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December 7, 2012

VIA E-FILING

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

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

Dear Ms. Brown:

Enclosed for e-filing in the above-captioned case, please find the Reply 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**

**REPLY COMMENTS
OF THE CHLORINE INSTITUTE**

Pursuant to the Decision served in this proceeding on July 25, 2012, the Chlorine Institute submits these Reply Comments addressing several aspects of the opening submissions of Class I railroad parties filed in this proceeding on October 23, 2012.

In its Opening Comments (“CI Op.”), the Chlorine Institute focused on the aspects of the Notice of Proposed Rulemaking (“NOPR”) that would revise the Simplified Stand-Alone Cost (“SSAC”) and Three Benchmark Methodology (“3B”) rate regulation rules. The Chlorine Institute did not comment on the NOPR’s proposed Full-SAC rule changes since this rate methodology is unavailable to the vast majority of chlorine rail shippers. CI Op. at 2. The Chlorine Institute explained why it believes both the SSAC and 3B methodologies require significant changes in addition to merely raising the relief limits for each method, as the NOPR proposes in part. Specifically, the SSAC rules must be modified to make them less costly, less complicated and more straightforward to administer, and the 3B rules must be significantly modified in addition to eliminating the current relief cap if they are to be of any use to chlorine rail shippers on a going forward basis. The Chlorine Institute included with its Opening Evidence a verified statement from Mr. Thomas D. Crowley, President of L.E. Peabody &

Associates, Inc., an economic consulting firm, which sets forth several suggested revisions to the 3B rules that could be considered by the Board in addition to removing the relief cap in 3B cases (“Crowley Op. V.S.”).

The positions of the Class I railroads submitting Opening Comments in this proceeding are inconsistent with the both the goals of the NOPR and of the Congressional directive to the Board in 49 U.S.C. §10701(d)(3). At a minimum, they would maintain the *status quo* with the SSAC and 3B rules, which is unacceptable to chlorine rail shippers. However, many of the Class I railroad responses to the NOPR would make the SSAC and 3B rate standards even *more* complicated, *more* expensive and *less* accessible to rail shippers, which is obviously even more unacceptable. This would also perpetuate the railroads’ current ability to significantly increase chlorine rail rates without STB review. Several of these responses are briefly summarized below:

First, in the NOPR the Board proposes to remove the \$5 million limit on relief that could be provided for cases brought under the SSAC test and procedures, but to “link” that removal to a requirement that a shipper complainant calculate the full replacement costs of the facilities of the rail system used to serve the affected shipper, as determined by the SSAC rules. NOPR at 13. The Chlorine Institute and other rail shipper commenters pointed out to the Board in their opening submissions that by the Board’s own admission, the proposed “linked” change will *increase* the costs and complexity of a SSAC case. This is contrary to the statutory directive to the Board to adopt regulations for less simplified and expedited ways to test the reasonableness of rates when a Full-SAC analysis is not feasible. 49 U.S.C. §10201(d)(3). One of the Class I railroads concurs with this assessment. See, Opening Comments of the Kansas City Southern Railway at 6 (“The Board’s proposal here goes in the opposite direction” of establishing a

methodology that was less costly than Full-SAC and “far simpler” to process). The Board’s “linked” proposal to remove the relief limit would make it even less likely for most chlorine rail shippers to ever utilize the SSAC rules to test the reasonableness of their rates.

In addition to arguing that the SSAC relief cap cannot be raised without violating §10701(d)(3), BNSF, NS, and CSXT argue that the Board should keep the current damage limit, but *still* modify the rules to require the full assessment of road property costs for the SSAC stand-alone railroad. BNSF Op. at 15; NS/CSXT Op. at 2, 13. Under this latter proposed modification, the litigation costs of the shipper, the complexity of the case, and the time for obtaining a decision would all increase as anticipated by the Board in the NOPR, yet the shipper’s damages would still be capped at \$5 million over five years.¹

Second, in its opening comments, UP states generally that the Board should not increase the relief limit for SSAC cases, but then states its reason for such a blanket position for all cases is to ensure that undefined “large” claims are pursued under the Full-SAC test, and to prevent shippers with “large” claims from “gaming” the rules. UP Op. at 17-18. In order to prevent such “gaming” UP would only agree to raising the SSAC limit if additional hurdles and risk are placed in front of shipper complainants, such as increased filing fees, rules where the shipper would pay the defendant railroad’s discovery costs if the shipper lost a SSAC case, and rules that would prevent a complainant from withdrawing a SSAC case and filing a Full-SAC case after discovery. *Id.* at 18.

¹ BNSF also states it would not be opposed to doubling the relief limits in SSAC and Three Benchmark Methodology cases if the Board was to modify its rules to (1) eliminate the use of cross-over traffic in Full-SAC cases; and (2) modify the calculation of cross-over traffic revenues in SSAC cases and require a full RPI analysis. BNSF Op. at 17. BNSF speculates without any factual support, that such changes would result in complainants incurring only a “modest increase in costs to pursue relief.” *Id.* The Chlorine Institute maintains that it is highly unlikely litigation costs would increase only modestly.

Third, in addition to arguing that the relief limit in SSAC cases should not be removed, *and* that complainants in SSAC cases should be required to present a full RPI presentation, NS and CSXT propose further that the Board’s SSAC rules should *also* be modified to eliminate the railroad’s Second Disclosure requirement and instead require shippers to assume the burden now found in Full-SAC cases to develop their case-in-chief entirely through discovery requested from the railroad. NS/CSXT Op. at 13. *See* AAR Op. at 14 (the burden should be shifted “[i]f the Board removes (or significantly increases) the cap in Simplified SAC”

All of the above proposals are counter to the stated goal of the NOPR and the need to make the SSAC rules *less* expensive, *less* complicated, and *more* accessible to chlorine and other rail shippers. The railroads’ various positions would only raise the hurdles to pursuing rate relief under these rules even higher. The Chlorine Institute reiterates that a starting point toward this goal is to remove the SSAC relief cap and not require that a shipper submit a Full-SAC replacement cost-evidentiary presentation as part of a SSAC proceeding. In addition, the Board should clarify that removal of the relief limit under SSAC is for a 10-year period – commensurate with a Full-SAC prescription period – rather than retaining a five-year period for SSAC.

Finally, the opening comments of the Class I railroad parties, with the exception of the joint comments of CSX and NS, contain little discussion of the Board’s proposal to double the relief limit in Three Benchmark Methodology cases. Most objected to the increase based on the assertion that the Board does not have sufficient evidence of the costs of pursuing a 3B case, and/or because they object to raising the SSAC relief limit, they also object to raising the 3B relief limit. The opening comments of the Chlorine Institute and other shipper parties in this proceeding have provided the Board with evidence and testimony it requested concerning the

actual costs of pursuing a Three Benchmark case under the current rules. This information confirms prior assertions by shippers that the Board significantly underestimated the costs of pursuing these cases. The Chlorine Institute also provided justification for elimination of the relief cap in 3B cases altogether. Crowley Op. V.S. at 12. The railroads' arguments for maintaining the 3B relief cap should be rejected.

The opening comments of NS and CSXT take the additional position that raising the 3B relief cap at all above the current \$1.1 million² would be harmful to the railroad industry because it would result in result in "downward rate 'ratcheting'" of all rail rates "to jurisdictional threshold," presumably because raising the limit to any degree will result in a flood of new complaints. *Id.* at 23. This is a remarkable (and wrong) statement in the context of chlorine and other TIH commodities, since it has been undisputed for nearly seven years that NS, CSX and the other Class I railroads have engaged in pricing practices that have intentionally ratcheted all rates for these commodities *upward* by significant amounts in order to minimize the rail transportation of these commodities. As shown by the Chlorine Institute in its Opening Comments, the significant, across-the-board increases in chlorine and other TIH rates has led to the 3B rules becoming unusable for such shippers on a going forward basis. CI Op.at 6-7, Crowley Op. V.S. at 2-5. The downward "ratcheting" speculation of NS and CSX is therefore completely belied by actual railroad pricing behavior, and the adverse effect of this behavior on the ability of chlorine and other TIH shippers to seek rate relief under the 3B rules.

In conclusion, the Board's SSAC rules and 3B rules are currently not useable by the vast majority of chlorine shippers, so any changes to the rules must be for the purpose of making

² Indeed, NS and CSX argue that even the current cap of \$1.1 million is too high, and that the more appropriate cap should be \$200,000, based on their view that the Three Benchmark rules are so "marked by multiple serious flaws." NS/CSXT Op. at 22-24.

them more accessible and a cost effective means to attempt obtain meaningful rate relief from the Board. The opening comments of the Class I railroad parties would, at a minimum, retain the unacceptable *status quo*, or they would make the SSAC and 3B rules even less accessible and less useable by increasing the costs, complexity, and uncertainty of such cases. The Chlorine Institute reiterates that the Board should at a minimum remove the rate relief cap for SSAC without also requiring complainants to prepare a Full-SAC road property investment presentation. The Board should also eliminate the relief cap in 3B cases and consider taking the additional measures set forth in the Chlorine Institute's Opening Evidence to make the 3B rules a useable means to test the reasonableness of chlorine rail rates.

Respectfully submitted,

Handwritten signature of Paul M. Donovan in blue ink, with a horizontal line underneath.

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Attorneys for The Chlorine Institute

December 7, 2012

Certificate of Service

I hereby certify that on December 7, 2012, I served a copy of the foregoing Reply Comments of The Chlorine Institute via U.S. mail on each of the Parties of Record in this proceeding.



Thomas W. Wilcox