UMTA's Privatization Directive: Legal and Regulatory Obstacles Barring Opportunities for the Private Sector to Serve Transit Demand in Southwestern Pennsylvania

John R. Hanlon
UMTA's Privatization Directive: Legal and Regulatory Obstacles Barring Opportunities for the Private Sector to Serve Transit Demand in Southwestern Pennsylvania*

I. INTRODUCTION

In October of 1984, the United States Department of Transportation Urban Mass Transportation Administration (UMTA) issued a new policy regarding private enterprise participation in the de-

---

* The author would like to acknowledge the support of the Southwestern Pennsylvania Regional Planning Commission (SPRPC). It should be noted, however, that the contents of this report reflect the views of the author who is responsible for the facts and the accuracy of the information presented herein. The contents do not necessarily reflect the official views or policies of the SPRPC.

1. UMTA Notice of Policy, 49 Fed. Reg. 41,310 (1984). This policy, entitled Private Enterprise Participation in the Urban Mass Transportation Program became effective October 22, 1984 and provides in pertinent part:

   I. Consultation with Private Providers in the Local Planning Process

      A. Notifications. It is UMTA policy that local entities, as part of their transportation planning process, provide reasonable notice to private transportation providers regarding opportunities for private transportation providers in order that they may present their views concerning the development of local plans. It is also desirable to make known in advance the criteria which will be taken into account in making public/private service decisions.

      B. Early Consultation. It is UMTA policy that private sector views and capabilities be assured by affording private providers an early opportunity to participate in the development of projects that involve new or restructured mass transit services.

   II. Consideration of Private Enterprise

      A. Development of the Transportation Program. It is UMTA policy that private providers be afforded an opportunity to participate in and have their views be considered in the development of the annual element of the TIP [Transportation Improvement Program] before MPO [Metropolitan Planning Organization] endorsement.

      B. Provision of Service by Private Operators Without Public Involvement. It is UMTA policy that when new service needs are developed, or services are significantly restructured, consideration should be given to whether private carriers could provide such service in a manner which is consistent with local objectives and without public subsidy. Moreover, existing transit services should be periodically reviewed to deter-
velopment of plans and programs to be funded under the Urban Mass Transportation Act of 1964, as amended (UMT Act). This policy, which has become known as the "Privatization Directive," is an effort by the Reagan Administration to encourage a stronger private sector role in addressing community transportation needs and is an attempt by UMTA to satisfy a frequently voiced concern of private transportation providers that "in spite of statutory requirements, public decision makers do not fully or fairly consider the capacity of private enterprise to provide mass transportation services."

The UMTA "Privatization Directive" attempts to breathe new life into three provisions of the UMT Act. In general: section 8(e) mine if they can be provided more efficiently by the private sector.

C. Opportunities for Private Carriers to Provide Assisted Services . . .

UMTA does not consider it acceptable for localities to foreclose opportunities for private enterprise by simply pointing to local barriers to their involvement in federally assisted local transportation programs. In general, a simple reference . . . to public agency labor agreements or a local policy that calls for direct operation of all mass transportation providers, would not satisfy the private enterprise requirements of the act.

D. True Comparison of Costs. When comparing the service proposals made by public and private entities . . . subsidies provided to public carriers, including operating subsidies, capital grants and the use of public facilities should be reflected in the cost comparisons.

Id. at 41,311-12.


3. 49 Fed. Reg. 41,310 (1984). This new UMTA policy statement articulates the agency's view on how meaningful compliance with the private sector provisions of the UMT Act can be accomplished. The notice points out that if private enterprise continues to be unfairly excluded from the plans and programs funded under the UMT Act, it may be necessary for UMTA to introduce more direct federal measures for accomplishing its objectives.

Id. As one magazine has indicated: "Privatization simply means the contracting of all or part of a public transit operation to the private sector, with the control of the operation (i.e. setting fares, routes and schedules) remaining with the public transit authority." Contracting Cuts Costs, Metro Magazine, Sept.-Oct. 1985, at 84.

4. 49 Fed. Reg. at 41,311. Section 3 of the UMT Act provides that:

[n]o financial assistance shall be provided . . . for the purpose . . . of acquiring any interest in, or purchasing any . . . property of, a private mass transportation company . . . or for the purpose of providing . . . for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless . . . the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies . . . .


Section 8 of the UMT Act provides that "[t]he plans and programs required by this section shall encourage to the maximum extent feasible the participation of private enterprise."
directs the recipients of UMTA funds to encourage the maximum feasible participation of private enterprise; section 3(e) protects private companies from unnecessary and unwarranted competition with public mass transportation companies; and section 9(f)(2) sets forth the manner for developing a program of projects to be funded under the Act which clearly directs a participatory consultative process involving all interested parties and, in particular, private transportation carriers.6

Of particular interest to this comment is the language of the "Privatization Directive" which states that "UMTA does not consider it acceptable for localities to foreclose opportunities for private enterprise by simply pointing to local barriers to their involvement in federally assisted local transportation programs."6 In general, this language is interpreted to mean that local legal, regulatory and labor contractual agreements should not bar public transit operators from complying with the policy and the basic requirements of the relevant provisions of the UMT Act.

This comment will address the merits of the UMTA "Privatization Directive" by identifying the various legal and regulatory obstacles barring opportunities for the private sector to serve mass transportation demands in the southwestern Pennsylvania region.7 By examining existing federal and state legislation which governs private sector involvement in public transit operations, this comment will seek to identify the legal and regulatory impediments which preclude increased opportunities for private enterprise and determine what legislative reforms may be necessary for public transit agencies to comply with UMTA's private sector participation policy.

Section 9 of the UMT Act provides that "[e]ach recipient shall . . . develop a proposed program of projects concerning activities to be funded in consultation with interested parties, including private transportation providers." 49 U.S.C. § 1607(f)(2). This new section 9 was added by Public Law 97-424. The former Section 9 was repealed by Public Law 95-599.

5. 49 Fed. Reg. at 41,311.


7. The Southwestern Pennsylvania Regional Planning Commission (SPRPC) which was established in 1962 comprises the six counties of Allegheny, Armstrong, Beaver, Butler, Washington and Westmoreland. As southwestern Pennsylvania's designated Metropolitan Planning Organization (MPO) and a recipient of federal Urban Mass Transportation Administration funds, the SPRPC is responsible for complying with the UMTA "privitization directive" in the development of its transportation plans and programs.
II. OVERVIEW OF PERTINENT FEDERAL AND STATE LEGISLATION

A. Genesis of the Competitive Model

Ralph L. Stanley, Administrator of the Urban Mass Transportation Administration, points out that federal subsidies for mass transit operating costs has declined from approximately $1.1 billion for fiscal year 1980 to $870 million in 1985. Because of this decline, public transportation agencies are now faced with the choice of curtailing services, increasing efficiency or turning to private operators. Whatever the fate of federal assistance, however, Wendell Cox, a consultant to the American Bus Association and former member of the Los Angeles County Transportation Commission, believes that the financial crisis of public transit agencies will continue because the crisis is "attributable to super-inflationary cost increases, not insufficient public revenues." Cox, who apparently reflects the sentiments of UMTA, cites rapidly increasing driver wages and benefits, service level declines, fare level increases and needed capital improvements as the motivating forces which require public transit agencies to continually seek more public revenue. But, "because public revenue sources rise at best with inflation, while transit cost rise above inflation [s]table public revenue sources are not enough as long as costs are not stable."

8. Tolchin, Private Concerns Gaining foothold in Public Transit, N.Y. Times, Apr. 29, 1985, at 9, col. 1. See also Cong. Budget Off., The Federal Budget for Public Works Infrastructure, CBO Study, July, 1985, at 48 "The [Reagan] Administration has proposed ending all federal operating assistance for transit in 1986, on the grounds that mass transit operations are essentially of local rather than national interest, involving local decisions on wages, fares, routes, and levels of service." Id.

9. Tolchin, supra note 8, at 1, col. 1. The "Privitization Directive," which took effect in December of 1984, is expected to accelerate the shift to an increased use of private operators by public transportation agencies. "Supporters of such a shift contend that private operators can manage and operate transit lines with more efficiency and less expense, freed to a degree from politics, bureaucracy and, in many cases, costly union contracts . . . . The result, supporters say, is a decreased need for government subsidies." Id. at 1, col. 1 & at 9, col. 1.

10. W. Cox, Transit Cost Control Through Competition, Presentation to the Annual Meeting of the Transportation Research Board, in Washington (Jan. 14, 1985) [hereinafter Transit Cost Control], reprinted in, American Bus Association, Mass Transit Programs, Marketing Opportunities In Public Transit: A Workshop For Private Bus Operators Sept. 10, 1985, app. E. Cox points out that from 1976 to 1982, the nation's largest public bus operators experienced unit cost increases 61 percent above the inflation rate. Cox is quick to add, however, that although these cost increases have been attributed to rapidly increasing driver wages and benefits, the record suggests that fare levels have increased, service levels have declined and needed capital improvements have been delayed or canceled. Cox concludes that, "across the board, transit costs are out of control." Id.

11. Id.

12. Id.
Cox contends that until public transit costs are controlled, services will continue to be curtailed, fare levels will continue to rise and needed capital improvements will be ignored. The present system of government subsidy, which lacks an element of competitive pressure, maintains Cox, is at the root of the problem. Cox asserts that “the antidote to monopoly is competition” and that private service contracting is a particularly promising alternative to spur competition and change present subsidy arrangements. This “Competitive Model,” however, does not call for a wholesale attack against the existing providers of transportation services, as was the case when public operators almost completely displaced private companies following World War II. Under the “Competitive Model,” Cox advocates blending public and private roles by authorizing a policy body (public agency) to decide what services are needed and then contracting the work to private companies in order to meet transportation needs.

Despite the potential for increased efficiency and cost savings, “many public agencies are aggressively fighting to keep their transportation monopoly.” Because public transit agencies are still re-

13. Id. With respect to this position, Cox wrote:
Transit service has historically been provided under monopoly mechanisms. This is true under public ownership and operation, just as it was under private ownership and operation. Monopolies tend to maximize revenues, and to impose products on markets, with insufficient regard for the needs of the market. Certainly, this has been characteristic of public transit.

14. Id. Cox sees private service contracting as a management tool which would allow private providers to produce identical service for 35% to 70% less than the cost to public operators. By introducing competition, public transit operators could obtain more cost-effective service, while retaining full policy control. Cox argues that since its conception in the late 1970’s as a strategy to control costs, this form of privatization has benefited both riders and taxpayers virtually everywhere that it has been implemented. Id.

15. Tolchin, supra note 8, at 9, col. 1. According to recent policy discussions in Washington, government subsidies will still be necessary. However, as local public transit authorities become more efficient by contracting with private operators, the money collected from passenger service will stretch further and thus require less subsidy. Id.

16. In most American cities transit systems began as private enterprises. “But the systems fell on hard times after World War II, as affluent city dwellers moved to the suburbs and relied on private automobiles and an expanding highway system.” As a result, most private transit systems were taken over by public agencies (local government) by the late 1950’s. Id. See George W. Hilton, Federal Transit Subsidies (Washington, D.C.: American Enterprise Institute, 1974).


18. Id. at 40, col. 3. According to Cox, two basic arguments have been advanced by public agencies against contracting with private operators:
ARGUMENTS AGAINST A PHANTOM: The first category of arguments is directed
sisting the participation of private enterprise, UMTA's "Privatization Directive" reemphasizes three provisions, sections 3(e)(2), 9(f)(2) and 8(e), of the UMT Act which require involvement of private operators in federally funded mass transportation programs.19 These provisions are discussed in detail below.

An investigation into the federal laws governing mass transportation services reveals two federal acts that control a public transit agency's ability to establish contractual agreements with private transportation providers. Following is an overview of the pertinent provisions of the Urban Mass Transportation Act of 1964, as amended, and the Bus Regulatory Reform Act of 1982.20

1. The UMT Act and the UMTA Policy

Section 3(e)(2) of the UMT Act provides protection to private transit operators from competition from federally subsidized transit programs.21 This provision of the Act suggests that UMTA will provide no federal subsidy to any public transit operation which will create a situation of unfair competition. A simple example best illustrates UMTA's concern. Suppose that an existing private operator is providing transit services in a given transportation

---

Private Sector Transportation corridor and that this private transit operator is functioning without any federal subsidy. Assume further that a public transit provider decides to expand its service area into the private carrier's transportation corridor and then applies to UMTA for federal operating funds. Under section 3(e)(2) of the UMT Act this public operator would not be eligible for federal subsidies because such assistance would create a situation of unfair competition and undercut the private carrier's operation.

Section 9(f)(2) of the UMT Act requires public transit operators (section 9 fund recipients) to fully involve private providers when developing a proposed program of projects concerning activities to be funded. Specifically, this section directs public transit operators to involve private carriers in projects to be funded under the transit component of their Transportation Improvement Program (TIP). The TIP planning process is the means by which the states, the Metropolitan Planning Organization (MPO), and the transit operators prioritize short and long range capital improvements. Competing projects are weighed against available funding resources involving federal monies, to arrive at a locally agreed upon spending plan. While the MPO is the focal point of the transportation planning process, it is incumbent upon public transit operators (recipients of UMTA section 9 funds) to ensure consideration of the capabilities and views of private carriers in their own internal planning process.


24. "Metropolitan planning organization" means that organization designated as being responsible, together with the state, for carrying out the provisions of 23 U.S.C. § 134, as provided in 23 U.S.C. § 104(f)(3), and capable of meeting the requirements of sections 3(e)(1), 5(1), 8(a) and (c) and 9(e)(3)(G) of the UMT Act (49 U.S.C. §§ 1602(e)(1), 1604(1), 1607(a) and (c) and 1607(e)(3)(G). The metropolitan planning organization is the forum for cooperative transportation decision-making. Id. § 450.104(b)(3). See also infra notes 32-33 and accompanying text.


[Long range transportation plans typically outline strategies and facilities for meeting future transportation demands generated by growth and the need to either replace or rehabilitate existing facilities. . . . Short range plans will typically focus on transportation system and facility management to make most effective use of existing plant and equipment and near term capital improvements.

Id.

26. Letter from Peter N. Stowell to Region III Grantees and MPOs (Jan. 22, 1985) (notes on the UMTA Policy Statement based on the provision of section 8, 3(e) and 9(f) of
Section 8(e) of the UMT Act requires that “[t]he plans and programs . . . encourage to the maximum extent feasible the participation of private enterprise.” This charge is incorporated in the mandates of the UMTA/FHWA Joint Planning Regulations which first require the urban transportation planning process to include the development of: “a transportation plan which describes policies, strategies and facilities or changes in facilities proposed” as well as “a staged multiyear program [TIP] of transportation improvement projects consistent with the Transportation Plan.” Secondly, these joint planning regulations assign the MPO with the responsibility of endorsing the Transportation Plan and the TIP since “[t]hese endorsements are prerequisites for the approval of programs and projects in urbanized areas . . . .” Finally, the UMTA/FHWA Joint Planning Regulations declare that the urban transportation “planning process shall be consistent with section 8(e) . . . of the UMT Act concerning involvement of the appropriate public and private transportation providers.”

Section 8(e) of the UMT Act requires the MPO, as the focus of the transportation planning process, to assume primary responsibility for ensuring that the transportation plans and the TIP include private sector participation before it provides the final stamp of local approval. In addition, the UMTA/FHWA Joint Planning Regulations provide that the state and the MPO must certify to UMTA that the planning process conforms with this section 8(e) requirement. According to the National Association of Regional Councils Federal Liaison, “UMTA will monitor the compliance with private enterprise provisions of the [UMT] ACT as part of the annual audits and triennial reviews required under Section 9 . . . .”

The UMTA “Privatization Directive” was essentially intended to enforce sections 3(e), 8(e) and 9(f) of the UMT Act by outlining the guidelines to be considered by public transit agencies in order
to comply with the legislative intent of involving private carriers in public transit operations. These guidelines are considered the general ground rules to ensure that public and private transit operators compete fairly in their efforts to provide transit services. The UMTA policy basically requires: early involvement of private operators in the planning of services; evaluation of the private operator's ability to meet service needs in the market place without subsidy; opportunities for the private sector to present service proposals for new or restructured services developed by the public; and fair comparison of costs. Although "UMTA does not intend to dictate specific ways of addressing the factors to be considered in judging compliance with this policy," UMTA has made it clear that it is dead serious about this issue. It will not allow MPOs to "get off the hook" by pointing to local obstacles which bar the involvement of private operators in UMTA assisted programs . . . [nor will it] hesitate suspending planning funds to any MPO that is not establishing procedures to involve private transportation operators.

2. The BRRA of 1982 and the ICC

The Bus Regulatory Reform Act of 1982 (BRRA) was a comprehensive package of revisions designed to significantly ease entry and exit requirements for regular-route intercity operations, create a process for preemption of burdensome state regulations, and remove "closed-door" restrictions that barred service to intermediate points on existing intercity routes.

The language of the Congressional Findings section of the
BRRA\textsuperscript{39} is clearly consistent with the UMTA policy statement and the related provisions of the UMT Act. The national transportation policy objectives of the BRRA "encourages the establishment and maintenance of reasonable rates . . . without . . . unfair or destructive competitive practices."\textsuperscript{40} Other sections of the Act encourage competitive transportation services in order to improve and maintain a sound private motor carrier system,\textsuperscript{41} ensure that federal reform initiatives enacted by the BRRA do not nullify state regulatory actions,\textsuperscript{42} and reflect key factors identified in UMTA's "Privatization Directive."\textsuperscript{43} The directive's cautionary note also encourages that local obstacles not bar opportunities for private enterprise participation in federally assisted local transportation programs.\textsuperscript{44}

With regard to new entry into the bus industry, the BRRA has substantially changed the policies and procedures of the Interstate Commerce Commission (ICC): it is now presumed that increased competition will benefit the public; and, carriers may now apply to the ICC for both interstate and intrastate authority, or for intrastate authority only.\textsuperscript{45} Such changes to the entry provisions have significantly stimulated the involvement of those carriers interested in providing new regular-route services.\textsuperscript{46} The entry policy of

\begin{itemize}

[A] competitive . . . motor bus system contributes to the maintenance of a strong national economy . . . ; that historically the existing Federal and State regulatory structure has tended . . . to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the motor bus industry; . . . that overly protective regulation has resulted in operating inefficiencies and diminished price and service competition . . . ; that the objectives contained in the national transportation policy can best be achieved through greater competition and reduced regulation . . . [and that] the Interstate Commerce Commission should be given explicit direction for reduced regulation of the motor bus industry and should do everything within its power to promote competition in the . . . industry . . .

\textit{Id.} (emphasis added).

\item\textsuperscript{40} \textit{Id.} § 5(a)(1)(D), 96 Stat. 1102, 1103 (codified as amended at 49 U.S.C. § 10101(a)(1982)).

\item\textsuperscript{41} \textit{Id.} § 5(a)(2)(G).

\item\textsuperscript{42} \textit{Id.} § 5(a)(3)(C).

\item\textsuperscript{43} \textit{Id.} §§ 5(a)(1)(D) and (5)(2)(G). \textit{See also} letter from Ralph L. Stanley to MPOs (Feb. 22, 1985) (officially transmitting the UMT Policy Statement). \textit{See supra} notes 1 & 35 and accompanying text.


\item\textsuperscript{45} Fravel, \textit{supra} note 38, at 43.

\item\textsuperscript{46} \textit{Id.} Between the enactment of the BRRA in October of 1982 and October 10,
the BRRA contains two new entry provisions, sections 6(c)(2)(A) and (B), which are applicable to motor carriers seeking certification from the ICC to provide regular-route transit services entirely in one state. 47

Section 6(c)(2)(A) of the BRRA is used only by applicants seeking a regular-route certificate entirely in one state, but already authorized by the ICC to provide interstate transportation of passengers for that route over which the intrastate transportation is proposed. 48 The ICC will issue a certificate to applicants that are "fit, willing, and able" 49 to provide service unless a protestant can

1983, the number of applications for new operating authority has increased greatly. Regular-route applications alone, during this one year period, totaled 225, an increase of 275% over the average of the five previous years. Although the 225 figure includes new interstate as well as intrastate applications, not all of the 225 applications have been granted nor have all those granted been implemented. Nevertheless, the interest of the carriers in providing new services is apparent. Id. at 43-44.


(2)(A) The Commission [ICC] shall issue a certificate . . . authorizing . . . regular-route transportation entirely in one State as a motor common carrier of passengers if such intrastate transportation is to be provided on a route over which the carrier has authority on the effective date of this subsection to provide interstate transportation of passengers if the Commission finds that the person [applicant] is fit, willing, and able to provide the intrastate transportation . . . , unless the Commission finds, on the basis of evidence presented by any person objecting to the issuance of the certificate, that the transportation to be authorized would directly compete with a commuter bus operation and it would have a significant adverse effect on commuter bus service in the area in which the competing service will be performed.

Id. § 6(c)(2)(A) (emphasis added).

Section 6(c)(2)(B) of the Bus Regulatory Reform Act of 1982 provides in pertinent part:

(B) The Commission shall issue a certificate . . . authorizing . . . regular-route transportation entirely in one State as a motor common carrier of passengers if such intrastate transportation is to be provided on a route over which the carrier has been granted authority, or will be granted authority, after the effective date of this section to provide interstate transportation of passengers if the Commission finds that the person [applicant] is fit, willing, and able to provide the intrastate transportation . . . , unless the Commission finds, on the basis of evidence presented by any person objecting to the issuance of the certificate, that the transportation to be authorized is not consistent with the public interest.

Id. § 6(c)(2)(B) (emphasis added).


Every applicant for motor common . . . authority has the burden of demonstrating only that it is fit, willing and able to provide the transportation to be authorized by the certificate . . . . "Fit, willing, and able" is specifically defined in sections 10922(c)(6) and 10923(b)(2) as safety fitness and proof of insurance pursuant to the minimum financial responsibility requirements of section 18 of the Act.
show that the issuance of the certificate "would directly compete with commuter bus operations and it would have a significant adverse effect on commuter bus service" in the area in which the competing service will be performed. According to an ICC representative however, there have been very few applications for new entry services under this provision since the enactment of the BRRA because the only applicants eligible under section 6(c)(2)(A) are "old certificate" holders who already have intrastate authority. Section 6(c)(2)(B) of the BRRA has invited most of the new entry applications since the Act's enactment in 1982. This provision issues an intrastate, regular-route certificate to carriers seeking authorization to operate on a route over which the carrier had or will be granted authority to provide interstate transportation after the enactment of the BRRA in 1982, if the ICC finds the applicant is "fit, willing, and able" and a protestant is unable to show issuance is "not consistent with the public interest." The primary change with regard to this provision was the enactment of a public interest standard which has effectively shifted the burden of proof (in an application for a new authority) from the carrier requesting the new authority to the party protesting the application. The public interest standard establishes a presumption that increased competition will benefit the public, thus, protestants must bear the burden of providing sufficient evidence to negate this presumption. Section 6(c)(3) of the BRRA directs the ICC to consider four fac-

---

50. "Commuter bus operations" means short-haul regularly scheduled passenger service provided by motor vehicle in metropolitan and suburban areas utilized primarily by passengers using reduced-fare, multiple-ride, or commutation tickets during peak period(s). Id. § 6(d)(1), 96 Stat. 1102, 1107 (1982) (codified at 49 U.S.C. 10102 (1982)).


52. Telephone interview with Barbara Reideler, Interstate Commerce Commission (Oct. 8, 1985) (Intrastate Entry).

53. Id.


55. Fravel, supra note 38, at 38, 43.

56. Id.
tors when determining if the issuance of an application is consistent with the "public interest." The public interest factors devote particular attention to the effect of an application upon service to small communities and upon commuter bus operations, protestants (usually small carriers) have urged the ICC to accord significant weight to the impairment factor of the public interest test. The ICC has responded however, that Congress has placed paramount consideration on the benefits to be derived by the public and not the protection of carriers, that the impairment prong of the test is only one of four factors to be considered by the ICC, and, that these factors are to be given equal weight. Therefore, these factors are balanced against each other when making the public interest determination.

The foregoing paragraphs emphasize Congress' intent to make entry into the bus system easier under the BRRA of 1982 than it had been for motor carriers under the Motor Carrier Act of 1980. Section 6(c)(1)(A) and (c)(2)(B) of the BRRA, which allows carriers to obtain interstate as well as intrastate regular-route certificates, appears to satisfy Congressional objectives since it has literally opened the doors to the entry of new operators into the bus industry. Although the new entry provisions have permitted more private carriers to become involved in the bus industry, those car-

57. These four factors are:
(A) the transportation policy of section 10101(a) of this title [see supra note 40 and accompanying text];
(B) the value of competition to the traveling and shipping public;
(C) the effect of issuance of the certificate on motor carrier of passenger service to small communities; and
(D) whether issuance of the certificate would impair the ability of any other motor common carrier of passengers to provide a substantial portion of the regular-route passenger service which such carrier provides over its entire regular-route system.

Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 6(c)(3), 96 Stat. 1102, 1105-06 (1982) (codified at 49 U.S.C. § 10922(c)(3) (1982)). Regarding the fourth factor, a protestant relying on this criterion is required to establish that granting the application would jeopardize its ability to continue operating over a substantial portion of its "entire regular-route system" (defined to include the routes of the company's subsidiaries and affiliates). Ex Parte No. 55 (Sub-No. 56), Applications for Operating Authority-Motor Passenger Carriers, 133 M.C.C. 62, at 68 (1982).

58. 133 M.C.C. at 68-69.
60. Ex Parte No. 55 (Sub-No. 56), Applications for Operating Authority-Motor Passenger Carriers, 133 M.C.C. at 68-69
riers who were operating before the BRRA was enacted in 1982 (existing operators) have not welcomed the resulting increase in competition. This observation is documented by the fact that small carriers have protested the system-wide approach to the impairment test and have made efforts to persuade the ICC to accord more weight to the impairment prong of the four part public interest test.\textsuperscript{62}

The exit process has also been changed under the BRRA. Section 16 has increased flexibility with regard to that process by preempting state regulatory authority, which the ICC considered to be a burden on interstate commerce.\textsuperscript{63} This new exit provision permits carriers to apply to the ICC for a discontinuance of \textit{intrastate services} over interstate routes when carriers have been denied such permission by the state regulatory authority or when the state authority has failed to act on such petition within 120 days of the carrier's initial complete filing with the state authority.\textsuperscript{64} Section 16(e)(1)(A) requires the ICC to grant the carrier's petition to discontinue service unless it finds, on the evidence of a protestant, that the discontinuance is not consistent with the public interest or that continuing the transportation without the proposed discontinuance will not constitute an unreasonable burden on interstate commerce.\textsuperscript{65} In making its finding the ICC is directed to place great weight on the extent to which intrastate and interstate revenues from the services to be discontinued are less than the variable costs including depreciation for revenue equipment.\textsuperscript{66}

By the end of November 1983, about one year after the enactment of the BRRA, eighteen cases had been decided by the ICC, in fifteen of which the ICC had granted the carrier's petition to discontinue service.\textsuperscript{67} In the first case to reach the Commission the variable costs of providing the service exceeded the revenues, and the ICC, following the "great weight" directive of section 16(g)(1),

---

\textsuperscript{62} See supra note 46 and accompanying text.

\textsuperscript{63} Ex Parte No. 55 (Sub-No. 56), Applications for Operating Authority-Motor Passenger Carriers, 133 M.C.C. at 68-69. See supra notes 57-59 and accompanying text.

\textsuperscript{64} Fravel, supra note 38, at 38.


\textsuperscript{66} Id. § 16(g)(1), 96 Stat. 1102, 1117 (1982) (codified at 49 U.S.C. § 10935(g)(1) (1982)). Three other considerations are: the National Transportation Policy enunciated in 49 U.S.C. 10101; whether the carrier has been offered a subsidy to continue the service; and, whether it is the last service available to the communities on the affected routes and what alternative may be available. Id. § 16(g)(1)(A)(B)(C), 96 Stat. 1102, 1117 (1982). (Codified at 49 U.S.C. § 10935(g)(1)(A)(B)(C) (1982)).

\textsuperscript{67} Fravel, supra note 38, at 40.
decided to permit the abandonment and preempt a denial by the West Virginia Public Service Commission.68 In other cases in which the ICC denied the carrier's petition to abandon, the carrier had either failed to provide the mandated support data documenting the fact that variable costs exceeded the revenues produced, or had its petition dismissed for lack of jurisdiction because the carrier had not followed the established state procedures prior to its appeal to the ICC.69

Thus, case law during the year following the enactment of the BRRA indicates that the ICC will grant a petition to abandon intrastate service over interstate routes if the carrier demonstrates that its variable costs exceed the revenues produced by that service.70 However, the carrier seeking discontinuance of intrastate services still has the responsibility of making initial application for abandonment to the appropriate state regulatory authority and must follow the correct state procedures.71 It is important to note that although the states have retained their authority to review and decide service discontinuance cases, as a result of section 16 of the BRRA, "the ICC has become the final authority through the creation of an appeals process, with definite standards for the ICC to follow in permitting abandonments denied by the state."72

B. State Legislation

An investigation into the state laws governing mass transportation services in southwestern Pennsylvania reveals three pieces of legislation which influence a public transit agency's ability to establish contractual agreements with private transportation providers: the Pennsylvania Public Utility Code (PUC); the Municipality Authorities Act of 1945; and the Second Class County Port Authority Act.73 Generally, the PUC exercises jurisdiction over the

70. Fravel, supra note 38, at 40. "It seems unlikely then that carriers will bring such petitions [to the ICC] in the future unless they have developed such evidence." Id.
71. Id. at 39.
72. Id. at 38.
transportation of persons between points in Pennsylvania.\textsuperscript{74} The Municipality Authorities Act of 1945 and the Second Class County Port Authority Act, however, provide exceptions to the PUC's jurisdiction.

Under the Municipality Authorities Act of 1945, multiple municipalities and entire counties are permitted to form a transit authority to provide mass transit services.\textsuperscript{75} Moreover, these "municipal corporations" are expressly excluded from PUC jurisdiction.\textsuperscript{76} As a result, several transit authorities have been formed in southwestern Pennsylvania pursuant to this Act.\textsuperscript{77} While they are limited in scope they are allowed, among other things, to own or lease as either lessor or lessee, municipal transportation projects.\textsuperscript{78} Further, it is unclear whether the statute confines the operations of a municipal transit authority to the geographical limitations of those municipalities which make up the authority. According to \textit{Commonwealth v. Erie Metropolitan Transit Authority},\textsuperscript{79} the courts have "consistently held that municipal authorities are not creatures, agents or representatives of the municipalities which organize them, but rather are 'independent agencies of the Commonwealth.'"\textsuperscript{80} Thus, if an authority is an independent agent of the Commonwealth,\textsuperscript{81} it would seem that the operations of the authority are not specifically confined to the geographical boundaries of the municipalities which constitute the authority. Moreover,

\begin{itemize}
  \item if the municipalities set up a transit authority to operate mass transit ser-
\end{itemize}


\textsuperscript{78} Within the six-county southwestern Pennsylvania region (Allegheny, Armstrong, Beaver, Butler, Washington and Westmoreland counties) there are five transit authorities which were created under the Municipality Authorities Act enabling legislation. They include: the Beaver County Transit Authority (BCTA); Greater Aliquippa Transit Authority (GATA); Mid County Transit Authority (MCTA); Mid Mon Valley Transit Authority (MMVTA); and the Westmoreland County Transit Authority (WCTA).


\textsuperscript{80} Id. at 348, 281 A.2d at 884, quoting, Whitemarsh Twp. Auth. v. Elwert, 413 Pa. 329, 332, 196 A.2d 843, 845 (1964).

\textsuperscript{81} There are no cases specifically addressing this issue.
vices for the benefit of the public living within the general area, it would seem logical that the buses could operate within the scope of the territory which the authority was designed to encompass. *This would include the forming municipalities and areas reasonably adjacent thereto.* A logical interpretation of the motor bus provision . . . would confine the rendition of service to movements between points within the underlying municipalities and from points in those municipalities to other points within the general area encompassed by the municipal authority . . . .

Therefore, an argument can be made that the municipal transit authority can extend its operations to areas reasonably adjacent to the municipality. The problem with such an extension is that the PUC has jurisdiction over areas outside the municipality’s corporate limits. Section 1102 of the Public Utility Code, which enumerates acts requiring PUC certification, states that a municipal corporation providing a public utility service beyond its corporate limits must acquire a PUC certificate of operation. The exception from PUC jurisdiction therefore, is limited. Indeed, “[p]ublic transit operations actually conducted by a municipal transit authority properly created under the Municipality Authorities Act are exempt from Public Utility Commission . . . rules and regulations . . . so long as service is not rendered beyond the authority’s corporate boundary.”

Another exception to the PUC’s jurisdiction over the transportation of persons between points in Pennsylvania can be found with regard to transportation services rendered by the Port Authority of Allegheny County (Port Authority). In order to provide a unified transportation system for Allegheny County, the Pennsylvania Legislature created the Port Authority and defined its rights, powers and purposes in section 3 of the Port Authority Act which states in pertinent part that “[e]ach authority shall be for the purpose of . . . operating . . . a transportation system in the county

---

   (a) General rule.—Upon the application . . . and the approval of such application by the Commission, evidenced by its certificate of public convenience . . . , it shall be lawful: (5) For any municipal corporation to acquire, construct, or begin to operate . . . for the rendering or furnishing to the public of any public utility service beyond its corporate limits.
   Id. (emphasis added).
84. Letter from Henry M. Wick to Bruce W. Ahern (May 28, 1982 at 5) (discussing issues raised by the Beaver County Transit Authority).
by which it is incorporated and outside of the county to the extent necessary (i) for the establishment of an integrated system . . . .”86 In vesting the Port Authority with exclusive jurisdiction over the transportation system within Allegheny County, the legislature explicitly divested the PUC of jurisdiction over that transportation system: “[t]he Public Utility Commission shall have no authority to grant certificates of public convenience for a transportation system within the service area of the authority or for the establishment of group and party rights to operate wholly within such service area.”87

As the above discussion illustrates, private operators attempting to offer services on behalf of, or in conjunction with, a public transit authority are increasingly encountering problems under the federal and state regulations. The issues surrounding these problems will be presented in various scenarios involving both private and public parties.

1. Contracts Between an Operating Municipal Transit Authority88 and a Non-PUC Certified Carrier

A common scenario is this: a private operator, P, who possess no PUC certificates of operation covering routes within the service area of the operating municipal transit authority X, approaches X for the purpose of entering into a contract under which P would provide certain services on behalf of X within X’s legal service area.

As a “municipal corporation,” a municipal transit authority is exempt from PUC regulation over transportation services provided within its legal service area.89 In addition, it has been established that the PUC has no power over the agents of an authority when the authority exercises pervasive control over these agents.90 In

86. Id. § 553(a).
87. Id. § 563.1.
88. An operating municipal transit authority has been defined as one which “operates its own facilities [in the case of a transit authority it operates its own buses]. It is responsible for the sale of the service, [the establishment of service levels and routing] . . . and . . . financing the project [the setting of transit fares].” Dennis, Municipal Authorities in Pennsylvania, Pennsylvania Dep’t of Community Affairs (3d ed. Apr. 1985), Edition, Harrisburg, April 1982 at 15.
Breston v. City of Bradford, the PUC disclaimed regulatory control over utility facilities owned and operated by the authority itself or operated by an agent or lessee within the authority's lawful service area. Also, according to an opinion of the chief counsel of the PUC, if an authority exercises pervasive control, through contract, over a carrier, that carrier need not hold a PUC certificate, since the carrier is operating under the aegis of the authority, not of the PUC. The PUC's chief counsel notes, however, that the authority's exercise of pervasive control over the carrier's rates, routes and service characteristics can only be determined by the PUC on a case-by-case basis after an examination of the facts on record.

With regard to the aforementioned scenario, there is an issue as to whether a contracted operation, between a municipal authority and a non-PUC certified carrier, would unfairly compete with existing services provided by a PUC certified carrier. Such unfair competition would result in a violation of the Pennsylvania Municipality Authorities Act and the Eminent Domain Code, and would require the Authority to compensate the certified carrier.

A transit authority formed under the Municipality Authorities Act must operate in accordance with and carry out the purposes of that Act. Section 306(A) states, in pertinent part:

> [t]he purpose and intent of this act being to benefit the people of the Commonwealth . . . , and not to unnecessarily burden or interfere with existing business by the establishment of competitive enterprises, none of the powers granted by this act shall be exercised in the construction, improvement, maintenance, extension or operation of any project or projects which in whole or part shall duplicate or compete with existing enterprises serving substantially the same purposes.

With regard to active existing carriers, an important case decided by the commonwealth court focused on whether new services provided by an authority competed with or duplicated the service of

---

92. Id. at 354.
an existing carrier. In *Para Transit Corp. v. County of Monroe*, petitioner alleged that as a consequence of the creation of a scheduled route service, by a transit authority established under the auspices of the Municipality Authorities Act, his call or demand taxicab service and a paratransit service were destroyed. Petitioner also alleged violation of the Eminent Domain Code, arguing that the scheduled route service of the transit authority directly competed with his enterprise and, "in effect, took his business profits without any compensation."

The issue presented in *Para Transit*, therefore, was whether the new services provided by the public transit authority duplicated or competed with an existing enterprise serving substantially the same purpose. The commonwealth court stated that "[i]f the services provided by the County's new scheduled route service are distinct, there is no violation of the Municipal Authorities Act and no de facto taking of . . . property." The commonwealth court found that the new services were different and satisfied a different community need and as such did not serve substantially the same purpose nor constitute a de facto taking of business profit. Because the court found that the services were not competitive or duplicative, it did not address the issue of compensation due an existing carrier. The following language of the court in *Para Transit*, however, suggests that if the specific facts of a case indicate that new services duplicate or compete with existing enterprises serving substantially the same purposes, it could be found that some compensation would be due existing carriers. "Because we have concluded that there has been no taking, it is not necessary for our purposes to decide whether the property discussed . . ."

97. Id. at 105, 468 A.2d at 549.
100. Id. at 106, 468 A.2d at 550.
101. Id. (emphasis added). See also Southeastern Pennsylvania Transp.-Auth. (SEPTA) v. Yellow Limousine Serv., Inc., 10 Pa. Commw. 572, 312 A.2d 79 (1973). In the SEPTA case, an authority formed pursuant to the Metropolitan Transportation Authorities Act of 1963, Pub. L. No. 984, 66 PA. CONS. STAT. ANN. § 2001, a limousine and call or demand service company protested the extension of SEPTA's scheduled route service into the area where the cab and limousine service was operating. The commonwealth court held that such services were distinguishable and did not constitute unfair competition, reasoning that the existing service did not serve substantially the same purpose as the new mass transit system operating on scheduled routes. 10 Pa. Commw. at 579, 312 A.2d at 82.
102. 79 Pa. Commw. at 107, 468 A.2d at 550.
herein could constitute the type of property interest compensable under the Pennsylvania Eminent Domain Code.\textsuperscript{103}

Thus, an authority has no obligation to compensate a certified PUC carrier for business loss merely because the authority contracted with a non-certified carrier. If, however, the new services of an authority duplicate or compete with an existing service for substantially the same purpose, the Eminent Domain Code may require the authority to compensate the existing carrier for business losses. As a practical matter, however, new services of an authority which serve substantially the same purposes as an existing carrier may occur simultaneously for an interim period of time. Viewing the facts of \textit{Para Transit} as an example, the municipal transit authority was established on October 5, 1979 to operate the scheduled route service system that was the subject of the controversy.\textsuperscript{104} It was not until December 15, 1983 that the commonwealth court of Pennsylvania rendered a decision.\textsuperscript{105} Assuming that services in such a time frame would have served substantially the same purpose and that an injunction would not have been granted by the court of common pleas, it is conceivable that duplicative and competitive services could have continued simultaneously for over four years.

Another question raised can be stated as follows: presuming the new service is found to be substantially for the same purpose and compensation is due the existing enterprise, must the authority cease its competing and duplicative service after compensation has been paid? Although \textit{Para Transit} does not answer this question either, the following language of section 306(A) suggests that the new service of the Authority may not be provided; "none of the powers granted by this act shall be exercised in the . . . extension or operation of any project . . . which . . . shall duplicate . . . existing enterprises . . . ."\textsuperscript{106}

Another issue that arises under the facts of the first scenario, is whether an authority can contract with a non-certificated carrier to provide service in an area where the PUC has certified a carrier, but where the carrier's rights were dormant at the time the authority initiated a contract with the non-certificated carrier? In a legal opinion prepared for the Beaver County Transit Authority, counsel

\textsuperscript{103} \textit{Id.} at 107-08, 468 A.2d at 550.

\textsuperscript{104} \textit{Id.} at 105, 468 A.2d at 549.

\textsuperscript{105} \textit{Id.} at 104, 468 A.2d at 548.

asserted that in a situation where a PUC certificate holder has not exercised its rights, a municipal transit authority could effectively argue that the holder's ownership of the dormant rights would not amount to a competing transit service. Therefore, the authority would not violate the anti-competitive provision of section 306(A) of the Municipality Authorities Act. Counsel pointed out, however, that a certificate holder would still be able to file suit against the municipal authority seeking an injunction for instituting a duplicating or competing service as prohibited by the Municipality Authorities Act. In addition, the certified carrier could also file suit seeking an injunction which could prevent UMTA from awarding the public transit authority federal funding.

An interesting case which refutes the argument that a holder's ownership of dormant rights could not constitute a competitive or duplicative enterprise is Warminster Township Municipal Authority v. Pennsylvania Public Utility Commission. In Warminster, an authority was established under the Municipality Authorities Act "as the sole and exclusive instrumentality for constructing and operating a public sewerage system within the township." Subsequently, the PUC granted certificates of public convenience to a private sewerage company to provide service to the public in a designated portion of Warminster Township. In the appeal by the authority over the issuance of the certificates, the superior court, relying on section 306(A) of the Municipality Authorities Act, made the following observation on the effect the certification would have on the authority: "Although the Authority is not subject to the general regulatory jurisdiction of the commission . . . the effect of the grant of certificates of public convenience to Hartsville [the private company] is to preclude the Authority from subsequently rendering competitive sewerage service to the same area."

The implication of this observation is that the bare certificate alone is sufficient to preclude an authority from rendering services which are substantially similar to those in existence and that the

107. Letter from Henry M. Wick to Bruce W. Ahern (May 28, 1982 at 3-4) (discussing issues raised by Beaver County Transit Authority).
108. Id. at 4.
109. Id.
111. Id. at 435, 138 A.2d at 242.
112. Id. at 433, 138 A.2d at 241.
113. Id. at 442, 138 A.2d at 245.
argument with regard to dormant rights is meritless.

In the alternative, *Thompson Appeal*, appears to suggest that a municipal authority may condemn existing rights if there is substantial evidence to justify a taking for the benefit of the public. According to *Thompson Appeal*, a municipal authority has the power to acquire, in an eminent domain proceeding, the rights of a certified holder where the new services offered the public are not substantially similar to those existing, whether or not at the time of the condemnation the rights were being exercised by a PUC holder. Section 306(A) of the Municipality Authorities Act provides that municipal authorities created under this Act “shall be for the purpose of acquiring, holding, constructing, . . . projects of the following character [including transportation].” In reference to the anti-competitive proviso which also appears in section 306(A), the court in *Thompson Appeal* noted that the omission of the power to acquire and hold property was a deliberate attempt by the legislature to show that the proviso was not designed to be a restriction upon the authority’s right to condemn. The court pointed out that the primary purpose of the proviso is to protect businesses which would be competing with the condemnor’s (authority’s) operation, “because any loss of business resulting from such competition is not compensable under the Eminent Domain Code.” Thus, where the condemnee (an existing operation) is found not to be in competition with the municipal services proposed and the condemnee will receive full compensation for the taking, the justification for the anti-competitive proviso disappears.

Finally, it should be noted that, although it appears that a municipal authority has the power under the Eminent Domain Code and Municipality Authorities Act to acquire the rights of an existing PUC certificate holder, such an approach carries with it the expense of litigation and the publicity involved in a lawsuit. For these reasons, a more practical approach may be for a municipal transit authority to investigate a PUC certificate holder’s asking

---

115. *Id.* at 4, 233 A.2d at 239.
117. 427 Pa. at 3, 233 A.2d at 239.
118. *Id.* 4, 233 A.2d at 239.
119. *Id.*
120. Letter from Henry M. Wick to Bruce W. Ahern (May 28, 1982 at 4) (discussing issues raised by Beaver County Transit Authority).
price and negotiate a purchase price with knowledge of the maximum price it would pay if the rights were taken by eminent domain.\textsuperscript{121}

The final issue raised by the facts in the first scenario is whether a contractual agreement between a municipal authority and a non-PUC certified carrier unfairly competes with an existing service as proscribed by the UMT Act, thereby jeopardizing the authority's federal funding and requiring the authority to compensate the existing certified carrier. The purpose of the UMT Act is to improve urban mass transportation systems by providing financial assistance to mass transportation projects.\textsuperscript{122} Section 3(e)(3) of the UMT Act prohibits the grant of financial assistance to any local public body or agency for the purpose of acquiring transit property or providing:

\begin{quote}
for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless . . . (3) just and adequate compensation will be paid to such companies for the acquisition of their franchises or property to the extent required by applicable State or local laws . . . .\textsuperscript{123}
\end{quote}

The language of section 3(e)(3) of the UMT Act is significant in that it defers to state law. Thus, in regard to municipal transit authorities operating in Pennsylvania, it requires application of the anti-competitive proviso of section 306(A) of the Municipality Authorities Act, which prohibits the duplication of or competition with existing transportation systems.\textsuperscript{124}

Although Thompson Appeal provides the authority for acquiring the rights of an existing operator, as a practical matter, a municipal transit authority should, as a first option, seriously consider negotiating a purchase price with the existing operator.\textsuperscript{125} In the

\textsuperscript{121} Id. at 5. There is, however, very little information available that can be used to establish criteria for the valuation of transit rights. Although it would be difficult to discern specific criteria for valuation of transit routes, a purchase price may be established by an appraisal of physical assets. Furthermore, without proof that a holder of dormant rights made investments in personnel, equipment and other facilities, it is questionable whether anything other than a nominal payment would be required. Letter from Henry M. Wick to Bruce W. Ahern (June 20, 1983 at 4-5) (opinion discussing the operation of McCarter Transit, Inc).


\textsuperscript{123} Id. § 1602(e)(3)(emphasis added). See supra note 21 and accompanying text and text following note 22.


\textsuperscript{125} Letter from Henry M. Wick to Bruce W. Ahern (May 28, 1982 at 5) (discussing issues raised by Beaver County Transit Authority).
event that a municipal authority is unable to negotiate an agreement to buy the existing, dormant rights of a PUC certified carrier, it is recommended that an authority could initiate operations without violating the anti-competitive proviso of the UMT Act on the basis that the courts have granted great latitude to public mass transit agencies under similar circumstances. Finally, anonymous conversations with UMTA staff indicate that the "(a)gency has been required to purchase the existing operating rights of a certificated carrier in order to institute service on its own." With the advent of the UMTA "privatization directive," it is conceivable that the wide latitude granted public transit operations may be narrowed since a primary objective of this UMTA policy statement is to breathe new life into section 3(e) of the UMT Act and to protect private operators from unnecessary and unwarranted competition with public transit agencies.

2. Status of PUC Operating Certificates When Holder Contracts with a Municipal Authority

A second scenario is this: a private operator, P, already possessing PUC certificates covering certain routes within the service area of public transit authority X, approaches X for the purpose of entering into a contract under which P would provide certain services on behalf of X. The contract agreement between P and X may even include service routes for which P does not presently hold PUC rights.

In accordance with current PUC policy interpretations, a contractual agreement between a municipal transit authority and a private operator possessing a PUC certificate is permissible, providing the authority exercises pervasive control over the rates and routes of a carrier and the carrier operates only within X's chartered service area. In this case, as in the case of a non-PUC certified holder, the municipal authority is controlling the operation under its statutory authority, so PUC rights are not necessary. Under the circumstances, the question arises as to what

---

126. *Id.* See Westport Taxi Serv., Inc. v. Adams, 571 F.2d 697 (2nd Cir. 1978); Bradford School Bus Transit v. Chicago Transit Auth., 537 F.2d 943 (7th Cir. 1976); South Safeway Lines v. City of Chicago, 416 F.2d 535 (7th Cir. 1968).
See supra notes 4 & 5 and accompanying text.
130. Letter from Charles F. Hoffman to Southwestern Pennsylvania Regional Plan-
status a PUC certificate assumes during the period that the municipal authority is under contract with the PUC holder to provide services.

A recent opinion by the chief counsel of the PUC on this issue indicated that if a private carrier continues to provide service to the public under its PUC certificate, in addition to those services that are provided in conjunction with an authority, there would not appear to be any change in the status of the carrier’s PUC certification. On the other hand, where a private carrier stops rendering service under its PUC certificate to exclusively devote its equipment and service to the authority, it is possible that the carrier may be deemed to have abandoned the PUC certification.

This opinion by the chief counsel appears to be based on PUC cases which have held that where: (1) a carrier leases or sells his equipment; (2) does not conduct any PUC certificated operations; (3) and places itself in a position where it is unable to provide service to the public, abandonment is indicated and a revocation of the certificate is warranted. However, if a PUC certificate holder who has contracted with an authority retains its own equipment or uses its equipment in the authority’s operation, it appears that two legitimate arguments could be made that the carrier has maintained a position where it is still able to render service to the public if such services were requested.

First, the commission, as affirmed by the Supreme Court of Pennsylvania, in In re Byerly stated that “[t]o constitute an abandonment there must be an intention to abandon together with external acts by which the intention is carried into effect.” Thus, if a private carrier expresses an intention to provide PUC certificated operations when such services are requested and in fact continually makes its equipment available, such external acts should negate any implication that the carrier intended to abandon.

A second argument can be made against a finding of abandonment by invoking the “presumption of continuance doctrine” which has been adopted by the commission and was reemphasized

132. Id.
135. Id. at 525-26, 270 A.2d at 189.
by the court in *Morgan Drive Away, Inc. v. Pennsylvania PUC*.136 In *Morgan Drive Away*, the commonwealth court stated that, "[o]nce continuing need has been established it continues to exist, unless it is clearly rebutted."137 Therein, the court determined that the "presumption of continuance doctrine" is not rebutted by simply advancing that the rights of a certificated holder were dormant.138 The commonwealth court, quoting the language of the Pennsylvania Supreme Court in *Byerly*, stated, "[t]he fact that a carrier has not transported the certificated product and the fact that he has not been requested to do so does not rebut the presumption of continuing necessity."139 In determining that dormancy did not rebut the presumption and that the carrier "continued to hold himself open for business", the court held that a finding of abandonment was unwarranted.140

Thus, a carrier's certification should not be deemed abandoned simply because the carrier has contracted with an authority and is not currently providing certificated services. Although both *Byerly* and *Morgan Drive Away* involved the transfer of certificates of public convenience it would seem illogical for the commission to adopt a different abandonment analysis in the context of a certificate holder who has contracted with a municipal authority.

Rather than risk revocation of their license to operate, PUC certificate holders may prefer that their certificates be suspended during the time that they are under contract with a public transit authority. In a letter from the Pennsylvania Department of Transportation (PaDOT) Office of Chief Counsel to the Public Utility Commission, an assistant counsel to PaDOT stated:

> [m]ost private operators are unwilling to give up P.U.C. rights to their traditional routes as a cost of doing business with public transit authorities. This is especially true where the private operator is unsure whether their annual contract with a public transit authority will be renewed. In many cases, public transit authorities in rural areas are marginal, publically funded operations which may close their doors after several years of service because of funding or organizational problems. In these cases, the private operators' fears are understandable.141

Since private carriers are understandably concerned about the loss

---

136. 6 Pa Commw. 229, 293 A.2d 895 (1972).
137. *Id.* at 233, 293 A.2d at 897.
138. *Id.*, 293 A.2d at 896-97.
139. *Id.*, 293 A.2d at 897, quoting *In re Byerly*, 440 Pa. at 522, 270 A.2d at 189.
140. *Id.* at 234, 293 A.2d at 897.
of a valuable asset, PaDOT's Office of Chief Counsel proposed to the PUC a procedure whereby a carrier's certificate would be merely suspended during that time period in which the carrier had contracted with an authority, and, it could then be reinstated upon a simplified filing.142

Although the PUC has not responded to this proposal, there is one opinion in which a certificated carrier was granted a temporary suspension of a certificate. In In Re Carriage Tours, Inc.,143 the commission granted a request for a suspension with the qualification that the carrier report to the commission at the conclusion of a pending court action. At that time the commission would then consider reinstatement or revocation of the suspended certificate.144 A statement by the Chief Council to the PUC suggests that this case "presents a possibility of similar action for carriers devoting exclusive service to a municipal authority."145

Another issue arising under the second scenario involves the powers created by a contractual agreement between a private operator and a municipal authority on routes where the private carrier held no PUC certificated operational rights prior to the contract. It is clear under this set of facts that, in order for the private carrier to operate legally, the municipal authority must exercise pervasive control over the private carrier's rates, routes and service characteristics.146 Thus, on those routes located outside of the PUC certificated operational area of the private carrier but within the lawful service area of the authority, the carrier need not hold a PUC certificate since the carrier is operating under the aegis of the authority. As such, the exempt status of the municipal authority would control.147 In this particular section of the service area of the authority, the private carrier would be treated as a non-PUC certificate holder and upon termination of the contract, the carrier would hold no operating rights.

142. Letter from Gareth W. Rosenau to the Southwestern Pennsylvania Regional Planning Commission (Sept. 26, 1984 at 1) (discussing SPRPC's requested clarification of four specific issues regarding transportation services).
144. Id.
146. Id. at 1-2.
147. Id. See supra notes 89-94 and accompanying text.
3. Contracts Between a Non-Operating Municipal Transit Authority and a Non-PUC Certified Carrier

A third scenario is this: a transit operator, T, who possesses no PUC certificates of operation covering routes within the service area of the non-operating municipal transit authority X, approaches X for the purpose of entering into a contract under which T would provide certain services on behalf of X within X’s legal service area.

The Public Utility Commission, by its Order in Application of McCarter Transit, Inc., provides cautionary language to the effect that a municipal authority, as a non-operating entity, must use carriers certificated by the commission. Although this issue was not before it, the commission felt compelled to expound thereon because the applicant intended to provide future services over local routes within the jurisdiction of the authority. McCarter Transit contended that because such services would occur wholly within the jurisdiction of the authority, no certification from the commission would be necessary.

In McCarter, the commission reminded both parties that “the . . . Transit Authority is a non-operating entity and since no service will actually be provided by the entity itself, the carriers it selects to provide service must be appropriately certificated.” The essence of the commission’s position was that a non-operating municipal transit authority could not lawfully contract with a non-PUC certificated carrier for the purpose of leasing equipment and drivers.

One exception to this rule can be found in Chappell v. Pennsylvania PUC, which held generally that the commission has no jurisdiction over carriers transporting persons, in specially equipped vehicles, who are traveling to and from medical facilities. The

---

148. A non-operating authority contracts with other entities to perform services on behalf of the authority. See also supra note 88.
150. Id. A grant of certification by this order enabled the applicant (McCarter) and the non-operating transit authority to initiate contractual arrangements so the applicant could operate this segment of its service as an essential part of the transit authority's operation. Id. at 4.
151. Id.
152. Id. at 5.
153. Letter from Henry M. Wick to Bruce E. Woodske and Bruce W. Ahern (June 20, 1983 at 2) (discussing issue raised by the Beaver County Transit Authority).
commission's entry control division chief interpreted this holding to suggest that a non-operating authority does not have to use commission certified carriers when contracting for this service. The exception, however, is limited. "[I]t appears that with the sole exception of transportation to and from medical facilities in specially equipped vehicles, any carrier . . . [contracted] as a [non-operating municipal] county transit authority to provide service would require authority from . . . [the] . . . Commission." However, in an opinion prepared for the Beaver County Transit Authority, it is asserted that there is no case law deciding whether a non-operating municipal authority must use PUC certificated carriers; that the McCarter order only provides cautionary language; and, that it is still questionable as to how a court might rule on the issue. Relying upon the general powers of the Municipality Authorities Act that a municipal authority should be exempt from commission regulation, this legal opinion concludes that there is no distinction of substance between services rendered by an authority which has contracted with a certificated carrier for the use of the authority's equipment and drivers, and services rendered by an authority through a contractual agreement for the use of a non-certificated carrier's equipment and drivers. Thus, "[i]t is possible that a court could broadly interpret the exemption granted to municipal authorities as totally removing Commission jurisdiction over any form of transportation, without regard to whether the equipment [used in the authority's operation] is owned or leased."

4. The Port Authority of Allegheny County (PAT)

Transit authorities derive their specific functions by enabling legislation, and PAT derives its authority from the Second Class County Port Authority Act. Under the Port Authority Act, PAT has plenary jurisdiction over all public transportation within Allegheny County and the authority to operate such services as lessor

---

156. Letter from Barry L. Ernst to Bruce W. Ahern (Mar. 10, 1982 at 2) (discussing numerous "gray areas" of regulatory policy).
157. Id.
158. Letter from Henry M. Wick to Bruce E. Woodske Esq. and Bruce W. Ahern (June 20, 1983 at 1-2).
159. Id. at 2.
or lessee.\textsuperscript{162} Section 553 of the Act provides that "[e]ach authority shall be for the purpose of . . . operating . . . either as lessor or lessee . . . a transportation system . . ."\textsuperscript{163} and that "[t]he authority shall determine by itself exclusively, the facilities to be operated by it and the services to be available to the public."\textsuperscript{164} In vesting PAT with exclusive jurisdiction over the transportation system within Allegheny County, section 563.1 of the Act explicitly divests the PUC of jurisdiction over the "transportation system within the service area of the authority."\textsuperscript{165} Along these lines, the term "service area" is defined to mean "the entire county incorporating the authority"\textsuperscript{166} and the term "transportation system" has been defined to only exclude taxicabs and school buses.\textsuperscript{167}

A fourth scenario is this: the public transit authority (PAT), which holds no PUC certificates of operation, has decided to discontinue its own service on a particular route because the route is no longer economically feasible. PAT has determined, however, that the service should be continued for the benefit of the public living within the general area.

Several sub-issues are presented in determining whether PAT can contract with another entity to provide service along the discontinued route. First, is it lawful for PAT to contract with a non-operating municipal transit authority to provide such service, when it is between points within the jurisdictions of both authorities?

An argument could be made that such a contract is lawful. The Pennsylvania Legislature created the Port Authority for the purpose of providing Allegheny County with a unified and integrated transportation system.\textsuperscript{168} Furthermore, section 553 of the Port Authority Act directs PAT to exercise the right "[t]o fix, alter, charge and collect fares, rates, rentals and other charges for its facilities . . . [and to] determine by itself exclusively, the facilities to be operated by it and the services to be available to the public."\textsuperscript{169} Thus, the commission would have no jurisdiction over such a contractual agreement so long as the operation in question remained totally within the legal geographical service area of PAT and the legal ge-

\textsuperscript{162} Id. §§ 552, 553(a), 553(b)(9), 563.1. See Port Authority of Allegheny County v. Pennsylvania Public Utility Commission, 494 Pa. 250, 431 A. 2d 243 (1981).
\textsuperscript{164} Id. § 553(b)(9).
\textsuperscript{165} Id. § 563.1.
\textsuperscript{166} Id. § 552(17).
\textsuperscript{167} Id. § 552(13).
\textsuperscript{168} Id. § 563.1.
\textsuperscript{169} Id. § 553(b)(9).
ographical service area of the adjacent municipal transit authority. This argument highlights the fact that the commission would not have jurisdiction over that portion of the proposed transit service operating in Allegheny County. This is because the Port Authority Act vests PAT with exclusive authority over the transportation system in its particular area, while the portion of the transit service performed in the adjacent county would also be exempt from commission jurisdiction by powers vested in that county's transit authority under the Municipality Authorities Act. This argument, of course, places more weight on the jurisdictional aspect of the scenario and less weight on the issue of whether the equipment is owned or leased.

In an opinion by the commission's chief of entry control division, two arguments were presented to support the commission's position that such a contractual arrangement would violate the Public Utility Code. The commission's first argument was based upon its position that a non-operating transit authority could only contract with PUC certificated operators for the purpose of providing services. The commission further contended that because PAT was not a PUC certified operator, it would be illegal for a non-operating authority to contract with PAT for the purpose of leasing equipment and drivers.

The commission's second argument that such a contractual agreement between PAT and an adjacent municipal transit authority would be violative of the Public Utility Code was directed at a limitation placed on PAT's authority by section 563.1 of the Port Authority Act. The limitation states that "[t]he . . . Public Utility Commission shall continue to have jurisdiction, with respect to all matters regarding those transportation systems and group and party rights to operate into or out of said [PAT's] service area." This argument, based on the fact that the contracted for route goes beyond PAT's jurisdiction, could be averted by PAT's plan of an integrated system. Section 553(a) of the Port Authority Act states that "[e]ach authority shall be for the purpose of . . . leas-

171. Id.
173. Letter from Barry L. Ernst to Bruce W. Ahern (Mar. 10, 1982 at 1) (discussing numerous "gray areas" of regulatory policy).
ing, either as lessor or lessee . . . a transportation system in the county by which it is incorporated and outside of the county to the extent necessary for the establishment of an integrated system."175 The Act then requires, in section 563.1, that "[t]he authority, immediately upon its organization . . . shall prepare a plan of integrated operation showing the service area and the pattern of its integrated system. . . [and] shall, thereafter, have the right to make such changes in the pattern of its integrated system as it may deem proper . . . ."176 Thus, while there does not appear to be precedent for such contracts, the power to amend does exist in the Act and could conceivably be used as a means to establish a contractual agreement between PAT and transit operators in areas adjacent to the incorporated county.

Although there are several arguments on both sides as to whether regular bus service could be established on a route between connecting points in Allegheny County and an adjacent county which falls within the jurisdictional area of a municipal transit authority, it is interesting to note that in Port Authority of Allegheny County v. Pennsylvania Public Utility Commission,177 the court allowed municipal authorities to contract with PAT to provide vanpool services. In this case, the Pennsylvania Supreme Court determined that vehicles not reserved for individual use were not considered a taxicab service; that PAT had exclusive jurisdiction over such vehicles within Allegheny County; and, that the PUC had been completely divested of jurisdiction over such vehicles in Allegheny County.178 Further, with regard to a vanpool operation, the court clearly established the legality of a contractual agreement between PAT and an adjacent municipal transit authority because PUC certification for that portion of the service operating in Allegheny County was deemed no longer a viable concern of

175. Id. § 553(a) (emphasis added).
176. Id. § 563.1. It appears that section 563.1 provides for agreements between PAT and transit operators in areas adjacent to the incorporated county if such arrangements are defined in the plan of integrated operation:

The authority shall have the exclusive right to operate . . . within the service area as set forth in the plan . . . except for those transportation systems, operating into the said service area from points outside of said area, which companies shall have the right to pick up and discharge passengers destined to and from the territory outside the said area but not the right to pick up and discharge passengers entirely within the service area.

Id. The 88 Transit Lines, Inc. is an example of such a transportation system operating into Allegheny County. Letter from S. Berne Smith to Aldo Nones (Jan 14, 1985 at 1).
178. Id. at 259, 431 A.2d at 248.
the commission.

Regarding the circumstances in the fourth scenario, another issue which arises when the operating rights for the discontinued route is placed up for bids from private carriers. Because the PUC cannot issue certificates of operation in Allegheny County, private carriers bidding for PAT operating rights would possess no PUC certificate of operation for Allegheny County. The problem presented under these facts is whether PAT has authority under the Port Authority Act to provide service within its incorporated county (Allegheny) under contract with such private carriers? Clearly the answer to this question is yes.

As discussed earlier, PAT is vested with exclusive jurisdiction over the transportation system within Allegheny County. Its legislative purpose is to provide a unified and integrated transportation system in Allegheny County. Moreover, it is directed to determine the facilities to be operated by it and the services to be available to the public. Thus, PAT has the authority to contract with non-PUC certified public carriers. However, as previously discussed, it must exercise pervasive control over the rates and routes of any such carriers.

With regard to this scenario, the concept of providing transit service under contract with private carriers is a very sensitive labor issue in the transit industry. First, according to a Demonstration Design Study, there are no provisions in the authority's labor agreements with its union which prohibit contracting for ser-

---

179. For the first time in its 22-year history, the Port Authority Transit will accept bids from private operators to run mini-bus shuttle service on routes in Allegheny County for an 18-month experimental period in 1986. The plan, prepared by Mellon Institute, recommends Monroeville for this low density transit service demonstration project because it is a major center of activity and has a single corridor of bus routes into the central business district and the Oakland districts of Pittsburgh. This neighborhood shuttle service would follow fixed routes and feed into regular PAT truck routes, using leased vans or buses with 15-25 seats. *PAT to Seek Private Help on Routes*, Pgh. Post-Gazette, July 26, 1985, at 1, cols. 2 & 3. Service in these low density, fringe service areas is not efficiently provided by the authority because the cost per bus-hour is nearly the same in lower density areas as higher density corridors and since ridership is low, the cost per rider served, a key measure of efficiency, is much higher in the low density areas. *Low Density Service Methods Demonstration Design Study*, prepared for Port Authority of Allegheny County by Mellon Institute, at 5 (June, 1985) [hereinafter Mellon Study].

180. See supra notes 161-65 and accompanying text.

181. See supra note 168 and accompanying text.


183. See supra notes 90-93 and accompanying text.

In fact, the Second Class County Port Authority Act, seems to contemplate such contracting for services.186 However, an attempt to substitute existing bus service on low density service routes must comply with section 13(c) of the UMT Act which provides that transit agencies receiving federal funds must protect the interests of employees including, but not limited to, the preservation of rights, privileges and benefits under existing collective bargaining agreements and protection against a worsening of their employment positions.187 The Port Authority Act, in fact, appears to reflect these protective measures in its employer-employee relations provision.188

A review of the Demonstration Design Study indicates that PAT would have basically two arguments to support a contention that placing low density service routes up for bid is not detrimental to existing labor contracts and thus not violative of the UMT Act, section 13(c) protections. First, the demonstration plan recommends opening the bidding process to the Authority's work force, noting that the labor union may be willing to negotiate a lower wage scale since the service would involve the operation of smaller vehicles.189 Secondly, assuming the service on low density routes was contracted to private carriers, it is entirely possible that more riders would be fed into the trunk routes of the regional bus system and, in fact, benefit the authority's labor force.190 Thus, if the attempt to provide service on low density routes through the use of private contracts has no detrimental effect on union labor, there is no section 13(c) labor protection issue. But, if such services would adversely effect local labor agreements, a public transit agency which is a direct recipient of federal funds from UMTA may be in violation of section 13(c).

Another issue with regard to this fourth scenario arises when PAT decides to discontinue its own service on a route, defined as part of the integrated system plan, located outside the incorporated county, and determines to place the operating rights up for bid, for the purpose of contracting with a private carrier. Accord-

185. Id.
188. 55 PA. CONS. STAT. ANN. § 563.2 (Purdon Supp. 1986).
190. Id. at 8-9.
ing to section 563.1 of the Port Authority Act, the authority, upon its organization, could provide service to areas outside the incorporated county if such service areas were defined in the integrated operation plan filed with the PUC. Because areas lying outside the incorporated county are defined as part of the integrated transportation system, PAT would acquire exclusive rights to provide transit services, with one exception:

[...]that if the authority [PAT] shall at any time desire to abandon or change any portion of a transportation system outside the territorial limits of the county incorporating the authority, the approval for such abandonment or change must be secured by the authority from the Pennsylvania Public Utility Commission.

One of the major difficulties which could be anticipated, if PAT attempted to contract with a private carrier to provide service on an integrated system route located outside the boundaries of the incorporated county, focuses on whether such a contract constitutes a change to the transportation system so as to require approval from the PUC. Since the selection of a private carrier would inevitably involve the solicitation of bids, one might conclude that the use of the bidding process may constitute such a material change that it would require approval by the PUC. An informal opinion of the PUC indicates that “[t]he ‘bidding process’ is foreign to the philosophical principles of utility regulation.” Thus if the PUC were in fact, to view the bidding process for the selection of a private carrier as repulsive to the Public Utility Code, it appears that section 563.1 of the Port Authority Act provides the PUC with sufficient authority to disapprove such changes to the transportation system occurring outside of Allegheny County.

On the other hand, section 563.1 further states that “nothing in this section . . . shall prevent . . . an undertaking . . . by the authority of any demonstration, test or experimental project relevant to, and necessary for, the establishment of an integrated transportation system.” Under this provision, the Authority could argue that such contractual agreements with private carriers is relevant and necessary to the operation of an integrated system.

192. Id. (emphasis added).
193. Letter from Barry L. Ernst to Bruce W. Ahern (Mar. 10, 1982 at 2) (discussing numerous “gray areas” of regulatory policy) (emphasis omitted).
5. *Independent Operations by Private Carriers*

Assuming that PAT could overcome the bidding process hurdle presented above, a question arises as to whether PAT would maintain its exclusive rights to provide service on integrated system routes located outside the boundaries of the incorporated county where PAT has contracted with a private carrier.

As was discussed previously under the first scenario, an existing certified private carrier may independently continue operating in the same service area where a municipal authority has contracted with a non-certified carrier if the new service to be provided by the Authority does not serve substantially the same purposes as the existing enterprise. According to the chief counsel for the PUC, nothing in the Municipality Authorities Act or the Public Utility Code would prevent the existing carrier from continuing to operate.\(^{195}\) Note, however, that operations in Allegheny County are governed by the Second Class County Port Authority Act, with different results.\(^{196}\) It is clear, that in the situation where PAT contracts with a private carrier to provide service on integrated system routes located *solely within the boundaries of the incorporated county*, that PAT would maintain the exclusive right to provide services. No independent private carrier could be granted a certificate of operation to provide services by the PUC.\(^{197}\)

In the hypothetical where PAT contracts with a private carrier to provide service on routes located outside the boundaries of the incorporated county, it is unclear whether PAT retains its exclusive operating rights so as to preclude independent operations by private carriers providing services in the same general area. As explained earlier, the PUC has the authority, on routes located outside the incorporated county, to approve or disapprove changes.\(^{198}\) Since PAT's operating rights are obviously not exclusive with regard to these extraterritorial routes, an argument could be made that independent operations by private carriers would not violate the Port Authority Act. According to the PUC's chief counsel, nothing in the Public Utility Code would preclude independent

---


196. Letter from Gareth W. Rosenau to the Southwestern Pennsylvania Regional Planning Commission (Sept. 26, 1984 at 2) (discussing SPRPC's requested clarification of four specific issues regarding transportation services).

197. See *supra* notes 162-77 and accompanying text.

The final question on this subject is whether the exclusive rights granted PAT under the Port Authority Act preclude continued independent operations by a carrier who holds certificates of operation over a route on which PAT may contract with private carriers to provide service. With regard to operational rights granted by the Interstate Commerce Commission (ICC), it is clear that PAT has no authority over those transportation systems subject to the jurisdiction of the ICC. Thus, it is unlikely that PAT would have the authority to preclude independent operations by carriers certified by the ICC, regardless of whether the routes were located within or without PAT's incorporated county. Considering the fact that the Bus Regulatory Reform Act (BRRA) substantially changed the entry procedures of the ICC, the independent operations of an ICC certificate holder has become a real concern. In general the BRRA is based on a presumption that increased competition benefits the public; allows carriers to apply to the ICC for both interstate and intrastate authority; removes "closed-door" restrictions that bar service to intermediate points on existing intercity routes; and establishes a new entry provision, shifting the burden of proving that the issuance of a certificate will not benefit the public interest to the party protesting the application.

Section 3(e)(3) of the UMT Act, prohibits the grant of financial assistance to any public agency for the purpose of providing mass transportation "in competition with ... service provided by an existing mass transportation company, unless ... just and adequate compensation will be paid ... to the extent required by applicable State or local laws...." This provision, which defers to state laws, requires recognition of Port Authority Act section 563.1 which authorized PAT upon its inception to acquire by purchase, lease or condemnation any existing transportation systems necessary to the development of an integrated system of mass transportation.

The acquisition of existing transportation systems by PAT occurred in the early stage of its organization and such acquisition efforts appear to have been directed to the establishment of an in-
tegrated system rather than the prevention of unfair competition between a public transit authority and a private operator. This observation is documented by the numerous references within the Port Authority Act to an integrated system and the absence of any anti-competition proviso such as that contained within the Municipality Authorities Act. The most obvious explanation for this discrepancy is that the Port Authority Act, unlike the Municipality Authorities Act, grants PAT exclusive operating rights within its jurisdiction and thus precludes any concern for unfair competition.

However, the issue of unfair competition becomes a serious concern in those service areas where PAT may contract with a private carrier and where independent services are provided by a carrier holding a certificate of operation from the ICC. If the circumstances indicate that the private carrier under contract with PAT, a recipient of federal funds, creates a situation of "unfair competition", it could be argued that section 3(e) of the UMT Act becomes applicable and would require the authority to compensate the ICC certificate holder.

C. Other Potential Points of Conflict Between the BRRA and Pennsylvania Enabling Legislation

The following paragraphs of this Comment highlight several potential areas of conflict between the Bus Regulatory Reform Act, the Public Utility Code, the Second Class County Port Authority Act, and the Municipality Authorities Act.

1. Municipality Authorities Act v. the BRRA: Two Standards for Measuring Competition

As was discussed in the first scenario of this Comment, when a municipal transit authority contracts with a non-PUC certified carrier, the paramount issue presented is whether these new services will duplicate an existing service provided by a PUC certified carrier. In order to answer this question, attention was directed to the anti-competition proviso of section 306(A) of the Municipality Authorities Act which prohibits the duplication of, or competition with, existing transit systems. In *Para Transit Corp. v. County*...
of Monroe,\textsuperscript{207} the commonwealth court, in interpreting the section
306(A) standard, determined that where new services are distinct
and satisfy a different community need, the new services do not
serve substantially the same purpose as an existing service and
thus, do not duplicate or compete with the existing enterprise.\textsuperscript{208}

In the event that the non-certified carrier decides not to provide
services as an agent of the municipal transit authority, but seeks to
provide services on its own by securing a certificate of operation
for regular route service from the ICC,\textsuperscript{209} the PUC certificated car-
rier must now challenge the new service under the public interest
standard of the BRRA.\textsuperscript{210} In regard to the impairment test of the
BRRA's public interest standards, the protestant is required to
show that the new service would impair its own ability to continue
operating over a substantial portion of its entire regular-route sys-
tem.\textsuperscript{211} It should be noted here that the impairment test is only
one prong of the standard to be used to determine if an application
is consistent with the public interest\textsuperscript{212} and each factor is to be
given equal weight and balanced when making this public interest
determination.\textsuperscript{213}

Several observations can be made about these two hypothetical
situations. First, in \textit{Para Transit Corporation}, where the munici-
pal transit authority's creation of a scheduled route service alleg-
edly competed with petitioner's demand taxicab service and para-
transit service, the court's inquiry into whether the new service
was distinct or satisfied a different community need was appropri-
ate since the competing services were \textit{different types} of transporta-
tion.\textsuperscript{214} It would appear that when the competing interests involve
the \textit{same type} of transportation, such as regular route bus service,
the \textit{Para Transit Corporation} test may be difficult to apply. The
impairment test of BRRA, however, would be a much more useful
tool to determine if the new and existing services are overly

\begin{footnotes}
\item[208]  Id. at 106, 468 A.2d at 550.
1102, 1104 (1982).
\item[210]  Id. § 6(c)(3), 96 Stat. 1102, 1105-1106.
\item[211]  Ex Parte No. 55 (Sub-No. 56), Applications for Operating Authority - Motor Pas-
\item[212]  Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, §6(c)(3), 96 Stat. 1102,
1105-1106 (1982).
\item[213]  Ex Parte No. 55 (Sub-No. 56), Applications for Operating Authority - Motor Pas-
enger Carriers, 133 M.C.C. 62, at 68-69 (1982). \textit{See supra} notes 60-63 and accompanying
text.
\end{footnotes}
private carriers to compete. In support of this observation, attention is directed to that section of the Municipality Authorities Act which states that the purpose of the Act is "not to unnecessarily burden or interfere with existing business by the establishment of competitive enterprises . . . ." On the other hand, a recent Interstate Commerce Commission decision states that:

[under the provisions of the BRRA, competitive transportation service is encouraged and a carrier is allowed the flexibility to conduct its operations in response to market demands. . . .

It is axiomatic that authorization of a competitive service would result in the loss of some traffic from existing carriers and impact on their operations . . . [but] the benefits which normally accrue from a competitive service . . . are readily apparent."

Finally, it is important to emphasize the potential for inconsistent results depending upon whether an existing carrier is challenging services to be provided by an agent of a municipal transit authority or challenging a carrier who is seeking to provide services under the auspices of the ICC. Since the Municipality Authorities Act is more interested in guarding against duplicate services, it is conceivable that an existing carrier, attempting to protect its business enterprise, would be more likely to succeed in a suit against the transit authority. This is because a suit challenging the ICC’s issuance of an application for new services would place greater emphasis on the public interest to be served and would, therefore, more probably produce a different result.

2. Public Utility Code vs. the BRRA: Entry and Exit Policy Modifications

The Bus Regulatory Reform Act (BRRA) of 1982 was designed to ease entry as well as exit requirements for private carriers providing regular-route transit service. Most significantly, the new entry provisions are intended to stimulate the interests of private

---

217. Fravel, supra note 38, at 38.
carriers\textsuperscript{218} by making entry into the bus transportation system easier under the BRRA than it was under the Motor Carrier Act of 1980.\textsuperscript{219} The \textit{new exit provision} is intended to establish an appeals procedure to the ICC which preempts the state's regulatory authority\textsuperscript{220} and allows private carriers to abandon routes which are clearly unprofitable. This, in turn, would allow private carriers to devote their resources to areas where there is a greater demand for service.\textsuperscript{221}

In Pennsylvania, regulatory authority for the issuance of certificates of operation for carriers to provide transit services is controlled by the PUC.\textsuperscript{222} Following the enactment of the BRRA and a change in the ICC's policy, the PUC adopted and made final those requirements used in adjudicating motor common carrier applications.\textsuperscript{223} Policy statements published by the PUC indicate that it believes the evidentiary requirements existing prior to the change were derived from a "monopoly" theory of regulation. Thus, those standards were inappropriate with respect to motor carriers because they were very protective of existing carriers and restrained healthy competition.\textsuperscript{224} In light of these realizations, the PUC has altered the third prong of its three part test (for granting common carrier authority) by eliminating the applicant's burden of showing the inadequacy of the existing service.\textsuperscript{225} Under the third prong of the modified test, the protestant has the burden of showing that the entry of a new carrier would impair the operation of an ex-

\textsuperscript{218} \textit{Id.} at 43.
\textsuperscript{219} Ex Parte, No. 55 (Sub-No. 56), Application for Operating Authority - Motor Passenger Carriers, 133 M.C.C. 62 at 68 (1982).
\textsuperscript{220} Fravel, \textit{supra} note 38, at 38.
\textsuperscript{221} \textit{Id.} at 38-39.
\textsuperscript{223} 12 Pa. Admin. Bull. No. 51, Dec. 18, 1982 at 4282. The evidentiary criteria used to decide motor common carrier applications read in pertinent part:

(a) An applicant seeking motor common carrier authority has a burden of demonstrating that approval of the application will serve a useful public purpose . . . .

(b) An applicant seeking motor common carrier authority has the burden of demonstrating that it possesses the technical and financial ability to provide the proposed service . . . .

(c) The Commission will grant motor common carrier authority commensurate with the demonstrated public need \textit{unless it is established that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to such an extent that, on balance, the granting of authority would be contrary to the public interest.}

\textsuperscript{224} 52 PA. ADMIN. CODE § 41.14 (Shepard's 1985) (emphasis added).
\textsuperscript{225} \textit{Id.}
isting carrier to such an extent that, on balance, the issuance of the application would be contrary to the public interest.\textsuperscript{226}

Several observations can be made about the PUC's modification of the third prong of its motor carrier entry test in comparison with the impairment prong of the public interest test established by the BRRA.\textsuperscript{227} First, both tests shift the burden of proof to those protecting the issuance of a new application.\textsuperscript{228} Second, the third prong of the PUC entry test requires the PUC to balance the impairment to an existing carrier and the effect on the public interest, while section 6(c)(3) of the BRRA directs the ICC to consider four factors when considering if an application is consistent with the public interest. These factors are to be given equal weight and balanced when making the public interest determination.\textsuperscript{229} Third, with reference to a clear intent to advance the public interest, both impairment tests establish a strong presumption that increased competition will benefit the public. The national transportation policy section of the BRRA encourages competitive transportation services in order to improve and maintain a sound private motor carrier system.\textsuperscript{230} The PUC has also recently commented that it has a duty to keep its entry policy attuned to the competitive atmosphere advocated by the federal government and, that although, in the past, it had sought to further the public interest by protecting carriers from competition, this protection was only a means to an end. The public convenience is now paramount.\textsuperscript{231}

Although the PUC's new evidentiary standard and corresponding policy statements appear to be attuned to advancing the competitive spirit of the BRRA thus making it easier for motor common carriers to secure authority, there are limits to the PUC's flexibility.\textsuperscript{232} In Application of McCarter Transit,\textsuperscript{233} decided only

\begin{enumerate}
\item \textit{See supra} note 35 and accompanying text.
\item \textit{See supra} notes 228-31 and accompanying text.
\item Application of McCarter Transit, Inc., Pa. P.U.C. Dckt. No. A-00103585 at 5 (or-
two months after PUC issued the policy statement which indicated that it intended to follow the spirit of the BRRA and the lead of the ICC, the PUC made it quite clear that a municipal authority, as a non-operating entity, must use carriers certified by the commission.\textsuperscript{234} The PUC's adherence to this requirement, however, is a major barrier to the entry of new carriers and is certainly contradictory to both the competitive spirit of the BRRA and the recent modification to PUC policy.

In Pennsylvania, regulatory authority over the discontinuance of transit services is controlled by the PUC in basically two situations. First, the PUC is authorized to approve the abandonment of all motor carriers who have been issued a PUC certificate of public convenience.\textsuperscript{235} Second, the PUC has authority to approve abandonments of certain service routes being operated by PAT which are located outside the territorial limits of the incorporated county as defined by the integrated system plan.\textsuperscript{236} Regardless of whether the petitioner is a private carrier holding a PUC certificate of operation or whether it is PAT seeking to abandon a route located outside the incorporated county, the PUC, in determining whether to grant a discontinuance, applies a public interest test. This test essentially requires that an abandonment should not be detrimental to the "service, accommodations, convenience, or safety of the public."\textsuperscript{237} In making a determination as to whether an abandonment of service will be detrimental to the public interest, the PUC

\begin{flushleft}

\textsuperscript{235} Public Utility Code, 66 PA. CONS. STAT. ANN. § 1102(a)(2) (Purdon 1978). Section 1102(a)(2) of the Code provides in part:

\begin{itemize}
  \item \textit{Enumeration of acts requiring certificate}
  \item \textit{(a) General rule. - Upon the application of any public utility and the approval of such application by the commission, . . . it shall be lawful:}
  \item . . .
  \item (2) For any public utility to abandon or surrender, in whole or in part, any service . . .
\end{itemize}

\textit{Id.}

\textsuperscript{236} Second Class County Port Authority Act of 1956, Pub. L. No. 1414, as amended, 55 PA. CONS. STAT. ANN. § 563.1. See supra note 192 and accompanying text.

\textsuperscript{237} Public Utility Code, 66 PA. CONS. STAT. ANN. § 1103(a) (Purdon Supp. 1978). Section 1103(a) of the Code provides in part:

\begin{itemize}
  \item \textit{Procedure to obtain certificates of public convenience}
  \item \textit{(a) General rule. - . . . A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, or safety of the public.}
\end{itemize}

\textit{Id.}
may consider: "the use of the service by the public; the prospects as to future use by the public; the hardship to the public if service were discontinued; and the availability of alternative service."238

Two observations can be made about the abandonment test applied by the PUC and the ICC under the new exit provision of the BRRA. First, the BRRA requires that a protestant must demonstrate that the discontinuance will result in an unreasonable burden on interstate commerce.239 The applicant, seeking to abandon a PUC certificate of operation, has the burden of showing that the discontinuance of service will not harm the public interest.240 Second, the BRRA directs the ICC, in making a determination of whether a discontinuance should be granted, to place "great weight" on the extent to which revenues from the service are less than the variable costs of the service.241 The Public Utility Code and the aforementioned abandonment factors, on the other hand, apparently contain no such considerations with regard to a determination for the discontinuance of service.

These comparisons between the abandonment test employed under the BRRA and the public Utility Code highlight a basic inconsistency between the federal and state legislation with regard to exit policy. Since the Public Utility Code is apparently more interested in guarding the public interest when evaluating an applicant's request for discontinuance of service, it is more difficult for a carrier to abandon routes which may be unprofitable. Conversely, the "great weight" directive of the BRRA's new exit provision which focuses on a comparison of revenues generated and variable costs expended on the route, highlights the unprofitability aspect of continued service and thus makes it easier for a carrier to acquire abandonment approval.

Yet, BRRA's new exit provision also contains a preemption clause which allows the ICC to grant a private carrier a discontinuance of service if the route to be abandoned is part of an interstate route; if the petitioner shows its variable costs exceed the revenues; and, if the petitioner makes initial application to the state regul-
tory authority and follows the correct state procedures. Thus, if a PUC certified carrier or PAT (for routes located outside the incorporated area) would be denied discontinuance for intrastate service over an interstate route, such petition to abandon could be appealed to the ICC. Case law during the year following the enactment of the BRRA has indicated that, if the above referenced criteria are met, the ICC is likely to reverse the state authority's denial and grant the petition to abandon. Again, due to the difference between the state (PUC) standard for determining if a discontinuance of service is justified and the standard applied at the federal level (ICC), the potential for inconsistent results is a realistic concern.

III. Conclusion

Of particular interest to this Comment, is the language of the "Privatization Directive" which states that "UMTA does not consider it acceptable for localities to foreclose opportunities for private enterprise by simply pointing to local barriers to their involvement in federally assisted local transportation programs." This policy statement of October 1984, which articulates UMTA's view on the importance of private sector involvement, was also accompanied by the warning that, if private enterprise continued to be unfairly excluded from those programs funded by UMTA under the UMT Act, it would be necessary to introduce additional measures to accomplish this objective. As promised, UMTA administrator Ralph Stanley announced, in a November 1985 letter to all UMTA grantees, a major new agenda to increase private-sector participation in public transit services which will include new administrative procedures, new regulations, and a series of legislative initiatives for consideration by the United States Congress. In general, the purpose of this new UMTA agenda is to give priority consideration to applicants for grants for public transit operators who demonstrate their commitment to competitive bidding and

242.  Id. §§ 16(a), 16(e)(1)(A) & 16(g)(1), 96 Stat. 1102, 1115 & 1117 (1982) (codified at 49 U.S.C. §§ 10935(a), (e)(1)(A) & (g)(1) (1982)).
244.  See supra notes 68-72 and accompanying text.
246.  Id. at 41,310.
247.  Letter from Ralph L. Stanley to UMTA Grantees (Nov. 18, 1985) (discussing additional measures to accomplish private sector participation in mass transportation programs).
private sector involvement.

There are legal and regulatory problems between PUC and non-PUC certificated private carriers interested in providing public mass transit services as agents of authorities created under the Municipality Authorities Act or the Second Class County Port Authority Act. In addition, there are major conflicts which exist between federal legislation and the state enabling legislation. In identifying these legal and regulatory obstacles, various opinions rendered by legal counsel for the Pennsylvania Public Utility Commission, the Pennsylvania Department of Transportation and several law firms have been presented. However, these are informal opinions and do not resolve the issues.

It is important, however, that the legal problems and regulatory conflicts identified herein be resolved since private operators may understandably hesitate to become involved with public transit authorities until they have solid legal guidelines. Private carriers do not want to be the "test case." In a letter to the chief counsel of the PUC, an assistant counsel for PaDOT stated that "[t]he present situation of not having answers to these questions is hampering the expansion of transportation services . . . . We need to resolve these problems in a manner that will encourage private operators to become involved with public transit authorities . . . ."

Also, in response to the PUC’s modification of its evidentiary requirements for motor common carrier applications, private carriers have commented "that they find it increasingly difficult to exist in two very different regulatory environments—that of the federal government and that of the Commonwealth of Pennsylvania."

An identification of the legal and regulatory obstacles which bar opportunities for private sector involvement in the public mass transportation system in southwestern Pennsylvania, however, is only the first step toward achieving compliance with UMTA’s "Privatization Directive." It appears as though the key to removing legal and regulatory barriers rests with the Public Utility Commission, the official regulatory authority in Pennsylvania. Section 331 of the Public Utility Code empowers the commission to "investigate and examine the condition and management of any public utility" and authorizes the commission to "issue a declaratory or-

---

249. Letter from Ralph L. Stanley to UMTA Grantees (Nov. 18, 1985 at 1).
order to terminate a controversy or remove uncertainty."\textsuperscript{252} Legislative reform, however, may be necessary to remove those impediments directly pertaining to the Municipality Authorities Act, since there is no internal mechanism within that Act for such changes. Finally, the Second Class County Port Authority Act appears to be flexible enough to accommodate private enterprise participation. Unfortunately, one major barrier to Port Authority Transit's efforts to involve private carriers in public transportation programs relates to the labor protection requirements of section 13(c) of the Urban Mass Transportation Act. However, UMTA, as part of its legislative initiative package to the United States Congress plans to propose a repeal of the section 13(c) labor protection provision as a means to increase private sector involvement.

\textit{John R. Hanlon}