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Decision No. 89815 DEC 22 1978

FINDING

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of ALLTRANS EXPRESS CALIFORNIA, INC. for authority to sell (1) its operating authority as a highway common carrier; and (2) certain property used in its public utility operations; and of DELTA LINES, INC. for authority to purchase the operating authority as a highway common carrier of ALLTRANS EXPRESS CALIFORNIA, INC.	Application No. 54997 (Filed June 26, 1974)

Dunne, Phelps & Mills, by Marshall G. Berol and James O. Abrams, Attorneys at Law, for Delta Lines, Inc. and Alltrans Express California, Inc.; and McCutchen, Doyle, Brown and Enersen by Stephen Grant, Attorney at Law, for Delta Lines, Inc.; applicants.

Silver, Rosen, Fischer & Stecher, by Martin J. Rosen, Michael J. Stecher, and John J. Hollenbach, Jr., Attorneys at Law, for Applegate Drayage, protestant. Mr. Rosen also appeared for Nielsen Freight Lines and Peters Truck Lines, protestants.

Malcolm G. Ellis, Attorney at Law, for Transcal Employees, Southern California; and George R. Gilmour, Attorney at Law, for Toward Utility Rate Normalization (TURN); interested parties.

Ira R. Alderson, Jr., Patrick J. Power, James Squeri, and Maxine C. Dremann, Attorneys at Law, and George Kataoka, for the Commission staff.

Sheldon Rosenthal and Scott Carter, Attorneys at Law, for Commissioners Holmes and Sturgeon, Administrative Law Judge Gilman, and Commissioner Assistant Bricca (special appearances).

OPINION ON REHEARING

I. Introduction

As ordered by Commission Decision No. 83581 issued October 8, 1974, this matter is on limited rehearing (1) to allow introduction of evidence with respect to the effect on competition, reflecting the sua sponte burden placed upon this Commission to "... place the important public policy in favor of free competition in the scale along with the other rights and interests of the general public." (Northern California Power Agency v PUC (1971) 5 C 3d 370, 377), and (2) to allow introduction of evidence with respect to waiver of the guarantees to be made by Delta and its affiliates under the September 30, 1972 loan agreement between Delta California Industries and the Bank of America National Trust and Savings Association. In furtherance of the first objective of the limited rehearing ordered, on November 26, 1974 the Commission by Decision No. 83787 directed that the Commission staff should participate in the rehearing.

In all, there have been three days of prehearing conference and 25 days of hearing in this entire proceeding. The three days of hearing leading to the original basic decision, Decision No. 83292 authorizing the merger, were held before Administrative Law Judge John C. Gilman[1/] with the then assigned Commissioner Vernon L. Sturgeon in attendance on July 18, 19, and 22, 1974. After limited rehearing was ordered on October 8, 1974, there were three days of prehearing conference before ALJ Gilman on November 8, 1974, December 20, 1974, and January 24, 1975, followed by ten days of hearing before ALJ Gilman on June 23, 24, 25, 26, 27, and 30, 1975, July 1, 1975, October 20 and 27, 1975, and December 15, 1975. Newly

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1/ The title of the Commission's hearing officers was changed from Examiner to Administrative Law Judge effective May 25, 1977.

assigned Commissioner William Symons, Jr. was in attendance the last day.[2] Thereafter, there were twelve days of hearing before ALJ John B. Weiss,[3] with assigned Commissioner Symons in attendance the first two days; these hearings were held on January 5, 6, and 22, 1976, June 21, 1976, July 18, 19, 20, 21, and 22, 1977, and August 23, 24, and 25, 1977. All hearings were in San Francisco. The matter was submitted initially on December 30, 1977, the last day set for submission of concurrent rebuttal briefs, but submission was vacated on January 11, 1978 by the presiding ALJ with concurrence of the assigned Commissioner to direct advisory briefing by the parties on the possible mootness, in whole or part, of a decision on the merits in view of changes to the Public Utilities Code contained in Stats. 1977, Chapter 840 (SB 860). By Decision No. 88420 dated January 24, 1978, the Commission sitting en banc reversed the ruling of the ALJ, and ordered the matter to stand submitted as of February 15, 1978.

Subsequently, assigned Commissioner Symons placed the recommended decision prepared by ALJ Weiss on the March 7, 1978 Conference agenda for the Commission's consideration. At the request of Commissioner Gravelle, the Commission put the matter over to allow Commissioner Gravelle to prepare an alternate order. Thereafter, pursuant to the request from the Delta attorney in a March 20, 1978 letter to Commissioner Symons, and in order to assure fundamental fairness, the Commission under provisions of Rule 87 of its Rules of Practice and Procedure determined to waive the requirements of Rule 78, and on March 27, 1978 issued the recommended decision of ALJ Weiss as a proposed report.

2/ On November 25, 1975, because of developments in the rehearing, and "in order to assure fairness and avoid even the appearance of a conflict of interest", the Commission formally reassigned the case from Commissioner Sturgeon to Commissioner Symons.

3/ As a consequence of possibly prejudicial effect upon the ALJ's judgment arising out of the May 28, 1975 ex parte contact by applicant's attorney with ALJ Gilman, Commissioner Symons (with ALJ Gilman's consent) determined upon reassignment of another ALJ to the case. Accordingly, ALJ Weiss was assigned to the case on December 15, 1975.

The Commission staff filed timely exceptions. Applegate and Delta filed timely replies to the exceptions. The Commission has now fully considered the exceptions and replies. The proposed report of ALJ Weiss is appended hereto as Attachment A and will be adopted, as modified herein as the result of consideration of the exceptions and replies thereto.

II. Issues

The following issues have been raised by the exceptions and replies:

A. What Definition of Relevant Product Market Should Be Adopted in this Proceeding?

B. What Definition of Geographic Market Should Be Adopted in this Proceeding?

C. Is the Staff Study Valid?

D. Is the Failing Company Defense Applicable?

E. What Finding and Conclusion Should Be Made with Respect to the Attempted Preservation of the 400 Jobs?

F. What Effect Did the Transfer Have on Competition?

III. Discussion

A. What Definition of Relevant Product Market Should Be Adopted in This Proceeding?

The Commission staff takes exception to the definition of relevant product market which is set forth in Conclusion No. 3 of the proposed report as follows:

> "3. The relevant 'product market' in California consists of the transportation of all weight classifications of general commodities freight intercity by common, permitted, parcel delivery, and proprietary carriers."

The staff contends that the relevant product market is the intrastate intercity for-hire transportation of general commodities in lots of 10 to 10,000 pounds by highway common carriers and express corporations.

It points out that the various kinds of operating authority in California have substantially different legal rights and obligations and serve certain submarkets in the trucking industry. However, it contends that only one of these submarkets, less-than-truckload (LTL), is relevant in determining whether there are anticompetitive considerations which would justify denial of the application.

It asserts that the proposed report arrives at its definition of relevant product market by distortion of the interchangeability test which is the basis of the definition in the significant cases addressing the issue of market definition.

The classic approach to product market definition is stated at page 44 of the proposed report:

> "In considering what is relevant market for determining the control of price and competition no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of trade or commerce,' monopolization of which may be illegal." United States v DuPont de Nemours & Co. (1956) 351 U.S. 377, 395. (Emphasis added.)

Delta Lines, Inc. (Delta) considers truckload and parcel delivery services to be necessary to its overall operation and therefore, ostensibly interchangeable with LTL. This focus is on trucking services that may be interchangeable to Delta whereas the appropriate inquiry should be whether parcel delivery and truckload carriers are interchangeable with LTL carriers for shippers of 100 to 10,000 pounds. The staff asserts that the obvious answer is that they are not.

The proposed report has interpreted the "cluster of services" concept to include in the market any carrier that competes for any one service in the cluster. The cases relied on are U.S. v Grinnell Corp. (1966) 384 U.S. 563, and U.S. v Philadelphia Nat. Bank (1963) 374 U.S. 321. These cases, however, hold that the only entities that should be included in the market analysis are those that offer every service in the cluster.

The following language from Grinnell supports such conclusion:

> "Defendants earnestly urge that despite these differences, they face competition from these other modes of protection. They seem to us seriously to overstate the degree of competition, but we recognize (as the District Court found) they 'do not have unfettered power to control the price of their services... due to fringe competition of other alarm or watchmen services.' 236 F. Supp at 254. What defendants overlook is that the high degree of differentiation between central station protection and the other forms means that for many customers, only central station protection will do." Grinnell, supra at 574.

Similarly in Philadelphia the Supreme Court excluded purveyors of only limited competing services:

> "Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. For example, commercial banks compete with small-loan companies in the personal-loan market; but the small-loan companies' rates are invariably higher than the banks', in part, it seems, because the companies' working capital consists in substantial part of bank loans. Finally, there are banking facilities which, although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a market degree, from competition; this seems to be the case with savings deposits." Philadelphia, supra at 356-367.

Among the entities excluded from the market were:

> "Mutual savings banks, savings and loan associations, credit unions, personal-finance companies, sales-finance companies, private businessmen (through the furnishing of trade credit), factors, direct lending government agencies, the Post Office, small business investment corporations, life insurance companies." Philadelphia, supra at 328.

The staff suggests that these exclusions furnish apt analogies: contract carriers to mutual savings banks, radial carriers to savings and loans associations, and parcel delivery to credit unions. Paraphrasing Grinnell, for many customers only the highway common carriers of general commodities will do.

The reason is very simple: economics. The essence of less-than-truckload transportation is the combining together of shipments of from 100 to 10,000 pounds from different consignors to different consignees from one geographic area to another. Inherent in LTL is the inefficiency of moving the freight without consolidation. Plainly, the combination of shipments can only be accomplished through the use of terminals at the points of origin and destination. Since the radial carrier cannot lawfully operate between fixed points over regular routes, it cannot effectively duplicate the service of a common carrier. Similarly, the combination of shipments can only be accomplished on a large scale by a carrier holding itself out to serve the public. Because contract carriers are precluded by law from serving the public generally, the contract carrier cannot lawfully offer the equivalent service of a common carrier. Some of the testimony sponsored by Delta supports a determination of illegal operations on the part of some carriers, rather than a finding of effective LTL competition between carrier classes.

The staff also points out that economics eliminates proprietary carriage from the relevant product market. The proposed report recites Campbell's Soup, Lipton's Tea, Thrifty Drug, and J. C. Penney as examples of proprietary carriers (p. 22). But the statewide distribution problem is not simply that of Sears, Penney's or Montgomery Wards. The customers who need a full service common carrier are those who would like, someday, to be as big as these huge companies, but who will need a lot of help, with efficient distribution of goods playing a key role. There are thousands of shippers throughout the state making shipments each day to widely dispersed customers. Often their

physical facilities will preclude dealing with different carriers for each shipment and they will deal with the minimum number of carriers with the appropriate operating authority. Again paraphrasing Grinnell, for many customers only the use of highway common carriers of general commodities will suit their needs.

In its reply to the exceptions of the staff Applegate Drayage Company (Applegate) adopted each and all of the exceptions of the staff, its citations to statutory provisions and principal authorities, and its proposed findings of fact and conclusions of law.

In its reply to the exceptions of the staff Delta contends that the exceptions should be rejected on the merits because the uncontradicted evidence in the case supports every finding and conclusion of the ALJ, as well as the proposed report in its entirety.

Specifically Delta contends that the shipping public views proprietary, permitted and common carriage as "functionally interchangeable" for the transportation of LTL and TL, and parcel delivery and common carriers as "functionally interchangeable" for the transportation of less than 101 pounds (minishipments). Delta points out that common carriers daily compete with parcel delivery carriers for shipments of less than 101 pounds (minishipments) and with permitted and proprietary carriers for TL and LTL shipments.

In this proceeding the definition of the relevant product market proposed by the staff will be adopted because the LTL submarket is the primary submarket which is relevant in determining whether there are anticompetitive considerations which would justify denial of the application and because in this submarket (under the cluster of services doctrine of the Grinnell and Philadelphia cases) permitted carriers and proprietary carriers should be excluded; only highway common carriers and express corporations should be included in the definition.

We conclude that the relevant product market is the intrastate intercity for-hire transportation of general commodities in lots of 10 to 10,000 pounds by highway common carriers and express corporations.

B. What Definition of Geographic Market Should be Adopted in this Proceeding?

The staff takes exception to conclusion 4 which states:

"The relevant 'geographic market' in California is the intercity movement of all weight classifications of general commodities freight throughout the State of California."

The staff defines the relevant geographic market as the total of those submarkets which are the traffic lanes interconnecting the various terminal groupings wherein Delta and Alltrans competed for traffic at the time of filing.

The staff contends that the geographic market cannot extend beyond the combined geographic operating authority range of Delta and Alltrans, and asks of what significance to the acquisition is the freight moving between two points not covered by these certificates.

Delta in its reply contends that the essential fallacy in the staff's approach is that a study of terminal-to-terminal movement will show traffic moving between two cities or areas in which the terminals are located. Where the question is traffic movement both the number and location of terminals is immaterial. The issue is whether the traffic moves from the origin point to the destination point, not how it gets there. Between any two points there can be substantial competition from single terminal carriers and from carriers that operate no terminals at all. Delta points out that the entire market could have been sampled and a statistically reliable result achieved.

The staff is correct in its contention that freight moving between points not covered by Delta's certificate is not relevant to the issue of the anticompetitive effect of the transfer of the Alltrans operating authority. For the purpose of considering the anticompetitive effect of the transfer it was appropriate for the staff to include in its study traffic between those common points where the largest volume of competitive traffic was being handled by Alltrans and Delta. It was reasonable to limit the study to traffic moving

in the lanes interconnecting the various terminal groupings wherein Delta and Alltrans competed for traffic at the time of the filing of the application, as such lanes would undoubtedly be those involving the largest volume of competitive traffic.

We conclude that the relevant geographic market is the total of those submarkets which are the traffic lanes interconnecting the various terminal groupings wherein Delta and Alltrans competed for traffic at the time of the filing of the application.

C. Is the Staff Study Valid?

The staff takes exception to Finding No. 16 which states: "The staff study has no statistical validity."

The staff points out that the proposed report recites a number of criticisms of the staff study but contends that the proposed report does not recite the evidence presented by Delta to confirm that the criticisms are valid, except in one instance.

The proposed report accepts Delta's contention that the staff exclusion from its study of carriers grossing less than $500,000 annually "destroys credibility in that while smaller carriers do not provide a transportation service for all commodities throughout the State of California, but rather tend to be concentrated in specific geographic regions, such carriers could be significant over particular lanes. Here they were arbitrarily eliminated and their impact on any given lane was not even investigated." (Proposed Report p. 51.)

The staff points out that although Delta attacked the staff exhibit it did not supply the evidence itself regarding the carriers and lanes to correct the alleged deficiency so that the extent of the alleged deficiency, if any, could be determined by the Commission.

The staff points out that Delta had the opportunity to review all of the underlying data of the staff report, and contends that to the extent such data was found to be deficient by Delta, Delta should have supplied the evidence necessary to rebut any deficiencies so that the Commission would have a complete record on which to base its decision.

Delta or the co-applicant Alltrans could have undertaken independent discovery to obtain information and raw data on the market shares of competitors in relevant traffic lanes and prepared a study on the anticompetitive effect of the proposed acquisition. Instead, they chose on rehearing to let the staff develop the evidentiary record on anticompetitive implications. Since Delta or Alltrans did not undertake and prepare a study there may be a tendency to believe the burden of showing the effect on competition was the staff's alone. We directed the staff to undertake a study in order to discharge our sua sponte obligation to consider anticompetitive implications. However, we could have just as easily directed the applicants to develop the evidentiary record on rehearing to show the effect on competition. Essentially, the burden of showing the proposed acquisition does not have anticompetitive implications, or that there is a public interest to be served that outweighs any anticompetitive effects, is on the applicants.

We take this opportunity to commend the staff for its diligence in responding to our directive to develop the record in this proceeding on rehearing as an interested party.

The staff further points out that part of the deficiency complained of by Delta was based on unreliable information furnished by Delta's co-applicant Alltrans:

> "In his study of each of the 38 responses used by the staff, Dr. Daicoff testified that he had discovered that one respondent [applicant], Alltrans, with some 34 traffic lanes to cover, reported 1,724 shipments on each of eight different lanes, and a multiple (twice or thrice) 1,724 on another eight lanes. ...[I]t is patently obvious that the Alltrans 1974 figures were fictitious made up numbers; a result beyond the laws of statistical probability." (Proposed Report p. 53.)

The staff points out one of the applicants, Alltrans, has furnished the staff unreliable data which it knows will be incorporated in the staff study. At the hearing the staff study was attacked by Delta, a co-applicant because of the unreliable data furnished by Alltrans. Then Delta urges that the application be granted because there is no reliable evidence on which to base a finding that the acquisition of Alltrans by Delta might have a serious anticompetitive effect. Likewise, in such a situation there would be no reliable staff evidence on which to base a finding that: "The acquisition of Alltrans by Delta has been shown to have had a neutral effect on competition in that segment of the market sampled." (Proposed Report Finding 5, p. 68.)

The staff contends that the furnishing of unreliable data by Alltrans supports the denial of the application without consideration of the antitrust issues. The staff asserts that as a practical matter Delta has still failed to prove that the numbers furnished by the staff are not reasonably representative of the actual shares, and that Delta should be estopped from asserting their unreliability.

In its reply Delta admits that there is no question that the staff study was well-intended and conscientious but contends that the record is clear that the staff study is valueless for the following reasons:

1. None of the information submitted to the staff on which its report was based was audited or verified in any respect. (Tr. pp. 1791, 1970, 2008-2012, 2483.)

2. Each carrier supplying data was permitted to make its own judgment as to the information requested and has to supply it. (Tr. p. 1792.)

3. The mail questionnaire that solicited the information did not define its terms (Tr. pp. 2210-2214) or describe how the information sought was to be gathered. (Tr. p. 2217.)

4. No control was built into the questionnaire to check the accuracy of the information submitted. (Tr. pp. 2220-2221.)

5. The staff study measured only the intercity movement of LTL, by common carriers (Exhibit R-14, pp. 19, 20), and excluded proprietary and permitted carriers, two substantial purveyors of that service.

6. The staff limited its study of highway common carriers to those whose LTL revenues were greater than $500,000, (Exhibit R-14, Appendix I ("Eye"), p. 1-1), even though the smaller carriers whose operations were ignored might be precisely the ones who are of greatest significance in the particular traffic lanes under study. (Tr. p. 2196.)

7. From the 2307 carriers reporting LTL revenue under MRT 2 in 1974 (Exhibit R-14, Appendix I, only the 105 largest carriers were selected. This number was further reduced by various judgments made by the staff (for example all permitted carriers and one-terminal carriers were excluded) to 38 carriers, less than two percent of the purveyors of LTL service. (Exhibit R-14, Appendix I, Table II.)

8. The inadequacy of the staff's judgmental exclusions is illustrated by comparing the carriers identified in its study (Exhibit R-15) with the carriers identified in the Pacific Coast Tariff Bureau and Western Motor Tariff Bureau scope tariffs. (Exhibit 23, Tr. pp. 2345-2351) as follows:

Lane	No. of Certificated Carriers in Staff Report	No. of Certificated Carriers in Scope Tariffs
Los Angeles - San Diego	18	42
Los Angeles - Santa Maria	6	19
Los Angeles - Vallejo	2	18
Salinas - Santa Barbara	4	16

9. Information obtained from Alltrans has been shown and is admitted by the staff to be fictional, made-up numbers. Of the 34 submissions of answers to the staff questionnaire regarding shipments, 16 were an exact multiple of 1724 and 6 were a multiple of 1714. (Tr. p. 2229.) The staff was told specifically that Alltrans had in its possession only a few freight bills for 1974 and that it was concerned they were not representative. Nevertheless the staff told Alltrans to endeavor to obtain additional information. Accordingly, Alltrans, at the suggestion of the staff, made up some estimate of what it thought the information might be. (Tr. p. 2480.)

10. The staff treated Delta's submissions as covering the period January 1 to August 18 (Tr. p. 2016), rather than January 1 to July 31 as actually was the case. (Tr. pp. 2254-2255.)

11. The staff study failed to take into account seasonal variations in traffic flow and that a higher volume of shipments is handled in the last quarter of the year. (Tr. pp. 2255-2256.)

12. The staff study failed to take into account that Alltrans was to be closed down on August 16, 1974, and that its business would have been absorbed by the carriers remaining in the market. (Tr. pp. 2257-2258.)

13. When the corrections set forth in paragraphs 10, 11, and 12 are made, the staff study shows that Delta achieved an overall market share that was less than it would have been expected to have obtained if Alltrans had merely shut down. (Exhibit R-17.)

In view of the Commission's definitions of relevant product market adopted in this proceeding the alleged deficiency set forth in paragraph 5 above is not a deficiency.

The record shows that the so-called fictional, made-up numbers furnished by Alltrans and discussed in paragraphs 9 and 10 above are the best estimates which could be furnished by Alltrans. There is no evidence in the record to show that better estimates could be furnished if this proceeding is reopened for the receipt of further evidence. Such estimates are reasonable and will therefore be relied upon.

The staff's contention that it was incumbent on the applicants to supply the primary evidence relating to carriers other than themselves where they allege deficiencies in the staff study is well taken. As discussed earlier, the applicants could have undertaken independent discovery; they did not. The staff's working papers and raw data supporting the study were available to the applicants so they could have undertaken discovery into areas they took exception to or seriously questioned. The inaction of the applicants to develop the evidentiary record on rehearing with respect to anticompetitive implications made the staff's study the focal point on rehearing.

After a review of the record we are of the opinion the staff's study (with corrections incorporated in Delta's Exhibit No. R-17) is probative and valid for the purpose intended, e.g., to illustrate the effect on competition of the proposed acquisition. Given the lack of an alternative study, our evidentiary record on rehearing would otherwise be void of meaningful data to evaluate any anticompetitive effects of the acquisition.

D. Is the Failing Company Defense Applicable?

The staff takes exception to Conclusion No. 6 which states:

"Alltrans was a 'failing company' whose acquisition by Delta preserved competition in the relevant markets and thereby furthered the public interest."

The staff contends that this conclusion is contrary to the facts and the law and refers to the discussion in the proposed report at pages 61-62.

The staff also takes exception to Finding No. 2 which reads:

"Negotiations with one potential purchaser having failed, time was running out when Delta was approached, leaving Delta the only viable potential purchaser Alltrans had located interested in the acquisition within the time constraints placed on Alltrans by its Australian owners."

The staff asks the question how can two parties (Alltrans and Delta) to a transaction agree to an artificial deadline and then rely on that deadline as a defense to an otherwise illegal transaction. The staff contends that the facts do not support applying the failing company defense because of the failure to meet the "only available purchaser" test adopted in Citizen Publishing Co. v U.S. (1969) 394 U.S. 131.

The staff also asserts that Finding No. 1 which reads as follows is not supported by the record:

"The intrastate highway common carrier operations of Alltrans by 1974 had become increasingly unprofitable resulting in substantial losses despite strenuous efforts to ameliorate the development, until in early 1974 the Australian owners determined to sell the operation immediately, or in the absence of a sale by August 16, 1974, unilaterally shut down the operations."

Exhibit No. 1 attached to the proposed report is an Examiner's Ruling dated May 20, 1977, on a motion filed by protestant Applegate. This ruling includes a lengthy discussion of the representations made to the Commission at the original hearing in which the following statement appears on page 21:

> "In the July 1974 hearing on the then proposed acquisition Delta's president testified at some length and with a degree of specificity as to how his secretary-treasurer, along with his people in operations and other fields, worked with the secretary-treasurer's counterpart in Alltrans, and concluded from their study that Alltrans could be 'turned around and turned around in a short period of time and made to operate in the black'. The conclusion was assertedly made after an in-depth analysis of the Alltrans ledger for a 4-week period in April 1974 (the then most current Alltrans profit period)."

The staff contends that Alltrans could not have met the failing company test in view of the realistic prospects of its being "turned around" by Delta. To meet this test the acquired company must first have had its "resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure." International Shoe v FTC (1930) 280 U.S. 291 at 302.

The staff points out that the suggestion that the failing company defense has been liberalized by the Supreme Court in U.S. v General Dynamics Corp. (1974) 415 U.S. 486 was expressly repudiated in this decision at page 507:

> "... The District Court's conclusion was not identical with or even analogous to such a finding (of failing company)."

The General Dynamics case found that the acquired company would not be a significant competitive factor because nearly its entire resources (coal reserves) were then already committed to long-term contracts.

In support of its contention that the failing company doctrine is applicable Delta refers to Decision No. 83292 herein issued August 6, 1974 wherein the Commission chronicled the history of Alltrans, the losses it had sustained and the decision of its owners "that their losses could no longer be tolerated and that the intrastate carriage business must be either terminated or sold before the close of the parent's fiscal year, June 30 [later reluctantly extended to August 16, 1974]". (Also see Tr. pp. 40-77.)

Delta refers to the efforts of Alltrans to find a buyer within the time constraints laid down by its parent company Thomas National Transport (TNT). Alltrans compiled a list of carriers that might be interested in purchasing the company, and contacted only carriers which it felt would have an interest in the acquisition and which would be prepared to come to an agreement as quickly as possible. The first carrier was contacted in late April but although the parties were close on price they could not agree on method of payment or security. Delta which was the second carrier contacted showed an interest, was permitted to inspect the facilities of Alltrans, and was given one week to determine whether to go forward with the purchase. At the same time Alltrans developed a very specific and detailed plan for closing down. Agreement was reached with Delta on June 14, but if a concrete agreement had not been reached by June 30, Alltrans would have closed operations. (Tr. pp. 67-73.) Delta had nothing to do with Alltrans cessation of operations on August 16. TNT made the decision unilaterally that Alltrans would not be permitted to continue its operations beyond August 16, 1974 because of mounting losses. (Tr. p. 47.)

Delta asserts there is no evidence of record to support the staff's contention that Alltrans did not face "the grave possibility of business failure". Delta again points out that TNT was firmly committed to closure of Alltrans on August 16. (Tr. pp. 47-48 and 76-77.) Delta contends that the record establishes beyond question

that on June 1, 1974, Delta was the only practicable source of financing available to maintain the operations of Alltrans. In support of the applicability of the "failing company defense" Delta cites United States v International Harvester, 564 F 2d 769 (7th Cir. 1977) BNA Antitrust Reg. Rep. No. 839, November 17, 1977; United States v General Dynamics Corp. (1973) 415 U.S. 386; and United States v Southern National Bank (1974) 422 U.S. 86.

The record shows that Delta was a viable purchaser but not the only possible viable purchaser. The record shows that Alltrans contacted only two carriers, Delta being the second. Delta itself in the footnote on page 29 of its reply to the exceptions of the Commission staff states:

> "Alltrans made the decision to deal with one prospective purchaser at a time, rather than to make a general offer to sell. 'We decided it was in our best interest to deal with one carrier at a time'." (Tr. p. 67.)

We do not know what would have happened had Alltrans decided to make a general offer to common carriers and other parties who may have been interested in conducting highway common carrier operations in California. It was the time constraints imposed by Alltrans parent TNT and the method of seeking a purchaser which resulted in Delta being the only prospective purchaser on June 1, 1974.

TNT threatened to close down Alltrans, although Alltrans had the obligation to serve the public under its certificates of public convenience and necessity. There is no evidence that Alltrans itself explored other alternatives such as the employment of new management or the obtaining of financing other than through its parent TNT in order to enable it to continue its operations. As the staff has pointed out, Delta itself at the time of the negotiations was of the opinion that Alltrans' operations were viable.

We conclude that the failing company defense is not applicable in this proceeding.

E. What Finding and Conclusion Should Be Made with Respect to the Attempted Preservation of the 400 Jobs?

The staff takes exception to Finding No. 3 and Conclusion No. 7 insofar as they relate to the preservation of some 400 jobs (thereby promoting the public interest) on the grounds that they overlook the controlling law and are irrelevant.

The staff points out that Alltrans had a public utility obligation which was not subject to the whims of TNT, the Australian owners. The staff suggests the alternative that if the Commission had summarily denied the application and enjoined the abandonment Alltrans might have been acquired by an entity which would have truly succeeded in preserving the 400 jobs. The staff requests the Commission to repudiate the suggestion that a common carrier can abandon service unilaterally without Commission authorization.

Delta asserts that the ALJ in Conclusion No. 7 of the proposed report correctly concluded that the acquisition reasonably offered continued employment to approximately 400 Alltrans employees and the preservation of existing competition in territory where Alltrans had authority and Delta did not.

With respect to the contention that a utility ought not to be able to abandon its operations unilaterally, Delta cites Lyon & Hoag v R.R. Commission 103 Cal. 145 (1920), as holding otherwise where a utility has consumed its capital in the service of the public interest.

Delta also points out that the Commission in Decision No. 83292 herein specifically has concluded that the Commission would not prevent Alltrans from discontinuing its operations in the circumstances presented.

Conclusion No. 1 in Decision No. 83292 is based on Findings Nos. 1 and 2 therein which read as follows:

"1. Alltrans has a negative net worth of $1.5 million. Substantially all of its losses were incurred in rendering public service.

"2. Alltrans' management will commence its discontinuance plan if the application is not approved on or before August 16, 1974."

Conclusion No. 1 in Decision No. 83292 reads as follows:

"1. A carrier which has expended all of its original capital in losses incurred in rendering common carrier service cannot, consistent with due process, be prohibited from discontinuing service. The Commission will not prevent Alltrans from discontinuing its intrastate carrier operations."

Decision No. 83292 herein is of course the decision which is the subject of this rehearing and therefore it is not a final decision of this Commission.

On page 4 of Appendix A to Exhibit No. 1 of the proposed report, which is a Chronology of Events and Summary of Evidence, it is stated that at 12:01 a.m. August 19, 1974, Delta took over Alltrans, renamed it TransCal, and thereafter operated it as a division of Delta, doing business as TransCal Motor Express, Inc. On page 6 of Exhibit No. 1 reference is made to the press release announcing the close down of TransCal effective May 30, 1975. During the nine months period that Alltrans was operated by Delta as its TransCal division a loss of approximately $1,200,000 was incurred by Delta on these operations. (Exhibit No. 1, Footnotes 15 and 16.)

A recital of the facts regarding the 400 employees of Alltrans appears in Footnote 12 on page 22 of Exhibit No. 1 as follows:

"Had Delta not been authorized to acquire Alltrans, Alltrans would have been shut down fully as of August 16, 1974 by its Australian owners, and the Alltrans employees would have been all terminated, losing all seniority without recall rights to any potential employer. Instead, as part of the acquisition contract, Delta and Alltrans representatives met with the Western Conference of

> Teamsters and representatives of the locals involved, and worked out an agreement signed by the parties, which agreement gave Alltrans employees who might be laid off as a consequence of the acquisition both recall rights to Alltrans and additional first right of employment rights for three years with Delta. Most of the Alltrans employees, by reason of the acquisition, did receive continued employment beyond August 16, 1974 to May 1975, an additional nine months of work."

It is clear from the facts in the record that the finding and conclusion regarding the attempted preservation of the 400 jobs is irrelevant at this stage of the proceeding. The jobs will not be reinstated by Delta whether the Commission grants or denies the application. 4/

F. What Effect Did the Transfer Have on Competition?

The staff takes exception to Finding No. 13 which states:

> "13. The acquisition of Alltrans has not been shown to have increased or enhanced the market share of Delta in any relevant market."

and to Conclusion No. 5 which is based on Finding No. 13. Conclusion No. 5 reads as follows:

> "5. The acquisition of Alltrans by Delta has been shown to have a neutral effect on competition in that segment of the market sampled."

The staff asserts that both Finding No. 13 and Conclusion No. 5 are contrary to the record. The staff points out that Alltrans, which was a substantial enterprise, directly competed with Delta. As Delta and Alltrans are necessarily greater than simply Delta, the staff asks what is the basis for the finding.

The staff refers to the discussion at page 59 of the proposed report to the effect that Delta's adjustments to the staff study show:

> "The result was that overall for these 20 lanes the Delta group achieved in 1974 a smaller proportion of the total market in these most important lanes than they received in 1973!"

4/ Examiner's Ruling, dated ~~March 27, 1978~~ May 30, 1978, page 5, line 11, should read "...in August 1974..."

The staff, however, contends that such facts do not support Finding No. 13, because if Delta and Alltrans in 1974 were less than Delta and Alltrans in 1973, Delta and Alltrans were still obviously greater than Delta alone in 1974.

The staff also points out a grave danger in relying on post-acquisition evidence to measure competitive effect by referring to the following quotation:

> "If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a §7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anti-competitive behavior when such a suit was threatened or pending." U.S. v General Dynamics Corp (1974) 415 U.S. 486 at 504-505.

In its reply Delta asserts that the staff cites no evidence to substantiate its exceptions to Finding No. 13 and Conclusion No. 5 and contends that there is none. Delta refers to the testimony of the industry witnesses regarding the competitive health and vigor of the California Trucking Industry (Tr. 2365 (Vasozza); 2458 (Lawlor); 2470 (Gilardy). Delta's own transportation economist testified that the California market is highly competitive, and that "nationwide California has the reputation of being one of the absolutely most competitive states in the country." (Tr. pp. 2231-37.) Also Delta points to the evidence in the record (Tr. pp. 2238-76; Exhibits R-17 and R-18) to the effect that Delta achieved a lesser market share than it would have been projected to receive in the absence of the acquisition.

On page 10 of the proposed report the guidelines utilized by the U.S. Department of Justice in deciding whether certain mergers or acquisitions should be challenged under Section 7 of the Clayton Act are set forth as follows:

In a concentrated market where the shares of the four largest firms amount to approximately 75 percent or more of the market, ordinarily challenges will be made of mergers where the parties account for the following percentages of the market:

Acquiring Firm	Acquired Firm
4%	4%
10%	2%
15% or more	1%

In a concentrated market where the shares of the four largest firms amount to less than 75 percent of the market, ordinarily challenges will be made of mergers where the parties account for the following percentages of the market:

Acquiring Firm	Acquired Firm
5%	5%
10%	4%
15%	3%
20%	2%
25% or more	1%

To determine which lanes should be considered for anti-competitive purposes under the above guidelines we have prepared the following table from the information contained in staff Exhibit R-15

TABLE I

Percentages of Shipments on Selected Lanes in 1973
(Those Lanes included in Exhibit R-15 Supplement)

Traffic Lanes	(1) Distance Miles	(2) 4 Largest Carriers %	(3) Delta Plus CME %	(4) U.S. Dept. Of Justice Guidelines Acquiring Firm %	(5) Alltrans %	(6) U.S. Dept. Of Justice Guidelines Acquired Firm %	(7) Found To Be Anti-Competitive
Chico-Los Angeles	506	100	26.8	15	8.1*	1	yes
Chico-Sacramento	92	100	38.7	15	6.3	1	yes
Chico-San Francisco	199	100	36.2	15	14.3	1	yes
Los Angeles-Santa Maria	189	99	14.2	10	Negligible	2	no
Salinas-Sacramento	188	90	76.7	15	19.9*	1	yes
Sacramento-Santa Rosa	98	90	14.6	10	44.1	2	yes
San Diego-San Francisco	564	90	60.3	15	Negligible	1	no
Salinas-San Francisco	106	89	49.3	15	Negligible	1	no
Sacramento-Stockton	50	88	39.8	15	8.8	1	yes
San Francisco-Santa Rosa	74	88	14.7	10	2.6	2	no
Los Angeles-Salinas	342	85	52.9	15	6.5	1	yes
Los Angeles-Santa Rosa	484	78	16.6	15	16.4	1	yes
Fresno-Sacramento	172	77	46.4	15	3.9*	1	yes
San Francisco-Stockton	103	74	39.0	25	5.4	1	yes
Los Angeles-San Diego	123	66	19.4	15	Negligible	3	no
Fresno-Los Angeles	244	60	27.9	25	1.1	1	no
Los Angeles-Stockton	370	58	28.2	25	1.4	1	no
Sacramento-San Francisco	118	57	27.1	25	14.5	1	yes
Fresno-San Francisco	204	56	33.3	25	2.7	1	no
Los Angeles-Sacramento	414	54	28.1	25	15.7	1	yes
Los Angeles-San Francisco	446	42	22.5	20	7.5	2	yes

(1) Constructive mileage from Distance Table 7.

(2) Aggregate percentage of four largest carriers in lane.

(3) Aggregate percentage of Delta and CME.

(4) U.S. Department of Justice Guidelines for Acquiring Firms.

(5) Percentage of Alltrans.

(6) U.S. Department of Justice Guidelines for Acquired Firms.

(7) Found to be anticompetitive by the Commission on the basis of the U.S. Department of Justice Guidelines.

* Alltrans reported that data for these lanes were not available. Figures shown are the average (mean) of the years 1970, 1971 and 1972.

The table includes figures for 1973 since that is the last full year before the proposed transfer was to take place. Figures for the year 1974 cannot be so easily compared because Alltrans ceased its operations on August 16, 1974 and Delta commenced its operation of Alltrans as the TransCal division on August 19, 1974. Figures for all other carriers in Exhibit 15 are only for the full year 1974.

In Table I where the Commission has found the lanes to be anticompetitive the U.S. Department of Justice Guidelines have been far exceeded and in the opinion of the Commission have been sufficiently exceeded to offset any deficiencies in the staff study which may have been shown to exist by reason of cross-examination of the staff witness and the direct testimony of applicants witnesses. Those lanes which have not exceeded the guidelines or have exceeded the guidelines by relatively small amounts have been found not to be anticompetitive.

Thirteen of the twenty-one lanes have been found to have anticompetitive consequences while only eight of the lanes have been found not to be anticompetitive.

Table I shows clearly that there are significant anti-competitive consequences to the proposed acquisition when the U. S. Justice Department's Guidelines are applied to regional city pair traffic lanes. We are of the opinion that there are no public interest considerations at this point which outweigh denying the application. The traditional market share analysis set forth in the Justice Department's Guidelines is, under the circumstances, a reasonable test of anticompetitive consequences and, in the absence of significant public interest considerations to the contrary, is controlling in our decision.

We note in retrospect that Alltrans' management and owners acted too hastily in their approach to selling Alltrans. 1974 was a year of economic recession for California's highway common carrier industry as well as the nation as a whole. There was opportunity for Alltrans to undertake a more widespread search for buyers (the certificate could have been sold in parts to various buyers) because Alltrans

could not unilaterally without Commission authority abandon its public utility common carrier franchise to serve the public (although its management seemed to overlook that restraint or burden imposed by law which accompanies the benefits of public utility status).

Also, again in retrospect, the Commission should have (in view of the course of events) stayed Decision No. 83292 pending the completion of this rehearing. Conceivably, if that had been done, there would today be an operating Alltrans intrastate carrier enterprise to sell (if the owners still desired) to purchasers which would not pose the significant anticompetitive consequences that the sale to Delta does.

Upon review of the evidence, we are of the opinion that Findings Nos. 6 and 7 and Conclusion No. 1 of the Proposed Report of Administrative Law Judge John B. Weiss should be adopted herein. All other findings and conclusions and the order in the attached proposed report are hereby expressly not adopted. Following are the adopted findings, conclusions, and order.

Findings of Fact

1. Delta and Alltrans were each highway common carriers specializing in the intrastate intercity for-hire transportation of general commodities in LTL lots of up to 10,000 pounds per shipment.

2. Radial highway common carriers are unable to offer service over regular routes between fixed termini and are not an adequate LTL substitute for highway common carriers.

3. Contract carriers are unable to serve the public generally and are not an adequate substitute for highway common carriers.

4. Proprietary carriage is not an adequate substitute for the highway common carrier for shipments of less than 10,000 pounds.

5. The area of effective competition between Delta and Alltrans is defined by their operating authorities and consists of the sum of the pairing of regional origin markets and destination markets.

6. The staff study is valid for the purpose of illustrating the effect of the proposed acquisition on competition.

7. Delta is estopped from asserting the unreliability of its co-applicant's (Alltrans') data.

8. There has been no evidence offered on public interest considerations that rebut the staff's prima facie case.

9. Applicants failed to demonstrate that Alltrans was a failing company at the time of its acquisition by Delta.

10. Applicants failed to demonstrate that Delta was the only available purchaser of Alltrans.

11. Though duplicate service was offered by Delta, the closing down of Alltrans by Delta was accomplished without Commission authority.

12. The most meaningful geographic markets to consider are those intercity regional pairs listed on Table I.

13. Data for the year 1973 is most relevant since data for 1974 would be distorted as a result of the acquisition. 1973 was the last full year before the acquisition of Alltrans by Delta.

14. Table I illustrates the market shares of the acquiring and acquired carriers as related to relevant intercity regional city pairs shared by both carriers.

15. Applying Department of Justice guidelines (see Table I) the staff has shown that the acquisition of Alltrans by Delta has a substantial and serious anticompetitive effect.

16. The impromptu meeting of May 19, 1975 was merely exploratory on a collateral procedural point, and while in retrospect preferably avoided, was not improper or prejudicial as to the rehearing issues then before the Commission relating to antitrust considerations and guarantee waivers.

17. The May 29, 1975 ex parte contact of the then presiding ALJ by the Delta attorney was a personal lapse of professionalism not ascribable to his principal.

Conclusions of Law

1. The relevant product market is the intrastate intercity for-hire transportation of general commodities in lots of 10 to 10,000 pounds by highway common carriers and express corporations.

2. The relevant geographic market is the total of those submarkets which are the traffic lanes interconnecting the various terminal groupings wherein Delta and Alltrans competed for traffic at the time of filing.

3. Applicants failed to carry the burden of showing that the acquisition of Alltrans by Delta will not tend to have a substantial negative effect on competition.

4. Applicants failed to carry the burden of showing that the failing company defense is applicable.

5. Alltrans did not have the legal alternative of unilaterally abandoning service.

6. The application should be denied.

7. Alltrans should be directed to file with the Commission within ninety days from the effective date of this order its proposed plan for the disposition of its intrastate operating authority which was the subject of this application. The proposed plan should be served on all appearances to this proceeding.

8. The two Commissioners charged in the May 19, 1976 Applegate petition have not been involved in improper or prejudicial conduct as alleged.

O R D E R

IT IS ORDERED that:

1. Application No. 54997 is denied.

2. Alltrans Express California, Inc. shall file within ninety days from the effective date of this order its proposed plan for the disposition of its intrastate highway common carrier operating authority which was the subject of this proceeding, and Alltrans shall serve a copy of its proposed plan on all appearances to this proceeding.

The effective date of this order shall be thirty days after the date hereof.

Dated at San Francisco, California, this 22nd day of DECEMBER, 1978.

Robert Batinovich
President

See separate concurring opinion.
Richard D. Gravelle

I will file a dissent.
William Symons Jr.

I abstain
Vernon L. Sturgeon

Richard D. Gravelle
Claire T. Dedrick
Commissioners

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of ALLTRANS EXPRESS CALIFORNIA, INC. for authority to sell (1) its operating authority as a highway common carrier; and (2) certain property used in its public utility operations; and of DELTA LINES, INC. for authority to purchase the operating authority as a highway common carrier of ALLTRANS EXPRESS CALIFORNIA, INC.	Application No. 54997 (Filed June 26, 1974)

Dunne, Phelps & Mills, by Marshall G. Berol and James O. Abrams, Attorneys at Law, for Delta Lines, Inc. and Alltrans Express California, Inc.; and McCutchen, Doyle, Brown and Enersen by Stephen Grant, Attorney at Law, for Delta Lines, Inc.; applicants.

Silver, Rosen, Fischer & Stecher, by Martin J. Rosen, Michael J. Stecher, and John J. Hollenbach, Jr., Attorneys at Law, for Applegate Drayage, protestant. Mr. Rosen also appeared for Nielsen Freight Lines and Peters Truck Lines, protestants.

Malcolm G. Ellis, Attorney at Law, for Transcal Employees, Southern California; and George R. Gilmour, Attorney at Law, for Toward Utility Rate Normalization (TURN); interested parties.

Ira R. Alderson, Jr., Patrick J. Power, James Squeri, and Maxine C. Dremann, Attorneys at Law, and George Kataoka, for the Commission staff.

Sheldon Rosenthal and Scott Carter, Attorneys at Law, for Commissioners Holmes and Sturgeon, Administrative Law Judge Gilman, and Commissioner Assistant Bricca (special appearances).

PROPOSED REPORT OF ADMINISTRATIVE LAW JUDGE JOHN B. WEISS

OPINION ON REHEARING

As ordered by Commission Decision No. 83581 issued October 8, 1974, this matter is on limited rehearing (1) to allow introduction of evidence with respect to the effect on competition, reflecting the sua sponte burden placed upon this Commission to "... place the important public policy in favor of free competition in the scale along with the other rights and interests of the general public." (Northern California Power Agency v PUC (1971) 5 C 3d 370, 377), and (2) to allow introduction of evidence with respect to waiver of the guarantees to be made by Delta and its affiliates under the September 30, 1972 loan agreement between Delta California Industries and the Bank of America National Trust and Savings Association. In furtherance of the first objective of the limited rehearing ordered, on November 26, 1974 the Commission by Decision No. 83787 directed that the Commission staff should participate in the rehearing.

Statement of Facts

In all, there have been 3 days of prehearing conference and 25 days of hearing in this entire proceeding. The three days of hearing leading to the original basic decision, Decision No. 83292 authorizing the merger, were held before Administrative Law Judge John C. Gilman[1/] with the then assigned Commissioner Vernon L. Sturgeon in attendance, on July 18, 19, and 22, 1974. After limited rehearing was ordered on October 8, 1974, there were 3 days of prehearing conference before ALJ Gilman on November 8, 1974, December 20, 1974, and January 24, 1975, followed by ten days of hearing before ALJ Gilman on June 23, 24, 25, 26, 27, and 30, 1975, July 1, 1975, October 20 and

1/ The title of the Commission's hearing officers was changed from Examiner to Administrative Law Judge effective May 25, 1977.

CORRECTION

THIS DOCUMENT

HAS BEEN REPHOTOGRAPHED

TO ASSURE LEGIBILITY

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of ALLTRANS EXPRESS CALIFORNIA, INC. for authority to sell (1) its operating authority as a highway common carrier; and (2) certain property used in its public utility operations; and of DELTA LINES, INC. for authority to purchase the operating authority as a highway common carrier of ALLTRANS EXPRESS CALIFORNIA, INC.	Application No. 54997 (Filed June 26, 1974)

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1/ The title of the Commission's hearing officers was changed from Examiner to Administrative Law Judge effective May 25, 1977.

27, 1975, and December 15, 1975. Newly assigned Commissioner William Symons, Jr., was in attendance the last day.[2] Thereafter, there were twelve days of hearing before ALJ John B. Weiss,[3] with assigned Commissioner Symons in attendance the first two days; these hearings were held on January 5, 6, and 22, 1976, June 21, 1976, July 18, 19, 20, 21, and 22, 1977, and August 23, 24, and 25, 1977. All hearings were in San Francisco. The matter was submitted initially on December 30, 1977, the last day set for submission of concurrent rebuttal briefs, but submission was vacated on January 11, 1978 by the presiding ALJ with concurrence of the assigned Commissioner to direct advisory briefing by the parties on the possible mootness, in whole or part, of a decision on the merits in view of changes to the Public Utilities Code contained in Stats. 1977, Chapter 840. By Decision No. 88420 dated January 24, 1978, the Commission sitting en banc reversed the ruling of the ALJ, and ordered the matter to stand submitted as of February 15, 1978.

A detailed "Chronology of Events and Summary of Evidence" covering this proceeding from its inception in 1974 up to and through June 21, 1976, was prepared by ALJ Weiss, and was set forth as Appendix A to his May 20, 1977 Ruling on the Applegate motion filed May 21, 1976. That Ruling and its Appendix A are attached to and form part of this decision as Exhibit 1. We adopt that Chronology and Summary as our Statement of Facts for the period ending June 21, 1976.

2/ On November 25, 1975, because of developments in the rehearing, and "in order to assure fairness and avoid even the appearance of a conflict of interest", the Commission formally reassigned the case from Commissioner Sturgeon to Commissioner Symons.

3/ As a consequence of possibly prejudicial effect upon the ALJ's judgment arising out of the May 28, 1975 ex parte contact by applicant's attorney with ALJ Gilman, Commissioner Symons (with ALJ Gilman's consent) determined upon reassignment of another ALJ to the case. Accordingly, ALJ Weiss was assigned to the case on December 15, 1975.

Staff Evidence

After being charged by Decision No. 83787 in November, 1974 with evaluating and presenting evidence on possible anti-competitive aspects of this acquisition of Alltrans by Delta, the staff over the intervening months before July 1977 collected and analyzed data preparatory to presentation of exhibits and testimony. In this regard the staff necessarily utilized protected carrier revenue information taken from the Commission's Data Bank.[4/] On December 21, 1976 staff counsel distributed a 29-page document, plus appendices, entitled "Report Concerning Relevant Market in the Matter of Acquisition of Operating Authority and Property of ALLTRANS EXPRESS CALIFORNIA, INC., by DELTA LINES, INC." This proposed exhibit, subsequently entered as Exhibit R-14 in this proceeding, defined the staff's view of the relevant market. The staff also advised that an additional exhibit, containing analysis of carrier data concerning market shares, would follow.

In its December 21, 1976 report, the staff concluded that the relevant product market associated with this acquisition would be that embracing intrastate intercity for-hire transportation of general commodities in lots of up to 10,000 pounds per shipment, and that the relevant purveyors would be highway common carriers and certain express corporations under common ownership with highway carriers.

The staff in the report asserted that highway common carriers of general commodities tend to specialize in transportation of less-than-truckload lots (LTL), noting that nationwide about 54 percent of intercity freight revenue of Class 1 motor carriers of general commodities was from shipments under 10,000 pounds, and that

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4/ Appropriate authorization was sought by the staff and obtained from the presiding ALJ for coded utilization of this data.

the actual custom of the applicants herein reflects an even greater concentration in the LTL transportation. Observing that during the years 1970 through 1974 revenue from intercity transportation of LTL shipments produced 89.9 percent of the intercity revenue, and 84.8 percent of the total revenue of Delta Lines, Inc. (when consolidated with Delta Express), and that for the years 1970 through 1973 such transportation produced 88.3 percent of the intercity revenue and 70.2 percent of the total revenue of Alltrans Express California, Inc., the staff concluded that the practice of the applicants themselves, in specializing in transportation of LTL shipments, demonstrated that larger shipments of over 10,000 pounds are of lesser importance to them, and that therefore these larger shipments should be excluded from consideration, restricting the relevant product market to transportation of general commodities in lots of less than 10,000 pounds per shipment.

The staff further concluded that air carriers, passenger stage corporations, parcel delivery carriers, freight forwarders and most express corporations, and the U. S. postal service provide very different services than do highway common carriers of general commodities, specializing for legal or economic reasons in very small shipments with different rate structures, line haul speeds, and in some cases provide no pickup or delivery, and therefore should be excluded from the staff's conception of the relevant product market. Concluding also that the legal restrictions on highway permit carriers against their operating over regular routes or between fixed termini tend to inhibit them from specializing in line haul of LTL shipments, the staff excluded radial highway common carriers and contract carriers from its market. Railroad and water carriers were excluded. Finally, asserting that the nature of proprietary transportation tends to make

line haul movements of small shipments by private carriers generally uneconomical, being limited competition-wise by cost factors including back-haul needs, and that private carriers are not really engaged in the transportation business, the staff excluded them also.

Having thus assessed and identified what it determined to be the relevant product market, the staff turned next to the question of the geographic market which would be applicable to this acquisition - that area of effective competition in the known lines of commerce. The staff concluded that the geographic market would be the sum of those sub-markets which in turn would be those traffic lanes interconnecting the various terminal groupings wherein both Alltrans Express California, Inc., on one hand, and Delta Lines, Inc., Delta Express, Inc., California Motor Express, Ltd., (CME) and/or California Motor Transport, Inc., on the other hand, competed for business at the time this application was filed. Asserting that a local market area is primarily defined as to any particular carrier by the location of that carrier's terminal, and that it is necessarily between such terminals that trucks loaded with LTL shipments generally move, the staff concluded that the most appropriate way to measure geographic market would be to measure inter-terminal movements of LTL shipments. Noting from Table 7.2 of this Commission's Report 601-5 dated June 1975 (a report among other matters containing information as to 1974 revenue derived from LTL shipments subject to the Commission's Minimum Rate Tariff 2 (MRT 2)) that the preponderance of LTL revenue was earned by the larger of the involved carriers, the staff retrieved the identities of carriers reporting more than $500,000 revenue annually from LTL shipments subject to MRT 2 from the Commission's Data Bank.

There were 105 carriers reporting more than $500,000 revenue. This list was then analyzed, and common carriers whose operations were concentrated in any single local area; those whose operations were from a single California terminal, those whose operations were specialized, and those who operated solely as highway permit carriers, were eliminated, leaving 40 carriers. After the validity of this sample had been tested,[5/] in late July and early August of 1975 a questionnaire was sent to each of these 40 carriers (see Exhibit 2 attached hereto). Responses from 35 carriers[6/] came in over a period of time. Some indicated that different carriers frequently served the same geographic area from terminals located in different cities. Accordingly, terminal location cities reported by the various carriers were listed, put through two clustering steps and aligned into geographical groupings assigned as one regional city. For example, the final geographical terminal designated "San Francisco" included all those individual terminals located in Berkeley, Emeryville, Hayward, Oakland, San Leandro, Richmond, San Rafael, San Francisco, San Carlos, Brisbane, Fremont, Redwood City, Mountain View, San Jose, Santa Clara, and Sunnyvale. Similarly, the terminal finally designated "Los Angeles" included all individual terminals located in Compton, Los Angeles, Montebello, Santa Fe Springs, Pico Rivera, La Mirada, Carson, Anaheim, Orange, and Garden Grove. In the resultant study, all LTL shipments subject to MRT 2 between these resulting geographical terminals, i.e., "San Francisco" and "Los Angeles", for example, were considered as being in a single traffic lane constituting a sub-market.

5/ Description of the testing process is set forth in Appendix I to Exhibit R-14.

6/ A list of 44 carriers to whom the questionnaire was sent is included as Appendix J to Exhibit R-14. Of these 44, six were not included in the final study, and responses from three others were consolidated into their principal carriers.

Over succeeding months the staff analyzed market shares of the competing carriers in the various city-pair sub-markets to attempt to determine the effect upon competition of Delta's acquisition of Alltrans. Hampered by complications with Data Bank programming, the second staff report was delayed. However, on June 13, 1977 the report entitled, "Report of Inter-terminal Traffic Flow in Connection with the Matter of Acquisition of Operating Authority and Property of ALLTRANS EXPRESS CALIFORNIA, INC. by DELTA LINES, INC.", was completed and served upon the parties to this proceeding. Subsequently, this report was introduced into evidence as Exhibit R-15. This report, a 129-page document, purported to set forth in comparative form, inter-terminal traffic flow in both directions, in 119 individual regional terminal city pairings, or traffic lanes, in California, reported by each of the selected larger volume carriers reporting over $500,000 total revenue from California LTL MRT 2 operations. Arranged for each year 1970 through 1974, data was set forth for each of the 119 traffic lanes showing the number of shipments, aggregate weight, and aggregate revenue attributable to each carrier, as well as that carrier's percentage of the total reported by the selected carriers operating in that lane.

Hearing resumed on July 18, 1977. In the eight days of hearing that ensued in July and August, both the Commission staff and applicant Delta presented evidence. Asserting "economic constraints", after participating through July 22, 1977, protestant Applegate Drayage Company, while remaining as a protestant, did not attend the final three days of hearing. At the beginning of hearing on July 18, 1977, the staff introduced an 11-page supplement to its inter-terminal traffic flow report entitled: "Lanes with Ten Thousand or More LTL Shipments in 1974", to supplement Exhibits R-14 and R-15, and in

effect rested its case. This supplement selected 23 high volume lanes from the 119 in Exhibit R-15, noted the respective competitive positions in that market for Delta and Alltrans (and in some instances CME) vis-a-vis competition and contrasted them with the situation in 1974. The Alltrans operation having been acquired August 19, 1974, Delta, CME, and Alltrans had been asked to provide traffic data between terminals broken down for 1974 into periods January 1 - August 19, 1974, and August 20 - December 31, 1974. The staff then mathematically projected 7/ each's probable volume for each lane for the entire year 1974, using the actual volume reported for the first 230 days to August 19, 1974. This projected volume was then contrasted against the actual volume reported for the entire year 1974 to attempt to ascertain the effect of the Alltrans acquisition upon Delta's and CME's competitive position vis-a-vis the other larger carriers in that lane. The supplement for each lane sets forth what the staff concluded to be the effect upon competition of the Alltrans acquisition.

At the request of the ALJ, the staff's expert witness, who had prepared the staff's exhibits, grouped the traffic lanes into

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7/ The projection factor used was 0.6301369 (230 days divided by 365 days equals 0.6301369).

a rough ranking and drew the indicated conclusions on each of the 13 lanes ranked.8/

8/ In its analysis of the respective lane-by-lane market shares to determine possible effects of the acquisition on competition, the staff, aware of the difficulty of obtaining precise quantitative answers, relied heavily upon the guidelines utilized in the federal sector by the United States Dept. of Justice in deciding whether certain mergers or acquisitions should be challenged under Section 7 of the Clayton Act (Section 7 of the Clayton Act makes illegal the direct or indirect acquisition of one company of the stock or share capital of another where the effect is to substantially lessen competition. Concurrent jurisdiction to enforce Section 7 is explicitly conferred upon the Dept. of Justice and the Interstate Commerce Commission) with regard to horizontal mergers (mergers between direct competitors) the Dept. of Justice accords primary significance to the market share held by the parties, assuming that the larger the market share held by the acquiring firm, the more likely the acquisition will advance its position or entrench it in a dominant position. Therefore, in a concentrated market where the shares of the four largest firms amount to approximately 75 percent or more of that market, ordinarily challenges will be made of mergers where the parties account for the following percentages of the market:

Acquiring Firm	Acquired Firm
4%	4%
10%	2%
15% or more	1% or more

And, in a less concentrated market of less than 75 percent dominance by the four largest firms, challenges ordinarily will be made where mergers account for the following market percentages:

Acquiring Firm	Acquired Firm
5%	5%
10%	4%
15%	3%
20%	2%
25%	1%

A. In the first order of significance:

(1) Los Angeles - San Francisco (446 mile lane): The Alltrans acquisition helped Delta/CME maintain its competitive position in this lane.

(2) Los Angeles - Sacramento (414 mile lane): The Alltrans acquisition led to the high number of shipments handled during the last third of 1974 by Delta and CME.

B. In the second order of significance:

(3) Chico - Los Angeles (506 mile lane): By the acquisition of Alltrans, Delta maintained its share of this market lane vis-a-vis System 99 and Pacific Motor Express (PMI).

(4) Fresno - Los Angeles (244 mile Lane): By the Alltrans acquisition Delta was able to move substantially into 1st place in this market.

(5) Los Angeles - Salinas (342 mile lane): Apparently as the result of the Alltrans acquisition, Delta and CME obtained significantly more of this traffic lane than otherwise they would have.

C. In this third order of significance:

(6) Salinas - Sacramento (188 miles): Delta dominated this market already and the acquisition of Alltrans further accentuated this domination.

(7) Chico - San Francisco (199 miles): By acquiring Alltrans, Delta was able to maintain its share of this lane.

(8) Sacramento - San Francisco (118 miles): In 1970 Delta and CME held 30 percent of this lane's traffic; in 1974 Alltrans had surged to a substantial lead, seconded by a decline Delta volume. The acquisition gives Delta-CME-Alltrans a consolidated 46.5 percent of the lane -- violative of Dept. of Justice Guidelines.

(9) Chico - Sacramento (92 miles):
By acquiring Alltrans, Delta in effect maintained its previous share of this lane, staving off System 99.

D. In the fourth order of significance:

(10) Fresno - San Francisco (204 miles):
Acquisition of Alltrans enabled Delta to exceed by 7 percent the number of shipments the staff's projection predicted for it.

E. In the fifth order of significance:

(11) Los Angeles - Santa Rosa (484 miles):
Delta, the acquiring firm, had 6.7 percent of this lane's market whereas Alltrans had 12.4 percent for the first 7.5 months of 1974. The acquisition violated Dept. of Justice Guidelines.

(12) Sacramento - Santa Rosa (98 miles):
Alltrans dominated this lane, and acquisition of Alltrans by Delta (number 4 carrier in the lane) was violative of the Dept. of Justice Guidelines.

In cross-examination of the staff the applicant extensively tested and disputed the limited LTL MRT 2 cluster of services product market adopted by the staff. The applicant probed into how the list of carriers included in the staff exhibits was selected, to whom questionnaires were sent, which carriers were excluded and which were not, and the basis for the selection. The staff's witness admitted that the staff had not independently verified the information reported by the carriers except that every carrier had been telephoned and some had asked questions. The applicant questioned the exclusion of permitted carriers, noting that for 1974, 391 carriers in the over $500,000 bracket reported LTL and truckload general commodity revenue of $468,000,000, and that none of these shipments were looked into in view of the staff's determination that they lay outside the relevant

cluster of services product market. Questioning the exclusion of all special commodity carriers, applicant was able to show that these exclusions included garments on hangers, refrigerated commodities, auto parts other than chassis, fish, film, and business records - all commodities that Alltrans was assertedly authorized to transport. The exclusion of contract carriers was questioned, and the staff conceded that the economics of that carriage could permit profitable LTL competition within a 200-300 mile radius, especially where back-hauls could be obtained. Applicant also developed uncertainties as to how carriers may have interpreted and reported in counting or not counting as individual shipments component parts of split delivery shipments, including those aggregating over 10,000 pounds.

The applicant on cross-examination also questioned and probed the staff's tailoring of the relevant geographic sub-markets selected to assertedly show the areas of effective competition. The thrust of the applicant's questions went to the point that the staff approach judged the movement of freight and the competitive effect by carriers by where they happened to have terminals - reasons asserted by applicant to be totally unrelated to the movement of traffic itself or to the competitive effect of one carrier upon another. The applicant also questioned exclusion of single terminal carriers, asserting that their short-haul carriage business volume is not insignificant or non-competitive. The staff agreed that "...it would have been nice to have considered every city as a point of origin, every city as a point of destination,...", but that data was not available, forcing use of data that was available, and noting that even so, it had taken about a year and a half to gather the data that went into the exhibits apart from the time needed to do the analysis. The staff conceded that it had been "...an inherent problem in the survey

from the very beginning as to how does one fairly arrange the [terminal] regions and there is no question that on short shipments especially that there is a certain distortion." Cross-examination also pointed up the fact that because of the necessarily arbitrary groupings of terminals, there are places where the periphery of one terminal region blends into the periphery of another so that one carrier's shipment would not end up included in Exhibit R-15 whereas that of another carrier, involving the same commodity, weight, origin, and destination, etc., would end up included. The staff accepted that this sort of thing was bound to happen at points, and in some instances it would not be minor. However, the staff witness testified that the staff tried to exclude the most significant of these when selecting the lanes to be reflected in the supplement to Exhibit R-15. The staff witness testified further that the sub-markets considered most significant relating to antitrust considerations are the 23 lanes set forth in the supplement. The staff agreed that it had made no analysis as to what effect, if any, the United Parcel Service (UPS) strike of November 11, 1974 through December 12, 1974 may have had upon market shares in any of the lanes,[9/] nor had it considered any seasonal effects on volume in making its projections of probable Delta, CME, and Alltrans volume in 1974 based upon actual January 1 to August 19, 1974 volume. It was developed that Alltrans figures for 1973 in some lanes were unavailable, and that some carriers had reported "negligible" volume rather than actual figures in certain lanes, without explanation of what they considered "negligible". On one lane, the

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9/ A significant omission when one notes that applicant's witness Varozza testified that during the UPS strike which occurred in the critical last 135-day period in 1974, Delta, CME, and Transcal, respectively, transported 600, 800-1,000, and 200 additional shipments daily of the UPS trade.

Los Angeles - San Francisco lane, it developed that there were LTL MRT 2 shipments handled by interline arrangements: shipments made San Francisco - Fresno via Haslett, and then interlined Fresno - Los Angeles by Kern Valley Trucking, and this traffic was not included in the Los Angeles - San Francisco volume although competitive to Delta.[10/]

Delta's Evidence

Protesting denial of a requested continuance and asserting shortness of time wherein to respond to the staff's conclusions of anti-competitive effects detrimental to the public good in the acquisition, Delta presented the final stage of its evidence, asserting that the acquisition had a neutral or pro-competitive effect, and that the staff presentation does not prove impaired competition in any relevant market, through the testimony and exhibits introduced by eight witnesses during the last four days of hearing.

One witness, Wayne Varozza, president of CME/CMI and vice president and a director of Delta Lines, Inc., step-by-step disputed the underlying assumptions to the staff's analysis. Protesting that specialized carriers are very much a part of his organization's competition, he disputed exclusion of UPS from the staff market study. Noting that about 25 percent of the Delta group's daily shipments weigh less than 101 pounds and that they actively solicit this business using 75 freight solicitation employees stressing faster service, acceptance of COD shipments, daily pickup without surcharge, full insurability, and traceability of shipments, in

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10/ At applicant's motion the ALJ took official notice that Haslett by Decision No. 84803 dated August 19, 1975 in Application No. 54265, and Kern Valley Trucking by Decision No. 84808 dated August 19, 1975 in Application No. 54156, were both certificated to operate between the San Francisco and Los Angeles areas, and in their respective applications filed in 1973, both alleged competitive status with the carriers then certificated for operation in those markets.

competition with UPS, sharing significant parts of this transportation, particularly from department stores and drug, toy, shoe, and other consumer item manufacturers, with UPS, he asserted "I sell them like the devil to get them" as does every carrier in the state. The witness introduced Exhibit 19, a "Profile of Business by Shipment, Weight, and Revenue for both CME and Delta Lines, Inc.", based on their monthly summary statistics which come directly from their freight bills, to show among other things that in 1974 the two firms moved $3.4 million in shipments weighing under 100 pounds,[11/] and to point up that that is considerably more than they ever earn in profit.[12/] Emphasizing that they serve some 2,000 places in California daily, and that four or five minishipments (as the under 100-pound shipments are known) on a run rack up $40 to $50 in revenue, helping to defray the cost of making many mandatory runs, he testified that all elements are important to a run since whether they have 5,000 pounds or $200 of revenue they must make these runs daily under their tariffs. The witness "totally disagreed" with the staff's conclusion that restrictions on UPS so limited the cross-elasticity of demand between it and the Delta group that there is no competition between them for business.

11/ Varozza testified that CME's 1970 revenue from minishipments was $820,000 against $46,275,000 for UPS. He asserted that considerable of the UPS revenue, however, is from intracity department store package delivery. Furthermore, in 1974 CME's revenue from minishipments was up to $1,160,000 representing 4.7 to 4.9 percent of total revenue, and thus essential to CME's prosperity.

12/ The witness testified that the Delta/CME operating ratio ranges between 96+ and 99 enabling them to earn between 1 and 3 cents on each dollar of revenue.

Varozza also took exception to the staff's classification of split delivery shipments moving under master bills of lading as "truckload", whether moved by private or for-hire carriers, and therefore, to be excluded. Delta/CME count such shipments as one for purposes of counting master bills for revenue billing purposes, but as multiple shipments for purposes of counting shipments to individual consignees requiring individual freight bills and receipts, and this practice was followed in responses to the staff questionnaire (on annual reports and in statistical data furnished the Commission the Delta Group count each component as an individual shipment, according to Varozza). He asserted that split delivery shipments account for 12 percent of their shipment volume and about 25 percent of their total tonnage.

Disputing and flatly disagreeing with the staff's conclusion that "the behavior of highway common carriers in general and of the applicants herein in particular demonstrates that larger shipments are of lesser importance to them", Varozza testified that to the contrary they compete "as strenuously as we possibly can" for the over 10,000 pound shipment and the only reason they do not have more is that "It's because we have got 20,000 permitted and contract carriers out there after them along with us is why we don't have all we want." The witness flatly asserted that "you cannot just slice out something like truckload and understand the business." Testifying that the shipments over 10,000 pounds comprise better than 25 percent of the tonnage, and that "...there isn't any way we could handle and support the LTL we handle through our terminals if we didn't have the shipments we have over 10,000 pounds. We would be broke in two months", he asserted that "the over 10,000 is more necessary to support the LTL

than any LTL is to support pure shipments of over 10,000 pounds." On cross-examination, he testified that they would like to have truckload (over 10,000) revenues in the range of 15 to 25 percent for a healthy mix (rather than their actual 8.9 percent), but that they have been unable to obtain it, competing as they must for it with every radial highway common carrier, every permitted carrier, every proprietorship carrier. The witness submitted Exhibit R-20 consisting of six sample delivery runs (assertedly random pulled) from terminals in Sacramento (2), Oakland, Oxnard, Los Angeles, and San Francisco, showing for each shipment: origin and destination towns, pieces, weight, and revenue. Apart from illustrating the interdependence and importance of each segment of transportation class, minishipment, LTL, and over 10,000 pounds, the exhibit was submitted to point up the importance of truckload shipments in the overall scheme. The witness testified that "...predominately our LTL freight moves heavier by volume and shipment from the southern end of the State into the northern end of the State. Were we not able to attract truckload shipments to return those trucks at 400 miles back to the south we could not effectively handle the LTL northbound...we just could not economically do it." To illustrate his point that about 70 percent of California industry producing hard goods, consumer goods, software, clothing, etc., is centralized in the Los Angeles basin from whence there is a heavy northward flow to the consumer market in northern California, and that the reverse traffic available for back-haul is primarily truckload traffic connected with agriculture, canneries, and heavy products in truckload lots, the witness introduced Exhibits R-21 and R-22 (data also taken from monthly summary statistics derived directly from their freight bill counts). These exhibits cover 1973 consolidated Los Angeles - Orange to Bay Area - Sacramento - Stockton

broad-lane traffic, as well as extracted Los Angeles - Sacramento and Los Angeles - Salinas narrow-lane traffic for CME and Delta, respectively, and evidence the imbalance of north-south traffic between LTL and truckload plus splits.[13/]

13/ North-south CME-Delta traffic lane profile - 1973.

	CME				Delta			
	LA-SF Areas		SF-LA Areas		LA-SF Areas		SF-LA Areas	
	Splits + TL	LTL	Splits + TL	LTL	Splits + TL	LTL	Splits + TL	LTL
Shipments	14%	86%	26%	74%	5%	95%	23%	77%
Weight	47	53	79	21	36	64	78	22
Revenue	25	79	51	49	15	85	50	50
	LA-Sacto		Sacto-LA		LA-Sacto		Sacto-LA	
	Splits + TL	LTL	Splits + TL	LTL	Splits + TL	LTL	Splits + TL	LTL
Shipments	12%	88%	23%	77%	7%	93%	31%	69%
Weight	33	67	82	18	34	66	92	8
Revenue	19	81	67	33	16	84	74	76
	LA-Salinas		Salinas-LA		LA-Salinas		Salinas-LA	
	Splits + TL	LTL	Splits + TL	LTL	Splits + TL	LTL	Splits + TL	LTL
Shipments	10%	90%	42%	58%	4%	96%	35%	65%
Weight	18	82	85	15	20	80	87	13
Revenue	12	88	63	37	8	92	65	35

Varozza also disputed the staff's use of terminal-to-terminal traffic to measure LTL competition, stating that the preferred method would be to measure or sample the entire geographic market served by Delta/CME, the interrelation between all the points served and the actual origin and destination of each shipment, regardless of where terminals happen to be. He testified that the terminal-to-terminal approach used by the staff does not reflect the dynamics of the marketplace in that no one lane can be or should be looked at by itself since they are all interdependent, relying upon the freight the system successfully solicits from its entire system operation. For example, he pointed out that the staff approach shows freight moving between Los Angeles and San Francisco whereas actually that freight might have been brought from San Diego by Delta or another carrier and interlined at Sacramento, or it might have been brought down from Oxnard or Santa Maria or San Luis Obispo to Los Angeles and interlined to San Francisco. Some such freight would not be reflected in the staff report. For a carrier with terminals in Los Angeles and Stockton the freight in the staff report would be shown moving Los Angeles - Stockton; whereas in fact the destination might be San Jose, Oakland, San Francisco, Sacramento, or Chico. The staff approach could be actually omitting substantial transportation carriers in any particular lane because these carriers, while perhaps big in a few lanes, do not have overall sufficient LTL revenue to be included.[14/]

14/ Ironically, Applegate Drayage, the sole remaining protestant, is not among the carriers included in the staff study. Applegate's gross revenues systemwide in 1974 were $1,125,000, spread over operations as a common carrier in the Sacramento - Quincy - Portola - Herlong area, and radial and contract carrier transportation as well as cement permit carriage.

For example, for the Los Angeles - San Diego lane the staff report lists 18 carriers whereas, the witness testified, the Pacific Coast Tariff Bureau and Western Motor Traffic Bureau traffic scope lists 42 certificated carriers in that lane. For the Los Angeles - Santa Maria lane, the staff lists six carriers against 19 listed by the Bureaus. For Los Angeles - Vallejo, the staff listed two carriers whereas the Bureaus listed 18. The Salinas - Santa Barbara lane reflects four carriers in the staff study contrasted with 16 by the Bureaus. In each instance above the witness provided a list of the certificated carriers and testified that his organization was in competition with the bulk of those listed.

Noting that while with terminals a carrier tends to get more LTL business, Varozza testified that it is not necessary to have multiple terminals to get LTL; that they experience tremendous competition from carriers operating with but one terminal. Varozza also noted that while many carriers[15/] service Chico direct or through interline out of Sacramento, this traffic would not be reflected in the staff study under the staff's methodology. He also discussed the strong competition with permitted carriers without any terminal at all; noting that "they grab the cream", the 2,000-3,000 pound shipments, loading direct frequently utilizing agency agreements with another carrier, and using a back yard, gas station, truck stop, or the highway itself to break down their loads. He cited loss of considerable choice

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15/ He named Willig, Associated Freight Lines, Crescent Truck Line, Sterling, Shippers Imperial, Di Salvo, Santa Fe Trail, and Haslett.

business from Campbell Soup Company, Lipton's Tea, Thrifty Drug, and J. C. Penney to proprietary carriers, and loss of accounts such as All American Nut, Allstate Tires, and other Sears' shipments to De Anza, a permitted carrier, rejecting the assertion that this is not competition.

Applicant's expert statistical and economic analyst, Darwin W. Daicoff,[16/] presented his evaluations of staff Exhibits R-14 and R-15 as well as the supplement to R-15. Noting that the relevant product market was to be LTL MRT 2 transportation, he found that the major problem with the staff studies was that they automatically exclude significant providers of this LTL service; two major exclusions being private or proprietary carriers and the freight forwarders. Testifying that with the proprietary operator it is not an either/or question whether he should do it all, or hire someone, but rather that the proprietor operator ships the cream, the highly rated traffic, and gives the so-called "garbage" to the common carriers. He asserted that there is a constant cross-elasticity of demand. Freight forwarders, on the other hand, receive and consolidate LTL into larger lots, tendering it as truckload to the common carrier or shipping it by air. As truckload or by air it is excluded by the staff but nonetheless it is LTL. Again, Daicoff found a high degree of cross-elasticity of demand. It was Daicoff's position that the relevant product market should include all the purveyors of LTL service.

16/ Daicoff is a professor of economics and director of the Division of Business and Economic Research at the University of Kansas, who among other statistical work, designed and monitors the state directed continuing traffic study for the State of Washington Utilities and Transportation Commission. Dr. Daicoff holds a PhD in economics from Michigan (1962); is a member of the American Statistical Association; and has consulted with the Committee for Economic Development and the Brookings Institution. He has worked for the Midwest Research Institute, directing the statistical team analyzing reliability of a continuing national traffic study, and the Rocky Mountain Motor Traffic Bureau as well as other transportation oriented firms.

While accepting that a $500,000 cutoff in statewide LTL revenue would be one acceptable approach to a study, Daicoff noted, however, that the particular emphasis of this staff study was not that of a statewide traffic picture, but rather was a picture of particular assumed traffic lanes, and that small carriers with under $500,000 statewide revenue could be concentrated in one or more traffic lanes and be the dominant or a significant carrier there although omitted entirely from the staff study. The emphasis being that while a small carrier may not have tremendous significance in a statewide study, he may be very, very relevant to a narrow traffic lane.[17/]

Observing that the reduction of the sampling universe upon which the study was based went through several judgmental reductions, Daicoff commented that the Interstate Commerce Commission (ICC) has ruled that judgmental sampling was completely improper and cannot be used in ICC rate proceedings. Daicoff testified that if one desires statistical credibility, random sampling would have been a valid statistical tool here, but that judgmental sampling is not.

Daicoff also severely criticized the mailed questionnaire used (see Exhibit 2), noting that the old maxim "garbage in is garbage out" must apply to it. He testified that in his professional opinion the questionnaire was so loaded with judgmental factors that it was inadequate to provide statistically reliable information. In his opinion point-to-point traffic movement (from specific origin points to specific destination points) would be the way to measure traffic flow; that terminal-to-terminal would be inadequate. Noting the lack of definitions in the questionnaire (for shipment, weight, and revenue), he gave examples of how these terms could be differently comprehended and used carrier-to-carrier, and concluded that the staff's failure

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17/ Daicoff noted that these less than $500,000 revenue carriers of LTL account for approximately $100,000,000 revenue yearly.

to direct and control the survey destroyed the reliability and credibility of the results. He testified of the complete absence of built-in external verification standards to verify comparability accuracy of the returns received. Daicoff pointed out that in checking the Alltrans response, for example, he found that the number 1,724, representing shipments in a lane, had been repeated in eight instances, and that a multiple of 1,724 had been used in 16 of 34 other instances, and concluded that these were "made-up numbers". Daicoff summed up his evaluation of the staff studies by testifying that in his professional opinion they produced numbers with no statistical validity whatsoever - despite all the work which had so evidently been placed in the studies - and that because of the faulty foundation, lack of control procedures, and verification standards, one cannot base conclusions upon further manipulation of the data they produced.

Expressing his professional opinion as to the state of competition in California trucking, Daicoff characterized it as being a highly competitive market, basing his opinion upon analysis of three indicia: profitability, ease of entry, and turnover. He further stated that the California's regulated trucking industry is well regarded nationally.

Daicoff then turned to applicant's Exhibits 17 and 18, prepared at his request by Robert F. Lantze, a California CPA and partner in the firm of Wolfe and Company. Lantze testified that he prepared the exhibits using as a base staff Exhibit R-15 and its supplement, and had recomputed data to show the inter-terminal traffic flow between the selected terminal pairs in the supplement, producing 1974 projections corrected to reflect (1) conversion of the Delta/CME reported 1974 figures to reflect the period actually reported, January 1 to July 31, 1974, not the January 1 to August 19, 1974 period the staff had assumed Delta/CME had used, (2) addition of

a seasonal fluctuation percentage adjustment to reflect heavier traffic volume in the latter part of the year as contrasted to the earlier part of the year (based upon a five-year analysis of Delta/CME operating results), and (3) an adjustment to proportionately divide Alltrans' 1974 last 5-month volume among the carriers including Delta, assuming all carriers would have shared in the Alltrans volume proportionate to each carriers' share of that market lane in 1973.

In Exhibit 18 Lantze further refined the Delta/CME corrected projection for 1974 for each of the lanes deemed significant by the staff, by making a fourth correctional adjustment to Delta and CME figures to reflect reporting of master bill shipments as they should have been reported to conform to the staff's intention and interpretation and deleted all master bill shipments where the aggregate of components weighed over 10,000 pounds. The result was that Delta and CME LTL volume had to be reduced by 11.92 percent and 16.74 percent, respectively, with resultant changes in the sample universe. The final result was that for these lanes deemed significant by the staff, the Delta group in the aggregate should have been projected to get 22.8 percent of the total volume of shipments, but actually only realized 22.2 percent. For the previous year, 1973, the group achieved 23.5 percent of the total.

Concluding his testimony, Daicoff summarized that in 1974, the Delta group therefore had achieved overall a smaller proportion of the total market as set forth by the staff in these significant lanes than they had received in 1973, and did not even achieve their projected share in 1974. According to Daicoff, this indicates that the acquisition actually decreased the amount of concentration in the market, reducing the degree of anti-competitiveness that had existed in this staff conceived component of the transportation industry. Charting the up and down variations year after year, lane by lane, Daicoff testified that he could not find a smooth even trend, terming the

variations statistical "noise", and concluded that the year end results in each lane are simply the composite of how successful Delta has been in getting freight in a highly competitive market, losing some customers and gaining some.

Applicant's final five witnesses were from the industry itself including competitors. William Almeida, a veteran of over 25 years and currently an executive of Mammoth of California, Inc., a radial carrier operating principally between San Diego through Los Angeles to Sacramento and the Bay Area, testified of his company's fierce competition with certificated carriers for LTL and split load shipments as well as truckload, noting that Mammoth runs 100,000 pounds of LTL and split loads daily in the Los Angeles to San Francisco lane in direct competition and that 30 percent of his total revenue is LTL. He testified of his firm's success in taking three accounts, Campbell Soup, Hershey's, and Wawona, from Delta/CME. He supported Varozza's concept of the importance to the bottom line profit of maintaining good balance in traffic flow between LTL and truckload. He too characterized the proprietary carriers as the greatest danger to the trucking industry in that "they take the cream and we get what is left over", noting that some proprietary carriers even have permits from the Commission and compete across the board, LTL and truckload, at the end of their proprietary haul with the for-hire industry for back-haul. He concluded by voicing disagreement with the staff's determination "that permitted carriers cannot lawfully conduct a linehaul LTL operation that would be of any competitive significance to a certificated carrier".

Harold Frank Culy,[18] executive vice president of Bayview Trucking, Inc., a certificated highway common carrier of temperature controlled commodities as well as a radial and contract permit holder through affiliated companies, testified of his firm's short and long line operations; of competition with certificated carriers for both LTL and truckload, and of the fact that LTL and splits account for 80 percent of their traffic.[19] He too testified of the careful attention they necessarily pay to maintaining a good balance of traffic, stating that their profitability depends upon it, and that they must compete for both LTL and truckload to maintain that balance. He described their experience operating an acquired common carrier trucking operation running up into the Sierra foothills from Sacramento, and of how the competitive foothill based permitted carriers "skimmed the traffic" with the result that his firm was only able to break even because 95 percent of their traffic was interline. He testified how he serves San Francisco from Carson by interlining himself, and how Salinas is served daily from Modesto and Carson terminals. He too disagreed with the staff's determinations that (1) a permitted carrier cannot lawfully conduct a line haul LTL operation

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18/ Culy is also a member of the board of directors of Western Motor Tariff Bureau, active in the California Trucking Association, a former officer of the Common Carriers Conference in California, as well as having been a member of the original Interstate Commerce Commission Carrier Group which filed the first carrier owned tariffs.

19/ With LTL single component shipments today producing about 10 percent of their revenue. Most of their split delivery components weigh under 10,000 pounds.

that would be of any competitive significance to certificated carriers, or (2) that competition from proprietary carriers is so limited by cost factors and other considerations as to be of insignificance to the business of certificated carriers, or (3) that truckload shipments are of lesser importance to certificated carriers than LTL, terming these staff determinations contrary to the facts of life in the California trucking industry.

Marvin R. Hollenbeck, distribution manager for Moore Business Forms, testified that today his firm handles approximately 80 percent of its own California hauling, both LTL and truckload, amounting to 500,000 pounds a day line haul and 400,000 pounds a day local, utilizing 10 line trucks, 45-foot trailers, and 26 local delivery trucks, with the remaining 20 percent (virtually all LTL) going mainly to certificated common carriers with some overflow to permitted carriers. Before instituting its own proprietary operations in 1966 it utilized both certificated and permitted carriers for all its LTL and truckload shipments. Describing the primary consideration in determining whether to use company-owned or for-hire trucks as economic, he testified that if the company truck could do it for less than the published for-hire rates, a company truck makes the run, but that if they have no back-haul they farm it out generally. He too disagreed with the staff determination that competition from proprietary carriers is so limited by cost factors and other considerations as to be insignificant, affirming that both certificated and permitted carriers aggressively solicit his business. Hollenbeck concluded by testifying that his firm's trucking operations are totally apart from its printing business, and exist nowhere else in its nationwide operations, existing in the West only because of the particular economics.

The president of Di Salvo Trucking Company, Charles James Lawlor, former president of the California Trucking Association and a present director of that organization since 1963, testified of his substantial experience not only in certificated trucking operations, but also as president of Lawlor Motor Express, a permitted carrier, in permit operations, and in Di Salvo in earlier years when it held permit and contract authorities. He testified that Di Salvo's truckload business, 50 percent of the weight and 25 percent of its revenue, allows it to exist in the LTL business. In some areas, he testified, for example, Salinas, inbound it is 90 percent LTL, and outbound 90 percent truckload. Noting that:

> "If we are hauling one way it's a loser. We have to haul two ways and we have to haul both ways with maximum payload. And that means in most cases going both ways with a certain amount of truckload freight and a certain amount of LTL freight in order to fully utilize our equipment."

He asserted that there would be no practical way to support the LTL into Salinas without the back-haul truckload freight from Salinas, given the rate structure in which he must operate. Lawlor also pointed out in his testimony that LTL allows a carrier to top load and/or rear load a truckload shipment with LTL; that "both unto themselves would be losers, but together they become profitable". He considers his competition to be the thousands of permitted, common, or contract carriers in the State. He described Di Salvo's "reasonably successful" use of leasing truck and driver to private shippers in efforts to head off the growing fleets of proprietary carriers. He also noted the many permitted carriers who operate as

common carriers - even after Commission cease and desist orders - until caught, naming Bay Area Los Angeles Express as one. While Di Salvo has 14 terminals, Lawlor stated that terminal location is very insignificant as far as competition is concerned, and that in the Los Angeles - San Francisco lane, competition is larger from those carriers who have no terminal in either location than from those who do. He described how location of a terminal is an economic decision - when it becomes more economical to bring in freight and break it down for reassembly for local delivery, you locate a terminal. Until then you operate without one - volume comes first. He testified that many permitted carriers based in Los Angeles with a terminal there handle truckload Los Angeles - San Francisco daily, and some develop interline arrangements to serve further afield, especially with LTL; and that many others with no terminal at all (naming Riss International as one example) who handle LTL, use local tie-in carriers.

Lawlor completely disagreed that permit carriers cannot lawfully conduct line haul operations competitively significant to certificated carriers, stating that on the contrary, they are strong competition. He also disagreed with the staff's further determination that competition with proprietary carriers is so limited by cost factors, etc., as to be insignificant to certificated carriers, noting that 80 percent of the trucks registered in California are not registered to the trucking companies under regulation, and that without them all that business they carry would go common or permitted carrier. He also asserted that parcel delivery carriers are not eliminated as competition by the weight limitations placed upon them. In conclusion, Lawlor testified that "competition is much tougher now than it's ever been", and "that CME and Delta would probably be Di Salvo's biggest

competitor in all our lanes", and repeated his disagreement with the staff that truckload is of lesser importance to certificated carriers than LTL, stating again that no LTL carrier can succeed without truckload.

Applicant's final witness, Marrin D. Gilardy, president of System 99, a certificated general commodity common carrier operating 20 terminals throughout most of the State, testified that the truckload portion of his business "...is a key factor because in almost all instances involving inter-terminal or intercity moves... it provides the greatest source of our back-haul, the balancing factor", and by the combination they are able to add LTL as top and back freight to truckload, as well as to marry truckload trailers to LTL trailers. In addition, he testified, many customers require truckload to be taken with LTL. Their truckload involves 16 percent of revenue and 38 percent of weight. Without it, Gilardy stated, they could not handle the LTL and stay in business. His competition is certificated, permitted, contract, radial common and proprietary carriers, and the parcel delivery services. He testified that some of his competitors operate out of one terminal, some with none, and others, for example in the San Francisco - Los Angeles lane, operate through interline arrangements without terminals in the area. He too disagreed (1) that permitted carriers, substantial competition for his LTL, cannot lawfully conduct line haul LTL operations in significant competition to certificated carriers as asserted by the staff, (2) that proprietary carriers are so limited by cost factors to be insignificant competition to certificated carriers, noting that the best traffic goes proprietary and "...we just get the leftovers...", (3) that parcel delivery carriers are not substantial competition, noting that seven percent of his revenue is hard earned minishipment, or (4) that

truckload is of less importance that LTL. In this last regard he testified that truckload was "absolutely essential" both to complement LTL on front-haul and to accomplish back-haul to get the trucks home. He asserted finally that California trucking is getting more competitive continuously and acknowledged that System 99 had acquired some accounts and moves previously Alltrans'.

Staff Rebuttal

After applicant rested its case on the rehearing phase, the staff recalled its expert witness Smith who testified of his discussions with Alltrans personnel over use of 1,724 to represent the number of shipments in their response to the survey the staff conducted, and he acknowledged that he was aware that it was an estimate; that, assertedly, actual records were missing. Smith admitted that he had not been aware of how extensively Alltrans had finally used 1,724 or a multiple in responding to the survey. He agreed that he and the staff had not audited or verified carrier responses by means of field visits, nor had he followed through when carriers did not furnish data on percentages of shipments weighing less than 101 pounds.

Both staff and applicant submitted concurrent final briefs and concurrent final rebuttal briefs in timely fashion.

Discussion

Restraint of trade acts have their origin in the common law and are rooted in the concept of encouraging free competition in open markets. They are based upon the assumption that competition is the best means of achieving a maximization of wealth with sociological and economic benefits to the general public. The major part of the antitrust field is covered by federal statutes applicable to activities subject to the federal commerce power. The Sherman Antitrust Act of 1890 (15 U.S.C. Section 1) is the basic federal statute, expressing in general terms the common law policy against monopoly as it applies among the several states, District of Columbia, federal territories, and with foreign nations. Following adoption of the Sherman Act, Congress passed in 1914 two different but interrelated laws - the Federal Trade Commission Act (38 Stat 717 (1914)), as amended 15 U.S.C. Section 45 (1964) and the Clayton Act (38 Stat 731 (1914)), as amended 15 U.S.C. Section 12 (1964). The Clayton Act is more detailed than the Sherman Act, and amongst its prohibitions is that which provides that the acquisition of stock or mergers are prohibited where the effect "may be substantially to lessen competition, or to tend to create a monopoly" (Section 7, 15 U.S.C., Section 18). And, as amended in 1950 by the Celler "Antimerger Act", Section 7 is also applicable to mergers accomplished by acquisition of assets as well as stock. In California, the Cartwright Act (1907) (Business & Professions Code Sections 16700 et. seq.) makes unlawful a "trust", defined as a combination of capital, skill, or acts by two or more persons, firms, partnerships, corporations, or associations of persons to restrict trade, limit production, increase or fix prices, or prevent competition.

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The federal antitrust laws statutorily are enforced by a number of methods not relevant here, and in California the Attorney General, or the district attorney of any county on the order of the Attorney General, institutes civil or criminal proceedings to enforce the provisions of the Cartwright Act. Regulatory agencies do not have jurisdiction to determine violations of the antitrust laws (see People of the State of California v PUC (1962) 369 US 482 at 490, and see California Business & Professions Code 16754). "Nor are the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social, and political considerations are found to be of overriding importance. In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give 'understandable content to the broad statutory concept of the "public interest"'". (Northern Natural Gas Co. v Federal Power Commission (1968) 399 F 2d 953 at 961.) In Northern California Power Agency v PUC (1971) 5 C 3d 370, the California Supreme Court, noting that "...since the grant of exclusive jurisdiction to the federal courts has not been held to preclude federal administrative agencies from considering antitrust problems, there is no reason to bar state administrative agencies from such concerns", (id. at 378) and that by considering antitrust issues, this Commission would be merely carrying out its legislative mandate to determine whether the proposed action would advance the public convenience and necessity. The Court concluded that: "The Commission must place the important public policy in favor of free competition in the scale along with the other rights and interests of the general public." (id. at 379.)

In approaching its charge from this Commission to evaluate and present evidence on the competitive aspects of the Alltrans acquisition by Delta, the staff was ploughing relatively virgin fields. In the past, in discharging its responsibilities under the Highway Carriers Act:

> "...to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; and to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public." (Section 3502, the Public Utilities Code.)

this Commission has focused more on its licensing, regulatory, and consolidation authority than upon antitrust considerations. It was generally believed that because of the highly regulated nature of the transportation industry, under which rates and practices were subjected to meaningful regulation and supervision by the state to the end that they were the result of the considered judgment of the state regulatory authority, that common carriers were to a large degree insulated from application of the antitrust laws. Since Northern Power Agency v PUC (supra) this has changed, and the important public policy in favor of free competition must be placed in the scale along with the other rights and interests of the general public.

Recognizing that the major part of the antitrust experience rests in the federal arena, the staff determined that the evaluation of a proposed merger for antitrust purposes should begin with the

"Merger Guidelines", issued May 30, 1968 by the United States Department of Justice, describing the standards used in determining whether the department will challenge corporate acquisitions and mergers under Section 7 of the Clayton Act. These guidelines are framed in general terms and apply to all mergers and acquisitions. In enforcing Section 7 of the Clayton Act against horizontal mergers[20/] the Justice Department accords primary significance to the size of the market share held by both the acquiring and the acquired firm on the premise that the larger the market share held by the acquired firm the more likely it is that the firm has been a substantial competitive influence in the market or that concentration in the market will be significantly increased. The larger the share held by the acquiring firm the more likely it is that an acquisition will move it toward, or further entrench it in, a position of dominance or of shared market power. As relevant to the instant case, the ultimate question in a Section 7 proceeding is whether the acquisition has the effect of "substantially lessening" competition in the relevant market. That relevant market is the "area of effective competition" (Standard Oil Co. v U.S. (1949) 337 U.S. 293, 299-300 n. 5), and "defining a market turns on discovering patterns of trade which are followed in practice" (U.S. v United Shoe Machinery Corp. (1953) 110 F. Supp. 295, 303 (D. Mass 1953), aff'd, (1954) 347 U.S. 521). Within this context, a market is defined both in terms of its product dimension and its geographic dimension.

20/ Horizontal mergers are mergers between direct competitors.

Product Market

In a Section 7 proceeding against a corporation marketing tangible products, the determination of a product market can be relatively simple; but in a matter involving common carriers in the transportation industry, a service rather than a tangible product is sold, and defining that product market is more complex. However, the Supreme Court in Brown Shoe Co. v U.S. (1962) 370 U.S. 294 has set forth guidelines for determination of a product market as follows:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. (Citation omitted.) The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the products' peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (id. at 325.)

In the instant proceeding the determination of the proper product market is a major point of dispute between the staff and Delta. However, the above guidelines give flexibility, and even where there is some competition between modes of transportation industrywide a core sub-market evidencing economically significant competition between only the parties involved in the acquisition can be isolated by using a 'cluster of services' concept.21/

21/ In U.S. v Philadelphia National Bank (1963) 374 US 321 at 356-357, the Supreme Court accepted the District Court's determination that a cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking" comprised a distinct line of commerce which constituted a market sufficiently exclusive to be meaningful in terms of trade realities to appraise the probable competitive effects to the proposed merger. Other services were excluded from this market as being insulated to a significantly marked degree from competition for one reason or another.

In the instant matter, the Commission staff quite correctly acknowledged that the broadest possible product market would be that of "transportation services", but that while it would constitute a product market for some purposes, it is not a product market sufficiently precise for Section 7 considerations. Accordingly, the staff split this broad general market into its five component modes of transportation.[22/] The staff then analyzed that one mode wherein Delta and Alltrans actually competed against each other - the motor vehicle mode - and sought to isolate a core of services therein which would serve as an appropriate sub-market for Section 7 considerations. After analysis, the staff determined that a central core of motor freight traffic which would be most reflective of competition between Delta and Alltrans was to be found in that narrow band of services embodied in general commodity LTL transportation,[23/] excluding TL as

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22/ Railroad, water, pipelines, aircraft, and motor vehicle.

23/ The staff's approach to definition of both the proper "product market" and "geographic markets" for purposes of Clayton Act analysis in this proceeding is closely patterned upon that followed by the ICC in Navajo Freight Lines, Inc. - Investigation of Control - Garrett Freightlines, Inc., (1976) 122 M.C.C. 345. In Navajo the ICC used its Clayton Act powers to prevent an involuntary takeover of one motor common carrier by another. In defining its product market in the federal proceeding, the Commission used the "cluster of services" concept to find a hard core service in which Navajo and Garrett had some comparative and competitive advantages over competitors with different characteristics. Noting that in the interstate freight transportation marketplace motor carriers have generally preempted the LTL field, the Commission concluded after detailed analysis that the relevant product market was movement of LTL general commodity traffic over regular routes by motor common carriers of shipments weighing between 100 and 10,000 pounds. In defining its relevant geographic markets, the Commission adopted four of seven proposed city-pairing traffic lanes, ranging between 564 and 1,235 miles apart, served by both Navajo and Garrett. It should be noted that the product market adopted by the ICC is currently being challenged on appeal in the U.S. Court of Appeals. Argument on the appeal was heard April 7, 1977 and a decision is pending (Navajo Terminals, Inc. v United States, No. 76-1635 7th Cir. filed July 1, 1976).

being of "lesser importance" and minishipments as having a cross-elasticity of demand of 1 percent or less. Then, noting what it termed to be inherent differences in similar services offered by proprietary carriers, radial highway common carriers, highway contract carriers, passenger stage corporations, and parcel delivery carriers, the staff excluded these carriers from consideration as competition, asserting that as a practical matter they provided no meaningful economic substitution or reasonable interchangeability of use for the general commodity LTL shipment that typically moves by common carrier truck service, and concluded that general commodity LTL shipments in intrastate intercity transportation would be the proper relevant product market in this proceeding to test for possible anti-competitive consequences in the acquisition.

On the other hand, Delta argues that the appropriate sub-market for Section 7 consideration under the particular circumstances prevailing in the California trucking industry must include all servic which are interdependently in actual competition, keeping in mind the economic realities of the market place. Delta notes that highway common carriers must handle all weight classifications of freight, i.e., less than 101 pounds (minis), less than 10,000 pounds (LTL), and over 10,000 pounds (TL), in order to discharge the service obligations of their certificates, and that they are in "head to head" fierce competition with the permitted, parcel delivery, and proprietary carriers of the State for all of that freight. Delta therefore contends that the obligation, ability, and willingness of the highway common carrier to offer, compete for, and handle mini, LTL, and TL service, each interdependent upon the others, each integral to the highway common carrier's operation, and each economically incapable of independent existence in "the real world", is evidence that these services combine to constitute a discernible and industry recognized cluster of services which are in fact a "single basic service" offered

to the shipping public. Delta contends that to disregard the interdependence of these services is to ignore the commercial reality of the California trucking industry; and noting the regular and substantial competition from permitted carriers for both LTL and TL shipments, the substantial competitive overlap existing with parcel delivery carriers, and the high elasticity of demand that exists between private and common carriers, asserts that the relevant product market applicable to this proceeding consists of the movement of general commodities of all weight classifications by common, permitted, parcel delivery, and proprietary carriers.

As noted earlier (see Footnote 23), the staff's approach in this proceeding is patterned upon that of the U.S. Department of Justice in the Navajo proceeding currently under appeal. The staff definition of the relevant product market in this proceeding as being "intrastate intercity for-hire transportation of general commodities in lots of up to 10,000 pounds per shipment" is closely similar to that adopted by the ICC in Navajo. Whether such a close transposition from the federal to the state arena is appropriate, considering certain differing characteristics of the California trucking industry from that of the federally regulated industry, is open to considerable question, especially when cast against the vastly differing distances involved in the city pairings chosen by the ICC and the terminal pairings chosen by the CPUC staff. In the federal case, even though recognizing that LTL traffic constituted but one of the cluster of trucking services provided by the regular route motor common carriers of general commodities,[24/] the ICC found that there was a general

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24/ LTL accounted for 73 percent of Garrett's revenue and 62 percent of Navajo's revenue. Navajo also operates a "protective service division", special and distinct from its LTL, for the purpose of handling commodities requiring protection from the heat or cold. This division is operated with owner operators.

preemption of the LTL field, leading to an "almost complete domination of the carriage of LTL traffic by regular route common carriers of general commodities", and concluded, after considering such factors as price, quality of service, speed in movement, reliability, flexibility, availability of pickup and delivery, size and weight restrictions, and special containers and packaging, that there was no substitutable service, and that therefore LTL constituted a very extensive and appropriate product market in which to assess the impact of the proposed acquisition of Garrett by Navajo within the confines of the geographic market there involved.

In California, however, the movement of LTL traffic is not completely dominated by highway common carriers. There is very significant movement of LTL by both proprietary and permitted carriers. Whereas in Navajo the ICC concluded that proprietary carriers were not a factor, that the likelihood of LTL movements by private carriers over the long distances (564 to 1,235 miles) between the cities paired in its geographic market was "practically nil", competent evidence in this proceeding established that in California the movement of highly rated LTL, particularly the heavier LTL weights, away from highway common carriers to proprietary carriers is one of the movements occurring in the transportation industry that is causing significant consequences to the highway common carrier. A shipper has his own fleet or leases a proprietary fleet,[25] and at each and every instance,

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25/ The president of one large highway common carrier, Di Salvo Trucking Company, testified in this regard that his company does a reasonably successful "very substantial" business in leasing drivers and equipment to shippers under MRT-2 as one means of competing with private carriers. It is interesting to note corroboration of this movement from the statistics provided in this Commission's publication "Distribution of Revenue by minimum rate tariff" for calendar years 1974 and 1976, of which we take official notice. Between 1974 and 1976 total revenue from all Minimum Rate Tariff transportation increased 14 percent; MRT 2 TL revenue increased 15.3 percent; and parcel delivery statewide increased 51.5 percent, while MRT 2 LTL revenue increased only 6.7 percent. But MRT 15 (revenue from rental transportation) revenue increased 22.3 percen

considering different types of freight over different lanes, he makes a decision: Shall I tender that shipment to a common carrier, or shall I ship it in my own vehicles? Abundant testimony clearly established that there are many substantial shippers who ship the cream, the highly rated LTL traffic in their own trucks, and tender the skim traffic to the common carrier.[26/] But the point made is that this is LTL traffic whoever carries it, and that the common carrier competes daily with the proprietary fleet shipper for it and it cannot be ignored as non-competitive.

In Navajo the ICC concluded that over the long distances involved in the particular four city-paired traffic lanes adopted as its geographic markets to test competition, the irregular route common carrier, usually lacking terminals and providing "indiscriminate, coincidental, non-scheduled, unperiodical, itinerant, ambulatory" call or demand service, for the most part handles TL and does not compete effectively in the LTL area,[27/] and therefore excluded him. In California, on the other hand, this distinction is not nearly so clear

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26/ The distribution manager of Moore Business Forms, shipping 500,000 pounds line haul and 400,000 pounds local daily, testified that his company consolidates its approximately 500-pound components and ships approximately 20 percent by highway common carrier, transporting the balance itself; making judgments on an economic basis regularly whether to move freight via its own fleet or via common carriage. Its primary consideration is back-haul. If it has no back-haul on a run it turns it over to a common carrier. The only place the company operates its own fleet is in the West, and the activity depends "strictly on its own economics".

27/ For a discussion of distinguishing features of the irregular route common carrier as viewed by the ICC see: Transportation Activities of Brady Transfer and Storage Co., (1947)-47 M.C.C. 23, aff'd Brady Transfer & Storage Co. v United States, 80 F. Supp. 110 (S. D. Iowa (1948), aff'd per curium 335 U.S. 875 (1948)).

cut. The uncontradicted evidence in this proceeding from those in the industry is to the effect that the irregular route common carrier's California counterpart, the radial permit operator, provides regular and substantial competition for both LTL and TL shipments.[28/] Examples of substantial LTL business, particularly in the split delivery traffic from larger shippers, lost to permitted carrier competition were cited. Indeed, an executive of one Fresno based permitted carrier, Mammoth of California, Inc., testified that he and other permitted carriers routinely compete "fiercely" with certificated carriers for both LTL and TL freight; that 30 percent of Mammoth's business is LTL; and that it daily runs three schedules involving 100,000 pounds in each direction of LTL split delivery freight between San Francisco and Los Angeles.

Thus, it is clear that, unlike the factual matrix appertaining to the regular route common carrier in the federal case, the California highway common carrier does indeed face significant and growing competition for LTL from both the proprietary carrier and the permitted carrier, and it is open to serious question whether this significant and growing competition at the time of acquisition can be disregarded in settling upon a realistically drawn relevant product market for purposes of Clayton Act Section 7 tests.

28/ A number of radial and contract carriers engaged in significant LTL competition with common carriers were named by various witnesses (in California the distinction between radial and contract carriers is in practice largely illusionary). The presidents of both Di Salvo and System 99 flatly rejected the staff's assertion that a permitted carrier could not lawfully conduct line-haul LTL operations that would be of any competitive significance. One commented that were it so, "I wish someone would tell the State of California about that".

Unfortunately the issues raised by this proceeding relating to the scope of the relevant product market to be applied in this instance do not end here. The core issue as to the relevant product market remains: Should the product market be limited to LTL, or should it include minis, LTL and TL? The staff relies upon the holding in Brown Shoe Co. v United States (1962) 370 U.S. 294, 325 that "...well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes", and that the product market may be defined by the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it". The staff contends that whether Delta as a carrier can survive exclusively as an LTL carrier or must offer mini and TL service as well to survive is irrelevant; that the proper applicable product market is defined in terms of interchangeability of the services on behalf of buyers - not other sellers, relying upon the statement by the U.S. Supreme Court in United States v E. I. Du Pont de Nemours & Co. (1956) 351 U.S. 377, 395 that:

> "In considering what is the relevant market for determining the control of price and competition no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of trade or commerce', monopolization of which may be illegal."

But in asserting that "Applicant has endeavored to show that, among motor carriers, each of these kinds of service [mini, LTL, and TL] is interchangeable to some extent"; that Delta contends that "... truckload is an adequate substitute for LTL...", the staff has missed the thrust of Delta's assertion. Delta is not contending that minis are an adequate substitute for LTL, or that there is a substitute for LTL. Rather, and relying upon United States v Grinnell Corp. (1966) 384 U.S. 563, 572 where the Supreme Court (noting that unlike the situation in Brown Shoe, here they were dealing "with services, not with products") held:

"We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities,"

Delta contends that where the market is defined so narrowly as to ignore commercial reality or the interdependence of the various services and their combined importance to the success of the business as a whole, it fails of its essential purpose of providing a true picture of the competitive marketplace being tested. In Grinnell the U.S. Supreme Court upheld the finding of the District Court denying the contentions of the U.S. Department of Justice that the various types of services offered by accredited central stations such as, for example, burglar alarm services, fire alarm services, waterflow alarm services, and sprinkler supervision services, were so different that they should not be lumped together to make up a relevant product market. The Supreme Court determined that the embracive overall service offered by the company was that of protection of property, and that it would be "unrealistic" to breakdown that market into the various kinds of protection services offered since "Central station companies recognize that to compete effectively, they must offer all or nearly all types of service." In Grinnell the court referred to and repeated its earlier holding in United States v Philadelphia Nat. Bank (1963) 374 U.S. 321 (where again, "...services, not products in the mercantile sense, were involved.") that "the cluster of services"denoted by the term "commercial banking" is "a distinct line of commerce", 29/ and

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29/ In United States v Philadelphia Nat. Bank, at pages 356-357, the Supreme Court agreed with the District Court that "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking...composes a distinct line of commerce," and determined that "it is clear that commercial banking is a market sufficiently inclusive to be meaningful in terms of trade realities." By footnote, banking services offered by commercial banks were stated to include:

(Continued)

stated: "In our view, the lumping together of various kinds of services makes for the appropriate market...," seeing "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act."

It must be recognized that in the instant proceeding, as in Grinnell and Philadelphia National Bank, we also deal with services, not mercantile products. Both Grinnell and Philadelphia National Bank are relatively recent expressions by the Supreme Court on "line of commerce" dealing with services. We believe that the lumping of services into a service package "line of commerce", or "relevant product market" approach as followed by the court in these significant cases is squarely on point given the factual circumstances in the case before us. In our opinion the staff has failed to establish by a fair preponderance of the credible evidence that the relevant product market in this proceeding is limited to LTL. Instead the evidence in this proceeding overwhelmingly establishes that the relevant product market is broader. From the evidence presented it encompasses the movement of general commodities freight of all weight classifications by common, proprietary, permitted, and parcel delivery carriers. As we have seen, the record herein is replete with credible evidence that in terms of economic trade realities prevailing in California at the time of this acquisition, Delta and the other leading common carriers in order to compete effectively and remain in business must offer and furnish the shipping public each category of freight transportation

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29/ Continued.

acceptance of demand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety deposit boxes; account reconciliation services; foreign department services; correspondent services and investment advice. In Philadelphia Nat. Bank the District Court stated:

> "It is the conglomeration of all the various services and functions that sets the commercial bank off from other financial institutions. Each item is an integral part of the whole, almost every one of which is dependent upon and would not exist but for the other." 201 F. Supp. 348, 363 (E.D. Pa. 1962), rev'd on other grounds, 374 U.S. 321 (1963).

service - mini, LTL, and TL. The evidence is that no one category alone represents an economically viable line of commerce, either to the carrier or to the shipper. Without the combination, the common carrier could not offer and the shipper would be without regular service, particularly to the more remote outlying areas. Mini service enables consolidation for large shippers - service they require. LTL offers one solution to the "small shipment" problem. Without TL a common carrier could not offer acceptable LTL service to much of the state - this is because of the necessity of generating back-haul business to balance shipping LTL on the front-haul. Exhibits R-21 and R-22 demonstrate the gross imbalance on three routes: San Francisco-Los Angeles, Sacramento-Los Angeles, and Salinas-Los Angeles. Trucks carrying LTL from the Los Angeles Basin to the northern areas cannot develop sufficient LTL traffic for the return run - they must have the TL back-haul or they could not sustain the volume of northbound LTL. The concept of balanced flow, integrating all three classifications of freight, is a fact of life in the California trucking industry, we are told; absolutely necessary to the "bottom line", and to disregard the interdependence of mini, LTL, and TL is to ignore commercial reality. Common carriers utilize the same employees, terminals, and equipment to offer and provide all three components as a package of transportation service. Whenever possible the common carrier truck will take everything it can get when picking up freight.[30/] All classifications of a shipper's freight are handled through the common carrier's terminal, and as noted in Exhibit R-20, typical freight runs carry all classifications of freight. The staff contends that the price

30/ As the president of Di Salvo testified: "Once our vehicle is backed into their dock we try to take whatever it is that we can, including those that might go to an operator such as United Parcel Service."

differential between parcel delivery carriers and common carriers on small packages should eliminate parcel delivery carriers from the relevant service market in that there is no cross-elasticity of demand. But the scope of a relevant product market is not governed by the presence of a price differential,[31] and as we have seen, the ability of the common carrier to provide certain additional services (faster delivery, traceability, COD, etc.) does enable him to compete for a share, albeit small, of that classification of freight.[32] In United States v Phillipsburg Nat. Bank (1970) 399 U.S. 350, at 360, the Supreme Court cautioned that "Submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." And in United States v Greater Buffalo Press, Inc. (1971) 402 U.S. 549 the court followed that viewpoint in reviewing the District Court's division of the color comic supplement printing business into component parts, and instead applied the "area of effective competition" rule set down in Standard Oil Co. v United States (1949) 337 U.S. 293, at 299-300 n.5.[33]

Geographic Market

As to the concept of a relevant geographic market for Clayton Act Section 7 considerations, the Supreme Court in Brown Shoe (at p.336) stated that it must be selected to "correspond to the commercial realities of the industry and be economically significant." It does

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31/ In United States v E. I. Du Pont de Nemours & Co. (1956) 351 U.S. 377, 401, the Supreme Court included cellophane in the flexible wrapper market along with glassine and grease-proof papers despite the fact that it costs two or three times as much.

32/ On brief the staff inadvertently recognizes the logic in the Grinnell determination that it would be "unrealistic" to fragment the market into service components since the companies "...recognize that to compete effectively, they must offer all or nearly all types of service", when it points up in a footnote the probability that much of Delta's TL is available because Delta carries LTL for shippers who require both LTL and TL and prefer to deal with one carrier.

33/ Where the court noted that "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition."

not require that an entire state, or that any county or region constitute the market, but rather more pragmatically it means that the delineation be made in accordance with the realities of the way in which the involved parties built and conduct their business. (Grinnell, supra, at p.576.) It means a "careful selection of the market area in which the seller operates and to which the producer can practically turn for supplies". (Tampa Electric Co. v Nashville Coal Co. (1961) 365 U.S. 320, 327.) The courts have held that so long as the geographic market selected reflects the "area of effective competition," it must be upheld, (Philadelphia National Bank, supra, at p. 359) and finally: "The two terms - area of effective competition and relevant market - are synonymous." (United States v Penn-Olin Chemical Co. (1963) 217 F. Supp. 110, 119 (D. Del.).)

In the instant case the staff asserts that the relevant geographic markets are the various traffic lanes between grouped terminals; lanes in which the operations of Alltrans and the Delta group overlap and are duplicative, and wherein they effectively compete in movement of traffic as highway common carriers of general commodities. The staff view is that the market area at one end of any such traffic lane is largely determined by the carrier; it being the sphere in which he concentrates his selling efforts and locates his terminal, and that the market area at the other end depends "in a large measure to the happenstance of shippers' distribution networks as well as carrier operating authority and proximity of a consignee to a terminal or to an established pickup and delivery route." From this the staff determined that the best way to measure the geographic market would be to measure inter-terminal group shipments. On the other hand, Delta asserts that the relevant geographic market consists of intercity movement of general commodity freight by the relevant carriers;

contending that that movement is not confined to movement between terminals, but rather moves by a wide variety of routes and ways;[34/] that data gathered on a terminal-to-terminal basis is inadequate to measure actual traffic flow between origin point and destination point since necessarily it does not include all freight moving between those points, but depends for its inclusions upon the operational characteristics of particular carriers.

Answering Delta's contention that an origin point to destination point study would be appropriate, the staff's expert witness agreed that "it would have been nice to have considered every city as a point of origin, every city as a point of destination, accumulated those data. They were not available. And I was forced to use the data that were available to the carriers. It would have been an impossible job in my judgment to have to go through every freight bill issued by every carrier within the State of California and copied down the points of origin, points of destination of the LTL shipments and tallied it all up." The staff witness concluded that his study shows the relevant movement of freight in California and that the transportation not reflected in it is "so minuscule that it is hardly worth talking about it". But Delta's expert witness noted that while the staff study purports to be of "intrastate, intercity for-hire transportation", it quickly ended up with only "highway common carriers and express corporations" grossing over $500,000 annually in LTL, and excludes 94.78 percent of all LTL carriers and 47.7 percent of the revenue. The Delta sponsored expert asserted that an arbitrary $500,000 cutoff on a statewide market might make some statistical sense, but on a particular traffic lane market such a

34/ For example, the terminal-to-terminal approach entirely excludes significant competition faced by common carriers on line haul moves by single terminal carriers, and from carriers that operate with no terminal at all, or inter-terminal operations where those terminals were grouped into a regional terminal.

cutoff destroys credibility in that while smaller carriers do not provide a transportation service for all commodities throughout the State of California, but rather tend to be concentrated in specific geographic regions, such carriers could be significant over particular lanes. Here they were arbitrarily eliminated and their impact on any given lane was not even investigated.

We believe Delta's point is well taken. As noted initially, a relevant geographic market must be "the area of effective competition". Here it clearly is not. On an arbitrary or a judgmental basis the staff has excluded smaller carriers under $500,000 LTL gross, proprietary carriers, permitted carriers, parcel delivery carriers, and freight forwarders. Then, of the remaining 105 carriers, judgmentally the number of participants in the survey is cut down to a final 38 carriers; some of whom participate in any one of the traffic lanes which constitute the staff's geographic markets. What we have is a judgmental sample; not a statistically derived sample. Statistically it would have been entirely possible to have developed a sampling plan to give representation of the full range of transportation service being actually provided by the entire range of carriers without an arbitrary cutoff at $500,000. Statistically a random sampling procedure, taking a larger proportion of the larger carriers, a somewhat smaller proportion of the medium sized carriers, and a very small proportion of the very, very small carriers, would have gotten representation from the total traffic movement, and would have provided some statistical credibility at the end.35/

35/ Dr. Daicoff (see n.16 for his qualifications) in general terms in his testimony described a similar sampling plan he was invclved with which was developed for the Washington State Utilities and Transportation Commission on traffic movement in the Puget Sound area; a plan wherein they developed a procedure for sampling from the entire range of providers of a particular transportation service, on varying sampling intervals depending upon the size of the carrier.

In considering further the validity of the staff survey, we are impressed with Dr. Daicoff's testimony about the inadequacies of the actual staff survey instrument and survey procedure followed - in particular the lack of direction and control. Daicoff quite properly noted that the questionnaire sent to the carriers for completion did not define its terms or describe how the requested data was to be collected.[36/] The participants should have been told specifically and completely just exactly what they were to produce so as to eliminate to the extent humanly possible any judgment on their part. But here this was not done. Other than an occasional telephone contact during

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36/ For example, how split pickups or split delivery shipments - either over or under 10,000 pounds in the aggregate, were to be reported. As a consequence here some carriers simply counted bills of lading, some reported pro numbers, some reported what they said to be shipments, some reported something called "transactions", and some did not tell what they reported. The staff intended that master bills were to be reported as a single shipment and so treated the data furnished; but the Delta group, in the absence of precise instructions, followed their usual practice and reported components of master bills as shipments where the master bill aggregate weight was less than 10,000 pounds. As a consequence Delta's shipments in 1974 as used in the survey were overstated by 11.92 percent, and CME's shipments by 16.74 percent. Another example: The staff intended that the Delta group's 1974 data be reported separately for the first 7-1/2 months and for the final 4-1/2 months, using the Alltrans acquisition date of August 18 as the breakpoint, and accordingly used the data furnished in arriving at projected market shares in the relative geographic markets. But the Delta group furnished data using the end of July 1974 as the breakpoint.

which few questions were posed by any carriers, each carrier used its own judgment. None of the information submitted was verified or audited in any realistic way by the staff. The important consequence here is that you do not know what you have got, and while you might have obtained excellent data from one carrier, when you add that to data from another carrier, for statistical credibility you have "garbage" information because they may have used different definitions, different criteria, different cutoff dates, etc. Possibly the most damaging result, however, of the failure of the staff to verify carrier responses relates to the data submitted by Alltrans. In his study of each of the 38 responses used by the staff, Dr. Daicoff testified that he had discovered that one respondent, Alltrans, with some 34 traffic lanes to cover, reported 1,724 shipments on each of eight different lanes, and a multiple (twice or thrice) 1,724 on another eight lanes. In addition, for each of another six lanes, Alltrans reported 1,714 (or a multiple thereof) shipments. (Curiously, where Alltrans reported a multiple of 1,724 or of 1,714 almost invariably it added one to the resultant number. Thus, as Dr. Daicoff pointed out, it is patently obvious that the Alltrans 1974 figures were fictitious made up numbers; a result beyond the laws of statistical probability. None the less these "estimates" went undetected and were incorporated into the staff study to be used in making the staff's projections.[37] But these figures constitute the heart of the staff's case. They constitute

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37/ On cross-examination, the staff's witness admitted that Alltrans had earlier advised that it had only a few freight bills for 1974, and that he was aware that their submission of information was based on some estimate before the Alltrans response was actually submitted in September 1976. After submission he "may have noticed on, say, two lanes or something like that", but not as a pattern. The data was then forwarded to the data bank for accumulation and used thereafter without question.

the projection base which we must accept to draw findings and conclusions purporting to prove antitrust implications sufficiently dangerous to require denial of this application in certain of the lanes. In the supplement to Exhibit R-15 introduced into evidence on July 18, 1977, the staff set forth an analysis of 23 lanes drawn from the exhibit. Each of these 23 lanes involved a sub-market with 10,000 shipments or more in 1974 wherein Alltrans and the Delta group participated. At the request of the ALJ presiding, the staff's expert witness ranked the first dozen of these lanes into five descending levels of potential antitrust implications and significance (see this ranking: supra, pp. 11-12). He excluded two other lanes as being outside the geographic market and therefore not relevant here, and designated the remaining lanes as of less significance. Our examination of the underlying Exhibit R-15 data for the dozen lanes ranked as the really significant lanes, reveals that nine[38/] of the twelve projections showing market shares contain the "estimated" Alltrans figures with the statistically impossible 1,724-1,714 numbers and are consequently worthless in this proceeding, carrying no pretensions to being of any probative worth in an antitrust consideration. In its concurrent closing brief the staff chose to focus our attention upon four traffic lanes, stating:

> "Focusing only on these four traffic lanes, they prove significant enough to warrant a conclusion by the Commission, as it weighs the public interest, that these anti-competitive influences are detrimental to the public good, and, therefore, the application for acquisition must be denied as being adverse to the public interest."

38/ Reflecting the staff's ranking: Lane 3: Chico-Los Angeles; Lane 4: Fresno-Los Angeles; Lane 5: Los Angeles-Salinas; Lane 6: Salinas-Sacramento; Lane 7: Chico-San Francisco; Lane 9: Chico-Sacramento; Lane 10: Fresno-San Francisco; Lane 11: Los Angeles-Santa Rosa; and Lane 12: Sacramento-Santa Rosa.

These four "significant" traffic lanes, in the order stated in the staff's closing brief, are:

1. Los Angeles-Sacramento (previously ranked second).
2. Los Angeles-Santa Rosa (previously ranked eleventh).
3. Salinas-Sacramento (previously ranked sixth).
4. Sacramento-San Francisco (previously ranked eighth).

But the data pertaining to three of these lanes is questionable. The first lane listed was considered by the staff itself as unreliable. As the staff witness testified on cross-examination:

> "I would point out that the 1973 data for Alltrans, I have a comment in there; I would not rely on that.... It appears that there were some data that they were unable to locate for that particular year, and they gave me what they had. And it does appear to be incomplete to me, especially when you compare it with the other years."39/

In addition, lanes 2 and 3 contained the worthless 1,724 "estimates" uncovered by Dr. Daicoff,40/ leaving only the fourth lane. Interestingly, the staff did not even include among the four finally selected lanes deemed "significant enough to warrant a conclusion" of anti-competitive detrimental influence, the Los Angeles-San Francisco lane, its initial choice for most significant lane at the hearing.

39/ Transcript pp. 2073-2074.

40/ Los Angeles-Santa Rosa: Exhibit R-15 lists 5,173 shipments in 1974 for Alltrans: 1,724 x 3 = 5,172 + 1 = 5,173.

Salinas-Sacramento: Exhibit R-15 lists 3,449 shipments in 1974 for Alltrans: 1,724 x 2 = 3,448 + 1 = 3,449. (Precisely the same figure also reported for the Sacramento-Stockton lane.

But before any of the Exhibit R-15 data could be granted even pro forma status, it would have to be corrected to adjust for:

1. Conversion of the 1974 projection base to reflect the end of July pre-acquisition reporting period used by the Delta group (supra, p. 24).
2. Weighing the Delta group 1974 projection base to reflect seasonal fluctuations.41/
3. An allowance to allocate for projection purposes the Alltrans post-merger 1974 traffic amongst all the competition based upon proportionate 1973 market shares for each lane (see the August 29, 1977 testimony of witness Lantze, pp. 2257-2258 transcript).
4. Incompatible master bill reporting by the Delta group (supra, p. 25).

While it might be interesting to pursue these adjustments through, it would only serve as an academic exercise. It is clear that the staff's reliance in this proceeding upon market share data derived from its survey to make determinations of anti-competitive influences detrimental to the public good cannot be credited in light of the shambles to which its survey has been reduced. While precision in detail in development of such statistics is not critical, accuracy of the broad picture is important. (Brown Shoe, supra, at p. 341 n.69.) Furthermore, in determining anti-competitive effect, concentration ratios, and consolidated firm shares are not of themselves sufficient

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41/ Delta's witness, as well as other witnesses, pointed out that freight transportation in California is strongly seasonal; being considerably heavier in the latter part of each year as contrasted to the earlier part. Mr. Lantze testified "I know from my own experience in California industry, because one of the reasons they have the trucking convention in February is that business is so poor you might as well have it then anyhow". This contention is amply corroborated by the quarterly reports on operating revenue issued by our Systems and Procedures Branch summarized in graphic form in Exhibit 3.

data from which to determine whether danger is present,[42] and the guidelines of the Department of Justice, while representing a statement of that federal enforcement agencies practice, are not binding. (United States v Atlantic Richfield (1969) 297 F. Supp. 1061 (S.D.N.Y.).) It must also clearly be remembered that the presumptive illegality approach involving the virtual adoption of a practically irrebuttable rule of prima facie illegality in horizontal merger cases (and the concurrent decline of the Brown Shoe (supra) "reasonable probability" tests) spawned in 1963 by Philadelphia National Bank (supra), and followed in cases such as United States v Von's Grocery Co. (1966) 384 U.S. 270,[43] and United States v Pabst Brewing Co. (1966) 384 U.S. 546 provided the climate in which the guidelines were born. Following Vons and Pabst, the courts tended to limit those cases to their facts and required that a detailed analysis of an appropriate geographic market was a necessary preliminary step to determining whether a

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42/ While pointing up the importance of market shares as "one of the most important factors", Brown Shoe (at p. 322 n.37) also cautioned against overreliance on market share data, stating:
"Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market - its structure, history and probable future - can provide the appropriate setting for judging the probable anti-competitive effect of the merger."

43/ Where, with a paucity of statistics, showing nothing more than a decrease in the number of owner-operated single stores and a corresponding increase in the number of chain stores, the Supreme Court reversed the District Court's holding that there was no reasonable probability of substantial lessening of competition, and found a Clayton Act Section 7 violation.

horizontal merger was anti-competitive. (United States v Crocker Anglo Nat. Bank (1967) 277 F. Supp. 133 (ND Calif.).) Finally, United States v General Dynamics Corp. (1974) 415 U.S. 486, and other recent cases[44/] appear to have reinstated the rule of Philadelphia National Bank as a rule of prima facie liability open to rebuttal; that is, if an apparent prima facie case has been made out, the merger proponents may still rebut it. Certainly if the General Dynamics court's quotation from Brown Shoe (see Footnote 42) is given face value, the rule now is that market shares are just the starting point for analysis; some effort to assess their significance in the particular economic setting of the merger must also be made. And the rule in General Dynamics cannot in logic be - and has not been - limited to the special case of a firm that can no longer obtain an essential input (see Marine Bancorporation and Citizens & Southern Nat. Bank (Footnote 43), where the court in both instances discounted the significance of market share percentages, and described its General Dynamics decision as holding that market share statistics establish only a rebuttable presumption of illegality). But market share statistics, at the very least, must at least be credible if they are to be used to prove anything. In the instant proceeding the staff survey lacks a valid statistical basis and ignores the commercial realities of the California trucking industry, and the more we try to read into the specific figures the further we stray from reality and the further the staff case crumbles.

For example, in Exhibits R-17 and R-18 sponsored by Delta, the applicant, taking the staff's Exhibit R-15 data at face value for purposes of the analysis, made the four adjustments referred to earlier (for 1974 pre- and post-acquisition reporting, seasonality factors, pro rata apportionment, and master bill reporting) and corrected the staff's

44/ United States v Marine Bancorporation (1974) 418 U.S. 602, and United States v Citizens & Southern Nat. Bank (1975) 422 U.S. 86.

1974 projected results lane by lane (for the 20 lanes initially selected as a supplement to Exhibit R-15 as the significant lanes), and then compared the resultant projections to the actual results for 1974. The result was that overall for these 20 lanes the Delta group achieved in 1974 a smaller proportion of the total market in these most important lanes than they received in 1973.[45/] In the one surviving lane of the four deemed most significant so as to be included in the staff's closing brief, the Sacramento-San Francisco lane; the Delta group in 1973 transported 24.3 percent of the total shipments in that lane according to the staff's figures, whereas in 1974 they transported only 21.1 percent of the actual shipments although by the staff's projection - corrected for the above four elements, they reasonably would have been able to transport 25.4 percent. Indeed, in only six of these 20 lanes did the Delta group in 1974 exceed the corrected projections. But in three of these six lanes the Alltrans share of the market was negligible[46/] and in the other three the

45/ In 1973 they had transported, according to the staff's survey actual results figures, 23.5 percent of the total shipments over these 20 lanes; in 1974 they transported 22.2 percent of the actual shipments, whereas, after the correction they reasonably would have been projected to have transported 22.8 percent.

46/ Fresno-Los Angeles in 1973 1.1 percent, declining from 2.2 percent in 1970; San Francisco-Santa Rosa in 1973 2.6 percent, declining from 4.6 percent in 1970; and Los Angeles-Santa Maria too negligible to be listed by the staff for any year. One can scarcely ascribe a decrease in competition to anything Delta did with Alltrans when Alltrans was a negligible factor in the market.

Alltrans figures were worthless, being flawed by the 1,724 estimates.[47/] Viewing the results in all of these lanes as a whole, Delta has shown, using the staff's own figures as a base, that it experienced an overall diminution in market share, and as witness Varozza testified, operational losses for nine months that Alltrans operated were $1,200,000. Therefore, as these financial consequences confirmed, Delta was no more successful than Thomas Nationwide Transport, Ltd. in making a viable operation of Alltrans.

From the above we must find that even if we could (1) accept the staff's definition of the relevant market as being a valid expression of the market applicable in this proceeding, and (2) overcome by adjustments and corrections the numerous reporting flaws, use of sheer estimates, and misconceptions in the accumulation of statistics in the staff survey, the projections based upon the corrected staff data when compared to the actual results achieved fail to show that the acquisition by Delta of Alltrans had an anti-competitive effect or influence detrimental to the public good. But we cannot accept the staff's definition of the relevant product or geographic markets because as we have discussed, we find them incorrect expressions of the "area of effective competition" in this service industry, and not reflective of the commercial realities of the trucking industry in California. "[w]ithout a definition of [a] market there is no way to measure [a defendant's] ability to lessen or destroy competition." (Walker Process Equip., Inc. v Food Mach. & Chem. Corp. (1965) 382 U.S. 172, 177.)

47/ Los Angeles-Stockton where Alltrans' market share in 1973 was a negligible 1.4 percent; Chico-Sacramento where both Delta's Alltrans' shares of the market substantially declined in 1973 over 1972 but where System 99's shares rocketed from 9.3 percent in 1970 to 35.4 percent in 1973 showing the non-acquisition potential for variation in market shares; and Los Angeles-Santa Maria where Delta gained 2.2 percent and Alltrans had lost 1.0 percent 1973 over 1972.

The staff's recommendation that we deny the application not only lacks substantial support in the record, but it is at odds with the record. Expressing concern with the probable "impact of the acquisition upon competitive conditions in the future", it lists four factors as the basis for its recommendation.

The first factor concerns the elimination of a competitive enterprise "which has been a substantial factor in competition". But Alltrans was not eliminated as a competitor because of the Delta acquisition. It was being eliminated by its own Board of Directors which had elected to close down its operations effective August 16, 1974. It was not merely in a precarious position. It was terminal.[48/] In such circumstances "market share statistics give an inaccurate account of the acquisition's probable effects on competition". (Citizens & Southern National Bank, supra, at p. 120.) Standing alone they do not constitute a prima facie case (General Dynamics, supra, at p. 498; Brown Shoe, supra, at p. 322 n.38; United States v International Harvester Co., (1977) ___ F 2d ___ 7th Cir., BNA, Antitrust Trade Reg. Rep., No. 839, November 11, 1977). The acquisition did not eliminate competition, rather it maintained competition in those areas where duplicating authority did not exist and it preserved 400 jobs for at least an additional nine months' time. Had it not been for the acquisition, Alltrans, in financial straits determined impossible by its Australian owners, was doomed to extinction August 16, 1974.

48/ The so-called "failing company" defense to Section 7 actions (pre-amendment) had its genesis in International Shoe Co. v FTC (1930) 280 U.S. 291, where there was at issue the acquisition by a competitor of the stock of a firm whose condition necessitated liquidation. concept was substantially bolstered by favorable comment in the Reports of both Houses on the Celler-Kefauver Amendment to Section 7. In Brown Shoe (at p. 331) the Supreme Court commented, "The importance which Congress attached to economic purpose is further demonstrated by the Senate and House Reports on HR 2734 which evince an intention to preserve the 'failing company' doctrine of International Shoe Co. v FTC."

(Continued)

The second factor concerned the effect of the increase in size of the acquiring company on competitors which remained in the marketplace. But the staff's study, corrected by Delta to reflect four previously discussed adjustments, show that Delta actually lost market share.

The third factor concerns whether the acquisition accomplished an "undue reduction in the number of competing enterprises". Obviously, since Alltrans was scheduled to be shut down August 16 anyway, there was no reduction accomplished by the acquisition. As the ALJ found in his "Examiner's Ruling" of May 20, 1977 on the Applegate motion filed May 21, 1976 (attached hereto as Exhibit 1):

> "Petitioner has not sustained its burden of proving that Delta had no intention to maintain Alltrans as an operating carrier, or that Delta's representations to this Commission inducing approval of its application, with particular reference to preservation of the jobs of many of the Alltrans employees, were either reckless or intentionally false."

The record in this proceeding shows that despite strenuous efforts and considerable economic losses, Delta was unable to save Alltrans.

48/ Continued.

However, in 1969 in Citizens Publishing Co. v U.S. (1969) 394 U.S. 131, the Supreme Court severely restricted availability of the defense to situations where the proponent could show that the condition of the acquired firm was terminal, that all alternative ways to save it were fully explored or fruitlessly tried, and that the acquiring firm was the only available purchaser. Since then General Dynamics in 1974, while not involving a failing company defense in the real sense, did widen the gamut of defenses generally, and affords opportunity to consider the defense in the context of a given situation. It would appear, from consideration of the testimony of Messrs. Golan and White on July 18, 1974, weighed against the widened defense scope clearly signaled by General Dynamics, that Alltrans' 1974 economic situation, efforts to solve it, and efforts to sell, would meet the loosened requirements of that defense.

The fourth factor relates to whether the acquisition served to deprive other competitors of access to shippers, thus depriving them of a fair opportunity to compete. Where the only (albeit conceptually and statistically not credible) statistics available show that the acquiring company actually achieved a lesser market share than it was projected to achieve in the absence of acquisition (and otherwise demise of Alltrans on August 18), no such finding can be made."

In conclusion, we must agree with Delta that an impartial view of the record compels the conclusion that there is no competent evidence that effect of the acquisition of Alltrans by Delta "may be substantially to lessen competition, or tend to create a monopoly", an action prohibited by Section 7 of the Clayton Act, as amended. Accordingly, we see no reason to change our Finding 7 in Decision No. 83292 that "The public interest is better served by authorizing the proposed transfer than by discontinuance".

Turning next to the second part of the order contained in our Decision No. 83581 dated October 8, 1974, to wit:

> "To allow the introduction of evidence with respect to waiver of guarantees to be made by Delta Lines, Inc. and its affiliates under the loan agreement between Delta California Industries and The Bank of America National Trust and Savings Association, dated September 20, 1972."

we observe that the jurisdiction conferred upon the ICC by Section 20-A, subsection 7 of the Interstate Commerce Act relating to the issue of securities or assumption of liabilities is "exclusive and plenary" with that Commission. We further note that Delta introduced Exhibit 21 - copy of ICC order - Finance Docket No. 27205 - Delta Lines, Inc. Notes and Assumption of Obligations and Liability - Service Date December 1, 1972, by which Delta Lines, Inc. was authorized to assume obligations or liabilities with respect to guaranteeing notes which might be issued by Delta California Industries on the terms and conditions as specified in that order. We see no further line of

inquiry as being necessary. The proponent of that part of our order in Decision No. 83581 was Nielsen, et al., and it was to accommodate that proponent's questions that we opened an opportunity to be heard in this reopening. Included in the appellation Nielsen, et al. at that time was the present surviving protestant, Applegate Drayage Co., Applegate's attorney, or attorneys, were present during most of the rehearing sessions, and have participated to a considerable extent through July 22, 1977, after which the ALJ was advised that because of economic constraints they would attend no further, although preserving participation. However, despite ample opportunity during the proceedings, at no time did Applegate offer witnesses or evidence in this context. Nielsen and the other protestants all withdrew earlier. We conclude that none of these parties had anything further to offer after reflection, and accordingly, we will consider that matter as being moot.

On July 7, 1975 protestant Applegate petitioned that a proposed report be issued by the presiding officer upon submission of of this matter. The issuance of a proposed report is discretionary with this Commission. In view of the extended time that this matter has been under rehearing, and of the opportunity for all parties to have fully expressed their viewpoints, as well as the time constraints imposed upon us by action of Section 1734 of the Public Utilities Code,[49/] we see no reason in further delaying issuance of a final decision by this Commission in this matter and will deny the petition.

49/ Section 1734: "If any application for a rehearing is granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the matter within 20 days after final submission. If no determination is made within that time, it may be taken by any party to the rehearing that the order involved is affirmed."

At various times during the course of these proceedings protestant Applegate has raised the issue of noncompliance with the conditions initially set down in paragraphs 2(a) and 2(b) of the order in Decision No. 83292 dated August 6, 1974, and modified by Decision No. 83388 dated September 4, 1974, in regard to a consolidated certificate and elimination of tariff duplications. On July 18, 1974 on the record the staff attorney acknowledged Delta's compliance, but stated that an in lieu certificate would be held in abeyance pending resolution of the rehearing questions. The staff will now be directed to expeditiously meet the requirements of Decision No. 83388. All other motions and requests for rulings raised during these proceedings and not ruled upon will be deemed denied.

Finally, we adopt as our own the May 20, 1977 ruling of ALJ Weiss on the six-point motion contained in protestant Applegate's petition filed May 19, 1976. This ruling is appended as Exhibit No. 1 to this order.

Findings

1. The intrastate highway common carrier operations of Alltrans by 1974 had become increasingly unprofitable resulting in substantial losses despite strenuous efforts to ameliorate the development, until in early 1974 the Australian owners determined to sell the operation immediately, or in the absence of a sale by August 16, 1974, unilaterally shut down the operations.

2. Negotiations with one potential purchaser having failed, time was running out when Delta was approached, leaving Delta the only viable potential purchaser Alltrans had located interested in the acquisition within the time constraints placed on Alltrans by its Australian owners.

3. The acquisition of Alltrans by Delta reasonably offered continued employment to approximately 400 Alltrans employees and preservation of the then existing levels of competition in territory where Alltrans had authority and Delta did not.

4. Expeditious handling of the Alltrans-Delta application was essential to preserve jobs and competition, and there was nothing ex parte, nothing reprehensible, nothing underhand, and nothing repugnant to due process or the public interest in the expeditious handling of the application.

5. Delta sustained $1,200,000 in losses from the operations of Alltrans during the period August 1974 - May 1975, which losses endangered the continued business of Delta.

6. The impromptu meeting of May 19, 1975 was merely exploratory on a collateral procedural point, and while in retrospect preferably avoided, was not improper or prejudicial as to the rehearing issues then before the Commission relating to antitrust considerations and guarantee waivers.

7. The May 29, 1975 ex parte contact of the then presiding ALJ by the Delta attorney was a personal lapse of professionalism not ascribable to his principal.

8. Because of these continuing and substantial losses, the operations of Alltrans were discontinued as a separate division of Delta in May, 1975 after all reasonable efforts had failed to make the business of Alltrans profitable under the adverse economic climate then prevailing.

9. In order to maintain viable operations, to compete effectively, and to meet the service requirements of the shipping public, highway common carriers in general, and Delta in particular, must handle all weight classifications of general commodities freight (i.e., less than 101 pounds, 101 to 10,000 pounds, and more than 10,000 pounds).

10. Highway common carriers compete among themselves and with permitted and proprietary carriers for the intercity movement of general commodities freight in all weight classifications in excess of 101 pounds throughout the State of California.

11. Highway common carriers compete among themselves and with parcel delivery carriers for the intercity movement of general commodities freight in lots of less than 101 pounds throughout the State of California.

12. Competition for general commodities freight of all weight classifications in intercity movement is not necessarily limited by location of, or existence of terminals.

13. The acquisition of Alltrans has not been shown to have increased or enhanced the market share of Delta in any relevant market.

14. Delta reasonably would have been expected to have at least obtained its pro rata share of the Alltrans traffic even in the absence of the acquisition.

15. The acquisition of Alltrans by Delta preserved 400 jobs and the existing level of competition in areas where there was no duplicative authority for approximately nine months.

16. The staff study has no statistical validity.

Conclusions

1. The two Commissioners charged in the May 19, 1976 Applegate petition have not been involved in improper or prejudicial conduct as alleged.

2. The transportation of all weight classifications of general commodities freight (i.e., less than 101 pounds, 101 to 10,000 pounds, and more than 10,000 pounds) by highway common carriers constitutes a "cluster of services" which is, in effect, a single basic freight transportation service in California.

3. The relevant "product market" in California consists of the transportation of all weight classifications of general commodities freight intercity by common, permitted, parcel delivery, and proprietary carriers.

4. The relevant "geographic market" in California is the intercity movement of all weight classifications of general commodities freight throughout the State of California.

5. The acquisition of Alltrans by Delta has been shown to have had a neutral effect on competition in that segment of the market sampled.

6. Alltrans was a "failing company" whose acquisition by Delta preserved competition in the relevant markets and thereby furthered the public interest.

7. The staff has failed to prove that the acquisition of Alltrans by Delta (1) did not continue 400 jobs for at least a reasonable period of time, (2) had anti-competitive influences detrimental to the public good, or (3) that the acquisition would be adverse to the public interest.

8. Further evidence on the waiver of guarantees by Delta Lines, Inc. and its affiliates under the loan agreement between Delta California Industries and the Bank of America National Trust and Savings Association, dated September 30, 1972, is unnecessary.

9. The order contained in Decision No. 83292 dated August 6, 1974, as modified by Decision No. 83388 dated September 4, 1974 and Decision No. 83581 dated October 8, 1974, should be affirmed.

O R D E R

IT IS HEREBY ORDERED that:

1. The order contained in Decision No. 83292 dated August 6, 1974, as modified by Decision No. 83388 dated September 4, 1974 and Decision No. 83581 dated October 8, 1974, is affirmed.

2. The Commission staff and the applicant are directed to expeditiously carry out the provisions of Ordering Paragraph 2 as amended in the above stated decisions.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 27th day of March, 1978.

Proposed Report
Respectfully submitted,

/s/ JOHN B. WEISS
John B. Weiss
Administrative Law Judge

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EXHIBIT NO. 1

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of) ALLTRANS EXPRESS CALIFORNIA, INC.) for authority to sell (1) its) operating authority as a highway) common carrier; and (2) certain) property used in its public utility) operations; and of DELTA LINES,) INC. for authority to purchase the) operating authority as a highway) common carrier of ALLTRANS EXPRESS) CALIFORNIA, INC.)	Application No. 54997 (Filed June 26, 1974)

EXAMINER'S RULING

Under provisions of Rule 63 of the Commission's Rules of Practice and Procedure, the presiding officer in a matter before the Commission has the authority to rule on all motions which do not involve final determination of the proceeding, and take such other action as may be necessary and appropriate.

In the rehearing on this application this examiner is the presiding officer, and has before him the six-point motion contained in protestant Applegate's petition filed May 19, 1976 to:

(1) Disqualify Commissioners Sturgeon and Holmes from further participation in proceeding;

(2) Require Commission, Commissioner Symons, and/or Examiner Gilman to produce document;

(3) Present oral argument to Commission within fifteen (15) days hereafter;

(4) Require Commission decision within thirty (30) days after oral argument;

(5) Impose constructive trust on Delta Lines, Inc.'s intrastate operating authority;

(6) Appropriately fine and revoke Delta Lines, Inc.'s intrastate operating authority for its contemptuous conduct in this proceeding.

EXHIBIT NO. 1

Before approaching the task of ruling on each of the six points contained in the petition, in view of the voluminous extent of the record in the case, the examiner found it necessary to chronologize and summarize the events and evidence before the Commission leading up to the filing and June 21, 1976 hearing on the petition. This chronology-summary appears as Exhibit A to this ruling.

Discussion

1. TO DISQUALIFY COMMISSIONERS STURGEON AND HOLMES FROM FURTHER PARTICIPATION IN PROCEEDING:

This section of the motion, seeking disqualification of two Commissioners in a proceeding, presents an issue of first impression to the Commission. Bearing in mind that the essence of justice is largely procedural, it would appear that the proposition that a fair hearing before an impartial tribunal is an inherent requirement of due process, should be as applicable to administrative agencies as to our courts, for not only is a biased decision-maker constitutionally unacceptable, but our system of justice has ever sought to prevent even a semblance of unfairness in our decisional processes. A Commissioner of the California Public Utilities Commission exercises judicial or quasi-judicial power.[1/] At law he cannot be competent to sit in any proceeding in which he has prejudged a case or wherein he is biased or prejudiced toward any party, and should disqualify himself, or be disqualified, if such incompetence can be proven. But a decision-maker, whether he be a judge or a Commissioner, should not be disqualified lightly. The heavy burden of proving prejudgment, bias or prejudice, is upon the complaining party. It consists of a mental attitude or predisposition toward a party litigant sufficient to impair the impartiality or sway the judgment of the decision-maker. It is never implied. It must be

1/ Pacific Tel. & Tel. Co. v Eshleman (1913) 166 C 640, 650.

established by clear convincing averment. It must be something substantial, direct, definite, capable of demonstration, and proximate; not something remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical. Disqualification cannot be based upon mere conclusions, suspicions, or the skepticism of a party.

Applying these considerations to the relevant facts derived from an extensive review of the record, and keeping in mind the particular constituent factors which necessarily must coalesce in the function of a Public Utilities Commission Commissioner, this examiner cannot find or conclude that petitioner has met his burden of proving prejudgment, bias or prejudice, sufficient to unfit either Commissioner Sturgeon or Commissioner Holmes.

To fully understand the examiner's conclusion, one must first comprehend the unique function of a Commissioner in this Commission. The Commission itself is a regulatory body of constitutional origin designed "to protect the people of the State from the consequence of destructive competition and monopoly in the public service industries".[2/] It is both an administrative tribunal and a court,[3/] uniting legislative, administrative, and judicial functions in a single body. The five Commissioners bring to a focus diverse skills and attributes, all of which are required to make this unique body function. Selected and appointed by the Governor for his expertise, on his ability to acquire expertise with experience, and confirmed by the State Senate, it seems clear that each should be a man of conscience and intellectual discipline, capable of determining matters fairly on the basis of relevant circumstance. The entire State looks to these Commissioners for their views on the efficacy and importance of Commission regulatory programs and the

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2/ Sale v Railroad Commission (1940) 15 C 2d 612, 617.

3/ People v Western Air Lines (1954) 42 C 2d 621, 632.

merits of related existing or proposed legislation. Each Commissioner must bring pragmatic expertise to bear on the wide range of regulatory service and rate problems coming before the Commission, keeping in mind the complex interplay of social, economic, and political aspects attending these problems. Always they must hold an acute appreciation of the overall public interest. Daily they meet and deal with individuals and groups representing the lay public, special interests, conservationists, pro bono views, regulated industries, etc. Each visitor wants to say something to the Commissioner he comes in to see. Each, when one separates the chaff, is lobbying ex parte a viewpoint. As the politically appointed administrative heads of the single most powerful agency in this State, with an impact upon every citizen in the State, the Commissioners humanize the agency, explain and justify, and listen to and assist those who come in seeking information or assistance. It just does not follow, under these circumstances, that an opinion which may be left from these informal contacts is automatically a prejudgment, bias or prejudice - at least not when held, as here, by one required and accustomed to hold all opinions subject to confirmation or rejection later in the light of the proof.

In this regard consider the evidence itself. Thomas R. Dwyer (Dwyer), board-chairman of Delta California Industries, suddenly is presented with what he perceives to be an evanescent opportunity to purchase the Alltrans authority. Aware of regulatory lag and faced with an inexorable deadline to bind or lose the opportunity (unless a Commission decision can issue by August the Alltrans organization will be dissolved and any subsequent acquisition would be worthless), he elects to go direct to the top of the regulatory agency to ascertain if possibly the matter can be expeditiously handled. As is his well-known general practice, the Commission president, Commissioner Sturgeon, sees him, hears his story, and advises that he will see what can be done. This and nothing more is in the

record. Accordingly Delta and Alltrans file the necessary application. Noting particularly a possible opportunity - should Delta prove to be successful in rehabilitating Alltrans - at least for awhile, to preserve 400 teamster jobs that otherwise would go down the drain, and to keep in competition an honored intrastate trucking service, Commissioner Sturgeon expedited the hearing process. There was nothing ex parte, nothing reprehensible, nothing underhand, and nothing repugnant to due process in his actions. Indeed, to have done otherwise, to merely let events take their course, would have opened the Commission to severe criticism. Alltrans would have shut down in August 1975 with disruption to the shipping public and an outright loss of jobs. Obviously, in the scrambling for pieces, some carriers, including petitioner, might well have benefited. Instead, the matter was expedited, authority was granted, an orderly transition made, and jobs were saved, albeit as it turned out, only temporarily. However, zeal in the overall public interest does not disqualify.

A closer issue arises out of the incident of the May 19, 1976 meeting between Dwyer, Sturgeon, the Commissioner's aid Bricca, Commissioner Holmes, and Transportation Director Gibson. The testimony before the Commission on rehearing provides ample evidence that after Delta acquired Alltrans, the Alltrans operation in the grip of a general economic depression continued to lose substantial money despite major operational surgery and asserted good faith efforts to "turn it around", resulting in "utter total frustration" and "chagrin" at Delta. The Delta board determined to sell or shut down. On the eve of a decision from a potential buyer and a crucial meeting with the teamsters union, Dwyer again went to the top and came to see Commissioner Sturgeon to relate the fact that Delta was losing money and something had to be done. That informal informational visit evolved into an impromptu discussion as Commissioner Holmes and Director Gibson were invited to join Sturgeon, Dwyer, and Bricca.

Memories of what was discussed were dulled by passage of time and not precisely in accord on details on subsequent examination months later. But the examiner finds a consistent thread which well establishes in his mind that Dwyer called to relate the facts on Alltrans losses and the need to do something, that a question evolved as to procedure in the event Delta should sell the operation while retaining the certificate, and that Dwyer also informed the participants he had further negotiations to conduct in the matter. But most importantly, what appears clear is that all the parties questioned[4/] in substance agreed that the impromptu meeting was merely exploratory on a procedural point. No attempt was made to have the rights of anyone adjudicated. At this point in time any question of an Alltrans operational closedown had not entered into the rehearing. It was only on May 28, 1975 that the staff filed its motion for an interim order to require Delta to in effect preserve the status quo with Alltrans, thus presenting another issue in the rehearing. Therefore, while no public utility has a right arbitrarily and unilaterally to discontinue its service, even when operations are unprofitable (Southern Pacific Co. (1921) 20 CRC 445, 453), any shutdown of Alltrans operations, although bearing on the bona fides of the original acquisition, was not on May 19, 1975 itself technically at issue in this proceeding, and the parties at the May 19, 1975 meeting were not legally restrained from discussing the matter.

4/ Curiously, Bricca, aid to Commissioner Sturgeon and a lawyer, although subpoenaed by petitioner, was not called upon to testify. This despite the fact that he was present throughout the time Dwyer met with Commissioner Sturgeon and also for the full meeting with Holmes and Gibson.

EXHIBIT NO. 1

The examiner has considered fully the implications which can be drawn from the conversation on May 29, 1975 between Delta's attorney, Marshall G. Berol (Berol), and Examiner Gilman. This examiner notes that Berol testified that he could not recall having reached any conclusions from what he had learned from his client Dwyer about the substance of the May 19, 1975 meeting, but that he (Berol) "would not have said and did not say that the matter was approved", and "I did not say it was authorized". However, when contrasting the hesitant memory and Berol's statement that he "may have said that there had been a discussion...", with the positive and steadfast testimony of Examiner Gilman that he first learned of the May 19, 1975 meeting from Berol in that May 29, 1975 telephone call, and that Berol had therein informed him that the "termination" had either been "approved or authorized" at that May 19, 1975 meeting, this examiner credits Examiner Gilman's version and finds that Gilman was indeed told that the Alltrans shutdown had been either approved or authorized at the May 19, 1975 meeting, inferably by Commissioners Sturgeon and Holmes.

Why would Berol advise Examiner Gilman that a shutdown had been approved or authorized? We can but speculate. Berol could have been so informed by his client Dwyer and thus merely intended to try to clinch the discussion with Gilman. But Dwyer's testimony of what transpired at that May 19, 1975 meeting does not support a finding that Dwyer had reached such a conclusion. Dwyer credibly testified that the participants at the May 19, 1975 meeting had merely "kicked the thing around" and that "I came out of there with the full impression that nobody - nobody said 'you can't do that' or 'you can do it'". The testimony of the other participants (save Bricca who was not called) clearly substantiate Dwyer's version. Examining the factual context in which the divulgement was made, the examiner notes that Berol had not initiated the telephone call;

rather he returned Gilman's call. Therefore, until Berol talked to Gilman he did not know that Gilman wanted to discuss timing of a hearing to consider the just-filed staff motion to compel Delta to preserve the status quo. Berol at that point did not know of the staff motion, but he did know that Delta had already determined to shut down Alltrans operations on May 30, 1975, and presumably wanted nothing to interfere with this imminent step. Thus it is concluded by this examiner that Berol, in a possible spur of the moment excess of zeal, suffered a lapse of professionalism and tried to influence Examiner Gilman to conclude that the shutdown had already been approved or authorized by two Commissioners at a meeting May 19, 1975. Were such true, this examiner would have to agree with the blunt argument made by petitioner's attorney at the June 21, 1976 hearing on this motion, that "the fix" was on. However, from all the evidence before this examiner, particularly the testimony of four of the five participants to the May 19, 1975 meeting, and the curious failure to call Bricca (the fifth participant whose testimony would have corroborated that of the others, cast doubts upon their testimony, or have rebutted it), this examiner must conclude that there was no approval or authorization given by the two Commissioners at the May 19, 1975 meeting. He further concludes that Dwyer was unaware, did not suggest, and did not have knowledge that Berol would make that assertion to Examiner Gilman. The impropriety of the attempt to influence was Berol's alone on this record. 5/

5/ Just as grave ethical standards are raised by an ex parte submission from an attorney to a judge relating to a particular case which is before or may come before that judge (American Bar Association Standards), so too an attorney improperly attempts to influence an examiner outside of recognized adjudicatory procedure when he communicates or discusses facts during an ex parte communication with the examiner, thereby throwing into the scales of justice argument on the merits of a pending motion.

EXHIBIT NO. 1

In view of the above conclusions, this examiner, while regretting in this instance the want of possibly a more perspicacious appreciation on the part of the Commissioners of the impressions which could be imputed to such a meeting as that of May 19, 1975, finds nothing improper in the statements or actions of either Commissioner as depicted on this record. Therefore, as pertains to Commissioner Sturgeon, the examiner denies that portion of petitioner's motion which seeks to disqualify the Commissioner from further participation in this proceeding. While the examiner would rule similarly as pertains to former Commissioner Holmes were he still in office, the issue of his qualification to further participate has been rendered moot by expiration of his term of office.

One further aspect of this issue requires comment. Assuming arguendo that the actions or statements of either or both Commissioners constituted prejudgment, bias or prejudice, this examiner's research has revealed no provision for disqualification by anyone of a California Public Utilities Commissioner from participation in a matter before this Commission. While a Commissioner himself may elect not to participate in a matter, with or without having made his reasons known, there exists, short of the impeachment procedure provided in Article XII, Section 1 of the California Constitution for removal from office for incompetence, neglect of duty, or corruption, no statutory mechanism providing for involuntary disqualification from a pending matter. The Legislature has not directed that any Commissioner should disqualify himself under any enumerated circumstances and there are no statutory provisions for determination of the facts of disqualification. The Legislature has acted with respect to the disqualification of judges by enacting Section 170 of the Code of Civil Procedure. Similarly, Section 11 12(c) of the Government Code provides for the disqualification of members of numerous agencies and hearing officers.

However, this Commission, although exercising certain judicial powers, is not part of the judicial department of the State (People v Western Air Lines, Inc. (1954) 42 C 2d 621), and the provisions of Section 170 of the Code of Civil Procedure do not apply to this Commission. Similarly, the provisions of Section 11512(c) of the Government Code are not applicable to this Commission (City of Riverside (1967) 67 CPUC 786). Not only has the Legislature made specific provisions for disqualification of judges and specified other decision-makers, but it also has provided for the substitution of another judge or decision-maker in such instances where one is disqualified. In the light of this legislative action, it would appear that an argument that the Commission itself has an implied power to determine whether one of its members is disqualified on the ground of prejudgment, bias or prejudice, must fail. If three members of the Commission are to decide the disqualification of the other two members, who will decide the disqualification of the remainder in the event petitions of prejudgment, bias or prejudice, are moved against one or more of them. The argument could be made ad absurdum. It may well be that there should be a provision for disqualification of a Commissioner. However, that is a question for the Legislature. None now exists.

2. REQUIRE COMMISSION, COMMISSIONER SYMONS, AND/OR EXAMINER GILMAN TO PRODUCE DOCUMENT:

In fiscal year 1975-76 this Commission issued 1557 decisions or orders of which 345 required hearing proceedings. Each such proceeding is assigned to a Commissioner and an examiner. Either may preside at a hearing although in the vast majority of proceedings the examiner sits alone. The Commissioner's time must be reserved for the larger issues of policy, overall supervision, and the more troublesome problems of fact finding in the cases of major impact. For the duration of any proceeding there may be conferences between the Commissioner and the assigned examiner, and memoranda, evaluations, and comments may be exchanged leading up

to submission of the examiner's draft decision to the Commissioner. The conference content and the written communications are confidential and are not made available to the public, being considered similar to judicial work product reflecting the deliberative and decisional processes of the Commissioner-examiner unit. The relationship is not unlike that of an appellate judge and his law clerk. Utter frankness of expression and opinion characterize this process, one which is absolutely essential to the working of the administrative law function, dealing as it does with a vast number of matters each year. It is no more proper to open up the mental and deliberative processes by which a Commissioner determines the issues in his case than it would be to expose the mental processes by which a judge arrives at his decision in any given case.

In the case at bar, the Commission, exercising its discretion, reassigned Commissioners to this matter during the proceeding. Former assigned Commissioner Sturgeon had sat on none of the rehearing sessions - the examiner had presided at all. Following the reassignment, the examiner prepared a confidential memorandum for his newly assigned Commissioner, Commissioner Symons. In this memorandum (the document sought by petitioner in the instant motion) the examiner discussed an ex parte communication contained in a telephone call from Delta's attorney to the point that the shutdown of the Alltrans operation on May 30, 1975 had been previously approved by Commissioners Sturgeon and Holmes[6/] at the May 19, 1975 meeting. After receipt of this memorandum and a conference with his aid and Examiner Gilman, Commissioner Symons concluded that it would be preferable that Examiner Gilman should not continue on the rehearing because (1) of the "powerful effect" the disclosure could have on the examiner's impartiality, and (2) the

6/ It should be noted that it would require the votes of three Commissioners to issue any such order.

evidence of the disclosure should be placed into the record, necessitating testimony by Examiner Gilman which in turn would present problems in regard to his resumption of the bench. Commissioner Symons further concluded, in open hearing, that Examiner Gilman consented to reassignment. Exercising his discretion as the assigned Commissioner on the matter, Commissioner Symons accordingly requested assignment of another examiner. The Commission thereupon assigned this examiner to the proceeding. Voluntarily Examiner Gilman subsequently testified of the circumstances and content of the ex parte communication. Petitioner unsuccessfully repeatedly sought disclosure of the examiner's memorandum to the Commissioner, being denied access by rulings made by this examiner that the document was (1) excluded from those public records open to public inspection by provisions of Section 2.3 of General Order No. 66-C,[7/] and (2) privileged under a form of the Lawyer-Client privilege provisions of Section 952 of the California Evidence Code.[8/] Commissioner Symons, the holder of the privilege asserted,

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7/ General Order No. 66-C provides in relevant part:

"2. EXCLUSIONS

Public records not open to public inspection include:

(2.3) Intra-agency notes, drafts, memoranda and other communications not otherwise made public by the Commission."

8/ California Evidence Code, Section 952 "Confidential communication between client and lawyer":

"As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses that information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

refused to voluntarily disclose the document. Examiner Gilman also refused to disclose it, claiming the privilege on behalf of his former client, Commissioner Symons.[9/] This examiner ruled that the privilege existed, and also that the Commissioner's disclosure of the fact of an ex parte telephone communication received by the examiner then assigned, and a recital of the contents of that ex parte telephone communication, did not in any way waive the privilege held by Commissioner Symons as to the confidential written memorandum to the Commissioner from the examiner about that ex parte telephone communication.

The best evidence of that ex parte telephone assertion is already on the record. Both Berol and Examiner Gilman testified at length about both the factual circumstances attending the telephone call and the actual contents of the call including the assertions that the Alltrans shutdown was "approved" or "authorized". There was extensive cross-examination on the topic. It was only when petitioner sought to go beyond the facts of the ex parte communication and strove to probe the possible impact upon the examiner and the deliberative processes of the Commission that this examiner cut off the petitioner's line of approach. Examiner Gilman's memorandum to Commissioner Symons is not necessary for exploration of the facts encompassed by the ex parte communication from Berol or the circumstances under which it was made. Disclosure would not assist petitioner in its quest for evidence, any evidence, which would go to support disqualification of two Commissioners; rather it would only serve to establish an unfortunate precedent opening up the deliberative and decisional processes of a Commissioner and his assigned examiner on a particular case.

9/ California Evidence Code, Section 955 "When Lawyer required to claim privilege":

"The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954."

EXHIBIT NO. 1

The applicable rule of law in California, as petitioner acknowledges, is found in State of California v Superior Court (1974) 12 C 3d 237, 257-258, wherein the Court noted that the rule of Morgan[10/] is generally followed by the states, and declined to permit a probe into the question of what evidence on administrator considered in reaching a decision. Quoting from Morgan, the Court repeated the following from that opinion:

> "The opinion states, 'The proceeding before the secretary "has a quality resembling that of a judicial proceeding." . . . Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held...that "it was not the function of the court to probe the mental processes of the secretary." . . . Just as a judge cannot be subjected to such a scrutiny, ...so the integrity of the administrative process must be equally respected...'"

Would it not be equally destructive of judicial responsibility were a party to be permitted to go rummaging through the confidential memoranda between a judge and his law clerk, or between a Commissioner and his assigned examiner? (It must be remembered that the Commission stands next in authority to the State Supreme Court in all matters of public utility regulation (Oakland v Key System Transit Lines (1953) 52 CPUC 729).)

Petitioner would have us turn and go down a different path, banking all upon his asserted distinction of strong preliminary findings of bad faith or misconduct on the part of two Commissioners, an assertion this examiner already has rejected. Petitioner would bottom its arguments on Citizens to Preserve Overton Park v Volpe (1971) 410 US 402, a case where the federal supreme court seemingly,

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10/ In United States v Morgan (1941) 313 US 409, 422, it was held improper to examine the Secretary of Agriculture with regard to whether and to what extent he had read and considered certain evidence and exhibits prior to making a rate order.

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in a relatively superficially reasoned opinion, moved away from the Morgan rule and remanded under circumstances where the Secretary of Transportation had issued a decision which contained no findings of fact, and declared that the administrative officials who participated in the decision could be required to give testimony explaining their decision (410 US 402 at 420). The other cases, but one, which petitioner cites similarly involve nonanalogous situations, although all involve discernible likely gross abuse of the decision-making process. In Union Savings Bank v Saxon (1962 D.C.D.C.) 209 F Supp 319, the court stated that the taking of oral depositions of heads of federal governmental agencies is not encouraged and normally will not be allowed, but in a situation where the award of a federal bank certificate was made by the Comptroller of the Currency to a friend under questionable circumstances it would require deposition of the Comptroller, but limited the deposition scope to the actions of the Comptroller and excluded probing into the workings of his mind. In Singer Sewing Machine Co. v N.L.R.B. (1964 4th Cir.) 329 F 2d 200, where the issue was whether there had been violation of a statute respecting the determination of an appropriate bargaining unit, the court held that the mental process rule did not prevent compelling an NLRB field examiner from testifying on those considerations which led to determination of the unit. However, in that instance the only inference which could be drawn from the record was that there had been a violation of the statute in determining the unit. In KFC National Management Corp. v N.L.R.B. (1974 2nd Cir.) 491 F 2d 298, the board has certified a union. On appeal, a decision was issued "by direction of the board" ruling that the appeal was "lacking in merit", in a situation where a quorum of the board had not voted, buth rather one board member and two assistants acting with general proxies had issued the decision. The court refused to permit the board to use the Morgan rule to prevent questioning of those involved.

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Finally, petitioner cites Olsen v Camp (1970 E. D. Mich.) 328 F Supp 728, the only case cited as authority for the production of internal memoranda from a governmental agency. In it defendant Comptroller of the Currency denied plaintiff's application for a banking certificate. On review in District Court, plaintiff sought the Comptroller's administrative file relating to the application including certain intra-departmental memoranda and recommendations. The Court, noting that the question before it was not one of jurisdiction, or whether there was substantial evidence to support the Comptroller's decision, but rather whether the Comptroller had made a "careful examination of the facts" prior to exercising his discretion, held that unless plaintiff could examine the documents he would be "virtually precluded from proving unreasonable conduct on the part of the defendant", and ordered production of the confidential documents for in-camera review by the court, using a balancing of the interests rationale. But contrast this with Montrose Chemical Corporation of California v Train (1974 CADC) 491 F 2d 63, where a corporation sought two summaries of hearing evidence prepared for the administrator of the Environmental Protection Agency by his aids, using the Freedom of Information Act (FOIA) as its lever. On appeal from the District Court, which had ordered disclosure subject to certain deletions, the circuit court reversed, and determined that the corporation could not use the FOIA to discover what the administrator's aids cited, discarded, compared, evaluated, and analyzed to assist the administrator in formulating his decision; that to permit this would be the same as probing the decision-making process itself. The court observed that the litigants sought to know what advice as to importance and unimportance of facts the administrator received, and how much of it he accepted, and concluded that "such information is most emphatically not part of the public record", and determined that the documents sought were exempt from disclosure. It is interesting

to learn that Davis considers that the Montrose case is the law not only of the D. C. Circuit but is likely to be followed by other circuits, and also by the Supreme Court. Davis further states that to the extent that the attitude behind the Overton Park decision is inconsistent, it is unlikely to survive. (DAVIS, Administrative Law of the Seventies (Supplementing Administrative Law Treatise) Section 11.04 Institutional Decisions p. 324 (June 1976)).

This examiner does not consider Section 1040 of the California Evidence Code dealing with the privilege against disclosure of official information particularly applicable here, although more relevant would be the provisions of Section 3.5 of Commission General Order No. 66-C which gives the examiner authority to direct production of information not open under Commission rules if for "good cause" he deems it necessary or desirable. However, on balance here this examiner cannot find it necessary or desirable to open up the deliberative and decisional processes of the Commission on this set of circumstances. Aside from Montrose, it must be noted that the tendency of the courts of appeals in recent years has been to resist probing the mental and deliberative process of agency administrators. Absent discernible likely gross abuse of due process and unless there is no other record, the thought processes and deliberative measures may not be probed (National Courier Ass'n v Board of Governors of Federal Reserve System (1975 CADC) 516 F 2d 1229, 1242; South Terminal Corp. v Environmental Protection Agency (1974 CA-1) 504 F 2d 646, 675; and see Union Oil Co. of California v Morton (1975 CA 9) 512 F 2d 743, 752).

In the instant motion the facts are in the public record, disclosed fully by the testimony of Examiner Gilman and Attorney Berol, and amplified by testimony from four of the five participants in the May 19, 1975 meeting. What is not in and should not be in the public record is Examiner Gilman's confidential evaluation and discussion of these facts. The work of an examiner in separating and evaluating

evidence is surely just as much part of the deliberative process of the Commission as is the later running the draft decision through the mind of the assigned Commissioner. Petitioner has strong suspicions, but this examiner cannot find that its repetitive allegations and arguments of "a fix", of bad faith, of improper behavior, of misconduct, etc., are supported by the record, and finds no basis for opening up the confidential papers of Commissioner Symons, with the attendant destructive impact which would result to the decisional processes of this Commission. The examiner will not overrule the claim of privilege. Accordingly, the examiner denies that portion of petitioner's motion which seeks to require the Commission, Commissioner Symons, and/or Examiner Gilman to produce Examiner Gilman's memorandum to Commissioner Symons.

3. PRESENT ORAL ARGUMENT TO COMMISSION WITHIN FIFTEEN (15) DAYS HEREAFTER:

This portion of the motion, to present oral argument to the Commission within fifteen days of May 19, 1976, is dismissed as being moot.

4. REQUIRE COMMISSION DECISION WITHIN THIRTY (30) DAYS AFTER ORAL ARGUMENT:

This portion of petitioner's motion presupposed both an en banc Commission hearing on the motion and a Commission ruling on the motion. The assigned examiner, as provided under Commission Rules of Practice and Procedure, with concurrence of the assigned Commissioner, set hearing for June 21, 1976 on the motion filed May 19, 1976, conducted the hearing on the motion, thereafter received briefs, and subsequently as his heavy schedule permitted, prepared this ruling on the motion. The examiner saw no compelling reason to deviate from normal procedure and there has been no recommendation from the assigned Commissioner for any different procedure. It is clear that this portion of petitioner's motion requiring a Commission decision within thirty (30) days after oral argument is now moot. Accordingly, it is dismissed.

EXHIBIT NO. 1

5. IMPOSE CONSTRUCTIVE TRUST ON DELTA LINES, INC.'S INTRASTATE OPERATING AUTHORITY:

A constructive trust arises where a party holding legal title to property is subject to an equitable duty to convey it to another party, on the ground that the legal holder would be unjustly enriched were he permitted to retain the property (Scott, Abudgment of the Law of Trusts (1960) Section 461-464, p. 770). The unjust enrichment may arise out of wrongful acquisition of the property, as where it is acquired by fraud or undue influence. The equitable theory at play is that of a duality in ownership, equitable and legal, and operates on the concept that the legal owner merely holds the property for the rightful or equitable owner; the law regarding that done which should have been done. It is not a true or technical trust, rather the court is merely using the machinery of trust to prevent fraud.

Of constitutional origin in this state, the Public Utilities Commission has been provided the broad powers both of a court and of an administrative tribunal (Pac. Tel. & Tel. Co. v Eshleman (1913) 166 C 640, 650, 689). In the past exercise of this broad array of power, as petitioner notes in its brief, the Commission has invoked and used certain constituent equitable powers as well as strictly judicial powers. While nowhere in the Public Utilities Code does there appear any specific provision granting the Commission jurisdiction to exercise general equitable power, it would appear that Section 701 of that Code[11/] provides an ample residuum of authority, including general equitable powers, to be exercised as deemed necessary by the Commission in appropriate cases to "do all things..., which are necessary and convenient" in the

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11/ California Public Utilities Code Section 701:

"The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

supervision and regulation of public utilities. Considering the broad constitutional grant of power and the legislative enactment of Section 701 to facilitate the exercise of that power, legislation certainly cognate and germane to regulation, in the opinion of this examiner the Commission's authority includes jurisdiction to impose a constructive trust in a proper case. However, before reaching the ultimate question as to whether the instant proceeding is a proper one for the imposition of a constructive trust on Delta, there exists the threshold issue whether or not the fraud actually exists as alleged by petitioner. Because of the very nature of constructive trusts, any fraud alleged must be proven clearly and satisfactorily. The relief asked is so extraordinary that it is only where it is fairly certain that the circumstances calling for the relief actually exist, that the extending of it can be justified.

Just what is the fraud alleged to have been perpetrated upon the Commission by Delta in this instance? It is that Delta had no intention of maintaining Alltrans as an operating carrier, and that its representations to this effect to persuade the Commission to authorize the acquisition, particularly including the shimmering prospect of saving the jobs of at least 400 Alltrans employees, were either reckless or intentionally false.

Petitioner argues that Delta's representations to the Commission that it believed it could reverse the unprofitable record of Alltrans were based upon a "cursory" and "superficial" study of Alltrans revenues and expenses for April 1976. The examiner finds this assessment to be a rather shallow evaluation of the evidence on record in this case. In the July 1974 hearing on the then proposed acquisition, Delta's president testified at some length and with a degree of specificity as to how his secretary-treasurer, along with his people in operations and other fields,

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5. IMPOSE CONSTRUCTIVE TRUST ON DELTA LINES, INC.'S INTRASTATE OPERATING AUTHORITY:

A constructive trust arises where a party holding legal title to property is subject to an equitable duty to convey it to another party, on the ground that the legal holder would be unjustly enriched were he permitted to retain the property (Scott, Abudgment of the Law of Trusts (1960) Section 461-464, p. 770). The unjust enrichment may arise out of wrongful acquisition of the property, as where it is acquired by fraud or undue influence. The equitable theory at play is that of a duality in ownership, equitable and legal, and operates on the concept that the legal owner merely holds the property for the rightful or equitable owner; the law regarding that done which should have been done. It is not a true or technical trust, rather the court is merely using the machinery of trust to prevent fraud.

Of constitutional origin in this state, the Public Utilities Commission has been provided the broad powers both of a court and of an administrative tribunal (Pac. Tel. & Tel. Co. v Eshleman (1913) 166 C 640, 650, 689). In the past exercise of this broad array of power, as petitioner notes in its brief, the Commission has invoked and used certain constituent equitable powers as well as strictly judicial powers. While nowhere in the Public Utilities Code does there appear any specific provision granting the Commission jurisdiction to exercise general equitable power, it would appear that Section 701 of that Code[11/] provides an ample residuum of authority, including general equitable powers, to be exercised as deemed necessary by the Commission in appropriate cases to "do all things..., which are necessary and convenient" in the

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11/ California Public Utilities Code Section 701:

"The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

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worked with the secretary-treasurer's counterpart in Alltrans, and had concluded from their study that Alltrans could "be turned around and turned around in a short period of time and made to operate in the black". The conclusion was assertedly made after an in-depth analysis of the Alltrans ledgers for a 4-week period in April 1974 (the then most current Alltrans profit period). In that analysis, according to the testimony of Delta's president, they eliminated all the warehouse and drayage division portion as well as the interstate revenues, and then after application of Delta's operating ratio experience to the Alltrans operations, the Delta people concluded that they could achieve monthly reductions of approximately $177,000, thereby turning Alltrans around. These reductions in the testimony were specifically related to areas involving maintenance, line transportation operations, terminal operations, communication expense, release of 100 leased and excess trailers, subhauling improvements, elimination of Transport Clearings in collection of freight bills, loss and damage claims, integration of workmen's compensation expense (Delta is self-insured), unemployment insurance, association dues, and administration, accounting, and payroll expense. Petitioner evidenced little interest at the time in contesting or probing these detailed assertions on cross-examination, and at this point in time it therefore is difficult to credit petitioner's characterization of the study as "cursory" and "superficial". Rather the record tends strongly to the conclusion that the study was, if not within its necessarily limited scope comprehensive, at least authoritative, and provided (under the time constraints Delta then faced) a rational businesslike basis for Delta to conclude that with close management under Delta policies, standards, and practices, the Alltrans operation could very possibly be salvaged. Certainly none of this portion of the record can be said to exude even the slighest aroma of fraud.

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There is no question but that Delta made a strong and appealing representation to the Commission regarding the jobs of the Alltrans employees. At the July 18, 1974 hearing on the application, the Delta president stated that of equal importance to the interest of the general public as would be retention of an intact shipping entity, would be the continued employment of the faithful employees. That it all did not work out as represented in 1974 does not on its face serve to sully the original stated intent and hopes, and indeed, the employees did gain by the acquisition.[12/] Unhappily there is nothing certain or guaranteed in the business world but the continuation of taxes.

Petitioner in the July 1974 hearing probed the Delta 1973 acquisition of Ringsby Pacific, Ltd. to the point that Delta makes a practice of purchasing competing carriers and then discontinues their operations in an effort to monopolize traffic within its authorized territory. On brief to this motion petitioner continues this thrust, and again makes the assertion, stating: "In separate transactions Delta has purchased competing operations of Ringsby Pacific, California Motor Transport, and Alltrans. In each instance Delta has merged the acquired company's authority with its own and then eliminated the purchased operation entirely." In the opinion of

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12/ Had Delta not been authorized to acquire Alltrans, Alltrans would have been shut down fully as of August 16, 1974 by its Australian owners, and the Alltrans employees would have been all terminated, losing all seniority without recall rights to any potential employer. Instead, as part of the acquisition contract, Delta and Alltrans representatives met with the Western Conference of Teamsters and representatives of the locals involved, and worked out an agreement signed by the parties, which agreement gave Alltrans employees who might be laid off as a consequence of the acquisition both recall rights to Alltrans and additional first right of employment rights for three years with Delta. Most of the Alltrans employees, by reason of the acquisition, did receive continued employment beyond August 16, 1974 to May 1975, an additional nine months of work.

this examiner, this broad statement, insofar as the intent of its thrust in the context of this motion is to cast Delta in the role of a scheming predatory operator, misspeaks the record.[13/] The record in Application No. 53518 shows that Ringsby Pacific, Ltd., as a consequence of continued unprofitable operations in certain of its business, determined that it would be advisable to discontinue part of its intrastate operations in California, while retaining other parts. Accordingly, Ringsby sought and obtained authority from this Commission to sell to Delta only its highway common carrier certificate, but not its equipment, terminals, or business. By Decision No. 80903 issued ex parte in January 1973 in the absence of timely protest, it was found by this Commission that the transaction would not be adverse to the public interest. Thereafter, as set forth by its application, Ringsby no longer operated as a general commodity highway common carrier in California. However, Ringsby continues as a viable and substantial operator both in interstate commerce and in certain California service. But this transaction scarcely merits the connotations raised by petitioner's characterization of it as an acquisition and deliberate elimination thereafter of a purchased operation. Looking next to the assertions respecting acquisition of California Motor Transport, the record in Application No. 49902 shows that in 1967 the City Transit System, as a result of continued operating losses experienced by its wholly owned subsidiaries California Motor Express, Ltd., and California Motor Transport Company, sought Commission authorization to sell the stock and operations of both subsidiaries to Delta, while City

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13/ This examiner reserves consideration of any possible antitrust implications which may be raised by this sequence of acquisitions as related to the Alltrans acquisition pending rehearing on that aspect. His conclusions are addressed only to the motion at bar.

retained the certificate. By Decision No. 76499 issued December 2, 1969, and subject to certain Interstate Commerce Commission approvals subsequently issued in April 1970, this Commission found the transaction would not be adverse to the public interest, and approved the acquisition. Thereafter, and to this date both California Motor Express, Ltd. and California Motor Transport Company have continued to exist and operate as subsidiaries of Delta under Delta's certificate. Furthermore, after the 1973 demise of the Motor Vehicle Transportation License Tax on carriers other than the express operators, there existed no reason for a duality of operations and Delta substantially curtailed use of California Motor Transport Company, concentrating most of the operations through the California Motor Transport Division of Delta Lines. However, although today pratically a shell corporation, California Motor Transport Company still exists and functions as another subsidiary division of Delta.[14/] There is no question but that California Motor Express, Ltd. still exists and handles a substantial volume of business. From the foregoing the examiner concludes again that it tends to mislead to state flatly that "Delta merged the acquired company's authority with its own and then eliminated the purchased operation entirely". Delta in this instance acquired no authority, but rather operated both acquired entities under Delta's authority, an authority substantially coextensive with that retained by City Transit System. In view of the passage of time and the overall changed circumstances arising out of the different tax situation after 1973, in the overall context it is misleading to infer that Delta deliberately set out to acquire and entirely eliminate the

14/ Commission records show that at the close of 1975 California Motor Transport Company still owned 18 pieces of equipment, all in intercity operations in California, and had intrastate operating revenue of $203,043.

California Motor Transport Company operation. Both the Ringsby and California Motor Transport decisions are long since final, and by inference cannot now be attacked as being against the public interest (Public Utilities Code Section 1709: "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.").

In further support to its allegations that fraud was perpetrated so as to justify and require imposition of a constructive trust, petitioner in this portion of its motion reiterates its earlier assertions that Delta's chairman Dwyer in seeking expeditious handling of Delta's prospective application from the then Commission president, Commissioner Sturgeon, acted improperly, and that this request, coupled with the Commissioner's intervention to order the application expeditiously heard and decided so at to meet the August 16, 1974 deadline set by the Australians, constituted "undue influence". This examiner has considered and rejected this assertion earlier in the discussion devoted to the first section of the motion.

Petitioner also asserts that "within three months of the acquisition" Delta's directors began planning a shutdown of Alltrans. This assertion severely stretches the record. Delta's board chairman testified that as August, September, and October 1974 passed and "there was red all over the place", the board was not very happy. Thereafter, at a time Dwyer did not recall, there was a board meeting and the board agreed to wait and see if by April 1975 there would be an upturn. Dwyer testified that "I felt that if we couldn't make it in April, it was hopeless". Obviously the board would have concern. Board members have a legal duty to diligently exercise proper care and skill in conducting the business of a corporation (Burt v Irvine Co. (1965) 237 CA 2d 828, 852-853). There is no evidence of planning to shut down within three months. That the

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board delayed as long as May 1975 before determining to sell or shut down the Alltrans operation, meanwhile sustaining substantial losses[15/] in what turned out to be a futile attempt to accomplish a turnaround during a severe business recession is ample evidence of the bona fides of Delta's intentions in this acquisition.

Petitioner states that "no evidence suggests that Delta instituted successful operational reforms or other changes to restore Alltrans finances". While they may have been less successful than anticipated, there were numerous reforms and changes made. The extensive and detailed testimony of Delta's vice president Varozza who managed the Alltrans operation, spelled out the changes and efforts made to try to attain a turnaround in the face of a general business recession. Varozza's testimony points up the growing sense of frustration and chagrin which emerged as time advanced and despite all their efforts they were unable to obtain the volume of business needed to turn the tide. Some operational and personnel expenses were cut, and terminals were combined and eliminated, but after December 1974 the number of freight bills dropped and revenues sank. Losses per month were halved but still persisted until they endangered the financial well-being of the parent and something had to be done. Obviously

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15/ Varozza testified that the operational losses for nine months that Alltrans operated were $1,200,000. Nothing significant was placed into evidence reflecting any tax implications which might serve to mitigate these losses, if indeed such considerations should be considered in determining Delta's good faith in shutting down Alltrans to stop the losses.

in instituting changes which halved the losses the reforms were successful, but not successful enough.16/

Decision No. 83388 issued September 4, 1974 was issued by the Commission to accommodate the stipulation which secured coprotestant Willig's withdrawal, a stipulation sought to insure that one single tariff would be filed for all the transportation service to be performed by the Delta divisions, not for the predatory connotations inferred in this motion.

In summary as to petitioner's allegations of fraud, undue influence, and unjust enrichment, this examiner from the foregoing must conclude that petitioner has failed to prove clearly and satisfactorily its case. Petitioner has not sustained its burden of proving that Delta had no intention to maintain Alltrans as an operating carrier, or that Delta's representations to this Commission inducing approval of its application, with particular reference to preservation of the jobs of many of the Alltrans employees, were either reckless or intentionally false. In short, petitioner has failed to show justification for the severe kind of relief requested. Petitioner having failed to pass the threshold issue to prove the existence of fraud, undue influence, or unjust enrichment, there is no need for the examiner to address the ultimate question as to whether the instant proceedings provide a proper

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16/ In this context it is difficult to envision unjust enrichment arising out of an operational loss of approximately $1,200,000 under these circumstances. A price tag of those proportions for the Alltrans certificate, substantially duplicative of the existing Delta authority, with an objective just to close down the operation months later and to gain 2,000 new shipper accounts and first crack at Alltrans market share, seems incredulous.

situation for imposition of a constructive trust.[17] Accordingly, the examiner denies that portion of petitioner's motion which seeks the imposition of a constructive trust on Delta Lines, Inc.'s intrastate operating authority.

6. APPROPRIATELY FINE AND REVOKE DELTA LINES, INC.'S INTRASTATE OPERATING AUTHORITY FOR ITS CONTEMPTUOUS CONDUCT IN THIS PROCEEDING:

This Commission has defined jurisdiction to fine, revoke, and suspend to enforce its orders and regulations, including contempt powers, in specific more prevalent and set areas as provided in the Public Utilities Code. However, as noted in another context earlier in this ruling, this examiner also believes that this Commission in Section 701 of the Code[18] has an ample residuum of authority to draw upon in extraordinary circumstances to fashion whatever reasonable and appropriate remedy it might find necessary and convenient in the exercise of its power and jurisdiction.

In the instant proceeding to this date the examiner does not find the record replete with Delta's contemptuous misconduct. He has not found nor has he been directed to any competent evidence of "a high degree of disregard for the authority and orderly processes of the Commission", or "a strong antipathy to the orderly exercise of the Commission's powers". The question of whether or not Delta required Commission authorization to shut down the Alltrans operation is only collaterally before the Commission so far in this proceeding. If future proceedings should demonstrate that Delta

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17/ For this reason the examiner has not considered herein the interesting but intricate questions which would arise were under the circumstances of this motion a constructive trust indicated; questions including but not limited to who has been defrauded and otherwise harmed, the extent of any unjust enrichment, the res of the trust, and for whose benefit a constructive trust should be imposed.

18/ See Footnote 11.

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has unlawfully closed down the Alltrans operation the Commission can adopt whatever remedy is deemed appropriate at conclusion of the rehearing. The examiner has considered and ruled adversely to petitioner's allegations as to the propriety of the May 19, 1975 meeting and the actions of the Commissioner participants, and has further found no fraud, undue influence, or unjust enrichment proven. For these reasons any fine and/or revocation of authority, based on the record to date, would be utterly unjustified. Accordingly the examiner denies that portion of petitioner's motion which seeks such relief.

Therefore, IT IS HEREBY RULED that the relief requested by petitioner's motion filed May 19, 1976 with this Commission is denied in its entirety.

Dated at San Francisco, California, this 20th day of May, 1977.

/s/ JOHN B. WEISS

John B. Weiss
Examiner

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Chronology of Events and Summary of Evidence

In mid 1974 both Alltrans Express California, Inc. (Alltrans) and Delta Lines, Inc. (Delta) held certificates of public convenience and necessity as highway common carriers granted by this Commission. Alltrans, a long established general commodity carrier, was a wholly owned subsidiary of Alltrans, Inc. which in turn was a subsidiary of Thomas Nationwide Transport, Ltd., an Australian corporation. After Alltrans incurred substantial operating losses ranging from $446,000 to $1,300,000 a year in four of the preceeding five years, the Australian parent in April of 1974 determined to stop the losses by disposing of the intrastate carriage operations of Alltrans before June 30, 1974, either by sale of by shutting down the operation. This deadline was subsequently extended to August 16, 1974, primarily, it was asserted, for personnel considerations. Accordingly, Alltrans, seeking the advantages of a negotiated sale as opposed to closure and forced sale, after unsuccessful negotiations with an initial potential purchaser, approached Delta in mid May, 1974 as a potential purchaser.

Delta, the largest general commodity carrier in California, and a subsidiary of Delta California Industries (DCI), held a certificate of public convenience and necessity essentially duplicating most of the Alltrans territory, but differing in that Alltrans held authorization to operate in certain northern territories and minor areas where Delta did not. After negotiation, Alltrans and DCI reached tentative agreement on a sale. Mindful, however, of the impending August 16, 1974 close down deadline insisted upon by the loss weary Australians, DCI's chairman of the board Thomas Dwyer (Dwyer), personally visited the then president of the Commission, Commissioner Sturgeon (Sturgeon) to ask for an expedited hearing and decision for a forthcoming Alltrans-Delta application, and pointed

up the fact that there would be no sense in going ahead with the transaction if a decision from the Commission could not be obtained before the impending closedown. Sturgeon advised Dwyer that he would attempt to expedite a hearing. Thereafter, on June 26, 1974 Alltrans and Delta filed with the Commission.

By their application Delta was to acquire Alltrans' certificate and business, while DCI would purchase certain physical assets from Alltrans. In support of the application it was asserted that Delta would continue the Alltrans intrastate carriage operations as a Delta division, thereby continuing the Alltrans service to the shipping public, and preserving approximately 400 Alltrans jobs which otherwise would go down the drain. Citing its experienced and competent management, and financial strength, Delta anticipated being able to turn the Alltrans operation around financially in a short period of time.

On July 5, 1974, nine days after filing of the application, the Commission published notice of a hearing on the application to begin July 18, 1974. Five intrastate motor carrier operators, including the petitioner here, filed protests to the application, contending that the proposed transfer of operating authority, if authorized and consummated, would be a significant step in furtherance of a scheme by the Delta interests to control and monopolize the California motor carrier industry contrary to the public interest.

Shortly thereafter the protestants variously moved (1) to dismiss the application, (2) for an order directing staff participation in the proceeding in the form of a thorough study to protect the public interest under the sua sponte requirements of Northern California Power Agency v PUC (1971) 5 C 3d 370, and (3) for continuance of the hearing to a later date. Hearing was held in San Francisco on July 18, 19, and 22, 1974. All three motions were denied

and Sturgeon advised all parties of his intention that a final decision on the application would be reached on or before August 16, 1974. The final half-day of hearing found the three percipient attorneys from the law firm representing four of the protestants unable to be present, having prior commitments in other proceedings out of town. During the last half-day of hearing, one protestant, Willig Freight Lines (Willig), arrived at certain stipulations with Delta, and withdrew as a protestant conditioned upon approval of the application and consummation of the transaction. The matter was submitted at conclusion of the last half-day of hearing, although the parties were told "... this does not preclude counsel from filing anything in the way of a proposed order, proposed findings and conclusions--proposed decisions, for that matter, if he wants to, anytime between now [July 22, 1974] and August 16th". On August 6, 1974, noting its view that any delay would render the sale and transfer moot, destroy competition, and put 400 out of work unnecessarily, thus leaving open no alternative course which would preserve the competitive status quo, the Commission issued Decision No. 83292 authorizing the sale and transfer on condition that Delta and its affiliated corporations accept a single highway common carrier certificate and a single express company certificate, encompassing all authorities of each type then held with duplications omitted, and that Delta and its affiliates restate, reissue, or refile all its tariffs. Four Commissioners voted for the decision; one Commissioner (Holmes) was absent. The order was effective the date issued.

On August 14 and 15, 1974 respectively, Willig and the other protestants filed for rehearing; Willig on technical grounds pertaining to its stipulation, and the other protestants on numerous

grounds including due process issues, allegations of technical deficiencies, and alleged failure by the Commission to consider Delta's anti-competitive conduct, the effect of such a transfer on competition and the general public, financial considerations and guarantees involved, enforcement of prior Commission orders, rules, regulations and statutes, and financial approval of lending arrangements.

At 12:01 a.m. August 19, 1974, Delta took over Alltrans, renamed it TransCal, and thereafter operated it as a division of Delta, doing business as TransCal Motor Express, Inc.

On September 4, 1974 the Commission issued Decision No. 83388 amending the conditions set forth in Decision No. 83292 to make them conform more closely to the Willig-Delta stipulation. Thereafter Willig withdrew from protestant status.

After review of the petitions for rehearing, on October 8, 1974 the Commission by Decision No. 83581 (1) dismissed the Willig petition as moot, and (2) granted limited rehearing on the petition of the other protestants; rehearing limited to the presentation of evidence and argument (1) on the effect on competition which would result from the transfer, and (2) with respect to waiver of the guarantees to be made by Delta and its affiliates under the September 30, 1972 loan agreements between DCI and the Bank of America National Trust and Savings Association. Additionally, the Commission modified Decision No. 83292 by adding thereto an additional finding to the point that Delta had the requisite financial ability to adequately serve Alltran's customers.

On October 16, 1974, pursuant to its decision granting limited rehearing, the Commission issued a Notice of Prehearing Conference (Re-Rehearing) to be held November 8, 1974. November 7, 1974 protestants Nielsen Freight Lines, Inc., Peters Truck Line,

and Applegate Drayage Company filed a petition before the California Supreme Court for a Writ of Review or Alternate Writ of Mandate (subsequently, on January 29, 1975 the Supreme Court issued its order (S.F. No. 23221) denying writ of review as premature). The prehearing conference was conducted over three days, November 8 and December 20, 1974, and on January 24, 1975. On the first day of the prehearing conference protestants (less Golden West Freight Lines which withdrew as a protestant) renewed their previously denied motion for staff participation. November 26, 1974, the Commission by Decision No. 83767 ordered the presiding Examiner to order staff participation to evaluate and present evidence on the competitive aspects of the merger under the sua sponte requirements of Northern California Power Agency v PUC (supra).

During the second day of prehearing conference, the Examiner instructed the staff to submit a memorandum of staff participation. This memorandum was forthcoming on January 17, 1975. By it the staff proposed to proceed in determining what effect the merger would have on competition by applying principles developed in interpretation of Section 7 of the Clayton Act, using factors suggested in the Report of the Attorney General's National Committee to Study the Anti Trust Laws to identify the major areas to be explored. Major focus would be on development of the market characteristics, including the history and degree of concentration in the relevant markets. The protestants by date of December 20, 1974, had also submitted a memorandum of issues for consideration on rehearing. Among the issues proposed for consideration were questions relating to lessened competition, relevant market, extent and trends of concentration therein, histories of the applicants, course of conduct in the past and present, consideration paid, disposition of property, scope of authority and service, and loan guarantee matters. Thereafter rehearing was set to begin June 23, 1975.

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APPENDIX A

During the months after Delta took over Alltrans, the Alltrans operation continued to be unprofitable and piled up substantial losses. On May 1, 1975 Delta determined it could no longer sustain these losses and determined to locate a buyer to take over the TransCal equipment and business. Shippers Imperial evidenced some interest. Having informed the Teamsters Union and its bank of the problem and its plans, Delta also determined to inform the Commission. Accordingly, after telephoning for an appointment, Dwyer on the afternoon of May 19, 1975 called upon Sturgeon to relate that Delta was losing money on the Alltrans operation and to inform the Commission that Delta had to do something about it. During this informal visit the Commissioner's aid, Mr. Bricca (Bricca) was present throughout; Holmes (then the transportation specialist for the Commissioners) was either invited in or dropped in, and the chief of the Transportation Division of the Commission, Mr. Gibson (Gibson), was called in. A question evolved as to procedure in such a spin-off situation and whether Delta would require Commission approval were it to sell the TransCal (Alltrans) division of the Delta system while retaining the certificate. Bricca expressed an opinion that Commission approval would be required, but no consensus or definitive answer was given Delta. Dwyer stated he would have to discuss any shutdown further with the Teamsters Union. The following week, Dwyer wrote Sturgeon and Holmes, and (after a phone call) Gibson, short notes, attaching to each a copy of the DCI news release (released to the press in part May 22, 1975) scheduled for release May 29, 1975, announcing closedown of TransCal effective May 30, 1975, and assuring all three that Delta and California Motor Express, Ltd. (CME), a Delta subsidiary, would handle the TransCal traffic so as not to inconvenience the public. Copies of these letters were not sent to the participants in this rehearing.

On May 20, 1975 Neilson Freight Line Inc. withdrew from the proceedings as a protestant, followed on May 22, 1975 by Peters Truck Line.

On May 28, 1975 the Commission staff filed a motion for an interim order to require Delta "...to continue serving all of the intrastate customers served by Alltrans...at time of acquisition... in the same manner to which Alltrans customers have become accustomed when served by Alltrans Express California, Inc.". The following day, May 29, 1975, having learned of the impending close-down of TransCal terminals and layoff of TransCal employees, the staff filed an amended motion so as to request a Commission order preserving the status quo, and preventing Delta from closing the terminals and laying off the former Alltrans employees.

Upon receipt of the Commission staff motion and its amendment, the presiding Examiner John Gilmn, concerned about the time frame for argument on the motion in view of the imminence of the TransCal shutdown, telephoned counsel for the applicant Marshall Berol (Berol) on May 29, 1975. Berol told the Examiner that there had been a "meeting" between his client, Dwyer, Commissioners Sturgeon and Holmes, and Gibson, and that the "termination" of TransCal operations had either been "approved or authorized". This was the first knowledge the Examiner had of the May 19, 1975 "meeting".

The Commission staff on June 6, 1975 filed a memorandum of its intended participation and the issues it proposed to address in the forthcoming rehearing. The staff noted its intent to consider the relevant market affected by the merger to be the less than truckload (LTL) shipment market with a weight of 100 to 10,000 lbs. The staff indicated that it would have to defer its presentation on anticompetitive implications until later than June, but indicated its intention of exploring fully the extent of the consolidation,

and the extent of liquidation, of Alltrans assets, expressing staff concern that there would be no distinguishable Alltrans organization for divestment from Delta in the event the Commission were to subsequently determine the merger contrary to the public interest and order a divesture.

Pursuant to Rule 78 of the Commission's Rules of Practice and Prodedure, on June 7, 1975 protestant Applegate petitioned that "...upon submission of this matter for decision of the Commission, and prior to the rendition of such decision, a proposed report be issued..." by the presiding officer, recommending findings of fact, conclusions of law, and a proposed order pursuant to Rule 79.

On June 9, 1975 protestant Applegate, noting the absence of any Commission order authorizing Delta to abandon Alltrans service or to close down or sell off equipment (and citing Sections 451 and 491 of the Public Utilities Code), petitioned the Commission for an interim order requiring Delta to immediately reinstate Alltrans service, and to pay a pumitive fine for each day of discontinued service. Applegate further asserted the possibility that in camera extra legal discussions on matters involved in the rehearing had occurred between one or more Commissioners and Delta, and requested, if those allegations were proven, that the involved Commissioners disqualify themselves.

On June 23, 1975, the rehearing began with opening statements by the parties. The staff expressed its concern that the merger of TransCal into Delta on September 30, 1974, being unauthorized, was possibly in violation of Section 851 of the Public Utilities Code, and that the May 30, 1975 closing of TransCal was an unauthorized abandonment of service. Asserting inconsistency between Delta statements during pre-acquisition relating to employment continuity and maintenance of a viable competitive force,

the staff considered the facts concerning the closure of TransCal relevant here as showing Delta's intentions toward competition and the posture it maintains in dealing with competitors. The Examiner took under submission protestant's petition for an interim order requiring immediate reinstatement of service, etc., advising that he would rule on it at the end of "this set of hearing".

The rehearing continued in this initial stage for seven consecutive hearing days through July 1, 1975, with testimony being taken from a variety of witnesses. Witness Applegate, owner of the petitioner-protestant here, and a former President of the California Trucking Association, testified pertaining to the alleged anti-competitive impact of the acquisition by Delta of Alltrans, the effect of the merger upon protestant's profitability, and the effect of the acquisition on certain interlining practices and arrangements. Three long-service former Alltrans employees, all drivers and all former union stewards, testified of circumstances and facts each considered contributed to their unemployment by reason of the Trans-Cal shutdown. They variously alleged questionable management, the inferred cost to DCI of high seniority Alltrans personnel, equipment transfers, maintenance cutbacks and deficiencies, alleged failures to dovetail seniority in certain terminal closings, and alleged deliberate freight transfers away from Alltrans-TransCal to other Delta trucking firms. One veteran based his contentions on experience derived observation of the docks, conversations with co-workers, observations of the lineboard, and layoffs of personnel, and asserted a fifty percent diversion of freight away from Alltrans-TransCal to others. A Delta witness, vice president of Delta and the executive in charge of CME operations, Wayne Varozza, testified that he had been in charge of the Alltrans operations throughout its existence as a division of Delta. His testimony, given over a 3-1/4

and the extent of liquidation, of Alltrans assets, expressing staff concern that there would be no distinguishable Alltrans organization for divestment from Delta in the event the Commission were to subsequently determine the merger contrary to the public interest and order a divesture.

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day period, stressed that Delta knew it would be a monumental task to turn the Alltrans operation around. He alleged losses approaching $1,200,000 in a good faith effort to do this, and blamed failure, citing "utter total frustration" and "chagrin", upon the general economic depression which made it impossible to attain the $45,000 to $50,000 per day Alltrans break-even expense level, even with retention of the full fifteen-man salesforce and initial decortication of the system in shedding uneconomic outer-core terminals in San Diego, Bakersfield, Santa Maria, Chico, Santa Rosa, and Eureka. The reconfiguration left gross revenues of approximately $35,000 per day compared to $40,000 to $45,000 per day before the paring, however, losses were cut from $225,000 to $250,000 per month to $80,000 - $90,000 - $100,000 per month. He testified that Alltrans had twice the equipment as the available business required, but flatly denied that the better equipment was transferred to Delta or Cal Motors (in this regard he asserted that CME licensed only 600 of its 1,000 trailers - the depression being so bad in 1975). The witness contrasted his establishment of a preventative maintenance program on Alltrans equipment with the "probable" breakdown basis program before the acquisition. On cross-examination, the role of CME and of other express companies in the allocation of freight was explored effectively, as was the dovetailing and layoff of former Alltrans employees during TransCal's tenure, and potential extension by CME into Nevada. On June 27, 1975 a stipulation was reached that the Alltrans operation had gross revenues of $936,000 in July, 1974 with daily revenue of $42,569, and gross revenues of $701,000 in September 1974 with daily revenues of $34,956. On June 27, 1975 Delta was ordered by the Examiner to supply TransCal profit and loss statements for the months TransCal was operational. Also on June 27, 1975 petitioner-protestant's attorney Martin Rosen (Rosen) advised

that the protestant would request a proposed report and order from the Examiner. He was told to submit his request in written form. Protestant at that time further advised of the probability he would request subpoenas to obtain the testimony of Sturgeon, Holmes, Gibson, and Dwyer.

On June 30 and July 1, 1975, the attorney for protestant was excused for those two days at his own request. On cross-examination of the Delta vice president by staff, the organizational outline of the Delta system was explored. The fact that one corporate highway common carrier, operating divisionally, does the underlying transportation for both express companies (Delta Express and Cal Motors Express) was noted, and Delta's interlining practices were probed. The failure to sell any Alltrans equipment (but one piece) in order to assist the TransCal financial picture was explained by the assertion that the equipment market was "soft as hell" with every motor carrier in the state having excess equipment, and by the desire not to adversely jolt morale. Thereafter the rehearing was continued.

On July 7, 1975 protestant Applegate petitioned the Commission, pursuant to Rule 78 of the Commission's Rules of Practice and Procedure, that upon submission of the rehearing a proposed report be issued by the presiding officer prior to rendition of a decision.

On October 9, 1975, petitioner Applegate requested issuance of subpoenas for attendance and testimony at further hearings of Dwyer, Sturgeon, Holmes, Gibson, and Bricca. Subpoenas were issued the same day as requested.

On October 20, 1975 the rehearing continued. Petitioner Applegate's attorney, relative to the subpoenaed witnesses, asserted that "...there was a hearing off the record - perhaps more than one hearing off the record...", and that if such were the case, the Commissioners involved should disqualify themselves voluntarily, and if they would not, that it was petitioner's intent "...to disqualify them from further participation as voting members of the Commission in this proceeding".

The Commission director of transportation was called first, and testified in summary as follows: that on the afternoon of May 19, 1975 he was summoned by Sturgeon to come to the president's office, a not unusual occurrance, and upon arrival found Sturgeon, Holmes, Bricca, and Dwyer present; that he knew all present; that Dwyer "...had a plan to get rid of the Alltrans operation by... selling the equipment to Shippers Imperial", (but not the certificate) and wanted to know what the Commission thought of it; that after discussion he, Gibson concluded, had never run into anything quite like it and did not know the answer; that he felt nothing was approved or disapproved at that meeting which lasted 30 to 45 minutes; that Dwyer then advised that he had further negotiations to conduct in the matter and all left the office at about the same time; that about a week later Dwyer called to tell him that Delta had decided just to cut Alltrans off and close them down; that no certificate was being abandoned; and that there had never been a combined certificate eliminating all the duplications as contemplated by the original order. Gibson further testified that it was not unusual for parties to seek him or Commissioners' out, as on May 19, 1975, to ask for direction as to a specific course they should take. However, on cross-examination he testified that it "hadn't happened recently" in a situation where "a utility was seeking advise about a matter which was the subject of a pending rehearing proceeding".

The DCI board chairman testified next (voluntarily in view of an indicated improper service of subpoena), substantially as follows: that in May or June 1, 1974, a representative of the accounting firm of Wolf & Co. approached Delta as to a possible acquisition of Alltrans, ostensibly as a consequence of sustained heavy Alltrans losses; that Delta expressed interest and made an offer which was accepted, but that if protracted Commission hearings would

be involved with delay in transfer permission, the owners of Alltrans would none-the-less shut it down August 1, 1974; that in view of this urgent situation he called on the Commission president, explained the urgency and asked for an expedited hearing, as in his view there would be no sense in going ahead with the requisite union and other negotiations unless a going operation could be acquired; that the Commission president stated "he would see what he could do", but gave no definitive answer; that in the interval following this conversation and the filing of the Delta application he could recall no other conversation with the Commission president; that thereafter the Australian owners of Alltrans were talked into extension of the shutdown deadline until mid-August; that negotiations were concluded and on June 26, 1974 Delta filed its joint application with Alltrans.

The DCI board chairman testified as to the disappointing figures on TransCal operations month after month following the acquisition, until in April 1975 the Delta Operating Committee made the decision that they could no longer sustain the losses and concluded to either sell the operation to some buyer who would not need a certificate, or close down the operation of Alltrans. Despite considerations raised by the two express conditions on acquisition contained in Decision No. 83292, and the pendancy of rehearing on the competitive effects of Delta's acquisition of Alltrans, Delta believed it had something to sell. Delta advised its bank and the union of the problem. Contact had been made with several potential buyers. Initially Shippers Imperial evidenced interest but on May 20, 1975 advised that it would not proceed. A meeting was set with the teamsters union for May 21, 1975 for all the involved locals to work out the situation on closing of terminals, dovetailing of seniority, and layoffs.

With regard to the meeting at the Commission on May 19, 1975, Dwyer testified that he telephoned the Commission president's office to request an appointment on an urgent matter and came to the office of the Commission president in accord with that appointment; that Bricca was in an adjacent office and participated; that he, Dwyer, advised the president of the tremendous losses developing in TransCal; of the possible sale of the operation to Shippers Imperial - or in the alternative, shutdown of the TransCal operation; that it was Delta's opinion that because of the "divisional" nature of the operation, and the consolidated nature of the certification, no Commission approval would be needed, and that the information was given to keep the Commission informed. On examination, Dwyer stated he could not recall any prior discussions with his counsel relating to possible need for Commission approval. He further testified that he recollected that Holmes walked in and was invited to join the group; that at some point Gibson was invited in; and they all "kicked the thing around"; and that "I came out of there with the full impression that nobody - nobody said 'You can't do it', or 'You can do it'." The board chairman stated he did not recall any discussion involving disposition of the employees. Dwyer further testified that in his mind, whether or not Delta continued the TransCal operation was a matter divorced from the rehearing proceeding. Additionally, on cross-examination Dwyer denied knowledge whether or not his attorney, after the May 19, 1975 meeting, had informed the then presiding Examiner that the shutdown of the Alltrans operation had been approved at that meeting, nor could he recall any subsequent conversation with Sturgeon after May 19, 1975 regarding the shutdown, other than recollection of courtesy calls to the two Commissioners and the transportation director, shortly after the May 21, 1975 agreement with the Teamsters on terminal closings and related matters, to advise each that TransCal would be closed - calls followed by confirmation letters enclosing a copy of a press release on the subject. Copies of these confirmation letters,

all dated May 27, 1975 with press releases, were subsequently located after Commission file searches and placed into evidence. Dwyer did not recall whether his attorney had or had not contacted any of the participants of the May 19, 1975 meeting with regard to the staff motion of May 28, 1975 or the amendment thereto of May 29, 1975. In his opinion, whether or not Delta continued TransCal operations was a matter divorced from the rehearing proceedings. Finally, he did recall an exchange of brief communications in telegram and letter form with Commissioner Batinovich.

On October 27, 1975 rehearing resumed. Berol, attorney for the applicant, was called as a witness by protestant. Over objection, he testified that at some time, probably May 29, 30, or June 1, 1975, he had discussed the staff's May 28-29 motion and amendment with his client Dwyer. He was questioned at length about a call he made to Examiner Gilman May 28, 1975. It was his recollection that he had responded to a telephone call from the Examiner pertaining to the staff's May 28, 1975 motion which he as yet had not at the time seen, and that during this conversation he had told the Examiner that the TransCal operation was being closed down. Questioned about his purported statements to the Examiner about the May 19, 1975 meeting, he answered that although he did not recollect how or just when he had learned of it, he did at the time of the conversation know that his client had spoken to Sturgeon "in the context" of an impending Alltrans shutdown in a meeting on May 19, 1975, and that while not recalling specifically, during the call to the Examiner he "...may have said that there had been a discussion between Mr. Dwyer and some of the people at the PUC...", but that "I would not have said and did not say that the matter was approved", and "I did not say it was authorized". He also stated that his files contained no memoranda pertaining to the conversation

with the Examiner. Finally, he testified that he could not recall having reached any conclusions from what he had learned from his client about the results of the meeting between the DCI board chairman and Sturgeon.

The protestant next elected not to call Bricca, a participant throughout the May 19, 1975 meeting. A motion to quash the subpoenas of Sturgeon and Holmes on grounds that their testimony would be cumulative was denied. Accordingly, in a precedent setting instance, Sturgeon was called to testify.

Sturgeon testified that Dwyer had come to see him in 1974 to relate that Alltrans was going to end their operations in California as a certified carrier by a certain date and that Dwyer questioned "...whether or not he should even attempt to buy the Alltrans operation, based on the record of proceedings in this Commission, whether it would be possible to get an order out either pro or con in the time allotted", that no alternative "remedy" was discussed; that he had responded to the effect that he would see if he could expedite the matter and get an answer; that thereafter, after the application was filed, he had assigned it to himself and had sat on the case himself with the assigned Examiner. The Commissioner testified he helped write, voted for, and signed Decision No. 83292 on the matter. Asked if the two conditions contained in paragraphs 2(a) and 2(b) of the decision had been fulfilled, he answered that he did not know. The Commissioner testified that as he had not personally participated in the hearing leading to the rehearing order, or the prehearing conference, and had not reviewed transcripts of the rehearing, he did not specifically know precisely what the issues were on rehearing at the time of the subsequent May 19, 1975 meeting with the DCI board chairman.

The Commissioner asserted that it was his long standing policy that "you don't talk about cases that are before you in private", and that in the May 19, 1975 meeting, "there was absolutely no reference made, no inference made to a case before us"; that Dwyer came in, stated he had a problem, was losing money (the Commissioner recollected the figure mentioned as being $100,000 a month) on Alltrans and had to do something about it; that Bricca had heard all from the doorway and joined them; that Holmes, the transportation specialist Commissioner, was asked to join in and that thereafter the Commission's director of transportation was sent for and joined the discussion. Sturgeon's recollection of the question posed to them was whether or not if Delta sold or terminated the Alltrans operations while retaining the certificate, would Commission action be needed? In Sturgeon's recollection, Bricca initially opinioned that it would; the transportation director indicated he had never had anything quite like it before; and Holmes was unwilling to give an opinion. The Commissioner testified that Dwyer indicated that this was an informational, preliminary fact-finding mission on procedure; that he still had to consult with the Teamsters; but would have to take some action. Sturgeon also recalled a question having been raised as to what would happen to the service if it were just shut down rather than being sold to another carrier, and the response from Dwyer that Delta hoped to retain 40 percent. The Commissioner further recalled asking the transportation director subsequently if he had heard any more about the matter, and having been told that TransCal was shut down or would be. Asked why there had been no discussion about the factor in Decision No. 83292 about retention of 400 to 420 Alltrans jobs, the Commissioner responded that there was no reason to ask, that it did not cross his mind as no action was being requested; that the inquiry was of procedure should Delta sell the assets of or shut down TransCal;

and whether or not prior Commission approval was required. The Commissioner stated that he was surprised to learn subsequently of the shutdown as he had not believed the Teamsters would have agreed. The rehearing was thereafter adjourned until December 15, 1975.

On November 25, 1975, avowedly "in order to assure fairness and avoid even the appearance of a conflict of interest", the Commission formally reassigned the case from Commissioner Sturgeon to Commissioner Symons (Symons). Subsequently, the Examiner had briefing discussions with the newly assigned Commissioner and his aid, Mr. Cahill, and prepared a draft memorandum for them in which he related the fact of an off-the-record contact from Delta's attorney just prior to discontinuance of the separate Alltrans operation; the thrust of the contact being "that the discontinuance had been approved by Commissioners Holmes and Sturgeon". The aid considered the fact of the contact and the information "probative", and "of a type which may be quite powerful in its effect on the Examiner's judgment of what went on in that meeting," and accordingly on the morning of December 15, 1975 recommended to the Commissioner that another Examiner should be assigned to the case, and that Examiner Gilman should give evidence in the rehearing. The Commissioner agreed with this recommendation and Examiner Gilman consented. Subsequently on December 15, 1975, the rehearing reconvened and Commissioner Symons announced the change in assigned Commissioners. The Commissioner then had his aid's memorandum read into the record (it also was subsequently entered as Exhibit R-9) and announced reassignment of the case to another Examiner to be named. Protestant's attorney stated his concern for potential delay in such a reassignment. Thereafter Sturgeon was recalled, and under cross-examination testified to the fact that it is very usual for parties to request expeditious treatment of their cases before the PUC; that he talks to "anybody who comes through my door"; and repeated that he had merely told Dwyer at conclusion of the May, 1974 discussion that he

would expedite if he could; and that he did so. The Commissioner was thereafter excused, and the rehearing adjourned until January 5, 1976, set for that entire week. The adjournment was to allow a newly assigned Examiner time to properly acquaint himself with the case. Thereafter on December 15, 1975 the case was assigned to this Examiner; a reassignment formally ratified in the usual manner by the Commission on December 30, 1975.

On December 17, 1975, in response to protestant's December 15, 1975 affidavit, a subpoena re deposition and subpoena duces tecum re deposition issued to Examiner Gilman commanding his presence December 29, 1975 for deposition and production of his Symons memorandum and other papers. Examiner Gilman on December 23, 1975 moved for an order that deposition not be taken and for a protective order, asserting that the Symons memorandum was privileged. On December 26, 1975 this Examiner stayed the subpoena and subpoena duces tecum pending a hearing January 5, 1976, and ordered the rehearing reconvening to trial on that same date.

On December 24, 1975 the Commission staff filed motions for two orders; one to compel Delta to furnish certain shipping, revenue, and employee data relevant to this proceeding; and the second to compel release of certain economic data from other selected common carriers. In both instances the staff also sought authority pursuant to Section 583 of the Public Utilities Code to make the data public information.

The rehearing reconvened January 5, 1976 with this Examiner presiding and Commissioner Symons present. At the onset, in response to protestant's request, Commission Symons refused, and reaffirmed his refusal, on grounds of privilege and the provisions of General Order No. 66-C, to release or to disclose the contents of the so-called "Symons' memorandum" prepared for him by Examiner Gilman. Gilman also

asserted the privilege. Thereafter protestant's attorney, noting the refusals, concluded that it would be an idle act to seek to have the Examiner order release of the document, and having preserved the issue for appeal, in the interest of going forward joined the other parties in moving that the subpoena re deposition, and subpoena duces tecum re deposition to Examiner Gilman be vacated. This Examiner thereupon vacated both. The Delta attorney next requested and was granted additional time to January 19, 1976 to complete Delta's reply to the staff motions of December 24, 1975 for production of evidence. January 22, 1976 was thereafter reserved for a hearing on the staff motions, if needed.

Over Delta's objection, Examiner Gilman was called by the protestant, who, pleading what it termed "an extraordinary posture of this proceeding", sought repeatedly to determine whether Gilman voluntarily withdrew as assigned Examiner, or was removed. Ruling that the reassignment was an internal procedure, discretionary with the Commission, this Examiner sustained objections to these efforts. On direct examination, after covering the general course of the prior proceedings leading up to the May 28, 1975 telephone conversation with Delta's attorney, Gilman testified that after the Examiner trying during that conversation to ascertain if there were any substantial reasons to delay considering the staff's May 28, 1975 motion seeking an order requiring Delta to continue service to all intrastate customers of Alltrans, the Delta attorney told the Examiner that there had been a meeting between his client and Sturgeon, Holmes, and Gibson, and that consequently the shutdown of Alltrans service had "either been authorized or approved". This discussion was the first Gilman learned of any May 19, 1975 meeting, and he had concluded that the thrust of what Delta's attorney stated was that the transaction which was the subject of the staff motion, namely the shutdown, had already

previously been either authorized or approved at that meeting. The Examiner admitted that his recollection of this aspect of the conversation on May 28, 1975 was specifically at variance with that testified to by Delta's attorney. Examiner Gilman testified that the Delta attorney had not informed the Examiner how he learned of such alleged authorization or approval. Examiner Gilman also stated that he had specifically offered Delta opportunity to respond to the staff motion but that no filing was made. Thereafter, this Examiner sustained objections to protestant's persistent attempts to ascertain what, if anything, Examiner Gilman did with this ex parte information, on the grounds that such efforts sought to reach the quasi-judicial subjective thought processes by which an Examiner weighed and considered evidence before him preliminary to preparation of a recommended decision to the Commission. Protestant next challenged and argued the Commission's discretionary reassignment of Examiner Gilman from the case, credibly pointing out that it served to further delay the case. Moving on, in response to questions Examiner Gilman stated that no orders had issued on the staff motion and amendment of May 28-29, 1975 for an interim order requiring continuation of Alltrans service, i.e., preservation of the status quo; or upon protestant's motion of June 7, 1975 for a proposed report from the Examiner after submission of the rehearing; or upon protestant's June 9, 1975 motion for an interim order requiring Delta to immediately reinstate Alltrans service.

Protestant's attorney eloquently protested this Examiner's restrictive rulings, noting the evidence of the May 19, 1975 meeting relating to a possible TransCal shutdown evidence which he points up varies from witness to witness, and noted the fact that the involved Commissioners initially could not recall receiving the May 27, 1975 follow up letters, although search of their files disclosed these

asserted the privilege. Thereafter protestant's attorney, noting the refusals, concluded that it would be an idle act to seek to have the Examiner order release of the document, and having preserved the issue for appeal, in the interest of going forward joined the other parties in moving that the subpoena re deposition, and subpoena duces tecum re deposition to Examiner Gilman be vacated. This Examiner thereupon vacated both. The Delta attorney next requested and was granted additional time to January 19, 1976 to complete Delta's reply to the staff motions of December 24, 1975 for production of evidence. January 22, 1976 was thereafter reserved for a hearing on the staff motions, if needed.

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letters therein and refreshed their memories, and that this Examiner by his restrictive rulings was preventing pursuit of what, if anything, had been done with the information of asserted authorization or approval received by Examiner Gilman from Delta's attorney, thereby assertedly denying justice to protestant. This Examiner recognized the limitations, but concluded that the workings of this Commission depend upon there being a high degree of confidentiality between the assigned Examiner and his assigned Commissioner in considering and weighing evidence leading to a draft decision, and that this Examiner would not open up the decisional processes of this Commission to discovery; that the Examiner comes within the penumbra of the Commission's judicial discretion whether or not it will be questioned about its decisional processes and conclusions as they relate to a case at bar. Thereafter Examiner Gilman testified that he had had no other off-the-record information pertaining to the discontinuation of TransCal; and that as Examiner he would not have made the decision on the TransCal shutdown, or on the disqualification of Commissioners Holmes or Sturgeon; and that he does not believe an Examiner is the trier of fact in a case. On cross-examination Examiner Gilman recalled that Delta's attorney, during the May 28, 1975 call, had expressed his opinion that other common carriers had not been required to have formal approval before terminating part or all of their operations. A motion to strike all of Examiner Gilman's testimony on grounds of irrelevancy was denied.

The attorney for Holmes next moved to quash the subpoena requiring the Commissioner's testimony as being cumulative, citing Rule 58 and noting the prior testimony of Commissioner Sturgeon, the DCI board chairman and the transportation director, as well as protestant's election to not call subpoenaed witness Bricca, the Commissioner's aid. The motion being denied, protestant called Holmes

who was questioned as to his familiarity with the issues in the proceeding. The Commissioner recalled that he did not sign the original order, Decision No. 83292; that he abstained from Decision No. 83388; and did not deny that he had signed Decision No. 83767. Upon objections anticipative that the thrust of this line of questioning was obliquely to probe behind the fact of signing to explore the comprehensions of fact and findings, an intent disclaimed by protestant who assertedly was just developing the record, this Examiner, noting that under the rule of Hohreiter v. Garrison (1947, 81 CA 2d 384), in California an administrative agency may adopt the proposed decision of the hearing officer without reading or otherwise familiarizing itself with the record, ruled against such probes. The Commissioner subsequently went on to testify that he had never been aware of all the issues in the instant proceedings; that at the May 19, 1975 meeting Dwyer had stated he was losing a considerable amount of money on Alltrans and that he intended to divest himself of the operation either by selling or closing it down; that this was the first time the Commissioner knew of this; that he had requested the presence of the transportation director; that with a case load of 130 to 150 cases of his own, he could not recall whether at the time he was conscious of the rehearing then underway; and that he did not recall competitive aspects being brought up at that meeting. Protestants thereafter asked if the Commission had been presented with a draft decision staying the TransCal shutdown. However, following arguments on objections to that question, and before a ruling, it being 4:35 p.m., this Examiner indicated that he proposed adjournment until 2:00 p.m. the next day before resuming with the Commissioner. At this, protestant's attorney objected to proceeding then, contending that his principal, Mr. Applegate, could not be present because of "previous engagements of a major magnitude" over the next several days scheduled

for hearing, and that as the Commission president was to be unavailable in Sacramento and elsewhere later in the week, he would request adjournment until January 22 or 23, 1976 when the Commission president would again be available, asserting that his principal, Mr. Applegate, was entitled to be present and assist his attorney. Noting that the entire week beginning January 5, 1976 had been calendared since December 15, 1975 for rehearing, that the other parties and subpoenaed witnesses were ready and available, and that protestant had waited until 4:35 p.m. to present its request, this Examiner ordered that the rehearing would continue as scheduled the next day, January 6, 1976. Thereupon protestant advised that "since they are unable to proceed with an orderly process in this proceeding", they would not withdraw their appearances, but that with the close of proceedings that day, January 5, 1976, "we are refusing to participate in this proceeding under these circumstances". It was next ascertained that Exhibit R-10, the Symons' memo, was at variance with what the Commissioner's aide had read into the record on December 15, 1975, and with Exhibit R-9, and with several photo copies that were in the possession of parties, in that certain quotation marks were not on the original memo. Thereafter, despite this Examiner's admonishments, protestant's attorney withdrew from active participation in the proceeding stating: "I have been instructed by my client simply to withdraw and let the chips fall where they may", and that protestant would "take it to the Commission initially en banc and then to the Supreme Court".

The following day, January 6, 1976 the rehearing reconvened without protestant or its attorney being present. This Examiner, on his own motion, in order to preserve fairness and protestant's record, sponsored and admitted into evidence over Delta's objections, Exhibits R-8-A and R-8-B (copies of this Examiner's December 15, 1975 assignment to the case and the Commission's December 30, 1975 ratification of that assignment). The original of the Symons' memo of December 15, 1975 produced by the Commissioner, was also admitted as Exhibit R-10

after authentication by the Commission's aid. Commissioner Holmes resumed the stand and on cross-examination testified that the general public, including representatives of various entities regulated by this Commission, associations, and consumer representatives, visit him to discuss items. These visits are more frequently than weekly now that he was the Commission president, but that his personal style was more restrictive of visitors than that of Commissioner Sturgeon; that as to the May 19, 1975 meeting, the DCI board chairman did not seek any approval, he merely made a statement of what he intended to do; that earlier in the proceedings but after Commissioner Sturgeon's testimony, protestant's attorney Mr. Rosen had telephoned him to solicitiously verify if the week of January 5, 1976 would be convenient for the Commissioner's testimony, and then had suggested that the Commissioner familiarize himself with the issues in the case; that thereafter, upon Holmes, having informed his own counsel of this call, his counsel had advised the Commissioner not to specially prepare; that one of his duties was to make known to the public and those whom the Commission regulates, what Commission policies are and that in order to assist them he tells them where to go and what they may do. The Commissioner was then excused. The staff indicated to this Examiner that little more than half of the data requested from carriers had been received, making it difficult, pending a ruling on the staff's two motions after the scheduled January 22, 1976 hearing, to determine when the staff would go forward. This Examiner instructed the staff that he anticipated "a rather active participation" by the staff in accord with the Commission's order.

On January 21, 1976 Delta filed a reply opposing the staff's motion, arguing that the economic data gathered from selected carriers should not be made public information.

On January 22, 1976 the rehearing reconvened to hear arguments on the staff motions. Delta stipulated that the data gathered in connection with the staff's transportation market survey should be public information. Accordingly, this Examiner granted the staff motion of December 24, 1975 for the release of economic data gathered from selected common carriers and ruled that under Section 3.5 of General Order No. 66-C the information received will be considered as public information and be exempted from the exclusions contained in Section 2 of the General Order. In arguing the second motion for a Commission order to compel Delta to furnish data relevant to these proceedings - the staff noted that its earlier May 28-29, 1975 motion was now somewhat moot as a consequence of Commission inaction at the time, so that as of January 1976, the Alltrans entity was "really scattered to the winds", the equipment sold at public sale by Delta, and many employees laid off, although the operating authority remains. Consequently, recognizing facts, the staff was saying: "lets make sure that some of this basic information is gathered and preserved, so should the day come the Commission may decide either all or part of the acquisition was inproper..." that it would be available in event of the need for a divesture order to help unscramble the present operations and if necessary fashion some antitrust remedies. Additionally, the staff wanted the information to look at how Delta handled the Alltrans operation after acquisition so as to evaluate the bona fides involved. Delta agreed to preserve and make available freight bills and bills of lading to the staff, but argued to retain their confidential nature and status. The Examiner ruled they should be made available in uncoded form to the staff, but not be made public information at this time. Next, noting staff arguments as to the relevancy of computer print outs of shipping account revenue to the asserted good faith efforts of Delta to preserve the Alltrans operation,

and to the impact of terminal reconfiguration, the Examiner ordered that these print outs, coded as ordered by Examiner Gilman in June 1975, be made available to the staff, uncoded if the staff so requested, but that they not be made public information without further order by the Examiner. Before this day's rehearing commenced Delta delivered a coded list of certain employees to the staff attorney. The Examiner ordered Delta to provide the names if the staff requests them but also provided that the list not become public information. The Examiner further ordered Delta to make available to the staff certain requested data as to the proceeds received from auction of Alltrans equipment by Delta, but declined at this point to make this information public. Delta was ordered to make all this data available to staff not later than February 20, 1976, with the data restricted as to use to this proceeding only. Referring to protestant's letters to Delta regarding a copy of the proposed form of certificate, the Examiner ascertained that Delta had submitted this proposed form to the Commission staff. Delta agreed to provide protestant and the staff attorney with copies of this proposed form of certificate. Finally, the staff agreed to furnish the Examiner on February 20, 1976 a statement as to when staff could proceed on the antitrust aspects of the rehearing. The rehearing proceeding was thereafter adjourned until further notice.

On February 20, 1976, staff counsel advised the Examiner of the status of responses from carriers, and of plans to have the Commission Data Bank program the data for computer analysis for subsequent development of particular city-pair market information. This survey work continued over subsequent months.

On May 19, 1976 protestant Applegate suddenly reentered the proceedings by filing a petition and supporting memorandum of points and authorities to

1. Disqualify Commissioner Sturgeon and Holmes from further participation in proceeding;
2. Require Commission, Commissioner Symons and/or Examiner Gilman to produce document;
3. Present oral argument to Commission within fifteen (15) days hereafter;
4. Require Commission decision within thirty (30) days after oral argument;
5. Impose constructive trust on Delta Lines, Inc. intrastate operating authority; and
6. Appropriately fine and revoke Delta Lines, Inc.'s intrastate operating authority for its contemptuous conduct in this proceeding.

Thereafter, on June 7, 1976 this Examiner, although heavily involved in both hearings and decision preparation in other proceedings before the Commission, attempted to accommodate petitioner and set June 21, 1976 for hearing argument on the petition. On June 9, 1976 protestant's attorney, noting that the Commission had not en banc heard petitioner within the 15 days petitioner had set, wrote the Executive Director of the Commission stating his conclusion his request was denied and that his remedy was "now before another tribunal". He further enquired whether the Commission would participate en banc at the scheduled June 21, 1976 hearing. The Executive Director, on June 11, 1976, in reply wrote to inform protestant that only a "final decision" of the Commission, rehearing denied or being decided, may be subject to review by the California Supreme Court; and that Application No. 54997 was still in rehearing. Protestant was told that this Examiner, with concurrance of the assigned Commissioner, was presiding as provided for in the Rules of Practice and Procedure of the Commission; had jurisdiction to conduct

the June 21, 1976 hearing, and that the Commission intended its normal procedures to be followed to ultimately result in a decision, with or without protestant's participation. After issuance of a final decision by the Commission on the rehearing the protestant would be free to seek review by a petition for rehearing, and if denied, to the Supreme Court.

The Commission staff and Delta filed an answer and a reply respectively, on June 16, 1976 and June 21, 1976 respectively, urging denial of the relief sought.

On June 21, 1976 the Examiner heard oral argument on the six-point petition. Briefs were subsequently filed and considered in the Examiner's Ruling to which this Appendix is appended.

A.54997

EXHIBIT NO. 2

ADDRESS ALL COMMUNICATIONS
TO THE COMMISSION
CALIFORNIA STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 557-0909

Public Utilities Commission

STATE OF CALIFORNIA

A-54997

Gentlemen:

Re: Application No. 54997, Alltrans Express California, Inc. to Sell Operative Authority and Proptery to Delta Lines, Inc.

In connection with the above application the Commission Staff has been directed by the Commission in Decision No. 83767 to develop the record on the issue of possible anticompetitive implications.

The Staff requests that you complete the attached forms to reflect data pertaining to movements from each of your terminals to each of your other terminals (within California). Mr. Carroll D. Smith of the Transportation Division will be contacting you shortly regarding the disposition of the completed report.

We trust we can rely on your cooperation in this matter and avoid unnecessary subpoenas. Your direct cooperation will assist the Staff in the permormance of its duties and will be greatly appreciated.

If you have any questions, please contact me at 415-557-0909.

Very truly yours,

Ira R. Alderson, Jr.
Staff Counsel

Attachment

EXHIBIT NO. 2
A-54997
PAGE 1 OF 2

A.54997 EXHIBIT NO. 2

Carrier _____

From _____ (Terminal) To _____ (Terminal)

The following pertains to intrastate shipments weighing 10,000 lbs. or less transported during each of the years shown:

	1970	1971	1972	1973	1974
Number of Shipments					
Aggregate Weight of These Shipments (a)					
Aggregate Gross Revenue from These Shipments (b)	$	$	$	$	$

(a) Round to nearest 1,000,000 lbs.

(b) Round to nearest $1,000

In the event the above figures were arrived at by first calculating total (intrastate and interstate) shipments of 10,000 lbs. or less and then applying a percentage factor, check here (_____) and explain method on reverse.

Estimated percentage of these shipments which weighed less than 101 lbs.:

	1970	1971	1972	1973	1974
By number of shipments	%	%	%	%	%
By weight	%	%	%	%	%
By revenue	%	%	%	%	%

Which carriers do you feel are your greatest competitors for intrastate traffic between 100 and 10,000 lbs. moving between the areas served by the two terminals named above? (You may list more or less than ten, as appropriate.)

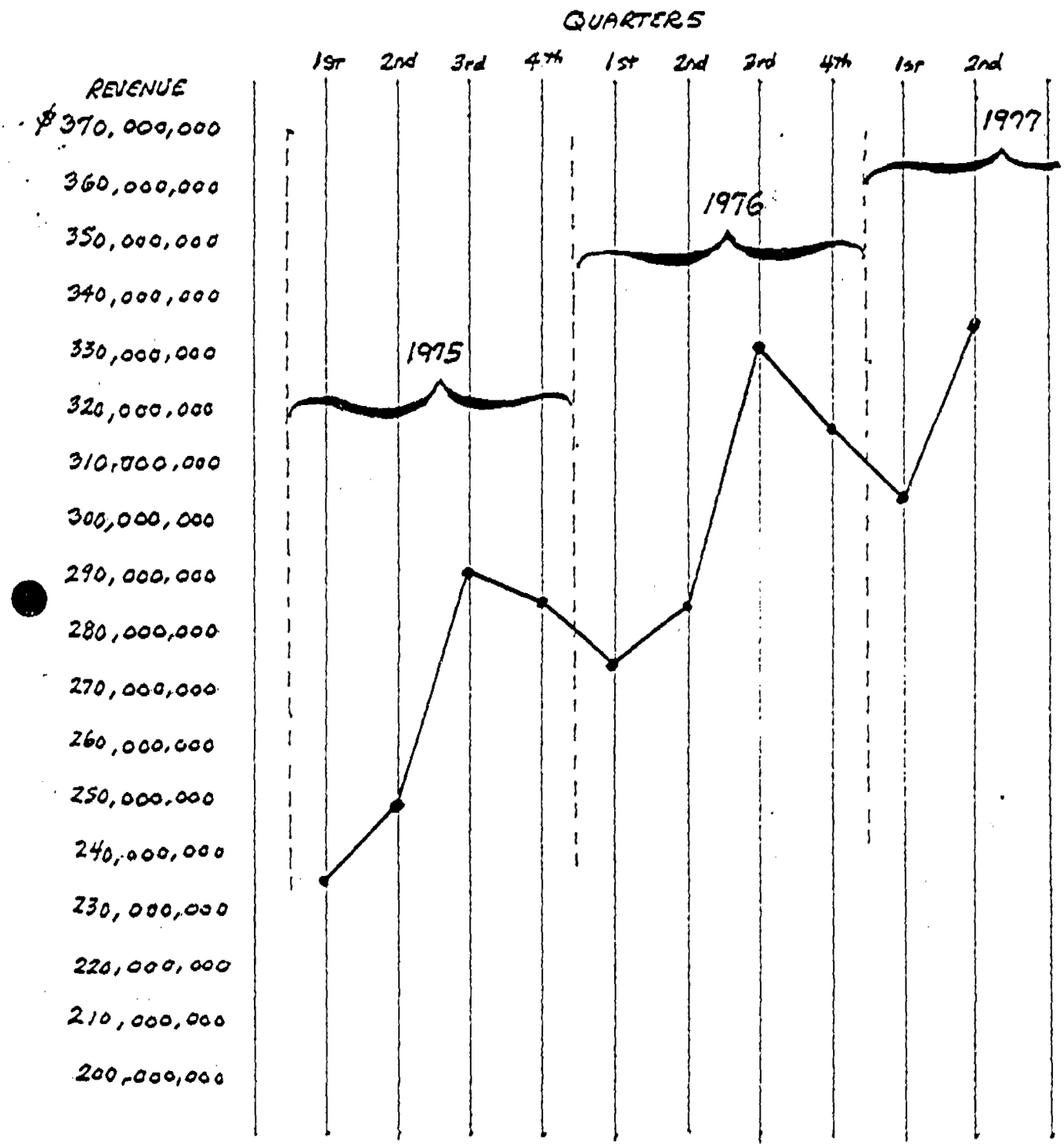
1. _____ 6. _____
2. _____ 7. _____
3. _____ 8. _____
4. _____ 9. _____
5. _____ 10. _____

EXHIBIT NO. 2
A-54997
PAGE 2 OF 2

A-34997

EXHIBIT NO. 3

CERTIFICATED HIGHWAY CARRIERS GROSS REVENUE - CALIFORNIA OPERATIONS



SOURCE: SYSTEMS & PROCEDURES BR.
TRANSPORTATION DIVISION
COMMISSION STAFF

Acquisition of Alltrans Express California, Inc., by Delta Lines, Inc.

COMMISSIONER WILLIAM SYMONS, JR., Dissenting

For the reasons which follow, I cannot accept the Opinion on Rehearing adopted by the majority in this proceeding. Rather I would adopt the Proposed Report of Administrative Law Judge Weiss as the decision of the Commission.

As stated in the majority decision, the Commission staff filed exceptions to the proposed report. The staff took exception to the ALJ's determination of both the relevant product and geographic markets; to the finding that the staff survey had no statistical validity; to the conclusion that Alltrans was a "failing company"; to the finding and conclusion relating to the attempted preservation of 400 jobs; and to the conclusion that the acquisition had been shown to have a neutral effect on competition. However, reflecting the same shortcomings and failings evident from the record of the hearings, the staff's recitations in support of its exceptions were ample in rhetoric, but painfully sparing in reference to any actual evidence on the record to support them. The reason is that such evidence was simply not submitted at the hearing. I would remind the staff that the place to make its case is in the hearing room, and not in the ante rooms of the Commissioners.

The staff had opportunity as did the other parties to this protracted proceeding to prepare a case, to bring in witnesses, and to present evidence. Unfortunately for its contentions here, the staff chose at the hearing to base its case upon a somewhat similar federal proceeding (one still on appeal before the federal courts), but then failed to take into consideration very substantial

and critically decisive, dissimilarities between the federal and state relevant product and geographical markets involved. And no amount of intemperate rhetoric and philosophical argument can gloss over that failing; it permeates every facet of the staff's case from the survey on. The staff's exceptions are based upon a refusal to accept the record evidence and mischaracterizations of controlling legal principles. They would deal in ephemeral possibilities, not the economic realities of the industry before us.

A. Relevant Product Market:

In this case we deal with shipping services, not products. The rule that controls determination of a relevant service market derives from the "area of effective competition" guide set down in Standard Oil Company v U.S. (1949) 337 US 293 at 299-300 n.5). That rule has been since followed by the court in those cases dealing with services. For example, in U.S. v Philadelphia National Bank (1963) 374 US 321, where the court stated: "In our view, the lumping together of various kinds of services makes for the appropriate market..."; in U.S. v Grinell Corp. (1966) 384 US 563, at 572, where the court stated: "We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities"; in U.S. v Phillipsburg (1970) 399 US 350 at 360, where the court cautioned that "submarkets are not a basis for the disregard of a broader line of commerce that has economic significance"; and in U.S. v Greater Buffalo Press, Inc., (1971) 402 US 549 where the court rejected division into component parts and applied the

Standard Oil "area of effective competition" rule.

While I agree fully with the staff's recitation from U.S. v DuPont & Co. (1956) 351 US 377 at 395, that determination of a relevant services market involves consideration of the "interchangeability by consumers" of the services offered, unfortunately for the staff's contentions, and the majority's adoption of these, the entirety of the evidence from those in the industry itself is that the shipping public views and uses proprietary, permitted, and common carriers as functionally interchangeable for the transportation of less than truckload (LTL) and truckload (TL), and parcel delivery and common carriers as functionally interchangeable for the transportation of less than 101-pound shipments.

I will not rehash the evidence again; it suffices to state that it is to the point that common carriers daily compete head to head with parcel delivery carriers for mini shipments, and with proprietary and permitted carriers for LTL and TL shipments. There just is no credible evidence to the contrary in this proceeding. That the realities of the specific marketplace here on issue do not fit into the preconceived philosophical confines of the neat little box that the staff would use is not the fault of the ALJ as the staff indicates. The staff would have us ignore the hard realities of the real life marketplace. For example, the staff's sole basis in excluding TL from its concept of the relevant product market in California was that it represented a small part of his business.

But the clear uncontradicted testimony of industry witnesses Culy, Lawlor, Gilardy, and Varozza was to the contrary; that TL was crucial. As Hollenbeck testified for Moore Business Forms, and Gilardy, Lawlor, Almerda, Culy, and Varozza testified for operators - all without contradiction or rebuttal, it is a clear fact that shippers view proprietary and common carriage interchangeably. The only economist who testified, Dr. Daicoff, also testified at length of the high cross elasticity of demand between private and common carriage, and of the severe problems for the trucking industry this development is creating. Our ALJ took notice from this Commission's own files of corroborative evidence showing the disproportionate growth in Minimum Rate Tariff 15 (MRT 15) revenues vis-a-vis MRT 2 TL and LTL revenues over the 1974-1976 period.

The ALJ's analysis drawn from the record before him is set forth on this point in his proposed report (pp 40-48). As the evidence clearly points up and as the ALJ concluded, the movement of LTL traffic is not completely dominated in California by the common carrier, and to disregard the interdependence of mini, LTL, and TL is to ignore commercial reality. No one categroy represents an economically viable line of commerce. The majority's findings and conclusion relative to the product market just do not reflect the reality in California, and are unsupported by the record, not exactly a new phenomenon in recent proceedings before this Commission.

B. Relevant Geographic Market:

Similarly to the facts in the produce market, the entirety of the evidence presented on the record pertaining to the

relevant geographic market supports the findings and conclusions of the ALJ. In filing exceptions, the staff merely stated that the ALJ was wrong and that it was right. Its argument, expressed in four lines of comment, again completely ignored the actual evidence of record. The staff at the hearing conceded that it had not checked the actual operational characteristics of a single common carrier! Nor did it ascertain the geographical area that was in fact served from any terminal. The terminal groupings overlap and interlock. In Brown Shoe Co. v. U.S. (1962) 370 US 294 at 336 the Supreme Court stated that the geographic market must be selected to "correspond to the commercial realities of the industry and be economically significant". It means a "careful selection of the market area in which the seller operates and to which the producer can practically turn for supplies" (Tampa Electric Co. v Nashville Coal Co.(1961) 365 US 320, 327). If it reflects the "area of effective competition", it must be upheld (Philadelphia National Bank, supra, at p 359).

The problem with the majority decision is that while it professes to have adopted as its geographic market the total of those submarkets which are the traffic lanes interconnecting the various terminal groupings wherein Delta and Alltrans competed, it just does not do that. Traffic is just not confined to movement between terminals, as the evidence on record clearly sets forth, and data gathered on a terminal to terminal basis as the staff proposes to have done is inadequate to measure actual traffic flow. It does not include all freight moving between those points, but depends

for its inclusions upon the operational characteristics of particular carriers. The staff arbitrarily excluded all traffic involving single terminal carriers or carriers using no terminals in that lane. This last dispite the considerable testimony from all of the industry witnesses of substantial competition not only from single terminal carriers but from operators operating with no terminals at all!.

Furthermore, the majority's chosen relevant geographic market is clearly not the area of effective competition. The adopted individual lane markets were each only incomplete segments of that individual lane market. In any particular lane, the only traffic included and considered was that of those carriers who were big statewide (over $500,000 volume annually) regardless of their bigness on that lane. A regional carrier who concentrated in the lane area and who was significant there would be excluded arbitrarily unless big enough statewide to survive the $500,000 cutoff. Thus we have the strange phenomenom of Applegate Drayage, the protestant here, and a significant carrier in some of these lanes, not making the draw statewide and thus being excluded on all lanes. Indeed, evidence was presented to show the inadequacy of the staff sampling. On the Los Angeles-San Diego route, the staff study listed 18 carriers. From the Scope Tariff of Western Motor Traffic Bureau and Pacific Coast Tariff Bureau, it can be seen that there are 42 carriers certificated between these points. The staff study on the

San Francisco-Sacramento lane lists 16 carriers. However, the tariff bureau listings show 31 carriers certificated on that lane. In both instances Delta testified to being in competition with most of these. By ignoring accepted and proven sampling techniques known and available to statisticians, the staff chose to arbitrarily exclude 94.7 percent of the carriers handling LTL and 47.7 percent of the volume. None-the-less the majority has adopted this fragmentary judgmental sample as its geographic market. Statistically speaking, it has capability of proving nothing.

C. The Staff Study's Invalidity:

On the record the staff continues to insist that its "survey" is valid! This despite the unhappy fact that the staff study has been shown to be a statistician's nightmare and of no value. Apart from the arbitrary exclusions of relevant categories of freight movement discussed earlier and the arbitrary and purely judgmental limitation of the scope of the "survey" to 38 carriers, the staff allowed each responding carrier to use his own judgment on his response. The staff did not define terms; it did not include checks and controls to verify accuracy of the data submitted, and there was no review of the raw data used. It was merely used as it came in. But the entire purpose of this "survey" was to measure the effect, if any, of Delta's acquisition of Alltrans. Without reliable Alltrans data no competent comparison or conclusions could be drawn. Nonetheless, the testimony of the staff's own witness was that as early as January 1976 the staff was told by Alltrans that complete Alltrans data was lacking and that Alltrans feared that what it had would not be representative. The staff then merely

made the suggestion that Alltrans estimate. This Alltrans did, using mere multiples of one response in the majority of its significant lanes. When the data was received in September 1976 the staff, with no further consideration, and without noting use of multiples, merely used the raw estimated data. Now the staff contends "If the applicant furnishes unreliable information it should face the consequences".

But there is more. As a result of its failure to provide clear unambiguous instructions or to build in elementary verification techniques, the staff itself built in three fundamental miscalculations which distort the data. I will not repeat the ALJ's discussion of these. It sufficies to note that they include the fact that Delta's submissions for 1974, although clearly marked as to the specific periods covered, were misconstrued by the staff; that no seasonal fluctuation allowance was provided for although such fluctuation was readily apparent in statistics on the industry long maintained by this Commission, and the failure of the staff toallow a factor to adjust for industry absorption of the Alltrans traffic after its August 16, 1974 closedown.

On this flimsy foundation we are asked by the staff to reject the impartial ALJ's findings and conclusions and to make a finding of anticompetitive effects on competition should the proposed acquisition be allowed. The plain fact is that the staff's "study" is a statistical disgrace, and in their exceptions brief the staff could point to no evidence to rehabilitate the discredited "survey".

D. The Failing Company Defense:

The staff took exception to the ALJ's conclusion that Alltrans was a "failing company". I disagree. The testimony of witnesses Golan and White was that Alltran's corporate parent, Thomas Nationwide Transport, Ltd. (Thomas), an Australian firm, after months of discussion determined in April 1974 that it had to quickly end the substantial and continuing drain on its resources resulting from the Alltrans operating loses ($1,572,286 in 1973 alone). It determined to do so by sale or closedown of Alltrans by the end of its fiscal year on June 30, 1974. Preferring to sell if a quick sale could be arranged (one asserted reason to sell being its desire to preserve at least some jobs), a list of potential buyers was drawn up. After a promising start the first attempt to sell fell through in mid-May 1974 over disagreement on the securities exchange in the proposed purchase plan. Delta was next on the list of potential buyers. Time was running out when on May 16, 1974 Delta was approached through an intermediary. Delta expressed interest. Nonetheless, during the next few weeks while Delta was looking the operation over and evaluating such an acquisition, Thomas and Alltrans concurrently put together a contingency shudown plan. When there seemed a good chance of a Delta deal, Thomas, despite the continuing losses, reluctantly extended its deadline to August 16, 1974, determining that if the Delta interest did not result in a sale by that date it would activate closedown of Alltrans on that date. Golan testified:

> "And therefore, the decision was taken to sell or close down without any view to extend even by one day. Management has planned if on the 16th the decision is not taken, frankly we cannot carry the burden anymore".

Such is the record. Nothing supports the staff's assertion that Delta and Thomas agreed to an "artificial deadline". The staff's argument that Alltrans could not have been a "failing company" so long as Delta would buy it is an absurdity. One man's opportunity is another man's loss. The evidence here is that Thomas could not and would not carry the continuing losses any longer. Of itself Alltrans was terminal. Delta believed that with Delta's considerable managerial and operational skills it could acquire and rehabilitate Alltrans, mistakenly as it developed. At that ninth hour Delta was the only practical alternative to an Alltrans shutdown.

The rationale behind the "failing company" defense rests in the lack of anticompetitive consequence in an acquisition if one of the combined companies is about to disappear from the marketplace anyway. As the lesser of two evils, the potential competitive threat from the acquisition is deemed a preferable alternative to the adverse impact of the failing company going out of business.

The staff, in its exception to the ALJ's proposed decision, asserts that any so-called liberalization of the "failing company" defense was "expressly repudiated" by the Supreme Court in United States v General Dynamics Corp. (1974) 415 US 486 at page 507. This is a misstatement of the thrust of the case. In General Dynamics the Supreme Court, while affirming the District Court's finding of no violation of the anti-rust laws in the acquisition, concluded

that the acquired company's weak reserves position rather than establishing a "failing company" defense by showing that the company would have gone out of business but for the merger, went to the heart of the Government's statistical case, but that this did not distract from the finding that the acquired company, even had it continued in business could not have competed effectively. Referring to General Dynamics, our ALJ stated in footnote 48 on page 62 of his proposed decision:

> "..., while not involving a failing company defense in the real sense, (it) did widen the gamut of defenses generally, and affords opportunity to consider the defense in the context of a given situation. It would appear, from consideration of the testimony of Messrs. Golan and White on July 18, 1974 weighed against the widened defense scope clearly signaled by General Dynamics, that Alltrans' 1974 economic situation, efforts to solve it, and efforts to sell, would meet the lessened requirements of that defense".

It seems clear that the severe restrictions set up by Citizens Publishing Co. v United States (1969) 394 US 131, restrictions which seem to disregard the explicit favorable reference to the failing company doctrine in the legislative history of the more recent amendments to Section 7 of the Clayton Act (HR Rep No. 1191, 81 Cong., 1st Sess., 6 (1949); S Rep No. 1775, 81 Cong., 2d Sess., 7 (1950)), have been liberalized in subsequent decisions, including General Dynamics, which involve reference to the doctrine. The writers seem to agree (see: Sullivan, Mergers Between Direct Competitors, Handbook of the Law of Antitrust,

Hornbook Series (1977); and R. A. Posner, Antitrust Law (1976)). Some commentators see the General Dynamics decision as evidence of a softer line on antitrust, perhaps taking their cue from Justice Douglas who in writing his dissent to General Dynamics wrote that the majority could have ruled as it did only on the basis of "a deep-seated judicial bias against Section 7 of the Clayton Act". Certainly the trend to widen application of the doctrine from the restrictive view expressed in Citizens Publishing continues to the present. The Business World section of the San Francisco Chronicle of June 22, 1978 carried a feature news item captioned "Attorney General OK's Merger of Steel Giants." In part, the item stated:

> "Attorney General Griffin Bell yesterday overruled his staff's recommendation and approved a merger by the parent firms of Youngstown Sheet and Tube Co. and Jones & Laughlin Steel Corp. into the nation's fourth-largest steel producer.
>
> "In the Carter administration's first major antitrust decision, Bell said the $6.1 billion merger of the LTV Corp., which owns No. 7 steelmaker Jones & Laughlin, and Lykes Corp., which owns No. 8 Youngstown Sheet & Tube Co., falls under the 'failing company' exception to anti-merger provisions of antitrust laws". (Emphasis added).

E. Attempted Preservation of the 400 Jobs:

This Commission in Decision No. 83293 dated August 6, 1974 (see Findings Nos. 3, 4, 5, and 7 therein) concluded that approximately 400 jobs would be preserved by allowing the acquisition. They were for a number of months. Unhappily in the business world jobs cannot be reasonably guaranteed into perpetuity. The ALJ reached the same general findings and conclusions as we had relative to a reasonable expectation of continued employment as a probable

result of allowing the acquisition. But Alltrans was not rehabilitated successfully and the losses continued, ultimately forcing the layoff of most of these people. The staff in its exception presented nothing to support the exception save a precatory suggestion that had the acquisition been denied at that ninth hour, and had Alltrans been enjoined from abandoning its service, the jobs might have been preserved. In light of the substantial recurring losses which Alltrans had piled up, resulting in a negative net worth of $1.5 million (see Finding No. 1 in Decision No. 83292), there is no constitutional way by which this Commission could force Alltrans to continue in business sustaining further losses after August 16, 1974 until such a time as another buyer might have been found and sanction for such an acquisition might have been obtained from this Commission. (See Lyon & Hoag v Railroad Commission (1920) 183 C 145, at 146 and 147).

F. The Acquisition on This Record Has Been Shown to Have a Neutral Effect on Competition:

The staff's argument in support ot its exception to the ALJ's Conclusion No. 5 which states that the acquisition has been shown to have a neutral effect on competition ignored the record. Even to the staff "survey" as a departure point, that corrected residue fails to support the exception. Furthermore, a simplistic adding together of Alltrans and Delta to find that the sum of the two is bigger than Delta is not the test to determine the effect of the acquisition upon competition. Nor can one any longer rely solely upon a valid market share analysis as the staff apparently believes. But we even lack a valid share analysis.

The Supreme Court in Brown Shoe Co. v U.S. (1962) 370 US 294 rejected any simple quantitative test of illegality in a prospective acquisition, stating that the legislative history of the 1950 amendment to Section 7 of the Clayton Act indicated that Congress was concerned with protection of competition, not competitors. However, the Court then proceeded to interpret the act so as to protect higher cost from lower cost competitors. Then in United States v Philadelphia National Bank (1963) 374 US 321, it established a test that a merger which (1) creates a firm having 30 percent of the market and (2) thereby increases concentration among the leading firms by at least 33 percent is presumptively unlawful. But next, in United States v Von's Grocery Co. (1966) 384 US 270, in a situation involving a grocery chain merger in a marketplace already regarded as concentrated, the Court stated that the purpose of the 1950 Act "was to prevent concentration in the American economy by keeping a large number of small competitors in business". Ignoring the ease and rapidity of entry and relatively low capital requirement of the grocery business, the Court concluded that the proposed merger was bad because it would enable the merging grocery business firm to injure its small competitors by under-pricing them (this although the Justice Department argued the merger would raise prices). And since then, in General Dynamcis, the Court declined to consider market share data alone, stating that while market share data remained "the primary index of market power...only a further examination of the particular market - its structure, history, and probably future - can provide the appropriate setting for judging the probably anticompetitive effect of the merger". Thus market shares are but the starting point for

analysis; an effort must also be made to access their significance in the particular economic setting of the merger. Impliedly then, exceptional ease and rapidity of entry into the industry could substantially today lessen the significance of market shares. In the instant proceeding there was abundant uncontradicted testimony of the competitive health and vigor of the California trucking industry. Daicoff also testified without contradiction that "nationwide, California has the reputation of being one of the absolutely most competitive states in the country". Furthermore, in a regulated industry such as the trucking industry in California the opportunity of collusion to manipulate prices in the market is minimal - unlike the open markets represented by the firms involved in the cases wherein most of the antitrust law has been made.

The majority has prepared Table 1 (in its opinion) which purports to show anti-competitive results from a merger. This Table, however, cannot show what it is touted to demonstrate, and this is why.

Columne 2 of this table purports to show the aggregate percentage of shipments carried by the 4 largest carriers in each respective traffic lane. But the carriers included in the majority's aggregate are in no way shown to be the "largest" carriers in that lane! Rather they are the largest of those carriers which were selected by the staff for inclusion in the staff's <u>partial</u> list of carriers for that lane - <u>a selection determined by size criteria in no way related to size criteria in that lane</u>. Excluded is any

carrier, regardless of how big it might be in that lane, who failed to make the statewide criteria. (And for example, Applegate is pretty big in the Sacramento Area, but it failed statewide to make the $500,000 cutoff in LTL volume). The plain fact is that we just have no way from the staff study of determining who the 4 largest carriers are for any lane in the staff study.

Similarly, column 3 shows what purports to be the aggregate of Delta-CME volume as compared to the total volume for any lane. But it, as well as Column 5 (which purports to show Alltrans' share), does not show percentage of the actual overall traffic in that lane; instead it is this percentage against the overall volume for those carriers the staff selected to be in its special universe. But unhappily for the staff's contentions, it does not even show that, because the majority neglected to use corrected Delta data reflecting corrected Master Bill reporting (although Delta supplied the corrected data after it learned what the staff wanted).

Application of Department of Justice Guideline percentages is meaningless when used against a strawman. As General Dynamics teaches, market shares are but the starting point for analysis; their significance in the particular economic setting must also be analyzed. I will not join the majority in their jousting with windmills when as there serious consequences necessarily must result with far reaching effects in the California trucking industry.

I do not share the ostrich-like disregard for the evidence regarding Alltran's incipient demise in 1974 which the majority

so tenuously clings to. The ALJ has thoroughly reviewed the record in this regard and his findings and conclusions are the only ones supportable by this record. Whether Alltrans could have or would have acted illegally in shutting down unilaterally is really hindsight quarterbacking. In 1974, it was going to do so. That is the clear thrust and fact from the evidence before us. Delta was its last and only hope to maintain operations and preserve some jobs. In that Alltrans was going under, and the purpose of anti-trust law in part is to protect competition, not competitors, the proper test in these circumstances is to see whether the effect of a last minute merger of Alltrans into Delta-CME would have served to enable Delta-CME to achieve a larger share of the markets that that share it would have in all probability achieved anyway, had Alltrans gone under. Using the staff study figures, corrected as the ALJ noted, to reflect Master Bill reporting to make Delta figures compatible with those of the other survey participants, the evidence clearly demonstrates that overall Delta actually achieved a lesser market share than it would have been projected to have received anyway in the absence of an acquisition, and in the event of Alltran's demise. Dissent Table 1 (5 pages), which was received as Exhibit R-18 (introduced by Delta) shows this result. This table is attached hereto.

As stated initially, I would adopt the attached ALJ's Proposed Report as the decision of the Commission, including his Ruling of May 20, 1977 attached to that proposed report as Exhibit No. 1.

San Francisco, California
December 19, 1978

William Symons Jr.
WILLIAM SYMONS, JR.
Commissioner

DISSENT TABLE 1

SUMMARY OF RESTATED INTERTERMINAL TRAFFIC FLOW
BETWEEN SELECTED TERMINALS
ADJUSTED FOR MASTER BILL REPORTING

Exhibit No.
Witness: R.F. Lautze
Date

Summary - Market Share of Delta California Industries	1973 Actual Results		1974 Projected Results		1974 Corrected Projection		1974 Actual Results	
	Shipments	Per Cent	Shipments	Per Cent	Shipments	Per Cent	Shipments	Per Cent
Chico-Los Angeles	5,028	24.4	5,073	22.3	5,127	23.9	5,170	23.8
Chico-Sacramento	11,735	35.8	13,605	38.0	13,612	40.1	14,553	43.0
Chico-San Francisco	14,483	33.4	13,353	36.2	13,375	38.2	13,023	37.1
Fresno-Los Angeles	93,929	24.8	98,115	24.5	93,983	24.4	103,732	28.4
Fresno-Sacramento	13,504	42.8	14,336	36.9	14,085	38.5	12,921	35.1
Fresno-San Francisco	68,503	30.0	67,115	29.2	64,170	29.2	61,003	27.7
Los Angeles-Salinas	45,010	48.9	52,028	52.8	49,366	55.0	47,841	53.1
Los Angeles-Sacramento	89,068	25.0	90,310	22.6	93,942	26.1	85,419	22.2
Los Angeles-San Diego	85,748	17.1	87,996	16.2	83,498	15.7	81,522	15.4
Los Angeles-San Francisco	369,176	19.9	323,387	17.8	318,214	18.1	315,379	17.9
Los Angeles-Stockton	37,137	25.0	34,037	24.0	32,388	23.7	34,853	25.6
Los Angeles-Santa Maria	13,477	12.2	13,857	11.7	12,750	11.0	12,988	11.2
Los Angeles-Santa Rosa	9,611	14.9	8,281	13.7	8,593	14.5	9,445	15.9
Salinas-Sacramento	7,886	74.0	9,503	55.4	10,488	67.3	9,091	57.5
Salinas-San Francisco	53,415	45.3	57,525	40.5	54,322	40.9	54,246	40.8
Sacramento-San Francisco	94,574	24.3	93,919	21.6	106,088	25.4	88,912	21.1
Sacramento-Santa Rosa	2,522	13.1	2,439	13.3	3,304	18.5	2,730	15.2
San Diego-San Francisco	36,373	56.8	35,646	51.4	33,970	53.1	33,022	51.5
San Francisco-Stockton	40,354	35.5	36,662	31.1	36,697	32.7	34,276	30.4
San Francisco-Santa Rosa	21,789	13.2	23,047	13.6	23,104	13.9	28,545	17.2
Total Delta California Industries	1,113,122	23.5	1,080,294	22.0	1,077,132	22.8	1,053,672	22.2
Total all carriers	4,741,924	100.0	4,911,585	100.0	4,734,103	100.0	4,733,057	100.0

App. Case 34997
Exhibit No. R-18
Witness LAUTZE
8/29/77
WEISS

BETWEEN SELECTED TERMINALS
ADJUSTED FOR MISTER BILL REPORTING

Exhibit No.
Witness: A.F. Lautze
Date

	1973 Actual Results		1974 Projected Results		1974 Corrected Projection		1974 Actual Results	
	Shipments	Per Cent	Shipments	Per Cent	Shipments	Per Cent	Shipments	Per Cent
Chico - Los Angeles								
Delta Lines	5,028	24.4	5,073	22.3	5,177	23.9	5,170	23.8
Alltrans	N/A	N.A	1,724	7.7	1,724	8.0	1,724	8.0
Sub total	5,028	24.4	6,797	30.0	6,901	31.9	6,894	31.8
All other carriers	15,615	75.6	15,560	70.0	14,755	68.1	14,763	68.2
Total	20,643	100.0	22,357	100.0	21,656	100.0	21,657	100.0
Chico - Sacramento								
Delta Lines	11,735	35.8	13,605	38.0	13,612	40.1	14,553	43.0
Alltrans	2,123	6.6	1,724	4.8	1,724	5.1	1,724	5.1
Sub total	13,903	42.4	15,329	42.8	15,336	45.2	16,277	48.1
All other carriers	18,890	57.6	20,493	57.2	18,644	54.8	17,576	51.9
Total	32,793	100.0	35,822	100.0	33,980	100.0	33,853	100.0
Chico - San Francisco								
Delta Lines	14,483	33.4	13,353	36.2	13,375	38.2	13,023	37.1
Alltrans	6,482	14.9	1,724	4.7	1,724	4.9	1,724	4.9
Sub total	20,965	48.3	15,077	40.9	15,099	43.1	14,747	42.0
All other carriers	22,437	51.7	21,775	59.1	19,543	56.9	20,343	58.0
Total	43,402	100.0	36,852	100.0	35,042	100.0	35,093	100.0
Fresno - Los Angeles								
Delta Lines	51,502	13.6	51,419	12.8	50,581	13.1	68,598	17.9
CHE	42,427	11.2	45,696	11.7	43,408	11.3	40,134	10.5
Sub total	93,929	24.8	93,115	24.5	93,989	24.4	108,732	28.4
Alltrans	4,308	1.1	6,857	1.7	6,857	1.8	6,857	1.8
Sub total	98,237	25.9	104,972	26.2	100,846	26.2	115,589	30.2
All other carriers	279,428	74.1	295,593	73.8	284,147	73.8	267,623	69.8
Total	377,665	100.0	400,565	100.0	384,993	100.0	383,212	100.0
Fresno - Sacramento								
Delta Lines	9,013	28.6	9,158	23.6	9,186	25.1	8,362	22.7
CHE	4,491	14.2	5,178	13.3	4,899	13.4	4,559	12.4
Sub total	13,504	42.8	14,336	36.9	14,085	38.5	12,921	35.1
Alltrans	N/A	N/A	1,724	4.4	1,724	4.7	1,724	4.7
Sub total	13,504	42.8	16,060	41.3	15,809	43.2	14,645	39.8
All other carriers	18,037	57.2	22,778	58.7	20,801	56.8	22,144	60.2
Total	31,541	100.0	38,838	100.0	36,610	100.0	35,789	100.0

REGULATED INTERNATIONAL TRAFFIC FLOW
BETWEEN SELECTED TERMINALS
ADJUSTED FOR MASTER BILL REPORTING

EXHIBIT NO.
Witness: R.F. Lautze
Date

	1973 Actual Results		1974 Projected Results		1974 Corrected Projection		1974 Actual Results	
	Shipments	Per Cent	Shipments	Per Cent	Shipments	Per Cent	Shipments	Per Cent
Fresno - San Francisco								
Delta Lines	40,200	17.6	39,747	17.3	38,862	17.7	37,459	17.0
CME	28,303	12.4	27,368	11.9	25,308	11.5	23,544	10.7
Sub total	68,503	30.0	67,115	29.2	64,170	29.2	61,003	27.7
Alltrans	6,482	2.8	1,724	.7	1,724	.8	1,724	.8
Sub total	74,985	32.8	68,839	29.9	65,894	30.0	62,727	28.5
All other carriers	153,298	67.2	161,173	70.1	153,771	70.0	157,482	71.5
Total	228,283	100.0	230,012	100.0	219,665	100.0	220,209	100.0
Los Angeles - Salinas								
Delta Lines	17,851	19.4	18,901	19.2	18,590	20.7	17,930	19.9
CME	27,159	29.5	33,122	33.6	30,776	34.3	29,911	33.2
Sub total	45,010	48.9	52,028	52.8	49,366	55.0	47,841	53.1
Alltrans	6,482	7.0	1,724	1.7	1,724	1.9	1,724	1.9
Sub total	51,492	55.9	53,752	54.5	51,090	56.9	49,565	55.0
All other carriers	40,688	44.1	44,788	45.5	38,746	43.1	40,534	45.0
Total	92,180	100.0	98,540	100.0	89,836	100.0	90,099	100.0
Los Angeles - Sacramento								
Delta Lines	38,398	10.8	36,682	9.2	42,125	11.0	35,908	9.3
CME	50,670	14.2	53,628	13.4	57,817	15.1	49,511	12.9
Sub total	89,068	25.0	90,310	22.6	99,942	26.1	85,419	22.2
Alltrans	58,217	16.4	89,345	22.3	89,345	23.4	89,345	23.2
Sub total	147,285	41.4	179,655	44.9	189,287	49.5	174,764	45.4
All other carriers	208,785	58.6	220,136	55.1	193,178	50.5	210,214	54.6
Total	356,070	100.0	393,791	100.0	382,465	100.0	384,978	100.0
Los Angeles - San Diego								
Delta Lines	49,422	9.9	47,500	8.7	46,235	8.7	44,255	8.4
CME	36,326	7.2	40,496	7.5	37,263	7.0	37,267	7.0
Sub total	85,748	17.1	87,996	16.2	83,498	15.7	81,522	15.4
Alltrans	NEG	NEG	NEG	NEG	NEG	NEG	NEG	NEG
Sub total	85,748	17.1	87,995	16.2	83,498	15.7	81,522	15.4
All other carriers	415,591	82.9	455,604	83.8	446,353	84.3	448,596	84.6
Total	501,339	100.0	543,600	100.0	529,851	100.0	530,118	100.0

Exhibit No.
Witness: R.F. Lautze
Date

RESTATED INTERTERMINAL TRAFFIC FLOW BETWEEN SELECTED TERMINALS ADJUSTED FOR MASTER BILL REPORTING

	1973 Actual Results		1974 Projected Results		1974 Corrected Projection		1974 Actual Results	
	Shipments	Per Cent	Shipments	Per Cent	Shipments	Per Cent	Shipments	Per Cent
Los Angeles - San Francisco								
Delta Lines	159,037	8.6	151,477	8.3	152,875	8.7	144,057	8.2
CHE	210,083	11.3	171,910	9.5	165,339	9.4	171,322	9.7
Sub total	369,176	19.9	323,387	17.8	318,214	18.1	315,379	17.9
Alltrans	144,457	7.8	103,058	5.7	103,058	5.8	103,058	5.9
Sub total	513,633	27.7	426,445	23.5	421,272	23.9	418,437	23.8
All other carriers	1,342,054	72.3	1,388,090	76.5	1,339,332	76.1	1,342,158	76.2
Total	1,855,657	100.0	1,814,535	100.0	1,760,604	100.0	1,760,595	100.0
Los Angeles - Stockton								
Delta Lines	14,605	9.8	14,451	10.2	14,162	10.4	13,866	10.2
CHE	22,532	15.2	19,645	13.8	18,226	13.3	20,987	15.4
Sub total	37,137	25.0	34,097	24.0	32,388	23.7	34,853	25.6
Alltrans	2,135	1.4	1,724	1.2	1,724	1.3	1,724	1.3
Sub total	39,272	26.4	35,821	25.2	34,112	25.0	36,577	26.9
All other carriers	109,287	73.6	106,447	74.8	102,574	75.0	99,595	73.1
Total	148,559	100.0	142,268	100.0	136,686	100.0	136,172	100.0
Los Angeles - Santa Maria								
CHE	13,477	12.2	13,857	11.7	12,750	11.0	12,933	11.2
Alltrans	NEG	NEG	NEG	NEG	NEG	NEG	NEG	NEG
Sub total	13,477	12.2	13,857	11.7	12,750	11.0	12,933	11.2
All other carriers	97,440	87.8	104,856	88.3	103,399	89.0	103,114	88.8
Total	110,917	100.0	118,713	100.0	116,149	100.0	116,102	100.0
Los Angeles - Santa Rosa								
Delta Lines	9,611	14.9	8,281	13.7	8,593	14.5	9,445	15.9
Alltrans	10,790	16.8	5,173	8.5	5,173	8.7	5,173	8.7
Sub total	20,401	31.7	13,454	22.2	13,766	23.2	14,618	24.6
All other carriers	43,899	68.3	47,149	77.8	45,674	76.8	44,707	75.4
Total	64,300	100.0	60,603	100.0	59,440	100.0	59,325	100.0
Salinas - Sacramento								
Delta Lines	6,016	56.5	7,446	43.4	8,276	53.1	7,158	45.3
CHE	1,870	17.5	2,057	12.0	2,212	14.2	1,933	12.2
Sub total	7,886	74.0	9,503	55.4	10,488	67.3	9,091	57.5
Alltrans	N/A	N/A	3,449	20.1	3,449	22.1	3,449	21.8
Sub total	7,886	74.0	12,952	75.5	13,937	89.4	12,540	79.3
All other carriers	2,769	26.0	4,208	24.5	1,658	10.6	3,262	20.7
Total	10,655	100.0	17,160	100.0	15,595	100.0	15,802	100.0

RESTATED INTERTERMINAL TRAFFIC FLOW
BETWEEN SELECTED TERMINALS
ADJUSTED FOR MASTER BILL REPORTING

Exhibit No. _____
Witness: R.F. Esuite
Date _____

	1973 Actual Results		1974 Projected Results		1974 Corrected Projection		1974 Actual Results	
	Shipments	Per Cent	Shipments	Per Cent	Shipments	Per Cent	Shipments	Per Cent
Salinas - San Francisco								
Delta Lines	24,664	20.9	26,118	19.4	25,422	19.1	25,652	19.3
CME	28,751	24.4	31,407	22.1	28,900	21.8	28,593	21.5
Sub total	53,415	45.3	57,525	40.5	54,322	40.9	54,246	40.8
Alltrans	NEG	NEG	NEG	NEG	NEG	NEG	NEG	NEG
Sub total	53,415	45.3	57,525	40.5	54,322	40.9	54,246	40.8
All other carriers	64,231	54.7	84,544	59.5	78,496	59.1	78,602	59.2
Total	117,646	100.0	142,063	100.0	132,818	100.0	132,848	100.0
Sacramento - San Francisco								
Delta Lines	69,219	17.8	67,404	15.5	77,354	18.5	64,459	15.3
CME	25,355	6.5	26,515	6.1	28,734	6.9	23,453	5.8
Sub total	94,574	24.3	93,919	21.6	106,088	25.4	88,912	21.1
Alltrans	58,218	15.0	99,651	22.9	99,651	23.8	99,651	23.7
Sub total	152,792	39.3	193,570	44.5	205,739	49.2	188,563	44.8
All other carriers	235,002	60.7	241,211	55.5	212,796	50.8	232,573	55.2
Total	387,793	100.0	434,781	100.0	418,535	100.0	421,142	100.0
Sacramento - Santa Rosa								
Delta Lines	2,522	13.1	2,439	13.3	3,304	18.5	2,730	15.2
Alltrans	8,616	44.9	6,857	37.4	6,857	38.4	6,857	38.2
Sub total	11,138	58.0	9,296	50.7	10,161	56.9	9,587	53.4
All other carriers	8,069	42.0	9,025	49.3	7,713	43.1	8,365	46.6
Total	19,207	100.0	18,321	100.0	17,874	100.0	17,952	100.0
San Diego - San Francisco								
Delta Lines	22,486	35.1	22,006	31.7	21,419	33.5	21,084	32.9
CME	13,887	21.7	13,640	19.7	12,551	19.6	11,938	18.6
Sub total	36,373	56.8	35,646	51.4	33,970	53.1	33,022	51.5
All other carriers	27,743	43.2	33,686	48.6	29,939	46.9	31,052	48.5
Total	64,116	100.0	69,332	100.0	63,909	100.0	64,079	100.0
San Francisco - Stockton								
Delta Lines	24,641	21.8	21,916	18.6	22,433	20.0	20,743	18.4
CME	15,513	13.7	14,746	12.5	14,264	12.7	13,533	12.0
Sub total	40,154	35.5	36,662	31.1	36,697	32.7	34,276	30.4
Alltrans	6,492	5.7	8,622	7.3	8,622	7.7	8,622	7.7
Sub total	46,636	41.2	45,284	38.4	45,319	40.4	42,898	38.1
All other carriers	66,624	58.8	72,682	61.6	66,743	59.6	69,540	61.9
Total	113,260	100.0	117,966	100.0	112,062	100.0	112,438	100.0
San Francisco - Santa Rosa								
Delta Lines	21,789	13.2	23,047	13.6	23,104	13.9	28,546	17.2
Alltrans	4,303	2.6	8,581	5.1	8,581	5.2	8,581	5.2
Sub total	26,037	15.8	31,628	18.7	31,685	19.1	37,127	22.4
All other carriers	139,560	84.2	137,832	81.3	134,648	80.9	128,470	77.6
Total	165,657	100.0	169,460	100.0	166,333	100.0	165,597	100.0

Commissioner Richard D. Gravelle

I concur:

It is my firm hope that this proceeding is appealed to the California Supreme Court and that the court grants review and addresses the questions presented. The Commission needs guidance in two areas, the first is compliance with the court's antitrust directions and the second our own internal processing procedures.

When the court issued Northern California Power Agency v. PUC (1971), 5 C 3d 370 (NCPA), it effectively legislated a new function for the Commission. The court could not, however, provide the wherewithal to discharge the new responsibility which it had imposed upon the Commission. We have endeavored, without additional funding or manpower, to educate our staff and ourselves in a complex and specialized legal field to carry out the mandate of NCPA. This proceeding, from the first days of hearing in July, 1974, focused upon the antitrust and anti-competitive issue in the acquisition of Alltrans by Delta. The record established in the process clearly reflects our real struggle to comply with NCPA.

It is my view that while we have undoubtedly erred in the course of this proceeding, today's decision has nevertheless been reached without prejudice to any party and has correctly resolved the highly technical legal issue with which we were presented. In view of the significant anti-competitive effects, the application simply cannot be approved.

An ancillary, but important, issue presented in this application involves the relationship between the members of the Commission and our staff. Accusations abound in the record and off the record of impropriety in Commissioners' communications with members of the civil service staff who participated in the conduct of the hearing and decision preparation process. Hearing Officer Weiss, in his ruling of ~~March 22~~ May 20, 1977, rules, correctly in my view, that the written memorandum prepared by Examiner Gilman for Commissioner Symons is privileged and a legitimate part of the deliberative process. Commissioner Symons, however, has suggested impropriety in my meeting with staff counsel and staff witnesses even though the sole purpose was to aid myself and the Assistant Chief Administrative Law Judge in the formulation of a draft decision for Commission consideration, which was fully supported by the record. It is my belief that there is no distinction between the Gilman/Symons contact and my contact with staff personnel.

To draw such a distinction in the context of PUC procedure would deprive the ultimate decision makers, the Commissioners, of a resource essential to the reasoned resolution of the some two thousand matters upon which we must reach decisions each year. Staff is the lifeblood of the decision-making process, without which we could not function.

The Commission's Hearing Examiners are important to this process in essentially the same manner as are other members of the staff. They do not occupy any position of unique importance.

Although the Hearing Examiners preside at public hearings, take evidence and typically prepare draft decisions, the Commission issues decisions only by vote of the Commissioners.

It is incumbent upon the Commissioners ultimately responsible for each decision to insure that the decision signed by the majority is well-reasoned and supported by the hearing record. The Hearing Examiners are but one of the staff resources available to assist the Commissioners in the discharge of this duty. To the extent that the examiners support their own draft decisions, they are advocates in much the same sense as are other parties to each proceeding. To deny to Commissioners the broader perspective that often may be gained through contact with other members of the staff would in my view serve only to isolate us both from the hearing process and from the staff expertise upon which we so heavily rely.

If the Commission is deprived of the use of its staff in the decision-making process, including those who have actively participated in a contested proceeding, then we, the public, and the legislature should be so advised in order that new procedures and new staff can be obtained to provide each individual Commissioner with the capability to <u>independently</u> assess complex proceedings and prepare draft decisions.

The key elements in our process, referred to repeatedly by the court, are that each of our decisions must reflect the record and be amply supported by findings of fact and conclusions of law. Seeking factual data from staff members who have that

data does not deprive other participants of their due process rights. Only when a staff member, or other party, presents a Commissioner with new facts or new arguments not offered in the proceeding and to which other parties cannot respond, are the absent parties due process rights violated. That has not occurred in this application.

RICHARD D. GRAVELLE
Commissioner

December 22, 1978
San Francisco, California