FEDERAL DEREGULATION OF THE BUSING INDUSTRY: WHY IS IT NOT WORKING IN NEW JERSEY?

Introduction

The State of New Jersey is presently encountering serious difficulties in its efforts to ensure safe, reliable, and responsive bus transportation services within its borders. The source of these difficulties is the recently enacted Bus Regulatory Reform Act of 1982[1] (Bus Act or Act). The Bus Act represents the fourth leg in a comprehensive effort by Congress to reduce regulation of the nation's transportation industries.[2] It was preceded by successful legislative efforts to relieve the airline,[3] railroad,[4] and trucking[5] industries from burdensome federal and state regulation.

Under the new entry standards adopted in the Act,[6] the Interstate Commerce Commission[7] (ICC or Commission) is now authorized and encouraged to certify passenger carriers to provide regular route services[8] in cases where it previously would have been compelled to deny certification,[9] or would have lacked jurisdiction to render a decision.[10] In reliance on this Congressional mandate, the ICC has proceeded to liberally and expeditiously certify new carrier routes throughout the country.[11]

Included in the flourish of newly certified bus routes are certain New Jersey based routes which, that State contends, pose significant public interest concerns which were not adequately addressed by the ICC prior to

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[1] Pub. L. No. 97-261, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1102.

[2] *See* H.R. REP. NO. 334, 97th Cong., 1st Sess. 18-19 (1981).

[3] Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

[4] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1897.

[5] Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793.

[6] 49 U.S.C.A. § 10922(c) (West 1983).

[7] The Interstate Commerce Commission is charged with the responsibility of carrying out the provisions of subtitle IV (Interstate Commerce) of title 49 (Transportation) of the United States Code. 49 U.S.C. § 1032(a) (Supp. V 1981).

[8] 49 U.S.C.A § 10922(c) (West 1983).

[9] *Compare* 49 U.S.C. § 10922(a) (Supp. V 1981) *with* 49 U.S.C.A. § 10922(c) (West 1983) (public convenience and necessity standard for motor common carriers eliminated in favor of "consistent with public interest" standard).

[10] *Compare* 49 U.S.C. § 10521(b)(1) (Supp. V 1981) *with* 49 U.S.C.A 10521(b)(1) (West 1983) (state closed door restriction eliminated).

[11] *See generally Oversight of the Bus Regulatory Reform Act of 1982: Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. (1983) (Statement of Reese H. Taylor, Jr., Chairman of the Interstate Commerce Commission) [hereinafter cited as *Senate Oversight Hearings*].

certification.[12] Specifically, the ICC has certified bus operations which, in the state's view, stand to jeopardize the stability of its extensive interstate commuter bus network,[13] and exacerbate an already serious bus congestion problem on routes to and from Atlantic City.[14]

This comment will first examine the regulatory and economic climate of the bus industry prior to the passage of the Act. It will then trace the legislative history of the Act, with particular emphasis upon certain safeguard provisions which, according to New Jersey, should provide protective treatment for its two unique busing environments. Finally, an analysis of two recent ICC decisions will be undertaken for the purpose of determining whether the ICC is ignoring Congressional intent in not giving New Jersey the protective treatment it desires, or whether the state's problems lie in the provisions of the Bus Act itself.

Background

A. *Regulation of the Busing Industry*

In order to understand the nature and breadth of the reforms included in the Bus Act, as well as the motivation for these reforms, it is necessary to appreciate certain conditions which characterized the industry prior to consideration of the Act. Whether imposed on the state or federal level, or both concurrently, the bus industry has been subject to substantial regulation throughout its history. The remainder of this discussion details the evolution of that regulation.

The roots of the intercity bus industry date back to approximately 1910.[15] It was during this era that advancements in the internal combustion vehicle, coupled with improvements to and expansion of highways and roads, made possible the provision of short-route automobile passenger operations within communities and among neighboring communities.[16] The sedan automobiles used for these local services were larger than common automobiles, and sat up to a dozen passengers.[17] These vehicles, known as jitney buses, initially encountered

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[12] *Oversight of the Bus Regulatory Reform Act of 1982: Hearings Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation*, 98th Cong., 1st Sess. (1983) (Statement of James Crawford, Assistant Commissioner, New Jersey Department of Transportation) [hereinafter cited as *House Oversight Hearings*].

[13] *Id.*

[14] *Id.*

[15] H.R. REP. NO. 334, *supra* note 2, at 19.

[16] *See* P. MCCOLLESTER & F. CLARK, FEDERAL MOTOR CARRIER REGULATION 3-4 (1935).

[17] M. FOSTER, FROM STREETCAR TO SUPERHIGHWAY: AMERICAN CITY PLANNERS AND URBAN TRANSPORTATION, *1900-1940* 50 (1981).

success in burgeoning urban areas where they presented an alternative to established trolley car systems.[18] By World War I, jitney buses were a common sight on city streets.[19] However, the traffic congestion caused by this new means of transportation, as well as complaints of unfair competition lodged by trolley companies, prompted municipalities to take regulatory action to control jitney bus operations.[20] Thus, from the outset, government regulation was imposed on the industry.

By the early 1920s, motor bus carriers were competing not only with trolleys in the cities, but were also organizing statewide operations.[21] These early statewide systems began as a form of substituted service for expensive railroad passenger operations in low density areas.[22] Unlike trolley companies, however, railroad companies did not fight the expansion of motor bus operations.[23] In fact, railroad companies viewed the motor bus as a welcome ally, and many obtained interests in motor bus operations.[24]

The growth and acceptance of the motor bus as a viable mode of intercity mass transportation inevitably led to state regulation of the industry.[25] The original basis of this regulation was the states' view that it was a necessary extension of their control over highway safety and maintenance.[26] As time passed, however, the rationale for regulation was increasingly based upon economic and social concerns. Through the use of the certificate of public convenience and necessity,[27] a device developed to regulate public utilities, states began to control the bus industry to ensure for their citizens the maximum benefits of these operations.[28] States regulated financial aspects of the industry, particularly the fares that could be charged, as well as operational aspects, such as routes that could be traveled.[29] By 1925, forty states required motor passenger carriers to obtain

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] H.R. REP. NO. 334, *supra* note 2, at 19.

[22] R. LIEB, TRANSPORTATION: THE DOMESTIC SYSTEM 70 (1978).

[23] BUREAU OF ECONOMICS, INTERSTATE COMMERCE COMMISSION, THE INTERCITY BUS INDUSTRY: A PRELIMINARY STUDY 4 (1978) [hereinafter cited as *ICC Study*].

[24] *Id.*

[25] *Id.* at 1 (Pennsylvania, in 1914, was the first State to impose regulation on the industry).

[26] *Id.*; *see also* P. MCCOLLESTER & F. CLARK, *supra* note 16, at 39.

[27] *See* Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426 (1979) (comprehensive discussion of the development of the certificate of public convenience and necessity).

[28] *See generally ICC Study*, *supra* note 23, at 1-2 (States adopted public utility approach in order to ensure stable operating conditions).

[29] *See id.* at 1.

a certificate of public convenience and necessity in order to operate within their borders.[30]

As states implemented regulatory policies to control motor passenger carriers, certain carriers began exploring interstate bus markets.[31] The trailblazers of the interstate regular route found it an arduous task to comply with the regulations of each state in which they sought operating authority.[32] State regulation was diverse and often promoted protectionist goals, resulting in considerable frustration to young bus companies attempting to expand into interstate markets.[33]

The problem reached its climax when A.J. Buck, a citizen of the State of Washington, sought the necessary certification to operate an "auto stage line" between Portland, Oregon, and Seattle, Washington.[34] Oregon granted this certification, but Washington refused, maintaining that the route was already adequately served.[35] Buck took his case to the United States Supreme Court, which, in its landmark decision of *Buck v. Kuykenhall,*[36] ruled that the actions of the State of Washington violated the Commerce Clause of the United States Constitution.[37] The Court stated that "the provision of the Washington statute is regulation, not of the use of its own highways, but interstate commerce. Its effect upon such commerce is not merely to burden, but to obstruct it."[38]

The Court's decision removed interstate bus operations from the purview of state regulatory control.[39] In addition to eliminating state controls on entry for motor carriers involved in interstate service, the decision also invalidated state requirements governing insurance and standards of service.[40] After *Buck,* state jurisdiction was relegated to intrastate bus operations and, more generally, to maintaining highway safety.[41]

The *Buck* decision left interstate motor passenger carrier operations virtually unregulated.[42] Fearing the potential impact of unrestrained

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[30] Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers,* 8 TRANS. L.J. 91, 92 (1976).

[31] *See generally ICC Study, supra* note 23, at 3-4 ("As the demand for long haul passenger service increased, it was natural that carriers would expand . . . to accommodate this growing demand.").

[32] *See, e.g.,* Buck v. Kuykenhall, 267 U.S. 307 (1925).

[33] *Id.; see also ICC Study, supra* note 23, at 1.

[34] Buck v. Kuykenhall, 267 U.S. 307 (1925).

[35] *Id.* at 313.

[36] 267 U.S. 307 (1925).

[37] U.S. CONST. art. I, § 8, cl. 3.

[38] *Buck,* 267 U.S. at 316.

[39] H.R. REP. NO. 334, *supra* note 2, at 19.

[40] Webb, *supra* note 30, at 92.

[41] H.R. REP. NO. 334, supra note 2, at 19.

[42] *Id.; see also* Webb, *supra* note 30, at 92.

interstate busing, states quickly appealed to Congress to fill the regulatory vacuum.[43] The states were joined in this effort by established bus operators and their trade unions, which were particularly concerned that irresponsible operations would damage the integrity of the industry.[44] In further support of the need for regulation, an ICC report released in 1928 stressed the advantages of imposing federal controls over motor buses and trucks operating in interstate commerce.[45]

Seven years after the issuance of the ICC report and following intense debate, Congress passed the Motor Carrier Act of 1935,[46] which placed both buses and trucks operating in interstate commerce under ICC jurisdiction.[47] In addition to the concerns of the states and responsible members of the industry, two other factors influenced Congress to move in this direction. First, depressed economic conditions convinced Congress that controls were necessary to avoid business failures which would both cripple the industry and disrupt the nation's transportation system.[48] Second, since controls had already been placed on the railroad industry, Congress concluded that it would be unfair to allow trucks and buses, competitors of this industry, to engage in unrestricted commerce.[49]

The articulated policy goals of the Motor Carrier Act were:

> [T]o recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among carriers in the public interest; promote adequate, economical and efficient service by motor carriers, and reasonable charges therefore, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.[50]

Despite the vague nature of this policy pronouncement, it did reflect Congressional recognition of the problems which prevailed in the two

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[43] H.R. REP. NO. 334, *supra* note 2, at 19.

[44] *Id.* at 20.

[45] Motor Bus and Motor Truck Operation, 140 I.C.C. 685 (1928).

[46] Pub. L. No. 74-255, 49 Stat. 543 (1935).

[47] *Id.* § 202(b), 49 Stat. 543.

[48] *See* H.R. REP. NO. 334, *supra* note 2, at 20 (Congress felt falling prices and business failures should be linked to excessive competition).

[49] Webb, *supra* note 30, at 97.

[50] Motor Carrier Act of 1935, Pub. L. No. 74-255, § 202(a), 49 Stat. 543.

previously unregulated industries, and its intent to address these problems through regulation.[51] In effect, Congress adopted the states' view that the busing and trucking industries should be regulated as public utilities.[52] Accordingly, Congress sought to achieve "a coordinated transportation system" for the public good.[53]

Beyond its implied endorsement of comprehensive regulation over this industry through its passage of the Motor Carrier Act, Congress also addressed specific aspects of bus operations over which regulation was to be applied.[54] After specifying these aspects, however, Congress delegated to the ICC the task of shaping the course of this regulation.[55] Nowhere was this broad delegation of authority more apparent than in the area of entry standards.[56] While Congress mandated the establishment of a federal certificate of public convenience and necessity, it failed to delineate the criteria for evaluating an application for such a certificate.[57] Consistent with the pattern of the entire legislation, the function of delineating specific criteria was delegated to the Commission.[58]

Pursuant to its newly delegated authority, the ICC developed a federal certificate of public convenience and necessity.[59] It was not until the passenger carrier application of Pan American Bus Lines was presented to the Commission, however, that it had an opportunity to define the criteria for issuance of a certificate. In *Pan American Bus Lines Operation*,[60] the ICC stated that:

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[51] *Id.*

[52] *See supra* notes 25-30 and accompanying text.

[53] P. MCCOLLESTER & F. CLARK, *supra* note 16, at 91.

[54] *See generally* Motor Carrier Act of 1935, Pub. L. No. 74-255, §§ 206-227, 49 Stat. 543, 551-67 (Congress mandated regulation of entry, rates, fares, charges, tariffs, mergers, acquisitions, issuance of securities, and other areas).

[55] *Id.* § 204, 49 Stat. 543, 546-47; *see also* P.MCCOLLESTER & F. CLARK, *supra* note 16, at 92-93.

[56] Motor Carrier Act of 1935, Pub. L. No. 74-255, § 207, 49 Stat. 543, 551.

[57] *Id.* The specific entry standard prescribed in the Motor Carrier Act is as follows:

> Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Id. (emphasis in original).

[58] *Id.*

[59] The terms and conditions for issuance of the certificate were set forth, at least in skeletal form, in the Act. *Id.* § 208, 49 Stat. 543, 552 (1935).

[60] 1 M.C.C. 190 (1936).

> [T]he question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.[61]

Consistent with the public utility approach to regulation adopted under the Act, this standard sought to prevent destructive competition in order to promote stability in the industry.[62] The criteria placed a heavy burden on an applicant seeking entry into a market if the proposed route was already serviced by, or in the vicinity of, another carrier's route.[63] In such a case, the applicant not only had the burden of showing that its proposed service would benefit the public, but also had to demonstrate that it would not be injurious to another carrier's existing route.[64] Further, a carrier already possessing authority on or near the proposed route could assert an interest in servicing that route before the applicant was given the opportunity to do so. Although the standard fell short of endorsing monopoly operations, it went to considerable lengths to protect existing carriers.[65] For the next forty years, while there were changes in the federal regulatory scheme governing interstate busing,[66] the *Pan American Bus Lines* decision remained the polestar of ICC regulation of entry for interstate regular route authority.[67]

B. *Industry Composition*

The composition of the interstate busing industry is as much a product of regulatory policies as it is of economic forces. During the early 1920s, state regulatory policy governing issuance of certificates of public

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[61] *Id.* at 203.

[62] *Bus Regulatory Reform: Hearings on H.R. 3662 and H.R. 3663 Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation*, 97th Cong., 1st Sess. 184 (1981) (Appendix to Statement of Arthur D. Lewis, President, American Bus Association) [hereinafter cited as *House Bus Act Hearings*].

[63] *See* Jones, *supra* note 27, at 427:

> The essence of the certificate of public convenience and necessity is the exclusion of otherwise qualified applicants from a market because, in the judgment of the regulatory commission, the addition of new or expanded services would have no beneficial consequences or, in a more extreme case, would actually have harmful consequences.

Id.

[64] *See* Webb, *supra* note 30, at 100.

[65] A. MEIER & J. HOSCHEK, OVER THE ROAD: A HISTORY OF INTERCITY BUS TRANSPORTATION IN THE UNITED STATES 65 (1975).

[66] *See, e.g.*, Pan American Bus Lines Operation, 1 M.C.C. 190, 208 (1936).

[67] *House Bus Act Hearings*, *supra* note 62, at 185-87 (Appendix to Statement of Arthur D. Lewis, President, American Bus Association).

convenience and necessity sheltered existing carriers from competition by restricting new carrier entry.[68] The existing carriers were therefore able to concentrate their resources on expanding their markets rather than protecting their established territory.[69] Simultaneously, railroad companies began investing considerable amounts of capital in certain motor bus carriers, thereby enabling these carriers to outpace the rest of the industry in the acquisition of new bus routes.[70] The result was a process of consolidation and merger in which a few major bus companies emerged as dominant.[71]

Among the carriers to stablish a dominant position, Greyhound was the most successful.[72] The large amount of capital which Greyhound had at its disposal enabled it to pioneer the first national bus network.[73] Aggressive acquisition and a national advertising policy further solidified Greyhound's early foothold on the industry.[74] By the middle 1930s, Greyhound commanded fifteen percent of the intercity regular route bus market and was fast acquiring additional routes.[75]

In order to compete with Greyhound, a group of six bus companies located throughout the nation organized a cooperative agreement in 1936.[76] This association of independently owned carriers used the title National Trailways Bus System (NTBS), and under this umbrella, the group agreed to "connect their operations, sell through tickets, share terminal space, advertise jointly and use common paint on equipment."[77] This venture proved successful, enabling the participating companies to take advantage of a national market and thereby challenge Greyhound's preeminence.[78]

Greyhound and NTBS continued to grow and thrive through he 1940s. Smaller bus companies also enjoyed a measure of stability during this decade, as the economic consequences of World War II created a

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[68] *ICC Study, supra* note 23, at 2 (quoting B. CRANDALL, THE GROWTH OF THE INTERCITY BUS INDUSTRY 91-92 (1954)).

[69] *ICC Study, supra* note 23, at 5.

[70] *See generally* A. MEIER & J. HOSCHEK, *supra* note 65, at 65-75 (description of railroad company involvement in bus industry development).

[71] *See ICC Study, supra* note 23, at 3-5.

[72] *See id.* at 3; *see also* A. MEIER & J. HOSCHEK, *supra* note 65, at 67-71.

[73] *ICC Study, supra* note 23, at 3.

[74] *Id.*

[75] *House Bus Act Hearings, supra* note 62, at 322 (Statement of Theodore C. Knappen, Senior Vice President, Trailways, Inc.).

[76] *ICC Study, supra* note 23, at 5.

[77] *House Bus Act Hearings, supra* note 62, at 322-23 (Statement of Theodore C. Knappen, Senior Vice President, Trailways, Inc.).

[78] *ICC Study, supra* note 23, at 5.

demand for bus transportation.[79] Yet, even though World War II produced a boon for the entire industry, the dominance that Greyhound and NTBS had established during the 1930s defined the economic structure of the bus industry for years to come.[80] As the 1940s came to a close, smaller independent operators increasingly fell victim to the country's new found dependence on the automobile.[81] These companies also encountered difficulty keeping pace with the equipment modernization programs undertaken by the two industry leaders.[82] The resulting fallout further cemented the dominant position of the two national systems.[83]

The protective entry policies of the ICC also encouraged the disproportionate growth in the bus industry.[84] Once a carrier obtained authority to operate an interstate route, a heavy burden was placed on any other carrier which desired to compete along or near the existing operation.[85] With Greyhound and NTBS marking out broad territory on interstate routes, companies with growth potential often found their opportunities to expand into the long distance intercity bus markets stifled by protests lodged by one or both of the major organizations.[86] In effect, the standard set forth in *Pan American Bus Lines* functioned as a protective mechanism for the two large carriers.

In 1981, as Congress prepared to address bus regulatory reform, it was confronted with statistics indicating that Greyhound and Trailways accounted for sixty-two percent of the total bus industry operating revenue, carried twenty-three percent of the passengers, and operated forty percent of the passenger miles.[87] The stark disparity between the two major bus organizations and the rest of the industry was made even more apparent in statistics revealing that the third largest carrier, Carolina Coach, earned less than two percent of the total industry operating revenue in that same year.[88]

Although the composition of the intercity bus industry and the federal entry standards have changed little over the years, the economic health of the industry has declined considerably. As stated in the report

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[79] *Id.* at 14.

[80] *Id.* at 3 ("By the late 1930s the economic structure of the bus industry had essentially evolved into its present form.").

[81] A. MEIER & J. HOSCHEK, *supra* note 65, at 114.

[82] *Id.* at 114-15.

[83] *Id.*

[84] *See supra* notes 62-66 and accompanying text.

[85] *Id.*

[86] A. MEIER & J. HOSCHEK, *supra* note 65, at 65.

[87] *ICC Study*, *supra* note 23, at 45.

[88] *House Bus Act Hearings*, *supra* note 62, at 437 (Testimony of Cornish F. Hitchcock, Attorney, Transportation Consumer Action Project).

issued on the Bus Regulatory Reform Act by the House Committee on Public Works and Transportation, "[i]n the past thirty years, the bus industry has been transformed from an industry enjoying relative financial stability to an industry currently described as financially weak."[89] Testimony to the economic decline is found in statistics which indicate that while intercity travel has increased three hundred percent since 1950, total intercity bus passenger miles have increased only twenty percent.[90] Passenger miles on regular route operations have actually declined thirty-three percent during this period.[91] The years 1970 to 1977 proved the most difficult for the industry, during which carriers experienced a precipitous drop of eighteen percent in bus ridership,[92] and an estimated 2,000 communities lost intercity bus service.[93] Only a steady increase in highly profitable tour and charter services has saved many carriers from total collapse.[94]

To a large extent, the bus industry's financial difficulties stem from its inability to compete with other forms of transportation, particularly the automobile, which is now responsible for ninety percent of all intercity passenger travel.[95] The airline industry, and more recently, the revitalization of Amtrak have also cut into the intercity travel market.[96] A second factor contributing to industry decline is an increase in operating expenses.[97] In the past twenty years, expenses for equipment, fuel, and labor have increased considerably.[98] Finally, state regulatory policies have created financial difficulties for passenger carriers, despite the fact that many of them receive their primary operating authority from the ICC.[99] Specifically, state regulations governing the intrastate portions of interstate routes often require a carrier to make additional stops, maintain lower fares, and continue to service unprofitable routes.[100] The industry has also

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[89] H.R. REP. NO. 334, *supra* note 2, at 24.

[90] *House Bus Act Hearings*, *supra* note 62, at 179 (Statement of Arthur D. Lewis, President, American Bus Association).

[91] *Id.*

[92] H.R. REP. NO. 334, *supra* note 2, at 22. It should be noted that during the gasoline shortage in 1974, bus ridership increased temporarily. *Id.*

[93] *See House Bus Act Hearings*, *supra* note 62, at 180 (Statement of Arthur D. Lewis, President, American Bus Association).

[94] *Id.*

[95] *Id.* at 179.

[96] H.R. REP. NO. 334, *supra* note 2, at 21.

[97] *Id.* at 22.

[98] *See ICC Study*, *supra* note 23, at 68-69, 79.

[99] *See* H.R. REP. NO. 334, *supra* note 2, at 24-27.

[100] *Id.*

complained that state regulatory procedures are often too slow, causing delays which translate into lost profits.[101]

Despite the economic difficulties of recent years, the intercity bus industry still exceeds both air and rail travel as the primary mode of intercity mass transportation.[102] The industry services an estimated 15,000 communities nationwide, 14,000 of which have no other form of public transportation.[103] Buses carried more than 370 million passengers in 1982.[104] Moreover, when compared with air and rail travel, bus travel remains the most economical form of transportation, and services those segments of the population which are not in a financial position to seek out alternative means of transportation, namely, the poor and elderly.[105] In short, the bus remains an integral part of the nation's mass transportation system.

Recognizing the importance of addressing the industry's current problems, Congress anticipated that regulatory reform would pull the industry from its torpor.[106] Congress had before it a stagnated industry, dominated by two corporate giants, and subjected to burdensome federal and state controls. In this regard, a deregulatory approach made practical sense. Of course, the prevailing political climate was also favorable to this approach.

C. *Busing in New Jersey*

Before shifting to an examination of the legislative history of the Bus Act, a brief sketch of New Jersey's two unique busing environments is in order. The State is in the unusual position of having an abundance of carriers which are interested in operating within its borders.[107] The State's busing markets are competitive, and are not dominated by the two major carriers, Greyhound and NTBS.[108]

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[101] *Id.*

[102] *Id.* at 51.

[103] *Bus Regulatory Reform: Hearings on H.R. 3663 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 134 (1982) (Statement of Norman R. Sherlock, President and Chief Executive Officer, American Bus Association) [hereinafter cited as *Senate Bus Act Hearings*].

[104] AMERICAN BUS ASSOCIATION, 1983 ANNUAL REPORT 3.

[105] *See generally House Bus Act Hearings, supra* note 62, at 358 (Statement of Michael Johnson, Commissioner of the Pennsylvania Public Utility Commission and Director of Congressional Liaison for the National Association of Regulatory Utility Commissioners).

[106] *See* Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 3, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1102, *reprinted in* 49 U.S.C.A 10101 note (West 1983).

[107] *See House Oversight Hearings, supra* note 12 (Statement of James Crawford, Assistant Commissioner, New Jersey Department of Transportation).

[108] *Id.*

New Jersey supports one of the most extensive interstate commuter bus networks in the country.[109] With New York City bordering it to the east and Philadelphia to the south, the State has become home to more than 300,000 commuters who ride interstate buses daily.[110] These commuters depend upon reliable and stable service.

Sixty percent of the interstate commuter service is provided by New Jersey Transit[111] (NJ Transit), the only statewide public transportation agency in the country.[112] The agency was created in response to what State officials termed a "transportation crisis," brought about by the financial collapse of the state's private carriers.[113] NJ Transit was established to provide transportation service where private carriers had faltered, and also to promote the participation of privately owned carriers wherever feasible.[114] The overall purpose of the public carrier is to ensure a coherent mass transportation system.[115] The remaining forty percent of interstate commuter service in the State is provided by privately owned carriers holding ICC certificates.[116]

For some time, many of the private carriers which provide commuter service in New Jersey have operated on a cross-subsidy basis.[117] Under these arrangements, the private carriers agree to operate certain unprofitable routes in exchange for authority to operate more profitable routes.[118] These profitable operations, in turn, defray any losses incurred as a result of unprofitable operations.[119] The system has been encouraged by state officials who feel it ensures the provision of commuter service to areas of the State which might not otherwise receive it, particularly those unprofitable intrastate urban routes which are vital to the citizens of those communities.[120]

Interstate commuter routes usually provide enough income to support operations along unprofitable intrastate urban routes, and therefore constitute an important part of the cross-subsidy system in New Jersey.[121]

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[109] *Id.*

[110] *Id.*

[111] *Senate Bus Act Hearings, supra* note 103, at 239 (Statement of Anne P. Canby, New Jersey Commissioner of Transportation).

[112] *Id.*

[113] *Id.*

[114] N.J. STAT. ANN. § 27:25-2 (West Supp. 1983-84).

[115] *Id.*

[116] *House Oversight Hearings, supra* note 12 (Statement of James Crawford, Assistant Commissioner, New Jersey Department of Transportation).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

Unlike long-haul intercity service, commuter bus operations depend on strong ridership only during the morning and evening rush periods.[122] For this reason, a commuter bus operation must establish a steady clientele in order to remain profitable.[123] Even a carrier which accomplishes this goal remains vulnerable to changes in ridership.[124] In short, the commuter market is a finite one in which competition is not necessarily a positive element.[125] Stability is essential to a successful commuter network.[126]

It was the perceived need for this stability which motivated the creation of NJ Transit by the New Jersey Legislature.[127] The state maintains that it has established a unique balance between its public and private carriers without subjecting its private carriers to overly burdensome regulation.[128] New Jersey also emphasizes that it relies on private carriers to provide reliable and responsible service whenever and wherever feasible.[129] If a private carrier can provide systemwide service to a particular area, NJ Transit will not be called upon to provide service or otherwise subsidize those operations.[130]

Aside from its extensive commuter bus operations, New Jersey has also experienced a tremendous influx of bus traffic to Atlantic City casinos.[131] It is estimated that between 1980 and 1982, the number of buses annually entering the city increased from 78,000 to over 300,000.[132] The New Jersey Department of Transportation estimates that on an average summer day in 1983, more than 1,000 buses traveled to Atlantic City.[133] This traffic poses significant health and safety concerns, and the geography of Atlantic City is not suited to accommodate this tremendous volume.[134]

Atlantic City is located on Absecon Island, a barrier strip directly off the New Jersey coast.[135] All vehicular traffic must funnel on to three bridges for ingress to and egress from the island.[136] The volume of bus

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *See supra* note 113 and accompanying text.

[128] *Senate Bus Act Hearings, supra* note 103, at 239 (Statement of Anne P. Canby, New Jersey Commissioner of Transportation).

[129] *See House Oversight Hearings, supra* note 12 (Testimony of James Crawford, Assistant Commissioner, New Jersey Department of Transportation).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

traffic, coupled with limited access, has resulted in massive traffic congestion.[137] Moreover, the available parking is completely inadequate.[138]

The magnitude of bus travel to Atlantic City has had a broader impact across the state, with buses clogging roadways in towns along the traveled routes.[139] New Jersey has been described as a "small corridor" state with highly competitive bus operations to the Atlantic City area.[140] Currently, there are over thirty carriers providing service over more than eighty state authorized and regulated routes to Atlantic City.[141]

The Bus Regulatory Reform Act of 1982

A. *Legislative History*

The Bus Regulatory Reform Act of 1982[142] was originally prompted on two fronts. First, at the request of the American Bus Association (Bus Association), Representative Glen Andersen introduced the Bus Regulatory Modernization and Improvement Act,[143] which outlined the bus industry's prescription for resuscitating its markets. The second legislative initiative was also introduced by Representative Andersen. This proposal, labeled the Motor Bus Act,[144] was the Interstate Commerce Commission's suggested reforms to regulation of the busing industry.

There were a number of differences between the two proposed measures, but the most important difference was in the area of federal entry standards governing the issuance of ICC certificates of public convenience and necessity.[145] While the Bus Association proposal addressed the need to erase burdensome state regulatory barriers, it reinforced the protective

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[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] Pub. L. No. 97-261, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1102.

[143] H.R. 3662, 97th Cong., 1st Sess. (1981), *reprinted in House Bus Act Hearings, supra* note 62, at 1.

[144] H.R. 3663, 97th Cong., 1st Sess. (1981), *reprinted in House Bus Act Hearings, supra* note 62, at 28.

[145] *Compare* H.R. 3662, *supra* note 143, § 5, *with* H.R. 3663, *supra* note 144, § 5. Under H.R. 3662, the entry standards currently in force would have been retained, so that an applicant would still have to show that "the transportation to be provided is consistent with the present or future public convenience and necessity." In contrast, H.R. 3663, as introduced, would have imposed the standard currently in force for motor common carriers of property (trucks), 49 U.S.C. § 10922(b) (Supp. V 1981), on motor common carriers of passengers (buses). Under this standard, an applicant would have to show that "the service proposed will serve a useful public purpose, responsive to a public demand or need; unless . . . [a protesting party shows] that the transportation . . . is inconsistent with the public convenience and necessity." *Id.*

federal entry standards already in practice.[146] By contrast, the ICC's proposal substantially liberalized federal entry standards, and also removed state regulatory barriers.[147] The basis of the ICC proposal was the perceived need to create a more competitive environment within the bus industry itself.[148]

The House Committee on Public Works and Transportation went to work on the ICC proposal.[149] At least part of the inducement for choosing the more liberal reform measure can be traced to the Reagan Administration's position that the Bus Association proposal was unacceptable.[150] In fact, during the early stages of consideration, Secretary of Transportation Drew Lewis made it clear that the Administration favored complete deregulation of the industry.[151] Support for a deregulatory approach could also be found among consumer groups.[152]

The first House Committee reform was the adoption of a revised standard by which the ICC should evaluate an application for regular route authority.[153] The new standard eliminated the requirement that an applicant show "that the transportation to be provided is or will be required by the present or future convenience and necessity" of the public.[154] This constituted a significant change in entry policy. While the ICC had eased entry standards through administrative means in recent

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[146] *See supra* note 145; *see also* H.R. 3662, *supra* note 143, § 10 (would give the ICC review authority over state regulatory practices and procedures).

[147] H.R. 3663, *supra* note 144, § 15.

[148] *Id.* § 3(a):

> [H]istorically the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the motor bus industry; that protective regulation has resulted in operating inefficiencies and diminished price and service competition; that the objectives contained in the national transportation policy can best be achieved through greater competition and reduced regulation . . . .

Id.

[149] *See* H.R. REP. NO. 334, *supra* note 2, at 1.

[150] *House Bus Act Hearings, supra* note 62, at 63 (Statement of Secretary of Transportation Drew Lewis) ("This bill, proposed by the American Bus Association, does not encourage competition and does not provide sufficient managerial freedom to lead to overall improvements in services rendered to the public.").

[151] *Id.*

[152] *See id.* at 435-46 (Statement of Cornish F. Hitchcock, Attorney, Transportation Consumer Action Project).

[153] H.R. 3663, § 6(b)(1), 97th Cong., 1st Sess., 127 CONG. REC. H8595-96 (daily ed. Nov. 19, 1981).

[154] *Id.* In place of this standard, the Commission was instructed to issue a certificate if it "finds that the person is fit, willing, and able to provide the transportation . . . unless the Commission finds, *on the basis of evidence presented by any person objecting to the issuance of the certificate,* that the transportation to be authorized . . . is not consistent with the public interest." *Id.* (emphasis added).

years,[155] the restrictive standards enunciated in *Pan American Bus Lines* had continued to survive.[156]

Under the new formula, an applicant still had to prove that it was "fit, willing and able" to provide the service.[157] A showing of fitness involved operational and financial, as well as safety fitness.[158] Once this fitness was established, however, a presumption that the proposed service was consistent with the public interest arose.[159] This presumption placed on a carrier which was protesting the application the burden of showing that the proposed service "is not consistent with the public interest."[160]

The burden, although heavy, was not intended to be "insurmountable."[161] If a protesting carrier demonstrated that the issuance of a certificate "would impair, contrary to the public interest, its ability to provide a substantial portion of its regular route passenger service,"[162] its burden would be met. However, "[d]iversion of revenue or traffic . . . in and of itself," was insufficient to support such a finding.[163] Instead, the ICC was directed to consider "the level of service being provided" by the established carrier, the relationship of that service to the entire system, and the "effect . . . [of] traffic or revenue diversion . . . upon the ability of the [established] carrier to provide service over its entire system."[164] At this

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[155] *See, e.g., House Bus Act Hearings, supra* note 62, at 186-87 (Appendix to Statement of Arthur D. Lewis, President, American Bus Association) ("During the past four years the Commission, without Congressional direction, has relinquished its role as regulator of competition.").

[156] 1 M.C.C. 190, 203 (1936).

[157] *See supra* note 154. The "fit, willing and able" requirement has been imposed on a prospective applicant since the passage of the Motor Carrier Act of 1935. *See supra* note 57.

[158] H.R. 3663, § 6(b)(1), 97th Cong., 1st Sess., 127 CONG. REC. H8596 (daily ed. Nov. 19, 1981).

[159] H.R. REP. NO. 334, *supra* note 2, at 29. "[B]y phrasing the requirement [that a protesting party show that the proposed service is not consistent with the public interest] in the negative, the provision creates a presumption that the grant of the application is consistent with the public interest." *Id.*

[160] *Id.*

[161] *Id.* at 30. "If the burden were so heavy as to result, for example, in the approval of all applications to transport passengers, it would be foolish to prohibit master certification . . . ." *Id.*

[162] H.R. 3663, § 6(b)(1), 97th Cong., 1st Sess., 127 CONG. REC. H8595-96 (daily ed. Nov. 19, 1981). The bill provided that:

> [T]ransporation to be authorized by issuance of a certificate under this subsection shall not be consistent with the public interest if the Commission finds, on the basis of evidence presented by persons objecting to such issuance, that such issuance would impair, contrary to the public interest, the ability of any other motor common carrier of passengers to provide a substantial portion of the regular-route passenger service which such carrier provides. Diversion of revenue or traffic from a motor common carrier of passengers in and of itself shall not be sufficient to support a finding that issuance of the certificate would impair, contrary to the public interest, the ability of the carrier to provide a substantial portion of the regular-route passenger service which the carrier provides.

Id.

[163] *Id.*

[164] H.R. REP. NO. 334, *supra* note 2, at 31.

stage of the legislation, the effect of new service upon established carriers was still of major importance.[165]

Under the House bill, the ICC was also directed to consider, at least to the extent raised by a protesting party, five other factors.[166] First among these was the National Transportation Policy,[167] which included the promotion of

> competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) to allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation. . . .[168]

The second factor to be considered was the effect of the new service on "passenger service to small communities."[169] The third and fourth factors, respectively, were the effect of transportation-related subsidies in charter or special operations cases,[170] and the cumulative effect of multiple

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[165] The Committee report stressed, however, that this provision "is not intended to undercut the basic policy objectives of . . . [the new section] to ease entry into the intercity bus industry." *Id.*

[166] H.R. 3663, § 6(b)(1), 97th Cong., 1st Sess., 127 CONG. REC. H8596 (daily ed. Nov. 19, 1981):

> (4) In making any findings relating to public interest under paragraphs (1) and (2) of this subsection, the Commission shall consider, to the extent applicable, at least the following:
>
> (A) the transportation policy of section 10101(a) of this title;
>
> (B) the effect of issuance of the certificate on motor carrier of passenger service to small communities;
>
> (C) in the case of the certificate for authority to provide special or charter transportation, whether any party to the proceeding with respect to issuance of the certificate is receiving transportation-related financial assistance from any governmental department, agency, or instrumentality;
>
> (D) the cumulative effect on any other motor common carrier of passengers if the Commission were to approve (i) the application for the certificate; and (ii) any other pending applications for authority to provide transportation as motor common carriers of passengers; and
>
> (E) any significant adverse effect of issuance of the certificate on commuter bus operations.

Id.

[167] *Id.*

[168] *Id.* § 5, 97th Cong., 1st Sess., 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981).

[169] *See supra* note 166; *see also* H.R. REP. NO. 334, *supra* note 2, at 27 (Committee discussion of its concerns over small community service).

[170] *See supra* note 166.

applications.[171] The final, and most critical factor from New Jersey's perspective, was the directive that the ICC consider "any significant adverse impact of issuance of the certificate on commuter bus operations."[172] Those operations were defined as "short-haul scheduled passenger service provided by motor vehicle in metropolitan and suburban areas; whether within or across the geographical boundaries of a State, and utilized primarily by passengers using reduced fare, multiple-ride, or commutation tickets during morning and evening peak period operations."[173] This provision directly addressed New Jersey's concern over the stability of its interstate commuter services,[174] and was reinforced by the House Committee's statement that it "strongly believes it would not be in the nation's interest to hamper our efforts to increase commuter passenger traffic provided by either public or private carriers."[175]

The second major change wrought in the area of entry standards was the preemption of state "closed door" restrictions.[176] In the past, individual states had jurisdiction over the intrastate portions of interstate regular routes.[177] Under the provisions of the proposed legislation, however, a carrier which was denied authority by an individual state to operate an intrastate service along an interstate route could petition the ICC to preempt the state's ruling and grant the authority.[178]

The House Committee bill also addressed New Jersey's concern over bus transportation to Atlantic City casinos.[179] It did so by precluding ICC jurisdiction over "any regular-route transportation of passengers provided entirely in one State which is in the nature of a special operation."[180] In clarifying this provision as it applied to the Atlantic City situation, the Committee stated that "a carrier, certified [for regular route authority] . . . would not be authorized to transport passengers from a point in New Jersey to Atlantic City if such transportation included *any* element of the tour service typically offered to patrons of gambling casinos."[181]

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[171] *Id.*

[172] *Id.*

[173] H.R. 3663, § 6(e)(1), 97th Cong., 1st Sess., 127 CONG. REC. H8596 (daily ed. Nov. 19, 1981).

[174] *See Senate Bus Act Hearings, supra* note 103, at 239 (Statement of Anne P. Canby, New Jersey Commissioner of Transportation).

[175] H.R. REP. NO. 334, *supra* note 2, at 23.

[176] H.R. 3663, § 6(b)(2), 97th Cong., 1st Sess., 127 CONG. REC. H8596 (daily ed. Nov. 19, 1981).

[177] *See* 49 U.S.C. § 10521(b)(1) (Supp. V 1981) (jurisdiction of ICC does not affect power of state to regulate intrastate transportation).

[178] H.R. 3663, § 6(b)(2), 97th Cong., 1st Sess., 127 CONG. REC. H8596 (daily ed. Nov. 19, 1981).

[179] *See Senate Bus Act Hearings, supra* note 103, at 239 (Statement of Anne P. Canby, New Jersey Commissioner of Transportation).

[180] H.R. 3663, § 6(b)(1), 97th Cong., 1st Sess., 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981).

[181] H.R. REP. NO. 334, *supra* note 2, at 35 (emphasis added).

The full House passed the newly entitled Bus Regulatory Reform Act without alteration.[182] The proposal then went to the Senate, which held additional hearings.[183] It was at this juncture that the Reagan Administration marshaled its forces in an effort to persuade the Senate to adopt a stronger deregulatory measure than did the House.[184] Secretary of Transportation Drew Lewis spearheaded this effort, testifying before the Senate Subcommittee on Surface Transportation that the House measure did not ease entry standards enough.[185] The Administration maintained that the "fit, willing and able" requirement should consist of only two elements: safety fitness and the ability to obtain adequate insurance.[186] The Administration claimed that the financial and operational fitness criteria included in the House bill were overburdensome and unnecessary, and should be eliminated.

The Chairman of the Federal Trade Commission, James Miller, also testified on behalf of the Administration.[187] Miller criticized the proposed criteria which would enable a protesting carrier to protect its interests.[188] He claimed that "[t]he principal defect [of the criteria] is the reliance on the notion that inefficient or unprofitable services should be supported by revenues from profitable ones. Cross-subsidization is a weak method of ensuring service to small communities or commuters."[189] As a matter of policy, the Administration found that protection of these systems was undesirable and anticompetitive.[190]

The Administration's efforts had their effect. The Senate Commerce Committee reworked the House bill to incorporate the specific changes recommended by the Administration.[191] First, the legislation was amended to limit fitness criteria to safety fitness and the ability to obtain adequate insurance.[192] The second and more critical changes were in the criteria under which the ICC was to evaluate protests.[193] The Senate Committee adopted two standards under which to evaluate protests.[194] A revised version of the House bill's "public interest" standard was adopted if the protest was in opposition to an application for interstate regular

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[182] 127 CONG. REC. H8602-03 (daily ed. Nov. 19, 1981).
[183] *Senate Bus Act Hearings, supra* note 103.
[184] *Id.* at 71-72 (Statement of Hon. Drew Lewis, Secretary of Transporation).
[185] *Id.*
[186] *Id.*
[187] *Id.* at 92-97 (Statement of James C. Miller, III, Chairman, Federal Trade Commission).
[188] *Id.* at 94-95.
[189] *Id.*
[190] *Id.*
[191] *See* H.R. 3663, 97th Cong., 1st Sess., 128 CONG. REC. S7699-707 (daily ed. June 30, 1982).
[192] *Id.* § 5(b), 128 CONG. REC. S7700 (daily ed. June 30, 1982).
[193] *Id.*, 128 CONG. REC. S7700-701 (daily ed. June 30, 1982).
[194] *Id.*

route authority,[195] or intrastate authority along an interstate route if the applicant did not possess interstate route authority prior to the effective date of the Act.[196]

Under the public interest standard as revised by the Senate, the ICC is directed to take four factors into considerations.[197] First, as in the House bill, the ICC must consider the National Transportation Policy.[198] This policy, however, was redefined by the Senate Committee to include the provision and maintenance of commuter bus operations.[199] The "significant adverse impact on commuter bus operations" factor included in the House bill was eliminated.[200] Any consideration of the effect of the proposed service on commuter bus operations was subsumed into the nine subfactors which now comprised the National Transportation Policy.[201]

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[195] *Id.* The Senate amendment provided as follows:

> A certificate shall be issued if the Commission finds that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission unless the Commission finds, on the basis of evidence presented by any person objecting to the issuance of the certificate, that the transportation to be authorized is not consistent with the public interest.

Id. Cf. H.R. 3663, § 6(b)(1), 97th Cong., 1st Sess., 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981).

[196] H.R. 3663, § 6(b), 97th Cong., 1st Sess., 128 CONG. REC. S7700 (daily ed. June 30, 1982).

[197] *Id.* The four factors were:

> (A) the transportation policy of section 10101(a) of this title;
>
> (B) the value of competition to the traveling and shipping public;
>
> (C) the effect of issuance of certificate on motor carrier of passenger service to small communities; and
>
> (D) whether issuance of the certificate would impair the ability of any other motor common carrier of passengers to provide a substantial portion of the regular-route passenger service which such carrier provides over its entire regular-route system. Diversion of revenue or traffic from a motor common carrier of passengers in and of itself shall not be sufficient to support a finding that issuance of the certificate would impair the ability of the carrier to provide a substantial portion of the regular-route passenger service which the carrier provides over its entire regular-route schedule system.

Id.

[198] H.R. 3663, § 6(b), 97th Cong., 1st Sess., 128 CONG. REC. S7700 (daily ed. June 30, 1982).

[199] *Id.*; *cf.* H.R. 3663, § 5, 97th Cong., 1st Sess., 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981).

[200] *Compare* H.R. 3663, § 6(b), 97th Cong., 1st Sess., 127 CONG. REC. H8595 (daily ed. Nov. 19, 1981) *with* H.R. 3663, § 6(b), 97th Cong., 1st Sess., 128 CONG. REC. S7700 (daily ed. June 30, 1982); *see also supra* note 166.

[201] The revised National Transportation Policy called for regulation of transportation by motor carrier that promotes competitive and efficient transportation services in order to

> (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) *provide and maintain commuter bus operations*; (G) improve and maintain a sound, safe, and

The second factor in the revised standard was the "value of competition to the traveling and shipping public."[202] The third, and only factor identical to one in the House bill, was "the effect of issuance of the certificate on . . . passenger service to small communities."[203] The final factor under the standard adopted by the Senate was the probable adverse effect of the new service on service provided by an existing carrier.[204] This consideration, which was entirely independent of any other under the House bill,[205] was now but one of four factors to be considered.[206] The net effect of this revised public interest standard was to dilute the assessment of the proposed route's impact on existing carriers and commuter bus operations.[207]

The second standard for evaluating protests applied in the case of an applicant which possessed interstate authority prior to the effective date of the Act, and was making a subsequent application for intrastate authority along that route.[208] Under this standard, the ICC was to issue a certificate unless a protesting party could show that the intrastate service "would directly compete with a commuter bus operation and it would have a significant adverse effect on commuter bus service in the area in which the

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competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system; and (I) promote intermodal transportation . . . .

H.R. 3663, § 5, 97th Cong., 1st Sess., 128 CONG. REC. S7699 (daily ed. June 30, 1982) (emphasis added); *cf.* S. REP. NO. 411, 97th Cong., 2d Sess. 6, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2308, 2312 (legislation is intended to address the stability of commuter bus operations).

[202] H.R. 3663, § 6(b), 97th Cong., 1st Sess., 128 CONG. REC. S7700 (daily ed. June 30, 1982).

[203] *Id.*

[204] *Id.*

[205] *See supra* notes 162-65 and accompanying text.

[206] *See* S. REP. NO. 411, *supra* note 201, at 17. The Senate Committee stressed that "this impairment standard is only one of four factors to be considered by the ICC in making its public interest determination. The other factors, including the value of competition, are to be given equal consideration by the ICC." *Id.*

[207] *See supra* notes 161-65, 172-75 and accompanying text.

[208] H.R. 3663, § 6(b), 97th Cong., 1st Sess., 128 CONG. REC. S7700 (daily ed. June 30, 1982). This standard provided that:

> The Commission shall issue a certificate to a person authorizing that person to provide regular-route transportation entirely in one State as a motor common carrier of passengers *if such intrastate transportation is to be provided on a route over which the carrier has authority on the effective date of the Bus Regulatory Reform Act of 1982 to provide interstate transportation of passengers* if the Commission finds that the person is fit, willing, and able to provide the intrastate transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission, unless the Commission finds, on the basis of evidence presented by any person objecting to the issuance of the certificate, that the transportation to be authorized would directly compete with a commuter bus operation and it would have a significant adverse effect on commuter bus service in the area in which the competing service will be performed.

Id. (emphasis added).

competing service will be performed."[209] This language is virtually identical to that included under the House bill as the last of the five factors to be considered by the ICC in making a public interest determination.[210] Under the House bill, however, this would have been a factor to be considered in practically every application for interstate or intrastate authority.[211] The narrow application of this standard in the Senate bill resulted in a substantial dilution of the protections for commuter bus operations included in the House bill.[212]

Another Senate adjustment to the House bill allowed immediate federal preemption of state regulations governing intrastate service when the intrastate service was located along an interstate route.[213] The House bill had required that the carrier seeking this authority first apply to the appropriate regulatory body of the particular state.[214] Only after this body denied certification could the carrier apply to the ICC to employ its preemptive powers.[215] Under the Senate Committee version, the ICC is permitted to preempt State "closed door" policies even absent prior state denial.[216] With these changes, the Senate Commerce Committee produced a bill which went considerably further than did the House bill toward liberalizing entry standards.[217] The full Senate passed the measure as reported by the Commerce Committee,[218] and the legislation was

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[209] *Id.*

[210] *See supra* notes 172-75 and accompanying text.

[211] *Id.*

[212] *See* S. REP. NO. 411, *supra* note 201, at 16:

> For entry authority to serve intrastate points on existing interstate routes, the Commission is to allow entry unless it finds that the intrastate service would directly compete with a commuter bus operation and would have a significant adverse effect on commuter bus service in the area in which the competing service will be performed. For intrastate entry authority to serve points on new interstate routes, the ICC is to allow entry unless it finds the transportation to be authorized is not consistent with the public interest. The burden of proof is on the protestant . . . .
>
> It should be noted that a carrier can be found to directly compete with a commuter bus operation even if the service to be authorized does not have all of the characteristics of "commuter bus operations" as defined in the Act. When there is such direct competition, the directly competitive service must be shown to have a prospective significant adverse effect on all commuter bus service in the area where the competing service would be performed.

Id.

[213] H.R. 3663, § 6(b), 97th Cong., 1st Sess., 128 CONG. REC. S7700 (daily ed. June 30, 1982).

[214] *See supra* notes 176-78 and accompanying text.

[215] *Id.*

[216] The provision effectively made the ICC the primary issuing authority for intrastate transportation along existing interstate routes. H.R. 3663, § 6(b), 97th Cong., 1st Sess., 128 CONG. REC. S7700 (daily ed. June 30, 1982).

[217] *See supra* notes 191-92 and accompanying text.

[218] 128 CONG. REC. S7721 (daily ed. June 30, 1982).

referred to conference committee in order to resolve differences between the House and Senate versions.[219] The conference committee reported essentially the same bill which the Senate had passed.[220] The conference measure was subsequently adopted by both Houses of Congress,[221] and it was signed into law by President Reagan on September 20, 1982.[222] Upon signing the bill, the President reemphasized the Administration's position that the Act should be read as broadly deregulatory.[223]

B. *ICC Implementation*

In November, 1982, the ICC announced rules for implementing the relaxed entry standards in the recently enacted Bus Act.[224] Essentially, these rules paralleled the provisions of the Act.[225] It was not long after the adoption of the rules that the State of New Jersey became aware of an application for ICC authority which posed public interest concerns for the State.[226] The application was that of Caravan Coach Lines, Inc. (Caravan), and the case that ensued as a result of the application demonstrates the rift between New Jersey and the ICC over the commuter safeguard provisions of the Bus Act.[227]

Caravan is a "small family-run business" based in New Jersey, which, in December 1982, filed an application with the ICC seeking certification to provide interstate regular route commuter bus service between points in northern New Jersey and New York City.[228] Caravan's proposed route traced over portions of the existing interstate commuter routes of two private carriers, Lakeland Bus Lines, Inc. (Lakeland), and Community Transit Lines, Inc. (Community), as well as NJ Transit.[229] All of these carriers were concerned over the probable diversion of passengers which would result if the application was approved, and accordingly, each filed protests to the application.[230]

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[219] *See* H.R. CONF. REP. NO. 780, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2342.

[220] *Id.*

[221] 128 CONG. REC. H6696 (daily ed. Aug. 19, 1982); *id.* at S11028 (daily ed. Aug. 20, 1982).

[222] President's Message to Congress on Signing H.R. 3663 Into Law, 18 WEEKLY COMP. PRES. DOC. 1179-80 (Sept. 20, 1982).

[223] *Id.*

[224] 47 Fed. Reg. 53,260-53,304 (1982) (codified at 49 C.F.R. §§ 1168.1 to .6 (1983)).

[225] *See generally id.*

[226] Caravan Coach Lines, Inc., Extension—New Jersey, No. MC-138730 (Sub-No. 15) (ICC Review Board No. 2 April 28, 1983).

[227] *Id.*

[228] *Id.*, slip. op. at 2-3.

[229] Protest of State of New Jersey, Department of Transportation at 6, Caravan Coach Lines, Inc., Extension—New Jersey, No. MC-138730 (Sub-No. 15) (ICC Review Board No. 2 April 28, 1983).

[230] *Id.* at 7.

Anticipating an adverse impact on the state's commuter bus service, the New Jersey Department of Transportation (NJDOT) also filed a protest.[231] There were two bases upon which NJDOT protested. First, it challenged the fairness of the ICC application process, asserting that the operational information required to be included in the proposed entrant's application was inadequate for purposes of assessing the impact of the proposed service.[232] Second, NJDOT maintained that the proposed service would destabilize the state's commuter bus network.[233]

With regard to its first argument, NJDOT took the position that because the ICC's new application process placed the burden on a protestant to prove that the applicant's proposed service was not consistent with the public interest, there should be a requirement that the application provide detailed operational information.[234] Otherwise, it asserted, the protestant could not properly assess the impact of the proposed service.[235] Using Caravan's application as an example, NJDOT pointed out that it provided no information concerning time schedules, location of pickups, or the number and type of vehicles to be used.[236] It claimed that because the information required of an applicant was so skeletal, the ability of a protestant to meet its burden was significantly hindered, if not completely destroyed.[237]

NJDOT's second argument concerning the need to maintain stable commuter operations was basically in support of Lakeland's protest.[238] NJDOT considered Lakeland a stable and reliable carrier.[239] The preponderance of Lakeland's operations was composed of commuter services, and the company transported approximately 5,600 commuters daily.[240] NJDOT was concerned that allowing Caravan to move into the finite markets in the areas which Lakeland serviced would have the effect of splintering service, thereby jeopardizing Lakeland's entire operations.[241] In the State's view, Caravan's operations would concentrate on "cream" routes;[242] there was no guarantee that the new operation would provide

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[231] *Id.*

[232] *Id.* at 3.

[233] *Id.* at 6.

[234] *Id.* at 3-6.

[235] *Id.*

[236] *Id.* at 4.

[237] *Id.* at 5-6.

[238] *Id.* at 6.

[239] *Id.*

[240] Caravan Coach Lines, Inc., Extension—New Jersey, No. MC-138730 (Sub-No. 15), slip op. at 3 (ICC Review Board No. 2 April 28, 1983).

[241] *Id.* at 4.

[242] These concerns were identical to those expressed by New Jersey Commissioner of Transporation Anne P. Canby during consideration of the Bus Act. *Senate Bus Act Hearings, supra* note 103, at 293.

the same type of area-wide service that Lakeland provided.[243] Further, competition in this area might preclude the profitability of either operation.[244] This would translate into abandonment of some routes or the need for state subsidies to allow continued service to certain areas.[245]

The legal arguments against Caravan's application were primarily contained in Lakeland's protest.[246] Because Caravan's application was for a new interstate service, the protestant had to meet the "public interest" test.[247] Invoking the four factor approach prescribed by Congress, Lakeland first argued that Caravan's proposed service would have a significant adverse impact on its systemwide commuter bus operations, thereby impairing its regular route operations.[248] Second, it contended that granting Caravan's application would be contrary to sections of the National Transportation Policy;[249] specifically, those sections which direct the ICC to encourage fair wages and working conditions in the transportation industry, to provide and maintain service to small communities, and to provide and maintain commuter bus operations.[250] Lakeland also echoed NJDOT's concern over the sparcity of information required of an applicant under the new ICC procedures, and urged the Commission to hold a hearing in order to supplement the record.[251]

Caravan countered these arguments by generally averring that its proposed service was consistent with the public interest in that it promoted the goals of the National Transportation Policy and the newly enacted Bus Act.[252] The "service . . . will be of value, and will affect favorably service to small communities."[253] Caravan contended that as a small carrier wishing to provide commuter service, it would expand commuter opportunities for citizens in the proposed area.[254] Further, it as-

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[243] *See House Oversight Hearings, supra* note 12 (Statement of James Crawford, Assistant Commissioner, New Jersey Department of Transporation) (*Caravan* decision could undermine stability of New Jersey's commuter network).

[244] *Id.*

[245] *Id.*

[246] Protest of Lakeland Bus Lines, Inc., Caravan Coach Lines, Inc., Extension—New Jersey, No. MC-138730 (Sub-No. 15) (ICC Review Board No. 2 April 28, 1983).

[248] Caravan Coach Lines, Inc., Extension—New Jersey, No. MC-138730 (Sub-No. 15), slip op. at 4 (ICC Review Board No. 2 April 28, 1983).

[249] 49 U.S.C.A. § 10101 (West 1983).

[250] Protest of Lakeland Bus Lines, Inc., at 23-24, Caravan Coach Lines, Inc., Extension—New Jersey, No. MC-138730 (Sub-No. 15) (ICC Review Board No. 2 April 28, 1983).

[251] *Id.* at 11.

[252] Caravan Coach Lines, Inc., Extension—New Jersey, No. MC-138720 (Sub-No. 15), slip op. at 5 (ICC Review Board No. 2 April 28, 1983).

[253] *Id.*

[254] *Id.*

serted that there was no evidence that its service would "substantially impair the overall operations of the protestants."[255]

The ICC granted Caravan's application.[256] First, it determined that Caravan had succeeded in overcoming the preliminary burden of proving that it was "fit, willing and able" to provide the service.[257] The Commission then disposed of the argument raised by NJDOT and Lakeland concerning the inadequacy of operational information, holding that the required information "sufficiently reveals the nature, extent and characteristics of the operation . . . ."[258] In addition, it found that the Bus Act does not require specific information of the type requested, and that such a requirement would be inimical to the flexibility which the Act sought to foster.[259] Accordingly, the ICC saw no reason to conduct a hearing or change its application procedures.[260]

The ICC dismissed the protestant's public interest arguments, holding that the record did not support a finding that "the ability of any existing commuter carrier to provide a substantial portion of their entire regular route system would be impaired . . . ."[261] The Commission also reminded the protestants that "evidence of potential diversion of traffic or revenue standing alone," is not sufficient to support a finding that an operation is not consistent with the public interest.[262] The ICC found no basis for denying Caravan's application. On the contrary, it declared that Caravan's proposed service was consistent with the articulated policies of the Bus Act, namely, the promotion of competition within the industry and improved service to small communities.[263]

The case was subsequently appealed to an ICC appeals board.[264] This appellate panel affirmed the decision below,[265] and discussed in detail only a minor issue concerning the inadequate attention given to the protest of Local 22 of the United Transportation Union.[266] Despite the rendering of a final decision in the case, it was subsequently reopened due

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[255] *Id.*

[256] *Id.* at 8.

[257] *Id.* at 5.

[258] *Id.* at 6.

[259] *Id.*

[260] *Id.* at 7-8.

[261] *Id.* at 7.

[262] *Id.* at 6.

[263] *Id.* at 7.

[264] Caravan Coach Lines, Inc., Extension—New Jersey, No. MC138730 (Sub-No. 15) (ICC App. Div. 1 August 1, 1983).

[265] *Id.*

[266] *Id.* Basically, this protest was based on the "fair wages and working conditions" portion of the National Transportation Policy. 49 U.S.C.A. § 10101(a)(2)(D) (West 1983).

to an ICC rule change which granted protestants the right to reply to an applicant's answer to the original protest.[267] While NJDOT and the other protestants were encouraged by this change and did file replies, the effort proved futile.[268] The Commission rendered a final decision in Caravan's favor on December 23, 1983.[269] An appeal of this decision is now pending before the United States Court of Appeals for the Third Circuit.[270]

The *Caravan* case demonstrates the ICC commitment to an interpretation of the Bus Act which promotes competition in spite of the probable adverse impact on an existing carrier.[271] As the initial decision in the case stated, "Congress emphasized that the public interest is of paramount importance and not the protection of existing carriers."[272] Nevertheless, it is entirely possible that in New Jersey's case, ICC decisions which authorize new competitive commuter services will jeopardize existing commuter operations with a resultant reduction in both the quality and quantity of service, contrary to the public interest.[273] Unfortunately, the four factor public interest standard does not appear to provide sufficient protections for existing commuter bus operations.[274] Using the *Caravan* case as an example, it seems clear that a protesting party attempting to demonstrate that the proposed service will significantly impair its entire regular route system would need to produce overwhelming evidence of potential harm in order to overcome its burden.[275] Although Caravan duplicated a substantial portion of Lakeland's commuter routes, the ICC did not deem this a sufficient basis for the denial of Caravan's application.[276] Moreover, the Commission clearly indicated that it did not feel bound to reject an application solely on this basis.[277]

What is clear from the result in *Caravan* is that the public interest test is extremely broad and grants to the ICC a considerable amount of

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[267] Caravan Coach Lines, Inc., Extension—New Jersey, No. MC-138730 (Sub-No. 15), slip op. at 1 (ICC Dec. 22, 1983).

[268] *Id.*

[269] *Id.*

[270] Lakeland Bus Lines, Inc. v. Interstate Commerce Commission and United States of America, No. 83-3400 (3d Cir. 1983).

[271] *See supra* notes 261-63 and accompanying text.

[272] Caravan Coach Lines, Inc., Extension—New Jersey, No. MC-138730 (Sub-No. 15), slip op. at 7 (ICC Review Board No. 2 April 28, 1983).

[273] *See House Oversight Hearings, supra* note 12 (Statement of James Crawford, Assistant Commissioner, New Jersey Department of Transportation).

[274] *See supra* notes 261-63 and accompanying text.

[275] *Compare* H.R. REP. NO. 334, *supra* note 2, at 30 (burden not intened to be insurmountable).

[276] Caravan Coach Lines, Inc., Extension—New Jersey, No. MC-138730 (Sub-No. 15), slip op. at 10 (ICC Dec. 22, 1983).

[277] *Id.*

discretion.[278] In this regard, it must be remembered that it was Congress, not the ICC, which established the test.[279] New Jersey may have legitimate concerns over the stability of its interstate commuter bus services, concerns which, at least to a limited extent, were addressed in the Bus Act.[280] Nevertheless, the ICC application of the public interest test holds no guarantee of protection of these services.[281] Until Congress amends the public interest test to specifically require a more detailed assessment of the impact of a proposed operation on commuter services, the state's argument that the ICC is ignoring Congressional intent is tenuous at best.[282]

New Jersey has also expressed concern over ICC authorization of intrastate regular route service to Atlantic City.[283] Two seemingly conflicting provisions of the Bus Act bear on this issue.[284] The first of these provides that the ICC does not have jurisdiction over intrastate regular route transportation "in the nature of special operations."[285] As discussed

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[278] *See* H.R. REP. NO. 334, *supra* note 2, at 31 (protections not intended to undercut basic policy objective of easing entry).

[279] *See supra* notes 159-65, 194-201 and accompanying text.

[280] *See supra* notes 197-201 and accompanying text.

[281] *See, e.g.*, Caravan Coach Lines, Inc., Extension—The Lincoln Tunnel Route, MC-138730 (Sub-No. 14), slip op. at 10 (ICC Review Board No. 1 March 10, 1983) (Chandler, Board Member, concurring):

> The unique character of interstate motor bus service in the New Jersey portions of the New York suburban area is amply demonstrated by the lengthy discussion in this decision of the operations performed by the four carriers which are parties to this proceeding. In this territory, many different bus companies operate over fixed routes which overlap, criss-cross, and generally lie close to those of their competitors. Competition is vigorous and often involves bitter disputes. Many bus operations are publicly subsidized, and it is unlikely that any can be conducted today at more than a marginal level of profitability.
>
> The problems presented to a regulator are entirely local, and it has long been absurd that they should be regulated by the Federal government as part of a statutory scheme necessarily directed primarily at long-haul intercity and charter bus operations conducted on a national scale. Unfortunately, however, the local jurisdictions have not been able to cooperate to the extent of agreeing on a plan for a multi-State regulatory compact, such as the one that governs bus service in the Washington, D.C., metropolitan area, under which essentially local services could be regulated in a manner designed to meet local needs. Thus, reluctantly, the Federal regulatory presence must be interposed in parochial disputes such as the one before us here.
>
> If we must regulate this kind of transportation, we must do so, as far as possible, with an understanding of and sympathy for the local situation. The issues raised by the New Jersey bus cases are different from those presented in the great majority of other applications coming before us. At times, therefore, different standards must be applied. For this reason I am prepared to agree that an exception to the Commission's usual policy of not restricting regular-route carriers against service at intermediate points is justified.

Id.

[282] *See House Oversight Hearings*, *supra* note 12 (Statement of James Crawford, Assistant Commissioner, New Jersey Department of Transportation).

[283] *Id.*

[284] 49 U.S.C.A. § 10922(c)(2)(B), (H) (West 1983).

[285] *Id.* § 10922(c)(2)(H).

previously, this restriction was placed in the Act as a result of New Jersey's efforts to maintain control over bus operations to and from Atlantic City.[286] The other provision, however, gives the ICC original jurisdiction over an application to provide intrastate service along an interstate route if the applicant did not possess interstate authority along that route prior to the effective date of the Bus Act.[287] The opposing goals of these provisions were exposed in the case of *C.L.D. Transportation Co., Inc. Extension—Regular Routes.*[288]

C.L.D., a New Jersey Corporation, sought regular route certification for service between New York City and Atlantic City.[289] Along with this underlying route, it also sought authority to provide service to all intermediate intrastate points. The application did not indicate the specific stops which were contemplated, but a fair reading of the route showed that C.L.D. planned the majority of its operations to be in New Jersey.[290] The initial application also made reference to casino packages which would be offered to patrons riding to Atlantic City casinos.[291] The State of New Jersey filed a protest to the application which advanced two distinct arguments.[292] First, it alleged that C.L.D.'s application was merely a subterfuge employed for the specific purpose of invoking ICC jurisdiction.[293] The state emphasized that most of C.L.D.'s operations would be within its borders, and only because the carrier had designated a New York departure point was it able to take advantage of the ICC's deregulatory posture.[294] In this regard, it was argued that if the ICC conducted more than a facial examination of the application, it would discover this underlying reality and reject the application.[295]

Second, and more importantly, the state argued to the Commission that Congress purposefully excluded "regular route transportation entirely in one state which is in the nature of special operations" from its jurisdic-

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[286] *See supra* notes 179-81 and accompanying text.

[287] 49 U.S.C.A. § 10922(c)(2)(B) (West 1983).

[288] No. MC-146473 (Sub-No. 8) (ICC Review Board June 7, 1983).

[289] *Id.*, slip op. at 1.

[290] *Id.*, slip op. app.; *see also* Protest of State of New Jersey, Department of Transportation at 3, C.L.D. Transportation Co., Inc., Extension—Regular Routes, No. MC-146473 (Sub-No. 8) (ICC Review Board June 7, 1983).

[291] C.L.D. Transportation Co., Inc., Extension—Regular Routes, No. MC-146473 (Sub-No. 8), slip op. at 2 (ICC Review Board June 7, 1983).

[292] Protest of State of New Jersey, Department of Transportation, C.L.D. Transportation Co., Inc., Extension—Regular Routes, No. MC-146473 (Sub-No. 8) (ICC Review Board June 7, 1983).

[293] *Id.*

[294] *Id.* at 6-10.

[295] *Id.* at 10-11. The practice of subterfuge applications for purposes of invoking ICC jurisdiction, and thereby evading state regulatory control, is one with which the ICC has long been familiar. *See generally* Motor Bus and Truck Operations, 140 I.C.C. 695, 703-04 (1928).

tion.[296] In the course of its argument, the state clarified its interpretation of this definition, hoping in the process to persuade the ICC. The state termed this service a "*hybrid,*" and went on to say that "[t]his hybrid service is not merely a regular-route; neither is it your usual 'special operation.' Rather, it combines some elements, and not necessarily all, of both types of service."[297] The state urged that the exemption of special operations be read in conjunction with the language contained in the House Report on the Bus Act.[298] This language stated that "a carrier certified under the provisions of paragraph (3) would not be authorized to transport passengers from a point in New Jersey to Atlantic City if such transportation included *any* element of the tour service typically offered to patrons of gambling casinos."[299]

Turning to the application of C.L.D., the state asserted that the carrier, through its own admission, planned to regularly offer casino bonuses.[300] Accordingly, it argued, the Commission should reject the application on the basis of lack of jurisdiction.[301] In further support of its position, the state stressed to the Commission that control of these operations was a health and safety matter, and was necessary to avoid excessive congestion of its roads and highways.[302]

The ICC decided in favor of C.L.D., finding that there was no need for a detailed examination of the application, and rejecting the state's argument that C.L.D.'s operation constituted "regular-route transportation entirely in one state which is in the nature of a special operation."[303] In rejecting the state's argument, the ICC definitively stated that the "[a]pplicant will provide a scheduled regular-route service and, although it proposes to cooperate with the casinos' bonus incentive programs to passengers, we fail to see how this is sufficient to transform applicant's proposed service into special operations."[304] Responding to the state's health and safety argument, the Commission stated that "[t]his decision

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[296] 49 U.S.C.A. § 10922(c)(2)(H) (West 1983).

[297] Rebuttal Statement on Behalf of Protestant, State of New Jersey, Department of Transportation at 2, C.L.D. Transportation Co., Inc., Extension—Regular Routes, No. MC-146473 (Sub-No. 8) (ICC January 27, 1984).

[298] *Id.*

[299] H.R. REP. NO. 334, *supra* note 2, at 35 (emphasis added).

[300] Protest of the State of New Jersey, Department of Transportation at 7, C.L.D. Transportation Co., Inc., Extension—Regular Routes, No. MC-146473 (Sub-No. 8) (ICC Review Board June 7, 1983).

[301] *Id.* at 6-11.

[302] *Id.* at 9.

[303] C.L.D. Transportation Co., Inc., Extension—Regular Routes, No. MC-146473 (Sub-No. 8), slip op. at 3 (ICC Review Board June 7, 1983).

[304] *Id.*

will not significantly affect either the quality of the human environment or conservation of energy resources."[305] In sum, the Commission found C.L.D. "fit, willing and able properly to provide the transportation services, . . ." that protestants had failed to demonstrate that the proposed operation was "not consistent with the public interest," and that the case was within ICC jurisdiction.[306]

The decision was appealed to an ICC appeals board which affirmed the decision below.[307] Nevertheless, the Commission re-opened the C.L.D. case on the same procedural grounds that it had re-opened the Caravan decision, thereby allowing the protestants the opportunity to resubmit their arguments.[308] Once again, this effort failed to alter the result.[309] On January 27, 1984, the Commission handed down its final decision granting C.L.D.'s application.[310] In so doing, the ICC reemphasized that it clearly rejected the State of New Jersey's interpretation of the exemption language, stating that it would be "unworkable."[311] The Commission asserted that "[r]egular route operations routinely overlap and contain certain characteristics of special operations. NJDOT's interpretation would result in preclusion of any additional regular route intrastate authorization under 49 U.S.C. 10922(c)(2)(B), and we do not believe that this was the intent of Congress in enacting Section 10922(c)(2)(H)."[312] Finally, the Commission restated that "the mere fact that C.L.D. will serve directly the Atlantic City casinos is insufficient to indicate to us that the proscriptions of Section 10922(c)(2)(H) should come into play."[313]

In this case, New Jersey makes a persuasive argument that the true intent of Congress is being ignored by the ICC. As the state vehemently contends, the exclusion of regular routes in the nature of special operations was placed in the Bus Act on its behalf.[314] The language in the report on the Act issued by the House Committee on Public Works and Transportation reinforces this contention.[315] The ICC should read this exclusion in light of its legislative history.

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[305] *Id.* at 4.

[306] *Id.*

[307] C.L.D. Transportation Co., Inc., Extension—Regular Routes, No. MC-146473 (Sub-No. 8) (ICC App. Div. 2 Sept. 22, 1983).

[308] *See supra* notes 267-68 and accompanying text.

[309] C.L.D. Transportation Co., Inc., Extension—Regular Routes, No. MC-146473 (Sub-No. 8) (ICC January 27, 1984).

[310] *Id.*

[311] *Id.* at 5.

[312] *Id.*

[313] *Id.* at 6.

[314] *See supra* notes 79-81 and accompanying text.

[315] H.R. REP. NO. 334, *supra* note 2, at 35.

Conclusion

The Bus Regulatory Reform Act of 1982 is a deregulatory measure, and the ICC has implemented it from that standpoint. The problems which the State of New Jersey is experiencing are, to a large extent, a result of the breadth of the Act itself. This becomes clear upon examination of the wide discretion afforded the ICC in applying the public interest test. Congress may have intended to protect commuter services from destabilizing competition; however, it did not provide a sufficient basis for this protection.

The Atlantic City problem is less clear. The exclusionary language employed by Congress concerning "special operations" targeted the Atlantic City bus market. In this limited area, it is a reasonable contention that the ICC is ignoring the economic reality of certain applications, and, in the process, is contravening Congressional intent. Unfortunately, it is not likely that the ICC will be forced to alter its implementation policy without Congressional action.

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