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October 23, 2012

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VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
October 23, 2012
Public Record

Re: STB Docket No. EP 715
Rate Regulation Reforms

Dear Ms. Brown:

In accordance with the procedures set forth in the Decision served on July 25, 2012, please accept these Comments Of The Kansas City Southern Railway Company for filing in the above-captioned proceeding. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmilller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Warren K. Erdman
W. James Wochner

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 715

RATE REGULATION REFORMS

COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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**Attorneys for The Kansas City Southern
Railway Company**

Dated: October 23, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 715

RATE REGULATION REFORMS

COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

In a Notice of Proposed Rulemaking (“NPR”) served on July 25, 2012, the Surface Transportation Board (“STB” or “Board”) proposed to modify some of the current rules and processes that apply in railroad rate reasonableness proceedings. The Kansas City Southern Railway Company (“KCS”) respectfully submits these comments as a party of record in accordance with the Board’s NPR.

While there have been differences between the shippers and the railroads over the years on the best methodologies to remedy instances where market abuse has resulted in unreasonable rail rates, it is clear that the ICC and the Board, throughout the past 25 years, have not ignored the shippers’ concerns. When responding to those concerns, the Board has universally addressed such concerns through specific rate cases and narrowly tailored notice and comment rulemakings; not through broad, damaging open access remedies. The Board has taken a carefully balanced approach – rejecting the extremes offered by either camp – and has continually responded with changes in its rate complaint procedures – changes which have consistently favored shipper interests. These changes have made it easier for shippers to challenge rates and otherwise use the regulatory process to prevent railroads from abusing

whatever market power they may possess. The Board deserves credit for its efforts and its carefully balanced approach.

The most recent NPR is yet another step in the direction of trying to make the shipper rate complaint process less costly and time consuming. KCS is generally supportive of the efforts by the Board to reform and continuously improve the rate complaint process. Indeed, KCS believes that the Board's resources are best spent on reforming the rate complaint process rather than trying to make wholesale and fundamental regulatory changes, such as those proposed in Petition for Rulemaking To Adopt Revised Competitive Switching Rules, EP 711 (STB served July 25, 2012). Given that the complaints by shippers are fundamentally rate complaints, it makes sense for the Board to focus on reforming the rate complaint processes.

While KCS supports the Board's continual review and revision of the rate complaint procedures, KCS believes that it is best when the Board undertakes such reviews only after first reviewing and evaluating cases under the reforms previously adopted. As KCS stated in its comments submitted in Competition in the Railroad Industry, EP 705 (STB served Jan. 11, 2011), KCS believes that, because of the numerous changes made to the rate complaint rules and procedures over the most recent years, the Board should allow time for those most recent changes to be tested and observed, rather than simply discarding them for vastly different, untested proposals, such as those currently under consideration in Ex Parte No. 711. If experience showed that the revised rate complaint rules and procedures were not working, the Board would then have a solid basis to undertake further changes to the rate complaint process.

With this in mind, the changes proposed in the NPR are premature. In this proceeding, the Board has proposed six changes to its rate reasonableness process: (1) to remove the

limitation on relief for cases brought under the Simplified-SAC¹ alternative; (2) to improve the accuracy of the Road Property Investment (“RPI”) component of the Simplified-SAC test; (3) to double the relief available under the Three Benchmark method; (4) to curtail the use of cross-over traffic in Full-SAC cases; (5) to modify the approach used to allocate revenue from cross-over traffic in Full-SAC and Simplified-SAC cases; and (6) to raise the interest rate that the railroads must pay to complainants for reparations when the railroad has been found to have collected unreasonable rates. While some of the proposals may eventually merit adoption, until the Board gains more experience applying its SSAC and 3B methodologies and determines those methodologies need to be modified, the Board should not move forward with the proposed changes.²

1. Simplified-SAC

The Board developed Simplified-SAC pursuant to its charge by Congress to develop a simplified and expedited method for determining the reasonableness of challenged rail rates “in those cases in which a full stand-alone cost presentation is too costly, given the value of the case” under 49 U.S.C. § 10701(d) (3). Simplified Standards at 4. To comply with this mandate, the Board put reasonable limits on relief for the simplified methodologies and concluded that placing such reasonable limits on the relief available under both 3B and Simplified-SAC “strikes a reasonable balance” and was consistent with the statutory mandate. Simplified Standards at 35.

¹ Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1)(STB served Sept. 5, 2007) (“Simplified Standards”). This proceeding: (1) created a simplified stand-alone cost (“Simplified-SAC” or “SSAC”) procedure to use in medium-size rate disputes for which a full stand-alone cost (“Full-SAC”) presentation is too costly, given the value of the case; and (2) modified the “Three-Benchmark” (“3B”) rate comparison method of Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004 (1996)(“Simplified Guidelines”), with certain adjustments, for the smallest disputes.

² While KCS has joined in the comments of the Association of American Railroads and generally supports the positions advocated therein, to the extent there are differences, these comments more accurately reflect KCS’s views.

Currently, the limit for relief available under the 3B methodology is \$1 million over a five year period and \$5 million over a five year period for a Simplified-SAC case.

The NPR proposes to revisit this balance and eliminate the limits on relief for a Simplified-SAC case. The rationale appears to be tied to the Board's concurrent proposal to improve the RPI component of the Simplified-SAC test. The Board's RPI improvement would move the Board's Simplified-SAC analysis closer to replicating the full replacement cost of the facilities used to serve a shipper. According to the Board, use of an RPI component based upon replacement costs makes the SSAC methodology more accurate. Given the presumed improved accuracy of the SSAC test that will be created by the Board's proposed change, there is "no apparent reason to force the shipper to use the more expensive Full-SAC approach over the Simplified-SAC approach in cases where the shipper seeks more than \$5 million in relief." NPR at 14.

As noted previously, KCS generally shares the Board's goal in making continued changes in the various rate complaint methodologies so as to make them less complex, less costly, and less time-consuming, but here, without further analysis and experience, the Board's proposal with respect to SSAC may be premature. There are two basic reasons for this belief: (1) the proposal actually makes the Simplified-SAC cases more costly and time-consuming; and (2) removing the limit on relief without more analysis and experience is not consistent with the statutory directive or previous policy. Until such time as the Board gains further experience with applying the Simplified-SAC and 3B methodologies and determines those methodologies are not effective, it should not remove the rate-relief cap on the use of Simplified-SAC.

The NPR actually increases the costs and delays associated with processing a Simplified-SAC case. Throughout the NPR, the Board discusses both the history and rationale for the

development of SSAC. The primary objective of SSAC was to develop a methodology that was “less costly” than Full-SAC and “far simpler” to process. Doing so was fully consistent with the statutory mandate to “establish a simplified and expedited method” for those cases where the Full-SAC methodology was too expensive for shippers. The Board’s proposal here goes in the opposite direction. The Board itself admits this when it states that “removing this simplification feature [i.e. the current RPI simplification process] of the approach will **raise costs** and may require **extending the procedural schedule.**” NPR at 14 (emphasis added).

Recognizing that there will be some increased costs, the Board proposes to compensate for that by raising the monetary limit on relief for a 3B case from \$1 million to \$2 million. The purpose of this is to allow “all complainants” (NPR at 15) who cannot afford to use the SSAC methodology, especially given the increased costs due to the proposal, to be able to use the more cost effective 3B methodology; however, not “all complainants” can use the 3B approach. Under the proposal, if you are a shipper that will have more than \$2 million in relief but cannot afford to bring a Full-SAC case, the Board’s proposal actually increases your litigation costs and extends the time for a decision on your complaint.

Overall, the Board’s proposal, while perhaps helping a small number of shippers who might have claims between \$1 million and \$2 million and could utilize the Three Benchmark process, really only helps those large shippers who have large claims for relief. Previously, such large shippers, who can fully afford litigating a Full-SAC case, could not, without limiting their relief, bring a SSAC case. Now, if the proposal is adopted, these large shippers will have alternative methodologies to consider for bringing large claims, possibly allowing them to game the system by choosing a methodology not based on whether it is appropriately accurate given the amounts in issue, but rather choosing a methodology based on which gives the shipper a

more favorable result. The added time and expense of litigating a SSAC case means very little to these large shippers, but for those shippers whose relief is between \$2 million and \$5 million, the added costs are meaningful. KCS would submit that it is not consistent with the Board's previous policies, nor does it represent good policy in the future, for the Board to increase litigation expense and delay for those shippers whose relief limits may be between \$2 million and \$5 million while providing the majority of the benefits of the proposal to very large shippers.

The proposal is also not consistent with the intent of the statute. The statute required the Board to establish a simplified and expedited method for ruling on rate complaints in those cases "in which a full stand alone cost presentation is too costly, given the value of the case." In Simplified Standards, the Board did that, and it deserves credit for what it has done. But now, the Board is actually increasing the costs of pursuing such a simplified and expedited case in contradiction to the goal of Congress.

It is also acting contrary to the Board's previous policy of basing the limits on relief for Simplified-SAC and Three Benchmark cases on the estimated cost for complainants to bring the next more complicated type of case. The Board previously stated that "[a]s cases are brought under these two approaches, actual litigation costs will become available, and over time we will observe whether the reforms of *Major Issues* have had the desired effect of reducing litigation costs." Simplified Standards at 31. Now, rather than first observing actual litigation so as to determine whether its previous reforms were working, the Board is proposing to eliminate the rate-relief caps and doing so without any experience or evidence related to actual litigation costs. As such, the Board has no experience analyzing SSAC cases and has no evidence on which to base its conclusion that the limits on relief should be removed and other changes made so as to

“encourage its use over the more complex, costly, and time consuming Full-SAC test.” NPR at 13.

KCS would submit that until such time as the Board has observed whether its reforms are working or not, it is premature to propose changes to Simplified-SAC. Missing from the NPR is any experience-based analysis, at least in the context of removing the rate-relief cap and the RPI simplification component, reflecting flaws in the Board’s existing approach. Also missing is any quantification (or, for that matter, even recognition) of the impact of the proposed changes on rail carriers.

As KCS noted in EP 705, the STB has made numerous changes in the rate complaint processes in the past to shorten and simplify the ability of shippers to challenge rates and otherwise use the regulatory process to remedy perceived misuses or abuses of market power, including adoption of the SSAC process. KCS stated then, and continues to believe, that changes to the Board’s rate complaint case processes can and should be made when appropriate. This view was also echoed by Mr. David Konschnik, former long time ICC and STB Senior Executive, in EP 705, and he reiterates that view here in the attached verified statement (Exhibit A – Verified Statement of Mr. David Konschnik)(“V.S. Konschnik”).³ Consistent with that view, the existing SSAC process should be allowed to function until it is clear how it impacts shippers and carriers. If the process doesn’t work, then the Board can, at that time, address any deficiencies. But, given the careful consideration given by the Board in establishing the simplified procedures, they should be given a chance to work, rather than altering them without knowing whether or not they function adequately.

³ Mr. Konschnik also explains why he believes the Board’s resources are better spent on making revisions and changes to the rate complaint processes and should avoid the temptation to adopt wholesale changes in the regulatory environment by expanding the use of reciprocal switching such as that proposed in Ex Parte No. 711.

While some of the proposed changes may have merit and may eventually deserve adopting, the Board should refrain from adopting any changes until such time as it has experience reviewing and analyzing cases brought under the SSAC and 3B methodologies. If, after such observation and experience, the Simplified-SAC and Three Benchmark processes are inadequate, the STB can adjust the procedures in the future. In the meantime, a case-by-case approach is the best and safest approach to avoid unintended consequences. As former KCS President and CEO, and now Executive Chairman of the Board, Mr. Michael Haverty said in EP 705, the Board's ultimate objective should be to "first, do no harm." Allowing more experience with the Simplified-SAC process would allow the Board to be sure it is doing no harm.

2. Improving The Accuracy Of The Road Property Investment

An essential component of lifting the rate-relief caps in a Simplified-SAC case is the Board's proposal to remove the current RPI simplification component. The existing Simplified-SAC test simplifies the RPI component by relying on findings from prior Full-SAC cases. The new proposal would require complainants to submit detailed expert testimony on the replacement costs of the facilities used to serve the complainant, but in doing so, litigation costs and time delays will increase. KCS of course supports efforts by the Board to modify its rate complaint methodologies to more accurately reflect replacement costs. In this case, however, the Board's rationale for doing so is explicitly tied to its proposal to eliminate the rate-relief caps. Because KCS does not believe the Board has enough experience in analyzing and processing Simplified-SAC cases to justify lifting the rate-relief cap at this time, KCS cannot, without further analysis, support the Board's proposed change to the RPI simplification component, especially when doing so raises the litigation costs and adds procedural delay. KCS may support such changes in

the future if, after the completion of several SSAC cases, it is clear that the RPI component the Board should be revised.

3. Doubling The Relief Under The Three Benchmark Process

In Simplified Standards, the Board based the limits on relief for Simplified-SAC and 3B cases on the estimated cost for complainants to bring the next more complicated type of case. The \$5 million limit for Simplified-SAC was based on an estimated cost to bring a Full SAC case and the \$1 million limit for Three Benchmark cases was based on the estimated cost to bring a Simplified-SAC case. The Board selected those caps because, at the time, those figures represented “the best evidence of record” (NPR at 15) for the costs of litigating a Simplified-SAC and Full-SAC case.

The Board now proposes raising the rate-cap relief for 3B cases to \$2 million. This increased limit is tied to the expected cost increase to litigate a SSAC case due to the increased complexities associated with presenting expert evidence on replacement costs rather than using the RPI simplification. Even though the Board proposes to remove the RPI simplification component and admits this will increase the SSAC litigation costs, the Board still believes the cost to litigate a SSAC case should be “significantly less than 50% of the cost to bring a Full-SAC case (i.e. less than 2.75 million in current dollars).” NPR at 15. Accordingly, the Board arbitrarily selects a \$2 million figure and seeks public input on the accuracy of that figure.

KCS is supportive of the Board’s efforts to improve the accuracy of its litigation costs estimates, but at this time, the Board has no basis for its cost conclusions. There have been no post-2007 Simplified-SAC cases litigated to completion on which to make a reasoned decision. Again, in general, if the rate complaint process is not working, KCS supports the notion of making the rate complaint process less costly and time consuming. In achieving that goal, it may

in fact be appropriate for the Board to raise the rate-cap relief limits and eliminate the RPI simplification component, but not until such time as the Board has actual experience with processing Simplified-SAC and Three Benchmark cases.

Having no experience with litigating either 3B or SSAC cases, KCS cannot provide evidence on the litigation costs associated with these cases. KCS suggests that before raising the 3B rate-relief cap, the Board should take evidence from those parties who have been involved in SSAC or 3B cases. Perhaps such evidence will be presented by other parties in this proceeding. If the evidence in this proceeding (or in a related supplemental proceeding specifically directed to litigation costs) shows that the costs to litigate a Simplified-SAC case are indeed more than \$1 million, KCS would support raising the rate-relief caps in a Three Benchmark case.

4. Curtailing The Use Of Cross-Over Traffic In Full-SAC Cases

To the extent the Board's proposal reduces the cost and complexity of litigating a Full-SAC case, KCS would support such an approach. Not having been involved in a rate complaint case since adoption of the Full-SAC methodology, KCS has no specific comment on the Board's proposal to curtail the use of cross-over traffic in Full-SAC cases.

5. Modifying Approach Used To Allocate Cross-Over Traffic

To the extent the Board's proposal reduces the cost and complexity of litigating a Full-SAC case, KCS would support such an approach. Not having been involved in a rate complaint case since adoption of the Full-SAC methodology, KCS has no specific comment on the Board's proposal to curtail the use of cross-over traffic in Full-SAC cases.

6. Raising The Interest Rate Used In Calculating Reparations

Reparation payments are required when the Board finds that the rate the shipper has been paying is unreasonable. Part of a reparation payment includes an interest component on the

money that the shipper has overpaid so as to reimburse the shipper for the lost opportunity costs associated with those payments. In calculating the interest rate applicable to reparations, the current practice is based on the use of the 90-day Treasury Bill. This is used because the 90-day Treasury Bill rate best reflects the interest rate applicable to a risk free rate of return.

The risk free rate of return standard is used because reparations reflect a return of the monies overpaid by the complainant for transportation charges, and since transportation payments come from cash, short term government securities, short term certificates of deposits, or money market accounts, the interest rate applicable in reparations should reflect the rate of return applicable to such short term working capital. Based upon a long standing Board rulemaking, adopted in 1984 after notice and comment, the Board determined that the 90-day Treasury Bill best reflects the lost opportunity costs based upon the risk free rate of return standard.

The NPR proposes to replace the 90-day Treasury Bill with the U.S. Prime Rate. The rationale offered for this change is that the Board “has a responsibility to establish an interest rate that encourages compliance without our rules and correlates to market interest rates over a comparable time frame.” NPR at 18. The Board then proposes use of the Prime Rate because the T-Bill rate “may be insufficient” to meet the Board’s responsibilities.

KCS understands the Board’s concerns and shares its goal to ensure that the interest rate correlates to market rates “over a comparable time frame.” It is unclear from the NPR, however, what the “comparable time frame” the Board is speaking about – the length of the time period over which the shipper has overpaid, the time it takes the Board to rule on the case, or both? KCS assumes that the “comparable time frame” is likely referring to the time to bring and pursue

a rate complaint case. With that understanding, KCS believes there may be a middle ground between use of the Prime Rate and use of the T-Bill rate.

One possible approach is to tie the interest rate to the type of proceeding and the length of the proceeding. For example, SSAC cases are supposed to be resolved in 510 days. As such, the Board could consider using a blend of 52-week T Bills and 2-year Treasury Note interest rates. Three Benchmark cases are supposed to take 240 days, so consider blending the interest rate of the 26 and 52-week T Bills. For Full SAC cases, the 3-year Treasury Note rate could be used. There are a myriad of other possibilities. KCS would suggest that the STB, like what the ICC did when it adopted the 90-day T-Bill rate in the first place, should have a notice and comment proceeding seeking proposals and thoughts, rather than simply proposing just one solution, i.e. the Prime Rate, and then adopting that as part of this proceeding.

Conclusion

The STB has made numerous changes in the rate complaint procedures over the past few years so as to significantly increase the ability of shippers to challenge rates and otherwise use the regulatory process to remedy perceived misuses or abuses of market power. The Board's most recent NPR is yet another step in that direction, and KCS is generally supportive of such efforts. The Board should gain more experience under the most recent changes it has made in the Simplified-SAC and Three Benchmark methodologies before proceeding with the proposed changes. If that experience shows that the revised rules and procedures are not working, the Board can, at that time, address any deficiencies, including consideration of some of the

proposals in the NPR. In the meantime, a case-by-case approach is the best and safest approach to avoid unintended consequences.

Respectfully submitted,

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Attorneys For The Kansas City Southern
Railway Company

Dated: October 23, 2012

CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of October, 2012, I caused the foregoing
“Comments of The Kansas City Southern Railway Company” in this Docket No. EP 715
proceeding to be served upon all known parties of record by first class mail, postage prepaid, or
by more expeditious means.


William A. Mullins

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 715

RATE REGULATION REFORMS

EXHIBIT A

VERIFIED STATEMENT OF DAVID M. KONSCHNIK

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 715

RATE REGULATION REFORMS

VERIFIED STATEMENT OF DAVID M. KONSCHNIK

My name is David M. Konschnik. I began my legal career working at the Interstate Commerce Commission (ICC) as an attorney in the Finance Section of the Office of Proceedings in 1976, just a few months after passage of the Railroad Revitalization and Regulatory Reform Act. I later also spent time in the Rates Section. I held several positions during my tenure at the ICC and later at the Surface Transportation Board (STB or Board), including as an attorney/advisor to several Commissioners, Chief of Staff to the Chairman, and the Director of the Office of Proceedings. I retired from my position as Director of the Board's Office of Proceedings in early March 2009. I have a BS in mathematics and a JD both from Georgetown University. I also have a master's degree in teaching from Howard University. In this proceeding, The Kansas City Southern Railway Company has retained me as an independent expert and not as an attorney. The views I am submitting are my own.

At the time I joined the ICC, the industry was heavily regulated. As a result of those regulations and the inability to shed excess capacity, many railroads were in dire financial straits. In fact, I spent quite a bit of time during my early ICC years on matters related to railroad bankruptcies and restructurings. During those days, a considerable part of my time was spent dealing with the fallout from railroad bankruptcies and working to address related railroad disabilities, including planning for large-scale directed service orders and actually implementing

such service orders when it became necessary to address service emergencies. So I have personal experience with the devastating consequences of a regulatory system that does not allow railroads to earn adequate revenues and that heavily regulates rates, routes, and services.

With the passage of the Staggers Rail Act of 1980, railroads were given the needed flexibility to raise or lower rates to address the demands of the market and to shed lines that were losing money through line sales or abandonments. The ICC, in keeping with the directions given by Congress in the Staggers Act, adjusted its regulatory approaches so that agency actions were limited to those situations where regulatory intervention was truly needed. Later, with the passage of the ICC Termination Act of 1995 (ICCTA) and the creation of the Board, Congress once again directed the Board to ensure that railroads remained financially healthy, but at the same time, the Board was asked to reform and revise some of its rate complaint procedures so as to provide those shippers who may not have competitive options with an effective and efficient regulatory structure for the redress of their concerns.

As I indicated in my oral testimony during the June 2011 hearing in Docket No. EP 705, I believe the Board has been very successful in balancing the agency's dual role of allowing the market to regulate rates and services to the maximum extent possible while protecting shippers where there are market failures. The balancing of interests that is required on the part of the Board in these instances is challenging but, in my experience, the agency has tried hard to provide a level playing field for all participants. It has been responsive to shipper concerns in making changes to its rate, service and unreasonable practice complaint processes. The Board has been open-minded and flexible in considering concerns and in trying to improve the processes and make them more efficient and less costly where possible. It has done so without sacrificing fairness to the parties in individual cases and all while endeavoring to remain faithful to the Congressional charges contained in the Staggers Act and in ICCTA. I am concerned, however, that, in its recent Decision that is

essentially a Notice of Proposed Rulemaking (NPR) in Docket No. EP 715, the Board may be proposing some changes while it is still too early to tell if those changes are needed or justified, especially when reviewed in the light of the Board's request for information in Docket No. EP 711.

I understand the concerns that have been expressed by, and on behalf of, shippers throughout the years, and the Board has responded to those concerns. Precisely because the Board has responded is exactly why I continue to believe that the Board's improvements to the rate case process should be given time to work before the Board should adopt any type of reforms similar to those proposed by The National Industrial Transportation League (NITL) in Docket No. EP 711. In general, the course set out by the Board in Docket No. EP 715 is the proper one: to strive to improve accessibility to the Board's existing rate case procedures and to encourage meaningful and helpful evidentiary presentations in these proceedings so that the resulting Board decisions can be as precise and accurate as possible. Issuance of the NPR demonstrates once again that the Board can adopt changes to the complexities of the rate case procedures without having to make fundamental changes in the regulatory and operating practices of the rail industry such as those proposed in Docket No. EP 711.

With respect to Docket No. EP 711, I cannot, at this time, support the NITL call for what amounts to circumvention of the Midtec and Bottleneck Precedents.¹ Those were correct and appropriate interpretations of the law. The underlying statute on which those decisions were based remains unchanged. Congress has had opportunities to change the law so as to reverse these precedents and has declined to do so. This indicates to me that the ICC and the Board have struck

¹ The agency's competitive access standards were adopted by the ICC in Intramodal Rail Competition, 1 I.C.C. 2d 822 (1985), aff'd sub nom. Balt. Gas & Elec. v. United States, 817 F.2d 108 (D.C. Cir. 1987); and applied in Midtec Paper Corp. v. Chi. & Nw. Transp. Co., 3 I.C.C. 2d 171 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988). The "Bottleneck" cases were addressed in Cent. Power & Light v. S. Pac., et al., 1 S.T.B. 1059 (1996), clarified, 2 S.T.B. 235 (1997), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

the appropriate balance. A change, at this time, to a regulatory structure in which one railroad can gain access to a competing railroad's traffic under the proposed circumstances would not be wise. Instead, in my opinion, the Board's resources are better spent on making revisions and changes to the rate complaint processes rather than pursuing the Docket No. EP 711 proposals.

In fact, as I noted in my Docket No. 705 testimony and reiterate here, the Board has made several changes in its rate complaint processes over the past few years—all toward the goal of improving access to the Board's regulatory remedies for those shippers who cannot afford to bring a full SAC case to the Board. The Board's changes to the Simplified-SAC, Three Benchmark, and SAC methodologies have been balanced, have been carefully considered, and have improved the rate complaint process. This is the proper course of action—incremental changes in the rate complaint process.

Indeed, just recently, in M&G Polymers USA, LLC v. CSX Transportation, Inc., NOR 42143 (STB served Sept. 27, 2012), the Board preliminarily refined its approach to assessing qualitative market dominance, subject to parties' comments. While I express no view as to the wisdom or validity of that particular proposal, I applaud it as a demonstration of the Board's attempts to make rate relief more accessible to the shipping community. Likewise, the Board's rate case process for large shippers appears to be working. For example, in Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company, NOR 42113 (STB served Nov. 22, 2011), the Board found market dominance, found the rates assessed by the defendant rail carriers unreasonably high, prescribed maximum reasonable rates for future shipments, and ordered the defendant railroads to pay reparations. Clearly the Board has the authority, and the will, to make changes to its rate complaint processes when doing so can improve the process without making substantial changes to the entire regulatory framework, such as that proposed in Docket No. EP 711.

This docket [No. 715] is another attempt to improve the rate complaint process, with the primary focus on improving the Simplified-SAC process and expanding the relief available in both Simplified-SAC and Three Benchmark cases. While I offer no opinion on the merits of the specific proposals in this docket, I see this proceeding as yet another attempt by the Board to continue to improve its rate complaint process. My only concern is that it is premature at this time to adopt the changes proposed in this docket. I say this because the Board has very little experience in reviewing and analyzing Simplified-SAC cases and issuing final decisions in those cases, and without such an evidentiary record, it might be difficult both for commenters to assess, and for the Board to make a reasoned decision on, the merits of the proposal. Moreover, there is no discussion of why the existing Simplified-SAC process does not comply with the statutory requirements. It seems to me that it would be better if the Board were to gain more experience applying the existing Simplified-SAC and Three Benchmark processes before adopting the changes proposed in this docket.

From my perspective, the changes adopted in the various rate complaint processes appear to be working to provide rate relief for shippers whose rates are too high. These changes should be given time to prove their effectiveness before the Board proceeds with further changes. The STB can adjust the procedures if necessary, in the same means it is considering doing in the present proceeding, but that action should be based on evidence that the processes are not working and need to be changed. Until the public and the Board gain that evidence through experience, a case-by-case approach continues to be the best and safest approach. Any broad-brush, automatic approach to competitive access, such as that being considered in Docket No. EP 711, poses significant dangers that could easily present effects adverse to both railroads and shippers.

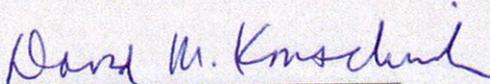
In the end, if I had to give one piece of advice to the agency based upon what I learned over my long career, it would be to make sure that, whatever regulatory structures and reforms you

undertake, you do carefully and in a way that does not undermine the rail industry's ability to invest in its infrastructure and to respond to market conditions by raising or lowering rates or changing routes and services. Sometimes what seems like a small step has far-reaching consequences. I am hopeful that the Board will keep this in mind while it considers further reforms to its rate complaint processes and any proposals that alter the agency's competitive access policies.

VERIFICATION

I, David M. Konschnik, verify under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 22, 2012



David M. Konschnik