MR. CUTLER: Thank you Chairman Nober. I’d like to start with a little background. The - both as to the rate bureaus generally to SMC in particular. When the rate bureau reform proceeding was begun in the latter part of the 90s, NASSTRAC was actually opposed to continued anti-trust immunity for the rate bureaus. As the proceeding progressed, it became apparent that eliminating anti-trust immunity for the rate bureaus was not in the cards in that proceeding. From the questions today, it appears that this issue may be arising again when the next round comes up to consider rate bureau anti-trust immunity generally. I think as Chairman Nober pointed out, there are going to be two proceedings here; this one, is SMC going nationwide, the other one going to be revised anti-trust immunity for the rate bureaus in general. They’re not unrelated. I don’t think you should ignore these fundamental questions about the benefits, the public interest and preservation of rate bureau anti-trust
immunity and considering nationwide authority for SMC. On the other hand, that issue is not unique to SMC and it may be that one way of addressing this confluence of issues would be to defer acting on SMC’s nationwide authority application until the broader issues are reached as to the rate bureaus generally in whatever proceeding is coming up toward the end of this year.

At any rate, because of the way we read the board’s intentions during the last rate bureau reform proceeding, NASSTRAC’s position became one of making the best of the situation. SMC’s application for anti-trust immunity for a nationwide authority is also many years old. At that time, NASSTRAC supported it. However, during the intervening years, we’ve seen a reduction in the number of rate bureaus that are out there and we’ve seen SMC grow and become stronger. Not just through the popularity of Czar-Lite but also through the ancillary software that it has developed and marketed very successfully. This factor is one of the things that differentiates SMC’s baseline from the hundreds of other baselines that Mr. Bagileo spoke of a few minutes ago. In many ways, SMC deserves credit for
its success. However, those very qualities that have led SMC to prosper where its rivals have fallen by the way side, also, raised concerns about the future. I agree with DOT. We’re talking about anti-trust immunity for price fixing as well as the creation and marketing of commercial packages that enhance the market power of SMC.

SMC’s position in proceedings is essentially two fold. On offense, SMC argues that Czar-Lite will be compromised if the other rate bureaus fold. On defense, SMC argues that it hasn’t abused its already strong position and that won’t change if it goes national. NASSTRAC doesn’t reject the argument that Czar-Lite would be enhanced if SMC goes national, but we think that argument’s exaggerated. The main reason I’m here, however, is that NASSTRAC can’t support SMC’s request for unconditional nationwide authority. SMC’s position is that it should be treated as innocent until proven guilty. In other words, SMC asks the board to assume the best as to the future that other rate bureaus and other rate bases will continue to exist and compete vigorously with SMC and shippers need have no
fear of any increase in SMC’s market power. DOT and the NITL League are skeptical as is NASSTRAC. There are simply too many unanswered questions. For example, Middlewest Motor Freight Bureau has not commented pro or con on SMC’s application. SMC cites Middlewest as a powerful competitor but we have no corroboration from Middlewest itself. No one knows what will happen in the next three to five years if SMC goes national. Three to five years from now, we’ll all know more. It’s actually axiomatic*(11:22:42) that an unregulated monopoly is not in the public interest. However, STB regulation of rate bureaus is rare outside these periodic renewal proceedings.

NASSTRAC doesn’t believe that recourse to the board adequately addresses shipper concerns. Requiring disclosure of rate discount ranges, the Truth in Rates Program, and prohibiting loss of discount penalties based on bureau class rates as was done in the last rate bureau reform proceeding are helpful as far as they go, but they don’t address the most fundamental problem with all rate bureaus including SMC. This is that when they increase base rates, shippers, other
than largest and most knowledgeable, will pay
collectively set rate increases to some degree. As a
practical matter, frequent protests are not likely.

Protections against abuse should be structural rather
than transactional. It could be argued that such
shippers have no basis for complaining about higher
freight rates if they don’t pay more attention to the
details of the collective rate making by a nominally
deregulated industry.

The fact of the matter is that many shippers
facing intense competition in their own businesses lack
the time and expertise to protect themselves. They
know about discounts but many are surprised to find
what’s behind discounting. In other words, NCC freight
classifications and regional rate bureaus.

A professor of logistics once told me he
didn’t realize that rate bureaus still existed.
NASSTRAC understands that trucking companies like
shippers sometimes need to increase their prices.
However, collectively set price increases should be the
exception rather than the rule.
Commissioner Mulvey mentioned the railroad, RCAF. I was involved in the proceedings that led to adoption of a productivity adjustment to the RCAF. There was a period of about 10 years during which there were virtually no tariff rate increases published by the railroad industry. It was easier, simply to let the RCAF, every quarter, increase freight rates. Similarly with rate bureaus - the easy way to do rate bureaus is through classification increases or general rate increases in base rates and then the discounts can remain in place. Shippers may think well I negotiated a good discount, so I’m safe, but when the baseline rate goes up, so does the discount rate.

Assuming there’s adequate competition as to baseline rates today, how long will this remain true if SMC gains national rate authority? Further rate bureaus fold or are absorbed by SMC. SMC becomes the only national rate bureau. Czar-Lite could become the dominant or only national baseline class rate tariff for the trucking industry. Alternatives could be few and could lack the software support that SMC provides.
NASSTRAC is not willing to assume that carriers who have market power will never abuse it.

We have a good relationship with SMC. I’ve attended their meetings, they are open. They have a good website. We think highly of them as a rate bureau, but this is a trust with verify situation. In the recent rate bureau proceedings, the board appeared to agree with some of our concerns. It makes no sense to assume that reforms adopted when SMC was only one of many rate bureaus will still be adequate when it’s dominant or the only rate bureau left. But that’s what SMC is effectively asking the board to decide here.

In our reply comments, we urge the board not to grant SMC’s application unless conditions are imposed. We still feel that way.

First, if SMC and Czar-Lite become more dominant, the accuracy of Czar-Lite will become more important. If increases in baseline rates are exaggerated – exaggerated increases in discount rates will follow. Shippers attempting to negotiate off sets may be met with the response that increases are cost justified.
To facilitate testing such claims, we recommend the imposition of conditions along the lines of those imposed on the NCC. In the old days, when I went to the NCC for an explanation of classification changes, I got at best, a paragraph. Today, thanks to the NCC reform proceeding, the NCC is required to provide justification for its proposals.

I’ve read the SMC white papers that are issued in advance of its GRI meetings. They’re pretty general. Apparently, more information is provided once you attend the meeting. We see no reason why the more detailed information couldn’t be provided in advance to let shippers see what’s going on.

Second, SMC should be prevented from prohibiting shippers from using Czar-Lite in combination with their own preferred software. SMC says it doesn’t engage in tying and if it did, it could be sued under the anti-trust laws. It is not clear that this is true as a matter of law but, even if it is, anti-trust actions are expensive and burdensome and maybe prohibitive unless the violations are widespread
or extensive, minor or ambiguous actions may never be challenged.

In addition, SMC acknowledges that it makes its software available subject to licensing agreements designed to protect SMC’s intellectual property. Sounds fine but licensing agreements can be pro-competitive or anti-competitive. The devil is in the details. Also, a seller’s incentive can change depending on whether it seeks to gain market share or to protect a lucrative monopoly. In the computer field, compare Microsoft and Linux. In any event, if SMC has no plans to engage in tying arrangements, how would it be harmed by conditions explicitly prohibiting such tactics?

Similarly, SMC should be prohibited from unreasonable discrimination in pricing. They say they tried to accommodate all reasonable requests, this is plausible. SMC’s incentive is to sell its products and services. However, as competition for Czar-Lite recedes, the temptation for price differentiating may increase.
The 20 percent minimum discount has been addressed in our comments. SMC says it has no plans to change the 20 percent minimum discount. However, we got similar promises from the other rate bureaus and the Truth and Lending disclosures that were required to be filed earlier this year indicated that some of those promises weren’t kept. If SMC abandoned the 20 percent minimum discount, it could be a year before this came to light and another six months before remedial action could be taken from the STB, assuming it was even sought. For this reason, SMC says the GRI’s won’t reflect fuel cost increases. I’m glad to hear it, but I have 1990 – and they said they haven’t done this ’95. I’m glad to hear it, but I’ve got a 1999 flyer that says the DOE Fuel Price Index is one of the components of the SMC carrier cost index. The carrier cost index is going to require a lot more attention if SMC becomes the only game in town. In the past we have been unable to rely on the existence of competing rate bureaus. In the future, we may not be able to do so.

Basically, SMC has said it would accept reasonable conditions but it seems to object to
conditions that are similar to conditions the board has
already adopted or to conditions that amount to no more
than taking SMC at its word.

   We don’t know what will happen if SMC gains
national rate authority, but because granting such
authority with no conditions amounts to favoring anti-
trust immunity contrary to general and specific
statutory and case law. The board’s choice is clear.
If it doesn’t deny SMC’s application, reasonable
conditions have to be imposed. Thanks very much.