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November 5, 2003

Vernon A. Williams
Secretary
Surface Transportation Board
The Mercury Building
1925 K Street, NW #700
Washington, DC 20423

ENTERED
Office of Proceedings
NOV 05 2003
Part of
Public Record

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

Dear Secretary Williams:

Enclosed please find the original and ten copies of Southern Motor Carriers Rate Conference, Inc.'s petition to reopen and reconsider the proceeding on the present record, or alternatively, for further hearing and the setting of a procedural order for the submission of additional evidence. A copy has been served on this date on all known parties of record.

An additional copy of this petition is enclosed which it is requested be date-stamped or receipt otherwise acknowledged, and returned to me. A self-addressed, stamped envelope is enclosed for your convenience.

Thank you for your assistance.

Sincerely,

John R. Bagileo

John R. Bagileo
Counsel for Southern Motor Carriers
Rate Conference, Inc.

Enclosures



209320

Before The
Surface Transportation Board

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

Petition of Southern Motor Carriers Rate Conference, Inc. to Reopen
and Reconsider the Proceeding on the Present Record, or
Alternatively, for Further Hearing and the Setting of a
Procedural Order for the Submission of Additional Evidence

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Counsel for Southern Motor Carrier Rate
Conference, Inc.

Dated: November 5, 2003



Before The
Surface Transportation Board

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

Petition of Southern Motor Carriers Rate Conference, Inc. to Reopen
and Reconsider the Proceeding on the Present Record, or
Alternatively, for Further Hearing and the Setting of a
Procedural Order for the Submission of Additional Evidence

Southern Motor Carriers Rate Conference, Inc. (SMC), by its counsel, files this petition seeking the reopening and reconsideration of its request in Section 5a Application No. 46 (Sub-No. 20) for nationwide collective ratemaking authority based on the record made in that proceeding, and the Surface Transportation Board's (STB) prior decision in that matter. Alternatively, if the STB desires that additional evidence be taken on that application that the agency, considering the evidence already of record, set the matter for further hearing and, in conjunction therewith, concurrently set a procedural schedule for the filing of evidence by interested persons. In support of those requests SMC respectfully states as follows:

I.
Background of the Proceeding

In the STB's Decision in Section 5a Application No. 118 (Amendment No. 1), et al., EC-MAC Motor Carriers Service Association, Inc., Et Al., served on May 20, 1997, the agency sought additional comments on the consolidated applications of seven

regional motor carrier rate bureaus for authority to expand their ratemaking activities nationwide. Embraced in that proceeding is the refiled application of SMC filed with the agency on December 19, 1996, requesting to engage in nationwide collective ratemaking. That expanded ratemaking authority is needed to enable its member motor carriers to establish class rates throughout the continental United States coextensive with the transportation operations those carriers now provide. That application is designated as Section 5a Application No. 46 (Sub-No. 20).

Unparalleled support of SMC's Section 5a Application is evidenced by the record in the Sub-No. 20 proceeding. There are 191 statements submitted by shippers, transportation intermediaries, a shipper organization and others voicing their support for SMC receiving nationwide collective ratemaking authority for its member motor carriers. Moreover, 116 statements were filed by small, medium-sized and large motor carriers attesting to their need for the agency granting SMC's application. With that authority the member motor carriers could establish a nationwide baseline of class rates reflecting their costs and revenue needs, and thereby be in the position to offer truly competitive rates to their transportation customers. Collectively, those supporting statements represented businesses and organizations having facilities providing or requiring motor carrier transportation services throughout the United States.

The agency found that the applications for expanded ratemaking authority had merit. In its Decision served on December 18, 1998, in the consolidated proceeding, the STB concluded that:

[W]e recognize the increasingly globalized nature of the transportation system and the anachronistic nature of restrictions limiting bureaus to geographic territories. In our view, provided the bureaus reduce their class rate scales appropriately, they should be

permitted to lift such territorial restrictions. Absent a clear expression from Congress to the contrary, we intend to allow bureaus whose agreements are approved after December 31, 1999, to lift the territorial restrictions on the scope of their agreements. (Decision, pp. 9-10.)¹

In Section 227 of the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (Dec. 9, 1999), the STB was prohibited from authorizing regional rate bureaus to operate on a nationwide, rather than a territorial, basis. Because of that stealth legislation, believed to have been initiated by several of the rate bureaus opposed to expansion of the territories served by the regional rate bureaus, the STB, at that time, was prevented from carrying out its recommended granting of the then pending nationwide ratemaking applications upon renewal of the motor carrier associations' extant Section 5a Agreements. Thus, in the STB's Decision served on February 11, 2000 in Section 5a Application No. 118 (Amendment No. 1), et al, EC-MAC Motor Carriers Service Association, Inc., Et Al., the agency indicated that the then effective legislative restriction on its authority directed it not to implement "the intention expressed in the 1998 Decision to allow rate bureaus to operate on a nationwide basis...."² (See 2000 Decision, pp. 4-5 and fn. 5.)

¹ A copy of the STB's Decision served on December 18, 1998 is appended as Attachment I. As the agency indicated, it did not finally rule on the requests for expanded ratemaking authority at that time because of a November 17, 1998 letter from the Committee on Transportation and Infrastructure of the U.S. House of Representatives asking the STB to refrain from taking any final action pending Congressional review of a number of provisions in the Interstate Commerce Commission Termination Act of 1995. (See Decision, pp. 8-9.)

² A copy of the STB's Decision served on February 11, 2000, in the consolidated rate bureau proceeding is appended as Attachment II.

II.
Basis for the Relief Requested

In Section 354 of the Omnibus Appropriations Act FY 2003, Pub. L. No. 108-7, 117 Stat. 11 (H.J. Res. 2) (Feb. 20, 2003), subsection (d) of Section 13703 of 49 U.S.C., which prohibited the STB from taking any action that would permit the establishment of nationwide collective ratemaking authority, was stricken. As indicated by the STB in its 2000 Decision, that prohibition was the sole reason the agency could not go forward with its expressed intent to grant the expanded collective ratemaking applications. Congress has repealed that prohibition and restored to the agency the long-standing authority which the STB, and its predecessor the Interstate Commerce Commission, possessed in granting the territorial expansion of so-called Section 5a Agreements.

Under 49 CFR § 1115.4, at any time a person may file a petition to reopen an administratively final action of the Board in accord with the requirements of Sections 1115.3(c) and (d). The petition to reopen must state in detail, as is particularly pertinent here, the respects in which the proceeding involves new evidence or substantially changed circumstances. It is submitted that the repeal of subsection (d) of Section 13703 of 49 U.S.C., and the concomitant restoration of the agency's authority to grant nationwide collective ratemaking, constitutes both new evidence and/or changed circumstances directly affecting the action taken by the STB in concluding that it was unable to grant SMC's application in Section 5a Application No. 46 (Sub-No. 20). That impediment no longer exists. Therefore, in light of the STB's specific findings that, but for the repealed prohibition, the application would be granted, good grounds exist for reopening and reconsidering SMC's nationwide collective ratemaking agreement. Moreover, as is particularly pertinent and further substantiates the appropriateness of now

reconsidering SMC's Sub-No. 20 application is the fact that by Decision served on October 16, 2003 in Section 5a Application No. 118 (Sub-No. 2), et al., EC-MAC Motor Carriers Service Association, Et Al., the STB has approved SMC's Agreement, as amended, for renewal. As previously indicated by the STB action granting the request for nationwide ratemaking authority would be taken contemporaneously when such renewal was granted.

SMC respectfully submits that in accord with the requirements of 49 CFR § 1115.3(c) it has stated in detail the nature of and reasons for the reopening and reconsideration of its application, and that new evidence and/or changed circumstances fully justify granting the relief sought. Accordingly, it is requested that the STB make said determination and grant the relief sought in this petition.

III. Further Hearing and the Setting of a Procedural Order

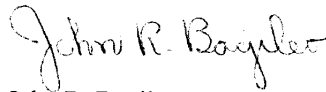
Should the STB favorably act on SMC's petition to reopen and reconsider SMC's application for expanded ratemaking authority, it is submitted that the present record, which underpins the agency's prior findings proposing the granting of the application, justifies final action on SMC's request. Should the STB, nevertheless, desire that additional information be submitted, it is requested that to expedite the handling of this important matter that contemporaneous with the granting of SMC's petition, a procedural order issue setting the dates for the submission of additional information. The prompt availability of that information would enable the agency to go forward with its original intent of taking affirmative action on the application, and minimize further delay in acting on SMC's request for expanded ratemaking authority so that it can better serve the pricing needs of its member motor carriers and the shipping public. As noted, the

agency's prior condition that granting of the nationwide application take place upon renewal of the extant Section 5a Agreement has been met.

V.
Conclusion

For the foregoing reasons, SMC requests that the STB reopen the proceeding in Section 5a Application No. 46 (Sub-No. 20), and reconsider its former inability to take final action on the proposed granting of SMC's nationwide collective ratemaking application because of the statutory prohibition against such action which recently has been rescinded. Further, should the STB grant SMC's petition, but desire additional information, it is requested that a procedural order issue concurrently with the STB's action on the petition setting the dates for the submission of that evidence.

Respectfully submitted,



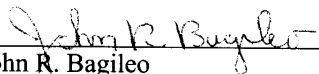
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Counsel for Southern Motor Carrier Rate
Conference, Inc.

Dated: November 5, 2003

Certificate of Service

I hereby certify that I have this 5th day of November, 2003, served a true and correct copy of the foregoing pleading, with Attachments, upon all parties of record, by first class mail, postage prepaid.



John R. Bagileo

Attachment I

28466
EB

SERVICE DATE - DECEMBER 18, 1998

This decision will be printed in the bound volumes of printed reports at a later date.

SURFACE TRANSPORTATION BOARD

DECISION

Sec. 5a Application No. 118 (Amendment No. 1), et al.¹

EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., ET AL.

Decided: December 10, 1998

The Surface Transportation Board indicates that it will approve motor carrier rate bureau agreements for one year, after which, absent a clear expression from Congress to the contrary, any bureau seeking continued antitrust immunity will be required to reduce "benchmark" rates.

BY THE BOARD:

We find that renewal of motor carrier rate bureau agreements would not contravene the public interest, but only if "benchmark" rates are reduced. Thus, we establish a procedure to effect appropriate benchmark rate reductions, which will take effect after one year absent a clear expression from Congress to the contrary.

¹ This decision embraces six other motor carrier rate bureau applications: Sec. 5a Application No. 34 (Amendment No. 8), Middlewest Motor Freight Bureau, Inc.; Sec. 5a Application No. 46 (Amendment No. 20), Southern Motor Carriers Rate Conference, Inc.; Sec. 5a Application No. 22 (Amendment No. 7), Pacific Inland Tariff Bureau, Inc.; Sec. 5a Application No. 60 (Amendment No. 10), Rocky Mountain Motor Tariff Bureau, Inc.; Sec. 5a Application No. 45 (Amendment No. 13), Niagara Frontier Tariff Bureau, Inc.; and Sec. 5a Application No. 25 (Amendment No. 8), The New England Motor Rate Bureau, Inc.

BACKGROUND

A. Legislative and Regulatory Background. Since the 1940s, interstate motor carriers have been permitted to collectively determine rates and practices that apply to the transportation they provide. Under the Reed-Bulwinkle Act,² now codified (as to motor carriers) at 49 U.S.C. 13703, motor carriers acting collectively could be immunized from the antitrust laws by submitting the agreements governing their collective activities to the Interstate Commerce Commission (ICC) (and now to the Board) for approval.

Carriers have historically effected collective ratesetting through what are known as rate bureaus. Rate bureaus performed a variety of functions for their members, some of which required antitrust immunity, some of which did not. Most significantly, they set rates collectively and acted as agents for their carrier members by filing tariffs at the ICC reflecting rates that had been collectively determined as well as those that had been individually set. See generally Investigation of Motor Carrier Collective Practices, 7 I.C.C.2d 388, 397 (1991) (Investigation).³

In the Motor Carrier Act of 1980 (1980 Act),⁴ Congress substantially reduced Federal motor carrier regulation in order to promote competition. Section 14 of the 1980 Act prohibited bureaus (and their members) from interfering with any carrier's right to publish its own rates ("independent actions"),⁵ and from voting on rate proposals in which they do not participate, other than general rate

² Pub. L. No. 90-662, 62 Stat. 472.

³ Many rates are derived from the class rate system, under which commodities are assigned to classes by a separate "classification" bureau, and rates are then applied (often through collective rate bureau action) to classes of commodities. A decision served today in National Classification Committee -- Agreement, Section 5a Application No. 61, which, out of deference to a legislative process that is to be initiated in the immediate future will become operative after one year absent a clear expression from Congress to the contrary, concludes that approval of an application for renewal of the classification agreement of the National Classification Committee to perform the classification function would not contravene the public interest, provided that certain changes to the agreement are made.

⁴ Pub. L. No. 96-296, 94 Stat. 793.

⁵ Shortly after the 1980 Act was passed, the ICC issued new regulations implementing section 14. Motor Carrier Rate Bureaus -- Imp. Pub. L. No. 96-296, 364 I.C.C. 921 (1980), aff'd in part, rev'd in part sub nom. American Trucking Ass'ns. Inc. v. United States, 688 F.2d 1337 (11th Cir. 1982), rev'd sub nom. ICC v. American Trucking Ass'ns. Inc., 467 U.S. 354 (1984) (affirming the ICC's regulations). Additionally, under its broad authority to review bureau

(continued...)

Section 5a Application No. 118 (Amendment No. 1), et al.

increases (GRIs), changes in commodity classifications, and changes in tariff structure.⁶ Throughout the 1980s, the ICC and the courts rejected several attempts by bureaus to influence individual carrier pricing by evading the ban on collective single-line ratemaking.⁷

In response to concerns subsequently voiced about motor carrier ratemaking, the ICC instituted a proceeding to inquire generally into those practices. In its final report the ICC found, among other things, that GRIs agreed upon by the bureaus produced rates that were unrealistically high, but that GRIs were, for many shippers, essentially benign due to widespread rate discounting. Investigation, 7 I.C.C.2d at 458. Thus, although it questioned the use of GRIs, and indeed the entire rate bureau structure, the ICC declined to revoke rate bureau agreements, as urged by the United States Department of Justice (DOJ), because the record lacked evidence that GRIs substantially inhibited discounting or were harmful to the majority of the shipping public. Id. at 463-64.

Since that time, two relevant statutes have been passed. First, in the Trucking Industry Regulatory Reform Act of 1994 (TIRRA),⁸ Congress generally eliminated the requirement that motor carriers of general freight file tariffs at the ICC. TIRRA also required the ICC to analyze its regulatory responsibilities and identify those functions that could be eliminated. In its report, the ICC found that antitrust immunity for motor carrier rate bureaus (other than as to mileage guides and classifications) "should be withdrawn." ICC, Study of Interstate Commerce Commission Regulatory Responsibilities, Oct. 25, 1994, at 76.

Second, although various Members of Congress criticized the ICC for having permitted collective ratemaking—indeed, the ICC's involvement in the classification/collective ratemaking process was cited as one of the main reasons for abolishing the ICC—in the ICC Termination Act of

⁵(...continued)

agreements on request or on its own motion, which the Board inherited (49 U.S.C. 13703(c)), the ICC reviewed the agreements of all motor carrier rate bureaus.

⁶ Section 14(b) of the 1980 Act also mandated an independent study of motor carrier ratemaking. A majority of the Motor Carrier Ratemaking Study Commission that conducted the study recommended the total elimination of antitrust immunity for motor carrier ratemaking, finding that it restrains competitive behavior. Report, Collective Ratemaking in the Trucking Industry, at 455, 534, June 1, 1983.

⁷ See, e.g., Collective Ratemaking Procedures -- Niagara Frontier Tariff Bureau, Inc., 1 I.C.C.2d 317 (1984), aff'd sub nom. Niagara Frontier Tariff Bureau v. United States, 780 F.2d 109 (D.C. Cir. 1986).

⁸ Pub. L. No. 103-311, 108 Stat. 1683.

1995 (Termination Act),⁹ Congress extended the provisions of Reed-Bulwinkle. Congress provided that all existing motor carrier bureau agreements would be permitted to remain in effect until December 31, 1998, after which, if renewal is sought, they will continue in effect to the extent that we find that renewal is not contrary to the public interest. 49 U.S.C. 13703(d). Thus, Congress in the statute specifically directed the Board to make an affirmative decision by the end of the year with respect to existing agreements.¹⁰ In addition, the Termination Act eliminated agency oversight of the reasonableness of rates charged for transportation of general freight, except, as here pertinent, for collectively set rates. 49 U.S.C. 13701(a).

B. This Proceeding. By decision served May 20, 1997, and notice published the same day in the Federal Register at 62 FR 27653, we requested comments on the following issues: (1) whether we should renew motor carrier rate bureau agreements; (2) whether antitrust immunity is necessary for any bureau activity other than collective ratemaking; (3) whether we should grant the applications of the rate bureaus that had been filed at the ICC for authority to expand their activities nationwide; and (4) whether the bureaus can admit shippers and other noncarriers as members.

Opening comments were filed by the following parties:¹¹ EC-MAC Motor Carriers Service Association, Inc. (EC-MAC); The Health & Personal Care Distribution Conference, Inc., jointly with The National Small Shipments Traffic Conference, Inc.; Midwest Motor Freight Bureau, Inc.; The National Industrial Transportation League; The New England Motor Rate Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc. (Niagara); Pacific Inland Tariff Bureau, Inc.; Professor Andrew F. Popper; Rocky Mountain Tariff Bureau, Inc.; Reliance Electric Company; Southern Motor Carriers Rate Conference, Inc. (SMCRC); Tom O'Loughlin; DOJ; and the United States Department of Transportation (DOT). Reply comments were filed by several parties. In general, the shipper groups and government entities opposed continued immunity, while the motor carrier interests supported it.

Additionally, we received letters from the Honorable Nick J. Rahall, II, and the Honorable Jack Quinn, Congress of the United States, expressing their support for continued approval of collective ratemaking agreements. Each stated that the collective ratemaking process has been used to provide procompetitive services to shippers, although each also recognized that the Board was

⁹ Pub. L. 104-88, 109 Stat. 803.

¹⁰ In contrast to its treatment of existing agreements, Congress provided that the Board should approve new bureau agreements "only if it finds that such agreement is in the public interest," 49 U.S.C. 13703(a)(2).

¹¹ In addition, numerous comments that were not served upon the parties listed in our notice in the Federal Register were placed in the docket in the proceeding.

"given ample authority to oversee and fine tune any motor carrier activity under this immunity to the extent it may be needed."¹²

DISCUSSION AND CONCLUSIONS

A. Antitrust Immunity for Collective Ratemaking. Although our notice listed four issues, we believe the central question here relates to the terms, if any, under which rate bureaus should be authorized to continue collective ratemaking and related activities¹³ free of antitrust scrutiny. Because we find that collective ratemaking, as it is currently administered, produces unrealistically high "benchmark" rates and thus is contrary to the public interest, after a one-year "grace period" imposed out of deference to a legislative process that is to be initiated in the immediate future, absent a clear expression from Congress to the contrary, we will continue immunity only if benchmark rates are reduced.

At the outset, while we do not find that continuation of the collective ratemaking process is categorically contrary to the public interest, we cannot accept the assertions of the rate bureaus that the current system affirmatively promotes the public interest because it is procompetitive. According to the argument, motor carrier pricing can be efficient only if it revolves around some form of benchmark rate.¹⁴ Apparently, the theory goes, if carriers and shippers do not have a benchmark rate (presumably a collectively set class rate) to use as a reference point, there will be a "proliferation of unilaterally-set carrier rates which create[] [a] deluge of data which impair[] rather than aid[] competitive pricing decisions." SMCRC Reply at 44.

We can accept the idea that trucking companies can benefit from having a baseline from which to make their actual pricing decisions. As counter-intuitive as it sounds, we might even also accept, at least for purposes of argument, the notion that too much information could turn out to be a competitive burden rather than a legitimate pricing tool.¹⁵ Neither assumption, however, supports the assertion that continuation of the current system promotes competitive pricing or the public

¹² We also received a letter from several Members of Congress dated November 17, 1998, discussed further later, indicating that Congress intends to review motor carrier issues in connection with the Board's reauthorization next year.

¹³ Acting under approved bureau agreements, motor carriers may collectively establish GRIs, through routes and joint rates, divisions of joint rates, and rules. In this decision, we refer to these four activities generally as "collective ratemaking."

¹⁴ As it is expressed by SMCRC (opening statement at 48), "baseline class rate scales [are] the quid pro quo for ensuring competitive pricing."

¹⁵ The rate bureaus suggest that small carriers need them in order to process information efficiently. But any procompetitive services that the bureaus provide—i.e., any services other than collective ratesetting—do not violate the antitrust laws and thus do not require antitrust immunity.

interest. Indeed, if all that carriers needed were a baseline to which they can refer when making individual pricing decisions, they already have it: the class rate on any given commodity as of the date of this decision (or one week or one month or one year before this decision).¹⁶

Moreover, we are not as sanguine as the ICC appeared to be in its determination in Investigation that the current system of collective ratemaking is essentially benign. The commenters all appear to agree that the rates established by the bureaus are not typically charged by bureau members to most shippers, and that discounts of up to 50% and more are common. The ICC reasoned that the harm associated with such unrealistically high collectively established rates is minimal because the class rate levels, which the carriers can refer to as "list prices," are only paid by a handful of uninformed or pressured shippers that might be able to protect themselves by more careful rate shopping. But it is not so clear that every shipper is in fact in a position to shop for a reasonable and competitive rate. To the contrary, it is just as likely that collective ratemaking continues to attract motor carriers because the carrier participants believe that enough shippers pay the collective rates, or the collective rates with only a minimal discount, to warrant their efforts to continue them. Indeed, such a conclusion is supported by the fact that over an extended period of time, GRIs have continued to be taken even as discounting has assertedly become steeper and more prevalent.¹⁷ If the industry simply needed a baseline, and was not using collective ratemaking as a way to increase revenues from more vulnerable shippers, carriers would have no motivation for seeking GRIs.

In any event, it is undisputed that some shippers pay undiscounted or minimally discounted class rates, and we do not believe that their situation can be ignored. One feature of more

¹⁶ We understand the argument that there could be any number of baselines available, and that, unless an authoritative body definitively sets a particular standard as a baseline, businesses would be swamped with too many options to make rational choices. As we give business more credit than that, however, we find the argument hard to accept. The bureaus may also take the position that, even if the existing class rates were frozen as a permanent baseline, joint-rate partners would still need immunity to interact as to actual rate levels. As the ICC, DOJ, and the reviewing court found in connection with a railroad case raising some similar issues, procedures can be feasibly developed to permit "direct connectors" to set joint rates without antitrust immunity. See Petition to Delay Applic. Of Direct Connector Requirement, 367 I.C.C. 886 (1983), aff'd sub nom. American Short Line RR Ass'n v. United States, 751 F.2d 107 (2d Cir. 1984). In any event, as discussed later, the approach contemplated by this decision will permit bureaus to continue to operate with immunity and to develop their own authoritative baseline rates; those rates will simply have to be set at levels below the prevailing class rate levels of today.

¹⁷ There is some debate among the parties as to the extent, if any, to which increases in collectively set rates have outpaced relevant inflation indexes. There is no debate, however, that baseline rates have increased. Indeed, some of the bureaus attribute the increase in baseline rates to the increased level of discounting.

competitive markets is that the benefits of low prices are broadly dispersed among the entire market of consumers, regardless of the fact that submarkets of consumers would, in the absence of competition, be willing to pay more for a good or service rather than do without it.¹⁸ It may be that those shippers that now pay the inflated collective rates are not able or willing to shop for lower rates, and that they would in fact pay whatever price a carrier quoted. It may also be that an interested person can, in theory, bring these collectively set rates before the Board for review, but in practice, the shippers that pay undiscounted rates—which, not surprisingly, did not participate in this proceeding—are likely to be the least able to bring a case to the Board.¹⁹ Thus, the most effective shipper protection that we can afford, short of abolishing collective ratemaking entirely, is to ensure that, if a carrier wants to charge a rate above a competitive level, it will not be able to justify its charges by reference to an unrealistically high list price set through a governmentally-sanctioned collective ratemaking process.²⁰

We understand the bureaus' position that list prices used by trucking companies that are not rate bureau members, and by businesses in other industries, are typically set at relatively high levels, from which customers in a position to do so can obtain discounts. Those list prices, however, are not set through discussions among competitors that are protected by government immunity. Any motor carrier that wants to do so should be able to set its baseline rates at unrealistically high levels, and perhaps it should even be permitted to charge those undiscounted rates to shippers willing to pay them. If it is to do so, however, we believe that it should be required to do so pursuant to individual rather than collective action.

In short, on the basis of the record compiled in this proceeding, we find that collective ratemaking, under present circumstances, contravenes the public interest, and that existing collective

¹⁸ In the rail industry, with declining average costs resulting from economics of scale, scope, and density, some shippers pay more than others under the Congressionally recognized concept of "differential pricing." By contrast, Congress has not indicated that the economics of motor carriage dictate the application of differential pricing principles.

¹⁹ Moreover, given the resources and the mission that Congress assigned us in the Termination Act, we are in no position to rule on the reasonableness of every individual motor carrier rate paid by every such vulnerable shipper, or otherwise to engage in the elaborate regulatory processes conducted by the ICC to review GRIs, to which some of the bureaus refer in their pleadings.

²⁰ We are not here declaring any particular rate unreasonably high. We note, however, that, if we were to review an individual motor carrier rate, one of the principal factors, if not the main factor, that we would consider would be its relation to other rates available for the services rendered. See Georgia-Pacific Corp. -- Pet. For Declar. Order, 9 I.C.C.2d 103 (1992), 9 I.C.C.2d 796 (1993), and 9 I.C.C.2d 1052 (1993), aff'd sub nom. Oneida Motor Freight, Inc. v. ICC, 45 F.3d 503 (D.C. Cir. 1995). Thus, the typical level of discounts would be highly relevant in a rate reasonableness case.

Section 5a Application No. 118 (Amendment No. 1), et al.

ratemaking agreements ought to be approved as not contrary to the public interest only if all existing class rates are amended to reflect market-based rates.²¹ We should also point out that, if the class rate structure were appropriately modified, any effort to implement GRIs that exceed the relevant rates of inflation would be viewed as conduct that is presumptively adverse to the public interest.

In the past, the ICC would have been able to identify competitive rate levels itself by reviewing a variety of information at its disposal. As Congress sought to make the motor carrier industry more competitive, however, it reduced the Government's presence to a point where virtually no rate information is now available to us, and therefore, public input would be necessary before we could determine how the class rate structure can be amended sufficiently so that bureau agreements would pass muster. One possible approach would be to require class rate reductions, on the basis of statistically valid samples, to levels that reflect the average rates actually charged for each classification level. We would not rule out, however, suggestions that we either issue a more broad-based rate reduction order (for example, that all class rates be reduced by a uniform percentage reflecting average discounts throughout the industry), or that we break the classification down more finely to distinguish among different types of shipments within a particular classification. Our main objective, if we undertook such an effort, would be to ensure that class rates are at competitive, market-based levels.

We will not, however, initiate such an effort at this time, notwithstanding the fact that the statute requires us to determine the extent to which renewal of rate bureau agreements would contravene the public interest. That is because, in a letter dated November 17, 1998, the Republican and Democratic leadership of the Committee on Transportation and Infrastructure of the U.S. House of Representatives asked the Board to defer issuing a final ruling in cases such as this one. The letter, signed by the Honorable Bud Shuster, Chairman; the Honorable James L. Oberstar, Ranking Democratic Member; the Honorable Thomas E. Petri, Chairman, Subcommittee on Surface Transportation; and Nick J. Rahall, II, Ranking Democratic Member, Subcommittee on Surface Transportation, reads as follows:

As you know, the Committee on Transportation and Infrastructure intends to pass legislation next year to reauthorize the Surface Transportation Board. As part of this reauthorization process, we will be reviewing a number of provisions contained in the ICC Termination Act of 1995 (ICCTA) related to motor carriers. . . . We therefore urge the Board to refrain from taking action in any case that would set major new policies or overturn existing practices in the motor carrier area before Congress has the opportunity to more fully consider and act upon these issues.

²¹ This adjustment to the rate process would address, at least to a point, the concern expressed by DOJ and some of the shipper commenters that competition among individual carriers would be more vigorous if base-line rates were at more realistic levels.

We are pleased that the leadership of the Committee on Transportation and Infrastructure has clearly indicated its intent to pass reauthorization legislation next year. Thus, to permit that process to move forward to completion, we will postpone the effectiveness of our decision. We believe that we can best meet our statutory responsibility, which calls for a decision one way or the other by the end of calendar year 1998, while respecting the legislative process that will be initiated in the immediate future, by extending approval of all existing motor carrier rate bureau agreements that are refiled in a timely manner for 1 year, until December 31, 1999; issuing this decision expressing our views on the matters that the statute requires us to consider; and awaiting the legislation to which the November 17 letter refers. If legislation addressing the rate bureau issue has not been enacted in sufficient time before the end of calendar year 1999, then, absent a clear expression from Congress to the contrary, the Board will initiate a proceeding on how to effect appropriate reductions in benchmark rates. If the proceeding is initiated, and rate bureaus and their members do not take appropriate steps to initiate benchmark rate reductions, then approval of the agreements will not be renewed.

B. Mileage Guides, Rules, and Other Ancillary Functions. In our decision initiating this investigation, we asked for comments regarding whether we should continue immunity for collectively set mileage guides, rules, and other related activities. Although the publication of mileage guides and the development of certain rules would not appear to have a substantial effect on competition, and thus technically may not require immunity, there is not always a clear line between those activities that need immunity and those that do not. However, we will here address at least those functions that obviously fall into one category or the other. Absent a clear expression from Congress to the contrary, we will permit bureaus that are seeking approval for their renewed agreements after December 31, 1999, to include in their agreements existing provisions specifically related to collective ratemaking, such as mileage guides and rules.²² We will not grant antitrust immunity for activities that are clearly unrelated to collective ratemaking, such as the publication of independently established rates. While there is nothing to prohibit rate bureaus from engaging in activities not specifically related to collective ratemaking, they should not be immunized from the antitrust laws in those activities. In the event that we do not approve the collective ratemaking provisions of the agreement of a particular bureau for setting class rates (for example, if a bureau does not appropriately reduce its class rates), we will then have to consider whether immunity should be extended to the rate-related ancillary functions such as mileage guides and rules.

C. Expansion of Regional Authority. Several bureaus sought authority from the ICC to expand their regional authority and operate on a nationwide scale. Support among the bureaus for the concept is not unanimous. EC-MAC and Niagara, for example, have suggested that we maintain existing territorial limitations on the activities of the bureaus. In light of the November 17 Congressional letter, we will not rule on those requests at this time. However, we recognize the increasingly globalized nature of the transportation system and the anachronistic nature of

²² The provisions of 49 U.S.C. 13703(a)(1) expressly permit bureaus to seek antitrust immunity for collectively set rules or mileage guides.

restrictions limiting bureaus to geographic territories. In our view, provided the bureaus reduce their class rate scales appropriately, they should be permitted to lift such territorial restrictions. Absent a clear expression from Congress to the contrary, we intend to allow bureaus whose agreements are approved after December 31, 1999, to lift the territorial restrictions on the scope of their agreements.

D. Extending Membership Opportunities to Noncarriers. Finally, SMCRC has asked us to grant bureau membership to shippers and other noncarriers. SMCRC's request has been questioned by other bureaus, which note the statutory language addressing agreements among carriers, and which also point out that SMCRC has not explicitly defined the rights that attach to the "associate membership" status that it seeks to confer. In light of the November 17 letter, we will not rule on this request at this time. However, even though the statutory language provides for agreements among carriers, and not among carriers and shippers, Congress plainly meant to give shippers a substantial voice in the rate bureau process. Consistent with our decision issued today in the proceeding relating to classification, we believe that shipper participation in rate bureau activities can be healthy. We would look favorably on amendments that, within the limits of the statute, give a greater role to those directly affected by rate bureau activities.²³

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Requests for approval of motor carrier rate bureau agreements will be governed by the determinations made in this decision.
2. This decision is effective on December 18, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

²³ We note that the statute, read literally, provides that renewal of existing agreements shall be subject to the "contrary to the public interest" standard, while new agreements must affirmatively advance the public interest to be approved. Although amendments to existing agreements arguably fall under neither category, we would view the amendments discussed here as subject to the "contrary to the public interest" standard.

Attachment II

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SERVICE DATE - FEBRUARY 11, 2000

This decision will be printed in the bound volumes of STB printed reports at a later date.

SURFACE TRANSPORTATION BOARD

DECISION

Sec. 5a Application No. 118 (Amendment No. 1), et al.¹

EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., ET AL.

Decided: February 9, 2000

The Surface Transportation Board, on reconsideration, affirms its prior decision conditioning approval of motor carrier rate bureau agreements on reductions in benchmark rates to competitive levels.

BY THE BOARD:

In our prior decision in this proceeding, we announced that we intended to approve current motor carrier rate bureau agreements only if "benchmark" rates were reduced to competitive levels. Various motor carrier rate bureaus filed a petition for reconsideration of our prior decision, to which various shipper groups replied in opposition. In this decision, we deny the petition for reconsideration.

BACKGROUND

The provisions of 49 U.S.C. 13703(d) and (e), as adopted by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), limited rate bureau approvals to 3 years and provided that existing motor carrier rate bureau agreement approvals would expire on December 31, 1998, unless they were extended by the Board. To implement section 13703, and to address other rate bureau issues that had been raised earlier, we initiated a proceeding in a decision served in this docket on May 20, 1997 (the 1997 Decision), and notice published on the same

¹ This decision embraces six other motor carrier rate bureau dockets: Sec. 5a Application No. 34 (Amendment No. 8), Middlewest Motor Freight Bureau, Inc.; Sec. 5a Application No. 46 (Amendment No. 20), Southern Motor Carriers Rate Conference, Inc.; Sec. 5a Application No. 22 (Amendment No. 7), Pacific Inland Tariff Bureau, Inc.; Sec. 5a Application No. 60 (Amendment No. 10), Rocky Mountain Motor Tariff Bureau, Inc.; Sec. 5a Application No. 45 (Amendment No. 13), Niagara Frontier Tariff Bureau, Inc.; and Sec. 5a Application No. 25 (Amendment No. 8), The New England Motor Rate Bureau, Inc.

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day in the Federal Register at 62 FR 27653. In the 1997 Decision, we indicated that we would be addressing “fundamental questions concerning the appropriate role for rate bureaus in the trucking industry, and the need for antitrust immunity, given today’s regulatory environment.”

After reviewing the extensive public comments filed in response to the 1997 Decision, we issued a decision on December 18, 1998 (the 1998 Decision).² The 1998 Decision did not categorically find that approval of rate bureau agreements would contravene the public interest. It did, however, find no basis for shielding from antitrust scrutiny the existing rate setting process, in which rate bureaus collectively publish class rates at levels that, the bureaus say, are almost never charged, and from which, the bureaus say, actual rates are nearly always discounted. Accordingly, the Board announced its inclination to approve rate bureau agreements, and thereby protect the parties establishing rates collectively from the operation of the antitrust laws, only if class rates are reduced to reflect market-based levels.³

In response to a letter from the Republican and Democratic leadership of the Committee on Transportation and Infrastructure of the U.S. House of Representatives,⁴ however, the Board decided to defer initiating the proceeding to effect appropriate rate reductions required for continued antitrust immunity. The letter, which was received shortly before the 1998 Decision was due to be issued, read in pertinent part as follows:

As you know, the Committee on Transportation and Infrastructure intends to pass legislation next year to reauthorize the Surface Transportation Board. As part of this reauthorization process, we will be reviewing a number of provisions contained in [ICCTA] related to motor carriers. . . . We therefore urge the Board to refrain from taking action in any case that would set major new policies or overturn existing practices in the motor carrier area before Congress has the opportunity to more fully consider and act upon these issues.

² On December 18, 1998, we also issued a decision indicating our intent to approve the agreement of the National Classification only if certain changes are made to the classification process. National Classification Committee — Agreement, STB Section 5a Application No. 61 (STB served Dec. 18, 1998) (NCC Decision).

³ The decision also indicated, among other things, the Board’s inclination to allow rate bureaus whose agreements were approved to expand their operations to a nationwide basis.

⁴ The letter was signed by the Honorable Bud Shuster, Chairman; the Honorable James L. Oberstar, Ranking Democratic Member; the Honorable Thomas E. Petri, Chairman, Subcommittee on Surface Transportation; and Nick J. Rahall, II, Ranking Democratic Member, Subcommittee on Surface Transportation.

simply found that it would not be in the public interest for the Government to protect collective ratemaking from legal challenge under the antitrust laws unless the collectively set class rates, which may be charged to shippers, are set at market levels. Whatever the benefits of collective ratemaking may be, our decision does not foreclose any carrier from taking advantage of them if it wants to do so.

The bureaus suggest that, in enacting ICCTA, Congress wanted the Board to approve the existing practice of setting inflated rates, from which rates charged to particular shippers may be discounted. To the extent that ICCTA addresses the levels of collectively set rates, however, it specifically requires that they be reasonable. Further, ICCTA contains no limitation on what the Board should consider when engaging in the statutorily-mandated periodic review of rate bureaus, and indeed section 13703(c) provides that we “shall change the conditions of approval or terminate it when necessary to protect the public interest.” [Emphasis added.] Our determination that it is not in the public interest for a regulatory agency to immunize above-market rates, which some shippers may be required to pay, from the antitrust laws does not contravene any Congressional directive contained in ICCTA.⁶

More importantly, recent legislation essentially ratifies those aspects of the 1998 Decision that Petitioners challenge. As noted, just before the 1998 Decision and the NCC Decision were to be issued, the leadership of both Parties of our authorizing committee of the House of Representatives suggested that Congress would be reviewing motor carrier rate bureau issues during 1999, and asked the Board not to proceed with any final decision until after such review was completed. Subsequently, the Board issued its decisions, telling Congress how it intended to proceed absent a directive to the contrary. In section 227 of the Motor Carrier Safety Improvement Act of 1999, H. R. No. 3419 (Nov. 19, 1999), Congress addressed the specific issues that were discussed by the Board in the 1998 Decision and the NCC Decision.⁷ Insofar as the 1998 Decision is concerned, Congress prospectively changed the three-year periodic rate bureau review set up in ICCTA to a five-year periodic review;⁸ Congress directed the Board not

⁶ The bureaus note (at 9) that Congress, in passing ICCTA, wanted reduced regulation of motor carriers. But government approval of a collective ratesetting process that allows carriers to set and charge rates that they seem to admit are above market levels without being subject to the antitrust laws can hardly be viewed as deregulatory.

⁷ NITL (on December 9, 1999), some of the rate bureaus (on December 15, 1999), and HCPDC/NASTTRAC (on December 22, 1999) filed letters expressing their views of the effect on this legislation on these proceedings.

⁸ In a letter received by FAX on February 8, 2000, Chairman Shuster and Congressman Rahall of the Committee on Transportation and Infrastructure, U.S. House of Representatives, express the view that the change from a 3-year to a 5-year periodic review requires maintenance
(continued...)

to follow through with the intention expressed in the 1998 Decision to allow rate bureaus to operate on a nationwide basis; but in all other respects, Congress did not stand in the way of the Board's going forward with the approach outlined in the 1998 Decision.⁹ The 1998 Decision did not contravene the Congressional intent underlying ICCTA, and Congress by its action in essence sanctioned that decision in the 1999 motor carrier legislation.¹⁰

2. Adjustments to the Bureau-Initiated Rate Structure Are Necessary. Apart from the issue of Congressional intent, Petitioners and their supporters argue that there is no evidence that collectively set rates are higher than they should be; that there have been no formal rate complaints filed at the Board by shippers paying collectively set rates; and thus that a Board proceeding conditioning rate bureau immunity on reductions, to competitive levels, in class rates that shippers may pay constitutes "intrusive" regulatory intervention with the free market. We disagree.

First, we must emphasize that we are not meddling or intruding in private business at all. Rather, the rate bureaus themselves have filed applications asking us to immunize them from the laws that would otherwise govern private businesses operating in the free market. If the rate bureaus do not want us to "intrude" into their affairs, they can withdraw their applications for immunity, and we will leave them to set whatever rates they want, however they want to set them, subject to whatever laws will apply to their unimmunized conduct. If they want immunity from the laws that govern private businesses in the free market, however, then they must demonstrate to us that immunity is in the public interest. And our view has been, and still is, that

⁸(...continued)

of the status quo "until such time as any proceeding is initiated within the five-year process." We will not require any specific changes until we complete the proceedings that we are now initiating.

⁹ In particular, the statute provides that "Nothing in section 227 [other than the directive not to allow nationwide expansion of rate bureau agreements], including the amendments made by [section 227], shall be construed to affect any case brought under this section that is pending before the Board as of the date of the enactment of this paragraph."

¹⁰ On January 28, 2000, we received a letter from Chairman Shuster and Congressman Rahall of the Committee on Transportation and Infrastructure, U.S. House of Representatives. The letter, as pertinent to this proceeding, states that, in its 1999 motor carrier legislation, Congress intended that the public interest be defined in the context of the national transportation policy (NTP) factors found at 49 U.S.C. 13101. The parties in their presentations generally did not address each of the NTP factors in detail, and thus the 1998 Decision did not mechanically go through each one individually. Nevertheless, we agree that the NTP is clearly relevant to any public interest determination we might make, particularly given the language of section 13703(a)(3).

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carriers should not be given immunity to collectively set, and to charge, rates that are above competitive levels; rather, if carriers want to set and charge rates above competitive levels, they must do so individually and not through their rate bureaus.

The bureaus say that we are overreacting: motor carrier shippers do not pay undiscounted rates (petition at 3-5), but to the extent that they do, it is only because the market and the transportation characteristics of their traffic warrant it (petition at 4, 11, 14), or because they are unwilling to shop around (petition at 6). Thus, the bureaus view our efforts to reduce class rates that some shippers may pay as "a solution in search of a problem." Petition at 13.

We do not agree. We cannot forget the undercharge crisis that developed when a number of carriers went into bankruptcy, and the representatives of their estates sought and collected millions of dollars on the basis of the class rate structure. We should point out in this regard that some of the undercharge cases that have come before us in recent years have involved referrals from courts addressing continuing attempts by operating carriers to charge class rates instead of the discounted rates that were originally billed. For shippers sued in court in such cases, the collective ratesetting process is hardly benign.¹¹

But apart from the undercharge crisis, shipper groups representing a broad spectrum of shippers in the proceeding have demonstrated that, while many of their members obtain discounts (some more than 70%), some pay undiscounted rates for a variety of reasons. The rate bureaus suggest that these shippers must not mind paying full price, or else they would find other carriers or would file complaints at the Board. But there are institutional barriers associated with legal remedies -- attorneys fees, the user fee that we are required to charge, and the disruption caused by litigation -- that many motor carrier shippers, particularly those that would be forced to pay class rates, are likely unable to overcome.¹²

The bureaus complain that our decision will deplete carrier revenues based on what they consider to be an unsupported assumption that class rates are unreasonable, but their argument misconstrues the entire thrust of our action. In fact, although it is unlikely that any individual

¹¹ The argument that shippers may be charged undiscounted class rates rather than discount rates because of the transportation characteristics of their traffic ignores the fact that the classification system is supposed to rate commodities by their transportation characteristics. Accordingly, two articles with the same rating, and thus the same class rate, ought to have the same transportation characteristics, and a decision to discount one but not the other would have to be based on something other than transportation characteristics.

¹² The bureaus argue that we should not worry about the level of class rates because they have little (if any) impact on the rates that actual shippers pay. If the level of the class rates were irrelevant, however, then the bureaus would not have objected to reducing them.

rate that is not at a market-based level could survive a challenge on reasonableness grounds,¹³ the 1998 Decision did not make a finding that any class rate was unreasonable. To the contrary, the decision did not preclude carriers from charging any rates they choose to charge; it simply found that, if they want immunity to collectively set rates that shippers may be forced to pay, their collective rates would have to reflect market-based levels.¹⁴ The 1998 Decision, which does not find any rate to be unreasonably high, and which does not foreclose any rate bureau from demonstrating that the undiscounted bureau rates do in fact reflect the going rate levels in a competitive market, ought to be revenue-neutral if the market is as competitive as the bureaus say it is.¹⁵

In their letter of December 15, 1999, some of the rate bureaus assert that their actions last month establishing 35% discounts for any shipper using otherwise undiscounted class rates (actions taken in response to a Board decision suspending several GRIs) moot the need for further proceedings. An automatic minimum discount to a level deemed to reflect market rates might be one way to address the concerns raised in the 1998 Decision,¹⁶ although it does not appear to us that the discount provisions published in connection with the recent GRIs are in fact automatic minimum discounts.¹⁷ In any event, the bureaus are free to make a formal proposal in

¹³ See Georgia-Pacific Corp. — Pet. for Decl. Order — Oneida Motor Freight, Inc., 9 I.C.C.2d 103 (1992), 9 I.C.C.2d 796 (1993), 9 I.C.C.2d 1052 (1993), aff'd sub nom. Oneida Motor Freight, Inc. v. ICC, 45 F.3d 503 (D.C. Cir. 1995).

¹⁴ To quote the Board's decision (at 8), "Any motor carrier that wants to do so should be able to set its baseline rates at unrealistically high levels, and perhaps it should even be permitted to charge those undiscounted rates to shippers willing to pay them. If it is to do so, however, we believe that it should be required to do so pursuant to individual rather than collective action."

¹⁵ Petitioners' witness, Dr. Silberman, argues that, if we require a reduction in the class rates to competitive marketplace levels, we will also have to provide for surcharges for recoupment of lost revenue. The argument contravenes Petitioners' assertion that class rates are rarely, if ever, charged. But if in fact Dr. Silberman's premise, rather than that of Petitioners, is correct, our 1998 Decision, as we have noted, does not foreclose any carrier from charging any rate to achieve any revenue level it wants. Our decision simply provides that a carrier that wants to charge above-market rates will not be able to hide behind the shield of the collectively-set rate.

¹⁶ Such automatic discounts would minimize the disruptions (which in any event are not a basis for resisting changes that are in the public interest) that some of the bureaus have alleged could result from substantial changes to the way they currently operate.

¹⁷ It appears that the "default" discounts would not apply if a shipper is given any other
(continued...)

pay the collectively set rates. We can only respond that the record developed in this case, conducted under a new statute that directed us to review rate bureau activities, makes it clear that some shippers pay collectively set rates. The shipper groups say that their members sometimes must pay class rates,²⁰ and Petitioners, while they challenge the claim, seem to admit that it is probably true.²¹ If it is not true, and if shippers do not in fact pay above-market collectively set rates, then we do not understand why the rate bureaus would object to adjusting the class rate structure so that the rates that the bureaus set are those that the shippers typically do pay.

Finally, the bureaus have complained that the 1998 Decision will improperly interfere with their right under 49 U.S.C. 13703(a)(1)(G) to GRIs based on "industry average carrier costs." But our decision merely found that there are grounds for commencing a proceeding to determine the extent to which bureau class rates that may be charged to some shippers must be reduced to attain parity with competitive, market based rates. Once the process is completed, class rates may be subjected to GRIs that are, as required under the statute, limited to demonstrated cost increases. Until a methodology for determining how to measure such increases is established, however, any complaint about cost recovery is premature.

SUMMARY

In summary, we find that reconsideration is not warranted, and we will initiate the proceeding contemplated in the 1998 Decision.²²

It is ordered:

1. The petitions for reconsideration are denied.

²⁰ See, for example, the replies filed by HPCDC/NASSTRAC, at 12-16, and by TCPC at 3-4.

²¹ See, for example, the Petition at 14-15.

²² We believe that our action here advances the relevant NTP factors. As noted, it does not limit the rates that individual carriers can charge, and thus it should not adversely affect those NTP considerations relating to carrier profits. And to the extent that our action requires carriers wishing to charge above-market rates to do so individually rather than collectively, it should encourage competition and reasonable rates; it should meet shipper needs; and it should promote price and service options.

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2. This decision is effective on February 11, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary