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January 11, 2007



**Via HAND DELIVERY**

ENTERED  
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JAN 11 2007

Part of  
Public Record

The Honorable Vernon A. Williams  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423

**Re: Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1)**

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and twenty copies of BNSF Railway Company's Rebuttal Comments. Please date stamp the extra copy of this letter and return it with our messenger.

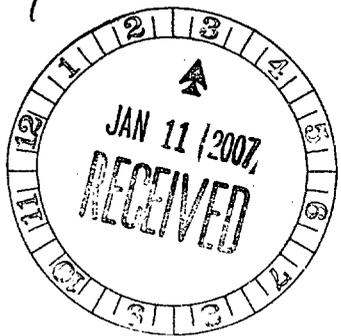
Sincerely,

  
Anthony J. LaRocca  
Counsel for BNSF Railway Company

Enclosures

cc: Parties of Record

218408



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 646 (Sub-No. 1)**

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**SIMPLIFIED STANDARDS FOR RAIL RATE CASES**

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**REBUTTAL COMMENTS OF  
BNSF RAILWAY COMPANY**

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**January 11, 2007**

**ATTORNEYS FOR  
BNSF RAILWAY COMPANY**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 646 (Sub-No. 1)**

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**SIMPLIFIED STANDARDS FOR RAIL RATE CASES**

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**REBUTTAL COMMENTS OF  
BNSF RAILWAY COMPANY**

**I. INTRODUCTION**

BNSF Railway Company (“BNSF”) submits these Rebuttal Comments in Ex Parte No. 646 (Sub-No.1), *Simplified Standards for Rail Rate Cases* (“EP 646 NPRM”). BNSF filed Opening Comments on October 24, 2006 and Reply Comments on November 30, 2006. These Rebuttal Comments respond to the Reply Comments submitted by shippers, government agencies and several other railroads.

As stated in its Opening and Reply Comments, BNSF accepts the basic framework proposed by the Board for simplifying and making more predictable the assessment of maximum reasonable rates in cases where a traditional SAC presentation is too costly, given the value of the case, although it has some concerns with certain elements of the Board’s proposed rules. The shippers, in contrast, reject the Board’s proposed approach and, after two rounds of comments, offer no constructive suggestions for simplified standards and procedures that are consistent with the legal and economic framework established by the *Coal Rate Guidelines* and the governing statute. The shippers<sup>1</sup> oppose altogether the use of a Simplified SAC (“SSAC”) methodology

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<sup>1</sup> As in the opening round of comments, the position of most shippers is set out in joint comments (“Joint Shippers Reply Comments”) filed on behalf of: American Chemistry Council, American Forest and Paper Association, American Soybean Association, Agricultural Retailers Association, Colorado Wheat Administrative Committee, Corn Refiners Association, The Fertilizer Institute, Glass Producers Transportation Council, Idaho Barley Commission, Idaho Wheat Commission, Institute of Scrap Recycling Industries, Iowa Soybean Association,

and they urge the Board instead to expand substantially the availability of a benchmark approach, with the aim of limiting the application of SAC-based rate reasonableness principles to only a small portion of railroad traffic potentially subject to regulation. The grounds for the shippers' position were set out in their opening comments and BNSF has replied at length to the shippers' arguments. The shippers' reply comments are relatively cursory, offering no new arguments.<sup>2</sup>

The shippers' rejection of the Board's proposed SSAC methodology is purportedly based on a view that simplification of the basic SAC approach is not possible without compromising the accuracy of the results. The shippers characterize the Board's attempt to simplify the SAC test for medium-sized cases as a "quagmire," where the need to ensure accuracy of results requires that the Board adopt complex and costly procedures that cut against simplification. *See* Joint Shippers Reply Comments at 21. As BNSF pointed out on reply, any attempt to simplify SAC would entail some sacrifice of accuracy in the interest of simplification, and therefore a simplified SAC methodology should be applied only in cases where a traditional SAC approach would be too costly, given the value of the case. But the fact that there is a trade-off between simplification and accuracy does not preclude simplification in the interest of ensuring access to the Board's rate reasonableness procedures. The question is whether the simplifying

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Montana Wheat and Barley Committee, National Association of Wheat Growers, National Barley Growers Association, National Corn Growers Association, National Council of Farmers Cooperatives, National Farmers Union, National Grain and Feed Association, National Sorghum Producers, The National Industrial Transportation League, National Oilseed Processors Association, National Petrochemical & Refiners Association, Nebraska Wheat Board, North American Millers Association, North Dakota Grain Dealers Association, North Dakota Public Service Commission, North Dakota Wheat Commission, Oklahoma Wheat Commission, Paper and Forest Industry Transportation Committee, PPL EnergyPlus, LLC, South Dakota Wheat Commission, Texas Wheat Producers Board, USA Rice Federation, Washington Wheat Commission, Alliance for Rail Competition, and Consumers United for Rail Equity.

<sup>2</sup> Should the shippers raise points on rebuttal that should have been raised on reply, BNSF will consider whether to move to strike any improper rebuttal.

assumptions are reasonable in light of the benefits that flow from simplification. BNSF showed that the basic simplifying assumptions in SSAC – particularly the use of the incumbent’s existing traffic base and existing route – are logical, reasonable and unbiased, and the shippers have offered no contrary evidence.

Moreover, the shippers’ desire to have the Board expand access to a benchmark approach is inconsistent with their stated concern over the accuracy of the results of a simplified methodology. As BNSF explained on reply, any benchmark approach has only the most tenuous connection to the principles of CMP that have provided the basic framework for rail rate regulation for more than two decades. Expansion of a benchmark approach would not improve the accuracy of the rate reasonableness inquiry; it would merely produce results that the shippers have apparently concluded are more favorable to them.

BNSF and the other railroad commenters have explained at length that the Board must preserve CMP to the maximum extent possible in any simplified rate reasonableness standards in order to ensure that railroads have a realistic prospect of attaining revenue adequacy. On reply, the shippers mischaracterize the railroads’ position on the question of revenue adequacy. BNSF and the other railroads have not argued, as the shippers claim, that the need for railroads to earn adequate revenues should “override” the requirement that rates be reasonable. *See Joint Shippers Reply Comments at 5.* Instead, the need for adequate revenues must inform the Board’s assessment of whether a challenged rate exceeds a reasonable maximum rate. If railroads are to have an opportunity to achieve revenue adequacy, the Board’s rate reasonableness standards must give railroads freedom to set rates based on demand for service. The railroads’ price setting discretion should be limited only to prevent railroads from forcing individual shippers to pay for inefficient service or to subsidize facilities from which the shipper obtains no benefit. This is the theory underlying CMP. Application of CMP to the maximum extent possible does

not “override” the statute. Instead, it allows the Board to “meet [its] dual objectives of providing railroads the real prospect of attaining revenue adequacy while protecting captive coal shippers from ‘monopolistic’ pricing practices.” *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 524. (1985).

The shippers also claim that the Board need not address the urgent need for expanded rail capacity in establishing rate reasonableness standards for small and medium-sized cases. *See* Joint Shippers Reply Comments at 6-8. The shippers’ position is short-sighted and contrary to the statute’s clear directives to the Board.<sup>3</sup> In any event, the shippers once again mischaracterize the railroads’ comments. The railroads are not asking that CMP or SAC principles be suspended so that railroads can earn enough revenues to invest in additional rail capacity. To the contrary, the railroads are urging the Board to minimize any departures from CMP in small and medium-sized cases so that the Board’s regulation of rates does not artificially impede the railroads’ ability to expand capacity. Only if the Board’s rate reasonableness standards give railroads an opportunity to attain revenue adequacy will the railroads have the ability and incentive to expand the railroad network to meet increasing demand for rail service. As to the shippers’ claim that increased revenues do not necessarily lead to increased infrastructure investments, BNSF has repeatedly shown that there is a direct correlation between the level of its net revenues and the level of its capital spending.<sup>4</sup>

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<sup>3</sup> The national rail transportation policy at 49 U.S.C. § 10101 directs the Board to “ensure the development and continuation of a sound rail transportation system . . .” (§10101(4)) and to “promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues.” § 10101(3).

<sup>4</sup> *See, e.g.*, Powder River Basin Coal Transportation, Federal Energy Regulatory Update, Presentation by Carl Ice, Executive Vice President and Chief Operations Officer, June 15, 2006 at p. 4, found at [www.bnsf.com/media/speeches](http://www.bnsf.com/media/speeches) and attached for the Board’s convenience as Exhibit 1 to this filing.

Finally, the shippers' comments do not take into account the Board's objective in this proceeding to make the Board's rate reasonableness procedures more widely available to small shippers. The shippers' proposal to make the Board's three-benchmark approach more open-ended benefits only larger shippers, as small shippers clearly do not benefit from making the standard more subject to manipulation and therefore more expensive to litigate. The Board's proposal to limit access to the three-benchmark approach to smaller shippers while making that approach more predictable and less malleable strikes an appropriate balance between the need to ensure access to Board procedures for small shippers and the goal of minimizing departures from CMP.

## **II. GENERAL ISSUES**

### **A. Eligibility**

The Board's eligibility criteria are rational and consistent with the statute. They appropriately link the eligibility threshold for the three-benchmark and SSAC methodologies respectively to reasonable estimates of the cost of litigating a SSAC or SAC case.

The shippers claim, incorrectly, that there is no "particularized support" for the reasonableness of the litigation cost estimates that are the bases for the Board's eligibility criteria. *See* Joint Shippers Reply Comments at 9. But the Board's estimate of the cost to litigate a traditional SAC case is based on shipper testimony, and BNSF and other railroads explained at length that this historical estimate probably overstates the cost of future SAC litigation given the recent changes in SAC standards and procedures. BNSF Reply Comments at 9; Canadian Pacific Reply Comments at 9-10; CSXT/NS Reply Comments at 14-15; UP Reply Comments at 27-38. While there is no experience in SSAC litigation on which to base an estimate of a shippers' litigation costs, the Board's cost estimate is reasonable in light of the fact that most of the litigation burden falls on the railroad defendant to identify, collect, organize and produce

relevant data in a format that can be used in a SSAC case. The shippers complain that they will still need consultants to check the railroads' work, but they vastly overstate the efforts that are reasonably required to review the railroads' data. UP's reply comments explain in detail that the shippers have overestimated the costs that would be incurred by them to produce evidence in a SSAC case.

Shippers also argue that the Board's proposed Maximum Value of the Case ("MVC") does not reflect the "actual" value of the case, and therefore may preclude access to the Board for some shippers that might be entitled to rate relief. Joint Shippers Opening Comments at 14; NITL Opening Comments at 9; Dow Opening Comments at 7-8; Cargill Opening Comments at 6. That objection is easily overcome. Most of the railroads in their reply comments agree that the shippers should be permitted to select an R/VC percentage higher than 180 that reflects their anticipated value of the case, and then stipulate to the use of that percentage to establish a floor for any prescribed rates.<sup>5</sup> This floor would be used to calculate a new MVC.

Finally, the shippers continue to argue that the Board's proposed aggregation rule should be eliminated because it limits the amount of traffic that may be able to take advantage of the simplified standards.<sup>6</sup> But the purpose of this proceeding is not to expand the scope of non-SAC standards. The SAC test should be applied whenever the value of the case justifies the cost to litigate it under the SAC test. And where the SAC test is too costly, the SSAC methodology should be applied unless the cost to litigate a SSAC case exceeds the value of the case. If the value of a set of related cases justifies litigation of the reasonableness of the rates at issue under

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<sup>5</sup> See AAR Reply Comments at 12; BNSF Reply Comments at 10-11; CSXT/NS Reply Comments at 10; UP Reply Comments at 58.

<sup>6</sup> See e.g., BASF Reply Comments at 4-5 and Snavely King Majoros O'Connor & Lee, Inc. ("Snavely King") Reply Comments at 5-6, (summarizing shippers' claims that the aggregation rule subjects a majority of their traffic to SAC); Joint Shippers Reply Comments at 8-9.

the SAC or SSAC standards, then there is no reason to apply a non-SAC standard in those cases. Moreover, the aggregation rule is necessary to prevent shippers from disaggregating challenges to related rates and bringing them piecemeal to take advantage of simplified but less accurate rate reasonableness standards. BNSF is not opposed to an approach that would allow the submission of evidence by a shipper who believes the aggregation rule would be inappropriate or unreasonable in a particular case. *See* Reply Comments of CSXT/NS. But the Board should make it clear that the proposed aggregation rule is a reasonable and necessary safeguard against the inappropriate overuse of the non-SAC standards and that exceptions to the rule will be granted only in extraordinary cases.

The shippers' arguments in opposition to the Board's eligibility standards focus almost exclusively on expanding the application of non-SAC standards to the majority of rail movements. The Joint Shippers acknowledge that their concern over the Board's eligibility standards is that "the proposed eligibility rules will greatly circumscribe the ability of shippers to maintain non-SAC rate litigation." Joint Shippers Reply Comments at 9. The agricultural shippers expressly argue that grain and other traffic with similar transportation characteristics should be subject to non-SAC rate reasonableness standards regardless of the value of the case. *See* NGFA et al. Opening Comments at 5-6, 15.<sup>7</sup> But the shippers misunderstand the purpose of this proceeding. This proceeding is not intended to revisit the economic principles underlying the Board's rate reasonableness standards and the SAC theory that implements those economic principles, but rather to develop simplified procedures to implement those standards to the

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<sup>7</sup> As CP explained in its reply comments, there is no principled basis for excluding agricultural shipments from SAC-based rate reasonableness standards. CP Reply Comments at 7. Agricultural shippers' desire for lower rates does not justify suspending the economic principles underlying the Board's rate reasonableness standards.

maximum extent possible, even in cases where the value of the case may not justify a traditional SAC analysis.

**B. Use of Unadjusted URCS Costs to Establish the Jurisdictional Threshold**

BNSF generally agrees with the Board's proposal to use unadjusted system-average URCS costs to establish the jurisdictional threshold in small and medium-sized cases, although BNSF urges the Board to leave open the possibility that adjustments may be needed in unusual cases. Most of the railroads also agree with the thrust of the Board's proposal, although some railroads urge the Board to expand the movement-specific adjustments that would routinely be considered in particular cases.<sup>8</sup> On reply, the Joint Shippers lump together the various railroads' comments and characterize them as a "litany of proposed exceptions" that would "compel shippers to seek offsetting adjustments" and open the floodgates to an "endless" adjustment process. Joint Shippers Reply Comments at 26-27. The shippers contend that the Board must, therefore, either deny all adjustments or continue the current practice of allowing open-ended submission of evidence on any conceivable URCS adjustment.

There is no reason to treat the calculation of the jurisdictional threshold as an all-or-nothing exercise, where movement-specific adjustments will either be allowed in all cases or disallowed in all cases. The Board can adopt the use of URCS system-average costs as a rule without categorically prohibiting adjustments in extraordinary cases.

**C. Exempt Traffic**

The Board proposed to make the SSAC and small case procedures available to shippers of exempt traffic by allowing those shippers to seek a partial revocation of the exemption when

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<sup>8</sup> CSXT and NS argue that "movement-specific adjustments would be essential in cases brought under the Board's proposed Three Benchmark test, where variable costs are a critical component of the Board's final rate prescription." CSXT/NS Reply Comments at 33. They urge the Board to "specify particular movement-specific adjustments that it presumptively will treat as appropriate in small shipper proceedings." *Id.* at 34.

they file a complaint. The railroads and the Department of Transportation acknowledged that partial revocations of an exemption are permitted under the statute, but they expressed alarm at the possibility that the Board was overlooking the rigorous standards that must be applied to revoke an existing exemption. The railroads therefore urged the Board to bifurcate the revocation and complaint proceedings and to make a determination on revocation prior to the initiation of a rate proceeding. On reply, the Joint Shippers dismissed the railroads' concerns over the need to carry out detailed market power inquiries in cases involving a petition for partial revocation of an exemption, claiming that the inquiry into a revocation as to a particular shipper would be "very closely related" to the inquiry into market dominance. They argue that a more thorough inquiry would be required only for the complete revocation of the class exemption as a whole. Joint Shippers Reply Comments at 34.

BNSF believes that the shippers' argument is wrong. As BNSF explained on reply, the market dominance inquiry in rate reasonableness cases specifically excludes examination of product and geographic competition, while the pervasive existence of those types of competition in railroad markets was an important basis for granting the class exemptions in the first place. Any inquiry into a partial revocation of an exemption, whether the inquiry focused on an individual shipper or the entire class of exempt movements, would have to consider the existence of product and geographic competition, thereby substantially expanding the scope of evidence beyond what would be considered in a market dominance proceeding. The shippers' argument that the statutory language relating to market dominance and to revocation of exemptions both use the term "absence of effective competition" is misplaced. The statutory language in 49 U.S.C. § 10707(a) relating to market dominance is not the same as the language relating to

exemptions.<sup>9</sup> Moreover, the Board chose to eliminate product and geographic competition from market dominance proceedings for reasons of expediency that do not apply to exempt traffic.<sup>10</sup>

### III. SIMPLIFIED SAC

To the limited extent that the shippers' reply comments address the specifics of the Board's proposed SSAC methodology, their comments focus on the supposed costs and complexity of SSAC litigation. They first claim that the railroads' comments confirm the shippers' concerns that SSAC is "extremely expensive and complex." Joint Shippers Reply Comments at 12. However, the railroad comments cited by the shippers are focused on the costs *to the railroads* to develop the data necessary to present SSAC evidence. BNSF and the other railroads are willing to incur these costs and burdens, so long as the Board adopts measures that will discourage unwarranted litigation. And as noted above, while the shippers may need to review the railroads' data, they vastly exaggerate the extent of such efforts.

The shippers also argue that the railroads' proposals for refining the SSAC methodology would "pile additional cost and complexity onto an already impossible process." Joint Shippers Reply Comments at 20. But the Joint Shippers' 8-bullet list of railroad proposals that they allege would increase costs clearly overstates the impact of the railroads' proposals. Joint Shippers Reply Comments at 19-20. Bullets 1, 3, and 8 relate to the assessment of the jurisdictional

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<sup>9</sup> The statute defines market dominance as "an absence of effective competition from other rail carriers and modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10707(a). The Board interpreted that provision as focusing on intermodal and intramodal competition, and therefore not *requiring* consideration of other forms of indirect competition, such as product and geographic competition, for purposes of market dominance in a rate proceeding. *Market Dominance Determinations – Product and Geographic Competition*, 3 S.T.B. 937, 945-46. This focus on intermodal and intramodal competition does not exist in the statutory provision cited by the Joint Shippers as relating to exemptions from regulation.

<sup>10</sup> The Board never even considered in the market dominance proceeding whether any statutory policies would be advanced by expediting the market power analysis in cases involving exempt traffic.

threshold, which is not even relevant to the validity of the SSAC methodology. The UP and BNSF proposals cited in Bullet 4 simply suggest that in the annual recalculation of relief over a five-year period, the railroads be permitted to update the RPI costs if new capital investments were made on the route at issue during that period. Such an adjustment to RPI is no more difficult or costly than any of the other required updates.

Similarly, the railroads' requests cited in Bullets 2, 5 and 6 for flexibility with respect to certain RPI costs in cases where the Simplified SARR route and facilities differ from those in prior all-coal SAC cases would not significantly increase the burden or complexity of SSAC litigation. The RPI adjustments most likely to be needed are land and earthwork costs for new construction. In any SSAC analysis, the parties would be required to determine the quantities of each category of land (agricultural, residential or commercial) traversed by the route and of each type of earthwork (based on terrain and topography) for any construction not covered by the ICC Engineering Reports. Where the land and/or type of earthwork clearly differ from prior SAC cases, the presentation of evidence on the appropriate costs for those limited items would not unduly complicate or significantly increase the cost of the analysis. The BNSF proposal cited in Bullet 7 with respect to state tax calculations requires no additional cost or complexity at all. In response to the Board's request for comments on whether to make changes in the DCF model with respect to tax calculations, BNSF proposed that the DCF *not* be adjusted to substitute estimates for effective state tax rates, as the state-specific tax calculations currently made in Full-SAC cases are not particularly complicated.

Finally, the shippers argue that the railroads' proposals for refining the SSAC methodology present the Board with a fatal dilemma: Either the Board must accept all proposed adjustments of SSAC in order to ensure that the results of the SSAC analysis are accurate, thereby undermining the goal of simplification, or it must "arbitrarily forbid[] any adjustments

whatsoever to its proposed Simplified SAC procedures regardless of the facts of a particular case,” thereby undermining the goal of accuracy. Joint Shippers Reply Comments at 21. But the Board is not faced with such an all-or-nothing choice. As noted previously, the tension between accuracy and simplification is always present in efforts to simplify complex methodologies, but the existence of such tension does not preclude simplification where reasonable simplifying assumptions can be made. The question is whether the simplifying assumptions are reasonable, and whether any proposed adjustments to the basic assumptions would improve the accuracy of the results without unduly complicating the analysis. The modest adjustments proposed by the railroads would improve the accuracy of the SSAC calculations without significantly complicating SSAC litigation, and they should therefore be accepted. There is no reason to conclude that the Board’s acceptance of these adjustments requires the Board to accept any adjustment proposed by any party.

#### **IV. THREE-BENCHMARK APPROACH**

The shippers’ asserted concern over the accuracy of the SSAC methodology is inconsistent with their advocacy of a benchmark approach that does not reflect CMP principles. Moreover, the shippers propose changes to the Board’s three-benchmark approach that would further undermine its tenuous relationship to CMP.

First, the shippers propose that the comparison group used as the basis for calculating the maximum reasonable rate include traffic from railroads other than the defendant. As BNSF explained on opening, other carrier traffic cannot possibly satisfy the requirement underlying the three-benchmark approach that the movement be comparable to the issue traffic movement. *See* BNSF Opening Comments at 39. Therefore, other carrier traffic should be excluded from the benchmark analysis altogether.

Second, the shippers disavow their stated interest in accuracy when it comes to the identification of comparable traffic based on demand characteristics. As BNSF explained on opening, demand-based pricing can be preserved in a three-benchmark analysis only if the comparable traffic group is limited to traffic that shares similar demand characteristics with the issue traffic. *See* BNSF Opening Comments at 38. The shippers claim that consideration of demand characteristics is “impracticable and inconsistent with the Congressional mandate for a ‘simplified’ process.” Joint Shippers Reply Comments at 24. In fact, the statute *requires* that any benchmark approach account for demand characteristics. *See Burlington Northern Railroad Co. v. I.C.C.*, 985 F.2d 589, 596-98 (D.C. Cir. 1993) (reversing ICC for attempting to set maximum rates by reference to a comparison traffic group that did not share similar demand characteristics). Moreover, the shippers mischaracterize BNSF’s position. BNSF is not advocating “the introduction of unlimited considerations to determine comparable traffic groups” and “attainment of ultimate precision in selecting a comparable group.” Joint Shippers Reply Comments at 23-24. Nor has BNSF argued that the “comparable traffic group is to be comparable in every minute detail.” *Id.* at 24. BNSF merely urged the Board to “make it clear that its decisions on a proper comparison group will account for demand-based pricing by requiring evidence that the traffic chosen for the comparison group shares similar demand characteristics with the issue traffic.” BNSF Opening Comments at 38. No less is required under the statute.<sup>11</sup>

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<sup>11</sup> The shippers’ true objective in eliminating consideration of demand-based characteristics appears to be to reduce the benchmark rates by including lower rated traffic in the comparison group. Indeed, one commenter goes so far as to urge the Board to expand the comparison groups to include traffic with an R/VC ratio of less than 180% because “[t]he test of a reasonable rate should not be just that the rate matches the contribution of other captive traffic, but that the rate matches the contribution of similar traffic.” *See* Reply Comments and Recommendations of Snavely King at 10. But rates for competitive traffic provide no information about appropriate rates for differentially-priced traffic that has fewer competitive options. It would clearly be inappropriate to include such traffic in a comparison group.

The shippers express concerns about expanding the complexity of the benchmark approach, but their own proposals would clearly increase the expense and complexity of the benchmark analysis, thereby imperiling access to rate litigation to shippers with the smallest cases. Specifically, the Joint Shippers argue that the Board should permit “consideration of non-URCS related factors in addition to Three-Benchmark statistical outcomes” as part of the three-benchmark analysis. Joint Shippers Reply Comments at 31. In the Joint Shippers’ view, the calculated result of the three-benchmark formula would be only the beginning of the inquiry, not the end.<sup>12</sup> The Joint Shippers do not specify precisely what types of additional evidence might be considered, but they assert that shippers must “retain an equal right to press for downward modifications to the formulaic outcome.” Joint Shippers Reply Comments at 25. On opening, the shippers claimed that evidence relating to the statutory Long-Cannon factors should be considered in addition to the benchmark-related evidence. On reply, the shippers claim that the Board should also consider supplemental evidence relating to “erratic, unpredictable service.” *Id.* Shippers do not explain why such evidence is pertinent, and it clearly has no relevance to the economic principles that the Board is supposed to be advancing in its maximum reasonable rate analysis. In fact, it would serve only to complicate the three-benchmark analysis.

Finally, the shippers’ position on the use of a confidence interval in setting the adjusted average rate for the comparable traffic group is internally contradictory. The shippers first claim that the Board’s proposal to use a confidence interval to establish the average of the comparable group rates “should be scrapped entirely.” Joint Shippers Reply Comments at 22. They then claim that the use of a confidence interval in the calculation of the maximum reasonable rate avoids the ratcheting down effect that can result from the use of an average rate because the use

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<sup>12</sup> This sounds remarkably similar to the approach that the Board adopted in the *Non-Coal Guidelines* in 1996, which shippers have consistently objected to as unworkable.

of a confidence interval would assure that the “final comparable rate is above the average of all comparable rates.” *Id.*

If there is no confidence interval, as they recommend, then no protection against the ratcheting down effect would even be possible from the use of a confidence interval. In any event, the shippers misunderstand the Board’s rationale for the use of a confidence interval. The confidence interval is not intended to identify a rate that is *above* the average. It is intended to maximize the Board’s confidence that the calculated rate does not understate the actual average of the comparable group. The use of a confidence interval therefore does not, in fact, address BNSF’s concerns about the ratcheting down effect of the Board’s use of average rates. Any use of an average rate, whether or not the average is identified using a confidence interval, will result in the ratcheting down of rates towards the average. As BNSF explained on opening, the Board can address the concerns over the ratcheting down effect of an average and preserve demand-based pricing by using the standard deviation to identify a permissible range of demand-based rates and to establish the benchmark rate at the upper end of that range. *See* BNSF Opening Comments at 45-48.

Respectfully submitted,

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Michael E. Roper  
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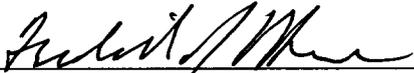
  
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January 11, 2007

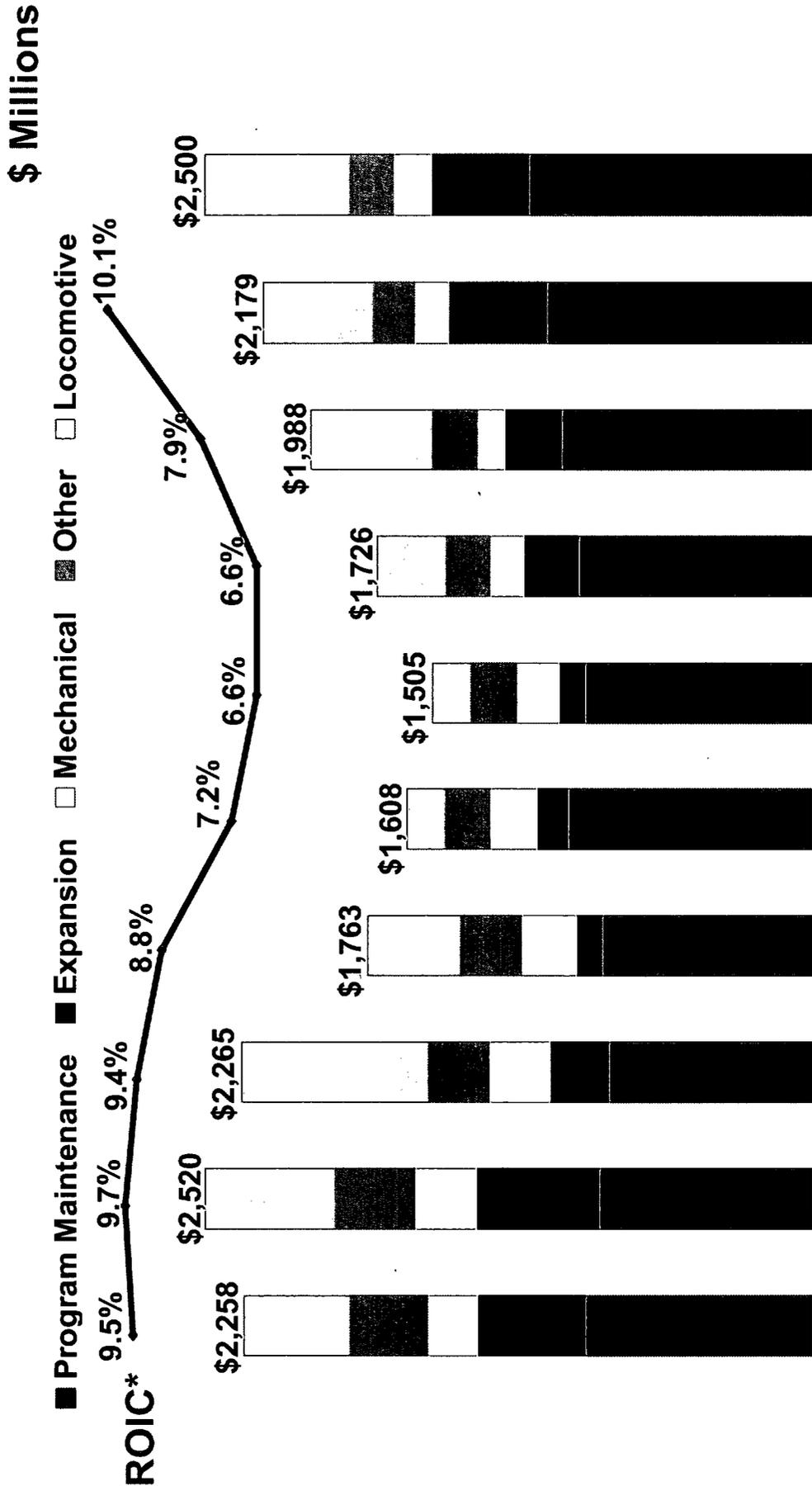
ATTORNEYS FOR  
BNSF RAILWAY COMPANY

**CERTIFICATE OF SERVICE**

I, Frederick J. Horne, hereby certify that on January 11, 2007, I caused a copy of BNSF Railway Company's Rebuttal Comments to be served by first-class mail or a more expeditious method of delivery upon all persons who have filed a notice of intent to participate in STB Ex Parte No. 646 (Sub-No. 1).

  
\_\_\_\_\_  
Frederick J. Horne

# Capital Commitments with ROIC



\*Adjusted for unusual or non-recurring items. \*See BNSF website [www.bnsf.com/InvestorRelations](http://www.bnsf.com/InvestorRelations) for a reconciliation to GAAP.

**BNSF**  
RAILWAY 4