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"Agreements" and Mergers: The Scope of Federal Maritime Commission Jurisdiction, American Mail Line, Ltd. v. FMC, 503 F.2d. 157 (D.C. Cir. 1974)

COMMENTS

"AGREEMENTS" AND MERGERS: THE SCOPE OF FEDERAL MARITIME COMMISSION JURISDICTION

American Mail Line, Ltd. v. FMC, 503 F.2d. 157 (D.C. Cir. 1974)

The Federal Maritime Commission (FMC) approved an agreement[1] whereby the world's two largest containership operators, Sea-Land Service, Inc. and United States Lines, Inc.[2] (USL), would have become sub-

1. The Commission's authority over agreements among or between shippers is founded in § 15 of the Shipping Act of 1916, 46 U.S.C. § 814 (1970), which provides in part:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic, allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
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> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. . . .
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> Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15 [Sherman Act], and amendments and Acts supplementary thereto.

2. In 1969 Sea-Land Service, Inc., which is owned by McLean Industries, Inc., which in turn is owned by R.J. Reynolds Tobacco Co. (Reynolds), a subsidiary of R.J. Reynolds, Inc., and United States Lines, Inc. (USL), a subsidiary of Walter Kidde & Co., Inc., agreed to a twenty-year charter of USL's entire containership fleet to Sea-Land, with an option to purchase at the end of the charter period. In November 1970, the agreement was restructured into a charter-merger agreement, the result of which

sidiaries of the same corporate parent (Reynolds). The FMC annexed to the agreement certain conditions[3] in order to insure competition between the two carriers and ongoing supervision by the FMC. Petitioners[4] sought review[5] of the approved agreement, alleging that section 15 of the Shipping Act of 1916 (Act) did not grant the FMC jurisdiction over the agreement because it was a merger.[6] The Court of Appeals for the District of Columbia Circuit vacated the order and *held*: The agreement, as approved, was a merger over which the FMC had

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would have made USL a wholly-owned subsidiary of Reynolds. In December 1970, the Department of Justice brought an action against Reynolds seeking to enjoin the merger for violation of the antitrust laws. *See* note 17 *infra*.

3. *See* App. at 171-73, American Mail Line, Ltd. v. FMC, 503 F.2d 157 (D.C. Cir. 1974); Brief for Respondent FMC at 12, American Mail Line, Ltd. v. FMC, *supra*. Condition I provided that Reynolds should not sell, dispose of, or otherwise encumber USL's stock or assets without FMC approval. Condition II provided that Reynolds should assume all of USL's outstanding debts and assist in future financing. Condition III provided that Sea-Land and USL should be operated independently and in competition with each other. Condition IV allowed for continuing FMC supervision, and Conditions V and VI provided for certain procedural matters concerning the merger. Condition VII dealt with registration of ships that Sea-Land had ordered.

4. Petitioners included three carriers competing with the two principal shipping lines involved, the United States (represented by the Antitrust Division of the Department of Justice), and a labor union. Walter Kidde & Co., the corporate parent of USL, was also a petitioner, seeking review of the Commission's adverse decision on the supplemental agreement, an issue which will not be discussed in this Comment. The supple-ental agreement provided that if the transaction were disapproved by a federal agency, Reynolds would find a substitute purchaser. 503 F.2d at 161, 171 n.29.

5. Jurisdiction to review a final order of the FMC is conferred by 28 U.S.C. § 2342(3) (1970), and venue by 28 U.S.C. § 2343 (1970).

6. *See* Brief for Petitioner American Export Lines, Inc. at 24-25, 27-40, American Mail Line, Ltd. v. FMC, 503 F.2d 157 (D.C. Cir. 1974). The other allegations were that the agreement was not between carriers subject to the Shipping Act, that petitioner American Export Lines was denied a fair hearing, and that the agreement lacked a basis in law. *Id.* at 24-25, 40-63.

For a discussion of the definition of "merger," see Note, *The Shipping Industry Seeks a Safe Haven: Merger Jurisdiction for the FMC?*, 5 LAW & POL. INT'L BUS. 274, 274 n.1 (1973), *quoting* P. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 510 (1967):

> Antitrust analysis customarily uses the word "merger" to describe a more or less permanent union of previously separate enterprises. It is generally irrelevant whether either or both corporations survive as a matter of corporate law. . . . Apart from the few instances requiring greater precision, we may generally speak interchangeably of mergers, consolidations, acquisitions, amalgamations or other forms of union. Such unions replace independent decision-making institutions with a unified system of control (whether or not actually exercised).

As used in this Comment, unless the context otherwise requires, "merger" should be taken to include all these terms.

no jurisdiction, notwithstanding the conditions imposed by the Commission.[7]

Congress has expressly granted some federal agencies jurisdiction over mergers involving companies subject to the particular agency's regulation.[8] Approval of such mergers does not in all cases exempt the merger from operation of the antitrust laws.[9] Section 15 of the Shipping Act, however, which grants the FMC authority over agreements between shippers and insulates those agreements from the antitrust laws, does not specify whether the FMC has jurisdiction over mergers.[10]

The Shipping Act of 1916 was enacted to substitute "effective government control" for "the disadvantages and abuses connected with steamship agreements and conferences as [then] conducted . . . ."[11]

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7. American Mail Line, Ltd. v. FMC, 503 F.2d 157 (D.C. Cir.), *cert. denied*, 95 S. Ct. 656 (1974).

8. *See, e.g.*, 12 U.S.C. § 1828(c) (1970) (FDIC); 47 *id.* § 222(b)(1) (FCC jurisdiction over telephone and telegraph mergers); 49 *id.* § 5(2) (ICC); *id.* § 1378(a) (CAB).

9. *See, e.g.*, 12 *id.* § 1828(c) (approval of bank merger does not produce exemption).

10. 46 U.S.C. § 814 (1970). Neither legislative, judicial, nor administrative history supports an inference that Congress intended to grant such authority to the FMC. *See* note 16 *infra*. A contrary argument is made in Brief for Respondent FMC at 21, American Mail Line, Ltd. v. FMC, 503 F.2d 157 (D.C. Cir. 1974), and in 40 GEO. WASH. L. REV. 322 (1971), commenting on United States v. R.J. Reynolds Tobacco Co., 325 F. Supp. 656 (D.N.J. 1971), *cert. denied*, 410 U.S. 964 (1973). Both respondent FMC and the student commentator suggest that the legislative history of § 15 can be read to include jurisdiction over mergers because the term "arrangements" as used in the Committee Report's discussion of domestic shipping problems included mergers and asset acquisitions. No documented support is given for this suggestion. Respondent FMC and the student commentator both look to later congressional silence on Commission assertions of jurisdiction as support for the Commission's position. For a discussion of the opposite viewpoint, see note 16 *infra*.

11. HOUSE COMM. ON THE MERCHANT MARINE AND FISHERIES, REPORT ON STEAMSHIP AGREEMENTS AND AFFILIATIONS IN THE AMERICAN FOREIGN AND DOMESTIC TRADE, H.R. DOC. No. 805, 63d Cong., 2d Sess. 418 (1914) [hereinafter cited as ALEXANDER REPORT]. "[Effective government control] is the means of preserving to American exporters and importers the advantages enumerated and of preventing the abuses complained of." *Id.* These advantages included improvement of service, stability and uniformity of rates, more economic cost distribution, and maintenance of parity with foreign shippers. *Id.* at 295-303. Some of the abuses were the monopolistic nature of conferences, arbitrary rate increases made without notice, secrecy of the conferences and agreements, special rates and deferred rebates to large shippers, and the lack of publication of tariff schedules. *Id.* at 304-07.

"Agreements" mentioned in text were one of three methods described in the *Alexander Report* by which a steamship line could control its competition. The other two methods were "control through *acquisition of water lines* or ownership of accessories to the lines" and "control through special practices." *Id.* at 409 (emphasis added).

Section 15 of the Act[12] provides the standards by which the Commission determines the necessity of, and benefit from, specific agreements.[13] Although there have been many cases concerning the Commission's authority to approve certain kinds of agreements,[14] in only three instances—*FMC v. Seatrain Lines, Inc.*,[15] *Matson Navigation Co.*

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12. 46 U.S.C. § 814 (1970), *quoted in part in* note 1 *supra.*

13. Section 15 provides for the disapproval of agreements that are unjustly discriminatory, detrimental to commerce, contrary to the public interest, or violative of a specific provision of the Act. The "public interest" standard was added by amendment in 1961 to broaden the Commission's authority to disapprove agreements. FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 243 (1968).

14. *See, e.g.*, Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 (1968) (FMC jurisdiction over agreement concerning fund for Longshoremen's Union); FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968) (FMC disapproved tying rule and unanimity rule of shipping conference); Transamerican Trailer Transp. v. FMC, 492 F.2d 617 (D.C. Cir. 1974) (FMC approved cost allocation agreement between New York Shipping Association and Longshoremen's Association).

15. 460 F.2d 932 (D.C. Cir. 1972), *aff'd*, 411 U.S. 726 (1973). *Seatrain* contains a fairly comprehensive look at the legislative, judicial, and administrative history of § 15 and concludes that a one-time acquisition of assets is not the kind of agreement specified in the section. Looking beyond the first paragraph of § 15, the court stated that the second and third paragraphs "undeniably envision agreements which are amenable to continuing Commission supervision." *Id.* at 935. Furthermore, in construing the *Alexander Report* the court noted that the House Committee had distinguished between "transactions not of a continuing nature" and agreements, thus undercutting the FMC's contention that the Committee had "used the term 'agreement' to encompass transactions other than those constituting cooperative working agreements." *Id.* at 939, *citing* ALEXANDER REPORT 409. *See* note 10 *supra.* The United States Supreme Court affirmed in a unanimous opinion which held that agreements within FMC jurisdiction must be of a continuing and ongoing nature.

The court of appeals also rejected the Commission's contention that congressional action subsequent to the Shipping Act augmented the Commission's authority. 460 F.2d at 941-43. The FMC claimed that merger jurisdiction had been vested in the Commission by the language of the 1950 amendment to § 7 of the Clayton Act to provide that nothing in that section applies to "transactions duly consummated pursuant to authority given by the . . . United States [now Federal] Maritime Commission . . . under any statutory provision vesting such power in such Commission," Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125, *amending* 15 U.S.C. § 18 (1946) (codified at 15 U.S.C. § 18 (1970)). The court noted, however, that the Senate Report stated that "' *it is not intended that the Maritime Commission . . . shall be granted any authority or powers which it does not already possess.*' " 460 F.2d at 941 (emphasis supplied by the court), *quoting* S. REP. No. 1775, 81st Cong., 2d Sess. 7 (1950).

For other examples of an unsuccessful claim of augmented authority under this amendment, see California v. FPC, 369 U.S. 482, 485-88 (1962) (two gas companies merged and sought antitrust exemption on basis of FPC approval); Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 469-70 (1959) (Association claimed that Secretary of Agriculture approval of acquisition produced antitrust exemption).

v. FMC,[16] and *United States v. R.J. Reynolds Tobacco Co.*,[17]—have courts considered the Commission's role in attempted mergers. In *Matson* the Ninth Circuit held that the Commission had jurisdiction over merger agreements,[18] but the Supreme Court subsequently held in *Seatrain*[19] that section 15 did not confer merger jurisdiction. The Court stated that "the statute . . . envisions a continuing supervisory role for the Commission and invests it with power to disallow an agreement after a period of time,"[20] but concluded that a one-time merger or acquisition of assets does not meet the statutory criterion.

The FMC contended in *American Mail Line Ltd. v. FMC*[21] that the conditions annexed to the merger agreement gave the FMC the continuing supervisory role contemplated by the statute.[22] The court found, however, that "the merger is a substantial and principal feature of the transaction,"[23] that "the merger portion of the agreement is not

16. 405 F.2d 796 (9th Cir. 1968). *Matson* involved an appeal of a Commission order approving a merger of three lines. Matson sought to have the order vacated, claiming, *inter alia*, that the FMC had no authority to approve mergers. The Ninth Circuit disagreed, citing language in Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 276 (1968), which stated that Congress in enacting § 15 meant to " 'subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry.' " 405 F.2d at 800. Although it recognized that *Volkswagenwerk* did not deal with a merger, the court felt that the expansive language in the opinion and the nature and consequences of shipping industry mergers required that such agreements to merge be subject to "expert scrutiny." The court therefore concluded that section 15 grants merger jurisdiction to the FMC. *Id.*

17. 325 F. Supp. 656 (D.N.J. 1971), *cert. denied*, 410 U.S. 964 (1973). *Reynolds* involved the same parties as the principal case. In *Reynolds*, the Department of Justice, alleging violations of 15 U.S.C. §§ 1, 18 (1970), sought to enjoin the implementation of the original charter-merger agreement, and the FMC petitioned to intervene and have the action stayed or dismissed until the proceedings on the agreement before the Commission were completed. Judge Garth explored the legislative history of the Shipping Act and determined that while Congress did not deliberately intend to except merger agreements from FMC authority, it did intend to give the Commission supervisory powers over only those agreements having an "ongoing nature." He concluded that the merger of USL into RJI, Corp., a corporation created to effect the merger, was not of an "ongoing nature" and that the FMC had no authority to approve or disapprove it. The court therefore refused to stay or dismiss the Justice Department suit. 325 F. Supp. at 658-63; *see* note 2 *supra.*

18. *See* note 16 *supra.*

19. 411 U.S. 726 (1973); *see* note 15 *supra.*

20. 411 U.S. at 735. "But it is hard to see how the Commission can exercise this supervisory function when there are no continuing obligations to supervise." *Id.*

21. 503 F.2d 157 (D.C. Cir.), *cert. denied*, 95 S. Ct. 656 (1974).

22. Brief for Respondent FMC at 24, American Mail Line Ltd. v. FMC, 503 F.2d 157 (D.C. Cir. 1974); *see* note 3 *supra.*

23. 503 F.2d at 167.

within the Commission's jurisdiction under the present provisions of section 15,"[24] and that "the Commission cannot acquire jurisdiction merely by agreement of the parties before it."[25] The court stated that agreements subject to section 15 must (1) create ongoing rights and responsibilities requiring FMC supervision, (2) retain the separate identity, ownership and independence of the parties, and (3) be "between parties subject to the Act."[26] Although the court found the first attribute present, it found the second lacking and, consequently, did not pass on the third.[27] In *American Mail Lines*, therefore, the District of Columbia Circuit followed and expanded the Supreme Court's holding in *Seatrain* by finding that a merger, even when coupled with conditions creating ongoing supervisory duties for the FMC and requiring the merging companies to compete and function independently, did not trigger section 15 jurisdiction.[28]

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24. *Id.* "Whether it is desirable for Congress to vest such jurisdiction in the Commission is not for us to determine." *Id.* (footnote omitted).

25. 503 F.2d at 170. The inference that Reynolds volunteered to submit itself to the jurisdiction of the FMC arises from Reynolds' proposal of the conditions of ongoing supervision which the Commission ultimately adopted. *Id.* at 161-62. The Commission, of course, argued that it could assert its statutory jurisdiction since the agreement with its ongoing conditions was of the kind encompassed by § 15 of the Act and the relevant precedent. *See* Brief for Respondent FMC at 21-26, American Mail Lines, Ltd. v. FMC, 503 F.2d 157 (D.C. Cir. 1974).

26. 503 F.2d at 165-66. The first attribute is self-explanatory. The second is derived from Seatrain Lines, Inc. v. FMC, 460 F.2d 932, 939 (D.C. Cir. 1972), *citing* United States v. Reynolds Tobacco Co., 325 F. Supp. 656, 658-59 (D.N.J. 1971). The third feature follows from the statutory requirement of filing of agreements by "every common carrier by water or other person subject to this chapter." 46 U.S.C. § 814 (1970). These attributes clearly are not exclusive. *See* 503 F.2d at 166 n.15.

27. Since the FMC approved the agreement with conditions requiring continuing FMC supervision, the first attribute is present. 503 F.2d at 168. The court assumed the existence of the third attribute without actually deciding. *Id.* at 169 n.22. The second attribute is not present because USL would have become a wholly-owned subsidiary of Reynolds. The court found this to be dispositive. *Id.* at 169-70.

The question arises whether a long-term lease agreement which contains the characteristics stated in *American Mail Line* would be subject to § 15 of the Act. A logical analysis of the court's decision leads to the conclusion that substance would rule over form and a court would find that other attributes of § 15 jurisdiction were not met by the hypothetical lease. A long-term lease, for example, wherein the lessee holds all indicia of ownership except title, would probably be disapproved by the court. *See also* United States v. Columbia Pictures Corp., 189 F. Supp. 153, 181-83 (S.D.N.Y. 1960), *cited in* 503 F.2d at 170-71 n.27.

The requirement that the agreement be between parties subject to the Act raises another unanswered question. Reynolds does not fit into the statutory definition of either a "common carrier by water" or "other person subject to this chapter" although it is the owner of Sea-Land. *See* 46 U.S.C. § 801 (1970).

28. 503 F.2d at 171.

The court demonstrated that the FMC did not impose any obligations on the parties that did not exist under the statutory scheme.[29] The court also concluded that the conditions did not prevent Reynolds' complete control over USL, even though Reynolds could not "sell, dispose of or encumber USL's stock or assets without Commission approval."[30] Furthermore, the contention that the conditions insured competition by continuing FMC supervision was dismissed on the ground that competition is required by both the Shipping Act and the antitrust laws.[31] The other conditions were perfunctorily rejected as not being "cooperative working agreements with another carrier or person subject to the Act" since they were imposed only on Reynolds.[32] In addition, the court rejected as circular the FMC claim that since it had jurisdiction over the original charter-merger agreement,[33] it retained jurisdiction over the agreement after the modification.[34]

Had the court concluded that the Commission did have jurisdiction over the merger, the agreement would have been insulated from the

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29. *Id.* at 170. The reasoning of the court is circular. If the FMC had the jurisdiction it asserted, then the Commission did have the continuing supervisory role contemplated by the statute and the conditions were superfluous. If the FMC did not have merger jurisdiction, then the statutory authority in the Commission to supervise the ongoing aspects was nugatory since the Commission's jurisdiction cannot be expanded by agreement.

30. 503 F.2d at 167. The court continued:

> However, the proposed conditions themselves suggest that Reynolds would possess virtually unlimited ownership and control over USL. . . . It is unlikely that Reynolds would undertake such responsibilities [*e.g.*, assuming all debts, expenses, and financing] if it did not consider itself possessed of essentially complete ownership of USL.

Id. (footnotes omitted).

31. *Id.* at 169; *see* Condition III, *set out in* App. at 172, American Mail Line Ltd. v. FMC, 503 F.2d 157 (D.C. Cir. 1974). Dictum in *Seatrain* indicated that an acquisition of assets coupled with an agreement not to compete might be within Commission jurisdiction. 460 F.2d at 943-46. The court in *American Mail Line*, however, stated that

> [r]egardless of the Commission's jurisdiction over agreements *not to compete*, it does not follow that section 15 confers jurisdiction over the undertaking to compete in this case. An agreement *not* to compete is precisely the type of arrangement which Congress intended to regulate by section 15.

503 F.2d at 169 (emphasis original).

32. *Id.* at 170.

33. *See* note 2 *supra*.

34. The difficulty with this argument is that it would allow the Commission to take jurisdiction over one agreement, transform the agreement into an outright merger and then approve the outright merger. This circuitous procedure would enable the Commission to escape the Supreme Court's holding in *Seatrain* that the Commission lacks jurisdiction over outright mergers.

Id. at 171. *See also* California v. FPC, 369 U.S. 482, 490 (1962).

antitrust laws.[35] Where Congress has explicitly granted an agency the authority to exempt certain approved agreements from the antitrust laws, courts are not likely to allow the agency to extend its jurisdiction to other forms of agreement.[36] Since section 15 did not specifically grant merger jurisdiction to the FMC,[37] the court looked to the legislative history[38] and the antitrust laws to determine that the FMC was asserting jurisdiction it did not possess.

The Supreme Court in *Seatrain* observed that statues creating exemptions from the antitrust laws must be strictly construed.[39] The Court had stated earlier that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[40] In addition, the District of Columbia Circuit has reasoned that antitrust policies have assumed such significance in the statutory scheme and economic functioning of the country that a finding of congressional intent to grant limited exemptions from the antitrust laws is not readily implied.[41] Consequently, it is unlikely that Congress would have exempted mergers without indicating that they were included in the term "agreement."[42] The strict construction of exemption statutes called for by *United States v. McKesson & Robbins, Inc.*,[43] the importance of the antitrust laws,[44] and the means that could

35. 46 U.S.C. § 814 (1970).

36. *See* Hughes Tool Co. v. TWA, 409 U.S. 363, 402 (1973) (Burger, C.J., dissenting).

37. *See* note 10 *supra* and accompanying text.

38. *See* note 11 *supra* and accompanying text.

39. 411 U.S. at 733; *see* United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956) (large drug manufacturer entered into illegal agreements not exempted from Sherman Act § 1 by the Miller-Tydings Act or the McGuire Act). Although *McKesson* does not deal with a problem in a regulated industry, the requirement of strict statutory construction is germane to the issue in *American Mail Line.*

40. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1962) (footnotes omitted).

41. Hecht v. Pro-Football, Inc., 444 F.2d 931, 935 (D.C. Cir. 1971) (action against Washington Redskins and District of Columbia Armory Board on restrictive lease agreement).

42. *See* Seatrain Lines, Inc. v. FMC, 460 F.2d 932, 937 (D.C. Cir. 1972), *aff'd*, 411 U.S. 726 (1973). The Court in Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973) stated:

> When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.

43. 351 U.S. 305 (1956), *see* note 39 *supra.*

44. *See* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1965):

be used to gain exemption from these laws[45] force the conclusion that section 15 was not intended to confer merger jurisdiction upon the FMC.[46]

Either a court decision overruling *Seatrain* or congressional action amending section 15 would be necessary to grant the FMC jurisdiction over mergers. Even then "the FMC would be bound to weigh the welfare of the shipping industry against the purported anticompetitive effects of the merger."[47] Without a change in the law, the FMC will only be able "to intervene on behalf of the 'industry viewpoint' "[48] in any antitrust action attacking a shipping industry merger. It has been suggested that few shipping industry mergers "will survive scrutiny by the courts in antitrust proceedings brought by the Justice Department."[49] By holding that section 15 does not grant merger jurisdiction to the FMC, the courts[50] have effectively prevented the expansion of the Commission's jurisdiction and limited the role of the FMC in the process of balancing the needs and policies of the regulatory scheme with the policies behind the antitrust laws. Unless the Commission can clearly demonstrate that merger jurisdiction is necessary for its regulation of the shipping industry, Congress should follow the courts' holdings and not change the statute.

"We have long recognized that the antitrust laws represent a fundamental national economic policy. . . ."

45. 503 F.2d at 164. "Otherwise an outright merger or sale of assets could be structured to include some ongoing aspect for the sole purpose of obtaining antitrust shelter under § 15." *Id.*

46. One commentator has stated that

> [a] frequent complaint of scholars has been that a regulatory agency tends to adopt the viewpoint of the industry and regulation becomes lax. This criticism has particular applicability to the shipping industry in view of the history of desultory regulation.

Comment, *Accommodation of Antitrust Law and Ocean Shipping Regulation*, 4 TEXAS INT'L L.J. 393, 424 (1968) (footnote omitted), *citing* Loevinger, *Regulation and Competition as Alternatives*, 11 ANTITRUST BULL. 101, 131 (1966); Note, *Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination*, 58 COLUM. L. REV. 673, 697 (1958). This viewpoint clearly supports the conclusion reached by the courts. *But see* FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 253 (1968) (Harlan, J., concurring); Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46 (1962).

47. Note, *supra* note 6, at 288.

48. Seatrain Lines, Inc. v. FMC, 460 F.2d 932, 948 (D.C. Cir. 1972).

49. Note, *supra* note 6, at 291.

50. FMC v. Seatrain Lines, Inc., 411 U.S. 726 (1973), *aff'g* 460 F.2d 932 (D.C. Cir. 1972); American Mail Line, Ltd. v. FMC, 503 F.2d 157 (D.C. Cir.), *cert. denied*, 95 S. Ct. 656 (1974); United States v. R.J. Reynolds Tobacco Co., 325 F. Supp. 656 (D.N.J. 1971), *cert. denied*, 410 U.S. 964 (1973). *Contra*, Matson Navigation Co. v. FMC, 405 F.2d 796 (9th Cir. 1968).