

4 MR. CUTLER: Thank you Chairman Nober. I'd  
5 like to start with a little background. The - both as  
6 to the rate bureaus generally to SMC in particular.  
7 When the rate bureau reform proceeding was begun in the  
8 latter part of the 90s, NASSTRAC was actually opposed  
9 to continued anti-trust immunity for the rate bureaus.  
10 As the proceeding progressed, it became apparent that  
11 eliminating anti-trust immunity for the rate bureaus  
12 was not in the cards in that proceeding. From the  
13 questions today, it appears that this issue may be  
14 arising again when the next round comes up to consider  
15 rate bureau anti-trust immunity generally. I think as  
16 Chairman Nober pointed out, there are going to be two  
17 proceedings here; this one, is SMC going nationwide,  
18 the other one going to be revised anti-trust immunity  
19 for the rate bureaus in general. They're not  
20 unrelated. I don't think you should ignore these  
21 fundamental questions about the benefits, the public  
22 interest and preservation of rate bureau anti-trust

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1 immunity and considering nationwide authority for SMC.  
2 On the other hand, that issue is not unique to SMC and  
3 it may be that one way of addressing this confluence of  
4 issues would be to defer acting on SMC's nationwide  
5 authority application until the broader issues are  
6 reached as to the rate bureaus generally in whatever  
7 proceeding is coming up toward the end of this year.

8 At any rate, because of the way we read the  
9 board's intentions during the last rate bureau reform  
10 proceeding, NASSTRAC's position became one of making  
11 the best of the situation. SMC's application for anti-  
12 trust immunity for a nationwide authority is also many  
13 years old. At that time, NASSTRAC supported it.  
14 However, during the intervening years, we've seen a  
15 reduction in the number of rate bureaus that are out  
16 there and we've seen SMC grow and become stronger. Not  
17 just through the popularity of Czar-Lite but also  
18 through the ancillary software that it has developed  
19 and marketed very successfully. This factor is one of  
20 the things that differentiates SMC's baseline from the  
21 hundreds of other baselines that Mr. Bagileo spoke of a  
22 few minutes ago. In many ways, SMC deserves credit for

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1 its success. However, those very qualities that have  
2 led SMC to prosper where its rivals have fallen by the  
3 way side, also, raised concerns about the future. I  
4 agree with DOT. We're talking about anti-trust  
5 immunity for price fixing as well as the creation and  
6 marketing of commercial packages that enhance the  
7 market power of SMC.

8 SMC's position in proceedings is essentially  
9 two fold. On offense, SMC argues that Czar-Lite will  
10 be compromised if the other rate bureaus fold. On  
11 defense, SMC argues that it hasn't abused its already  
12 strong position and that won't change if it goes  
13 national. NASSTRAC doesn't reject the argument that  
14 Czar-Lite would be enhanced if SMC goes national, but  
15 we think that argument's exaggerated. The main reason  
16 I'm here, however, is that NASSTRAC can't support SMC's  
17 request for unconditional nationwide authority. SMC's  
18 position is that it should be treated as innocent until  
19 proven guilty. In other words, SMC asks the board to  
20 assume the best as to the future that other rate  
21 bureaus and other rate bases will continue to exist and  
22 compete vigorously with SMC and shippers need have no

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1 fear of any increase in SMC's market power. DOT and  
2 the NITL League are skeptical as is NASSTRAC. There  
3 are simply too many unanswered questions. For example,  
4 Midwest Motor Freight Bureau has not commented pro  
5 or con on SMC's application. SMC cites Midwest as a  
6 powerful competitor but we have no corroboration from  
7 Midwest itself. No one knows what will happen in  
8 the next three to five years if SMC goes national.  
9 Three to five years from now, we'll all know more.  
10 It's ~~actually~~ **axiomatic** ~~\*(11:22:42)~~ that an unregulated  
11 monopoly is not in the public interest. —However, STB  
12 regulation of rate bureaus is rare outside these  
13 periodic renewal proceedings.

14 NASSTRAC doesn't believe that recourse to the  
15 board adequately addresses shipper concerns. Requiring  
16 disclosure of rate discount ranges, the Truth in Rates  
17 Program, and prohibiting loss of discount penalties  
18 based on bureau class rates as was done in the last  
19 rate bureau reform proceeding are helpful as far as  
20 they go, but they don't address the most fundamental  
21 problem with all rate bureaus including SMC. This is  
22 that when they increase base rates, shippers, other

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1 than largest and most knowledgeable, will pay  
2 collectively set rate increases to some degree. As a  
3 practical matter, frequent protests are not likely.  
4 Protections against abuse should be structural rather  
5 than transactional. It could be argued that such  
6 shippers have no basis for complaining about higher  
7 freight rates if they don't pay more attention to the  
8 details of the collective rate making by a nominally  
9 deregulated industry.

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

16 A professor of logistics once told me he  
17 didn't realize that rate bureaus still existed.  
18 NASSTRAC understands that trucking companies like  
19 shippers sometimes need to increase their prices.  
20 However, collectively set price increases should be the  
21 exception rather than the rule.

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1           Commissioner Mulvey mentioned the railroad,  
2 RCAF. I was involved in the proceedings that led to  
3 adoption of a productivity adjustment to the RCAF.  
4 There was a period of about 10 years during which there  
5 were virtually no tariff rate increases published by  
6 the railroad industry. It was easier, simply to let  
7 the RCAF, every quarter, increase freight rates.  
8 Similarly with rate bureaus - the easy way to do rate  
9 bureaus is through classification increases or general  
10 rate increases in base rates and then the discounts can  
11 remain in place. Shippers may think well I negotiated  
12 a good discount, so I'm safe, but when the baseline  
13 rate goes up, so does the discount rate.

14           Assuming there's adequate competition as to  
15 baseline rates today, how long will this remain true if  
16 SMC gains national rate authority? Further rate  
17 bureaus fold or are absorbed by SMC. SMC becomes the  
18 only national rate bureau. Czar-Lite could become the  
19 dominant or only national baseline class rate tariff  
20 for the trucking industry. Alternatives could be few  
21 and could lack the software support that SMC provides.

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1 NASSTRAC is not willing to assume that carriers who  
2 have market power will never abuse it.

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

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

16 First, if SMC and Czar-Lite become more  
17 dominant, the accuracy of Czar-Lite will become more  
18 important. If increases in baseline rates are  
19 exaggerated - exaggerated increases in discount rates  
20 will follow. Shippers attempting to negotiate off sets  
21 may be met with the response that increases are cost  
22 justified.

1           To facilitate testing such claims, we  
2 recommend the imposition of conditions along the lines  
3 of those imposed on the NCC. In the old days, when I  
4 went to the NCC for an explanation of classification  
5 changes, I got at best, a paragraph. Today, thanks to  
6 the NCC reform proceeding, the NCC is required to  
7 provide justification for its proposals.

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

14           Second, SMC should be prevented from  
15 prohibiting shippers from using Czar-Lite in  
16 combination with their own preferred software. SMC  
17 says it doesn't engage in tying and if it did, it could  
18 be sued under the anti-trust laws. It is not clear  
19 that this is true as a matter of law but, even if it  
20 is, anti-trust actions are expensive and burdensome and  
21 maybe prohibitive unless the violations are widespread

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1 or extensive, minor or ambiguous actions may never be  
2 challenged.

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

15 Similarly, SMC should be prohibited from  
16 unreasonable discrimination in pricing. They say they  
17 tried to accommodate all reasonable requests, this is  
18 plausible. SMC's incentive is to sell its products and  
19 services. However, as competition for Czar-Lite  
20 recedes, the temptation for price differentiating may  
21 increase.

1           The 20 percent minimum discount has been  
2 addressed in our comments. SMC says it has no plans to  
3 change the 20 percent minimum discount. However, we got  
4 similar promises from the other rate bureaus and the  
5 Truth and Lending disclosures that were required to be  
6 filed earlier this year indicated that some of those  
7 promises weren't kept. If SMC abandoned the 20 percent  
8 minimum discount, it could be a year before this came  
9 to light and another six months before remedial action  
10 could be taken from the STB, assuming it was even  
11 sought. For this reason, SMC says the GRI's won't  
12 reflect fuel cost increases. I'm glad to hear it, but  
13 I have 1990 - and they said they haven't done this '95.  
14 I'm glad to hear it, but I've got a 1999 flyer that  
15 says the DOE Fuel Price Index is one of the components  
16 of the SMC carrier cost index. The carrier cost index  
17 is going to require a lot more attention if SMC becomes  
18 the only game in town. In the past we have been unable  
19 to rely on the existence of competing rate bureaus. In  
20 the future, we may not be able to do so.

21           Basically, SMC has said it would accept  
22 reasonable conditions but it seems to object to

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1 conditions that are similar to conditions the board has  
2 already adopted or to conditions that amount to no more  
3 than taking SMC at its word.

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

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