BEFORE THE

SURFACE TRANSPORTATION BOARD

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RATE REGULATION REFORMS

OPENING COMMENTS OF PPG INDUSTRIES, INC.

Karyn A. Booth
David E. Benz
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
Phone: 202.331.8800
Fax: 202.331.8330

Counsel for PPG Industries, Inc.

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OPENING COMMENTS OF PPG INDUSTRIES, INC.

Pursuant to the decision issued by the Surface Transportation Board ("Board") on July 25, 2012 in the above-captioned proceeding ("Decision"), PPG Industries, Inc. ("PPG") hereby submits its Opening Comments regarding changes proposed by the Board to its rate regulation rules. The Board stated in its decision that its proposed changes are intended "to ensure that the Board's simplified and expedited tests for resolving rate disputes are more accessible to parties."[1]

PPG appreciates the opportunity to provide its views on the Board's proposals. PPG strongly supports the Board's goal in initiating this proceeding and agrees that the agency's current simplified rate procedures must be refined to result in more workable and effective procedures for captive shippers. To date, very few companies have utilized the Board's Three Benchmark and Simplified Stand-Alone Cost ("Simplified-SAC") rules, in large measure because the rate relief caps make such cases uneconomic for captive shippers that have endured substantial rate increases over the past decade. PPG commends the Board for responding to shippers' concerns over apparent shortcomings in its simplified rate procedures. These procedures have generally proved ineffective in satisfying the agency's statutory mandate to

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[1] See Decision at 1.

establish expedited and lower cost procedures that would result in reasonable rail rates where no effective competition exists. The need for reasonable rail rates is crucial for businesses like PPG that operate in a highly-competitive global economy.

PPG's Comments focus on the Board's proposals concerning its Simplified-SAC and Three Benchmark rate procedures. With respect to the Board's proposals concerning its full SAC methodology, PPG supports the Joint Opening Comments of The American Chemistry Council, The Fertilizer Institute, The National Industrial Transportation League, Arkema, Inc., The Dow Chemical Company, Olin Corporation, and Westlake Chemical Corporation ("Joint Comments").[2]

I. IDENTITY AND INTEREST OF PPG.

PPG is a diversified manufacturer of chemicals, protective coatings, glass, and fiberglass with over 14,000 employees in the United States and more than 50 manufacturing, research, and distribution facilities across the country. PPG operates in more than 60 countries with total sales in 2011 of over $14 billion.

PPG's commodity chemicals segment produces chlor-alkali and derivative products including chlorine, liquid caustic soda, vinyl chloride monomer, ethylene dichloride, chlorinated solvents, hydrochloric acid, calcium hypochlorite, and other chemicals. Most of these products are sold directly to manufacturing companies in the chemical processing, plastics and rubber, paper, minerals, metals, and water treatment industries. PPG's North American chlor-alkali chemicals business operates four production facilities and employed approximately 1,950 people in 2011. PPG is the third largest North American producer of chlor-alkali products with facilities

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[2] See Joint Comments at 4-23.

in Natrium, WV; Lake Charles, LA; Longview, WA; and Beauharnois, PQ. PPG also operates chemical facilities that receive chlorine by rail at La Porte, TX and Barberton, OH.

Some of these products, such as chlorine, are classified as poisonous and/or toxic by inhalation ("TIH") and are transported by rail. It is undisputed that rail transportation is the safest over-land method of transporting this commodity. Due to safety considerations, PPG does not ship chlorine by truck in North America. Although PPG can ship chlorine to a limited extent by barge and to certain customers by pipeline, many chlorine consumers cannot physically receive chlorine by barge or pipeline.

II. INTRODUCTION.

Prior to addressing the specific changes proposed by the Board, PPG would like to provide some context so that the Board may understand the current transportation climate facing PPG and other shippers. PPG operates in a fiercely competitive global marketplace. Transportation rates and service not only play a large role in PPG's ability to effectively compete in this marketplace, but they also affect economic development, the retention and creation of jobs, and the competitiveness of the American economy as a whole. In situations where there is no effective competition to rail service, the authority of the Board to establish reasonable rail rates is intended to operate as a constraint on unreasonable rail pricing behavior which would otherwise undermine the ability of PPG and other captive shippers to compete in both domestic and global markets.

However, shippers face significant hurdles in rate cases at the Board, thus reducing the effectiveness of the rate case option as a true restraint on rail rates. First, a shipper is forced to pay extremely high tariff rates during the entire multi-year case. This "tariff premium" is usually dramatically in excess of both the expiring contract rate and the new contract rate offered by the railroad but rejected by the shipper. PPG previously informed the Board of the dramatic costs necessary to bring a large rate case, including $100,000 to merely evaluate the validity of the case, $5 million to litigate, and an estimated tariff premium of $20 million annually, based upon an evaluation conducted by PPG at that time.[3] If the shipper loses a rate case, the tariff premium is irretrievably lost, a significant risk that is not required of the defendant railroad.

Furthermore, railroads often "bundle" all or most rates in a single tariff, meaning that a shipper must pay the tariff premium on rates which would not even be at issue in a rate case. In other words, to be able to bring a rate case against certain tariff rates, the shipper is required to accept very high tariff rates for all or substantially all traffic involving that particular railroad. This is a major deterrent to filing of a rate case, and one that PPG has experienced first-hand.

Large Stand-Alone Cost ("SAC") rate cases are extremely expensive and lengthy proceedings, with the defendant railroad encouraging delay at every opportunity. For example, one case filed in October 2004 is still not resolved, but, instead, is now at the appeals court for the third time. Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company, STB Docket No. 42088. Another recent case was filed in May 2010, but the shipper is still waiting for a decision as to whether the Board has jurisdiction over the challenged rates. Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., STB Docket No. 42121. The longer a rate case, the more pronounced the effects of the tariff premium, and the greater the deterrent to a shipper even filing a rate case. Meanwhile, the defendant railroad is not forced to endure any extraordinary financial penalty, which only multiplies for the shipper, based upon the length of the case.

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[3] See Correspondence of Michael H. McGarry, PPG Industries, Inc., STB Ex Parte No. 705, Competition in the Railroad Industry (filed July 15, 2011). Of course, the tariff premium for a particular case would depend upon the amount of traffic at issue and the level of the challenged tariff.

PPG recognizes that some of these issues are difficult for the Board to resolve. For example, the Board cannot force railroads to enter into contracts with shippers as a means of addressing the rate bundling issue. However, perhaps the Board should consider whether "rate bundling" in a tariff is an unlawful unreasonable practice if the circumstances related to a contract negotiation demonstrate that the railroads' conduct is intended to deter the filing of a rate case. Furthermore, PPG strongly believes that the Board must do everything in its power to reduce the length, cost, and complexity of rate case litigation.

III. COMMENTS.

A. PPG Strongly Supports Removal of the Simplified-SAC Relief Cap.

In 2007, the Board adopted its Simplified-SAC procedures to provide complainants with a lower cost and expedited alternative to a full SAC rate case. However, under Simplified-SAC, the Board limited the potential rate relief that a shipper may obtain to $5 million per case over a five year period. Under the operation of the relief cap, any rate prescription obtained by a shipper in a Simplified-SAC proceeding automatically expires once the $5,000,000 cap is reached, even if that occurs prior to the end of the 5 year period, and the carrier may reassess the challenged rate adjusted for inflation for the remainder of the 5 year period.[4]

In this proceeding, the Board is proposing to remove the relief cap on Simplified- SAC cases.[5] The Board has called this proposal the "centerpiece" of its Decision.[6] In explaining its rationale for proposing to remove the relief cap, the Board stated:

> [W]e are proposing to make a simplified alternative more accessible to a shipper who believes it is being charged

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[4] See Decision at 12.
[5] See Decision at 13-14.
[6] See Decision at 3.

> unreasonable rates, yet does not choose to go through the complex process of designing a hypothetical railroad to prove its case. Moreover, lifting the limitation on relief under the Simplified—SAC approach should address the concerns raised by many of our stakeholders that the Full SAC is too complex, too expensive, and too impractical for most shippers.[7]

It is beyond dispute that large rate cases are excessively complicated cases that require the engagement of expensive outside consultants, are increasingly subject to delays that often extend cases to four, five, or more years, and are extremely expensive to litigate. Simplified-SAC cases are intended to be less complex and more cost-effective, but only one Simplified-SAC complaint has ever been filed, and no Simplified-SAC cases have ever proceeded to a final Board decision. From PPG's perspective, a primary reason that the Simplified-SAC method has not been used more frequently, despite the obvious flaws in and dissatisfaction with the large rate case process, is because the Simplified-SAC relief limit forces shippers to use the large full SAC rate process in order to obtain meaningful rate relief.

The current Simplified-SAC limit of $5 million over 5 years is often insufficient given the high tariff rates, litigation costs, and risks inherent in a rate case. In PPG's experience, when evaluating all of these factors against the mandatory relief cap, the rate case becomes uneconomic, as compared to the unlimited relief that may be obtained under a full SAC case. Similar to a large rate case, a shipper is still required to pay thousands or even millions of dollars in tariff premiums during the litigation of the case, and that entire amount is "at risk." If the case is unsuccessful, the shipper loses the entire tariff premium to the defendant railroad. In other

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[7] See Decision at 14.

words, when a rate case is lost, the shipper is not returned to a neutral position as if the case had never happened. Conversely, the defendant railroad has no comparable premium that must be paid to litigate a case. If the railroad loses the case, the only "penalty" is the requirement to charge lawful rates (and the payment, as reparations, of any rates charged above the lawful rate)—for up to five years. Moreover, if one assumes that the $5,000,000 cap is reached in years 1, 2, or 3, and the shipper factors in litigation costs, the result often is not meaningful or justified, especially since the railroad may then charge the shipper the same rate which was determined to be unlawful for the remainder of the five year period.

Accordingly, PPG strongly supports removal of the relief cap applied to Simplified-SAC cases and believes this change would foster the Board's stated "goal" of encouraging shippers to use this simplified alternative to a full SAC analysis.[8] To make the use of Simplified-SAC even more attractive to shippers, PPG also believes that the Board should extend the 5 year rate prescription period to 10 years.

B. The Board Should Not Require the Complaining Shipper to Present Complex Road Property Investment Evidence in Simplified-SAC Cases.

The Board has proposed expanding the complexity of Simplified-SAC cases by removing the simplification for calculating road property investment costs ("RPI"). Basically, the Board would require shippers to present the same detailed and complex evidence from hired experts on the RPI replacement cost in Simplified-SAC evaluations that are presented in full SAC cases.[9] PPG opposes this proposal and does not believe that the Board should link the RPI simplifying assumption to removal of the relief cap discussed above.

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[8] See Decision at 3.
[9] See Decision at 14-15.

The proposal to remove the RPI simplification from Simplified-SAC cases directly contradicts the Board's own rationale (noted above) for eliminating the Simplified-SAC relief cap. Although the Board desires to incentivize shippers to use the Simplified-SAC procedures, the proposal affecting RPI evidence will have the opposite effect and will discourage use of these rate challenge rules. The Board itself recognized in its Decision that "removing this simplification feature of the approach will raise costs and may require extending the procedural schedule [in Simplified-SAC cases]."[10] Given the railroads' history of adding delay and complexity to SAC cases, removal of the RPI simplification will likely result in the RPI component of Simplified-SAC cases growing far beyond what the Board might expect.

The Board previously recognized that elimination of the RPI simplification would "entail elaborate discovery and require hiring of more experts."[11] PPG does not believe that the Board should now ignore those concerns and, thus, urges the Board to not require detailed RPI evidence in Simplified-SAC cases. In two separate parts of the National Transportation Policy, Congress directed the Board to engage in "expeditious" proceedings.[12] Requiring complex evidence on RPI issues would be contrary to this directive. See Simplified Standards, slip op. at 63 (rejecting adjustments to RPI figures because it would be "contrary to the goal of simplification and expeditiousness to introduce consideration of adjustments to these averages").

One of the drawbacks of the Simplified-SAC analysis is that the shipper does not have a substantial opportunity to design a more efficient system than that used by the defendant railroad.[13] Removal of the RPI simplification would make the case more expensive and

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[10] See Decision at 14.
[11] Simplified Standards for Rail Rate Cases, Ex Parte No. 646 (Sub-No. 1), slip op. at 62 (served Sept. 5, 2007).
[12] See 49 USC §§ 10101(2) and (15).
[13] See Simplified Standards at 14; Decision at 9.

complex, but would not permit the shipper any greater opportunities to identify new efficiencies. See Decision at 10 (noting that the complaining shipper must use the existing rail network configuration of the defendant). Moreover, as the Board itself has explained, the Simplified – SAC methodology does not produce a rate prescription that is as low as what can typically be achieved under the current full SAC procedures.[14] Thus, by adding additional cost and delays to the litigation of Simplified-SAC cases based on removal of the RPI simplifying assumption, shippers will be placed in a similar position they are today and may be driven to litigate a Full SAC case, given the potential to achieve the lowest possible rate.

Therefore, PPG believes that the RPI simplification should remain as an integral part of the Simplified-SAC process and should not be eliminated. After several decades of adjudicating complex issues regarding RPI in SAC cases, the Board has a wealth of data that can and should be used as part of the simplification in Simplified-SAC cases, and using that data will not unfairly prejudice the resulting prescribed rates.

C. The Board Should Remove the Three-Benchmark Relief Cap.

The Board has proposed increasing the relief limit for Three-Benchmark cases from $1 million (now $1.2 million as adjusted for inflation) to $2 million.[15] While PPG appreciates the Board's recognition that the current Three-Benchmark cap is insufficient, PPG does not believe that the proposal solves the recovery limitation problem with Three-Benchmark cases. Under either a $1 million or $2 million relief limit, the utility of the Three-Benchmark case for a TIH shipper like PPG is highly questionable. PPG previously considered bringing a Three-Benchmark case, but determined that the relief available under the cap was grossly insufficient to justify the litigation cost and risk. Also, since the Three-Benchmark rules are based on a

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[14] See Simplified Standards at 5.

[15] As stated by the Board, the relief limit is annually adjusted for inflation. See Decision at 15.

comparison of rates for similar and potentially captive traffic, the utility of Three-Benchmark rate relief has and will continue to diminish over time, as rail rates have continued to skyrocket, especially for TIH traffic. Thus, while it was always expected that Three-Benchmark rate prescriptions would lead to higher rates than prescriptions under Simplified-SAC or full SAC, the long-term prospects of shippers gaining meaningful relief under this process is highly questionable. Accordingly, PPG does not believe that an increase to a $2 million relief cap will be adequate to encourage shippers to use these procedures. PPG therefore supports complete removal of the Three-Benchmark cap or, at least, raising it to a figure substantially greater than $2 million.

In the Decision, the Board linked the proposed rise in relief limits under the Three-Benchmark method to the Simplified-SAC RPI proposal discussed above, since the current relief cap was based on the Board's estimated Simplified-SAC litigation cost.[16] However, for reasons noted above, the limit of Three-Benchmark relief should increase regardless of the RPI issue and associated Simplified-SAC litigation costs. Moreover, a shipper that desires to use the Three-Benchmark procedures understands that a less expensive and quicker litigation process may justify acceptance of a higher rate prescription over the 5 year period, but that higher rate prescription still must offer sufficient relief for the trade-off to be pursued. Accordingly, the Three-Benchmark cases will only become a viable option if the relief limit is eliminated or dramatically increased.[17]

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[16] See Simplified Standards at 27-28, 31.

[17] Notwithstanding the above comments, PPG has serious concerns about the long-term utility of the Three-Benchmark method as a means to constrain unreasonable rail rates. If railroads continue to broadly implement drastic rate increases, over time, the rate comparisons inherent in the Three-Benchmark methodology will only result in "reasonable rate" prescriptions that reflect substantial railroad market power.

D. PPG Supports the Joint Comments Regarding the Restrictions Proposed for Cross-Over Traffic.

The Board has proposed to restrict the use of cross-over traffic in large SAC cases.[18] PPG will not comment separately on this proposal, but instead supports the Joint Shipper Comments on this issue.[19]

E. PPG Supports the Joint Comments Regarding the Modification Proposed for the Average Total Cost Method.

The Board has proposed to modify the method by which revenues are allocated for cross-over traffic between the Stand-Alone Railroad ("SARR") and the residual defendant railroad.[20] PPG will not comment separately on this proposal, but instead supports the Joint Comments on this issue.[21]

F. The Board Should Adopt Its Proposal to Raise the Interest Rate on Reparations.

The Board has proposed to change the interest rate used on reparations due for overcharges determined by the Board at the end of a rate case.[22] This proposal is long overdue. The Board has proposed replacing the 91-day T-bill rate[23] (currently 0.1%) with the U.S. Prime Rate published in the Wall Street Journal (currently 3.25%).

PPG supports this proposal for a number of reasons. First, it is important to recognize that the interest rate is directly linked to the tariff premium issue mentioned above. If the complaining shipper wins its rate case, then some or all of the tariff premium will have to be paid by the defendant railroad to the shipper as reparations. Where the railroad has established tariff

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[18] See Decision at 16-17.
[19] See Joint Comments at 4-21.
[20] See Decision at 17-18.
[21] See Joint Comments at 21-23.
[22] See Decision at 18.
[23] See 49 CFR § 1141.1.

rates that are unreasonably high and reparations are due at the end of the case, the current 91-day T-bill rate (which is miniscule) means that the railroad has obtained a multi-year, multi-million dollar loan at a nearly interest-free level even though the railroad has acted unlawfully in rate-setting. This is manifestly unjust, not to mention a perverse incentive.

Second, the time period applicable to a reparations payment is usually measured in years, while the 91-day T-bill rate only covers a 13-week time period. The yield on long-term debt of several years is usually quite different from short-term debt lasting only a few weeks. While the U.S. Prime Rate may not be the best index to use for reparations, it is better than the current method. Third, the 91-day T-bill rate is based on the U.S. Government as the borrower, and is generally understood as an extremely safe, and nearly risk-free investment. However, where overcharges have been paid by a shipper, the beneficiary of this "loan" is not the U.S. Government, but the defendant railroad in a rate case. Such railroads borrow funds at then-prevailing market rates given their credit rating and the terms of the loan; they do not borrow at the same rate as the U.S. Government.

IV. CONCLUSION.

PPG appreciates this opportunity to provide its Opening Comments in response to the Board's proposed changes in its rate case rules and respectfully requests the Board to adopt the recommendations proposed herein.

Respectfully submitted,

Karyn A. Booth
David E. Benz
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036
202.331.8800
202.331.8330 (fax)

Attorney for PPG Industries, Inc.

October 23, 2012

CERTIFICATE OF SERVICE

I certify that on this October 23, 2012 I caused a copy of the foregoing to be served by first class mail upon all parties of record in this proceeding.

David E. Benz