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October 23, 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 Opening Comments of the US Magnesium, L.L.C. ("USM").

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

OPENING COMMENTS OF US MAGNESIUM, L.L.C.

US Magnesium, L.L.C. (“USM”), a Party of Record in this proceeding, hereby submits its Opening Comments pursuant to the Decision and Notice of Proposed Rulemaking (“NOPR”) served in this docket on July 25, 2012. These comments are supplemented by the Verified Statement of Dr. Howard I. Kaplan, who was an employee of USM for over 20 years and is currently employed as its Chemical Transportation Consultant (“Kaplan Opening V.S.”). In summary, USM appreciates the Board’s desire to improve its rail reasonableness rules, but USM does not believe the proposals in the NOPR would adequately address several fundamental deficiencies in the Board’s current rules, particularly the Simplified Standards for Rail Rate Cases (“Simplified Standards”).¹ As such, while USM supports some aspects of the NOPR, USM urges the Board to expand the scope of this proceeding to more fully explore further substantive modifications to the Simplified Standards to make them more accessible to chlorine and other TIH rail shippers.

¹ Ex Parte 646 (Sub-No. 1) *Simplified Standards for Rail Rate Cases* (served September 5, 2007); (“*Simplified Standards*”); *recon. denied* March 19, 2008; *aff’d*, *CSX Transportation, Inc. et al v. Surface Transportation Board*, 568 F.3d 236 (D.C. Cir. 2009).

I.
Identity and Interest of USM

The Board is familiar with USM and its rail transportation circumstances from USM's active participation in several Board proceedings concerning the transportation of chlorine and other hazardous commodities since 2006.² This participation has included the three rate cases discussed in more detail below. USM owns and operates a magnesium production facility located at Rowley, Utah, on the Great Salt Lake. USM is the only remaining producer of primary magnesium in the United States. Chlorine is one of several chemical co-products of the plant's magnesium production, whose primary feedstock is the vast amount of magnesium chloride present in the Great Salt Lake. Chlorine is crucial to the health of millions of Americans due to its widespread use in water purification. It is also vital to the United States economy because it is used as a building block in hundreds of essential and diverse products used throughout the economy from plastics to pharmaceuticals. The Rowley facility is captive to the Union Pacific Railroad Company ("UP") for rail service and rail transportation is the safest and most feasible means for USM to ship its chlorine to its customers. USM is a small shipper of chlorine on UP's system, consisting of approximately 600 carloads per year, or approximately 3% of the total chlorine volume UP transports annually. USM loads the chlorine into specialized rail tank cars it supplies to UP at no cost to the railroad. The volume of chlorine produced by USM in a given year is directly related to the demand for magnesium in the United States and the world, and this demand can vary from year to year. The chlorine co-produced at USM's facility cannot be stored at the plant site. Accordingly, USM must have the flexibility to ship this

² Ex Parte 667, *Common Carrier Obligation of Railroads*; Finance Docket 35219, *Union Pacific Railroad Company - Petition for Declaratory Order* (common carrier obligation to transport chlorine); FD 35504, *Petition for Declaratory Order of Union Pacific Railroad Company* (legality of UP tariff provisions).

chlorine to many destinations nationwide as chlorine volumes fluctuate. In 2012, for example, USM's chlorine was transported by rail to 22 separate destinations, ranging from 60 to approximately 1200 miles from the Rowley plant. Kaplan Opening V.S. at 2. Rail transportation by UP is the only feasible means for USM to transport its chlorine. Rail transportation is also the safest way to transport chlorine.

II. USM's Direct Experience with the Board's Rate Rules

Dependable rail service at reasonable rates is vital for the survival of the Rowley facility. As a result of UP starting in 2006 to apply annual, significant increases in the rates it charged USM to transport its chlorine from Rowley to all potential destinations, accompanied by an attempt by UP to limit its common carrier obligation to transport USM's chlorine,³ USM has expended significant costs and resources in proceedings before this Board. These proceedings have included three rate complaint cases, which USM filed in 2009 after UP raised all of USM's rates for chlorine, some near 100%, and refused to lower them. When evaluating which STB rate rules to use to test the reasonableness of the rates, USM and its consultants quickly determined that the Board's Full-SAC rules were not available to it, given the widespread and irregular nature of USM's movements, and its relatively low annual volumes. This left USM to pursue relief utilizing the Board's recently promulgated Simplified Standards. *Id.* at 3. Specifically, USM filed a complaint on May 4, 2009 in Docket NOR 42114 that sought prescribed rate relief for two UP movements from Rowley to destinations in Arizona using the Three Benchmark Methodology ("3B") of the Simplified Standards. Soon thereafter, on June 25, 2009, USM filed a complaint in Docket NOR 42115 that sought prescribed rate relief for UP

³ Finance Docket 35219, *supra*, note 1.

rates to seven destinations in California and Nevada using the Simplified Stand Alone Cost (“SSAC”) rules. Finally, on October 9, 2009, USM filed a complaint in Docket NOR 42116 seeking prescribed rate relief for five additional destinations in California, Nevada, and Utah using the SSAC rules. USM is the first and only shipper to file a SSAC case at the Board since the rules were adopted in 2007.

The 3B case in Docket NOR 42114 resulted in a split decision served by the Board on January 28, 2010 (“*USM Decision*”) in which USM was granted reparations and prescribed rate relief for the two movements at issue. This decision was later upheld by the United States Court of Appeals for the District of Columbia on December 28, 2010. Docket NOR 42115 was processed through the discovery phase and up to March 11, 2010, which was 20 days prior to the date for the filing of USM’s opening evidence, at which point USM and UP informed the Board that they were in the process of reaching a confidential commercial settlement of the issues in Docket NOR 42115 and 42116. Joint Motion to Stay Procedural Schedule, filed March 11, 2010 in both dockets. The parties’ commercial settlement occurred during the discovery phase of Docket NOR 42116.

While the Board ultimately determined that the two rates USM challenged in Docket NOR 42114 were unreasonable and granted USM reparations and prescriptive rate relief, and USM eventually reached an acceptable commercial settlement of the two SSAC complaints, USM nevertheless identified several deficiencies in the 3B and SSAC rules that the Board has not addressed in either the only subsequent 3B case⁴ or in the NOPR. These deficiencies, which include the Board’s significant underestimation of the cost and complexity of 3B and SSAC cases under the present version of the rules, are discussed below. USM believes these and other

⁴ Docket NOR 42132, *Canexus Chemicals Canada L.P. v. BNSF Railway Company*.

deficiencies in the Simplified Standards, 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 shippers, and TIH shippers generally from using any of the Board's rules to seek relief from monopolistic railroad pricing behavior in the future.

III.

A. **The Deficiencies in the Current 3B and SSAC Rules Are Not Cured By the NOPR**

1. **The Board Must Make More Modifications to the 3B Rules than Just Increasing the Relief Limit**

While USM received a favorable decision in its 3B case against UP, USM nevertheless has significant doubts that the 3B rules will provide any relief to chlorine shippers going forward. The primary reason for this conclusion is that the 3B rules are designed and intended to determine the reasonableness of the challenged rates by comparing them to other rates (or revenue to variable cost ("R/VC") ratios) for "comparable" movements to ascertain whether the complainant's rate is above the reasonable level of contribution of joint and common costs for such movements. *USM Decision* at 6. However, a method that determines the reasonableness of the rates of one movement by comparing them to rates for other movements quickly loses its effectiveness if the railroads use their market power to systematically raise *all* of the rates of *all* of their customers that ship a particular commodity to very high levels, as UP and the other Class I railroads have done for chlorine and other TIH shipments since 2005.

As these annual, across-the-board increases have been incorporated into the Board's Waybill Sample data each year, the R/VC ratios of the movements that would make up a comparison group of chlorine shippers selected from the Waybill Sample data increase, thereby limiting the amount of relief a complaining shipper could receive under a 3B analysis, even if

the R/VC ratio of the challenged rate is very high. The carriers' pricing practices have created an arguably insurmountable hurdle for chlorine and other TIH shippers to seek relief under the 3B rules in the future. As such, increasing the relief limit in 3B cases to \$2,000,000 as the NOPR proposes will provide no benefit to USM and other TIH shippers. The Board should strongly consider revising its 3B rules to account for this pricing behavior.

Other hurdles to chlorine shippers using the 3B rules to seek rate relief are briefly summarized below.

Restrictive Comparison Group Rules – As the Board and USM experienced in Docket NOR 42114, the Class I railroads' efforts to limit to the maximum extent possible the amount of chlorine they handle on their systems means that assembling a comparison group for a 3B case is extremely challenging due to a lack of movements contained in the Waybill Sample data. See *USM Decision* at 9, note 12. To address this problem, the Board instituted a Notice of Proposed Rulemaking in STB Ex Parte No. 385 (Sub-No. 7) *Waybill Data Reporting for Toxic Inhalation Hazards* (Served January 10, 2010), that would require 100% reporting of TIH movements in the Waybill Sample. The Board has not finalized this proceeding. Yet, the Board strongly indicated in Docket NOR 42114 that it would only accept a comparison group in a 3B case challenging a chlorine rail rate that was made up of only chlorine movements. The Board should examine modifications to the 3B rules that enable comparison groups for issue chlorine movements to be expanded to incorporate additional movements with similar operating characteristics.

The Costs of a 3B Case Exceed the Board's Initial Estimates – In *Simplified Standards*, the Board conservatively estimated that the total legal and expert costs of a 3B case would not exceed \$250,000, and that the cost would be "far less" than this amount after a body of precedent

was developed. *Simplified Standards* at 94. In USM’s experience, the Board’s estimate was too low. As explained by Dr. Kaplan, USM’s legal and expert consultant costs to pursue its 3B case from commencement through oral argument were nearly twice the Board’s estimate, in part due to the fact that UP presented a considerable amount of complex evidence on the “other relevant factors” component of the 3B case. Kaplan Opening V.S. at 4. This evidence was primarily devoted to an ultimately unsuccessful argument that alleged costs to install Positive Train Control (“PTC”) technology should have been added to the maximum reasonable rates produced by the 3B methodology. UP also presented evidence and argument on a “common carrier adjustment” that the Board ultimately found appropriate and which increased the rates produced by the 3B methodology by nearly 15%. *Id.* USM strongly disagreed with this adjustment for a number of reasons. However, the presence of the relief cap of \$1,000,000 over five years placed USM in the untenable position of being harmed by a successful appeal of this adjustment by reaching the relief cap more quickly over the five year period, at which point USM would have reverted to paying the full challenged rate levels for the remainder of the five-year period. *Simplified Standards* at 28. The Board denied USM’s request to increase the damage limit in its case. *USM Decision* at 20.

USM believes the Board should proactively limit the “other relevant factors” evidence that can be submitted by defendant railroads. For example, the Board determined in the *USM Decision* that an “other relevant factor” adjustment for PTC costs was inappropriate, mainly because

accounting for the PTC investment is an issue too complex to resolve in a Three-Benchmark proceeding. Even if the costs could be captured effectively and efficiently distributed on a movement-by-movement basis, the same numbers would then need to be backed out of the R/VC ratio, adding a further complicated step. The Three-Benchmark methodology represents the smallest and simplest

type of rate case in the Board's toolbox, and it must remain relatively straightforward and inexpensive to have any value (footnote and citation omitted).

Id. at 17.

This finding should preclude other railroad defendants from trying to re-argue "other relevant factors" adjustments based on PTC costs. A proactive announcement by the Board to this effect would provide helpful guidance to future potential claimants as to their expected litigation costs.

Given that the actual costs of pursuing a 3B case are higher than the Board's original estimate, the \$1,000,000 current limit is certainly too low, and USM submits increasing the limit to \$2,000,000 would not appreciably change TIH shippers' behavior concerning 3B cases, even if the pricing behavior discussed above was not an issue. Accordingly, USM recommends that the relief limit should be removed altogether, or substantially increased to a level that makes pursuing a 3B case cost-effective. *Id.* at 5.

In summary, USM believes that the 3B rules may no longer be an effective means of obtaining relief for it and other chlorine shippers, and that therefore the Board should make, whether by expanding the scope of the NOPR in this proceeding or commencing a separate rulemaking proceeding, more substantive revisions to the 3B rules.

2. The Board has Underestimated the Complexity and Cost of the SSAC Rules

The Board has yet to review any evidence applying its SSAC rules to a real rate dispute. It therefore has no basis upon which to conclude that shippers will start to utilize the SSAC rules even if they are only modified to remove the current relief cap of \$5,000,000 over five years, *without* the extra burden and cost of providing complete Full-SAC evidence on Road Property Investment ("RPI") as the NOPR proposes. USM believes from its experience that there are also

fundamental issues with the SSAC rules that must be addressed before shippers, particularly TIH shippers, will consider using these rules to test the reasonableness of their rates.

In the first place, many of the same reasons that the Full-SAC rules are not feasible for the typical TIH movement (multiple destinations over a variety of distances, low volumes, irregularity over a multi-year period, use of low density rail lines, etc.) make attempting to use the SSAC rules for chlorine movements difficult. Second, USM believes that the Board has significantly underestimated the complexity and the costs of pursuing a SSAC case. This is evident from the public record of Docket NOR 42115, where filings made by the parties to extend the procedural schedule in that case clearly indicate that a key fixture of the SSAC rules - the defendant railroad's "Second Disclosure" under 49 CFR §1111.9(b) - is more complex and onerous to assemble and produce to complainants in actual practice than the Board anticipated in *Simplified Standards*. See, Docket NOR 42115, Joint Second Motion to Extend Procedural Schedule, dated February 4, 2010 at 3 ("the Second Disclosure in this first case under the Simplified-SAC rules has entailed a significant volume of data and information that has proven in practice to be an extremely time consuming and complex undertaking"). In fact, in Docket NOR 42115, UP never did produce an error-free Second Disclosure to USM.

In addition, USM found that when preparing its opening evidence in NOR 42115 some key Full-SAC elements that were apparently given little or no consideration in the development of the SSAC rules were extremely difficult to apply in the SSAC realm, where the complainant must use only the existing system of the defendant railroad and does not have the flexibility afforded complainants in Full-SAC cases. One key example of this is the calculation of cross-over traffic. The development and use of the simplifying device of cross-over traffic and the allocation of cross-over revenues through the Average Total Cost ("ATC") methodology has

occurred entirely within the Full-SAC environment, where complainants are afforded broad flexibility to design a stand-alone railroad traffic group, configuration and operating plan. The Board provided no substantive discussion or guidance in *Simplified Standards* of how the rules governing cross-over traffic are to be applied in a SSAC case, where the complainant has none of the flexibility afforded a complainant in Full-SAC cases. Rather, the Board stated simply that “revenue from cross-over traffic will be apportioned between the on-SARR and off-SARR portions of the movement based on the revenue allocation methodology used in Full-SAC cases.” *Simplified Standards* at 15. Moreover, under the SSAC rules, the defendant railroad provides the initial evaluation of revenues for each cross-over movement in its Second Disclosure. 49 C.F.R. §1111.9(b)(4). In USM’s experience, (1) requiring the defendant railroad to make the initial calculation of cross-over revenues did not reduce the costs and complexity of the case since such calculations proved to be time consuming and complex for the defendant in its case, and the underlying data must be still be verified by the complainant and its consultants; and (2) strict application of the ATC methodology in the SSAC realm where the complainant has no flexibility regarding its traffic group, configuration and operating plan can adversely affect the ability of the complainant to obtain relief. Kaplan Opening V.S. at 6.

The foregoing, along with the burdensome requirement under the SSAC rules that the complainant’s experts develop and process data concerning some aspects of the RPI component, resulted in USM’s litigation costs in Docket NOR 42115 being significantly higher than the Board’s \$1,000,000 estimate in *Simplified Standards*. *Simplified Standards* at 93. As explained by Dr. Kaplan, USM’s legal and expert consultant costs for participating in mandatory mediation, completing discovery, and preparing opening evidence in NOR 42115 up to the point of the parties’ commercial settlement were in excess of \$750,000. Kaplan Opening V.S. at 6. In

his estimation, the full cost of just presenting USM's evidence in Docket NOR 42115 could have exceeded \$2,000,000 by the time it finalized its opening evidence and submitted reply and rebuttal evidence. *Id.* This estimate does not include the costs associated with filing or responding to procedural or substantive motions or other supplemental filings, or post-evidence briefing. *Id.* It also does not include the costs of USM counsel and experts to prepare for oral argument, which were not part of the Board's original cost estimate in *Simplified Standards* but which would have most certainly been incurred given that Docket NOR 42115 was the first SSAC case to be filed at the Board.

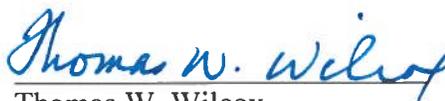
In light of its experience with the SSAC rules, USM believes the Board should undertake a comprehensive re-evaluation of those rules with the goal of making the rules applicable to rate cases that are not Full-SAC cases *less* costly, *less* complicated, and more useable. Accordingly, USM is not in favor of the NOPR's proposal to link the removal of the SSAC five-year relief cap with a requirement that SSAC complainants and their experts must prepare a Full-SAC evidentiary presentation on RPI. In addition, USM sees no reason why the removal of the relief limit should remain limited to the current five-year period and not the ten-year period of a Full-SAC case.

IV. Conclusion

In conclusion, USM appreciates the Board's recognition in the NOPR that its rail rate reasonableness rules need to be improved to make them more accessible to rail shippers. For the reasons set forth in these Opening Comments, USM believes that the Board must examine more

substantive modifications to its Simplified Standards to make it them feasible for USM and other chlorine shippers to challenge rail rates they believe are unreasonable.

Respectfully submitted,



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Attorneys for US Magnesium, L.L.C.

October 23, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**DOCKET NO. EP 715
RATE REGULATION REFORMS**

VERIFIED STATEMENT OF DR. HOWARD I. KAPLAN

My name is Dr. Howard I. Kaplan. I am currently employed by US Magnesium, L.L.C. ("USM") as a contractor with the title of Chemical Transportation Consultant for USM's Rowley, Utah production facility located on the shores of the Great Salt Lake, 60 miles from Salt Lake City. I have worked in the magnesium business in Rowley and Salt Lake City since 1981. For 14 years, I was the Vice President of Sales for Magcorp (a predecessor of USM) where I was responsible for all sales of Magnesium Metal and Chemical Co-products (including chlorine) and Chemical By-Products. My current duties for USM include railroad logistics, rate negotiations and rail car acquisition. I have submitted verified statement testimony in several prior Board proceedings, and have also appeared before the Board and provided live testimony in April, 2008 in Docket Ex Parte No. 677, *Common Carrier Obligations of Railroads*. This verified statement is offered in conjunction with USM's Opening Comments in this docket. My statement provides (1) a brief description of the Rowley facility; (2) a discussion of the Three Benchmark Methodology ("3B") and Simplified Stand Alone Cost ("SSAC") and rate cases USM filed at the Board in 2009, and (3) my views on the deficiencies in the Board's Simplified Standards and procedures from that experience and my views on the deficiencies of the proposals concerning

the SSAC and 3B rules in the Notice of Proposed Rulemaking (“NOPR”) that is the subject of this proceeding.

A. Description of the USM’s Rowley Facility

The Rowley facility, which has produced magnesium from the magnesium chloride rich waters of the Great Salt Lake since 1972, is the only surviving magnesium producer in North America. Chlorine is one of several chemical co-products of the plant’s magnesium production, whose primary feedstock is the vast amount of magnesium chloride present in the Great Salt Lake. Chlorine is crucial to the health of millions of Americans due to its widespread use in water purification. It is also vital to the United States economy because it is used as a building block in hundreds of essential and diverse products used throughout the economy from plastics to pharmaceuticals.

The Rowley facility is captive to the Union Pacific Railroad Company (“UP”) for rail service and rail transportation is the safest and most feasible means for USM to ship its chlorine to its customers. USM is a small shipper of chlorine on UP’s system, consisting of approximately 600 carloads per year, or approximately 3% of the total chlorine volume UP transports annually. USM loads the chlorine into specialized rail tank cars it supplies to UP at no cost to the railroad. The volume of chlorine produced by USM in a given year is directly related to the demand for magnesium in the United States and the world, and this demand can vary from year to year. The chlorine co-produced at USM’s facility cannot be stored at the plant site. Accordingly, USM must have the flexibility to ship this chlorine to many destinations nationwide as chlorine volumes fluctuate. In 2012, for example, USM’s chlorine was transported by rail to 22 separate destinations, ranging from 60 to approximately 1200 miles from the Rowley plant.

B. USM's Experience with the Simplified Standards

Starting in 2006, UP began to try and limit the extent to which it transported USM's chlorine. It did so first by significantly raising its rates. Then, in early 2009 UP unsuccessfully attempted to limit its statutory common carrier obligation by asking this Board to determine that UP could refuse to provide USM rates and service terms from our Rowley facility to customers in Louisiana and Texas. STB Finance Docket No. 35219, *Union Pacific Railroad Company – Petition for Declaratory Order* (decision served June 11, 2009). During this same period, UP sought to force USM's chlorine off of its system by imposing even larger across-the-board rate increases for transporting USM's chlorine to all of our potential customers on UP's system. These actions on the part of UP resulted in USM exploring whether the Board's rate reasonableness rules provided an opportunity to obtain relief from the rate increases. We and our expert consultants quickly determined that the high cost and extreme complexity of the Board's Full-SAC rules were not justified by the amount of potential damages at issue. However, USM was determined to try and obtain rate relief so we pursued utilizing the 3B and SSAC rules and eventually filed three rate reasonableness cases against UP in 2009 covering a major portion of the movements for which UP had provided common carrier rates to USM.

1. Three Benchmark Methodology Cases

USM filed a complaint on May 4, 2009 in Docket NOR 42114 that sought prescribed rate relief for two UP movements from Rowley to customer destinations in Arizona using the 3B rules. USM eventually was awarded some relief from the challenged rates in a decision issued January 28, 2010. While USM was pleased to receive reparations and rate relief in the case, it found several aspects of the process deficient.

First, the Board's rules for assembling comparison groups from the Confidential Waybill Sample and its criteria for comparability are extremely difficult to apply for chlorine movements since, due in large part to the railroads' collective efforts to reduce or eliminate chlorine traffic from their systems, there are relatively few chlorine movements from which to assemble a comparison group from the Confidential Waybill Sample provided to the parties.

Second, USM found that the Board's estimate of the costs of a 3B case were significantly understated. This was in part due to the fact that UP presented a considerable amount of complex evidence on the "other relevant factors" component of the 3B case, which was primarily devoted to an ultimately unsuccessful argument that alleged costs to install Positive Train Control ("PTC") technology should have been added to the maximum reasonable rates produced by the 3B methodology. UP also presented evidence and argument on a "common carrier adjustment" that the Board ultimately found appropriate and which increased the rates produced by the 3B methodology by nearly 15%. We strongly disagreed with this adjustment for a number of reasons, including that the Board's primary rationale for accepting it was the lack of sufficient common carrier chlorine movements in the Confidential Waybill Sample provided to the parties. However, the presence of the relief cap placed USM in an untenable position; had it successfully appealed this adjustment the relief cap would have been reached more quickly over the five year period, since the Board had refused our request to increase the relief limit because the R/VC ratios of the challenged rates were so high.

In any event, USM incurred litigation costs from the commencement of the case through oral argument that were nearly twice the Board's original conservative estimate of \$250,000 for the anticipated legal and consultant costs for pursuing a 3B case to completion. With this kind of cost required to pursue a 3B to decision, the current \$1,000,000 limit barely justifies filing a

complaint, and USM believes increasing the limit to \$2,000,000 limited would not appreciably change TIH shippers' behavior, even in the absence of the pricing behavior discussed below. In my opinion the relief limit for 3B cases should be removed altogether, or substantially increased to a level that makes pursuing a 3B case cost-effective.

More significantly, USM is concerned that rate relief under the 3B rules will not be available to TIH rail shippers in future cases due to the way the Class I railroads have priced chlorine and other TIH shipments. Specifically, it is my general understanding that all of the Class I railroads have for some time been significantly increasing the rail rates for all TIH shippers on an annual basis. To the extent this has been occurring, as these increases are incorporated into the Board's Waybill Sample data, it reduces the ability of a single shipper to successfully challenge the reasonableness of its rates under the 3B rules, which test reasonableness by comparing the complainant's rates to the rates of similar rail movements. The Board must consider revising the 3B rules to account for this behavior and insure that rates charged have some reasonable relation to the railroads costs and actual revenue needs.

2. Simplified Stand-Alone Cost

USM remains the only rail shipper to file a complaint asking the Board to assess the reasonableness of railroad rates under the SSAC rules, and we filed two such complaints. On June 25, 2009, USM filed a complaint in Docket NOR 42115 that sought prescribed rate relief for UP rates to seven destinations in California and Nevada. This complaint was filed by another complaint filed on October 9, 2009 in Docket NOR 42116 seeking prescribed rate relief for five additional destinations in California, Nevada, and Utah using the SSAC rules.

The SSAC approach originally appeared feasible for the rail movements at issue, since the routing involved in either case was essentially all UP routes mostly on UP main lines.

However, actually attempting to apply the SSAC rules to the facts was anything but simplified. Legal 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. It is my understanding that even in the relatively early stages, crossover traffic calculations involved calculations involving over several hundred thousand events, hardly anything resembling simplified! Our work was made further complicated and costly due to difficulties the UP experienced with trying to comply with the Board’s “Second Disclosure” requirements.

USM’s experience was that the Board also substantially underestimated the cost and effort required to pursue a SSAC case. Whereas the Board estimated that a SSAC case would cost \$1,000,000 million, we determined that the legal and expert costs just for completing discovery and preparing opening evidence in Docket NOR 42115 were approximately \$750,000. While USM was fully prepared to continue both cases, we estimated that the legal and expert costs for opening, rebuttal and reply evidence in Docket NOR 42115 could have reached approximately \$2,000,000, and that the total cost could have significantly exceeded that amount due to unanticipated motions, post-evidentiary briefing, and for our counsel and experts to prepare for and participate in oral argument. In my opinion, the current SSAC rules are too complex and too costly to administer, and the Board therefore should take steps to simplify them and reduce the costs of shippers to pursue relief under them.

In conclusion, as I have explained in testimony in prior proceedings before the Board in which USM has participated, the global market for TIH commodities is fluid and unpredictable. As such, TIH producers like USM must have maximum flexibility to compete in the global

market for these products. The inability of the SSAC and 3B rules to provide meaningful rate relief to the great majority of chlorine and other rail shippers will continue to constrict the ability of chlorine and other TIH commodity producers to market their products and compete and ultimately, survive.

Verification Page

I, Dr. Howard I. Kaplan, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sponsor this testimony.

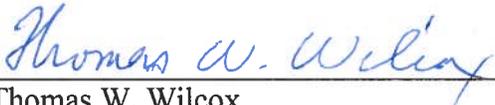
Executed, October 22, 2012

A handwritten signature in cursive script that reads "Howard I. Kaplan". The signature is written in black ink and is positioned above a horizontal line.

Dr. Howard I. Kaplan

Certificate of Service

I hereby certify that on October 23, 2012, I served a copy of the foregoing Opening Comments of US Magnesium, L.L.C. via email and U.S. mail on each of the Parties of Record in this proceeding.


Thomas W. Wilcox

: