UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE COMMISSIONER

December 7, 2010

Dorval Carter
Chief Counsel
Office of the Chief Counsel
Federal Transit Administration
U.S. Department of Transportation
1200 New Jersey Ave., S.E., Room E56-311
Washington, DC 20590

Re: Public Interest Waiver of the Federal Transit Authority's Buy American Requirements as Applied to Motor Coach Purchases

Dear Mr. Carter:

I write in my capacity as a member of the U.S. Federal Trade Commission, which is one of two federal agencies Congress has charged with enforcing the antitrust laws. I currently am one of the agency's five Commissioners. I previously served as the FTC's Chairman and General Counsel. Since 1986, I have taught antitrust law and government procurement law, first at the George Mason University School of Law and, since 1998, at the George Washington University Law School, from which I am now on leave. The views I express here are mine alone.

I urge the Federal Transit Administration (FTA) to account for the competitive effects upon domestic commerce when it considers whether to grant a waiver to the FTA's "Buy American" (BA) requirements that apply to motor coach purchases.[1] Monopolies can make consumers worse off in a variety of ways. First, firms that lack effective challenge from other producers typically charge higher prices than they otherwise would. Consumers who continue to purchase the monopolist's product pay more, and some consumers who could purchase the product at prices determined by a competitive market go without the product altogether. The result is a reduction in output that undermines the effective functioning of the economy. Second, firms with durable monopoly power often feel less incentive to improve quality, variety, or other product attributes, such as safety.

U.S. competition policy does not treat the attainment of monopoly power as illegal. A firm may achieve preeminence through superior performance, and the prospect

[1] *See* 49 U.S.C. § 5323(j)(1) and 49 C.F.R. § 661.5.

of gaining a decisive competitive advantage can inspire product and organizational innovations that confer immense benefits upon society. Competition law does not tamper with the returns that flow from this form of rivalry on the merits. At the same time, U.S. competition policy is intensely suspicious of dominant market positions that exist only by reason of government intervention that suppresses rivalry from other firms.[2] Monopolies that owe their power to government regulation provide none of the dynamic benefits that flow from business rivalry and impose significant costs in the form of higher prices and lower quality. Government-granted monopolies invest public officials, rather than consumers, with the power to decide which firms prosper and which decline.

To the extent that FTA's BA requirements were to vest a firm with monopoly power in the provision of motor coaches for public transit authorities, a waiver would be necessary to serve the public interest.[3] Not only would public transit authorities – and ultimately tax payers – pay artificially high prices, but such a distortion in the public market also may spill into to the private market. A monopoly provider of motor coaches to the public market could subsidize the prices that it charges private sector customers, thus distorting private purchasing decisions, again to the detriment of consumers.

The FTA may waive the BA requirements when the inclusion of manufactured goods produced in the United States will increase the cost of the overall project by 25 percent.[4] This 25 percent threshold on cost increases seems inadequate to address competition concerns. The FTC, along with the Department of Justice, analyzes the competitive effects of mergers and other business practices. An integral part of this analysis is to determine whether a transaction or practice is likely to allow a firm to exercise market or monopoly power. Our own guidelines for analyzing mergers define a firm that can impose a profitable 5-10 percent price increase as one possessing monopoly power.[5] Appeals courts reviewing FTC merger challenges, moreover, have agreed that evidence of price increases far below a 25 percent threshold is sufficient to suggest a transaction may harm consumers.[6] If a 5-10 percent price increase is sufficient to raise concerns under the federal antitrust laws – the laws Congress designed to protect consumers from the harms associated with monopoly – it should also be sufficient to raise concerns under the FTA's public interest waiver standard.

Thank you very much for considering my views.

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[2] *See* James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 BOSTON U.L REV. 1555 (2010).

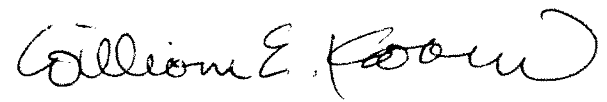
[3] *See* 49 C.F.R. § 661.7(b) ("the Administrator may waive the general [BA requirements] if the Administrator finds that their application would be inconsistent with the public interest").

[4] *See* 49 U.S.C. § 5323(j)(2)(D) and 49 C.F.R. § 661.7(d).

[5] *See* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines at §§ 4.1.2, 6.1 (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf.

[6] *See, e.g.*, *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1047-48 (D.C. Cir. 2008)(J. Tatel) (evidence of 5% increase in market price sufficient to give presumption to challenge merger); *F.T.C. v. Staples, Inc.*, 970 F.Supp. 1066, 1075-77 (D.D.C. 1997) (evidence that prices were up to 13% higher in markets without competitors was sufficient to challenge merger).

Sincerely,



William E. Kovacic
Commissioner
Federal Trade Commission