Southwest Airlines v. High-Speed Rail: More Powerful Than a Locomotive

Kathy Fox Powell

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SOUTHWEST AIRLINES V. HIGH-SPEED RAIL: MORE POWERFUL THAN A LOCOMOTIVE?

Kathy Fox Powell

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I. INTRODUCTION

THE PASSENGER RAIL revival is in full swing in the United States. In the 1890s, U.S. street railways carried two billion passengers a year, over two times the number carried in the rest of the cities of the world combined.1 During the first third of this century, the American fascination with private automobiles, the federal government's disinvestment in the rail industry and intense focus on the highway system, and fierce competition from the automobile industry resulted in the country's rail infrastructure being neglected, abandoned, and in some cases destroyed.2 With the increasing traffic congestion, airport congestion, and environmental concerns, states, cities, and the federal government are once again looking at rail transportation, especially high-speed rail systems or "maglev" systems, as viable solutions, or at least alternatives, to many of the country's transportation problems.3

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2 Id.
3 Id. High-speed rail is defined by Joseph Vranich, president and chief executive officer of the High-Speed Rail-Maglev Association, as a train service capable of competing with aviation in short-to-medium-distance corridors (typically using speeds of 150 to 200 miles per hour). Dean Patterson, Funding High-Speed Rail: There Has Got to Be a Government Role, Bond Buyer, July 7, 1994, at 6. "Maglev" is short for magnetic levitation, where magnetic force actually suspends the train a few inches above the
A. How Great is the Competitive Threat?

High-speed rail is especially well-suited to, and capable of competing with airlines for travellers of, short-to-medium-distance trips of approximately 500 miles. In the opinion of rail industry experts, any 500-mile trip that takes three hours or less by rail provides realistic competition to flying the same distance. Business travel of this nature is “at the heart of the slow but steady move toward high-speed rail service in the United States.” Outside the United States, rail ticket prices run slightly lower than the cost for air travel along the same routes. A World Market Forecast issued in September 1994 by Deutsche Aerospace predicted that high-speed rail development by the year 2010 could cut the number of aircraft delivered to European airlines by seven percent. A recent study by SC Stormont Corporation, commissioned by Air Canada and CP Rail, indicated that as many as half of the 1500 air travellers surveyed would likely switch to high-speed rail given the option.

Advantages of high-speed rail over highway and air transport, if investments in regular train service are adequate, can provide a useful complement to intercity rail networks. Many high-speed train trips, considered ideal for distances of 200 to 1000 kilometers, are fast enough to compete with air travel because high-speed trains deliver passengers directly downtown instead of to an airport. The bullet train has almost completely displaced air travel between Nagoya and Tokyo. During the first ten years of Train a Grande Vitesse (TGV) service between Paris and Lyon, the number of rail passengers increased 75 percent, while air travel between the same two cities fell by 48 percent. Notably, some airlines in Europe are now lobbying for more rail service in order to free overloaded terminals of short-trip passengers. Lowe, supra note 1, at 51.


Id.


Jeff Heinrich, High-Speed Train Could Clip Airline Wings, Study Suggests, MONTREAL GAZETTE, Jan. 14, 1994, at D3. For comparative statistics on high-speed rail technol-
B. **Southwest Wages War on High-Speed Rail in Texas**

The airlines threatened most severely, therefore, are those that serve this short-to-medium distance market, such as Southwest Airlines. Southwest is uniquely situated in this conflict; most other airlines competing for short-to-medium distance passengers prefer the more lucrative longer trips, and some airlines view the development as potential relief from airport congestion.\(^9\) Furthermore, the TGV-proposed routes were the same cities served by Southwest—the Texas Triangle: Dallas-Fort Worth, Houston, Austin, and San Antonio. Predictions made during Southwest’s battle against high-speed rail claimed the proposed Texas TGV rail system would redirect sixty percent of local air passengers to the rail system.\(^10\) After the Texas legislature created the Texas High-Speed Rail Authority in 1989, Southwest Airlines attacked on three major fronts: opposing Congress’ ultimately successful attempt to allow the use of tax-exempt bonds for high-speed rail development,\(^11\) encouraging Texas’ legislative prohibition of the use of state money for the high-speed rail program, and challenging administratively and judicially the creation of the Authority and award of the franchise in 1991 to the Texas TGV Consortium. Although unsuccessful in this third attack, Southwest is credited with causing delays which contributed to Texas TGV’s failure to meet its deadlines under the franchise...
agreement. In fact, most commentators give Southwest the lion's share of the "credit" for killing this opportunity for high-speed rail in Texas.

C. SOUTHWEST LOSES THE BATTLE BUT WINS THE WAR—FOR NOW

This comment is about one of the battles Southwest lost in its "down and dirty" fight to stop high-speed rail from encroaching on its captive market. The Texas Court of Appeals affirmed the dismissal, on standing grounds, of Southwest's administrative and constitutional challenges to the creation of the Authority and award of the franchise, and in September 1994 the Texas Supreme Court denied Southwest's application for writ of error in both cases. The comment will explore the standing issues facing the airlines as the high-speed rail revival slowly spreads through the states, and it will reveal a possible mistake that Southwest will be careful not to make the next time.

II. BACKGROUND

A. THE TEXAS HIGH-SPEED RAIL ACT

By enactment in 1989 of the Texas High-Speed Rail Act (Act), the Texas legislature created the Texas High-Speed Rail Authority (Authority), as an agency of the state to be administered by an eleven-member board of directors.

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12 John Williams, TGV Files Plea to Keep Rail Project, HOUS. CHRON., Apr. 1, 1994, at 26 (quoting Ace Pickens, Texas TGV's lawyer).

13 "What shot down the TGV and its French technology—aside from a superb bit of maneuvering by Southwest Airlines, which was afraid of losing its Texas cash cow flights—was its foolish pledge to build the thing without tax money." Jim Barlow, Bullet Train's Mortally Wounded, HOUS. CHRON., Apr. 17, 1994, at 1. Gil Carmichael, a federal railroad commissioner in the Bush Administration who is now with the Morrison-Knudsen Corporation, major stockholder of Texas TGV, attributed the failure to Herb Kelleher's political influence. Scott Pendleton, Texas Looks to State for High-Speed Rail Funding, CHRISTIAN SCI. MONITOR, Jan. 14, 1994, at 10. In 1991, Herb Kelleher reacted to the threat of competition from high-speed rail by publicly threatening to move Southwest from Dallas' Love Field Airport. Scott Williams, Southwest Mulls Expansion, DALLAS BUS. J., Jan. 28, 1994, at 3.

14 Joan M. Feldman, Seriously Successful; Southwest Airlines; Company Profile, AIR TRANSPORT WORLD, Jan. 1, 1994, at 60.

The sole purpose of the Act was to authorize the award of a high-speed rail franchise for the state if, in the Authority's judgment, such an award was "for the public convenience and necessity." The Authority would further facilitate the planning, design, and construction of the facility by exercising its powers of eminent domain and adopting rules and management policies.

The Authority promulgated its rules in February of 1991 and appointed an examiner to conduct the proceedings in accordance with the Administrative Procedure and Texas Register Act (APTRA). The proceedings culminated in an extended hearing on the franchise in March and April of 1991, and, almost a month and a half after the hearings concluded, the Board awarded a high-speed rail franchise to the Texas TGV Consortium.

B. THE LITIGATION

Southwest was admitted as a party to the agency proceedings well before the hearing began. After the examiner denied its "discovery" request on the basis of the promulgated rules, Southwest filed its first action in district court (First Action) claiming the Board was not established in accordance with the state constitution, nor were the rules adopted in compliance with the APTRA. The relief requested was an injunction against the validity of the rules and the actions of the Board, and a declaration that the Act was un-

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16 Id. § 3.4.
17 Id. § 2(a).
18 Id. § 6(b).
20 The First Action, however, was the latter to be heard by the court of appeals. See Southwest Airlines Co. v. Texas High-Speed Rail Auth., 863 S.W.2d 125 (Tex. App.—Austin 1993, writ denied).
constitutional and the rules and actions of the Board invalid.

After the hearing concluded and the Board issued its final order awarding the franchise, the examiner overruled Southwest's motion for rehearing in the agency. In August of 1991, Southwest filed its second action (Second Action) in district court requesting judicial review of the final order on grounds that the proceedings were fundamentally unfair, the Board had been illegally constituted, and the rules were invalid.

The district court eventually dismissed both suits for want of jurisdiction and, in separate appeals decided in June and August of 1993, the Texas Court of Appeals in Austin affirmed both trial court dismissals. In September of 1994, the Texas Supreme Court denied Southwest's application for a writ of error.

III. SCOPE OF THIS COMMENT

This comment will not attempt to address every issue and point of error introduced by Southwest during the course of the litigation. Specifically, no consideration will be given to the constitutionality of the Act, the validity of the Board and the rules, or the fundamental fairness of the actual proceedings from a due process standpoint. Instead, the comment will focus on why Southwest lacked standing to challenge the final order of the Board granting a high-speed rail franchise to Texas TGV.

Generally, the simplest way to have "standing" to challenge or enjoin a state agency order is to have statutory authority. Many statutes expressly grant a right to judicial review of agency action to "persons aggrieved," "persons ad-

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21 Southwest Airlines Co. v. Texas High-Speed Rail Auth., 867 S.W.2d 154 (Tex. App.—Austin 1993, writ denied) [hereinafter Southwest II].

22 The basic issue is one of "standing to sue." In the context where governmental action is challenged, the issue is also referred to as whether or not the court "has jurisdiction."

versely affected,” or to a broader sector such as “any taxpayer,” or “any citizen.”

In the absence of an express statutory right of review, common law and procedural due process provide, to varying degrees, bases for enjoining the operations of competing enterprises. The constitutional basis usually rests in the finding of a property or personal right, vested in the plaintiff, which is entitled to protection by a court of equity. Common law theories are the special injury theory and the public protection theory. The special injury theory is similar to a nuisance action in that the plaintiff must show a special injury or damage to himself, as opposed to the public in general. For the public protection theory, the plaintiff is not required to show special injury to himself but is granted standing as a protector of the public interest.

The distinctions between these theories are often blurred, sometimes beyond recognition. For example, statutory authority for “aggrieved persons” often draws on the property right theory or the special injury theory to determine whether a party is “aggrieved.” The broad statutory right given to “any taxpayer” or “any citizen” may have originated in the public protection theory, because the plaintiff is not required to show any special individual injury to avail himself of the statutory right to judicial review.

Southwest proposed an additional theory of standing, that of implied statutory right based on the language of the Act. The proposition is that the requirement of finding a public convenience and necessity is an express recognition by the legislature of the interest of competitors. If a statute has such a requirement, the theory would endow a mere

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26 Id. at 15.
27 Id. at 13.
28 Id.
competitor with the necessary standing, requiring no further interest to be shown. Southwest agreed and conceded that, generally, a business enterprise has no equitable right of protection from competition that may adversely affect it. Furthermore, there is some authority that a party lacks standing to enjoin a competitor's unlicensed or illegal activities unless the party also has a property right or a special injury. Southwest, however, asserted that freedom from unlawful competition is a property right in itself, and as such, it alone justifies injunctive relief.

In the discussion that follows, the author will attempt, through analysis of the case law addressing these issues, to determine the merits of Southwest's assertions as to its position under the relevant statutes, its claim to property rights which give rise to an inherent constitutional right of appeal, and the right to enjoin illegal competition as an independent property right. All of the theories asserted by Southwest fail to provide the necessary standing to challenge the Board's order, despite the uncontested assertion that Southwest would suffer great expense as a result of the operation of the proposed high-speed rail system. For future challengers, however, the Austin court of appeals and the Texas high court by its denial of writ left open a window of statutory construction.

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29 Brief of Appellant at 38-39, Southwest Airlines Co. v. Texas High-Speed Rail Auth., 867 S.W.2d 154 (Tex. App.—Austin 1993, writ denied) (No. 3-92-151-CV) [hereinafter Southwest Brief II]. This opinion was substituted by the court for the withdrawn opinion of June 9, 1993, reported at 1993 Tex. App. LEXIS 1633.

30 Southwest Brief II, supra note 29, at 33-34.

31 An exception to this general rule arises in the case of an exclusive franchise where the owner has a right to enjoin any encroachment of his franchise. See Lind, supra note 23, at 19.

32 Id. at 12-13.

33 Southwest Brief II, supra note 29, at 40-46.

34 Southwest Brief I, supra note 10, at 22.

35 See infra note 50 and accompanying text.
III. STANDING BY STATUTORY AUTHORITY

A. GENERAL JURISDICTION

Article V, Section 8 of the Texas Constitution grants general jurisdiction to district courts "of all actions, proceedings, and remedies, except in cases where . . . jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." Notwithstanding the general jurisdiction of a district court, an administrative order is not necessarily appealable to a district court because of its statutory origin. Where such jurisdiction is conferred on an administrative agency, a district court's jurisdiction is limited to that prescribed or allowed by the law underlying that agency's power. No other jurisdiction exists unless the action violates constitutional due process or the state waives its immunity. In circumstances where the agency has acted beyond its authority, the district courts may also review the actions of an administrative agency even though no statute vests in it special jurisdiction to do so. These inherent circumstances will be reviewed later in this comment.

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57 Southwest II, 867 S.W.2d at 157. The court, in its withdrawn opinion of June 9, 1993, described these exceptions as when the order "violates a constitutional right or adversely affects a constitutional property right." Southwest Airlines Co. v. Texas High-Speed Rail Auth., No. S-92-151-CV, 1993 Tex. App. LEXIS 1633, at *4 (Tex. App.—Austin June 9, 1993) [hereinafter Southwest I], opinion withdrawn, substituted opinion, 867 S.W.2d 154. This particular phraseology is from Stone v. Texas Liquor Control Bd., 417 S.W.2d 385, 385-86 (Tex. 1967) (holding statutory authority for private citizen to contest grant of beer license before the county judge is not authority for contestant to appeal county judge’s decision to the courts); see also Brazosport Sav. & Loan Ass'n v. American Sav. & Loan Ass'n, 342 S.W.2d 747 (Tex. 1961). The court drew upon language in a slightly more recent Texas Supreme Court decision in its substituted opinion. See Steele v. City of Houston, 608 S.W.2d 786, 791 (Tex. 1980) (holding the constitution’s authorization of compensation for destruction of property is a waiver of governmental immunity when such destruction is for public use); Pickell v. Brooks, 846 S.W.2d 421, 422 (Tex. App.—Austin 1992, writ denied) (holding breach of contract claim against agency barred by governmental immunity absent consent by legislature to be sued).

59 See infra part IV.A.
The concept of statutorily limited review has as its underlying basis the sovereign immunity enjoyed by the state and passed on to the agencies created by the state. Generally, therefore, an administrative order issued by an agency of the state cannot be challenged unless the legislature has expressly agreed that it can be challenged. In other words, the state cannot be sued unless it has given its permission to be sued or has waived its governmental immunity.

Texas has long recognized that if a cause of action and remedy for enforcement have their basis in a statute instead of the common law, those statutory provisions are mandatory and exclusive and must be strictly complied with in order to maintain the action. The right to appeal from an administrative order to the courts is not an inherent right and may be withheld or granted by the legislature in its discretion.

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41 Atchison, T. & S.F. R.R. v. Texas State Dep't of Highways & Pub. Transp., 783 S.W.2d 646 (Tex. App.—Houston [14th Dist.] 1989, no writ); Public Util. Comm'n v. City of Austin, 728 S.W.2d 907 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

42 Hosner, 1 Tex. at 769; see also, Pickell v. Brooks, 846 S.W.2d 421, 424 (Tex. App.—Austin 1992, writ denied). An exception for this premise is agency action outside the scope of its legislative authority. Public Util. Comm'n, 728 S.W.2d at 911; see also Bullock v. Marathon Oil Co., 798 S.W.2d 353, 361 (Tex. App.—Austin 1990, no writ).

43 Texas Catastrophe Property Ins. Ass'n v. Council of Co-Owners of Saida II Towers Condominium Ass'n, 706 S.W.2d 644, 646 (Tex. 1986) (barring judicial review because of noncompliance with provision in Texas Insurance Code requiring aggrieved party to name State Board of Insurance as a defendant within time period provided by APTRA); see also Grounds v. Tolar Indep. Sch. Dist., 707 S.W.2d 889, 891 (Tex. 1986); Texas Dep't of Pub. Safety v. Morris, 436 S.W.2d 124 (Tex. 1968); Alpha Petroleum Co. v. Terrell, 59 S.W.2d 364, 367-68 (Tex. 1933); Mingus v. Wadley, 285 S.W. 1084, 1087 (Tex. 1926).

B. THE TEXAS HIGH-SPEED RAIL ACT

1. Express Authority Under the Act

There is no express authority in the Act for a person to obtain judicial review of decisions made under authority of the Act. Section 6A of the Act provides that the proceedings, however, are governed under the provisions of APTRA.

2. Implied Authority Under the Act

a. Implied Right Through Waiver of Immunity

The Act provides that the Board "may sue and be sued on behalf of the authorized entity." The Texas Supreme Court held, in Missouri Pacific Railroad v. Brownsville Navigation District, that a "sue or be sued" clause in a statute is sufficient legislative consent to waive the state’s immunity. The Southwest II court implied strongly that Southwest might have succeeded in establishing a limited waiver of immunity if only it had sued the Board instead of the Authority.

Several other courts of appeal, however, have a different interpretation of the "sue and be sued" clause. The court

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45 Southwest II, 867 S.W.2d at 157.
47 Id. § 10(a).
48 453 S.W.2d 812, 814 (Tex. 1970) (holding was directed to a navigation district created under a statute that stated the district could sue and be sued in all courts of the state). But see Jackson v. City of Galveston, 837 S.W.2d 868, 871 (Tex. App.—Houston [14th Dist.] 1992, writ denied); Townsend v. Memorial Medical Ctr., 529 S.W.2d 264, 267 (Tex. Civ. App.—Corpus Christi 1975, writ ref’d n.r.e.) (holding that an enabling statute that grants such a right does not waive immunity from suit). The Southwest II court clearly disagreed with the Jackson and Townsend holdings. See Southwest II, 867 S.W.2d at 157 n.5; see also Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589 (Tex. App.—Austin 1991, writ denied).
49 The type of immunity discussed here is immunity from suit without consent, although there is no question that the state is liable. This is distinguished from immunity from liability even though consent to the suit is granted. Missouri Pacific, 453 S.W.2d at 813.
50 Southwest II, 867 S.W.2d at 157-58. The issue of waiver of immunity was not argued or briefed by Southwest. According to the court, the issue arose for the first time in a footnote in Southwest's motion for rehearing. The court's discussion then appeared in the substituted opinion after the hearing on the motion.
51 See supra note 48; see also Childs v. Greenville Hosp. Auth., 479 S.W.2d 399, 401 (Tex. Civ. App.—Texarkana 1972, writ ref’d n.r.e.).
in *Townsend v. Memorial Medical Center*\(^5^2\) rejected the plaintiff's waiver of immunity argument against a county hospital despite a statutory provision\(^5^5\) that the Board of Managers of a county hospital district has the power and authority to sue and be sued.\(^5^4\) *Townsend* was raped by a hospital orderly while the orderly was transferring her to another floor of the hospital. One of *Townsend*’s theories of liability was breach of an implied contract. The trial court found, however, that there was no contract. This finding could well explain the subsequent treatment of this case by the supreme court—refusal to address the immunity issue because the underlying theory of liability failed.\(^5^5\) Numerous courts have criticized the *Townsend* holding by the court of appeals.\(^5^6\)

In *Childs v. Greenville Hospital Authority*,\(^5^7\) the plaintiff argued that the statutory provision allowing the hospital authority to sue and be sued created a waiver of governmental immunity by the authority. The court summarily dismissed the argument,\(^5^8\) relying on a supreme court holding that a water improvement district was a political subdivision of the state and therefore had the same immunity privileges as a county.\(^5^9\) As in *Townsend*, however, there were other reasons the supreme court chose not to reverse the trial court’s decision.

\(^5^2\) 529 S.W.2d 264 (Tex. Civ. App.—Corpus Christi 1975, writ ref’d n.r.e.).


\(^5^4\) *Townsend*, 529 S.W.2d at 267.

\(^5^5\) Id.

\(^5^6\) See *e.g.*, Delaney v. University of Houston, 835 S.W.2d 56, 63 n.6 (Tex. 1992) (Doggett, J., concurring); Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 593 n.3 (Tex. App.—Austin 1991, writ denied); Industrial Constr. Management v. DeSoto Indep. Sch. Dist., 785 S.W.2d 160, 164 (Tex. App.—Dallas 1989, no writ).

\(^5^7\) 479 S.W.2d 599 (Tex. Civ. App.—Texarkana 1972, writ ref’d n.r.e.).

\(^5^8\) Id. at 401.

\(^5^9\) See Bennett v. Brown County Water Improvement Dist. No. 1, 272 S.W.2d 498 (Tex. 1954).
In *Jackson v. City of Galveston*, the court rejected plaintiff’s invitation to judicially abrogate the entire doctrine of sovereign immunity. The plaintiff argued that the language in the Texas Local Government Code stating that a city could sue and be sued constituted an implied waiver of immunity. The court declined to do away with sovereign immunity completely but confirmed that implied waiver has been denied in "analogous" cases (citing *Townsend* and *Childs*). The court further explained that a municipality’s capacity to sue and be sued was in place long before the legislature established the statutory exceptions. In view of the holding in *Missouri Pacific* and the disposition of *Townsend* and *Childs*, it appears quite possible the supreme court will again clarify the effect of a "sue and be sued clause" in its review of *Jackson*.

**b. The Public Convenience and Necessity Requirement as Implied Right to Judicial Review**

Southwest argued in its brief in the Second Action that, because a finding of public convenience and necessity is required before the award of a franchise, any competitor may challenge an order made as a result of such a finding. The rationale is that if the legislature requires the agency to consider the effect of the action on competitors, then the legislature must intend those competitors to have a right to object to the agency’s actions. Southwest cited *Lake Trans-***

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60 897 S.W.2d 868 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
61 Id. at 871.
62 Id.
63 In fact, the Texas Supreme Court granted a hearing in *Jackson* but withdrew the writ as of January 12, 1994.
64 Southwest Brief II, *supra* note 29, at 38–39 (arguing that "[t]he Legislature specifically recognized the interest of competitors since it required the Authority to find that the grant of a franchise is in the public convenience and necessity before any award could be made"). The court did not address this argument in either opinion.
65 An example of a statutory scheme which expressly provides for consideration of the competitive effect is the Motor Carrier Act, *Tex. Rev. Civ. Stat. Ann.* art. 911b, §§ 5a(d) and 6(c) (Vernon Supp. 1995). The Commission’s grant of certificate authority is based in part on a determination that competitors will not be adversely affected by the grant of additional authority to the applicant. See also *Lewis v. Metropolitan Sav. & Loan Ass’n*, 550 S.W.2d 11, 13 (Tex. 1977) (suggesting that courts...
port, Inc. v. Railroad Commission, as a primary source for this premise. Lake Transport, while offering an explanation of the role of a competitor in considering public convenience and necessity, does not stand for the proposition that a competitor is automatically awarded standing to appeal an order any time a finding of public convenience and necessity is required.

Lake Transport, Inc. held an inactive contract carrier permit to transport products for United States Gypsum Company. The company appealed a Railroad Commission order authorizing a competitor, Coastal Transport Company, Inc., effectively to perform the same service for United States Gypsum that Lake Transport had performed. Lake Transport, however, did not bring its appeal as a competitor challenging the public convenience and necessity finding requirement. Rather, Lake Transport first had to satisfy the statutory requirements of “any motor carrier or

should “see that justice is administered to competing parties by governmental agencies”); and Statewide Convoy Transps., Inc. v. Railroad Comm’n, 753 S.W.2d 800, 806 (Tex. App.—Austin 1988, no writ).


The Railroad Commission cases seem particularly appropriate sources since the High-Speed Rail Act provides that, when the Authority as a separate agency is effectively dissolved, its powers are transferred to the Railroad Commission. The Act makes it clear, however, that those powers are to be applied (and challenged) only in accordance with the Act. TEX. REV. CIV. STAT. ANN. art. 6674v.2, § 3 (Vernon Supp. 1995). The transfer of power to the Railroad Commission, therefore, does not broaden the current base of judicial review of its decisions.

The Railroad Commission, in deciding whether the public convenience and necessity require a proposed common carrier service, must consider the competitive effect upon presently operating carriers. Those carriers, therefore, have a right to object to new service on the grounds that it is not required. The statute also gives the existing carriers a right of appeal from an adverse order of the Commission. Lake Transport, 505 S.W.2d at 784-85.

See John F. Williams, Standing to Obtain Judicial Review of Agency Decisions, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED ADMINISTRATIVE LAW COURSE N, N-9 & N-10 (1991) (classifying Lake Transport and two similar pre-APTRA cases as standing for the proposition that “being a potential competitor of an applicant successfully obtaining transportation authority is not enough to obtain standing to seek judicial review,” id. at N-10).

The permit, issued by the Railroad Commission, was inactive because its contract with United States Gypsum Company had been validly terminated. Such a permit necessarily followed the service contract, and an amendment to the permit would have been required for Lake Transport to provide such service.
other party at interest." The Supreme Court of Texas agreed with the lower courts' decision that Lake Transport did not satisfy the statutory definition of a party at interest and was thus denied standing to challenge the order. Justice Steakley further emphasized the primary role of the express statutory right of appeal contrasted with any right implied by the public convenience and necessity requirement in the following statement:

Necessarily, the *right of appeal provided by the statute* presupposes that an appealing carrier is authorized to perform, and is performing, the character of service authorized by the Commission; thus the appealing carrier is in a position to show not only that the new service will impair its existing service by the loss of sustaining revenues, but also by reason of the availability of the existing services, there is not a public need for the newly authorized service.

Southwest was also a potential competitor of the Texas TGV. But Southwest and Texas TGV do not derive their authority to transport passengers to Texas cities from the same source; that is, Southwest is not performing "the character of service authorized by" the Authority. Consequently, Southwest is much less likely than Lake Transport to find express statutory standing under a similar definition of a party in interest.

Southwest may find more support for its standing argument in the dissent of *Lake Transport*. Justice Pope, joined by two other justices, would ignore the fact that Lake Transport's permit had expired at the time of its appeal, would recognize the permit as a right "not owned by the public

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71 Tex. Rev. Civ. Stat. Ann. art. 911b, § 20 (Vernon 1964) (Texas Motor Carrier Act). A "party at interest" was required to be operating over the same route and transporting the same class of commodities or persons as that proposed by the applicant. *Lake Transport*, 505 S.W.2d at 789.

72 Id. at 785.

73 Id. (emphasis added).

74 Justice Aboussie, in her initial opinion denying Southwest standing in its Second Action, noted that "Southwest does not hold a franchise from the Authority and does not assert that the Authority regulates any business of Southwest." *Southwest I*, 1993 Tex. App. LEXIS 1633, at *10.
generally," and would find that "[e]ven a mere competitive interest of a carrier is sufficient." The dissent would rely on *Alton Railroad Co. v. United States*, as a controlling decision in which the competing parties were a group of railroads engaged in transportation of new cars and an individual engaged in new car "driveaway service." *Alton* is distinguishable, however, because both competitors were under authority by the Interstate Commerce Commission.

Southwest also cited three earlier sources for this premise: *Brown Express, Inc. v. Railroad Commission*, *Railroad Commission v. Jackson*, and *Railroad Commission v. Red Arrow Freight Lines*. All three cases involved holders of motor carrier certificates that require public convenience and necessity. None of the three cases, however, justifies competitor standing on that basis. Justice Pope (the dissenter in *Lake Transport*) took the opportunity in *Brown Express* to affirm a competing carrier’s standing on the basis that it operated over the same routes encompassed in the challenged certificate; *ergo*, it was an interested party whose complaint should be heard. The competitor’s standing, however, was not grounded in the public convenience and necessity finding. In *Jackson* the requested transfer of certificates had the actual effect of creating new service; therefore, a

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75 Lake Transport, 505 S.W.2d at 786 (Pope, J., dissenting). Lake Transport’s contract (and therefore its permit) was active when Coastal applied to the Railroad Commission for the competing permit. In fact, had the hearing not been postponed a second time, Lake Transport’s permit would have been active when the challenged order was issued.

76 Id.

77 315 U.S. 15 (1942). In *Alton* the Supreme Court confirmed standing of several railroads to protest a railroad commission order awarding a certificate to a competing trucker, using "party in interest" criteria of the Interstate Commerce Act. *Id.* at 19-20.

78 Southwest Brief II, supra note 29, at 39.

79 415 S.W.2d 394 (Tex. 1967).

80 299 S.W.2d 266 (Tex. 1957).

81 96 S.W.2d 735 (Tex. Civ. App.—Austin 1936, writ ref’d).

82 Brown Express, 415 S.W.2d at 396. The complaint was that the certificates were dormant and subject to revocation, and therefore not properly transferable. The Railroad Commissioner flatly refused to hear any evidence of dormancy, an incorrect decision according to the Texas Supreme Court.

83 In fact, the court held that, since the contested order was for transfer of *existing* certificates, no new finding of public necessity was necessary. *Id.* The offer of evis-
new finding of public convenience and necessity was required. 84 Most significantly, however, standing of a competitor was not an issue in *Jackson*, since there was no competitor present. 85

Perhaps the most relevant case to Southwest's premise that a public convenience and necessity requirement alone creates a basis for competitor standing is *Red Arrow*. 86 In *Red Arrow* a motor freight line and four rail freight lines, all properly certificated by the Railroad Commission, challenged a rerouting order by the Commission as to a competing trucking freight line. The complaint was failure by the Commission to find the required public convenience and necessity. Both the trial court and the appellate court agreed and annulled the Commission's order. At first glance, *Red Arrow* appears to support Southwest's argument: "The statute makes it mandatory . . . to give notice to interested parties and thereafter to hear and determine . . . the issue of convenience and necessity . . . ." 87 A closer reading, however, reveals that the standing of the competitors was not an issue here either. 88

Understood in the context of the aforementioned cases, the closing statement of Southwest's argument, "[t]here can be no question that the statutory scheme contemplates the consideration of competitive effect in the decision

dence by the competitor that there was no such necessity was therefore denied a hearing. *Id.*

84 *Jackson*, 299 S.W.2d at 269.

85 The only parties to this action were the transfer applicant and the Railroad Commission, which denied the transfer on the basis of no public convenience and necessity.


87 *Id.* at 739.

88 The standing issue was apparently raised quite late in the controversy. The court noted that the record reflected no question raised as to the statutory interest of the competitors, but that "the sole issue . . . was . . . [w]hether [the Commission was required] to hear evidence and find facts essential to support a certificate of convenience and necessity." *Id.* Even if there had been a standing question, the court explained that all complaining competitors had current valid certificates from the Commission and were in fact operating over the very lines involved in the rerouting order. *Id.*
whether to award a franchise," is probably completely accurate as to the agency hearing process, but it is nondeterminative as to the standing issue facing Southwest Airlines. Furthermore, even if a public convenience and necessity requirement were determinative of standing to contest a final order, no case found has gone beyond the circle of a common authority (i.e., competitors whose activities are governed under the same statutory authority). Southwest simply cannot get around the fact that it carries on its business completely free of any required compliance with Texas High-Speed Rail Authority or Railroad Commission rules.

c. Southwest as a Competitor of High-Speed Rail

The competitors involved in a public convenience and necessity controversy are generally in the same industry or regulated by the same body. The cases discussed earlier in this comment involve controversy between competing motor carriers and railways, among themselves and against each other. Texas case law is pervaded by judicial intervention in the forces of the marketplace in the common carrier industry. Industries outside the transportation arena, such as health care, banking, and travel services, also face the issue of standing among competitors, as this comment will discuss. Of significance is the legislative intent to regulate those competitive forces by requiring the holding of an agency-granted certificate, license, or franchise. There follows naturally a "right" of the certificate holder to be protected from unauthorized competition by a non-certificate holder.

89 Southwest Brief II, supra note 29, at 39-40.
90 See supra notes 77-81 and accompanying text, for discussion of Red Arrow and cases in which the agency has exceeded its authority. The standard for interested competitors in such cases is much less stringent. See infra note 129 (discussing the Stone court's holding that even though statute gave private citizen the right to protest to county judge, the right to appeal to the court system did not necessarily follow).
91 See infra notes 205-211 and accompanying text.
The law has not addressed, however, situations in which the relationship between the competitors is analogous to air transportation and high-speed rail systems. In distinct contrast to these industries, such as common freight carriers which the legislature purposely protects from competition through the regulatory system, the airline industry is regulated through the Airline Deregulation Act of 1978[92] which encourages competition within the industry. The statute provides that it is in the public interest to place "maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital."[93] The House Conference Report confirms that it is in the public interest to allow the airline industry to be governed by the forces of the marketplace.[94]

The recent federal legislation, the High-Speed Rail Development Act of 1993,[95] would require a designation of a high-speed rail corridor to consider such criteria as "the effect of the proposed high-speed rail service on the congestion of other modes of transportation,"[96] and "the effect of the proposed high-speed rail service on other transportation services in operation or under development."[97]

[93] Id. § 1302(a)(4) (1988).
[95] The legislation authorizes the Secretary of Transportation to undertake and facilitate research of steel-wheel-on-rail technology, to designate "high-speed rail corridors" throughout the country, and to subsidize certain aspects of high-speed rail service developed within a designated high-speed rail corridor. H.R. 1919, 103d Cong., 1st Sess. (1993); see also S. 839, 103d Cong., 1st Sess. (1993) (substantially the same as House Bill 1919). In further support of high-speed rail development, legislation has been passed which amends the Internal Revenue Code of 1986 to remove certain high-speed rail facility bonds from the current volume ceiling for state tax-exempt bond programs. H.R. 5653, 103d Cong., 1st Sess. (1993); S. 436, 103d Cong., 1st Sess. (1993). This amendment, fiercely opposed by Southwest Airlines, allows high-speed rail to compete on an equal basis with airlines in their ability to raise the capital needed for development of infrastructure. Peter H. Stone & John Murawski, Airline Tries to Block Bill to Aid Rail Travel, LEAL TIMES, July 13, 1992, at 5.
[97] Id. § 1001(c)(10).
The legislative intent set forth in the Texas High-Speed Rail Act indicates that the activities of the Authority should promote the public good and serve public purposes "including the development and diversification of the economy of the state and the expansion of transportation in this state." Although this purpose is not as explicit as it might have been, the language does not, on its face, appear to indicate a legislative intent to limit intrastate passenger transportation facilities by controlling their interaction.

C. The Administrative Procedure and Texas Register Act (APTRA)

1. Judicial Review as an Independent Right Created by APTRA

To determine a party's right to judicial review of an administrative order, an analysis of the primary statute, i.e., the statute under which the agency derived its authority, is necessary. After January 1, 1976, the effective date of APTRA, the analysis also must look to the combination of APTRA and the primary, or enabling, statute. For example, in Texas Catastrophe Property Insurance Ass'n v. Council of Co-Owners of Saida II Towers Condominium Ass'n, the Texas Catastrophe Property Insurance Pool Act (TCPIPA) was invoked by insureds who were denied compensation for damages caused by Hurricane Allen. TCPIPA expressly created both the right and the procedure to contest such decisions in district court. Where the enabling statute's procedures stop, APTRA fills in the gaps for the institution of an administrative appeal.

Similarly, shortly after the enactment of APTRA, a Texas pharmacist, Kittman, failed in his attempt to get around

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100 706 S.W.2d 644 (Tex. 1986); see supra note 44 and accompanying text.
102 Texas Catastrophe, 706 S.W.2d at 646.
these "gap-filling" provisions of APTRA. He took the position that because the Texas Pharmacy Act did not require a motion for rehearing at the agency level, such a motion was not necessary to perfect his right of appeal to the district court. The court ruled, as a matter of first impression, that a motion for rehearing, required by APTRA, is a prerequisite to appeal to the district court.\(^{104}\) Kittman, however, can be read as confirming a right to judicial review under APTRA as well as under a primary statute.\(^{105}\)

By contrast, the Texas High-Speed Rail Act does not appear to create an express right or procedure for appeal of a final order of the Authority. It does, however, expressly provide that APTRA "applies to all proceedings under this Act."\(^{106}\) This leads to the question whether "any proceedings under this Act" includes or excludes appellate review of decisions rendered under the Act. The proponents of Texas TGV and the Authority argued that APTRA is to be utilized as a set of rules for the procedure of review (such review being derived from the common law in absence of a statutory right), while Southwest argued that it is to be used as a source of authority for the substantive right of review.

One of the most contested issues in the litigation was, therefore, whether or not APTRA provides an independent right of judicial review—indeed, that is, of the rights, if any, set forth in the laws under which the agency decision was rendered. The stated purpose of APTRA is to:

\(^{105}\) Kittman, 550 S.W.2d at 104 (Tex. Civ. App.—Tyler 1977, no writ).

\(^{104}\) Id. at 106. The court explained this was the proper ruling in view of the repealer clause as part of APTRA: "all other laws and parts of laws in conflict with this Act are repealed." Act of Apr. 22, 1975, 64th Leg., R.S., ch. 61, 1975 Tex. Gen. Laws 136 (amended), TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 22 (repealed 1993) (now codified at TEX. GOV'T CODE ANN. § 2001.901 (Vernon Supp. 1995)).

\(^{106}\) Kittman, 550 S.W.2d at 107 ("The cumulative provision merely means that upon a judicial review the appealing party shall be afforded not only the right to challenge the order . . . on the grounds specified in Section 19(a), but also shall have a right to challenge the order on any other grounds provided by other statutes."); see also Phyllis B. Schunck, Scope of Review of Agency Decisions in Contested Cases, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED ADMINISTRATIVE LAW COURSE 0, 0-9 (1991).
Provide minimum standards of uniform practice and procedure for state agencies; to provide for public participation in the rulemaking process; to provide adequate and proper public notice of proposed agency rules and agency actions through publication of a state register; and to restate the law of judicial review of agency action.\textsuperscript{107}

A literal reading of the phrase "to restate the law" would indicate that there was no intent to add to or detract from the existing law as to the availability of judicial review of agency action. It naturally follows that APTRA does not grant an independent right to judicial review where one does not exist otherwise, by statute or common law.\textsuperscript{108} Indeed, the Austin Court of Appeals pointed out in its opinion affirming dismissal of Southwest's Second Action that section 19 of APTRA is a "procedural provision that does not extend or limit the jurisdiction of the courts . . . [and] therefore, does not create a right of judicial review by generally waiving the state's immunity from suit, but instead sets out the procedure for a suit for judicial review authorized pursuant to another statutory provision."\textsuperscript{109} In recent dicta, the Austin Court of Appeals again expressed the view that APTRA provides procedural requirements for exercising rights granted under a primary statute.\textsuperscript{110} The Motorola\textsuperscript{111} holding


\textsuperscript{109} Southwest II, 867 S.W.2d at 158 (emphasis added) (citing Motorola, Inc. v. Bulpock, 586 S.W.2d 706, 708 (Tex. Civ. App.—Austin 1979, no writ). The significance of the emphasized language is that it was added when the court withdrew its earlier opinion and filed the above substituted opinion. The substituted opinion stressed heavily the issue of waiver of immunity, see supra notes 50-60 and accompanying text, even though Southwest did not argue the issue at all until the motion for rehearing, and then only in a footnote to the motion. The court, in its substituted opinion, completely modified its earlier rationale for holding that APTRA does not provide an independent substantive right of review.

\textsuperscript{110} Yamaha Motor Corp. v. Texas Dep't of Transp., 860 S.W.2d 223, 229 (Tex. App.—Austin 1993, writ denied). In a de novo review authorized by statute, the court held that because Yamaha failed to follow the procedure set forth, any remaining right of review must have its basis "outside the confines of a statutory suit for judicial review." Id. at 230 (citing Southwest I, 1993 Tex. App. LEXIS 1663, at *4). The court
cited by the court in Southwest I, however, had as its basis an underlying statute which provided express procedural requirements for perfection of the right of appeal, unlike the Texas High-Speed Rail Act. Southwest argued that the district court misunderstood the holding in Motorola, a plausible argument considering the distinguishing features of the two statutes at issue. Southwest’s position was that if the enabling statute is silent, then APTRA Section 19 provides the basis for judicial review. This position, however, appears to have little authority in the state of Texas.

Southwest based its argument on three cases, Moore v. Texas Employment Commission, Bullock v. Adickes, and Employees Retirement System v. Blount. None of the three cases, however, directly addresses the issue. In Moore the court held that administrative decisions of the Texas Employment Commission are subject to judicial review pursuant to the combination of another statute with APTRA. In Adickes the court likewise affirmed, relying on Robinson v. Bullock.

did not decide whether Yamaha in fact qualified for this independent right because only the district court had original jurisdiction to decide that issue. Id.

Motorola, Inc. v. Bullock, 586 S.W.2d 706, 709 (Tex. Civ. App.—Austin 1979, no writ) (holding APTRA did not provide an additional right of appeal of comptroller’s decision denying refund, where taxpayer failed to comply with underlying statute setting forth the procedure for bringing suit).

Southwest Brief II, supra note 29, at 19-20. Motorola involved an appeal by a taxpayer who was denied a substantive right to a tax refund because he had failed to pay the taxes first as required for the right of appeal under the statute. His appeal was dismissed because he had not satisfied the requirements under the statute granting the substantive right. Southwest argued that only dicta in Motorola indicate that APTRA does not provide for independent review and that when the Motorola court said “no substantive right,” it meant the right to a tax refund, not the right of review. Id. at 22-23.

The Austin Court of Appeals, however, has previously implied this question was not settled. Southwestern Bell Tel. Co. v. Public Util. Comm’n, 735 S.W.2d 663, 670 (Tex. App.—Austin 1987, no writ). In Southwestern Bell the court found no jurisdiction under either APTRA or the primary statute because there had been no contested case.


593 S.W.2d 805 (Tex. Civ. App.—Austin 1980, writ ref’d n.r.e.).

709 S.W.2d 646 (Tex. 1986).


553 S.W.2d 196 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.), cert. denied, 436 U.S. 918 (1978) (holding that APTRA’s procedural route to appeal was not in-
that jurisdiction is available under APTRA only if the under-
lying statute has been fully complied with.119 Finally, in
Blount the issue was not whether the court had jurisdiction,
but whether the agency had authority to adjudicate claims
under the enabling statute and APTRA.120 The trial court’s
jurisdiction was never challenged.

A similar situation was addressed one month after the
Motorola decision in connection with an order issued by the
Texas Health Facilities Commission.121 The underlying stat-
ute provided that APTRA applied to all proceedings except
to the extent inconsistent with the statute.122 The West
Texas HHA court, without further explanation,123 affirmed
the jurisdiction of the district court solely under the APTRA
criteria of “final decision” and “contested case.”124 On the
basis of West Texas HHA alone, an inference is possible that,
so long as the underlying statute invokes APTRA, APTRA
may be deemed to confer a substantive right of appeal, con-
ditional upon strict compliance with all procedural ele-
ments in both APTRA and the underlying statute. The
statute in West Texas HHA is more on point with the Texas
High-Speed Rail Act in that, except for express invocation
of APTRA to its proceedings, neither statute fully addresses
a right or procedure for review of decisions made thereun-
der. But West Texas HHA gives little guidance for its as-
sumption that the district court’s jurisdiction was proper
consistent with, and did not repeal, the procedural remedies set forth in the state
taxation statutes).

119 Adickes, 593 S.W.2d at 808. Adickes had initially pleaded jurisdiction only on
the basis of APTRA, but because she had not complied with the underlying statute,
APTRA alone could not satisfy any jurisdictional problem. Id.

120 Blount, 709 S.W.2d at 646.

121 See Texas Health Facilities Comm’n v. West Tex. Home Health Agency, 588
S.W.2d 655 (Tex. Civ. App.—Waco 1979, no writ).

678 (now codified at Tex. Health & Safety Code Ann. §§ 104.001-.043 (Vernon
1992)).

123 The entire matter was put to rest by a one-sentence pronouncement that the
“order was a final decision in a contested case, and the trial court had jurisdiction of
the case.” West Texas HHA, 588 S.W.2d at 657.

124 Id.
under APTRA. Although Southwest finally cited the case for the first time in its reply brief, the holding is problematic as potential authority in a number of ways.

First, the only challenge to jurisdiction in West Texas HHA was for failure to exhaust administrative remedies. The court summarily dismissed the challenge and affirmed jurisdiction. Second, the statute was not completely silent as to appeal rights. Section 3.15 provided appeal from orders granting or denying a certificate of need; Section 3.03 allowed the commission to rule on whether a certificate of need was required for a proposed project, but limited judicial review of that ruling to review of the actual denial of the certificate of need. The decision actually reviewed by the district court was a “cease and desist” order, not a denial of a certificate of need. In one fell swoop, the court of appeals said Section 3.03 did not preclude such a review, perhaps construing the limitation as not applicable to a situation where there was no “applicant” in fact. The decision is either blatantly wrong or stretched to the limits of statutory construction.

The enabling statute, the Texas High-Speed Rail Act, is silent as to express rights of judicial review of a Board decision but invokes APTRA as to its proceedings. The author has found no post-APTRA cases, except the Southwest actions, in which jurisdiction is denied under such a statute. Therefore, under West Texas HHA and despite its lack of guidance, APTRA may provide some right of review of Authority decisions where the underlying statute does not ex-

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125 Appellant’s Reply Brief at 3-5, Southwest II, 867 S.W.2d 154 [hereinafter Reply Brief II]. None of the opposing parties’ briefs cite the case.

126 Act of May 28, 1975, 64th Leg., R.S., ch. 323, 1975 Tex. Gen. Laws 832, Tex. REV. CIV. STAT. ANN. art. 4418h, § 3.03 (repealed 1989) (providing upon application, “the commission may issue a declaratory ruling on whether this Act requires a certificate of need . . . . If the commission rules that a certificate . . . . is required, the applicant may apply for a certificate of need . . . and may seek judicial review of the declaratory ruling only in proceedings to review the denial of a certificate . . . .”) (subject matter now codified generally at Tex. HEALTH & SAFETY CODE ANN. §§ 104.001-.043 (Vernon 1992).

127 West Texas HHA, 588 S.W.2d at 658.

128 Although Motorola has been cited extensively, especially by the Austin Court of Appeals, it appears that West Texas HHA has not been cited in any subsequent case.
pressly prohibit such review.\textsuperscript{129} Any such right would depend on the definition of "aggrieved party" and "contested case." The \textit{West Texas HHA} court did not suggest any standards for these requirements. The reader should keep in mind, however, the recent pronouncement by the \textit{Southwest II} court that, although the "may sue and be sued" clause in the High-Speed Rail Act may provide a waiver of immunity, the "aggrieved party" language in Section 19 of APTRA does not provide such a waiver because APTRA is a procedural statute only.\textsuperscript{130}

2. \textit{Section 19 Judicial Review of Contested Cases}

Section 19(a) of the Administrative Procedure and Texas Register Act states that a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Act.\textsuperscript{131} This section is cumulative of other means of redress provided by statute. Therefore, if Section 19 is indeed a mere restatement of the law of judicial review where the primary statute allows it or is silent, then an appealing party must satisfy three requirements: (1) the party must have exhausted all administrative remedies; (2) the final decision must have been in a contested case, within the statutory meaning of that term; and (3) the person must be aggrieved by that final decision. These requirements will be analyzed by focusing on and

\textsuperscript{129} Portions of \textit{Motorola} (other than the holding itself) may simply be irreconcilable with \textit{West Texas HHA}. The \textit{Motorola} court stated the general rule: "There is no right of appeal from an administrative order unless the statute provides for appeal or unless the order violates a constitutional right or adversely affects a vested property right," 586 S.W.2d at 708 (citing Stone v. Texas Liquor Control Bd., 417 S.W.2d 885, 885-86 (Tex. 1967), and quoting Hackney v. Meade, 466 S.W.2d 341, 342 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.)). Both \textit{Stone} and \textit{Hackney} were pre-APTRA cases, and may not be reliable sources as to the effect of APTRA on statutes which are silent as to judicial review. It is inconceivable, however, that APTRA would be effective to waive governmental immunity as to any agency whose proceedings are subject to its requirements.

\textsuperscript{130} See supra notes 108-110 and accompanying text.

comparing decisions prior to and after the effective date of APTRA.

a. Exhaustion of Administrative Remedies

Generally, the common law rule is that judicial review of administrative orders is not available unless all administrative remedies have been pursued to the fullest extent. The rule was set forth by the Texas Supreme Court in 1958 in *Sun Oil Co. v. Railroad Commission.*\(^{132}\) Application of this rule is illustrated in *Lloyd A. Fry Roofing Co. v. State.*\(^{133}\) Decided before the enactment of APTRA, *Fry Roofing* also supports the premise that APTRA simply restates the common law. In *Fry Roofing* jurisdiction was denied the district court to hear an appeal of a "request" by the Air Control Board, since the Board had not exhausted its own authority to handle the matter.\(^{134}\) In *Kittman*\(^{135}\) the failure to file a motion for rehearing in accordance with APTRA, even though the primary statute did not expressly require such, constituted a failure to exhaust administrative remedies, whereupon district court jurisdiction was denied.\(^{136}\) The same year as *Kittman*, the court ruled that, where the primary statute created the right of appeal with express procedural require-

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132 311 S.W.2d 235 (Tex. 1958); accord Lindsay v. Sterling, 690 S.W.2d 560, 563 (Tex. 1985); City of Sherman v. Public Util. Comm'n, 643 S.W.2d 681, 683 (Tex. 1983); see also City of Corpus Christi v. Public Util. Comm'n, 572 S.W.2d 290, 299-300 (Tex. 1978) (Section 19(a) of APTRA codifies this doctrine). Southwest argued in its Reply Brief that *Lindsay* supported the proposition that APTRA provides for an independent right of review even if the underlying statute denies such a right. Reply Brief II, supra note 125, at 6-7. The issue in *Lindsay*, however, was whether the county judge, in denying a beer license renewal, was acting judicially or administratively and, therefore, whether the procedural provisions of APTRA were applicable to a review of the county judge’s decision.

133 516 S.W.2d 430 (Tex. Civ. App.—Amarillo 1974, writ ref’d n.r.e.).

134 Id. at 433. The Air Control Board had requested the manufacturer to construct stack sampling facilities. The manufacturer refused to do so, and the Board brought action for injunctive relief, which the district court awarded. But the injunction was overturned by ruling that the Board had primary jurisdiction until it had issued a final ruling. Since a "request" did not rise to the level of a ruling or order, the district court did not have jurisdiction to issue the injunction.

135 Texas State Bd. of Pharmacy v. Kittman, 550 S.W.2d 104 (Tex. Civ. App.—Tyler 1977, no writ); see supra notes 103-05 and accompanying text.

136 Id. at 106-07.
ments, the aggrieved party who failed to comply with those requirements could not rely on APTRA for access to the courts.  

An exception to this requirement, however, is available when: (1) the agency is exercising powers outside the bounds of its statutory authority; (2) postponement of judicial review of administrative action will cause irreparable injury; (3) administrative remedies are inadequate; or (4) the agency's action is unconstitutional, beyond its jurisdiction, or clearly illegal. In these instances the doctrine of exhaustion of remedies will be relaxed. These "exceptions," however, are simply other names for the inherent procedural due process right to judicial review which exists independent of any statutory right or prohibition. The breadth of this inherent right has yet to be determined.
In the briefs filed by Southwest, no specific allegation of this type appears to have been made. Instead, Southwest asserted that the decision should be voided because of defective constitution of the Board.\textsuperscript{142} This question was never reached because Southwest was unable to show it had the right to present its case in the district court.

b. Was the Franchise Award Proceeding a “Contested Case”? 

A “contested case” is “a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.”\textsuperscript{143} This definition appears to focus on the relationship between the applicant and the agency. A contested case, therefore, would be any adverse agency decision reached after an adjudicative hearing. Southwest was not an applicant before the Authority, nor was the decision one that determined Southwest’s legal rights, duties, or privileges. Therefore, Southwest’s appeal for judicial review of the final decision is not a contested case.\textsuperscript{144} This issue was not addressed by the court of appeals.

c. Is Southwest an “Aggrieved” Party?\textsuperscript{145}

The APTRA does not provide a definition for a person who is “aggrieved.” This element, along with the contested

\textsuperscript{142}Southwest Brief II, \textit{supra} note 29, at 4.


\textsuperscript{144}This analysis would not give the same result, however, when applied to Southwest’s discovery request, which was denied, or to Southwest’s initial motion to intervene in the hearing, which was granted.

\textsuperscript{145}The fact that Southwest was admitted as a party to the proceedings is not determinative as to its standing to contest the final decision. \textit{See} Fort Bend County v. Texas Parks & Wildlife Comm’n, 818 S.W.2d 898 (Tex. App.—Austin 1991, no writ) (holding that party status for administrative hearing does not necessarily confer standing to appeal to district court). Neither does Southwest strongly assert this fact as a basis, although Southwest distinguished the instant hearing from that of \textit{Fort Bend County}. Southwest Brief II, \textit{supra} note 29, at 32 (“Unlike the situation in \textit{[Fort Bend County]}, the hearing record was introduced as an exhibit in the district court,
case requirement, is the common law equivalent of "standing." Standing is a component of subject matter jurisdiction. Lack of standing, therefore, deprives a court of subject matter jurisdiction. The general test for standing in Texas is "a real controversy between the parties, which will be actually determined by the judicial declaration sought." From this definition, the term "justiciable interest" derives and often is used as a synonym for standing and aggrieved-party status. The law in Texas is not clear as to what constitutes a justiciable interest. One court has suggested that the adverse effect of the agency order must be "sufficiently grave, and involve a sufficiently important interest" to satisfy this constitutionally-based limitation on the judicial power. Another court has suggested a "substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation" is required for a party to be "aggrieved." It has also been said that a "special injury" must be shown in order to be an aggrieved party.

and it fully establishes that Southwest Airlines did have standing."

146 Texas Ass'n of Business v. Texas Air Control Bd., 852 S.W.2d 440 (Tex. 1993).
147 Id. at 446 (quoting Board of Water Engrs v. City of San Antonio, 283 S.W.2d 722, 724 (Tex. 1955)).
148 Hooks v. Texas Dep’t of Water Resources, 611 S.W.2d 417, 419 (Tex. 1981); see also City of San Antonio v. Texas Water Comm’n, 407 S.W.2d 752, 765 (Tex. 1966).
149 Public Util. Comm’n v. J.M. Huber Corp., 650 S.W.2d 951, 955 (Tex. App.—Austin 1983, writ ref’d n.r.e.).
150 Texas Indus. Traffic League v. Railroad Comm’n, 628 S.W.2d 187, 201-02 (Tex. App.—Austin 1982), rev’d on other grounds, 633 S.W.2d 821 (Tex. 1982), overruled by Texas Ass’n of Business v. Texas Air Control Bd., 852 S.W.2d 440 (Tex. 1993). The decision in Huber was based on the supreme court’s holding in Texas Industrial that a party’s lack of standing is not an issue of fundamental error. This is precisely the holding that was overruled 10 years later in Texas Ass’n of Business.
151 City of Houston v. Public Util. Comm’n, 618 S.W.2d 428, 431 (Tex. Civ. App.—Austin 1981, writ ref’d n.r.e.). The court held that a municipality as a ratepayer had standing to appeal a PUC order allowing an electric rate increase.
152 See id. at 430. In this case, however, the court overruled its own prior decision and held that it was not necessary for a party to show special injury in order to obtain judicial review of a Public Utility Commission order.
In *Alabama Power Co. v. Ickes*, Alabama Power sought to enjoin the execution of loan agreements between a federal agency whereby four municipal corporations would construct electricity distribution systems in direct competition with Alabama Power. Its grounds were that the loan agreements were outside the scope of statutory authority of the agency or, alternatively, that the statutory provisions were unconstitutional. The Supreme Court found that Alabama Power had no standing because no legal or equitable right had been invaded. Its rights were nonexclusive; the municipalities had authority to construct and operate the systems. There was no conspiracy between the federal agency and the municipal corporations; none of them (nor the federal agency) had any right or power to eliminate competition (thus directly affecting complainant). The courts have no power to consider the constitutionality of a statute or action unless the action violates the party's legal right. Damage alone (such as financial loss by reason of the competition) is insufficient; it must result from violation of a legal right.

The claim that petitioner will be injured, perhaps ruined, by the competition . . . presents a clear case of *damnnum absque injuria*. . . . [T]hese municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed . . . it will be by lawful competition from which no legal wrong results.

An even closer parallel is drawn by the Court's use of an example where "A" operates a business, and "B" desires to borrow money to open a competing business. If B's actions in using the loan proceeds are fully lawful, A cannot complain because B's lender exceeded its corporate authority

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154 *Id.* at 480.
155 *Id.* at 476.
156 *Id.* at 478.
157 *Id.* at 479.
in making the loan. In discussing *New Orleans, Mobile & Texas Railroad Co. v. Ellerman*, the *Alabama Power* court implied that standing may be available if the company sought to be enjoined owed a duty to the complainant which it had not performed.

Southwest sought to enjoin the presumably lawful activities of the franchisee by attacking the validity of the statute under which the franchise was awarded. Under *Alabama Power*, unless Southwest does more than attack the constitutionality of the statute, the Authority, and its Board, and demonstrate its own financial injury resulting from competition, Southwest’s cause of action will not lie.

Southwest relied heavily on *Texas Industrial*, *City of Houston*, and *Hooks* as support for its theory that a showing of special injury was no longer required for standing to appeal administrative decisions. *Texas Industrial*, however, was overruled recently by the supreme court, and the holding in *City of Houston* is narrowly based: first, section 69 of the Public Utility Regulatory Act entitles *any party to a proceeding* to judicial review; and second, because few ratepayers were ever able to demonstrate special injury in a rate case, public policy demanded some expansion in such cases. Section 69 represented the legislative

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159 Id. at 480-81.
160 105 U.S. 166 (1881).
162 Texas Indus. Traffic League v. Railroad Comm’n, 628 S.W.2d 187 (Tex. App.—Austin 1982), rev’d on other grounds, 633 S.W.2d 821 (Tex. 1982), overruled by *Texas Ass’n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440 (Tex. 1993); see Southwest Brief II, supra note 29, at 37.
164 *Hooks v. Texas Dep’t of Water Resources*, 611 S.W.2d 417 (Tex. 1981); see Southwest Brief II, supra note 29, at 37.
165 See *supra* note 150 and accompanying text.
167 *City of Houston*, 618 S.W.2d at 429.
intent to effect that policy. In *Hooks* the term "special injury" was not mentioned. The contestant owned riparian land downstream from a proposed wastewater discharge plant. The permit issued by the commission would allow in excess of two million gallons of wastewater per day to flow through Hooks' property. Although Southwest argued that the court did not require a special injury to grant standing to Hooks, this author can conceive of no better example of a special injury in fact than the injury to Hooks. Additionally, the Texas Water Code expressly allowed judicial review for "person[s] affected." It is unlikely, then, that Southwest could show a justiciable interest within the common law meaning to satisfy the subject matter jurisdiction requirement.

IV. CONSTITUTIONAL BASES FOR STANDING

A. INHERENT RIGHT TO APPEAL

With or without statutory authorization for judicial review of administrative actions, the district courts have the power to hear and decide claims that an agency violated the due process clause of the Constitution. In other words, if agency action deprives a person of a constitutionally pro-

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168 Id. at 480.

169 *Hooks*, 611 S.W.2d at 419; see also *Empire Gas & Fuel Co. v. Railroad Comm'n*, 94 S.W.2d 1240 (Tex. Civ. App.—Austin 1936, writ ref'd) (remote effects on party were insufficient to support standing, but material and substantial effects on land and property rights were sufficient).

170 *Bank of Woodson v. Stewart*, 632 S.W.2d 950, 956 (Tex. App.—Austin), dismissed as moot, 641 S.W.2d 230, 231 (Tex. 1982). The bank sought declaratory and injunctive relief on both a statutory and a constitutional basis. The court of appeals affirmed dismissal of the statutory action because it was technically in the wrong county under the statute. *Id.* at 955. The appellate court reversed the dismissal as to the procedural due process grounds, *id.* at 960, but the supreme court dismissed as moot because the relief requested—intervention in liquidation proceedings in another county—could not be granted by a Travis County court, 641 S.W.2d at 231. *See also Firemen's & Policemen's Civil Serv. Comm'n v. Blanchard*, 582 S.W.2d 778 (Tex. 1979); *Brazosport Sav. & Loan Ass'n v. American Sav. & Loan Ass'n*, 342 S.W.2d 747, 751 (Tex. 1961); *City of Amarillo v. Hancock*, 239 S.W.2d 788, 790 (Tex. 1951); *Fox v. Carr*, 552 S.W.2d 885 (Tex. Civ. App.—Texarkana 1977, no writ); *Pruitt v. City of Houston*, 548 S.W.2d 90 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); and *Lee v. Firemen's & Policemen's Civil Serv. Comm'n*, 526 S.W.2d 553, 555 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (holding that inherent
tected interest, then the Constitution provides the underlying basis upon which an aggrieved party may seek judicial review. A narrow construction of this theory is espoused by the Supreme Court of Texas in City of Amarillo v. Hancock: "[C]ourts should carefully restrict their jurisdiction to that clearly granted or necessarily implied from the Constitution and specific acts of the legislature."

In federal courts, a constitutional analysis of the standing issue necessarily involves two prongs: (1) a "subject" standing inquiry—whether the matter is a justiciable "controversy" within the meaning of Article III of the Constitution, i.e., whether the dispute "will be presented right of appeal from administrative body created by act silent on question will be recognized only where action violates constitutional provision)."

The first prong has not been clearly defined by either the Texas Supreme Court or the United States Supreme Court. Typically, the justiciable controversy inquiry arises in a context where the subject matter has not fully grown into a controversy the court can adjudicate. For example, in California Prods., Inc. v. Puretex Lemon Juice, Inc., 334 S.W.2d 780 (Tex. 1960), the court found no justiciable controversy: one party had not yet manufactured the bottle which might copy the competitor's design. Id. at 783. Some commentators have expressed the opinion that the distinction between a justiciable controversy and a party with a justiciable interest may be "a distinction without a difference." Williams, supra note 69, at N-7 (discussing trend in United States Supreme Court decisions recognizing standing as a proper constitutional inquiry). Any judgment rendered by the court in a case brought by a party without standing necessarily becomes an advisory opinion, which
in an adversary context and in a form historically viewed as capable of judicial resolution;\textsuperscript{175} and (2) a "party" standing inquiry—whether the interest sought to be protected by the complaining party is "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."\textsuperscript{176}

It is this second prong on which Southwest relies for federal support of its standing argument. In \textit{Association of Data Processing}, the Court granted standing to the ADP to challenge the Comptroller's ruling allowing national banks to offer data processing services.\textsuperscript{177} This ruling would place banks in direct competition with ADP's members. Specifically, the Comptroller's ruling allegedly violated several federal statutes by allowing banks to engage in activity outside the scope authorized by those statutes. The issue was whether ADP, through the Administrative Procedure Act,\textsuperscript{178} was a person "aggrieved by agency action within the meaning of a relevant statute."\textsuperscript{179} The factors bearing on the Court's decision were a trend toward a larger class of persons who may challenge administrative decisions,\textsuperscript{180} the economic injury to be suffered by ADP,\textsuperscript{181} and recognition that the banking statutes supported a general policy of protection for those similarly situated to ADP, even though the statutes did not so specify.\textsuperscript{182}


\textsuperscript{176} \textit{Id.} at 153.

\textsuperscript{177} \textit{Id.} at 158.


\textsuperscript{179} \textit{Id.} § 702; \textit{see also Association of Data Processing}, 397 U.S. at 153 (quoting 5 U.S.C. § 702 (1988)).

\textsuperscript{180} \textit{Association of Data Processing}, 397 U.S. at 154.

\textsuperscript{181} \textit{Id.} at 152. The Court made it clear, however, that financial injury is not the only kind of injury in fact which satisfies this test. \textit{Id.} at 153-54.

\textsuperscript{182} \textit{Id.} at 157.
Southwest's position can be compared favorably with that of ADP: Neither Southwest nor ADP is regulated by the agency whose decision is challenged. Neither of the agency decisions at issue was directed at the plaintiffs. Both plaintiffs sought to establish standing by way of a procedural statute invoked by the substantive statutes.

There are some distinguishing features, however. First, ADP and the banks would be offering precisely the same commodity, whereas Southwest and the high-speed rail franchisee would not. Second, while the federal courts may encourage an expansive construction of legislative intent to expand the base of aggrieved parties,183 Texas courts have repeatedly stressed that a right to judicial review of administrative decisions must be clearly and unequivocally expressed by the legislature.184 Third, and perhaps most importantly, the Court in Association of Data Processing required at least a hint of legislative intent to protect competitors, while the Texas High-Speed Rail Act expresses legislative intent primarily to expand transportation in the State.185 Fourth, and perhaps the most problematic for Southwest, ADP was able to point directly at the banks' newly sanctioned activity and call it outside the scope of statutory legitimacy.186 Southwest cannot, and does not, point to the construction and operation of a high-speed rail system by Texas TGV and say the activity exceeds the Texas TGV's authorization.

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183 "The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." Id. (quoting the House Report on the federal Administrative Procedure Act).

184 City of Amarillo v. Hancock, 239 S.W.2d 788, 791 (Tex. 1951).

185 Tex. Rev. Civ. Stat. Ann. art. 6674v.2, § 2(a)(3) (Vernon Supp. 1995). Southwest's reply would be that the legislature intended to protect competitors' interests through the public convenience and necessity requirement and the Board's own requirement that the franchise applicants provide information regarding the effect on existing transportation systems. See supra notes 64-72 and accompanying text.

B. PROCEDURAL DUE PROCESS

Standing to invoke the inherent right of appeal in the face of legislative silence or denial generally requires agency deprivation of a personal interest that warrants procedural due process protection. The interest may be a vested property right, a liberty or personal interest, or an interest derived from an independent source, such as state law.

1. The Vested Property Right or Franchise Theory

Southwest could use another escape route from the confines of statutory authority if it were able to show deprivation of a vested property right. If vested property rights are invaded by such administrative agency actions, the right of judicial review exists with or without a statute which confers

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187 See Alford v. City of Dallas, 738 S.W.2d 312, 314 (Tex. App.—Dallas 1987, no writ) (holding that party seeking review of administrative order must show possible violation of a constitutionally protected interest); Fox v. Carr, 552 S.W.2d 885 (Tex. Civ. App.—Texarkana 1977, no writ) (stating that no right of appeal from action of an administrative body exists unless the statute so provides or the action violates a constitutional right; legislative denial of judicial review does not invalidate such an action or constitute a denial of due process).

188 See Pruitt v. City of Houston, 548 S.W.2d 90 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (ruling that inherent right of appeal where enabling statute is silent will be recognized only where the administrative action complained of violates a constitutional provision); see also Pickell v. Brooks, 846 S.W.2d 421, 426-427 (Tex. App.—Austin 1992, writ denied) (holding that an at-will employee had no vested property right, core interest, or interest granted by state law in receiving supervisory credit, only in salary and benefits for the time she had already worked); Martine v. Board of Regents, 578 S.W.2d 465, 473 (Tex. Civ. App.—Tyler 1979, no writ) (recognizing tenured position of university faculty member as vested property right allowing appeal of dismissal).

189 See Texas State Bd. of Pharmacy v. Walgreen Tex. Co., 520 S.W.2d 845 (Tex. Civ. App.—Austin 1975, writ ref’d n.r.e.) (permitting judicial determination of free speech infringement notwithstanding failure to exhaust administrative remedies and to follow statutorily prescribed procedures); cf. Touchy v. Houston Legal Found., 432 S.W.2d 690 (Tex. 1968) (holding that attorneys have standing to enjoin action which is damaging to their profession). Southwest incorrectly cited Touchy as support for its standing argument. Southwest Brief II, supra note 29, at 36. The reliance is misplaced because there was no state agency action involved in Touchy.

190 A person’s interest in a benefit is a “property interest” for due process purposes if claim of the benefit is supported by explicit rules or mutual understandings that may be invoked at a hearing. Perry v. Sindermann, 408 U.S. 593, 601-02 (1972); Board of Regents v. Roth, 408 U.S. 564, 577 (1972); see also Southwest II, 867 S.W.2d at 159; Martine, 578 S.W.2d at 470.
it. Property rights cannot be determined by the orders of an administrative agency without affording a right of judicial review. Unless an agency action violates a constitutional right or adversely affects a vested property right, the district court is powerless to review those decisions.

Adjudication of cases on this theory falls generally into three categories: The most common type of case is when agency action goes directly to the complainant, such as dismissal from employment, suspension of advertising rights, denial of welfare payments, denial of intradepartmental transfer, or denial of driver’s license. Second, well represented in the case law are situations

191 Board of Ins. Comm’rs v. Title Ins. Ass’n, 272 S.W.2d 95, 97 (Tex. 1954); see also Bank of Woodson v. Stewart, 632 S.W.2d 950, 956 (Tex. App.—Austin), dism’d as moot, 641 S.W.2d 290 (Tex. 1982), (citing Schwantz v. Texas Dep’t of Pub. Safety, 415 S.W.2d 12 (Tex. Civ. App.—Waco 1967, writ ref’d n.r.e.)).

192 Stone v. Texas Liquor Control Bd., 417 S.W.2d 385 (Tex. 1967); see also Texas Dep’t of Human Servs. v. Trinity Coalition, Inc., 759 S.W.2d 762, 764 (Tex. App.—El Paso 1988, dism’d w.o.j.) (stating that “pre-contract negotiations, expectations, prospects, or pursuits are not the vested property rights, benefits or interests which are constitutionally protected by procedural due process”), cert. denied, 493 U.S. 1020 (1990).

193 In a recent Texas case, the supreme court noted that a “for cause” limitation on dismissal of an employee created a property interest in continued employment for due process purposes. Bexar County Sheriff’s Civil Serv. Comm’n v. Davis, 802 S.W.2d 659, 661 n.2 (Tex. 1990), cert. denied, 502 U.S. 811 (1991). See also Martine v. Board of Regents, 578 S.W.2d 465, 473 (Tex. Civ. App.—Tyler 1979, no writ). Martine was a tenured faculty member at a state university whose employment was terminated by the Board of Regents. Although the underlying statute was silent, the court held Martine had an inherent right to appeal the adverse effect of the Board’s action on his property interest in his position as a tenured faculty member at a state university. Id. at 473.

194 See Texas Optometry Bd. v. Lee Vision Ctr., Inc., 515 S.W.2d 380 (Tex. Civ. App.—Eastland 1974, writ ref’d n.r.e.). The court held that two opticians had an inherent right, despite the silence of the underlying statute, to appeal to the courts the State Board decision to suspend their advertising permits for five days. Id. at 382.

195 Hackney v. Meade, 466 S.W.2d 341 (Tex. Civ. App.—Austin 1971, writ ref’d n.r.e.) (deciding that applicant had no vested property right to receive welfare payments; underlying statute did not provide for judicial review or order denying application for payments; therefore no right of appeal).

196 In City of Amarillo v. Hancock, 239 S.W.2d 788 (Tex. 1951), the court reversed both lower courts’ decisions, holding that an officer of the city fire department who had been demoted had no inherent right of appeal (where statute provided procedure for demotion but no review rights) because a captaincy in the fire department was not property; therefore the right to a captaincy is not protected by due process. Id. at 792.
where, although the order is not directed toward the complainant, the agency, nevertheless, is one that exercises control over the complainant's activities. This situation is most likely to bring into focus the competitor standing issue.

Finally, the category in which Southwest's complaint belongs is when the complaining party is not the object of the agency action, and the agency does not regulate any activities of the complainant. The Authority's final order of which Southwest complains was not issued to Southwest, nor does the Authority (or its successor, the Texas Railroad Commission) regulate Southwest in any of its activities; rather, Southwest is in a "circle" of parties removed from the direct effect of the order.

Generally within the first category are cases that address the issue of whether a state agency's failure to follow its self-promulgated rules may violate some property right of the plaintiff created by those rules. For example, in Alford v. City of Dallas\(^{198}\) police department procedures regarding intradepartmental transfers were found not to rise to the level of creating a property right in the plaintiff that was violated when the rules were not followed as to him.\(^{199}\) Similarly, in Lee v. Firemen's & Policemen's Civil Service Commission,\(^{200}\) the complainant was held not to have a vested property right in the position of assistant fire chief, nor was the promotion procedure found to be a denial of due process.\(^{201}\) This line, however, is hardly bright. In Logan v. Zimmerman Brush Co.\(^{202}\) a state scheme for adjudication of alleged discrimina-

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\(^{197}\) See Texas Dep't of Pub. Safety v. Carraway, 775 S.W.2d 672 (Tex. App.—Amarillo 1989, no writ).

\(^{198}\) 738 S.W.2d 912 (Tex. App.—Dallas 1987, no writ).

\(^{199}\) Id. at 316-17. The dissenting opinion, however, expressed the view that such rules and regulations created a reasonable expectancy interest in all transfer applicants. Id. at 320 (Whitham, J., dissenting).

\(^{200}\) 526 S.W.2d 553 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

\(^{201}\) Id. at 556-57.

\(^{202}\) 455 U.S. 422 (1982). In Logan, a state agency failed to follow its prescribed procedures for adjudicating alleged discrimination. The U.S. Supreme Court held that this failure deprived the plaintiff of a property right, i.e., his cause of action. Id. at 430-31. Logan, however, can be factually distinguished from Alford in that the "procedure" in the former was literally an adjudication, while in the latter, the "procedure" was simply a sequence of steps whereby transferees were selected. See also
tion was found to constitute a protectable right.\textsuperscript{203} Southwest did not allege a property right under this theory, although Southwest's allegations included an assertion that the Board misapplied its own rules in denying its discovery request prior to the hearing.\textsuperscript{204}

The second category includes the franchise cases.\textsuperscript{205} It is in this group of cases that the issue of competitor standing arises most often. Southwest relied on the franchise cases in developing its theories of protection from illegal competition. In an early franchise case, 

\textit{Frost v. Corporation Commission,}\textsuperscript{206} the court considered an Oklahoma law which prohibited operation of a cotton gin without a license from the state Commission. The Court held that complainant's license, while not exclusive against another licensee, was exclusive against a competitor operating without a valid permit.\textsuperscript{207} The license was, therefore, a property right protected by the Fourteenth Amendment.\textsuperscript{208}

In \textit{Brazosport Savings & Loan Ass'n v. American Savings & Loan Ass'n}\textsuperscript{209} the State Banking Commissioner had granted a charter, franchise, and certificate to American Savings

\begin{footnotesize}
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\item \textsuperscript{203} \textit{Logan}, 455 U.S. at 429-30, 435-36. Such rights appear to be justified when the statute "add[s] to the constitutional minimum." \textit{Ferguson v. Thomas}, 430 F.2d 852, 856 (5th Cir. 1970); \textit{see also Alford v. City of Dallas}, 738 S.W.2d 312, 320 (Tex. App.—Dallas 1987, no writ) (Whitham, J., dissenting). The cases holding that failure to follow a statutory scheme could also be analyzed as the agency exceeding its statutory authority, hence invoking a lower level of scrutiny required for standing. \textit{See supra} notes 26-27 and accompanying text.
\item \textsuperscript{204} \textit{See supra} part II.B.
\item \textsuperscript{205} The franchise cases can also be analyzed as protecting interests derived from an independent source, the state laws governing issuance of the franchises and prohibition of operations in the absence of such a franchise.
\item \textsuperscript{206} 278 U.S. 515 (1929).
\item \textsuperscript{207} \textit{Id.} at 521.
\item \textsuperscript{208} \textit{Id.} at 519-20.
\item \textsuperscript{209} 342 S.W.2d 747 (Tex. 1961).
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and Loan Association to do business. Petitioners were several existing savings and loan associations operating under an existing charter and franchise in the same geographic area. Petitioners claimed the Commissioner had granted the American charter in violation of prescribed procedures and American would be operating illegally. The court recognized petitioners' charters and franchises as vested property rights and confirmed their right to prove their assertion of illegality.

The parallels between Brazosport and the Southwest litigation are obvious. Southwest transports passengers between certain Texas cities. The Authority granted a franchise to Texas TGA to transport passengers between those same Texas cities. Southwest protested the grant of the franchise, alleging that the Act, the Board, and the Board-promulgated rules are unconstitutional, and demanded the right to challenge the order judicially on that basis. The difference, however, is of utmost importance: unlike the protesting savings and loan associations, Southwest does not hold a franchise, permit, or certificate from the Authority or the Railroad Commission.

In Brazosport, the court noted the significance of the quasi-public nature of the savings and loan industry, implying that an ordinary private business might not be entitled to receive similar protection against competition. The court reasoned that the state could not lawfully require a showing of public convenience and necessity except in a business affecting the public interest. The offsetting corollary to this type of regulatory control is that the quasi-public business will be protected from competing businesses which violate those regulatory controls.

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20 A franchise becomes a vested property right when money has been paid for it. Corpus Christi Gas Co. v. City of Corpus Christi, 283 S.W. 281 (Tex. Civ. App.—Corpus Christi 1926, writ ref'd).
21 Brazosport, 342 S.W.2d at 752.
22 Id. at 750.
23 This discussion is significant in understanding the policy underlying the freedom from illegal competition theory argued by Southwest. See supra notes 205-12 and infra note 214 and accompanying text.
Southwest mildly asserted a franchise-type interest in the form of a certificate from the Civil Aeronautics Board (CAB) that purportedly gives it authority to provide the air transportation threatened by the proposed high-speed rail facility.214 The CAB's route authority, however, effectively ceased in 1981.215 Furthermore, unlike the complainant in *Frost*, Southwest neither held a franchise from the Authority nor is its business regulated by the Authority or pursuant to the Act.

2. *Freedom from Unlawful Competition*216

Cases falling within the third category of vested property rights cases, in which Southwest necessarily falls, are relatively few. In those cases in which freedom from unlawful competition is a protectable right, it is not at all clear whether this freedom is a property right, a liberty interest, or some other right *sine nomine* deemed worthy of due process protection.

The rationale underlying this right, as explained by the Texas Supreme Court in *Brazosport*, is this: the operation of certain types of businesses has such an impact on public interest and welfare that the state is permitted to exercise its police power to control them.217 The state exercises its police power by establishing regulations with which these quasi-public businesses must comply in order to operate. In exchange for operating subject to those regulations, the business benefits from the state's promise to protect the complying business from competition from noncomplying businesses. This promise is in the form of common law that gives the complying business standing to cause the state to enforce the same rules against its competitors. This stand-

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214 *Southwest I*, 1998 Tex. App. LEXIS 1633, at *7. Southwest did not, however, base its vested property right argument on the existence of this CAB certificate.


216 Although Southwest asserts freedom from unlawful competition as a property right, it may also be analyzed as a liberty interest.

ing would not otherwise be available to the business because of the sovereign immunity doctrine.

Of immense relevance to the Southwest Airlines controversy is the corollary to this rationale: that a party cannot enforce rules against a competitor unless the party itself is subject to and in compliance with those rules. Case law supports this corollary even though it has not been explicitly stated.

Southwest's argument for its theory that freedom from unjust competition is a protectable property right is based primarily on Board of Insurance Commissioners v. Title Insurance Ass'n of Texas,\(^2^{18}\) specifically the statement from the opinion that "one transacting a legitimate business has a right to enjoin a competitor from transacting an unlawful business."\(^2^{19}\) In Title Insurance, several title companies sued the Board of Insurance Commissioners, appealing the Board's approval of a contract of agency between a title insurance company and an abstract company. Complainants alleged the contract violated the Texas Insurance Code provision which requires a title insurer to appoint as its representative only those who own and operate an abstract plant in the county in which they conduct their business. After noting that the business of title insurance affects the public interest and is properly subject to legislative controls,\(^2^{20}\) the Texas Supreme Court upheld the right of complainants to bring the action as an unlawful invasion of their property rights.\(^2^{21}\) This question was one of first impression for the court.\(^2^{22}\) Only two cases were cited by the court: Frost v. Corporation Commission\(^2^{23}\) and Featherstone v. Independent Ser-

\(^{218}\) 272 S.W.2d 95 (Tex. 1954).

\(^{219}\) Southwest Brief II, supra note 29, at 40 (quoting Title Ins., 272 S.W.2d at 98).

\(^{220}\) Title Ins., 272 S.W.2d at 98 (quoting Daniel v. Tyrrell & Garth Inv. Co., 93 S.W.2d 372 (Tex. 1936)).

\(^{221}\) Id.

\(^{222}\) Id.

\(^{223}\) 278 U.S. 515 (1929) (holding cotton gin operator could enjoin operation of another gin whose certificate had been issued without the state-required showing of public necessity).
vice Station Ass’n. Frost was cited as a “close analogy” to Title Insurance, and Featherstone as “somewhat analogous.”

Both Frost and Title Insurance are second category cases, as discussed above, and both cases support the rationale of the Brazosport court and the corollary espoused by this author earlier in this discussion. In other words, in both cases the state exercised its police power to regulate a quasi-public business, giving to complying businesses in return the right to cause enforcement of those same regulations against competing businesses. Southwest, on the other hand, is not such a case and cannot use the same rationale and corollary. Southwest attempted to enforce regulations, the requirement of showing public convenience and necessity as well as the legislation governing the establishment of the Authority and constitution of the Board, to which it is not subject. Hence, the quid pro quo reasoning for the protection does not exist.

V. SUMMARY AND CONCLUSIONS

Ironically, the issue of Southwest’s standing to appeal the Texas High-Speed Rail Authority’s award of the franchise for a high-speed rail facility revolves around sovereign immunity, an issue Southwest did not even argue. The es-

224 10 S.W.2d 124 (Tex. Civ. App.—Dallas 1928, no writ). In Featherstone, a service station operator was granted standing to enjoin fellow service station operators from using an illegal lottery to entice customers. One’s business and his right to conduct it are property that should be protected from unlawful injury. Id. at 128.

225 Title Ins., 272 S.W.2d at 98.

226 Featherstone is closer to a true third category case in that, although the opposing parties are in competing businesses, one is simply attempting to get a competitive edge by offering illegal incentives. The lottery was not illegal because of rules governing service stations; the illegality ran to every person in the state. Southwest cited Featherstone as support for its standing to seek injunction against the franchise award in alleged violation of the public convenience and necessity requirement. Southwest Brief II, supra note 29, at 42. Featherstone, however, was not an administrative agency decision and falls far short of being parallel to those cases discussed above in which exceptions were made to the doctrine of sovereign immunity to allow a third party to appeal those decisions.

227 Title Ins., 272 S.W.2d at 98.

228 See supra notes 205-215 and accompanying text.
sence of the court of appeals' substituted opinion is that Southwest likely would have fared much better had it argued for waiver of immunity by the "sue or be sued" clause in the Texas High-Speed Rail Act. Instead, the arguments focused on other potential bases, both statutory and constitutional, all of which were poorly supported by the existing body of case law and public policy.

Absent a waiver of immunity, an express legislative grant of authority, or an abuse of constitutional due process, a district court has no power to adjudicate a suit against the state or any of its agencies. The Act provides no express right of appeal of Authority actions. Section 19 of APTRA alone probably does not provide a right of appeal. The only court that has adjudicated a claim against an agency under those conditions is the Waco Court of Appeals in West Texas HHA. The issue, however, was not competitor standing, and the holding did not go to jurisdiction of the court. Furthermore, if APTRA alone were sufficient to confer standing on any aggrieved party, the doctrine of sovereign immunity would crumble. This is the reason the court of appeals abandoned the portion of its first Southwest II opinion that focused on whether APTRA was a procedural or a substantive statute, and rewrote the opinion to focus instead on the real controlling question: whether governmental immunity was waived.

Of the potential constitutional grounds, freedom from illegal competition is the most applicable to the situation. State law currently recognizes that right as one that merits due process protection, bypassing sovereign immunity, only as a public policy doctrine to offset governmental regulation of semi-private, or quasi-public, industry. Southwest cannot qualify for this protection because it is not subject to those governmental controls.

Practically speaking, these hotly litigated issues currently appear moot. As of the end of 1993, Texas TGV defaulted

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229 Texas Health Facilities Comm'n v. West Tex. Home Health Agency, 588 S.W.2d 655 (Tex. Civ. App.—Waco 1979, no writ); see supra notes 121-28 and accompanying text.
under the terms of its franchise by failing to raise token financing in the amount of $170 million in private funds.\textsuperscript{230} Respecting the highly charged political atmosphere, fueled in part by Southwest Airlines and various groups of landowners along the proposed rail corridors, the Authority officially terminated the franchise on August 19, 1994.\textsuperscript{231} Spokespersons for the Authority have indicated they will consider more options, including cancellation of the franchise agreement and dissolution of the Authority.\textsuperscript{232} Board chairman Hershel Payne has announced, however, that he will appoint a “blue-ribbon panel” made up of high-speed rail supporters, opponents, and Southwest Airlines, to conduct further feasibility studies and return to the Board with their recommendations.\textsuperscript{233}

Business enterprises will continue to protect their interests from creative competitors through the court system, and the law of standing will continue to be tested and molded according to the social policies in place. Meanwhile, increasing strains on road and air transportation are resulting in a proliferation of ideas and plans for high-speed and magnetic levitation rail systems all across the country.\textsuperscript{234} The federal government has allocated approximately $170 million in federal funds to be used by states in planning these projects,\textsuperscript{235} and the largest federal government investment ever in this technological area, over $225 million for Amtrak’s Northeast Corridor improvement project, was approved in late 1994.\textsuperscript{236} As international travel increases, airport congestion will increase and airlines will

\textsuperscript{230} Janin Friend, Texas Supertrain Group Defaults on Franchise When Deadline Passes Without $170 Million, BOND BUYER, Jan. 5, 1994, at 5.

\textsuperscript{231} John Williams, State Drops Plan to Seek Bullet Train; Failed Rail Effort Hailed as a “Noble Experiment”, HOUS. CHRON., Aug. 20, 1994, at A29.

\textsuperscript{232} Id.

\textsuperscript{233} John Williams, Bullet Train Officially Becomes a Dud; High-Speed Rail Body May Seek New Plan, HOUS. CHRON., Dec. 18, 1993, at A31.


\textsuperscript{235} See Texas Rescinds Franchise, ENGINEERING NEWS-REC., Sept. 5, 1994, at 20 (funding would be for three-year periods).

\textsuperscript{236} Krumm, supra note 11, at 315.
favor long-distance flights over shorter regional flights. Because of increasing airport congestion and the difficulty of building new airports or expanding existing ones, high-speed rail is the most attractive alternative for moving people between cities 250 to 400 miles apart.237

Southwest’s influence is apparent and powerful, but probably unique in Texas. While other airlines consider joining the high-speed rail revival,238 Southwest maintains its fierce protection of its transportation turf. State resources are not currently expected to meet the demands of predicted growth, yet the Texas Department of Transportation is discussing a long-range transportation plan that does not include high-speed rail because “that issue is bigger than we are . . . [t]hat’s up to the state Legislature.”239 Only time and transportation and environmental pressures will determine whether Southwest Airlines is truly the more powerful.

237 James L. Tyson, High-Speed Rail Linking Midwest States on Distant Horizon But Chugging Closer, CHRISTIAN SCI. MONITOR, June 17, 1994, at 1 (quoting Dr. David Schulz, director of the Infrastructure Technology Institute at Northwestern University and former Chicago deputy commissioner for public works).

238 USAir is an equity partner in Maglev, Inc., an organization which figures prominently in the development of high-speed rail in the Northeast. Patterson, supra note 3, at 6 (quoting Joseph Vranich, president and CEO of the High Speed Rail-Maglev Association and author of SUPERTRAINS: SOLUTIONS TO AMERICA’S TRANSPORTATION GRIDLOCK (1991)). See also Woolsey, supra note 9, at 40 (noting that “a surprisingly large number of airline executives both in Europe and the U.S. seem to feel that the high-speed train actually will benefit both the airlines and the traveling public by helping to relieve airport congestion,” and quoting USAir President Edwin Colodny in a recent speech supporting exploration of high-speed rail). According to Gil Carmichael, former Federal Railroad Administrator and now with Morrison Knudson, major shareholder in the Texas TGV Consortium, American Airlines was interested in becoming an investor in the Texas system. Edward L. McKenna, High-Speed Rail Builds Steam to Put Project Back on Track, INSIDE DOT & TRANSP. WK., May 13, 1994. Air Canada is giving serious thought to “getting in on the ground floor” of high-speed rail development being considered between Montreal, Toronto, and Ottawa. Heinrich, supra note 8, at D3.

239 John Williams, Texans Face Growing Pains Down the Road; Transportation Plan’s Hearing Set for Today, Hous. Chron., Nov. 21, 1994, at A11 (quoting Texas Department of Transportation (TXDOT) Commissioner Anne S. Wynne). TXDOT predicts that, during the next 20 years, the state’s population will grow from 18 million to 29 million; the miles travelled on Texas roads will increase by 45%; and the number of air travellers will double. Id.