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**U.S. Department of  
Transportation**  
Office of the Secretary  
of Transportation

**General Counsel**

400 Seventh St., S.W.  
Washington, D.C. 20590

October 20, 2004

Vernon A. Williams, Secretary  
Surface Transportation Board  
Suite 700  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Re: Southern Motor Carrier Rate Conference, Inc.  
Section 5a Application No. 46 (Sub-No. 20)

Dear Secretary Williams:

Pursuant to the Board's decision in the above-referenced docket served October 1, enclosed herewith is the Summary Statement of the United States Department of Transportation. This document has been filed electronically and is being served on all Parties of Record by first-class mail, postage prepaid.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Paul Samuel Smith".

PAUL SAMUEL SMITH  
Senior Trial Attorney  
(202) 366-9280

cc: Parties of Record

**Before the  
Surface Transportation Board  
Washington, D.C.**

Summary Statement of the ) Sec. 5a Application No. 46 (Sub-No. 20)  
United States Department of Transportation )

The petition before the Surface Transportation Board (“STB” or “Board”) proceeds from an inherently flawed foundation: that prices set by horizontal competitors reflect the rates set by a competitive marketplace. Collectively fixed prices have *always* produced above-market rates, and the Board has found this industry to be no different. That is why this activity is *per se* illegal under federal antitrust law.

It does not matter if the rate produced is a “baseline” rather than a final price. It does not matter if such a baseline is in some sense “convenient” as a reference point for negotiations. As the Department of Justice observed more than seven years ago in an earlier iteration of this proceeding, “To rely on discounting from a cartel price -- a price that would not otherwise be set -- to protect consumers is to stand competition policy on its head.”

It is understandable that the Southern Motor Carriers Rate Conference (“SMC”) would try to pull off this feat. Domestic transportation firms in different modes have attempted to do the same when they were faced with the loss of antitrust immunity for substantially similar activities decades ago. They, too, contended that collective ratemaking and related functions were not only defensible but a positive public good, whose absence would bring about chaos and worse.

But that did not happen; the sky did not fall. The air carriers lost their antitrust immunity and they continue to operate, communicate with each other and their

customers, collect and disseminate information, sell their individual and joint services, etc. So do the rail carriers. Shippers and passengers continue to be served in a manner consistent with antitrust law and competition policy, oftentimes through collaborative mechanisms and procedures.

Technically, of course, the question now before the Board is not the existence, *vel non*, of antitrust immunity for collective ratemaking or "baseline setting." Rather, it is the grant of immunity for a sort of "refinement" of this activity. Proponents of nationwide expansion of rate bureaus seek thereby to improve this function by better matching costs and synchronizing pricing decisions. They contend that the result will meet the revenue needs of motor carriers and produce competitive rates (or "baselines") for shippers.

But labor-related costs, which have not been shown to vary significantly (or even at all) by region, account for far more than any other category of carrier expenses. Furthermore, the record does not reflect that trucking firms make decisions about the scope of their own operations based on the geographic extent of rate bureaus.

Notwithstanding these points, the United States Department of Transportation ("DOT" or "Department") repeats its views on the collective ratemaking function because we oppose efforts to "improve" upon it. Such improvements cannot redound to the ultimate advantage of consumers of transportation services, for whose benefit competition has displaced protected collective activity by every other type of carrier, any more than does ratesetting itself.

To the contrary, it is because any benefit will more likely accrue to rate bureaus and their membership that DOT is concerned about the expansion now pending. A rate

bureau that can better align costs, synchronize pricing, and otherwise respond to its members is likely to attract new motor carriers. If the number of rate bureaus declines, there will be fewer alternative sources of even rate "baselines" for shippers. The above-market rates or "baselines" produced by larger and/or fewer groups of carriers covering the entire country may be more resistant to widespread discounting. Since it was only this phenomenon that provided the basis for continued antitrust immunity for rate bureaus in the first place, the risk is obvious. There is simply no reason to be sanguine about the consequences of granting the SMC petition. Since there is little or nothing to be gained and only the prospect of consumer welfare losses, the petition is not in the public interest. Because it does not meet the applicable legal standard, it should be denied.

Should the STB nonetheless consider approving the petition, conditions should be imposed to monitor real-world consequences and provide a basis for any corrective measures that may be warranted. Conditions should include periodic reporting by rate bureaus of their membership, and on the range and weighted average of discounts offered by their membership.