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FEDERAL TRADE COMMISSION
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COMMISSION AUTHORIZED

March 18, 1991

The Honorable Terrence L. Barnich
Chairman
Illinois Commerce Commission
100 West Randolph Street
Suite 9-100
Chicago, Illinois 60601

Re: Illinois Commerce Commission Trucking Regulation

Dear Chairman Barnich:

The staff of the Federal Trade Commission's Chicago Regional Office and Bureau of Economics are pleased to respond to your request for comments regarding the Illinois Commerce Commission's ("Commerce Commission") proposed amendments to its rules regulating intrastate trucking.[1] In your letter requesting our comments, you reference and attach a letter to former Governor James R. Thompson from Secretary of Transportation Samuel K. Skinner, dated January 3, 1991, in which Secretary Skinner urges that the proposed amendments be rejected to the extent that they make entry into the intrastate trucking industry more difficult. Noting that Illinois intrastate trucking rates are already higher than interstate rates as a consequence of regulation, Secretary Skinner concludes that "[t]ighter entry rules will likely lead to even higher prices and greater inefficiency...." and suggests that "a better solution would be to totally deregulate trucking in Illinois." We agree that greater restrictions on entry may have undesirable consequences.

The proposed rules would require that firms seeking authority to act as motor carriers file additional information with their applications, and would for the first time delineate the standards which the Commerce Commission must consider in assessing the public need for new carriers.[2] This proposal could make entry into the market for motor carrier services more difficult than it is currently under the authorizing statute.

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[1] These comments are the views of the staff of the Chicago Regional Office and Bureau of Economics of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner. Inquiries regarding this comment should be directed to John Hallerud (312-353-5575), Attorney, Chicago Regional Office, or to Timothy Daniel (202-326-3520), Assistant Director for Economic Policy Analysis, Bureau of Economics.

[2] Proposed amendments to Ill. Admin. Code tit. 92, § 1202, Applications.

The staff of the FTC believes that relaxing rather than tightening restrictions on entry into the trucking industry has benefitted consumers and competition by increasing choices, improving service and reducing prices for the transportation of goods.[3]

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

The Federal Trade Commission ("FTC") is an independent federal agency charged with enforcing Section 5 of the Federal Trade Commission Act.[4] Section 5 prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[5] Under this statutory mandate, the Commission staff seeks to identify restrictions that impede competition or increase costs without offering countervailing benefits to consumers. In enforcing the FTC Act, the staff of the FTC has gained substantial experience in analyzing the impact of private and governmental trade restraints and their effects on consumers and competition. The staff of the FTC submits comments sharing its experience, upon request, to federal, state, and local governmental bodies to help them assess the implications of proposed legislation and regulations.

The staff of the FTC has studied the deregulation of trucking and the benefits resulting from an increased reliance on market forces at both the federal[6] and state[7]

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[3] In addition, the proposed rules would expand the fitness standards that applicants for authority to act as motor carriers must meet. Proposed amendments to Ill. Admin. Code tit. 92, § 1304, Motor Carrier of Property Fitness Standards. We do not address these proposals.

[4] See 15 U.S.C. §§ 41-58.

[5] 15 U.S.C. § 45.

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

[7] See letter from C. Steven Baker, Director, Chicago Regional Office, FTC, to Glen McKay, Assistant Director, Division of State Audit, Tennessee Comptroller of the Treasury (June 28, 1990); letter from Thomas B. Carter, Director, Dallas Regional Office, FTC, to

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levels. In addition, the Bureau of Economics of the FTC has published a report on trucking deregulation (including the relaxation of entry restrictions),[8] and has published additional studies concerning the effects of regulating the entry of competitors into other industries.[9] Recently, the FTC ruled that a regional multistate trucking rate bureau violated the antitrust laws by fixing the rates of its members.[10] These activities regarding trucking regulation and competition policy generally have provided the staff of the FTC with experience in analyzing the effects of trucking regulation.

II. REGULATION OF TRUCKING

If enacted, the proposed rules would affect an important aspect of trucking regulation in the State of Illinois -- entry of new carriers. These rules must be considered

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

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

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

[10] New England Motor Rate Bureau, Inc., 112 F.T.C. __, FTC Docket 9170, 5 Trade Reg. Rep. (CCH) ¶ 22,722 (August 18, 1989), rev'd on other grounds, 1990-2 Trade Cas. (CCH) ¶ 69,108 (1st Cir. 1990) (decision reversed on state action grounds with respect to the bureau's activities in Massachusetts).

in light of the applicable Illinois statutes. It seems clear that the rules should be judged in terms of their effects on achieving the goals of the statutory scheme and the public interest generally. It would appear useful to gauge the likely effects of these rules by considering the underlying rationales that have typically been advanced in support of trucking regulation and the actual effects observed when entry regulation has been reduced or removed in other jurisdictions. This is done in the following section. Our intent is to provide a context for the subsequent discussion of the proposed rules.

A. ARGUMENTS ADVANCED IN SUPPORT OF REGULATION

Trucking regulation, including legal restraints on motor carrier rates and new entry, originally was partially intended to help protect the regulated railroads from competition from the then-unregulated, and expanding, trucking industry. It also was designed, in part, to support the trucking industry by restricting competition during the depression of the 1930's.[11]

In our experience, those who support continued regulation of motor carriers usually advance four major arguments. They argue that regulation will prevent predatory pricing, forestall destructive competition, maintain safety, and ensure service to small communities. However, a number of empirical studies have concluded that these common rationales do not provide a significant basis for regulating common motor carriers. In fact, much of this work indicates that regulation has undesirable consequences.[12]

1. Predatory pricing

A common argument advanced in support of rate regulation is that it is needed to prevent predatory pricing. The principal thrust of this argument is that larger, better financed companies will attempt to drive out competitors by selling trucking services at a loss -- below their average variable costs. The surviving firms, the argument goes, will then raise their prices above the competitive level, eventually recouping their losses and increasing their profits. This argument is usually applied to industries with high entry barriers and high "sunk costs."[13]

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

[12] See generally Weinstein & Gross, Transportation and Economic Development: The Case for Reform of Trucking Regulation in Texas, Center for Enterprising, Southern Methodist University (Feb. 1987); Breen, supra note 6; Diane S. Owen, supra note 8.

[13] Sunk costs are those that, once incurred, cannot be recovered should the firm choose to exit the industry. Expenditures on assets that can be easily redeployed to

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The difficulty in attempting predatory pricing – losing money now in the hope of making more later -- is that when firms employ this strategy and later raise their prices to noncompetitive levels, other firms should enter or re-enter the market, taking business away from the "predator" and forcing prices back to competitive levels. Predatory pricing is therefore unlikely to succeed. The Supreme Court has stated that "predatory pricing schemes are rarely tried, and even more rarely successful."[14] In any event, firms that attempt to engage in predatory pricing would also be subject to public and private antitrust enforcement actions.

The conditions usually cited that might aid in making a predatory pricing strategy workable do not seem to be present in the trucking industry. There are two distinct segments of the trucking industry. One involves shipments of 10,000 pounds or more (truckload, or TL, shipments), and the other involves shipments of less than 10,000 pounds (less-than-truckload, or LTL shipments). Truckload shipments usually go from shipper to consignee without intermediate handling; the truck itself is the only equipment needed. Because trucks are highly mobile and can be transferred quickly, sunk costs are probably minimal in the TL segment.[15]

The LTL part of the industry also seems unlikely to be amenable to successful predatory pricing. Although LTL shipments often are transported to break-bulk facilities before reaching their destinations, any sunk capital costs associated with warehousing can be reduced significantly by leasing, rather than owning, terminal facilities.

Since predation is unlikely to be profitable or successful, motor carriers are not likely to attempt it. In 1987, the General Accounting Office joined the Interstate Commerce Commission, the Motor Carrier Ratemaking Study Commission, and the Department of Justice in concluding that predation is unlikely to occur as a consequence

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[13](...continued)
alternative uses (such as trucks) would not represent significant sunk costs; expenditures on assets that cannot be easily redeployed (such as gas pipelines) would be sunk.

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

[15] T.E. Keeler, Deregulation and Scale Economies in the U.S. Trucking Industry: An Econometric Extension of the Survivor Principle, 32 J. L. & Econ. 229, 250 (1989).

of trucking deregulation.[16] For these reasons, predatory pricing in the trucking industry appears to be little more than a theoretical possibility.[17]

2. DESTRUCTIVE COMPETITION

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

Conditions conducive for destructive competition are not likely to exist in the trucking industry. Fixed costs comprise only a small percentage of total costs, which include such variable costs as labor and fuel expenses. Trucks are highly mobile assets, suggesting that they may be transferred readily and easily from less profitable to more profitable geographic markets in response to fluctuations in demand, or sold or leased to other operators. Therefore, destructive competition in the trucking industry seems unlikely.[18]

3. SAFETY

Another argument that has been advanced is that reducing economic regulation will have an adverse effect on safety in the trucking industry, because carriers facing stiff competition in rates or service will neglect maintenance, delay replacement of vehicles,

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[16] U.S. Gen. Acct. Off., Trucking Regulation: Price Competition and Market Structure in the Trucking Industry, 8-10 (Feb. 1987). The positions of the ICC, MCRSC, and DOJ are discussed in the GAO report.

Although it has been argued that the LTL segment of the trucking industry has high entry barriers and high sunk costs, the GAO report concluded that entry barriers in LTL trucking, the most significant of which include sunk costs involved in providing terminals, financial capital requirements for effective entry, and impediments to entry imposed by state regulation, are only "moderate." Id. at 18; Diane S. Owen, supra note 8, at 13.

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

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

and overwork drivers. This is really a variant of the destructive competition argument, for safety is a dimension of service. Although opponents of deregulation have cited statistics showing an increase in the average age of trucks on the road and a greater frequency in reported accidents involving truckers, other studies have shown that safety has not been compromised following deregulation.[19] For example, a study of truck safety in California was "unable to prove the hypothesis that CPUC [California Public Utilities Commission] economic regulation of trucking is significantly and positively linked to improved highway safety."[20] In any case, reduced safety is not a necessary consequence of price and entry deregulation; nor do regulated motor carriage rates ensure that profits will be spent to ensure safe truck operations. Directly addressing a state's legitimate safety concerns, through enforcement of safety regulations, may be more effective in promoting safety than indirectly addressing those concerns through economic regulation.

4. PRESERVING SERVICE TO SMALL COMMUNITIES

Some proponents of trucking regulation have argued that without economic regulation of trucking small communities will lose services because motor carriers will find it unprofitable to serve small markets unless they are guaranteed a fair return on investment. Studies have been conducted that have examined the effects of trucking deregulation at the federal and state levels, however, and they have not revealed any significant deterioration in service to small communities.

A series of surveys conducted between 1980 and 1985 by the U.S. Department of Transportation found that a large majority of shippers in rural areas reported either no change or an improvement in the quality of service after partial deregulation of interstate trucking by the Motor Carrier Act of 1980.[21] These findings are consistent with those of a 1982 Interstate Commerce Commission study, which found that federal deregulation had resulted in lower prices, less damage, and often more service options for shippers in small communities.[22] Similarly, in a survey following deregulation of intrastate trucking in Florida, 65 percent of respondents in small communities expressed a preference for

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[19] Diane S. Owen, supra note 8, at 18-21; Weinstein & Gross, supra note 12, at 50-51.

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

[21] Pub. L. No. 96-296, 94 Stat. 793 (1980). See U.S. Dep't Transp., Third Follow-Up Study of Shipper-Receiver Mode Choice in Selected Rural Communities, 1982-3 (1986); U.S. Dep't Transp., Fourth Follow-Up Study of Shipper-Receiver Mode Choice in Selected Rural Communities, 1984-5 (1986).

[22] Interstate Com. Comm'n, Small Community Service Study (1982).

deregulation, with 30 percent expressing no preference.[23] A study of the Texas trucking market concluded that small Texas communities would not lose service in a deregulated environment because common carriers have found such service to be profitable.[24]

B. EFFECTS OF REGULATION

A recent comprehensive study of the impact of state trucking regulation by the U.S. Department of Transportation found that current Illinois regulation of trucking costs approximately $445 million each year.[25] This study allows some comparison between Illinois and states that have relaxed or eliminated regulation of rate levels and made it easier for new companies to enter and compete. The study estimates the costs of state-level trucking regulations by comparing deregulated interstate rates with regulated intrastate rates.

Nationally, the annual costs of state trucking regulations are approximately $2.8 billion (1988 dollars) according to this study. The approximately $445 million attributable to the regulations in place in Illinois constituted about 16% of that total. Only one other state -- Texas with estimated costs of over $750 million -- imposes more costs on consumers than Illinois by regulating intrastate trucking more stringently than the federal government regulates interstate trucking.[26]

The experiences of many states attest to the benefits to consumers and competition from reduced trucking regulation. California, for example, experimented with partial economic deregulation of trucking from 1980 to 1986. During that time entry was

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

[24] Pustay, Interstate Motor Carrier Regulation in Texas, The Logistics and Transportation Review, vol. 19, no. 2 (1984), quoted in Weinstein & Gross, supra note 12, at 49. Noting individual entry petitions for common carrier operating authority, as well as a resale market for existing authority, the study found that these indications of willingness to serve small communities suggested that carriers would provide the service voluntarily, "even in the absence of regulation."

[25] U.S. Dep't Transp., W. Bruce Allen et al., The Impact of State Economic Regulation of Motor Carriage on Intrastate and Interstate Commerce, at 294 (May 1990).

[26] Id. at 294.

virtually free, and rates, though regulated, were flexible.[27] The result was lower rates with no loss in service.[28]

A study of trucking in New Jersey concluded that deregulation worked well in that state.[29] According to a study by W. Bruce Allen, shippers were satisfied with the available service, rates were about ten percent lower than they would have been under regulation, and intrastate carriers have prospered.[30]

Florida trucking was deregulated so quickly that truckers and shippers had no opportunity to prepare for it. Nonetheless, according to one study, a year after deregulation 88 percent of shippers, as well as 49 percent of truckers, supported it. Most shippers thought that service levels remained constant and that rate fluctuations had posed no difficulties. Only a few shippers converted to private carriage;[31] many more such shippers' conversions might have been expected if "destructive competition" had resulted in a large reduction in the number of truckers.[32] Likewise, a 1982 U.S. Department of Transportation study[33] found that 90 percent of Florida shippers believed that post-deregulation service was at least as good as service before deregulation and 30 percent reported improvements. A majority of these shippers (58 percent) perceived that deregulation had held down rates. Finally, economists Blair, Kaserman, and McClave

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

[28] Cal. Pub. Util. Comm'n, Simmerson, Analysis of The Impact of Deregulation of the General Freight Trucking Industry, Investigation No. 84-05-048, 20-21 (Aug. 10, 1984) (based upon survey by CPUC of 239 general freight carriers and survey by California State University, Hayward, Institute of Research & Business Development of 596 shippers.)

[29] U.S. Dep't Transp., Allen, Lonergon & Plane, Examination of the Unregulated Trucking Experience in New Jersey, (July 1979).

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

[31] Private carriage refers to those situations where the motor carrier is owned by the shipper.

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

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

found that Florida's deregulation of intrastate trucking led to a 15 percent average reduction in motor carrier rates.[34]

In Maryland, intrastate household goods movers were not regulated. A study conducted in that state in 1973-1974 revealed that the then-regulated interstate household goods carriers charged 27 percent to 67 percent more than unregulated intrastate carriers for comparable moves.[35]

In sum, the deregulation of intrastate trucking appears not to have had the adverse impact on competition or consumers that had been predicted by many critics of deregulation. In fact, deregulation has been beneficial both to the industry generally and to consumers.[36]

III. RULES PROPOSED TO THE ILLINOIS COMMERCE COMMISSION

Inasmuch as the proposed new rules regulating entry into the intrastate trucking industry appear likely to raise prices to consumers and diminish competition, we believe that the Commerce Commission might wish to consider whether the proposed changes would serve the interests of the people of Illinois.

The new rules proposed by the Illinois Commerce Commission would affect new entry by altering the applications that prospective truckers must submit when they seek authority to act as motor carriers.[37] The Illinois Commerce Commission is required by statute to issue a certificate of motor carrier authority if the application meets several requirements.[38] One of these requirements is that a "public need" exists for the issuance

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

[35] Breen, Regulation and Household Moving Costs, Regulation, 53 (Sept.-Oct. 1978).

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

[37] Proposed amendments to Ill. Admin. Code tit. 92, § 1202, Applications.

[38] The standards for motor common carrier and motor contract carrier authority are (continued...)

of a new certificate. The ICTL specifies "standards" that are to be considered by the Commerce Commission in determining whether such a "public need" exists.[39]

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[38](...continued)
similar. The Commission must approve an application for motor common carrier authority:

> to the extent that it finds that the application was properly filed; a public need for the service exists; the applicant is fit, willing and able to provide the service in compliance with this Chapter, Commission regulations or orders; and the public convenience and necessity requires issuance of the certificate. Ill. Rev. Stat. ch. 95 1/2, ¶ 18c-4202 (2).

The requirements for obtaining motor contract carrier authority are slightly less rigorous:

> The Commission shall grant an application for a motor contract carrier permit, in whole or in part, to the extent that it finds that the application was properly filed; supporting shippers need the proposed service; the applicant is fit, willing and able to provide the service in compliance with this Chapter, Commission regulations and orders; and issuance of the permit will be consistent with the public interest. Ill. Rev. Stat. ch. 95 1/2, ¶ 18c-4203 (2) (a).

[39] The statute defines the standards that must be considered when issuing certificates:

> (a) The characteristics of the supporting shipper or shippers transportation needs, including the total volume of shipments, the amounts handled by existing authorized carriers and others, the amounts which would be tendered to the applicant, the nature and location of points where traffic would be picked up and delivered, and any special transportation needs of the supporting shipper or shippers or their receiver or receivers;
> (b) The existing authorized carriers' services, including the adequacy of such services and the effect which issuance of a new certificate or permit would have on such services;
> (c) The proposed service, and whether it would meet the needs of the supporting shipper or shippers;
> (d) Any evidence bearing on the fitness, willingness, or ability of the applicant, including but not limited to any past history of violations of this Chapter, Commission regulations or orders, whether or not such violations were the subject of an enforcement proceeding; and

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The ICTL does not require that the Commerce Commission adopt any additional standards defining "public need,"[40] and the existing regulations governing the issuance of operating certificates to motor carriers do not contain any such standards.[41] The current proposal, however, would add new regulatory provisions defining the "public need" requirement contained in the statute.[42] In addition, the proposed rules would

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(e) The effect which issuing the certificate of permit would have on the development, maintenance and preservation of the highways of this State for commercial and other public use. Ill. Rev. Stat. ch. 95 1/2, ¶ 18c-4204 (1).

The statute also defines the standards that the Commission shall not consider:

(a) The mere preference of the supporting shipper or shippers or their receiver or receivers for the applicant's service; or

(b) Any illegal operations of the applicant as evidence of shipper need or the inadequacy of existing carriers' services. Ill. Rev. Stat. ch. 95 1/2, ¶ 18c-4204 (3).

Public Act 86-1005, effective December 28, 1989, amended ¶ 18c-4204 by changing the term "factors" to be considered by the ICC to "standards" that the Commerce Commission must consider (as enumerated above). This amendment also provided that the Commerce Commission is to exercise its discretion in issuing licenses in accordance with those standards. The Illinois Transportation Lawyers Association informs staff that the legislative history of Public Act 86-1005 does not explain why the term "standards" was substituted for the term "factors."

[40] The statute does require that the Commerce Commission adopt standards defining "fitness." Ill. Rev. Stat. ch. 95 1/2, ¶ 18c-4204a. (Public Act 85-553, effective September 18, 1987.) We are not aware of any legislation requiring that the Commerce Commission employ any criteria other than those specified in the statute itself in determining "public need."

[41] Ill. Admin. Code tit. 92, § 1202.

[42] The proposed provisions provide:

In determining whether a public need exists for the requested service the Commission shall consider:

1) Whether the applicant has sufficient shipper support to establish a public need for each commodity and territory requested. Any commodity or territory which is not supported will not be granted.

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change the criteria that the Commerce Commission employs in issuing temporary motor carrier licenses.[43]

In an unregulated market, public demand or need for a particular service is shown through consumers' willingness to pay for the service, and producers are rewarded with higher sales and greater profits when they meet these needs efficiently. Although Illinois' statutory scheme requires that the Commerce Commission make a determination of public need, we caution against requiring too extensive a showing or imposing too rigid a standard for making that determination. To the extent consistent with the statutory mandate, we believe that the Commerce Commission can rely on the marketplace to determine which service or bundle of services consumers wish to purchase. Determining public need in its least restrictive context would likely make the market for transportation services more responsive to consumer demands and enhance consumer choice.[44]

The proposed rules appear to go beyond the statutory mandate by defining public need in ways that may unnecessarily impede competitive entry into the market for motor

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2) Whether supporting shippers have made a bona fide attempt to obtain service from existing authorized carriers.

3) Whether supporting shippers have experienced service failures, within the calendar year preceding application, which warrant the addition of new service.

Proposed Ill. Admin. Code tit. 92, § 1202.10 (f).

[43] Proposed amendments to Ill. Admin. Code tit. 92, § 1202.40.

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

carrier services in Illinois.[45] First, the proposed administrative standards require that the Commerce Commission deny a certificate for *each* commodity or territory that is not supported by a showing of sufficient shipper need. The statute, by contrast, appears to require only that the Commerce Commission consider the general characteristics of the supporting shippers' needs. In particular, the statute does not require that the Commerce Commission consider each commodity and each territory separately. Incorporating such an approach, as contemplated by the proposed rules, would increase the burdens on firms seeking authority to operate (or to expand their operations) in Illinois. Further, restricting the commodities and territories for which authorized carriers can operate would inhibit them from responding flexibly to unexpected shifts in shippers' needs. Prior to 1980, the Interstate Commerce Commission required interstate truckers to obtain route-specific and commodity-specific certificates, a regulatory structure similar to that contained in the proposed regulatory changes. At the interstate level, these restrictive entry requirements were loosened by the Motor Carrier Act of 1980, and studies suggest that shippers and consumers have benefited from lower shipping rates and more flexible

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[45] In fact, it appears that the purpose behind the proposed new rules is to limit entry. A memorandum of October 18, 1990, from Tom Myers, manager of the Transportation Division, to the Commerce Commission, recommending adoption of the resolution authorizing publication of the proposed new rules, stated that:

> [t]he Illinois Commercial Transportation Law has been amended three times since 1986 to strengthen the language governing initial licensing. Without adequate administrative standards, however, the hearing examiners have found it difficult to determine whether sufficient need exists for a new authority, and have continued to grant virtually all applications. The result of our laissez-faire approach, we believe, is a marketplace with an oversupply of carriers to transport a limited amount of freight.

We note here that concerns that an "oversupply" of truckers will ultimately harm shippers by reducing service and safety have been raised many times before, and the weight of the evidence suggests that the concerns lack merit. See the discussions of "Destructive Competition" and the "Effects of Regulation," *supra* Sections II.A.2. and II.B., respectively.

That the proposed rules appear designed to impede entry is further evidenced by the announcement that:

> [a]ny person who desires to speak at the hearing will have approximately ten minutes to state his views on the question of tightened entry and the wording of the proposed rules. Illinois Commerce Commission Transportation Register, Special Edition, page 1 (January 1991).

service offerings.[46] Studies of state-level deregulatory changes have yielded similar results.[47] Unless the Illinois trucking industry is fundamentally different from either the interstate industry or the intrastate industries in states that have experimented with entry deregulation, the staff believes that these findings strongly suggest that the proposed changes could well increase shipping costs in Illinois without offering countervailing benefits.

Second, the proposed rules would require the Commerce Commission to consider whether shippers on record in applications as supporting a new entrant have "made a bona fide attempt to obtain service from existing authorized carriers."[48] Nothing in the statute appears to impose such a requirement. Thus, the rules again appear to go beyond the statute and would, in this case, act to insulate existing carriers from entry. As discussed earlier, laws and regulations that impede entry have tended to impose net costs on shippers and ultimately consumers. Further, any number of reasons could explain why a supporting shipper has not made "bona fide attempts" to obtain service from existing carriers. For example, a shipper supporting the prospective carrier may have been shipping goods itself rather than seeking the services of existing carriers. A shipper in this situation may have concluded that the services of existing carriers did not adequately suit its needs and decided that it was more efficient to use the services of the prospective carrier rather than to continue to haul goods itself. In essence, the prospective carrier may be offering a new service which had not been available from existing carriers. Alternatively, a shipper that supports the prospective carrier could be new to the area or could be expanding its business and seeking to utilize the carrier that has provided reliable service in other geographic areas or for other commodities.

Third, the proposed rules require that the Commerce Commission consider whether supporting shippers have experienced "service failures" warranting the addition of new service. This provision may be overly restrictive. The statute requires only that the Commerce Commission consider the "adequacy" of existing service. Shippers could conclude that existing service is inadequate for a number of reasons (e.g., high prices, uncertain quality, or inconvenient locations) that may not be considered a service failure.

The proposed rules also affect entry by making it more difficult to obtain interim temporary motor carrier authority. The Illinois statute allows the Commerce Commission to issue certificates for interim authority.[49] The proposed administrative rules appear to

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[46] *See, e.g.*, Diane S. Owen *supra* note 8, and Winston et al. *supra* note 36.

[47] See the discussion in section II.B. *supra*.

[48] Proposed Ill. Admin. Code tit. 92, § 1202.10 (f) (2).

[49] Ill. Rev. Stat. ch. 95 1/2, ¶ 18c-2107 (2), among other things, provides:

(continued...)

require an applicant for temporary authority to demonstrate more than is required either by statute or under the current rules. For example, the proposed rules would require the Commerce Commission to consider whether substantial economic harm will result to supporting shippers if the temporary authority is not granted.[50] In contrast, current rules focus on the needs of supporting shippers, whether existing carriers are meeting those needs, and the reasons behind any failure to meet them.[51]

Establishing that shippers would suffer "substantial economic harm" if entry is prohibited is likely to be more difficult than establishing that their needs would likely be better met if entry is permitted. The proposed rules appear likely to extend the hiatus between application for temporary authority and its authorization, or they may deter or reduce entry. The longer an applicant must wait prior to commencing business and receiving a return on an initial investment the more difficult entry becomes. Setting aside considerations of "fitness," we believe that temporary certificates should ordinarily be issued unless strong reasons exist to doubt that an applicant will be issued a permanent certificate. This would ease the entry of new carriers into the marketplace and make existing carriers more responsive to the demands of shippers.

IV. CONCLUSION

The trucking industry has been partially deregulated at both the federal and state levels. Arguments typically advanced against deregulation appear to have been largely unfounded. Deregulation appears to have brought lower prices and in many instances

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[49](...continued)

> The Commission may, on request, issue interim orders for temporary authority in motor carrier of property authority proceedings making temporary disposition of issues in a proceeding after notice and review of verified supporting statements. Such orders shall remain in effect pending final disposition....

[50] Proposed Ill. Admin. Code tit. 92, § 1202.40 (e) (emphasis added). Substantial economic harm would include whether a supporting shipper would face a significant loss of business or whether a layoff of a supporting shipper's work force would result from failure to issue temporary authority.

[51] Ill. Admin. Code tit. 92, § 1202.40 (b). The present rule itself is somewhat restrictive since it ignores the possibility that new carriers may be able to meet the needs of shippers less expensively and more efficiently than existing carriers even if existing carriers are in fact meeting those needs. Neither the proposed nor the current rule places much weight on whether existing carriers are providing the type, quality and price of service that could most efficiently meet shippers' needs.

better quality service to shippers. In particular, relaxing regulations that impede market entry and that limit rate flexibility appear to benefit consumers and competition.

The rules that have been proposed for adoption by the Commerce Commission would likely make entry into the intrastate trucking industry in Illinois more difficult. We believe that consumers and competition in Illinois would be best served if these obstacles could be reduced or, alternatively, if the Commerce Commission can avoid increasing the barriers to new competition.

We appreciate this opportunity to comment.

Sincerely,

C. Steven Baker, Director
Chicago Regional Office
Federal Trade Commission