

in "umbrella ratemaking," holding up the rates of one class of carrier to protect the traffic of another, while actually vacillating between doing so and not doing so. In the present instance, the Commission has argued as if the passenger train should and can be preserved, and as if its behavior were guided to that end. It has specifically denied using a market test of profitability as the criterion for passenger train discontinuance, explicitly characterizing such an approach as "sterile." (*New York, New Haven & Hartford RR, Trustees, Discontinuance of all Passenger Trains*, 327 ICC 151 at 205.) Instead, the Commission purports to be making a comprehensive evaluation of the costs, revenues and external benefits of the operations of the several trains individually. In direct contrast to this, the Commission in its first major decision concerning discontinuance of a train Section 13a stated that it would not indefinitely require continuance of an unprofitable passenger train on the ground that the railroad as a whole was profitable. (*Great Northern Ry. Discontinuance of Service*, 307 ICC 59 at 69.) This was an application of the Commission's long-standing doctrine that it would not indefinitely require perpetuation of an unprofitable branch merely because the railroad was profitable over-all. More basically, this doctrine is a manifestation of the obligation of a regulatory body to refrain from confiscating the property of a regulated firm through requiring long-continued unprofitable operation.

Thus, in the long run in the treatment of individual trains, the Commission was using a market test of profitability, even though it denied it was doing so. An explicit market test would have indicated that essentially all of the trains on which the Commission was passing should have been discontinued. That is, a market test would accord with the usual economists' presumption that the public's expenditures on a service represent its value to society and that its costs represent the sacrificed alternatives to providing the service. Chronic unprofitability, as in this instance, indicates that society wants the resources being used in the service devoted to other purposes. All economic activity yields external benefits and entails social costs of some sort, but the rate of utilization of intercity passenger trains is so low that their external benefits in reduction of traffic congestion or atmospheric pollution are negligible. The external benefits can also be expected to atrophy *pari passu* with patronage. Consequently, the externalities are not significant enough so that a market test could not be employed.

More specifically, had the Commission been willing to accept the Hosmer Report as correct, it would have held that all of the trends operating against particular trains—which it continually recognized in individual cases—were operating irreversibly against rail passenger service as a whole. Thus, it could and should have approved the discontinuance of any demonstrably unprofitable passenger train as merely a manifestation of an inevitable trend. Further, it should have recognized that any train which was not currently unambiguously unprofitable (for example, because of controversy in allocation of terminal expenses), would shortly become so because of the irreversibility of the trends of demand and cost operating against the passenger train.

Failure to use an explicit market test in Section 13a actions has had a predictable consequence: the Commission has frequently required continuance for a year, and occasionally for a second year, of passenger trains neither more nor less hopeless than the majority which it allowed to be discontinued at once. It is impossible to show any consistency of the Commission's behavior in this respect. What the Commission claims to be doing, making a careful evaluation of the external benefits of the operation of trains, is in fact yielding on an occasional basis to casual qualitative statements by persons with an interest in perpetuation of trains. As usual, only people with some interest in train continuance have an incentive to appear in discontinuance proceedings, and thus an adversary action brings forth a grossly distorted view of the public interest, relative to a market test.

The Commission is not wholly to blame for failing to use a market test of profitability explicitly and on the first application in discontinuance actions Congress provided it with no explicit directive as to a criterion; in fact, Congress forewent an opportunity to provide a market test. The first Senate draft of the Transportation Act of 1958 provided that, in order to require continuance of a train, the ICC should assure itself that the train was not operated at a loss. Senator Javits, at the suggestion of the New York commission, secured removal of that provision out of fear of quick discontinuance of much of the passenger service out of New York City. Thus, Congress was basically to blame in not providing a market test where it was clearly appropriate.