Mr. SMITH: Chairman Nober, Vice Chairman Mulvey, Commissioner Buttrey, good morning. My name is Paul Samuel Smith and again it is my privilege today to represent the United States Department of Transportation. The Department opposes nationwide expansion of motor carrier rate bureaus for three main reasons.

First, because the central activity of rate bureaus requires your approval, collective rate
making is anti-competitive and against the public interest.

Second, it is expanding the geographic scope of rate bureaus as opposed to improve upon that activity in various ways if there is no demonstrable reason to believe that it will.

And, third, not only is there no clear public benefit to be gained from expansion but there is also reason to be concerned about its effects on the widespread discounting that characterizes most motor carrier pricing.

The first reason is grounded in classical economics in anti-trust law. Agreement on price, by horizontal competitors is always and everywhere detrimental to the public interest and therefore per se illegal. This is true regardless of whether that price is in the first instance a benchmark or a baseline uses a basis for further negotiations, Because such benchmarks are significantly above marketplace levels. To those who claim that the open price is paid truly reflect competitive levels or enable competitive pricing, I
offer the Justice Department’s earlier and still very couchant observation. “To rely upon discounting from a cartel price, a price that would not otherwise be set to protect consumers is to stand competition policy on its head”.

Before I move on to my next point I want to say a word here about the reliance of motor carriers and shippers on rate bureaus baselines to set the stage for price negotiations. There is no doubt that it is in some sense convenient or efficient for to parties to have these reference points. But neither is there any doubt that every other domestic transportation sector conducts business without such aids. Air carriers and rail carriers have been weaned off the anti-trust immunity that they once thought they could not do without. Barge and other domestic water carriers never had this regulatory protection. Individually and collectively, all these carriers gather and convey information, arrange complex transport services and otherwise compete in the marketplace as they should for the benefit of their customers and
without anti-trust immunity. Motor carriers are not uniquely incapable of doing the same and we don’t believe the board should be concerned that they are.

Second point is that our opposition to the pending proposal is geographically expansion is unlikely to do the Southern Motor Carrier Rate Conference says that it will, which is to improve the rate setting process but more closely aligning region costs and synchronizing the effective dates of rate increases. The improvement is supposed to be found in better, quicker meeting of so-called carrier revenue needs and more competitive rates. But regional cost differences have not been shown to be a significant component of overall trucking expenses. Revenue needs are met whenever the market permits. And finally, collective benchmarks again, are simply neither competitive nor appropriate basis for negotiation of competitive prices.

Finally, we at DOT oppose nationwide collective rate setting for the sheer imbalance that it presents. On the one hand, there is little or no demonstrable public benefit to be had from extending
this activity, and on the other, there is at best, uncertainty about its effects on the shipping public. Specifically, there is some likelihood that nationwide rate bureaus would attract more carriers and so become larger and that the number of rate bureaus might well decrease. If either or both of these happen, there is no record basis for confidence that widespread discounting will continue unabated as before; and this is critical because it is the existence and vitality of such discounting from above market benchmarks that gave the board some basis to renew its approval for the underlying agreements in the first place. The board has consistently sought to promote continued discounting and reduce reliance upon those benchmarks through its conditions. The pending request, however, threatens those efforts and the effectiveness of those conditions and should, therefore, be disapproved.

That concludes my remarks. I would be pleased to try and answer any questions that you have.
CHAIRMAN NOBER: Well - thank you. Vice Chairman Mulvey?

VICE CHAIRMAN MULVEY: Thank you. In DOT’s reply comments filed with the board, it pointed out that in addition to DOT, the Department of Justice has stressed the inherently anti-competitive nature of collectively establishing rates. To your knowledge is this still the position of the Department of Justice? Because they’re not here today so --

Mr. SMITH: They’re not here today. They have participated in numerous instances in past iterations of this proceeding. I cannot speak for the Justice Department but I think it highly unlikely that it would have reversed or otherwise materially changed its position beyond that previously submitted in this – before this board.

VICE CHAIRMAN MULVEY: In my opening statement I mentioned that in the grant of anti-trust immunity we normally narrowly construe anti-trust immunity applications. Is it the administration’s position that the petitioners have
not demonstrated that nationwide rate making
authority will promote better service to the public
or economy operation or that it will not
unreasonably restrain competition? In other words,
that they have not met that standard, crossed that
bar?

Mr. SMITH: We do not think that they have
met that standard. What they’re trying to do is
extend the scope nationwide of what is fundamentally
an anti-competitive activity and by aligning a
certain type of cost differences *(10:44:13)* which is
of a – must be a relatively minor dimension compared
to labor costs, fuel costs, depreciation costs which
are – have not been shown to differ depending upon
where one operates and in fact, as it has been
earlier pointed out this morning, carriers have to
know their costs in order to stay in business. In
fact, it was ironic to me to hear the point made
earlier that motor carriers don’t want to rely upon
somebody else – somebody else’s cost and their own.
Well, that’s what a rate bureau does. It’s
everybody else’s cost thrown into the mix. So I
don’t – and I don’t believe that there’s a public interest in extending that collective activity. It’s, there’s... you’ve just *(10:45:04)* meeting carrier needs and carrier costs. It reflects a traditional mindset that indeed every other regulated transportation sector once had given the legislative and regulatory policies of the times. But those times and policies are gone for every other segment of the transport industry.

CHAIRMAN NOBER: Okay, Commissioner Buttrey.

COMMISSIONER BUTTREY: Mr. Smith, thank you for your comments which I found to be eloquent on the points concerning the existence or non-existence of the continuation of any anti-trust immunity. But I don’t think that is the issue that’s squarely before us today in this hearing. The issues seem to be completely different to me. I don’t think you would argue that the rate bureau do not have, currently, anti-trust immunity. The question clearly before us is; they do, should they be able to expand their coverage or territory to customers outside of their traditional...
boundaries and I was just wondering, if you take away the argument about whether they should have anti-trust immunity, what is the point of them not being able to operate in all 50 states or 48 states, whichever they wish to be operating in? If they can operate in the southeast, why can’t they operate wherever they want to operate in a - basically deregulated environment, if you will, without regard to the question of whether they should have anti-trust immunity?

Mr. SMITH: Well, I can give you answers that are both divorced from and not divorced from the core question which you mentioned is not technically before the board. But I don’t think you can ignore that what is at base here is an effort to expand an activity that we and a anti-trust law regard as detrimental to the public interest. But, aside from that, we don’t think that some kind of matching or closer matching of regional cost difference of some undetermined quantity is going to have the Effect that the SMC says that it will and we are concerned – we do not believe that is irrelevant, the number of rate bureaus that exist. We would rather that none of them have anti-trust immunity.
but, if they do, we think it, if anything, a benefit to the public interest that there’d be more than a single dominant one. Or just as a great many competitors in a marketplace, as you said Mr. Chairman earlier, produces better competition for consumers. An oligopoly is better than monopoly. So we would rather have more rate bureaus with more baselines if there must be baselines to provide some check on other baselines that exist.

COMMISSIONER BUTTREY: Well, if you granted authority to have nationwide authority, wouldn’t that give - stimulate, if you will the other rate bureaus or give them at least an opportunity anyway to be nationwide rather than just be limited to one particular part of the country.

Mr. SMITH: It would as a legal matter, yes. But I - as was also earlier mentioned this morning, there is a declining number of rate bureaus in the last 10 years or so anyway and I think that reason there are - is some support, and some opposition among rate bureaus for this petition that is before you is based upon the respective use of those rate bureaus for their
future. If they think that they can make a go of it in the face of either nationwide possible scope or can’t, either they don’t think they can or they’re concerned that some other rate bureau such as SMC would dominate them, then they would oppose it.

COMMISSIONER BUTTREY: Thank you.

CHAIRMAN NOBER: Okay, well, again I just want to reiterate the point that I made earlier and Commissioner Buttrey just made which is, it seems like we have separate questions. One is: Are rate bureaus good – good or bad to have in the – and do they help the marketplace? And, are rate bureaus in the public interest? We just completed a proceeding on that score and we’re going to start another one in a few months and I don’t want to have a constant proceeding going on rate bureaus but we do have a opportunity to review that. And then here, the question is: If we have rate bureaus, is it in the public interest to have them have broader scope or narrower scope. And, do you think we can divorce the two questions and look at them independently or not?
Mr. SMITH: I think you can, yes. As I tried to respond to Mr. Buttrey, aside from their necessary tie to the existence of collective rate setting within some geographic region, we don’t believe that they will have a beneficial effect on the public interest even notwithstanding that question.

CHAIRMAN NOBER: In the end, isn’t it relatively, I mean, isn’t there – there’s plenty of competition in the LTL market, isn’t that right?

Mr. SMITH: Yes. There are –

CHAIRMAN NOBER: There are tens of thousands of competitors.

Mr. SMITH: Well, not in the LTL market, per se, I would say there are probably a few hundred competitors certainly. It’s not like a point to point kind of market because there’s different capital requirements and arrangements to be set up for terminals and so on and so forth. But there are – it certainly is competitive.

CHAIRMAN NOBER: But the argument has at least been – always been made to me that the benefit of rate bureaus, if there is one, is that it allows
smaller competitors to have a national - to look nationally and be able to price nationally when they otherwise wouldn’t have the sophistication or ability to do it and that that keeps competitors in the market with a few large national companies. How do you respond to that?

Mr. SMITH: I would respond to that by saying that I don’t think that the motor carriers use is unique. Nobody else has that ability to use a collective immunized group that conducts some activity or other to stay in business. In fact, in every other sector they do manage collectively to gather price information disseminated with immunity - they go to the Department of Justice for review or the Fellow Trade Commission, whomever, and they run through the details of what they can or cannot do under penalty of facing any trust suit and they continue to function. And they obviously must be mindful of risks that are involved and they can do some things and not do other things. But small companies do enter businesses and stay in business even in other sectors with much higher barriers than in the motor carrier industry.
CHAIRMAN NOBER: Let’s say that you were right and if we granted anti-trust immunity that any competitive harm would flow from that downstream, which is not a subject I’d really like to look at. Would we have the opportunity to address that later on? Are there conditions we could put on that would – or subsequent review that we do that would let us address anti-competitive outcomes in the future?

Mr. SMITH: Well, as you said before, our Congress requires you to look at it no less than every five years and you have always an on-going opportunity any time you wish to re-open the quest. Although as you also mentioned, you don’t want to have continual re-opening of – -

CHAIRMAN NOBER: It took us over five years to get the last proceeding done, which is not to our agency’s credit. But one of my priorities was to get that resolved, and we did, and to get us back on some kind of regular schedule here, which, I think, we’re trying to do now.
Mr. SMITH: Sure, but you’ll certainly have ample opportunity to visit core questions or even secondary questions at any time.

CHAIRMAN NOBER: Finally, as I look at it now, we don’t have rate bureaus competing with one another. We have a series of enforced regional monopolies, if you will, over rates for the rate bureaus. So why does maintaining that benefit competition? Couldn’t you argue that letting the rate bureaus, for whatever it is that they do, compete with one another, and if they go bankrupt, so be it or not? Maybe they’ll thrive and compete or maybe two will survive. Who knows what will happen? None of us – if we could predict the future, we probably wouldn’t be sitting here. We’d be somewhere else (certainly I would be) and see what happens. Why would that be the more pro - that would allow two bureaus to compete. Right now we’re protecting two bureaus from competing.

Mr. SMITH: If you remove interest immunity from the equation, I would agree with you.
CHAIRMAN NOBER: Okay, we could revisit that next year. Anyway, it’s just a – it’s a question. So you think that it would be --

Mr. SMITH: Even from the extension, removing this immunity from the extension nationwide as I’m sure --

CHAIRMAN NOBER: But even right now, just again to reiterate a point I and Commissioner Buttrey both made which is, “How is maintaining regionally enforced monopolies with anti-trust immunity more competitive than having national enforcement – national bureaus, if you will, with anti-trust immunity?

“Granted, you don’t like anti-trust immunity.

Mr. SMITH: We don’t see any reason to be optimistic about expanded rate bureaus not having a deleterious effect on discounting. There is little or no upside to us and only the potential for downside for allowing this extension.

CHAIRMAN NOBER: Gotcha. Okay. Does anybody else have any questions?

VICE CHAIRMAN MULVEY: A couple more minor questions. You admit though that competition has been
extremely effective in the truckloading industry since the Motor Carrier Act and even with collective rate making, the shippers receive highly competitive rates. So, collective rate making really has not been detrimental to those who rely upon truck transport for moving goods right?

Mr. SMITH: Well, as the board said earlier in this case, if we were - if we the board, that is, were totally unconcerned that some shippers no - the shippers wouldn’t - no shipper would ever pay the class rates—(10:55:32), then there wouldn’t be a problem. It would be less of a problem but there are - if there are hundreds of LTL firms, there are tens of thousands or more of shippers and there’s - smaller shippers by definition use less than a truckload and they would be roughly unsophisticated and those shippers would be at a disadvantage.

VICE CHAIRMAN MULVEY: But it behooves a shipper to find out - to investigate what the costs of services are. The shipper buys all kinds of inputs including the transportation input in getting his product to market. Isn’t it his responsibility to shop
around and try and find the best cost, and Commissioner Buttrey suggested earlier, firms that don’t know their cost or don’t at some point manage their cost probably shouldn’t be in business, even the small shipper. We have the same argument sometimes for people who ship household goods and we say that the household goods shippers, that is you or I moving our personal effects, don’t have any experience. But that’s a little different from somebody who’s manufacturing something and shipping it. They may be small but one would presume that they’re constantly moving things by truck and would learn something about how to go about negotiating and getting the best rate, no?

Mr. SMITH: To the extent that they – yes, and the more informed consumer/shipper otherwise is always going to be better off because they’re always going to be comparing. The difficulty here is that the major basis for comparison is this baseline rate that wouldn’t be there in the absence of immunity in the first place. It is an artificial construct that forms this reference point about which the negotiations evolve.
VICE CHAIRMAN MULVEY: But it does strike me that the shipper has some responsibility to understand how rates are constructed for what he’s moving. You were talking about how the trucking industry differs from other industries in that they don’t have this collective rate making ability, but it’s also true that – you talk about small firms, these small firms can be moving many, many thousands, if not millions, of different commodities and I say millions of different commodities. There is immunity to standardize them as the class system does with regard to the characteristics of storability, density, liability, etc., and that these small trucking companies – without this class system and without the collective rate making that is tied to it would be at a loss as to what should be the relevant charge that they should make or the relevant base charge that they should discount from without some collective assistance, and some knowledge of the cost characteristics which are the basis for these rates nationwide or regional wide. How would you comment on that?
Mr. SMITH: I would say that small barge lines, small air cargo carriers, they manage to do it along with the Federal Express’s of the world. It’s – there’s nothing about being a motor carrier, large or small, that makes you incapable of doing the same thing as your counterparts or competitors.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN NOBER: Okay, in some ways to me, the pricing in the LTL market is something like buying a car. There’s kind of a sticker price and everybody discounts off of that. The sticker price is kind of a baseline that everybody understands and you go and you try to negotiate your best deal and consumers find that to be a deeply satisfying consumer experience of any other. It’s not certainly anything to be proud of but the market does eventually work in that circumstance, difficult as it may be. The consumers that go on line and find out the invoice price, do the auto shopping guides, they manage to get a better price than others. It depends on how much work they want to put into it. I know that’s not a perfect analogy but at least it’s
how, in my own mind, I think I see it. I don’t know if you agree with that.

Mr. SMITH: But that Monroney sticker that’s on that car comes from one manufacturer, not the group of all the manufacturers deciding what they’re going to put on that sticker.

CHAIRMAN NOBER: True. But in theory cars are all different. Okay, well if there’s no further questions, thank you very much for your thoughts on this and we’ll now call up our remaining speakers, David Coburn on behalf of the Rocky Mountain Tariff Bureau and EC-MAC Motor Carriers, John Cutler on behalf of the NASSTRAC, and Jeff Moreno on behalf of the NITL League. Then again some of you are frequent customers and others of you are not. But the – I’ll tell you that the – my policy is to start from my left and go to my right. So, Mr. Coburn draws short straw and he goes first.