB about 2 weeks before the bill actually passed. But from everything I have heard and learned about it, we were taking some chances in going as far as we went. Under our existing law, we were at the time, subject to judicial challenge. Delta Airlines has in court challenged our right to act on a set of principles very similar to what are expressed in the proposed bill.

I think what would happen with the proposed bill is to make it a lot easier for other agencies to follow these principles and have the flexibility to find their own way to do things pursuant to the mandate to find the least anticompetitive alternative when individual decisions are made.

Senator KENNEDY. Do you think that consideration of a procompetitive standard may cause delay in agency decisionmaking?

Chairman COHEN. Mr. Chairman, we found in applying it to pricing or even health and welfare type decisions like the no smoking rules, like charter consumer protection rules, it has not delayed our process. It has expanded the universe for the frame of reference in which you considered what to do. Instead of seeking one way to go, we stand back and say, "Is there a less anticompetitive way to do this," and in some

instances we have found those ways. It just meant that we looked at other alternatives at the time we were looking at what we ought to do. We have not found it unduly delaying, Mr. Chairman, in our process. I have some examples here of how we have applied that. It has many applications for other agencies in their functions.

Mr. Chairman, our experience at the CAB leads me to conclude that one of the virtues of the Competition Improvements Act is that it will be triggered whenever a major action is taken that has serious competitive implications. It is my view that the discipline of section 3(a) should be applied consistently to regulatory activities, and the committee, if it should err at all, should err on the side of overinclusion.

At the CAB we have adopted virtually the exact standard of section 3(a) to govern our decisions involving the grant of antitrust immunity. These decisions primarily involve consideration of mergers and airline agreements. I can't say much about the current merger cases pending before us, except to note that the section 3(a) standard, now incorporated into section 408(b) by the Deregulation Act, was used almost word-for-word in most of our orders predating the Deregulation Act. About 2 years ago we began to consider two factors in all of our antitrust proceedings: Whether there had been a clear and convincing showing that the public benefits of the transaction outweighed the probable anticompetitive effects, and if so, whether there was any less anticompetitive way to achieve the same benefits.

This, in essence, is the standard of section 3(a) of S. 382. Substantively, we found that using such a standard encourages a more imaginative approach to dealing with regulatory problems. The entire focus of decision and argument is changed. Too often the agency and those appearing before it stop thinking after considering whether public interest factors outweigh estimated anticompetitive effects. Unless the agency also asks whether a less anticompetitive option is available, it may settle for only a second- or third-best solution. The S. 382 standard requires the additional investigation to find the first-best solution.

Procedurally, this process has disciplined us to keep from snapping at what, on first glance, may seem the best and most reasonable solution to a problem, but one which tarnishes after a sober second thought. The procedural benefit may be even more important than the substantive one. There is a tendency in human nature—and even in the regulatory agencies—to grab for the obvious, direct, short-run solution almost like a life preserver, specially if it is presented with the skillful advocacy so abundant in Washington. The long-run effects, which usually include anticompetitive ones, go unperceived unless agencies acquire the habit of purposely and routinely considering them. Purposeful and routine consideration is what would be required of agencies under this bill.

Actions involving antitrust immunity are not the only cases where the agency—

Senator KENNEDY. How much more of an administrative burden will a purposeful and routine search for the least anticompetitive alternative place on an agency? Will it take much more time for the agency to examine the considerations, and make the findings required by this bill? How will this impact the decisionmaking process? Will it slow it down? Will it make it more bureaucratic? Do the agencies have the economic and antitrust expertise to comply with the standard?

Chairman COHEN. Mr. Chairman, as far as the economic considerations, most of the agencies that we are dealing with here throughout the Government have the economic expertise in their particular field just as we have a pretty fair economic expertise as far as airlines are concerned. The other agencies already have the economic expertise and know the fields that they are dealing with. That does not make a new requirement of them. The new requirement is to look at things from a different angle than they have been looking at them. It does not take a great deal of new expertise. The principles are rather clear.

Antitrust, I guess, has been considered by many to be a mystique, at least I thought so. I wasn't an antitrust expert in my law practice in Arizona. I came back here in October. My first inclination was that I didn't know anything about antitrust. It is a mystique. You have to be initiated into it and you have to be expert to deal with it, over a period of years. What I have learned in the past 4 months is that isn't so. You already have in your agency the economic information about that industry. The basic principles of finding the least anticompetitive way of doing things is kind of commonsense.

Instead of reading the examples, let me explain a couple of examples. We found the most important might be pricing, for instance, by the airlines. Under the old way of doing things at CAB, when there was no effort to seek the least anticompetitive way of doing things we would have something called the DPFI, the Domestic Passenger Fare Investigation, that would set price levels for the airlines. There was no effort to find out whether we could protect the public from prices that were too high, and yet protect the industry and the public from predatory pricing by any less anticompetitive means than just telling them what to charge. When we stood back and looked at them from the standpoint of "Is there another way to do this, which preserves some aspects of competition," we found that there was. The thing that apparently took the long time—from what I am told—what took a long time, was to find out whether we could legally do this and try to work out a legal rationale of the old law which did not exist very clearly there.

What we did in fact is to say: There is a range within which the airlines can operate. There is an upper level. If there is competition on the route, you can go 5 percent or in some instances, 10 percent above that upper level, which gives some flexibility upward, and there is a 50-percent range below, and let the airlines then make competitive decisions within that range. That is not giving them total freedom, but it is giving them more freedom and allows them to act more competitively than under the old system in which we didn't consider the competitive needs.

A health and safety example is smoking, which seemed to me to be no problem: smoking on airplanes and merely setting aside a "no smoking area." In recent years, this does not seem to be enough. A lot of people are still upset. Smokers want to be able to smoke and non-smokers want not to have to breathe unwanted smoke. How do you accord their different rights within this closed tube that is 30,000 feet up in the air? We could have and we were urged to say precisely what to do to the airlines. Instead, we decided to stand back and find out if there was a way to give them more flexibility to compete somewhat among each other, but still preserve the rights of the passengers.

We established as a basic principle that the nonsmoker should not be burdened unreasonably with smoke that he does not want to breathe and that right is prior to the right of the smoker on the airplane. Then we said to the airlines, "Look. You figure out how to accomplish this so that the nonsmoker's rights are prior to the smoker's rights, and you decide how to do it." We gave each airline the freedom to find their own way. With pipes and cigars we urged them to ban them completely. It would be very easy to say, "No, you can't smoke pipes and cigars." Instead, we chose to just tell them to further segregate pipes and cigars from nonsmokers than they are segregated now, or to ban them if they chose to ban them. Let the airlines decide how to do that. We are giving them flexibility. But we are also prepared to come on with more detail, prohibitions, if the airlines don't solve the problems themselves.

In the charter area we have had a problem with consumers——

Senator KENNEDY. How many airlines banned pipes and cigars? Do you know?

Chairman COHEN. I think that there were two airlines that had already banned cigars before we did this and I think four more have in the past month decided to ban cigars and pipes.

Senator DeCONCINI. Does the chairman want the names of them? [Laughter.]

Chairman COHEN. They are free to advertise that after telling about their airline.

Mr. CHUMBRIS. I don't think you got the inference of Senator DeConcini's remark because the chairman of the committee is a great cigar smoker.

Senator KENNEDY. We were going to let that pass. [Laughter.]

Chairman COHEN. I love to smoke cigars. I don't smoke them on airplanes.

Senator KENNEDY. I think you are right.

Chairman COHEN. It was a very difficult question for me. The board was split 2 to 2. I first wanted to ban them because people shouldn't be subject to that. Finally, in looking at it from the standpoint, is that the right way for Government to interfere with the way private industry operates. We decided not to ban it, but to leave it to the airlines to decide.

Senator KENNEDY. In our Health Subcommittee we are considering the Califano recommendation which bans smoking in all public places. Quite frankly, I doubt if the votes are there in the Senate to do that.

Chairman COHEN. We are going to find out in the next few months. We will be bringing along a detailed set of proposals, one of which is to ban all smoking on airplanes as a matter for us to consider. The airlines, I think, know that our getting into this in detail is coming along just behind what we have already done. I think they should have some incentive to address this problem more seriously than they have.

Senator KENNEDY. I think that the major point made by your testimony is that the analysis required by S. 382 will not place a significant burden on the agency in meeting its responsibilities to the public. I think that is what is most important.

Chairman COHEN. I think that is very true, Mr. Chairman. I agree. It has really expanded our way of looking at things, but not

really slowed us down and not created any great burden on us. I think it makes us more able to serve the public interest in making decisions.

When we first started applying the type of standard contained in S. 382, to our decisionmaking, our big worry was not that the courts would tell us to be more competitive but rather that they would not allow us to apply our competitive analysis to our decisionmaking at all. Without the Deregulation Act, our statutory mandate was unclear, and we feared a court telling us that we did not have the authority to adopt the section 3(a) approach without new legislation. Since other agencies are today reforming themselves without new organic statutes—the ICC and FCC are two prominent examples—I suspect that S. 382 will provide a welcome and helpful statutory basis for what all agencies should be doing as a matter of course. In addition, the systematic analysis required in S. 382 will be far more effective in ensuring that agencies pay attention to antitrust policy than the past history of case-by-case review in the courts has been.

While the courts seem to agree in principle that the effect on competition should be a factor when regulatory agencies determine the overall public interest, the cases are sparse, vague, and differently worded. Each agency has a different precedent to work from if they have one at all. Also, it is not clear that agencies whose primary responsibilities are health and safety must evaluate the economic effects of their decisions. Thus, specific action by Congress would be a welcome clarification of the picture. I think everyone is now beginning to realize that all regulatory decisions will have some effect on competition, and that it is only sensible to try to evaluate that what effect will be before taking action.

This legislation would thus do two useful things that court decisions have not accomplished so far. It would establish a clear duty for all agencies to consider anticompetitive effects, and it would establish a uniform, workable verbal formula to guide them in their analysis, and courts in their judicial review. Mr. Chairman, critics of S. 382 have said that it will foster additional litigation and confusion in the regulatory process. I must emphatically disagree. In fact, had S. 382 been the law of the land when we were embarking on regulatory reform, there would have been less litigation, less uncertainty, more prompt and thus less costly regulatory proceedings.

We think it is crucial that the standard in S. 382 be subject to judicial review. If section 3(a) is worth applying to agencies, then it follows almost inevitably that agency decisions applying it should be subject to court review. I will skip over and turn to some of the more detailed provisions of S. 382. I elaborated on these in my prior testimony. I will just roughly outline the points here. One of the virtues of S. 382 is that it provides a flexible but uniform antitrust standard for government regulation. But that virtue will be lost if the application of S. 382 is exempted from judicial scrutiny. Those who argue that subjecting 3(a)'s application to court review will invite too much litigation are, in my view, raising a bright red herring.

The fact is that just about any agency decision of major importance raises competitive issues and gets appealed in the courts today. S. 382 does not—I repeat, does not—add another layer of review of this inevitable appellate litigation, nor does it lengthen the appellate proc-

ess. It simply means that another issue has to be briefed on appeal. If the agency has to defend the anticompetitive aspects of its action in court, it is likely to do a better job of deciding the matter before it gets to court.

Let me now turn to some of the more detailed procedural provisions of S. 382. Section 4 would require named independent agencies, of which the CAB is one, to notify the Attorney General of proceedings that might fall within the scope of the bill. We recognize that none of the independent agencies listed has dominant expertise in antitrust matters. The Attorney General and the Federal Trade Commission can play a helpful role in coordinating the antitrust programs of all the agencies. We support the notification requirement in section 4(a), and we look forward to cooperating with Justice and the FTC in this joint effort. At the same time, in the interests of fairness and administrative efficiency, we have objections to the other powers given the Attorney General and the FTC in section 4.

First, section 4(b) would apparently permit either the Attorney General or the FTC to intervene as a matter of right in the judicial review of an administrative proceeding, even if they were not a party in the administrative proceeding itself. Certainly, either agency should be entitled to participate as of right in any administrative proceeding within the scope of section 3(a) and be able to appeal that decision to the courts. However, if they have not participated at the administrative level, it is unfair to the agency and the other participants to allow intervention at the judicial level. Judicial review as a matter of right should be reserved only for parties who participate at the administrative level.

We see a second problem in section 4(c). It gives the Attorney General the right to demand a full evidentiary hearing at any time, if the agency has not already held one. I assume this extraordinary power was included to allow Justice to supervise the agencies' duties under this bill without resorting to time-consuming judicial review. This unrestricted power is a bad idea. It may interfere with the ability of the agency to fulfill its statutory responsibilities. In regulating what is increasingly a fast-changing and competitive airline industry, the Board is often called upon to make decisions without the sort of time-consuming, costly, and cumbersome evidentiary hearings that the Attorney General may prefer.

The Attorney General could impose considerable delay by requesting hearing under section 4(c) that must be honored. Such procedural delay may well be more damaging to competition than prompt decisionmaking. Since Justice has neither the expertise in the airline industry, nor the responsibility to uphold the Federal Aviation Act, the Attorney General is not in the best position to evaluate the need for a hearing. And if the section is read to allow the imposition of a hearing after final agency decision has been made, that power threatens fundamental notions of fairness and finality of decisions.

Section 5(a) has other ambiguities. How, if at all, is the burden of proof that is normally applicable to judicial review of administrative decisions affected by the provision? And what precisely is meant by "the requirements of section 3(a)?" Clearly, there must be evidence in the record to support the findings of overriding statutory purpose, significant public benefit, and absence of better alternatives.

Another criticism or concern is in section 5. The standards for judicial review are somewhat confusing. There is now in the Administrative Procedures Act the standards that have worked fairly well for reviewing agency actions and we think those standards are adequate for review of actions taken under section 3(a). We suggest in our testimony some particular problems with that section on judicial review standards.

One final point, Senator. Developing a comprehensive antitrust policy in cooperation with Justice and the FTC, as prescribed by section 6, is basic to the whole purpose of the bill. We have already started that process at the CAB. Our only suggestion is to clarify the scope of the provision to specifically include enforcement actions and certain other crucial agency decisions. Many Government grants of money, for example, have significant effects on competition and they should be included in the overall evaluation of antitrust policy. The present language can be read to include these types of actions, but a more specific statement might more effectively promote the broad sort of policy analysis that this section contemplates.

In summary, Mr. Chairman, let me reemphasize the Board's overall and enthusiastic support for this bill. Aside from our few reservations on procedural matters, the requirements of S. 382 reflect the same decisionmaking processes that the Board has been applying in recent years. In light of the sunset provisions of the Deregulation Act, I appreciate the opportunity to talk now. I'd be happy to answer any questions.

Senator KENNEDY. Well, I think you have covered the material very well, Mr. Chairman. I suppose the crucial question is whether the language of the bill provides a clear, uniform standard for the agencies to apply. What is your sense about that? Do you think we have achieved that?

Chairman COHEN. I think so. When I was looking at the bill, reading it, I summed it up from that standpoint of does this really state it broadly enough. It seems to me that it does. Particularly two things: Talking about overriding statutory purpose, so that if things need to be done pursuant to overriding statutory purpose they are able to be done. This really would not prevent agencies from fulfilling their particular statutory purposes. Yet, seeing that agencies have to look at whether this cannot be accomplished in substantial part by alternative means having lesser anticompetitive effects is crucial, of course, to the whole process. It is the same general standard that we have been following the past couple of years and I think has resulted in better procedures.

Senator KENNEDY. Where do you see the limitations of the application of this language to international agreements? For example, the Bermuda agreements have had a significant impact up in Massachusetts.

Chairman COHEN. It is hard to tell what would happen there if this bill had been in place and if the people who were looking at the issues had to stop and take a look at whether there was a less anticompetitive way of doing it. We think this language would apply in our International Aviation Policy and properly so.

Senator KENNEDY. Of course, the point is getting others to agree with it, clearly.

Chairman COHEN. Yes. We have two aspects to it, Senator. In a broad sense, the old way of doing things before we adopted a more procompetitive international litigation policy. The only way to do things was to take Bermuda I, which set the standard of how to deal with another country, back in 1948, and see how many other countries we could enter into a Bermuda I agreement with. It was a uniform process under the old way of doing things. In a very broad sense now, we are seeking more competitive ways to work things out with other countries. We are entering into diverse kinds of agreements in seeking more competition in different ways. In some countries we are successful and in some countries we are not. We are successful in varying degrees in trying to get more competition in international aviation.

Then on a microlevel, in single situations, and this would apply to the situation up in Boston, for instance, where there is only one U.S. carrier under a particular agreement, because the other country's requirements are limited to one carrier, how are we to deal with that one carrier in terms of regulation. Do we just leave them alone to do what they please? We don't think so because there is no check and balance of the marketplace to make sure that they act in the public interest.

Should we, on the other hand, regulate in detail as we have done in the past. That, to us, is not the least anticompetitive way to do things. We have chosen a third way to try to deal with this problem and that is to let that monopoly carrier—U.S. monopoly, at least—know that there is a threat of entry, that there is a threat that if they do not act in a competitive manner as if there was competition, that they may lose their certificate and somebody else may come in. So that they are at risk. They have had a little problem with adjusting to this. They would rather that we told them precisely what to do, but we won't do that. We say, "Look. You are at risk. You know how to run your business better than we can. You decide what to do and act as if there was a competitor there." They know we are breathing down their neck so that they really are at risk and we think that is a good substitute, a surrogate for competition to replicate the marketplace.

Senator KENNEDY. I just have one final question. Do you think the public interest might be jeopardized by requiring a competitive impact analysis of health and safety regulations?

Chairman COHEN. No, I don't think so at all, because under the terms of the act, and I think as it would be implemented by agencies, there is the overriding statutory purpose to protect the health and safety of the public that would be the overriding public purpose. And if they couldn't do it—

Senator KENNEDY. In a way consistent with that provision.

Chairman COHEN. Yes. That particular provision is quite important. They detail requirements if they have to, but this bill requires them to look at alternative ways to see whether there is a less anticompetitive means of doing it and they still accomplish the purpose by less anticompetitive means. We think it is in the public interest to take that look. It doesn't sacrifice health and safety if you take a look and find that you might be able to accomplish the purpose by a less anticompetitive way.

Senator KENNEDY. Mr. Chumbris.

Mr. CHUMBRIS. Mr. Chairman, just one question. Senator Kennedy had introduced S. 2028 in the 94th Congress. It passed out of the Judiciary Committee and it was referred to the Commerce Committee, also. As I understand it, from talking to some of the staff on the Commerce Committee, there was some objection at that time and the bill did not pass at that particular Congress. Now, in the CAB, did you have any objection to S. 2028 or successor bill, in the 95th Congress, and now we are in the 96th Congress. This is a third bill on this subject. There have been some changes made.

Chairman COHEN. Let me ask legal counsel here.

Mr. BAKES. I don't recall exactly, but I think the CAB responded by letter. To the extent that they were critical, I think they were critical of some procedural provisions, the de novo review provisions. The general principle of competition is something they had already begun to adopt, and as I recall, I will check, and supply it for the record, I thought they were generally supportive of the principle that is now incorporated in 3(a) of S. 382.

Chairman COHEN. I would be happy and this still goes for this committee and the Congress, I would be happy to do whatever I can to assist the Congress.

Mr. CHUMBRIS. Thank you, Mr. Chairman. Thank you, sir.

Senator KENNEDY. Thank you very much. Your testimony was very, very helpful.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF MARVIN S. COHEN

I appreciate this opportunity to give the views of the Civil Aeronautics Board on the Competition Improvements Act of 1979. I don't think there is much question that competition was an undernourished plant at the CAB until just a few years ago. But given some sunlight and encouragement, it has produced impressive benefits for both consumers and the industry. I do not know whether all other industries are as ripe for a thoroughgoing transition to competition as the airline industry was, but I suspect a few of them are and the others could use at least a good dose of competition. The Competitive Improvements Act will help on both scores.

Our Nation's economic system is based on a belief that the open market is the best regulator. Any substitution of Government regulation should be reviewed to make sure that resulting distortions to the market are not worse than the original problem, and that if competition must be hedged in, it is done carefully and cautiously. As I understand it, that is what S. 382 is all about. It is the same approach that the CAB has been using for about 2 years. The well-publicized results of our policies speak for themselves, and they make a good case for applying the same process Government-wide.

We at the CAB have been living under a self-imposed "Competition Improvements Act" for some time. Well before the Airline Deregulation Act, the Board, under Chairman John Robson, began flirting with competitive principles, and under former Chairman Alfred Kahn that flirtation grew into a passionate and notorious love affair. The Federal Aviation Act of 1958 essentially directed the CAB to regulate in the "public interest" and in accordance with the "public convenience and necessity." The general policy statement of the act contained a variety of factors that the agency was required to consider in determining the public interest. We were supposed to "foster sound economic conditions" in the industry, to promote the airline industry, and to avoid "destructive competitive practices," on the one hand, and still make sure that the Nation's air service was "efficient" and "economical," and that consumers were charged "reasonable" prices. "Competition" was only to be considered "to the extent necessary to assure a sound air transportation system." Of course, the Airline Deregulation Act has since made the competitive mandate both clear and preeminent, but not so long ago the agency was laboring under the more contradictory and ambiguous man-

date I have just described. It was in that statutory context that the CAB—without the benefit of new legislation—began applying competitive principles to some of its major decisions and eventually to all activities.

There are three fundamental points I would like to make about the usefulness of the Competitive Improvements Act approach in our experience. First, the injunction of section 3(a) to consider less anticompetitive alternatives has been applied voluntarily to all areas of Board activity. The results from the public's viewpoint have been generally quite good and certainly better than the results of regulation when competition was not taken seriously. Second, the absence of a firm statutory basis to allow us to choose the least anticompetitive alternative in discharging our regulatory responsibility was an impediment to sound and prompt decisionmaking. With the eventual passage of the Airline Deregulation Act, which provides a firm legal basis for procompetitive decisions, we will thankfully never know just how serious the impediment might have been. And finally, the 40-year absence of a vigorously procompetitive set of CAB policies was costly to the public and was due in part to the absence of a legal and judicially reviewable requirement to choose the least anticompetitive means among the various alternatives.

Let me briefly develop each of these points.

First, our experience at the CAB leads me to conclude that one of the virtues of the Competition Improvements Act is that it will be triggered whenever a major action is taken that has serious competitive implications. It is my view that the discipline of section 3(a) should be applied consistently to regulatory activities, and the committee, if it should err at all, should err on the side of overinclusion. At the CAB we have adopted virtually the exact standard of section 3(a) to govern our decisions involving the grant of antitrust immunity. These decisions primarily involve consideration of mergers and airline agreements. I can't say much about the current merger cases pending before us, except to note that the section 3(a) standard, now incorporated into section 408(b) by the Deregulation Act, was used almost word for word in most of our orders predating the Deregulation Act.

About 2 years ago we began to consider two factors in all of our antitrust proceedings: whether there had been a clear and convincing showing that the public benefits of the transaction outweighed the probable anticompetitive effects, and if so, whether there was any less anticompetitive way to achieve the same benefits. This, in essence, is the standard of section 3(a) of S. 382. Substantively, we found that using such a standard encourages a more imaginative approach to dealing with regulatory problems. The entire focus of decision and argument is changed. Too often the agency and those appearing before it stop thinking after considering whether public interest factors outweigh estimated anticompetitive effects. Unless the agency also asks whether a less anticompetitive option is available, it may settle for only a second- or third-best solution. The S. 382 standard requires the additional investigation to find the first-best solution.

Procedurally, this process has disciplined us to keep from snapping at what, on first glance, may seem the best and most reasonable solution to a problem, but one which tarnishes after a sober second thought. The procedural benefit may be even more important than the substantive one. There is a tendency in human nature, even in regulatory agencies, to grab for the obvious, direct, short-run solution almost like a life preserver, especially if it is presented with the skillful advocacy so abundant in Washington. The long-run effects, which usually include anticompetitive ones, go unperceived unless agencies acquire the habit of purposely and routinely considering them. Purposeful and routine consideration is what would be required of agencies under this bill.

Actions involving antitrust immunity are not the only cases where the agency on its own adopted what section 3(a) essentially requires. The two major areas of Board action—pricing and route policy—have evolved radically in the last several years. The Board's pricing rules provide one of the best examples of how a vigorously procompetitive approach to regulation can mean greater freedom for companies to compete, a better shake for the consumer, and still maintain a firm and certain power on the part of the agency to substitute its judgment for that of the market when the public interest requires. For many years, the agency established by rigid formula all first class and coach fares in the country. Our rules literally forbade airlines to offer lower or higher fares than those dictated by our formula. This method of regulating prices was intended to achieve two quite reasonable goals: first, to make sure airlines didn't charge too much, or not more than a price to cover costs and a reasonable profit, and thus not gouge the consumer; second,

to make sure the airlines didn't charge too little, to prevent predatory pricing against weaker competitors, and to prevent uneconomical service and consequent bankruptcy. If I might oversimplify to make my point, a careful and painstaking analysis convinced the Board last year that a great deal of the worry over excessively high or low air fares could be shifted to the marketplace where it would be policed better than at the CAB.

In choosing the least anticompetitive alternative, however, we did not find ourselves required immediately to relinquish all regulatory price controls. We transformed the previous fare formula into a fare ceiling, and allowed airlines freedom to charge above that ceiling depending on how many competitors were authorized to fly in any particular market. We allowed airlines to charge below the ceiling but maintained the right to suspend any predatory rates. We expected that our price ceiling—a regulatory tool—and competition in the market would keep air fares from becoming unreasonably high. Corporate self-interest and a regulatory prescription against predatory pricing would keep prices from going too low. And the ability to compete within a wide price range would, we hoped, bring benefits to consumers. The point of this story is that, by applying essentially a section 3(a) standard to our pricing policy, considerable benefit in the form of lower air fares came to the consumer, and the agency still maintained sufficient control over the industry.

There are many other examples. The smoking problem is one of the most difficult and hard-fought issues the Board has had to face. In an airplane cabin, it seems that the inherent conflict between those who want to smoke and those who find tobacco smoke obnoxious reaches a fever pitch. It seems that the solution of merely requiring the airlines to provide some sort of no-smoking section no longer satisfies the non-smoking public. We cannot claim to have solved this problem to the satisfaction of everyone—if anyone knows of such a solution we will be grateful forever to hear it—but we have tried to keep competitive considerations in the forefront of our decision.

Cigars and pipes have been a particular problem, and we have focused on them partly as a result of a petition on that subject by public-interest groups. We have deliberately spoken to the airlines in broad terms, requiring "special segregation" of cigar and pipe smokers, in an attempt to have them maintain a competitive posture on the issue—which in this case would mean some differences in their response, offering some real choices to the public. We are not sure of the result. Several airlines, I understand, have responded by prohibiting cigar and pipe smoking. But the point is that we have passed the mandate to do something that the market by itself would not do, but have done so in a way that leaves considerable freedom. At the same time, we are proposing some more specific rules that we can put into place if the results of our earlier move turn out to be unsatisfactory. Even in later rules, if they are necessary, we will try to adopt the course that leaves as much room as we judge is possible for the carriers to differ in their responses.

Our actions in response to the denied problem are, we think, another successful application of procompetitive principles. Here, again, we had a rule, but it didn't seem to be sufficient to handle the problem perceived by the public in being bumped after having a confirmed reservation. Stiffening the rule seemed to be called for, and we did that—doubled the maximum compensation that would have to be paid. But we also gave the airlines another way out, in fact required them to take at least one step before paying the compensation: seeking volunteers. That opens up some competitive daylight, for we didn't specify how much the airlines would have to offer the volunteers. But that daylight is important: it brings some free choice into the situation, meaning a more rational selection of persons who are bumped from a plane, including those whose plans are flexible enough so that it isn't a hardship; it uses denied boarding money more efficiently, thus costing the public less in the end, by directing it at those who want it the most; and it drains off a lot of the public frustration that comes from a transportation system that suddenly seems to have malfunctioned to their personal detriment. The fact that we maintained regulatory control in these cases does not argue that such controls are always or even often required, but simply illustrates for the critics of S. 382 that the discipline of section 3(a) is not too harsh or restrictive for agencies with responsibilities, like health and safety, that cannot be left entirely to the market.

We have applied the section 3(a) approach to other consumer protection activities. Just last week the agency adopted a major set of rules to protect charter participants. By relying primarily on disclosure and borrowing from common law notions of contract and restitution, we were able to fashion a rule that allows extremely wide latitude for charter operators to use their competitive energies and marketing skill to offer just about any type of charter option a consumer will ever want.

For instance, we were faced with the question whether to allow charter operators to specify alternative cities, hotels, or departure dates in their charter contracts. Changing of these elements of a charter has been one of the main complaints of charter passengers in the past—yet we did not want to eliminate the choice of a lower-priced charter where the possibility of some changes by the operator would have that effect, especially since it might mean the difference between running a charter or canceling it. The key element in the situation, of course, is full notice, leading to an informed choice by the consumer.

We answered the question by setting up a special form of contract, the Operator's Option Plan, whereby this flexibility would exist. The choices have to be clearly specified, and the operator has to make his choices 10 days before departure. The prominent labeling of the charter contract by a special name is designed to alert all consumers, and all the other safeguards of the new rules are in place. But the point is that we tried as hard as we could to preserve these especially flexible charters as a low-end option, another competitive opportunity to provide alternatives to the more definite luxurious forms of travel.

The alternative to this approach was to prescribe in more detail the particular services that the charter operator could and could not sell, to protect the participant from buying a lemon. I have no doubt that in some cases and some types of regulation the prescriptive approach—the less competitive approach—is necessary. And as chairman of a regulatory agency that has been trying to take the least anticompetitive approach, I also have no doubt the Competition Improvements Act and section 3(a) give agencies sufficient flexibility to use the prescriptive approach when the circumstances require. Section 3(a) contains a standard that we at the CAB are familiar with, that is and should be applicable to the whole range of regulatory activities, including consumer protection, and that is flexible enough to allow the regulator to choose the appropriate solution for the particular problem at hand.

When the Board first started applying the type of standard contained in S. 382 to our decision-making, our big worry was not that the courts would tell us to be more competitive, but rather that they would not allow us to apply our competitive analysis to our decision-making at all. Without the Deregulation Act, our statutory mandate was unclear, and we feared a court telling us that we did have the authority to adopt the section 3(a) approach without new legislation. Since other agencies are today reforming themselves without new organic statutes—the ICC and FCC are two prominent examples—I suspect that S. 382 will provide a welcome and helpful statutory basis for what all agencies should be doing as a matter of course.

In addition, the systematic analysis required in S. 382 will be far more effective in insuring that agencies pay attention to antitrust policy than the past history of case-by-case review in the courts has been. While the courts seem to agree in principle that effect on competition should be a factor when regulatory agencies determine the overall public interest, the cases are sparse, vague, and differently worded.¹ Each agency has a different precedent to work from, if they have one at all. Also, it is not clear that agencies whose primary responsibilities are health and safety must evaluate the economic effects of their decisions. Thus, specific action by Congress would be a welcome clarification of the picture. I think everyone is now beginning to realize that all regulatory decisions will have some effect on competition, and that it is only sensible to try to evaluate what that effect will be before taking action. This legislation would thus do two useful things that court decisions have not accomplished so far. It would establish a clear duty for all agencies to consider anticompetitive effects, and it would establish a uniform, workable verbal formula to guide them in their analysis, and courts in their judicial review.

Mr. Chairman, critics of S. 382 have said that it will foster additional litigation and confusion in the regulatory process. I must emphatically disagree. In fact, had S. 382 been the law of the land when we were embarking on regulatory reform, there would have been less litigation, less uncertainty, more prompt and thus less costly regulatory proceedings.

We think it is crucial that the standard in S. 382 be subject to judicial review. If section 3(a) is worth applying to agencies, then it follows almost inevitably that agency decisions applying it should be subject to court review. Judicial review of agency decisions is somewhat fundamental to our whole system of ad-

¹ See cases cited in Congressional Research Service report reprinted in the Competition Improvements Act of 1975: Hearings on S. 2028 Before the Subcommittee on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong. 1st Sess. 346, and *U.S. v. FCC*, — F. 2d — (D.C. Cir. 1978).

ministrative law and Congressional delegations of power. I think it would be extremely unwise to impose a substantive standard on regulatory agencies and then exempt the application of the standard from judicial scrutiny. Without the discipline of judicial review to oversee its application, there is a danger that some agencies will feel immune from 3(a)'s strictures and go about their business as usual. Moreover, lack of judicial review would mean that section 3(a) would be interpreted and applied in contradictory and confusing ways depending on what agency is applying it and, even worse, depending on the political party or prejudices of the decision-maker.

One of the virtues of S. 382 is that it provides a flexible but uniform antitrust standard for government regulation. But that virtue will be lost if the application of S. 382 is exempted from judicial scrutiny. Those who argue that subjecting 3(a)'s application to court review will invite too much litigation are, in my view, raising a bright red herring. The fact is that just about any agency decision of major importance raises competitive issues and gets appealed in the courts today. S. 382 does not—I repeat does not—add another layer of review to this inevitable appellate litigation, nor does it lengthen the appellate process. It simply means that another issue has to be briefed on appeal. If the agency has to defend the anti-competitive aspects of its action in court, it is likely to do a better job of deciding the matter before it gets to court.

Let me now turn to some of the more detailed procedural provisions of S. 382.

Section 4 would require named independent agencies, of which the CAB is one, to notify the Attorney General of proceedings that might fall within the scope of the bill. We recognize that none of the independent agencies listed has dominated expertise in antitrust matters. The Attorney General (and the Federal Trade Commission) can play a helpful role in coordinating the antitrust programs for all the agencies. We support the notification requirements in section 4(a), and we look forward to cooperating with Justice and the FTC in this joint effort. At the same time, in the interests of fairness and administrative efficiency, we have objections to the other powers given the Attorney General and the FTC in section 4.

First, section 4(b) would apparently permit either the Attorney General or the FTC to intervene as a matter of right in the judicial review of an administrative proceeding, even if they were not a party in the administrative proceeding itself. Certainly, either agency should be entitled to participate as of right in any administrative proceeding within the scope of section 3(a) and be able to appeal that decision to the courts. However, if they have not participated at the administrative level, it is unfair to the agency and the other participants to allow intervention at the judicial level. Judicial review as a matter of right should be reserved only for parties who participate at the administrative level.

We see a second problem in section 4(c). It gives the Attorney General the right to demand a full evidentiary hearing at any time, if the agency has not already held one. I assume this extraordinary power was included to allow Justice to supervise the agencies' duties under this bill without resorting to time-consuming judicial review. This unrestricted power is a bad idea. It may interfere with the ability of the agency to fulfill its statutory responsibilities. In regulating what is increasingly a fast-changing and competitive airline industry, the Board is often called upon to make decisions without the sort of time-consuming, costly, and cumbersome evidentiary hearings that the Attorney General may prefer. The Attorney General could impose considerable delay by requesting hearings under section 4(c) that must be honored. Such procedural delay may well be more damaging to competition than prompt decision-making. Since Justice has neither the expertise in the airline industry, nor the responsibility to uphold the Federal Aviation Act, the Attorney General is not in the best position to evaluate the need for a hearing. And if the section is read to allow the imposition of a hearing after final agency decision has been made, that power threatens fundamental notions of fairness and finality of decisions.

The fact is that if the agency does not call a hearing when it should, the courts will order it to do so. We can confirm that with our own experience at the CAB when a few years ago the Justice Department argued successfully to the Court of Appeals that we should have held a hearing.² We don't object to courts telling us whether the procedure we follow is correct or incorrect, but we do object to placing another agency of the government—with a particular policy ax to grind—in the position of telling us how to structure our proceedings.

The Attorney General may participate as a matter of right in an agency proceeding. At that stage, he can request a hearing. If that request is denied, he can

² *U.S. v. CAB*, 511 F. 2d 1315 (D.C. Cir. 1975).

appeal to the courts. With such procedural protections at his disposal, effective oversight of agency antitrust programs does not require unrestricted power in the Attorney General to require a hearing at any time.

I also have some reservations about section 4(d), which would allow the Attorney General and FTC to use special investigatory powers not available to other parties or even to the agency itself. A hearing is often an adversary proceeding. No party should enjoy favored treatment in obtaining evidence. Thus, we think discovery in agency proceedings should be limited to what is obtainable under ordinary agency powers. If, however, the Attorney General and the FTC are allowed to use their special powers in agency matters, then all parties should have the same benefit.

I am, also, unclear about the purpose of section 5(a), which says that "the agency or other proponent of the action has the burden of establishing by substantial evidence based on the record as a whole that the requirements of section 3(a) have been met." The Administrative Procedure Act Already contains standards of review for agency actions, and we think these have worked well in the past. Under the APA, and in other contexts, the "substantial evidence" standard is used to test the record of a formal, trial-type hearing. The "arbitrary and capricious" standard is used to test non-hearing matters, where there is a much less formal record. Since S. 382 would apply to rulemaking and other non-hearing matters, it does not seem clear how the substantial evidence test would apply to those proceedings. I assume that the intent of the provisions is not to require a hearing-type record for rulemaking. It certainly should not require such proceedings. But I do not know just what it does require in the way of an evidentiary record that is not already required under the APA.

Perhaps the purpose of the provision is simply to state that the section 3(a) findings must be supported by material contained in the official public documents which the agency considers in reaching its decision, but that the supporting material need not be reiterated in detail in the final order or rule. If that is the purpose, it should be clarified.

Section 5(a) has other ambiguities. How, if at all, is the burden of proof that is normally applicable to judicial review of administrative decisions affected by the provision? And what precisely is meant by "the requirements of section 3(a)?" Clearly, there must be evidence in the record to support the findings of overriding statutory purpose, significant public benefit, and absence of better alternatives. But those findings must only be made when the threshold level of significant or substantial burden on competition is reached. Must the agency introduce in every other case "substantial evidence" that the threshold level has not been reached? In short, section 5(a) is confusing. In view of the adequate provisions in the APA, we see no harm in leaving it out.

Developing a comprehensive antitrust policy in cooperation with Justice and the FTC, as prescribed by section 6, is basic to the whole purpose of the bill. We have already started that process at the CAB. Our only suggestion is to clarify the scope of the provision to specifically include enforcement actions and certain other crucial agency decisions. Many government grants of money, for example, have significant effects on competition and they should be included in the overall evaluation of antitrust policy. The present language can be read to include these types of actions, but a more specific statement might more effectively promote the broad sort of policy analysis that this section contemplates.

In summary, let me reemphasize the Board's overall and enthusiastic support for this bill. Aside from our few reservations on procedural matters, the requirements of S. 382 reflect the same decision-making processes that the Board has been applying in recent years. In light of the sunset provisions of the Deregulation Act, I appreciate the opportunity to talk now. I'd be happy to answer any questions.

Senator KENNEDY [continuing]. Our next witness, Dr. James Miller III, was formerly with the Council of Economic Advisers, and subsequently served as Acting Assistant Director of Government Operations and Research of the Council on Wage and Price Stability. He is today a distinguished economist with the American Enterprise Institute.

Dr. Miller has done extensive research and writing in the area of regulatory reform. I am sure that his testimony will be helpful.

STATEMENT OF DR. JAMES C. MILLER III, CODIRECTOR AND
RESIDENT SCHOLAR, CENTER FOR THE STUDY OF GOVERNMENT
REGULATION, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC
POLICY RESEARCH

Dr. MILLER. Thank you, Mr. Chairman.

I have a short prepared statement, which, with your permission, I would like to read into the record.

Senator KENNEDY. Fine.

Dr. MILLER. Mr. Chairman, members of the committee: I welcome this opportunity to present my views on S. 382, the proposed Competition Improvements Act of 1979. I should emphasize at the outset that these views are my own and do not necessarily reflect those of the American Enterprise Institute (AEI), with which I am associated. As you may know, AEI is a nonprofit, publicly supported research and educational institution which does not itself take positions on public policy issues.

In my judgment, passage of the Competition Improvements Act would increase the efficiency of the U.S. economy. It would not only enhance competition—especially in regulated industries—it would mean concomitant benefits in terms of improved resource allocation, lower costs to consumers, and a reduction in the rate of inflation. This view is consistent with the comments I made on S. 2028—an earlier version of the bill—when I testified on behalf of the Council on Wage and Price Stability in December of 1975.¹ If anything, my support for this approach has increased since that time. For one thing, I think S. 382 is an improvement over S. 2028; for another, I have become even more convinced of the need to restrain the anticompetitive activities of Government agencies.

In the remainder of this prepared statement, I would like to summarize briefly the need to restrain the anticompetitive actions of government agencies, explain why in my judgment S. 382 represents a good approach to this problem, and comment on two specific issues raised by the bill as drafted.

As this committee has heard on many occasions, one of the most important sources of anticompetitive behavior (and thus poor economic performance) in the U.S. economy is the Federal Government itself. Nowhere is this more evident than in the traditional "economic" regulatory agencies. For example, several years ago this committee's Subcommittee on Administrative Practice and Procedure heard extensive evidence that the anticompetitive activities of the U.S. Civil Aeronautics Board—(CAB)—had severely restrained the economic performance of the U.S. airline industry. Subsequent action by the Congress, with support of the administration, the CAB, and many other groups, went far to remedy this situation. Also, during the last Congress, this committee's Subcommittee on Antitrust and Monopoly heard extensive evidence of the adverse consequence of anticompetitive regulation of interstate trucking by the Interstate Commerce Commission.

¹ See "The Competition Improvements Act of 1975," hearings before the Subcommittee on Antitrust and Monopoly, U.S. Senate (Washington: U.S. Government Printing Office, 1976), pp. 134-44.

Study after study by academic economists, including those who have held important positions in the government, have concluded that the efficiency of the U.S. economy could benefit greatly from measures to reduce the anticompetitive activities of Federal agencies.¹ Part of the problem is that Government agencies, in pursuing what they view as the major objectives set forth in their legislative mandates, simply do not take into account the importance of avoiding adverse effects on competition. But, especially in the economic regulatory agencies, a good portion of the problem is that the agencies shelter and even promote the anticompetitive activities of the industries directly affected. In this regard, it would seem wise to heed the advice which Adam Smith gave in 1776:²

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, *it ought to do nothing to facilitate such assemblies; much less to render them necessary* (emphasis added).

In my judgment, the approach embodied in S. 382 is very appropriate, for several reasons. First, as this committee well knows, reforming agency anticompetitive behavior on a case-by-case basis is difficult because of strong opposition from those who benefit from the present state of affairs. Of course, it is only natural for those protected by anticompetitive rules and regulations to oppose a recodification of an agency's statutory mandate to remove the protection such agencies afford. But beyond that, there is widespread belief in many industries that whereas some agencies help them, others impose considerable costs. No industry wants to take the lead in removing the anticompetitive restraints that are of direct benefit to it. On the other hand, these industries would be less opposed to, and might even favor, an initiative which removed anticompetitive regulation en masse, all at once. S. 382, of course, has the characteristic of broad and immediate coverage.

Second, as is also well known by this committee, the case-by-case approach to recodifying agency legislative mandates to remove anticompetitive aspects can be slow and tedious. S. 382, of course, can be much more timely. But I do want to emphasize my view that S. 382 is not a substitute for a case-by-case restructuring; S. 382 is wholly complimentary—a means of generating a significant favorable impact while such restructuring takes place.

Third, in a similar vein, my judgment is that some of the other major proposals now being discussed are not sufficient by themselves to bring about a significant reduction in the anticompetitive behavior of Federal agencies. Take, for example, the "sunset" approach. From my experience in the Federal Government, the only way a sunset

¹ See, for example, Alfred E. Kahn, "The Economics of Regulation: Principles and Institutions" (New York: John Wiley & Sons, Inc., 1971); "Ford Administration Papers on Regulatory Reform" (edited by Paul W. MacAvoy; Washington: American Enterprise Institute, 1977); Roger Noll et al., "Report of the Economic Advisory Panel to the National Commission for the Review of Antitrust Laws and Procedures" (Washington: Nov. 9, 1978); Almarin Phillips (ed.), "Promoting Competition in Regulated Markets" (Washington: Brookings Institution, 1975); and Murray L. Weidenbaum and Robert DeFina, "The Cost of Federal Regulation of Economic Activity" (Washington: American Enterprise Institute, 1978).

² Adam Smith, "The Wealth of Nations" (New York: The Modern Library, 1937), p. 128.

law could have a truly significant effect on an agency is for it to represent a viable threat. But put yourself in the position of the typical agency official: Does the possibility of the sun's setting loom large, or is it really quite remote? Or, take the legislative veto. While I should imagine this would be of substantial concern to agency officials, it is not clear to me that this approach would have a significant effect in reducing anticompetitive rules and regulations. The locus of the adversary process would be spread to the Hill, where Senators, Congressmen, and their staffs would have neither the time nor the expertise to evaluate fully each and every issue. Moreover, I suspect that regulatory proposals would not be voted individually, but would be packaged, thus reducing the potential for selective restraints on agency anticompetitive behavior. Or take even President Carter's new Executive order and the new Regulatory Council. Based on my experience in trying to improve agency performance how this approach can have significant impact unless its requirements are made more specific and are raised to the standing of public law. This is not to say that such approaches are undesirable: Merely I think it would be a mistake to rely altogether on them to achieve the purposes set forth in the bill before this committee.

One of the issues discussed at earlier hearings on the proposed Competition Improvements Act was whether its provisions should be applied to the so-called social regulatory agencies—those dealing with health, safety, and the environment. (Examples include the Consumer Product Safety Commission, the Environmental Protection Agency, the Food and Drug Administration, and the Occupational Safety and Health Administration.) In my judgment, the requirements of the proposed act should be applied to the social regulatory agencies for two reasons. First, there is tentative, increasing evidence and widespread belief that the social regulatory agencies often do have an adverse effect on competition.¹ Second, it would seem there are few instances where a social regulatory agency could not tailor its rules and regulations to minimize the adverse impact on competition. In short, I do not believe the Competition Improvements Act would prevent social regulatory agencies from carrying out their objectives.

On the other hand, I am troubled by section 5(b) of the bill, which would allow the court to award litigation costs under certain conditions. Certainly, it is important that sufficient incentives be present to assure that agencies adhere to the act's provisions. But it seems to me that such incentives are present without this provision: Parties directly (adversely) affected would have strong motives to bring action before the courts, and the functioning of the Department of Justice and the Federal Trade Commission (as authorized under the statute) would appear sufficient to protect the general public.

Mr. Chairman, members of the committee, that completes my prepared statement. I shall be happy to address any questions you might have.

But first, I would like to make a few points not covered in my formal statement. First, people have pointed to the prospect that S. 382 would create interminable court delays because there would be a new

¹ See, for example, the testimony of Milton Kafoglis before this committee's Subcommittee on Administrative Practice and Procedure (Oct. 7, 1977).

standard of competition. There is a potential for some delay. But let me make the point that at the present time the courts interpret the objectives of the antitrust laws in light of the agencies' statutory mandates.

I was just referencing this morning an article by Prof. Phil Areeda, at Harvard University, who wrote in the 1972 issue of the *Bell Journal of Economics and Management Science*, outlining the relationship between the regulatory agencies' own statutory mandates and the antitrust laws—to what extent do agencies have to consider the antitrust laws. Also discussed is the way the courts oversee these regulatory agencies with respect to their interpretation of the antitrust laws. So we already have that. We already have some oversight today. The Competition Improvements Act would simply change that standard and would make it a great deal more specific.

Senator KENNEDY. Is that going to impose an additional burden on the regulatory agencies, or will the establishment of a clear standard shorten the process rather than lengthen it? What is your own assessment?

Dr. MILLER. Well, I doubt if it would lengthen it materially. The reasons are several. One is that agencies are already required to give some credence to the antitrust laws.

Senator KENNEDY. If that is true, then why is this legislation necessary?

Dr. MILLER. Well, because the existing standard is not strong enough. What we need, I think, is a much stronger one, because the present court interpretation, as I understand it, is not sufficient to prevent regulatory agencies from having significant anticompetitive consequences.

Senator KENNEDY. Are you satisfied that the language of the bill is flexible enough to be applied to the broad range of regulatory agencies?

Dr. MILLER. Yes, sir, I am.

The other thing is that as we have more and more expressions of concern on the part of the Congress, the administration, and others over the propensity of regulatory agencies to be overzealous in restraining competition, the agencies are more and more going to consider the effects of competition, and you may well be doing them a great service by giving them a more specific standard on which they can hang their hat. You may well be reducing the amount of litigation involved by giving the courts a clear indication of the standard they are supposed to enforce.

Senator KENNEDY. That is clearly our intention.

Dr. MILLER. Yes, sir.

Now, on a related point, section 5(a) says that in a judicial review of an agency decision, the burden of proof shall be on the agency. Would it not also be consistent to place the burden of proof of the need for an anticompetitive policy or anticompetitive acts in an administrative proceeding on those advocating the anticompetitive policy?

Finally, a point that I raised in December 1975, when I testified on predecessor bill S. 2028: It would seem important that the legislative history reflect very specifically that the purpose of the Competition Improvements Act is not to protect competitors but to protect competition. It should not be used as an excuse for an agency to protect existing competitors from outside competitive pressure.

Senator, that is all I have.

Senator KENNEDY. I have one final question. What will happen when these requirements are applied to health and safety regulations? How do you feel that they can be or should be applied?

Dr. MILLER. Well, I think that the standard should be applied. My feeling is that there are very few instances where a social regulatory agency has to implement a rule or regulation to meet a social regulatory objective where it cannot tailor that rule or regulation so as to minimize the adverse consequences on competition. We would go into a very long colloquy about the need for a social regulatory agency to implement some form of cost-benefit analysis, which I think is very important. But I think these things can be weighed, especially if you are talking about trying to minimize the adverse consequences in one specific dimension.

Senator KENNEDY. No. That is fine. I really do not have any further questions. Your testimony was very helpful. You have obviously given a lot of thought and attention to these issues. We are grateful that this committee is able to draw on your expertise. I want to thank you very much.

Dr. MILLER. Thank you, Senator.

Senator KENNEDY. Our next witnesses will testify on the impact of the Competition Improvements Act from the perspective of small business. We have with us this morning Mr. Mike McKeivitt and Mr. Thomas Rothwell.

Mr. McKeivitt is Washington counsel for the National Federation of Independent Business.

Mr. Thomas A. Rothwell is antitrust consultant to the National Small Business Association. The NSB is a multi-industry trade association representing approximately 50,000 small business firms nationwide.

We look forward to your testimony. We are glad to have you back here before the committee.

Mr. McKEVITT. Thank you, Mr. Chairman. This is Frank Swain, on my right; and Mr. Dennis, on my left.

Senator KENNEDY. Fine.

PANEL OF SMALL BUSINESS EXPERTS:

STATEMENTS OF JAMES D. McKEVITT, WASHINGTON COUNSEL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THOMAS A. ROTHWELL, ANTITRUST CONSULTANT, NATIONAL SMALL BUSINESS ASSOCIATION

Mr. McKEVITT. We poll our membership about eight times a year on eight or nine issues. We stay away from the "no win" issues and we stay away from foreign policy. Last October we polled them on the question of abolition of all antitrust exemptions. They came back 3 to 1 in favor of it. The same with the deregulation of trucking on the legislation, the same way there, same ratio.

As a result of that, we strongly supported you on the deregulation of trucking and we will continue to do so.

I think Tom Steed, my former colleague, he said the word isn't free enterprise, it is competitive free enterprise. I think

that our membership which is a mixture of manufacturers, retailers and wholesalers and they are saying let us breathe and have a shot at it. For these reasons and the three big concerns of our membership is inflation, the need for tax relief and also a need for competition and to open up and the regulatory abuses which we see.

We think this legislation is good for two primary reasons. One is to force the agencies to consider and justify the kind of economic regulations which increase the cost and increase competition. We think it will prevent some of the freeze outs.

I would give three examples where I think the legislation will be extremely beneficial. You have a door opener for us if you will take for example, the Interstate Commerce Commission. You have a battle of the major truckers at the Interstate Commerce Commission. These features here, it will be just the establishment of whether it is a competent carrier and let them have at it. There are a lot of independent truckers who do want a bigger shot at a bigger opportunity in the trucking market. By simplifying this it will give a much greater door opener for competition.

Another example is the food nutrition service as far as food stamps are concerned which became effective on January 1, 1979. It says that no business establishment can process food stamps unless that business receives over half of its gross income from the sales of food. Take the rural stores, they sell sporting goods, they sell a variety of stuff but will exceed 50 percent of sales of nonfood items. We feel it discriminates against small town rural stores at the present time that handle a variety of goods and products. Here is another example where it is anticompetitive.

The third example is let's take Big Boy Meats versus Small Boy Meats where you have this rigidity so far as meat content is concerned. Big can afford to have a lab on the premises for required specific contents, the Small cannot. They cannot afford the laboratory or testing procedures. They have to farm it out. They can do a periodic testing. We feel that there must be some tolerance there, some bounce. As it is now, it forces us out of the market.

One concern that we do have and that is the degree of paperwork and the impact of competition. Our members spend as much as 20 percent of their productive time on paperwork, Federal, State and local. Senator Eagleton and Brock introduced a variety of bills on reduction of paperwork and setting specific standards. I think you almost have to legislate intent into the bureaucrat's mind whether it is on competition or whether it is on paperwork reduction.

People like Mr. Cohen is one thing, for example, but if you don't have an administrator or a director or cabinet-head that has a feel for competitive free enterprise but really is concerned about the advance of paperwork the department is putting out, I think the legislation will go a long way to reshape their thinking in this regard.

That is all I have. Thank you very much.

Senator KENNEDY. What I would like to do, if I might, is hear Mr. Rothwell's testimony and then proceed to questions.

Mr. Rothwell, would you join us here?

Mr. ROTHWELL. Mr. Chairman, thank you very much for giving us the opportunity to testify on this matter, one which we feel is of overriding concern and importance to the small business community

especially, and indeed, is in a sense vital to the future progress of this Nation, in a healthy, developing, upswinging mode.

With the permission of the Chair, I would like to submit my statement for the record and summarize the contents thereof, focusing, if I may, on two suggestions that are contained in my prepared statement.

The first of the matters that I would like to address is to state that it is going to take some time to penetrate the bureaucratic mind-set, if I may, and have the regulators, those who make economic decisions for hundreds of thousands of American businessmen, the vast majority of which are in no position whatsoever to even squeak the faintest protest—it is going to take some time for them to appreciate what the will and intent of Congress is, and the fact they have to change longstanding patterns.

Of course, Mr. Chairman, any regulator, like any monopolist, as has been pointed out, prefers the quiet life. From the point of view of the regulator, the quiet life means stability in the industry. And, to achieve that, anticompetitive policies, positions, rulemaking, et cetera, proliferate, and there is no cop on the beat, if you will, to point and say, "This is anticompetitive." I don't think, in many years of experience with Government in a variety of mechanisms, the fact is that I have never heard of a regulator saying that a particular regulation was anticompetitive. That becomes a contradiction in terms, like a resourceful sheriff or a sentimental police matron, or something of the sort. You don't see that occur.

Our first suggestion is that we must not make this merely a paper reform, something to speak to during annual meetings of the membership, or Fourth of July celebrations, and this is going to require diligent spadework to make this reform proposal effective in the nooks and crannies of the Federal regulatory agencies.

No. 2 and vastly more important, Mr. Chairman, members of this committee, is the fact that there is no one common standard to determine what is procompetitive and what is anticompetitive. Indeed, the debate on that issue rages, and is continuing to rage with increased fury at this very time. We find that many of the monopolists, many of the anticompetitive forces, are cloaking themselves in the garb of champions of competition. So that like Iago, they can continue on their mission of monopolization, under the guise of the most favorable competitive cloak, if you will.

Now, we suggest that Congress—and we would very much like to start with this committee, Mr. Chairman—we suggest that Congress articulate, in the bill itself, what is the yardstick to be employed by these agencies and officials who will be making these discrete decisions, what yardstick they will employ. What will be the litmus paper that will tell them whether their actions are procompetitive or anticompetitive?

The prior witness said he wanted language in the bill to insure that it would protect competition rather than competitors. That, of course, is a phrase that has been heard in the halls of Congress from those opposing the Robinson-Patman Act—antiprice discrimination act. Price discrimination being historically one of the favorite tools of the monopolists, and of course, they, like others in pursuing their economic ends, utilize predatory practices. They very piously say that this is all in the name of competition.

We suggest, Mr. Chairman, that the committee and the Congress made it clear that by competition they mean anticoncentration. That the litmus paper, the true and overriding yardstick as to the presence or absence of competition, is very simple. It is the number of competitors and their market share.

We should not be led down the primrose path to pursue the ideal of the least possible price, so that perhaps the two or three chains can devour the entire food marketing industry, and the Sears and Roebucks can grow apace because the value sought is the least possible price. We say no. We have adopted as a fundamental idea and, as one of the prior witnesses referenced Adam Smith's 1776 statement, the unifying principle of our economic culture should be competition and competition means competitors, and competition means viable market shares.

The fact that two companies do 80 percent of an industry, and there are 24 companies sharing with the other 20 percent, does not present a picture of competition within that industry. The examples of this proliferate.

We especially applaud the committee and the chairman for his perseverance and understanding of these problems, and most especially for the part of the statute—the proposed bill, I should say—that has not yet been referenced and that is the aspect of repealing and amending that section of the Clayton Act granting seemingly limitless anti-trust immunity to actions of certain agencies named within that third paragraph of that section of the Clayton Act.

Mr. Chairman, if I may be permitted to submit my rather brief statement for the record, this constitutes the points that we, at the National Small Business Association, feel of vital importance to this proposed legislation, and the committee's handling thereof we feel would be vital to the success and ultimate fate of this law and effect of this law.

Thank you, Mr. Chairman.

Senator KENNEDY. Both of you represent major groups of small businessmen and women. What has been your experience with the performance of regulatory agencies in the past in terms of commitment to competition?

Mr. McKEVITT. I think that Parkinson's law is not only a school-book and a textbook for this town, now you are starting to see the growth of it in State and local as well. I do not see the end of this by any means.

Mr. ROTHWELL. Mr. Chairman, if I might pose a supplemental answer to that inquiry, I think as referenced by the national committee or commission as reported in January, the agencies that control, the regulatory agencies, and especially in the economic sphere, have undergone metamorphosis. Formerly, back say 30 years ago, the agencies were run by people who had considerable latitude and reliance was placed upon their expertise.

In that mode, we have had a very flexible and a very sort of coat of many colors. At times, under certain regulators, competitive principles and so forth were honored to some extent. However, with the arrival of the environmental and consumer interest concerns coming to the fore in the last few years, this has been accompanied by a change in the regulatory mechanisms, where the regulatory mecha-

nisms now do not depend on the discretion and expertise of the regulator nearly as much, but rather they depend upon the literal interpretation of specific words of legislation. This, in turn, has led to a decrease in any scope whatsoever for consideration of competitive values in the sense that we would recommend. That is, the number of competitors and the fact they have a viable and significant market share distributed among them.

In that sense, I can say I know of no regulatory situation in which that value has been continued.

Mr. DENNIS. Mr. Chairman, section 1, of that bill, which gave both the IRS and Department of Labor to add some flexibility not only into their regulations, but on paperwork. It gave them more flexibility, an option to create more viable standards. As a result, we have small businesses faced with the dilemma of either incurring enormously high costs and becoming increasingly less competitive or dropping the pension plan.

We estimate that there are 6,000 pension plans that were dropped because of that, only belatedly has the agencies decided to do anything about it.

Mr. BOIES. Is it your belief that the provisions of the act ought to apply to health and safety regulations as well as to so-called economic regulations?

Mr. ROTHWELL. As the first witness this morning, the Chairman of the CAB, testified there is not the slightest suggestion that matters relating to the safety aspects of airline operations have been in the slightest bit affected by the deregulation and the concomitant increase in competition.

I think we certainly are not going to have competitive values take precedence over the rulings of the Food and Drug Administration, for example, as to which product should be sold by prescription only, to take a homely and commonplace example of their activity. I think there would be very, very little trouble in discerning when the statutory purposes would override all other considerations. But one thing that the bill would do, would compel someone to sit and think about the matter and perhaps write a memo and publish something in the Federal Register, and it would open that decision to challenge so that it could not be arbitrary.

Today, such decisions may be arbitrary and are beyond such challenge.

Mr. BOIES. So I take it you would be in favor of applying the act to health and safety regulations as well as to so-called economic regulations?

Mr. ROTHWELL. Very much so.

Because in the pursuit of their statutory public health and safety goals they very frequently make rulings that are disastrous to competition and small business.

Mr. BOIES. I take it you would also agree that where an overriding statutory purpose exists, an agency might impose restrictions even on competition, if it is necessary for health and safety?

Mr. ROTHWELL. Yes; and I commend very much those people associated with this measure and its predecessors for thinking the whole set of problems through so specifically, and coming up with that kind of language. Certainly no one should suggest that com-

petition should obviate the Consumer Product Safety Commission's primary statutory tasks. No one is suggesting that. I think that would require an irrational reading thereof to read that into the bill. So, I think that the broader the scope of coverage the more effective the bill will be as to all departments within the economy.

Mr. BOIES. Mr. McKevitt, do you agree that the act should apply to health and safety regulations?

Mr. McKEVITT. Yes; I do. I think Big Boy Meats is a good example. I think another example is OSHA, the exit signs, the fire extinguishers, that enables the inspectors to really pick on the small business and not go after the real problems of safety and health, whether it is a foundry, a paint shop, or the construction industry. It is too easy to go to the numbers game. As a result of that I think we see a trend—for example 928 regulations have been abolished in OSHA and also now we are talking about SIC Code exemptions in the Department of Labor based on reports of several months ago on safety that showed that small businesses of 25 employees or less had a 90 percent high safety rating.

I think these things should be taken into account as well because it is highly anticompetitive when small businesses have to submit to a variety of very unreasonable inspections just to accommodate a person's goal in making inspections.

Mr. BOIES. Mr. Dennis, do you agree?

Mr. DENNIS. I can give you another example from OSHA, the issue of performance versus specification or design standards. Performance standards set a goal to be achieved. Design or specification standards tell you how you must accomplish that goal—in other words, what type of technology you are going to apply and things of that nature. Smaller firms have to be innovative and find a way to accomplish the goal it wasn't the generally accepted or generally thought of way of doing things. Use of performance standards makes them more competitive and the objectives are achieved just as well as if someone came in and told them how to do it.

So, yes, by requiring performance rather than design standards, agencies can achieve their health and safety objective while doing things perhaps in a more competitive way.

Mr. BOIES. Thank you.

Senator HEFLIN. Do you consider that in carrying out this that there is a need for some watchdog approach towards regulatory agencies to carry out the intent of this act either in the form of a separate agency or divisions within, as opposed to the provisions of the act by which the Attorney General, of course, can intervene?

Mr. ROTHWELL. Senator, of course, the bill addresses itself to that question by giving to the Attorney General some additional jurisdiction in the case of the independent regulatory agencies, minus one or two. Insofar as the creation of another agency is concerned, I reserve the right to correct the record. I have not discussed this with the client, if you will, but the client's general policy I think would be adverse and inimical to that idea.

Now the other suggestion the Senator makes to the effect that each of the agencies should create within itself under its current budget, a task force, if you will, to monitor their competitive control versus anticompetitive activities such as giving an audit to the Congress. or

some group under the supervision of the Congress, given on an annual basis, perhaps that would be a helpful input, also.

You know, things have a great habit of missing the mark. As a gross example, the greatest experiment in morality, in this country's history, the prohibition amendment, the 18th amendment, who could have predicted that would lead to the organized crime that we thereafter encountered? So, I think we obviously have to stop and consider that the arrow shot at a particular target, it doesn't always hit, or there are some unexpected side effects.

I would suggest that if this bill becomes law, and we fervently hope it will, with the addendum we have had the audacity to suggest, that we should sit back and wait for a year or two. Wait for the time and weathering and so forth and then take a look see and find out if you need that kind of a watchdog. It would seem to be unnecessary at this point, Senator.

Senator HEFLIN. Let me say, I didn't think this was a suggestion. This was an inquiry. I think there is a distinction between watchdog and policing too.

Mr. ROTHWELL. Yes.

Senator HEFLIN. I just was inquiring whether in your opinion and in the opinion of the people here, the so-called teeth that the Attorney General will acquire, will be sufficient to cause a slow moving regulatory agency to follow the intent of the law. Do you think the Attorney General's posture in this and the powers given him are sufficient?

Mr. ROTHWELL. Yes. I think the Senator puts his finger on the vital matter. That, of course, is the first point we made in reference to our prepared statement; that is, how to get people to pay attention, heed and respond to, and we have to expect a time lapse.

Now the question suggests something that I would rather not contemplate. I would not like to think the Attorney General himself would ignore the bill and ignore the law and not proceed with the powers that he has and with his additional powers, supervisory powers, if you will, over the independent regulatory agency. As a matter of fact my conjecture is that the Attorney General would be prompt to move out and test the waters in some court or proceeding, to see just how far he could go. This puts him in a stage, in some respects, a half a stage up in reference to some of his fellow Cabinet members. I think the Attorney General is going to enjoy that opportunity. I suspect that he would find occasion to at least test the waters in reference to this.

Mr. McKEVITT. Senator, having served in Justice I do not know how fast moving Justice will be or how effective they would be on something like this.

I would like to see the machinery in place and address itself first and such as the agency pick up this attitude within their own structure and also they have the assistance of the courts. You now have a competitor, as well as arbitrary and capricious, in addition you also have an office in place that is called the Office of Advocacy of the Small Business Administration which I think would be a good watchdog already created to pursue the anticompetitive aspects of the regulation.

Senator HEFLIN. Let me ask you this: Are we getting into, from a viewpoint of a watchdog, are we getting into contradictory philosoph-

ical approaches. A regulatory agency is created to be independent. Granting to the Attorney General, which represents basically, the philosophy of the majority party or the party that is in power, an oversight function, is this a contradictory philosophical approach to this problem?

Mr. ROTHWELL. Mr. Senator, I do not think the "independence" of the regulatory agencies is a limitless role, if you will. Now the Attorney General, acting under the powers that this bill grants, is not subtracting from the independence of the regulatory agencies any more than Congress has decided. It was Congress, in conjunction with the President, that gave these independent regulatory agencies their "independence." Congress, with the conjunction of the President, has a perfect legal right to take it away in whole or in part.

So there is really no philosophical contradiction insofar as it was Congress which makes the policy and not the Attorney General. I think it is clear that Congress is making the policy and asking in certain limited instances, for the Attorney General to assist in its implementation. Now whether that impacts on the executive or judicial or the independent regulatory agencies, I firmly believe it is not philosophically inconsistent whatsoever and it is well within the scope of the legislative power.

Senator HEFLIN. Well, procedurally, but how about from a rationale basis?

Mr. ROTHWELL. Only if one spells the word "independence" with full capital letters. I think the independence of the regulatory agency was designed to not have them shift course with every passing wind or every political storm that swept across the country, so as to give some stability and so forth.

That is why I suspect that many of the terms of the Commissioners of these agencies is 7 years. That leaves time for at least one national election. I do not believe the word "independent" philosophically or in terms of political science extends so far that Congress has disabled itself from declaring a set of policy guidelines to be followed by the independent regulatory agency as well as other departments.

Mr. CHUMBRIS. Mr. Chairman, this may not be entirely on point, but in 1963, Senator Kefauver was chairman of the Senate Antitrust and Monopoly Subcommittee and he introduced a bill which would amend the ICC law that the Commission would have to put more emphasis on competition rather than the public interest provision in the ICC law when it made its decisions as to railroad mergers. Now there is the case, as the Senator brought up, there is a case where the law, and as you pointed out too, where Congress itself, if it wished to do so, could have passed that law that Senator Kefauver suggested.

But the Congress did not and did not accept that theory, feeling that the congressional law for years had been that antitrust implications would be just one aspect, but overriding would be the public interest. That is the way the ICC made its rulings. As I say, this may not be entirely on point, but it points out both ends of it where Congress can change the law to give competition a greater impact than public interest as is now in the law.

Senator HEFLIN. Well, my direction was not necessarily toward anti—I mean toward competition approach, but was the relationship to the Attorney General in relationship to the independent agencies which was in a watchdog effect.

Mr. ROTHWELL. Yes, Senator, if the word "watchdog" came to mind let me withdraw it. I do not come from that quarter at all. I think, however, perhaps the independent regulatory agencies do not—do they not have to work through the General Services Administration in supplying their needs, the supplies, the desks and paper and typewriter and so forth. Isn't this a parallel situation?

Mr. Chumbris, on the occurrence in 1963, is not at all off point. Since the independent agencies do not have the constitutional status as the other legislative, executive, and judicial levels of Government, I should think that the constitutionally organized levels of Government considerably control and lend direction to the independent regulatory agencies.

Mr. Senator, what I think the independence of the regulatory agencies was designed to accomplish in the Government plan was to stop a call from the Oval Office of the White House that would result in a 180-degree turnabout in terms of policy decision. That is really what the independence of the agency was all about. It wasn't independent of policy direction taken by a law which has as much peer group effect, if you will, as the organic law creating the agency.

That is, S. 382, if it becomes the law—for example, the Federal Reserve Board, it has the same legal muscle, if you will, as the law that created the Board.

Mr. CHUMBRIS. Senator Heflin's point is the power of the Attorney General. We have had instances in the past, where the Attorney General would intervene in the FCC. I think the case was the ITT and the network, ABC. Although the Attorney General did not intervene successfully in a sense, it did delay the matter before the ICC for about 6 months. The stock market and the economy changed and the two companies decided between them that they would nullify that agreement they had made.

There were several instances where the Attorney General tried to intervene in ICC cases. I think that is the point that Senator Heflin is trying to bring out as to how far an Attorney General should go.

Senator HEFLIN. Well, I just raised the issue. The concept is that you create an independent agency and there is no question that Congress can do what it wants to, give it directions. It can give it directions as to competitive approaches. I just raise the issue just as an inquiry.

Mr. ROTHWELL. Yes.

Senator HEFLIN. As to whether or not you are eroding the independence concept by allowing a political agency under the administration to watchdog that independent agency. There may not be anything wrong with it. I just raised that question. It is a philosophical approach, I suppose.

Mr. SWAN. Senator, I think we are all interested in the least intrusive way of achieving a mechanism whereby the goals of the bill are served. There are several ways of achieving that. You may create an independent agency. You can create an independent advocacy office within each agency with the goal of monitoring this. I think this is what the bill does.

Senator HEFLIN. Well, that is largely dependent upon the zeal of or the lethargy of the Department of Justice on the issue.

Mr. SWAN. Yes.

Mr. ROTHWELL. Senator Heflin, if I may make one further comment. Senator HEFLIN. Yes.

Mr. ROTHWELL. There is in the bill itself, of course, the giving of a sort of oversight responsibility also to another regulatory agency which is the Federal Trade Commission. Also, there is the oversight function of Congress that supports the measure at hand. That is what Congress is doing. It is saying to both the independent regulatory agency and other agencies in the executive branch that competition be made of paramount concern. That is what this S. 382 is all about. This without doubt can be enacted pursuant to the oversight responsibility of Congress.

Now, in giving specific guidance to the Federal Trade Commission and the Attorney General in the exercise of its statutory responsibility, I think goes a long way to avoiding that difficulty. Perhaps there is a limit put on the authority of the regulatory agency if S. 382 would become law that didn't exist before. Perhaps there is some incursion into the scope and thrust of the word "independent." But, I not only think it is within the power of Congress, but the overriding benefits to be achieved by the legislation at hand are certainly well worth that little how should I say, mental inconsistency, you set up an independent agency and then subtract from its independence, giving to the Attorney General instruction and language.

I would say in total agreement with where I perceive you are coming from sir, I would agree wholeheartedly to give the Attorney General of the United States oversight responsibility without specific directions would certainly pose—a question of constitutional language would be a totally inconsistent thing. I do not believe that is what is proposed by this measure.

May I add in conclusion, that that is a burden and most legally compelling argument why Congress should articulate in the measure itself what it means by procompetitive as distinguished by from anti-competitive so that decision is not left either to the regulators or to the Attorney General.

Mr. CHUMBRIS. Mr. Rothwell, the very point that I raised earlier about the ICC, I raised that point with Mr. Cocker at that time who was head of the Antitrust Division and whether there was the wisdom in the bill to give the Department of Justice the authority to use the anticompetitive aspect rather than the public interest which is exactly what Senator Heflin was bringing out.

Mr. ROTHWELL. Yes.

Mr. CHUMBRIS. I tried to show that you could do it by Congress; but at the same time that was a concern we had.

Senator HEFLIN. I believe we covered this pretty well. I did not mean to create a long discussion on it. Are there any other statements from any of the group that is testifying now? [No response.]

[The prepared statement of Mr. McKevitt follows:]

PREPARED STATEMENT OF JAMES D. "MIKE" MCKEVITT

Mr. Chairman, I am appearing this morning on behalf of the National Federation of Independent Business (NFIB), a national association of more than 560,000 small independent business members. We are grateful for this opportunity to appear before the Senate Judiciary Committee, and express our views on S. 382, the Competition Improvements Act of 1979. This proposal would impose on all Federal agencies the specific requirement that they take into account the possible

anticompetitive effects that may result from the rules and regulations they promulgate, and clearly justify an occasion in which a rule has an anticompetitive result.

NFIB has longed believed that the regulatory process has produced too many overly complex, inflationary and unjustified procedural and substantive requirements, which often have only a tenuous connection to a public purpose or Congressional intent. We are very pleased to see that this fact is being recognized in many quarters within the Federal Government. Recent actions within the administration, including the formation of the Regulatory Council and the issuance of the executive order requiring plain-English regulations, are a good start at providing the necessary focus on regulatory actions within the administration. But, NFIB believes that firm pressure in the form of legislation will be more effective at provoking essential basic changes in patterns of thought and action within the agencies as well as in reaching those which can be touched in no other manner. S. 382 is a simple and effective proposal which is clearly needed. For these reasons we feel it is good legislation.

From the perspective of small business, anticompetitive regulation takes on three forms. The first and most obvious form serves to limit the entry of new competitors or new competitive technologies. Perhaps the most visible example involves the need for certain types of truckers to obtain a Certificate of Convenience for the Interstate Commerce Commission (ICC), and the administrative procedures by which this is accomplished.

But equally blatant examples can be found in other areas as well. One of the more interesting was presented by an NFIB member, Mr. David H. Fulton, president of the 25-employee Plantabbs Corporation in Timonium, Maryland.¹ It seems Mr. Fulton was handed a monopoly by EPA on a product for the control of insects on houseplants, while simultaneously being denied the right to enter the market in dog repellents. Events leading to Mr. Fulton's status are rather involved, but the heart of the matter is that new registrations on fungicides, insecticides, et cetera, were frozen until existing registrations could be studied. Originally, it was believed the studies would last 2 years, but 3 years have already passed with only a small number of registrations reviewed. When this process will be completed is anybody's guess, presumably maintaining the monopolies for an extended period of time.

In a slightly different twist on the same theme, the utilization of specification standards rather than performance standards can create a monopoly or near monopoly situation. By requiring a specific method to achieve a regulatory objective, it is possible for an agency to "lock-in" a specified patent or series of patents. Thus the small firm finds only one source of supply and, often more importantly, cannot employ the entrepreneur's considerable ingenuity to reach the regulatory objective.

The second type of anticompetitive regulation involves requiring acts which the small competitor either simply cannot afford, or which must be accomplished in a manner more ideally suited to the needs and business practices of larger firms.

Let me offer several examples to illustrate, the first being rather lengthy. Nutritional labeling of processed meats has at one time or another been discussed by the Department of Agriculture (USDA). Assuming for the moment USDA determined the nutritional labeling of processed meats was in the public interest, regulations promulgated would probably require, among other things, the listing of specified components, for example, protein and the minimum amount, for example, 12 percent weight. Each consumer unit of product, for example, a package, would be expected to meet the assertions found on the label.

Let us briefly examine the differential impact such a single set of regulations would have on Big Boy Meats, an industry giant, Little Boy Meats, a small processor, and Joe Smith's Locker Plant.

Big Boy Meats should have comparatively little difficulty complying. Each of its plants contains several mixing vats producing the same meat, for example, salami, with a testing laboratory right next to them. After each batch is mixed, a sample is taken and analyzed. Within a minute, it will be known if the batch matches the labeling claims. If the batch does not, the proper adjustments are made, and Big Boy always produces its processed meats right to label specification.

Little Boy Meats faces an entirely different situation. The firm doesn't have a lab on the premises, let alone anyone who could operate it. Little Boy's procedure

¹ Statement of David H. Fulton, President, Plantabbs Corporation, testimony before the Subcommittee on Consumer of the Senate Committee on Commerce, Science and Transportation, Nov. 21, 1978.

has been to send a sample to a professional laboratory for analyzing. If the ingredient mixture is not exact, adjustments are made in the next batch. But the new regulations would effectively prohibit continuation of existing practice.

Little Boy Meats must now make one of three choices: The firm can build a lab, install a computer-like testing machine at a cost of approximately \$35,000, and train someone to operate the equipment. But that choice is prohibitively expensive, considering the facilities may be used less than 5 minutes a day. The second choice is to produce a label that deliberately underrepresents the quality of the firm's normal product. In that way, any batch which is slightly different from label claims will be covered. But if nutritional labeling means anything to consumers, Little Boy is placed at a competitive disadvantage because the product's quality is labeled to account for the worst possible circumstances. Finally, Little Boy can close his doors, and with some luck induce Big Boy to buy his good will, name, and marketing.

If Federal regulation compels States to have equivalent standards, forget Joe Smith's Locker Plant. Joe may stay in business exclusively with custom slaughtering, but there will be no more sales of processed meat to the public.

Should you find this example too improbable or hypothetical, I would draw your attention to a similar ongoing labeling problem small bakers are having with the Food and Drug Administration (FDA).²

Other regulations are promulgated in a manner more conducive to compliance by larger firms than smaller ones. The classic case is found in the paperwork requirements of the Employee Retirement Income Security Act (ERISA). Both the legislation and the implementing regulations were drafted with large firms in mind. But the Congress did include sec. 110, which gave the Internal Revenue Service (IRS) and the Department of Labor (DOL) an option to use abbreviated reporting requirements for small pension plans, among other possible variances. Instead, the bureaucracy chose to institute a form (Form 5500) obviously designed for an international conglomerate. That presented numerous small businesses with the option of competitive disadvantage or dropping (as well as not instituting) an employee pension program. Not surprisingly, the latter was frequently chosen. Only after the major damage was done did the bureaucracy become sufficiently concerned to attempt to rectify the problem.³

This class of anticompetitive regulation creates numerous unnecessary difficulties for smaller firms because it is so alien to the thinking of most regulators. It has simply been too subtle, and small business has not had the capacity to systematically point out the problem. While the condition is admittedly improving, much remains to be accomplished in redirecting the bureaucracy's thinking and making them understand small business is an important competitive element with somewhat unique competitive problems.

Finally, it is important to recognize that regulation per se tends to have a disproportionate impact on smaller firms.⁴ There are economies of scale in regulatory compliance just as there are economies of scale in the production and distribution of goods and services. That is not an argument against all regulation, but it does enter an anticompetitive (anticonsumer or antipublic) cost, though difficult to quantify, into the regulatory cost-benefit equation.

This point is not surprising once attention is focused on it. The problem is that all too frequently it is overlooked in regulatory decisions. And perhaps while not directly pertinent to S. 382, it clearly reveals that the competitive impact of a regulation is not always obvious or direct. Coincidentally, it also re-emphasizes the need for Senator Culver's S. 299, the Regulatory Flexibility Act, a bill harmonious with the one now under consideration.

² "The Food and Drug Administration's Food Labeling Regulation: Its Effect on Small Business," Subcommittee of Special Small Business Problems of the House Small Business Committee, 95th Congress, 2nd Session, Washington, D.C. July 13, Aug. 13, 1977 and Mar. 15, 1978.

³ It has been estimated that over 6,000 plans were terminated in calendar year 1975. For further information, see "Foundations for a National Policy to Preserve Private Enterprise in the 1980's," Subcommittee on Economic Growth and Stabilization of the Joint Economic Committee, Apr. 8, 1977.

⁴ See, among others, "Differential Impact of Pollution Control Requirements on Small vs. Large Business in Grain and Stone Industries," Small Business Administration, prepared by JACA Corp., (Fort Washington, Pa.), May, 1975; "The Impact on Small Business Concerns of Government Regulations Forcing Technological Change," Small Business Administration, prepared by Charleswater Associates (Boston, Mass.), September, 1975; statement of James D. McKeivitt, Washington counsel, National Federation of Independent Business, testimony before the Subcommittee on Administrative Practices of the Senate Judiciary Committee, October 7, 1977.

Regrettably, NFIB can neither quantify the impact of anticompetitive regulations on small business nor can we provide a comprehensive list of regulations pertinent to the present discussion. It is doubtful anyone can. That in itself is sufficient argument for proceeding on the "broad brush" approach found in S. 382 rather than something piecemeal. NFIB expects that the application of a standard which would forbid anticompetitive regulations will serve as an effective threat for regulators. It will force those who administer the laws to do something about the effect their actions will have, and if that effect is anticompetitive, to find a less burdensome alternative.

We hope, for instance, that agencies will make greater use of performance-oriented standards rather than demand particular and expensive technologies. Such technological requirements create, in effect, needless economic barriers to doing business and have a clearly anticompetitive effect on the small business. We would hope that this standard would be interpreted to require agency review of required paperwork and reporting requirements.

We would hope section 3(a) would be interpreted in a broad sense. In other words, we hope this legislation recognizes that anticompetitive regulation is not solely a function of "locking in" a particular competitor or competitors. Our reading of the bill indicates a broad interpretation is appropriate. However, we suggest report language to that effect.

NFIB feels it is important to force agencies to consider the impact of their regulations. We are pleased that S. 382 would provide the legal basis to do this without creating any new procedural mechanisms which could unduly hinder or delay the regulatory process. We do believe that whatever time it takes to consider the anticompetitive ramifications of agency rules and decisions is clearly worthwhile.

PREPARED STATEMENT OF THOMAS A. ROTHWELL

Mr. Chairman and members of the committee: My name is Thomas A. Rothwell. I am antitrust consultant to National Small Business Association (NSB), a multi-industry trade association representing approximately 50,000 small business firms nationwide. These members represent over 1,000 of the 1,200 Standard Industrial Classifications.

National Small Business Association applauds and wholeheartedly endorses S. 382, the Competition Improvements Act of 1979. It has been recognized for some years past that governmental processes themselves frequently function to inhibit and obstruct the interplay of natural competitive forces. The distinguished chairman and other members of this committee are to be commended for perseverance as well as insightful understanding of the problems to which the measure is addressed. This is the third Congress to which the substance of this proposal has been presented for consideration.

Generally stated, the problem is a pervasive one throughout government; namely, a marked bias in those making regulatory policy, rulings and decisions. This bias operates to oppose the specific manifestations of competition, such as new market entrants, or the establishing of a priori pricing mechanisms that are inimical to competitive processes.

Every economic system known to man may be viewed generally as a system pursuant to which decisions are made determining who gets how much of what goods and services (the economic product of the culture), when and under what circumstances, and most importantly, for what set of reasons. Is it a matter of heredity, because one is born to the aristocracy or even the royalty? Does the division of wealth, meaning the goods and services produced by an economy, turn on the decisions of some Central Planning Committee or subordinate Bureau in a Peoples' Republic? The economic system to which we have fallen heir is still developing, and at times in disquieting dimensions. One such dimension is the torrent of rules, decisionmaking and regulations pouring forth daily, memorialized in the Federal Register, the work product of agencies, departments and bureaus functioning throughout the Federal Government.

Our economic system theoretically operates on the basis of merit and achievement, the unifying and overriding principle thereof being competition. This is the theory—the common understanding to which we all gratefully pay lip service. But in practice we too often strive for other goals. As recently reported by the National Commission for the Review of Antitrust Laws and Procedures: "As a result, the anticompetitive and protectionist tendencies of regulation were left

largely unchecked and regulators increasingly interpreted their statutory authority as a mandate to overlook or even suppress competition in pursuing regulatory goals."

As noted by this distinguished National Commission, the legislation at hand "would encourage and facilitate the use of procompetitive policies in regulatory decisionmaking. It would require agencies to focus on the economic effects of their actions and to maximize competition as a regulatory tool."

In other words, let's give competition a chance.

S. 382 is more specific and compelling by far than the relatively bland legislative admonitions of prior years to the effect that the regulators should take competitive values into account in determining the public interest and public policy underpinnings of their rulemaking and other regulatory activities. Yet S. 382 is at the same time of general application, and wisely differentiates as between the independent regulatory agencies and those subject to more immediate control.

In reviewing the competitive shortcomings of present agency activity, one frequently encounters as cited examples, limitations, and other obstacles designed to limit entry—what the antitrust lawyers call market entry barriers, pricing controls, and even compulsory collective ratemaking. The prevailing attitude as noted by the National Commission is that of protectionism. The net result, the bottom line if you will, is that regulation by Government functions in such a manner as to be more harshly punitive to the small business as compared to the large. The failure of Federal agencies to assess properly the economic impact of their regulations on the small was noted last year by the Antitrust, Consumers and Employment Subcommittee of the House Committee on Small Business, 95th Congress, Second Session, Report No. 95-1810, dated November 9, 1978; Union Calendar No. 944. Pointing out that the Commission on Federal Paperwork estimates that small business spends \$15 billion annually on paperwork imposed on them by various Federal agencies, the subcommittee summarizes its findings on the burdens imposed on the small by Federal regulatory policies as follows:

"Testimony presented before the subcommittee also pointed to the disproportionate share of the regulatory impact which small business must bear. It has neither the financial nor the human resources available to big business to examine, understand and fully comply with the precise obligations imposed by the regulators. Thus, this also exposes the small business to a greater risk of fines and penalties for violation of rules and regulations it may never fully understand.

"The regulatory bind which the small business sector is in has not been fully recognized by the Federal Government. While there are examples of regulatory and administrative schemes which consider the substantive differences between the small and large business, the majority of regulatory actions taken by the Federal agencies fail to take these differences into account.

"Another point emphasized at the hearings was the cumulative effect of regulations imposed by various governmental bodies. Duplicative and often conflicting requirements are imposed on businesses by agencies at the Federal, State, and local levels. Thus, when examining the burden of regulations, it is necessary to consider the combination of all regulations as impacting on the small business community."

This same report goes on to record its finding that inadequate enforcement of the antitrust laws are "severely limiting the ability of small businesses to compete effectively in the marketplace." Thus, if, as and when competitive principles are honored in their observance, rather than their breach, by the departments of the Federal establishment, such should turn out to be good news for small businesses everywhere.

In order that the proposed regulatory reform embodied in S. 382 may be effective, we urge this distinguished committee to take the time and make the record of its intentions unmistakably clear. For S. 382 will be effective only if the regulators are given a clear exposition of what is meant by Congress by the use of the terms "procompetitive policies" and "alternate means having lesser anticompetitive effects."

We respectfully submit that the one overriding indicator of the nature and degree of competition is simply the number of competitors in any given market. Numbers of firms and market share data are the most important measuring devices to disclose the degree to which competition is present or absent. Other data, such as market entry, the course of pricing, innovation, et cetera, are also helpful, but the regulation and rulemakers must understand that when Congress mandates competition as a unifying principle, this means competitors. Regulatory action designed to, or with the necessary effect of, increasing the number of viable

competitors in a given market is consistent with the congressional command; whereas the converse is not.

Thus we perceive two distinct problem areas concerning S. 382 in operation. First, will the agencies heed both the spirit and letter of this salutary legislation? A diligent effort by the Attorney General, insistent on compliance, as provided in the bill, holds out much promise. But as best we cannot expect an overnight miracle. Long-entrenched attitudes are difficult to change.

Yet this problem is the lesser of the two. The second area, that of understanding and agreeing as to which specific actions are procompetitive and which are not, will keep lawyers and judges busy for years, unless Congress legislates on the basis of specific language in respect to its purpose and intent. Even though the language of S. 382 be enacted as is, the committee report as well as debates on the floor will provide an opportunity to reduce this problem to a manageable size.

Realistically, this is far too important a consideration as to the actual day-to-day impact of S. 382 on the regulatory process when it becomes law to leave to the individual discretion of hundreds of regulatory officials. Antitrust and trade regulation issues frequently tend to be complex; our most profound economists, lawyers and yes, even Supreme Court Justices, are often in sharp disagreement as to whether a particular public policy or rule of law is procompetitive or anti-competitive. Reference to the conflicting views as to competitive policy set out in the *Schwinn* case in 1967, as opposed to the *G.T.E.-Sylvania* decision a decade later, provides a compelling example of this difficulty.

To invite the numerous, farflung and most diverse community of Federal regulatory officials to participate in the making of such decisions may well turn out to be an invitation to chaos. Thus at a minimum, Congress should provide specific guidance to the regulatory agencies as to how to distinguish between a procompetitive practice, policy or regulation and the unwelcome intrusion of the converse thereof. Experience demonstrates that monopolists are always skillful apologists and rationalizers as to their misdeeds.

Therefore, it is submitted that the most obvious and simple measuring device to assist one in determining the index of competition—its presence or absence on a relative basis—is the number of competitors actually competing in a given market segment and their individual market share. Ideally, this index should be written into the statute itself as a clear and unequivocal legislative mandate.

Mr. Chairman, National Small Business Association and I am very grateful to you for this opportunity to express our views. Thank you.

Senator HEFLIN [continuing]. If not then I suppose we can go to the next witness who is Ms. Kathleen O'Reilly, the executive director of the Consumer Federation of America. The Consumer Federation of America is a federation of national, State, and local nonprofit organizations that join together to articulate the consumer viewpoint.

CFA and its member organizations represent over 30 million consumers throughout the Nation. Ms. O'Reilly's testimony here today will reflect the direct impact of the Competition Improvements Act on the consuming public.

Ms. O'Reilly.

STATEMENT OF KATHLEEN O'REILLY, EXECUTIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Ms. O'REILLY. I do not have the ability to speak today because of a sore throat. I would ask that my statement be inserted in the record.

I will ask for the opportunity to answer all of your questions in writing.

Senator HEFLIN. Without objection, so ordered.

Ms. O'REILLY. Thank you.

[The prepared statement of Ms. O'Reilly follows:]

PREPARED STATEMENT OF KATHLEEN F. O'REILLY

Consumer Federation of America is a federation of 240 national, State and local nonprofit organizations that have joined together to espouse the consumer viewpoint. CFA and its member organizations represent over 30 million consumers throughout the United States. Among our members are: 60 State and local consumer organizations, 83 consumer cooperatives, 16 national labor organizations, and 27 national and regional organizations.

For the fourth consecutive year, CFA's membership has recently approved a resolution in support of the basic principles of S. 382, "The Competition Improvement Act." That resolution reads as follows:

UNNECESSARY REGULATION

Many Federal agency actions have significant adverse impacts on the extent of competition in the American economy. While changed economic, social and technological conditions in the 1960's and 1970's have expanded opportunities for competition, unnecessary regulation of some segments of the economy has bred inefficiency, poor service, unsatisfactory business practices and high prices to the detriment of the consumer. We urge the passage of legislation which would require Federal agencies to make certain findings before taking actions which would significantly affect competition. Agencies would have to determine that: (a) The action is necessary to accomplish a statutory purpose of the agency; (b) Any anti-competitive effects of the action are clearly outweighed by significant and demonstrable benefits to the general public, and (c) the objectives of the action and the overriding statutory purpose cannot be accomplished in substantial part by alternative means having lesser anticompetitive effects.

That resolution evidences our membership's longstanding conviction that Government regulation, particularly economic regulation, has all too often adversely affected the very competition which should be the consumer's best tool against inflation. It is essential that Government agencies take actions consistent with the advancement of competition. All too often, however, agencies have acted as the witting or unwitting accomplice to those who share the late cosmetic magnate's philosophy: "I don't meet competition, I crush it."

To cite but a few examples of the diverse spectrum of agency activities which highlight the need for legislation:

(1) The Department of Interior's longstanding leasing policies (coal and other minerals) have allowed the major oil companies to acquire an increasing share of the Nation's coal and mineral reserves.

(2) Similarly, Outer Continental Shelf leasing could and should be conducted in such a manner as to promote rather than retard competition.

(3) In the area of utilities, there is widespread conviction that when it issues licenses and oversees the sales of power from investor-owned utilities to publicly-owned utilities, the Federal Energy Regulatory Commission must conduct such activities in a much more procompetitive fashion.

(4) Traditionally the Federal Communications Commission has prohibited the cable television industry from effectively competing with broadcasters in promoting diverse channel selection.

(5) The Department of Commerce recently drafted a comprehensive Model Products Liability statute. Yet in preparing that draft, the Commerce Department gave no consideration to whether voluntary compliance would impose a significant competitive disadvantage on small manufacturers because of their inability to secure the discounted comprehensive product liability policies typically made available to multiproduct large conglomerates.

Essentially, S. 382 codifies a policy which should already be standard procedure for Government agencies. Competitive impact analysis is hardly new. In its June 30, 1977 Final Report on the Impact Assessment of Automotive Fuel Economy Standards for Model Years 1981-1984 for passenger cars, the National Highway Traffic Safety Administration specifically addressed the competitive impact of the proposed fuel economy standards. Unsurprisingly (as current sales figures graphically demonstrate), compliance with those fuel economy standards has actually improved the competitive posture of domestic auto manufacturers in the international market.

To cite another example, in the past those companies which have sought to negotiate food procurement contracts with the Government have had to deal with frustration of varying specification standards depending on which agency they

were dealing with (USDA, Pentagon, et cetera). This placed smaller companies at a competitive disadvantage because they typically did not have the resources to analyze such multiple specifications standards. Now through a cooperative inter-agency effort, a single set of specification standards will be developed to enhance the competitive posture of small companies.

Wisely, this legislation is framed so as to recognize the important distinction between economic regulation and noneconomic regulation directed at health, safety, environmental protection and equality of opportunity (equal credit laws, civil rights, redlining, et cetera). As a matter of public policy, the goals of these noneconomic regulations override competitive implications. This is not to deny, however, that even these noneconomic regulations should be developed in the most efficient, least anticompetitive fashion consistent with the need to assure consumers health, safety and environmental protections, together with equality of opportunity.

The language of section 3(a)(1) and the specific enumeration of those exclusively economic regulatory agencies in section 8(c) evidence a sensitivity to this distinction. We urge that the bill be molded even more tightly so that as a practical matter, this legislation could not be used as a strategic tool for judicial delay tactics by persistent opponents of sound and much needed health, safety, environmental and equality of opportunity. Although the bill confers no new standing rights, it would provide yet another potential cause of action for that growing number of affected industries which are willing to pay the acknowledged high cost of attempting to apply judicial brakes when all else fails. The July 1977 Senate Governmental Affairs Study on Federal Regulation (Vol. IV), persuasively documents the increasing reliance on such delay tactics by those affected industries which have an inherent incentive to stall health, safety, and other regulations.

We also urge that the definition of "action" in section 8(b) be expanded so as to specifically include Government procurement and contract activities.

Two specific, yet representative examples, highlight the broad competitive implications of Government procurement/contract authority. When HUD's Federal Insurance Administration decides which architectural and engineering firms shall be awarded a contract to assess the impact to a particular community of proposed flood insurance regulations, the initial Evaluation Board does not and cannot consider the cost of the bid. Based on such noncost (albeit valid) factors as experience, the Evaluation Board ranks the submitted bids, forwarding the top three ranked bids to the Procurement Section which then begins a price negotiation process exclusively with the number-one ranked bidder. Only at this point does the cost of the bid finally enter the picture, and even then it is in a narrow non-competitive manner. If the cost of the number-one ranked bid is "fair and reasonable" it is accepted without comparisons to the costs of competing bidders.

This procedure is similarly followed in all Government procurement contracts with "professionals" (including lawyers, economists, et cetera). The rationale that it is unseemly for professionals to compete on a basis which includes cost is reminiscent of the medieval guild mentality which insulated professionals from advertising. Obviously, "cost" should not be the exclusive or overly weighted consideration, but logic and economic sense dictate that it be given far more than the current cavalier treatment by Government agencies.

Aggressive FTC action to permit advertising by lawyers, eye glass companies, et cetera is well received by consumers because it stimulates competition and lowers costs. For example, although a simple divorce in the District of Columbia cost between \$350-500 5 years ago, now with vigorous advertising available, the cost has dropped to \$125-150. Similarly, in Phoenix, Ariz., the rate plummeted from \$350 to \$125. There is neither evidence of decreased quality nor of the inability of standard remedies against fraud and misrepresentation to sufficiently protect consumers from abusive practices. As the largest procuring consumer, the Government has a significant stake in promoting cost competition when it negotiates contracts.

Another disturbing example of an increasing pattern is the distribution of the Department of Energy's Solar Energy Research funds. From 1977 to 1978 the percentage of that \$15-18, 5 million budget allocated to big business increased by 17 percent. The small business share declined 18 percent and the nonprofit share decreased by 200 percent! The Competition Improvement Act, if expanded to include procurement/contract actions would serve as an effective wedge in establishing underdeveloped government sensitivity to the competitive impact of its actions.

CFA also urges that the list of independent regulatory agencies in section 8(c) be expanded to include GSA, the Commodity Futures Trading Commission, and financial institution regulatory agencies (the Federal Reserve Board, Federal Home Loan Bank Board, Comptroller, Federal Deposit Insurance Corporation and National Credit Union Administration).

Bank agency powers, for example, over merger and branching applications embrace substantial competitive implications. In assessing branching applications (unlike mergers), the agency is not even directed by statute to consider let alone be governed by competitive considerations. Additionally, in light of recent passage of legislation establishing rights and responsibilities in the field of Electronic Funds Transfer Systems (EFTS) the competitive impact of financial institution regulatory agency decisions is critical.

Finally we urge that S. 382 include sufficient funding so that the agencies (particularly the FTC) will as a practical matter, be able to adequately comply. We have learned from experience (e.g. the Magnuson-Moss Warranty Act) that if an agency is given significant new responsibilities without any additional funding, the goals of the legislation cannot realistically be achieved.

We look forward to working with the committee and staff to provide strengthening amendments to this much-needed legislation. The time is long overdue for all agencies to be competition-sensitive. Hopefully, in the near future, all agencies will instinctively and routinely assess the effect on competition of their actions and economic regulations will consistently be motivated and influenced in large part by just such a consideration.

Senator HEFLIN. Thank you.

Mr. BOIES. Let me thank you for coming. I know that you were not feeling well and we appreciate your making the effort.

Senator HEFLIN. With the assistance of laryngitis, this hearing is recessed until March 20, 1979.

[Whereupon, at 11:05 a.m., the hearing in the above-entitled matter recessed until March 20, 1979.]

COMPETITION IMPROVEMENTS ACT OF 1979, S. 382

TUESDAY, MARCH 20, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:52 a.m. in room 2228, Dirksen Senate Office Building, Washington, D.C., Hon. Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, DeConcini, Leahy, Baucus, Heflin, Thurmond, and Hatch.

Also present: David Boies, chief counsel and staff director; Ed Merlis, deputy staff director; and Susan McDermott, counsel.

OPENING STATEMENT OF SENATOR DeCONCINI

Senator DeCONCINI. The committee will come to order.

We had hoped to have an executive session meeting here, and as soon as a quorum comes, then we would ask the Senators who are here if they could stay. As soon as we have a quorum, we will recess the hearing and go into the executive session to consider the bills.

We will now commence the hearing on the first bill, this morning, on regulatory reform.

The Committee on the Judiciary today resumes its hearings on regulatory reform in general and in particular on proposals to increase competition in the regulated industries.

Two weeks ago, the committee opened its hearings on regulatory reform with testimony endorsing S. 382, the Competition Improvements Act of 1979, from the Chairman of the Civil Aeronautics Board, the director of the American Enterprise Institute, two spokesmen for small business groups, and the head of the Consumer Federation of America.

These witnesses testified that S. 382 would be an important step in insuring that competition and the principles embodied in our antitrust laws play a significant role in the regulated industries and in other areas of the economy supervised by Federal agencies. The bill would do this by requiring the agencies to take a fresh look at their statutory purposes and the methods they choose to accomplish them, and by directing them to regulate in the least anticompetitive manner consistent with their legislative mandates.

Before an agency takes any action that may substantially affect competition, S. 382 requires that it find: First, the action is necessary to accomplish an overriding purpose of the agency; second, the anti-competitive effects of such action are clearly outweighed by significant benefits to the general public; and third, the objectives of the action

and the overriding statutory purpose cannot be accomplished in substantial part by alternative means having lesser anticompetitive effects.

The standards proposed here are neither novel nor burdensome. They are found in several existing statutes—the Atomic Energy Commission Act and the Bank Merger Act—and, to various degrees, in the judicial or administrative construction of the “public interest” standard found in most agency statutes.

What is new about this standard is that it replaces these uneven legislative, judicial, and administrative formulations with a uniform standard to be applied across the board by all Federal agencies.

At the same time, the broad language of the bill will provide ample flexibility for each agency to adapt this competitive standard to the individual industries and statutory goals.

However, the Competition Improvements Act is not simply an exercise in idle analysis for the Federal agencies. It is a directive to make a reasoned search for and selection of the least anticompetitive means for achieving their statutory goals. And it is enforceable.

Today’s witnesses are Assistant Attorney General John Shenefield of the Antitrust Division of the Department of Justice; and Ms. Joan Bernstein, General Counsel of the Environmental Protection Agency and assistant to Chairman Doug Costle of the President’s Regulatory Council.

The need to increase competition in regulated industries is a need that both the Antitrust Division and Mr. Shenefield know well.

In 1975, then-Assistant Attorney General Thomas Kauper of the Antitrust Division testified strongly in support of provisions that have been introduced in this Congress as S. 382.

Mr. Shenefield has recently finished serving as the Chairman of the National Commission for Review of the Antitrust Laws, which studied S. 382’s predecessor legislation at length and unanimously endorsed that bill’s principles.

We look forward today to the testimony of Mr. Shenefield and Ms. Bernstein, for their recommendations as to how we can increase competition and reduce unnecessary regulation in regulated industries.

If you would come forward, please, your statements will appear in the record, in full. If you would highlight them for us, please proceed.

STATEMENT OF JOHN H. SHENEFIELD, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. SHENEFIELD. Thank you, Mr. Chairman, members of the committee. I will summarize my statement, if that is agreeable with the committee.

[See appendix for Shenefield letter to Senator Kennedy.]

Mr. SHENEFIELD [continuing]. I do appreciate the opportunity to appear before the committee today to testify on this subject because I believe that S. 382 reflects an idea that is important and timely. It would in essence establish a uniform standard to guide consideration by Federal agencies of the effects of regulation on competition. Its goal is to require agencies to accurately assess such effects, to opt for the least anticompetitive alternatives that would accomplish regulatory goals, and to defend their decisions where challenged.

The administration is committed to implement these goals in appropriate legislation; however, the views I express today on S. 382 are solely those of the Department of Justice.

The Department believes that legislation along the lines of S. 382 is in fact overdue. The long and the short of it is that competition is the fundamental policy on which our economy is based, and Federal Government agencies should be the first to say so.

When Federal agencies undertake direct, economic intervention in markets, they should recognize potential competitive dangers and avoid as many of these as is practicable.

In my statement, I place this legislation in proper historical perspective, outline the rationale underlying its essential features, and submit our recommendations to the committee as to its appropriate scope.

We propose that a bill along the lines of S. 382 require specific consideration of competitive effects and the least anticompetitive alternative whenever a Federal agency:

(1) Regulates entry under a scheme in which the level of entry is limited; (2) sets or reviews prices; (3) sets, limits, or allocates economic output; and (4) reviews agreements among competitors.

We also recommend that agency attention to competition in such circumstances be subject to judicial review under existing procedures and standards. We believe that these recommendations will enhance the ability of the bill to achieve its objective, as well as minimize the possibility of inadvertent derogation of important, legitimate regulatory goals.

My statement then expands on our view for the need for such legislation. It describes two major types of regulation that have been assessed in recent years under the schemes of regulatory reform.

The first scheme reflects congressional decisions to replace competition in free markets with regulatory controls. My statement gives the example, in that context, of motor carrier regulation. It highlights the point that today's perception of the appropriate role of economic regulation differs markedly from that of times gone by.

I believe it is fair to say that we have learned that direct Government intervention is an inadequate substitute for the marketplace in determining the mix of goods and services most suitable to the desires and well-being of the consuming public.

We have also learned an unfortunately expensive lesson—direct Government intervention in markets is likely to have unintended effects, such as increased costs, decreased innovation, and poorer quality of service.

The second type of regulation is not intended to substitute economic controls for competition, but rather to achieve social goals as to which the market process is basically irrelevant, for example, in the areas of environmental protection or safety legislation.

Such regulatory schemes are intended neither to enhance nor suppress competition; their intended effect on the market process is neutral.

Nonetheless, regulation of this type can take economic form and where it does should be scrutinized to determine the effects that it may have on competition, and, consequently, on the price and the quality of goods and services.

My statement then gives examples of four or five areas in which Congress in recent years has conducted a detailed review of several regulatory schemes and has consistently decided to enhance the role of competition.

I simply enumerate them: The Airline Deregulation Act of 1978, the Securities Act Amendments of 1975, mandated competitive review of Federal Energy Leases, licensing of crucial energy facilities and the Atomic Energy Act come to mind.

Thus, our case-by-case regulatory reform experience to date leads to a straightforward conclusion: We can make real progress in improving all types of regulation by allowing competition to play its fullest practicable role, and we can do so without sacrificing any of the improvements we are making in the quality of the lives of our citizens.

My statement then deals with the essential features of the legislation.

A statute of broad applicability such as S. 382 must be carefully drafted if it is to apply in appropriate fashion to economic and non-economic regulatory decisions.

The Department believes that, with improvements, S. 382 can reach those agency actions with the greatest potential for competitive injury and, at the same time, avoid jeopardizing legitimate social goals of regulation.

We believe that there are three key objectives of the bill: (1) To identify the agency decisions having anticompetitive potential, (2) to set a uniform competitive standard applicable to those decisions; and (3) to require that agency decisions that implement the competitive standard be subject to judicial review. These objectives can be achieved in a way that will enhance the ability of the statute to meet its essential goals.

Let me say a brief word about each of those points.

First, the regulatory decisions to be covered.

The plain intent of S. 382 and its predecessor legislation is to apply only to those regulatory decisions that threaten serious anti-competitive effects.

As presently written, S. 382 defines covered decisions in terms of their effects, that is, whether they may substantially lessen competition, tend to create a monopoly, or create or maintain a situation involving a significant burden on competition.

These standards have considerable merit when applied to purely economic regulation, for example, ICC regulation.

However, we are uncertain as to how such standards would affect agency decisions whose goals are social, not economic. If, for example, the setting of health or safety standards should become entangled in the procedural requirements of S. 382, as currently drafted, important social regulation could be exposed to significant delays.

This result is clearly unintended and can be easily avoided without interfering with the effectiveness of S. 382. The history of prior regulatory reforms provides the key to the changes in language we suggest.

A review of those efforts reveals that Congress prime concern has been with agency decisionmaking that effectively substitutes direct economic regulation for the free operation of the marketplace, and not with Federal regulation that sets standards to protect health, safety, and the environment.

Primary attention has been directed toward regulatory actions that limit entry, control prices, set output, or permit groups of competing businesses to engage in collective activity.

Of course, such actions can be undertaken by agencies whose basic mandates are social as well as those with economic orientation. The competitive concerns would be the same in either case, regardless of the agency's ultimate goal.

We believe that the jurisdictional language of S. 382 should be refined to subject four specific types of direct economic intervention—entry, pricing, output allocation, and agreements among competitors or prospective competitors—to a uniform competitive review standard.

Section 3(a) of the bill requires that each covered regulatory decision be justified as necessary to accomplish an overriding statutory purpose, that the benefits to the general public of such purpose be shown to outweigh the anticompetitive effects of the action, and that such purpose cannot be served in substantial part by less anticompetitive alternatives.

This section would require that injury to competition be balanced against the benefits of the regulatory objective—a task that would be quite burdensome if the goals sought were noneconomic.

Perhaps a uniform competitive standard can be fashioned to apply to economic and social regulation without imposing an unwarranted burden, and thus insure that competition is not needlessly sacrificed without subordinating social goals to competition.

We strongly agree that a uniform competitive review standard is necessary. Federal agencies, at the present time, are subject to potentially confusing guidelines as to the role that competitive considerations are to play in their actions.

While courts have required agencies that are subject to a broad “public interest” mandate to take competition into account in their decisionmaking, the precise manner in which anticompetitive consequences are to be dealt with once such consequences have been “considered” is unclear.

In one case, the Supreme Court indicated that where private activities subject to agency approval may give rise to a violation of the antitrust laws, they are to be presumed not in the public interest unless other benefits are shown.

In another case, however, a court ruled that under the Federal Aviation Act, prior to its recent amendment, the CAB was not required to explore less anticompetitive alternatives before approving a capacity limitation arrangement, a per se violation of the Sherman Act.

The U.S. Court of Appeals for the District of Columbia has ruled that the Federal Communications Commission was not required to adopt the least anticompetitive alternative in approving a regulatory framework for cable television having potentially anticompetitive effects; the same court held that a standard analogous to the no-less-anticompetitive-alternative test was required before the FCC could license a satellite communications joint venture raising competitive concerns.

In this situation, it would be not surprising to find that regulatory agencies would be uncertain of the appropriate tests they should use in making their decisions.

Moreover, for those agencies uninterested in the competitive impact of their decisions, the current absence of a uniform competitive standard makes it easy to avoid meaningful consideration of competition.

For these reasons, we support a statutory requirement that each agency weigh the competitive consequences of its actions falling within the categories I have previously described, and that it choose the least anticompetitive alternative practicably and legally available to effectively achieve the agency's regulatory objective.

Such an approach would not threaten the agency's ability to carry out the congressional mandate to achieve objectives in, say, the health or environmental areas, nor would it detract from the ability of a regulatory agency to establish, within a broad legislative mandate, appropriate goals for its regulatory activities. This result is at the heart of S. 382.

Finally, S. 382 establishes the principle that a competitive review standard should be enforceable through judicial review. We agree that such a requirement is essential if adoption of a uniform competition standard is to have a meaningful impact on an agency's decision-making process.

It is the Justice Department's experience that legislative or administrative exhortations to consider a particular factor remain simply exhortations if agency decisionmakers recognize that they are not accountable to the judiciary.

We agree with the observation that a statutory standard that accords weight to a specific policy objective constrains perceived agency biases, facilitates judicial review by narrowing the relevant issues, and provides further guidance for the agency, in the words of the District of Columbia circuit, in a recent case. Such an impact upon regulatory consideration of competition would be beneficial.

Mr. Chairman, in my letter to you of March 5, 1979, I pledged the active support of the administration in your effort to eliminate unnecessary regulatory burdens on the competitive market processes of our economy.

In so doing, I stated my commitment to cooperate with this committee in the development of legislation that will insure that Federal regulatory programs preserve and enhance competition to the maximum feasible extent, and also insure that vital public purposes served by such regulation will not be made subject to unnecessary procedural complexities.

My testimony today represents the Department of Justice's efforts to set out clarifications to the language of S. 382 that will enable this committee, and those who may have had initial concerns about the impact of S. 382 on particular regulatory decisions, to agree on specific statutory language.

I believe that there is not a more important task facing this Congress than the adoption of legislation that will, at long last, insure that all regulation directly supplanting competition in the marketplace will be adopted only if it is the least anticompetitive way available to effectively achieve an agency's regulatory objectives.

I look forward to working with the committee to fulfill our shared commitment to this end.

Mr. Chairman, members of the committee, I would be happy to answer any questions you may have.

Senator DeCONCINI. Thank you very much.

[The prepared statement of Assistant Attorney General John H. Shenefield follows:]

PREPARED STATEMENT OF JOHN H. SHENEFIELD

Mr. Chairman and members of the committee, I appreciate the opportunity to appear before the committee today to testify on the Competition Improvements Act of 1979. Senate bill 382 reflects an idea that is important and timely. It would establish a uniform standard to guide consideration by Federal agencies of the effects of regulation on competition. Its goal is to require agencies to accurately assess such effects, to opt for the least anticompetitive alternatives that would accomplish regulatory goals, and to be prepared to defend their decisionmaking where challenged. The administration strongly supports consideration of competition by Government decisionmakers and the goals reflected in S. 382. The administration is committed to implement them in appropriate legislation; however, the views I express today on S. 382 are solely those of the Department of Justice.

The Department of Justice believes that legislation along the lines of S. 382 is in fact overdue. The long and the short of it is that competition is the fundamental policy on which our economy is based, and Federal Government agencies should be the first to say so. When Federal agencies undertake direct, economic intervention in markets, they should recognize potential competitive dangers and avoid as many as practicable.

In my statement this morning, I would like to place this legislation in proper historical perspective, outline the rationale underlying its essential features, and submit our recommendations to the committee as to its appropriate scope.

Before describing them in detail, I would like to outline our recommendations regarding the scope of S. 382. We propose that the bill require specific consideration of competitive effects and the least anticompetitive alternative whenever a Federal agency:

(1) Regulates entry under a scheme in which the level of entry is limited; (2) sets or reviews prices; (3) sets, limits, or allocates economic output; or (4) reviews agreements among competitors.

We also recommend that agency attention to competition in such circumstances be subject to judicial review under existing procedures and standards. We believe that these recommendations will enhance the ability of the bill to achieve its objective, as well as minimize the possibility of inadvertent derogation of important, legitimate regulatory goals.

THE NEED FOR LEGISLATION

The costs and benefits associated with regulation have become an increasingly important subject of public debate and congressional attention. The goal of S. 382, which follows similar bills introduced in the 94th and 95th Congresses,¹ is to focus this attention on a key issue—should we continue the current haphazard approach to economic regulation, or try to go back to basics, and establish a presumption in favor of the competitive alternative? We have addressed several regulatory schemes in recent years, and have made some significant progress. However, we have yet to enact needed across-the-board reform, perhaps because of a concern for legitimate social or economic goals that might be accidentally lost in the shuffle. The essence of S. 382 is such reform.

Two major types of regulation have been confronted by those seeking regulatory reform. Some schemes reflect congressional decisions to replace competition in free markets with regulatory controls. These programs, such as motor carrier regulation, are the legacy of an earlier era, in which competition was viewed with much suspicion. Indeed, in those days of depression much regulation was designed to increase prices. It is not surprising that such regulatory schemes have often

¹ Senate bill 382 is an amended version of S. 2625 introduced in the 95th Congress and S. 2028 introduced in the 94th Congress. Senate bill 2028 was supported in concept by former Assistant Attorney General Kauper in testimony on behalf of the Department of Justice and was favorably reported by this committee. The concept was also endorsed by the recently completed National Commission for the Review of Antitrust Laws and Procedures.

been carried out in a way which gives short shrift to competition and the role that a dynamic marketplace might play in achieving an efficient, equitable allocation of society's economic output.

Today's perception of the appropriate role of economic regulation differs markedly from that of times gone by. We have learned that direct Government intervention is an inadequate substitute for the marketplace in determining the mix of goods and services most suitable to the desires and well-being of the consuming public. We have also learned an unfortunately expensive lesson—direct Government intervention in markets is likely to have unintended effects, such as increased costs, decreased innovation and poorer quality of service.

The second type of regulation is intended not to substitute economic controls for competition, but rather to achieve social goals as to which the market process is basically irrelevant. For example, in the area of environmental protection, or the safety of workers and consumers, it would appear that the market process is not fully able to take into account the total costs to society that the production or sale of a particular commodity may impose. In such instances, regulatory standards regarding safety or mitigation of pollution may be necessary to ensure that these "externalities" are nevertheless taken into proper account. Such regulatory schemes are intended neither to enhance nor suppress competition; their intended effect on the market process is neutral. Nonetheless, regulation of this type can take economic form and where it does should be scrutinized to determine the effects that it may have on competition, and, consequently, on the price and the quality of goods and services.²

Over the last decade, Congress has conducted a detailed review of several regulatory schemes and has consistently decided to enhance the role of competition. For example, in the Airline Deregulation Act of 1978, the CAB was directed to make competition rather than protection of the airline industry its chief regulatory goal; entry and price regulation was sharply curtailed, and the Board was directed to reject potentially anticompetitive mergers and intercarrier agreements if necessary regulatory objectives could be accomplished in a less anticompetitive manner.³ The Securities Act Amendments of 1975 mandated the establishment of a national market system for securities based on maximum reliance on competition consistent with the objectives of the securities laws, and directed the SEC to eliminate anticompetitive rules and regulations of self-regulatory organizations in the securities industry.⁴ In the important energy area, Congress has mandated competitive review of Federal energy leases⁵ and required that the licensing of crucial energy facilities include close scrutiny of their competitive impact.⁶

Thus, our case-by-case regulatory reform experience to date leads to a straightforward conclusion: we can make real progress in improving all types of regulation by allowing competition to play its fullest practicable role, and do so without sacrificing any of the improvements we are making in the quality of life of our citizens.

THE ESSENTIAL FEATURES OF THE LEGISLATION: A COMPETITIVE REVIEW STANDARD OF GENERAL APPLICABILITY

A statute of broad applicability such as S. 382 must be carefully drafted if it is to apply in appropriate fashion to economic and noneconomic regulatory decisions. The Department believes that with improvements S. 382 can reach those agency actions with the greatest potential for competitive injury and at the same time avoid jeopardizing legitimate social goals of regulation.

We believe that there are three key objectives of the bill: (1) To identify the agency decisions having anticompetitive potential, (2) to set a uniform competitive standard applicable to those decisions, and (3) to require that agency decisions which implement the competitive standard be subject to judicial review. These objectives can be achieved in a way that will enhance the ability of the statute to meet its essential goals.

THE REGULATORY DECISIONS TO BE COVERED

The plain intent of S. 382 and its predecessor legislation is to apply only to those regulatory decisions that threaten serious anticompetitive effect. As pres-

² National Commission for the Review of Antitrust Laws and Procedures, report, p. 181.

³ See § 412 of the Federal Aviation Act, as amended, Airline Deregulation Act of 1978, Public Law 95-504.

⁴ 15 U.S.C. § 78f(e) (1).

⁵ See e.g., Coal Leasing Act amendments of 1975, 30 U.S.C. § 184(1).

⁶ See, e.g., Deepwater Ports Act, 33 U.S.C. §§ 1503(c) (7), 1506.

ently written, S. 382 defines covered decisions in terms of their effects, that is, whether they may substantially lessen competition, tend to create a monopoly, or create or maintain a situation involving a significant burden on competition. This standard has considerable merit when applied to purely economic regulation, for example, ICC regulation. However, we are uncertain as to how such a standard would affect agency decisions whose goals are social, not economic. If, for example, the setting of health or safety standards should become entangled in the procedural requirements of S. 382, as currently drafted, important social regulation could be exposed to significant delays.

This result is clearly unintended and can be easily avoided without interfering with the effectiveness of S. 382. The history of prior regulatory reforms provides the key to the changes in language we suggest. A review of those efforts reveals that Congress' prime concern has been with agency decisionmaking that effectively substitutes direct economic regulation for the free operation of the marketplace, and not with Federal regulation that sets standards to protect health, safety, and the environment.⁷ Primary attention has been directed toward regulatory actions that limit entry, control price, set output or permit groups of competing businesses to engage in collective activity. Of course, such actions can be undertaken by agencies whose basic mandates are social as well as those with economic orientation. The competitive concern would be the same in either case, regardless of the agency's ultimate goal.

We believe that the jurisdictional language of S. 382 should be refined to cover precisely four types of direct economic intervention—entry, pricing, output allocation, and agreements. Such a refinement would satisfy concerns about the costs of attempting to impose a uniform competition standard on regulatory actions not directly regulating the marketplace, or whose impact on competition is only indirect. At the same time regulatory actions that are potentially most injurious to competition would be reached.

ADOPTION OF A UNIFORM COMPETITIVE REVIEW STANDARD

Section 3(a) of the bill requires that each covered regulatory decision be justified as necessary to accomplish an overriding statutory purpose, that the benefits to the general public of such purpose be shown to outweigh the anticompetitive effects of the action, and that such purpose cannot be served in substantial part by less anticompetitive alternatives. Section 3(a) would require that injury to competition be balanced against the benefits of the regulatory objective—a task that would be quite burdensome if the goals sought were noneconomic. We believe that a uniform standard can be fashioned to apply to economic and social regulation without imposing such a burden, and thus ensure that competition is not needlessly sacrificed without subordinating social goals to competition.

We strongly agree that a uniform competitive review standard is necessary. At the present time, Federal agencies are subject to potentially confusing guidelines as to the role that competitive considerations are to play in their actions. While courts have required agencies that are subject to a broad "public interest" mandate to take competition into account in their decisionmaking,⁸ the precise manner in which anticompetitive consequences are to be dealt with once such consequences have been "considered" is unclear. In one case, the Supreme Court indicated that where private activities subject to agency approval may give rise to a violation of the antitrust laws, they are to be presumed not in the public interest unless other benefits are shown.⁹ In another case, however, a court ruled that under the Federal Aviation Act, prior to its recent amendment, the CAB was not required to explore less anticompetitive alternatives before approving a capacity limitation arrangement, a per se violation of the Sherman Act.¹⁰ The D.C. circuit has ruled that the Federal Communications Commission was not required to adopt the least anticompetitive alternative in approving a regulatory framework for cable television having potentially anticompetitive effects;¹¹ the same circuit court held that a standard analogous to the no less anticompetitive alternative test was required before the FCC could license a satellite communications joint venture raising competitive concerns.¹²

⁷ See, e.g., Senate Committee on the Judiciary, Competition Improvements Act of 1976; S. Rep. No. 1045, 94th Congress, 2d session (1976).

⁸ See, e.g., *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747 (1973); *Federal Maritime Commission v. Akteibolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *United States v. FCC*, (SBS case), — F. 2d — (D.C. Cir. 1978).

⁹ *Federal Maritime Commission v. Akteibolaget Svenska Amerika Linien*, supra.

¹⁰ *United States v. CAB*, 511 F. 2d 1315 (D.C. Cir. 1975).

¹¹ *Home Box Office v. FCC*, 567 F. 2d 9 (D.C. Cir. 1977).

¹² *United States v. FCC*, — F. 2d — (D.C. Cir. 1978).

In this situation, it would not be surprising to find that regulatory agencies would be uncertain of the appropriate tests they should use in making their decisions. Moreover, for those agencies uninterested in the competitive impact of their decisions, the current absence of a uniform competitive standard makes it easy to avoid meaningful consideration of competition.

For that reason, we support a statutory requirement that each agency weigh the competitive consequences of actions falling within the categories I have previously described and choose the least anticompetitive alternative practicably and legally available to effectively achieve the agency's regulatory objective. Such an approach would not threaten the agency's ability to carry out the congressional mandate to achieve objectives in, say, the health or environmental area, nor would it detract from the ability of a regulatory agency to establish, within a broad legislative mandate, appropriate goals for its regulatory activities. This result is at the heart of S. 382.

THE NECESSITY FOR JUDICIAL REVIEW

Finally, S. 382 establishes the principle that a competitive review standard should be enforceable through judicial review. We agree that such a requirement is essential if adoption of a uniform competition standard is to have a meaningful impact on the agency decisionmaking process. It is the Justice Department's experience that legislative or administrative exhortations to consider a particular factor remain simply exhortations if agency decisionmakers recognize that they are not accountable to the judiciary. We agree with the observation that a statutory standard that accords weight to a specific policy objective constrains perceived agency biases, facilitates judicial review by narrowing the relevant issues, and provides further guidance for the agency.¹³ Such an impact upon regulatory consideration of competition would be beneficial.

Since most regulatory decisions are subject to judicial review under existing statutes, and most controversial decisions are, in fact, likely to be appealed, it would not appear that making a competition standard reviewable would materially delay affected regulatory actions. In this regard, I note that the language of S. 382 does not provide any new provisions for standing, but merely relies upon existing statutes and case law to determine whether an individual is an aggrieved party for purposes of judicial review.

As presently drafted, however, S. 382 places the burden of establishing that the requirements of section 3(a) have been met (based on substantial record evidence) on the agency or other party defending the agency action. Such a provision would appear to be an unnecessary complication. The Administrative Procedure Act, most regulatory statutes, and existing case law make a clear distinction between normal rulemaking, which is subject only to reversal under an "arbitrary and capricious" standard, and "on the record" decisionmaking which must be supported by substantial evidence. Moreover, courts reviewing agency actions currently operate under the presumption that the agency decision is lawful unless a party to the proceeding can demonstrate to the court that the agency's decision was not in accordance with law.

I see no great advantage to be gained by modifying the existing standards for judicial review or reversing the presumption of regularity accorded agency decisionmaking. The basic purposes of S. 382 can be served under existing judicial review standards.

* * * * *

The Justice Department thus believes that S. 382, reduced to its essential elements, would embody the following concepts:

1. For each agency action specified below the agency shall consider the competitive effects of such action and choose the least anticompetitive alternative legally and practicably available to achieve the agency's statutory goals.

2. The foregoing standard shall apply to agency action that—

- (a) Regulates or licenses entry under a scheme in which the level of entry is subject to limitation; (b) Sets or reviews with authority to accept, reject, or modify the monetary price charged for the provision of goods or services; (c) Sets, limits, or allocates the economic output of providers of goods or services; or (d) Reviews, approves, rejects, or regulates the terms and conditions of agreements among competing providers or purchasers of goods or services.

¹³ See, Stewart, "The Reform of American Administrative Law," 88 Harv. L. Rev. 1667 (1975).

3. Agency compliance with the above standards would be subject to judicial review under existing procedures; no change would be made in the standards governing an agency's choice of adjudication or formal or informal rulemaking as the means of making its regulatory decisions nor would on-the-record proceedings be mandated where none are now required.

I have attached an appendix detailing the anticipated coverage of S. 382 if it is focused according to our recommendations. I should stress that this language is intended to illuminate a concept: we welcome the opportunity to work with the committee on how to improve these provisions.

CONCLUSION

Mr. Chairman, in my letter to you of March 5, 1979, I pledged the active support of the administration in your effort to eliminate unnecessary regulatory burdens on the competitive market processes of our economy. In so doing, I stated my commitment to cooperate with this committee in the development of legislation that will ensure that Federal regulatory programs preserve and enhance competition to the maximum feasible extent and also ensure that vital public purposes served by such regulation will not be made subject to unnecessary procedural complexities.

My testimony today represents the Department of Justice's efforts to set out clarifications to the language of S. 382 that will enable this committee and those who may have had initial concerns about the impact of S. 382 on particular regulatory decisions to agree on specific statutory language.

I believe that there is not a more important task facing this Congress than the adoption of legislation that will, at long last, ensure that all regulation directly supplanting competition in the marketplace will be adopted only if it is the least anticompetitive way available to effectively achieve an agency's regulatory objectives. I look forward to working with the committee to fulfill our shared commitment to this end.

ADDITIONAL SUBMISSION OF JOHN C. SHENEFIELD

APPLICATION OF 382 STANDARDS TO REGULATORY DECISIONS

This appendix discusses the ways in which the essential elements of S. 382, as set out on page 13 of the Department of Justice testimony, might apply to various types of agency decisionmaking, and provides specific examples of regulatory activities of Federal agencies that would be included in—and excluded from—its coverage.

The number of Federal regulatory statutes is, of course, enormous. Consequently, this appendix is not intended to provide a comprehensive catalogue of these laws and the likely effect of S. 382 on them. Rather, it simply lists some of the major agencies and regulatory functions affected by S. 382 for the purpose of demonstrating the scope of the proposed standard.

A. IMPLEMENTATION OF THE LEAST-ANTICOMPETITIVE-ALTERNATIVE STANDARD

Under the least-anticompetitive-alternative test agency decisionmakers are not required to balance the benefits of a particular regulatory objective against the adverse effects that its achievement might have on competition. Rather, after determining the regulatory goal sought and the various ways in which the objective could effectively be achieved, they are required to select from among the available alternatives the one which would bring about the desired result in the least anticompetitive manner.

A key part of the test is the term "legally and practicably available." This means that an agency need only make a reasoned search for alternatives, it need not consider methods beyond its powers to implement, be forced to adopt approaches which impose materially greater costs on society, nor be required to formulate an endless number of obscure or extreme hypotheticals for the purpose of convincing a reviewing court that it has followed the proposed mandate.¹

The practical impact of the least-anticompetitive-alternative standard can be shown by reference to a hypothetical example of an EPA decision to set an absolute ceiling on the volume of particular emissions which could be pro-

¹ See S. Rept. 95-931, at 80 (discussion of application of least anticompetitive alternative standard contained in "Airline Deregulation Act of 1978").

duced in a given air quality region. The basic decision to impose a particular ceiling on total emissions in an air quality district, although having the possible effect of limiting business entry, would not itself come within the scope of the statute since it would not represent a discretionary decision to limit entry, but merely a finding that the Clean Air Act required a certain limitation on total emissions to meet statutory standards.

How to meet the ceiling requirement, however could require heed to the proposed least anticompetitive alternative standard. EPA might determine that three alternatives were available to it: First, the imposition of strict emission controls on new and existing sources, either by requiring the use of certain pollution control equipment or by mandating specific pollution reduction standards; second, a licensing process that places a ceiling upon the number of new firms that can locate in a given geographic area; or, third, an agreement among all firms in the market owning restricted pollution sources. If EPA selected the first option, the choice would not come within the proposed standards, because it would not meet the jurisdictional tests of the statute. However, before one of the other alternatives could be chosen the first would have to be considered in a least-anticompetitive-alternative review.

B. COVERAGE

1. Regulates or Licenses Entry Under a Scheme in Which the Level of Entry is Subject to Limitation

Decisions as to entry and exit from a marketplace are at the heart of the competitive process. When agencies go beyond the setting of minimum qualifications for entry into or operation in a marketplace and attempt to restrict the total number of firms which may participate in a market, they directly replace the allocation mechanism of the marketplace with their own judgment. Agencies that choose to distribute entry "slots" should therefore be required to find that such an allocation mechanism is the least anticompetitive method of achieving regulatory goals and to use the least anticompetitive method of achieving regulatory goals and to use the least anticompetitive method in making the allocation or in passing upon entry applications of individual firms.

This standard is not directed toward situations in which an agency establishes minimum qualifications, be they financial responsibility, facility design, safety, etc., which allow any firm meeting those requirements to begin business, nor is it directed at regulatory mechanisms which establish minimum requirements as to emissions, working conditions, etc., with which all potential entrants may comply (and thus enter the marketplace) if they have the financial or physical capability of doing so. Rather, the language is directed toward situations in which an agency, with an eye toward the various regulatory goals set forth in its enabling legislation, undertakes as a matter of discretion to place some restriction on the total number of enterprises which may be licensed or otherwise allowed entry and then seeks to determine who will be permitted to do business. Such limitations need not be absolute; rather, the crucial factor is the agency's choice to restrict entry to specific levels.

The least anticompetitive alternative standard would not apply to a decision establishing a precise regulatory goal, but would apply to a decision to utilize an entry limitation to achieve that goal. For example, the decision to establish specific service obligations for motor carriers would not be covered while a decision to limit the number of motor carriers for the purpose of ensuring the availability of transportation services would be.

An illustration of the operation of this standard can be seen in the previous hypothetical involving the Environmental Protection Agency's decision to limit the total amount of emissions in a particular air quality region. Neither the decision to impose an absolute ceiling nor the level of the ceiling would be subject to the requirements of the statute. However, if EPA should implement its goals through direct limitations on entry of business firms, it would be required to consider the competitive implications of that decision and to choose the least anticompetitive alternative for allocating entry rights. Such alternatives theoretically might include a "free market" among existing and potential entrants for rights to pollute.

REPRESENTATIVE ACTIVITIES COVERED

(a) ICC; CAB—entry certification activities of the ICC with respect to motor carriers and the CAB's certification practices for air carriers would generally be

included. To the extent, however, that the "public convenience and necessity" requirements that restrict entry are eliminated (as presently is the case for air cargo carriers) then this proposal would not be applicable, since all fit, willing and able carriers would be able to enter automatically and there would be no constraint on total entry.

(b) Comptroller of the Currency; Federal Reserve Board; Federal Deposit Insurance Corporation; Federal Home Loan Bank Board; National Credit Union Administration—financial institution chartering activities would be included insofar as these agencies limit the granting of certificates to prevent unsoundness due to "over banking" in particular regions. Bank supervisory activities, as such, would not be affected since they set minimum entry standards and ongoing requirements for banks which are not direct limitations on the total number of banks in a particular market.

(c) FCC—licensing procedures for broadcasters would be included if limitations on entry are imposed for frequency-management purposes. Communications common carrier certification would be included if fit, willing, and able carriers could be excluded for other public interest reasons related to the demand for proposed services.

(d) Department of Energy (Federal Energy Regulatory Commission) licensing of gas pipelines would be covered.

2. *Sets or Reviews With Authority to Accept, Reject or Modify, the Monetary Price Charged for the Provision of Goods or Services*

The setting of prices is also a crucial element of the competitive process. Agency intervention in the price setting process represents a judgment that regulation is required because the structure of the given industry is noncompetitive, or that such intervention with respect to price is necessary to achieve social objectives of a regulatory scheme (for example, to underwrite the provision of services through cross-subsidies). Such intervention in the pricing mechanism presents clear potential for unnecessary restrictions on competition. Where an agency is not directly mandated to engage in price intervention as a method of achieving another regulatory goal, it therefore would be subject to the proposed test, i.e., price intervention would have to be the least anticompetitive alternative of achieving that goal. The reference to "monetary price" is intended to insure that "price" is not read to encompass terms and conditions of sale, such as cost disclosure information, or contractual rights among parties, elements of what one might broadly construe to be "price."

REPRESENTATIVE ACTIVITIES COVERED

(a) ICC; CAB—regulation of prices, including decisions on methodologies for pricing formulas; (b) FCC—regulation of prices, including decisions on methodologies for pricing formulas; (c) Department of Energy—(FERC) regulation of natural gas prices and of rates for natural gas and petroleum pipelines and (ERA) regulation of petroleum prices; (d) Department of Agriculture—pricing provisions of milk marketing orders; (e) Federal Reserve; Federal Home Loan Bank Board; National Credit Union Administration—regulation of interest charges and payments.

3. *Sets, Limits or Allocates the Economic Output of Providers of Goods or Services*

When Government agencies intervene in a market to directly restrict output, or to establish a mechanism by which the output of goods is allocated among purchasers, such agencies directly impact the competitive process in affected industries. Agency action designed to establish or implement such a limitation or allocation scheme should be subject to at least anticompetitive alternative test. The phrase "economic output" used in this subsection is intended to ensure that regulation designed to control the incidental, nonmarket byproducts of an industrial society, such as pollution, is not construed as falling under this test.

This subsection encompasses a broad range of activities. For example, it would cover the Department of Agriculture when USDA determines to accomplish its statutory objectives concerning agricultural production by establishing marketing orders which limit the output or schedule shipments of various commodities. Also included are agency restrictions on the ability of common carriers to offer a new service to the public. In addition, mechanisms to allocate goods during shortages and to ensure the preservation of particular buyers by "freezing" buyer-supplier relationships, as in the petroleum industry, come within the scope of this subsection.

REPRESENTATIVE ACTIVITIES COVERED

(a) ICC; CAB—regulation of service offerings by transportation common carriers, including ICC allocation of railroad box cars and restrictions on railroad abandonments; (b) FCC—control over communication common carrier service offerings; (c) DOE—(FERC and ERA) regulation to allocate natural gas, and petroleum products, as well as allocations of bulk electric power during shortages; (d) USDA—the establishment and implementation of non-price provisions of agricultural marketing orders; (e) Federal Reserve; Federal Home Loan Bank Board; and National Credit Union Administration—restrictions on service offerings by financial institutions.

4. *Reviews, Approves, Rejects or Regulates the Terms and Conditions of Agreements Among Actually or Potentially Competing Providers or Purchasers of Goods or Services*

Agreements among competitors are inherently dangerous to competition. For that reason all aspects of agency activity regarding agreements among competitors must be subject to careful scrutiny under a least anticompetitive alternative standard. While some agencies, particularly the CAB, have power to approve a broad range of agreements among competitors,² it is expected that such agreements will fall into three major categories: price cartels, self-regulatory organizations, and mergers.

Price cartels, such as truck and rail rate bureaus and ocean shipping conferences, are prevalent in the transportation sector and their competitive dangers need little elaboration. Self-regulatory organizations play an important role in various aspects of the securities industry. These groups of industry participants have been authorized to perform various policing functions to protect the public. Self-regulation can be used, however, to stifle competition³ and innovation. To avoid or limit these effects the proposal would cover the establishment and approval of self-regulatory organizations, the rules governing their behavior, and regulatory sanction of their activities.

Mergers raise somewhat special concerns. Several regulatory agencies are empowered to review mergers among firms falling within their jurisdiction. Most regulatory schemes, either by statutory language or judicial interpretation, require an agency review of a merger to take competitive concerns into consideration. Mergers are generally allowed unless shown to be a anticompetitive or contrary to other regulatory agency goals.

Regulatory statutes may, however, permit anticompetitive merger to be approved in order that broader regulatory goals be achieved. It is in these instances that the least anticompetitive alternative standard would come into play. This is similar to the Airline Deregulation Act of 1978, which expressly requires the CAB to apply a least anticompetitive alternative standard before it approves an anticompetitive merger as necessary to achieve the transportation convenience and needs of communities. Likewise, by judicial interpretation, a least anticompetitive alternative standard has been applied to the "convenience and needs" defense used by banking regulatory agencies in approving mergers among banks.⁴ The proposal would apply this test to all regulatory agency decisions in which an attempt is made to justify an anticompetitive merger on the basis of other regulatory objectives.

REPRESENTATIVE ACTIVITIES COVERED

(a) CAB—review of agreements among carriers filed under Aviation Act Section 412 and mergers under section 408; (b) ICC—review of consolidations and pooling agreements under section 5 and rate bureau agreements under the Reed-Bulwinkle Act; (c) FMC—review of shipping conference agreements; (d) FCC—review of mergers among communications common carriers; (e) Securities and Exchange Commission—review of agreements of self-regulatory organizations under the Securities Exchange Act of 1934 and merger agreements under the Public Utility Holding Co. Act; (f) Commodity Futures Trading Commission—review of agreements of commodities industry self-regulatory organizations; (g) Federal Reserve; Federal Deposit Insurance Corporation; Comptroller of the Currency; Federal Home Loan Bank Board—review of mergers involving bank holding companies and financial institutions; (h) Federal Trade Commission—approval of Webb-Pomerene Act export associations.

² See section 412 of the Federal Aviation Act, as amended.

³ See *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

⁴ *United States v. Third National Bank in Nashville*, 390 U.S. 171 (1968).

**STATEMENT OF JOAN BERNSTEIN, GENERAL COUNSEL,
ENVIRONMENTAL PROTECTION AGENCY**

Ms. BERNSTEIN. Thank you, Mr. Chairman.

Ms. BERNSTEIN. As Mr. Shenefield said, I am here as general counsel of a regulatory agency whose primary mission is to protect the public health and the environment.

At the same time, I like to think my Agency is also sensitive to the competitive effects of what we do. That is why I am here, very briefly, to add our support to the approach set out in Mr. Shenefield's testimony. We believe it properly focuses on the concerns of Government constraints and competition, and also provides, in our judgment, a relatively clear set of guideposts for the agencies, private parties, and the courts to know which regulatory activity will require at least some additional specification.

I believe that such guidance is essential to minimize the need for regulatory and judicial procedures.

We also support the Department of Justice's proposal in regard to judicial review of the competitive analysis.

I look forward to working with the committee and the Department of Justice to articulate in further detail the legislative language to carry out these purposes.

Thank you.

Senator KENNEDY. We are glad to have you here, and we appreciate your testimony. We look forward to working closely with you and with the other agencies.

I think it is vital that competition be taken into account in the agency decisionmaking process, and that it be treated as a matter of considerable priority.

We intend to work with you to try to insure the creation of a viable uniform standard that will not cause excessive delay. I think this can be done.

I have no other questions.

[The letter and prepared statement of Ms. Joan Bernstein follows:]

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Washington, D.C., March 22, 1979.

Hon. EDWARD M. KENNEDY,
U.S. Senate
Washington, D.C.

DEAR MR. CHAIRMAN: I appreciated the opportunity to join Assistant Attorney General Shenefield on March 20, 1979, in testifying before the committee on issues relating to S. 382, the Competition Improvements Act of 1979.

Unfortunately, my appearance seems to have generated some confusion, reflected in press reports, about the Environmental Protection Agency's views on the issues raised by this important piece of legislation.

The statement I had prepared to deliver represents EPA's views, and was cleared by OMB. To clarify any existing misconceptions, I respectfully request that the written record of the hearing include that statement (a copy of which is enclosed), together with this explanatory letter.

I understand from Mr. Shenefield's testimony that the Department of Justice will shortly be submitting to the committee revised statutory language designed to further the competitive goals addressed by S. 382, while assuring the ability of regulatory agencies to preserve other fundamental societal goals, such as the protection of public health and the environment. I look forward to working with the committee and the Department of Justice in this important effort.

Sincerely,

JOAN Z. BERNSTEIN,
General Counsel.

PREPARED STATEMENT OF MS. JOAN BERNSTEIN

I am happy to discuss the Competition Improvement Act of 1979 from the viewpoint of the General Counsel of an Agency whose mission is to protect public health and the environment. From my experience and inclination, I share the concerns of the committee and those of the Department of Justice that governmental power not be used to replace or unduly impede competition. Before I came to EPA I was in private practice as an antitrust lawyer, and before that, as head of the FTC's Bureau of Consumer Protection. I helped spur Commission action against governmentally imposed restrictions on advertising and price competition. I have never believed that regulatory agencies should ignore the competitive impacts of their actions, even when the agency's primary mission is to protect noncompetitive values, such as the public health. My own experience at the FTC taught me that concerns about public health may sometimes be invoked as an excuse for regulatory activities that are designed to maintain prices, or to exclude competitors. I have carried my concerns with me to EPA, and I have been gratified by the response I have received within the Agency. I think that EPA's own regulation development procedures have been effective in focusing concern within EPA on the impacts its own regulations have on the economy, and on particular competitive segments within the general economy. Executive Order 12044, which requires that a "regulatory analysis" be prepared for major regulations, has served further to focus these concerns.

At the same time, however, I have been deeply concerned about the phenomenon of regulatory delay and the seemingly endless litigation that any of our significant regulations seems to engender. Congress has given EPA extraordinarily ambitious and detailed marching orders and has frequently given us too little time to do the task. The job of cleaning up the environment and protecting the public from the threats posed by toxic chemicals is too important to permit endless delay. While I share the committee's commitment to a sound competitive system, I am concerned that that commitment not result in legislation that can be perverted by clever lawyers into an instrument for creating new opportunities for uncertainty and delay.

Therefore, although I agree that additional legislation may be necessary to underscore the fundamental importance of free competition to our society, I urge the committee to recognize the need to protect other fundamental goals such as environmental preservation, a safe workplace, and minimizing the risks of disease from dangerous chemicals and drugs. As you know, the costs of achieving these goals are sometimes high, and the benefits are frequently difficult to predict with great precision. In enacting much of our environmental and health legislation Congress recognized that agencies like EPA must often act at the fringes of scientific knowledge. Often the scarcity or the tentative nature of the scientific data with which we must work requires us to act long before the threat to public health has been conclusively established. The concepts of an "ample" or "adequate" margin of safety that are embedded in some of our statutes reinforce the predictive nature of many of the judgments we must make. I would be very concerned about any legislation that would require a fine-tuned balancing between the Agency's evaluation of a risk, and an industry's assertion that a regulation to guard against the risk has somehow impeded competition by raising its costs. I don't think this sort of approach is at all necessary to guard against the sort of abuse that has troubled this committee or the President's Antitrust Commission.

Although I have not yet had the opportunity to analyze its impact in any detail, I believe the approach set forth in Mr. Shenefield's testimony properly focuses on the core concerns about governmental restraints of competition. Prohibitions against new entrants, price-setting, marketing allocation and agreements among competitors make up a class of conduct which antitrust law has traditionally frowned upon, conduct which requires careful scrutiny, even when such important public goals as protection of health are involved. At the same time, this approach provides a relatively clear set of guide posts to enable agencies, private parties and the courts to know which regulatory activities will require at least some additional justification. I believe that clear guidance of this sort is essential to minimize uncertainty and endless regulatory and judicial proceedings, and to avoid subverting such critically important national goals as providing a clean and healthy environment.

I look forward to working with this committee and the Department of Justice in the development of this important legislation to insure that the translation of this approach into statutory language does not compromise important health, safety and environmental goals which Congress has already enacted.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Shenefield, on page 65, of the previous hearings, the following was said:

Senator HEFLIN. Do you consider that in carrying out this, that there is a need for some watchdog approach toward regulatory agencies to carry out the intent of this act, either in the form of a separate agency or divisions within, as opposed to the provisions of the act by which the Attorney General, of course can intervene.

Mr. ROTHWELL. Senator, of course the bill addresses itself to that question by giving to the Attorney General some additional jurisdiction in the case of the independent regulatory agencies, minus one or two.

Insofar as the creation of another agency is concerned, I reserve the right to correct the record. I have not discussed this with the client, if you will, but the client's general policy, I think, would be adverse and inimical to that idea.

Now, is it your thinking that the Attorney General's Office ought to be a watchdog in these matters over other agencies or not?

Mr. SHENEFIELD. My thought is, Senator Thurmond, very much in line with the Department's present practice of attempting to insure that competition in the Department is carefully considered where appropriate. The Attorney General is charged with those kinds of functions without the need to increase the number of agencies of Government. It is entirely appropriate for you to do so.

Senator THURMOND. I believe the President's Antitrust Commission made a recommendation that seems to be in line with this, too.

Mr. SHENEFIELD. Yes, sir, it did.

Senator THURMOND. Chapter 15, "General Approach to Competition Improvements Act, S. 265."

Recommendation. Congress shall enact legislation to require increased consideration of competitive issues in regulatory decisionmaking. This legislation should adopt the principles contained in S. 2625 which provide where the effect of a regulatory action may be to substantially lessen competition, to tend to increase a monopoly or to create or maintain a situation involving a significant burden on competition, the agency could not approve such action unless it found that: (a) Such action is necessary to accomplish an overriding statutory purpose of the agency, (b) the anticompetitive effects of such action are clearly outweighed by significant and reasonably certain public benefits, (c) the objectives of the action and the overriding statutory purpose cannot be substantially accomplished by alternative means having less anticompetitive effects.

Do you have any comment on that?

Mr. SHENEFIELD. No. I think the Commission of which I was chairman and of which the chairman of this committee was a member, other members of this committee were members, felt strongly the need to mandate some orderly way to cut across agency lines in consideration of competition as part of the decisionmaking process. Its recommendation that legislation along the lines of S. 2625, in that Congress, be enacted. It was very much in line with the bill S. 382 now being considered by this committee, and also consistent with the kinds of proposals I articulated this morning on behalf of the Department.

Senator THURMOND. I think the chairman wants to move on to another matter. I will just ask one more question.

Mr. Shenefield, from your testimony today, it seems that you feel some changes are needed in the language of S. 382. Could you give us, as soon as possible, and if you want to do it in a written response it would be all right, the specific changes that you would recommend, together with the reasons for those recommended changes.

Mr. SHENEFIELD. I look forward to supplying that for you.

Senator THURMOND. To be helpful to us, we ought to receive those before we act on the bill.

Senator THURMOND. Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much.

Senator DeConcini.

Senator DeCONCINI. No questions.

Senator KENNEDY. Senator Leahy.

Senator LEAHY. No questions.

We will be working with the Justice Department and the other agencies on this legislation.

Thank you very much.

[Whereupon, at 10:30 a.m., the hearing was adjourned, subject to the call of the Chair.]

COMPETITION IMPROVEMENTS ACT OF 1979, S. 382

TUESDAY, MAY 22, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room 2228 Dirksen Senate Office Building, Hon. Edward M. Kennedy, chairman, presiding.

Present: Senators Kennedy and Baucus.

Also present: David Boies, chief counsel and staff director; Thomas M. Susman, general counsel; Susan McDermott, counsel; Patti Saris, counsel; and Jeff Stone, research assistant.

Senator KENNEDY. We will come to order.

OPENING STATEMENT OF SENATOR KENNEDY

The Committee on the Judiciary today resumes its examination of one of the most pressing issues of contemporary Government, the need to reform our Federal regulatory agencies and processes. The focus of this hearing is S. 382, the Competition Improvements Act of 1979, designed to reduce unnecessary anticompetitive economic regulation and to maximize the proven benefits of a rigorously competitive market.

The last decade has produced dozens of studies on how Federal economic regulation has tended to lock out energetic newcomers from industry participation and impose on consumers higher, sometimes collusive, prices. The results have been inefficiency in industry operation, inflationary pricing and, most importantly, a souring of the faith Americans have had in the soundness and fairness of governmental decisions.

Competition is not just an abstract concept, its effects are concrete. It promotes more efficient business practices, greater innovation, a wider range of goods and services, lower prices, and a more healthy economy in general. Though its appropriate role in the regulated sector has largely been ignored and suppressed by the agencies, its potential for effective use remains. Senate bill 382 is designed to put competition to work in the regulated industries.

Competition can and should be a regulatory tool. The committee has heard testimony from the Department of Justice and the Federal Trade Commission that in the area of economic regulation, there is little justification for governmental sanction of anticompetitive activities. Historically, this Nation has succeeded by relying upon competition to provide both discipline and stimulation for the economy.

To the degree that the Government has to override the competitive mechanism of the marketplace, it should do so cautiously—and with the least anticompetitive means practically available.

This committee has also heard testimony from consumer groups who want to put an end to the unnecessarily anticompetitive regulations which take money directly out of the pocket of consumers by artificially raising the price of goods and services.

We have heard testimony from business groups who complain that anticompetitive regulations make it harder and more costly to do business.

We have also heard that this legislation should honor more clearly the distinction between economic and social regulation. The Department of Justice, in its precise and well-reasoned testimony, highlighted the fact that the jurisdictional reach of S. 382 is directed primarily at that form of "agency decisionmaking that effectively substitutes direct economic regulation for the free operation of the marketplace and not with regulation that sets standards to protect health, safety and the environment." The record developed on S. 382 and its predecessor legislation is clear on this point. However, the Justice Department has raised the possibility of misapplication of the bill and resulting delay in the functioning of health and safety programs. For that reason, we are considering modifications to S. 382.

The modifications proposed to the bill target specifically four types of direct Federal economic regulation:

First: Limitations on entry where the regulator seeks control over the actual number of participants in the market;

Second: Control over prices;

Third: Restrictions on the amount of goods or services which may be produced or distributed;

Fourth: Approval of business agreements between competitors which would normally violate the antitrust laws.

The modifications would allow an agency to regulate in this manner only if it considered the competitive effects of the action and concluded that it was the least anticompetitive alternative available to achieve its statutory goals. The modifications would allow agencies flexibility but, at the same time, it would restrict them from taking unnecessarily anticompetitive actions.

These modifications differ from S. 382 as introduced in two major respects. The analysis required has been simplified to a finding that the regulatory method chosen by an agency is the least anticompetitive alternative available, and the scope of S. 382 has been narrowed to affect only the four specifically delineated types of activities.

These modifications would focus the bill on Federal regulatory activity which directly supplants marketplace forces, and they would acknowledge special health, safety and environmental concerns.

The testimony we will hear today will be on S. 382 and the suggested modifications. We will hear from the Office of Advocacy of the Small Business Administration, which is charged with advancing the needs of small business enterprise within the Federal Government. We will also hear from the spokesman for over 1 million autoworkers who see more competition as benefitting their employers and ultimately benefitting themselves. We will hear from a group of independent truckers who have separately tried to offer competitive service and have been

prevented from doing so by the operation of ICC regulations. Last, we will hear from a panel of attorneys for the antitrust section of the American Bar Association.

Our first witness today is Howard Paster, who is legislative director of the International Union, United Auto Workers of America. In addition to representing UAW, Mr. Paster works with a number of public interest coalitions, concentrating on energy issues, health, and tax policy.

It is good to have you here. Nice to see you.

**STATEMENT OF HOWARD G. PASTER, LEGISLATIVE DIRECTOR,
INTERNATIONAL UNION, UAW**

Mr. PASTER. My statement is brief, and with your permission I would like to read it if I may.

Mr. PASTER [continuing]. We appreciate the opportunity to express the support of our 1.5 million member International Union, UAW, on the revised version of S. 382, the Competition Improvements Act.

I would like, at the outset, to explain briefly the general view with which we approach the broad issue of regulatory reform, an issue that has spawned a great deal of legislation of which the bill under consideration today is but one example. We reject the premise that Government regulation is some pernicious evil that must be eradicated. Quite to the contrary, Government regulation is essential to the health and safety of American consumers and workers who learned long ago that they could not leave their well-being in the hands of corporations for whom profit is the overriding objective.

Moreover, while economic regulation can work against the public interest, we are deeply troubled with the ease with which too many legislators have fallen prey to the simplistic, and erroneous notion that lessening Government regulation affecting health and safety is a valid means of fighting inflation. There are those, and we know the chairman is not among them, who would subject every regulation of the Environmental Protection Agency, or the Occupational Safety and Health Administration, or the Consumer Product Safety Commission, to some risk-benefit equation.

But to do so means assigning hard dollar values to human lives and illness. What is the cost of a child's life lost because an unsafe toy was kept on the market? What is the monetary cost of the death of a worker who is the victim of workplace cancer? How many dollars are we willing to put into the risk-benefit equation of 10,000 elderly people are forced to breath polluted air that requires them to be confined and perhaps shortens their lives?

These are not idle questions. For, as unreasonable as they are and as absurd as they strike some of us, these questions are being asked too frequently in too many places. Even more distressing is the fact that many who would quickly reject such questions as inhumane and unreasonable, are dealing on the edge of this abyss by toying with the more general, but equally inhumane and unreasonable, questions about the economic cost of health and safety regulation.

We reject, Mr. Chairman, the notion that there is too much health and safety regulation. Indeed, we think there is too little. We further reject efforts, in the name of regulatory reform, which would under-

mine the health and safety regulations already on the books. Certainly the administration of regulations can be improved, and certainly pointless regulations can be dispensed with. One need only look at the change in direction and emphasis at OSHA in the past 2 years to find an outstanding example of improved regulation with a clearer sense of priorities.

While we oppose improper tampering with health and safety regulations, we do believe that the revised version of S. 382, the bill now before you, does represent a responsible attempt to come to grips with a particular problem associated with economic regulation. I must say, we do not oppose economic regulation per se. For example, we are aligned with the chairman in the effort to continue controls on crude oil prices.

But it is also true that in certain instances economic regulation has served as much to protect the regulated industry as it has to protect the consumer. The successful experience with airline deregulation is a good, current example of how the removal of regulation can serve the public. Airline fares are reduced, more people are able to use air travel, and in many locals employment in the airline industry has increased.

Senator KENNEDY. We have 1,100 more jobs at Logan Airport.

Mr. PASTER. I think that is a good example of what this bill can do.

Moreover, there is good reason to accept the underlying premise of S. 382 as revised. That is, Government regulation can inhibit competition and, in doing so, increase the concentration of economic power and leave the consumer at a greater disadvantage in the marketplace.

As we read this bill it simply sets out the principle that economic regulation—as distinct from health and safety regulation—shall take into account the competitive consequences of Federal action with the goal of promoting, rather than deterring, competition. We note as a key part of the bill in section 3(a), that agencies shall take “the least anticompetitive alternative legally and practically available to achieve statutory goals.”

Our understanding is that this does not change underlying law which results in Federal regulations. Agencies must continue to pursue the goals set out for them by the Congress. But when those goals can be pursued in a practical way in a manner which does not unduly inhibit competition, then certainly that is a fair and reasonable standard to set forth.

Section 4 of the bill logically involves those agencies charged with antitrust enforcement in the economic regulatory process as it relates to the promotion or inhibition of competition. Section 5 continues the chairman’s longstanding commitment to help concerned parties take part in litigation in which their members have a legitimate interest.

We do have a question about section 6 of the bill which instructs all agencies to review existing regulation to bring them in compliance with the act. We think it important to do this, but we also think it important to make explicit—perhaps in report language—that the discharge of this mandate not become the excuse for any agency to fall behind in its current regulatory responsibilities.

It will not surprise the committee to know that we have a special concern for regulations governing labor standards. It is our under-

standing of the bill that it does not propose to undermine in any way existing statutes and regulations concerning labor standards. For example, our support of this bill is based on our belief that it would not provide a basis for challenge to minimum wage or equal pay regulations. It would be helpful if the committee report could deal specifically with these and other similar matters which are not properly within the purview of the bill.

Mr. Chairman, having set out our general view of regulation and having addressed specifically, if briefly, certain sections of the bill, I would like to conclude my statement with a short, general comment about the broad thrust of this legislation.

The UAW believes that antitrust enforcement in recent years has failed to stem the tide of economic concentration. We support initiatives to improve antitrust enforcement, including legislation in those instances in which the agencies charged with antitrust responsibilities are unable or unwilling to act. One of the ironies of this situation is that Government regulation is itself sometimes the culprit. In its triennial convention in 1977, the UAW adopted a policy resolution on antitrust matters which said, in part:

The UAW urges * * * use of the antitrust laws to enforce competition in industries now supposedly regulated but which in reality control the regulating agencies to prop up high prices to gouge consumers and workers.

By imposing a competitive test on economic Federal regulation, this bill will help to correct this unfortunate trend. It is for this reason that the International Union, UAW, is pleased to endorse and to pledge its support to S. 382 as revised.

Senator KENNEDY. Thank you very much, Mr. Paster, for an excellent statement.

I have some brief questions. One is whether you think that the revised language adequately distinguishes between health and safety regulations and economic regulations? Are you satisfied that it does?

Mr. PASTER. I think that the language of the bill is satisfactory, Mr. Chairman. I think there are some questions which remain about what constitutes entry into the marketplace as the criteria for economic regulation. I think those can be addressed adequately in report language. I know what the intent of the bill is.

Senator KENNEDY. You might take a look at just those provisions. If you have any suggestions, we would welcome them.

Mr. PASTER. I appreciate that.

Senator KENNEDY. Do you think that the implementation of S. 382 will slow down the administrative process?

Mr. PASTER. There is no reason why it has to slow the process down. There are those who seek to slow the administrative process through undue litigation. They are going to continue to try to do that. But, no, I think it is entirely feasible for regulators, in the course of considering proposed rulemaking, to take into account the competitive aspects.

Senator KENNEDY. Do you think that S. 382 might actually reduce economic regulation?

Mr. PASTER. I think we have found that economic regulation has been too pervasive. I think, to the extent that it might reduce economic regulation—where it will promote competition without deterring agencies from their statutory goals—that it will serve a public purpose.

Senator KENNEDY. But it is entirely conceivable that there will be a reduction in regulation, and that the process will be actually expedited.

Mr. PASTER. I think that makes sense, and I think the experience with airline deregulation, which the chairman was intermittently involved with, bears this out.

Senator KENNEDY. Thank you very much.

Mr. PASTER. Thank you.

[The prepared statement of Mr. Paster follows:]

PREPARED STATEMENT OF HOWARD G. PASTER

Mr. Chairman, members of the committee, thank you for giving me this opportunity to express the support of the 1.5 million member International Union, UAW, on the revised version of S. 382, the Competition Improvements Act.

I would like, at the outset, to explain briefly the general view with which we approach the broad issue of regulatory reform, an issue that has spawned a great deal of legislation of which the bill under consideration today is but one example. We reject the premise that Government regulation is some pernicious evil that must be eradicated. Quite to the contrary, Government regulation is essential to the health and safety of American consumers and workers who learned long ago that they could not leave their well-being in the hands of corporations for whom profit is the overriding objective.

Moreover, while economic regulation can work against the public interest, we are deeply troubled with the ease with which too many legislators have fallen prey to the simplistic, and erroneous, notion that lessening Government regulation affecting health and safety is a valid means of fighting inflation. There are those, and we know the chairman is not among them, who would subject every regulation of the Environmental Protection Agency, or the Occupational Safety and Health Administration, or the Consumer Product Safety Commission to some risk-benefit equation.

But to do so means assigning hard dollar values to human lives and illness. What is the cost of a child's life lost because an unsafe toy was kept on the market? What is the monetary cost of the death of a worker who is the victim of workplace cancer? How many dollars are we willing to put into the risk-benefit equation if 10,000 elderly people are forced to breathe polluted air that requires them to be confined and perhaps shortens their lives?

These are not idle questions. For as unreasonable as they are, and as absurd as they strike some of us, these questions are being asked too frequently in too many places. Even more distressing is the fact that many who would quickly reject such questions as inhumane and unreasonable, are dealing on the edge of this abyss by toying with the more general, but equally inhumane and unreasonable, questions about the economic cost of health and safety regulation.

We reject, Mr. Chairman, the notion that there is too much health and safety regulation. Indeed, we think there is too little. We further reject efforts, in the name of regulatory reform, which would undermine the health and safety regulations already on the books. Certainly the administration of regulations can be improved, and certainly pointless regulations can be dispensed with. One need only look at the change in direction and emphasis at OSHA in the past 2 years to find an outstanding example of improved regulation with a clearer sense of priorities.

While we oppose improper tampering with health and safety regulation, we do believe that the revised version of S. 382, the bill now before you, does represent a responsible attempt to come to grips with a particular problem associated with economic regulation. I must say, we do not oppose economic regulation per se. For example, we are aligned with the chairman in the effort to continue controls on crude oil prices.

But it is also true that in certain instances economic regulation has served as much to protect the regulated industry as it has to protect the consumer. The successful experience with airline deregulation is a good, current example of how the removal of regulation can serve the public. Airline fares are reduced, more people are able to use air travel, and in many locales employment in the airline industry has increased.

Moreover, there is good reason to accept the underlying premise of S. 382 as revised. That is, Government regulation can inhibit competition and in doing so increase the concentration of economic power and leave the consumer at a greater disadvantage in the marketplace.

As we read this bill it simply sets out the principle that economic regulation—as distinct from health and safety regulation—shall take into account the competitive consequences of Federal action with the goal of promoting, rather than deterring, competition. We note as a key part of the bill in section 3(a), that agencies shall take “the least anticompetitive alternative legally and practically available to achieve statutory goals.”

Our understanding is that this does not change underlying law which results in Federal regulations. Agencies much continue to pursue the goals set out for them by the Congress. But when those goals can be pursued in a practical way in a manner which does not unduly inhibit competition then certainly that is a fair and reasonable standard to set forth.

Section 4 of the bill logically involves those agencies charged with antitrust enforcement in the economic regulatory process as it relates to the promotion or inhibition of competition. Section 5 continues the chairman’s longstanding commitment to help concerned parties take part in litigation in which their members have a legitimate interest.

We do have a question about section 6 of the bill which instructs all agencies to review existing regulation to bring them in compliance with the act. We think it important to do this, but we also think it important to make explicit—perhaps in report language—that the discharge of this mandate not become the excuse for any agency to fall behind in its current regulatory responsibilities.

It will not surprise the committee to know that we have a special concern for regulations governing labor standards. It is our understanding of the bill that it does propose to undermine in any way existing statutes and regulations concerning labor standards. For example, our support of this bill is based on our belief that it would not provide a basis for challenge to minimum wage or equal pay regulations. It would be helpful if the committee report could deal specifically with these and other similar matters which are not properly with the purview of the bill.

Mr. Chairman, having set out our general view of regulation and having addressed specifically, if briefly, certain sections of the bill, I would like to conclude my statement with a short, general comment about the broad thrust of this legislation.

The UAW believes that antitrust enforcement in recent years has failed to stem the tide of economic concentration. We support initiatives to improve antitrust enforcement, including legislation in those instances in which the agencies charged with antitrust responsibilities are unable or unwilling to act. One of the ironies of this situation is that Government regulation is itself sometimes the culprit. In its triennial convention in 1977 the UAW adopted a policy resolution on antitrust matters which said, in part: “The UAW urges * * * use of the antitrust laws to enforce competition in industries now supposedly regulated but which in reality control the regulating agencies to prop up high prices to gouge consumers and workers.”

By imposing a competitive test on economic Federal regulation this bill will help to correct this unfortunate trend. It is for this reason that the International Union, UAW is pleased to endorse and to pledge its support to S. 382 as revised.

Senator KENNEDY. Our next witness is Milton D. Stewart, Chief Counsel for Advocacy of the Small Business Administration, and past president of the National Small Business Association.

Mr. Stewart, we are glad to have you back here.

STATEMENT OF MILTON D. STEWART, CHIEF COUNSEL FOR ADVOCACY, SMALL BUSINESS ADMINISTRATION

Mr. STEWART. Mr. Chairman, it is always a privilege to be here. I have a brief statement, which I will dispense with, offering it for the record with your permission, and just make several salient points, if I may.

Mr. STEWART. First and foremost, perhaps the central mission of our Office of Advocacy focuses on a relationship between Federal policy and practice on the one hand, and entrepreneurial environment for small business on the other.

It is a hard thing to describe what it is that makes a risktaking entrepreneur or risktaking investor decide to proceed with a hazardous or risky enterprise or not to; but it appears to us, based on our review of Federal policy, and this is not limited to regulation, it includes procurement, it includes tax policy, and it includes a variety of Federal acts and activities.

The cumulative impact of Federal action over the last 40 years has been—we think it is beyond debate any more—has been to truncate the relative growth of the small business sector of the economy. To overcome these adverse Federal policies and practices, one by one is the mission which we, along with Members of the Senate and the House, the President and others are engaged in.

To draw down to the bottom line, our central reason for supporting S. 382 is the fact that we view it as one of the necessary signals for the small business people of the country that Federal regulatory policy will change and will become more reasonable, more sensitive to the need to preserve competition and to avoid anticompetitive regulation.

Let me close in discussing the present state of morale, if you will, in the small business sector by quoting from the forthcoming report by the Batelle Institute on regulation and paperwork and its impact in the State of Washington. This is the result of a study of not just Federal regulation but State and local as well.

Two central conclusions emerged from the study.

First: The time and energy expended by the owner-manager of the small business is the singlemost important impact of Government requirements.

Second: The psychological costs of compliance are in many cases much more important than the actual amount of time and money spent. The psychological cost of compliance goes far beyond the amount of time spent, and may decrease the entrepreneurial spirit by giving rise to feelings of frustration, fear, hostility or resignation.

As a consequence, businessmen forgo far more opportunities than the apparent time and money spent complying with Government requirements would suggest.

As a final point, Mr. Chairman, it seems to me that one other beacon of hope is reflected in the airline industry. A year ago there were 116 commuter airlines. Today that number has grown to 141.

If we can see the same kind of gradual improvement in the competitive environment industry by industry, I think small business can take heart about the future, and we believe that S. 382 will be a contribution to that goal.

Senator KENNEDY. Mr. Stewart, why is it that competition and the small business interests served by competition have been basically ignored by the Federal agencies?

Mr. STEWART. I am not sure I know the answer to that.

Senator KENNEDY. Would you agree?

Mr. STEWART. Yes; emphatically yes.

Senator KENNEDY. Why do you think that this has been so?

Mr. STEWART. Let us try them one at a time. One element certainly is that when you give an agency a regulatory mission, inevitably what concerns each of us is most important to us, and inevitably you get an excess of zeal. I think of Mr. Justice Brandeis, who warned all young people in Government about it, and I think he was right on target.

Second, as the agency becomes more and more involved with its own internal, almost metaphysical concerns, the narrow issues of regulation, it loses sight of overall impact on the economy as a whole and the regulatory structure.

Finally, inevitably it establishes ongoing relationships with the particular industry or industries that it is regulating, and becomes—well, it is too harsh to say “a captive,” but perhaps it accepts the status quo and the trends of status quo more than it should.

Senator KENNEDY. How much consideration do you feel the agencies give to competition?

Mr. STEWART. Mr. Chairman, as a lawyer, I dealt with perhaps five or six Federal regulatory agencies as a regular matter of course. I ran a federally licensed company which was closely regulated by the agency I am now with, as well as by the Securities and Exchange Commission. All I can tell you is that this question is not now raised often enough, and it is a question that ought to be.

I think the statute is needed.

Senator KENNEDY. Finally, we are not interested in delaying the process, we are interested in expediting it. Do you believe that S. 382 could be used to delay the administrative process?

Mr. STEWART. Mr. Chairman, energetic and imaginative lawyers can find ways to screw up any process.

Senator KENNEDY. That applies to Senators as well.

Mr. STEWART. I cannot say that, sir.

Senator KENNEDY. Yes, you can.

Mr. STEWART. I would rather you said it.

But I do think, on balance, that asking this question is much more likely to expedite the regulatory process, because I think it is going to result in increasing the push toward deregulation and increasing reliance on the market, where the market should be relied on.

I cannot help but believe that the cumulative impact will be to facilitate the process.

Senator KENNEDY. Thank you very much.

Mr. STEWART. Thank you.

[The prepared statement of Mr. Stewart follows:]

PREPARED STATEMENT OF MILTON D. STEWART

Mr. Chairman and members of this committee. It is a pleasure to be here today before this committee to discuss the Competition Improvements Act of 1979. My comments today reflect my views as Chief Counsel for Advocacy and not necessarily those of the Small Business Administration or the administration.

How one views the national entrepreneurial environment is a little bit like the old saying about the water glass: is it half full or half empty? The relationship between public policy on the one hand and entrepreneurship and competition on the other hand has been a matter of concern to me for most of my adult life.

Without getting into arguments about the significance of specific data, it seems to me to be unexceptionable that the effect of Federal policy on competition and the small business sector of the economy has been negative and anticompetitive.

This is not just the consequence of regulatory policy; it results from changes of credit policies, from procurement policies, from tax policies, from science and technology policies.

This proposal, for that reason alone, has my support: it is a potentially useful contribution to changing the Nation's entrepreneurial climate by laying the basis for a change in Government attitude and hopefully in Government conduct.

What makes a risk taker invest or not invest, a would-be entrepreneur take the plunge in a high risk venture or not take it, a small business person expand into a new market opportunity or not, these are the complex questions without any single answer. Legislation such as proposed by the administration for regulatory reform, antimerger legislation, legislation to stimulate innovation which is expected to come out of the President's domestic policy review, will all help. Such legislation is important since, in recent years the role of Government and Government regulators have loomed larger and larger in the minds of the people involved in the entrepreneurial process. The enactment of this particular legislation will, I believe, be a helpful signal to them of an important change in the Government produced elements that affect the market sector of our economy is occurring.

Through the years I have learned to become somewhat skeptical of rhetoric in support of competition and small business.

In 1953, when the Small Business Act was introduced Senator Thyne stated: "The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiation and individual judgment be assured. The preservation and expansion of such competition is basic, not only to the economic well-being but to the security of this Nation."

As you can see significant discussion has been paid to the issue of competition and small business. Unfortunately, our Government's actions have not kept up with the rhetoric.

As John Shenefield stated in his testimony, the judicial review section of S. 382 is important to insure that this bill does not become just another piece of rhetoric in our law books.

In evaluating the effect of Government regulations on small business and competition it is difficult to arrive at specific dollar figures. The pattern of economic regulation in regulated industries was established many years ago. For this reason it is difficult to determine precisely the effect a bill such as S. 382 would have.

The only instance in which economic regulations have been removed from an industry is the airlines industry. Even in this situation it is too early to tell what the effect of removing these economic regulations will have. It is clear that one of the important effects has been to stimulate the growth of the small businesses within the airline industry. Commuter airlines have expanded their operations significantly during the first year after deregulation occurred. In addition to the expansion of existing carriers operations, additional new commuter airlines have come into existence. One year ago there were 116 commuter airlines. Today that number has grown to 141. In conversations with the individuals at the Commuters Airline Association of America, they pointed out that the growth had been restrained by their inability to obtain airplanes and equipment.

It seems to me that this proposed legislation highlights the common interest to be served by both small business and antitrust. One of the many Government mysteries I have never been able to solve is why those concerned with antitrust law and those concerned with small business so often must be introduced to one another. We are dealing, after all, with two sides of the same coin: facilitating competition by making it easier for small businesses to be founded, to succeed and to compete and to make it harder for big business—and equally important, big Government to exercise negative anticompetitive influences on the market.

We may not be able to measure precisely the effect of S. 382 or any other pro small business or pro competition legislation but there is one point that I would like to stress—the decline of the small business sector of our economy must be reversed—legislation such as S. 382 is a step in the right direction.

Senator KENNEDY. If any of the witnesses have other suggestions or recommendations, we are going to keep the record open and we will welcome comments.

Next we have a panel of independent businessmen under ICC regulation. They have all had firsthand experience with the types of regulation which S. 382 addresses.

With us also is Jack Pearce, who will introduce the witnesses and give a brief overview.

PANEL OF INDEPENDENT BUSINESSMEN UNDER ICC REGULATION:

STATEMENTS OF JACK PEARCE, PARTNER, PEARCE & BRAND; DON CHICHILLA, PRESIDENT, NATIONAL AGRICULTURAL TRANSPORTATION ASSOCIATION; THOMAS LIVINGSTON, REPRESENTATIVE, LIVINGSTON STORAGE & TRANSFER CO.; TIMOTHY PERSON, OWNER, ALL-STATES TRANSCONTINENTAL VAN LINES; ARNOLD PEVNA, PRESIDENT, HAVERHILL LAWRENCE TRANSPORTATION CO., AND ALFRED RAPPEPORT, PRESIDENT, GENERAL AMERICAN SHIPPERS, INC.

Mr. PEARCE. Mr. Chairman, the panel which is before you is composed of small business people who found that the existing regulatory system in the trucking industry imposes major costs and difficulties for them in trying to serve the public. Some of them have asked me to point out that they regret having to take your time on these issues and would have greatly preferred that they had nothing to say on the issues addressed by S. 382. Three of these companies have cases pending before the Interstate Commerce Commission. They are not here today to ask the committee to intervene in those proceedings; they all hope and expect that eventually they will get some or all of the operating authority they seek. They all believe that they have met and/or can or will meet all the existing tests that have been administered by the ICC, and they are not here to condemn the Commission's personnel.

The issues which they address are questions relating to overall structure and operation of the regulatory system as it has affected them.

They are here to illustrate the costs and impediments which small firms and exempt firms encounter in dealing with the system as it now exists after numerous court decisions to the effect that the Commission should accommodate the policies of the antitrust laws. They hope to assist the committee in its consideration of this bill.

If I may take just a moment briefly to submit that the testimony will show a need for new legislative direction from the Congress to the Commission, and, by analogy, to other regulatory agencies at three levels.

The first level may relate to the large general issues related to, let us say, entry and collective pricing, which may be addressed in specific regulatory reform bills not here today before this committee. In some respects that level may be the most important.

The second level concerns a layer of regulation which does not often attract public attention, but does affect industry performance. Particulars of industry operation, such as, in trucking, the way vehicles

may be leased, the number of companies which a local agent can represent, and the like, are often reached by rulemakings, sometimes by agency policies which are not in the form of rules.

If I may, I would submit that this level of Commission regulatory activity may be thought of as having the level of significance of, let us say, Federal Trade Commission trade regulation rules. That obviously can be of substantial significance.

The third level is particular adjudications under whatever statutory standards may exist. Here, too, this group would suggest a directive to an agency such as the ICC, to achieve procompetitive results, and this can be of some substantial consequence. Any agency and particular adjudications, and each adjudication, must be guided by a structure of guidelines, lawyers often say principles, and this bill would make procompetitive principles explicit.

If an agency finds that in its adjudication it is repeatedly running into conflict between its existing standards and the procompetitive principles, that may be a very important signal that it ought to rethink the existing standards. If it repeatedly finds that it is simply executing a procompetitive mandate, it may find that it should not have as many detailed adjudications and should cut down its regulatory reach.

Thank you for your indulgence in that introduction.

If I may, I will introduce the members in the order of the panel.

First will be Mr. Arnold Pevna, president, Haverhill & Lawrence Transportation Co. in New England.

Then Mr. Chichilla of the National Agricultural Transportation Association.

Mr. Person from Allstates Transcontinental Van Lines.

Mr. Livingston, from Livingston Storage & Transfer Co. in Columbus, Ga.

Mr. Rappeport, with the General American Shippers Inc. in New York.

First will be Mr. Pevna.

Senator KENNEDY. Mr. Pevna, we are glad to have you here from Massachusetts.

Mr. PEVNA. It is nice to be here, sir.

Senator KENNEDY. I was up in Haverhill recently, and know the Souliotis family.

Mr. PEVNA. Very close friend.

Senator KENNEDY. Barbara has worked for me for 20 years now.

Mr. PEVNA. I have known the family for a good number of years.

Senator KENNEDY. She is probably the best Red Sox fan in Massachusetts.

We are glad to have you here, and look forward to your testimony.

Mr. PEVNA. I am Arnold Pevna, president of Haverhill & Lawrence Transportation Co. in Haverhill, Mass.

I understand that S. 382 is aimed at making agencies like the ICC stop, look, and listen before they eliminate or diminish competition. I also understand that this bill is not a substitute for bills to deregulate trucking.

I think encouraging an open, competitive economy is great. But as soon as Congress starts telling agencies to promote competition, the people who come before the agencies will start justifying everything from birth control to breeder reactors—and some say they are

the same thing—in terms of promoting competition. You had better also tell the agencies something about what you mean when you say you want to promote competition.

Take the ICC. Some ICC-regulated truckers go around telling everyone that the regulatory system protects small business, and promotes competition. Let me tell you what I have observed.

We have seen large trucking companies come in and buy up small companies, with ICC approval, in order to get a route segment, and then drop most of the service which the small company performed.

We have seen Roadway Express buy two small companies in our area, the New England area. One was very close to us, also located in Haverhill, Mass.: the Hub Transportation Co. Hub served over all of Massachusetts, particularly eastern Massachusetts. Roadway apparently bought Hub in order to get service into the Boston metropolitan area. Our observation is that Roadway then just did not bother to solicit or service most of the non-Boston traffic which Hub had serviced.

Also, in 1972, Roadway bought Atlas Transportation Co., of Kennebunk, Maine. I had been dickering with the company over the price for buying it, so I was fairly closely acquainted with it. Again the same thing happened; Roadway dumped all the service except for a few route segments.

As we see it, the reason Roadway or other large firms do this is very simple. They are geared for relatively long-haul traffic. They do not handle the local, short-haul, pickup-and-delivery runs efficiently. In fact, most of this business is done by small firms like mine. But because it has been so expensive and difficult to get new authority by the direct method of applying for it, truck companies, even such large ones as Roadway, have been encouraged to buy authorities, by buying up companies having authorities.

I can understand why a large company such as Roadway does this, under the existing regulatory system. But the system is producing just the opposite effect claimed for it. Smalltown service tends to get cut down, rather than promoted.

While the large carriers may buy out small ones, and drop small-town service, the small carrier providing LTL service to small towns faces major obstacles to growth. The small carrier is less able than the large one to cover the costs of hearings to get a certificate, and has no large cash flow with which to buy out neighbors.

If you can figure out how the small shipper, small community, and small carrier come out ahead in that game, I wish you would let me know.

We have spent the last 30 years in a bottle. We have been in the role of the small carrier—limited in hopes of expansion by the ICC certification system. We would like to find our way out of this bottle. We believe that if we could get an interstate authority for LTL service, we could provide more service at lower rates than existing certificated ICC carriers.

I am told there is a lot of talk about "deregulation" harming LTL service to small towns. I have a message for you and the Nation at large. There are some small LTL companies around the country who would be perfectly capable of expanding their services, if all they had

to do was prove their ability, and attract the capital to undertake the service. The Interstate Commerce Commission ought to be given that message. If Yellow Freight or PIE says it is not so, I, Arnold Pevna, say: Open the door and we will show you.

If Congress enacts S. 382, I hope it will make clear to the regulatory agencies what it means when it is talking about lessening or promoting competition. If you mean to say that things like price fixing, dividing up markets, limiting new business enterprises, and allowing big firms to buy up little firms fall in the anticompetitive category, you had better say that. That may seem elementary even to a small businessman like myself, and even more so to you.

But these agencies face hoards of people with a vested interest in their license telling them the opposite. If you mean licenses should be easy to get for the small, but willing and able firm, you had better say that. If you mean that regulators better learn the antitrust laws, why not say that? We must find some way to get away from a system which doles out the opportunity to serve the public as if it were toxic in large doses.

I hope my brief testimony has been of some value to this committee.

Senator KENNEDY. It has been very helpful. I just have a few questions, if I may.

Are you organized by the Teamsters?

Mr. PEVNA. Yes.

Senator KENNEDY. During the Teamsters strike, was your company struck as well?

Mr. PEVNA. No; we operated. During this particular period we were allowed by the Interstate Commerce Commission to operate areas on an emergency basis, that we were not allowed to operate before, mainly New Hampshire and Maine in that particular situation.

Senator KENNEDY. You did not participate in the lockout?

Mr. PEVNA. No; we did not.

Senator KENNEDY. During the strike, you expanded your service in the Merrimac Valley and into Maine, serving the shoe industry among others. What was their reaction to your rates and service?

Mr. PEVNA. They were very receptive. As a matter of fact, many of them in the New Hampshire and Maine areas that I serviced during this labor problem asked me if I could make some attempts at getting authority so I could service them on a regular and permanent basis. They were so delighted with the service that I did provide them with.

Senator KENNEDY. As I understand, in some instances about 20 percent less for the LTL; is that correct?

Mr. PEVNA. Yes.

Senator KENNEDY. How can you serve the small communities more cheaply?

Mr. PEVNA. Because our traffic lanes are geared for this, where our particular flow of traffic goes into these particular small communities. This is our market. Therefore, we already have the lanes established. It becomes a question then of putting more dollars on the same vehicle, delivery and/or pickup vehicle, depending on what the situation is.

Senator KENNEDY. We are told that the smaller communities will be the big losers if we eliminate collective ratemaking and facilitate entry.

Mr. PEVNA. I disagree with this. I do not think that the small communities will be any more at a loss than they are at the moment, because most of these bigger carriers are not serving the small communities on a daily basis—even though they hold themselves out to be. In many instances they are turning this freight over to a small inter-line carrier such as myself to deliver for them, because it is economical and feasible.

Senator KENNEDY. Mr. Chichilla, we welcome you.

Mr. CHICHILLA. My name is Donald R. Chichilla. My business address is 1717 Penn Avenue, suite 900, Pittsburgh, Pa. I am president of the National Agricultural Transportation Association, NATA.

I am also president of the A.C.R. Inc., a broker of truck transportation for agricultural cooperatives exempt from economic regulation under the Interstate Commerce Act. I have been engaged in various phases of transportation—industrial traffic, private and for-hire carriage, fleet owner, and agricultural cooperative transportation broker—for over 26 years.

NATA's purpose is to promote the public interest in the safe, efficient and economic transportation of agricultural products from farm to market and consumer.

Senate bill 382, the proposed Competition Improvement Act, represents one way, but not the only or most important way, to improve the administration of the Interstate Commerce Act. We think specific amendment of that act, to free up backhauls for agricultural carriers, is needed.

The transportation of farm products including fresh fruits and vegetables from the farm to market and consumer is a major concern of the Nation. The Interstate Commerce Act exempts the truck transportation of farm products from the economic regulation of the ICC. It also exempts an agricultural cooperative hauling the farm products of its members and, on the return trip, ICC regulated freight for nonmembers of the cooperatives, provided the return regulated freight does not exceed 15 percent of the cooperative's fiscal year freight, measured in tons.

This means that of 10 trucks coming in to the East with member tonnage, 7 must return empty or be leased to an authorized carrier, under unfavorable terms.

Following its long-time policy of protecting regulated carriers, the ICC has been hostile to all the exempt status of carriers which it does not regulate, including those hauling farm products and in need of a return haul.

The hostility of a regulatory agency to competition with its regulated charges from outside the regulated arena may be one of the more important issues addressed by S. 382. This hostility can result in use of Government resources to suppress economic activity by people whose major crime is to provide a better service at a lower price.

The committee will find in my statement the proof of the ICC's hostility. What really matters is that the exempt carriers are now handling over 80 percent of the fresh fruits and vegetables to the eastern markets. The railroads and the regulated carriers are not interested in this perishable traffic, particularly since the price for hauling such traffic is determined by the marketplace and is not subject to any antitrust exemption.

A major point of competition occurs when a cooperative competes for ICC regulated freight for its backhaul. However, present laws limit this opportunity to 15 percent. It is a fact that a transportation cooperative can save the consumer money which helps hold down inflation.

A declaration in an act of Congress that regulatory agencies like the ICC should promote competition in pricing and service, in their interpretation of the regulatory statutes, would be in the best interests of the Nation.

This would promote the movement of food to market and consumer as economically as possible. What is more important than hauling food for America? However, more should be done. Specific legislation should give agricultural carriers fully competitive access to all sources of backhaul traffic.

That is the end of my summary.

Senator KENNEDY. Thank you.

If the ICC is granting 96 percent of all applications, why do the members not apply to the ICC for backhaul rights? Have you tried?

Mr. CHICHILLA. Several of our cooperatives have tried and have received small grants. What is needed because of the nature of agriculture is broad-range general commodities certificates, general commodity certificates off the east coast. From a practical standpoint, financially you could not afford to try to obtain such a certificate. It would have to be broad range. For example, Washington does not eat one load of lettuce every day, it fluctuates greatly; and the harvest of the product is not consistent and the delivery points are not consistent. You need a broad range of authority.

I believe that at least 96 or 97 percent of authorities granted have been limited to point-to-point specific commodities. Just financially impractical.

My attorneys tell me that they are planning their retirement if we try to get broad-range general commodities authority.

Senator KENNEDY. Do you have an estimate of what it cost your members to comply with existing ICC regulations?

Mr. CHICHILLA. It is very expensive to try to comply with the 15 percent, if you open up that 15 percent to 50 percent backhaul—well, let me say, if we have to send 7 out of every 10 trucks back empty, particularly into California, which is long haul, that gets very expensive, just from the fuel aspect, very expensive.

Senator KENNEDY. I guess the Energy Administration Task Force estimated ICC regulations on trucks were adding \$300 million a year to food prices. Do you agree with this estimate?

Mr. CHICHILLA. We have made some preliminary studies on that particular figure. Because of the billion dollars involved in the transportation of food, we think that the estimate is low. However, I do not have anything right now to substantiate. We are still in the process of studying it.

Senator KENNEDY. You will let us know?

Mr. CHICHILLA. I certainly will.

Senator KENNEDY. Mr. Person from Allstates Transcontinental Van Lines.

Mr. PERSON. Mr. Chairman, I want to thank you for inviting me. You have a copy of my testimony, so I will not read it.

I do have some points I would like to bring to your attention that are not covered in my testimony.

In 1953 I was discharged from the Army, and I went to work with my dad, who had started the moving and storage business in 1929. From 1929 until 1953 he had been only able to represent the lesser carriers, the ones with the poor service, and ones that paid badly if they paid at all. I, after having a conversation with my dad, decided that maybe the answer to our problem was that if we could contact a black national carrier, one who had authority nationwide, that they would be able to give our customers the kind of service that we felt that they were entitled to. After traveling from coast to coast and going into all of the major cities and talking to individuals about people that were there in the moving and storage business and the like, I found out, after about 4 years, that there was no such thing as a black national carrier.

The money that I spent making these trips was my own money, and I really do not have any money to spend in this manner. I wrote a letter to the Government Printing Office and asked them to direct me to any black carriers or the like, and I received a letter back that they had no such information, and they referred me to the Interstate Commerce Commission. They told me that they did not categorize their carriers in terms of race.

So, after proceeding to travel all over the country and finding that there were no carriers, black carriers, I proceeded to prepare myself to file for nationwide authority.

I was told at the beginning of this hearing that we would probably have 10 minutes, and a number of the things that I proposed to talk to you about I am going to skip over.

Not having the ability to be signed by the major carriers, such as Allied, Mayflower, and the like, we felt that the growth potential and the like in the interstate commerce business or in the interstate transportation of household goods, was not a viable one for blacks, and the great American dream, as it is spoken of, is really a nightmare for black truckers. I have been in the process now since 1968, of applying or preparing myself to apply for a nationwide authority.

After that period of time, we have approximately 250 people that have signed up with us. Of that number, we have 60 black companies that have signed to represent us. I have spent approximately \$350,000 since 1953, and if you check my income tax records, you will find that I really cannot afford to spend that kind of money.

Even after having spent that kind of money in 24 years of endeavors, trying to find an attorney to represent us, we had problems just getting the kind of attorney that you normally read about in transport topics. The majority of them, or all of them, said that if they represented me, it would be tantamount to cutting their throat economically, because the other companies that they normally represented would be our protestors.

Beekins Van and Storage, who were one of our protestants, they signed up two of our witnesses. After having signed them up, they immediately said they would not be able to testify in our behalf. One of the witnesses, Rudy Williams of Los Angeles, Calif., said he was given \$35,000 to sign. Beekins, in their testimony, said that they had admitted giving him from \$14,000 to \$18,000. Van Lines routinely

give good agents that are booking a lot of traffic, bonuses for signing; but they never give a company that has not been engaged in interstate commerce, such as Mr. Williams, this kind of bonus.

I see my time is up. I would like to close by saying that even after spending all of this time preparing myself, if it were not for the Office of Minority Business Enterprise giving me a grant, because after I spent all of this time getting to the hearing process, I was out of money and credit, and such people from the Senate and Congress, such as yourselves, Senator Danforth, Congressman William Clay, and Parren Mitchell, who were instrumental in helping us to get OMBE to agree to give us a small grant in order to pay our witnesses.

At this time I would be happy to answer any questions you might have, Senator.

Senator KENNEDY. Well, that is a pretty fearsome indictment of the current system. I think you have probably answered this question, but I have heard it said that the trucking industry is so locked up that new minority firms would not be able to compete effectively in a competitive market. That seems to be pretty much what you are saying now, is that not so?

Mr. PERSON. That is true. As a matter of fact, we have had a number of people that refused to testify because of what they consider to be reprisals from not only the companies that they were working with—I am talking about carriers—but from Government agencies as well.

Senator KENNEDY. That does not seem to make much sense. There are supposed to be incentives for minority businesses, yet it would appear from what you said that this is not the case at all.

Mr. PERSON. The truth of the matter is that people looking for minorities to help is a myth. There is nobody looking for anybody to help. The proof of it is my father started this business in 1929 and we have been continuously in business since that time. I have never been able to get an SBA loan. We make a profit every year, and even though, for the last 11 years, I have been busily engaging myself in trying to get nationwide authority, but I can really say that there is nobody looking for successful endeavors. People that come up with ideas and have not had a track record or experience, now they get some money, but it is mostly a showcase type orchestration. It is not intended to really help minorities to get into the marketplace.

Senator KENNEDY. Mr. Pearce, you seem to be one of the few lawyers we have had before the Judiciary Committee who is trying to put himself out of a job. How much has the application process cost you so far?

Mr. PEARCE. In Mr. Person's case, this whole process has cost well over \$100,000, when you count factfinding by entities, other than us, not all the money has flowed into our firm. But when you count the financial consultant arrangement, arrangements to get information on minority enterprise in various cities around the country, our own preparation time, over \$100,000.

Mr. PERSON. Could I make one comment, Senator Kennedy? Mr. Pearce here has been as much instrumental in helping me to bring my case before the Interstate Commerce Commission as OMBE and the senatorial and congressional help that I have gotten. The grant that I got was mishandled. A lot of times he did not get his money, and he has really helped me.

Senator KENNEDY. He is a good man.

Mr. PERSON. Very low-keyed person, but without him I could not have made it.

Senator KENNEDY. That is a fine commendation.

Mr. Livingston.

Mr. LIVINGSTON. Thank you.

Our understanding is that this committee, in considering S. 382, is considering the desirability of directing agencies such as the Interstate Commerce Commission to be more openminded when considering competition in the economy.

I am here to give this committee some of our experiences with the Interstate Commerce Commission in hopes that it will help in your consideration of the bill.

Livingston Storage & Transfer Co., Inc., was founded by my father, Cliff Livingston, Sr., in 1949, which, at this time, became an agent for Allied Van Lines, and has been primarily a household goods mover. We feel we have built up a very good and strong reputation within our Columbus area.

Columbus, Ga., has a population of approximately 175,000, which consists of steel fabricating companies, heavy machinery dealers, and cotton gin manufacturing companies.

In the seventies we realized there was a strong demand for long-needed service for transporting the heavy and cumbersome items. In 1976 we started offering this service through two agency agreements, transportation companies who specialized in hauling. One carrier was Heavy and Specialized Hauler, Inc., which our equipment was permanently leased with this carrier. At this time we assumed most of the responsibilities in providing this service to the customer.

In January 1978 we applied for interstate authority. There were three carriers who opposed this application, which in turn has cost us in excess of \$30,000 and longer than a year and a quarter of waiting. At this time there has not been a final decision on our application.

The hearing took place in Atlanta, Ga., of which at this time we were able to furnish 13 supporting shippers to speak in our behalf.

On the second day of the hearing these protestants approached us and indicated that they were not interested in our scrap metal application, but if we were willing to withdraw portions of our origin territory in our size and weight application, that they would withdraw their process; if not, since they had reviewed the records that we had produced on display in the hearing room, they had found a number of things we were doing wrong in our operation, and they would make it difficult for us from that time on. We refused. We felt confident there was nothing we were doing wrong, and we were operating within the ICC regulations.

Soon thereafter we discovered for the first time some of the arrangements that we were operating under, our carriers were not in accordance with ICC regulations. After the hearing we approached our carrier in order to make corrections in our operation, and they indicated they felt like they were minor and that we could easily take steps to correct these problems.

Two weeks later we received a termination letter from this carrier, and after a call, questioning this carrier, they indicated that they had received a threat from one of the protestants who insisted if this carrier did not drop us as an agent, that they would report them to the ICC.

We immediately filed for emergency temporary authority, which was granted on January 5. During this time, after this, the same three carriers protested this application. Based on this protest, a single Commissioner revoked the ETA on April 30. We then filed a second application which contained a more condensed territory, and this application was granted on May 16. During this time we were shut down for 2 weeks waiting for this final decision. It was a costly shutdown, loss of revenue as well as several trained drivers that we lost as well.

While we were struggling to maintain our service pending the decision of the permanent authority, the administrative law judge issued a decision that he did not feel that it was necessary to question the need for service, but recommended that the Commission find us unfit because of some of the regulations that we did not follow. While under our temporary authority we made steps to correct these changes in our operation.

We are not here to ask the committee to intervene in our case. We hope and believe that the Commission will take a more balanced view in our appeal. We bring these points out here to point out that unless Congress directs agents to favor competition, that some of these agents could possibly construe these in many ways, and possibly suppress competition.

If S. 382 would have this effect for more opportunity for competition, then we support the bill.

Thank you.

Senator KENNEDY. It seems to me that you were found to be unfit because you tried to provide something extra to the shippers; is that part of the testimony?

Mr. LIVINGSTON. Yes, sir. As I indicated, prior to the hearing we felt like we were within the guidance of the regulations. In some cases that were indicated, we had possibly extended some additional loading or unloading times that were not offered in the tariff. We feel like some of these things were blown out of proportion. We feel like we operated in the interest of the customer. We are there to provide the service, and we try to operate under the guidance of these carriers.

Senator KENNEDY. Do you think that the ICC's fitness criteria themselves may be anticompetitive? Certainly it would appear that you were trying to provide the kind of additional services which would be respected and would be the usual way of doing business in other industries in order to retain customers and attract shippers. Yet, because you were doing these kinds of things, you were found unfit. It does not seem to me to make a lot of sense.

Mr. LIVINGSTON. This was not a common practice. We did not mean to operate in this manner in order to bring about new customers. We felt like we were fit, due to our being financially able, and able to provide the service to the customer.

Senator KENNEDY. Thank you very much.

Mr. Rappeport, president, General American Shippers.

Mr. RAPPEPORT. Thank you, Mr. Chairman, for your time.

We favor S. 382, but also more broadly for the entire range of initiatives to reform the Interstate Commerce Commission.

In my opinion auto driveaway is a classic example of how anticompetitive practices developed within the last 15 years, mainly because of ICC regulations.

I am president of General American Shippers, Inc., an automobile freight forwarder in New York. The auto driveaway business is integral to our import-export business.

My son, Jeffrey Rapoport, and his partner, Bonnie Weiner, have formed a company called American Auto Shippers, and they received an emergency temporary authority from the Interstate Commerce Commission, being required to extend it every 30 days. We have been familiar with the auto driveaway business since 1954. As an individual citizen, related to my son, of course, and vitally concerned with the operation which he heads, I would like to reflect to you the effects of Interstate Commerce Act regulation of the auto driveaway business, as I have observed it.

Briefly, my position is that most ICC-type regulation has limited service to the public, and led to public abuse which would not exist in an "unregulated" regime. If any regulation is needed, it would be rules requiring sellers to be financially responsible and truthful in dealing with consumers.

If S. 382 were enacted, and if its reasoning were followed through thoroughly by the Commission, in the spirit intended, the Commission could do little harm. The Commission would have little left to do other than prevent consumer abuse. But I fear that the Commission would not understand clearly what a competitive market requires. Probably Congress must just tell the ICC not to impose barriers to entry into interstate transportation other than fitness tests, and not to allow carriers price fixing.

In my opinion, ICC regulation has been a curse on the auto driveaway business. I know most people at the Commission never have intended that. When the auto driveaway business was unregulated, there were many people spread all over the country, working with each other for interstate moves when necessary. When ICC regulation came into effect, a few people got national authority, a few more got limited interstate authority, and most of the remainder became subservient to the principal firms. Though I cannot prove it, I believe find fear that there may have been collusion on the part of the few licensed companies concerning their prices to the public and their priorities as to "agents." With entry at the national level limited, the licensed companies squeezed more and more out of the local companies which do most of the work involved in moving cars, leaving those companies barely enough to survive. The insurance claims policies of at least one company came to be of serious concern.

If the people at the Commission—and there are good people at the Commission—had had a different set of directives, this need not have happened.

Let me tell you about the auto driveaway business. The local auto driveaway company matches the people who want to go somewhere without paying common carrier fare with a carowner who wants the car moved but does not want to drive it. The local auto driveaway businesses are usually small, locally owned businesses of a "mom and pop" sort. Such a local business could, but for ICC regulation, just move cars from its city to various distant points. But there are advantages to the various local companies working together. One can call on another to pick up a car owned by a customer located in a distant city. This is especially useful in dealing with corporate cus-

tomers—auto dealerships, car leasing companies, companies with salesmen needing cars, and so forth.

There is no trucking involved in the auto driveaway business. It could hardly have been in the mind of Congress when the 1935 Motor Carrier Act was passed. For over 20 years, it was not regulated by the ICC. Then, in the sixties the ICC decided it wanted to regulate auto driveaway services. Appeals to the courts did not work. Regulation descended.

Every local company had to get an ICC certificate or become an "agent" for someone who had a certificate. Well, you can imagine that very few of these local "mom and pop" companies could take on the burden of showing a public need for their service over a large area. They could provide the service, but launching a Federal case to prove it was just beyond their means.

A few people did get certificates. The number with certificates narrowed down to three. After a few people got entrenched, trying to get a certificate became not just a logistical exercise, but a war. Any new application was greeted by an all-out attack by those who sat astride the business. Funds milked from over a hundred local driveaway businesses around the country were turned against the one or two which wanted to venture into the interstate field.

The Commission had made some effort to protect consumers. It requires that certain disclosures be made, that a business to keep a car tied up indefinitely, and that insurance or some substitute therefor be carried.

But, overall, the deck has been stacked against the buyer. There really is no effective control over what kinds of drivers are used. We could leave this to competitive prices, if those forces were not suppressed. But they are. With only three national companies, there was little or no price competition. That has to hurt the consumer.

If a local driveaway business ran afoul of one licensed company, it just might not be accepted by another. A pending antitrust suit filed by one local company, one of American Auto Shippers' affiliates, alleges that the three certificated companies conspired to limit the ability of local companies to move between the certificated companies. This would, of course, limit the local companies' ability to seek a better deal for their customers.

The limited certificate system may have turned this market on its head. Instead of the interstate company being a servant of the local companies and their customers, they have tended to become masters, and hard ones.

Even though we believe there is a major need for a new, fourth national carrier, and maybe for other national firms as well, American Auto Shippers would not be in existence today but for an historical fluke.

A company called the Sober Co. started to operate a nationwide driveaway service in 1977, thus making a fourth company. Many local driveaway companies, dissatisfied with the other three companies affiliated with the new company, U.S. Driveaway. They relied on the Sober Co.'s assurance that it had ICC authority, and attorneys' reports that an apparently valid authority existed. These local companies had a significant business operating under the U.S. Driveaway name.

Then in 1978 the ICC determined, upon inquiry by the certificated three, that it had made a ministerial error and should have canceled Sober's authority in 1972 or thereabouts. The Sober Co. was told to stop operating. Well, they are basically a truck operation—auto driveaway was just a sideline for them—and they continued their trucking business. But over 20 local driveaway businesses around the country were stranded, without interstate authority. My son's company was among them. Both his company and our import-export business were immediately jeopardized.

Many of these local companies felt they could not go back to the certificated three, or would rather quit the business than do so. Just the fact that they felt this, alone, should tell you something about the sad state of the industry, with just three dominant companies.

The local companies which joined AAS served many customers who were very unhappy with the service of the three nationally certified carriers or had never been served by them. They also believed that if they went out of business their customers would lose service for which there was a substantial, immediate, and continuing need.

Two companies, my son's and a firm owned by the Weiner family, Driveaway Service, Inc., in New York, formed a partnership and asked these local businesses and as many customers as could be reached on an emergency basis to file statements with the Commission. The Commission issued an emergency temporary authority. Then a single Commissioner revoked it, on grounds that the certificated three, primarily, could provide the service which the company provided. After an extraordinary appeal to the Commission as a whole, the full Commission reinstated the ETA. AAS has been operating under an ETA, with successive 30-day extensions, while awaiting a decision on a temporary authority. AAS has been operating on the most tenuous of leases, with life given it in 30-day doses. Even on this basis, I am advised, it has gotten many calls from local driveaway firms wanting to join it, in preference to others.

If AAS is given a temporary authority, it can live until there is a hearing on a permanent authority application. However, AAS and over 20 local businesses around the country could be cut off tomorrow if the ICC does not issue a "temporary authority" pending the hearing on permanent authority. We really do believe that this would do a great disservice to many car shippers around the United States. My son and Mrs. Weiner advise that in 6 months of operation people have called on AAS to move over 2,000 cars.

AAS has estimated that it will have to spend over \$50,000 to get a permanent authority. Fortunately, its revenues are supporting it—even though it is taking less from its own affiliates than the other companies are taking from theirs. But our family and the Weiner family would never have undertaken the burden of establishing a new interstate carrier—a desperately needed new interstate carrier—except under threat of immediate extinction, or being forced to submit to people who have been sucking the life out of the local driveaway companies and their customers.

I have seen defenders of the existing system, in effect, suggest that you need only have a few hundred dollars to apply for an ICC authority. Insofar as the mechanical act of applying is concerned, this can be close to correct. But if you apply for any substantial operation,

where you would offer substantial competition to people already in the field, you need enough money to fight with the already established industry.

I give you my own view. Something must be done about the ICC regulations. Minor and cosmetic changes are not enough. The whole certificate system must be drastically streamlined. I believe that all that needs to be shown is a fitness, willingness, and ability to serve, and people who want your services. In no way should people who now have certificates be allowed to make a Federal case out of the simple act of entering a business. When people get a lock on the business, they become monsters. It is as if they owned the business, the public exists to feed them, and a new entrant is an alien and subversive influence. Those backing AAS want it to operate, but it should not have this power over other people any more than the ones now having ICC certificates. The system should be opened up for A-1 qualified companies, by law.

How can S. 382 help? To be truthful, I would think it might help very little unless the Commission is directed, very clearly, in this bill or another, that fostering competition means opening the door to qualified entrants, and that this means a major change in the way the ICC does business. Otherwise, the best you can hope for is a very slow ebbing of restrictive policies, at best; and a return to old patterns of operation with lipservice to your bill, at worst.

Senator KENNEDY. That is speaking quite frankly about the current situation and the dangers of the future.

Are you suggesting that ICC policies themselves regarding auto driveaways are actually fostering higher concentration in the industry?

Mr. RAPPEPORT. Could you kindly repeat that question?

Senator KENNEDY. Do you think, that ICC regulations are actually fostering a higher concentration in the driveaway industry?

Mr. PEARCE. "Concentration" is a word Mr. Rappeport might not be familiar with. The Senator means a reduction in number of firms, small numbers.

Mr. RAPPEPORT. Absolutely. Because two companies applied for national authority, and they received limited authority, and then eventually they received interstate authority to and from the 50 States with some restrictions. Once those two companies received authority, the doors clanged shut. All future applicants—and there have been many in the last 12 years—have been denied authority, plus they have been harassed by the major companies, and they have actually been sued on various things, and their money just ran out. They just could not get within ICC standards to apply for authority.

Senator KENNEDY. Hasn't the effect of the ICC policies been to turn competition on its head? As I understand the insurance industry, for example, agents represent many firms, and this encourages the companies to compete so that agents will sell their insurance. But that is not possible in the driveaways, is it?

Mr. RAPPEPORT. It is very, very hard for a common carrier to get insurance, because this is not the usual form of trucking. The ICC, for some reason, decided that casual driveaways fell within the scope of their authority. When the American Auto Shippers went up November 17, 1978, to get insurance, it took us 4 days to finally come up with an

insurance policy, and the insurance broker that we went to originally represented two of the common carriers, and he stalled us for 4 days before we could finally come up with a policy from a mutual type of insurance broker.

Mr. PEARCE. Mr. Rappeport—excuse me, Senator—Mr. Rappeport came in late last night, and we have been hurried this morning, and he has had a severe cold, so perhaps it is difficult to follow all the questions which might be directed to him. I believe your question related to the question of whether the small number of carriers has worsened the competitive position of the agent who has no choice.

I do not know whether that was your question.

Senator KENNEDY. Yes.

Mr. RAPPEPORT. You mean does the agent have a choice on insurance?

Mr. PEARCE. On auto driveaway companies who—

Mr. RAPPEPORT. The agent has no choice; no, sir. If there is an accident to a car, he must turn to the carrier and the carrier must file the claim with the insurance company. All an agent can do is just ship the car, and if there is an accident, he has no say in the claims procedure.

Senator KENNEDY. Senator Baucus?

Senator BAUCUS. I have no questions. Thank you, Mr. Chairman.

Senator KENNEDY. There is a vote on.

Just before we recess briefly, Mr. Pearce, Chairman O'Neal told the committee last month that the ICC is now granting more than 96 percent of its entry applications of this size. Does this mean the ICC is effectively promoting competition?

Mr. PEARCE. No; that is like saying that a pipeline 1 inch in diameter is taking care of all of the fluid that may be backed up in a box 3 feet in diameter. Most of what goes in the pipe gets out the other end, but the pipe is nowhere near wide enough to accommodate the needed channel of trade.

I think these people have illustrated that if you are prepared to spend \$150,000 to \$200,000, maybe you will get results, but there are an awful lot of people who are not in a position to spend \$150,000 to \$200,000 for one piece. The whole process can be backed up for 1, 2, 3 years while this enormously elaborate and expensive machine grinds through and sometimes grinds people up.

Senator KENNEDY. We are told that the existing court decisions, such as *McLean Trucking*, adequately instruct the ICC to take competition into account. What is the difference between the court's instruction and the ICC's practice?

Mr. PEARCE. Well, I have had some experience with mergers, which is directly addressed by that court decision, and our experience was that the Commission gave only lipservice to the *McLean* case, and the other cases bluntly. It is my impression that the Commission listens a little bit more to Congress than to the court. Perhaps it is an act of faith to assume as I do, that if Congress directly changes the statutory mandate under which the Commission works, that the Commission will heed its direction.

Senator KENNEDY. That is what you hope and what I intend that this legislation should accomplish.

Mr. PEARCE. Yes, sir.

Senator KENNEDY. All of your statements, as I mentioned, will be printed in their entirety. We are very grateful for your testimony this morning.

We will recess and vote and come right back.

[The prepared statements of Messrs. Chichilla, Livingston, Person, Pevna, and Rapoport follow:]

PREPARED STATEMENT OF DONALD R. CHICHILLA

My name is Donald R. Chichilla. My business address is 1717 Penn Ave., suite 900, Pittsburgh, Pa. 15221. I am President of National Agricultural Transportation Association (NATA).

I am also President of A.C.R. Inc., a broker of truck transportation for agricultural cooperatives exempt from economic regulation under the Interstate Commerce Act. I have been engaged in various phases of transportation (industrial traffic, private and for-hire carriage, and agricultural cooperative transportation broker) for over 26 years.

NATA's purpose is to promote the public interest in the safe, efficient and economic transportation of agricultural products from farm to market and consumer.

Our goals are:

To urge and participate in the adoption of a national policy and legislation promoting a sound system of transporting agricultural products from farm to market and consumer;

To bring to the attention of the public and the several governments the agricultural carrier and the importance of agricultural products and their transportation to the welfare of the people of the United States;

To support research in the field of transportation of farm products and supplies; and

To engage in other activities directly related to the transportation of agricultural products from farm to market and consumer.

Membership is open to farmers, owner operators of trucks including those hauling exempt agricultural products, truck brokers, agricultural cooperatives, and many others concerned with getting food to market.

In connection with the Competition Improvement Act (S. 382), we bring to the committee's attention the important matter of getting food to market under the provisions of the Interstate Commerce Act exempting the transportation of agricultural products from economic regulation by the Interstate Commerce Commission (ICC).

The ICC's negative attitude toward the trucking of exempt agricultural products illustrates this point—when an agency feels it has a mandate to regulate and protect a given set of sellers, it seems also to feel that it has a mandate to suppress those whom it does not regulate. The result is that the governmental body is turned against a goodly portion of the community including the consumer.

To give you a broad picture of the motor transportation of exempt agricultural products, I list the participants in the distribution system for getting the products of our farms—for example, fresh fruits and vegetables—from farms to consumers:

Shippers:

Farmers.

Packers.

Jobbers or brokers.

Farm cooperatives.

Processors (if the processor does not make a manufactured product).

Carriers:

Farmers.

For-hire exempt carriers, not farmer owned, including fleet owners.

Farm cooperatives and federations of farm cooperatives.

Regulated carriers (to a limited extent).

TRUCK BROKERS

Receivers:

Repackers.

Wholesale and retail firms and chain stores.

Food brokers.

Processors.

The exempt truck, after delivering its load, must return to its home base near the farm. What alternative does it have for the backhaul? He may return empty for distances up to several thousand miles, a tremendous loss of available truck transportation and really economically not feasible. Truly a waste of a valuable transportation resource.

Or an exempt carrier has the alternative of going to a regulated freight carrier and making a trip lease for the return trip to the home base, but if he elects this alternative, he must pay to the certificate holder the equivalent of 25 percent or more of the gross freight charges for the privilege of operating under the carrier's operating authority. An exempt transportation broker would charge only about 10 percent for a similar service. I call the 15 percent difference "monopoly rent". A third alternative is that the exempt carrier may return with an exempt agricultural load, but such movements are rare.

A fourth alternative, in case of equipment operated by agricultural cooperatives, is to return with regulated traffic under the present provision of the Interstate Commerce Act.¹ The return trip must be incidental and necessary. Transportation for nonmembers should in no event exceed 15 percent of the cooperative's total interstate transportation rendered in each fiscal year, measured by tonnage.

The 15 percent limitation is arbitrary. It was derived from a provision in the Internal Revenue Code, (26 U.S.C. § 521 (b)(4)). It provides that cooperative purchases for nonmember nonproducers may not exceed 15 percent of the value of all purchases made for a cooperative in any given year to maintain the tax exempt status of the cooperative. Obviously, this 15 percent rule in terms of handling the tonnage to be handled by a cooperative does not reflect any of the economic realities of operating a cooperative. Rather, it is arbitrarily derived from the tax statute. This means 3 of every 10 units can return loaded, but the other 7 must either trip lease to a regulated carrier or return empty.

In attachment 1,² we depict how the elements of the distribution system, described above, fit together. For illustrative purposes, we have used the States of California, Florida, Texas and Washington. These four States in recent years account for over 70 percent of the shipments of fresh fruits and vegetables to the United States.

The great bulk of the fresh fruits and vegetables shipped from the West, the Southwest and the South to the North and the East is carried by exempt carriers, usually owner-operators, and farm cooperatives. I emphasize that the rates charged for this exempt transportation are based on competitive marketplace pricing.

This hostility is particularly harmful at this time, because the fresh fruit/vegetable movement from farmer to consumer now depends largely on exempt owner-operator and agricultural cooperative trucking.³ Neither the railroads nor the regulated motor common carriers are really interested in this perishables traffic as may be seen by next two attachments. Attachment 2 tabulated the equipment owned by major transcontinental motor common carriers of general freight in 1977. They owned a total of 60,569 trailers (column H) of which 495 were refrigerated, that is, less than 1 percent of the total.⁴

These 10 transcontinental general freight truckers have prospered magnificently.

My next table, attachment 4, shows the increase in total operating revenues and the operating ratios of these carriers for the years 1969 and 1975 to 1978, inclusive. The operating ratios shown at the bottom represent the percent of each dollar of revenue needed to pay operating expenses. The operating ratios are excellent. In columns G and H, the table shows the increase in operating revenues 1978 over 1975 and 1969. For example, Roadway Express (line 7) shows an increase from \$211.1 million in 1969 and \$497.7 million to \$918.1 million in 1978, increases of 335.0 percent and 84.5 percent, respectively. Competitive marketplace pricing would certainly be appropriate for these general freight truckers.

These carriers as a group in 1978 had gross revenues of \$3.7 billion, and total operating expenses of \$3.4 billion. The group has an operating ratio of 92.4 for 1978, a handsome ratio indeed.

¹ That is, transportation for nonmembers that are not farmers must be limited to transportation incidental to the cooperative's primary transportation operation and necessary for its effective performance.

² I include in several attachments to my statement tables and charts to support and illustrate our position.

³ The ICC has consistently tried to limit the scope of this exempt transportation, though it brings food to the Nation at competitive marketplace pricing.

⁴ My attachment 3 shows by bar graphs the minuscule ownership of refrigerated trailers by the 10 transcontinental truckers.

My next table, attachment 5, shows that the railroads are not interested in the fresh fruits/vegetables traffic. The table shows the railroad ownership of refrigerator cars, the serviceable ownership and turnaround time (time from one load to the next) for the years 1957, 1962, 1967, and 1973 to 1977, inclusive. The ownership of the class I railroads has declined almost 30 percent from 103,347 cars in 1967 to 73,531 cars in 1977. The poor utilization of refrigerator cars appears in the column of the table headed Turnaround Time. In 1976, a railroad refrigerator car had a turnaround time of 35.58 days between loads.

I go back to my prior statement that the ICC is hostile to exempt carriers including agricultural cooperatives and those carriers hauling agricultural products. In the Motor Carrier Act, 1935, specific exemptions were included for agricultural haulers and agricultural cooperatives organized under the Agricultural Marketing Act (12 U.S.C. 141 et seq.) (the Marketing Act). Early in its administration of motor carrier regulation, the ICC began a long and arduous battle attempting to limit the scope of transportation operations conducted under the agricultural exemptions. I will use as illustrative of the battle, the Commission's efforts to confine agricultural cooperatives.

The Marketing Act limits the business that an agricultural cooperative may do with nonmembers to the amount of business in dollars that the cooperative does with its members. The ICC, however, lobbied to restrict the kind of transportation services that an agricultural cooperative may provide through legislation. Concurrently, the ICC, in administrative and in judicial proceedings, attempted to restrict transportation operations of agricultural cooperatives.⁵ The Commission met with little success in the courts.

Finally, in 1966, the Commission was dealt its most serious setback in *Northwest Agricultural Cooperative Association v. Interstate Commerce Commission*, 350 F. 2d 252 (C. A. 9, 1965), cert. denied, 382 U.S. 1011, 86 S. Ct. 620, 15 L. Ed. 2d 526 (1966). In that case, the court specifically noted that the Commission had, through lobbying efforts and administrative means, attempted to limit the true scope of the transportation exemption for agricultural cooperatives. The court found that the Commission's interpretation and subsequent attempts at restriction were not justified in view of the clear statutory language of the Marketing Act. The court found that the cooperatives were free to pursue incidental and necessary activities so long as such "incidental" activities did not become primary activities, that is, to the extent that the cooperative pursued these activities without generating revenues from nonmember business exceeding the value of the total business transacted for its members.

As a practical matter, this meant that cooperatives could make transportation a viable economic venture. Transporting member freight to market could now be economically balanced with transportation of nonmember traffic in the reverse direction, as long as the primary business of the cooperative remained the providing of service for its members, and as long as 50 percent or more of its revenue was earned by providing service for members.

The Commission, having lost its argument in judicial proceedings, now proceeded to intensify its lobbying efforts in order to secure an amendment to the Interstate Commerce Act specifically restricting the amount of nonmember freight to be legally handled by an agricultural cooperative. The Commission originally asked the Congress for an amendment to the Interstate Commerce Act which would have restricted the agricultural cooperatives to the transportation of farm items only for nonmembers. The amendment finally passed is not as restrictive as the Commission desired, but does drastically reduce the amount of nonmember freight that a cooperative can handle. Following the rule of *Northwest*, the amendment limits transportation to that which is "incidental and necessary", but adds the further proviso that such transportation for nonmembers should in no event exceed 15 percent of the total interstate transportation rendered in any fiscal year, measured in tonnage.

I have previously commented about how the 15 percent limitation was arbitrarily derived from a provision in the Internal Revenue Code.

⁵ The railroad's lack of interest in produce traffic, on the one hand, and on the other, the Nation's dependence on trucks to move fresh fruit and vegetables are reflected in my attachments 6 and 7. Attachment 6 tabulates total unloads of fresh fruit and vegetables at 11 major Eastern cities for the even numbered years in the period 1960-1976 and 1977. The rail unloads have dropped from 252,833 or 53.5 percent of the total in 1960 to 62,515 or 20 percent of the total in 1977. Truck unloads went up from 219,915 or 46.5 percent of the total in 1960 to 249,420 or 80 percent of the total in 1977. I should point out that these statistics are based on U.S.D.A. reports and the reports are adjusted to make the rail and truck loads comparable.

My attachment 7 portrays by a line graph the dramatic reversal of the rail/truck unloads at the 11 cities.

The Commission's hostility has continued in 1969, shortly after the 15 percent amendment, in ex parte No. MC-75, Implementation of Public Law 90-433—Agricultural Cooperative Exemption, 108 M.C.C. 799 (1969), the Commission promptly acted to issue rules directed to limiting backhaul movements to a specific vehicle which would otherwise move empty after moving agricultural commodities.

In 1977, the Commission reopened ex parte MC-75, with a group of proposed rules which would have severely constricted agricultural cooperative transport. Upon a host of objections from the agricultural community, it retreated to an extension of its recordkeeping requirement and a ban on one-way trip leases for nonfarm commodities—that is, a ban on the cooperatives use of an owner-operator to keep happy a shipper of backhaul traffic when the cooperative does not have a truck in the area, even though the cooperative is within the 15 percent limitation.

Why this long history of attempted limitations and extensions of agency control?

There may be more than one reason for an agency to seek to extend its reach. None of us is exempt from the tendency to build empires. But even if the empire building were all that were at stake, an agency might well ask itself whether in extending its reach it is unintentionally or intentionally eliminating competition, and whether this is necessary.

This might be a very healthy exercise for an agency such as the ICC. If an agency were to feel that competition from unregulated entities is making it difficult for regulated carriers to shoulder "regulatory burdens" thought necessary for national goals, before suppressing the competition of the exempt entities, the agency should assess whether all those "burdens" are essential.

In the case of an agency such as the ICC, such an examination, if made objectively, is likely to reveal that the high sounding goals of the regulation can be achieved, for the most part, more readily by competitive markets. Essential regulation, we submit, relates primarily to truthfulness in representations and integrity in business dealings generally. The economic substance of what the Commission is doing is maintenance of a loose cartel.

The history of the ICC indicates that at least some agencies may find it extremely difficult to face a mirror which reflects an image of the agency's actions and predispositions such as we reflect. Thus, S. 382 may be most effective if there is specific legislation which removes authority to undertake or approve restrictive agency actions. We have some comments on this. Congress must be clear about the kinds of actions which it generally wishes agencies to avoid. In addition, critical reviews of the agency's action, oriented to the general public welfare, outside the agency play a role in assessing the agency's conduct.

What we are talking about here is very important to agricultural trucking, to the Nation's consumers, and to our national effort to control inflation.

To be more specific, we are talking about, among other things, getting the trucks which move farm freight back home both efficiently and economically.

If we could solve this one problem created by ICC regulation, we could save the consumer, and the country, large sums of money.

Frankly, we think specific legislation will be needed to bring this about. But we do believe that S. 382 is directed toward real problems and that a regulatory agency's hostility to sources of competition for the regulated entities is one of the major problems which it addresses.

[Additional material submitted by Mr. Chichilla follows:]

ADDITIONAL SUBMISSION OF DON CHICHILLA

In 1944, in *ICC v. Jamestown Farmers Union Federated Cooperative Transportation*, 57 F. Supp. 749 (D. Minn. 1944) the agency sought to prevent a coop performing truck service for individual farmer members or a coop, or for coops which are members of a coop.¹

As noted above, in 1955, 1956, and 1957, the ICC asked Congress for more authority to deal with exempt farm coops; and in 1961, 1962, 1963, and 1964 asked for authority to issue "certification of exemption".

In 1961, in *Machinery Haulers Association et al. v. Agricultural Commodity Service*, 86 M.C.C. 5 (1961), the Commission sought to prevent a farm coop from moving nonfarm, backhaul traffic—in order to prevent competition with the regulated carriers. The Commission also attempted to close off access to the vitally

important pool of owner-operators by asserting that the driver of a truck operated for the cooperative had to be an employee rather than an independent contractor. No such restriction applied to regulated carriers, of course.

In 1964, the Commission took another step to close off backhaul traffic for exempt carriers, by denying cooperatives nonfarm backhaul traffic, only to be reversed by the ninth circuit, court of appeals in *Northwest Agricultural Cooperative Association, Inc. v. ICC*, 350 F. 2d 252 (9th Cir. 1965).

In 1968, the Commission supported regulated carrier efforts to block off from cooperatives the back hauling of Government munitions, *Munitions Carriers Conference, Inc. v. American Farm Links, Inc.*, 303 F. Supp. 1078 (W. D. Okla. 1968).

The Commission joined in the legislative effort to repeal the Northwest case, which resulted in the existing 15 percent of tonnage limitation in nonfarm traffic, in 1968.

In 1969, in ex parte MC 75, 108 M.C.C. 799 (1969), the Commission promptly acted to issue rules directed toward limiting backhaul movements to a specific vehicle which would otherwise move empty after moving agricultural commodities.

In 1977, the Commission reopened ex parte MC-75, with a group of proposed rules which would have severely constricted coop transport. Upon a host of objections from the agricultural community, it retreated to an extension of its record-keeping requirements and a ban on one-way trip leases for nonfarm commodities—that is, a ban on the coop's use of an owner-operator to keep happy a source of backhaul traffic when the coop doesn't have a truck in the area (within the 15 percent limitation).¹

PREPARED STATEMENT OF THOMAS LIVINGSTON

Our understanding is that this committee, in considering S. 382, is considering the desirability of directing agencies such as the Interstate Commerce Commission to give greater weight in all their deliberations to the value of "competition" in the economy.

We do not advance ourselves as knowledgeable in all matters of national economic policy. We are generally in favor of having an open economic system, in which any responsible person can participate. Perhaps our experiences with the Interstate Commerce Commission may shed some light on the subject which you are addressing.

We do have some reason to think the ICC should be directed to take a more procompetitive stance, in many ways.

First, let us put on the record something about our company, and our area in Georgia.

The Livingston Transfer & Storage Co., founded by Cliff Livingston, Sr., has been in business in the Columbus, Ga. area, doing interstate household goods business as an agent for Allied Van Lines since 1949. We have been engaged primarily in household goods moving. We now have over 50 pieces of equipment engaged in household goods service.

We believe we have a good record in household goods moving. We've never received a citation of any kind for unsafe operations. Our household goods business has grown steadily, leading us to believe the people of the Columbus, Ga. area have some confidence in us.

In the seventies we began to see that there were, at least in our opinion, substantial transport needs in our local area which were not met, or could be met better by a carrier based in Columbus.

The Columbus, Ga. area, with a population of about 175,000, has a number of metalworking, heavy equipment, and similar businesses. There is opportunity for a significant commerce with the Birmingham, Ala., and Atlanta, Ga. area, as well as the entire Southeastern United States.

¹ The ICC says "sham" coops use the one-way trip lease to haul "regulated" freight without either having an ICC certificate or being a legitimate farmer coop. We have to grant that this has happened on occasion. The cartelizing effect of ICC regulation is to enhance costs and prices in the regulated sector, and create a grey market on its fringes. That is, truckers have an incentive to go after price-enhanced "regulated" freight, without getting a license. We don't condone the violations of federal law involved in doing this. But we cannot avoid observing that the effect of federal law is to make illicit the performance of socially useful acts—providing efficient, economical transport. The law has been turned on its head.

Our view is that the law should be changed to eliminate the excess costs and enhanced prices, and the opportunities for exempt transport should be opened wider. If these things are done, the grey market will disappear.

We found that there appeared to us to be very little interest in scrap metals hauling in our area. In addition, the Columbus area companies appeared to be disadvantaged vis-a-vis companies in other areas when it came to getting specialized equipment for oversized or heavy items.

Of course, these were just our unproved impressions until we could offer services and see if they were used.

We obtained a Georgia intrastate scrap and heavy hauling authority. We found that the shippers patronized our services. Then we decided to move into interstate hauling.

In going to interstate hauling, we followed the pattern we had observed in the household goods area. That is, we sought to become an agent for other carriers who had operating authorities. We thought we could gain experience in the business as an agent, and then, if our perception of the needs was accurate and the business developed, perhaps get our own authority. In September of 1976 we entered into an agency arrangements with the Ryder Ranger division of Ryder Trucking. Under the Ryder arrangement we were a booking agent in most cases. In September of 1976 we entered into what we believed was an agency arrangement with Heavy & Specialized Haulers, a company based in Nashville, Tenn., and committed our equipment on permanent lease to the Heavy & Specialized Haulers service.

We hauled heavy and specialized materials pursuant to these arrangements from late 1976 for a year or so before we applied for our own authority. We could see that shippers in the Columbus area, and across the river in the adjacent Alabama area, and other shippers in Macon and elsewhere, seemed to feel that we were affording them service which other trucking lines were not. The other truck lines had equipment based at other areas, and as far as the shippers who used us were concerned, seemed not to have equipment available with anything like the rapidity or frequency which we could make available.

At least, that is what our shippers told us, and they gave us a substantial amount of business. In addition, we found that people who had been using their own trucks began to turn to us to handle a substantial portion of their movement. They apparently had been buying and using their own trucks because they could not get quick and closely tailored service from other for-hire carriers.

Under our arrangement with Heavy & Specialized Haulers, we paid them 10 percent. Actually, we assumed most of the responsibility for the transportation. We contacted the shippers, determined their needs, provided the equipment, and billed the shippers (though we always used Heavy & Specialized Haulers' delivery freight bills), bought our own liability and cargo insurance and the like.

We accumulated over 20 pieces of equipment to meet the shippers' needs. We had nine different types of specialized trailers. We also bought 3½ acres of land to set up the heavy and specialized hauling operation. We found considerable demand for our service, and made a substantial investment in responding to that demand.

Before applying for substantial interstate authority in our own name in 1977, we made a couple of relatively small attempts to get limited ICC authority for service to the port of Savannah. We ran into vigorous protests, and our applications were rejected.

As said before, we applied for interstate authority in our own name to replace the Heavy & Specialized Haulers arrangement in January 1978. The application wasn't set for hearing until November 1978. We had 13 shippers who supported our application, going to the hearing in Atlanta to do so. Three carriers protested the "size and weight" authority. No one protested the application for scrap metals hauling authority.

The protesting carriers let us know on the morning of the second day of hearings that if we were willing to drop service to Savannah from our application, they would withdraw their protests. They told us that if we did not cut back our application, they would use records of service with Heavy & Specialized Haulers and Ryder which we had provided for the hearing to show that we were doing certain things wrong, and this would make things hard for us.

I was not aware that we were doing anything "wrong", and felt this was a bluff. We believe we were providing a good service, and were not aware of being outside regulations in anyway.

Protestants alleged, at the close of the hearing, that the arrangements under which we had been functioning with Heavy & Specialized Haulers were not in accordance with ICC regulations. In substance, we were assuming more of the

responsibility to shippers than we were supposed to assume under ICC regulations. After the hearing we traveled to Nashville to discuss this question with one of the owners of Heavy & Specialized Haulers. He told us he believed these were minor problems, could easily be straightened out, and we could amend the arrangement to take care of any objections raised. Then, apparently, one or more of the protesting carriers went to Heavy & Specialized Haulers, told that company that the agency arrangement didn't conform with ICC regulations, and told the company that if they did not sever relationships with us, they would get the ICC to investigate Heavy & Specialized Haulers. Heavy & Specialized Haulers then sent us a letter terminating the agreement with us, effective December 31, 1978. They explained why in a telephone conversation, referring to a threatening phone call by a protesting carrier.

This left us without any interstate authority, except for Ryder's. We could not haul a great deal of our product out of the Columbus area under arrangements with Ryder, because of limited territorial and commodity authority. Therefore, we applied for an emergency temporary authority, giving as justification that shippers in the Columbus, Macon, and Atlanta, Ga. areas, and shippers in the Alabama area, had been unable to secure timely service until we began operations, and would lose needed service if we stopped operations. We introduced statements by 13 of these shippers in support of this request. We followed this with an application for temporary authority supported by 21 shippers. We don't want to duplicate here, before this committee, the file before the Commission, but I have attached some of the excerpts from those statements so that you can get at least some idea of the nature of the representations made by these people who wanted to use our service.

An employee board of the Commission, the Motor Carrier Board, issued us the emergency temporary authority on the recommendation of the Atlanta regional office of the Interstate Commerce Commission, on January 5. The carriers which had protested our application for permanent authority also protested the grant of any form of temporary authority. As a result of these protests, a single Commissioner, Commissioner Gresham, revoked our emergency temporary authority by order served on April 30. During the January-April period, we had transported about 175 shipments. We find it hard to believe there was no need for our service.

The protestant carriers had put material on record to the effect that they had equipment based in various portions of the Southeast: Birmingham, Atlanta, Marietta, Charlotte, and a few other places. None of them showed they had equipment based in the Columbus-Opelika area. Also, none of them showed any detailed information to offset the statements of the people who supported us to the effect that these shippers had not been able to get service on a timely basis, according to what they needed in their particular lines of business. As we read the opposing submissions, a carrier just came in and said they had a large amount of equipment available, in generalized terms, without being able to show that this equipment was actually available at the time, in the place, and on the terms needed by the people who were supporting out application. In fact, we found that not one of the protesting carriers directly solicited the shippers supporting an order to offer service while we had the temporary authority.

We appealed this decision to a division of the Commission, but it did not reverse the order. We were put out of interstate business on April 30. We then applied for two more narrowly limited authorities—scrap from a broad geographic area and "heavy and specialized" items from the Columbus-Opelika origin area only. This narrowed scope of authority for heavy and specialized items did not take care of all the shippers who had used our services, and would not allow operating flexibility which we believe important over the long run. We were told on May 16 that the Motor Carrier Board of the Commission approved these two emergency temporary authorities. We don't know whether other carriers will protest these grants of temporary authority or not. If they do, we don't know whether a single Commissioner will reverse the Motor Carrier Board or not.

They forced layoff from May 1 through May 16, during which period we did not know when, if ever, we could operate again, cost us four valuable, trained drivers, in addition to the financial loss from idled equipment and no revenues.

We don't know exactly what considerations the Motor Carrier Board took into account in reinstating the authority, but we do know that on two occasions known to us, shippers called carriers which had protested our authority and could not get any service. At least one of these shippers called the ICC to tell them about this. So our shippers, as well as ourselves, suffered from this break in our service.

Our application for permanent authority is pending. In that proceeding, the administrative law judge issued an opinion to the effect that he did not need to look at the question of whether there was a need for our service. He said that our nonconformance with Commission regulations, prior to our applying for authority, disqualified us, or made us "unfit" for service as a carrier.

This has caused great consternation to us. The administrative law judge could not and did not say that we were not financially responsible. We have been a financially sound, though small, company. We borrowed about \$400,000 from the Small Business Administration in the early sixties and paid off our loans 2 years ahead of time.

The administrative law judge could not and did not say that we had ever mistreated customers, because customers who testified in our behalf were very satisfied with our service. There has been no showing of any customer abuse of any kind.

Nor did anyone say that we had been unsafe in our operations. We've never had a Department of Transportation safety inspection, audit, or warning of any kind. We carry more insurance than is required under the law.

The administrative law judge deemed us "unfit" because we had, he said (1) leased trucks for outbound movement to Ryder, using our own man for a safety inspection, and then leased the same truck to another carrier for a movement back in our direction (back-to-back trip leases); (2) on two occasions, out of 250, may have carried shipments which may have been overweight;¹ (3) and on some occasions carried some items "bundled", or aggregated for the convenience of the shipper, such as steel tubing and 5,000 pound bundles of scrap radiators which weighted about 18 pounds each (under the impression that this sort of thing was heavy and fell within the definition of "heavy and specialized" hauling).

We had, at the hearing, tried to make clear that if any of these practices were not in accordance with ICC regulations, we would amend them. When we got the emergency temporary authority, we put in our own tariff allowance for extra detention time for loading in some circumstances, and we started using a standard lease form for shipper-owned trailers. When we read the administrative law judge's opinion, we stopped all trip lease arrangements with Ryder. We had made an effort to conform our lease arrangement with Heavy & Specialized Haulers only to get that cut off entirely by Heavy & Specialized Haulers. We make every effort we can to prevent any loads heavier than the weight laws allow. Sometimes drivers don't follow your instructions; but we have kept this down to a very low percentage.

What puzzles us about this administrative law judges findings, which is on appeal to the Commission, is that everything we did unknowingly was in the nature of extending ourselves to the shippers more than Commission regulations apparently will allow us to extend ourselves.

When I say this, I don't want anyone to have the impression that we will not abide by the regulations. We want to be licensed by the ICC. We will abide by whatever regulations exist. But we have difficulty in understanding why we are in any way "unfit" to serve the public when we have apparently been more willing and eager to serve the public than other carriers have, and such violations of regulations as we unknowingly committed did not disadvantage the shippers.

We are not here to ask this committee to interject itself in a case pending at the ICC. The more general question is whether the Commission's regulations might be improved by a directive to foster competition, such as is contained in S. 382.

Let us start with the temporary authority statute. As we read this statute, as an ordinary layman, it would seem to allow a broad range of interpretation. It just says that a temporary authority can issue if there are no carriers able to meet the immediate needs of a place or area. But we can see from the experience we have gone through that this statute can be given a very restrictive interpretation. If the Commission took the view that all a carrier has to do is show that he has a large equipment list, then people in the market can just about block any new entry.

This statute can be interpreted in a way which either allows competition or blockades new competition. People at the Commission may differ about how to interpret. The existing Commission is relatively liberal, as a whole, but the Commission is always changing. You can expect people who have certificates to encourage the Commission to take a restrictive approach. We understand this. I

¹ Actually, the record did not show conclusively that any shipments were overweight. In one instance, there was a typographical error, and the shipment was not actually overweight. In one instance, I must admit, though the hearings record does not prove the fact, the shipment was overweight.

can tell you that we'd feel a little safer now if this bill had been enacted a year ago.

There are other regulations which seem to us to be restrictive of competition. For example, if you apply for a temporary authority, you must not change any price below the lowest price of someone already in the market. This automatically restrains price competition. That rule is not required by the statute, but we are advised that the Commission has had it in effect for decades.

There are other Commission regulations which aren't so visible that they might get involved in a national debate over regulatory reform, but do appear to restrict competition. For example, shippers bundle of aggregate items for economy and convenience. We will follow the Commission's rules, but it appears to us that the only reason for this rule is to limit competition between the common carriers and the specialized carriers.

The rule which forbids trip leases of less than 30 days, or back-to-back trip leases, is another puzzling rule. We can certainly understand rules requiring inspections from a competent mechanic or repair person, before a piece of equipment goes into the service of a new carrier. We've always tried to make sure our equipment is in working condition, and we've had a very good safety record. Also, we have no quarrel with regulations designed to be sure the licensed carrier is responsible for the transportation performed. We've always assumed responsibility; not ducked it.

We have stopped all trip leases of any kind with Ryder. But why in the world do regulations exist which, generally, prevent trip leases of less than 30 days? At least in some circumstances, trip leases of less than 30 days can bring about a very efficient use of trucking equipment. As far as we can see, highly restrictive trip leasing rules hurt the shipper. Instead of just getting available equipment and making sure it is safe, you have to watch out for the 30 day limit, in what direction the equipment is going, and so forth.

Why isn't back-to-back trip leasing efficient, providing you have safe equipment? In these days when people are lining up at gas pumps, and truckers in California are complaining that they can't get enough diesel fuel, we think that we ought to be doing everything we possibly can to make the most efficient use of trucking equipment.

It may be difficult for the Congress and the general public to see regulations buried way down in the depths of some agency. We do figure that some kind of directive from Congress which would require the Interstate Commerce Commission to reassess its way of doing business would be healthy.

Also, legislation like this might not be an imposition on many people at the Commission. There are fine people at the Commission. Giving them a clear directive to further competition could help them make their jobs productive, and support them when they feel they wish to authorize needed services.

We suppose that many of the people who come before this Congress appeal for sympathy on the basis that they are small, or that they serve small towns, or that they serve small businesses, or the like. We are a small company. We do serve a relatively small town. We do serve a number of small businesses.

We are not here to ask for sympathy. We are here to urge very strongly that our Federal Government could serve us best by letting us compete. We believe our service could help the small businesses in our area be more competitive with the other larger businesses in Atlanta, Birmingham, and elsewhere, as well as the smaller businesses in other territories.

We can see the Federal Government helping small business by making available information on business practices, common market opportunities, export market opportunities, Federal Government regulations, perhaps, by tax incentives and the like. But making it difficult for small businesses to serve small towns is the kind of help we would be much better off without. If S. 382 would make it easier to serve the public, we support it.

PREPARED STATEMENT OF TIMOTHY PERSON

I am Timothy Person, owner of Allstates Transcontinental Van Lines, a household goods moving firm in St. Louis, Mo. I am the second generation of our family in household goods service. I recently applied for nationwide operating authority, with the support of over 40 other minority household goods movers located all over the United States. We have been through hearings before the ICC, and my case is now with Administrative Law Judge White. My testimony today is not

focused primarily on my own situation, though my situation can be used to illustrate the position of minorities in intercity trucking in the United States. Rather, I want to talk with you today about what I've learned in over 30 years of traveling around the United States and dealing with minority truckers, and over 30 years of dealing with the Interstate Commerce Act.

First: Let me put a couple of qualifiers on my testimony. It may be a little difficult to separate out the particular effects of the Interstate Commerce Act and the ICC regulation from the general effects of the overall position of minorities in the United States. The results of our ancestors coming from Africa to a more developed country, and the pervasive and systematic segregation they eventually encountered here, are widespread and numerous, affecting all aspects of the economic life of black people. Similar effects from similar circumstances can be seen in the lives of Mexican-Americans, and families from China.

Second: We have learned, 125 years after Emancipation, 25 years after the *Brown v. Board of Education* death knell for segregation, and over 10 years after the riots, that closing the economic gap separating blacks from others in America is a long and laborious process. We must build skills of many kinds. Training—education of all kinds—comes first. We need more opportunity. We need more capital. But all factors—training, opportunity, and capital—must be fitted together into a growth process. With a seed must go soil, water, sunshine, and, for best results, fertilizer. All must be in proportion, and combined at the right times. You don't grow a grove of redwoods in one human lifetime.

So it is in trucking. If the barriers to opportunity come down, we think the "minorities" may make a major contribution. But we will have to grow into it. What we need is a reduction in regulatory barriers, assistance in training, modest assistance in funding, a willingness at the traffic manager's table to give us a shot, and time.

As I understand it, S. 382 would require agencies such as the ICC to give more weight in setting up and administering their regulations to achieving a generally open and competitive system. Senate bill 382 is not designed to make unnecessary changes in particular regulatory statutes. It is intended, I am advised, to limit the extent to which regulators interpret the statutes which now are on the books so as to hold down competition, and to encourage regulators to interpret any revised statutes so as to encourage open, generally competitive industries.

There are two sides to this coin. I think both sides are needed, from the minorities' standpoint.

Let me tell you what I found, traveling over the countryside hunting minority truckers these last 30 years.

I found that there actually were a few black truckers in operation in 1935, when the "grandfather" rights were given out by the ICC. But the black grandfathers' share in trucking was maybe 20 or 30 very small authorities out of over 10,000 grandfather rights.

When I started, I found that there was no black trucker in interstate commerce with revenues as much as \$500,000 per year. Today the largest black trucker, Leamon McCoy, grosses about \$8 million. The largest firms in the trucking industry gross over \$300 million.

I found that in my field, household goods, there were a few black businessmen with interstate authority; but no one had been able to gather a widespread network of local black companies. Less than 10 local black household goods companies, out of thousands of local household goods companies in the Nation, were affiliated with major interstate van lines. The black-owned businesses were for the most part small, isolated from one another, and undercapitalized.

But what did the ICC have to do with this, and what would S. 382 do about it? Let me put it this way.

The ICC has administered its licensing authority so as to give each carrier which has an authority a right to protest any new entrant. Any would-be entrant has the burden of proof in showing there is a need for his services.

If you watch sports on TV, you will have noticed that a substantial portion of the NFL and NBA players are black. We are over-represented there. Much of our talent is channeled into professional sports.

How many black players do you think there would be in the major leagues if, before a kid could set foot on the field in high school, college, and the pros, he had to go through a formal hearing, and prove on paper that the people on the squad were not as good as they might be?

To shift the analogy slightly, it is as if all the players on the court were allowed to form a wall at the edge of the court, and you could play only if you could find a

way through it, and then, if the game were administered by the ICC's rules, you could only play along the baseline, or outside the foul circle, until you had proved somebody elsewhere on the court had tripped over his feet and fallen on his face.

In my case, applying for nationwide household goods authority, I have spent over 20 years gathering support among black truckers, and then could not have proceeded had not OMBE financed a part of the costs of the application process. I want to express my appreciation to OMBE and those in Congress who have taken an interest in my case. Without you we wouldn't be here today. But we can't have a system in which every ambitious entrepreneur requires special funding merely to present his case to the relevant Government agency. We must find a way to reduce the Government-composed hurdles put in front of new entrants, and the costs of getting over those hurdles.

I understand that Congress may revise the Interstate Commerce Act to reduce the barriers to entry, and diminish the price-fixing among the carriers. This is needed. But I doubt that Congress or the American public have any idea about how many ways the ICC limits competitive enterprise.

For example, in household goods moving, a local company can represent only one major carrier, by ICC regulation. A local insurance agent can represent several insurance companies, if he and they agree. A regulated carrier can interchange with several carriers. But an agent is restricted to one carrier. There are many smaller carriers and many smaller household goods agents who could improve their competitive abilities if this rule were lifted.

Carrier certificates are usually geographically restricted. Most carriers cannot venture into the national level.

Household goods carriers have "peak load" problems—a heavy summer peak and slow business in the winter months. But mixing a U-haul type of service, use of vehicles in services other than household goods in off-peak periods, auto transportation, and use of flexible rate devices would run into many regulatory problems.

I believe that there is no one thing which Congress can do which would take care of all the problems in regulated trucking, and, of course, minority enterprise.

Probably of greatest importance is taking away from regulatory bodies such as the ICC the ability to do harm. That is, their ability to restrict entry, except on fitness grounds, and to authorize collusion on prices and service, should be eliminated or cut back substantially by specific legislation.

But the ICC will probably be left with some regulatory functions. Whatever authority the ICC keeps should be exercised according to the guidelines set out in S. 382. I sincerely hope the people appointed to the Commission understand transportation, economics, and the society in which we live.

I want to make it clear that in suggesting that the Congress should give the Commission new direction, I am not intending to be critical of the people at the Commission. There are many fine, conscientious people there. But the Commission must respond to whatever the Congress directs. The Congress gave it a very restrictive statute in the thirties. Things have changed. That statutory design has big errors in it. If someone like the current Chairman wants to update and liberalize regulation, he comes under fire from all directions. He is like a ship trying to get underway with its statutory anchor firmly stuck in the mud of 40 years ago. In our application, I think and we hope that the administrative law judge grasped much of what we put before him, and we think we must meet all the burdens on us or hurdles put in our way. But we could not avoid this enormously expensive hearing process, or its dealing with the barriers to enterprise built up in ICC precedent. New statutory directions are needed not only to direct the Agency in the way the Nation needs it to go, but also to support quicker, more thorough action by those who want to go in that direction of their own volition.

Let me generalize a little bit from my area and my experience. I know that, even as representative of minorities, I am limited by my own background. But I can suggest some thoughts which may apply to how this bill might help achieve economic goals for the nation as a whole, and social justice, insofar as it affects "minorities".

I do not hold myself above or opposed to using the levers of government to manipulate economic situations to improve the situations of minorities. In more plain language, if all we can get from the government is quotas, I'll support quotas. We need to do something to offset historic imbalances and injustices.

But as a small, minority businessman, I really prefer a different way. I would prefer that the government opened the doors to opportunity, and that society

invested some of its resources in training and money capital to help those who are making an effort to help themselves meet those opportunities.

The name of the game is success in a competitive field. If we are given a national operating authority, our objective is a profitable, self-sustaining enterprise. If we create such an enterprise, that operation will show trained minority talent many paths in the transportation industry. You can learn from failures. But success is the most rewarding school. We will take advantage of every bit of manpower training and financial assistance we can find. But we don't want to be dependent. Our aim will be to provide a return on not only our own investment, and society's investment.

More generally, I believe I am not stretching the point too much in saying that reducing barriers to minority enterprise will make our Nation more competitive more just, and more stable. Here is an avenue for realizing the social goals of the Nation while also serving our economic goals.

If there are other industries where there are unnecessary regulatory barriers to enterprise, I wouldn't be surprised to find blacks and other minorities among the chief victims of those barriers. If S. 382 can make any contribution to reducing those barriers, then I support it, and I would commend it to the Congress.

In order to make clearer what I am trying to say on this matter, I am attaching a copy of testimony in our hearing of Margaret Bush Wilson, head of the NAACP, and David Vann, the mayor of Birmingham. Also, to give you just a little bit of an impression of the pent-up energy seeking an outlet to perform interstate service, I enclose summaries of the support which was available for our own application for interstate service.

[See appendix for additional material submitted by Mr. Person.]

PREPARED STATEMENT OF ARNOLD PEVNA

I am Arnold Pevna, President of Haverill Lawrence Transportation Co., Inc.

I understand that S. 382 is aimed at making agencies like the ICC stop, look, and listen before they eliminate or diminish competition. I also understand that this bill is not a substitute for bills to deregulate trucking.

I think encouraging an open, competitive economy is great. But as soon as Congress starts telling agencies to promote competition, the people who come before the agencies will start justifying everything from birth control to breeder reactors—and some say they are the same thing—in terms of promoting competition. You'd better also tell the agencies something about what you mean when you say you want to promote competition.

Take the ICC. Some ICC-regulated truckers go around telling everyone that the regulatory system protects small business, and promotes competition. Let me tell you what I have observed.

We've seen large trucking companies come in and buy up small companies, with ICC approval, in order to get a route segment, and then drop most of the service which the small company performed.

We have seen Roadway Express buy two small companies in our area, the New England area. One was very close to us, also located in Haverill, Mass.—the Hub Transportation Co. Hub served over all of Massachusetts, particularly eastern Massachusetts. Roadway apparently bought Hub in order to get service into the Boston metropolitan area. Our observation is that Roadway then just didn't bother to solicit or service most of the non-Boston traffic which Hub had serviced.

Also, in 1972, Roadway bought Atlas Transportation Co., of Kennebunk, Maine. I had been dickering with the company over the price for buying it, so I was fairly closely acquainted with it. Again, the same thing happened. Roadway dumped all the service except for a few route segments.

As we see it, the reason Roadway, or other large companies, do this is very simple. They are geared for relatively long haul traffic. They don't handle the local, short haul, pick up and delivery runs especially efficiently. In fact, most of this business is done by small firms like mine. But because it has been so expensive and difficult to get new authority by the direct method of applying for it, truck companies, even such large ones as Roadway, have been encouraged to buy authorities, by buying up companies having authorities.

I can understand why a large company such as Roadway does this, under the existing regulatory system. But the system is producing just the opposite effect claimed for it. Small town service tends to get cut down, rather than promoted.

While the large carriers may buy out small ones, and drop small town service, the small carrier providing LTL service to small towns faces major obstacles to growing. The small carrier is less able than the large one to cover the costs of hearings to get a certificate, and has no large cash flow with which to buy out neighbors.

If you can figure out how the small shipper, small community, and small carrier comes out ahead in that game, I wish you'd let me know.

We've spent the last 30 years in a bottle. We have been in the role of the small carrier—limited in hopes of expansion by the ICC certification system. We would like to find our way out of this bottle. We believe that if we could get an interstate authority for LTL service, we could provide more service at lower rates than existing certificated ICC carriers.

I am told there is a lot of talk about "deregulation" harming LTL service to small towns. I have a message for you and the Nation at large. There are some small LTL companies around the country who would be perfectly capable of expanding their services, if all they had to do was prove their ability, and attract the capital to undertake the service. The Interstate Commerce Commission ought to be given that message. If Yellow Freight or PIE says it isn't so, I, Arnold Pevna, say: open the door and we'll show you.

If Congress enacts S. 382, I hope it will make clear to the regulatory agencies what it means when it is talking about lessening or promoting competition. If you mean to say that things like price-fixing, dividing up markets, limiting new business enterprises, and allowing big firms to buy up little firms fall in the anticompetitive category, you'd better say that. That may seem elementary even to a small businessman like myself, and even more so to you. But these agencies face hordes of people with a vested interest in their license telling them the opposite. If you mean licenses should be easy to get for the small but willing and able firm, you'd better say that. If you mean that regulators better learn the antitrust laws, why not say that? We must find some way to get away from a system which doles out the opportunity to serve the public as if it were toxic in large doses.

I hope my brief testimony has been of some value to this committee.

PREPARED STATEMENT OF ALFRED RAPPEPORT

I am here to speak in favor of S. 382, but also more broadly for the entire range of initiatives to "reform" the Interstate Commerce Commission.

I am President of General American Auto Shippers, an automobile freight forwarder in New York. The auto driveaway business is integral to our import-export business. My son, Jeffrey Rappeport, is President of Auto Delivery U.S.A., a local auto driveaway business, which works with the export business. Auto Delivery, U.S.A. is a partner in American Auto Shippers, a partnership having a form of temporary interstate auto driveaway operating authority.

I have been familiar with the auto driveaway business since its beginning. As an individual citizen, related to my son, of course, and vitally concerned with the operation which he heads, I would like to reflect to you the effects of Interstate Commerce Act regulation of the auto driveaway business, as I have observed it.

Briefly, my position is that most ICC type regulation has limited service to the public, and led to public abuse which would not exist in an "unregulated" regime. If any regulation is needed, it would be rules requiring sellers to be financially responsible and truthful in dealing with consumers.

If S. 382 were enacted, and if its reasoning were followed through thoroughly by the Commission, in the spirit intended, the Commission could do little harm. The Commission would have little left to do other than prevent consumer abuse. But I fear that the Commission would not understand clearly what a competitive market requires. Probably Congress must just tell the ICC not to impose barriers to entry into interstate transportation other than fitness tests, and not to allow carriers price-fixing.

In my opinion, ICC regulation has been a curse on the auto driveaway business. I know most people at the Commission never have intended that. When the auto driveaway business was unregulated, there were many people spread all over the country, working with each other for interstate moves when necessary. When ICC regulation came into effect, a few people got national authority, a few more got limited interstate authority, and most of the remainder became subservient to the principal firms. Though I cannot prove it, I believe and fear that there may have been collusion on the part of the few licensed companies concerning their prices to

the public and their priorities as to "agents". With entry at the national level limited, the licensed companies squeezed more and more out of the local companies which do most of the work involved in moving cars, leaving those companies barely enough to survive. The insurance claims policies of at least one company came to be of serious concern.

If the people at the Commission—and there are good people at the Commission—had had a different set of directives, this need not have happened.

Let me tell you about the auto driveaway business. The local auto driveaway company matches the people who want to go somewhere without paying common carrier fare with a car owner who wants the car moved but doesn't want to drive it. The local auto driveaway businesses are usually small, locally owned businesses of a "mom and pop" sort. Such a local business could, but for ICC regulation, just move cars from its city to various distant points. But there are advantages to the various local companies working together. One can call on another to pick up a car owned by a customer located in a distant city. This is especially useful in dealing with corporate customers—auto dealerships, car leasing companies, companies with salesmen needing cars, and so forth.

There is no trucking involved in the auto driveaway business. It could hardly have been in the mind of Congress when the 1935 Motor Carrier Act was passed. For over 20 years, it wasn't regulated by the ICC. Then, in the sixties, the ICC decided it wanted to regulate auto driveaway services. Appeals to the courts didn't work. Regulation descended.

Every local company had to get an ICC certificate or become an "agent" for someone who had a certificate. Well, you can imagine that very few of these local "mom and pop" companies could take on the burden of showing a public need for their service over a large area. They could provide the service. But launching a Federal case to prove it was just beyond their means.

A few people did get certificates. The number with certificates narrowed down to three. After a few people got entrenched, trying to get a certificate became not just a logistical exercise, but a war. Any new application was greeted by an all-out attack by those who sat astride the business. Funds milked from over a hundred local driveaway businesses around the country were turned against the one or two, which wanted to venture into the interstate field.

The Commission had made some effort to protect consumers. It requires that certain disclosures be made, that a business not keep a car tied up indefinitely, and that insurance or some substitute therefor be carried.

But, overall, the deck has been stacked against the buyer. There really is no effective control over what kinds of drivers are used. We could leave this to competitive prices, if those forces were not suppressed. But they are. With only three national companies, there was little or no price competition. That has to hurt the consumer.

If a local driveaway business ran afoul of one licensed company, it just might not be accepted by another. A pending antitrust suit filed by one local company, one of American Auto Shippers' affiliates, alleges that the three certificated companies conspired to limit the ability of local companies to move between the certificated companies. This would, of course, limit the local companies' ability to seek a better deal for their customers.

The limited certificate system may have turned this market on its head. Instead of the interstate company being a servant of the local companies and their customers, they have tended to become masters, and hard ones.

Even though we believe there is a major need for a new, fourth national carrier, and maybe for other national firms as well, American Auto Shippers would not be in existence today but for an historical fluke.

A company called the Sober Co. started to operate a nationwide driveaway service in 1977, thus making a fourth company. Many local driveaway companies, dissatisfied with the other three companies affiliated with the new company, U.S. Driveaway. They relied on the Sober Co.'s assurance that it had ICC authority, and attorneys' reports that an apparently valid authority existed. These local companies had a significant business operating under the U.S. Driveaway name.

Then in 1978, the ICC determined, upon complaint by the certificated three, that it had made a ministerial error and should have canceled Sober's authority in 1972 or thereabouts. The Sober Co. was told to stop operating. Well, they are basically a truck operation—auto driveaway was just a sideline for them—and they continued their trucking business. But over 20 local driveaway businesses around the country were stranded, without interstate authority. My son's company was among them. But his company and our import/export business were immediately jeopardized.

Many of these local companies felt they could not go back to the certificated three, or would rather quit the business than do so. (Just the fact that they felt this, alone, should tell you something about the sad state of the industry, with just three dominant companies.) The local companies which joined AAS served many customers who were very unhappy with the service of the three nationally certificated carriers or had never been served by them. They also believed that if they went out of business their customers would lose service for which there was a substantial, immediate, and continuing need.

Two companies, my son's and a firm owned by the Weiner family, Driveaway Service, Inc., in New York, formed a partnership and asked these local businesses and as many customers as could be reached on an emergency basis to file statements with the Commission. The Commission issued an emergency temporary authority. Then a single Commissioner revoked it, on grounds that the certificated three (primarily) could provide the service which the company provided. After an extraordinary appeal to the Commission as a whole, the full Commission reinstated the ETA. AAS has been operating under an ETA, with successive 30 day extensions, while awaiting a decision on a temporary authority. AAS has been operating on the most tenuous of leases, with life given it in 30 day doses. Even on this basis, I am advised, it has gotten many calls from local driveaway firms wanting to join it, in preference to others.

If AAS is given a temporary authority, it can live until there is a hearing on a permanent authority application. However, AAS and over 20 local businesses around the country could be cut off tomorrow if the ICC does not issue a "temporary authority" pending the hearing on permanent authority. We really do believe that this would do a great disservice to many car shippers around the United States. My son and Mrs. Weiner advise that in 6 months of operation people have called on AAS to move over 2,000 cars.

AAS has estimated that it will have to spend over \$50,000 to get a permanent authority. Fortunately, its revenues are supporting it—even though it is taking less from its own affiliates than the other companies are taking from theirs. But our family and the Weiner family would never, never have undertaken the burden of establishing a new interstate carrier—a desperately needed new interstate carrier—except under threat of immediate extinction, or being forced to submit to people who have been sucking the life out of the local driveaway companies and their customers.

I have seen defenders of the existing system, in effect, suggest that you need only have a few hundred dollars to apply for an ICC authority. Insofar as the mechanical act of applying is concerned, this can be close to correct. But if you apply for any substantial operation, where you would offer substantial competition to people already in the field, you then need enough money to fight a war with the already-established industry.

I give you my own view. Something must be done about the ICC regulations. Minor and cosmetic changes are not enough. The whole certificate system must be drastically streamlined. I believe that all that need be shown is a fitness, willingness, and ability to serve, and people who want your services. In no way should people who now have certificates be allowed to make a Federal case out of the simple act of entering a business. When people get a lock on the business, they become monsters. It is as if they owned the business, the public exists to feed them, and a new entrant is an alien and subversive influence. Those backing AAS want it to operate, but it shouldn't have this power over other people any more than the ones now having ICC certificates. The system should be opened up for all qualified companies, by law.

How can S. 382 help? To be truthful, I would think it might help very little unless the Commission is directed, very clearly, in this bill or another, that fostering competition means opening the door to qualified entrants, and that this means a major change in the way the ICC does business. Otherwise, the best you can hope for is a very slow ebbing of restrictive policies, at best; and a return to old patterns of operation with lipservice to your bill, at worst.

[A short recess was taken.]

Senator KENNEDY. We will come to order.

Our final panel consists of three attorneys from the American Bar Association: Mr. Ernest Gellhorn, professor of law and dean of the

University of Washington Law School, whose main areas of teaching and scholarship are administrative and antitrust law; Richard Pogue, who is a partner in the law firm of Jones, Day, Reavis & Pogue in Cleveland, Ohio, a substantial portion of whose practice for the past 22 years has been in antitrust law; and Mr. Bert Rein, who is a partner in the firm of Kirkland & Ellis, Washington, D.C., and chairman of the Antitrust and Environmental Committee of the American Bar Association.

We will start off with Mr. Pogue.

**PANEL OF ATTORNEYS FROM THE AMERICAN BAR ASSOCIATION:
STATEMENTS OF ERNEST GELLHORN, DEAN AND PROFESSOR OF
LAW, UNIVERSITY OF WASHINGTON LAW SCHOOL; RICHARD W.
POGUE, AND BERT W. REIN, ATTORNEY**

Mr. POGUE. Thank you, Mr. Chairman.

As to the part of my background that is useful, I am a public member of the Administrative Conference of the United States and, since 1977, I have served as a member of the council of the antitrust section of the American Bar Association.

As I believe you know, in 1976 the house of delegates of the American Bar Association adopted a resolution that related to S. 2028 which was the predecessor to S. 382. I was very deeply involved in the American Bar Association's consideration of that bill and I am familiar with it. However, I do want to emphasize that I am appearing today in my individual capacity and in no way should my testimony be regarded as stating American Bar Association policy.

I basically am here to say that I think the proposed modifications in S. 382 represent a very substantial improvement over the old S. 2028 and I would like to explain briefly how I believe the proposed modifications in this bill meet a number of major objections that the American Bar Association found with the prior bill.

The 1976 American Bar Association resolution was affirmative on the proposition that additional means should be found to increase the role of competitive considerations in Federal regulatory agency proceedings where consistent to the statutory mandates of the agency involved. Then, further, that the agencies should be directed to develop recommendations toward that end. However, the American Bar Association took very serious issues with the means to achieve this desirable end of S. 2028 and basically I think there were two fundamental concerns that the American Bar Association had to S. 2028 which are relevant to our deliberations on S. 382.

First: Today almost all of us—at least those of us who are in the antitrust field—agree that competition is clearly a very important national policy, but the problem is that there are a number of other important national policies as well, and the agencies which have been directed, often by specific statute, to carry out these other policies, often could be put in a paralyzing situation if they were felt constrained from carrying out their responsibilities under their organic act because of a broad competition standard indiscriminately applied to them.

Second: Perhaps even more serious, is that the American Bar Association was deeply concerned with the regulatory overkill which it felt S. 2028 reflect. The American Bar Association saw some procedural nightmares which seemed inevitable under S. 2028, and it was concerned if this bill were enacted it would lead to much more litigation, and substantial delays in agency decisionmaking; so I believe personally that both these problems have been improved substantially in the proposed modifications of the S. 382.

With regard to the first problem, section 3(a) of S. 382 is a great improvement in two respects. First, of course, it limits drastically the application of the statutes to the four categories that you mentioned at the start of the hearing this morning. Second, the obligation it imposes now on an agency is only to consider the competitive effects of the agency's action and then the agency must conclude that the action it is taking is the least anticompetitive alternative legally and practically available to achieve statutory goals, their recognition of these other national policies reflected in other legislation. So that with regard to this, the second problem, the procedural morass problem, I think the proposed modifications of S. 382 are also a very welcome follow-on or aftermath of S. 2028. The worst feature is the one which would have permitted the Attorney General to force hearings to be held whenever he felt the standards of the act were not being met. That is being deleted in the proposed modifications of S. 382.

Another bad feature of S. 2028 which would have provided for independent judicial review of agency actions, the burden would have been on the agency or someone supporting the agency's action to prove that it met the standards of the bill. That has also been deleted in these proposed modifications, and I think those changes should reduce a very severe major problem that the prior bill had.

So my basic view, having gone through the history of this legislation, is that the proposed modifications of S. 382 have solved some of the serious flaws in the original statute which the American Bar Association recognized in 1976.

I have some other minor suggestions which are in my prepared statement for the consideration of you and your staff. I would like to make one point: While I think that this legislation has been dramatically improved from a technical standpoint, you still have the question of whether the best approach to the problem that we are wrestling with here is not individual agency-by-agency legislation.

The Securities Reform Act of 1975, the Airline Deregulation Act of 1978 are examples, I think, of outstanding congressional attention to the specific problems that individual agencies have and I think that that is a superior way to approach this problem. On the other hand, obviously it recognizes the impatience that many of us feel in the desire to get more competition into agency decisionmaking.

I thank you for the opportunity to be here and I do urge that the proposed modifications in S. 382 remain part of the legislation.

Mr. KENNEDY. Thank you very much. Mr. Gellhorn.

Mr. GELLHORN. Thank you, Mr. Chairman. I also am appearing in an individual capacity, not as a representative of the American Bar Association. I endorse Mr. Pogue's comments on the specifics of S. 382. In terms of the basic thrust of the legislation, however, I take

a somewhat ambivalent position. I have submitted a prepared statement, so I will merely comment here on a couple of items.

On the one hand, the concept of bringing competitive factors to the fore before the agencies has considerable appeal to me even on the generic industrywide basis. Senate bill 382 builds on the findings and reasons requirements of the Administrative Procedures Act. These, in turn, rely on the presumption that reasoned elaboration for agency decisions will result in better decisions and in checking arbitrariness.

It also builds on the NEPA "impact statement" approach. That statute applied an action-forcing mechanism requiring agencies to consider a new and different factor. In fact, S. 382 would be an inferential step beyond the cost-benefit analysis suggested first by the Ford Executive order applicable to the executive department agencies in 1974 and President Carter's cost-benefit order, Executive Order 12044, of March of 1978.

So S. 382 is a tool, perhaps, for a more alert, careful, and responsible agency analysis to take account of competitive factors. Yet, because of the way the bill is now drafted and limited, focusing solely on economic regulatory agencies, I wonder whether it is really going to have any effect. Certainly those of us who have looked at the Ford Executive order on inflation impact and the Carter order during this past year, have been unable to discern any significant or even perceptible change in agency considerations. If one stops for a moment and asks why, I think the reason is apparent. For example, look at the Interstate Commerce Commission. Since 1936 it has articulated competitive factors as a basis for consideration in its decisions, in addition to impairment of service and viability of the competitive entry or competitive components.

What would happen here if S. 382 were adopted and the ICC were now specifically directed to take a look at competitive factors? Would its decisions be changed? I would suggest the Commissioners would say we have already considered that as part of our mandate under the public convenience and necessity standard. Certainly by S. 382 the Congress is not telling the ICC that competitive factors shall now override and eliminate from consideration factors such as quality of service, ability of firms to compete within the regulated market. So I don't see S. 382 as changing the basic interpretation and understanding of the Commissioners of the Interstate Commerce Commission or any of the other economic regulatory agencies.

The next question is what would be the effect of S. 382. Does this mean that instead of focusing solely on the regulated trucking firms, for example, the ICC should now look at what is the impact of a licensed application on nonregulated trucking. If it is obliged to look at nonregulated trucking, what you have adopted is a bill which, in essence, overtakes the hearing which Senator Cannon is planning to hold on truck deregulation. I frankly do not read this legislation so broadly and I do not think a fair reading permits that understanding. That also raises one additional consideration and question for me.

If by competitive factors, does S. 382 mean that the ICC should also consider the impact of licensing restrictions on airline freight? On barge freight? On railroad freight? In other words, as the legislation is written, it does not identify the meaning of the competitive effects standard.

This suggests a troublesome question of law raised by S. 382. That is, it relies on a presumption that most economic regulatory agencies do not consider competitive effects today. But if you look at their statutory purpose, at the public interest, convenience, and necessity standard written into their organic acts, and how they have applied it, they say that they are taking into account competitive factors. I might not agree with how they make their choices, but the statutory standards, as interpreted, already recognize the competition aspect of their responsibility.

There is, I believe, a more direct solution to the problems that S. 382 addresses and that is to reexamine agency authority. On the one hand, the Congress should cut back that authority where it seems unnecessary, as it has in the case of airline regulation and as it should with much of trucking regulation or, alternatively, Congress should redefine agency authority in specific instances where regulatory authority is to be continued. Finally, I would urge that, where possible, regulatory responsibility be consolidated. One of the serious problems which S. 382 might create if the competition standard is read broadly is confusion, because we have four agencies regulating transportation.

The reason that I am skeptical about the potential benefits of S. 382 is because it has now been narrowed solely to the economic regulatory agency. I would, perhaps, have different questions and different assessment if it were to cover the health and safety regulatory arena.

Thank you very much.

Senator KENNEDY. Mr. Rein.

Mr. REIN. Thank you, Senator.

Living very close to this red light, I will try to keep this brief. As you have noted, I am chairman of the Committee on Antitrust and the Environment section on antitrust of the American Bar Association, but once again my testimony today is entirely my own and is not intended to present the position of the committee or any of its other members.

I would like to focus briefly on three issues which I believe are common to the original and revised versions of the bill and which may not have been fully evaluated in the past.

First: I question whether a least anticompetitive alternative standard, however drafted, would effect a sufficiently useful change in substantive regulatory law to run the inevitable risks of procedural complexity and administrative stagnation which S. 382 would create as to interpretation and litigation.

Second: Looking at the impact of both versions of S. 382 on what is commonly understood to be economic regulation of international economic activities, I wonder whether a least anticompetitive alternative standard, drawing exclusively on U.S. antitrust concepts, would provide the flexibility necessary to reach an intelligent accommodation with foreign governments in areas where sovereign interests overlap.

Third: Looking at the impact of S. 382 on what is commonly understood to be noneconomic—health, safety, welfare—regulation domestic activities, I am concerned that the effort in the revised draft to exclude these activities from least anticompetitive analysis would eliminate the most beneficial aspect of S. 382.

Now, to elaborate briefly on each of these points, I think the testimony you have heard indicates that however you draft the procedures

to implement S. 382 and however you phrase the standard, lawyers will find something to fight about. There will be controversy as to which precise agency's actions fall within the mandate, what is least anticompetitive in particular situations. For example, if a price increase is denied and is necessary for the survival of less efficient firms, is that procedure competitive or is that anticompetitive, and how useful would S. 382 be in giving the answer? Thus, unless S. 382 is going to make an important change in how agencies do business, I think we would have to ask a question as to whether we should be cautious in imposing a broad standard.

It seems to me that recent efforts to achieve deregulation by administrative order or legislative action involve largely an attack on the basic economic justification for detailed regulation. Increasing numbers of economists have shown that regulated industries are naturally competitive; that competition will not result in predation and movement toward monopoly by destruction and that forces most effectively protect the consumer against economic inefficiency and distorted prices. As the regulatory agencies, or the Congress, become persuaded that the objective of providing goods or services at reasonable prices can best be served by competition, the scope of regulation is inevitably narrowed.

It is important to note, however, that regulatory reform comes not from a restatement of the question, whether particular regulatory actions are required to meet defined objectives, but from a reconsideration of the answer.

Under the economic thinking which guided most agencies until quite recently, I doubt very much whether any standard would have changed substantive results. Indeed, agencies employed a standard that sounded a lot like S. 382 and came to a number of results which, I think, would curl your hair. My concern, though, about applying S. 382 even to domestic regulation is also based on the fact that domestic economic regulation also includes important social objectives. Decisions that all small communities ought to have jet air service, that all telephone rate payers ought to pay the same thing for long distance calls regardless of density, that small independent refiners ought to stay in business regardless of their efficiency, or that crude oil prices ought to be limited to restrict inflation are not necessarily decisions that the free market needs to be regulated. They are, rather, endorsements of social or macroeconomic goals which may well be inconsistent with maximizing efficiency and permitting an optimum allocation of resources. This social thrust in economic regulation is, for example, clearly in evidence when the Federal Communications Commission gives preference in licensing choices to community involvement or minority participation. How S. 382 would impact on a policy of that kind I think is a difficult question.

A similar difficult question is how S. 382 would operate when conflicting views of foreign sovereigns become involved in a regulatory problem.

Quite recently, for example, the Civil Aeronautics Board, which is hardly an antideregulation agency, approved what in effect involved a pooling agreement between the United States and Saudi Arabia. Its stated purpose for that approval was representations by the Department of State and strong interest of the Saudi Government in that kind of an economic arrangement.

I might submit to you that the CAB's decision in that particular case was probably correct and if S. 382 were to block decisions of that kind because questions would arise as to what is a statutory goal, it would not serve a useful purpose. Indeed, I believe the original S. 382 would have forced disapproval of that agreement and it would have some grave foreign relations consequences. Therefore, I suggest to you that following the model of airline deregulation, any version of S. 382 should be limited to actions primarily affecting domestic commerce of the United States and not try to solve international problems at this time.

The third point I make and one that I discuss in length in my testimony and appendix is the value of S. 382 as applied to a huge and ever-growing complex of regulatory actions which are stated to be health and welfare actions. Each of those actions involve substantial investments of capital resources and it has a major impact on operating costs. Whether or not the ostensible reason for regulating is social or economic, these regulations have an impact on individual firms and individual industry sectors which is undeniable. They have a particularly intensive impact on small business and I think that it is essential in that kind of regulation to take account of how competitive markets will be affected. Senate bill 382 can serve an extremely useful purpose of reminding all social regulatory agencies of the need to minimize intrusion on the market system, and to consider the cost which consumers can bear for regulations which unnecessarily burden the operation of the free market. I believe that sensitivity to competitive factors and adequate methodology is essential if the free market economy and a detailed set of social goals are to coexist.

I believe the original version of S. 382 might have overemphasized the antitrust goals at the expense of the social goals and I believe the revised version would be of great benefit if applied to those other regulatory agencies. I realize you could argue about some of the categories that we recommend, but I think S. 382 should invite them to the free market through the front and not the back.

Thank you very much.

Senator KENNEDY. Thanks very much.

Mr. Gellhorn, in your testimony you compare S. 382 to the Environmental Policy Act, and say:

Both rely on a primary assumption which I believe to be sound—that by forcing agency attention to the reasons for their actions and particular considerations such as environmental concerns, the decisions which follow are more likely to reflect a reasoned consideration of all arguments and alternatives.

Why would that not be true in areas of competition? Why isn't that same reasoning applicable to this?

Mr. GELLHORN. As I sought to indicate, it might, which is why I am only skeptical and not opposed to S. 382. NEPA was effective because many of the agencies did not believe that it was appropriate for them to consider environmental factors prior to the adoption of the act. As a result of NEPA the agencies are now taking new factors into account. However, in connection with an analysis of the economic regulatory agencies, Interstate Commerce Commission being the one that was discussed most frequently here this morning, competitive effects are already being considered by the agencies. In connection with the I.C.C., competitive effects is one of the primary considera-

tions which it is to take into account for over 40 years. This ICC has done since 1936.

Senator KENNEDY. It might say that in the rules and regulations, but I am amazed to hear from a professor of law that that has actually, been the track record.

Mr. GELLHORN. I agree.

Senator KENNEDY. I don't plead to have profound knowledge and understanding, but I have sat through 18 days of hearings. To hear that they do that, from you, when we are hearing the most convincing kind of evidence from the people who are on the firing line and the people who are involved in the process, that this is not the case, is basically quite puzzling.

Mr. GELLHORN. Well, I am not suggesting that this may not affect—

Senator KENNEDY. Let me say at the outset, that it is my position that we ought to proceed agency by agency. It took us 4½ years to deregulate the airlines. I am hoping to beat that in trucking. If you look at the President's Commission on Antitrust, we are looking at 20 different areas of economic regulation. We are talking about the next 20 years of congressional action. With all due respect, it seems desirable and worthwhile, and it ought to be pursued by those interested in competition. None of us think this will be the magic wand that will resolve the problems of competition. I find, in looking through the statute itself in terms of the questions of either rate or entry, under rates, it says, "Approve only just and reasonable charges for any service rendered in the transportation of passengers or property." That is the ICC, and on the issue of entry:

Any qualified application, certificates of public convenience and necessity to motor carriers engaged in interstate commerce, providing that the carrier's service is or will be required by the present or future for public convenience or necessity.

Looking both at the language and track record, I find it very difficult to accept a statement to the effect that competition has been taken into consideration by the ICC.

Mr. GELLHORN. Let me be specific. Under the public interest, convenience and necessity standard in this statute, the ICC in 1936 articulated several factors that had to be taken into account in every decision, one of which was competition. As a standard practice, the ICC's administrative law judges and the commission itself makes findings in connection with entry, pricing and product decisions in terms of the impact of its decisions as it perceives it on competition. When it fails to do so adequately, the courts on review reverses and remands to the agency to reconsider its decision. In this connection I call your attention to the *P. C. White** decision last term of the District of Columbia Court of Appeals.

What I am suggesting, in other words, is that in this particular circumstance, unless S. 382 is read very broadly—and I would even suggest in a way in which the language to me does not support—it will have no effect. I will take more than S. 382 to change ICC decisions. I don't think that this legislation has enough of a nail sticking outside its 2 by 4 to get the commission to change its approach.

Senator KENNEDY. I am willing to get the nail out.

**P. C. White Truck Line, Inc. v. IVV*, 551 F. 2d 1326 (D.C. Cir. 1977).

Mr. GELLHORN. I do not think you can do it on a generic basis when you are addressing the economic regulatory agencies. Their decisional standards have evolved over the past years. Each of them have already, with minor exception, adopted a competition standard as part of their decisional process.

Let me take one which does not—the Nuclear Regulatory Commission. Here my statement asks: Would S. 382 effect NRC's mandate? I really don't think so, but it might add some finding requirements to the Nuclear Regulatory Commission. If anything, its impact will not be where one perhaps wants it to be. This does not appear to be desirable to me. It may have an effect where we don't want it.

Senator KENNEDY. The Atomic Energy Act states: "The Commission shall give due consideration to the advice received from the Attorney General and to such evidence that may be provided during proceedings in connection with the subject matter and shall make a finding whether the act of granting the license would create and maintain a situation inconsistent with any antitrust laws specified." It is probably longer than our bill.

Mr. GELLHORN. Except it is limited, when the Attorney General brings it before the agency. The question I would raise when they make a decision in connection with nuclear licensing, must they under S. 382 take into account the impact of that decision on competition in the coal industry, in the gas industry and in the oil industry?

I don't read the competitive effects language of S. 382 that broadly. I would suggest that is a possible reading. It would be a basis for judicial appeal, review and possible delay. Legislation is not costless. Inevitably, it raises questions. My concern is that I would like to be persuaded, I would like to see some evidence of where this bill is really likely to change agency decisions. I do not see it in the ICC. I do not see it in the FCC. I do not see it really in any of the significant economic regulatory agencies. That is the only reason I raise the question, sir.

Senator KENNEDY. Mr. Pogue, do you agree with that?

Mr. POGUE. With due deference to my friend, Mr. Gellhorn, I really do not. I can see an opportunity in many different agency proceedings for various parties to rely on this specific congressional directive that has come out in 1979, in a period in which the world is tending toward deregulation and I can see that it can become an important factor in those agency considerations. I don't think, under the S. 382 as it is being modified, that the cost will be that significant. I don't see that there are going to be major delays in regulations and, therefore, if you stand back and look at it, I think you can say that the chance of its having some impact is significant, the cost is unlikely to be great and so what do you have to lose?

Senator KENNEDY. Mr. Rein, one of the points that you make is that you do not see S. 382 making much difference because some of the agencies apply similar tests now, and you cite the *Local Cartage* and *Svenska* decisions; both require that the act will not be deemed in the public interest unless it is "required by serious transportation needs or in pursuit or in furtherance of a valid regulatory purpose."

Once the public benefit or valid regulatory purpose is determined, there may be several methods to achieve it. Some are more anticompetitive than others. Nowhere do those standards require an analysis of the least anticompetitive alternative for achieving the goal; S. 382 would take the *Svenska* and *Local Cartage* decisions a step further and

require the agencies not only to think about competition technically when it was submitted by enabling statutes; is that not a significant change?

Mr. REIN. We are talking about two different versions of S. 382. The unrevised version clearly had that, because it was spelled out in three steps how you would approach the problem. The second version is more flexible because it deals with what is reasonably and practically available, and that would give the agency more flexibility. You will have to recognize that *Local Cartage* and the *Svenska* test dealt with private agreements. There you are always in some tension between least anticompetitive and how much regulating you want to do. If you want to do minimum regulating, you have to say yes or no to a private agreement. If you want to start playing around with the least anticompetitive agreement, then you will get into conditions on that agreement. You will have to play around with it. Basically, it could be rewritten a little this way and a little that way.

You have to choose between saying to the agency, when you see a private agreement, it is either anticompetitive and not outweighed by benefits and so say no; or it is sufficiently outweighed and you ought to say yes. I think when you tell them that they also have flexibility to find some other means of refashioning that agreement and conditioning it, I think you are going to get increasing amounts of regulation under the guise of competition.

I think my basic point, however, on those cases was that those agencies devised word formulas over time which were quite similar to the word formulas in S. 382. These formulas were applied with 180 degree worth of difference by the agency at different points in time. The language you read from the ICC Act was not dissimilar to the old language of the FAA and under Chairman Kahn the CAB took that language and had multiple-permissive entry, which is like free entry and a zone of rate flexibility greater than the zone of rate flexibility in the Airline Deregulation Act. It was the very same language. So I am not sure it is language that governs. So if you look at the real world agency process, where agencies decide and the general counsel's office writes opinions, I am not really sure that getting just one more word formula into the opinion is going to make a lot of difference.

Senator KENNEDY. Of course, Mr. Kahn and the current chairman thought it would help.

Mr. REIN. It certainly was one of the goals of the CAB to have a permanent enforcement of some of the interpretations they have made of the act and that there were judicial challenges, but I think the agency had a good faith belief they would survive or they would not have made those decisions. They didn't say we have decided it this way because we are barred. They said we decided it this way because there is some doubt. We would like to confirm it. Chairman Kahn felt that a future Chairman would not have the same view of economics that he did. He wanted Congress to endorse that view. As the views of the agency shift, and you can see it in the FCC as well as the CAB, certainly their microwave policies now under the same statute are different than they were 10 years ago; you will get different results, I guess.

My concern with a new form of words, is that you can change the substance when they have big staffs to write opinions who can play the words. I agree with Mr. Gellhorn; when you get outside agencies

that traditionally deal in those words, that is when you get into social regulatory agencies; S. 382 would have the same impact on them as NEPA had on the economic agencies. It would make them think for the first time about something they tried very hard to ignore. I think that is of substantial value.

Senator KENNEDY. We will have your statements printed in the record in full. Many thanks.

The meeting is adjourned.

[The prepared statements of Messrs. Gellhorn, Pogue, and Rein follow.]

PREPARED STATEMENT OF DEAN ERNEST GELLHORN

My name is Ernest Gellhorn and I am a professor of law and dean at the University of Washington Law School in Seattle, Wash. My primary areas of teaching and scholarship are administrative and antitrust law. I am also chairman of the Industry Regulation Committee of the American Bar Association's section on antitrust law.¹

My comments will seek to evaluate the requirements that S. 382 would impose on Federal agencies and the impact it would have on agency decisionmaking, and then to assess some of this bill's benefits and costs. One cannot, of course, be certain how agencies would in fact apply the "competitive effects" test of S. 382, and my assessment is necessarily tentative. Nor can all problems of coverage, of the detail of particular provisions, of the requirement of findings, and so forth be forecast with assurance. Nevertheless, as this statement seeks to develop, it seems to me unlikely that passage of S. 382 would have a substantial beneficial affect on agency decisionmaking. Therefore, in light of some of the costs which it seems likely would result from adoption of S. 382, I would urge that this committee and the Congress first explore less costly—and I believe more effective—alternatives which seem more likely to improve regulatory performance.

While the most recent modification of S. 382 narrows its coverage as compared to its lineal predecessors in the 95th and earlier Congresses (e.g., S. 2625), problems remain. As now drafted, S. 382 would apply to four types of administrative regulation, namely, controls on (a) entry, (b) price, (3) products, and (d) private agreements. On its face, this proposal has considerable appeal. It builds on the lessons of the findings and reasons requirements of the Administrative Procedure Act and the action-forcing mechanism of the National Environmental Policy Act. Both were designed to require agencies to consider the bases of agency action. Both rely on a primary assumption which I believe to be sound—that by forcing agency attention to the reasons for their actions and to particular considerations—such as environmental concerns—the decisions which follow are more likely to reflect a reasoned consideration of all arguments and alternatives.

Even as now limited to four specific types of agency action, the coverage of S. 382 is broad and numerous agency decisions would be required to consider the competitive effects of their action and to conclude that the approach they have chosen causes the least competitive harm of any alternative legally available. Taking entry regulation as a first illustration, almost all actions of the Interstate Commerce Commission (ICC), the Federal Communications Commission (FCC), and even of the Nuclear Regulatory Commission (NRC) fall within its ambit. This raises, it seems to me, two immediate questions. Is it likely that these agencies would in fact reach different decisions as a consequence; that is, would adoption of S. 382 force new and different considerations to the fore? Unless it does, there would seem to be little justification for its consideration. Second, are newly directed competitive considerations appropriate matters for inclusion in the decisions of these and other affected agencies? Again, the answer must be yes for S. 382 to be approved. A review of how S.382 would operate in these three typical agencies suggests to me that neither question can be answered affirmatively with confidence. Of the three, I believe that only the FCC takes competitive considerations into account in its entry decisions, and then only as one factor among others. Although the ICC has increasingly looked toward limiting licensing controls and encouraging

¹ This statement, however, has not been approved by either the Committee on Industry Regulation or the section on antitrust law and I am not speaking on behalf of the ABA.

competition in trucking, even then the standard of S. 382 seems inappropriate. Adding competitive considerations to the NRC's current burdens seems to me both futile and undesirable.

Trying to apply S. 382 to ICC actions raises the immediate and obvious question of whether the bill seeks to override or modify the "public interest, convenience and necessity" standard of the Interstate Commerce Act—as amended—or otherwise substantially broaden the scope of the Commission's consideration of entry decisions. In licensing regulated—common carrier and contract—trucks, the ICC has traditionally looked only at competition among regulated trucking and sought to protect certificated firms from nonregulated carriers. Would S. 382 rewrite the ICC's mandate so that the Commission should modify its regulatory approach and eliminate these protected enclaves? If not, then S. 382 would be a meaningless paperwork exercise for the Commission—especially since it already considers competition among regulated firms in making licensing decisions. On the other hand, if the ICC is to change its approach, this seems an awkward and indirect way in which to rewrite the Commission's primary regulatory role. That is to say, the ICC already seeks to maintain as much competition as it believes feasible within the regulated trucking market—assuring service on the one hand and reasonable prices on the other. To do so, however, it has protected regulated trucking from inroads by nonregulated firms where possible, and this action is obviously contrary to a competitive market approach. To change this basic approach through S. 382 seems far beyond the understanding of its proponents and an inappropriate way of rewriting specific legislation by generic amendment. It would then be further required to consider the impact of its actions on competition in allied industries such as railroads, barges and air freight. Yet, if S. 382 is not to be read so broadly, as rewriting the Commission's mandate and as applying to all competition, one must wonder whether it would have any affect on ICC decision-making.

However, more needs to be determined. If S. 382 is viewed as being hortatory legislation only and as requiring no specific agency response, I would not be here raising questions except to wonder whether we really need more aspirational statutes. A reading of S. 382 suggests to me that it may impose additional requirements on the agencies such as the ICC and that it would result in judicial review of agency compliance with them. While section 3(a) of the bill specifies only that the agency "consider" and "conclude"—which appear to me to be exhortations only—section 3(b) states that "findings" required by section 3(a) must be included in an agency's opinions and statements.² Thus an agency failure to outline how it considered competitive factors in its decisionmaking or to show that the action it approved was the least anticompetitive available, would seem to constitute a basis for reversal. Particularly significant in this regard are the provisions of section 5 of S. 382 on costs and the deletion of section's judicial review provisions. As a consequence, the review authorizations of the Administrative Procedure Act (5 U.S.C. 701-706) would govern and agency compliance with the directions of S. 382 would therefore be subject to procedural and substantive review. See, e.g., *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F. 2d 289 (8th Cir. 1972), certiorari denied, 412 U.S. 908 (1973) (requiring review of both procedural requirements and the merits of NEPA directions to the agencies where the statute made no specific provision for judicial review). What this means in the ICC context is that the agency's actions pursuant to S. 382 not only would be a basis for delay, objection and review, but also that the troublesome questions of coverage and application suggested earlier could be raised by those objecting to ICC actions. This, it seems to me, is a substantial additional reason for further clarification of S. 382 so that there can be no doubt as to the meaning of its direction to the agencies; both the agencies and the courts need a meaningful standard to apply.

This analysis has suggested that adoption of S. 382 could pose additional burdens on the ICC without corresponding benefits. Similar conclusions are suggested by a review of its application to FCC license renewals of broadcasters or decisions by the NRC to license nuclear plants. Broadcast renewals are normally approved by the FCC even when challenged unless it is shown that the broadcaster's performance was inferior. Questions of competitive effects are seldom considered, although they have been included as a factor—and in light of cross-ownership rules, sometimes a controlling factor—in licensing standards developed by the agency under the "public interest" measure. As with the ICC, the application of S. 382 to these entry actions of the FCC raises questions of coverage and

² The reference to "findings" in section 3(b) seems somewhat anomalous in light of the modification of section 3(a) and may reflect its continuation without change from S. 2625.

scope. The agency already takes competitive factors generally into account. It usually does not apply them to broadcast renewals, a policy which has withstood judicial review under the Communications Act. Would it now be required to make findings and review its decisional standards for broadcaster renewal? As in the case of the ICC, my initial reaction was that this was not within the purpose of S. 382, especially since other committees of the Congress are considering this and similar matters of communications regulation in the Communications Act "rewrite" process. To make such a major shift by indirection seems inappropriate. On the other hand, what purpose would the application of S. 382 to the FCC otherwise serve—other than forcing it to make additional findings and subjecting its decisions to another basis for objection and review. A look at NRC plant license decisions further compounds the questions raised here. As recent events highlight, the primary question in this agency determination is public safety. Competitive considerations do not appear to play a significant role. Whether one favors or opposes nuclear power, it seems hard—perhaps impossible—to argue that the lengthy and complex nuclear licensing procedures be further burdened by consideration of competitive effects. The standard seem wholly inappropriate to nuclear powerplant licensure. Nor does the NRC seem designed or equipped to make an assessment of competitive effects of its licensing decisions.

Whether these problems or questions are overriding should depend on the possible beneficial effects of the proposed legislation. Additional costs, confusion over coverage and application, or delay may be worth the price if, as in the case of the NEPA, administrative decisions are altered and important considerations are taken into account as a consequence. My difficulty with S. 382 is that in trying to ascertain how it would affect the actions of these three—or other—agencies, I could not locate agency decisions which would be altered as a consequence of S. 382's application, nor am I aware that this showing has been made by others. Since concrete benefits for particular agency actions are not readily apparent, it seems appropriate to remain doubtful and to suggest that the burden of establishing such benefits should be borne by the bill's sponsors or supporters.

Of course, even after one locates a series of agency actions which would indeed be substantially affected by adoption of S. 382, additional questions would need to be raised and answered. Can one identify in a particular context what constitutes adequate consideration of "competitive effects" or a sufficient determination that the agency action takes the least anticompetitive route? This is not to suggest that Congress must define these standards more precisely, but rather to note that they are not self-defining and would impose some additional burden on the agencies to which they apply. These have proved difficult concepts to apply even within the confines of the Sherman, Clayton and Federal Trade Commission Acts. Applied to the vast array of regulatory statutes administered by Federal agencies, the problems of interpretation must be multiplied severalfold. We need some assurance that agency decisions would in fact be improved.

The underlying problem with this proposal, it seems to me, and the reason for my skepticism about S. 382 is that there simply is no single cause which can be pinpointed as the basis for the perceived regulatory malaise. Thus no single procedural response is likely to have much of an impact. The problems of the administrative process are many; most are peculiar to a specific agency or subject. Even where general principles or common threads seem identifiable, their application will vary and they must be tailored to the particular problem at hand. Turning to the effect of agency regulatory actions on competition, it is not at all clear that agency failure to account for competitive considerations is in fact a reason for current reform pressures. Where relevant most agencies have considered them. I might not agree with the administrative choice, but under the existing agency structure and legislative mandate, most decisions do not seem so flawed that S. 382 would have any effect.

I would therefore suggest that a realistic reform effort must shun procedural solutions to substantive problems and establish necessary priorities. Thus, the first order for regulatory reform is not S. 382 but a systematic congressional program to examine and, where possible, cut back existing regulatory authorizations. ICC control of railroads and trucking seems a prime candidate and current efforts in this direction deserve support. A second and closely related priority—which S. 382 indirectly addresses—is for Congress to give the agencies much clearer directions. It simply must face the hard questions and make basic value choices instead of passing the problems to the agencies. Nor is it a solution to urge that the agencies consider competitive factors in addition to the public interest. More

precise standards can be given for defining FCC standards on broadcaster renewals, for cable entry, and so forth, rather than leaving the matter for FCC. Finally, and again related, is a third step. I would urge that Congress restructure and consolidate that regulatory authority which is to remain. Historical accident and interest group pressures rather than reason explain the division of transportation responsibilities among at least four agencies and departments, consumer protection among a like number, and antitrust between two.

If anticompetitive agency action is a concern, the proper focus is in Congress which is the source of this authority.

PREPARED STATEMENT OF RICHARD W. POGUE

My name is Richard W. Pogue. I practice law with the firm of Jones, Day, Reavis & Pogue in Cleveland, Ohio and for the past 22 years a substantial part of my practice has been in the antitrust field. Of relevance to my appearance here today are the facts that since 1974 I have served as a public member of the Administrative Conference of the United States, and since 1977 I have served as a member of the council of the antitrust section of the American Bar Association.

In 1976 the house of delegates of the American Bar Association adopted a resolution relating to S. 2028, 94th Congress, which was the predecessor of the bill you are considering today, S. 382, 96th Congress. I must emphasize that I am here today solely in my individual capacity, and my testimony should not be construed in any way as stating the policy of the ABA or, indeed, of the antitrust section of the ABA. Nonetheless I am very familiar with the ABA resolution and supporting report adopted in 1976 and I would like to give my personal views on how S. 382, as proposed to be modified, represents a substantial improvement over the old S. 2028 and how I personally believe it meets some of the objections which the ABA found with S. 2028.

The 1976 ABA resolution specifically endorsed the proposition "that additional means should be found to increase the role of competitive considerations in Federal regulatory agency proceedings where consistent with statutory mandates to the agency involved, and that the agencies should be directed to develop recommendations toward that end." But ABA took serious issue with some of the means to achieve these desirable ends which were proposed in S. 2028. I think it is fair to state that there were two fundamental concerns which the ABA had—and both seem to me to be relevant to your consideration of any bill such as S. 382 as proposed to be modified.

First: While we would all agree that competition is an important national policy, the fact is that there are other important national policies as well, and the agencies which have been directed, often by statute, to carry out these other policies could be placed in a paralyzing dilemma if they felt constrained from carrying out their mandated responsibilities if a broad meat-ax competition standard were indiscriminately superimposed on all their decisionmaking. For example, suppose in the fight against inflation the Council on Wage and Price Stability were intimidated by reason of an S. 2028 type statute from issuing guidelines because of a concern that it was in effect inducing industry-wide implied agreements on price—I think we all agree that that would be a bad result.

Second: The ABA was deeply concerned about the regulatory overkill which S. 2028 seemed to reflect. The procedural nightmares which seemed inevitable under S. 2028 would have led, in the judgment of many, to more litigation and more substantial delays in agency decisionmaking, two commodities which none of us desire.

To a significant extent, both these problems of the old S. 2028 have been ameliorated significantly in S. 382 as proposed to be modified. With regard to the first problem, the new substantive section 3(a) is a great improvement, in two respects: first, it drastically limits application of the statute to four categories of action which involve traditional issues of competition and antitrust concern—limitations on market entry, fixing of prices or rates, limitations on production or distribution and private agreements. Second, the obligation it imposes on the agency is only to consider the competitive effects of agency action and to conclude that the agency action actually taken is "the least anticompetitive alternative legally and practically available to achieve statutory goals." With regard to the second problem, S. 382 as proposed to be modified is also a welcome aftermath to S. 2028: perhaps the worst procedural feature of old S. 2028 has been deleted in the proposed

limitations on S. 382—that is, the provision which would have permitted the Attorney General to force hearings to be held whenever he believed that the standards of the act were not being met. Another had feature of S. 2028—providing for independent judicial review of section 3(a) actions, with the burden on the agency or other proponent of the action to prove that the section 3(a) standard has been met—has also been deleted in S. 382 as proposed to be modified. This deletion should reduce one major potential source of proliferation of collateral litigation.

So, in these major respects, I think that we should commend those who are responsible for revising this proposed legislation to deal with some of the major flaws of the initial S. 2028 proposal which were recognized and pointed out in the 1976 ABA resolution and report.

There are three other points I would like to mention briefly.

First: I continue to believe that the best approach to the problem dealt with in S. 2028 and S. 382—that is, the insensitivity of some regulatory agencies to competitive and antitrust type issues—is quite different from that proposed in this legislation. The best approach is that which was proposed in the ABA resolution—that is, examination of each substantive statute under which the regulatory agencies currently operate and then amendment of each such statute in such a way as to infuse competitive considerations into the decisionmaking process. This tailoring of competitive analysis to other statutory goals would help to avoid silly arguments about whether the broad requirements of S. 382 should or should not be applied in particular agency deliberations. Examples of this approach which I believe have been generally successful include the Bank Merger Act of 1966 (Pub. L. 89-356), the Securities Reform Act of 1975 (Pub. L. 94-29) and the Airline Deregulation Act of 1978 (Pub. L. 95-504). The only argument I have ever heard against this tailoring approach is that it will take too long, and there is an impatience on the part of some to compel as soon as possible greater recognition of competitive factors by a large number of regulatory agencies.

Second: A minor suggestion is that the annual report to the President and Congress provided for in section 6(b) be required of the Attorney General rather than the Federal Trade Commission. Section 4(a) of S. 382 would obligate the agencies to consult with the Attorney General on their procedures, and would require them to advise the Attorney General of agency proceedings which would be subject to the act. Therefore the Attorney General would seem to be in the best position to prepare the annual report. Injection of the FTC into the reporting function as now proposed would mean more duplication of effort and possible double interference with agency deliberations, many of which are already notoriously slow.

Third: Another minor point is that the bill might better state the objectives of the legislation if some word such as "competitive" were substituted for the word "antitrust" in both section 2(b) and the heading of section 4. It seems to me that the use of the term "antitrust" in those places could be interpreted as limiting the agencies' obligations to purely antitrust concepts, whereas I believe that the real thrust of S. 382 is intended to be broader and to require attention to competitive factors whether or not conduct violative of the antitrust laws is involved. If you agree with this point, you might also wish to delete the word "antitrust" in the heading of section 4 of the bill.

In conclusion, I would like to thank you for the opportunity to make these comments. I believe that the proposed modifications of S. 382 are very much in the public interest and I personally believe that they go a long way to meeting some of the objections to S. 2028 which were raised in the 1976 ABA report.

PREPARED STATEMENT OF BERT W. REIN

My name is Bert W. Rein and I am a partner in the firm of Kirkland & Ellis in Washington, D.C. I serve as chairman of the Committee on Antitrust and the Environment of the section of antitrust, American Bar Association and participated actively in the preparation of its published report on antitrust and environmental policy relationships (45 Antitrust Law Journal 355). My testimony today, however, is entirely my own and is not intended to present the position of the Committee or of any other of its members.

I recognize that S. 382 already has been the subject of lengthy scrutiny and debate. I understand that this committee is now considering proposed revisions to narrow the scope of the bill to certain defined classes of Federal action and to give affected agencies increased flexibility in ascertaining a least anticompetitive

course of action. In these remarks, I would like to focus attention on three issues which are common to the original and revised versions of the bill and which may not have been fully evaluated in the past.

First: Looking exclusively at the impact of S. 382 on what is commonly understood to be economic regulation of domestic economic activities, I question whether a least anticompetitive alternative standard, however, drafted, would effect a sufficiently useful change in substantive regulatory law to run the risks of procedural complexity and administrative stagnation which S. 382 would create.

Second: Looking at the impact of both versions of S. 382 on what is commonly understood to be economic regulation of international economic activities, I question whether a least anticompetitive alternative standard, drawing exclusively on U.S. antitrust concepts, would provide the flexibility necessary to reach an intelligent accommodation with foreign governments in areas where sovereign interests overlap.

Third: Looking at the impact of S. 382 on what is commonly understood to be noneconomic (health, safety, welfare) regulation of domestic economic activities, I fear that the effort in the revised draft to exclude these activities from least anticompetitive analysis would eliminate the most beneficial aspect of S. 382.

Let me elaborate briefly on each of these points.

A. IMPACT ON DOMESTIC ECONOMIC REGULATION

The findings of S. 382 and its statement of policy, particularly in the revised version, indicate that the sponsors' principal concern is domestic "economic regulation" which is "more anticompetitive than necessary to achieve statutory goals." This deficiency is to be remedied by the formal imposition of a least anticompetitive alternative/antitrust standard accompanied by specified—original version—or agency-initiated—revised version—implementing procedures and additional incentives for contested and close judicial scrutiny.

However these procedures are drafted, and however the burden on the agency in the judicial review is stated, it is undeniable that the amount of effort required to produce and review final agency action will increase; that controversy will exist as to which precise agency actions fall within the mandate—e.g.—would merger agreements fall within the revised version—and what is least anticompetitive in particular situations—e.g.—would denying a price increase necessary to the survival of less efficient firms be anticompetitive—and that parties aggrieved by agency action will litigate S. 382 compliance. Thus, unless S. 382 has important foreseeable benefits to the public, the committee may properly regard it with caution.

The congressional decisions which imposed economic regulation on particular sectors of our economy like transportation, energy and communications were, in my view, based on two separate premises. In some measure classic economic regulation represents a legislative determination that competition is unworkable either because the industry in question is a "natural monopoly" or because competition would be wasteful and destructive. Regulation is thus mandated to organize and limit competition by restricting entry to markets, allocating scarce raw materials among competitors and granting antitrust exemption to agreements among competitors designed to avoid predation or waste. As a concomitant protection to the public, regulatory agencies are granted price regulation powers to limit monopoly profits threatened by protected unilateral or shared monopolies.

The recent efforts to achieve deregulation by legislative or administrative action have involved largely an attack on the economic justification for detailed regulation. Increasing numbers of economists have argued that regulated industries are naturally competitive, that competition will not result in predation and movement toward monopoly by destruction and that market forces most effectively protect the consumer against economic inefficiency and distorted prices. As the regulatory agencies, or the Congress, become persuaded that the objective of providing goods or services at reasonable prices can best be served by competition, the scope of regulation is inevitably narrowed.

It is important to note, however, that regulatory reform comes not from a restatement of the question whether particular regulatory actions are required to meet defined objectives but from a reconsideration of the answer. Under the economic thinking which guided most agencies until quite recently, I doubt very much whether even the original version of S. 382 would have modified substantive results. In fact, the Civil Aeronautics Board—under its local cartage standard—and the Federal Maritime Commission—under the standard set forth in *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968)—employed tests for restrictive agreements quite similar to those in S. 382 and reached re-

sults which S. 382's sponsors would no doubt condemn. Thus, unless S. 382 is intended to endorse particular economic analyses of differing regulated sectors, I doubt that it will make a sufficient substantive change in regulatory agency action to justify its inevitable costs in delay and additional litigation.

My concern about the substantive application of S. 382 to economic regulatory agencies is increased by the fact that even classic economic regulation is partially based on attaining social objectives or macroeconomic objectives which cannot be attained through market forces. Decisions to provide jet air service to certain small communities, to equalize mileage rates for truck movements regardless of route densities, to standardize interstate long distance telephone rates, to preserve the businesses of small, independent refiners and distributors to limit crude oil are not efforts to avoid the economic malfunctions of the free market. They are rather endorsements of social or macroeconomic goals which may well be inconsistent with maximizing efficiency and permitting an optimum allocation of resources. This social thrust in economic regulation is, for example, clearly in evidence when the Federal Communications Commission gives preference in licensing choices to community involvement or minority participation. Macroeconomic interests predominate when petroleum prices are controlled to limit the overall inflation rate.

Applying the original S. 382 to conflicts between social policies and antitrust principles seems very difficult. Original section 3(a) demands a weighing of antitrust departures against "significant and reasonably certain benefits to the general public" as well as an investigation of "alternative means having lesser anticompetitive effects" and capable of achieving the "overriding statutory purpose." Social and macroeconomic values do not readily lend themselves to quantification nor is it clear how beneficial particular policies such as minority broadcasting involvement are to the general public or exactly how one would frame the boundaries of "alternative means."

The revised language, which focuses on means "legally and practicably available" to achieve statutory goals would alleviate certain difficulties in the original version. Nevertheless, there would still seem to be substantial ambiguity in the phrase "statutory goals" with ample room for litigation whether a particular goal, such as minority ownership, is "statutory." Perhaps more important, my experience leads me to believe that economic regulatory agencies are almost always conscious of their departures from competitive norms so that the revised S. 382, if flexibly interpreted, would add little to the substantive deliberations of these agencies.

B. IMPACT ON INTERNATIONAL ECONOMIC REGULATION

The emphasis in the original S. 382 on quantitative balancing and the invocation of "statutory goals" in the revised version may prove particularly troublesome for agencies whose regulatory domain extends to international actions affecting the interests of other sovereigns. In these circumstances, an effort to place a superseding emphasis on U.S. antitrust principles—which do not have universal acceptance—may prove both unpalatable and detrimental to broader U.S. interests which could be protected by a more flexible public interest standard.

Quite recently, the Civil Aeronautics Board—an agency which is certainly not backward in its adherence to antitrust principles—was required to pass upon an agreement between a U.S. airline and the national carrier of Saudi Arabia.¹ The agreement established a "blocked space" arrangement which, in effect, permitted the two carriers to pool revenues on the United States-Saudi route. The Board explicitly found the agreement anticompetitive and unnecessary to achieve statutory aviation goals. Nevertheless, recognizing that the Saudi Government did not share its economic philosophy and placed a higher value on Saudi participation on the route, and taking into account representations by the Department of State, the Board approved the arrangement under the general "public interest" standard still in effect for foreign air transportation.

I think that there can be little doubt that the Board acted properly in the Saudi case and that either version of S. 382 would have pushed strongly toward a different, and less advantageous result. Indeed, the original S. 382 would almost certainly have forced disapproval of the Saudi agreement.

The Saudi incident is not atypical for those agencies like the CAB, FMC and FCC which deal continuously with foreign sovereign interests. Foreign governments may have strong interests in licensing policies, rates on international routes allocation of resources to their national carriers in international service and agree-

¹ CAB Order No. 79-1-161, application of Pan American World Airways, Inc. and Saudi Arabian Airlines Corp.

ments involving their nationals. Foreign approaches to economic issues may differ from our own in a way that goes to the heart of foreign economic systems. If S. 382 is to apply to regulation of the foreign commerce of the United States, it must be amended to permit recognition of our own foreign policy and national security interests. A preferable solution, following the model of airline deregulation, would be to limit section 3(a) to actions primarily "affecting the domestic commerce of the United States."

C. IMPACT ON DOMESTIC NONECONOMIC REGULATION

While S. 382 finds that this Nation is committed to "a free market economy" to maximize consumer welfare, and while the "deregulation" movement has generated substantial recent publicity, the reality is that the economic activity of American industry is increasingly regulated for noneconomic reasons. The Congress has apparently concluded that "free markets" are incapable of satisfying certain basic health, safety and welfare goals without Government regulatory intervention. Thus, the last decade has witnessed an enormous regulatory intrusion into economic activities by an alphabet soup of agencies whose interest and expertise in antitrust concepts and goals is limited.

When the antitrust section's environmental law committee undertook its initial study of antitrust and the environment, we quickly recognized that social regulators were having an enormous impact on the cost patterns of different industries, the comparative advantages of the United States and other nations, and the fortunes of different companies. As set forth in the appendix to my written testimony, which contains a detailed assessment of the application of S. 382 to social welfare regulations, an ever-increasing share of industry capital projects and operating costs are controlled by Federal social regulation and these consequences are clearly here to stay.

Whether or not health, safety and welfare standards are considered economic, they can drive a firm out of business or increase its costs to the point where it becomes noncompetitive. Such regulation can deeply impact the behavior and structure of existing markets as well as create marked increases in capital and time barriers to entry when, for example, discharge permits are required. Small businesses, in particular, may be threatened by reporting and recordkeeping requirements which increase optimum scale beyond their capability or capital-intensive technological requirements which they cannot meet.

The committee's report, and the materials in the appendix, indicate that the various social regulatory agencies have encountered difficulty in coming to grips with antitrust and competitive goals. While most agencies have a mandate to consider "costs" or "feasibility," their assessments are limited to absolute cost levels and industry survival analyses. No systematic effort has been undertaken to determine whether barriers to entry are being erected, effective vertical monopolies created by specification of control technology, or anticompetitive activity encouraged or condoned by disclosure requirements.

Senate bill 382, in my judgment, could serve an extremely useful purpose in reminding all social regulatory agencies of the need to minimize intrusion on the market system and to consider the costs which consumers can bear from regulations which unnecessarily burden the operations of free markets. If applied to social regulatory agencies, S. 382 could lead to the development of sorely needed standardized methodology to measure the consumer costs of social regulatory inhibitions on competition. I believe that sensitivity to competitive factors and adequate methodology to assess them is essential if a free market economy and a detailed set of social goals are to coexist.

The original version of S. 382 clearly applied to social regulatory actions but might have been justly criticized for overemphasizing antitrust goals at the expense of the primary goals of social regulatory activity—a problem which is greatly alleviated by the revised version. Nevertheless, the revised version attempts to avoid the problem of balancing social and antitrust goals by limiting S. 382 to classical regulatory categories. While I would still be prepared to argue that a number of social regulatory activities constitute entry licensing or allocation of production, I think S. 382 should invite social agencies to the free market through the front rather than back door. Indeed, I submit to this committee that limiting the scope of S. 382 applies the bill where it is largely counterproductive and seeks to foreclose it where it could be most helpful.

[The meeting adjourned at 12:15 p.m., May 22, 1979, subject to the call of the Chair.]

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY
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CHICAGO, ILLINOIS 60607-7070
TEL: (773) 936-5500
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WWW: WWW.CHEM.UCHICAGO.EDU

STATEMENT OF WORK FOR THE PROJECT OF THE UNIVERSITY OF CHICAGO

The project of the University of Chicago is to develop a new method for the determination of the structure of a molecule. The project is to be carried out by the University of Chicago and the University of Illinois at Chicago. The project is to be carried out by the University of Chicago and the University of Illinois at Chicago. The project is to be carried out by the University of Chicago and the University of Illinois at Chicago.

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APPENDIX

96TH CONGRESS
1ST SESSION

S. 382

To amend the Clayton Act by strengthening and facilitating the carrying out of antitrust and procompetitive policies by agencies of the Federal Government, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7 (legislative day, JANUARY 15), 1979

Mr. KENNEDY (for himself, Mr. HATCH, Mr. RIEGLE, Mr. DOMENICI, Mr. DANFORTH, Mr. LEVIN, and Mr. MAGNUSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Clayton Act by strengthening and facilitating the carrying out of antitrust and procompetitive policies by agencies of the Federal Government, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 *That this Act may be cited as the "Competition Improve-*
- 4 *ments Act of 1979."*

DECLARATION OF POLICY

SEC. 2. (a) FINDINGS.—The Congress finds and declares that—

(1) this Nation is founded upon and committed to a private enterprise system and a free market economy, in the belief that competition protects consumers, promotes efficiency, and spurs innovation;

(2) economic regulation by Federal agencies has at times created unnecessary losses for consumers, fostered inefficiency, and stifled innovation;

(3) Federal agencies have taken actions which are more anticompetitive than necessary to achieve statutory goals;

(4) adherence to a definitive and formal antitrust standard by Federal agencies will reduce losses to consumers, improve efficiency, and remove impediments to innovation.

(b) POLICY.—It is the purpose of this Act to reaffirm that the fundamental national economic policy of the United States is free and open competition by—

(1) minimizing anticompetitive behavior in regulated industries;

(2) establishing procedures that strengthen and facilitate the application of antitrust and procompetitive policies by Federal agencies; and

1 (3) enabling Federal agencies better to restore,
2 maintain, and protect open and vigorous competition in
3 the marketplace.

4 ANTITRUST STANDARD FOR FEDERAL AGENCIES

5 SEC. 3. (a) Notwithstanding any other provision of law,
6 no Federal agency shall take any action, the effect of which
7 may be substantially to lessen competition, to tend to create
8 a monopoly, or to create or maintain a situation involving a
9 significant burden on competition, unless it finds that—

10 (1) such action is necessary to accomplish an
11 overriding statutory purpose of the agency;

12 (2) the anticompetitive effects of such action are
13 clearly outweighed by significant and reasonably cer-
14 tain benefits to the general public; and

15 (3) the objectives of the action and the overriding
16 statutory purpose cannot be accomplished in substan-
17 tial part by alternative means having lesser anticompe-
18 titive effects.

19 (b) The findings, if required by section 3(a), shall be in-
20 cluded in any opinion accompanying an agency order and
21 shall be included in the statement of basis and purpose incor-
22 porated in any rule or regulation.

23 (c) The Attorney General and the Federal Trade Com-
24 mission may render advice to the agency regarding the find-
25 ings required by section 3(a).

1 ADDITIONAL ANTITRUST REQUIREMENTS FOR CERTAIN
2 INDEPENDENT AGENCIES

3 SEC. 4. (a) Each independent regulatory agency as de-
4 fined in section 8(c) of this Act, after consultation with the
5 Attorney General and within one hundred and twenty days
6 after enactment of this Act, shall establish procedures by
7 which the Attorney General will be notified of important
8 pending agency action subject to section 3(a).

9 (b) In any administrative or judicial proceeding subject
10 to section 3(a) and involving independent regulatory agen-
11 cies, as defined in section 8(c), the Attorney General and the
12 Federal Trade Commission may each appear as a party of
13 right.

14 (c) Each independent regulatory agency as defined in
15 section 8(c) must convene a hearing or other appropriate pro-
16 ceeding if, in the opinion of the Attorney General, the re-
17 quirements of section 3(a) have not been met and a hearing
18 has not already been held pursuant to section 553 or 556 of
19 title 5, United States Code.

20 (d) The Attorney General and the Federal Trade Com-
21 mission may utilize any and all powers conferred upon them
22 by any other provision of law, including the antitrust laws
23 and the Antitrust Civil Process Act (15 U.S.C. 1311), in
24 carrying out their responsibilities under this Act.

JUDICIAL REVIEW

1

2 SEC. 5. (a) In any proceeding for judicial review of an
3 agency order involving an action subject to section 3(a), the
4 agency or other proponent of the action has the burden of
5 establishing by substantial evidence based on the record as a
6 whole that the requirements of section 3(a) have been met.

7 (b) In any action where the court finds an agency in
8 violation of section 3(a), the court may award costs of litiga-
9 tion (including reasonable attorneys' and expert witness fees)
10 to any party if—

11 (1) in the judgment of the court, the initiation and
12 prosecution of such action served an important public
13 interest; and

14 (2)(A) the economic interest of the person is small
15 in comparison to the costs of effective participation in
16 the action by that person, except that if the person is a
17 group or organization, the economic interests of a sub-
18 stantial number of members of such group or organiza-
19 tion taken individually are small in comparison to the
20 costs of effective participation in such action, or

21 (B) the person demonstrates to the satisfaction of
22 the court that such person does not have sufficient re-
23 sources adequately to participate in the action in the
24 absence of an award under this subsection.

1 REVIEW OF POLICIES AND ANNUAL REPORT

2 SEC. 6. (a) Each Federal agency shall—

3 (1) utilize a systematic approach which will insure
4 the integration of antitrust law and policy in planning,
5 in decisionmaking, and in other activities which may
6 have an impact on competition;

7 (2) identify and develop, in consultation with the
8 Attorney General and the Federal Trade Commission,
9 methods and procedures, which will insure that anti-
10 trust laws and policies, and the promotion of competi-
11 tion, will be facilitated and enhanced in planning, in
12 decisionmaking, and in other activities; and

13 (3) make available to States, political subdivisions
14 of States, institutions, and individuals advice, informa-
15 tion, and assistance in restoring, maintaining, and en-
16 hancing competition in the marketplace at the local, re-
17 gional, national, and international levels.

18 (b) Each Federal agency shall review its present statu-
19 tory authority for the purpose of determining whether there
20 are any deficiencies or inconsistencies which may prevent full
21 compliance with the purpose of this Act. Each such agency
22 shall recommend to the President and to the Congress, not
23 later than January 1, 1980, such measures as may be neces-
24 sary or appropriate to maximize the carrying out of the pur-
25 poses, policies, and provisions of this Act.

1 (c) Each Federal agency shall review and modify pro-
2 spectively its rules, regulations, policies, practices, and pro-
3 cedures so as to have them conform to the purposes, policies,
4 and provisions of this Act.

5 (d) The Federal Trade Commission shall report annually
6 to the President and the Congress on the degree to which
7 Federal agencies have complied with the purposes of this Act
8 by fostering substantial and effective competition in the econ-
9 omy. Such report may focus on the industries or facets of
10 industries, subject to regulation, that the Commission be-
11 lieves should be accorded priority consideration for the pur-
12 pose of promoting competition in the economy.

13 **APPLICABILITY**

14 SEC. 7. (a)(1) Nothing in this Act shall be deemed to
15 authorize or make lawful anything heretofore prohibited or
16 made illegal by the antitrust laws, nor to affect the applica-
17 bility of the penal provisions or the civil remedies therein
18 provided.

19 (2) The provisions of this Act are in addition to and not
20 in lieu of the provisions of the antitrust laws, and no provi-
21 sion of this Act shall be deemed to grant immunity, or to
22 create defenses to actions, under the antitrust laws.

23 (3) Nothing in this Act shall be deemed to preclude the
24 intervention in any agency proceedings by any party, includ-
25 ing the Attorney General and the Federal Trade Commis-

1 sion, and nothing in this Act shall be deemed to preclude the
2 institution or maintenance of any action under the antitrust
3 laws at any time.

4 (b) Effective on the date of enactment of this Act, the
5 last full paragraph of section 7 of the Act entitled "An Act to
6 supplement existing laws against unlawful restraints and mo-
7 nopolies, and for other purposes", approved October 15,
8 1914 (15 U.S.C. 18), is repealed.

9 DEFINITIONS

10 SEC. 8. As used in this Act, the term—

11 (a) "Agency" means each authority of the Gov-
12 ernment of the United States as defined in section 551
13 of title 5, United States Code, except the United
14 States Patent and Trademark Office.

15 (b) "Action" includes the whole or a part of an
16 agency rule, order, license, sanction, relief, or the
17 equivalent or denial thereof, or failure to act as defined
18 in section 551 of title 5, United States Code.

19 (c) "Independent regulatory agencies" means the
20 Interstate Commerce Commission, the Federal Energy
21 Regulatory Commission, the Federal Communications
22 Commission, the Securities and Exchange Commission,
23 the Civil Aeronautics Board, the Federal Maritime
24 Commission, the Nuclear Regulatory Commission, and
25 the International Trade Commission.

1

EFFECTIVE DATE

2

SEC. 9. This Act shall become effective one hundred

3

and twenty days after the date of enactment, and shall apply

4

to all agency action not final at such time.



1 in the belief that competition protects consumers, pro-
2 motes efficiency, and spurs innovation;

3 (2) economic regulation by Federal agencies has at
4 times created unnecessary losses for consumers, fostered
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14 that the fundamental national economic policy of the United
15 States is free and open competition by—

16 (1) minimizing anticompetitive behavior in regu-
17 lated industries;

18 (2) establishing procedures that strengthen and fa-
19 cilitate the application of antitrust and procompetitive
20 policies by Federal agencies; and

21 (3) enabling Federal agencies better to restore,
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23 the marketplace.

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3 law, no Federal agency shall take any action, the effect of
4 which may be substantially to lessen competition, to tend to
5 create a monopoly, or to create or maintain a situation in-
6 volving a significant burden on competition, unless it finds
7 that—

8 (1) such action is necessary to accomplish an over-
9 riding statutory purpose of the agency;

10 (2) the anticompetitive effects of such action are
11 clearly outweighed by significant and demonstrable
12 benefits to the general public; and

13 (3) the objectives of the action and the overriding
14 statutory purpose cannot be accomplished in substantial
15 part by alternative means having lesser anticompetitive
16 effects.

17 (b) The findings, if required by section 3 (a), shall be
18 included in any opinion accompanying an agency order and
19 shall be included in the statement of basis and purpose incor-
20 porated in any rule or regulation.

21 (c) The Attorney General and the Federal Trade Com-
22 mission may render advice to the agency regarding the find-
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5 Attorney General and within one hundred and twenty days
6 after enactment of this Act, shall establish procedures by
7 which the Attorney General will be notified of important
8 pending agency action subject to section 3 (a) .

9 (b) In any administrative or judicial proceeding subject
10 to section 3 (a) and involving independent regulatory agen-
11 cies, as defined in section 8 (c) , the Attorney General and the
12 Federal Trade Commission may each appear as a party of
13 right.

14 (c) Each independent regulatory agency as defined in
15 section 8 (c) must convene a hearing or other appropriate
16 proceeding if, in the opinion of the Attorney General, the
17 requirements of section 3 (a) have not been met and a hear-
18 ing has not already been held pursuant to section 553 or 556
19 of title 5, United States Code.

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22 by any other provision of law, including the antitrust laws
23 and the Antitrust Civil Process Act (15 U.S.C. 1311), in
24 carrying out their responsibilities under this Act.

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7 met.

8 (b) In any action where the court finds an agency in
9 violation of section 3 (a), the court may award costs of liti-
10 gation (including reasonable attorneys' and expert witness
11 fees) to any party if—

12 (1) in the judgment of the court, the initiation and
13 prosecution of such action served an important public
14 interest; and

15 (2) (A) the economic interest of the person is small
16 in comparison to the costs of effective participation in the
17 action by that person, except that if the person is a group
18 or organization, the economic interests of a substantial
19 number of members of such group or organization taken
20 individually are small in comparison to the costs of effec-
21 tive participation in such action, or

22 (B) the person demonstrates to the satisfaction of
23 the court that such person does not have sufficient re-
24 sources adequately to participate in the action in the ab-
25 sence of an award under this subsection.

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2 SEC. 6. (a) Each Federal agency shall—

3 (1) utilize a systematic approach which will insure
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5 in decisionmaking, and in other activities which may
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9 methods and procedures, which will insure that antitrust
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25 out of the purposes, policies, and provisions of this Act.

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5 (d) The Federal Trade Commission shall report an-
6 nually to the President and the Congress on the degree to
7 which Federal agencies have complied with the purposes of
8 this Act by fostering substantial and effective competition in
9 the economy. Such report may focus on the industries or
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19 (2) The provisions of this Act are in addition to and not
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21 vision of this Act shall be deemed to grant immunity, or to
22 create defenses to actions, under the antitrust laws.

23 (3) Nothing in this Act shall be deemed to preclude
24 the intervention in any agency proceedings by any party,
25 including the Attorney General and the Federal Trade Com-

1 mission, and nothing in this Act shall be deemed to preclude
2 the institution or maintenance of any action under the anti-
3 trust laws at any time.

4 (b) Effective on the date of enactment of this Act, the
5 last full paragraph of section 7 of the Act entitled "An Act
6 to supplement existing laws against unlawful restraints and
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8 1914 (15 U.S.C. 18), is repealed.

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CHAPTER FIFTEEN: A GENERAL APPROACH: THE COMPETITION
IMPROVEMENTS ACT (S. 2625)

Recommendation

Congress should enact legislation to require increased consideration of competitive issues in regulatory decision-making. This legislation should adopt the principles contained in S. 2625 which provide that where the effect of a regulatory action may be to substantially lessen competition, to tend to create a monopoly, or to create or maintain a situation involving a significant burden on competition, the agency could not approve such action unless it found that:

- (a) such action is necessary to accomplish an overriding statutory purpose of the agency;
- (b) the anticompetitive effects of such action are clearly outweighed by significant and reasonably certain public benefits; and
- (c) the objectives of the action and the overriding statutory purpose cannot be substantially accomplished by alternative means having less anticompetitive effects.

I. The Need for a Broad Attack on Regulatory Discretion and Inattention to Competition

A decision to impose regulatory limits on a particular industry generally does not address the question of the appropriate role of competition within the regulatory framework. Traditional statutes often do little more than state broad public policy objectives, list the regulators' powers, and tell them to act "in the public interest." In fact, the whole notion of precise standards and guidelines ran contrary to the early philosophy of administrative regulation which tended to rely on regulators' expertise. As a result, the anticompetitive and protectionist tendencies of regulation were left largely unchecked, 1/ and regulators

increasingly interpreted their statutory authority as a mandate to overlook or even suppress competition in pursuing regulatory goals. 2/ As one experienced antitrust practitioner told the Commission, "[I]t has been my experience that competition policy is a marvelous idea and rather few agencies of this government have ever heard of it." 3/

As we have detailed earlier in this report, existing antitrust immunities must be individually examined in their proper context. 4/ Elimination of those exemptions and attendant regulatory schemes that are not currently justified can be accomplished only through an industry-by-industry approach. Nevertheless, a more general measure can deal effectively with the problem of unfettered administrative discretion. Competition should be a principal consideration in agency decisionmaking, and legislation mandating that concept can serve a dual purpose. Until such time as existing immunity and regulatory schemes are subjected to analysis and appropriate change, such legislation will limit unnecessarily anticompetitive regulatory actions. For those activities that remain subject to regulatory oversight, enactment of a legislative mandate to weigh the competitive impact of agency actions will significantly increase the likelihood that regulatory intervention complements rather than inhibits existing market forces.

II. A Proposed Solution: S. 2625

The Commission studied one proposal dealing with a general approach to the interaction of regulation and

competition, the Competition Improvements Act of 1978, S. 2625. 5/ We believe a bill along the lines of S. 2625 can provide a needed message to regulatory agencies that have previously functioned with vague statutory guidelines. The proposal would encourage and facilitate the use of procompetitive policies in regulatory decision-making. It would require agencies to focus on the economic effects of their actions, and to maximize competition as a regulatory tool. 6/ To accomplish these general goals, the bill establishes a uniform antitrust standard to guide both administrative agencies and reviewing courts and provides additional procedures to promote adherence to the new standard. For the most part, the mandate of S. 2625 would apply within established regulatory procedures and structures.

The heart of S. 2625 is section 3(a). This section establishes a three-part test for all federal agencies to apply to any action "the effect of which may be substantially to lessen competition, to tend to create a monopoly, or to create or maintain a situation involving a significant burden on competition." 7/ The agency could not approve any such action unless it found:

- (1) such action is necessary to accomplish an overriding statutory purpose of the agency;
- (2) the anticompetitive effects of such action are clearly outweighed by significant and demonstrable benefits to the general public; and

- (3) the objectives of the action and the overriding statutory purpose cannot be accomplished in substantial part by alternative means having less anti-competitive effects. 8/

The first part of the test requires the agency to specify the statutory purpose it seeks to accomplish by its action. The second part of the test demands that the benefits to the general public must clearly outweigh the anticompetitive effects of the action that is approved. The criteria of this balancing test are very similar to those contained in the Bank Merger Act and Section 105 of the Atomic Energy Act, 9/ and to the revised public interest standard approved by the Supreme Court in Federal Maritime Commission v. Akteibolaget Svenska Amerika Linien. 10/ Finally, the third element of the test specifies that the proposed action must be the least anticompetitive option available that could accomplish the stated regulatory objective.

The bill also provides that enumerated independent regulatory agencies 11/ would be subjected to additional requirements. Those agencies would have to notify the Attorney General of important pending actions that may have anticompetitive consequences. The Attorney General and the Federal Trade Commission could appear as a party of right in these agencies' proceedings, and in particular circumstances the Attorney General could require the agency to hold a hearing. The statute would also authorize the Department of

Justice and the Federal Trade Commission to use all of their investigatory powers, including those provided by the Antitrust Civil Process Act, in carrying out their responsibilities under the Act.

Section 5 of the bill provides that in any proceeding for judicial review, the agency has the burden of showing by substantial evidence that it has met the competitive standards set by S. 2625. All federal agencies would be required to review their statutory mandates, rules and policies in order to determine whether changes are warranted to facilitate compliance with the competitive standard established by the bill. Finally, the Federal Trade Commission would be required to report annually on the progress made by federal agencies in fostering effective competition.

III. The Advantages of a Specific Legislative Standard

Legislation embodying the principles of S. 2625 would push the regulatory agencies and courts beyond their current sporadic attention to competitive concerns to more meaningful and consistent application of competitive principles. Current law on agency responsibility to consider competition in reaching decisions has been aptly described as a collection of rules that "are very often articulated in a variety of cases that may be difficult to understand, may be internally inconsistent, will differ from industry to industry, and will be lacking in the kind of clarity and

uniformity that it is desirable to have. . . ." 12/ Under existing law, virtually every agency has at some point demonstrated or been forced to demonstrate some deference to antitrust concerns in its "public interest" or "public convenience and necessity" determinations. 13/ These examples fall well short, however, of providing a set of clearly articulated rules whose application has solved the problems created by the excessively vague standards in regulatory statutes.

The general balancing tests contained in Section 3(a) of S. 2625 are similar to those already utilized in previous legislation, and experience in those areas has shown that regulatory agencies and antitrust enforcers can work together successfully to implement such standards. 14/ Above all, a bill like S. 2625 would help tip the balance of agency decisionmaking in favor of competition. Those proposing agency decisions with anticompetitive consequences would have the burden of showing that overriding regulatory purposes required the action and that no less intrusive alternatives exist for achieving the same goals. 15/ Such a required showing would not unduly burden agencies in the pursuit of legitimate regulatory goals, but would provide a specific set of requirements that could not be disregarded as casually as, for example, a simple admonition to the agencies to consider competition where appropriate. 16/

Those who oppose the approach of S. 2625 argue that

application of the proposed uniform antitrust standard to agency actions affecting competition would cause a sizable increase in litigation, regardless of the outcome of agency rulings, further aggregating the delay and uncertainty which are such criticized features of the administrative process. 17/ The bill does not, however, create any new causes of action nor is it intended to bifurcate appellate review. Except where the Attorney General requested one of the specifically listed independent regulatory agencies to hold a hearing, the bill does not change administrative procedures, nor does it create standing for additional parties. We would not, therefore, anticipate any significant increase in litigation or administrative delay.

The bias in favor of competition created by S. 2625 would not, of course, go so far as to force an agency to abandon considerations not directly related to competition, such as the adequacy of health and safety standards. 18/ As a practical matter the application of S. 2625 would reduce the probability that agencies would adopt entry limits, set price floors, and approve collective ratemaking agreements among the regulated firms except in those rare instances in which reliance on more competitive approaches truly would frustrate essential statutory objectives. 19/ To the extent that the bill's standards and procedures limit agency discretion, such limitation is warranted by the past record of many regulators who failed to recognize the role of

competition in serving the public interest. The Commission recommends enactment of a strong, uniform antitrust standard for agency decisionmaking as an important step toward channeling agency discretion in a procompetitive direction.

Some Members' Concern with the Bill

While a significant majority of the Commission favors a bill with the scope of S. 2625, as presently drafted, several members believe that environmental, health and safety regulation should be removed from the bill's ambit, arguing that the bill could unduly hinder implementation of such regulation. These members suggest that such an amendment could reduce compliance costs significantly without limiting the most important potential benefits of the bill. These members are concerned that the bill as presently drafted could be used as a delaying tactic by the subjects of such regulation, that it could be an obstacle to emergency regulation and expedited appellate review, and that the bill implies, because of the burden of proof that the bill establishes, that competitive concerns outweigh health and safety goals.

A majority of this Commission, however, is satisfied that the threshold test for applicability of the statute's requirements adequately defines the types of regulatory decisions to be covered. The bill's requirements come into play only after genuine and substantial competitive concerns are triggered. Even if competitive concerns are raised, an

agency action to protect health and safety will be an overriding statutory purpose, and an agency will only be required to make a reasoned search for the least anti-competitive alternative available to accomplish such purpose. Additionally, unnecessary delay can be prevented by creative use of informal and emergency procedures already established in administrative practice.

FOOTNOTES TO CHAPTER FIFTEEN

1/ Antitrust Commission Hearings 44-46 (July 26, 1978, morning session) (testimony of Joe Sims, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice).

2/ The Competition Improvements Act of 1975: Hearings on S. 2028 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 29 [hereinafter cited as S. 2028 Hearings] (prepared statement of Thomas E. Kauper).

3/ See Antitrust Commission Hearings 81 (July 26, 1978, afternoon session) (testimony of Terrence R. Murphy, member, Task Force Panel on Antitrust Immunities, Antitrust Section, American Bar Ass'n).

4/ See Chapter Nine supra.

5/ S. 2625 is an amended version of S. 2028, the Competition Improvements Act of 1976. S. 2028 was originally introduced in 1975 by Senators Kennedy and Hart. The bill was referred to the Antitrust and Monopoly Subcommittee and was favorably reported by both the Subcommittee and the full Senate Judiciary Committee in significantly amended form. See Senate Comm. on the Judiciary, Competition Improvements Act of 1976, S. Rep. No. 1045, 94th Cong., 2d Sess. 31 (1976) [hereinafter cited as Committee Report]. The bill was reintroduced in its amended form as S. 2625 by Senator Kennedy on March 1, 1978. S. 2625, 95th Cong., 2d Sess., 124 Cong. Rec. S2663 (1978).

6/ Committee Report, supra note 5, at 1-4.

7/ S. 2625, 95th Cong., 2d Sess. § 3(a), 124 Cong. Rec. S2664, (1978).

8/ The language in subsection (2) above differs slightly from the wording of the Commission's recommendation set out at the beginning of this Chapter. The bill as presently drafted requires "significant and demonstrable benefits" outweighing anticompetitive effects. We believe that the language "significant and reasonably certain" benefits in this subsection would be more clear and is consistent with the principles of the bill.

9/ See Committee Report, supra note 5, at 21-23.

10/ 390 U.S. 238, 243-46 (1968). See H. Cohen, The Extent to Which Federal Agencies Must Consider Antitrust Policies: An Analysis of the Potential Impact of S. 2028 (Jan. 22, 1976) (report prepared by Congressional Research Service for Sen. Philip A. Hart), reprinted in S. 2028 Hearings, supra note 2, at 364.

11/ Section 8(c) of the bill defines "independent regulatory agency" as the Interstate Commerce Commission, the Federal Power Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Maritime Commission, the Securities and Exchange Commission, and the Nuclear Regulatory Commission. See note 5 supra.

12/ Antitrust Commission Hearings 65 (July 26, 1978, afternoon session) (testimony of David Boies, Chief Counsel and Staff Dir., Subcomm. on Antitrust and Monopoly, Sen. Judiciary Comm.).

13/ See, e.g., Gulf States Utilities Co. v. Federal Power Comm'n, 411 U.S. 747, 756-62 (1973); Federal Maritime Comm'n v. Akteibolaget Svenska Amerika Linien, 390 U.S. 238, 243-46 (1968); United States v. Federal Communications Comm'n, ____ F.2d ____ (D.C. Cir. 1978).

14/ Committee Report, supra note 5, at 21-23.

15/ Antitrust Commission Hearings 66 (July 26, 1978, afternoon session) (testimony of David Boies).

16/ Id. at 85-87. See also id. at 92 (testimony of Edmund E. Harvey, member, Task Force Panel on Antitrust Immunities, Antitrust Section, American Bar Ass'n) (agreeing that proposal to have agencies consider competition where appropriate is unlikely to have much effect). This approach could be supplemented with an Executive Order mandating additional consideration of competitive concerns. Cf. Exec. Order No. 12044, 43 Fed. Reg. 12,661 (1978) (Improving Government Regulations).

17/ See, e.g., Antitrust Commission Hearings 69-70 (July 26, 1978, afternoon session) (testimony of Victor E. Ferrall, Jr., member, Task Force Panel on Antitrust Immunities, Antitrust Section, American Bar Ass'n); id. at 72-73, 88 (testimony of Edmund E. Harvey).

18/ Prepared statement of David Boies, Chief Counsel and Staff Dir., Subcomm. on Antitrust and Monopoly, Senate Judiciary Comm., to the Antitrust Commission 4 (July 26, 1978).

19/ Antitrust Commission Hearings 103-04 (July 26, 1978, afternoon session) (testimony of David Boies).

ADDITIONAL SUBMISSION OF TIMOTHY PERSON
BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of:

ALLSTATES TRANSWORLD VAN LINES, INC.,	}	Docket No. MC-14009
Common Carrier Application		

STATEMENT OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE IN SUPPORT OF THE APPLICATION OF
ALLSTATES TRANSWORLD VAN LINES, INC.

I. My name is MARGARET BUSH WILSON. My address is 4054 Lindell Boulevard, St. Louis, Missouri. I am Chairman of the National Board of Directors of the National Association for the Advancement of Colored People (hereinafter "NAACP"), located at 1790 Broadway, New York, New York. I serve on the following other boards, committees and foundations: the NAACP Special Contribution Fund (the tax exempt arm of NAACP), the Monsanto Company, the Mutual Real Estate Investment Trust (M-Reit), the Police Foundation, the American National Red Cross, the United Way of America, the boards of trustees of St. Augustine's College, Raleigh and Webster College and Washington University in St. Louis and the General Advisory Committee to the Arms Control and Disarmament Agency. I am engaged in the private practice of law in St. Louis as a senior partner in the firm of Wilson, Smith and Smith with experience in real estate and housing, municipal law, civil rights law and corporate and probate matters.

II. The NAACP is the largest and oldest civil rights organization in the nation with some 1700 branches in fifty states and approximately 450,000 members. The NAACP's purpose and goal

is to insure the political, educational, social and economic equality of minority group citizens and to eliminate race prejudice among citizens of the United States. During its sixty-nine year history, the NAACP has pursued its goals in the courts, the Congress, other legislative bodies and in communities around this nation. For years it has had a department of labor which has focussed on jobs and employment opportunities for minorities. Recently, the NAACP has created a department of economic development to provide technical assistance and support to minority businesses and encourage more minority business development. The NAACP, as a rule, does not conduct job training programs, but vigorously supports such programs in the public and private sectors which are especially beneficial to minority group members.

III. The NAACP supports the application of Allstates Transworld Van Lines for several reasons:

- residents of the inner city in urban areas, largely black persons, our constituents, need better transportation service

- blacks and other minorities need increased opportunities as entrepreneurs and employees of newly vitalized companies

- severe unemployment problems among blacks, especially young blacks, can be eased by the growth of this company and others with similar goals

- there is an urgent need for business ventures in the inner cities of our urban areas which are labor intensive and provide on-the-job training

- it is the public policy of this nation to encourage minority business development

IV. There is a demonstrated need for Improved Household Goods Moving Service.

As a resident of the city of St. Louis for over thirty years, my experience is concentrated there. However, in my work with the NAACP, I have become familiar with problems of minorities and their communities across the country.

Black, urban neighborhoods are ill-served in many respects. Grocery stores are expensive and few, safe and habitable housing is scarce, mass transit systems are designed to serve suburban commuters rather than inner city residents, lending institutions are reluctant to provide financial support to inner city residents and there has been an exodus of business to the suburbs.

In St. Louis, there has been a dramatic flight of household goods companies from the central city since the 1960's. With Mr. Person's help, I have constructed two maps showing first, the present location of predominantly black neighborhoods in St. Louis, and second, the movement out of the city of van lines representing major carriers. Attachment 1. The maps show that only two out of nineteen companies continue to remain in the city.

The effect of this flight by agents of major van lines on service to the city is clear if one looks at the census data.^{1/} Almost half of St. Louis' population lives in a low income neighborhood.^{2/} In the low income areas, blacks accounted for 71%

^{1/} "Low Income Neighborhoods in Large Cities: 1970: St. Louis, Missouri". U.S. Dept. of Commerce, Bureau of Census, PC (S1)-98, June, 1974, p. ii, iii.

^{2/} Low income neighborhoods are those with more than 20% of the population below the poverty level.

of the population. This confirms what is obvious in our north-eastern and midwest cities: that low income urban neighborhoods are predominantly black. However, the census report showed further that blacks who were above the poverty level were more likely to live in low income, black neighborhoods than were whites who were whites who were below the poverty level 3/ Non-service or reluctant service to poor, black communities disservices more than poor blacks who, it may be argued, cannot afford service anyway; it hinders the mobility of black people who are not poor, too.

That there is little service by major van lines in black neighborhoods has been recognized by the carriers. United Van Lines, which is domiciled in my home city of St. Louis, said in 1969 that carriers "practically embargoed" areas inhabited by blacks in St. Louis. 4/

This situation is one of serious concern to me as a St. Louis resident residing in the inner city and to the NAACP. Frankly, it comes as a surprise that the big carriers are protesting Allstates' application, given their unwillingness to serve black areas and their well-known inability to meet the general demand for moving services. There is an overall need for household goods services, but there is an even greater need for such service in black, urban communities.

3/ 75% of the non-poor blacks lived in low income neighborhoods, compared to only 2 0% of the non-poor whites.

4/ Reply of United Van Lines, Inc. to Applicant's Petition for Reconsideration Herein, Timothy David Person d/b/a Allstates Transworld Van Lines, I.C.C. Docket MC 133745, dated Se p. 22/69

V. Other benefits seen by NAACP

The need for service to inner city residents is not the only reason NAACP supports the Allstates Transworld Van Lines application. Our goals include a broad range of interests, several of which can be addressed by Allstates Transworld Van Lines.

a. Business development

The sparse and very limited number of sound businesses in black communities contributes to many other problems of these areas. The lack of a substantial tax base hampers any attempts to improve the situation. NAACP interest in the Allstates project is based in part on the broad, nation-wide opportunity presented. Unlike most business development ventures, which involve a single company, the Allstates project involves dozens of small businesses, many located in the inner city. Given access to interstate markets and given the management assistance of Allstates, each individual trucking company which serves as an agent will be able to grow and undoubtedly prosper. Each agent will be able to serve his entire community, not just those seeking local moves. Each member of the Allstates team will be able to draw on the Allstates capacity for assistance, and to contribute his own excess capacity to the carrier's system.

Sound, viable businesses mean a return of capital to the inner city and an increase in the number of steady jobs.

b. Employment

One of the greatest problems addressed by the NAACP is the high rate of unemployment facing blacks and especially

black youth. The household goods moving industry in particular is an ideal mechanism for serious address to this problem. Jobs as packers, warehousemen, helpers and drivers do not require formal education, and potential employees can be easily trained. Each agent of Allstates will create a local job cluster of clerks, secretaries, drivers, helpers, warehousemen, sales people and managers. Compared to many business development efforts which require significant capital, a local household goods moving company is labor intensive, providing a large number and variety of jobs for the investment involved.

For these reasons, the NAACP believes that Allstates Transworld Van Lines, Inc. effort can provide immediate and discernable benefit.

c. End to illegal or "grey" trucking

Without access to the financial stability of interstate markets of a large carrier, many local moving companies that do serve inner city areas are uninsured or under-insured; they may operate interstate without a certificate; they may lack resources to fulfill their honestly made promises of service. These are problems for the involved trucker, but they are also problems for the consumer forced to rely on these truckers. Allstates, as the carrier responsible for the acts of its agents will be able to assure that a dequate insurance is carried, that each operation is run in a business-like manner, and that the public--no matter where it is located--is served.

VI. NAACP Support not Based Solely on Race

NAACP is aware of the Commission's decisions that the race of an applicant is not relevant factor in an operating rights case, except where it relates to a special ability to provide service. While we disagree with that policy, we do not think the limits imposed by the Commission are relevant here.

The concern of the NAACP is with the service provided to black people and the representative participation of local black truckers in the household goods industry. That the owner of Allstates Transworld Van Lines is black is not critical to our support.

During peak months in the industry, apparently all people experience service problems and lack of service. Black people in the inner cities receive even less service. The Interstate Commerce Commission has expressed its concern with problems industry-wide. The NAACP is concerned with the adequacy of service to black people and other minorities. So long as the major van lines, the reputalbe companies most able to provide service, do not serve inner city, black neighborhoods, and hire very few or no black agents to serve these areas, there is a need for carriers who will serve our people and who will associate themselves with others willing to serve.

Allstates Transworld Van Lines, Inc. has indicated that it will serve this need. The Company has gathered a group of potential agents who apparently are serving inner city neighborhoods now but are limited in the service they can provide by lack of interstate rights. The NAACP supports Allstates for that reason. The fact that the owner of Allstates is black and is

presently serving low income, black neighborhoods, only lends credibility to his promise to us and to the public.

VII. Conclusion

The NAACP understands that this Commission's original decision to deny the application of Allstates was that there was "no need for the firm's services". By implication this finding meant that the Commission concluded that some 23 million black Americans were being adequately served by existing carriers. This is not the fact. It is not the fact for the reasons which have been outlined in this presentation, and for the further reason that there still exists in our society some of the vestiges and constraints of racism whether we like it or not.

As a duly constituted regulatory agency of the Federal Government bearing primary responsibility for the enforcement of federal regulations relating to the dynamic transportation industry, it is imperative that the peculiar difficulties faced by the public in urban, minority communities be faced realistically and forthrightly.

On March 27, 1978, the President of the United States delivered his message to Congress on a comprehensive National Urban Policy. The thrust of that policy as stated was "to build a New Partnership involving all levels of government, the private sector, and neighborhood and voluntary organizations in a major effort to make America's cities better places in which to live and work."

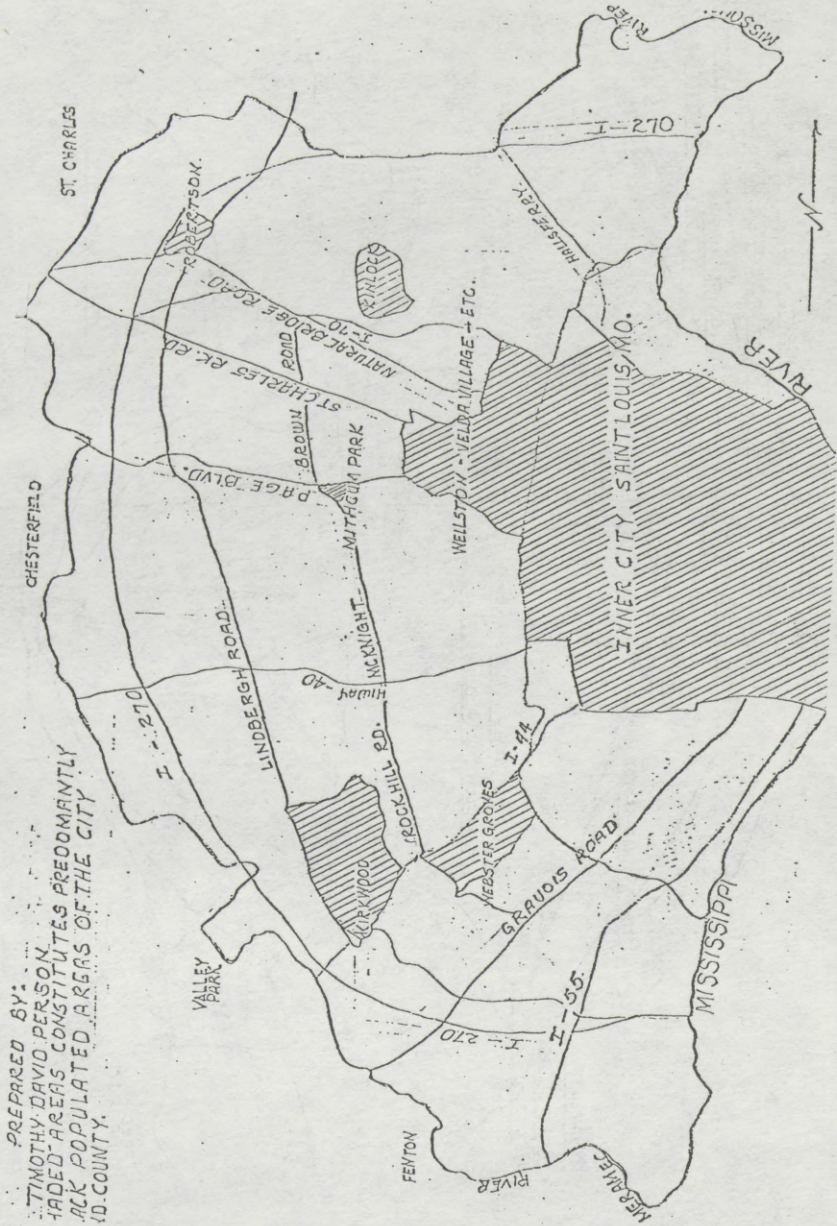
Two of the principles by which this New Partnership will be guided, stated President Carter, were, first, that of "being flexible enough to give help where it is most needed and to

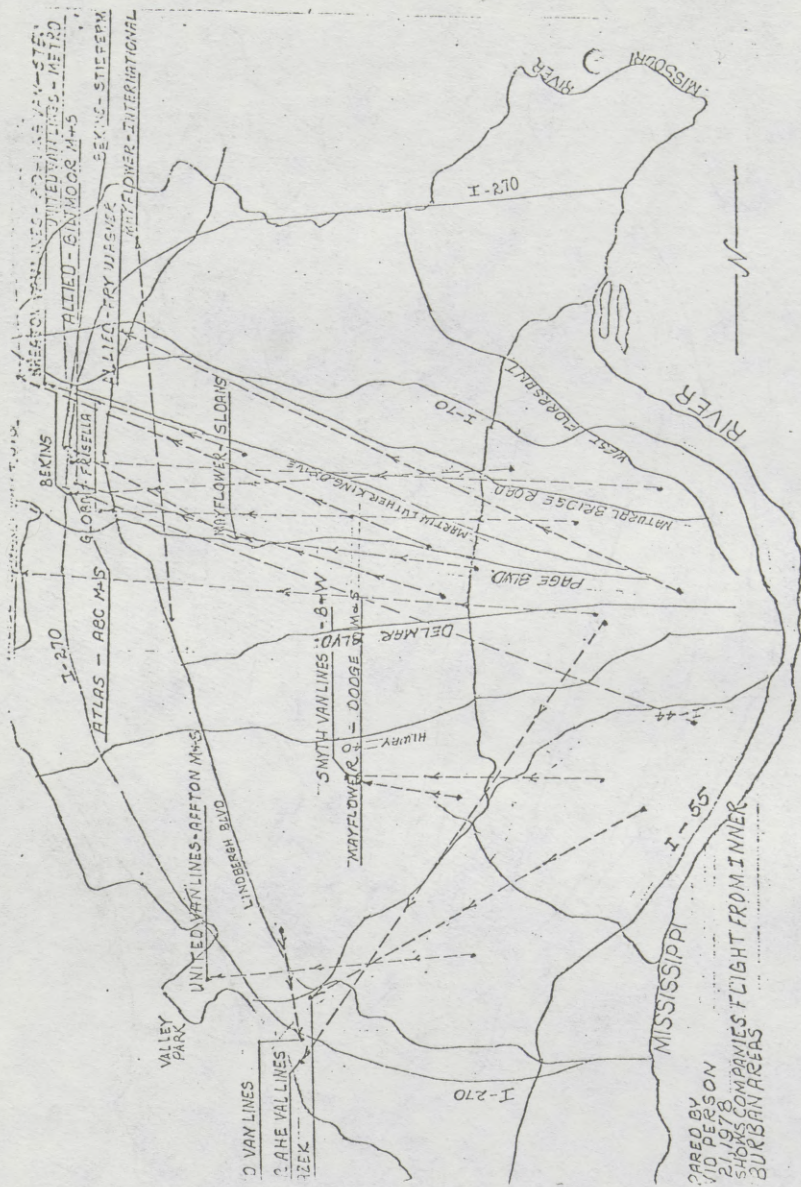
respond to the particular needs of each community", and second "increasing access to opportunity for those disadvantaged by economic circumstances or history of discrimination".

As a governmental, regulatory agency, the Interstate Commerce Commission, in the public interest, and in furtherance of stated public policy, has a duty and responsibility to recognize that there is a major portion of the public in the minority community which is inadequately served by present carriers, and favorable consideration should be given to applicant, Allstates Transworld Van Lines, Inc., and its plans and capability to address this need.

Respectfully submitted,
NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE

By Margaret Bush Wilson,
Chairman of the Board





AGENCY COMMENTS

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1101 SHERIDAN, N.W., SUITE 1200
WASHINGTON, D.C. 20037
(202) 254-7020OFFICE OF
THE CHAIRMAN

July 11, 1979

Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Chairman Kennedy:

This is in response to your request for our comments on S. 1291, the Administrative Practice and Regulatory Control Act of 1979. I must emphasize that the Administrative Conference as a body has not considered this bill and that the views set forth herein, to the extent they go beyond the formal Conference recommendations I cite, are those of my Office and not necessarily those of the Conference as a whole.

When you introduced S. 1291 you remarked that it is intended to complement other important regulatory proposals such as S. 262, introduced by Senator Ribicoff, and colleagues on the Governmental Affairs Committee, or the Administration's regulatory reform bill (S. 755, H.R. 3263). Copies of our detailed comment on those bills are enclosed.

TITLE IRulemaking Procedure

Title I of S. 1291, Improving the Regulatory Process, would significantly modify the informal rulemaking section of the Administrative Procedure Act, 5 U.S.C. § 553. The revision would narrow several of the present exemptions from notice-and-comment procedure, alter the existing minimum procedural requirements applicable to all non-exempt rules, and, in new section 553a and new sub-sections 553(c) and (f), establish more rigorous requirements for "significant" rules.

Narrowing of exemptions. The present exemption from notice-and-comment procedures for matters relating to "public property, loans, grants, benefits or contracts," would be eliminated. Because of the substantial public impact of many of these rules, the Administrative Conference has long favored this step. See ACUS Recommendation 69-8, 1 C.F.R. § 305.69-8.

The bill also narrows the present exemption for matters involving a military or foreign affairs function of the United States so that it covers only such functions as are "specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy." This change, which makes the exemption consistent with the parallel provision in the Freedom of Information Act, 5 U.S.C. § 552(b)(1), is expressly supported by the Conference, see ACUS Recommendation 73-5, 1 C.F.R. § 305.73-5.

For these reasons, we prefer the approach taken by S. 755. The bill also takes account of the fear of agency bias in distributing the funds by requiring the agency to structure its decision-making process so that the regulatory unit making the final determination on a grant of assistance is separate from the unit responsible for presenting or deciding the case. The Conference could quite appropriately evaluate agency rules and procedures and make reports on agency activity under this program. Further, consistent with other proposals in S. 1291, it could issue advisory guidelines on the program for the agencies' use.

TITLE II

Title II would enact a new requirement, placed in a new chapter 6 of Title 5, U.S.C., that agencies apply a pro-competitive standard in taking certain actions. This proposal tenders issues that are primarily substantive, and, therefore, beyond our statutory concern and expertise. However, we would raise a few questions that occur to us upon reading the text. Section 602 forbids agencies to take certain actions unless they find that such action "is the least anticompetitive alternative legally and practically available to achieve statutory goals." We doubt that the term "least anti-competitive" has a sufficiently definite meaning to provide guidance to the agencies. For example, would an agency be required always to choose the smaller of two entities competing for an exclusive license, or could it take into account the financial responsibility and, hence, greater viability of the larger applicant? Would the term "license" cover such actions as that of the National Park Service in granting or denying permits to concession stands in the national parks? What about the grant of offshore oil leases by competitive bid?

Finally, the language in § 602(b) does not parse very well. It speaks of "regulation" based upon "a finding that an applicant for entry does not meet [health and safety standards]." But the term "regulation" is nowhere defined. If it is intended to mean "rule," as defined in section 551, the result is confusing because few rules "directly" regulate entry or are based upon a "finding" as to particular applicants or licensees.

TITLE III

Title III sets up a high-level Committee on Regulatory Evaluation to evaluate and assess on a fixed schedule the need for retention of specific, regulatory agencies. Based upon the recommendations of the Committee, the President would report on these agencies and propose appropriate reform legislation, which would be "privileged" in Congress.

We have no comment on this proposal.

TITLE IV

This portion of the bill, devoted to the functions and structure of the Administrative Conference, is of especially great interest to us. The bill would make a number of important amendments to the Administrative Conference Act, 5 U.S.C. §§ 571-576.

Structure of the Conference

As I believe it very important to do, S. 1291 retains the basic membership structure of the Administrative Conference. Even though the membership would not

U.S. SENATE
WASHINGTON, D.C. 20510

June 15, 1979

B-1-35

Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On March 6, 1979, I testified before the Judiciary Committee in support of S. 382, as it was introduced in February. I have recently reviewed the changes in the new draft, and I have the following comments.

The new draft makes several changes from the original version on which I testified. It limits the scope of the bill, focuses the findings that each agency must make on anticompetitive alternatives, removes the power of the Attorney General to require an administrative hearing on competition issues, and eliminates the original judicial review standard, which seemed to apply a hearing-type evidentiary standard ("substantial evidence on the record") to rulemaking proceedings. These changes appear to have two major effects: they limit the applicability of the statute to a limited class of agency actions, and they clarify the bill's purpose as instituting a routine for considering the competitive consequences of agency decisions, rather than redirecting the primary statutory goals of each agency.

The scope of the former version was defined in terms of the effect of the agency action: if the action was likely to create or maintain an anticompetitive situation, the agency had to make the specified findings. The unamended bill therefore applied to actions intended to promote health, safety, or fair business practices as well as to actions intended primarily to control supply and demand in some way. The scope of the amended version is defined in terms of the purpose of the action to be taken. It does not apply unless the action is intended to regulate entry, price, production or distribution levels, or agreements among producers or purchasers (these actions will be referred to as "economic regulations"). Thus, the scope of the new draft excludes non-economic regulations (even though they may have a substantial effect on competition) and includes all economic regulations (even the ones that do not meet the old version's threshold standard derived from the Clayton Act).

I took the position in my testimony that "least anticompetitive effect" analysis should be applicable to both consumer protection and economic regulation. The fact that the amended bill limits its application to economic regulation does not change my basic support for the bill. Procompetitive thinking is surely needed in economic regulation, regardless of whether it is used in other areas. And application of the legislation to all such decisions, regardless of their actual effect on competition, is an improvement; attention to competitive alternatives is good policy even for minor decisions, and it avoids uncertainty over which decisions are covered by the law. Nevertheless, I feel that cutting away all application to government action other than strictly economic activities is a serious loss. Public-utility-type regulation such as the classic CAB pricing and entry controls is already shrinking fast, and today represents only a small fraction of total U.S. government regulatory activity. The value of competition is already widely recognized in the economic area. The real frontier question is whether and how we can allow the broadest range for innovation and rivalry in areas such as auto or industrial safety, energy and natural resources, and the vast field of distribution of benefits to the needy. I feel that the bill could have been a major force for change in these areas.

One passage of amended Section 3(a) seems to require more precise language or an explanation. That paragraph requires findings for agency action that "regulates or licenses entry under a scheme in which the level of entry is subject to limitation." I surmise that the underlined portion is intended to focus on types of regulations that purposely limit the number of competitors in a given market, without regard to fitness. However, the distinction is not too clear. I suggest it would be clearer to say, "regulates or licenses entry for reasons other than health, safety, or fitness."

The amended bill requires only that the contemplated action be found to be "the least anticompetitive alternative legally and practically available to achieve statutory goals." This seems to make clear that any statutory goal is a valid justification for agency action, as long as that action minimizes the anticompetitive effects as much as possible. The public benefits need not outweigh the anticompetitive effects. This seems more in keeping with the nature of legislative and administrative processes. It should be the responsibility of the agencies to carry out statutory directives in the most competitive manner, while it is properly the job of Congress, not regulators, to weigh the importance of statutory goals against their anticompetitive consequences. The amendments thus make clear that the Competition Improvements Act is intended to force regulators to consider competitive alternatives only within the context of statutory directives, and that the Act was not intended to amend each agency's basic statute by inserting a substantive pro-competition override. These changes are consistent with my original interpretation of the bill and add to its clarity.

Section 4 of the original version of S. 382 gave special powers to the Attorney General and the Federal Trade Commission in dealing with independent regulatory agencies. One of those special powers has been withdrawn, and those that remain are now applicable to all Federal agencies. I expressed reservations about two parts of Section 4 that have not been affected by the amendments. First, the bill still provides that the Attorney General and the FTC may appear as parties of right "in any administrative or judicial proceeding subject to Section 3." I have no objection to their appearance as of right in an administrative proceeding, but if they have not appeared at the administrative level, they should not be admitted as of right at the judicial review stage. It is not clear what the bill means by "judicial proceeding subject to Section 3," since only agency actions are subject to Section 3. The section-by-section analysis of the proposed amendments only describes the provision as applying to "agency proceedings," so some clarification is needed. Second, the amended version retains intact the permission for the Attorney General and the FTC to use their full discovery powers in all matters under the proposed law. These powers would include use of discovery tools, such as CID's, that would be unavailable to other parties, including the agency. In fairness, the Attorney General and FTC should be restricted to the normal discovery powers applicable to the agency and parties to the proceeding, and if they are permitted to use their special powers, then all parties should be extended similar privileges.

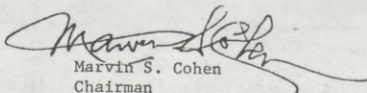
Other changes to the bill are either in line with my earlier recommendations or unobjectionable. The requirement of former Section 5(a) that the "agency has the burden of establishing by substantial evidence based on the record as a whole that the requirements of Section 3(a) have been met" has been removed as recommended. The old requirements of Section 6 that the agencies must "utilize a systematic approach," consult with the Attorney General and the FTC, and review its statutory authority and report to the President and Congress have been eliminated, leaving a one-sentence requirement, without time deadline, that the agency "review and modify its rules, regulations, policies, practices and procedures." This gives agencies more flexibility and discretion on how to implement the provisions of the Act, emphasizing the objective of adopting anticompetitive policies, rather than the actual process of internal review. Finally Section 9 would make the proposed legislation applicable to all agency action begun after enactment. The old version would have applied to all agency actions not final within 120 days after enactment. The amended version is preferable, as it avoids the possible need to reopen substantially completed cases.

I repeat my strong support for S. 382, in either of its two versions. Although I favor the broader scope of the original draft, I agree with the other changes made in the new draft. The essential message is that agencies should not rest on outdated practices and policies, no matter how well-established, but they should think creatively to carry out their mandate in the least anticompetitive manner.

Nor do I think that the CAB should be exempted from S. 382. As a co-author of the Airline Deregulation Act of 1978, you clearly understand how far toward competitive goals that legislation moves the agency. The fact of its passage and the pro-competitive direction it takes do not, however, mean that the general approach of S. 382 is not relevant to the CAB. Since we already regulate (or deregulate) in the least anti-competitive manner, S. 382's passage will have very little impact on our decisions, but it would be a serious mistake in my view to attempt to judge the degree to which an agency already applies--by organic statute or choice--S. 382's principles in order to decide whether to exempt particular agencies from S. 382. S. 382 should apply to all agencies and the CAB should be no exception.

Please let me know if I can be of further assistance.

Sincerely,


Marvin S. Cohen
Chairman

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

JUN 12 1979

Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

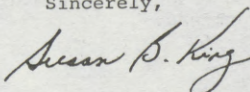
Dear Mr. Chairman:

We are pleased to respond to your request for comments on S.382. It is our understanding that comment is sought on the modified version of S.382 that is now contained in Title II of the draft "Administrative Practice and Regulatory Control Act of 1979."

The thrust of Title II is the requirement that agencies assess the anticompetitive impact of certain agency actions. Title II's applicability is limited to the four types of regulatory action set out in § 602(a)(1)-(4). The Consumer Product Safety Commission does not engage in agency action within the scope of § 602(a)(1), (a)(2) or (a)(4). The Commission does, however, take action, such as the issuance of descriptive standards and bans, that may have the effect of limiting the production or distribution of types and classes of consumer products and hazardous substances. Additionally, the Commission's remedial powers of recall and seizure directly interrupt product distribution. The Commission, however, takes no regulatory action to accomplish health and safety objectives by setting numerical limits on the products that may be produced or distributed, or by allocating that production or distribution. We assume § 602(a)(3) refers to the latter form of regulatory actions and is not intended to apply to the actions traditionally taken by the Commission. We would suggest that the bill and its legislative history make this clear.

Please call us if we can be of further assistance.

Sincerely,



Susan B. King
Chairman



ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

United States Department of Justice

WASHINGTON, D.C. 20530

March 5, 1979

The Honorable Edward M. Kennedy
Chairman, Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

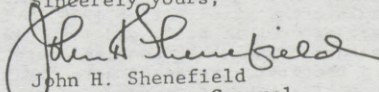
As the Judiciary Committee begins its consideration of S. 382, the Competition Improvements Act of 1979, I wish to pledge the active cooperation and support of President Carter in your effort to eliminate unnecessary regulatory burdens on the competitive market processes of our economy. We believe that this effort will make a major contribution to the broader historic re-examination of the role of regulation in our economy, which you and the Administration continue to place at the top of our common agenda.

The recent trend has been away from antitrust immunities and regulatory schemes, and toward increased reliance on free market mechanisms. In recent years, the Administration and the Congress have taken significant steps to deregulate specific industries. In 1975, Congress abolished the system of fixed brokerage commissions for securities transactions. In 1976, Congress passed the 4R Act that contained limitations of ICC rate-making authority for railroads and confined the ability of railroads to agree on rates. 1977 saw substantial legislative deregulation of air cargo carriers, and in 1978, Congress greatly reduced economic regulation of air passenger carriers. In 1978 also, the President promulgated Executive Order 12044 on Improving Government Regulations, which among other things requires Federal agency heads to choose regulatory approaches which are both effective and minimally burdensome to the competitive process.

In 1979 in his State of the Union Message, President Carter pledged to continue his efforts to reduce unwarranted government regulation. The President has also stated that "[o]f all our weapons against inflation, competition is the most powerful We must therefore work to allow more competition wherever possible so that powerful groups -- government, business, labor -- must think twice before abusing their economic power. We will redouble our efforts to put competition back into the American free enterprise system."

I know that you share our recognition both that many regulatory and other governmental programs serve vital public purposes, and our determination to ensure that in their design and administration, these programs preserve and enhance competition to the maximum feasible extent. Over the coming weeks, we look forward to cooperating with you and the Committee in the development of legislation that will reconcile these shared commitments, and thereafter, to securing its enactment in this session of the 96th Congress.

Sincerely yours,


John H. Shenefield
Assistant Attorney General
Antitrust Division

file

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN REPLY REFER TO:

3700

Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This will reply to your letter of June 22, 1979, seeking comment on S. 1291, "The Administrative Practice and Regulatory Control Act of 1979." I strongly support the purposes of this bill, and I am pleased to offer my comments. The other Commissioners have not been polled, and thus the views expressed here are not necessarily those of the entire Commission.

Due to the number of subjects covered in the bill, title I is divided into two parts for discussion, and titles II, III and IV are discussed individually.

Title I - Improving the Regulatory Process
(Informal Rulemaking and Open Communications)

These parts of title I modify the Administrative Procedures Act to require additional procedures in connection with a new class of agency rules, to be known as "significant rules." A rule is defined as "significant" if it will have an annual impact on the economy of \$100 million or more or if the agency promulgating it expects it to have an equally significant impact. The additional procedures required for agencies attempting to promulgate such rules include: (1) printing an advance notice of the proposed rulemaking; (2) providing a more detailed notice of proposed rulemaking in the Federal Register which would include, "to the extent feasible," a description of alternatives to the proposal and a description of the anticipated burdens of complying with the proposed rule; (3) printing with the adopted rule an analysis of the substantial arguments made while it was being considered and an explanation of why significant alternatives were rejected; (4) conducting a review of significant rules every five years and issuing a report on

their effectiveness; and (5) maintaining a file for all significant rulemakings which would contain (a) copies of, or identification of, all studies and documentary material relied upon by the agency and (b) a record of each communication initiated by persons outside the agency which relates to the merits of the proposed rule.

These provisions have two apparent purposes: increased public awareness of significant agency actions and fuller agency exploration of relevant issues to improve both the initial decision making and the review processes. However, I am concerned that the provisions of the bill may not be the best means of encouraging public participation and may even discourage innovation in this area. Also, I suspect that the analyses resulting from these provisions may be merely formalities which nevertheless will require inefficient allocation of agency resources.

Regarding public participation, advance notice and more detailed rulemaking proposals in the Federal Register may be of use to some participants, such as the citizen group lobbyists. However, these persons are those who least need such notice since they are likely to be monitoring the agency's activities anyway. Unfortunately, the information printed in the Federal Register, no matter how useful, will reach only a very small proportion of those persons interested in agency proceedings. To meet this problem, the F.C.C. has recently initiated a number of steps both to broaden the range of persons notified of impending agency actions, and to state in plain language the issues involved and the means for participating. For example, our Office of Consumer Assistance has held a series of public participation workshops in several cities; the Commission publishes a weekly two page summary of pending significant rulemakings designed for a much broader audience than that of the Federal Register; for particularly important rulemakings we publish "F.C.C. Feedback," which both explains the rulemaking and describes how to file comments; and in one recent rulemaking we experimented with publishing a summary of the initial comments to aid the industry and the public in filing reply comments. While I would not urge that any of these procedures be made mandatory for other agencies, I believe these types of actions are more likely to achieve the desired public participation than the requirements of this bill. Further, for Congress to formalize these or other procedural requirements in any manner could only discourage

experimentation with other approaches which might be more effective. Many promising techniques still need to be tried before the best approaches will be known.

A more useful procedural requirement, in my opinion, is the "open communications" provision that a file must be kept on all significant agency rulemakings which includes, among other things, a record of each communication received on the merits of a proposed rule. Recent judicial decisions in this area have been contradictory, and congressional guidance would be useful. The provisions of the proposed bill closely resemble the procedures adopted by the F.C.C., which I enclose (attachment 1). In three areas, our policy differs from the bill's provisions: (1) our policy applies to all informal rulemakings; (2) it requires logging only those communications that are "presentations" on the merits -- thus, it does not affect contacts which only tangentially relate to an ongoing rulemaking; and (3) it sets a definite time limit when contacts on the merits cease to be *ex parte*. I would recommend adoption of the Commission's position in each of these areas, and it is particularly important that the logging provisions terminate at some point, preferably after all opportunities for review of the decision have passed.

These procedural sections of the bill point out several general problems which result from dealing with procedures through legislation: (1) it is impossible to legislate for all the various situations which will arise in practice; (2) authoritative interpretation of statutes requires court action; and (3) amending or waiving the procedures would require another act of Congress. For example, litigation could result under these proposals if an agency rule were promulgated under regular procedures, but it subsequently became "significant" (due, perhaps, to inflation over a period of years). Opponents of the rule could urge that it was thus invalidated by the agency's failure to comply with the Act, and the ultimate decision would rest with the courts. Obtaining a judicial decision probably would require an extended period of time during which the regulated industry would be uncertain of the rule's validity and, if the rule were invalidated, the adverse impact of this decision would increase in proportion to the length of the delay.

An alternative to direct legislation would be to authorize the Administrative Conference of the United States (Conference or ACUS) to adopt these procedures as uniform rules under the provisions described in title IV of the instant bill. Congress could direct the Conference to adopt specific rules, and it could grant the Conference discretion to interpret or to amend the rules when circumstances warranted such action. Since the Conference is such a large and diverse body, it might be advisable to establish a permanent Committee on Administrative Procedures with authority both to propose rule amendments to the Conference and to hear petitions for interpretation or waiver of particular rules. Prompter action on disputes should be possible than could be obtained from the courts, and the possibility for prospective remedies would exist.

Finally, regarding specific sections of this title, I would recommend (1) specifying how far in advance the "advance notice" of a significant rulemaking must be; (2) clarifying that, although the file required by proposed section 553(d) is public, the required "identification" of all studies or documentary evidence relied upon by the agency does not mean that the agency cannot consider confidential data in informal rulemakings; and (3) eliminating the sections requiring a separate, formal analysis of significant rules at their adoption and every five years thereafter. The analysis requirements seem to me to ignore the fact that agencies already must establish a basis in the record justifying any new rules, and that agencies must continuously review all their policies and rules under the impetus of complaints, petitions for rulemaking, Congressional oversight, and their own familiarity with the operation of their rules gained through ongoing oversight and suggestions from staff. The addition of a formal five year review, limited to specific parts of the administrative process, would artificially narrow the scope of the Commission's focus and would inefficiently reallocate its resources.

Title I - Improving the Regulatory Process (Enhancing Public Participation)

This title would create a new section of the Administrative Procedure Act which would authorize the Administrative Conference to disperse money to members of the public participating in agency proceedings. Certain basic qualifications for government aid are listed, and the ACUS is

directed to draw up procedures for participants to seek funds. Under these regulations, agencies would draw up annual reports for the Conference on the nature of the proceedings for which funds are sought, and the Conference would set up procedures for effective disbursement of the funds. The head of each agency and the Chairman of ACUS must prepare annual reports to the Congress and to the Chief of the Office of Management and Budget (OMB) on these proceedings. \$20 million is allocated to the program for each fiscal year through October 1, 1981.

I fully support creation of a system whereby some of the costs associated with meaningful public participation in agency proceedings can be defrayed. Further, granting the Administrative Conference authority to disperse the allocated funds should prove more adaptable than if Congress itself were to attempt to establish a mechanism. However, the language of the bill only requires the Conference to consult with the agency before dispensing funds. Thus, the Conference could allocate these moneys in a manner different from or even in direct contravention to the wishes of the agency. I would strongly recommend that the final decision on dispensing money should be that of the independent agency since each agency will be in the best position to determine its needs for information. It would seem more efficient and more logical for the Conference to set up the dispersal procedures and then to review agencies' allocation decisions in its annual report to the Congress and to OMB. Also, I would like to suggest that while \$20 million may be adequate for the first year pilot program, allowance should be made for increased funding in subsequent years if experience warrants.

Title II - A Procompetitive Standard For Federal Agencies

This title requires agencies to consider the anti-competitive effects of their actions and to choose the least anticompetitive alternative in achieving their statutory goals. The title applies to four specific areas of agency action: (1) regulating or licensing entry under a scheme in which the level of entry is subject to limitation; (2) regulating the price of goods or services; (3) regulating the production or distribution of goods or services; and (4) regulating agreements among providers or purchasers of goods or services. The F.T.C. and the Attorney General are authorized to intervene as parties of right in any action or the review of

any action in these areas. Also, existing agency rules, regulations, policies, practices and procedures must be modified to conform to the purposes of this title, and the F.T.C. is directed to report annually to Congress and to the President on the degree of agency compliance.

This title is almost identical to sections 3, 4 and 6 of S. 382, the "Competition Improvements Act of 1979," and I have enclosed a copy of my comments on that bill (attachment 2). As I stated there, I believe that by clarifying the weight to be attached to competitive considerations, this bill will have a very beneficial effect on the F.C.C.'s efforts to deregulate in those areas where market forces can operate effectively. However, my letter also notes (1) that, since the F.T.C. and the Attorney General may use their full investigative powers in F.C.C. proceedings, due process considerations might require providing the other parties with discovery rights, and (2) that the provisions for notice to the Attorney General appear unclear and unnecessary.

In addition, it appears that the bill's description of the four areas to which the section applies is much too broad. The present language requires the F.C.C. to make a finding on competitive effects every time it grants a new broadcast or other license, whether or not any policy is affected. Thus, "boiler plate" language, explaining that no competitive effect would occur, would have to be included in many F.C.C. opinions. I suggest limiting the section's requirement to agency actions which would themselves meaningfully affect competition.

Finally, I believe the F.T.C.'s role as watchdog over other agencies should be clarified. I suggest amending the bill's language to specify that the F.T.C.'s annual report should focus on the effects of agency actions on the regulated industry. This would better indicate that the F.T.C.'s oversight role is intended to be industry-wide rather than focusing on an agency's individual decisions.

OFFICE OF CONGRESSIONAL RELATIONS

July 10, 1979

Honorable Edward M. Kennedy
 Chairman
 Committee on the Judiciary
 United States Senate
 Washington, D. C. 20510

Dear Mr. Chairman:

This responds to your letter dated June 22, 1979 requesting our views on S. 1291, the "Administrative Practice and Regulatory Control Act of 1979."

TITLE I - IMPROVING THE REGULATORY PROCESS

Rulemaking Procedures. This Title would establish a new rulemaking procedure for so-called "significant rules" having an annual impact on the economy of \$100 million or more. Basically, the new procedure would require an agency subject to the Administrative Procedure Act (including FDIC) to publish advance notice of significant rules, with a brief description of the substantive areas to be covered and the objectives sought to be achieved, inviting suggestions with respect thereto. An agency would be permitted but not required to hold an informal public meeting, establish an ad hoc advisory committee and use other devices designed to obtain suggestions regarding the area of inquiry. No specific time periods are mandated for this initial phase of the rulemaking process. Then, the agency would proceed to publish at least 60 days' notice of proposed rulemaking. Again at this stage the agency could (but need not) hold informal public meetings, appoint advisory committees and use other methods of evaluating comments on the proposed rule -- including formal, on-the-record hearings if considered appropriate. Excluded from this prescribed procedure, would be --

- (1) any rule required by Executive Order to be kept secret in the interest of national defense or foreign policy;
- (2) any rule involving agency organization or personnel matters or agency rules of procedure;
- (3) any "emergency rule" as to which the agency determines that immediate adoption is necessary to prevent serious injury to an important public interest, substantial frustration of legislative policies or serious damage to any person or any nonemergency rule where notice and public procedure is found by the agency to be "impracticable, unnecessary, or contrary to the public interest";

these funds effectively represent important viewpoints that would not otherwise be heard. Financial assistance would not be provided unless public participation is authorized by statute, regulation, agency practice or the exercise of agency discretion. Safeguards are also specified in the bill to assure proper use of funds provided. We support the thrust of these provisions. Our only difficulty relates to the provision which permits each agency to evaluate the performance of subsidized witnesses and to recoup funds advanced to them if the agency itself determines that the witness "clearly has not provided the representation for which the payments were made" or if the witness has "acted in a manner demonstrating bad faith toward the agency." We believe this recoupment power gives the agency concerned too much influence over the nature of testimony presented and could thereby undercut the whole purpose of this procedure. We would recommend instead that this recoupment power, if necessary at all, be vested in the Administrative Conference, based on consultation with the agency involved.

TITLE II - A PROCOMPETITIVE STANDARD FOR FEDERAL AGENCIES

Title II is a revised version of S. 382, "The Competition Improvements Act of 1979." Generally, Title II seeks to tighten the focus of S. 382 and allay concerns that the bill would inadvertently jeopardize legitimate regulatory goals or adversely affect current efforts to improve the regulatory process. Specifically, while S. 382 originally imposed competitive standards on all agency action, the new draft applies only to four types of action: (1) entry regulation, (2) price regulation, (3) production limitations, and (4) approval of private agreements. In these four areas agencies would be required to consider the competitive effects of their actions and choose the least anticompetitive alternative legally and practically available to achieve statutory goals.

Title II would seem to cover such FDIC actions as deposit insurance, merger and branch applications, Regulation Q-type limitations on interest rates paid by insured banks, and other actions restricting service offerings by banks. The effect on competition is already a major consideration in connection with most of these types of regulatory actions taken by the FDIC.

We generally support the thrust of S. 382. We believe, however, that a Cabinet-level department (most logically the Justice Department), rather than the Federal Trade Commission, should be granted authority under the bill to report annually to the Congress on the degree of compliance by Federal agencies with the bill's requirements. Alternatively, we would recommend that each Federal agency be required to include such material in its own annual report to Congress. Neither approach is reflected in the revised provisions in Title II of S. 1291. We have difficulty with the concept of one independent regulatory agency policing the compliance by other agencies with statutory requirements.

One area of difficulty created by the revised provisions of Title II is the right granted to the Justice Department and Federal Trade Commission to intervene in regulatory proceedings subject to the bill. Originally, S. 382 granted this right only as to a few specific agencies. Title II gives Justice and the FTC broad authority to intervene in the proceedings of all agencies. Section 603(b) states that the Attorney General and the FTC "may each appear as a party of right" in any administrative or judicial proceeding subject to the bill. This ambiguous language could become the source of considerable controversy and uncertainty in the administrative process.

While we do not object to granting the Justice Department, as a spokesman for the Administration, the authority to provide input on antitrust matters to other Federal agencies, we believe that similar authority should not be conferred on an independent regulatory agency such as the FTC. We believe that such a grant of authority to the Justice Department should be spelled out in more detail to avoid unnecessary delay and uncertainty in administrative proceedings. Accordingly, we would prefer that either § 603(b) be phrased in terms of granting Justice the right to submit advisory opinions on competitive matters pending before other agencies or that the procedures and legal effect of formal intervention by the Justice Department be more fully set-out in the bill.

Otherwise, we have no strong objections to the revised provisions of Title II, but we prefer the original version of the bill; i.e., S. 382.

TITLE III - REVIEW OF THE EFFECTIVENESS OF AND CONTINUING NEED FOR GOVERNMENT REGULATION

This title would require the President, acting on the advice of a newly-established Committee on Regulatory Evaluations to propose regulatory reform bills according to a schedule which mandates Presidential review of 10 categories of agencies between 1982 and 1992 (banking agencies in 1992). Once in Congress, the President's regulatory reform bill would be referred to the appropriate committees which would have 360 days of continuous session to scrutinize, amend and report out a regulatory reform bill. If the committee reports out the bill, it would become a "privileged" matter on the floor of Congress. If the committee fails to report out the bill by the 360-day deadline, Title III provides for a discharge measure which could be used to bring a regulatory reform bill to the floor of Congress.

We support Title III, and we would note that we are engaged with our partner financial regulatory agencies in a joint exploration of areas of cooperation and coordination through the vehicle of the Federal Financial Institutions Examination Council created by Title X of FIRICA (the Financial Institutions Regulatory and Interest Rate Control Act of 1978.)

OFFICE OF THE CHAIRMAN
FEDERAL MARITIME COMMISSION
WASHINGTON, D. C. 20543

Office of the Chairman

February 27, 1979

Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your February 9, 1979 request for the views of the Federal Maritime Commission on S. 328. Our comments are substantively identical to those which we prepared on S. ~~328~~'s predecessor bill, S. 2625.

We submitted them to OMB on July 7, 1978. Unfortunately OMB never authorized direct submission of our views to the Congress. In view of that experience, we are submitting our comments on S. 328 to you directly.

The Federal Maritime Commission opposes enactment of S. ~~328~~, as we opposed S. 2625, for several reasons.

Section 3(a) of the bill would preclude any agency action tending to create an anticompetitive effect in the absence of a finding that the action in question meets one of several overriding criteria. Legislation applying these standards to the ocean shipping industry is unnecessary because the Commission, in interpreting and implementing the policies of the Shipping Act, already applies criteria for approving grants of antitrust immunity that are very similar to those listed in this section of your proposed bill.

The FMC has developed a standard for review of potentially anticompetitive agreements filed under section 15 of the Shipping Act, and this standard was expressly approved by the Supreme Court in 1968. Agreements filed with the Commission that are per se violations of the United States antitrust laws

are deemed contrary to the public interest unless they are "required by serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act." Investigation of Passenger Travel Agents, 10 FMC 27, 34-35 (1966) aff'd sub nom; FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 243 (1968).

Under section 4, particularly subsection 4(c), of S. 322, it would appear that the Attorney General would have unlimited power to determine whether a Commission hearing has been held, whether the criteria of section 3(a) had been met, and, if not, what type of proceeding should be held. We strenuously oppose any provision which would convey to the Attorney General powers which would interfere significantly with the independence that is essential to the effective operation of the Federal Maritime Commission.

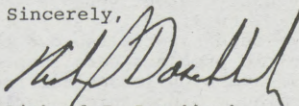
In regard to judicial review of agency actions, section 5 of the bill assigns the burden of proof for establishing compliance with section 3(a) upon the agency, thereby, in effect, establishing a prima facie case of noncompliance which the agency must rebut by "...substantial evidence based on the record as a whole..." We believe that it is inappropriate to create a statutory presumption that an agency has not complied with its regulatory responsibility to incorporate antitrust considerations into its administration of its governing statutes.

Section 6 would require the Commission to review its statutes, practices and procedures and take steps to bring them into compliance not only with S. 322, but with U.S. antitrust statutes as well. It should be emphasized that the Federal Maritime Commission has been granted, and the Congress has repeatedly re-affirmed, statutory authority to accord limited antitrust immunity to activities in the international shipping industry, an obligation which the Commission already exercises in a way so as to accomplish the stated purpose of the subject legislation.

The Commission is a small agency with a staff of 350 people operating on a budget of only \$8,901,000 for Fiscal Year 1978. It has neither the manpower nor the funding to comply with the extensive reporting and rulemaking requirements envisioned in S. 382. We are not convinced that the provisions of this bill would improve our regulatory functions, much less to such an extent that the budgetary and administrative costs of compliance would be outweighed. In fact, at a time when all Federal regulatory agencies are under criticism for cumbersome procedures that cause lengthy delay in agency proceedings, we cannot support legislation which contains provisions that, if enacted, would result in additional delays.

Although we share your concern that the public interest be protected from unnecessary anticompetitive activity, we believe that this laudatory goal can better be accomplished through continuation of existing regulatory policies toward ocean shipping rather than incorporation of the principle of S. ~~382~~ 382.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Richard J. Daschbach', written in a cursive style.

Richard J. Daschbach
Chairman

Office of the Chairman
Federal Maritime Commission
Washington, D. C. 20510

Office of the Chairman

June 27, 1979

The Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your May 24, 1979 request for the comments of the Federal Maritime Commission on proposed changes to S. 382, the "Competition Improvements Act of 1979."

These changes would eliminate most of the specific problems that we outlined in our February 27, 1979 letter to you, and they would clearly improve the original bill. However, the specific problems were symptomatic of a fundamental deficiency in S. 382's philosophical and economic approach to ocean shipping. Since this underlying defect has not been remedied, the Commission's objection to the subject legislation remains.

The domestic concept of free competition is presumed by the legislation not only to be workable in international shipping, but preferable to the cooperative activity authorized by the Shipping Act, 1916, and this view is antithetical to our perception of our regulatory responsibilities and to the intent of Congress in enacting the shipping statutes we administer.

Normal market factors which make open competition function well in most aspects of the U.S. domestic economy are distorted in international shipping by the influence of foreign governments on the financing and operations of their steamship lines and by the absence of antitrust prohibitions in most foreign countries. Combinations, mergers, and other types of coordinated activity which may be considered in restraint of trade in this country, for example, are often viewed as good business practices abroad.

Cognizance of the political and economic characteristics that distinguished international liner shipping from many domestic U.S. industries led Congress to create the antitrust exemption for ocean shipping in 1916 and to reinforce that exemption in 1961. As recently as the 95th Congress, an extreme example of the extent to which government influence can distort the normal market process was acknowledged and addressed by enactment of the "controlled-carrier" legislation (P.L. 95-483).

In spite of specific positive changes, the suggested new language in S. 382 which perpetuates our problem with the legislation is contained in subparagraph (d) on page 3(a) of the marked-up copy enclosed with your letter. That language would preclude the Commission from approving or modifying agreements in foreign ocean commerce unless

"it has considered the competitive effects of such action and concluded that such action is the least anticompetitive alternative legally and practically available to achieve statutory goals"

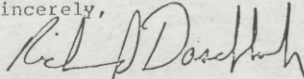
We believe that this language has traditionally been used to implement rigorous application of domestic antitrust standards to domestic industries, and its application to the approval of section 15 agreements under the Shipping Act, 1916, may be in direct conflict with the purpose of that law, which is intended to accord antitrust immunity to an international industry.

Conference and rate agreements by their very nature are generally anticompetitive in varying degrees. By authorizing the Commission to approve these agreements without consideration of U.S. antitrust law, the Congress essentially declared that the anticompetitive method is not always the best method in the ocean shipping industry we regulate. The proposed new language of S. 382 would thus conflict with the mandate of section 15 of the Shipping Act, 1916, unless the modifying phrase "legally and practicably available to achieve statutory goals" were strictly interpreted to conform to the purposes of the Act.

We do not believe that this interpretation would be clear. On the contrary, the language is so vague that it will be the cause for litigation in virtually every case in which the Commission approves an agreement over the objections of other parties. This vagueness is compounded by the fact that the Shipping Act, 1916 does not enumerate specific statutory goals, but instead vests in the Commission the discretion to evaluate various factors affecting the approvability of section 15 agreements.

There are at least two ways to eliminate the problem that we have described. One method would be to delete subparagraph (d) on page 3(a). Another would be to insert language into S. 382 which would limit its provisions to domestic industries. With either of these changes, the Commission would no longer object to the proposed legislation.

Sincerely,



Richard J. Daschbach
Chairman



BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C. 20510

OFFICE OF THE VICE CHAIRMAN

August 2, 1979

The Honorable Edward M. Kennedy
Chairman
Committee on Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Kennedy:

This is in further response to your letter of June 27 requesting comments on S. 1291, the "Administrative Practice and Regulatory Control Act of 1979," a bill "to improve the procedures for agency rulemaking; to require agencies to adhere to a pro-competition standard; to require the Congress and the President to review certain regulatory agencies; to provide public participation funding; and for other purposes."

The Board's comments will be limited to those areas of principal concern in the operations of the Federal Reserve. The Board supports the efforts of Congress to improve the regulatory process, to enhance public participation, and to strengthen Congressional oversight of Federal programs.

Some progress toward these goals has been made as the result of Executive Order 12044 of March 23, 1978, that required the need for regulations to be clearly established and meaningful alternatives to be considered and analyzed.

For example, the Federal Reserve, consistent with the purposes of that order, has adopted expanded rulemaking procedures that, in most cases, requires more detailed analyses of the potential cost and benefits of regulatory and nonregulatory alternatives.

The Board has also undertaken a regulatory improvement program that involves a substantive zero-base review of each Federal Reserve regulation to determine (1) fundamental objectives and the extent to which the regulation is meeting current policy goals, (2) costs and benefits of the regulation, (3) any unnecessary burdens imposed by the regulation, and (4) nonregulatory alternatives that might be used to accomplish the same objectives. The Board's program also contemplates procedures for reviewing each regulation at least once every five years.

Despite recent accomplishments, we recognize that more needs to be done. We are aware that government regulation of economic activity may introduce distortions and inequities into the economy. Both Federal legislation and implementing regulations have sometimes resulted in a lessening in competition, a reduced ability to deal with economic change, and a higher and more rigid structure of costs and prices which the consuming public must inevitably bear. Accordingly, the Board supports the basic objectives of Titles I, II, and III of S. 1291 dealing with regulatory reform.

However, some provisions of the bill would seem to work against more effective regulation and would appear to make the regulatory process more inefficient. For example, section 102(c)(5) suggests the expansion of informal rulemaking proceedings to include the creation of expert advisory councils, mediation techniques and presentation of studies, documents and arguments for written comment and rebuttal, all of which could contribute to delay and inefficiency in rulemaking. Section 803 of Title III relating to regulatory review would establish a new Committee on Regulatory Evaluation that would appear to add further delay, paper work and expense. We question the need for these provisions and would suggest their reconsideration.

The Board also has some reservations about the provisions for funding public participation expenses. The Board has tried to involve all affected groups, including consumers, in early stages of regulatory review, as well as in the formal public comment periods. Several years ago, as provided for in the Equal Credit Opportunity Act of 1975, the Board appointed a Consumer Advisory Council consisting currently of 27 members with broad representation of consumer and borrower groups to assist us in our regulatory and supervisory responsibilities. On a number of occasions the Board has directly solicited the views of consumer groups and consumer protection agencies.

The Board has not provided funds directly for public interest testimony because of the problems associated with selecting eligible representatives. The very selection process by which an agency would decide which individuals or groups to assist could give rise to conflict of interest problems and have discriminatory implications. It has been the Board's view that its funding of the Consumer Advisory Council, together with other procedures to increase the participation of consumers and others affected by our decisions has made it possible for those concerned to be well represented in our rulemaking.

We are also concerned that section 104(a) appears to involve the Administrative Conference in the authorization to pay public interest representatives appearing before an agency in rulemaking proceedings. We believe it would be inappropriate to authorize another agency to make these decisions.

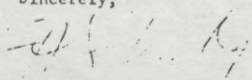
~~Title III~~ would mandate a procompetitive standard for Federal regulations. A number of statutes administered by the Board now require consideration of procompetitive standards. However, these standards are weighed along with financial, managerial and other considerations. We do not believe that procompetitive standards should override all other considerations and urge that proposed section 602(b)(2) be amended to add standards of safety and soundness for financial institutions to the exemption for health and safety standards now specified in this section.

Title III proposes a review of regulatory agencies by the President and the Congress. The Board believes that a number of the provisions in Title III are improvements on proposals in other regulatory reform bills. The proposed 10-year time span for completing the regulatory review is much more realistic than the shorter periods in other bills. The greater flexibility given the President in presenting review programs, particularly the recognition that no reform of an agency or its regulations may be necessary, appears desirable. Of most importance, the proposed action-forcing or triggering mechanism is preferable to proposals in other bills that would terminate an agency's regulations or even the agency itself. We believe that the proposed triggering mechanism directed to the procedures of the Congress, and based upon the provisions of the Congressional Budget and Impoundment Control Act, is more likely to achieve the desired reviews.

With regard to Title IV, relating to the Administrative Conference, we would question the desirability of giving the Conference authority to participate in regulatory proceedings, or authority that would overlap the work of other agencies of the government. It appears to the Board that the Conference could be of the greatest assistance by serving as a clearing house for information and acting in an advisory capacity.

It is hoped that these comments will be helpful to your Committee in its consideration of S. 1291.

Sincerely,


Frederick H. Schultz

MEMORANDUM FROM THE UNITED STATES INTERNATIONAL TRADE COMMISSION
CONCERNING S.382, THE COMPETITION IMPROVEMENTS ACT OF 1979

The United States International Trade Commission (the Commission) is pleased to comment on S. 382, the Competition Improvements Act of 1979. The Commission is an independent agency of the United States and is not subject to all the statutory procedures imposed on agencies within the executive branch. See, Sections 330-333 of the Tariff Act of 1930 (19 U.S.C. 1330-1333) and Section 175 of the Trade Act of 1974 (19 U.S.C. 2232). Notwithstanding its statutory independence, the Commission is pleased to comment upon the impact of this bill, particularly with respect to the possible inclusion of certain of the Commission's activities under Sections 3 and 4 of the bill. The Commission believes that none of its proceedings should be encompassed within the requirements of the bill. The independence of the Commission is, indeed, so important that we believe it would be improper to have Commission proceedings supervised in any sense by the Executive Branch. Accordingly, we disagree with the inclusion of the Commission under Sections 3 and 4 of the bill, and believe that it may be desirable to exempt the Commission from the bill as offered.

THE ORIGINAL BILL

S. 382, a bill to amend the Clayton Act, was initially introduced in the 93rd Congress and was introduced again as S. 2028 in the 94th Congress and as S. 2625 in the 95th Congress. The bill was substantially amended and favorably reported by the Senate Committee on the Judiciary in the summer of 1976, but no action was taken in that Congress.

As originally proposed, Section 3 of the bill established an antitrust standard for federal agencies. An agency would have been forbidden to take "any action" which may have the effect of substantially lessening competition, creating a monopoly or creating or maintaining a situation involving a significant burden on competition unless it made certain findings, which must be included in any opinion accompanying the agency's order or statement of basis for a rule or regulation. "Action" was (and is) defined in the bill as follows:

...the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act as defined in Section 551 of Title 5, United States Code.

Section 4 of the bill as originally proposed would have created additional antitrust requirements with respect only to certain independent agencies, including notifying the Attorney General of important agency action subject to Section 3, making the Attorney General and the Federal Trade Commission parties as of right in agency proceedings subject to Section 3, and requiring agencies to have a hearing or "other appropriate proceeding" in the

event the requirements of Section 3 have not been met and a hearing pursuant to the Administrative Procedure Act has not previously been held. In addition to their party status under Section 4, the Attorney General and the Federal Trade Commission were to render "advice" to agencies regarding the antitrust impact of their actions.

Section 5 of the original bill, dealing with judicial review, would have placed upon all agencies, in any proceeding for judicial review of the agency's orders involving action that is subject to Section 3, the burden of establishing by "substantial evidence based on the record as a whole" that the requirements of Section 3 have been met.

THE AMENDED BILL

The Commission, 1/ and apparently other agencies as well, objected to many provisions of the original bill. Especially troublesome were, 1) the unbending imposition of a competition standard in areas of the law where Congress expressly established other overriding standards, 2) the requirement for unnecessary and burdensome hearings and records, 3) judicial review on such records, and 4) the insertion of the Justice Department and the Federal Trade Commission as parties of right in certain agency proceedings. The amended bill (hereinafter, S. 382) addresses some of these problems.

1/ See letter dated February 12, 1979 from Chairman Joseph O. Parker, to Mr. Steven Needle, Executive Office of the President.

S. 382 in Section 3 requires agencies taking action with certain listed effects on competition in the economy 1/ to choose "the least anticompetitive alternative legally and practically available to achieve statutory goals" and to include appropriate fundings in any opinion accompanying an agency order under Section 3(a). The bill thus recognizes the presence of other statutory objectives but still imposes an additional requirement on agencies.

Section 4 of the bill continues to provide for intervention as a party of right by the Attorney General and the Federal Trade Commission "in any administrative or judicial proceeding subject to Section 3." However, the requirements for a special hearing on competitive effects and for special standards of judicial review have been dropped. Section 6 of the bill requires federal agencies to modify and conform their rules and practices to the requirements of the bill.

1/ ANTITRUST STANDARD FOR FEDERAL AGENCIES

Sec. 3(a) Notwithstanding any other provision of law, no Federal agency shall take any action that

- (a) regulates or licenses entry under a scheme in which the level of entry is subject to limitation;
- (b) sets or reviews with authority to accept, reject, or modify the monetary price charged for goods or services;
- (c) sets, limits, or allocates the production or distribution of goods or services; or
- (d) reviews, approves, rejects, or regulates the terms and conditions of agreements among providers or purchasers of goods or services

unless it has considered the competitive effects of such action and concluded that such action is the least anticompetitive alternative legally and practicably available to achieve statutory goals.

(b) The findings, if required by section 3(a), shall be included in any opinion accompanying an agency order and shall be included in the statement of basis and purpose incorporated in any rule or regulation.

THE COMMISSION

The bill, as amended, is from the Commission's point of view, an improvement over the original bill. However, even as amended, the bill should not apply to the Commission because of the Commission's independent status and preexisting Congressional mandate to analyze conditions in the U.S. economy. We think that it will place our comments in context to provide some background on the role of the Commission under the statutes that might be affected by this bill.

The Commission has a role under several statutes of providing findings on whether there is or is likely to be injury to a domestic industry caused by various types of international trading practices which we describe below. In addition, the Commission provides information to the President and in some cases recommendations on matters relating to trade negotiation and on imports of articles that are causing or are likely to cause serious injury within the United States economy. Finally, the Commission is in effect a competition enforcement agency under the provisions of Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337; hereafter, Section 337), which is also described below.

It appears that since most of these activities, excepting particularly those under Section 337, do not result in final agency action, they are not within the scope of Section 3 "action," as that term is defined in the bill. (The Commission does not issue final "orders" under any head of authority except Section 337.) However, this is not entirely clear, and, moreover, these non-action functions apparently fall within the requirements

of Section 6 of the bill. Therefore, in these comments we will discuss all aspects of our authority, with an emphasis on Section 337.

Pursuant to Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), the Commission may order persons to cease and desist unfair methods of competition and unfair acts in the importation and sale of articles in the United States which have specified effects or tendencies in the domestic economy, such as substantially injuring an efficiently and economically operated domestic industry, or restraining or monopolizing trade and commerce within the United States. This emphasis on efficiencies in the domestic industry; the determination (in some cases) of whether a restraint of trade exists; and the very limitation of any restriction of trade upon a finding that there is an unfair method of competition or unfair act involved, demonstrate the Congressional interest in restricting relief under Section 337 to situations in which free competition is being destroyed by unfair practices. Under Section 337, the Commission may exclude from entry articles tainted with the unfairness where a cease and desist order is not appropriate, but even in these cases, the Commission must, as a result of the Trade Act of 1974, consider certain factors relating to the public interest in competition. These factors are "competitive conditions in the United States economy" and "the production of like or directly competitive articles in the United States" and "United States consumers." Moreover, Section 337 requires the Commission to consult with, among others, the Department of Justice and the Federal Trade Commission in the course of its investigations under that law.

The Antidumping Act, 1921, as amended (19 U.S.C. 160 et seq.) provides for the imposition of special duties on imported goods sold in the United States at less than fair value if an industry in the United States is being or is likely to be injured, or is prevented from being established as a result of such importation. The responsibility for determining whether merchandise is being or is likely to be sold at less than fair value is vested in the Department of the Treasury. If the Treasury Department makes an affirmative determination, an investigation is referred to the Commission for a determination as to whether an industry in the United States has been or is likely to be injured or is prevented from being established by reason of the less than fair value sales.

Should the Commission make an affirmative determination under the Antidumping Act, 1921, the Treasury Department will issue a dumping finding and the matter is transmitted to the U.S. Customs Service to determine which entries are subject to the special duties. ^{1/} The imposition of special dumping duties is ministerial, that is, they will be assessed by the Treasury Department once the margin of unfair pricing is determined.

This procedure would appear to involve "action," as that term is defined in section 8(b) of the bill at some point, because the special dumping duty is a type of "relief." However, it concerns the Commission that it might

^{1/} The Commission's activities pursuant to the countervailing duty law, which is Section 303 of the Tariff Act of 1930 (19 U.S.C. 1303), are similar to its action under the Antidumping Act, 1921, except that only one class of Treasury Department determinations of the existence of bounty or grant, those as to articles which are otherwise entered duty free, are referred to the Commission.

be subjected to the bill without the Department of Treasury being subject to the same requirements. It is conceivable that neither of the Department of the Treasury's determinations--either as to less than fair value sales or as to the amount of any necessary special dumping duty--would be subject to section 3 of the bill, because neither would be "action" within the meaning of Section 8(b) of the bill. In fact, the Commission believes, for reasons presented below, that it would be undesirable to make any phase of proceedings under the Antidumping Act, 1921, subject to the bill.

Under Sections 201 and 406 of the Trade Act of 1974, the Commission only makes findings and recommendations and thus would not be subject to section 3 of the bill.

THE IMPACT OF THE LEGISLATION UPON COMMISSION PROGRAMS

In general, the Commission supports the objectives of this legislation. However, we have serious reservations whether the Commission ought to be subject to any provision of the bill both from a policy standpoint and in light of procedures in the areas under our jurisdiction.

For one thing, we think it will be difficult in administering statutes that already take into account economic factors directly related to competitiveness, to consider the competitive impact in terms of this bill. Indeed, under Section 337 (arguably the only Commission proceeding subject to Sections 3 and 4 of the bill), the Commission is engaged in a process of protecting competition. It seems to us unnecessary to require the Commission to make determinations pursuant to Section 3 of the bill, when the very agency

actions to which Section 3 might relate are themselves by law supposed to be procompetitive. The bill is the functional equivalent of requiring the Environmental Protection Agency to file environmental impact statements when it takes regulatory action to protect the environment. Arguably, most activities of the Commission would not be subject to the bill, except under Section 6, and they should not be, because the interests sought to be protected by the bill are already accounted for in current law. There is some uncertainty, however, because the list of covered agency actions in Section 3(a) is, in attempting to be broad, extremely vague. For example, does the Commission "modify the monetary price charged for goods or services?" Do Section 337 cease and desist orders control pricing practices? The vagueness of Section 3(a) of S. 382 will likely lead to litigation.

The statutes administered by the Commission are an integral part of a system of trade relations between this country and its trading partners which includes international agreements and powers of the President and Congress relating to the foreign trade of the United States. Since the beginning of the trade agreements program in the 1930's, an objective of this country internationally has been to promote free trade, a concept not unlike the idea of free competition expressed in the antitrust laws of the United States. Of course, statutes relating to these international trading problems take into account the need to balance the interest of maintaining a vital domestic economy with the interest in free competition. At various times in the intervening years, that balance has obviously been directed in such a way

as to protect domestic industry from imports which were considered in some sense dangerous to this country economically. Section 201 of the Trade Act of 1974 represents a process by which domestic industries are given relief from such imports. Any decision to include this system within the scope of the Competition Improvements Act would under amended Sections 3 and 4 have to take into account the adjustment of interests which the Congress has made in framing these statutes. Nonetheless, the Commission's view is that it should not be forced to do pursuant to Sections 3 and 4 a different form of what it already does under existing law.

Moreover, it would be anomalous to make the Commission subject to the requirements of Sections 3 and 4, since many of these requirements are already a matter of law. The Commission by law and regulation already now notifies the Attorney General and the Federal Trade Commission of proceedings under Section 337 (See section 4(a) of the bill). Notices of other proposed Commission actions are readily available in the Federal Register. Indeed, these agencies regularly appear before the Commission to argue the impact of possible Commission action upon competition. The Commission frequently solicits these comments.

It is possible that the purpose of placing agencies within the scope of Sections 3 and 4 would be to give the Department of Justice and the Federal Trade Commission access to the confidential information submitted by industry to those agencies. While this is not apparent from the face of the bill, we see no other reason for giving these agencies, who are regularly invited to appear and express their views on the interests protected by this bill, the status of parties of right.

This provision would allow the Department of Justice and FTC unlimited access to confidential data in ITC proceedings. The Commission disagrees with this objective. ^{1/} For one thing, the Commission has enabled the Department and the Federal Trade Commission to have access to confidential industry data, but only after the Commission has had an opportunity to balance the impact of such access upon its ability to get information in the future against the need for expert advice. If access were entirely free in every Commission investigation, this might have a chilling effect upon parties' desire to proceed, because they might feel the Justice Department's access to these documents would be not only to aid the Commission in determining the competition impact of its possible action, but also to aid the Justice Department in investigating these complaints. We think it is far better to leave to the agency the decision of how much access will be granted other agencies to its confidential data. We should add that the sharing of information between government agencies is a matter often left by statute to the discretion of the President, who appears to have this power pursuant to a number of federal statutes. (See 19 U.S.C. 1334 and 15 U.S.C. 48).

In conclusion, the Commission objects to its being subject to the bill because doing so would be duplicative and illogical. It would increase costs and administrative burdens without any corresponding benefit, since the Commission already analyzes the effect of its actions on the public interest including competitiveness. (See, e.g., 19 U.S.C. 1337(d).) In fact, making the Department of Justice a party of right will likely have the effect of making it more difficult for the Commission to obtain the information necessary for it to do the economic impact analyses already required of it by Congress.

^{1/} Incidentally, Commission rules relating to proceedings under Section 337 (19 C.F.R. Part 210) provide for discovery. These rules can be used to discover "data relevant to competitive considerations."

COMMENTS OF
A. DANIEL O'NEAL, CHAIRMAN
INTERSTATE COMMERCE COMMISSION
ON S. 382,
THE "COMPETITION IMPROVEMENTS ACT"

April 19, 1979

Thank you for the opportunity to comment on S. 382, the "Competition Improvements Act." The purpose of this Act is to ensure that agencies determine the impact of their actions on competition. Specifically, it requires them to regulate in a manner least likely to affect competition adversely.

The economic regulation of surface freight transportation--the role of the ICC--is an area where consideration should be given to the impact of the Commission's decisions on competition. In particular, the growth of the trucking industry since the enactment of the Motor Carrier Act in 1935 suggests that a requirement to give full effect to the benefits of competition is appropriate. And while competition is less pervasive in the railroad industry than in the motor carrier industry, the increase in intermodal competition in the rail industry since World War II underscores the need to consider the issue of competition in making decisions in the rail area.

The passage of this bill would provide additional support for the Commission's actions taken to lessen regulation and to place greater reliance on competition, particularly in the trucking industry. A statement of some of those actions is attached as Appendix I to these comments. In addition, it would provide

us and future members of the Commission with a constant reminder of the importance of competition as an economic force in these industries.

The heart of the bill--section 3(a)--is similar to the standard which the Commission has developed for reviewing grants of antitrust immunity; see Tidewater Coal Demurrage Agreement, Section 5a Application No. 10, 356 ICC 66 (January 10, 1978). The test was adopted by the Commission as the standard for review of all outstanding rate bureau agreements in Ex Parte No. 297 (Sub-No. 4), Reopening Of Section 5a Application Proceedings To Take Additional Evidence, where the Commission said,

"As the Commission interprets paragraph (2) [of Section 5a], the question is not simply whether the activities to be carried out under the agreement will further the National Transportation Policy, but assuming that they will, whether the benefits of the agreement from the standpoint of the National Transportation Policy outweigh its disadvantages from the standpoint of national antitrust policies. The benefits to be weighed are the various National Transportation Policy goals which the agreement will foster. The disadvantages to be weighed are the anti-competitive effects which the agreement will have. The analysis which the Commission must apply in reviewing

an agreement is therefore a three-step process. First, the Commission must determine whether the agreement enhances one or more National Transportation Policy goals. Second, the Commission must determine whether the agreement will harm interests intended to be protected by the antitrust laws. Third, the Commission must determine whether the benefits the agreement confers on the public interest from the standpoint of the National Transportation Policy outweigh the harm the agreement will do to the public interest intended to be protected by the antitrust laws,

*382 one step
further to be lost
if to achieve
that goal.*

"At each step in this three-step analysis, whether in a proceeding concerning a previously approved agreement or a proceeding involving a new agreement, the burden of proof rests with the applicants. Thus, the applicants have the burden to establish 1) that the agreement enhances one or more National Transportation Policy goals, 2) that the agreement will not have anticompetitive effects, and 3) that (if anti-competitive effects might be found) the benefits the agreement confers on the public interest from the standpoint of the National Transportation Policy outweigh the harm the agreement does to the public interest from the standpoint of national antitrust policy.

"The burden of proof rests at all times with applicants for two reasons. First, the test articulated in the legislative record of section 5a speaks in terms of finding whether the National Transportation Policy benefits of an agreement outweigh the national antitrust policy disadvantages of the agreement. The operative presumption suggested by the language is that such agreements are harmful unless proven otherwise.

"Second, section 5a is an antitrust exemption statute restrictive of competition. Thus, it must be construed as narrowly as possible in favor of competition. Accord, Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956); United States v. Masonite Corp., 316 U.S. 265, 280 (1942); Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F. 2d 686, 691 (9th Cir. 1977)."

A copy of that notice, which discusses the reasons why the Commission imposed that standard, is attached as Appendix II.

While the Commission generally supports the enactment of section 3(a), with some modifications as noted below, one point deserves special mention. Section 3(a) states that the procedures of this bill apply to agency actions where the effect would be "substantially to lessen competition" or which would create

or maintain a situation involving a significant burden on competition. The importance of limiting these procedures to the consideration of broad policy issues or other major decisions cannot be overemphasized. ✓

The Commission makes tens of thousands of decisions each year. Some of them, such as reviewing or making grants of anti-trust immunity or mergers are, by their nature, significant and relatively few in number. But decisions as to rates and motor carrier entry total in the thousands.

The Commission had 14,402 cases pending before it as of February 28, 1979. During the month of February, it closed 1,074 cases on the formal docket and opened 1,686 cases. The number of cases filed is increasing rapidly, chiefly due to increased filings of applications for motor carrier operating authority. For example, in February 1977, 609 applications for entry into the trucking industry were filed; in February 1978, the number was 991; and in February 1979, the number had risen to 1,602. In addition, the Commission has an even more extensive docket of informal cases. For example, in February 1979, we had 2,992 filings.

If the Commission were forced to undertake this analysis in every entry case and in every rate adjustment, it would slow our administrative process substantially. In the entry area, the Commission would seem to be required to perform the analysis in decisions granting entry as well as those denying it. The trucking industry at present seems to be characterized by excessive

service competition, and free entry has been advanced as a means to reduce service competition and stimulate price competition. Protestants could raise this issue in entry applications and presumably we would have to consider it. A proper balance of price and service competition could well support a grant of authority; but if the analysis must be made in each protested case, the result would be to greatly slow down the rate at which the Commission is now granting applications.

The potential for administrative burden is even greater in the rate area, where the volume of filings is much heavier.

The policies, standards, and criteria which guide how entry and rate decisions are made should be subjected to the section 3(a) standard, but some means must be developed to accomplish that goal rather than by the application of the proposed procedures in each individual case. We think that one way of doing that would be to limit the application of the standard to major agency actions as defined by the agency. An agency's decision as to whether a particular action is major would be subject to judicial review. As discussed below, such an approach has worked well in other areas of the law. In addition, the Department of Justice might be given standing to ask the Commission to review Commission policies which are promulgated not in any major individual action, but rather are developed through a number of particular actions, which taken individually may possess only minor significance. The Commission would, of course, have the primary responsibility to identify and review its new policies in the light of section 3(a).

I would now like to turn to the specific provisions of the bill. I should note that the Commission takes exception to some of the provisions. Where that is the case, we are suggesting changes. Also, while we generally support section 3(a), we are suggesting certain modifications.

Section 2 makes certain findings and sets out the purpose of S. 382. We agree that competition plays an important role in protecting consumers and promoting efficiency and that, where applicable, agencies should consider the impact of their actions on competition. However, it is also true that unfettered competition may result in harm to consumers. Hence, Congress has hedged the "free market economy" of section 2(a)(1) with regulatory and antitrust controls. For example, Congress enacted the Interstate Commerce Act in 1887 to curtail certain "free market" practices of railroads--rate cutting, rebates, and financial combinations. Three years later the first federal antitrust law was adopted--the Sherman Act. The Clayton Act followed in 1914. As the Nation's industrial economy developed, federal economic regulation was extended to shipping, investment companies, the securities and commodities markets, labor-management relations, communications, etc. We think that those regulatory and antitrust controls are an important part of our Nation's economy. Consequently, we suggest that section 2(a)(1) be amended to read as follows:

"(1) This Nation is founded upon and committed to the private ownership of business and is committed to the concept that competition is a significant factor in protecting consumers, promoting efficiency, and spurring useful innovation;

Also, we think the findings should include an explicit recognition of the regulatory agencies' role in protecting the public interest in the marketplace. To that end, section 2(a)(2) could be amended to read:

"(2) Economic regulation by Federal agencies, including regulation which may have the effect of controlling or limiting competition, is recognized as necessary in certain situations in order to ensure that essential public services are provided and that commercial and industrial activity is carried on in such a way as to be consistent with the public interest, and to the extent that such regulation does not create unnecessary losses for consumers, foster inefficiency or stifle innovation;"

Further, we suggest that the reference in section 2(a)(4) to "a definitive and formal antitrust standard" be changed to "a pro-competitive standard." As written, that language could constitute a rationale for using the 3(a) standard to pour over the

large and complex body of antitrust law into agency decisionmaking. Finally, in section 2(b)(1), insert "unnecessary" after the word "minimizing", and strike the words "antitrust and" in section 2(b)(2).

Section 3(a) sets out the standard that agencies must use in determining the competitive effect of their actions. Our chief problem with this section, as noted above, is that the provision could be interpreted to apply to all agency actions. We have some other problems, as well. I think some further discussion of this provision may be helpful.

Under current law, the Commission is required to consider the effect on competitors and upon the general competitive situation in the industry when ruling on rail or motor carrier acquisitions and mergers. The standard guiding the Commission in those cases was announced by the Supreme Court in McLean Trucking Co. v. United States, 321 U.S. 67 (1944). Briefly stated the standard is:

Although §5(11) does not authorize the Commission to "ignore" the antitrust laws, there can be "little doubt that the Commission is not to measure proposals for acquisition by the standards of the antitrust laws." 321 U.S. 85-86. The problem is one of accommodation of §5(2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the

effects of the curtailment of competition which will result from the proposed acquisition and consider them along with the advantages of improved service to determine whether the acquisition will assist in effectuating the overall transportation policy." Minneapolis & St. Louis R. Co. v. United States, 361 U.S. 173, 186 (1959).

In announcing the standard, the Court recognized that in executing the policies underlying the Interstate Commerce Act and other legislation dealing specifically with transportation facilities and problems, the Commission may be faced with overlapping and sometimes inconsistent policies embodied in other legislation. While it directed the Commission to accommodate those policies, it also said that in the case of acquisitions and mergers the Congress intended the Commission to approve them even though they may result in some curtailment of competition. In this situation "the preservation of competition . . . is significant chiefly as it aids in the attainment of the objectives of the National Transportation Policy." 321 U.S. 85-86.

In our view, the antitrust standard of section 3 would augment the standard articulated by the Supreme Court for carrier mergers and acquisitions. It also would appear to augment statutory standards governing approval of rate bureau agreements, pooling of traffic, etc. The three-part analysis of section 3

would appear to permit the accommodation of overlapping policies guiding the Commission. But it would require explicit consideration of the role of competition.

We think it is desirable to give explicit consideration to the benefits of competition in major Commission decisions. But the Commission seeks to exercise its authority to serve broad social objectives, and does not limit itself to purely economic considerations. Therefore, the fact that section 3(a) is a balancing test is important. Some changes in the language of paragraphs (1), (2), and (3) seem appropriate in order to strike the balance more evenly. The use of the word "overriding" in paragraphs (1) and (3) is confusing and is not compatible with the balancing test put forth in paragraph (2). It clearly prejudices the outcome of any weighing of competing interests by the agency. We suggest that the term be deleted. For similar reasons, we would also suggest that the word "clearly" in paragraph (2) and "in substantial part" in paragraph (3) be deleted.

I would like to stress again that the Commission believes this legislation should be applied only to major agency actions. This approach appears to have worked well in the environmental area. Also, it would permit agencies like the Commission, which may issue as many as 12,000 orders and rulings per year, to cope with an otherwise overwhelming workload. Further, it is consistent with the requirement of Executive Order 12044 (issued by President Carter March 23, 1978) that Executive agencies prepare

a "regulatory analysis" for all proposed rules which will have a major impact on the economy or in the costs or prices for individual industries, geographical regions or levels of government. The order provides that agencies may use their discretion in preparing analyses for any other regulations. While independent regulatory agencies are not covered by the order, we have agreed to comply with it. In fact, we have developed pre-notice of proposed rulemaking procedures, which include a process for identifying rulemaking proposals requiring analysis.^{1/}

Under this bill agencies could use the rulemaking required by section 4(a) to promulgate procedures for determining which actions require analysis under section 3(a). We would expect these procedures to be similar to those we developed for purposes of E.O. 12044. Section 3(b) should be modified accordingly.

The status of the Attorney General and the Federal Trade Commission under section 3(c) is unclear to us. It appears to give them special standing. We think their status should be kept to that of formal parties to agency proceedings. Any "advice" respecting the findings of section 3(a) should be made part of the record, so that other parties to the proceeding will have an

^{1/} For your information, the Executive Order requires agencies to consider, among other things, the impact of their proposed rules on competition.

opportunity to respond to it. For those reasons, section 3(c) should be deleted from the bill.

Section 4 of the bill requires the independent regulatory agencies after consultation with the Attorney General to establish procedures for notifying him of actions subject to section 3(a). In line with the modification we recommend in section 3(b), we would suggest that section 4(a) be amended to provide that all agencies subject to section 3 be required to establish procedures for determining what are major actions affecting competition. Again, we would recommend against permitting the Attorney General and the Federal Trade Commission to render advice respecting those procedures. Under section 4(b) their right to participate as "parties" is clearly established and we would expect them to participate in this capacity.

Under section 4(c) the Attorney General can require an independent regulatory agency to convene a hearing or other appropriate proceeding, if in the Attorney General's opinion, the requirements of section 3(a) have not been met and a hearing has not already been held. We find this provision objectionable because it would infringe on the independence of a regulatory agency, would delay proceedings, and would add an unnecessary layer of review. Under section 4(b) the Attorney General and the Federal Trade Commission can appear before the agency to raise the question whether a particular proceeding involves a major action affecting competition. The agency's decision not to hold a hearing or other proceeding would be subject to judicial review.

Section 5 provides that in any proceeding for judicial review of an order involving an action subject to section 3(a) the agency or other proponent of the action has the burden of proving that the requirements of section 3(a) have been met. This section poses several problems.

It would complicate judicial review by providing different standards of review for different aspects of a single action.

Further, in reversing the normal burden of proof it would complicate agency proceedings. Different elements of the case would be accorded different weights, since the burden of proof on those would vary. It would be difficult to come up with a properly weighted decision. One possible result would be that we would set an overall higher standard of proof in all our proceedings. We don't think that is a result intended by the legislation.

Finally, the requirement is inconsistent with the provisions of the Administrative Procedures Act (5 U.S.C. §551 et seq.) and court decisions directing the proponent of change or the challenging party to bear the burden of proof.

Section 6 of the bill is adopted largely from the National Environmental Policy Act (NEPA). Paragraphs 6(a)(1), (2), and (3) are similar to 42 U.S.C. 4332(1)(A), (B), and (F), respectively. We see no problems with the first of those paragraphs. However, we believe that regulatory agencies should not be required to consult with the Attorney General or the FTC as paragraph (2) of section 6(a) would provide. Here again, we recommend that the bill be amended to require the agencies to develop

those procedures in a public proceeding, in which the Attorney General and the FTC would have the right to participate as parties.

We feel the provision of paragraph 6(a)(3) is inappropriate. It may have been a good idea where the NEPA was concerned, since that Act provided a new program and since the corresponding provisions of NEPA apply to Executive Branch departments and agencies in addition to the regulatory agencies. However, the regulatory agencies are not, and should not be, in the business of providing advice and counsel to states and individuals concerning the application of antitrust laws. That should be the work of the Executive Branch and carried out through the Antitrust Division of the Department of Justice.

Subsections 6(b) and 6(c) are also adopted from NEPA. The review called for in subsection 6(c) is similar to the periodic review required by E.O. 12044. In addition to the "regulatory analyses" I discussed earlier in this statement, the Executive Order directs agencies to conduct a periodic review of their regulations to determine whether they are still working or remain justified. Each agency's plan for reviewing regulations is to set forth a schedule and statement of the criteria it will use in selecting which regulations to review. Also, each agency is to publish a list of the regulations it plans to review in the succeeding twelve months. We think the two reviews probably can be incorporated, especially since they would appear to share some

similar purposes. If so, we feel the legislation should be amended to make clear that the review required by subsection 6(c) can be combined with other similar requirements.

Before going on, I would also like to say that we think reviews of this kind are beneficial, even though time-consuming. Further, we support the discretion given agencies to determine which regulations to review and when to review them.

Concerning subsection 6(d)'s requirement of an annual compliance report by the FTC to the President and Congress, the report will be more helpful if it measures, in terms of S. 382's stated goals, the effect of agency action which has fostered "substantial and effective competition in the economy". The following addition (underscored) is therefore recommended in the wording of section 6(d):

(d) The Federal Trade Commission shall report *** on the degree to which Federal agencies have complied with the purposes of this Act by fostering substantial and effective competition in the economy, and the extent to which such competition has reduced losses to consumers, improved efficiency and removed impediments to innovation.

In addition, we would suggest that that section be further amended to require the FTC to report existing anticompetitive practices of regulated sectors to the agencies responsible for them. That requirement would be consistent with the FTC's obligation to report on rate bureau activities under 49 U.S.C. 10706(h). The additional requirement would provide as follows:

(d)***In addition, the Federal Trade Commission, in consultation with the Attorney General, shall prepare periodically an assessment of, and shall report to each agency on possible anticompetitive

features of the industry subject to the agency's jurisdiction, and possible ways to alleviate or end such anticompetitive features in a manner that will further the statutory goals of the agency.

We think that information should be brought to the attention of the agencies. It will be helpful to them in carrying out their own responsibilities under the Act.

Section 7(b) of the bill would delete the last full paragraph of section 7 of the Clayton Act. That paragraph exempts from section 7 transactions duly consummated by certain regulatory agencies pursuant to their statutory authorities. The legislative history of the provision discloses that its purpose was merely to give legislative recognition to what was existing practice. It was not aimed at changing that practice. The legislative report states:

The last paragraph of section 7 is new. It simply provides that provisions of the bill should not apply to corporations coming under the jurisdiction of ICC, CAA, FCC, FPC, SEC, and the Secretary of Agriculture. These agencies already have jurisdiction over these corporations, and there is no disposition to change the present arrangement regarding them. H. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949).

See, also, H. Rep. No. 596, 80th Cong., 1st Sess. 5 (1947); H. Rep. 1820, 79th Cong., 2d Sess. 4 (1946); S. Doc. No. 35, 77th Cong., 1st Sess. 40 (1941); S. Doc. No. 95, 76th Cong., 1st Sess. 21 (1939).

The purpose in deleting the paragraph is unclear to us. Recently, the Commission has assumed a more activist role with

respect to enforcing violations of section 7 against carriers subject to our jurisdiction. Further, if we approved an acquisition after finding no violation of section 7 or approved it after determining that its benefits outweighed any curtailment of competition, the effect of our determination would be to exempt the transaction from further antitrust enforcement. Section 11(a) of the Clayton Act gives the Commission exclusive jurisdiction where the facts involve common carriers or the business of common carriers. Fruit Growers Express, Inc. v. FTC, 274 F. 205 (C.C.A. Ill., 1921), cert. dismissed, 261 U.S. 629. Not only is the FTC without authority to enforce section 7 against common carriers, but under section 16 (15 U.S.C. 26) private parties are also prohibited from bringing injunctive actions against common carriers. State of Georgia v. Pennsylvania R. Co., 324 U.S. 4939 (1945), rehearing denied, 324 U.S. 890.

I hope that our comments on S. 382 will be helpful to you. I would be glad to answer any questions you may have on the statement or on other matters.

Commissioner Stafford does not approve this statement insofar as it indicates any support for S. 382.

Appendix I -Recent Commission Actions to Improve Competition
In the Motor Carrier Industry

One of the ways in which the Commission has attempted to increase competition is through liberalized entry. In the past two years, it has increasingly interpreted its existing regulations to favor easier entry into the motor carrier industry. As a result, in fiscal 1978 it granted either in whole or in part 96.7 percent of the applications for operating rights. This compares to the highest previous grant rate which was 86.4 percent in fiscal 1975. While those statistics include partial grants as well as unopposed cases, the Commission now makes more complete grants and grants more authority in partial grants than it did in previous years. The Commission keeps statistics on total and partial grants of operating authority. In the month of February 1979, the Commission decided 972 applications for operating authority.

On the merits?

Granted in whole	908
Granted in part	36
Granted conditionally	12
Denied	14
Withdrawn	2
Total Decisions	972

How many reg. vouch & freight?
How many without backhaul?

The partial grant reflects instances where the Commission gives the applicant less than it wants. It does not indicate situations where the applicant itself pares down his original application, either to eliminate protests or for some other reason.

In addition, it has recently adopted or has under consideration a number of proposals to liberalize and improve entry

regulation. For instance, it struck down a forty-year old prohibition against granting for-hire authority to private carriers.^{1/} In a recent series of decisions, it also reversed a policy of discouraging carriers from holding both common carrier authority and contract carrier authority. Further, it eliminated the arbitrary restriction on the number of shippers which a contract carrier may serve.^{2/} Historically, the number has been eight. It's expected that as a result of these decisions both private carriers and contract carriers will provide additional competition to common carriers.

Last fall, the Commission adopted new rules to eliminate frivolous protests by carriers seeking to block entry by new applicants.^{3/} Under those rules, carriers that cannot demonstrate that they are actually providing the proposed service or have vigorously solicited it, will not be allowed to participate automatically in the entry proceeding. Instead, they will have to file a petition and obtain leave to intervene.

Still allowed to intervene

^{1/} Ex Parte No. MC-118, Grant of Motor Carrier Operating Authority to an Applicant who Intends to Use it Primarily as Incident to Carriage of its Own Goods.

^{2/} Ex Parte No. MC-119, Policy Statement Regarding "The Rule of Eight in Contract Carriers' Applications."

^{3/} Ex Parte No. 55 (Sub-No. 26), Protest Standards in Motor Carrier Proceedings.

In another recent action, the Commission agreed to consider rates in considering applications for new authority.^{4/} That action represented a shift from the old practice of not allowing rates to be reviewed in such cases. It is felt that this step will encourage price competition. As a matter of fact, for years the potential for a lower rate has frequently been the basis for shipper support in a very substantial number of application proceedings. The Commission hopes that this new policy will induce efficient carriers or those who think they are efficient to seek entry and to publish lower rates.

Finally, the Commission is now considering a proposal to alter the standard of proof in motor carrier entry cases by placing more emphasis on competition and less emphasis on protecting existing carriers.^{5/} Currently, an applicant must show a public need for his service, whether this service can be provided as well by existing carriers, and that the grant of authority would not harm existing carriers. Under the proposed rule, an applicant would no longer have to prove that the proposed service cannot be performed by existing carriers. Instead, he would have to show only that a shipper wants his service. The burden of proof

— again limited in scope

^{4/} Ex Parte No. MC-116, Consideration of Rates in Operating Rights Application Proceedings - Proposed Issuance of Policy Statement.

^{5/} Ex Parte No. MC-121, Policy Statement of Motor Carrier Regulation.

then would shift to the protestant to demonstrate that the new entrant would impair the operations of existing carriers contrary to the public interest.

It is expected that the overall effect of these recent actions and others in the area of motor carrier entry will be to increase competition. In turn, the increase in competition should help spur improved service, lower rates, and more innovative pricing techniques.

In the area of rate bureau regulation, the Commission currently is taking a hard look at the operations of both motor and rail rate bureaus.^{6/} It began in 1973 with the institution of a major rate bureau investigation docketed as Ex Parte No. 297, Rate Bureau Investigation. As a result of that proceeding, the Commission imposed a number of new requirements on the rate bureaus. Perhaps the most important of these was the requirement that all rate bureau dockets be disposed of within 120 days and that a rate bureau would not be permitted to protest the independent rate actions of its members.

^{6/} Under 49 U.S.C. 10706 (former sections 5a and 5b of the Interstate Commerce Act) the Commission can approve agreements among carriers that allow them to discuss among themselves and jointly vote on the level of rates which they will charge to shippers. Commission approval of these agreements carries with it the grant of immunity from the antitrust laws. The organizations established or continued under the agreements approved under this section are known as rate bureaus.

The Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) modified the legislation applicable to railroad rate bureaus by imposing some of the conditions adopted by the Commission in Ex Parte No. 297 as well as certain other significant restrictions. Those changes were designed not only to modernize the functions of railroad rate bureaus, but also to foster competition among railroads by prohibiting them from collectively making rates and charges on certain traffic.

In a recent rulemaking, the Commission voted to impose the same restrictions on nonrail rate bureaus which the Congress imposed on railroad rate bureaus in the 4-R Act.^{7/} Rate bureau members will no longer be permitted to vote on single-line rates, and they will be allowed to vote on joint-line rates only if they can "practicably participate" in the movement under consideration. The "practicably participate" rule means that any voting must be done by the participants themselves. The Commission will define "practicably participate" as it applies to individual agreements in the context of each application for antitrust immunity. This restriction should help reduce the dominant role large carriers now play in the rate-setting process. In addition, the Commission prohibited rate bureaus from protesting rates filed by any carrier, whether a member of the bureau

^{7/} Ex Parte No. 297 (Sub-No. 3), Modified Terms and Conditions For Approval of Collective Ratemaking Agreements.

or not, under its right of independent action. Further, it voted to institute a proceeding to determine whether to impose Sunshine Act provisions on the rate bureaus. The Commission expects these changes to promote greater competition in the motor carrier, water carrier, and freight forwarder industries.

In addition to scrutinizing the operations of the rate bureaus, the Commission is reevaluating the rate bureau agreements.^{8/} Most of those agreements were approved by the Commission more than fifteen years ago. In light of the substantial changes in the industry and in the Commission's regulations since then, the Commission directed all rate bureaus to revise their agreements and resubmit them for approval. In re-examining the agreements, the Commission is considering the anticompetitive effects of the agreements and the need for continuing the rate bureaus' antitrust immunity. First, it is asking whether the bureaus actually do anything that would violate the antitrust laws and thus require immunity. Second, it is asking whether the antitrust competitive effects which may result from the bureaus' activities are compensated for by the transportation benefits which they can offer to the carriers and shippers.

In the area of rate setting, the Commission is attempting to provide more flexibility and choice by encouraging carriers to \

^{8/} Ex Parte No. 297 (Sub-No. 4), Reopening of Section 5a Applications Proceedings to Take Additional Evidence.

file different levels of rates for different levels of service.^{9/}

Under sections 11341 and 11343 of Title 49 (former section 5(2) and 5(12) of the Interstate Commerce Act), Commission approval is required for any transaction which results in the acquisition of one regulated carrier by another, or in the common control of two or more regulated carriers. In approving such arrangements, the Commission is charged with determining whether the proposed transaction is consistent with the public interest and whether it will further the national transportation policy. Inherent within "consistent with the public interest" are several issues, including the matter of competition. In McLean Trucking Co. v. United States, 321 U.S. 67, 87 (1944), the Supreme Court interpreted that language to mean that the Commission shall consider "the effect of the [transaction] on competitors and on the general competitive situation in the industry . . ." in conjunction with the furtherance of the national transportation policy. The Court has also ruled that the Commission is responsible for considering the anticompetitive consequences of a proposed securities issuance under 49 U.S.C. 11301 (former section 20a of the Interstate Commerce Act). Denver & R.G.W. R. Co. v. United States, 387 U.S. 485 (1967).

^{9/} Ex Parte No. MC-98, New Procedures in Motor Carrier Restructuring Proceedings.

Recently, the Commission has given increased attention to the effect on competition of such transactions.

For example, it has instituted a new policy with respect to the acquisition of carrier operating rights. Traditionally, it cancelled any operating rights that the selling carrier had allowed to become dormant, so that the result of a purchase of those rights would not be the institution of a new competitive service. Now, the Commission imposes upon carriers opposing the transaction the burden of showing that the revitalization of dormant operations would injure them.

Further, the Commission has decided to initiate an analysis of the role of antitrust and competition factors in motor carrier finance proceedings, and to develop appropriate guidelines in this area. To assist its staff in the development of the analysis, the Commission plans to invite members of the public and such interested governmental bodies as the Department of Justice and the Federal Trade Commission to participate in a preliminary conference in early May. The Commission is seeking comments concerning the scope, content and direction of the proposed analysis and guidelines.

Finally, it has assumed a more activist role with respect to enforcing violations of section 7 of the Clayton Act.^{10/} One

^{10/} Under section 11(a) of the Clayton Act (15 U.S.C. 21(a)) the Commission is authorized to enforce compliance with sections 2, 3, 7, and 8 of the Clayton Act (15 U.S.C. 13, 14, 18, and 19) "where applicable to common carriers" under its jurisdiction.

well-known case is Navajo Freight Lines, Inc.--Invest. of Control, 122 M.C.C. 345 (1976). In that case the Commission determined that Navajo's acquisition of Garrett Freightlines' stock might substantially diminish competition in five distinct geographic markets in violation of section 7. It ordered Navajo to divest itself of the Garrett stock. Its decision has been pending before the United States Court of Appeals for the Seventh Circuit since early 1977. In another recent action it ordered the Bureau of Investigations and Enforcement (BIE) to temporarily halt the consummation of a stock tender offer involving Green Bay & Western Railroad. Finance Docket No. 28638, Brae Corporation v. Itel Corporation. In Finance Docket No. 28811, Seaboard Coast Line Industries, Inc. v. Southern Pacific Company, it cited section 7 in ordering Southern Pacific to cease and desist purchase of Seaboard shares for at least 70 days. In Finance Docket No. 21215 (Sub-No. 2), Seaboard Coast Line Railroad Co., et. al. --Investigation of Control and Modification of Traffic Conditions, BIE argued that the defendants violated section 7.

The actions outlined above represent initiatives the Commission has taken in attempting to find the proper mix of regulation and competition in transportation. These initiatives should increase competition and strengthen the impact of market forces in the transportation industry.

[7035-01]

(Ex Parte No. 297 (Sub-No. 4))

REOPENING OF SECTION 5a APPLICATION PROCEEDINGS TO TAKE ADDITIONAL EVIDENCE

Collective Rate-making Agreements

AGENCY: Interstate Commerce Commission.

ACTION: Reopening all application proceedings in which agreements were approved under section 5a of the Interstate Commerce Act.

SUMMARY: The Commission is reopening all application proceedings under section 5a of the Interstate Commerce Act (Act) (excluding proceedings now subject to section 5b of the Act) in which collective ratemaking agreements were previously approved by the Commission for the purpose of taking additional evidence to determine whether those agreements still qualify for Commission approval. This action is being taken because deficiencies in these agreements have been found to exist and because newly "ratified" agreements have been found in recent section 5a application proceedings not to satisfy the requirements of the Act. The effect of this action is to bring all currently approved collective ratemaking agreements under section 5a of the Act before the Commission for complete review. It also applies to pending applications.

DATE: The closing dates for submission of evidence are staggered and are set forth in detail below.

ADDRES: Representations in this proceeding should be addressed to: Office of the Secretary, Interstate Commerce Commission, Washington, D.C. 20423.

FOR FURTHER INFORMATION CONTACT:

Deputy Director Janice M. Rosenak or Assistant Deputy Director Harvey Gobetz, Section of Rates, Office of Proceedings, Interstate Commerce Commission, Washington, D.C. 20423, telephone 202 275-7693.

SUPPLEMENTARY INFORMATION: By order of June 15, 1973, the Commission instituted Ex Parte No. 297, an investigation into the activities of ratemaking bureaus and conferences. In its report, Ex Parte No. 297, *Rate Bureau Investigation*, 351 ICC 437 (1973) and 349 ICC 811 (1975), the Commission made 26 findings, some of which necessitated revisions of agreements already approved by the Commission. Parties to those agreements were ordered to submit necessary revisions for Commission approval. Disputed findings in that proceeding were upheld in *Motor Carriers Traffic Association v. United States*, 559 F.2d 1251 (4th Cir. 1977) (pet. for cert. pending).

In reviewing proposed revisions the Commission had occasion to review the entire agreement to which the revisions pertained. Many of these agreements were found deficient. Parties to those agreements were ordered to revise them according to terms and conditions which the Commission prescribed. E.g., *Machinery Haulers Association—Agreement*, 355 ICC 857 (1977); *National Association of Specialized Carriers, Inc.—Agreement*, 355 I.C.C. 67 (1977); *Waterways Freight Bureau—Agreement*, 353 ICC 128 (1976). During this period, the Commission had occasion to review several newly proposed ratemaking agreements. The Commission found that they did not satisfy the standard of review set forth in paragraph (2) of section 5a. E.g., *Florida Specialized Carriers Interstate Rate Conference, Inc.—Agreement*, 355 ICC 623 (1977); *Arizona-Nevada Rate Conference—Agreement*, 355 ICC 130 (1977).

Because these newly proposed agreements have been found not to satisfy the standard of review set forth in paragraph (2) of section 5a, and because previously approved agreements have been found deficient in many respects, the Commission has reason to question whether such agreements still satisfy the standard of review set forth in paragraph (2). Pursuant to paragraph (7) of section 5a, the Commission is therefore reopening the application proceedings concerning those agreements for the purpose of taking additional evidence to determine whether previously approved agreements (excluding agreements now subject to section 5b of the Act) still satisfy the requirements of the Act. The Commission will incorporate this evidence with revisions proffered under Ex Parte No. 297, as well as any other revisions the parties in each proceeding wish to submit, to determine whether each agreement, viewed in its most favorable light, should continue to have the approval of the Commission. Approval of agreements found not to conform to section 5a will be discontinued as will approval of agreements for which no evidence is filed. This order also applies to all pending applications.

STANDARD OF REVIEW

Paragraph (2) of section 5a provides that any carrier party to an agreement between two or more carriers relating to certain matters may:

... apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6)) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) should apply with respect to the making and carrying out of such agreement; otherwise the

application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

Paragraph (9) of section 5a provides that parties to any agreement approved by the Commission under this section and other persons are relieved from the operation of the antitrust laws with respect to the making and carrying out of such agreement but only insofar as those parties act in conformity with the terms of the agreement and such terms and conditions prescribed by the Commission.

Under paragraph (2) the test of whether an agreement should be approved is whether it "by reason of furtherance of the national transportation policy declared in the Act, the relief provided in paragraph (9) should apply with respect to the making and carrying out of such agreement." According to the legislative history of section 5a:

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

Under the standard in the bill Congress entrusts to the Commission the task of applying to particular cases the general formula which Congress finds to be determinative of the public interest, and directs the Commission to determine whether the advantages to the public interest, through furtherance of the national transportation policy, are such as to outweigh the disadvantages to the public interest intended to be guarded against by the antitrust laws. (H.R. Rep. No. 1100, 80th Cong., 1st Sess. 13-14 (1947).)

The test was articulated in this manner, as the report cited here indicates, because Congress was concerned that two national policies, one involving antitrust and the other involving transportation, did not always apply in full measure in the field of transportation. Thus, some accommodation between these two policies had to be found. With respect to rate bureaus and conferences, the problem was how to draft a rule that would clarify for all time how that accommodation should be struck. Congress concluded that it was impossible to draft such a rule. It was necessary, Congress concluded, to draft a general standard and to leave its administration to an expert regulatory commission. It was with this intent that the standard articulated in paragraph (2) was enacted. Supra at 12-13. The task of administering that standard was delegated to this Commission.

As the Commission interprets paragraph (2), the question is not simply whether the activities to be carried out under the agreement will further the national transportation policy, but

assuming that they will, whether the benefits of the agreement from the standpoint of the national transportation policy outweigh its disadvantages from the standpoint of national antitrust policies. The benefits to be weighed are the various national transportation policy goals which the agreement will foster. The disadvantages to be weighed are the anticompetitive effects which the agreement will have. The analysis which the Commission must apply in reviewing an agreement is therefore a three-step process. First, the Commission must determine whether the agreement enhances one or more national transportation policy goals. Second, the Commission must determine whether the agreement will harm interests intended to be protected by the antitrust laws. Third, the Commission must determine whether the benefits the agreement confers on the public interest from the standpoint of the national transportation policy outweigh the harm the agreement will do to the public interest intended to be protected by the antitrust laws.

At each step in this three-step analysis, whether in a proceeding concerning a previously approved agreement or a proceeding involving a new agreement, the burden of proof rests with the applicants. Thus, the applicants have the burden to establish: (1) That the agreement enhances one or more national transportation policy goals, (2) that the agreement will not have anticompetitive effects, and (3) that if anticompetitive effects might be found the benefits the agreement confers on the public interest from the standpoint of the national transportation policy do not outweigh the harm the agreement does to the public interest from the standpoint of national antitrust policy.

The burden of proof rests at all times with applicants for two reasons. First, the test articulated in the legislative record of section 5a speaks in terms of finding whether the national transportation policy benefits of an agreement outweigh the national antitrust policy disadvantages of the agreement. The operative presumption suggested by the language is that such agreements are harmful unless proven otherwise.

Second, section 5a is an antitrust exemption statute restrictive of competition. Thus, it must be construed as narrowly as possible in favor of competition. Accord, *Federal Maritime Comm'n. v. Seatrains Lines, Inc.*, 411 U.S. 729, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 303, 316 (1956); *United States v. Masonite Corp.*, 318 U.S. 263, 280 (1942); *Mc Hood Steves, Inc. v. Greyhound Corp.*, 555 F. 2d 686, 691 (9th Cir. 1977). This principle is a derivative of the proposition that the position of

the antitrust laws in the scheme of national policy is "fundamental." *Gulf States Utilities Co. v. Federal Power Comm'n.*, 411 U.S. 747, 759 (1973); *Old Trail Power Co. v. United States*, 410 U.S. 366, 374 (1973). Thus, conduct is not immunized from the antitrust laws merely because it is subject to a regulatory scheme. Regulatory schemes exempt conduct from the antitrust laws only where they are "plainly repugnant" to the antitrust laws. *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682 (1975), or where a particular statute grants an administrative agency primary jurisdiction to consider a question. See *Keogh v. Chicago & N.W.R. Co.*, 290 U.S. 156 (1932) explained in *United States v. Radio Corp. of America*, 358 U.S. 334, 346-48 (1959). But even in the latter instance, the scope of that jurisdiction must be construed as narrowly as possible. See *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 455 (1945).

Section 5a is an antitrust exemption statute restrictive of competition. Without the immunity it accords carriers and others parties to collective ratemaking agreements approved by the Commission, the carriers and others would be subject to antitrust liability. Compare *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 455 (1945); *United States v. Joint-Traffic Ass'n.*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n.*, 168 U.S. 290 (1897); *United States v. Ass'n of American Railroads*, 4 F.R.D. 510 (D. Neb. 1945) with *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Section 5a grants the Commission primary jurisdiction to consider the value and necessity of collective ratemaking agreements. It is not, however, a grant of jurisdiction which permits the Commission to ignore antitrust considerations. Rather, as noted here, the anticompetitive effects of an agreement must be carefully weighed. Section 5a is not therefore a grant or "primary jurisdiction" as that term is normally used. Nor, for the same reasons, is section 5a "plainly repugnant" to the antitrust laws. Moreover, in *United States v. Southern Motor Carriers Rate Conference*, 3 CCR Trade Reg. Rptr. §61.551 at 72,174 (N.D. Ga. 1977) it was held that the regulatory scheme of the Interstate Commerce Act does not exempt motor carriers from antitrust liability for conduct not expressly exempted by Commission action.

Thus, section 5a must be construed as narrowly as possible in favor of competition. Consistent with this objective, the burden of establishing the merits of an anticompetitive agreement lies with the applicants seeking the exemption from antitrust law liability.

EVIDENCE REQUIRED

Parties subject to this notice are required to submit evidence consistent

with their burden of proof set forth above. Other interested parties, such as shippers, ultimate consumers or public interest groups, the Federal Trade Commission and the Department of Justice are invited to participate in any or all proceedings. The latter two government agencies are particularly invited to comment on the anticompetitive effects of the agreements under consideration. Evidence submitted by all parties in any proceeding must be relevant to one of these three issues:

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

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

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

The Commission will not accept general allegations of fact unsupported by evidence or not stated with particularity. Evidence, either by way of verified statement or in the form of documents, must be detailed and thorough. If no evidence exists to support a particular contention, the parties should state why. General allegations that ratemaking agreements are necessary, or that they are not, will be disregarded unless substantiated by facts which relate the statement to the agreement under consideration. Nor will the Commission accept as justifications for an agreement that collective ratemaking will enable the parties to economize in their operations or in tariff publication. Such arguments have been made by applicants and rejected by the Commission in the past. E.g., *Fior's Specialized Carriers Interstate Rate Conference, Inc.-Agreement*, 353 I.C.C. 623 (1977). As a helpful guide to applicants in determining whether evidence will be considered persuasive by the Commission, it should be kept in mind that applicants have the burden of proof at every step in the proceeding.

In addition to the requirements outlined here concerning evidence, applicants must also submit evidence responsive to the following questions:

(1) Whether any of the goals which justify the collective ratemaking agreement under consideration can be accomplished by some other method than collective action.

(2) Whether any of the reasons which justify membership in the agreement by any specific parties can be accomplished without belonging to the agreement, and

(3) The number of carriers with operating authority from the Commission which qualify for membership in

the agreement but which are not parties to it.

Evidence responsive to these questions must be detailed, substantiated by documents such as continuing traffic studies, and otherwise meet the standards for evidence generally set forth here. It is the Commission's determination that it needs more specific information respecting a particular agreement. It will issue the necessary Orders, with adequate notice and opportunity for comment by the parties affected.

OTHER MATTERS

Unless the Commission states otherwise with respect to any particular proceeding, replies to initial statements filed in any of these proceedings will be due thirty days after the filing with this Commission of the statement to which the reply makes reference. Due dates for initial statements from parties in each proceeding are set forth in the following paragraphs and are staggered for the Commission's administrative convenience. All parties should be aware that the Commission will disfavor requests for extension of time to file initial or reply statements or other pleadings absent a showing of compelling necessity.

These are the due dates:

For the following applications, June 12, 1978: No. 1, Household Goods Carriers' Bureau; No. 4, Movers' & Warehousemen's Association of America, Inc.; No. 9, National Bus Traffic Association, Inc.; No. 10, Waterways Freight Bureau; No. 11, Michigan Movers' & Warehousemen's Association, new furniture; No. 15, Atlantic-Buff Coastwise Steamship Freight Bureau; No. 113, Automotive Carriers Association; No. 114, Midwest Household Goods Carriers Association; No. 15, Midwest Offfield Haulers Freight Traffic Association; No. 115, Willamette Tariff Bureau, Inc.; No. 107, Air Freight Motor Carriers.

For the following applications, July 10, 1978: No. 22, Pacific Inland Tariff Bureau, Inc.; No. 23, Middle Atlantic Conference; No. 24, San Francisco Movers Tariff Bureau; No. 25, New England Motor Rate Bureau, Inc.; No. 30, Tobacco Transporters Freight Traffic Committee; No. 31, Chicago Suburban Motor Carriers Association, Inc.; No. 32, Columbia River Tariff Bureau; No. 33, Central States Motor Freight Bureau, Inc.; No. 34, Midwest Motor Freight Bureau; No. 35, Oil Field Haulers Association, Inc.

For the following applications, August 9, 1978: No. 36, Wearing Apparel Carriers; No. 37, Southern Illinois Motor Rate Conference; No. 39, Western States Movers' Conference; No. 40, Kansas Oil Field and Heavy Machinery Haulers; No. 45, Niagara Frontier Tariff Bureau, Inc.; No. 46, Southern Motor Carriers Rate Conference, Inc.; No. 48, Eastern Central Motor Carriers Association, Inc.; No. 49, Central and Southern Motor Freight Tariff Association, Inc.; No. 51, Indiana Motor Rate and Tariff Bureau, Inc.; No. 52, Freight Forwarders Conference.

For the following applications, September 8, 1978: No. 53, Intercoastal Steamship Freight Association; No. 54, Heavy and Specialized Carriers Tariff Bureau; No. 55, Motor Carriers Traffic Association, Inc.; No. 58, Machinery Haulers Association; No. 60, Rocky Mountain Motor Tariff Bureau, Inc.; No. 61, National Classification Committee; No. 62, Intermountain Tariff Bureau, Inc.; No. 63 Bulk Tank Carrier Conference, Inc.

For the following applications, October 9, 1978: No. 64, Steel Carriers' Tariff Association, Inc.; No. 65, Western Tank Truck Carriers' Conference, Inc.; No. 69, Perishables Tariff Bureau; No. 70, Western Motor Tariff Bureau, Inc.; No. 73, Ohio Motor Freight Tariff Committee, Inc.; No. 75, Pacific Motor Tariff Bureau, Inc.; No.

77, Nationwide Household Movers Association.

For the following applications, November 7, 1978: No. 78, Mobile Housing Carriers Conference; No. 79, Hawaiian Freight Tariff Bureau, Inc.; No. 81, New York Movers Tariff Bureau, Inc.; No. 83, Alaska Carriers Association, Inc.; No. 85, Oil Capital Tariff Bureau, Inc.; No. 87, National Association of Specialized Carriers, Inc.; No. 91, Wyoming Trucking Association, Inc.; No. 92, Maine Motor Rate Bureau; No. 94, Automotive Transporters Tariff Bureau, Inc.; No. 95, United Tariff Bureau, Inc.

For the following applications, December 7, 1978: No. 65, Equipment Interchange Association; No. 72, Motor Carrier Inter-Related Rate Agreement; No. 96, Northwest Towboat Tariff Bureau, Inc.; No. 99, Nebraska Motor Carriers' Association; No. 101, Midwest Cement Carriers; No. 103, Household Goods Forwarders Tariff Bureau.

Applicants in all proceedings must serve a copy of their evidence on the Federal Trade Commission, Office of the Secretary, Washington, D.C. 20580, and on the Department of Justice, Attn: Assistant Attorney General John H. Shenefield, Antitrust Division, Washington, D.C. 20530. Nonapplicant parties filing pleadings with respect to a particular agreement must serve a copy of the pleading on the group of parties to the agreement affected.

This document was adopted formally at a general session of the Interstate Commerce Commission held at its office in Washington, D.C. on the 20th day of December 1977.

By the Commission. (Commissioner Brown not participating.)

H. G. HOMME, Jr.,
Acting Secretary.

(PR Doc. 78-777 Filed 1-10-78; 8:43 am)

COMMENTS OF
A. DANIEL O'NEAL, CHAIRMAN
INTERSTATE COMMERCE COMMISSION
ON TITLE II OF S. 1291, "A PROCOMPETITIVE
STANDARD FOR FEDERAL AGENCIES"

The Interstate Commerce Commission appreciates the opportunity to comment on title II of S. 1291 which is a revised version of S. 382, the "Competition Improvements Act of 1979". As you know, we commented on S. 382 last April.

In the statement on S. 382, a majority of the Commission endorsed the enactment of the procompetitive standard with some modifications. That standard has now been revised. Consequently, I would like to begin by discussing whether the new standard is a workable one from our point of view. Also, as you will recall, in endorsing the procompetitive standard of S. 382, we emphasized the importance of limiting the application of the standard to decisions involving major agency actions. Title II, like its predecessor, requires the application of the standard to all agency actions. Therefore, I will take up that point again, and provide some further documentation on the potential adverse effect on the Commission's decisionmaking of applying the standard to every agency action. In concluding, I would like to suggest some changes in the language of the standard which we think would accomplish the purpose of the legislation without unnecessarily burdening the administrative process.

Before discussing the revised procompetitive standard, I should mention that the purpose and the basic procedure of title II and S. 382 are identical. Both would require agencies to regulate in a manner least likely to affect competition adversely. In our earlier statement, we said that we thought agencies, like the ICC, should consider the impact of their actions on competition. We also attached to that statement an appendix which described a number of recent Commission actions aimed at improving competition in the motor carrier industry. Since that statement fully addressed those matters, I will not discuss them further in this statement. Instead, I am attaching a copy of the earlier statement as an appendix.

In the statement on S. 382, we noted the similarity between the procompetitive standard of S. 382 and the standard developed by the Commission for reviewing collective ratemaking agreements. Both would require the Commission to find that the proposed action is necessary to further certain statutory goals; that the anticompetitive effects of the action are outweighed by other benefits to the public; and that the statutory purpose cannot be accomplished by alternative means having lesser anticompetitive effects. In approving the procompetitive standard, we said that it would appear to permit the accommodation of overlapping and sometimes inconsistent policies guiding the Commission in its actions.

The procompetitive standard of title II provides that an agency must consider the effects on competition of its proposed action and find "that such action is the least anticompetitive alternative legally and practicably available to achieve statutory goals." We think that the new standard, like its predecessor, would permit the accommodation of overlapping goals and policies. A couple of examples may be helpful.

The Midwestern rail network was built to meet the needs of an agricultural distribution system back when a farm-to-railroad round trip of 15 miles was about all that would be accomplished in a single day. Today, the Midwest suffers from an overcapacity problem which has contributed to the unhealthy condition of a number of railroads. In response to this problem, Congress took steps to ease the restructuring of the railroad system. In its past merger decisions, the Commission has examined, among other things, the presence of truck and barge competition in many rail markets. In some instances, it has found that the extensive presence of such competition has diminished the need and potential for intra-railroad competition.

We believe that the Commission's decisions with respect to those railroad mergers probably would be consistent with the procompetitive standard of title II. The Commission could find that the mergers were the least anticompetitive alternatives

available to further transportation goals. There would be less intramodal competition, but enhanced intermodal competition, since the merged railroad might well be stronger than the individual railroads making up its parts.

Currently, the Commission is granting either in whole or in part approximately 98 percent of the applications for motor carrier permanent operating rights. In most cases, those grants are the least anticompetitive alternatives available to the Commission in carrying out its statutory goals. However, contrary arguments have been raised that, under certain circumstances, a grant of operating authority could adversely affect competition.^{*/} Without giving an opinion on the validity of these arguments, we can envision a court finding that they raise a legitimate issue which the Commission must address in a decision authorizing a grant over such protests.

For example, it might be argued that a large, aggressive carrier providing extensive single line service could apply for authority already served by several smaller carriers. In the short run, the competitive situation would be improved by increasing the number of carriers in the market. However, the argument could be made that over the long run it could be adversely affected, if the smaller carriers fail to compete with the large carrier and drop out of the market. The validity of this argument hinges on a number of factors,

^{*/} Of course, if the Act specified that a grant of entry authority will have no anticompetitive impact, the prospect of an unwieldy administrative burden arising from the handling of that issue would be abated.

including whether advantages to large size exist in some circumstances of the trucking industry, and it could be burdensome to address the issue in the numerous application cases which the Commission processes, and it could delay that process. ^{**/}

Under the proposed legislation, it appears that the Commission would have to consider the effects on competition of its proposed actions in the situation in the example. ^{1/} In turn, it would have to select the least anticompetitive alternative available to achieve its goals. Protestants could argue that a Commission should deny the applications on the basis that over the long run that action would have the least anticompetitive effect.

As I have said, we believe that the procompetitive standard of title II will provide the Commission with sufficient flexibility to carry out the various policies guiding our actions. However, we would suggest that the language "notwithstanding any other provision of law" be deleted in order to make it clear that the procompetitive standard is not intended to override other policy considerations. As a substitute for that language, we would suggest something

^{**/} See Commissioner Trantum's separate expression.

^{1/} The courts have made it clear already that in determining whether the public convenience and necessity requires additional service, the Commission must consider the possible benefit to the public from increased competition which a grant of the application will foster. Bowman Transportation, Inc., v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974); P.C. White Truck Line, Inc., v. ICC, 551 F.2d 1326 (D.C. Cir. 1977); and Sawyer Transport, Inc., v. United States, 565 F.2d 474 (7th Cir. 1977).

along the lines of Section 105 of the National Environmental Policy Act of 1969 (NEPA).^{2/} That section provides that "The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies." That section was intended to give recognition to the fact that NEPA did not repeal existing law. However, it did not "obviate the requirement that the Federal agencies conduct their activities in accordance with the provisions of [NEPA] unless to do so would clearly violate their existing statutory authorizations."^{3/} We think the language of NEPA is consistent with the purpose of title II.

While we think that the procompetitive standard is a workable one, we must emphasize again the importance of limiting the application of the standard to decisions involving broad policy issues or other major decisions. As currently drafted, title II requires that the procompetitive standard be applied to every agency action. In fiscal 1978, the Commission disposed of 11,650 formal cases and completed a number of rulemaking proceedings. In addition, it disposed of a large number of informal cases, including 18,632 applications for motor carrier temporary authority. Further, the number of cases filed is increasing rapidly, chiefly due to increased filings of applications for motor carrier permanent

^{2/} 42 U.S.C. 4335.

^{3/} 1969 U.S. Code Cong. and Adm. News, p. 2751.

and temporary operating authority. If the Commission were forced to apply the standard in every proceeding, it would slow our administrative process substantially. I think it may be helpful to review each of the categories listed in section 602(a) for the purpose of determining to what extent each of them would affect our decisionmaking process.

Under section 602(a)(1), the Commission would be prohibited from taking any action that "regulates or licenses entry under a scheme in which the level of entry is subject to limitation...unless it has considered the effects on competition of such action and found that such action is the least anticompetitive alternative legally and practicably available to achieve statutory goals." Approximately 9,800 of the 11,650 formal cases disposed of in fiscal 1978 were entry cases. All 18,632 cases involving motor carrier temporary authority fall under this category.

Committee staff has advised us that the purpose of the language "under a scheme in which the level of entry is subject to limitation" is to limit the application of this section to agency actions which deny entry to an applicant on the basis that existing carriers can provide the service. Assuming that this section could be applied in that manner, it would reduce substantially the number of cases requiring a procompetitive analysis. During the last two years, the Commission has placed more emphasis on the need for additional competition than on the protection of carriers already in the market. In fact, as I indicated earlier, during fiscal 1979 98 percent of the motor carrier applications for permanent authority which we decided

on the merits resulted in full or partial grants.^{4/} However, because of the basic evidentiary requirements needed to support the grant or the denial of an application for operating authority, we do not believe that this section can be applied in the manner intended. In the event the Commission denied an application for authority, it would have to have sufficient evidence in the record to support the finding that the denial was the least anticompetitive alternative available to achieve statutory goals. In deciding whether or not to grant an application, the Commission must consider the evidence submitted by the applicant, its supporting witnesses, and the opponents. Consequently, the parties would have to present evidence on the competitive effects of the Commission's action regardless of whether the Commission ultimately granted or denied the application. In turn, the Commission would have to evaluate the additional evidence. Under the circumstances, we do not see how the language restricting the application of the standard can in fact reduce the number of cases requiring a procompetitive analysis.

It has been suggested that this section would not significantly burden the Commission's decisionmaking since the Commission is already required in determining whether the public convenience and necessity requires additional service, to consider "...the contribution that competition might make to the public weal."^{5/} However, there are two basic problems

^{4/} During the 1979 calendar year, the Commission granted in whole or part 90.6 percent of the applications for temporary motor carrier authority decided on the merits.

^{5/} P.C. White Truck Line, Inc. v. ICC, supra, 551 F.2d at 1329.

underlying that assumption.

First, while the courts have required the Commission to consider the benefits to the public of competitive service, they have not required the Commission to make specific findings on competition. We think the requirement that the Commission find that its action is the least anticompetitive alternative would dictate that evidence beyond what is required now to support agency actions be put into the record.

Second, the courts have not required the Commission to consider competition in determining whether to grant an application for temporary authority.^{6/} One reason for the distinction is that grants of permanent and temporary authority are governed by different statutory criteria. The public convenience and necessity standard is thought to embrace a wide variety of factors, including competition. On the other hand, a motor carrier soliciting temporary operating authority has a relatively narrow standard to meet. It is required to show that shippers have an immediate and urgent need for the service contemplated and that existing carriers cannot meet that need.^{7/} Another reason for the distinction is that the courts have allowed the Commission especially broad discretion in deciding temporary authority cases. The Commission's

^{6/} Barrett Mobile Home Transport, Inc., v. United States, 567 F.2d 150 (D.C. Cir. 1977).

^{7/} 49 U.S.C. 10928.

decisions must be supported by relevant data. However, because of the urgency of the situation generally surrounding the applications, the decisions often are made quickly with very little written supporting data and analysis.

Section 602(a)(2) would require the Commission to apply the procompetitive standard to its rate actions. In order to understand better the impact of this section on the Commission, I think an explanation of our rate authority may be helpful.

The statutes require that common carrier rates be reasonable^{8/} and not unjustly discriminatory.^{9/} Common carrier practices and regulations relating to charges are required to be just and reasonable, as well. Carriers must publish the rates and file the tariff publications with the Commission.^{10/} There must be strict observation of the tariff publications.^{11/} A proposed rate change ordinarily must be filed with the Commission at least thirty days before it becomes effective.^{12/}

^{8/} 49 U.S.C. 10701.

^{9/} 49 U.S.C. 10741.

^{10/} 49 U.S.C. 10762.

^{11/} 49 U.S.C. 10761.

^{12/} 49 U.S.C. 10762.

The Commission, either on its own initiative, or on the basis of a complaint (protest) may begin a proceeding to determine whether the proposed rate is lawful.^{13/} The Commission must complete such a proceeding (investigation) and make a final decision ordinarily no later than seven months after the rate was to become effective.^{14/} In specified circumstances, it may suspend the effectiveness of the proposed rate pending final action in the investigation.^{15/}

If the Commission does not suspend or investigate, and the proposed rate takes effect, the Commission later may investigate the lawfulness of the rate, acting either on its own initiative or on complaint of an affected person.^{16/} In the case of a complaint, the Commission must begin an investigation unless the complaint states no "reasonable grounds for investigation and action."^{17/}

If, after a hearing, the Commission finds that a rate is unlawful, it may prescribe the lawful rate and it may order

^{13/} 49 U.S.C. 10707 and 10708.

^{14/} Id.

^{15/} Id.

^{16/} 49 U.S.C. 11701.

^{17/} Id.

the carrier to stop charging the unlawful rate.^{18/} The Commission's final order in a complaint proceeding determines the lawfulness of the carrier's rate and is subject to judicial review.

The number of tariff publications that the Commission receives annually is huge.^{19/} During fiscal 1978, we received 397,024. This fiscal year, we expect the number to reach 503,760. Obviously, we cannot review every tariff publication in detail. Consequently, back in 1973, we set up a consumer-oriented tariff examination program to provide for detailed analysis of certain types of tariffs, such as general increase publications and those tariffs published by major rate bureaus and large carriers for their own accounts. The program is intended to detect proposed rate changes or rule revisions that may be, among other things, unreasonable or discriminatory. Approximately, one-half of all the tariffs filed with the Commission are examined under this program. The other half receive a more limited review where we check

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49 U.S.C. 10704.

^{19/}

Tariff publications include initial tariffs and revisions and supplements to existing tariffs. A tariff publication may contain as few as one or as many as thousands of individual proposed rate changes.

for compliance with statutory notice provisions, orders of the courts and Commission and tariff publishing regulations.^{20/}

If the tariff examiner working in our consumer-oriented program suspects that a proposed rate or rule is unreasonable or discriminatory, he or she will forward the proposal to a board of employees, known as the Suspension Board. I will explain momentarily the functions of the Board.

On the other hand, a tariff publication receiving limited review which is found not to comply with the notice provisions, certain orders, or tariff publishing regulations is handled by the tariff examiner. The tariff examiner will either reject or criticize the tariff depending on the severity of the violation. If the tariff is rejected, a letter ordinarily is sent to the carrier or its publishing agent explaining the reason for the rejection and returning the tariff publication.^{21/}

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Beginning October 1, 1979, the Commission will no longer examine every tariff filed to determine compliance with regulatory requirements. Instead, only a sample of tariffs will be reviewed. However, the change will not affect our consumer-oriented tariff examination program.

^{21/}

In the case of tariff publications which are criticized, the violation is brought to the attention of the carrier's publishing agent so that it can be corrected. However, the violation is not so great that the entire tariff publication warrants rejection. In fiscal 1978, we criticized 9,711 tariff publications.

Carriers can appeal the rejection to the Commission, and ultimately, of course, to the courts.

In fiscal 1978, we rejected 4,198 tariff publications. Those tariffs were rejected on nonsubstantive grounds. In fact, as I indicated above, the non-consumer-oriented examination program does not involve the examiners in such substantive matters as the reasonableness of the rates contained in the tariff publications. In view of the nature of that tariff examination, we think it would be inappropriate to require the Commission to consider the competitive effects of the tariff publication. In addition, because of the volume of tariff publications we receive, we think that the requirement that competition be considered would be especially burdensome. While only a small number of all of the tariff publications we receive are rejected, title II would seem to require that certain evidence be developed prior to the decision to accept or reject the tariff publication. This is the same problem that I described with respect to operating rights cases. There must be sufficient evidence in the record to support the agency's decision regardless of whether the agency accepts or rejects the tariff publication. The only practicable way to accommodate the new requirement would be to reduce the number of tariff publications we actually review. We do not think that is a result intended by the legislation.

Before describing the functions of the Suspension Board, there is one other point that I would like to make with respect to the tariff examination program. As I indicated above, beginning in fiscal year 1980 we will no longer review every tariff publication. Also, one-half of the publications now receive only limited review. Where there is no review or only limited review, the possibility arises that some tariff publications filed with the Commission contain rates and rules that are in violation of the statutes and our regulations. In light of that possibility, it is now established law that the fact that a rate is on file with the Commission raises no presumption of its legality.^{22/} For the reasons cited above, we believe that title II, as drafted, would require a procompetitive analysis whenever the agency reviews a tariff because of the possibility that it may reject a tariff publication. However, if the Commission did not review a tariff publication at all, we think title II would not be applicable. That is because the mere filing of the rate would not constitute Commission approval, and therefore, there would be no agency action as defined by the bill.

^{22/} H. J. Baker & Bros., Inc. - Statute of Limitations, 357 I.C.C. 640 (1978); Moore Bros., v. Chicago, B & O R. Co., 210 I.C.C. 95 (1935); and San Bernardino Bd. of Trade v. A. T. & S. Fe R. Co., et al, 4 ICC 104 (1891).

If a tariff examiner suspects that a tariff publication contains a rate (or rule) which is unreasonable or discriminatory, he or she will forward it to the Suspension Board with a request for suspension. On the other hand, shippers and other carriers file "protests" with the Board if they object to proposed publications.^{23/} The Board may enter an order of investigation and suspension, initiate an investigation without suspension, or decline to take action.

As observed above, a tariff publication must be filed thirty days before the effective date. Consequently, the Board must do its screening quickly. Under Commission rules, protests and requests for suspension must be filed with the Commission and served upon the publishing carrier no less than twelve days before the effective date of the tariff. The protestant must indicate in what way the proposed rate is alleged to be unlawful and must state what the protestant believes is a lawful alternative. The carrier may file a reply, but no later than the fourth working day before the rate's effective date. If the Board declines to suspend a proposed tariff publication, the protestants may seek reconsideration by the Commission. However, the request must reach the Commission no later than two workdays prior to the

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A three-member division of Commissioners or the entire Commission may also act initially on such requests and protests.

effective date of the protested matter. If the Board votes to suspend, the affected carrier may file a petition within twenty days.

During fiscal 1978, a total of 1,355 protested rate proposals were handled by the Commission, the vast majority initially by the Board. In addition, the Board handled on request of ICC staff 247 proposals published in 464 tariff publications.

The decisions of the Board are based on its determination of whether there is probable cause to believe that the proposal, if made effective, would violate the statutes.

The Board must make its decisions under the pressure of a tight time schedule and a large volume of business. Its procedures are necessarily informal. The Board makes no transcript, issues no subpoenas, administers no oaths. It accepts telegraphic pleadings when circumstances warrant. Inevitably, it tends to place substantial reliance upon its "feel" for the matter and its understanding of the Commission's preferences and policies.^{24/}

The tight time limits, the volume of business, and the informality of the procedures are all reasons why we think it would be inappropriate and burdensome to apply the procompetitive

^{24/} Spritzer, Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices, 120 U. Pa. L. Rev. 39, 56 (1979).

standard to decisions on whether or not to initiate an investigation of a rate proposal. In fact, it was those factors, among others, that led the United States Supreme Court to hold that the Commission's decisions to investigate^{25/} or not to investigate^{26/} are within its discretion, and not matters which are reviewable.^{27/}

Of course, in saying that the procompetitive standard should not be applied to those decisions, we do not mean to suggest that the Board or Commission should not consider the effects on competition of their actions. In fact, we think that to the extent there are competitive issues involved in those decisions, the effects on competition should be considered. However, we believe that result could be achieved as well if the application of the procompetitive standard were limited to decisions involving broad policy issues or other major decisions. As mentioned above, the Board is influenced

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City of Chicago v. United States, 396 U.S. 162, 165 (1969); and New Jersey v. United States, 168 F. Supp. 324, aff'd., 359 U.S. 27 (1959).

^{26/}

Southern Ry. Co. v. Seaboard Allied Milling Corp., et al, U.S. , 60 L. Ed. 2d 1017, 99 S.Ct. (1979).

^{27/}

On the other hand, if the Commission undertakes an investigation, its decisions terminating such investigations are reviewable. City of Chicago v. United States, 226 F. Supp. 318, aff'd., 379 U.S. 6 (1964).

in its decisions by its understanding of Commission preferences and policies. If the procompetitive standard were applied to Commission policy decisions, those decisions would be reflected, in turn, in the Board's decisions.

Those factors which influenced our recommendation with respect to the application of the procompetitive standard to decisions on whether or not to investigate a rate proposal, do not pertain to the Commission's actual investigations (proceedings) into the lawfulness of proposed rates or rates already in effect. The time limits are not as stringent; there are fewer cases; and the proceedings are more formal. Also, the Commission is required to make a report that includes the findings, conclusions, and its order.^{28/} The analysis required by title II could be included in the report.

We think the analysis required by title II is of the type that ordinarily is included in a formal Commission proceeding, like an investigation into the lawfulness of a rate. However, we still have one concern. That concern is not limited to rate investigations, but instead pervades the entire rate area. The problem is that competition simply may not be a factor in many rate cases. For instance, in

^{28/}

49 U.S.C. 10310.

some cases involving rate increases, the only question may be whether the proposed increase is excessive. Title II would require us to consider the effects of our action on competition, as well as make a finding on the least anticompetitive alternative available to us. We think the bill should be amended to make it clear that where the agency determines that its action will have no effect on competition, no finding on the least anticompetitive alternative is necessary.

By suggesting that competition is not a factor in many rate cases, we do not mean to leave the impression that such is always the case. There are cases where competition is most definitely a factor, and we think the Commission should consider competition in those cases. For instance, we would expect competition to be taken into account where a carrier proposes to offer different levels of service for different rates or proposes to decrease its rates below its competitors. Similarly, in the case of some rate increases, we would consider their impact on the competitive positions of the shipping communities and regions involved.

Section 602(a)(3) would require the Commission to apply the procompetitive standard to any action that "sets, limits, or allocates the production or distribution of goods or services". It's been suggested that this section would affect partial grants of operating authority. If so, we would not expect it to have a sizeable impact on our workload. Partial grants make up a relatively small percentage of our total

grants. For example, in the month of July, the Commission handled 1,379 applications for motor carrier permanent authority. We granted 1,291 in whole and 32 in part.

Section 602(a)(4) refers to any action that "reviews, approves, rejects, or regulates the terms and conditions of agreements among providers or purchasers of goods or services." As you know, the Commission is authorized to approve acquisitions and mergers, as well as agreements among carriers that allow them to discuss among themselves and jointly vote on the level of rates which they will charge to shippers. Section 602(a)(4) would apply to such actions. However, as we previously explained in the statement on S. 382, we currently are required to consider the effects on competition when ruling on rail or motor carrier acquisitions and mergers. Also, we are using a standard similar to the procompetitive standard in reviewing the collective ratemaking agreements. In addition, we noted that the total number of actions involved in this area is small compared to the entry and rates areas. With those factors in mind, we think that the application of the procompetitive standard would be neither inappropriate nor particularly burdensome in this area.

To summarize briefly the preceding paragraphs, we believe that if the Commission were required to apply the procompetitive standard to every entry and rate action, it would burden the administrative process substantially. Further, many of this agency's actions do not raise issues of competition. Consequently, the application of the procompetitive standard to

those actions would be an unnecessary exercise. Finally, some of the Commission's actions, especially in the entry area, are so clearly procompetitive that a procompetitive analysis makes little sense.

Of course, at the same time, we think that competition does play, and should continue to play an important role in our regulation of the surface transportation industry. Thus, we would like to see some means developed which would not unnecessarily burden the administrative process, but yet the policies, standards, and criteria which guide our decisions would be subject to the procompetitive standard of title II. We have considered several different approaches to this matter.

One approach would be to rewrite each of the categories listed in section 602(a)(1)-(4), so as to include some agency actions, but not others. The problem with that approach is that some of our actions cannot be easily described, and certainly cannot be described in such a way as to include the actions of other agencies covered by title II. Further, if we undertook simply to list all of the actions we take, the categories would be unwieldy.

Another approach would be to revise the standard so as to require the agency to consider competition in every action, and in the case of "important" agency actions, make a finding that such action is the least anticompetitive alternative available to it. That change would lessen the workload somewhat. However, it would still require an analysis where

the proposed action raises no competitive issues or where it is clearly procompetitive.

We think that the most effective and workable approach is the one we proposed in our statement on S. 382. There we said that the application of the procompetitive standard should be limited to major agency actions as defined by the agency. The agency's decision as to whether one of its actions is major would be subject to judicial review. That approach appears to have worked well in the environmental area. Further, we think that the guidelines we developed for the implementation of the NEPA could serve as a model for regulation implementing title II.^{29/} Those guidelines describe some of the factors to be taken into account in determining whether an action is a major one. They also list classes of actions which have the potential for a significant "environmental" impact and classes of actions where no "environmental" issues are present. They describe the type of information that an applicant must present indicating the presence or absence of any "environmental" impact. While those are just a few examples, we think they illustrate the similarity in approach between the requirement that we consider the environmental impact of our major agency actions and a requirement that we consider the anticompetitive impact of such actions.

^{29/} 49 C.F.R. 1108.1 et seq.

Naturally, we would expect the Attorney General to participate in the development of the regulations implementing title II, as well as individual proceedings involving issues of competition.

Before closing, I would like to mention briefly the other sections of title II.

Section 602(b) exempts from subsection (a) certain agency actions involving entry and the production or distribution of goods or services, if the agency's actions are based on matters of health or safety. We support such an exemption, since it attempts to save decisions based on non-economic factors from a procompetitive analysis. However, we would suggest that the exemption be expanded to include "fitness".

Before issuing a certificate or permit to a carrier to provide service, the Commission must find that the carrier is "fit, willing, and able" to provide such service and to comply with the statutes and our regulations.^{30/} That finding is separate from the finding that the Commission must make with respect to "public convenience and necessity" or other similar standards. Safety is only one of the factors that the Commission considers in determining whether the carrier is "fit, willing, and able". We also must take into account the

^{30/}

49 U.S.C. 10922 and 10923.

carrier's financial fitness, its past performance, its ethical integrity, and whether it has adequate insurance. Those are matters which should be taken into account separate from economic considerations. We think they fit into the same category as health and safety, and, thus should be covered by section 602(b).

There is one other exemption which we believe should be added to title II. We do not believe that title II was intended to affect an agency decision based on a finding that the applicant did not present a prima facie case. If an applicant fails to meet statutory deadlines or forwards an incomplete application, an agency should not have to consider competition before rejecting the application. We believe that is true, regardless of whether the decision is one with respect to entry, rates, or financial matters. We suggest title II be amended accordingly.

Subsections (a), (b), and (c) of section 602 are slightly modified versions of sections 4(a), 4(b), and 4(d), respectively, of S. 382. In commenting on S. 382, we suggested only minor changes in those sections. Rather than repeating those suggestions here, we wish to refer you to page 13 of our statement on S. 382.

Similarly, subsections (a) and (b) of section 604 are nearly identical to sections 6(c) and 6(d) of S. 382. In our comments on S. 382, we supported the requirement that

each agency review its rules, policies and procedures for the purpose of bringing them into conformity with the legislation. We also discussed the similarity between that review and the current review of our regulations prompted by President Carter's 1978 executive order aimed at improving government regulations.^{31/} Our comments on sections 6(c) and 6(d) are on pages 15 through 17 of the statement on S. 382.

I hope that our comments on title II will be helpful to you. I would be glad to answer any questions you may have on the statement or other matters.

Attachment

Commissioner Stafford and Commissioner Gresham were absent and did not participate.

Commissioner Trantum submitted the following separate expression to Chairman O'Neal:

I believe S. 1291 should be strongly supported by the Commission. If the following points are not incorporated into the testimony, show them as a separate expression.

With respect to your concerns, I would make the following points:

(1) A "procompetitive standard" would seem to be consistent with the Commission's apparent direction of

^{31/} See Ex Parte No. 350, Improving Commission Regulations, served July 18, 1979 and Executive Order 12044, Improving Government Regulations, signed March 23, 1978.

relaxing barriers of entry for motor carriers. Just because individual cases are generally small, does not appear to be a forceful argument against the application of a procompetitive standard. The fact that we are currently approving 98% of motor carrier entry applications prevents the standard from being an administrative burden. The intent of this legislation is to apply the standard only when entry is being limited.

(2) I strongly disagree with your economic analysis contained in the second full paragraph on page 4. Optimal economic efficiency in the trucking industry has little to do with size. Effective and innovative management is the key--and this can be found in both large and small trucking companies. If you wish, I would be happy to discuss this point at length with you and/or your staff.

(3) I favor leaving in the language "notwithstanding any other provision of law." As indicated in footnote number one, page 5 of the testimony, the courts have already made it clear that competition has some role in entry cases. Without this language, the procompetitive standard would merely repeat what the Court has already said.

(4) The standard should be applied to fitness findings rather than exempting them as proposed on page 24. While ICC fitness findings do not currently have a large

impact on the degree of competition, they could in the future. In any event since the requirement would only be applied when a carrier was found not fit, the potential administrative burden does not seem unreasonable. More importantly, in some areas there could be "less anti-competitive alternatives" to simply finding a carrier unfit. For example, the public's interest may be protected by placing restrictions on the suspect carrier.



 NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

July 19, 1979

Honorable Edward M. Kennedy
 Chairman
 Committee on the Judiciary
 United States Senate
 Washington, DC 20510

Dear Mr. Chairman:

This is in response to your letter of June 27, 1979, requesting the views of the National Credit Union Administration (NCUA) on S. 1291, The Administrative Practice and Regulatory Control Act of 1979.

This agency has continuously supported regulatory reform efforts and has voluntarily complied with the provisions of E.O. 12044. Our final regulation on rulemaking became effective on April 16, 1979.

We are pleased to offer support for the type of reform proposed by S. 1291. We support the concept of increased public participation as well as the provisions to coordinate existing regulatory improvement activities. This bill provides for a Presidential review of many of the regulatory agencies including NCUA and we concur in this approach. As our detailed comments point out, credit unions and their common bond requirement for membership pose some difficulties in applying traditional measurements of competition. Approximately 90% of credit unions do not and in fact cannot compete for the funds of the general public.

Our detailed comments on these issues and others are as follows:

1. Sec. 101. The concept of "emergency rule" will provide each agency with the opportunity to promulgate a regulation immediately when necessary to prevent serious injury to an important public interest, substantial frustration of legislative policies, or serious damages to a person or class of persons. However, the agency would, whenever appropriate, be required to comply with the usual rulemaking requirements after the emergency rule is issued. This, in our opinion, provides the agency with the opportunity to issue an interim rule without denying the public the opportunity to participate in the formulation of the final rule. We support this provision and suggest that more explicit guidance be set forth in the legislative history.

2. Sec. 102 would require an agency to issue an Advance Notice of Proposed Rulemaking for all significant rules before issuing a proposed rule. NCUA has used this technique in connection with a proposal to regulate the debt collection practices of Federal credit unions (See: 44 F.R. 20447, April 5, 1979). The comment period ended on June 30, 1979, and we are still in the

process of evaluating the comments. Nevertheless, the response to the Advance Notice was enthusiastic, indicated that the problem was not as serious as originally contemplated, and could result in a decision not to promulgate a regulation on this issue. Although we recognize that the use of this technique will considerably lengthen the time it takes to issue a regulation, the exceptions for "emergency rules" and "non-significant rules" may make the use of this technique manageable.

3. Sec. 103 would amend 5 U.S.C. 553(d) to require an agency to maintain a file on each rulemaking proceeding which would include the notice of proposed rulemaking; copies of documents relied upon by the agency, copies of written comments, records of communications with outside parties, and other material which is required by law to be made public. NCUA's Office of General Counsel presently maintains a system of rulemaking files substantially similar to those required. This has been useful to the staff in the development and subsequent interpretation of the regulations and has not imposed a substantial burden on the agency.

4. Sec. 103(a) would establish a new Administrative Procedures Act provision, 5 U.S.C. §553a, which would require agency officials to keep written records of oral or written communications from persons outside the agency "relevant to the merits of a rule making proceeding for a significant rule." This requirement will increase the workload of agency officials, but, in light of the public interest in the development of significant rules, this burden is worthwhile. However, in order to decrease this burden, it is suggested that communications that do not contain comments on the proposed rule, such as requests for information concerning the proposed rule (i.e., citation in the Federal Register, where comments should be sent and the date the comments are due, and questions on the meaning of certain provisions), not be considered to be "relevant to the merits" and thus excluded from §553a coverage.

The proposal also explicitly recognizes the need to hold certain communications in confidence. The bill provides that the exemptions from the Freedom of Information Act's mandatory disclosure provisions would apply to the requirement that the written record be included in the public comment file. Since this proposal would include communications from other agencies, the exemption for inter-agency memorandum (5 U.S.C. §552(b)(5)) would be important.

5. Sec. 104(a) would establish a provision for the funding of public participation in rulemaking. The Administrative Conference would implement this provision by issuing regulations, establishing procedures for making awards and for reviewing performances, and would be responsible (after consultation with the agency) for making the awards. One potential problem

is that of the time needed to decide upon the applicant's need, the need for balanced representation, the importance of public participation on a particular issue, and the complexity of the issue presented. This will require the Administrative Conference to understand the substantive issues for all the agencies involved as well as the qualifications of the applicants. Centralization of this function (to permit a neutral body to control the funds) will likely lead to a bottleneck in which applications are ruled upon after the time for effective representation. As an alternative, the following suggestions are offered. First, applicants should be permitted to submit blanket applications specifying the types or areas of issues that they wish to be considered for in relation to a particular agency's rulemaking procedures. Thus the qualification of an applicant can be decided independently of, and prior to, the emergence of a particular issue. Second, the process of approving funding on a particular issue should be decentralized so that those most familiar with the issues can determine the complexity and importance of the issue, the importance of public participation, and the need for balanced representation. If these suggestions are taken together, the Administrative Conference could decide on the qualifications of the applicant and could award the public funds after being advised by the agency of the need on a particular issue. This should expedite the procedures.

6. Sec. 201 would require agencies to consider the competitive effects of their actions and to select the least anticompetitive alternative legally and practically available. This requirement would apply to agency rulemaking, licensing, and to sanctions imposed by the agency. NCUA will have some particular problems in complying with this requirement. First, the Federal Credit Union Act limits the chartering of Federal credit unions to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district (12 U.S.C. §1759). This provision necessarily results in some anticompetitive restrictions being imposed by NCUA. For example, NCUA must limit the extent to which a Federal credit union can compete for "customers" by limiting their field of membership. Although the proposal recognizes that statutory goals may intervene in selecting the least anticompetitive alternative, there is the possibility that NCUA's chartering policies may be viewed to be in violation of the proposed legislation. Secondly, the proposal would appear to apply to actions taken by NCUA to place insolvent credit unions into involuntary liquidation. These actions are taken by NCUA primarily upon the finding that a credit union is insolvent and does not appear to be able to return to a solvent state within a reasonable period of time. However, these actions may be considered to be "orders" or "sanctions" may be said to "limit the distribution of services . . .", and have the anticompetitive effect of eliminating a source of financial services in a community. This may have the effect of requiring NCUA to

permit some insolvent credit unions to remain in operation.

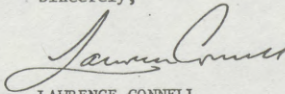
7. Sec. 301 would establish a program to review, over a period of 10 years, the effect of regulatory agencies. NCUA would be reviewed, along with the other financial institution regulatory agencies, in 1992. The review would be initially undertaken by the Committee on Regulatory Evaluation, established by the President and composed of the heads of some specified agencies, five individuals appointed by the President, the head of the agency under review (on an ad hoc basis), and a supporting staff. Two million dollars would be appropriated each year for the Committee's work. The Committee would review the agency and its proposed reform to increase economic competition, achieve statutory goals by less restrictions or new regulatory means, increase the effectiveness of regulations, and enhance the agency's ability to protect health, safety, and consumer interests. The President will issue a report and recommend legislation. The legislation would be a privileged matter and could be discharged from the committee considering it on the motion of a person favoring the legislation and upon a vote of 1/5 of the members of the House considering it, but only after 360 days of continuous session after it was introduced.

NCUA can support this provision. It permits the agency to participate in the review of its activities (as ad hoc member of the Committee) rather than having the review conducted by a body that is not comprised of persons sensitive to important agency issues. The procedures also appear to permit an expeditious consideration of legislation by Congress without tying the agency to other programs as would other proposals with automatic sunset provisions.

8. Sec. 401 would revise and expand the authority of the Administrative Conference of the U.S. Among other things, the Conference is directed to establish a Committee on Administrative Procedures composed of members of the Conference, employees of Federal regulatory agencies, and private citizens. The goal of this Committee would be to, within two years, develop regulations governing the rulemaking procedures of 5 U.S.C. §§553 through 558. These rules would be binding on all agencies, and agencies could not adopt inconsistent procedural rules. The Chairman of the Administrative Conference would be authorized to grant waivers or modifications on petitions by independent Federal regulatory agencies. These provisions could, potentially, be very worthwhile. The provisions of the Administrative Procedures Act are not well defined, either in the statute or by subsequent case law. Therefore, specific regulations which do more than merely repeat the broad language of the APA would be useful. Since the Federal agencies would be bound by these regulations, they should explicitly be provided with the opportunity to participate in this rulemaking process. It is also suggested that any modification or waiver authorized by the Chairman should be promulgated as an amendment to these regulations so that the public and the other agencies have an opportunity to be informed and to participate in the decision. At minimum, such modifications or waivers should be published in the Federal Register so that Federal agencies similarly situated and the public will be aware of the Conference's approval of such changes.

I hope these comments are of assistance.

Sincerely,



LAWRENCE CONNELL
Chairman



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

*File with S.382
material*

August 2, 1979

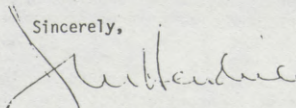
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cc - Mr. Tamm*

The Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

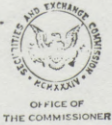
Dear Mr. Chairman:

The Commission appreciates the opportunity to offer further comment on S. 382, the "Competition Improvements Act of 1979." The Commission has no objection to S. 382 in its current form.

Sincerely,



Joseph M. Hendrie



SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

MAY 25 1979

Honorable Edward M. Kennedy, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

MAY 30

Dear Mr. Chairman:

The Commission is pleased to comment on the revised version of S. 382, the Competition Improvements Act of 1979. As you know, the Commission has commented twice previously on earlier drafts of this legislation, in letters to you dated March 15, 1979, and July 11, 1978. In addition, former Commission Chairman Roderick M. Hills testified on S. 2028, the Competition Improvements Act of 1975, before the Subcommittee on Antitrust and Monopoly on February 5, 1976. In each of these instances, the Commission has ~~not~~ ^{opposed} the "competition improvements" bills as drafted.

As you know, the Commission has long supported the policy of encouraging competition in the securities markets and believes that, in making regulatory decisions, it should weigh carefully any burdens on competition that its regulation would impose. Nevertheless, we believe that while the proposed standard in S. 382, as revised, is an improvement over the prior versions of the bill, it still would ~~not be the appropriate standard~~ to be applied to the Commission's regulatory decision-making.

S. 382 would establish a special requirement for certain kinds of agency action that may affect competition. It would prohibit a federal agency from taking any such action unless the agency had considered the competitive effects of such action and concluded that such action is the least competitive alternative legally and practicably available to achieve statutory goals." 1/ An agency's action would be subject to that requirement if it:

- (a) regulates or licenses entry under a scheme in which the level of entry is subject to limitation;

1/ S. 382, Section 3(a).

- (b) sets or reviews with authority to accept, reject, or modify the monetary price charge for goods or services;
- (c) sets, limits, or allocates the production or distribution of goods or services; or
- (d) reviews, approves, rejects, or regulates the terms and conditions of agreements among providers or purchasers of goods or services.

It appears that a large proportion of the Commission's actions under the various statutes it administers would not be subject to that requirement. As a general matter, the Commission is not usually called upon to allocate valuable franchises between or among competing applicants, nor does the Commission fix the prices at which most securities-related services are offered or, in most cases, establish limitations on the number of market participants that are allowed to compete. Nevertheless, the Commission is required, particularly in ~~several contexts~~^{several cases} under the Securities Exchange Act of 1934 (the "Securities Exchange Act"), to take action that could fall within the categories enumerated in S. 382, as revised. It is in view of those statutory mandates that the Commission believes the proposed requirement would be inappropriate.

The Securities Exchange Act directs the Commission to regulate a large number of competing entities and to use its authority to facilitate the establishment of both a national market system and a nationwide system for the clearance and settlement of securities transactions. ^{2/} In carrying out those responsibilities, and in certain other contexts under the Securities Exchange Act, the Commission is frequently called upon to ~~balance the need for~~ balance the need for

~~competition against several other statutory objectives,~~ competition against
~~such as the establishment of efficient components of~~ several other
 as the establishment of
 efficient components

^{2/} Sections 11A and 17A of the Securities Exchange Act. of a

national market system or a national clearance and settlement system.

~~national market system or a national clearance and settlement system.~~ In some cases, greater efficiency of operation, needed methods of protecting investors and safeguarding funds and securities may, in the Commission's judgment, ~~justify action that inhibits competition.~~ ^{justify action that inhibits competition.} Indeed, while the maintenance of a fair field of competition is generally an important goal under the Securities Exchange Act, the Commission must also consider the other goals articulated by Congress. In balancing these various public policy objectives, the Commission must give due deference to the need for competition. At the same time, it should neither overestimate nor underestimate the relative importance of competitive objectives as compared to the other statutory purposes.

The Congress recently considered the role the Commission should play in assessing burdens on competition. When it enacted the Securities Acts Amendments of 1975, the Congress ~~proposed by the Department of Justice — a formula similar to that contained in S. 382, as revised — and gave greater latitude, and more responsibility, to the Commission in determining whether burdens on competition should be tolerated.~~ ^{rejected a statutory formula} The Department of Justice had argued that the Commission should be required, in issuing rules and orders, to adopt "the least anticompetitive means" available to achieve the other statutory goals. ^{3/} In rejecting that approach, the Congress instead directed the Commission (1) to evaluate competitive burdens imposed by its own rules, as well as by rules of the stock exchanges and the other self-regulatory organizations, and (2) ~~to allow such burdens to be imposed~~ ^{to allow such burdens to be imposed}

3/ Attachment A to Statement of Donald J. Baker, Deputy Assistant Attorney General, Antitrust Division, Department of Justice (Feb. 19, 1975), reprinted in Securities Acts Amendments of 1975, Hearings on S. 249 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. 257 (1975).

A second inappropriate feature of S. 382 is the requirement that federal agencies establish special procedures for ~~providing notice to the Justice Department concerning actions to which the bill would apply~~. 5/ That requirement is unnecessarily duplicative of existing notice requirements under the Administrative Procedure Act. We do not believe it is necessary for the Justice Department to be given more extensive notice than is provided to members of the public who are directly affected by the agency's action.

providing notice
to the Justice
Department
concerning
actions to
which the
bill would apply.

Finally, we note that, in certain other respects, S. 382 remains unchanged from its prior versions. The Commission continues to object, for the reasons stated in our previous comments, to the provisions that give the Department of Justice and the Federal Trade Commission the ability to intervene "as a party of right" in Commission proceedings involving competition related issues, and that would, in effect, give the Justice Department and the FTC broad discovery rights not afforded other participants in such agency proceedings.

We appreciate this opportunity to comment on the revised version of S. 382. The views expressed here are those of the Commission, and do not necessarily represent the views of the Administration. A copy of this letter is being submitted simultaneously to the Office of Management and Budget, and we will inform you of any further advice received from that Office concerning the views of the Administration.

Sincerely,

Philip A. Loomis, Jr.
Philip A. Loomis, Jr.,
Commissioner

Air Transport Association



OF AMERICA

BY HAND

1709 New York Avenue, N.W.
Washington, D. C. 20006
Phone (202) 872-4000

May 29, 1979

The Honorable Edward F. Kennedy
Chairman
Senate Committee on Judiciary
Room 2226
Dirksen Senate Office Building
Washington, D.C. 20510

MAY 30 1

Dear Mr. Chairman:

The Air Transport Association of America (ATA), which represents virtually all federally certificated United States scheduled airlines, appreciates the opportunity to comment upon S.382, the Competition Improvement Act of 1979 (Competition Act). We believe that the application of the Competition Act to federal action taken pursuant to the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978 (Deregulation Act), will interfere with the carefully balanced and finely tuned Congressional program for airline deregulation.

For more than four years, Congress engaged in a thorough investigation of governmental regulation of the domestic airline industry. Countless hearings were conducted, points debated, and compromises reached. The end product, the Deregulation Act, signed by the President on October 24, 1978, contained the statutory policy guidance, standards, and procedures which Congress believed could best accommodate the shift away from pervasive regulation with the preservation of an integrated national air transport system. The highly detailed and clearly interdependent provisions of the Deregulation Act were designed to resolve problems which some foresaw for government and industry during the transition period.

The standards for approving airline agreements and conferring antitrust immunity exemplify the very specific attention Congress gave to the deregulation program. Section 28 of the Deregulation Act provided, for example, that domestic airline agreements which would substantially reduce or eliminate competition could not be approved by the Civil Aeronautics Board unless

"it finds that . . . agreement . . . is necessary to meet a serious transportation need or to secure important public benefits and it does not find that such need can be met or such benefits can be secured by reasonably available alternative

if they are "necessary or appropriate in furtherance of
~~that they are necessary or appropriate in furtherance of~~
~~the purposes of the Securities Exchange Act.~~" 4/ [the purposes of
 [the Securities Exchange
 Act]."

The current Securities Exchange Act standard reflects the need for a regulatory consideration of competitive impacts more appropriately than does S. 382. Having identified a competitive burden, the Commission must evaluate the extent to which the proposed action would nevertheless foster other statutory purposes and determine whether, in light of that analysis, the burden should be tolerated as a necessary or appropriate result of achieving the other goals. That balancing test requires the Commission to give appropriate consideration to the need for competition, but it avoids elevating that public policy over other equally important, and possibly competing goals.

S. 382 appears to be designed to achieve some semblance of the balance the Congress struck in the Securities Acts Amendments of 1975, but the statutory test S. 382 would impose is more cumbersome and less well suited to the regulatory process. ~~While we do not believe that the bill is intended to restrict agency discretion to such an extent,~~

the requirement in S. 382 that an agency determine its actions to be the "least anticompetitive alternative legally and practicably available to achieve statutory goals" may be interpreted to elevate the need for competition beyond the status the Congress determined it should have in the recent securities law amendments.

And, even though an agency might reasonably conclude that a proposed action did not burden competition in any inappropriate way, the restrictive language that S. 382 would impose could nevertheless invite litigation on a broad range of factual issues concerning possible alternatives that the agency might have, but did not adopt. We believe that the standard now found in the Securities Exchange Act better satisfies the objective of maximizing the role of competition in industries subject to the Commission's regulatory activities insofar as is consistent with the goals of regulation established by the Congress or by the agency acting pursuant to its statutory authority.

invite litigation on a broad range of factual issues concerning possible alternative approaches the agency might have, but did not adopt.

While we do not believe that the bill is intended to restrict agency discretion to such an extent, the may be interpreted to elevate the need for competition beyond the status the Congress determined it should have in the recent securities law amendments.

4/ See Section 23(a)(1) of the Exchange Act; see also Sections 6(b)(8), 15(b)(9), 15B(b)(2)(C) and 17A(b)(2)(I) of the Exchange Act.

means having materially less anticompetitive effects"

While this approach is very similar to that of the Competition Act, and establishes the same pro-competitive sensitivity, it does differ. And the difference is highlighted by the very precise burdens of proof that supporters and opponents of agreements must carry. See §28(c)(2)(B) of the Deregulation Act, 49 U.S.C. §1382(c)(2)(b).

With respect to the antitrust exemption provision, section 30 of the Deregulation Act, the standard therein set forth provided that the Board cannot grant antitrust immunity unless to do so is "required by the public interest", measured by a very pro-competitive public interest standard. It is noteworthy that this test received no adverse comment from the National Commission for the Review of Antitrust Laws and Procedures. It provides another example of how the general goals of the Competition Act have already been addressed in a very specific way by the Deregulation Act.

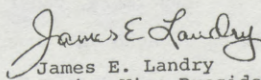
The Competition Act presents an approach to federal action so generalized that it applies across the board to essentially all federal regulatory bodies. ATA submits that the airline deregulation process, which was developed after so much analysis and was crafted with so much precision, should not be unbalanced or confused by the application of a very broad statute. The Competition Act simply cannot embody an appreciation for the intricacies and interdependence of a deregulation process so recently initiated by Act of Congress.

In summary, the Deregulation Act seeks to achieve the same results as the Competition Act, but does so in harmony with the entirety of the deregulation process. Seven months' experience with that process supports the view that new tests for domestic air transportation are neither necessary nor desirable. Accordingly, federal action taken pursuant to the provisions of the Federal Aviation Act of 1958, as amended by the Deregulation Act, should be exempted from the Competition Act. This could be accomplished by adding a new subsection (c) to section 7, which would provide:

"(c) This section shall not apply to federal action taken pursuant to the provisions of the Federal Aviation Act of 1958, as amended."

CC: All members of Senate
Committee on Judiciary

Sincerely,


James E. Landry
Senior Vice President
and General Counsel

April 23, 1979

STATEMENT OF
AMERICAN TRUCKING ASSOCIATIONS, INC.
BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
ON S. 382, THE PROPOSED
COMPETITION IMPROVEMENTS ACT OF 1979

The American Trucking Associations, Inc., 1616 P Street, N.W., Washington, D.C., 20036, is the national trade association of the motor carrier industry. It represents all types of motor carriers, and has affiliated associations in every State and the District of Columbia.

We are pleased to have this opportunity to express our views on S. 382, the proposed Competition Improvements Act.

We are concerned that the bill would require the Interstate Commerce Commission (ICC) to concern itself to a much greater extent than at present with the provisions of the Sherman Antitrust Act and restrict its freedom to arrive at decisions in general rulemaking proceedings, in proceedings involving applications for motor carrier operating authority, and, as suggested by some, even in ratemaking proceedings, without specific reference to the Sherman Antitrust Act.

Furthermore, under Section 7 of the Clayton Act, a corporation engaged in commerce is prohibited from acquiring another such corporation where the effect "may be substantially to lessen competition, or tend to create a monopoly." This

same section contains a paragraph exempting transactions authorized by the ICC and other agencies. The exemption would be repealed by S. 382. Yet, the exemption permits the ICC to regulate and effectively oversee consolidations and mergers of carriers under its jurisdiction at the present time and there is no need for removal of the exemption.

At the outset, it should be noted that federal regulation of railroads preceded federal antitrust statutes by a few years. No doubt, because regulation of competition in transportation historically has been handled by the ICC, an agency specially created to do just that, Congress has chosen to exclude carriers regulated by that agency from most of the various provisions of the antitrust statutes as they have been amended and broadened down through the years.

Thus, a well-recognized separation of jurisdiction has resulted. In the case of business generally, the general laws such as the antitrust statutes are relied upon to assure fair and proper pricing of goods and services for the purpose of safeguarding against unfair destruction of competition and the monopolistic abuses which inevitably flow from an abnormal concentration of control in any area of the economy.

Application of the principles of the antitrust statutes is no less important in the field of transportation. Congress long since recognized that such safeguards were doubly important in a field such as transportation, which touches virtually

every aspect of our national life. This is the primary reason for the existence of the Interstate Commerce Act and the ICC -- a special statute to be enforced by a special arm of Congress, to make especially sure that competition would exist on a fair basis and that never again should a dominant agency of transport subject its competitors and the public to the abuses of monopoly.

Simply put, in the field of transportation, the Interstate Commerce Act and the ICC were very largely substituted for the antitrust laws, the Department of Justice and the Federal Trade Commission and this division of responsibility has worked well over the years. In this connection, the ICC is contemplating more extensive antitrust considerations in its proceedings than it has in the past. For instance, in Ex Parte No. MC-121,^{1/} the ICC is proposing to give greater weight to the benefits of competition in reviewing motor carrier entry and acquisition cases. Insofar as acquisition proceedings are concerned, the ICC said, in its notice of proposal to issue a statement of general policy, that it "will concentrate on the potential competitive -- or anticompetitive -- aspects of the transaction," and that it "will make a positive effort to increase the expertise of our staff in antitrust and related matters."

^{1/} Served November 30, 1978 and published in the Federal Register of December 5, 1978 (43 Fed. Reg. 56978).

As this Committee well knows, there are presently over 16,600 motor carriers operating under ICC authority, of which 85 percent are common carriers. In fiscal year 1978 alone, there were 9,068 applications for authority processed by the ICC and 95.8 percent of them were granted by that agency in whole or in part. Approximately ten percent of the grants each year are being made to new entrants into the field.

The trucking industry under ICC regulation is far less concentrated than other major industries operating under the antitrust laws as enforced by the Justice Department and the Federal Trade Commission.

For example, in the case of regulated motor carriers, the eight largest account for 14 percent of the total carrier revenue volume. In the case of other large industries operating under the antitrust laws, a very different picture emerges. In motor vehicle manufacturing, the eight largest account for 97 percent, or virtually all of the total volume. In steel, the eight largest companies account for 65 percent of the total. In the cigarette industry, the eight largest account for virtually 100 percent.

Of the thirty-five major industries, in terms of value added by manufacture, the only ones with concentrations as low, or lower, than the trucking industry are the manufacturers of miscellaneous machinery and feminine wearing apparel.

The problem with S. 382 is that the Commission functions under a different statute than the antitrust laws and grants and denies applications for authority based on criteria which are necessarily different since they are tailored to the transportation industry. The criteria under the statute is wisely couched in broad language. These criteria have included in the past: whether the circumstances demonstrate that the new operation will serve a useful public purpose; whether this purpose can and will be served by existing carriers; and whether the new operation proposed by applicant can be performed without endangering or impairing the operation of existing carriers contrary to the public interest. Many other criteria fit within the statute and are utilized where appropriate. Energy conservation is becoming extremely important and this consideration runs contrary to open-entry policies. All in all, the standards the ICC has utilized in the past have worked well in creating in this country the finest transportation system in the world barring none.

Supposedly, under the proposed Competition Improvements Act, the ICC would be able to continue its well-proven application of its "overriding statutory purpose" which has met with such success, but this is not at all certain. As the minority views in the Report on the Judiciary to accompany S. 2028 ^{2/} (dated July 21, 1976, No. 94-1045) point out, the agencies which

^{2/} S. 2028 which was considered by the 94th Congress is substantially the same as S. 382.

would be covered by the Competition Improvements Act would end up with "two sets of conflicting instructions" from Congress.

The first set of instructions to the ICC came in 1887 for railroads and 1935 for motor carriers with passage of the Interstate Commerce Act and the Motor Carrier Act, respectively. In these statutes, Congress stated its belief that unfettered competition within the transportation market is not in the public interest. For motor carriage, the reason was succinctly enumerated by the Supreme Court of the United States when it described the conditions in the trucking industry prior to 1935 which led to passage of the Motor Carrier Act as "overcrowded with small economic units which proved unable to satisfy the most minimal standards of safety or financial stability." (*American Trucking Associations v. United States*, 344 U.S. 298, 312 (1953)).

The second set of instructions under S. 282, if enacted, would be to tell the affected agencies to consider competition as the highest priority.

We sincerely believe this bill, if enacted into law, would produce a prodigious amount of litigation in the courts, which are already overworked in many instances, while these conflicting sets of instructions are being resolved.

If the courts rule in favor of the primary purpose of the agency, then nothing is accomplished by the Act except the horrible reality of even more prolonged agency proceedings and increased regulatory lag. Incidentally, ATA is clearly on record in support of reducing existing regulatory lag. We have continually sought extension of the expedited ICC procedures for railroad proceedings, established pursuant to the Railroad Revitalization and Regulatory Reform Act of 1976, to motor carrier proceedings.

On the other hand, if the courts eventually rule in favor of competition at all costs, the motor carrier industry would revert back to pre-1935 days and all of their evils and hardships to the detriment of the transportation needs of the public. .

In either event, the public is the loser under this misnamed bill. Rather than improve competition in motor transportation to the public's benefit, the bill, if enacted, would increase regulatory lag, and if successful in its intended goal, would open up the floodgates of unrestrained and destructive competition. And all this, based not on a serious and well-considered look into the motor carrier industry, but on the basis of a broad brush stroke covering eight independent regulatory agencies without an informed evaluation of any of them.

For these reasons, we are strongly opposed to the enactment of S. 382.

September 28, 1979
Washington, D.C.

FEDERAL REGULATION: ROADS TO REFORM

Panel IV A. Revised Procedures

for Rulemaking and Adjudication: Can We

Improve Administrative Efficiency While Preserving Fairness?

Remarks by Clark Byse

The question for discussion is, as the program states, "Can we improve administrative efficiency while preserving fairness?" My answer is I hope so. In any event, surely we must strive to do so. Perhaps, however, this is not the best way to phrase the question, for, as Roger Cramton wrote a few years ago, to appraise a procedure in terms of "'fairness', 'due process', and the like, suffers from undue generality, since the content of these value-laden words shifts from time to time and from person to person."

Dean Cramton then advanced the proposition that the "basic notion [is] that in a society committed to a representative form of government, private persons should have a meaningful opportunity to participate in government decisions which directly affect them, especially when governmental action is based on individual rather than on general considerations." He also suggested that beyond this basic idea of meaningful participation, "any evaluation of administrative procedures must rest on a judgment which balances the advantages and disadvantages" of the procedures in question. In striking this balance, rather than emphasizing "fairness" or "due

process", the evaluation should direct attention to the following considerations: "the extent to which the procedure furthers the accurate selection and determination of relevant facts and issues, the efficient disposition of business, and, when viewed in the light of the statutory objectives, its acceptability to the agency, the participants, and the general public."

If the adjudication and rulemaking procedures of the Ribicoff (S. 262), Kennedy (S. 1291) and Administration (S. 755) bills are appraised in terms of the Cramton criteria of accuracy, efficiency and acceptability, what will be the appraisal?

Considering first, the "general hearing" [§201(e), p. 26 et. seq.] and "expedited procedures" [§202(d)(1), p. 27 et. seq.] provisions of the Ribicoff and Administration bills--the Kennedy bill has no similar proposal--I am on the whole favorably impressed. One can--as, indeed, has been done today--criticize some aspects of these proposals, but in the main they are designed to make the practice more efficient and at the same time to provide for an accurate process.

Whether these procedures satisfy Dean Cramton's third standard of acceptability is more difficult to determine, for a judgment concerning acceptability is every bit as subjective and "value-laden" as a conclusion concerning "fairness". Accordingly, while I do not disregard the acceptability standard, I give it less weight than the other two criteria. Or perhaps one may reason that a procedure which is both accurate and

efficient is or should be acceptable.

These proposals build on the sound proposition that procedures should be related to the character or nature of the question to be decided--a proposition already incorporated in the Administrative Procedure Act. Indeed, all or nearly all that is sought by these proposals could be achieved without any amendment of the APA. See the last sentence of section 556(d) which provides that in "rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." But since many, perhaps most, agencies have not used the authority given them by section 556(d), the bills make use of the new procedures mandatory. In light of the agencies failure to use their 556(d) powers, some coercion appears to be in order. Whether these bills apply too much coercion and whether their limitation of cross-examination is too extreme is not easy to state. I believe that only experience will provide answers to these questions.

If that experience demonstrates that these provisions reached the right balance, well and good. But what if experience indicates that the provisions went too far? The only remedy would appear to be amendatory legislation. But how likely is it that Congress would enact such legislation? In the thirty years since enactment of the APA, its hearing provisions have not been amended. Should there not be some

mechanism or process short of full-scale statutory enactment which could rectify procedural misjudgments by Congress or by the agencies? I shall return to this point later. For the present, I repeat that I approve the conceptual basis which underlies the "general hearing" and "expedited procedures" proposals.

Turning now to the informal rulemaking provisions of the Administration [\$201(a), p. 23 et. seq.] and Kennedy [\$102, p. 3 et. seq.] bills--the Ribicoff bill has no similar proposals--the picture is more complicated.

The Administration bill proposes several changes in section 553. Generally speaking, those changes are intended to make the present section 553 requirements of notice, comment and concise general statement more detailed. They are not designed to require or encourage what has come to be known as "hybrid rulemaking". The Kennedy bill, on the other hand, is intended to encourage hybrid rulemaking with respect to a "significant" rule which is defined as a "rule or series of closely related rules which will result in an annual impact on the economy of \$100,000,000 or more; or any other rule or series of closely related rules which the agency determines is likely to have an equally significant impact on the economy" [\$101, p. 2]. In the case of a proposal for a significant rule, the agency:

[M]ay use either oral or written procedures which the agency determines are appropriate for resolution of significant controversies

over factual issues, including but not limited to...

- (A) informal public hearings, meetings, or conferences;
- (B) the creation of expert advisory panels;
- (C) mediation techniques;
- (D) presentation of studies, documents, and staff arguments for written comment and rebuttal; and
- (E) presentation of witnesses....

Whether one approves or disapproves these provisions will depend in part on one's assessment of Vermont Yankee. Those who believe that pre-Vermont Yankee judicial prescription of hybrid rulemaking was a desirable development will tend to approve the Kennedy bill proposals. This is so because although the bill provides that an agency may--not must--consider employing the listed hybrid procedures, it is likely that a court would review the agency's decision concerning utilization of the listed hybrid rulemaking procedures to determine whether the decision was arbitrary or capricious or an abuse of discretion; and in exercising this reviewing function the court might substitute its judgment for that of the agency. It is true, of course, that a court might hold that Vermont Yankee precludes review except to determine whether there are "constitutional constraints or extremely compelling circumstances" which require hybrid procedures. Unless the matter is clarified by statutory language or rather

clear legislative history, I incline to the view that some federal judges very likely would revert in part at least to their pre-Vermont Yankee role of prescribing hybrid procedures.

It is not difficult to understand the motivation and reasoning of the drafters of this Kennedy bill provision. Believing that the simple notice, comment, and statement requirements of section 553 are inadequate, they wanted to encourage the agencies to use hybrid procedures. But they knew that an across-the-board hybrid requirement would be impracticable. So they used the nudging device of listing the procedures, stating that agencies may employ them and leaving it to the agencies in the first instance and the courts in the second to define the precise meaning of their nudge.

The Kennedy drafters' quandary in this respect is not different from the predicament of the drafters of the Ribicoff bill's general hearing procedures. Whereas the Kennedy drafters wished to encourage hybrid rulemaking, the Ribicoff drafters wished to limit orality and cross-examination. Both were confronted with the problem of implementation. Both had three choices: (1) they could impose the desired procedure by a fairly specific legislative requirement; (2) they could rely on the agencies to exercise their discretion to employ the desired procedure; (3) they could rely on the courts, as in the pre-Vermont Yankee era, to impose the desired procedure. (Another expedient which sometimes has been employed is ad hoc legislative prescription of hybrid procedures applicable

to a single agency, as has been done, for example, in the case of FTC and the Department of Energy. But such an ad hoc solution is not available to the drafters of general, across-the-board legislation such as the Ribicoff and Kennedy bills.)

Given their respective objectives and the fact that their means of achieving those objectives were limited to the three methods I have listed--(1) specific legislative prescription; (2) agency discretion; and (3) judicial imposition--it seems to me that the respective choices of the Ribicoff and Kennedy drafters are entirely rational. Their solutions, nevertheless, are troubling, for the Ribicoff limitations on orality and cross-examination may have gone too far whereas the exhortations of the Kennedy hybrid proposal may, on the one hand, not go far enough in prodding agencies and on the other, go too far in providing a means for the senior partner in the court-agency "partnership" to impose hybrid procedures on the junior partner. How far is too far is, of course, a matter of judgment and the experiential data for making that judgment must await future events. Let us assume, however--and surely this is not a far-fetched assumption--that experience demonstrates the need for different solutions than those embodied in the present bills. What is to be done? The logical answer is: amend the legislation. But everyone knows how difficult it is to overcome the burden of inertia of our legislative system. Observe, if you will, that the APA provisions most closely related to the subjects under discussion have not been amended

since their enactment in 1946. A second answer is to seek corrective action by the judiciary. But the judiciary may be part of the problem rather than the architect of its solution and, in any event, the solution may be beyond the powers of the courts.

So where are we? Perhaps the answer is a frank recognition that ideal solutions often are impossible, that the best we can do is to select the least undesirable alternative, that the drafters did not promise us a rose garden. On the other hand, when a rational choice among existing techniques or methods produces a troubling result, should we not ask ourselves whether it may be possible to evolve a new process? After all, is it not the responsibility of lawyers to create new structures or processes which enable society to achieve social objectives?

If the problem of administrative procedure reform is viewed from this perspective, what might be developed? Can there be a process which would facilitate achievement of desirable procedural objectives and also provide a means for coping with the risk that administrative and judicial practices under a statute will not achieve the statute's objectives? I am not sure there could be such a process but I suggest the following as a rough outline of a model which deserves consideration and, perhaps, a trial.

Drafters of proposals such as the Ribicoff limitation on orality and cross-examination or the Kennedy encouragement of hybrid rulemaking would state their objectives, perhaps in terms

very similar to those employed in the present bills. But instead of relying on a rather explicit statutory directive, or on the agency's exercise of discretion, or on the courts' reviewing power to achieve the objectives, another agency would be authorized to issue rules or orders which would be binding on the agencies. Whatever may be the limitations of such a proposal, it has the obvious merit of providing a means for avoiding the disadvantages of the present system, for unlike Congress, the agency would enjoy a greater measure of flexibility and could, rather easily, change its rules in light of experience; it also avoids reliance on the operating agencies or on the courts.

There are, of course, a number of objections which might be advanced against such a proposal. For example, what reason is there to believe that procedures promulgated by such a procedure agency would be preferable to those adopted by the operating agencies? Might not the procedure agency and the operating agencies work at cross purposes? Is it an advance to impose another bureaucratic layer on what already is a bureaucratic labyrinth? What would be the membership of the new agency? Where in the structure of government would it be placed--in the executive branch or "independent"? Depending on the answer to that question, is there any reason to believe that Congress or the President (or the operating agencies) would be willing to vest the suggested power in a new agency? Should the procedural rules of the new agency be subject to

a legislative or executive veto or some other form of outside control such as a power to grant exceptions? Should the new agency be subject to a sunset provision? If so, at the expiration of what period of years? And so on and so on.

These surely are legitimate questions and no doubt others will readily occur to you. I think, at least I hope, that they can be answered satisfactorily. At the very least, it seems to me that we should attempt to do so. Perhaps the Ribicoff and Kennedy drafters may wish to devote some staff resources to such an endeavor. There is reason to believe that at least the Kennedy drafters might find such an assignment congenial, for section 402(a) of the Kennedy bill provides that a newly established Committee on Administrative Procedures of the Administrative Conference shall draft procedural rules to be utilized by agencies conducting proceedings subject to the Administrative Procedure Act. The rules are to be "consistent with" the APA and will become "binding on all agencies" if they are approved by a majority of the members of the Conference. Perhaps all that I have proposed could be achieved by enactment of Section 402(a). I am not sure. In any event, although I do not assert that this is an idea whose time has come, I do suggest that it deserves consideration by those interested in administrative procedure reform.

REVOLUTIONARY LEADER EMERGES IN A CHANGING WORLD



Chamber of Commerce of the United States

HILTON DAVIS, VICE PRESIDENT
LEGISLATIVE AND POLITICAL AFFAIRS

202-659-5140

1615 H STREET, N.W.
WASHINGTON, D.C. 20062

August 1, 1979

The Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Kennedy:

On behalf of its 86,000 members, the Chamber of Commerce of the United States is pleased to submit the following comments to the Committee on the Judiciary concerning S. 382, the "Competition Improvements Act of 1979."

The National Chamber supports the underlying concept of S. 382. That is, the Chamber believes it is the obligation of regulatory agencies to consider, and to minimize, the potentially anticompetitive effects of its regulations, be they licensing and pricing regulations or regulations dealing with the health and safety of the public. However, some features of S. 382 should be revised to better achieve the objectives of the bill.

S. 382 would establish a three-part competitive analysis to be factored into the policy development of new regulations. Under this analysis, an agency would not be able to take any action hindering competition unless (1) the action is necessary to accomplish an overriding statutory purpose; (2) the anticompetitive effects are clearly outweighed by significant and reasonably certain benefits to the public; and (3) the overriding statutory purpose cannot otherwise be achieved by an alternative means having a lesser anticompetitive effect.

The three-part test is particularly appropriate for application to agencies involved in more than only "economic regulation." The Environmental Protection Agency and the Occupational Safety and Health Administration, for example, are both charged with the responsibility of protecting the health and safety of the public and yet possess the authority to promulgate regulations that could prove severely injurious to the forces of market competition. S. 382 would compel those agencies to acknowledge the competitive implications of their regulations and to choose the least constricting alternatives.

Our recommendations are as follows:

(1) S. 382 should be amended to make its provisions and obligations applicable to actions taken by the Federal Trade Commission (FTC).

(2) The FTC should be deleted as a "party of right" to participate in any administrative or judicial proceeding arising under this legislation, to avoid a potential conflict-of-interest.

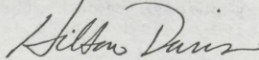
(3) S. 382 also should apply to actions taken by the Consumer Product Safety Commission.

(4) Section 4(d) should be eliminated. This section would enable the Attorney General and the FTC to utilize "any and all powers conferred upon them by any other provision of law, including the antitrust laws and the Antitrust Civil Process Act..., in carrying out their responsibilities under this Act." This is an altogether unnecessary expansion of powers for the two agencies, given the specific additional duties they would be required to perform.

(5) Section 5(b) should be eliminated. This section would award litigation costs to any party under certain conditions and would serve no public interest. Given the inherently controversial and judgmental choices that an agency would be required to make in its competitive analyses, the bill might well carry a heavy load of litigation. Providing for reimbursement of litigation costs would only encourage more lawsuits, thereby increasing the costs of administering the Act. The increased delays in agency rulemaking and other activities would be contrary to the public interest.

I will appreciate your consideration of our views, and I respectfully request that this letter be made a part of the hearings record.

Cordially,



Hilton Davis
Vice President
Legislative Affairs

cc: Members of the Committee
Ms. Susan McDermott
Mr. Emory Sneed



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National
Customs Brokers & Forwarders Association of America, Inc.

ONE WORLD TRADE CENTER • NEW YORK, N.Y. 10048 Suite 1109

Telephone 432-0050

May 21, 1979

U.S. Senator Edward A. Kennedy
Senate Judiciary Committee
Washington, D.C.

Re: S. 382
Competition Improvements
Act of 1979

Dear Senator Kennedy:

Our Association consists of approximately 400 members licensed by the Federal Maritime Commission as ocean freight forwarders to handle exports and by the U.S. Treasury Department as customs brokers to handle imports. Affiliated with us are 23 local associations whose members are similarly licensed. The membership of our association and its affiliates process the vast bulk of general cargo being exported from or imported into the United States.

We understand that the basic purpose of the above bill is to make certain that competitive market forces should be established to the maximum degree possible within all regulated industries.

Our particular concern relates to the approval of steamship conferences and concerted action thereunder by the Federal Maritime Commission under §15, Shipping Act, 1916. (46 U.S.C. 814). We believe that it should be incumbent upon the FMC in such approval proceedings to apply the standards set forth in Section 3.(a) of the above bill.

It its decision in FMC et al. v. Aktiebolaget Svenska Amerika Linien, et al., 390 238 (1968), the Supreme Court held that approval

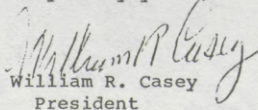
by the FMC under Section 15 could only be granted if there were substantial evidence to show that the concerted arrangement was necessary to meet a serious transportation need, to secure important public benefits, or to further a valid regulatory purpose of the Shipping Act.

To a considerable extent the Supreme Court standards in Svenska are similar to those set forth in Section 3.(a) of your bill. Nevertheless, Svenska is always subject to judicial modification and interpretation. To make certain that the standards of that case will continue to be applied in Section 15 proceedings, we believe that it would be beneficial to our foreign commerce if such standards are enacted into law, as Section 3.(a) would do.

Accordingly, we support the above bill and request that our letter be incorporated into the record of the hearings.

Thanking you, we remain,

Very truly yours,


William R. Casey
President



**National
Farmers Union**

STATEMENT
OF THE
NATIONAL FARMERS UNION

TO THE
SENATE COMMITTEE ON THE JUDICIARY
WASHINGTON, D. C.

Relative to Senate 382
The Proposed "Competition Improvements Act"

March 8, 1979

National Farmers Union has throughout its history supported measures dealing with the abuses of the market system by trusts, monopolies, and other combinations.

Particularly where competition was absent, or not likely attainable, Farmers Union has advocated federal regulation to cause the franchises or monopoly services to operate in the public interest.

Prior to the organization of the Farmers Union, earlier farm organizations with small businessmen were the nucleus of demands which led to the adoption of the Interstate Commerce Act in 1877 and the Sherman Antitrust Act of 1890.

From its beginning in 1902 and particularly in 1906 and beyond, Farmers Union supported numerous legislative measures in transportation, banking and credit, and farm marketing.

After a rudimentary version of the Capper-Volstead Act was vetoed by President Taft in 1913, Farmers Union supported the adoption of the Clayton Act with its Section 6 provisions dealing with agricultural and labor organizations, which became law in October 1914.

Subsequently, Farmers Union was active in the promotion of the Warehouse Act and the Cotton Futures Act in 1916, the Packers and Stockyards Act in 1921, and the Grain Futures Act in 1922.

The Capper-Volstead Act was drafted by Farmers Union leaders who enlisted Senator Capper and Representative Hersman as original sponsors. The bill, renamed the Capper-Volstead bill, cleared both Houses of the Congress in 1920, but died in conference. It was approved again in the 67th Congress and became law in February 1922.

We have recounted this history briefly because these legislative enactments were efforts to somehow redress the competitive imbalance between farmers and the handlers, processors, and distributors of the products of the farm.

On the one hand, were some 6.5 million farm families, functioning in atomistic competition, with no individual family able to have any perceptible impact on markets or prices by its decisions to produce, to market, or not to produce and not to market. On the other hand were the comparatively fewer handlers, processors, and distributors of food and other farm products.

It was because the free market and open competition did not function effectively for the farmer, the consumer, or for society generally, that enabling legislation for farm cooperatives was approved by the Congress, that various federal regulatory agencies were given the responsibility of supervising transportation, marketing and other services.

The intent of federal regulation was not always to impose competitive conditions since in some instances competition would have been duplicative, costly, and wasteful.

Agriculture was one of the fields in which society found the results of free markets and open competition unacceptable. The farm cooperative structure, the federal farm credit programs, and the early farm programs were efforts to modify and regulate the market mechanism so that it would yield results compatible with the well-being of society.

What we are pointing up here is that agriculture is fundamentally different than other industry.

If you ask us the extent to which competition should be substituted for federal intervention or direct regulation in agriculture, our answer would have to be that to attempt to do so would be a step backwards.

For all the progress that has been made in the past 40 or 50 years, farmers still have a relatively weak position as against that of the buyers, processors, and distributors of their products.

In the accompanying EXHIBIT I, is shown the cooperative and other firm share of farm product marketing and input purchases.

In EXHIBIT II, we show the sales and assets of the four largest cooperative firms and the four largest non-cooperative firms in sales of grain, milk and products, fruits and vegetables, and poultry and eggs.

In EXHIBIT III, we show the four largest cooperative and four largest non-cooperative firms in sales of farm supplies and inputs to farmers for feed, fertilizer, and petroleum products.

In EXHIBIT IV, we show the gain in cooperative share in selected product marketings and input purchases, comparing the years 1950 and 1975. In feed, poultry and eggs, and fruits and vegetables, the share is substantially unchanged in the 25-year period. There has been some gain in the share in dairy and grain, but it should be pointed out that this is principally at the first sales from the hands of farmers and that the cooperative share declines in the processing, distributive, and export sectors.

There has been some gain in the cooperative share in petroleum products and commercial fertilizer; however, part of this gain is attributable to abandonment of some of the farm markets by proprietary suppliers since 1973.

To put this market share into perspective, it must be understood that the 75 percent initial market share of the cooperatives in dairying products represents the activity of some 630 separate companies, rather than the volume of a few highly-concentrated firms.

In fertilizer, the 40 percent cooperative share is dispersed among some 3,800 separate firms.

Although there has been some advance in the cooperative share since 1950 and since 1970, the share of the four largest cooperative handlers has not advanced as rapidly in the same time as the share of the four largest non-cooperative handlers.

The point is that we have not reached a situation in which the public interest requires that the cooperative share be reduced, but, in fact, further growth will still be essential in the years ahead.

The maintenance of an adequate supply of reasonably-priced food and farm products will require a stronger cooperative presence in marketing and export of farm products, a significantly stronger program of federal farm price and income stabilization, and an expansion of federal marketing order and agreement programs, and an improvement of farm collective bargaining authority.

The bill before this committee today is an amendment to the Clayton Act of 1914. As you know, Section 6 of that Act declares:

"Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural associations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organization, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

We are convinced, therefore, because of the fundamentally different nature of agriculture, and because the stance of farmers as against the marketing system will need to be strengthened, S. 382 should contain an exclusion for agriculture.

We propose that an item "d" be added to Section 3, to read as follows:

- "(d) Provided, however, that Section 3 shall not be applicable to the Department of Agriculture in any programs or activities which deal with the on-farm production of crops, livestock, or poultry; the initial sale of such products by producers or their cooperatives; federal farm stabilization, price support, procurement, loan, and payment programs; acreage allotment, marketing quota, and set-aside programs; federal marketing orders and agreements; international commodity agreements; cooperative pool commodity loans; national or international farm commodity reserves or buffer stocks; export or import policies regarding farm and food commodities; and bargaining between farm producers and handlers."

Such an amendment is essential because, frankly, it would not be practicable or workable to require the Secretary of Agriculture to make the judgments suggested in Section 3 on every decision which he makes relating to the farm programs, marketing orders, bargaining activities, cooperative pool plans, export-import policies, etc., etc.

To require such decisions and judgments on the part of the Secretary of Agriculture would run counter to the mandate Congress has given him and reiterated from time to time to take actions to assure parity prices and income to agriculture.

Whether or not Section 3 would require him to file "Competitive Impact Statements" every time he makes a policy decision, the exercise would be a pointless and counterproductive one.

For the independent regulatory agencies enumerated in Section 8 (c), we believe that S. 382 would introduce a helpful standard for establishing a balanced perspective between regulatory and pro-competitive strategies.

In our view, practically all of the high prices in the industrial sector are high because someone who has the power to do it has set them high, and they go on rising because someone has the power to raise them.

Some kind of direct public intervention is needed to curb unjustifiably high prices in the industrial and service sectors of the economy. Positive and deliberate action will be needed to make either regulation or competition do the job. The anti-trust standards suggested in S. 382 may well help choose the most effective course.

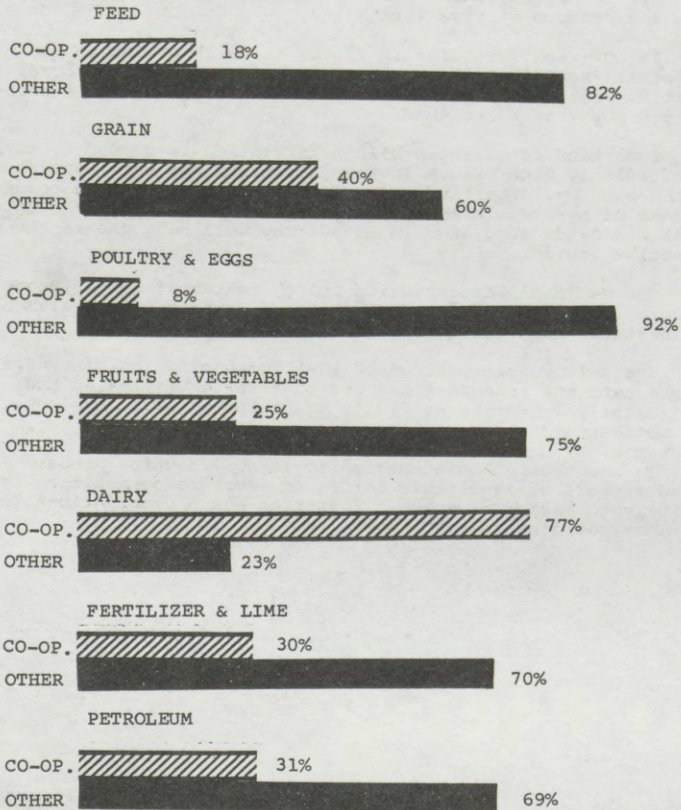
The National Farmers Union policy statement for 1978 expressed concern about the dominance of the food distribution system by chain stores and processors.

The policy statement noted that "concentration of ownership of the nation's resources and wealth -- both vertically and horizontally -- threatens family agriculture, small business, and ultimately consumers."

In the section on energy policy, Farmers Union members urged support of "antitrust action to increase competition in the private sector of energy industries where combinations result in unwarranted charges to consumers."

EXHIBIT I

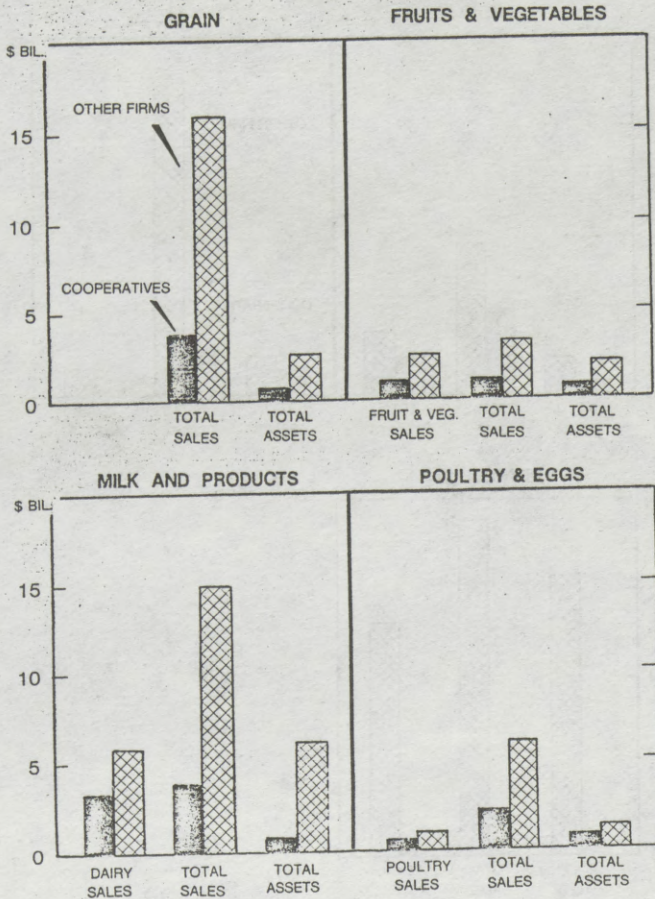
CO-OPERATIVE AND OTHER FIRM SHARE OF
FARM PRODUCT MARKETING
AND INPUT PURCHASES, 1975



---USDA Cooperative Research Report, July, 1978

EXHIBIT II

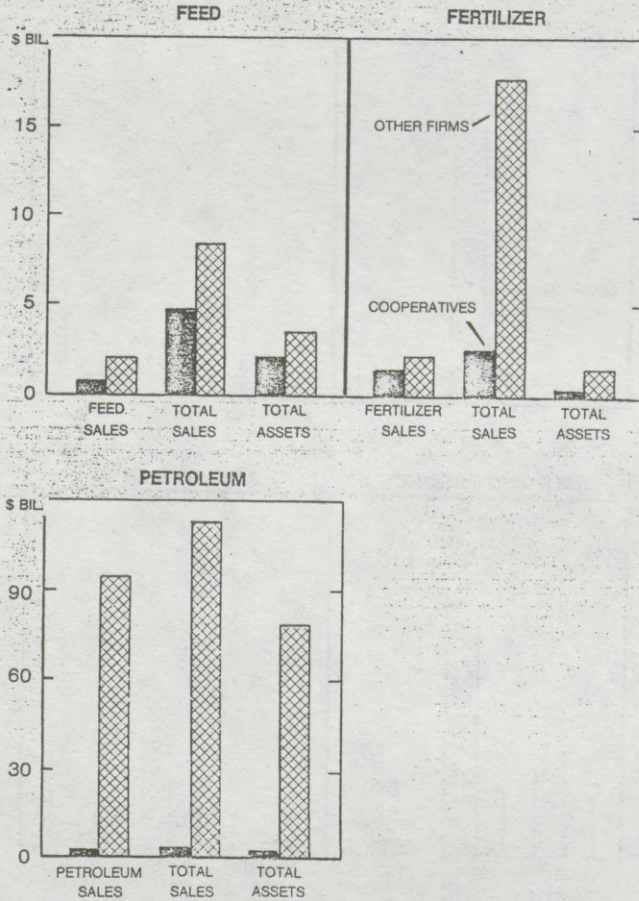
**SALES AND ASSETS OF FOUR COOPERATIVES AND
FOUR NONCOOPERATIVE FIRMS REPORTING LARGEST SALES
OF FOUR FARM PRODUCTS IN 1975**



---USDA Co-operative Research Report, July, 1978

EXHIBIT III

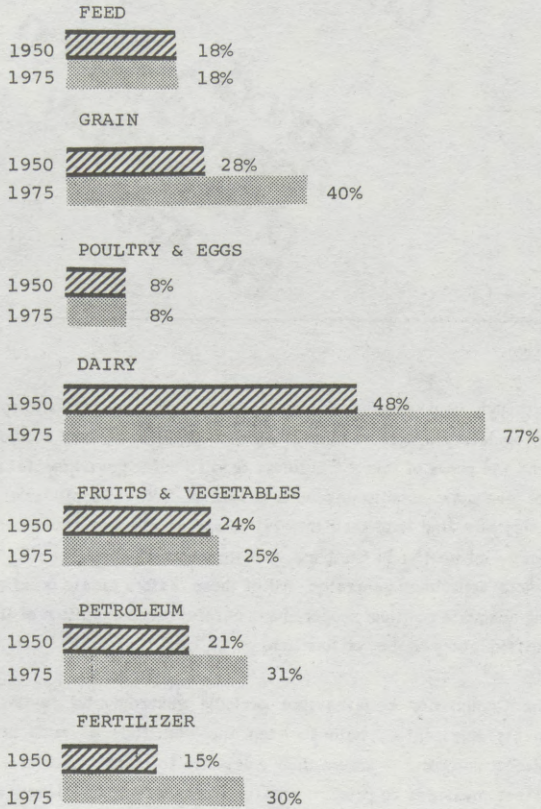
**SALES AND ASSETS OF FOUR COOPERATIVES AND
FOUR NONCOOPERATIVE FIRMS REPORTING LARGEST SALES
OF THREE FARM SUPPLIES IN 1975**



---USDA Co-operative Research Report, July, 1978

EXHIBIT IV

COMPARISON OF MARKET SHARE OF
FARM COOPERATIVES IN SELECTED PRODUCT
MARKETINGS AND INPUT PURCHASES
1950 AND 1975



---USDA Co-operative Research Report, July, 1978

Chapter Seven

Periodic Reauthorization of Regulatory Programs

Introduction

Although unnecessary or inappropriate regulation is contrary to the public interest, regulatory programs tend to survive longer than they should. Institutional inertia and the press of current business tend to defer governmental reconsideration of earlier decisions establishing such programs. The beneficiaries of regulatory policies may also find it in their interest to oppose changes. Such beneficiaries may be politically influential in Congress, and the costs of their benefits may be spread widely among consumers generally. All of these factors create practical obstacles to mobilizing adequate political support for a careful reconsideration of the value of any particular regulatory agency or function.

The Commission believes that periodic governmental review of regulatory arrangements is essential, both to keep the multitude of such arrangements in reasonable harmony and to assure their relevance to current problems. Without such review, other measures to procure greater coordination, efficiency, and fairness in regulation have little hope of avoiding unwise proliferation of regulatory requirements. To assure that regulatory requirements serve the public interest and achieve the objectives set out in earlier chapters of this report, obstacles to effective governmental review must be overcome. An institutionalized review procedure, subject to schedules and deadlines, is essential for this purpose.

Accordingly, the Commission supports—as a supplement to existing methods of legislative oversight—the use of an additional legislative technique to force periodic reconsideration of the goals and methods of federal economic regulation. Popularly described as "sunset" legislation, this procedure is in essence a statutory plan for periodic reauthorization or termination of regulatory programs. If reauthorization is not affirmatively legislated within a stipulated time after review of a specific regulatory agency or function, the agency or function is phased out of existence. The Commission suggests that the selection of agencies or functions to be reviewed be made initially by the President, subject to congressional approval, and that only a small number of reviews be undertaken by any one Congress until further experience with the technique is gained.

Sunset legislation has been enacted in approximately half the states during the last two years. The legislation varies somewhat but generally provides a set period (usually six to ten years) after which a government agency or function is automatically abolished unless it is reauthorized by legislation. The purpose is not to abolish agencies or functions but to force thoughtful reconsideration of whether it is appropriate either to recast or abandon them. The philosophy embodied in this legislation is related to the concepts of "zero-based budgeting" and intensive legislative oversight, which delve into the rationale for an agency's existence as well as the caliber of its performance.

It is too early to assess the effectiveness of state sunset legislation. Newspaper reports describing a flood of paperwork caused by such legislation in Colorado¹ confirm the Commission's judgment that such legislation may not achieve its salutary purpose unless its scope is carefully limited. Thus, while the Commission believes that sunset legislation at the federal level would be a desirable step, it has done so with a number of qualifications set forth at the end of this chapter.

A number of proposals for federal legislation embodying the sunset technique are pending before Congress. Rather than discussing any specific sunset proposal here, the next sections of this chapter deal with aspects of sunset legislation which the Commission deems worthy of consideration regardless of the precise form in which the legislation is cast.

Advantages of Federal Sunset Legislation

The Commission emphasizes that the sunset technique should not and could not substitute for proper budget reviews, legislative oversight, or conventional reform proposals, but can usefully supplement these measures. For this purpose, there are a number of advantages of sunset legislation on a limited scale over other types of legislative review. These advantages include:

- Focusing for legislative attention the questions pertaining to the underlying need for a regulatory program. Normal congressional review of an agency's operations concentrates on other subjects while tending to take for granted the assumption that the duties imposed on the agency were imposed wisely. The Ribicoff Report states that "... the vast sweeps of regulatory agency policies are passed over without any critical review"² by appropriations committees preoccupied with budget programs; that many regulatory activities are relatively neglected by authorizing committees because they have permanent authorizations, and that even among those programs that are periodically reviewed, "... a careful analysis of the entire agency's operation may never occur" since oversight "tends to be on a crisis basis only."³
- Obliging advocates of continued regulation to make an affirmative case for a statute authorizing continuation, rather than permitting continuation as a result of inaction. Inaction, by its very nature, is seldom as systematically justified as affirmative action.

- Establishing a schedule for congressional action which may be changed only by further congressional action. By providing for automatic abolition of an agency or regulatory function unless Congress acts to the contrary, Congress would provide a strong incentive to agencies and other interested parties to complete in timely fashion any compilations, analyses, or reports desired by Congress for consideration in deciding whether to continue a regulatory program.
- Encouraging agencies, in anticipation of sunset review, to orient their programs more toward serving current needs, to request statutory changes when needed for this purpose, and to collect the data required to measure the agency's effectiveness.
- Providing a mechanism, not quite the same as a legislative proposal or a reorganization plan, which permits cooperation between the legislative and executive branches in initiating the legislative review process, thus forcing the executive as well as the legislative branch to continue to monitor the ongoing justification for economic regulation.

The sunset technique has inherent flexibility. It can be applied to federal regulatory agencies or to regulatory functions either within an agency or distributed among agencies, depending on the reason for the review and on an evaluation of practical and political realities. Thus, a review could be directed at the Interstate Commerce Commission itself, at trucking regulation (a portion of the Interstate Commerce Commission's responsibilities) or at an entire type of regulation, such as all transportation regulation (including the ICC, the Civil Aeronautics Board, and the Federal Maritime Commission). If a sector of the economy is designated for review, it is necessary for the President to specify the agencies or parts of agencies which must be reauthorized. The Commission believes, however, that sunset legislation itself should not exclude particular agencies or regulatory functions from review. Little is to be gained by such exclusions, and a sunset review may improve the effectiveness of any agency.

Suggested Limitations on Use of the Sunset Procedure

The Commission is concerned that possible overuse of the sunset procedure could prove counter-productive. It has been reported⁴ that the Colorado legislature was unable to complete action on all of its scheduled sunset reviews. Congress could easily find itself in a similar situation if too many reviews were begun, particularly since sunset reviews of federal programs may absorb extensive resources and political energies. For example, a recent Senate review of the Civil Aeronautics Board took over a year to complete and provoked strong resistance from labor unions and most airlines affected by the review, resulting in expenditures of substantially more time by legislators and staff personnel.

A substantial number of sunset reviews of comparable scope in any one Congress could well prove so time-consuming that Congress would be unable to complete its reviews within the time stipulated. This could lead to postponement of sunset deadlines, or reauthorization without adequate consideration, neither of which would serve the public interest.

¹ The analytical difficulty of completing a particular sunset review and the practical and political difficulty of accomplishing meaningful reform depend in part on the size and nature of the agencies or regulatory functions designated for review. Until it is demonstrated by experience that Congress can complete a substantial number of reviews and reauthorizations effectively within a short period of time, sunset legislation should not require review of more than a very limited number of regulatory agencies or regulatory functions by any one Congress. Because reviews are likely to vary in difficulty, the Commission's recommendation does not specify the exact number of reviews which one Congress might effectively accomplish.

The Selection Process

The Commission believes the legislation should delegate to the President the authority and responsibility of designating the agencies or regulatory functions to be reviewed, subject to approval by both houses of Congress. This could avoid potentially serious problems in selection, and would tend to assure that sunset

proposals advanced by the President would be approved by Congress. Unless the President and Congress work closely together, fundamental reform is unlikely.

Under the procedure recommended by the Commission, the President would designate agencies or functions for review by Congress. He could make the designation in the form of one proposal or more. Congress could approve one or more of the proposals submitted (but only an entire proposal rather than a portion of a proposal). Approval would cause the listed agencies or functions to be subjected to automatic review and termination unless new authorization legislation were enacted. If dissatisfied with the President's proposals, Congress could make its own designation of agencies or functions by passing legislation that would, like all other legislation, be sent to the President for signature or veto. As with other legislation, a veto could be overturned by a two-thirds vote in each house of Congress.

If experience should indicate or Congress should decide that a greater number of reviews can be handled effectively by a single Congress, there is substantial merit in the proposition that agencies should automatically be subject to reauthorization on each tenth anniversary of their original authorization, thereby eliminating potential problems in the selection process.

Provision for Phaseout

Sunset legislation would provide an orderly method by which to phase agencies out of existence if they are not reauthorized. Sudden abolition of any agency would be likely to create great confusion. Abolition of the CAB, for example, without some provision for the consequences of abolition would create uncertainty as to whether routes and rates were frozen or free entry and price competition were permitted. Termination of the Federal Communications Commission would create similar confusion about the right to broadcast. To reduce confusion and uncertainty, sunset legislation should contain a method for developing contingent phaseout plans. One possibility would be to permit the President to include contingent phaseout plans in his sunset proposals. These contingent plans would take effect in the absence of reauthorization legislation.

Congressional Review

The key to successful implementation of a sunset review is the establishment of a schedule that permits adequate time for the collection of pertinent data, the presentation of views by the public and all interested parties, and enactment of reauthorizing or amending legislation, if appropriate. Since sunset legislation means that an agency will cease to exist unless new legislation is passed, procedural safeguards should be instituted providing that any such legislation is to be discharged promptly from committee and given prompt consideration on the floor and by conference committee.

The type of congressional review will necessarily vary with the agency or function under review. Congress will undoubtedly wish to attract public attention to sunset reviews, both to obtain testimony from all interested sources and to build public support for the outcome. It should consider whether to make provision for payment of attorneys' fees and other expenses of public interest organizations in connection with their participation in reviews, under proper limitations and controls, when the availability of such financing is necessary to assure the presentation of positions which deserve full and fair consideration and would otherwise not be presented. The Commission recommends that separate reports be submitted to Congress by the Office of Management and Budget, the General Accounting Office, the Congressional Budget Office, and the affected agency itself each time the congressional review process is initiated. Useful expertise and a different viewpoint should be forthcoming from each of these sources. Competition among them to submit the most meaningful and persuasive report should stimulate the production of superior analysis. The legislation should establish criteria for these reports. At a minimum, sunset reports should:

- identify the regulatory objectives of the designated agencies or parts of agencies under review and assess their effectiveness in achieving the objectives;
- identify and assess the effectiveness of other programs having similar, conflicting, or duplicate objectives;

- identify and assess the potential effectiveness of other policy choices, including increased reliance on market competition or pursuit of a different government program;
- suggest ways of enhancing agency procedures to improve the determination of technical and factual questions while reducing delay and increasing the representation of all legitimate interests;
- assess the cost of modifying existing agencies and making the transition to preferred policy alternatives;
- make recommendations about the transfer, consolidation, modification, or elimination of functions; the reform of structures and procedures; the merger, modification, establishment, or abolition of regulations or agencies; the elimination or phasing out of outdated, overlapping, or conflicting regulatory jurisdictions or requirements; the reduction of delay; improving the representation of affected interests; and the advantages that might come from increased reliance on economic competition or private incentives.

SUNSET: PERIODIC REAUTHORIZATION

RECOMMENDATION 12: The Commission and the ABA support a limited form of sunset legislation which would require review and reauthorization by the Congress of federal regulatory agencies or functions and embody the following considerations:

(a) Until it is demonstrated by experience that Congress can accomplish a substantial number of reviews and reauthorizations effectively within a short period of time, sunset legislation should not require review of more than a very limited number of regulatory agencies or regulatory functions by any one Congress.

(b) The legislation should delegate to the President, subject to approval by both Houses of Congress, the authority and responsibility of designating the agencies or regulatory functions to be reviewed and subjected to automatic

termination (under paragraph (d) below) unless reauthorized by new legislation.

(c) Reports to Congress on the agencies or regulatory functions scheduled for review should be prepared by the Office of Management and Budget, the General Accounting Office, the Congressional Budget Office, and the affected agencies themselves. The legislation should establish criteria for the comprehensiveness and usefulness of these reports. The schedule should permit enough lead time for the completion and publication of such reports in advance of consideration by the appropriate committees of Congress, and should provide for full public participation in the review process.

(d) Sunset legislation should provide an orderly method by which agencies may be phased out if they are not reauthorized.

(e) Sunset legislation should provide procedural safeguards to require that legislation drafted in response to sunset review should be discharged promptly from committee and given prompt consideration on the floor and by conference committees.

(f) Sunset legislation should apply to all forms of government regulation and should not exclude particular regulatory agencies or functions from intensive review.

Pending Legislative Proposals

Since publication of the Exposure Draft of this report in August 1978, a number of major bills have been introduced in the 96th Congress which would carry out, in varying degrees, those recommendations in this Report which require new legislation. Certain of these pending bills contain provisions for periodic reauthorization of regulatory agencies and functions, or variations thereof. A predecessor of one such bill passed the Senate at the end of the 95th Congress and was reintroduced as S. 2 (January 15, 1979). Other major bills are S. 262 (introduced January 31, 1979), S. 445 (introduced February 21, 1979), S. 755 (introduced March 26, 1979) and S. 1291 (introduced June 6, 1979). Representatives of the Commission have testified before Committees of Congress as to the extent to which these measures reflect the principles of this Report. Detailed commentary on the pending bills is not included here, but the Commission commends their sponsors and the appropriate Committees of Congress for the initiative reflected in the legislative activity to date which parallels many of the objectives of this Report. Nonetheless, much remains to be done.



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THE EXTENT TO WHICH FEDERAL AGENCIES MUST CONSIDER
ANTITRUST POLICIES: AN ANALYSIS OF THE POTENTIAL
IMPACT OF TITLE II OF S. 1291, 96th CONGRESS

by

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September 4, 1979

THE EXTENT TO WHICH FEDERAL AGENCIES MUST CONSIDER
 ANTI-TRUST POLICIES: AN ANALYSIS OF THE POTENTIAL
 IMPACT OF TITLE II OF S. 1291, 96th CONGRESS

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THE EXTENT TO WHICH FEDERAL AGENCIES MUST CONSIDER
ANTITRUST POLICIES: AN ANALYSIS OF THE POTENTIAL
IMPACT OF TITLE II OF S. 1291, 96th CONGRESS

Introduction

Title II of S. 1291, 96th Congress, entitled "A Procompetitive Standard For Federal Agencies," would require that specified actions taken by Federal agencies be "the least anticompetitive alternative legally and practicably available to achieve statutory goals." Specifically, it provides (in part):

- Notwithstanding any other provision of law, no Federal agency shall take any action that directly -
- (1) regulates or licenses entry under a scheme in which the level of entry is subject to limitation;
 - (2) sets, or reviews, with authority to accept, reject, or modify, the monetary price charged for goods or services;
 - (3) sets, limits, or allocates the production or distribution of goods or services; or
 - (4) reviews, approves, rejects, or regulates the terms and conditions of agreements among providers or purchasers of goods and services, unless it has considered the effects on competition of such action and found that such action is the least competitive alternative legally and practicably available to achieve statutory goals.

It further provides that the provisions of clauses (1) and (3) above shall not apply in cases in which an agency bases its action upon a finding that an applicant for entry or a licensee, or a good or service, "does not meet specified standards of health or safety as required by a law that specifically regulates health or safety."

This report will analyze the potential impact of S. 1291 on Fed-

eral agencies. For each agency the report will first describe the agency's statutory powers that arguably might fall within the four types of actions that would be subject to the bill's procompetitive standards. Then it will list statutory provisions that currently may require the agency to consider competitive concerns when exercising its powers. These provisions often provide no more than that the agency exercise its powers in the "public interest," but court opinions have frequently interpreted these provisions to require agencies in varying degrees to consider potential anticompetitive effects in determining the means of exercising their statutory powers. * These court opinions will be the next item discussed with regard to each agency. It should be noted that the leading opinions that interpret various agencies' statutory powers are often relied upon in decisions concerning agencies other than those involved in the leading cases. Therefore, an absence of cases interpreting a particular agency's statute does not necessarily mean that judicial guidance is unavailable to that agency; an opinion interpreting a similar statute enforced by another agency may have precedential value in interpreting the first statute.

Finally, after discussing the current legal requirements of each agency to consider the competitive impact of its actions, this report will compare those requirements with the procompetitive standards that would be imposed by S. 1291.

* In *Northern Natural Gas Company v. Federal Power Commission*, 399 F.2d 953, 959-961 (D.C. Cir. 1968), the court discussed the basis for requiring Federal agencies to consider antitrust policies:

[W]e think it helpful to examine the overall relationship between antitrust law and regulatory agencies. Despite a continuing debate, it appears that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same - to achieve the most efficient allocation of resources possible. For instance, whether a regulatory body is dictating the selling price or that price is determined by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable rate of return on capital, thereby avoiding monopoly profits. Another example of their common purpose is that both types of regulation seek to establish an atmosphere which will stimulate innovations for better service at a lower cost. This analysis suggests that the two forms of regulation complement each other.

This theory of complementary regulation appears to be borne out by the Supreme Court cases holding that regulated industries must, to some degree at least, accommodate the antitrust laws. [citations omitted.] Moreover, the Court has held that even where there are specific statutory exemptions for regulated industries from the antitrust laws, such exemptions are to be very narrowly construed. [citations omitted.]

The complementary regulation theory is also supported by congressional directives requiring certain regulatory agencies to enforce portions of the antitrust laws. . . . Congress has also explicitly advised certain agencies to consider basic issues of competition while regulating the industries within their jurisdictions. For other agencies the obligation to act in favor of "public convenience and necessity" has been construed as implying a duty to recognize and weigh traditional antitrust concepts. . . .

This is not to suggest, however, that regulatory agencies have jurisdiction to determine violations of the antitrust laws. [citations omitted.] Nor are the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest.'" [citation omitted.] But . . . competitive concerns are an important element of the "public interest". . . .

Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission, an independent regulatory commission within the Department of Energy (42 U.S.C. §7171(a)), has been granted authority formerly vested in the Federal Power Commission to administer various provisions of the Federal Power Act and the Natural Gas Act. 42 U.S.C. §7172(a). It has also been granted authority formerly vested in the Interstate Commerce Commission under the Interstate Commerce Act to "establish[] rates or charges for the transportation of oil by pipeline or establish[] the valuation of any such pipeline." 42 U.S.C. §7172(b).

I. Statutory powers that arguably would be subject to the bill's procompetitive standards

A. Federal Power Act

- (1) "To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power. . . ." 16 U.S.C. §797(e).
- (2) To waive "conditions, provisions, and requirements of this subchapter" in issuing licenses in specified circumstances. 16 U.S.C. §803(i).
- (3) "[T]o regulate and control so much of the services rendered, and of the rates and charges for payments therefor as constitute interstate or foreign commerce. . . ." 16 U.S.C. §813.
- (4) To approve contracts by licensees "for the sale and delivery of power for periods extending beyond the date of termination of the license." 16 U.S.C. §815.
- (5) To "direct a public utility . . . to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to

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sell energy to or exchange energy with such persons. . . . The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them." 16 U.S.C. §824a(b).

- (6) "[T]o require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as will best meet the emergency [the Commission determines to exist by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy. . .] and serve the public interest. . . . [T]he Commission . . . may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party." 16 U.S.C. §824a(c).
- (7) To prescribe rules that "require electric utilities to offer to - (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and (2) purchase electric energy from such facilities." 16 U.S.C. §824a-3.
- (8) To approve any specified "proposed disposition, consolidation, acquisition, or control" of facilities by public utilities. 16 U.S.C. §824b(a).
- (9) To by order authorize a public utility to "issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person. . . ." 16 U.S.C. §824c(a).
- (10) To "determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force. . . ." 16 U.S.C. §824e(a).
- (11) To "determine the proper, adequate, or sufficient service to be furnished. . . ." 16 U.S.C. §824f.
- (12) To authorize "any person to hold the position of officer or director of more than one public utility or to hold the position of officer or director of a public utility and the position of officer or director of any bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility, or officer or director of any company supplying electrical equipment to such public utility. . . ." 16 U.S.C. §825d(b).

B. Natural Gas Act

- (13) To "determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force. . . ." 15 U.S.C. §717d,
- (14) To "direct a natural gas company to . . . establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public. . . ." 15 U.S.C. §717f(a),
- (15) To authorize a natural-gas company to "abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities. . . ." 15 U.S.C. §717f(b),
- (16) To authorize a "natural-gas company or person which will be a natural gas company upon completion of any proposed construction or extension [to] engage in the transportation or sale of natural gas subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any facility or extensions thereof. . . ." 15 U.S.C. §717f(c),
- (17) To approve a transfer of contractual interests to receive natural gas "(i) to any interstate pipeline; (ii) to any local distribution company served by an interstate pipeline; and (iii) to any person served by an interstate pipeline for a high priority use by such person." 15 U.S.C. §717y.

C. Interstate Commerce Act

- (18) To "establish[] rates or charges for the transportation of oil by pipeline or establish[] the valuation of any such pipeline."

II. Statutes that may require consideration of competitive concerns

A. Federal Power Act

- (1) "Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited." 16 U.S.C. §803(h).
- (2) The Commission may exercise statutory power (2) "as it may deem to be in the public interest." 16 U.S.C. §803(i).

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- (3) "[T]he rates charged and the service rendered by any such licensee . . . shall be reasonable, nondiscriminatory, and just to the customer. . . ." 16 U.S.C. §813. (See statutory power (3)).
- (4) The Commission may exercise statutory power (4) "[w]henver the public interest requires or justifies" so doing. 16 U.S.C. §815.
- (5) The Commission may exercise statutory power (5) when it finds it "necessary or appropriate in the public interest." 16 U.S.C. §824a(b).
- (6) The Commission may exercise statutory power (6) when it "will best meet the emergency and serve the public interest." 16 U.S.C. §824a(c).
- (7) Under statutory power (7), "[t]he rules prescribed . . . shall insure that, in requiring any electric utility to offer to purchase electric energy . . . the rates for such purchase -
 - (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
 - (2) shall not discriminate against qualifying cogenerators or qualifying small power producers. . . .
 The rules prescribed . . . shall insure that, in requiring any electric utility to sell electric energy . . . the rates for such sale -
 - (1) shall be just and reasonable and in the public interest, and
 - (2) shall not discriminate against qualifying cogenerators or qualifying small power producers." 16 U.S.C. §824a-3.
- (8) The Commission may exercise statutory power (8) when it "will be consistent with the public interest." 16 U.S.C. §824b(a).
- (9) The Commission may exercise statutory power (9) when "compatible with the public interest." 16 U.S.C. §824c.
- (10) "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable. . . ." 16 U.S.C. §824d(a).
- (11) "No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities ~~as~~ as between classes of service." 16 U.S.C. §824d(b).

- (12) The Commission may exercise statutory power (12) "upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby." 16 U.S.C. §825d(b).

B. Natural Gas Act

- (13) "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable. . . ." 15 U.S.C. §717c(a).
- (14) "No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person, subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or between classes of service." 15 U.S.C. §717c(b).
- (15) The Commission may exercise statutory power (14) whenever it "finds such action necessary or desirable in the public interest." 15 U.S.C. §717f(a).
- (16) The Commission may exercise statutory power (15) after a finding "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 15 U.S.C. §717f(b).
- (17) The Commission may exercise statutory power (16) by issuing "a certificate of public convenience and necessity." 15 U.S.C. §717f(c).
- (18) "The Commission may transmit such evidence as may be available concerning . . . apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings. " 15 U.S.C. §717s(a).
- (19) The Commission may exercise statutory power (17) by issuing "a certificate of public convenience and necessity." 15 U.S.C. §717y(b).

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III. Judicial decisions on the obligation of the Commission to consider competitive concerns

A. Federal Power Act

In Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 749 (1973), the Supreme Court held that "when a public utility applies to the Federal Power Commission for authority to issue a security, as the utility is required to under §204 of the Federal Power Act [16 U.S.C. §824c], the Commission, in passing upon the application, must consider the issue's anticompetitive effect in determining whether it is 'compatible with the public interest,' as that phrase is employed in §204(a)." The Court noted that the Commission's regulatory

power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to §§202 and 203 [16 U.S.C. §§824a and 824b], and under like directives contained in §§203, 206, and 207 [16 U.S.C. §§824d, 824e, and 824f]. . . . Nothing in the Act suggests that the "public interest" standard of §204 contains any less broad directive than those contained in the similarly worded and adjacent sections. . . . Without a more definite indication of contrary legislative purpose, we shall not read out of §204 the requirement that the Commission consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws. . . . Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.

Id. at 758-760. Thus, the Supreme Court has interpreted statutory powers

(5), (6), (8), (9), (10), and (11) to require the Commission to consider antitrust policies when exercising its authority. (Statutory power (7) had not been enacted at the time Gulf States was decided.) However, in Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973), the Court wrote, "The standard which governs [the Commission's] decision [to order interconnections under statutory power (5)] is whether such action is 'necessary or appropriate in the public interest.' Although antitrust considerations may be relevant, they are not determinative."

In Federal Power Commission v. Conway Corporation, 426 U.S. 271, 279 (1976), the Supreme Court restated its holding in Gulf States, adding:

The Commission must arrive at a rate level deemed by it to be just and reasonable, but in doing so it must consider the tendered allegations that the proposed rates are discriminatory and anticompetitive in effect.

Several courts of appeals decisions have applied the rule that the Commission's public interest standard requires consideration of antitrust policies. See Central Power & Light Company v. Federal Energy Regulatory Commission, 575 F.2d 937, 938 (D.C. Cir. 1978); cert. den., 99 S.Ct. 568; Kansas Power and Light Company v. Federal Power Commission, 554 F.2d 1178, 1184 (D.C. Cir. 1977); Niagra Mohawk Power Commission v. Federal Power Commission, 538 F.2d 966, 971 (2d Cir. 1976); Northern California Power Agency v. Federal Power Commission, 514 F.2d 184, 187 (D.C. Cir. 1975); Alabama Power Company v. Federal Power Commission, 511 F.2d 383, 393 (D.C. Cir. 1974); City of Huntingburg, Indiana v. Federal Power Commission, 498 F.2d 778, 783 (D.C. Cir. 1974); Utility Users League v. Federal Power Com-

mission, 394 F.2d 16, 21 (7th Cir. 1968). None of these cases appears to provide much information as to the extent to which antitrust policy must be considered; although Alabama Power Co., supra, contains the following dictum:

That the general policy of promoting competition in the market is an important component of regulation in the public interest is a principle both longsettled [citation omitted] and of current validity [citation omitted]. The Commission of course lacks principal responsibility for the implementation of antitrust policy; indeed, it may be accustomed to viewing matters in terms of the paradigm of monopoly regulation rather than of markets lubricated by competitive conditions. Other agencies, having primary concern with enforcement of the antitrust statutes, are presumably able to assist the Commission by giving advice on disputed issues of antitrust policy and by identifying the factual questions relevant to an assessment of the anticompetitive impact of a proposed action. The opportunity for consistency and evenhandedness in the development of policy that Congress has put within the ken of several administrative bodies is enhanced when one agency elicits the views of another and draws upon the latter's expertise. Such a procedure would embody sound administrative practice. The Commission retains an obligation to give reasoned consideration to the bearings of antitrust policy on matters within its jurisdiction.

City of Huntingburg, supra, states:

Courts have long recognized that careful assessment of the potential effects of a proposed action on competition in the regulated industry is an integral aspect of the public interest standard.

B. Natural Gas Act

"Beginning with City of Pittsburgh v. FPC, 237 F.2d 741

(D.C. Cir. 1956), the courts have held that the Commission must consider antitrust policies when deciding whether proposals satisfy the [Natural Gas] Act's public interest requirements." American Bar Association, Anti-Trust Law Developments 426 (1975). In that case, the court set aside a Commission order that had granted an application for a certificate of public convenience and necessity which had authorized abandonment of a pipeline as a natural gas pipeline (see statutory power (15)). The order had been challenged on the ground that it was a "violation of the national policy against monopoly expressed in the antitrust laws" (id. at 754), an issue the Commission had not considered in making its determination. The court held:

The Commission, while it "has no power to enforce the Sherman Act [15 U.S.C.A. §§ 1-7, 15 note] as such * * * [and] cannot decide definitely whether the transaction contemplated constitutes * * * an attempt to monopolize which is forbidden by the Act * * *," nevertheless "cannot without more ignore the [Act]." Thus, it appears that Texas Eastern's project would tend to produce monopolization of a petroleum products market, the Commission cannot ignore that fact merely because it is an antitrust factor and such factors have been placed within the ken of the Attorney General. . . . Although the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the right to consider a congressional expression of fundamental national policy as bearing upon the question whether a particular certificate is required by the public convenience and necessity.

Id. at 754. This case was cited by the Supreme Court when it noted that "[e]vidence of antitrust violations is plainly relevant in merger applica-

tions, for part of the content of 'public convenience and necessity' as used in §7 of the Natural Gas Act [statutory power (16)] is found in the laws of the United States." California v. Federal Power Commission, 369 U.S. 482, 484-485 (1962). In Northern Natural Gas Company v. Federal Power Commission, 399 F.2d 953, 958 (D.C. Cir. 1968), the court, on the ground that "the Commission have ^{given} inadequate consideration to the antitrust policy of the United States," set aside a Commission order (under statutory power (16)) authorizing a joint venture for the purpose of constructing a pipeline. The court wrote:

[W]e believe that in a case such as this the Commission was obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations.

Id. at 961.

The cases under both the Federal Power Act and the Natural Gas Act provide that the Commission's obligation to consider the ~~the~~ public interest in exercising its powers includes a "careful" and "reasoned" assessment of potential effects on competition, but that such effects need not be determinative of agency action. S. 1291, although not providing that potential anticompetitive effects preclude the taking of any action, does require that the least anticompetitive action legally and practicably available be taken.

Federal Maritime Commission

I. Statutory powers that arguably would be subject to the bill's procompetitive standards

A. Shipping Act

- (1) To "determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property -
 - (1) Has violated any provision of section 812 of this title [which prohibits various anticompetitive practices], or
 - (2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission." 46 U.S.C. §813.
- (2) To "permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers. . . ." 46 U.S.C. §813a.
- (3) To approve agreements, and modifications and cancellations thereof, "fixing or regulating transportation rates or fares; giving special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. . . . Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of section 1 to 11 and 15 of Title 15, and amendments and Acts supplemental thereto." 46 U.S.C. §814.
- (4) To "make an order that the carrier shall discontinue demanding, charging, or collecting any unjustly discriminatory or prejudicial rate, fare, or charge." 46 U.S.C. §816.
- (5) To "determine, prescribe, and order enforced a just and reasonable regulation or practice." 46 U.S.C. §816.

- (6) To allow a carrier to "demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section." 46 U.S.C. §817(a).
- (7) To "determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice." 46 U.S.C. §817(a).
- (8) To "disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers." 46 U.S.C. §817(b)(5).
- (9) To approve a rate increase after "a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitor carrier by water." 46 U.S.C. §818.

B. Intercoastal Shipping Act

- (10) To "determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum or minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice." 46 U.S.C. §845a.

II. Statutes that may require consideration of competitive concerns

A. Shipping Act

- (1) "No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passenger or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country -
 First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. . . .
 Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. . . .
 Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.
 Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper. . . ." (See statutory power (1)). 46 U.S.C. §812.

- (2) The Commission may exercise statutory power (2) unless it "finds that the contact, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair. . . ." 46 U.S.C. §813a.
- (3) The Commission may exercise statutory power (3) if it finds the agreement, or any modification or cancellation thereof "to be unjustly discriminatory or unfair . . . or to operate to the detriment of the United States, or to be contrary to the public interest, or to be in violation of this chapter. . . ." 46 U.S.C. §814.
- (4) "It shall be unlawful for any common carrier by water, or other person subject to this chapter . . .
 First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .
 Second. To allow any person to obtain transportation for property at less than the regular rates or charges. . . .
 Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance. . . ." 46 U.S.C. §815.
- (5) The Commission may exercise statutory power (8) if it finds the rate "to be so unreasonably high or low as to be detrimental to the commerce of the United States." 46 U.S.C. §817(b)(5).
- (6) The Commission may exercise statutory power (9) if it "finds that such proposed increase rests upon changed conditions other than elimination of said competition." 46 U.S.C. §818.

III. Judicial decisions on the obligation of the Commission to consider competitive concerns

In Federal Maritime Commission v. Akteibolaget Svenska Amerika Linien (Swedish American Line), 390 U.S. 238 (1968), the Commission, pursuant to 46 U.S.C. §814 (statutory power (3)), had disapproved two provisions of several shipping conference agreements. 7 FMC 737 (1964). The court of appeals had remanded, holding:

We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles, the theory on which seemingly the Commission's disapproval rests here. . . . The statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of four ways set out in the section by Congress.

351 F.2d 756, 761 (D.C. Cir. 1965). On remand the Commission had again disapproved the agreements (10 FMC 27 (1966)) and on appeal the court of appeals had again set aside the order. 372 F.2d 932 (1967). The Supreme Court reversed and approved the Commission's action, holding:

Insofar as this holding [the court of appeal's first opinion] rests on the absence of an explicit antitrust test among the "four ways set out in the section," we think the Court of Appeals was excessively formalistic in its approach to the Commission's findings. By its very nature an illegal restraint of trade is in some ways "contrary to the public interest," and the Commission's antitrust standard, involving an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of "the public interest." Certainly any reservations the Court of Appeals may have had on this point should have been dispelled by the Commission's careful explanation on remand of the connection between its antitrust standard and the public interest requirement. . . . As long as the Commission indicates which of the statutory standards is the ultimate authority for its disapproval, we can see no objection to the Commission's casting its primary analysis in terms of the requirements of its antitrust test. . . . The Commission must of course adduce substantial evidence to support a finding under one of the four standards of § 15, but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is "contrary to the

public interest," unless other evidence in the record fairly detracts from the weight of this factor.

390 U.S. at 244-245.

The Supreme Court described the principle upon which the Commission had made its determination:

The Commission has formulated a principle that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can "bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act. . . ."

at 243. In Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 274 n. 21, the Court quoted the following from Isbrandtsen Co. v. United States, 211 F.2d 51, 57 (D.C. Cir. 1954); cert. den., 347 U.S. 990 (1954):

"[T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute."

In Federal Maritime Commission v. Pacific Maritime Assn., 435 U.S. 40, 53 (1978), the Court wrote:

That the Commission is the public arbiter of competition is reflected in prior holdings that in reaching its decision under

§15 [46 U.S.C. §814] the Commission must [emphasis supplied by the Court] "consider the antitrust implications of an agreement before approving it," FMC v. Seatrain Lines, Inc., 411 U.S. 726, 739 (1973), and should approve an anticompetitive agreement only if it is "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." FMC v. Svenska Amerika Linien, 390 U.S. 238, 243 (1968). The Commission, nevertheless, may approve agreements "even though they are violative of the antitrust laws. . . ." Seatrain, supra, at 728.

The Supreme Court has thus adopted the Commission's formula set forth in Svenska Amerika Linien.

In United States Lines v. Federal Maritime Commission, 584 F.2d 519, 531 (D.C. Cir. 1978), the court of appeals held:

The responsibility delegated to the Commission by Congress is not simply to guard against per se violations of the antitrust laws; it is to protect the public interest, which may be adversely affected by all forms of anticompetitive arrangements.

(See also the court's footnote 31.)

The cases thus appear to require that serious consideration be given to possible anticompetitive consequences of Commission action, but, unlike S. 1291, they have not ~~not~~ explicitly required that the least competitive alternative legally and practicably available be chosen.

Interstate Commerce Commission

In 1978, in Public Law 95-473, Congress "restate[d] in comprehensive form, without substantive change, the Interstate Commerce Act and related laws." House Report No. 95-1395 (1978).

- I. Statutory powers that arguably would be subject to the bill's procompetitive standards
 - (1) To "prescribe the rate (including a maximum or minimum rate, or both) to be followed." 49 U.S.C. §10704(a)(1), (b)(1).
 - (2) To "prescribe the minimum rate, rule, or practice. . . ." 49 U.S.C. §10704(c)(1).
 - (3) To "prescribe through rates, joint rates (including maximum or minimum rates or both), the division of joint rates, and other conditions under which those routes must be operated. . . ." 49 U.S.C. §10705(a)(1).
 - (4) To approve agreements of rail carriers that relate "to rates (including charges between rail carriers and compensation paid or received for the use of facilities and equipment), classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. . . . If the Commission approves the agreement . . . , the Sherman Act (15 U.S.C. 1, et seq.), the Clayton Act (15 U.S.C. 12, et seq.), the Federal Trade Commission Act (15 U.S.C. 41, et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a) do not apply to parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. §10706(a)(2)(A).
 - (5) To approve agreements between common carriers (other than rail carriers) with "at least 2 carriers related to rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. . . . If the Commission approves the agreement . . . , the antitrust laws, as defined in section 12 of title 15, do not apply to parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. §10706(b).

- (6) To determine a rate for transportation "to be unreasonable if it exceeds a reasonable maximum for that transportation." 49 U.S.C. §10709(c).
- (7) To permit rail carriers to construct or acquire extended or additional railroad lines. 49 U.S.C. §10901(a).
- (8) To authorize rail carriers "to take action necessary to provide adequate, efficient, and safe facilities to enable the rail carrier to perform its obligations under this subtitle. . . ." 49 U.S.C. §10902.
- (9) To permit a rail carrier to "(1) abandon any part of its railroad lines; or (2) discontinue the operation of all rail transportation over any part of its railroad lines." 49 U.S.C. §10903(a).
- (10) To order a carrier discontinuing or changing interstate train or ferry transportation "to continue or restore that transportation for not to exceed one year from the date of the Commission order." 49 U.S.C. §10908(c).
- (11) To permit a carrier to discontinue or change any part of ~~the~~ the transportation of a train or ferry operated by it~~e~~ entirely in one State. 49 U.S.C. §10909(c).
- (12) To "issue a certificate to a person authorizing that person to provide transportation . . . as a motor common carrier or water common carrier." 49 U.S.C. §10922(a).
- (13) To "issue a permit to a person authorizing that person to provide transportation . . . as a motor contract carrier or water contract carrier." 49 U.S.C. §10923(a).
- (14) To "issue, subject to section 10927(b) of this title, a license to a person authorizing the person to be a broker for transportation." 49 U.S.C. §10924(a).
- (15) To "relieve a water carrier . . . from the requirements of this subtitle when a rate, rule, or practice established by a person providing water transportation to or from a port in a foreign country in competition with that carrier unreasonably discriminates against that carrier." 49 U.S.C. §11108(a).
- (16) To approve the issuance of securities or the assumption of obligations and liabilities by certain carriers. 49 U.S.C. §11301(d)(1).
- (17) To approve consolidations, mergers, and acquisitions of control by carriers. 49 U.S.C. §§11343, 11344.

- (18) To approve consolidations, mergers, and acquisitions of control by rail carriers. 49 U.S.C. §11346.
- (19) To authorize the issue of securities or assumption of obligations or liabilities by persons subject to 49 U.S.C. §§11301, 11302, 11322, 11709, and 11911. 49 U.S.C. §11348(b).
- (20) "To approve a proposed change . . . within the scope of section 11361 of this title." 49 U.S.C. §11362.

II. Statutes that may require consideration of competitive concerns

- (1) "[I]t is the policy of the United States Government . . . to encourage sound economic conditions in transportation, including sound economic conditions among carriers [and] to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices. . . . This subtitle shall be administered and enforced to carry out the policy of this section." 49 U.S.C. §10101.
- (2) "In a proceeding involving a proposed increase or decrease in rail carrier rates, the Commission shall specifically consider allegations that the increase or decrease would . . . have a significant adverse effect on the competitive position of shippers or consignees served by the rail carrier proposing the increase or decrease." 49 U.S.C. §10704(e).
- (3) The Commission may prescribe the minimum rate, rule, or practice for the carrier (under statutory power (2)) that is in the public interest and will promote [the transportation policy of section 10101 of this title]." 49 U.S.C. §10704(c)(1).
- (4) The Commission may exercise statutory power (3) "when it considers it desirable in the public interest." 49 U.S.C. §10705(a)(1).
- (5) The Commission may exercise statutory powers (4) and (5) "only when it finds that the making and carrying out of the agreement will further the transportation policy of section 10101 of this title." 49 U.S.C. §§10706(a)(2)(A), 10706(b).
- (6) The Commission may exercise statutory power (6) "[w]hen the Commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies." 49 U.S.C. §10709(c).

- (7) The Commission may exercise statutory power (7) "only if the Commission finds that the present or future public convenience or necessity require or will be enhanced by the construction or acquisition (or both) and operation of a railroad line." 49 U.S.C. §10901(a).
- (8) The Commission may exercise statutory power (8) "only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. §10903(a).
- (9) The Commission may exercise statutory power (10) if it "finds that any part of the transportation [to be discontinued or changed] is required or permitted by present or future public convenience ^{and} necessity and will not unreasonably burden interstate or foreign commerce. 49 U.S.C. §10908(c).
- (10) The Commission may exercise statutory power (11) if it "finds that - (1) the present or future public convenience and necessity require or permit the discontinuance or change to be authorized by the Commission; and (2) continuing the transportation, without the proposed discontinuance or change, will constitute an unreasonable burden on the interstate operations of the carrier or on interstate commerce." 49 U.S.C. §10909(c).
- (11) The Commission may exercise statutory power (12) if it finds that "the transportation to be provided under the certificate is or will ~~be~~ be required by the present or future public convenience and necessity." 49 U.S.C. §10922(a).
- (12) The Commission may exercise statutory power (13) if it finds that "the transportation or service to be provided under the permit is or will be consistent with the public interest and the transportation policy of section 10101 of this title." 49 U.S.C. §10923(a).
- (13) The Commission may exercise statutory power (14) if it finds that "the transportation for which the person is to be a broker will be consistent with the public interest and the transportation policy of section 10101 of this title." 49 U.S.C. §10924(a).
- (14) The Commission may relieve the carrier under (statutory power (15)) "to the extent necessary to end or ease the discrimination if the relief is in the public interest and consistent with the transportation policy of section 10101 of this title." 49 U.S.C. §11108(a).
- (15) The Commission may exercise statutory power (16) "only when it finds that the securities issue or assumption . . . is compatible with the public interest." 49 U.S.C. §11301(d)(1).

- (16) "The Commission shall approve and authorize a transaction [under statutory power (17)] when it finds the transaction is consistent with the public interest." 49 U.S.C. §11344(c).
- (17) "The Commission [under statutory power (18)] may -
 (1) approve the transaction if the Commission determines the transaction is in the public interest; (2) approve the transaction with conditions and modifications that it determines are in the public interest; or (3) disapprove the transaction if it determines the transaction is not in the public interest." 49 U.S.C. §11346(d).
- (18) The Commission may exercise statutory power (19) "only when it finds the issue or assumption . . . is consistent with the public interest" 49 U.S.C. §11348(b).
- (19) The Commission may exercise statutory power (20) if it finds "that the proposed change . . . will be in the public interest." 49 U.S.C. §11362.

Clayton Act

- (10) "Authority to enforce compliance with sections 13, 14, 18 and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended." 49 U.S.C. §21(a).

III. Judicial decisions on the obligation of the Commission to consider competitive concerns

In McLean Trucking Co. v. United States, 321 U.S. 67 (1944), the Supreme Court held that the question presented by a case involving a Commission ruling approving a merger (see statutory power (16)) was not whether the merger would violate the antitrust laws, but whether the Commission had failed "to consider and give due weight to the anti-trust and other laws of the United States." Id. at 77. The Court wrote:

The history of the development ^o of the special national transportation policy suggests . . . that the policies of the antitrust laws determine "the

public interest" in railroad regulation only in a qualified way. . . . [T]here can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the antitrust laws. . . . [T]he preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy. . . .

Congress however neither has made the antitrust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. . . .

In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.

Id. at 83-85.

In Missouri Pacific Railroad Company v. United States, 346 F. Supp. 1193, 1199 (E.D. Mo.); aff'd mem., 409 U.S. 1094 (1973), the Supreme Court affirmed a decision that upheld Commission approval of a railroad merger. The lower court wrote:

[T]he national transportation policy articulated by Congress favors railroad mergers. Indeed, such mergers are, "upon approval by the Commission, . . . immunized from the operation of the anti-trust laws. . . ." [citation omitted]; although the "curtailment of competition is a factor to be considered in determining whether a proposed merger is in the public interest and will "assist in effectuating the over-all transportation policy."

In United States v. Interstate Commerce Commission (Northern Lines Merger Cases), 396 U.S. 491, 513-514 (1970), the Court, again upholding ICC

approval of a railroad merger, wrote:

The Department urges that the Commission failed to give sufficient weight to the diminution of competition between the Northern Lines - in short, that it failed to strike the correct balance between the antitrust objectives and the overall transportation needs that concern Congress. This contention tends to isolate individual factors that are to enter into the Commission's decision and view them as controlling. "Competition is merely one consideration here," Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486, 500 (1968). And, we might add, it is a consideration that is implied and is in addition to the four specifically mentioned in §5(2)(c) [see §11344(b)] of the statute.

Similarly, in Minneapolis & St. Louis Railway Co. v. United States, 361

U.S. 173, 187 (1959), the Supreme Court wrote:

As respects railroad acquisitions, the Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in "the public interest." A contrary view would, in effect, permit the Commission to authorize only those acquisitions which would not offend those laws. "As has been said, this would render meaningless the exemption relieving the participants in a properly approved [acquisition] of the requirements of those laws. . . ." 321 U.S., at 86.

In Denver and Rio Grande Western Railroad Co. v. United States,

387 U.S. 485, 498 (1967), the Supreme Court wrote:

We conclude, therefore, that the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider the control and anticompetitive consequences before approving stock issuances under §20a(2) [see statutory power (16)].

In Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974), the Commission had authorized the issuance of motor carriers' applications for certificates of public convenience and necessity (under statutory power (12)). Upholding the ICC, the Supreme Court wrote:

A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen Government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration. [citations omitted.]

Id. at 298.

Since Bowman, the Commission's failure to consider possible benefits that might result from increased competition has resulted in at least three courts of appeals' decisions reversing Commission denials of motor carriers' applications for certificates of public convenience and necessity. Niedert Motor Service, Inc. v. United States, 583 F.2d 954, 963 (7th Cir. 1978); Sawyer Transport, Inc. v. United States, 565 F.2d 474, 478 (7th Cir. 1977); F.C. White Truck Line, Inc. v. Interstate Commerce Commission, 551 F.2d 1326 (D.C. Cir. 1977).

The cases dealing with the Interstate Commerce Commission indicate that although competition is one factor that must be taken into account in rendering a decision, it is merely one of several considerations. S. 1291 might, therefore, substantially affect the Commission's decision-making processes.

- (9) To "relieve foreign air carriers who are not directly engaged in the operation of aircraft in foreign air transportation from the provisions of this chapter." 49 U.S.C. §1386(b)(3).

II. Statutes that may require consideration of competitive concerns

- (1) "(a) In the exercise and performance of its powers and duties under this chapter with respect to interstate and overseas air transportation, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
- (1)
 - (2)
 - (3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers. . . .
 - (4) The placement of maximum reliance on competitive market forces and on actual and potential competition. . . .
 - (5) The development and maintenance of a sound regulatory environment which is responsive to the needs of the public. . . .
 - (6)
 - (7) The prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation, and the avoidance of -
 - (A) unreasonable industry concentration, excessive market domination, and monopoly power; and
 - (B) other conditions;
 that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.
 - (8)
 - (9)
 - (10) The encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional air transportation markets by existing air carriers, and the continued strengthening of small air carriers so as to assure a more effective, competitive airline industry.
- (b) In addition to the declaration of policy set forth in subsection (a) of this section, the Board, in the exercise and performance of its powers and duties under this chapter with respect to all-cargo air service shall consider the following, among other things, as being in the public interest:
- (1) The encouragement and development of an expedited all-cargo air service system, provided by private enterprise, responsive to . . .

Civil Aeronautics Board

The Civil Aeronautics Board administers the Federal Aviation Act, which was amended by the Airline Deregulation Act of 1978, Public Law 95-504.

- I. Statutory powers that arguably would be subject to the bill's procompetitive standards
 - (1) To issue certificates authorizing air carriers to engage in air transportation. 49 U.S.C. §1371.
 - (2) To issue permits to foreign air carriers to engage in foreign air transportation. 49 U.S.C. §1372.
 - (3) "[T]o fix and determine . . . the fair and reasonable rates of compensation for the transportation of mail by aircraft. . . ." 49 U.S.C. §1376(a).
 - (4) To approve consolidations, mergers, and acquisitions of control. 49 U.S.C. §1378(b).
 - (5) To approve interlocking relationships among air carriers. 49 U.S.C. §1379.
 - (6) To order air carriers, foreign air carriers, or ticket agents to cease and desist from unfair or deceptive practices or unfair methods of competition. 49 U.S.C. §1381.
 - (7) To approve contracts and agreements affecting foreign air transportation "for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements." 49 U.S.C. §1382(a).
 - (8) To "exempt from the requirements of this subchapter . . . any person or class of persons. . . ." 49 U.S.C. §1386(b)(1).

the commerce of the United States. . . .

(2) The encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent, variety, quality, and price of such services.

(3) The provision of services without unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing.

(c) In the exercise and performance of its powers and duties under this chapter with respect to foreign air transportation, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(1) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States. . . .

(2) The regulation of air transportation in such a manner as to . . . foster sound economic conditions in, such transportation, and to improve the relations between and coordinate transportation by air carriers.

(3) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.

(4) Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States. . . .

49 U.S.C. §1302.

- (2) The Board shall issue a certificate (under statutory power (1)) if it finds that the transportation covered by the application -
 "(A) in the case of interstate or overseas air transportation, is consistent with the public convenience and necessity; and
 (B) in the case of foreign air transportation, is required by the public convenience and necessity;
 otherwise such application shall be denied." 49 U.S.C. §1371(d)(1).
- (3) In the case of an application for a certificate to engage in temporary air transportation, or in charter air transportation, the Board may issue a certificate -
 "(A) in the case of an application for interstate or overseas air transportation, as is consistent with the public convenience and necessity; and
 (B) in the case of an application for foreign air transportation, as may be required by the public convenience and necessity. . . ."
 49 U.S.C. §§1371(d)(2) and (3).

- (4) The Board may issue a permit (under statutory power (2)) if it finds "that such transportation will be in the public interest." 49 U.S.C. §1372(b).
- (5) The Board may approve a consolidation, merger, or acquisition of control (under statutory power (4)) unless it "finds that the transaction will not be consistent with the public interest . . . except the Board shall not approve such transaction -
(A) if it would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of air transportation in any region of the United States; or (B) the effect of which in any region of the United States may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the anticompetitive effects of the proposed transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public, and unless it finds that such significant transportation conveniences and needs may not be satisfied by a reasonably available alternative having materially less anticompetitive effects." 49 U.S.C. §1378(b)(1).
- (6) The Board may approve interlocking relationships (under statutory power (6)) "upon due showing . . . that the public interest will not be adversely affected thereby." 49 U.S.C. §1379.
- (7) "The Board shall by order disapprove any such contract or agreement [under statutory power (7)] . . . that it finds to be adverse to the public interest . . . and shall by order approve any such contract or agreement that it does not find to be adverse to the public interest." 49 U.S.C. §1382(b).
- (8) "In any order made under section 1378, 1379, or 1382 of this title, they may, as part of such order, exempt any person affected by such order from the operations of the 'antitrust laws' set forth in subsection (a) of section 12 of Title 15 to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest." 49 U.S.C. §1384.
- (9) The Board may exercise statutory power (8) "if it finds that the exemption is consistent with the public interest." 49 U.S.C. §1386(b)(1).

- (10) The Board may exercise statutory power (9) "to the extent and for such periods as such relief may be in the public interest." 49 U.S.C. §1386(b)(3).

Clayton Act

- (11) "Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the . . . Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938 [which was superseded by the Federal Aviation Act]." 15 U.S.C. §21(a).

III. Judicial decisions on the obligation of the Board to consider competitive concerns

The following cases under the Federal Aviation Act should be considered in light of the substantial changes made in the Act by the Airline Deregulation Act of 1978. In Pan American World Airways, Inc. v. United States, 371 U.S. 296, 307-308 (1963), the Supreme Court wrote:

Whatever the unfair practice or unfair method employed, §411 of this Act [statutory power (6)], like §5 of the Federal Trade Commission Act . . . was designed to bolster and strengthen antitrust enforcement. We have said enough to indicate that the words "unfair practices" and "unfair methods of competition" are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular cases on competition and monopoly.

In Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 389 (1973), the Court wrote:

The control which the CAB is authorized to grant or to deny under §408 [statutory power (4)] involves an appraisal of the impact of that control in terms of monopoly and competition.

In United States v. Civil Aeronautics Board, 511 F.2d 1315 (D.C. Cir. 1975), the United States argued that the Board "cannot find an agreement [under statutory power (7)] to be in the public interest unless the Board determines that the end sought cannot be achieved at all in a less competitive way." The court rejected this view, holding:

[C]ompetition is merely one of six or more factors to be considered by the Board in determining the public interest. Conceivably, in any given case, a less anticompetitive means of achieving the same result would be possible, but it might be uneconomical, less safe, or discourage development of an air transportation system properly adapted to America's future needs (to name three other considerations set out in section 102 [49 U.S.C. §1302]). In that event, the statute would appear to contemplate that the factor of competition could be outweighed by one or more of the other factors. Even if the value of competition is given a preferred status relative to other aspects of the public interest, such a preferred status does not lead one inexorably to the Government's "impossibility" standard.

Id. at 1322.

In Continental Air Lines, Inc. v. Civil Aeronautics Board, 519 F.2d 944, 954 (D.C. Cir. 1975); cert. den., 424 U.S. 958 (1976), the court wrote:

The legislative history and the early CAB decisions indicate that there is no presumption in favor of competition per se because competition may prove uneconomical and destructive of the healthy environment of the industry if the relevant market is too small to support competing carriers. But when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act

as providing the best means of effectuating the other public interest goals contained in §102 [49 U.S.C. §1302].

In Continental Air Lines, Inc. v. Civil Aeronautics Board, 551 F.2d 1293, 1302 (D.C. Cir. 1977), the court wrote:

The legislative history of the Civil Aeronautics Act of 1938 [superseded by the Federal Aviation Act] makes it clear that the law delegates authority to the agency to cope with and protect against disastrous rate wars and cutthroat competition. The Act does embody a general policy that regulation be conducted in such a way as to respect the workings of competition among entrepreneurs risking private capital.

Thus, cases under the Federal Aviation Act indicate that potential effect on competition is but one of several factors to be considered by the Board in performing its statutory functions. With the amendments of the Airline Deregulation Act of 1978, competitive factors appear to have significantly greater weight, although the amendments do not specifically provide, as S. 1291 would, that "the least anticompetitive alternative" be chosen.

Federal Communications Commission

I. Statutory powers that arguably would be subject to the bill's
procompetitive standards

- (1) To order common carriers engaged in interstate or foreign commerce by wire or radio "to establish necessary physical connections with other carriers, to establish routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes." 47 U.S.C. §201(a).
- (2) "[T]o determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair, and reasonable. . . ." 47 U.S.C. §205(a).
- (3) To authorize "any person to hold the position of officer or director of more than one carrier subject to this Act. . . ." 47 U.S.C. §212.
- (4) To approve "the construction, or operation, or construction and operation of [an] additional or extended line." 47 U.S.C. §214(a).
- (5) To permit a carrier to "discontinue, reduce, or impair service to a community, or part of a community." 47 U.S.C. §214(a).
- (6) To certify a proposed consolidation, acquisition, or control of a telephone company or telephone companies, thereby making inapplicable any Act or Acts of Congress that make the proposed transaction unlawful. 47 U.S.C. §221(a).
- (7) To approve consolidations and mergers between telegraph carriers, thereby making inapplicable any law or laws making consolidations and mergers unlawful. 47 U.S.C. §222(c)(1).
- (8) "[T]o prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them. . . ." 47 U.S.C. §303(1)(1).
- (9) To "grant to any applicant . . . a station license provided by this Act." 47 U.S.C. §307(a).
- (10) To grant renewals of licenses for the operation of broadcasting stations. 47 U.S.C. §307(d).
- (11) To "grant construction permits and station licenses, or modifications or renewals thereof." 47 U.S.C. §308(a).

- (12) To refuse or revoke a station license to "any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth the capital stock ~~of which~~ is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country." 47 U.S.C. §310(b)(4).
- (13) To approve a "construction permit or station license, or any rights thereunder, [to] be transferred, assigned, or disposed of. . . ." 47 U.S.C. §310(d).
- (14) To approve an agreement whereby one or more applicants withdraws his or their application or applications for a permit for construction of a broadcasting station, where two or more applications are pending, only one of which can be granted. 47 U.S.C. §311(c)(1).
- (15) To "waive the requirement for a permit for construction" of a station. 47 U.S.C. §319(d).

II. Statutes that may require consideration of anticompetitive concerns

- (1) The Commission may exercise statutory power (1) if it "finds such action necessary or desirable in the public interest." 47 U.S.C. §201(a).
- (2) "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. §201(b).
- (3) "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. §202(a).
- (4) The Commission may exercise statutory power (3) upon due showing "that neither public nor private interests will be adversely affected thereby." 47 U.S.C. §212.
- (5) The Commission may exercise statutory power (4) upon finding "that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line." 47 U.S.C. §214(a).

- (6) The Commission may exercise statutory power (5) if it finds "that neither the present nor future public convenience and necessity will be adversely affected." 47 U.S.C. §214(a).
- (7) The Commission may exercise statutory power (6) if it "finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest." 47 U.S.C. §221(a).
- (8) The Commission may exercise statutory power (7) if it "finds that the proposed consolidation or merger . . . is in the public interest." 47 U.S.C. §222(c)(1).
- (9) The Commission may exercise statutory power (9) "if public convenience, interest, or necessity will be served thereby." 47 U.S.C. §307(a).
- (10) The Commission may exercise statutory power (10) if it "finds that public interest, convenience, and necessity would be served thereby." 47 U.S.C. §307(d).
- (11) The Commission may exercise statutory power (11) if "the public interest, convenience, and necessity will be served." 47 U.S.C. §309(a).
- (12) The Commission may exercise statutory power (12) if it "finds that the public interest will be served." 47 U.S.C. §310(b)(4).
- (13) The Commission may exercise statutory power (13) if "the public interest, convenience, and necessity will be served." 47 U.S.C. §310(d).
- (14) The Commission may exercise statutory power (14) "only if it determines that the agreement is consistent with the public interest, convenience, or necessity." 47 U.S.C. §311(c)(3).
- (15) No person shall "acquire, own, control, or operate any cable or wire telegraph or telephone line or system . . . or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain competition" 47 U.S.C. §314.
- (16) The Commission may exercise statutory power (15) if it "finds that the public interest, convenience, and necessity would be served thereby. . . ." 47 U.S.C. §319(d).

Clayton Act

- (17) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in . . . the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy. . . ." 15 U.S.C. §21(a).

III. Judicial decisions on the obligation of the Commission to consider competitive concerns

In Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86 (1953), the Commission, citing the "national policy in favor of competition," authorized a radiotelegraph company to open two new circuits. The Supreme Court overturned the authorization, finding that the Commission had failed to weigh factors other than competition.

That there is a national policy favoring competition cannot be maintained today without careful qualification. . . . Federal legislation affecting railroads is a familiar but far from unique example of those many areas of economic activity in which serious inroads have been made on an original policy favoring competition. Indeed, as to the industry before us in this case, there has been serious qualification of competition as the regulating mechanism. . . . Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces and public intervention.

Id. at 91-94. This case was cited by the court of appeals in Washington Utilities & Transportation Commission v. Federal Communications Commission, 513 F.2d 1142, 1158 (9th Cir. 1975); cert. den., 423 U.S. 836 (1975), when it held that the Commission had accorded competitive considerations the proper weight in the case before it.

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In United States v. Radio Corporation of America, 358 U.S. 334, 351-352, the Court wrote:

This is not to imply that federal antitrust policy may not be considered in determining whether the "public interest, convenience, and necessity" will be served by proposed action of a broadcaster, for this Court has held to the contrary. National Broadcasting Co. v. United States, 319 U.S. 190, 222-224. Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly over that area's major media of mass communications. See 98 Cong. Rec. 7399; Mansfield Journal Co. v. Federal Communications Comm'n, 86 U.S. App. D.C. 102, 107, 108, 180 F.2d 28, 33, 34.

In Home Box Office, Inc. v. Federal Communications Commission, 567 F.2d 9, 40 n. 67 (1977); cert. den., 434 U.S. 829 (1977), the court wrote:

We do not agree with the suggestion of some petitioners that the Commission must demonstrate that the means it has chosen have the least impact on competition consistent with achievement of the Commission's purposes. To the extent that First Amendment and antitrust considerations coincide, it is necessary to make such a showing. See 185 U.S.App.D.C. at --, 567 F.2d at 48, *infra*. Otherwise, we think our recent decision in United States v. CAB, 167 U.S.App.D.C. 313, 318-320, 511 F.2d 1315, 1320-1322 (1975) [*supra*, page 35] is controlling and requires rejection of the least restrictive alternative approach.

Thus, case law provides that competitive impact is only one of several factors that the Federal Communications Commission must consider in performing its statutory functions.

Securities and Exchange Commission

The statutes listed below should be viewed as a sampling of those that might have been included.

I. Statutory powers that arguably would be subject to the bill's procompetitive standards

A. Securities Exchange Act of 1934

- (1) To prescribe rules and regulations concerning the use of manipulative and deceptive devices in the purchase and sale of securities. 15 U.S.C. §78j.
- (2) To exempt from registration requirements "any security of a foreign issuer, including any certificate of deposit for such a security." 15 U.S.C. §781(g)(3).
- (3) To exempt "in whole or in part any issuer or class of issuers from the provisions of subsection (g) of this section or from section 78m, 78n, or 78o(d) of this title or may exempt from section 78p of this title any officer, director, or beneficial owner of securities of any issuer, any security of which is required to be registered pursuant to subsection (g) hereof. . . ." 15 U.S.C. §781(h).
- (4) To adopt rules and regulations "(A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices." 15 U.S.C. §78m(e).
- (5) To prescribe rules and regulations governing solicitations and recommendations to security holders "to accept or reject a tender offer or request or invitation for tenders." 15 U.S.C. §78n(d)(4).
- (6) To "define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious." 15 U.S.C. §78o(c)(2).

B. Public Utility Holding Company Act of 1935

- (7) To "exempt from the provisions of subsection (a) of this section the issue or sale of any security by any subsidiary company of a registered holding company. . . ." 15 U.S.C. §79f(b).

- (8) To "permit a declaration regarding the issue or sale of a security to become effective." 15 U.S.C. §79g(d).
- (9) To permit a registered holding company "to acquire, directly or indirectly, any securities or utility assets or any other interest in any business." 15 U.S.C. §79i(a)(1).
- (10) To permit a person "to acquire, directly or indirectly, any security of any public-utility holding company, if such person is an affiliate. . . ." 15 U.S.C. §79i(a)(2).
- (11) To approve "the acquisition of securities or utility assets, or of any other interest in any business." 15 U.S.C. §79j(a).
- (12) To prescribe rules and regulations governing extensions of credit or indemnifications by registered holding companies or subsidiary companies thereof of "any company in the same holding-company system." 15 U.S.C. §79j(b).
- (13) To prescribe rules and regulations governing the sale of securities of any public utility company or any utility assets by any registered holding company. 15 U.S.C. §79j(d).
- (14) To prescribe rules and regulations governing maintenance of competitive conditions in relation to service, sales, or construction contracts with public utility companies. 15 U.S.C. §79m(f).

II. Statutes that may require consideration of competitive concerns

A. Securities Exchange Act of 1934

- (1) The Commission may exercise statutory power (1) "as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. §78j.
- (2) The Commission may exercise statutory power (2) if it "finds that such exemption is in the public interest and is consistent with the protection of investors." 15 U.S.C. §78i(g)(3).
- (3) The Commission may exercise statutory power (3) if it "finds, that by reason of the number of public investors, amount of trading interest in the securities, the nature and extent of the activities of the issuer, income or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors." 15 U.S.C. §78i(h).

- (4) The Commission may exercise statutory power (4) if "in the public interest or for the protection of investors." 15 U.S.C. §78m(e).
- (5) The Commission may exercise statutory power (5) "as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. §78n(d)(4).

B. Public Utility Holding Company Act of 1935

- (6) The Commission may exercise statutory power (7) "subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers." 15 U.S.C. §79f(b).
- (7) The Commission may exercise statutory power (8) unless it finds that "(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers." 15 U.S.C. §79g(d).
- (8) The Commission may exercise statutory power (11) unless it finds that "such acquisition will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or in the interest of investors or consumers. . . ." 15 U.S.C. §79j(b).
- (9) The Commission may exercise statutory power (12), (13), or (14) "as it deems necessary or appropriate in the public interest or for the protection of investors or consumers." 15 U.S.C. §§79l(b) and (d), 79m(f).

III. Judicial decisions on the obligation of the Commission to consider competitive concerns.

In Municipal Electric Association of Massachusetts v. Securities and Exchange Commission, 413 F.2d 1052 (D.C. Cir. 1969), the Commission by order had approved (under statutory power (11)) an acquisition by electric utility companies of nuclear-power electric generating companies. The court set aside the Commission order, writing that "the Commission explicitly recognized that consideration of anti-competitive consequences was a factor relevant to the statutory standard of public interest," but that

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the Commission had approached this factor in too restrictive a manner. The SEC, it said "must take significant content from these [federal anti-trust] policies." Id. at 1056-1057.

In City of Lafayette, Louisiana v. Securities and Exchange Commission, 454 F.2d 941 (D.C. Cir. 1971); aff'd 411 U.S. 747 (1973), the Federal Power Commission and the SEC had approved applications by electric utilities proposing issuance of bonds, notes, and stock to finance capital requirements. The cities involved challenged the agencies' orders, contending that they had failed to give proper consideration to antitrust factors. The court of appeals remanded the Federal Power Commission order (this aspect of the case was affirmed by the Supreme Court in Gulf States Utilities Co. v. Federal Power Commission, supra at 11) but affirmed the SEC order, writing:

the general doctrine requiring an agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and present) and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company. The SEC has no jurisdiction over operations and stands in a different posture from the FPC which, as we have already noted, has regulatory jurisdiction over operations. . . .

Id. at 955. The court noted that it was leaving open the question whether applications under § 6 (statutory power (7)) require consideration of anti-trust issues:

So far as this opinion is concerned the court will be free to determine, if the circumstances warrant, that the application under § 6 requires

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consideration of antitrust issues because the purpose of the application is significantly related to the structural position of the applicant in the industry . . . which presents the kind of issue, of undue concentration of control, that lies within the regulatory jurisdiction of SEC upon consideration of an application under § 10 [statutory power (11)].

Id. at 956.

The statutory functions of the SEC appear to be of a different type from those of other regulatory agencies, and antitrust considerations generally do not appear to play as significant a role.

Nuclear Regulatory Commission

The licensing and regulatory functions of the Atomic Energy Commission under the Atomic Energy Act were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974, 42 U.S.C. §5841(f).

I. Statutory powers that arguably would be subject to the bill's procompetitive standards

- (1) "[T]o issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, product, transfer, acquire, possess, use, import, or export . . . utilization or production facilities for industrial or commercial purposes." 42 U.S.C. §2133.
- (2) "[T]o issue licenses to persons applying therefor for utilization facilities for use in medical therapy." 42 U.S.C. §2134(a).
- (3) "[T]o issue licenses under this subsection to persons applying therefor for utilization and production facilities for industrial and commercial purposes." 42 U.S.C. §2134(b).
- (4) "[T]o issue licenses to persons applying therefor for utilization and production facilities useful in the conduct of research and development activities. . . ." 42 U.S.C. §2134(c).

II. Statutes that may require consideration of competitive concerns

- (1) "It is . . . declared to be the policy of the United States that . . . the development, use, and control of atomic energy shall be directed so as to . . . strengthen free competition in private enterprise." 42 U.S.C. §2011.
- (2) "Nothing contained in this Act shall relieve any person from the operation of [15 U.S.C. §§1 et seq., 15 note, §§8 et seq., §§12, 13, 14 et seq., 20, 21, 22 et seq.; 29 U.S.C. §§52, 53; 15 U.S.C. §§41 et seq., 47, 48, 50 et seq.]." 42 U.S.C. §2135(a).
- (3) "The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or tend

toward violation of any of the foregoing Acts, or to restrict free competition in private enterprise." 42 U.S.C. §2135(b).

- (4) The Commission "shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws specified in subsection (a) of this section." 42 U.S.C. §2135(c)(5).
- (5) "The Commission, with the approval of the Attorney General, may except from any of the requirements of this subsection such classes or types of licenses as the Commission may determine would not significantly affect the applicant's activities under the antitrust laws as specified in subsection (a) of this section." 42 U.S.C. §2135(c)(7).

III. Judicial decisions on the obligation of the Commission to consider competitive concerns

In Cities of Statesville, et al. v. Atomic Energy Commission,

441 F.2d 962, 973-974 (D.C. Cir. 1969), the court held that §105(c) (42 U.S.C. §2135(c))

was most assuredly an attempt . . . to inject antitrust principles into the Act. However, section 105(c) is patently restricted to section 103 [statutory power (1)] licensing. In fact, it could not apply to section 104(b) [statutory power (3)] licensing until a section 102 finding of "practical value" could be made. In effect then, the Commission is barred, with certain exceptions (such as § 103 licensing), from considering affirmative anticipatory antitrust sanctions. . . . These findings of course do not preclude the Commission from keeping an administrative eye on anticompetitive effects of the use of these facilities once they are constructed under section 104(b). The Commission has the statutory obligation to report to the Attorney General any information it might receive "with respect to any utilization of special nuclear material or atomic energy which appears to violate or tend toward the violation of any of the [antitrust laws], or to restrict free competition in private enterprise." 42 U.S.C. § 2135(b) (1964). [Emphasis in original.]

In granting authorizations under §103, the court emphasized, the Commission "has a most serious duty to perform,"

for if the trade has shown that these nuclear reactors are competitive in the commercial sense and it is clear that a commercial license is appropriate, then the Commission must consider, under section 105(c), anticipatory antitrust impact.

Id. at 974. But, §103 aside, the Commission's authority must be distinguished from that of other regulatory agencies:

Unlike the Federal Power Commission, the Federal Communications Commission, and the many other regulatory agencies, the Atomic Energy Commission is dealing with a subject matter that is not, as yet, open to vast commercial exploitation. These atomic power plants are not like radio stations of proven technical and commercial feasibility which are coveted prizes of the elite; instead, nuclear reactors are extremely speculative investments because of the many technical and financial imponderables. Unlike the other regulatory agencies, the Atomic Energy Commission concerns itself not with economic feasibility but with practical development and application of this wondrous source of energy. While the regulatory agencies in most of the other fields concern themselves with establishing an efficient national allocation of resources in the area which they are administering, and base this goal on a "public interest" concept of free enterprise, the Atomic Energy Commission concerns itself with promoting technical innovation in a highly experimental field and implementing "public interest" concepts through protection of the health, safety, and security of the nation.

Id. at 975. Thus, according to the only case found on the subject, it was held that antitrust principles are inapplicable to §104(b) of the Act. For further discussion see the annotation at 15 ALR Fed 599.

International Trade Commission

The United States Tariff Commission was redesignated the United States International Trade Commission in 1975 by 19 U.S.C. §2231. The ITC does not appear generally to perform the types of functions that would be covered by S. 1291. It is concerned with competition under statutes such as the following:

- (1) "Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section." 19 U.S.C. §1337.
- (2) "In advising the President under paragraph (2) or (3) as to the probable economic effect [of import relief] on the industry concerned, the Commission shall take into account all economic factors which it considers relevant, including ther considerations set forth in section 2252(c) of this title and the progress and specific efforts made by the industry concerned to adjust to import competition." 19 U.S.C. §2253(i)(4).

Federal Trade Commission

The Federal Trade Commission also does not appear generally to perform the types of functions that would be covered by S. 1291. Some of its primary functions with regard to competition are set forth in the Federal Trade Commission Act as follows:

- (1) "The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), common carriers subject to the Acts to regulate commerce, air carriers, and foreign carriers subject to the Federal Aviation Act of 1958 [49 U.S.C. §1301 et seq.], and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. §181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(a)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45(a)(2), as amended by Public Law 96-37.
- (2) "The Commission shall also have power - To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 18(f)(3), and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations." 15 U.S.C. §46(a), as amended by Public Law 96-37.
- (3) "The Commission may prescribe - (A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), and (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). . . ." 15 U.S.C. §57a(a).

Federal Banking Agencies

Some of the Federal banking statutes are enforced by all three banking agencies (Comptroller of the Currency ("Comptroller"), Board of Governors of the Federal Reserve System ("Board") and Federal Deposit Insurance Corporation ("FDIC")) within their respective jurisdictions. Therefore, examination of the agencies' statutory functions and obligations to consider competitive concerns will not be discussed agency-by-agency. Generally, under the Federal banking statutes, the Comptroller regulates national banks, the Board regulates State banks that are members of the Federal Reserve System, and the FDIC regulates State banks it insures that are not members of the Federal Reserve System.

I. Statutory powers that arguably would be subject to the bill's procompetitive standards

A. National Bank Act

- (1) The Comptroller shall "determine whether the association is lawfully entitled to commence the business of banking." 12 U.S.C. §26.
- (2) The Comptroller may authorize State banks to become national banks. 12 U.S.C. §35.
- (3) The Comptroller may authorize branching by national banks. 12 U.S.C. §36.

B. Change in Bank Control Act

- (4) The appropriate banking agency may disapprove acquisitions of control of any insured bank. 12 U.S.C. §1817j(1).

C. Federal Deposit Insurance Act

- (5) The responsible banking agency may approve mergers and consolidations of banks, and acquisitions by one bank of assets of another, and assumptions by one bank of liabilities of another. 12 U.S.C. §1828(c), known as the "Bank Merger Act."

- (6) The FDIC may approve a State nonmember bank's establishing a new branch or moving its main office or a branch from one location to another. 12 U.S.C. §1828(d).

D. Bank Holding Company Act

- (7) The Board may permit (1) a company to become a bank holding company, (2) a bank to become a subsidiary of a bank holding company, (3) a bank holding company to acquire ownership or control of any voting shares of any bank if after such acquisition the bank holding company will own or control more than 5% of the voting shares of the bank, (4) a bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank, or (5) a bank holding company to merge or consolidate with another bank holding company. 12 U.S.C. §1842(a).

E. International Banking Act of 1978

- (8) The Comptroller may permit a foreign bank which engages directly in a banking business outside the United States to "establish one or more Federal branches or agencies. . . ." 12 U.S.C. §3102(a).

II. Statutes that may require consideration of competitive concerns

- (1) "The appropriate Federal banking agency may disapprove any proposed acquisition [under statutory power (4)] if -
 (A) the proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States;
 (B) the effect of the proposed acquisition of control in any section of the country may be substantially to lessen competition or tend to create a monopoly or the proposed acquisition of control would in any other manner be in restraint of trade, and the anticompetitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."
 12 U.S.C. §1817j(7).

- ~~(2) "The responsible agency shall not approve [under statutory power (5)] -
 (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
 (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend~~

- (2) "The responsible agency shall not approve [under statutory power (5)] -
- (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
 - (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U.S.C. §1828(c)(5).
- (3) "The factors to be considered in granting or withholding the consent of the Corporation under this subsection [statutory power (6)] shall be those enumerated in section 6 of this Act [12 U.S.C. §1816]." 12 U.S.C. §1828(d). (One of the factors enumerated is "the convenience and needs of the community to be served by the bank.")
- (4) "The Board shall not approve [under statutory power (7)] -
- (1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination ~~or~~ conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
 - (2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U.S.C. §1842(c).
- (5) "In determining [under statutory power (8)] whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices." 12 U.S.C. §1843(c)(8).
- (6) "In acting on any application to establish a Federal branch or agency [under statutory power (9)], the Comptroller shall take into account the effects of the proposal on competition in the domestic and foreign commerce of the United States. . . ." 12 U.S.C. §3102(c).

Clayton Act

- (7) "Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the . . . Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies." 15 U.S.C. §21(a).

III. Judicial decisions on the obligation of the banking agencies to consider competitive concerns

In Pitts v. Camp, 329 F. Supp. 1302, 1306 (D. S.C. 1971); vacated, 463 F.2d 632 (4th Cir. 1972); vacated and remanded, 411 U.S. 138 (1973), the Comptroller denied (pursuant to statutory power (1)) an application to organize a new national bank because he was "unable to reach a favorable conclusion as to the need factor." The plaintiffs argued that under 12 U.S.C. §§21-27, "need" was not a proper consideration of the Comptroller in issuing certificates to new banks. The district court, concluding otherwise, wrote:

The court has difficulty in seeing language in those sections giving the Comptroller discretion in granting the certificate if the specific requirements of the act are met. The plaintiffs cite one case in a district court which may be authority for their argument. (Olsen v. Camp, 328 F. Supp. 728 (E.D. Mich. Jan. 1970)).

The statutory language, which the defendant contends makes the need of the new bank a proper consideration and commits the determination of that need to the Comptroller's discretion, does not impress the court. However, the court is impressed with the long and continued practice of the Comptroller of considering the need of the community. It is impressed with the necessity of that consideration if national banks are to be so regulated as to minimize bank failures with their accom-

panying effects on the total community. It is also impressed with the fact that the weight of authority accepts the consideration by the Comptroller of the need factor without question. In Sterling National Bank of Davie v. Camp, 431 F.2d 514, 516 (5th Cir. 1970), the court stated:

It has always been recognized that this legislation (speaking of the above quoted section) confers vast discretion on the Comptroller to approve or disapprove a new charter application.

Therefore, this court concludes that the need of the community for the new bank is a factor to be considered by the Comptroller on an application for a certificate for a new bank. In his determination of that question he must exercise his expertise and discretion.

Id. at 1307. The decisions of the court of appeals and the Supreme Court were on other grounds. No cases have been found that discuss the extent to which "need" includes competitive factors.

In United States v. Citizens and Southern National Bank, 422

U.S. 86, 91 (1975), the Supreme Court wrote:

In applying the antitrust laws to banking, careful account must be taken of the pervasive federal and state regulation characteristic of the industry, "particularly the legal restraints on entry unique to this line of commerce." [Citation omitted.]

In United States v. Philadelphia National Bank, 374 U.S. 321, 362 (1963),

the Court held that the Bank Merger Act

requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future.

In United States v. Third National Bank in Nashville, 390 U.S. 171 (1968),

the Supreme Court struck down a merger that had been approved by the Comptroller under the Bank Merger Act. The Court interpreted 12 U.S.C. §1828(c)(5)(B) to require "that before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot reasonably be expected through other means." *Id.* at 190. In United States v. First National Bank of Maryland, 310 F. Supp. 157, 161 (D. Md. 1970), the court wrote:

Both section 7 [of the Clayton Act] and the 1966 Act (see 12 U.S.C. § 1828(c)(5)(B)) speak of mergers whose effect "may be substantially to lessen competition" (emphasis supplied). The word "may" connoted reasonable probability [citation omitted], not an "ephemeral possibilit[y]." [Citation omitted.]

In First Midland Bank and Trust Company v. Chemical Financial Corporation, 441 F. Supp. 414 (W.D. Mich. 1977), the court wrote:

[T]he Bank Merger Act of 1966 represents a congressional attempt to insulate the banking industry from full antitrust liability. In 1966, Section 11 of the Bank Holding Company Act, 12 U.S.C. § 1849, was amended to conform to the provisions of the Bank Merger Act of 1966. . . . The antitrust provisions in both the Bank Holding Company Act and the Bank Merger Act are consequently to be construed in *pari materia* [alike].

In Martin-Trigona v. Federal Reserve Board, 509 F.2d 363, 367 (D.C. Cir. 1975), the court wrote:

It is not clear whether the Board should consider the anticompetitive effects of § 4 mergers [statutory power (8)]. The Board is expressly obligated under § 3 of the Bank Holding Company Act [statutory power (7)] and under the parallel Bank Mergers Act [statutory power (5)] to review

the anticompetitive effects of mergers of member banks and of bank holding companies. But this obligation does not apply directly to § 4 mergers. We are not informed at this time what reasons if any should prevent the Reserve Board from applying the statutory scheme under § 3 and the Bank Mergers Act to § 4 mergers. We do note that the legislative history seems to indicate that anticompetitive considerations undergird § 4 as well as § 3 and that antitrust policy is of such national importance that regulatory agencies should apply that policy sua sponte [of their own accord] in order to discharge their duty to represent the public interest. Furthermore, the Board is given express authority under 12 U.S.C. §1843(c)(8) to apply anti-trust considerations to § 4 mergers. This is, to be sure, an authority not fully parallel to the authority granted by the Bank Holding Company Act and the Bank Mergers Act, both of which assume administrative application of the standards of § 7 of the Clayton Act.

Thus, for the banking agencies, unlike for other agencies generally, Congress appears to have explicitly set forth the antitrust standards to be applied in some circumstances. Under the Bank Change in Control Act, the Bank Merger Act, and the Bank Holding Company Act (§3), the banking agencies may permit acquisitions and mergers only when the anticompetitive effects of the proposed transaction are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The extent to which agency actions taken under the standards of S. 1291 would be different from those taken under current standards appears speculative.

Federal Thrift Institution Agencies

- I. Statutory powers that arguably would be subject to the bill's procompetitive standards
- (1) The Federal Home Loan Bank Board is authorized "to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', or 'Federal mutual savings banks'. . . ." 12 U.S.C. §1464(a).
 - (2) "The [Federal Home Loan Bank] Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, for the merger of associations with other institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation. . . ." 12 U.S.C. §1464(d)(11).
 - (3) The Federal Savings and Loan Insurance Corporation may disapprove an acquisition by any person of control of an insured institution. 12 U.S.C. §1730(q)(7).
 - (4) The Federal Savings and Loan Insurance Corporation may approve acquisitions by savings and loan holding companies. 12 U.S.C. §1730a(e)(1).
- II. Statutes that may require consideration of competitive concerns
- (1) "No charter shall be granted . . . unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions." 12 U.S.C. §1464(e).
 - (2) "The [Federal Savings and Loan Insurance] Corporation may disapprove any proposed acquisition [under statutory power (3)] if -
 - (A) the proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the savings and loan business in any part of the United States;
 - (B) the effect of the proposed acquisition of control in any section of the country may be substantially to lessen competition or to tend to create a monopoly or the proposed acquisition of control would in any other manner be in restraint of trade, and the anticompetitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."
 12 U.S.C. §1730(q)(7).

- (3) "The [Federal Savings and Loan Insurance] Corporation shall not approve [under statutory power (4)] any proposed acquisition -
 (A) which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the savings and loan business in any part of the United States, or
 (B) the effect of which in any section of the country may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed acquisition are clearly outweighed in the public interest by the probable effect of the acquisition in meeting the convenience and needs of the community to be served." 12 U.S.C. §1730a(e)(2)(B).

III. Judicial decisions on the obligation of the thrift institution agencies to consider competitive concerns

In City Federal Savings and Loan Association v. Federal Home Loan Bank Board, 441 F. Supp. 89, 98 (E.D. Wisc. 1977), the court wrote:

City Federal urges that the Board erred by failing to consider the anti-competitive impact of First Federal's branch expansion program. To the extent this inquiry is relevant, it is already subsumed in the undue injury test [see 12 U.S.C. §1464(e)]. Beyond this, however, I reject City Federal's contention since 12 C.F.R. §545.14(j) includes no such test. The absence of such a test is particularly significant given Congress's specific inclusion of this additional inquiry where deemed appropriate. See 12 U.S.C. § 1730a(e)(2). . . .

In Federal Home Loan Bank Board v. Elliot, 386 F.2d 42 (9th Cir. 1967); cert. den., 390 U.S. 1011 (1968), the court ^{stated} that under 12 U.S.C. §1464(d)(11) (statutory power (2)), mergers require Board approval. The relevance of antitrust factors was not discussed.

In Fort Worth National Corporation v. Federal Savings and Loan Insurance Corporation, 469 F.2d 47 (5th Cir. 1972), the Federal Saving

and Loan Insurance Corporation⁴ disapproved (under statutory power (4)) an acquisition of an insured institution on the ground that the acquisition might substantially lessen competition. Citing United States v. Philadelphia National Bank, supra at 57, the court affirmed, writing:

We conclude that there is no ground for requiring the Corporation to wait until there has been an actual lessening of competition.

Id. at 61.

The antitrust standards that must be applied by the Federal thrift institution agencies in approving mergers and acquisitions appears generally to parallel those that must be applied by the Federal banking agencies.

Department of Energy

The Department of Energy, created by the Department of Energy Organization Act, Public Law 95-91, does not appear generally to engage in the type of regulatory functions that would be covered by S. 1291. Such functions are performed by the Federal Energy Regulatory Commission, supra at 6, which was created by the same Act. However, the Department of Energy may have to consider competitive factors insofar as it implements the following purposes of the Public Law 95-91:

- (9) to promote the interests of consumers through the provision of an adequate and reasonable supply of energy at the lowest reasonable cost . . .
- (12) to foster and assure competition among parties engaged in the supply of energy and fuels . . .
- (14) to assure, to the maximum extent possible, that the productive capacity of private enterprise shall be utilized in the development and achievement of the policies and purposes of this Act. . . ."

42 U.S.C. §7112.

Department of Agriculture

I. Statutory powers that arguably would be subject to the bill's procompetitive standards

A. Packers and Stockyards Act

- (1) To "determine and prescribe what will be ^hthe just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged. . . ." 7 U.S.C. §211.
- (2) To "prescribe the rate, charge, regulation, or practice thereafter to be observed. . . ." 7 U.S.C. §212.

B. National Forest Act

- (3) "[T]o permit the use and occupancy of suitable areas of land within the national forests . . . for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety." 16 U.S.C. §497.

II. Statutes that may require consideration of competitive concerns

- (1) The Secretary of Agriculture may exercise statutory power (1) whenever he "is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory. . . ." 7 U.S.C. §211.
- (2) The Secretary of Agriculture may exercise statutory power (2) whenever he "finds that any rate, charge, regulation, or practice of any stockyard owner, market agency, or dealer . . . causes any undue or unreasonable advantage, prejudice, or preference. . . ." 7 U.S.C. §212.
- (3) The Secretary of Agriculture may exercise statutory power (3) "in such manner as not to preclude the general public from full enjoyment of natural, scenic, recreational, and other aspects of national forests." 16 U.S.C. §497.

III. Judicial decisions on the obligation of the Commission to consider competitive concerns

In Sabin v. Butz, 515 F.2d 1061, 1069 (10th Cir. 1975), the

court held:

Where the governing statute charges the agency with considering the public interest in its decisions, in appropriate cases it must weigh traditional antitrust concepts and related anti-competitive factors [citations omitted].

There is a public interest provision in the directive in 16 U.S.C.A. § 497 that the use permit authority "shall be exercised in such manner as not to preclude the general public from full enjoyment of natural scenic, recreational, and other aspects of national forests."

Department of the Interior

- I. Statutory powers that arguably would be subject to the bill's procompetitive standards
 - A. Surface Mining Control and Reclamation Act of 1977
 - (1) To issue permits for surface coal mining operations. 30 U.S.C. §1256.
 - B. Outer Continental Shelf Lands Act
 - (2) "[T]o grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf. . . ." 43 U.S.C. §1337(a).
 - (3) "[T]o grant to the qualified persons offering the highest cash bonuses on a basis of competitive bidding leases of any mineral other than oil, gas, and sulphur in any area of the outer Continental Shelf. . . ." 43 U.S.C. §1337(k).
 - C. Federal Land Policy and Management Act of 1976
 - (4) To grant, issue, or renew rights-of-way over, upon, under, or through lands within the National Forest System.

Department of Labor

I. Statutory powers that arguably would be subject to the bill's procompetitive standards

A. Walsh-Healey Public Contracts Act

- (1) To determine the minimum wages paid to employees of contractors who contract with the United States or the District of Columbia for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000. 41 U.S.C. §35.

B. Davis-Bacon Act

- (2) To determine the minimum wages paid to mechanics or laborers under any "contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia. . . . 40 U.S.C. §276a.

Department of Transportation

Deepwater Ports Act

I. Statutory powers that arguably would be subject to the bill's procompetitive standards

- (1) "[T]o issue, transfer, amend, or renew a license for the ownership, construction, and operation of a deepwater port." 33 U.S.C. §1503(b).

II. Statutes that may require consideration of competitive concerns

- (1) The Secretary of Transportation may exercise statutory power (1) if
" (3) he determines that the construction and operation of the deep-
water port will be in the national interest and consistent with
national security and other national policy goals and objectives,
including energy sufficiency and environmental quality. . . .
(7) he has received the opinions of the Federal Trade Commission and
the Attorney General, pursuant to section 7 of this Act [33 U.S.C.
§1506], as to whether issuance of the license would adversely affect
competition, restrain trade, promote monopolization, or otherwise
create a situation in contravention of the antitrust laws." 33 U.S.C.
§1503(c).

Conclusion

The Supreme Court has held "time and again" that the regulatory agencies "must consider the anticompetitive consequences of matters properly before [them]. . . . That the doctrine is now fully ingrained in our jurisprudence is now beyond question." Northern California Power Agency v. Federal Power Commission, 514 F.2d 184, 187 (1975). However, the weight the agencies are to give to competitive considerations generally has not been specified by Congress. Many statutes that the courts have interpreted to require consideration of national antitrust policies on their face require only that the agency in question enforce the public interest. Judicial decisions provide some guidance as to the weight to be accorded competitive factors, but provide no general standard for all situations. Some decisions require that the potential effect on competition be a crucial consideration for some agencies in some situations; other decisions require that competitive effects be merely one of a number of factors to be weighed. In many instances it may not be clear how much weight should be given to competitive considerations; agencies must draw analogies from court decisions, sometimes decisions concerning other agencies. In no case does it appear that a statute or court decision requires, as S. 1291 would, that agencies "[n]otwithstanding any other provision of law," choose the action that "is the least anticompetitive alternative legally and practicably available to achieve statutory goals."

Despite its apparent straightforwardness, however, the standard

prescribed by S. 1291 may have some difficulties in its application. The phrase "Notwithstanding any other provision of law" appears to contradict the requirements to choose alternatives "legally" available and to achieve "statutory goals." If all other provisions of law are superseded, then what alternatives are legally available and what statutory goals are to be achieved? This question aside, some statutory goals are to some extent anticompetitive. Under S. 1291, an agency attempting to achieve such goals by the least anticompetitive means available apparently will still have to balance competitive concerns with other factors.

It appears that S. 1291 would increase the weight that would have to be given by regulatory agencies to competitive concerns. S. 1291 would not appear, however, to require that competitive concerns necessarily override all others, so it would apparently not provide the agencies with a clear-cut standard for weighing national antitrust policies.

§ 305.77-3 Ex parte Communications in Informal Rulemaking Proceedings (Recommendation No. 77-3).

In Recommendation 72-5 the Conference expressed the view that, generally, agency rulemaking is preferably carried out through the simple, flexible and efficient procedures of 5 U.S.C. § 553. That statute requires publication of notice of proposed rulemaking and provision of opportunity for submission of written comments; additional procedures may be utilized by the agencies as they deem necessary or appropriate. Recommendation 72-5 counseled that Congress ordinarily should not impose mandatory procedural requirements going beyond those of § 553 in the absence of special reasons for doing so. In Recommendation 76-3 the Conference amplified its 1972 recommendation by suggesting ways in which agencies might usefully supplement the minimum procedures required by § 553 in appropriate circumstances.

The primary purposes of rulemaking procedures under § 553 are to enhance the agency's knowledge of the subject matter of the proposed rule and to afford all interested persons an adequate opportunity to provide data, views, and arguments with respect to the agency's proposals and any alternative proposals of other interested persons. Section 553 procedures, in some instances, also serve to provide the basis for judicial review. To the extent consistent with all of these purposes, the agencies should have broad discretion to fashion procedures appropriate to the nature and importance of the issues in the proceeding, in order to make rules without undue delay or expense. Informal rulemaking should not be subject to the constraints of the adversary process. Free of access to information and opinions, whether by recourse to published material, by field research and empirical studies, by consultation with informed persons, or by other means, should not be impaired.

While the foregoing considerations militate against a general prohibition upon ex parte communications in rulemaking subject only to Section 553, certain restraints upon such communications may be desirable. Ex parte communications during the rulemaking process can give rise to three principal types of concerns. First, decision makers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for open government; second, significant information may be unavailable to reviewing courts; and third, interested persons may be unable to reply effectively to information, proposals or arguments presented in an ex parte communication. In the context of Section 553 rulemaking, the first two problems can be alleviated by placing

written communications addressed to a rule proposal in a public file, and by disclosure of significant oral communications by means of summaries or other appropriate techniques. The very nature of such rulemaking, however, precludes any simple solution to the third difficulty. The opportunity of interested persons to reply could be fully secured only by converting rulemaking proceedings into a species of adjudication in which such persons were identified, as parties, and entitled to be, at least constructively, present when all information and arguments are assembled in a record. In general rulemaking, where there may be thousands of interested persons and where the issues tend to be broad questions of policy with respect to which illumination may come from a vast variety of sources not specifically identifiable, the constraints appropriate for adjudication are neither practicable nor desirable.

RECOMMENDATION

In rulemaking proceedings subject only to the procedural requirements of § 553 of the APA:

1. A general prohibition applicable to all agencies against the receipt of private oral or written communications is undesirable, because it would deprive agencies of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

2. All written communications addressed to the merits, received after notice of proposed rulemaking and in its course, from outside the agency by an agency or its personnel participating in the decision should be placed promptly in a file available for public inspection.

3. Agencies should experiment in appropriate situations with procedures designed to disclose oral communications from outside the agency of significant information or argument respecting the merits of proposed rules, made to agency personnel participating in the decision on the proposed rule, by means of summaries promptly placed in the public file, meetings which the public may attend, or other techniques appropriate to their circumstances. To the extent that summaries are utilized they ordinarily should identify the source of the communications, but need not do so when the information or argument is cumulative. Except to the extent the agencies expressly provide, the provisions of this paragraph and the preceding paragraph should not be construed to create new rights to oral proceed-

ings or to extensions of the periods for comment on proposed rules.

4. An agency may properly withhold from the public file, and exempt from requirements for making summaries, information exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

5. Agencies or the Congress or the courts might conclude of course that restrictions on ex parte communications in particular proceedings or in limited rulemaking categories are necessitated by considerations of fairness or the needs of judicial review arising from special circumstances.

[42 FR 54253, Oct. 5, 1977]

PART 310—MISCELLANEOUS STATEMENTS

Sec.

310.1 Views of the Administrative Conference on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization (Adopted May 7, 1971).

310.2 Statement of the Administrative Conference on the ABA Proposals to Amend the Administrative Procedure Act (Adopted June 7-8, 1973).

310.3 Statement of the Administrative Conference on ABA Resolution No. 1 Proposing to Amend the Definition of "Rule" in the Administrative Procedure Act.

310.4 Strengthening Regulatory Agency Management Through Seminars for Agency Officials.

310.5 Statement on procedures to deal with emergency shortages of natural gas.

AUTHORITY: 5 U.S.C. 571-576

§ 310.1 Views of the Administrative Conference on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization (Adopted May 7, 1971).

[38 FR 19794, July 23, 1973]

§ 310.2 Statement of the Administrative Conference on the ABA Proposals to Amend the Administrative Procedure Act (Adopted June 7-8, 1973.).

(a) In August, 1970 the House of Delegates of the American Bar Association adopted twelve resolutions calling in general terms for amendments to the Administrative Procedure Act. They are a valuable means of focusing the attention of the Administrative Conference, the organized bar, and

other interested persons upon revisions and improvements in the APA suggested by a quarter-century of experience.

(b) The Conference has studied the resolutions and the implementing recommendations prepared by the Administrative Law Section of the ABA. The Conference has expressed its views in recommendations previously adopted respecting the subject matter of several of the resolutions. We believe it desirable, however, to state in a single document our views on the resolutions and on those parts of the implementing recommendations which appear to raise issues separate from those posed by the resolutions.

Resolution No. 1.

The Conference approves in principle Resolution No. 1, calling for improved definitions of "rule" and "order" so as to distinguish clearly between the nature of rulemaking and the nature of adjudication. The Conference has commenced, and will continue, the further study that is needed to determine how this can most effectively be achieved.

CROSS REFERENCE: See § 310.3.

Resolution No. 2.

The Conference agrees with Resolution No. 2. We have previously called for eliminating from 5 U.S.C. 553 the exemption for rules relating to "public property, loans, grants, benefits, or contracts" (Recommendation No. 69-8). We also favor limiting or eliminating the present exemption that applies whenever a military or foreign affairs function is involved, provided that appropriate safeguards can be retained to protect the aspects of those functions that concededly need special treatment. This subject deserves further study, which the Conference has already begun.

Resolution No. 3.

Resolution No. 3 would extend the existing provisions regarding separation of functions in 5 U.S.C. 554(d) to all formal proceedings, both adjudicatory and rulemaking; the existing exceptions for ratemaking, initial licensing, and formal rulemaking generally