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VIA E-FILING

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings
January 7, 2013
Part of
Public Record

RE: STB Docket No. EP 715 - Rate Regulation Reforms

Dear Ms. Brown:

Enclosed for e-filing in the above-captioned case, please find the Rebuttal Comments of The Chlorine Institute.

Please feel free to contact the undersigned if you have any questions.

Very truly yours,

Thomas W. Wilcox
Attorney for The Chlorine Institute

Enclosure

cc: Counsel, Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 715

RATE REGULATION REFORMS

**REBUTTAL COMMENTS
OF
THE CHLORINE INSTITUTE**

Pursuant to the Decision served in this proceeding on July 25, 2012, The Chlorine Institute submits these Rebuttal Comments addressing several aspects of the reply submissions of Class I railroad parties and the Association of American Railroads (“AAR”) on December 7, 2012.

In its Opening Comments (“CI Op.”), the Chlorine Institute voiced its general support for the Notice of Proposed Rulemaking’s (“NOPR”) proposals to modify the Board’s Simplified Stand Alone Cost (“SSAC”) and Three Benchmark Methodology (“3B”) rules, but it also argued that “the Board should be actively pursuing ways to make its rules applicable to rate disputes that cannot feasibly be resolved using Full-SAC rules less costly, less complex, and more straightforward.” CI Op. at 4. The Chlorine Institute also explained how the typical chlorine rail shipper cannot utilize the Full-SAC rules or the SSAC rules to obtain relief from unreasonable rates, *id.*, and that, due to railroad efforts to rid their systems of chlorine in part through significant across-the-board rate increases, the 3B rules “may no longer be usable for chlorine shippers, even if the relief limit is increased to \$2,000,000 as the Board has proposed in the

NOPR.” *Id.* at 7. In addition to addressing the current deficiencies in the 3B rules as applied to chlorine rail shippers, the Chlorine Institute provided the Board with several suggested potential modifications to the current rules for the Board to consider and seek further input on, either in this proceeding or a separate proceeding. *Id.* at 9 and Verified Statement of Thomas D. Crowley (“Crowley V.S.”). Finally, the Chlorine Institute asked the Board to respond to the September 21, 2011 request by the Chlorine Institute and the American Chemistry Council that the Board address the railroad practice of “bundling” of rates, by which a railroad forces its customers with numerous origin and destination pairs to ship all the movements either entirely pursuant to common carrier rates and service terms or entirely pursuant to a rail transportation contract.¹ This practice is a significant deterrent to chlorine rail shippers pursuing rate relief under the Board’s rate rules, particularly the 3B rules, if they believe only one or a few of their rates have been established at unreasonably high levels. *Id.* at 8.

The assertions of the Chlorine Institute that the current Full-SAC and SSAC rules are not accessible to the vast majority of chlorine shippers, for the reasons set forth in its Opening Comments, are unrebutted by the reply submissions of the Class I railroad parties and the AAR. Even though it is apparently undisputed that testing the reasonableness of the vast majority of chlorine rail rates is not feasible under these rules, the railroad parties on reply nevertheless continue their defense of the *status quo* and their claims that the current rules should be made even more costly and complex, which would further reduce, if not eliminate altogether, the regulation of chlorine rail rate levels under the Full-SAC and SSAC rules. The Chlorine Institute reiterates that maintaining the *status quo* with the SSAC rules, or making them even more costly

¹ The September 21, 2011 letter states, in part, “Particularly, we would like to know if you and/or the Board have discussed the issue at hand and if you could share with us any preliminary thoughts regarding the reasonableness of this practice. If so, does the Board plan to take action or open a proceeding on the matter?”

and complex for rail shippers, is not acceptable. Removing the relief limit as proposed in the NOPR (without linking the removal to a requirement that the complainant submit a Full-SAC road property investment analysis) is an acceptable initial step, but it should be part of a more in-depth review and significant modification of the SSAC rules.

The railroad parties also object to the requests by the Chlorine Institute and other parties to raise the current damage limit in 3B cases to either well above the \$2,000,000 proposed by the NOPR, or removal altogether of a damage cap in 3B cases. The railroads also object to any other modifications of the 3B rules proposed by the Chlorine Institute and other parties. First, the position by Class I railroad parties that the Board cannot consider raising the relief limits in 3B cases until it has detailed information on the litigation costs of multiple SSAC cases should be rejected. *See* NS/CSX Reply at 26 (“any increase in the 3B relief limit must first be supported by solid probative evidence showing that the costs of SSAC cases are higher than the Board determined in Simplified Standards.”); *see also* AAR Reply at 16 (Board must have “detailed evidence as to the cost of Simplified SAC before it considers raising the cap on the Three Benchmark approach”). The Board did not have specific evidence of litigation costs when it adopted the initial relief limits in *Simplified Standards*. Rather, it established the limits based on its estimates of the litigation costs, which estimates rail shippers have consistently maintained, and have demonstrated in this proceeding, were too low. Opening Comments of US Magnesium L.L.C. (“USM”) at 6-7; Verified Statement of Howard I. Kaplan (“Kaplan V.S.”) at 5-6. Moreover, only USM has sought to utilize the SSAC rules since their adoption in 2007, and that case did not proceed to a final decision.² There is also no indication that multiple SSAC cases will be filed at the Board (let alone proceed all the way to a final decision) if the current rules are

² Docket NOR 42115, *US Magnesium L.L.C. v. Union Pacific Railroad Company*.

not changed. Thus, it is highly unlikely that the Board will have specific litigation cost data from multiple, complete SSAC cases in the foreseeable future. Accordingly, the insistence by railroad commenters on requiring such data before the current 3B relief limit can be raised seeks a standard that can't be met, and is merely a thinly veiled attempt to maintain the *status quo*.

The Chlorine Institute and other parties also argued that the 3B relief limit should be raised or eliminated because the costs of litigating a 3B case are actually significantly higher than the \$250,000 originally estimated by the Board in *Simplified Standards*. Kaplan V.S at 6-7 (costs of litigating USM's 3B case against UP³ were "nearly twice the Board's estimate"); CI Op. at 8, note 5 (litigation costs of complainant in Docket NOR 42132, *Canexus Chemicals Canada, L.P. v. BNSF Railway Co.*, were well in excess of \$250,000 estimate). These are two of the only three 3B cases filed under the current 3B rules. For the most part, the railroad parties either disregarded this evidence or attempted to diminish its significance. *See e.g.*, NS/CSX Reply at 27. For example, the Chlorine Institute and USM provided detailed comments that the extensive, detailed and complex "other relevant factor" evidence submitted by the railroad defendants in these two cases greatly increased the complainants' respective litigation costs in those proceedings. CI Op. at 7-8; Crowley V.S. at 9-11; USM Op. at 6-7. The railroad parties did not address this information and evidence. *See e.g.*, BNSF Reply at 10-11 (where BNSF responds to the Chlorine Institute's complaints about complexity due to introduction of substantial "other relevant factor" Positive Train Control ("PTC") cost adjustments by making a comparability argument). Moreover, the Chlorine Institute is not advocating that all evidence of PTC costs should be "barred" from 3B cases, as BNSF misrepresents. *Id.* Rather, the Chlorine Institute is simply suggesting that the Board should adopt for all 3B cases the position it adopted

³ Docket NOR 42114, *US Magnesium L.L.C. v. Union Pacific Railroad Company* ("USM v. UP").

in *USM v. UP*, which was that separate “other relevant factor” PTC cost adjustments are too complex for a 3B case, and also not needed since “as the PTC investments are made, the costs will flow into our costing model and then into the rate prescriptions.” Crowley V.S. at 11; quoting *USM v. UP* (served January 28, 2010) at 17, note 20.⁴ For these, and other reasons set forth in the Chlorine Institute’s opening and reply comments, the Board should significantly raise, and preferably eliminate altogether, the current relief cap in 3B cases.

The railroad parties also criticize the examples of potential modifications to the 3B rules suggested by the Chlorine Institute in its Opening Comments to make them more accessible and meaningful to chlorine rail shippers. See Crowley V.S. at 6-8. These suggestions for further development and consideration in either this or a separate proceeding are aimed at addressing some of the current deficiencies in the 3B rules as applied to chlorine movements. These include the undisputed fact that, under the current 3B rules, there can be very few movements in a 3B comparison group closely comparable to an issue chlorine movement. They also suggest ways to address the fact that the current 3B rules do not address how to determine the reasonableness of an issue rate when the defendant railroad has exercised its market power to significantly raise all of the rates of all of its chlorine customers “across-the-board.”

⁴ The Chlorine Institute has already pointed out at page 5 of its Reply Comments the lack of merit to the claims by several railroad parties in their opening submissions (and repeated in their reply comments) that increasing the current relief limit in 3B cases will result in a downward “ratcheting” of chlorine rail rates, in particular, to the jurisdictional floor of 180% of URCS variable costs. See e.g., AAR Reply at 15; BNSF Reply at 7-8. The railroads’ claims are exaggerated for any commodity. As the Board stated in *Simplified Standards*, “even if every single potential captive shipper were to seek, and obtain, the maximum relief available under the Three-Benchmark approach this would result in a reduction in total revenues by less than 2.4%,” and “for *that* ratcheting potential to be realized, there would have to be an *avalanche* of rate cases brought to the agency.” *Simplified Standards* at 74 (emphasis supplied). Contrary to the assertion of AAR, neither the D.C. Circuit nor the Board has ever stated that “ratcheting” rates down to the jurisdictional threshold level was “likely.” AAR Reply at 15.

In general, the railroads attempt to dismiss out of hand the suggested possible modifications offered by the Chlorine Institute and others, whether by stating they are “designed to stack the deck against railroads when it comes to selecting an appropriate comparison group,” UP Reply at 15, or that they “driven by the goal of achieving favorable rate prescriptions rather than sensible economic principles.” BNSF Reply at 13. The Chlorine Institute disagrees with these assessments, and maintains that the Board should conduct a more in-depth inquiry into the merits of, and economic justifications for, these and other potential changes to the current 3B rules. It is undisputed that only three 3B cases have been filed in the five years the rules have been in existence. Moreover, for the reasons explained by the Chlorine Institute in its Opening Comments, the continued usefulness and feasibility of the 3B rules to test the reasonableness of chlorine rates is highly questionable, primarily due to railroad pricing behavior in recent years. The Chlorine Institute’s recommendations on the 3B relief cap, and its suggestions of additional possible modifications to the 3B rules, are offered as part of a request that the Board undertake a significantly more in-depth review of the SSAC and 3B rules, either in this proceeding or in a separate proceeding.

Finally, none of the Class I railroads addressed the Chlorine Institute’s concerns about “bundling” in their reply comments. However, the Board’s continued failure to respond to the September 21, 2011 letter request of the Chlorine Institute and American Chemistry Council to address the carrier practice of “bundling” rates for multiple chlorine and other commodity movements means the continued presence of a significant deterrent to chlorine shippers attempting to utilize the Board’s rate rules, particularly the 3B rules. As explained in the Chlorine Institute’s opening comments and the September 21, 2011 letter to Chairman Elliott, this practice entails a railroad discouraging, or even making financially prohibitive, rate litigation

on a subset of its total movements for a particular customer – which could consist of hundreds of origin-destination pairs – by insisting that the shipper either utilize all common carrier rates or all contract rates to transport its shipments. This requirement forces the shipper, if it still desires to challenge the few rates it believes are unreasonable, to also ship all of its other traffic by common carrier rates during the pendency of the case or cases, which rates can be considerably higher than contract rates offered for those movements. The high total costs for shipping 100% of the movements by common carrier rates can greatly exceed the benefits that might be obtained from the Board establishing the maximum reasonable levels for the subset of rates that are challenged, thus the railroad succeeds in imposing significant rate increases – on usually movements critical to the shipper – that are insulated from Board rate reasonableness review. The Chlorine Institute again asks the Board to address this critical issue, whether in this proceeding or a separate proceeding.

In conclusion, the railroads' arguments in the reply phase of this proceeding are all variations on the same general theme to keep the *status quo* with the Board's SSAC and 3B rules, or make them even less accessible and meaningful to chlorine rail shippers. Either would be an unacceptable outcome of this proceeding. The Chlorine Institute strongly urges the Board to continue its efforts to improve its Simplified Standards by making them *less* expensive, *less* complicated and more accessible to chlorine shippers. To this end, the Board should (1) remove the SSAC relief cap without requiring complainants to conduct a Full-SAC road property investment evidentiary presentation; (2) preferably eliminate, but at a minimum significantly increase above \$2,000,000, the 3B relief cap; and (3) undertake a more in-depth review of its SSAC and 3B rules to make them more accessible and meaningful to chlorine shippers. The

Chlorine Institute also again requests that the Board address the “bundling” rates issue, as discussed above and in the Chlorine Institute’s Opening Comments.

Respectfully submitted,



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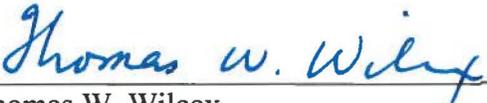
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Attorneys for The Chlorine Institute

January 7, 2013

Certificate of Service

I hereby certify that on January 7, 2013, I served a copy of the foregoing Rebuttal Comments of The Chlorine Institute via U.S. mail on each of the Parties of Record in this proceeding.



Thomas W. Wilcox