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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 US Magnesium L.L.C.

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

Very truly yours,

Thomas W. Wilcox
Attorney for US Magnesium L.L.C.

Enclosure

cc: Counsel, Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB Docket No. EP 715
RATE REGULATION REFORMS**

**REBUTTAL COMMENTS
OF US MAGNESIUM L.L.C.**

US Magnesium L.L.C. (“USM”) hereby submits these Rebuttal Comments pursuant to the Decision served in this proceeding on July 25, 2012.

In its Opening Comments in this proceeding, USM provided its input on several of the proposals contained in the Board’s Notice of Proposed Rulemaking (“NOPR”) from the perspective of USM’s actual experience with the Board’s Three Benchmark Methodology (“3B”) and Simplified Stand-Alone Cost (“SSAC”) rate reasonableness rules. USM is unique in this respect because it is the only rail shipper that has sought relief under both of these sets of rules, and the only rail shipper to have filed a complaint seeking relief under the SSAC rules. USM’s opening submittal included verified statement evidence provided by Dr. Howard I. Kaplan, who was an employee of USM for over 20 years, is currently employed by USM as its Chemical Transportation Consultant, and who actively participated in each of the rate cases pursued by USM (“Kaplan V.S.”). This verified statement evidence included a discussion of the litigation costs incurred by USM in pursuing its cases, in response to the Board’s request in the NOPR for such information. NOPR at 15. Specifically, Dr. Kaplan explained that USM’s costs to litigate its 3B case against Union Pacific Railroad Company (“UP”) in Docket NOR 42114 were nearly

twice the \$250,000 estimated by the Board in *Simplified Standards*. Kaplan V.S. at 4. He also explained how USM's legal and consulting costs to litigate its SSAC case against UP in Docket NOR 42115, just short of filing opening evidence, were approximately \$750,000, and that he estimated the legal and expert costs to litigate the case to decision could have reached \$2,000,000. *Id.* at 6. These costs are well in excess of the estimated costs upon which the Board based the damage relief limits for SSAC and 3B it adopted in *Simplified Standards*.

In their reply evidence, the Class I railroad parties responded to USM's evidence on litigation costs by (1) completely ignoring Dr. Kaplan's testimony as to USM's 3B costs being nearly twice the Board's estimate of \$250,000; and (2) either trying to discount his statements as to SSAC litigation costs (UP and BNSF) or choosing to completely ignore them while at the same time stating that no shipper party submitted any evidence of litigation costs in their opening evidence (NS and CSXT). *See* Joint Reply Comments of NS and CSXT at 27 (The *only* "evidence" presented by *any* commenter on this question [SSAC litigation costs] is a set of unsubstantiated assumptions presented by Crowley and Mulholland.") (emphasis supplied). Also incorrect is UP's characterization of USM's summary of why it believed its litigation costs in NOR 42115 would have greatly exceeded the Board's estimate of \$1,000,000 in *Simplified Standards*. UP Reply Comments at 14. While UP's failures to comply with the SSAC rules' Second Disclosure requirement were a factor, they were certainly not the largest factor, as UP erroneously speculates. On the contrary, as Dr. Kaplan explained, "[l]egal and expert costs quickly escalated due to the complex nature of the replacement cost railroad property calculations USM was responsible for, and became even more complicated as we attempted to apply the Full-SAC rules for 'crossover traffic' within the confines of the SSAC rules Our work was made further complicated and costly due to difficulties the UP experienced while

trying to comply with the Board's 'Second Disclosure' requirements." Kaplan V.S. at 6. Finally, while USM's experience with the SSAC rules and the associated costs was not complete due to USM's two SSAC cases being settled, it is not true, as BNSF argues, that because of this "there is no basis for estimating the costs of litigating a Simplified-SAC case." BNSF Reply Comments at 5. USM's experience provides *some* basis grounded in actual experience, which is more than the Board had when it first adopted the relief limits in *Simplified Standards*.

USM is the only shipper to have filed a SSAC rate case since the rules were adopted in 2007, and the record in this proceeding and other Board proceedings is replete with testimony and comments from shippers that they believe the current SSAC rules are simply not useable to test the reasonableness of their rates. There is thus no indication that the *status quo* will result in more SSAC cases being filed if the rules are not modified. In spite of this fact, or perhaps because of it, the Class I railroads take the position in this proceeding that the Board cannot consider making any changes to the SSAC or 3B relief caps until it has actual evidence of litigation costs from multiple SSAC cases that are litigated all the way to a final decision. *See e.g.* 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*.").

The railroads' insistence that the Board must have detailed evidence of the litigation costs of multiple SSAC cases before any increase in the relief limits of the SSAC or 3B rules may be considered is nothing more than a further attempt to perpetuate the *status quo*. The Board did not require specific evidence of costs to set the relief caps currently in place. It should not and does not need to require the extensive data advocated by railroad parties to modify the rules to raise, or eliminate, the relief limits.

The railroads' insistence on extensive, detailed evidence of litigation costs before considering raising SSAC and 3B relief limits also stands in sharp contrast to their position that the Board should simply accept, without *any* evidence whatsoever, the railroads' claims concerning the alleged "extraordinary burden on the railroads imposed by the second disclosure requirements" of SSAC cases. AAR Reply Comments at 14. Only one Class I railroad, UP, has ever been a defendant in a SSAC case. NS and CSXT therefore have no actual experience or actual evidence upon which to base their complaints about the alleged burdens the Second Disclosure imposes on railroads in SSAC cases and how raising the relief limit in SSAC cases might affect the parties respective burdens of proof. NS/CSXT Reply Comments at 20. Moreover, while UP similarly complains of the burdens of the Second Disclosure requirement, it submitted no actual evidence of the extent of such burdens. UP Reply Comments at 13. In fact, UP concluded that the initial burden it experienced with the Second Disclosure was lessened over the course of NOR 42115 as UP improved the computer program it developed for that case. *Id.*

USM also reiterates its significant doubts that the current 3B rules will provide any relief to chlorine shippers going forward due to the practice of the railroads, in recent years, of using their considerable market power to systematically and significantly raise the rates of all chlorine rail shippers across-the-board. USM Opening Evidence at 5. Such increases are also due to the publicly announced intentions of all of the Class I railroads to eliminate rail transportation of chlorine from their systems, even if the increases were not economically justified since the intent was to forego otherwise profitable traffic. It is therefore misleading for railroads to say that the huge increases in rates for chlorine shippers "were a response to changes in the regulatory and market environment." BNSF Reply Comments at 10. In any event, this does not change the

overall point of USM that these pricing practices have created an arguably insurmountable hurdle for it and other chlorine shippers to seek relief under the 3B rules in the future, and that this and other flaws in the current 3B rules must be addressed. USM Opening Comments at 6.

In conclusion, the reply comments of the Class I railroads are a continuation of their attempt to either keep the current SSAC and 3B rules unchanged, or make them even less available to chlorine and other rail shippers. USM's comments and verified statement testimony of the costs it incurred and expected to incur in its 3B and SSAC cases provide the Board with information it requested in the NOPR and provide additional justification for raising or removing the current relief limits. Further, as USM explained in its opening comments, the current deficiencies in the SSAC and 3B rules described therein, combined with the well-documented goal of the Class I railroads to eliminate, or significantly reduce the transportation of chlorine on their systems, are very likely to foreclose USM, other chlorine rail shippers, and TIH shippers generally from using any of the Board's rules to seek relief from monopolistic railroad pricing behavior in the future. The Board should vigorously resist the railroads' attempt to maintain the *status quo* with the Board's SSAC and 3B rules, and it should pursue changes to those rules as proposed in the NOPR, with the additional measures suggested by USM in its Opening Comments.

Respectfully submitted,



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January 7, 2013

Certificate of Service

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


Thomas W. Wilcox