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2004 DEC 13 P 4:09

OFFICE OF DEFECTS INVESTIGATION

DaimlerChrysler Corporation
Stephan J. Speth
Director
Vehicle Compliance & Safety Affairs

December 10, 2004

Ms. Kathleen C. DeMeter, Director
Office of Defects Investigation
Enforcement
National Highway Traffic Safety Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Ms. DeMeter:

Reference: NVS-213; EA03-023

This responds to your letter of November 23, 2004 regarding your staff's investigation of the performance of front suspension upper ball joints in Model Year (MY) 1998 through 2003 Dodge Durango sport utility vehicles and MY 1997 through 2004 Dodge Dakota pickup trucks. The staff has requested DaimlerChrysler Corporation (DCC) to conduct a safety recall to address an alleged defect in the ball joints installed in the 4-wheel drive Durangos and Dakotas built in Model Years 2000-2003 (prior to January 2003). These ball joints were manufactured by New Castle Machining and Forge. By agreement with you, the date for responding to your letter was established as December 13, 2004.

Your letter surprised and disappointed DCC. DCC was surprised by your letter's assertion that the Office of Defects Investigation (ODI) had "completed its investigation" of the subject vehicles. Our review of the record, as described in your letter, shows numerous factual errors and mischaracterizations of the record, none of which is consistent with a completed investigation of an alleged motor vehicle safety-related defect. Moreover, the letter reflects a fundamental unfamiliarity with the design and operation of a compression-type upper ball joint, and confusion between the expected performance of a compression-type upper ball joint and a tension-type lower ball joint in several important respects. In addition, there is no evidence in the record that the staff has conducted any physical testing or vehicle inspections that provide evidence to contradict, or rebut, evidence that DCC has provided to the agency – a fact that is also inconsistent with a completed investigation.

DCC was disappointed by your letter, because we had been strongly encouraged by a senior representative of the agency's enforcement staff to believe that the agency was still actively considering our pending offer to resolve the staff's concerns with a

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significant field action. DCC was led to believe that agency would respond to the DCC offer before sending a recall request letter. We were frustrated that the agency chose to send the recall request letter without making any substantive response to DCC's settlement offer, after specifically and explicitly encouraging DCC to await such a response.

DCC strongly disputes the agency's conclusion that the record supports a determination that the vehicles at issue contain a "safety-related defect," as that term has been interpreted by the federal courts. For this reason, DCC does not believe that the agency would be able to bear its burden to prove a safety-related defect in the subject vehicles, if the agency were to choose to pursue this in litigation. For example:

- There is no evidence in the record that the agency conducted any testing of any ball joints or ball joint-equipped vehicles to determine the forces needed to separate an upper ball joint from its socket. DCC provided ODI with extensive test data showing that the tensile load needed to separate an upper ball joint from its socket is over 4800 pounds at about 0.4 inches end play (the worst case observed by DCC in the field), and these data are unrebutted.

- There is no evidence in the record that the agency conducted any testing to determine the typical tensile load force exerted on upper ball joints during reasonably foreseeable driving maneuvers. DCC provided ODI with test data showing that the ***maximum*** tensile vertical load observed in abusive condition testing is less than 1250 pounds, and these data are unrebutted.

- There is neither evidence nor any explanation in the record to support ODI's conclusion that 0.500 inches of axial end play is the "best estimate" for the "upper limit of joint wear that can occur before the joint loses its retention capability." More importantly, there is no evidence that ODI inspected any of the subject vehicles to determine how many of them, if any, are approaching axial end play that exceeds DCC's recommended replacement level of 0.06 inches, much less the level at which ODI says they are at risk of losing retention capability, which is more than 8 times higher than the end play at which DCC agrees that the ball joint should be replaced in routine maintenance. So even if the agency is correct that 0.500 inches is the correct value for identifying the risk of ball joint separation, the agency has not attempted to quantify the magnitude of the risk that is represented in the real world population of affected vehicles. Two further points should be noted:

    - First, ODI's reliance on DCC's vehicle survey is misplaced. DCC's survey identified ***only two ball joints out of 94 (47 vehicles)*** that had end play greater than 0.06 inches, and they were 0.073 inches and 0.153, respectively – many times below ODI's "best estimate" of joint wear that could cause the joint to lose its retention capability.

- Second, DCC has never seen a subject vehicle or returned ball joint part with end play above 0.4 inches, and ODI does not state that it has seen such a vehicle or component in the field.

- The failure rate is low by the measures ODI has used in prior ball joint investigations.

  - Even using ODI's worst case estimate (which DCC vigorously disputes), the failure rate for the vehicles ODI has asked DCC to recall is 17.9 separation incidents per 100,000 vehicles. By contrast, the failure rate in EA99-022 (General Motors) was nearly 70 incidents per 100,000 – about four times higher than the DCC vehicles. To DCC's knowledge, and based on information on ODI's website, EA99-022 led to the only recall of an *upper* ball joint that has ever occurred, and the vast majority of vehicles involved in EA99-022 were allowed to be addressed with an extended warranty, not a ball joint replacement.

  - ODI's worst case estimate is not significantly different than the separation rate in RQ03-002 (Ford), which was about 10 separation incidents per 100,000 vehicles according to the publicly available information in the NHTSA closing report, and which was closed because NHTSA found this to be a "relatively low complaint rate." When DCC's separation figures are used, the separation rate is 12.7 per 100,000 vehicles, even closer to the Ford rate in absolute terms.

  - ODI also analyzed the vehicles in RQ03-002 (Ford) on an age-adjusted basis, and concluded that there was one separation incident per 10,000 vehicle years, which the agency characterized as "low." When that methodology is applied to compute the age-adjusted failure rate of the vehicles ODI has asked DCC to recall, the rate is ***less than half*** of the age-adjusted failure rate of the Ford vehicles at issue. NHTSA closed RQ03-002 without any action.

- Owners of deteriorated upper ball joints are provided with substantial warning of the condition long before the condition reaches an unsafe level. DCC provided documented measurements of the noise level of a deteriorated ball joint and proved that it exceeded ordinary traffic noise and was readily noticeable. ODI provided no data to refute this information, but summarily dismissed the facts about the warnings without any data or justification.

For these reasons, the facts do not support ODI's conclusion that a "safety-related defect" exists in the subject vehicles. DCC will now explain in more detail why it believes that the agency's theory of defect will not survive judicial review.

1. The Ball Joint at Issue Does Not Contain a Defect.

Although NHTSA's governing statute does not provide a satisfactory definition of the term "defect," the case law has clarified that "commonsense" limitations are relevant to the meaning of the term "defect." *U.S. v. General Motors Corporation* (*"Wheels"*), 518 F.2d 420, 435-436 (D.C. Cir. 1975). As the courts have said, "manufacturers are not required to design vehicles or components that never fail." *Wheels*, 518 F.2d at 436.

In the context of upper ball joints, for which DCC could locate only one other completed ODI investigation, NHTSA has accepted this formulation, and agreed that some rate of upper ball joint failure is acceptable. See Closing Report in EA99-022 and Closing Report in associated RQ 02-012 (General Motors). NHTSA has even accepted some rate of lower tension-type ball joint failures, where the degree of pre-separation warning is less. Under these circumstances, then, the question is not whether upper ball joints in the subject vehicles have "failed" at all, but rather, whether they have failed "prematurely," relative to some benchmark that has yet to be articulated in any definitive manner.

NHTSA has never litigated to conclusion the question of what constitutes an acceptable level of degradation in a component that is not expected to last the life of the vehicle. In this case, DCC has a published policy recommending replacement of the upper ball joint when it reaches 0.06 inches end play, a recommendation that finds no quarrel in the ODI record. As there is no apparent disagreement about DCC's recommendation to replace an upper ball joint after it degrades to a level that exhibits end play of 0.06 inches, and there is no apparent disagreement that this level of end play is well below the level required to permit joint separation, the open question should be whether the components in the field are degrading to an unsafe level before a reasonable owner would have notice or opportunity to repair the component.

In its letter, ODI loosely uses the term "failure" to describe durability concerns with the upper control arm ball joint assemblies. This is a serious misapplication of the term. As ODI describes, leakage through the crimp seal may lead to looseness and noise from the upper ball joints, but this is not a "failure" in the context of joint separation as is suggested in the letter. While ball joint separation is not a desired outcome, we have shown in this case that ball joint separation will not occur if the car is reasonably maintained. Moreover, ODI has not attempted to correlate crimp seal issues with the separations that have occurred in the field.

The issue here is fundamentally different from the issues that have resulted in previous DCC recalls. DCC has long recognized that ball joint separation in tension-type

lower ball joints, which can occur with little warning, can warrant a safety recall, and we have taken multiple recall actions to address such issues, where appropriate. However, in those cases, there was an actual ***defect*** identified in the component. For example, in recall 99V-066, which ODI cites on page 7 of the letter, there was a manufacturing defect that resulted in a slit boot during the vehicle manufacturing process. The slit boot allowed moisture to enter the boot, resulting in rapid degradation of the sealing system and potential lower ball joint failure This case involves compression-type upper ball joints, and is not premised on a specific manufacturing or design defect, within the meaning of the Vehicle Safety Act.

ODI alleges that 4-wheel drive vehicles experience "tensile loads acting on the upper ball joint [that] are consistently and significantly higher" than two-wheel drive vehicles. ODI "believes that the greater tensile loads in the upper ball joints in four-wheel drive vehicles will tend to promote wear to the critical area of the housing throat opening ... as well as providing higher separation forces through a wider array of driving conditions." This allegation mischaracterizes DCC's data, and the conclusion ODI drew from the data is flawed.

First, these upper ball joints are compression-type joints, which are always under compressive loads while the vehicle's suspension is at "curb" position. ODI incorrectly states that DCC "is no longer claiming that the subject ball joints are compression type joints." DCC agrees that these ball joints may ***also*** be characterized as stabilizing joints, but DCC's representative never agreed that they are not compression joints. DCC's comprehensive test data provided in previous submissions clearly indicate that ***compressive loads, not tensile loads,*** are imposed on the upper ball joints, even during testing designed to simulate abusive conditions. The only condition in which an upper ball joint will experience a tensile load is during a significant rebound event such as a wheel dropping below the curb plane, and then only for a very short period of time. Compressive loads are not related to ball joint separation; it requires a tensile load to separate a ball joint, and these upper ball joints are rarely exposed to tensile loads at all, much less under conditions that represent a safety risk.

Second, DCC data that has previously been provided to ODI clearly show that the loads during steady state driving are near zero, and that loads measured during suspension articulation events are for extremely short durations, proving that wear necessarily will occur over a long period of time. While the suspension articulation may exhibit slight differences between the four wheel drive and two wheel drive vehicles during certain maneuvers, the measured loads indicate ***no noticeable, let alone significant, differences*** between the service loads or peak dynamic vertical loads between two wheel drive and four wheel drive vehicles. ODI's "belief" that four-wheel drive vehicles experience higher tensile loads and higher separation forces on their upper ball joints is without substantiation and clearly misconstrues the data provided by DCC.

Third, regardless of drive type, upper ball joint loads did not exceed 1250 pounds of tensile vertical load during DCC's comprehensive vehicle testing. ODI did not conduct its own testing, so this conclusion is unrebutted. Likewise, DCC's pull force testing, designed to replicate the highest articulation, full rebound position of the subject vehicles, indicated that it required over 4800 pounds of pull force to separate a significantly worn ball joint exhibiting just under 0.400" of end play (which represents a wear level of over six (6) times DCC's recommended level for ball joint replacement). In other words, the peak vertical load seen throughout the most abusive vehicle tests is only approximately 25% of the tensile strength of this grossly worn ball joint assembly. This assembly represents the most significantly worn part returned to DCC. It remains clear that any upper ball joint assembly approaching this level of wear is capable of withstanding vertical loads that are at least four times that which it will see in service, even in the most severe customer usage.

ODI seems to agree that significant end play is needed for a separation, stating "that 0.500" of end play is the best estimate for the upper limit of joint wear that can occur before the joint loses its retention capability." Neither DCC nor ODI has identified a single vehicle in the field or in a returned upper ball joint that has 0.500 inches of end play, and there is certainly no evidence to suggest that there a significant number of upper ball joints on vehicles in the fleet that are experiencing end play that is even close to that amount.

Finally, ODI has mischaracterized DCC's vehicle survey data. Of the 47 vehicles with subject upper ball joints analyzed in the survey (94 upper ball joints), only 2 exceeded 0.06 inches of end play, and even those two were not close to the end play needed before separation can occur. This data strongly supports DCC's position that properly maintained vehicles in the field are at no risk of ball joint separation.

Here, ODI has not clearly identified any "defect" in the design of the subject ball joints. ODI describes dimensional differences between the subject ball joint design and its predecessor design, but does not suggest that the design differences make the subject ball joint inherently defective, nor could they, because the predecessor design experienced separations, as well. ODI does not identify any flaw or mistake in the material, the size, the location, the ball/socket interface or any other defect in design. ODI observes that the subject ball joints had some issues with upper crimp seal integrity, but correctly characterizes those issues as durability concerns, not evidence of a "defect," in the meaning of the Vehicle Safety Act. Moreover, ODI has made no effort to correlate the crimp seal issue with the separation incidents.

Likewise, ODI has not suggested that some defect was introduced during the manufacturing process, such as occurred in recall 99V-066. It appears, then, that ODI's primary theory is that there is a defect in the performance of the upper ball joint, merely because some number have separated in the field.

DCC does not dispute that some upper ball joints in the subject vehicles have separated in the field. DCC vigorously disputes whether those separations are "failures" that provide evidence of a "defect" in the context of the *Wheels* case and subsequent litigation. As the *Wheels* court noted:

> "It would appear economically, if not technologically, infeasible for manufacturers to use tires that do not wear out, lights that never burn out, and brakes that do not need adjusting or relining. ***Such parts cannot reasonably be termed defective if they fail because of age and wear.***" *Wheels*, 518 F.2d at 436. (emphasis supplied).

The question, then, is whether the subject upper ball joints are failing because of age and wear or for some other reason. If the ball joints are "failing" because of age and wear, the *Wheels* court teaches that they "cannot reasonably be termed defective." The overwhelming evidence in the record shows that the components will not fail unless they have worn significantly beyond the recommended replacement level. ODI does not point to any "failures" that are not explained by age and wear. Indeed, ODI characterizes the incidents as "wear-related upper ball joint separation." ODI Letter, Page 4. Under *Wheels*, the government makes a *prima facie* case of defect ***only*** when it can demonstrate to a court the existence of "a significant number of failures as to which causes like age and expected wear and tear ***have been negated***". *Wheels*, 518 F.2d at 438. ODI has identified no such failures, so it cannot rely solely on the reports of upper ball joint separations to meet its burden to prove the defect.

ODI has never suggested that upper ball joints are always expected to last the life of the vehicle, nor would such an assertion be accurate. Upper ball joints are not expected to last the life of the vehicle. That is why the owners' manual for the subject vehicles recommends regular inspection of the suspension each time the vehicle is taken in for routine maintenance. DCC's service manual contains an inspection protocol for the routine maintenance of the ball joints, and contains a specific recommendation for replacing the ball joint when the end play exceeds 0.06 inches, which is a level of end play that is far lower than the level at which separation can occur.

Thus, like in the *X-Cars* case, ODI appears to be alleging a defect that includes "concepts of causation ... and consumer expectations" about the prematurity of the upper ball joint wear. The *X-Cars* court described the government's case as presenting "a considerably more complex legal environment than [faced] the court in either *Wheels* or *Pitman Arms*. " *U.S. v. General Motors (X-Cars)*, 841 F.2d 400, 406 (D.C. Cir. 1988) . The *X-Car* court held that the government cannot meet its burden to prove a defect on the basis of consumer complaints when those complaints do not provide a technical basis to judge the "technical adequacy" of the allegedly defective systems in their cars. *X-Cars*, 841 F.2d at 409.

Like *X-Cars*, consumer complaint evidence alone will be insufficient to make the government's case here. All ball joints can separate if they wear out or are damaged, so a

consumer complaint of a ball joint separation, without more, is not an indication that the ball joint "failed," for purposes of establishing evidence of a "defect," under the *Wheels* and *X-Car* cases. Rather, the consumer complaints of ball joint separation are evidence of "failures" only if the separations "occurred under circumstances in which, absent a defect, they would not have occurred." *X-Cars*, 841 F.2d at 412. As it has been settled for more than a quarter century that failures due to wear "cannot be deemed defective," the upper ball joints at issue here can be considered defective only if they are separating for reasons other than wear. ODI's letter suggests no such alternative reason

The warranty experience of the subject ball joints, which, without any benchmark, ODI characterized as "high," likewise does not establish the presence of a defect. The warranty numbers provided to ODI were not limited to claims of loose, noisy, and worn upper ball joints, and do not suggest that there was anything defective about the component. Moreover, the warranty data show that 89% of the upper ball joints returned through warranty that were analyzed by DCC had end-play with less than 0.06 inches.

2. The Performance of the Ball Joint Does Not Present An Unreasonable Risk to Motor Vehicle Safety.

Even if the performance of the subject ball joint were deemed "defective," DCC would disagree that it presents an unreasonable risk to motor vehicle safety. First, to state the obvious, there are no substantiated injuries associated with failure of the subject ball joint. While we recognize that the Vehicle Safety Act is intended to be preventative of injuries, the fact that these vehicles – some of which are now five years old – have no injuries associated with the performance of the component at issue is significant.

Apart from the fact that there are no confirmed injuries alleged to have been associated with the performance of the ball joint, the case law supports our conclusion that there is no unreasonable risk to motor vehicle safety. "It would defy logic to find that the Safety Act, which strives to reduce traffic-related safety risks, would require a recall for *all* defects, even those that would not reasonably lead to a reduction in traffic accidents." *Center for Auto Safety et al. v. NHTSA*, Civ. No. 04-392 (ESH), slip op. at 22 (D.D.C. Sept. 30, 2004). (emphasis in original).

The reasonableness of a given safety risk is determined in terms of three factors: the severity of the harm it threatens, the frequency with which the harm will occur, and the "economic, social and safety consequences of reducing the risk to a so-called 'reasonable' level." *X-Cars*, 841 F.2d at 410 (quoting the District Court opinion). In this case, a properly serviced vehicle will not experience a ball joint separation, so it presents no risk to safety. It is only when an owner ignores substantial warnings of upper ball joint wear in the form of noise, tire wear and other audible and tactile signals over a long period of time that the ball joint is at risk of separation. A risk that does not manifest itself until long after an owner has neglected needed maintenance is not unreasonable.

As to the frequency of the condition occurring in the field, the *X-Car* decision requires ODI to consider the effect of publicity as a contributor to the volume of reported incidents. *X-Cars*, 841 F.2d at 414. When this investigation was first opened as PE03-032, DCC had received only 2 reports of actual or unconfirmed ball joint separation in the subject vehicles. When DCC responded to NHTSA's inquiry, the vehicles had an extremely low "failure" rate of 1 per 100,000 vehicles. One month after DCC provided that information to ODI, CBS News aired a story about the issue, and the complaints soared. As the *X-Car* court noted, a complaint rate for an issue that has received extensive publicity cannot reasonably be compared with the complaint rate on another vehicle that has not received the same level of publicity. *Id.*

In this case, despite the publicity, the upper ball joint separation rate on the subject vehicles compares very favorably with the separation rate documented in the public record of EA99-022 (General Motors), which is the only other completed upper ball joint investigation in NHTSA's public files. The GM vehicles' separation rate in that investigation was approximately 70 per 100,000 vehicles, a rate that is about four times higher than ODI's own estimate of 17.9 separations per 100,000 vehicles in the population ODI has asked DCC to recall. Particularly given the fact that the DCC rate was influenced by substantial publicity, it is extremely low compared with the GM population (most of which were addressed with an extended warranty).

Although DCC has used ODI's estimate of 17.9 separations per 100,000 vehicles for purposes of demonstrating that the rate is significantly lower than the rate in the investigation of upper ball joints in the GM case, DCC disagrees that this figure correctly reflects the documented incidents of separation in the record. DCC has previously provided ODI with a careful analysis of the incidents ODI is counting as "failures," and documented many cases that should not have been included because no upper ball joint separation is alleged to have occurred. DCC is aware of 97 incidences of confirmed or potential upper ball joint separation in the population that was subject to the investigation, 75 of which occurred in the population for which ODI has requested a recall. In the population for which ODI has requested a recall, there is a separation rate of 12.7 per 100,000 vehicles, which is close to the vehicle separation rate of about 10 per 100,000 vehicles in RQ03-002 (Ford), a rate which NHTSA's closing report characterized as a "relatively low complaint rate." It is noteworthy that the Ford case involved a tension-type, lower ball joint, which can fail with less warning than an upper ball joint.

In RQ03-002, NHTSA also prepared an age-adjusted analysis of the Ford vehicles, and concluded that the population experienced less than one separation per ten thousand vehicle years, which NHTSA characterized as "low." DCC used the same methodology to analyze the age-adjusted separation rates on the vehicles ODI has asked to be recalled and found the following:

MY 2000 4x4	0.51 separations/10,000 Vehicle years
MY 2001 4x4	0.24 separations/10,000 Vehicle years
MY 2002 4x4	0.09 separations/10,000 Vehicle years
MY 2003 4x4 (through 1/2003)	0 separations

Even if ODI's higher count of relevant incidents is substituted, the age adjusted rate for the population ODI wants recalled will not be higher than the rate NHTSA characterized as "low" in the Ford case.

ODI is incorrect that there is a "distinct rising trend with age and mileage accumulation" on the subject ball joints. ODI correctly notes that the rate was 1 per 100,000 vehicles in the summer of 2003 before the first CBS News story was aired; the fact that additional incidents were reported as a result of the publicity does not constitute a "distinct rising trend with age." In fact, when the incidents are analyzed by the month when the separation occurred, and the mileage at the time, there is no pattern – it is a random scatter diagram.

In any event, DCC does not disagree that the upper ball joint can wear out with age, so it is unclear what the significance would be, even if there were a "rising trend with age and mileage accumulation." That is true with any issue that is wear-related, but that does not help to demonstrate the existence of a defect or an unreasonable risk to safety.

Finally, the reasonableness of any risk to safety also depends upon the reasonableness of an owner's response to signals that a component is in need of maintenance or repair. DCC presented NHTSA with evidence quantifying the fact that an operator will be well aware of the presence of a deteriorated ball joint long before the ball joint is at any risk of failure. The audible and tactile warnings of the progressive deterioration are substantial. ODI has summarily rejected this evidence without justification.

First, ODI claimed that the noise in the exemplar vehicle provided by DCC for evaluation was "intermittent" and "potentially ... masked" by the radio or ambient noise. While any warning signals can be drowned out by a very loud radio or by a transient occurrence, such as a passing fire engine, the evidence provided by DCC quantified the decibel level of the noise produced by the ball joint, and proved that it exceeded ordinary traffic noise by a significant amount. ODI made no effort to refute those data with objective evidence. Moreover, the evaluation vehicle had a ball joint with end play at 0.20 inches, still well below the level where separation was a risk. The noise from the ball joint would continue to increase as the deterioration increased, providing additional, sustained audible warning that the component was in need of maintenance or repair.

Second, ODI has mischaracterized DCC's survey. ODI states that DCC's engineers "failed to detect audible noise in 83%" of the vehicles in the survey. ODI fails

to note that most vehicles in the survey had upper ball joints that had less than 0.60 inches of end play, so they should not have made any "audible noise." DCC expects prominent noise to begin somewhere before 0.200 inches of end-play, and none of the survey vehicles with subject ball joints had that that much end-play.

Third, ODI's reliance on the consumer responses to interviews is not persuasive. It is not surprising that a consumer would claim not to have heard any warning before the separation because s/he would not want to admit the responsibility. Because ODI did not evaluate consumer vehicles with progressive ball joint deterioration and quantify the noise level in those vehicles, the consumer interview responses are not sufficient to refute DCC's quantified data.

3. ODI's Theory of Safety Defect Is Inconsistent with Its Own Precedents and With Applicable Case Law.

Manufacturers must be able to rely on the agency's decisions in prior defect investigations as a reasonable predictor of how a particular alleged defect will be analyzed. It is a well-settled principle of administrative law that agencies may not change prior policies or depart from prior decisions without acknowledging the departure from precedent and without providing a reasoned analysis of the rationale for doing so.

The D.C. Circuit recently reversed an FAA/NTSB safety enforcement decision, noting that the agencies had departed from their prior precedents in similar enforcement actions without explanation. "[A]gency action is arbitrary and capricious if it departs from agency precedent without explanation. Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a 'reasoned analysis indicating that prior policies and standard are being deliberately changed, not casually ignored. An agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decisionmaking. "*Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1124-1125 (D.C. Cir. 2003) (internal quotations and citations omitted).

Even more recently, the D.C. Circuit reversed a Surface Transportation Board order for similar reasons. "The Board's brief, generalized statement fails to provide an adequate explanation to allow the STB to ignore factors and reasoning it has previously – and consistently- found controlling." *New York Cross Harbor R.R. v. Surface Transportation Board*, 374 F.3d 1177, 1183 (D.C. Cir. 2004).

In the case of upper ball joint investigations, DCC is aware of only one other investigation, EA 99-022 (General Motors). In that case, the GM vehicles had an upper ball joint separation rate that is about four times higher than ODI's estimate of the separation rate on the vehicles for which ODI has requested a recall in this case. GM reluctantly agreed to recall a small proportion of the population, even while objecting that

the condition did not reflect a safety-related defect, and extended the warranty on the vast majority of the population.

DCC does not understand ODI's statement that the separation rate of the subject vehicles in this case is "high relative to other vehicles investigated by ODI for similar defect conditions." There has been only one other investigation of a "similar defect condition" in an upper ball joint, and DCC's separation rate is one-fourth the separation rate observed in that case.

Moreover, to the extent ODI is mixing upper ball joint investigations and lower ball joint investigations, ODI made no effort to distinguish those recalls that were conducted because the manufacturer identified a design or manufacturing defect (such as the slit boot in Recall 99V-066). DCC knows of no lower ball joint recall conducted solely on the basis of ball joint separation rate, where the manufacturer did not identify some design or manufacturing flaw contributing to the risk of separations. Thus, contrary to ODI's assertions, the request for a recall in this case is simply without precedent.

ODI's letter makes the astonishing statement that "a manufacturer may not avoid making a safety-related defect determination by asserting that it is the operator's responsibility to detect and repair a defect condition that involves a progressive deterioration of a part that is critical to the safe operation of the vehicle." ODI cites no authority for this sweeping statement, nor could it, because it is flatly inconsistent with the *Wheels* case. In *Wheels*, the court expressly agreed that "manufacturers are not required to design vehicles or components that never fail." *Wheels*, 518 F.2d at 436. The court identified tires that wear out, lights that burn out and brakes that need adjusting or relining as examples of conditions that do not rise to being "defective." Certainly, ODI would agree that tires, lights and brakes are "critical to the safe operation of the vehicle." DCC knows of no basis on which ODI could claim that there is a legal obligation under the Vehicle Safety Act for manufacturers to be lifetime warrantors of all parts that are "critical to the safe operation of the vehicle," nor do ODI's decisions closing other ball joint investigations (including RQ03-002 and RQ02-012) support such a statement.

ODI's rejection of the adequacy of the warning in this case is also inconsistent with its previous decisions. For example, NHTSA denied a petition for a defect investigation in certain Honda vehicles, concluding "the distributor bearing failure on these vehicles is almost always progressive, and ... warnings such as significant bearing noise, poor engine performance and starting difficulty are clearly evident to the operator long before the bearing seizes and causes the engine to stop running." *Denial of Defect Petition from W. Schroeder*, 66 Fed.Reg. 55243, November 1, 2001. Many other ODI investigations have been closed because the condition manifested itself through warnings to the operator long before the condition deteriorated to an unsafe level, including RQ 03-002 (Ford lower ball joints). ODI has made no effort to acknowledge, much less explain, its departure from these precedents in this case.

DCC has spent the past 15 months conducting a thorough and comprehensive investigation into the scope and potential consequence of front suspension upper control arm ball joint wear in the subject vehicles. This information has been expediently provided and discussed with NHTSA's staff, and has been formally presented to ODI management on several occasions. Based on the construction of the front suspension on these vehicles, the loads they experience in use, and the ultimate strength of the part even when in a severely worn state, it is obvious that separation of the joint is not likely except in cases of lack of proper vehicle maintenance and intentional disregard for the clear and present warning provided. There are no substantiated injuries or multi-vehicle accidents as a result of this condition. This is not a safety related defect.

DCC has been continuously forthright with NHTSA with our intentions to take an appropriate form of customer notification to remedy this customer satisfaction issue. We have designed a new service part in anticipation of this action, and we have made multiple efforts over the last four months to resolve this issue with the agency on the basis of extending the warranty sufficiently on these vehicles to remove the financial burden that is the source of nearly all of the complaints.

DCC values its relationship with NHTSA; however, when a condition does not present an unreasonable risk to motor vehicle safety, customer satisfaction must remain our highest priority, and we must act accordingly. Moreover, we cannot agree that this case is an appropriate one in which to make new law about acceptable levels of performance of a part that is not intended to last the life of a vehicle.

For the reasons stated in this letter, DCC declines the ODI request for a safety recall pursuant to 49 U.S.C. § 30118 of the subject vehicles.

Sincerely,

Stephan J. Speth