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January 11, 2007

**HAND DELIVERY**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and ten copies of the Rebuttal Comments of CSX Transportation, Inc. and Norfolk Southern Railway Company. A diskette containing an electronic version of the Rebuttal Comments is also enclosed.

Please acknowledge receipt of the CSXT/NS Rebuttal Comments by date-stamping the enclosed extra copies and returning them via our messenger. Thank you for your assistance in this matter. If you have any questions, please contact the undersigned counsel.

Sincerely,  
  
Paul A. Hemmersbaugh

*Counsel to CSX Transportation, Inc. and  
Norfolk Southern Railway Company*

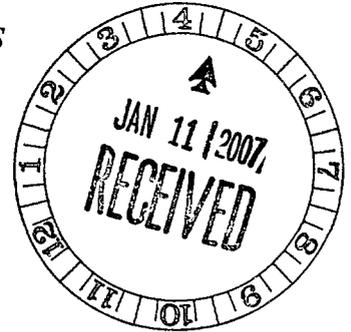
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UNITED STATES OF AMERICA  
SURFACE TRANSPORTATION BOARD

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

*SIMPLIFIED STANDARDS FOR RAIL RATE CASES*



REBUTTAL COMMENTS OF  
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NORFOLK SOUTHERN RAILWAY COMPANY

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**Dated January 11, 2007**

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## **I. OVERVIEW**

Establishing regulations to determine rate reasonableness fairly and accurately in circumstances in which the value of a case does not justify the expense of a full stand-alone cost analysis is a difficult task. CSXT/NS respectfully submit that if the Board adopts the approach they advocate, the resulting scheme would be more likely to meet the Board's multiple statutory obligations while continuing to regulate rates in an economically rational manner. This section briefly summarizes CSXT/NS's views on major issues in this proceeding. Section II reiterates the core principles that CSXT/NS maintain must guide the Board in this proceeding. And, the remaining sections contain more detailed discussions of the major issues.

### **A. Eligibility**

The proposed eligibility thresholds for the three levels of rate reasonableness analysis are acceptable. The Board's approach is sound – the more revenue that is at stake, the more rigorous the rate reasonableness analysis must be. The actual threshold levels are based upon testimony and evidence presented in prior hearings and the Board's expert judgment. As the Board has made clear, the eligibility thresholds would not be rigid limits but rather rebuttable presumptions that complainants could overcome based on the facts and circumstances of a specific case. Shipper proposals to calculate the value of a rate case differently are unworkable and depend on a subjective prejudging of the merits of a case, which would be both speculative and inappropriate.

The Board should resist calls for further departure from the painstakingly developed and judicially approved Constrained Market Pricing ("CMP") rate reasonableness methodology. The ICC developed CMP (including the Stand Alone Cost ("SAC") constraint)

through an extensive, seven-year process of notice-and-comment rulemaking, culminating in adoption of an economically sound and legally sufficient set of standards. In the two decades following judicial approval of the *Coal Rate Guidelines*, the ICC and the Board developed experience and expertise in implementing CMP and applying its SAC constraint. As the Board has repeatedly recognized, SAC is the gold standard for rail rate reasonableness determinations. Any departure from SAC principles and analysis should be considered only to the extent it is essential to achieve statutory requirements, and any such departures must be kept to a bare minimum.

**B. SSAC**

As modified by CSXT/NS's suggested changes, the Board's SSAC proposal would create a framework that should provide an acceptable shortcut to a full SAC analysis. The Board's proposal must be amended to: (i) change the discovery burden; (ii) restrict the route to the one that is most frequently used; (iii) prescribe rates, if necessary, through the use of PRM rather than MMM; and (iv) allow adjustments to URCS to reflect actual costs of the challenged move. Without these revisions, the Board's SSAC proposal would be arbitrary, capricious and contrary to law, and would encourage litigation over negotiation.

**C. Three Benchmark**

As proposed, the Three Benchmark approach would be arbitrary, capricious, and contrary to law, because it would prescribe maximum reasonable rates based upon mechanical application of a formula. By their nature, immutable formulas cannot adequately account for the myriad and complex factors and variables involved in the ratemaking process. Even "comparable" movements will differ significantly, and a reasonable rate cannot be determined

solely by the simplistic application of a formula to a collection of such movements. Economic rationality therefore requires that any benchmark methodology retain a basic tenet of the existing *Simplified Guidelines*, by using benchmarks (and any formula derived therefrom) as the *starting point* for a rate reasonableness analysis. To assist the Board in making a rate reasonableness determination from that starting point, parties should be allowed to submit any relevant evidence bearing on the reasonableness of the challenged rate, including importantly the existing RSAM (unadjusted) and  $RVC_{>180}$ .

#### **D. URCS Adjustments**

The proposed SSAC and Three Benchmark frameworks must be revised to ensure that any resulting rate prescription is based upon the actual costs of the issue movement(s), not upon system average costs. As proposed, the framework would not consider the actual costs of a movement, but rather would prescribe a maximum reasonable rate based upon the application of a formula to URCS system average costs, which could be significantly different from the actual costs of the issue movement. Although necessary for both approaches, using actual costs is particularly important for the Three Benchmark methodology because of the more significant, central role of variable costs in that approach. A rate prescription methodology that disallows adjustments to URCS would be inconsistent with the Board's statutory responsibilities and limits on its rate reasonableness jurisdiction.

#### **E. Mediation**

The Board should require mediation prior to litigation of rate challenges under either the SSAC or Three Benchmark approaches. Mediation can and does lead to the settlement

of disputes. Even when mediation cannot resolve the dispute, it often will narrow the issues and further ultimate resolution. And mediation is both quick and relatively inexpensive.

**F. Monitoring**

Of course, the ultimate success of the revised SSAC and Three Benchmark framework that CSXT/NS advocate will depend on its implementation and application in actual rate cases. The Board's application of the framework in specific cases will determine whether it properly achieves statutory requirements and advances policy aims. Accordingly, the Board should carefully monitor the implementation of the SSAC and Three Benchmark approaches, and their results, to ensure that they closely track the results that would be generated by a SAC analysis, and thereby "achieve the same objective[s]" as SAC "albeit in a less precise manner." See NPRM at 10.

**G. Requests for Partial Revocation of Exemptions**

The Board should not change its current standards for granting a partial revocation of an exemption. The Board should also rule on the underlying exemption revocation request before it considers any rate challenge. To do otherwise would fail to honor existing, in-force exemptions by requiring rail carriers to spend significant time and money defending rate challenges to traffic that the Board has expressly exempted from regulation.

**II. "SIMPLIFIED STANDARDS" MUST BE PREDICATED UPON CORE STATUTORY AND ECONOMIC PRINCIPLES FOR DETERMINING MAXIMUM REASONABLE RATES.**

In both their Opening and Reply Comments, CSXT/NS emphasized that any "simplified standards" for determining maximum reasonable rates must adhere to certain core statutory and economic principles. Those principles underlie the provisions of ICCTA governing

the Board's rate reasonableness jurisdiction, and they are the foundation of sound rail rate regulation, constrained market pricing, and the SAC test applied in rate reasonableness cases over the past 20 years. It is disappointing that shippers seek to turn back the clock to a time when the Government decided what rates were reasonable without considering market conditions or economic principles. Because CSXT/NS believe that rate regulation based on market conditions and economic principles is inextricably linked to the post-Staggers Act renaissance of the rail industry, these Rebuttal Comments must be read and understood in the context of their embrace of such core principles – principles that no shipper or shipper organization even commented upon, despite their prominence in our earlier submissions. (*See* Opening Comments of CSXT/NS at 1-2; Reply Comments of CSXT/NS at 1-2).

### **Core Principles**

**Basic economics dictates that when demand for rail transportation exceeds supply, prices will rise. Therefore, in the current transportation environment, rising rail prices are not an indication that STB rate regulation has failed.** The rail transportation policy set forth in the Interstate Commerce Act (49 U.S.C. § 10101(1)) states that the market should determine rail rates to the maximum extent possible. Prices adjust to bring supply and demand into equilibrium. While rail rates have increased somewhat in recent years, there is no record that the increase reflects anything other than the appropriate operation of market forces. And, there is nothing in the record to suggest that current rail rate levels pose a significant problem that should be addressed in this proceeding. Indeed, rate regulations that prevent the law of supply and demand from functioning efficiently in the rail transportation market (which some commenters seem to advocate) would be inconsistent with the national rail transportation policy.

**Increasing rail capacity and improving rail service require increased rail revenues.** Shippers argue that carriers' need for more money does not make an unreasonable rate reasonable. While that argument is correct, it misses the larger point that rate regulation must be consistent with the public interest and the public interest requires that rail rates produce sufficient revenues to allow railroads to make investments necessary to increase capacity and improve service. Shippers do not deny that railroads must generate increased revenues, but choose to pretend that numerous individual rate reductions will not affect the funds railroads have to increase capacity and improve service.

**Prices are the heart of any business and are seldom, if ever, simple to determine.** Shippers have not addressed this point. Railroads devote considerable time and resources to setting the rates they will charge. Shippers have not suggested railroads should do otherwise. Shippers never suggest that it is a simple matter to set the prices shippers charge *their* customers. Despite the importance and complexity of setting rates, however, shippers do not even acknowledge the challenges faced by the Board in this proceeding. Instead they complain that if they cannot get a rate *reduction* in a matter of a few months and at little cost, the Board is not doing its job.

**No rate should be prescribed based on a formula because it is impossible for a formula to be easy, quick and accurate.** Accuracy of results is of little-to-no concern to shippers. Nor are they concerned about the revenue needs of the railroads. Shippers do not want to spend either time or money litigating a rate case. They want the STB to be like a dry cleaner, where a shipper drops off a rate complaint at 9 and receives an automatic rate reduction by 5.

**Small cases should be determined by the Board's evaluation of a number of relevant factors and use of its expertise to judge the reasonableness of a challenged rate.** While shippers contend they should be allowed to introduce evidence to show that the prescribed rate should be lower than that produced by the formula, they complain that allowing railroads to introduce evidence concerning the market or actual costs of the move in question would unnecessarily complicate the process. CSXT/NS recognize that for the truly small cases to which the Three Benchmark test applies, tradeoffs between accuracy and costs are inevitable. But a one-size-fits-all formula will not work. Rates are not set in a vacuum and rate reasonableness cannot be judged in a vacuum. At a minimum, the Board needs to know about the major components of the market for, and the costs of, the rail transportation whose rate is under challenge. Relying solely on a formula cannot produce rational rate regulation. The STB's proposed formula will drive rates down toward a declining average. The shippers' opposition to allowing railroads to introduce evidence as to the market and costs of the move at issue is particularly perplexing given that shippers want the rough Three Benchmark test to apply to the large majority of rail traffic.

**The more revenue that is at stake in an individual case, the closer its results must be to results that would be generated in a full SAC analysis.** The Board's three-tiered approach recognizes this important principle. Shippers do not. Shippers just want lower rates, without regard for the accuracy, rigor, or soundness of the process used to reduce those rates. *See, e.g.,* Open. Comments of NGFA *et al.* at 15-16 (seeking less rigorous standards for rate relief because they are unable to show rates are unreasonable under the SAC test).

**The more overall rail revenue that is judged by non-SAC procedures, the more important it is that the non-SAC procedures produce SAC-like results.** If the (non-SAC) Three Benchmark approach is to have any chance of producing economically sound, SAC-like results, it must not rely on a simple formula that ignores relevant market and demand parameters and the specific costs and characteristics of the issue movement. The proposed benchmarks must be the starting point for analysis, not a determinative formula. As the Board explained when it adopted

the *Simplified Guidelines* it seeks to refine in this proceeding, “the three benchmarks are only a starting point for our analysis. They can and should be supplemented, as appropriate, with any particularized evidence that would qualify or modify what one or more benchmarks might otherwise indicate.” *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1041 (1996) (“*Simplified Guidelines*”)

**Eligibility for the new methodologies should not be expanded.** CSXT/NS are encouraged that shippers are considering a modification of the calculation of the Board’s “maximum value of the case” proposed in the CSXT/NS and AAR filings. That aside, however, shippers seek to minimize the application of SAC by expanding the eligibility criteria for small cases. Moreover, many shippers apparently seek to abandon market-based rate regulation and replace it with formula-based rate regulation.

**The Board should monitor the effects of any new procedures to ensure that results are not materially different from results that would be generated by a full SAC analysis.** Neither the Board nor the parties can be certain what kinds of determinations may ultimately be made if and when actual rates are judged under the SSAC or Three-Benchmark methodologies. Nor is it known at this juncture what specific kinds of evidentiary issues may arise, what the burdens and scope of discovery will ultimately prove to be, how many non-SAC rate cases may be brought, or the impact of such cases on railroad revenues and profitability. What the Board and the parties do know, however, is that the results of such cases will not be determined as a result of a full SAC analysis and therefore are unlikely to replicate precisely those that would be produced under a full-SAC analysis. To guard against the possibility that SSAC or Three-Benchmark cases generate unintended negative consequences, including results that significantly and materially differ from those that would be produced by a SAC analysis, the Board should establish procedures for periodic monitoring of the effects of any new rate procedures it adopts in this proceeding. Such monitoring should include opportunities for all interested parties, not just the parties to individual rate cases, to participate and be heard.

**Rate regulation should not encourage litigation over negotiation.** Shippers demand regulations with minimum cost and maximum certainty. Creating a regulatory formula and making it quick and cheap to apply the formula to any rate will not foster meaningful negotiations. The governing statute requires the STB to allow the market to set rates to the maximum extent possible. A process that is certain, quick and cheap would favor regulatory intervention over market-based negotiations, which would be directly at odds with the fundamental policy of encouraging carrier-shipper negotiations, and the statutory mandate that the Board favors marketplace determination of rates.

**III. MANDATORY MEDIATION SHOULD BE ADOPTED TO REDUCE THE TIME AND COST REQUIRED TO LITIGATE RATE CASES, AND TO PROMOTE SETTLEMENT.**

CSXT/NS have proposed that the Board adopt mandatory mediation as part of its new rules for small and medium rate reasonableness cases. *See* CSXT/NS Open. Comments at 8-10. CSXT/NS believe this proposal holds significant potential for reducing the time and expense of litigating smaller rate cases and could facilitate early resolution of rate disputes. No commenter has opposed the proposal and several commenters – including the largest shipper group – have endorsed it. *See* Joint Shipper Reply Comments at 32.

In the only case filed under the existing *Simplified Guidelines* prior to the commencement of this proceeding, NS and BP Amoco Chemical agreed to participate in such a mediation process. As a direct result of that process, the parties were able to resolve the dispute at a very early stage, thereby avoiding the time and expense of further rate litigation. *See B.P. Amoco Chem. Co. v. Norfolk So. Ry. Co.*, Decision, STB Docket No. 42093 (served June 28, 2005). Based upon that experience, and upon the experience of both CSXT and NS with mediation in other contexts, CSXT/NS believe that a mandatory mediation requirement could save significant time, cost, and effort in small and medium rate cases. And even when mediation does not resolve an entire case, mediation (and/or technical conferences) supervised by Board staff can substantially narrow the issues in dispute and thereby reduce the parties' litigation costs. These proactive measures would encourage railroads and shippers to reach common ground whenever possible, and are one of the best prospects for creating a simplified rate reasonableness procedure that serves the interests of both shippers and railroads.

**IV. A THREE-TIERED APPROACH AND THE PROPOSED ELIGIBILITY STANDARDS ARE APPROPRIATE.**

**A. The Three-Tiered Approach is An Acceptable Framework to Implement Competing Statutory Requirements.**

Simplified, the general goal of this proceeding is to establish procedures to ensure that all shippers of traffic within the Board's rate reasonableness jurisdiction – including those which ship relatively small volumes – have reasonable access to procedures for the challenge of their rail transportation rates. *See* NPRM at 3-5. More specifically, this proceeding is part of the Board's continuing effort to implement its statutory charge to “establish 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,” in a manner that is consistent with other statutory requirements. *See id.* at 3 (quoting 49 U.S.C. § 10701(d)(33)). The proposed three-tiered approach, with the important adjustments described below, is an acceptable framework for implementing the Board's multiple statutory responsibilities concerning rail rates.

Contrary to the apparent impression of some commenters, there is nothing in governing statutes or in the NPRM that suggests that new or revised methodologies should lower the standards or requirements for rate relief, or otherwise make it easier for complainants to prevail in a rate case. Nor is there any evidence in the record to support the imposition of more rate regulation. To the extent comments have the intent or effect of lowering the standard for obtaining rate relief or generating more extensive rail rate regulation, they should be disregarded as outside the scope of this proceeding and inconsistent with its purpose.

The Board's proposed SSAC and Three Benchmark proposals are constructive attempts to implement the statutory goal of simplified rate reasonableness proceedings for smaller value cases, without undue sacrifice of other statutory and regulatory goals, policies, and requirements. Consistent with the Board's statutory responsibilities, the rigor and accuracy of the applicable rate reasonableness methodology – and the extent to which it generates results that emulate SAC results – should increase as the amount at issue in the case increases. An important corollary to this basic principle, which the Board has repeatedly recognized, is that a methodology which does not attempt to emulate SAC or implement CMP should be used only as a last resort for those very small cases whose size makes both SAC and SSAC analysis infeasible. *See, e.g.*, NPRM at 11; *Simplified Guideline*, 1 S.T.B. at 1021. The three-tiered proposal, including the proposed eligibility ceilings and aggregation rule, appears consistent with these principles. Increasing the eligibility thresholds or eliminating the aggregation rule, as some commenters have suggested, would violate those important principles and the Board's statutory responsibilities.

**B. MVC is the Only Proposal that Would Measure the Value of a Case Objectively, and the Board Should Adopt MVC as Proposed.**

The Board's proposed Maximum Value of the Case ("MVC") is readily ascertainable, verifiable, and objective. MVC does not require the Board or any party to speculate in advance about the likelihood that a complainant will prevail or the amount of rate relief it might obtain should it prevail. No alternative proposal even attempts to achieve those aims, and the Board should adopt MVC as the measure of the "value of a case" for purposes of determining eligibility for non-SAC methodologies.

Some commenters suggest that the Board should somehow attempt to estimate the “actual” value of a case. *See, e.g.*, Joint Written Comments of American Chemistry Council *et al.* at 14-17 (Oct. 24, 2006). They offer no proposal, however, for calculation of a case’s hypothetical “actual” value. The reason they offer no proposal is because they cannot: there is no objective way to determine in advance – prior to the submission of any evidence or argument – the amount of rate relief, if any, a complainant will likely obtain in any specific case. Moreover, any such projection by the Board would amount to prohibited prejudgment by the tribunal charged with issuing an impartial decision on the merits after the case has been fully submitted.

Similarly, there is no legitimate basis for shippers’ suggestion that the Board apply a risk premium to discount the value of a case. In the first instance, shippers offer no sound, objective basis for calculating or forecasting the risk faced by a complainant in any specific case, so their proposal is unworkable as a practical matter. Moreover, shippers’ suggestion that the Board insulate them from litigation risk is unsound as a matter of law and policy. Risk is faced by all persons involved in or considering litigation. It serves as a useful check on excessive or unmeritorious claims and encourages private resolution of disputes. In the context of rail rate disputes, mutual litigation risk provides a powerful incentive for parties to agree to negotiated contract rates, an important objective of rail transportation policy for the last three decades. Insulating one party – shippers – from that risk would defeat that core policy objective by encouraging rate litigation over marketplace negotiations. The proper purpose of this proceeding is to develop procedures designed to provide shippers with lower value cases better access to rate reasonableness challenges, *not* to eliminate litigation risk.

CSXT/NS, as well as the AAR, have made a proposal to address shippers' claim that MVC overstate the value of rate cases in those situations in which complainants have no realistic possibility of obtaining rate reductions to levels near the jurisdictional limits. Under CSXT/NS's proposal, complainants would be allowed to reduce the MVC of a case in accordance with their estimate of the rate reduction they believe they might obtain, by stipulating a minimum R/VC ratio as the floor for any rate reduction they might obtain in a case. *See* CSXT/NS Reply Comments at 8-9. That R/VC ratio would be used to calculate an adjusted MVC of the case (calculated by multiplying the difference between the R/VC ratio generated by the challenged rate and the stipulated R/VC by the volume of traffic at issue), which in turn would be used to determine the presumptive eligibility of that case for analysis under SSAC or the Three Benchmark framework. *Id.* Complainants who believe they could not obtain rate relief below the floor they stipulate could thus reduce the MVC of their case without any effective sacrifice of potential rate relief.

Shippers apparently believe this proposal has some merit, because they requested and received an extension of the time to file rebuttal comments in order to more fully consider the AAR's similar proposal. *See* Ex Parte 646 (Sub-No. 1) Decision (Dec. 19, 2006). In any event, the parallel AAR and CSXT/NS proposals are the only proposed adjustments to the MVC calculation that could be readily calculated without requiring the Board to make a premature assessment of the merits of the case. Accordingly, this is the only proposed modification to MVC that is lawful and supported by the record.

**C. The Proposed Eligibility Presumptions are Appropriate, and Shipper Proposals to Change Those Presumptions Should Be Rejected.**

The Board's proposed eligibility presumptions would subject fully two-thirds of all traffic within the Board's rate reasonableness jurisdiction to evaluation under standards and procedures that are not as accurate or rigorous as SAC. *See* NPRM at 37. Experience may show that the eligibility thresholds are too high and subject too much rail revenue to evaluation under non-CMP methods, and if that proves to be the case, the presumptive eligibility thresholds should be reduced. Initially, however, CSXT/NS are willing to accept the proposed eligibility thresholds, which are based upon evidence submitted to the Board in related proceedings by expert witnesses and by shippers themselves.

Because the eligibility thresholds are presumptions and not rigid bright-line limits, the Board will have the flexibility to ensure that application of the thresholds does not work hardship or injustice in close cases. Indeed, the NPRM expressly contemplates that a complainant may present evidence to rebut the eligibility presumptions by showing, for example, that a SAC presentation would not be feasible even though a case's MVC exceeds \$3.5 million. *See* NPRM at 34.

The Joint Shipper comments propose a "drastic upward revision" of eligibility thresholds, but they offer no actual eligibility levels. *See, e.g.,* Joint Shipper Open. Comments at 5. Because they do not propose specific eligibility thresholds, and because they urge elimination of SSAC altogether, Joint Shippers have offered no meaningful alternative to the eligibility

thresholds for the three-tiered framework proposed by the Board.<sup>1</sup> Thus, the general and indefinite suggestions of the Joint Shipper comments do not provide an adequate basis for increasing the eligibility thresholds.

The huge increases in eligibility threshold levels suggested by the U.S. Department of Agriculture are apparently based on the erroneous assumption that the purpose of this proceeding is to maximize the number of shipments whose rates are evaluated under non-CMP methodologies.<sup>2</sup> The proper purpose of this proceeding is not to exempt all cases involving numerous origin-destination pairs or commodities, as well as the majority of all rail traffic, from the rigorous and accurate SAC analysis. Nor is the purpose of this proceeding to increase the likelihood that a complainant will recover more than its litigation cost, or to eliminate litigation risk. Rather, in the words of the statute, the purpose of this proceeding is to develop an “expedited method for determining the reasonableness of challenged rates *in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.*” 49 U.S.C. § 10701(d)(3) (emphasis added).

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<sup>1</sup> Because they have proposed eliminating SSAC, Joint Shippers may be suggesting tacitly that the eligibility threshold for Three Benchmark cases be increased to \$3.5 million. There is absolutely no support in the record for such a threshold level or for subjecting two-thirds of jurisdictional traffic to rate reasonableness review under a standard that does not attempt to emulate CMP results, and which the Board has stated should be used only as a last resort for the smallest cases.

<sup>2</sup> USDA’s suggestion that MVC be adjusted to reflect a complainant’s likelihood of prevailing has the same flaw as shippers’ similar suggestion. First, the likelihood of prevailing, even if it could be accurately projected without prejudging a case, should not be taken into account in determining the appropriate methodology for evaluating a rate challenge. Second, there is no objective and unbiased way to accurately determine a complainant’s likelihood of prevailing or amount of recovery at the outset of a case. And, it would be arbitrary to base the eligibility thresholds for all cases based upon a single generalized assumption about some aggregate, non-case-specific overall likelihood of recovery in all rate cases.

SAC remains the best and preferred rate reasonableness methodology except in those cases in which a SAC presentation is too costly. USDA offers only unsupported generalizations and hypothetical examples to suggest that a SAC presentation may be too costly for cases whose MVC exceeds \$3.5 million, or that a SSAC presentation may be too costly for cases whose MVC exceeds \$200,000. Such speculation is insufficient to demonstrate that the Board should raise the proposed eligibility thresholds.

**D. The Aggregation Presumption is Appropriate and Should Be Applied Flexibly to Achieve its Purpose of Preventing Manipulation of the Simplified Methods.**

The Board has correctly recognized the potential that shippers could manipulate the proposed framework by “disaggregating claims that could and should be brought in a single complaint.” NPRM at 34. The Board’s response – an aggregation requirement for certain claims brought by the same complainant within a two-year period – is an appropriate solution to the potential manipulation problem. As CSXT/NS have explained, the Board can address shippers’ concern about potential unfairness that might result from rigid application of the aggregation presumption in certain circumstances by confirming that it intends the aggregation presumption as a flexible “rule of reason,” to be applied as necessary to avoid manipulation. *See* CSXT/NS Reply Comments at 7-8. Such an approach would provide the latitude necessary to prevent inappropriate manipulation without unfairly barring multiple claims that could not have been brought in a single complaint.

**V. IF THE BOARD MAKES A FEW ESSENTIAL MODIFICATIONS, THE SSAC PROPOSAL SHOULD BE ADOPTED.**

**A. Much of the SSAC Proposal Appears to Be An Acceptable Effort to Implement the Requirement of 49 U.S.C. § 10701(d)(3).**

The Interstate Commerce Commission Termination Act required the STB to develop a simplified and expedited method for evaluating rate reasonableness challenges in cases in which a SAC presentation is too costly, given the value of the case. 49 U.S.C § 10701(d)(3). In accordance with that mandate, the Board issued its *Simplified Guidelines*. 1 S.T.B. 1004 (1996). The present proceeding attempts to revise those *Guidelines* in light of a decade of experience, multiple hearings on the subject, and other input from interested parties. Consistent with § 10701(d)(3), the Board's SSAC proposal is designed to eliminate some of the most time-consuming and costly elements of full SAC proceedings, without undue sacrifice of accuracy or the principles of Constrained Market Pricing.

Below, CSXT/NS describe proposed adjustments to the SSAC proposal intended to ensure that it is fair and consistent with other governing law and policy, and does not impose undue burdens on the parties; and to further reduce costs and complexity and enhance the efficiency of SSAC analysis. In addition to the specific adjustments described below, CSXT/NS re-emphasize that it is critical that the Board monitor the implementation and application of the SSAC framework it ultimately adopts, to ensure that it is consistent with the Board's other statutory responsibilities and national transportation policy and does not unduly sacrifice accuracy and analytical rigor in the service of speed and simplicity.

**B. CSXT/NS's Proposed Adjustments to SSAC**

1. The Costly and Time-Consuming Proposed Route Selection Process Should be Eliminated, and the SARR Should Follow the Issue Traffic's Predominant Route of Movement.

The Board should eliminate the alternative route selection phase of its SSAC proposal in order to reduce the costs and complexity of the SSAC approach while avoiding potential distortion of its results. *See* CSXT/NS Reply at 17-19. The Board's proposal would allow a complainant to designate any route over which the issue traffic has traveled in the last year as the preferred route for the SARR. The proposed procedural schedule then devotes 90 days – one quarter of the time allotted for the entire case from filing to final briefs – to discovery and litigation between the parties regarding the appropriate route for the SARR. *See* NPRM at 12, 16-17.

The predominant route of movement of the issue traffic best reflects the actual characteristics, capital costs, and operational expenses of the route that traffic uses. As the Board affirmed in its Decision, “the principal objective of the SAC constraint is to restrain a railroad from . . . charging more than it needs to earn a reasonable return on the replacement cost of the infrastructure used to serve that shipper.” NPRM at 10; *see id.* (SSAC is intended to achieve the same results as SAC, “albeit in a less precise manner.”). The Board further explained that the SSAC inquiry is “limited to whether the captive shipper is being forced to cross-subsidize other parts of the railroad’s rail network.” *Id.* at 11.

Allowing a complainant to use a route other than the predominant route of movement would thwart the fundamental objective of the analysis by founding it on infrastructure that generally is not used to serve the issue traffic, thereby making it impossible to

evaluate whether, using its primary route of actual movement, the issue traffic cross-subsidizes other portions of the defendant carrier's network. The proposed re-routing provision could distort the SSAC analysis and results by, for example, effectively allowing the issue traffic to avoid the actual costs incurred on the movement's predominant route (*e.g.*, greater capital investments on the predominant route), or by erroneously assuming it would benefit from more favorable characteristics of a route that it does not generally use (*e.g.*, greater economies of density on an alternative route).<sup>3</sup> *See* CSXT/NS Open. Comments at 12-15; CSXT/NS Reply Comments at 17-19.<sup>4</sup> Moreover, allowing a complainant to select a route other than the one predominantly used would also mean that the Board is not reviewing the costs of the actual rail transportation covered by the challenged rate, as required by 49 U.S.C. § 10704(a)(1).

In the real world, carriers re-route traffic in response to exigencies, not because a secondary route is better or more efficient. Such exigencies include temporary congestion, derailments, track maintenance and weather-related track repairs. Indeed, real world carriers' ability to re-route traffic on other lines in emergent situations is a benefit of their maintaining a rail network, a benefit whose cost is not borne by the SARR. The suggestion by some commenters, that rail carriers would make routing decisions based upon their effect on potential future rate cases (rather than their commercial and business judgment) is absurd.

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<sup>3</sup> The Joint Shipper Reply Comments misconstrue CSXT/NS's explanation that requiring a complainant to show that the alternative route has sufficient capacity to handle the issue traffic would not be an effective check on manipulation. What CSXT/NS explained was that issue traffic in SSAC cases would likely be handled in multiple less-than-trainload movements (unlike trainload movements of coal, for example), which would add cars to existing trains and thus would not likely impose a material strain on the capacity of the alternative route.

<sup>4</sup> *See also* Union Pacific Open. Comments at 14-19; BNSF Open. Comments at 18-19; Canadian Pacific Open. Comments at 8-10.

The Board could achieve considerable savings of time and expense while simultaneously guarding against distortion of the analysis, by simply requiring that a SSAC stand alone railroad follow the predominant route of movement of the issue traffic during the Test Year. *See* CSXT/NS Op. Comments at 12-15; CSXT/NS Reply Comments at 17-19. By eliminating litigation over route selection, the Board would free 90 days in the procedural schedule for use in other phases of the proceeding (where it is sorely needed), and save the parties from the substantial costs of discovery, preparation, and submission of three rounds of evidence regarding route selection. *See* CSXT/NS Reply at 17-19. Accordingly, CSXT/NS urge the Board to adopt their proposal to further simplify SSAC by eliminating the route selection process.

The SSAC proposal would also place extraordinary and undue burdens on defendant carriers. There is nothing in the record that suggests, much less demonstrates, that SSAC discovery should impose unique burdens on rail carriers. The proposed rules would impose on defendant carriers virtually the entire burden of collecting, producing, and analyzing the data and information complainants need for their case, and presenting that information to complainants in a particular format, regardless of whether the defendant maintains the information in that format in its regular course of business. *See* CSXT/NS Open. Comments at 5-8. In their opening comments, CSXT/NS urged the Board to modify the “second disclosure” phase of its SSAC proposal by applying the normal rules and requirements of discovery. That is, neither party should be required to collect, develop, arrange, or otherwise generate data or information that they do not produce in their normal course of business or arrange such data

other than in the manner in which it normally exists. And, each party should bear the costs of any special study it wishes to conduct for use in its rate case. *Id.*

Equally important, the discovery rules, as proposed, would encourage a deluge of new rate litigation, because shippers could seek rate relief with the investment of little more than the \$150 filing fee. Because the overwhelming burden of developing both parties' SSAC cases would fall on the defendant carrier, shippers would have every incentive to file rate complaints as part of the bargaining process. As the U.S. Department of Transportation warned in its comments, simply by filing a rate case under the Board's proposed approach, a shipper could obtain significant additional information, and improve its negotiating leverage, all at very little cost. *See* DOT Open. Comments at 8. These litigation incentives would conflict directly with a central goal of rail transportation policy over the last 25 years – to promote the establishment of rail rates through private negotiation and contracts rather than through regulation and litigation.

It appears that no party opposes CSXT/NS's moderate proposal to apply standard discovery rules to simplified rate challenges, including the "second disclosure" in SSAC. On reply, no party submitted comments disagreeing with the proposal. The largest group of shippers cited CSXT/NS's description of the burdens of discovery and production under the Board's proposal, essentially affirming that the proposed rules would impose a huge burden on defendant rail carriers. *See* Joint Shipper Reply Comments at 12-15.<sup>5</sup> Moreover, shipper Arkansas Electric Cooperative Corporation proposed that the Board "equalize (or equitably distribute)" the costs of

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<sup>5</sup> CSXT/NS's comments did not propose a "loser pays" solution to the problem of disproportionate discovery burdens. CSXT/NS simply proposed that SSAC cases proceed under normal discovery rules and each party bear the cost of its own special studies.

rate case “analysis and litigation,” and endorsed the Department of Transportation’s proposal that “shippers and carriers should bear ‘symmetrical burdens.’” AECC Reply comments at 9.

Further, Joint Shippers have expressed the view that shifting the discovery burden to the railroad would not save the complainant any money. *See* Joint Shipper Reply comments at 15-16; CSXT/NS Reply Comments at 19-20. So, in the view of the intended beneficiary of the proposal (shippers), its perceived cost and time savings are illusory. If the “Second Disclosure” proposal generates no benefits to the parties, there is no reason to impose its additional burden on defendant carriers.

CSXT/NS have not asked the Board to attempt to equalize the burdens of smaller rate case litigation – they recognize that, as in SAC cases, defendant carriers in small and medium rate cases will likely bear a greater discovery burden than complainants. Rather, CSXT/NS’s more moderate proposal is that defendants not be required to develop complainants’ case-in-chief, and that normal discovery rules (which apply in SAC cases) should govern SSAC cases. As a matter of fundamental fairness and due process, CSXT/NS urge the Board to adopt this proposed modification.

The time proposed for the second disclosure phase of SSAC cases is also inadequate. As CSXT/NS have explained, and as the Joint Shipper Comments acknowledge, it would be nearly impossible to develop and produce the required information within the 30 days allocated by the proposed procedural schedule. *See* CSXT/NS Open. Comments at 10; Joint Shipper Reply Comments at 14. To remedy this situation without lengthening the overall schedule, CSXT/NS suggest that the 90 days the Board had originally proposed to devote to route selection instead be used for discovery and development of a modified “second disclosure.”

See CSXT/NS Open. Comments at 10. Here again, no reply comments voiced opposition to the proposed increase in time allotted for the second disclosure,<sup>6</sup> and CSXT/NS ask the Board to adopt this proposed modification of the procedural schedule.

2. The Rate Prescription True-Up Process Should be Made Optional, to Allow Parties to Avoid Its Cost and Burden If They Wish.

Some commenters express concern that the annual rate prescription true-up process would be unduly burdensome and costly. To address that concern, CSXT/NS have proposed that the Board make the annual true-up optional. Under this proposal, parties to a case in which the Board prescribed a rate could opt to forgo the true-up process and maintain the existing prescription, to avoid devoting time and resources to that process. Each party would retain the right to request a true-up in any year in the five-year prescription period. Adoption of this proposal would allow parties to avoid the cost of an annual true-up if and when they wished to do so.

3. The Board Should Not Adopt the “MMM” Rate Prescription Method for SSAC Cases.

The Board should not adopt its proposal to apply the MMM methodology to prescribe maximum reasonable rates in SSAC cases. See NPRM at 13 (proposing to use in SSAC cases the same rate reduction methodology the Board adopted in Ex Parte 657 for SAC cases). In a Decision issued while this proceeding was pending, the Board adopted MMM for use in full SAC cases. See Ex Parte 657 Decision at 12-19 (Oct. 30, 2006). CSXT and NS

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<sup>6</sup> But see Joint Shipper Reply Comments at 14-15 (noting carriers’ suggestion that the NPRM provided too little time for the second disclosure, and complaining that the overall procedural schedule was too long).

opposed the Board's MMM proposal in Ex Parte 657 as, *inter alia*, (i) inconsistent with fundamental principles and requirements of CMP and the Board's statutory responsibilities; and (ii) unnecessary because "gaming" has never occurred and if it ever did, the Board could impose appropriate relief. Both CSXT and NS have appealed the Decision and rules promulgated in Ex Parte 657, and they will argue on appeal that the adoption of MMM should be struck down as unlawful. *See CSX Transportation, Inc. v. STB*, No. 06-1374 (D.C. Cir.); *Norfolk Southern Railway Company v. STB*, No. 06-1373 (D.C. Cir.).

It is not appropriate or lawful to use the MMM approach to prescribe rates in cases evaluated under the proposed SSAC approach. Commenter BNSF Railway Company has explained in detail the flaws in the MMM approach, and the reasons it would be arbitrary, capricious, and clearly erroneous to apply MMM in SSAC cases. *See* BNSF Reply Comments at 28-33; BNSF Open. Comments at 32-35. CSXT and NS endorse and support BNSF's arguments against the adoption of MMM in this proceeding, and they join and adopt those arguments. The Board must not adopt MMM as the method to prescribe rates in SSAC or any other approach adopted in this proceeding, and to do so would be arbitrary, capricious, and clearly erroneous.

4. For SSAC to Be Workable, The Board Must Resolve All Cost Issues In SAC Cases.

If the Board intends to use rolling averages of road property investment costs from the most recent five SAC cases as the basis for SSAC road property costs, the Board must evaluate and decide all cost issues in all SAC cases. This would eliminate the Board's ability to decide a case by determining that one party would prevail even if all of the opposing party's road property investment cost evidence were accepted (such an approach would understate road

property investment and thereby distort the rolling average for subsequent SSAC cases). *See, e.g., PPL Montana, LLC v. BNSF Railway Co.*, STB Docket No. 42054, Decision, slip op at 10-15 (Aug. 20, 2002). Complete analysis of cost issues in SAC cases would be essential to generate accurate inputs for SSAC cases.

**C. Despite Their General Criticisms, Shippers Offer No Constructive Suggestions or Meaningful Alternative to the SSAC Proposal.**

Shippers level a number of general criticisms against the Board's SSAC proposal, but their comments are virtually devoid of suggestions for workable improvements to the methodology. Indeed, shippers' only real "proposal" is to eliminate SSAC altogether, and thus abandon the Board's three-tier approach in which larger non-SAC cases (*i.e.*, "medium" size cases) are judged under SAC-like standards.

1. Shippers Contradict Themselves

The major shipper reply filing essentially takes the position that the Board's attempt to simplify the rate reasonableness analysis for smaller cases while continuing to meet its other statutory requirements and responsibilities is futile. *See* Joint Shipper Reply Comments at 12-21. On one hand, shippers argue that SSAC as proposed is too complex. On the other hand, they argue that if SSAC is to be accurate and lawful, it needs to be made even more complex. *See id.* It is difficult to understand the shippers' view of the need for accuracy. The untenable position of most shippers appears to be that, because it is (in their view) too difficult to craft a rate reasonableness approach that is both simplified and reasonably accurate, the Board should give up on accuracy and evaluate all non-SAC cases under the rough and far *less* accurate Three Benchmark approach, an approach that shippers themselves criticize as "skew[ed],"

“fundamentally unfair,” “arbitrary and capricious,” and inconsistent with statutory requirements. *See* Joint Shipper Open. Comments at 34-37. In shippers’ criticism of SSAC, they emphasize that accuracy is important; but in their promotion of the Three Benchmark methodology for all non-SAC cases, accuracy is apparently irrelevant .

2. Shippers’ Apparent Objective is to Obtain Quick and Inexpensive Rate Reductions, Which is Not a Proper or Intended Goal of This Proceeding.

In the end, shippers’ comments make clear that their overriding objective in this proceeding is to obtain a rate evaluation process that is quick, cheap, and results in significant rate reductions. *See e.g.*, Joint Shippers Open. Comments at 4-8, 13-14. Beginning with the unsupported and erroneous assumption that rail transportation rates are presently too high, the majority of shipper comments are aimed at refashioning the existing rate reasonableness framework to encourage greater regulatory intervention, less reliance on market forces and negotiation, and a regulatory methodology that will predictably reduce rates in most cases. *See, e.g., id* at 4-15, 17-19; NITL Open. Comments at 3-13; Occidental Chemical Corp. Open. Comments. None of these objectives is a proper or wise goal for this proceeding. The appropriate purpose of this proceeding is not to increase regulation and litigation, to dilute standards for evaluating rate reasonableness, or to consistently drive down rail transportation rates. The Board should disregard comments that are not aimed at developing a simple, but reasonably accurate, process to evaluate rate reasonableness.

3. Subjecting All Non-SAC Traffic to the Proposed Three Benchmark Method Would be Unsound Policy, Arbitrary, Capricious, and Contrary to Law.

Shippers' proposal to eliminate SSAC, in combination with their proposed elimination of the aggregation rule and request for "drastic" increases in eligibility thresholds would subject the vast majority of rail rates within the Board's jurisdiction to evaluation under the rough and less accurate Three Benchmark formula. The Three Benchmark methodology, as proposed by the Board, or with the changes requested by shippers, would impose rates by the application of a simplistic formula. As discussed below in Section VI, this methodology is contrary to law. It is also bad public policy. Because the Board proposes to exclude consideration of any other factors, including major market factors, the Board would ignore the market when prescribing rates. The formulaic approach would often drive down rail rates and revenues at a time when sound rail transportation policy requires increased revenues. Such additional revenue is essential for the capacity and service enhancements necessary to respond to rail customers' rapidly increasing demand for service. Particularly at this point in U.S. transportation history, any proposal that would subject even more rail revenue to the inaccurate, "last resort" Three Benchmark methodology should be rejected out of hand as unwise and unsound policy, as well as arbitrary, capricious, and contrary to law.

4. SSAC Shortcuts Should Not be Applied to SAC Cases.

At least one commenter has suggested that it may be appropriate, at some time in the future, to use SSAC procedures and shortcuts for full SAC cases.<sup>7</sup> CSXT/NS strongly

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<sup>7</sup> See Union Pacific Reply Comments at 62-63.

oppose this suggestion.

There is simply too much revenue at stake in SAC cases to subject them to rate reasonableness determinations under the less accurate and less rigorous SSAC shortcuts. As the Board has repeatedly and correctly held, “CMP, with its SAC constraint, continues to be our preferred and the most accurate procedure available for determining the reasonableness of rail rates where there is an absence of effective competition.” NPRM at 9. While SSAC shortcuts may be acceptable for cases in which a full SAC presentation is not feasible given the value of the case (*see* 49 U.S.C. § 10701(d)(3)), there is no basis in law or policy to evaluate full SAC cases under truncated SSAC standards and procedures. Moreover, without results from SAC cases, SSAC would be unworkable because the results of SAC cases are essential inputs to the SSAC analysis. *See* NPRM at 13, Appendix A (39-48).

**VI. IF THE BOARD MAKES CRITICAL MODIFICATIONS, THE THREE BENCHMARK PROPOSAL MAY BE AN ACCEPTABLE LAST RESORT APPROACH FOR CASES FOR WHICH EVEN SSAC IS NOT FEASIBLE, GIVEN THE VALUE OF THE CASE.**

CSXT/NS support the Board’s efforts to create an appropriate rate reasonableness methodology for cases too small to justify a SSAC analysis. Throughout this proceeding, CSXT/NS have offered constructive comments in an effort to improve the Three Benchmark proposal. That constructive criticism should not obscure the fact that the Three Benchmark approach, as proposed by the Board, is seriously flawed. Below, CSXT/NS describe the most significant flaws in the Three Benchmark approach and their proposals to remedy those flaws.

**A. The Board's Proposal to Use a Mechanical Formula to Dictate the Results of Three Benchmark Cases is Unlawful and Unjustified, and It Should Not Be Adopted.**

The most critical flaw is the Board's proposal to rely on a formula to definitively determine the reasonableness of a rate and to prescribe a maximum reasonable rate. Reducing rate reasonableness review to an inflexible formula is an unjustified departure from the Board's long recognition that no mechanical formula can provide definitive answers on whether a rate is reasonable. Indeed, even shippers agree that the Board should take "non-formulaic considerations" into account in Three Benchmark proceedings. Joint Shipper Reply Comments at 25.<sup>8</sup> The Board should not depart from its precedents and the law by adopting an approach that would eliminate its ability to use its expertise to judge the reasonableness of rates in light of all the relevant factors.

Rate setting is a complex undertaking, and the reasonableness of any given rate depends upon a variety of market factors that cannot be encompassed adequately by any formula. To be sure, formulas are simple. But simplified rate procedures must be more than just simple there is no value in a procedure that is quick, simple, and wrong. As the Board has explained, "simplified procedures must be equitable, must comport with the underlying statutory directives and guiding economic principles, and must produce realistic measurements." *Simplified Guidelines*, 1 S.T.B. at 1010. No automatic formula can satisfy these standards. No such

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<sup>8</sup> While the Joint Shippers originally proposed a fundamentally unfair approach in which railroads would be bound by the outcome of the Three Benchmark formula but shippers could present evidence that a rate level below the formula was nevertheless unreasonable, *see* Joint Shipper Open. Comments at 37, their Reply Comments agree that both railroads and shippers should be able to introduce evidence of "non-formulaic considerations." Joint Shipper Reply Comments at 25.

formula will consistently “produce realistic measurements” of what rates are reasonable. *Id.* Nor can a formula “comport with . . . guiding economic principles” of constrained market pricing or “the underlying statutory directives” of revenue adequacy. *Id.*; see 49 U.S.C. § 10704(a)(2). The only way to balance the competing goals of simplicity and accuracy and reach “realistic measurements” is for the Board to adopt a flexible approach that permits it to exercise its judgment in light of all relevant evidence. *Simplified Guidelines*, 1 S.T.B. at 1010.

The Board, and the ICC before it, have long recognized “that no single formula for measuring a rate could deal satisfactorily with the complexities of a rail rate analysis.” *Coal Rate Guidelines*, 1 I.C.C. 2d 520, 524 (1985). Before the adoption of the Coal Rate Guidelines, the ICC experimented with a formulaic approach of setting a maximum reasonable rates at 7% above fully allocated costs; however, that “seven percent solution” was firmly rejected by the D.C. Circuit. See *San Antonio v. United States*, 631 F.2d 831, 852-53 (D.C. Cir. 1980). Subsequently, the ICC concluded that there was no “ready formula for testing a rate” accurately. *Coal Rate Guidelines*, 1 I.C.C. 2d 520, 524 (1985). The ICC supported its rejection of formulas with the observation that “the overall [statutory] scheme calls for a flexible, non-mechanical approach to ratemaking.” *Id.* at 524 n.9 (quoting *Public Serv. Co. of Ind. v. I.C.C.*, 749 F.2d 753, 763 (D.C. Cir. 1984)).

The Board’s 1996 decision establishing the existing *Simplified Guidelines* continued to reject “formulaic approach[es].” *Simplified Guidelines*, 1 S.T.B. at 1023. The Board made clear that the three benchmarks it proposed were not formulas giving all the answers—on the contrary, the Board recognized that the benchmarks had “limitations,” and for that reason they were “only a starting point, not the end result, of a rate reasonableness analysis.”

*Id.* at 1013. Indeed, the Board firmly rejected “a strictly formulaic approach,” and instead made it clear it would consider “whatever additional information is available that bears on the reasonableness of the pricing of the traffic at issue.” *Id.* at 1022-23. The only rationale for departing from this longstanding aversion to formulas – the mere passage of time – has not made a formulaic approach any more economically rational, consistent with statutory directives, or lawful. There is no reason in the record for the Board to abandon that position, and changing course without justification would be arbitrary and capricious.<sup>9</sup>

The Board’s particular formula proposal is even more problematic because it is not grounded in sound economics. Unlike SSAC, which is designed to approximate SAC, the Three Benchmark approach has no relationship to SAC or to the principles of constrained market pricing—the only court-approved methodology for railroad rate regulation. *See Consolidated Rail Corp. v. United States*, 812 F.2d 1444, 1457 (3d Cir. 1987) (upholding *Coal Rate Guidelines*). Nor is the Three Benchmark formula based on any other economic theory. While shippers support the proposed Three Benchmark approach to the extent of arguing that it should apply to almost all traffic, not one of them has been able to articulate an economic justification for it.

The only way that the Three Benchmark approach might begin to “comport with the . . . guiding economic principles” of SAC is for the Board to reject the formula approach and

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<sup>9</sup> In addition, the NPRM departs from the Board’s approach in *BP Amoco Chemical Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42093 (June 6, 2005), which was issued after the Board had completed two rounds of hearings on changes to small case guidelines. While the Board proposed several modifications to the Simplified Guidelines in *BP Amoco*, it never suggested that it intended to depart from the Simplified Guidelines’ rejection of “a strictly formulaic approach.” There is no reason in the record for the Board to change course now.

flexibly use the benchmarks—along with all other relevant evidence—to guide its judgment in cases too small for a SSAC or SAC analysis. *Simplified Guidelines*, 1 S.T.B. at 1010. In particular, the Board must modify the Three Benchmark approach along the lines set forth in CSXT/NS’s prior submissions.

First, the Three Benchmark approach should be a flexible one in which the benchmarks are used as “the starting point, not the end result, of a rate reasonableness analysis.” *Id.* at 1022. In any Three Benchmark case, the Board should consider benchmarks (including both the three benchmarks proposed in this proceeding and the existing benchmarks and measures adopted in *Simplified Guidelines*) as guideposts for the exercise of its judgment in light of all relevant evidence—not as elements of a simplistic determinative “reasonableness” formula. Second, and closely related, the Board should consider all relevant evidence in a Three Benchmark proceeding – particularly evidence on cost and market issues that significantly affect the reasonableness of a rate. Third, because even a modified Three Benchmark approach will be a “rough, but reasoned call” that lacks the accuracy of a SSAC or SAC analysis, *id.* at 1023, the Board should limit the Three Benchmark approach to the very smallest of cases where even a SSAC analysis is impractical. As discussed in Section IV.B., the Board’s proposed MVC eligibility threshold sets an appropriate eligibility ceiling boundary for use of the Three Benchmark approach. Fourth, the Board should monitor the results of Three Benchmark proceedings to ensure that they remain in line with Constrained Market Principles.

**B. The Use of a Confidence Interval Will Not Solve the Fundamental Problems Caused By Treating the Benchmarks as Components of a Formula.**

The Board may not adopt a formula that has the effect of prescribing rates at an ever-declining average. *See Burlington N. Ry. Co. v. I.C.C.*, 985 F.2d 589, 597 (D.C. Cir. 1993) (holding that such an effect is a “fundamental conceptual problem” with using a mean figure to evaluate a rate’s reasonableness).<sup>10</sup> The Board’s proposed Three Benchmark formula suffers from this same fatal flaw. Repeated application of the proposed approach to the higher rates in a comparison group to reduce rates to the upper boundary of a 90% confidence interval around the estimated mean—like repeated prescription to the mean itself—necessarily will reduce both the mean rate and the upper bound of the confidence interval, and drive those rates down toward the mean. *See V.S. Lowengrub* at 3-7.

As Dr. Lowengrub explains, the use of a confidence interval will not eliminate this feedback effect. The net result of repeated application of the proposed approach would be to drive above-average rates down to the average. Nor would the proposed “revenue adequacy adjustment” of inclusion in the comparison group of movements subject to SAC or SSAC significantly mitigate this effect of the proposed approach (reducing rates toward the mean, while reducing the mean itself). *Compare V.S. Lowengrub* at 7-10 *with NPRM* at 27-28. Rather, to properly address this “fundamental conceptual problem,” the Board must abandon its proposal to treat the benchmarks as elements in a determinative formula, and instead treat them as a few

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<sup>10</sup> The Joint Shippers argue that the Board should abandon use of the confidence interval and assert that the confidence interval would have a “ratchet-up” effect on rates. *See Joint Shipper Reply Comments* at 22. As explained in the attached Verified Statement of Dr. Paul Lowengrub, this is not the case.

among many relevant factors and considerations that it will use to guide its expert evaluation of the reasonableness of a challenged rate and to prescribe a maximum reasonable rate where necessary.

**C. The Board's Proposed Adjustments to the RSAM and R/VC<sub>>180</sub> Benchmarks Would Make Those Benchmarks Less Useful.**

CSXT/NS generally do not object to the Board's decision to calculate revised versions of the RSAM and R/VC<sub>>180</sub> benchmarks, so long as those revised calculations are considered along with the original benchmarks as part of the Board's analysis. *See* CSXT/NS Open. Comments at 23. However, CSXT/NS agree with other commenters that the original formulations are more consistent with the statutory standard than the proposed revisions. *See* BNSF Open. Comments at 41-45. As CSXT/NS noted in their initial comments, the original RSAM and R/VC<sub>>180</sub> benchmarks are "more useful" than the Board's proposed revisions, for the original benchmarks focus on traffic priced at over 180% of variable costs, *i.e.*, traffic that is presumably more demand inelastic. Open. Comments of CSXT/NS at 23. Both of these original benchmarks were grounded in the Board's recognition that "a simplified rate reasonableness analysis . . . [must] account[] for a railroad's need to earn adequate revenues" by differentially pricing potentially demand inelastic traffic. *Simplified Guidelines*, 1 S.T.B. at 1027. The Board has offered no rationale for no longer accounting for a railroad's need to earn adequate revenues as Congress has directed.

The Board's current proposal to replace these benchmarks with ratios calculated from *all* traffic is fundamentally at odds both with the statutory demand to consider revenue adequacy and with principles of differential pricing. Indeed, the NPRM concedes that the

purpose of the Board's revisions is "to allocate responsibility for a carrier's revenue shortfall amongst all the traffic it carries." NPRM at 24. It is economically illogical—and contrary to a basic tenet of CMP—to assume (erroneously) that railroads' ability to price traffic to recover revenues is equivalent for all traffic regardless of competition and demand elasticity. And, there is no evidence in the record to support the conclusion that railroads have market power over traffic priced below 180% of variable costs.<sup>11</sup> The only effect of the Board's change in course would be to make the benchmarks more divorced from the statutory requirement that the Board consider revenue adequacy. While CSXT/NS do not object to the Board considering these benchmarks along with existing measures and benchmarks as part of its analysis, using them as a blindered formula for determining rate reasonableness would be arbitrary, capricious and erroneous.

#### **D. Comparability Determination**

The utility of the  $R/VC_{COMP}$  benchmark—and to a large extent the accuracy and value of the Three Benchmark analysis in general—depends on the comparable traffic group. For this reason, selection of the comparable traffic group should be done in a careful and rigorous manner. And because comparability requires an assessment of all factors "which could

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<sup>11</sup> The Board's observation that railroads "raised rates on competitive traffic as demand for rail transportation increased" is irrelevant to the question of whether railroads have market power over competitive traffic. NPRM at 24. In any market, prices rise and fall based on the laws of supply and demand. The fact that rates rise as "demand for rail transportation increased" does not indicate that railroads have some sort of market power over all traffic (and certainly not over traffic with  $R/VC$  rates below 180%)—rather, it is what one would expect in a well-functioning market. Also, markets change. It is likely that at various points in the business cycle demand for rail services will decline. It is arbitrary and capricious to adopt benchmarks that assume railroads have pricing power over traffic that is not only subject to effective competition but traffic over which railroads have declining pricing power or no pricing power at all.

affect demand characteristics and operating costs,” NPRM at 20, the Board must consider individualized evidence concerning potentially comparable movements. Because selection of comparable movements is a key part of a Three Benchmark case, it is appropriate for the parties to spend some time on it.<sup>12</sup>

The Joint Shippers’ claim that railroads like CSXT and NS seek to “overwhelm shippers . . . with sophisticated elasticity arguments” is unfounded. Joint Shipper Reply at 22. The Board certainly does not need to consider “endless” presentations on every conceivable factor, *id.*, and it can direct parties to refrain from such tactics. But the Board cannot make a meaningful determination of whether movements are comparable without considering the factors that affect comparability, many of which will vary from case to case and movement to movement.

The Board can alleviate any legitimate concerns about unnecessarily complex proceedings by adopting two of CSXT/NS’s proposals. First, the Board should give parties more guidance on the primary factors it believes will be most relevant to comparability in most cases. *See* CSXT/NS Open. Comments at 24. Such guidance would help parties to focus their presentations on the most relevant factors.

Second, the Board should create a rebuttable presumption that movements of the same commodity in similar service over a similar distance are comparable, and put the burden of proving otherwise on the defendant rail carrier. *See* CSXT/NS Reply Comments at 31. A

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<sup>12</sup> Replacement of the Board’s formulaic approach to Three Benchmark cases with a more flexible approach will reduce potential conflicts over comparability, both because the outcome of the R/VC<sub>COMP</sub> will no longer dictate the outcome and because the Board would have the flexibility to give different weights to movements with varying comparability.

railroad would be able to overcome this presumption by proving by a preponderance of the evidence that the movement is not comparable. Such a framework would simplify the evidence necessary for shippers to show that movements are comparable, while preserving the Board's ability to consider evidence of relevant comparability factors other than commodity and distance.

**E. Updating Waybill Sample Revenue**

The Board should also address the discrepancy caused by measuring the reasonableness of current rates against Waybill Sample data, which is necessarily historical data that can be over two years old. The Board should consider some procedure to bring Waybill Sample data up to date. One possibility would be to update the Waybill Sample with current revenues for identical current movements. Where that is not possible, the Board should consider some sort of indexing.

**F. The Board should reject the shippers' proposal to grant them access to highly confidential waybill sample data that is irrelevant to selection of the comparison group.**

As discussed in CSXT/NS's Reply comments, the Board should reject the Joint Shippers' demands for (i) data on traffic that is not from the same 2-digit STCC as the issue movement; and (ii) unmasked revenue data from waybill samples. *See* CSXT/NS Reply Comments at 28-32.

First, "expanding the universe of potential compar[ables]" beyond traffic with the same 2-digit STCC is an unnecessary complication of the Three Benchmark process. Joint Shipper Open. Comments at 38. As demonstrated in CSXT/NS's reply comments, a data set of all movements from the 2-digit STCC is already overbroad, for rarely, if ever, will commodities with the same two digit STCCs be comparable. *See* CSXT/NS Reply Comments at 32 (noting

that, for example, spent nuclear fuel and chlorine gas are within the same 2-digit STCC as non-hazardous soda ash). There is no reason to expand that universe to even less comparable commodities, and to do so would complicate the Three Benchmark process without any potential for identifying traffic that is more comparable to the issue traffic.

Second, the Joint Shippers' demand for access to unmasked waybill sample data should be rejected. *See* CSXT/NS Reply Comments at 28-30. The premise of the Joint Shippers' demand—that a railroad's knowledge of the actual revenue for a contract movement masked in the waybill sample will give the railroad some advantage in selecting a comparison group—is fundamentally incorrect. The Board's proposal makes clear that “[t]he comparability of a movement should depend on the characteristics of the movement, not the level of the rate for that movement.” NPRM at 33 (emphasis added). For this reason, “unmasked revenue information . . . would not be necessary to formulate a reasonable comparison group.” *Id.* Moreover, the only revenue data masked in the Waybill Sample is that for contract movements. As a practical matter, there is a good chance that contract traffic will not be comparable to the challenged tariff movement(s). *See* CSXT/NS Reply Comments at 29.<sup>13</sup>

In all events, the Joint Shippers' request for access to unmasked revenues in the Waybill Sample prior to filing a case is wholly unwarranted and inconsistent with the Board's

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<sup>13</sup> The Joint Shippers' hypothesis that railroads might manipulate their Waybill Sample revenue masking factors to gain an advantage in Three Benchmark proceedings is completely unwarranted. *See* Joint Shipper Comments at 35. Regardless, the Board already has the ability to protect against any “gaming” through its review of each carrier's masking factors. *See* 49 C.F.R. § 1244.3(b).

long history of guarding that revenue information very closely.<sup>14</sup> Unmasked waybill revenue data “ha[s] never been made publicly available, not even under a protective order”; on the contrary, it has “been held in the strictest confidence, and, at any time, ha[s] been known only by a few members of the Board’s staff.” Finance Docket No. 33388, *CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co.—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corp.* (Decision No. 42, served October 3, 1997), at 7.<sup>15</sup> The Board should refuse the Joint Shippers’ invitation to abandon this sound, longstanding policy.

## VII. URCS COST ADJUSTMENTS

The Joint Shippers erroneously “[p]resum[e]” what CSXT/NS’s position on the Board’s URCS proposals might be if one or another of CSXT/NS’s proposals are adopted. Joint Shipper Reply Comments at 26 n.19. The Board has proposed to use URCS system average costs in three ways in SSAC and Three Benchmark cases, and CSXT/NS’s position on each of these proposals is clear.

First, CSXT/NS do not object to the Board’s proposal to use unadjusted URCS in SSAC cases to estimate SARR operating and equipment costs. *See* CSXT/NS Initial Comments at 16.

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<sup>14</sup> Congress also strongly favors keeping rate information confidential, as evidenced by the statutory prohibition against rail carriers disclosure of such information. *See* 49 U.S.C. § 11904. Further evidencing the importance of confidentiality of individual rates, many rail transportation contracts expressly prohibit disclosure of contract rates.

<sup>15</sup> *See also* Ex Parte No. 385 (Sub-No. 4), *Modification of the Carload Waybill Sample and Public Use File Regulations* at 3 (June 16, 2000) (“Our long-standing policy is not to release actual contract revenues reported in the confidential waybill sample because of the potential for commercial harm to both the contracting railroad and shipper.”).

Second, CSXT/NS do not object to the Board's proposal to use unadjusted URCS costs for initial jurisdictional threshold determinations in SSAC or Three Benchmark cases. CSXT/NS strongly disagree with the Board's decision in *Ex Parte 657* to abandon the use of movement-specific calculations and adjustments to URCS costs for jurisdictional threshold determinations in SAC cases; in the context of small cases, however, using unadjusted URCS for the initial jurisdictional determination is an acceptable simplification.

Third, URCS adjustments must be allowed to determine the maximum prescribed rate if a railroad's rate is adjudged unreasonable. The Board's proposed regime, which would definitively prescribe rates without accounting for the actual costs of the movement at issue, would be illegal. *See* 49 U.S.C. § 10704(a)(1). Prescribing rates based on unadjusted URCS could also violate Congress' mandate that the Board not regulate traffic with an R/VC of under 180%. *See id.* § 10707(d)(1)(A). Congress empowered the Board to make URCS adjustments where necessary or appropriate, and the Board cannot abdicate that responsibility in the name of simplicity when it is prescribing a rate. *See id.* § 10707(d)(1)(B). It is one thing to subject a carrier to the litigation of a small case when the actual R/VC is under 180%; it would be entirely different for the Board to prescribe a rate on traffic that Congress has removed from its jurisdiction or prescribe a rate below the statutory floor for rate prescriptions because the Board failed to examine and determine the actual costs for the transportation at issue.

In reply, the Joint Shippers offer the unresponsive contention that the Board should ignore statutory limits on its rate reasonableness jurisdiction because it would be "equally unlawful" for the Board to prescribe a maximum rate that is above a reasonable level. Joint Shipper Reply Comments at 31. This "response" makes no sense, and does not address

CSXT/NS's point. Congress has expressly forbidden the Board from regulating traffic with an R/VC ratio of less than 180% (*i.e.*, the Board has no jurisdiction over such traffic), while it has given the Board discretion to determine whether challenged rates with its jurisdiction are reasonable. *See* 49 U.S.C. § 10707(d)(2). Moreover, URCS adjustments are essential to comply with Congress' instruction that rates be "reasonable"; considering the actual costs of the transportation at issue (not the system average of all transportation provided on the railroad) is necessary to prescribe a reasonable rate for that transportation. *See* 49 U.S.C. § 10704(a)(1) (Board's jurisdiction only extends to deciding reasonableness of "a rate charged or collected by a rail carrier for transportation").

Shippers do not—and cannot—dispute that, without adjustments, URCS simply does not reflect the actual costs of many movements. Instead, they suggest that the Board's preclusion of adjustments by either shippers or carriers will balance out and be a reasonable "trade-off." Joint Shipper Reply Comments at 27. The Shippers' comments seem to echo the Board's reliance on a comparison of URCS costs before and after adjustments in the *Xcel* rate case. *See* NPRM at 15 (citing Board's discussion of *Xcel* in *Major Issues in Rail Rate Cases*, Ex Parte 657 (Sub-No. 1) at 23-27 (Feb. 27, 2006)). Even if *Xcel* were representative of all coal cases (and there is no evidence that it is) and even if prohibiting adjustments were appropriate in SAC cases involving coal transportation (and it is not), prohibiting adjustments is not appropriate in non-SAC cases. For many categories of smaller movements, disallowing appropriate adjustments plainly would have a substantial adverse effect on defendant railroads. Prohibiting such adjustments without any URCS costing experience in rate reasonableness cases that do not

involve coal transportation would be arbitrary, capricious, and could result in illegal rate prescriptions below the Board's jurisdictional threshold.

For example, the Joint Shippers admit that hazardous materials shipments involve greater real world costs than non-hazardous shipments, and that URCS costing of hazardous material shipments would produce inaccurate results, absent adjustments. Nevertheless, they claim that the Board should not permit adjustments to URCS costs because the additional costs would be "hard to quantify." But the cost of hazardous materials shipments is not limited to "risk," but also includes more readily quantified increased expenses. For example, the Department of Transportation and the Department of Homeland Security have proposed regulations on the transportation of certain hazardous materials that significantly increase the cost of transporting such materials, including costs for monitoring and inspection. *See Notice of Proposed Rulemaking, Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments*, 71 Fed. Reg. 76833 (Dec. 21, 2006); *Notice of Proposed Rulemaking, Rail Transportation Security*, 71 Fed. Reg. 76852 (Dec. 21, 2006). There is no doubt that URCS will not accurately reflect actual costs for specific higher-risk movements, and the possibility of dispute about how much higher the costs would be is no reason to refuse to account for any higher cost.

Similarly, shippers provide no rationale for prohibiting adjustments for other transportation such as the movement of circus trains or high/wide shipments moving under tariffs, other than asserting that most such movements move under contract. But if the Board does not allow adjustments, shippers could let contracts expire and then extract unreasonably low

rates in the knowledge that the costs for those movements would not be reflected in a small rate case.

The Joint Shippers assert that allowing any movement-specific adjustments will inevitably lead to an “endless” and “destructive” stalemate, but this hyperbole is unfounded. Joint Shipper Reply at 27. Many of the most important movement-specific adjustments can be implemented with minimal cost and expense. For example, it is very easy to determine the actual number of locomotives used for an issue movement. There is no good reason to use an URCS-average estimate of 2.4 locomotives for a movement in lieu of the actual number. The actual number of locomotives would obviously not be 2.4 – it could be anywhere between one and four, or more. In either case, the actual number of locomotives is not subject to dispute, and there should be minimal expenses in ascertaining the answer and making the corresponding adjustment. It is similarly not difficult to adjust for payments to third parties, whether those payments are made to short lines, to loaders, or to terminal switchers. Such payments are not captured as costs by URCS, but they can have a significant effect on the actual costs of a movement. In the same vein are adjustments such as car hire costs and private car mileage allowances, which are potentially significant adjustments that can be made with little additional expense to the parties.<sup>16</sup> Indeed, many of these adjustments have been resolved expeditiously and cheaply through technical conferences conducted by STB staff in SAC cases.

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<sup>16</sup> Many of these simple adjustments would benefit *complainants*. For example, an adjustment for switching payments would benefit a shipper who performs switching for the issue traffic. And an adjustment for the actual number of locomotives would benefit the shipper whenever the actual number is less than the overall average, as when an average of 2.4 locomotives is replaced with an actual number of two.

While some movement-specific adjustments that CSXT/NS have proposed may require somewhat more effort, their effect on the accuracy of the Board's determination makes it necessary for the Board to consider them. For example, current fuel costs could differ significantly from the URCS system averages, in part because URCS is based on costs from several years previous. Particularly when the Board is prescribing rates, the need for accuracy requires that it consider this evidence of actual costs.

There is a reasonable middle ground between "endless" movement-specific adjustments and a regime that blindly imposes URCS costs while ignoring critical and readily ascertainable facts affecting the actual costs of the movement at issue. The Board can significantly control the expense of litigating movement-specific adjustments by limiting the adjustments that it will consider in a simplified proceeding. At a minimum, the Board should allow adjustments for fuel costs, equipment ownership, locomotive costs, crew wages, loading times, car hire costs, private car mileage allowances, absorbed switching costs, and movement-specific payments to others.

In addition, the Board should recognize that diverse types of movements could come before it and should remain open to consider additional appropriate adjustments in extraordinary circumstances. While many of the Board's past cases have elaborated on the movement-specific adjustments for coal, cases involving other commodities could implicate different types of adjustments. For example, a movement of hazardous materials imposes costs of regulatory compliance that are not reflected in URCS costs. No reasonable rate for a shipment of hazardous materials could be determined without reference to those increased costs. The

Board should leave enough flexibility for the consideration of such extraordinary circumstances or movement characteristics in an appropriate case.

**VIII. REQUESTS FOR PARTIAL REVOCATION OF AN EXEMPTION FILED IN CONJUNCTION WITH A RATE CASE MUST BE EVALUATED UNDER THE SAME STANDARD AS ANY OTHER PETITION FOR REVOCATION.**

CSXT/NS reiterate their opposition to the Board's proposal to consider an exemption revocation request while a rate case relating to the exempt commodity proceeds. Such a process would be inefficient and inconsistent with the deregulatory purpose of the Staggers Rail Act of 1980 in general and exemptions in particular. The class exemptions identified in 49 C.F.R. § 1039 were established because of the ICC's expert findings that there are competitive markets for the transportation for the listed commodities and that therefore the Rail Transportation Policy supported their exemption from regulation. *See, e.g., Rail General Exemption Authority—Lumber or Wood Products*, Ex Parte No. 346 (Sub-No. 25), 7 I.C.C.2d 673 (1991). It would subvert the purpose of these exemptions for the Board to require a carrier of an exempt commodity to defend itself from a rate complaint before a reasoned finding supporting revocation of that exemption. *See American Rail Heritage, Ltd. d/b/a/ Crab Orchard & Egyptian R.R. v. CSX Transportation, Inc.*, ICC Docket No. 40774 (June 5, 1995) (hereinafter "*Crab Orchard*") ("Before we may assert jurisdiction to hear any complaints involving [revocation of an exemption], we must revoke the exemption in whole or in part."). Therefore the threshold issue of exemption revocation should be decided at the outset of a case, before requiring the parties to engage in discovery and development of evidence. In those cases in

which an exemption is not revoked, initial determination of this threshold issue will save significant resources of the parties and the Board.<sup>17</sup>

The Joint Shippers argue that the Board can consider whether to revoke an exemption concurrent with the merits of the case because of the supposed “close[] relat[ion]” between the market dominance standard and the market power considerations of the Rail Transportation Policy. Joint Shipper Reply Comments at 34. The Joint Shippers misunderstand the statute and these two distinct inquiries. In the first place, the Rail Transportation Policy requires consideration of a number of policies that are not considered in the initial market dominance inquiry of a rate case—including the policies “to minimize the need for Federal regulatory control over the rail transportation system” and to “allow[] rail carriers to earn adequate revenues.” 49 U.S.C. § 10101(2, 3). Moreover, the Joint Shippers’ claim that the statute governing the market dominance inquiry is “word for word” identical to § 10101(6) of the Rail Transportation Policy is incorrect. Joint Shipper Reply at 34. The market dominance

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<sup>17</sup> The Board’s decision in *FMC Wyoming v. Union Pacific Railroad*, STB Docket No. 42022 (Aug. 31, 1998) – that the unique circumstances in that case warranted the simultaneous consideration of a rate challenge and a petition for revocation – does not support the proposal to defer determination of an exemption revocation request where the sole (or primary) issue traffic is covered by an exemption. The primary harm from allowing rate litigation to proceed before an exemption has been revoked – *i.e.*, the harm from subjecting a carrier of an exempt commodity to potentially unnecessary litigation and discovery costs – was not present in *FMC Wyoming*. The exempt commodity in *FMC Wyoming* involved only one of sixteen separate challenged rates; therefore the defendant railroad would incur litigation and discovery costs regardless of whether the petition for revocation was decided at the outset of the proceeding. See *Union Pacific Open. Comments* at 71. Moreover, because the complainant intended to include the exempt traffic in the SARR traffic group, resolution of the petition for exemption would have little effect on the scope of discovery. *FMC Wyoming*, slip op. at 4. In contrast, most simplified standards cases likely will involve only one commodity, and allowing a rate complaint to proceed in such a case before having revoked an applicable exemption could subject the parties and the Board to needless litigation and discovery costs.

inquiry of § 10707(a)—“an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies” (emphasis added)—is distinct from the broader inquiry of § 10101(6)—“to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital.” Moreover, the nature and purpose of the market dominance inquiry and the exemption revocation inquiry are undisputedly different. For example, exemption analysis examines product and geographic competition, but market dominance analysis no longer does.

As explained in their prior filings, CSXT/NS do not understand the NPRM to change the standard for revoking an exemption. The Joint Shippers concur that the Board’s proposal is merely a “procedural device” that does not intend any substantive change to the standards for revoking an exemption. Joint Shipper Reply Comments at 33. As the Department of Transportation cautioned, the Board should not change the statutory standard for revoking exemptions merely because the request for revocation arose in the context of rate regulation. *See* DOT Open. Comments at 3.

A revocation may not be based upon vague allegations that the original exemption was based on “a cursory examination,” and a class exemption may not be revoked as to an individual shipper merely on an assertion that the Rail Transportation Policy supports revocation of the exemption as applied to its individual facts. *See* Joint Shipper Reply at 33-34. A petition for partial revocation of an exemption with respect to a specific movement need not refute all findings supporting the class exemption *for the entire class*—however, a petitioner must show that those findings are incorrect or inapplicable *as to it*. For example, in *Granite State* the

petitioner demonstrated that the truck competition which was the basis for the class wide exemption was not an option for it because a municipality forbade it from using truck service. *Granite State Concrete Co. v. Boston & Maine Corp.*, STB Docket No. 42083 (Sept. 15, 2003). Without a similar showing that the factual basis of the exemption does not apply to the individual shipper or traffic at issue, any request to re-regulate exempt traffic must be denied. *See, e.g., Crab Orchard*, ICC Docket No. 40774.

**IX. THE BOARD SHOULD CONDUCT PERIODIC PUBLIC REVIEWS OF THE SIMPLIFIED METHODOLOGIES, AND MAKE ADJUSTMENTS TO THOSE METHODS AS NECESSARY.**

In addition to ongoing monitoring of the implementation of the proposed three-tiered approach, CSXT/NS propose that the Board hold periodic public hearings regarding the application of the approach and its results. Those hearings would present an opportunity for a more formal evaluation of the new methodologies and whether they are achieving their intended purposes. At such hearings, all interested parties should be allowed to present testimony regarding the three-tiered methodology, its application and effects, and any concerns or suggestions for improvement. Based upon the testimony it receives, in combination with its experience in actual adjudications under the new procedures, the Board could determine whether adjustments or revisions to its procedures may be appropriate. Such periodic reviews would give interested persons an opportunity to seek appropriate changes to the rules and procedures the Board adopts in this rulemaking, without requiring them to file and litigate a rate case in order to do so.

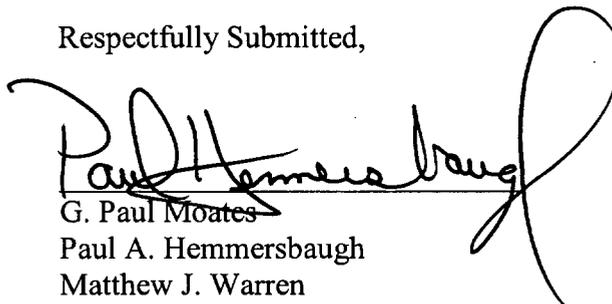
## CONCLUSION

For the reasons described above, and for all the reasons set forth in CSXT/NS's Initial Comments and Reply Comments, the Board should adopt the changes, revisions, and adjustments proposed by CSXT/NS, and reject most of the changes proposed by shippers.

In summary, the Board should: (1) adopt CSXT/NS's proposal for mandatory mediation in smaller rate reasonableness cases; (2) adhere to its MVC proposal, aggregation presumption, and proposed eligibility limits, and adopt the CSXT/NS proposal to allow complainants to reduce the MVC by stipulating a floor for any rate relief they might recover; (3) adopt the SSAC approach with the other adjustments proposed by CSXT/NS, including (a) eliminating the proposed route selection process and instead requiring the SARR to follow the issue traffic's predominant route of movement; (b) modifying the Board's "second disclosure" proposal and applying normal rules of discovery; (c) making the annual rate prescription "true-up" process optional; and (d) rejecting the proposed MMM methodology for rate prescriptions; (4) adopt a modified "Three Benchmark" approach with the adjustments proposed by CSXT/NS, including (a) abandoning the proposal to decide Three Benchmark cases based on a formula, and instead using the benchmarks as guides to exercise the Board's expert judgment in light of all relevant circumstances; (b) considering the original RSAM and R/VC<sub>>180</sub> benchmarks as factors along with the new benchmarks the Board has proposed; (c) adopting CSXT/NS's proposals for the comparability determination; and (d) maintaining the eligibility ceiling at the level proposed in the NPRM; (5) make appropriate movement-specific adjustments to URCS for the purposes of determining rate prescriptions; (6) determine any petition for partial revocation of an exemption filed in conjunction with a rate complaint before the parties litigate the merits of the case, and

determine such petitions under the same standards as petitions filed in other contexts; and (7) monitor the results of cases brought under new SSAC and Three Benchmark rules, hold periodic public hearings to review the new methodologies, and make adjustments to them as necessary.

Respectfully Submitted,



~~G. Paul Moates~~

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**Dated: January 11, 2007**

**SURFACE TRANSPORTATION BOARD**

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

**Simplified Standards for Rail Rate Cases**

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**Verified Statement**

**Of**

**Paul S. Lowengrub Ph.D.**

**Manager**

**FTI Consulting, Inc.**

Due Date: January 11, 2007

## **I. Introduction**

My name is Paul S. Lowengrub. I am a Manager in the FTI Consulting, Inc. (“FTI”) Network Industries Strategies Practice in Washington D.C. I have a Ph.D. in Economics from Arizona State University, with specialties in corporate finance, applied econometrics, international finance, and applied microeconomics. I have taught undergraduate and graduate level courses in Finance and Economics at Johns Hopkins University, Thunderbird - The Garvin School of International Management, and Arizona State University (main and west campuses).

I am an active member of the American Economic Association, American Financial Association, Financial Management Association, and American Bar Association (as an economic consultant) and have authored multiple articles for refereed financial journals and various legal publications including chapters in both, Modern Scientific Evidence: The Law and Expert Testimony entitled, *Economic and Financial Expertise and Economic Damages* and Advances in Financial Economics Volume 8 entitled, *Does Corporate Governance Matter in the Market Response to Merger Announcements? Evidence from United States and German Merger Announcements*.

Prior to joining FTI, I was an economist and financial manager with The CapAnalysis Group, LLC, and an associate at Nathan Associates Incorporated. Before joining Nathan Associates Incorporated, I spent one year as a visiting professor in the finance department at Thunderbird - The Garvin School of International Management. I have also worked as an adjunct faculty member at Johns Hopkins University in the School of Professional Studies and Business Education, and Arizona State University.

I also have extensive expertise in empirical issues and have developed numerous statistical models on behalf of both plaintiffs and defendants.

A copy of my Curriculum Vitae is attached as Exhibit 1.

I have been asked by counsel for Norfolk Southern Corporation (NSC) and CSX Corporation (CSX) to address commenters' assertion that the application of the Board's proposed Three Benchmark approach would have a "ratchet-up" effect on rail rates, in the context of the Surface Transportation Board's ("STB" or "Board") proposed use of the upper-boundary of a one-sided 90 percent confidence interval to prescribe maximum reasonable rates.<sup>1</sup> See Joint Reply Comments of American Chemistry Council, American Forest and Paper Ass'n, et al at 22 (Nov. 30, 2006). As explained below, after repeated applications, the Board's proposal would result in rates for a small shipper comparison group being driven toward the comparison group's mean, which would also reduce the mean and standard deviation of the comparison group.

## II. Background

Under its proposed three-benchmark methodology, the STB will determine the reasonableness of a rate by comparing the challenged rate's Revenue per Variable Cost ("R/VC") ratio to the adjusted average R/VC ratios for a comparison group of traffic.<sup>2</sup> The STB proposes to use the upper-boundary of a one-sided 90 percent confidence interval around the comparison group's adjusted average R/VC ratio, as the measure of rate reasonableness.<sup>3</sup>

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<sup>1</sup> Surface Transportation Board Decision, STB Ex Parte, No. 646 (Sub-No. 1), "Simplified Standards for Rail Rate Cases," Decided: July 26, 2006 at pp. 25-28 (hereinafter "NPRM at \_\_\_\_").

<sup>2</sup> The STB defines the R/VC comparison group ( $R/VC_{COMP}$ ) as all traffic priced above the 180% R/VC level involving the same or a similar commodity moving similar distances (weighted in accordance with proper sampling factors), which is drawn from the Waybill Sample. Examples of these factors include (1) the carrier or region identifier; (2) the type of shipment (local, received-terminated, etc.); (3) the one-way distance of the shipment; (4) the type of car (by URCS code); (5) the number of cars; (6) the car ownership (private or railroad); (7) commodity type (STCC code); (8) the weight of the shipment (in tons per car); and (9) the type of movement (individual, multi-car, or unit train), and other factors which could affect demand characteristics and operating costs (See *Simplified Guidelines*, 1 STB at 1035 n. 90) (A properly selected comparison group will have a similar degree of demand elasticity. See NPRM at pp. 18 – 26 for a detailed description of the comparison group selection process.

<sup>3</sup> See NPRM at p. 26.

The upper boundary of the confidence interval would be calculated using the mean and standard deviation of the comparison group's R/VC ratios, weighted in accordance with certain sampling factors. Using the mean and standard deviation of the adjusted R/VC ratios for the comparison group, the STB proposes to estimate a 90 percent confidence interval around the adjusted mean R/VC ratio.

If the STB determined the R/VC for the issue movement exceeded the upper-bound of the 90 percent confidence interval of the adjusted mean R/VC of the comparison group, the STB would deem the rate unreasonable and set the prescribed rate at the upper-bound of the 90 percent confidence interval. (*See generally*, NPRM at 19, 22-28.)

### **III. Practical Implications of the Board's Proposal**

The STB defines a "confidence interval" as "an attempt to quantify the uncertainty in a measurement, such as the uncertainty in the measurement of the comparison group." NPRM at 19, n.31. The Board further indicates that a confidence interval shows both "an upper and lower bound, which is the range of values within which one can be 90 percent or 95 percent sure that the true measurement lies." *Id.* It concludes the definition by stating that "[a] broad confidence interval indicates lower precision and more uncertainty, while a tight confidence interval reflects greater precision and less uncertainty." *Id.*

Although it is not clear from the NPRM, it appears that for purposes of the STB's Three Benchmark proposal, the Board tacitly defines "true measurement" as the population mean of all movements that fit the criteria of the comparison group. It further appears that the objective of the STB's "Confidence Interval" may be to use the comparison group's mean to estimate a range of values that would make them 90 percent confident that the mean of the entire population of comparable movements from which the comparison group is drawn lies approximately within the interval calculated from the comparison group's adjusted sample mean.

As the following hypothetical examples illustrate, regardless of whether the Board used the mean of the comparison group, or a confidence interval around that mean, the result of multiple rate cases decided under the proposed Three Benchmark approach would be to compress rates down toward the mean and to reduce the comparison group's mean itself.

### **Example 1**

In the event of multiple rate complaints challenging rates generating higher R/VCs within the same comparable traffic group, the mean and corresponding confidence interval for that traffic group will decline and the rates in the traffic group will be driven toward the mean.

As shown below, Table 1 depicts a hypothetical comparison group consisting of 11 movements with R/VC's ranging from 180 to 290.<sup>4</sup>

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<sup>4</sup> The lower-bound is based on the fact that the STB is precluded from finding market dominance to those entities with R/VC's below 180 percent ( NPRM at p. 4). Although the upper-bound was arbitrarily chosen, it is relatively consistent with STB estimates for the 2004 R/VC benchmarks that range from 197 to 261 percent (see Id. at p. 25, Table 1.)

**TABLE 1**

<b>Movement</b>	<b>R/VC</b>
1	290
2	280
3	270
4	260
5	250
6	240
7	220
8	210
9	200
10	190
11	180

The mean and standard deviation of the group are 235 and 37.8, respectively. The first complaint will be filed against the rate for movement 1, the rate generating the highest R/VC. Using the STB's proposed methodology, movement 1's R/VC will be prescribed at the confidence interval for the remaining 10 movements and fall to 246. The next complaint would challenge the rate for movement 2, which would produce a prescribed R/VC of 241. This process would continue until it is no longer beneficial to file complaint (*i.e.*, when the R/VC ratio is less than the observation's current R/VC ratio). Details of the practical application of the Three-Benchmark proposal to the traffic group in this Example are set forth in Table 2.

Table 2

Observation	Mean	Upper-Boundary <sup>1</sup>	Difference Between Upper-Boundary & Mean	R/VC Before Complaint Filing	Standard Deviation	Standard Error	Maximum	Minimum
Before Any Complaint is Filed	235	-	-	-	37.78	-	290	180

Complaint Number	Mean	Upper-Boundary <sup>1</sup>	Difference Between Upper-Boundary & Mean	R/VC Before Complaint Filing	Standard Deviation	Standard Error	Maximum	Minimum
1	230	246	16	180	34.96	11.65	270	180
2	227	241	14	280	30.98	10.33	260	180
3	224	236	13	270	27.63	9.21	250	180
4	221	233	11	260	25.07	8.36	250	180
5	220	230	11	250	23.42	7.81	246	180
6	219	229	10	240	22.66	7.55	246	180
7	220	230	10	220	22.90	7.63	246	180

Comparison Group	Mean	Upper-Boundary <sup>1</sup>	Difference Between Upper-Boundary & Mean	R/VC Before Complaint Filing	Standard Deviation	Standard Error	Maximum	Minimum
After all Complaints are filed	220	-	-	-	21.73	-	246	180

1. Upper-boundary = Mean +  $t_{n-1} * (S / (n-1))^{1/2}$ , where S is the standard deviation, n is the number of observations, and  $t_{n-1}$  is the one sided critical value from the T-distribution at the 90 percent level.

**Example 2**

In its decision, the Board attempts to address the fact demonstrated in Table 2 that the repeated application of the mean figure as the basis for the regulatory ceiling would have a feedback effect that would lower the mean for future cases by asserting first that the revenue adequacy adjustment (the ratio of RSAM over R/VC<sub>TOTAL</sub>) would have a countervailing effect that would produce higher adjusted R/VCs for that comparison group and second, that certain of the movements in the comparison group would not be eligible for treatment under the Three-Benchmark approach. The rates for such movements, the Board further asserts, would likely be constrained by some form of the SAC test, either the Full-SAC for large shipments or the Simplified –SAC for medium size shipments and, as such, would import the constraints imposed by those tests indirectly on the comparison group. Neither of these assertions is valid.<sup>5</sup>

<sup>5</sup> NPRM at pp.27-28.

First, any effects on the revenue adequacy adjustment from adjustments to small shipper rates under the Three-Benchmark approach would be subject to regulatory lag and would not materialize until the following year's carload waybill sample is published. Even then, because the revenue adequacy adjustment is derived from system-wide revenues and system-wide expenses, changes to the adjustment caused by Three-Benchmark based rate adjustments would not mitigate the dramatic decline in the mean R/VC for the comparison traffic group. In fact, any changes Three Benchmark results due to the revenue adequacy adjustment would likely be so small as to be negligible.

Example 2 addresses the assertion that the comparison group will likely include movements that would not qualify for treatment under small shipper guidelines. (e.g., movements who's R/VCs are affected by the SAC constraint or other "Constrained Market Pricing" limits). This example shows that inclusion of such SAC-influenced rates in a comparison group would not materially affect the results under the Three Benchmark approach (as proposed) – rates would continue to be driven toward a declining mean. Table 3 assumes that rates generating R/VC's are SAC-based R/VCs and that these rates are not eligible for the three-benchmark approach.

**Table 3**

<b>Movement</b>	<b>R/VC</b>
1	350
2	320
3	290
4	275
5	260
6	245
7	230
8	215
9	200
10*	305
11*	335

**\* Movement is not eligible for the prescribed three-benchmark approach.**

The mean and standard deviation of the group are 275 and 49.75, respectively. The first complaint would be filed against movement 1, which has an R/VC of 350. Using the STB's proposed methodology, R/VC for movement 1 would be prescribed at the confidence interval boundary for the remaining 10 movements and fall to 293. The next complaint would be filed against movement 2 (with the 320 percent R/VC ratio), which would produce a prescribed R/VC of 284. This process would continue until it was no longer beneficial to file complaint (i.e. when the R/VC ratio is less than the observation's current R/VC ratio). Details of the practical application of the Three-Benchmark proposal to this Example are set forth in Table 4.

Table 4

Comparison Group	Mean	Upper-Boundary <sup>1</sup>	Difference Between Upper-Boundary & Mean	R/V/C Before Complaint Filing	Standard Deviation	Standard Error	Maximum	Minimum
Before Any Complaint is Filed	275	-	-	-	49.75	-	350	200

Complaint Number	Mean	Upper-Boundary <sup>1</sup>	Difference Between Upper-Boundary & Mean	R/V/C Before Complaint Filing	Standard Deviation	Standard Error	Maximum	Minimum
1	271	293	22	350	50.02	16.67	350	200
2	265	284	19	320	42.69	14.23		

Comparison Group	Mean	Upper-Boundary <sup>1</sup>	Difference Between Upper-Boundary & Mean	R/V/C Before Complaint Filing	Standard Deviation	Standard Error	Maximum	Minimum
After all Complaints are filed	266	-	-	-	40.93	-	350	200

1. Upper-boundary = Mean +  $t_{\alpha, n-1} * (S / (n-1)^{1/2})$ , where S is the standard deviation, n is the number of observations, and  $t_{\alpha, n-1}$  is the one sided critical value from the T-distribution at the 90 percent level.

The reduction in the boundary of the confidence interval in Example 2 follows the pattern shown in Table 2 of Example 1. In both cases, the Board’s proposal will result in rates for the comparison group being driven toward the comparison group’s mean.

#### IV. General Description of Confidence Intervals<sup>6</sup>

Simplified, a confidence interval is the range where one would expect something to be. The degree of confidence measures the probability that expectation will be correct. The degree of confidence is linked to the width of the confidence interval. It is easy to be very confident that something will be within a very wide range, and more difficult to be confident it will be within a narrower range. Also, the amount of information (typically related to the sample size) affects the degree of confidence and the width of the confidence interval. The margin of error of a confidence interval is dependent on the spread in the data (commonly measured as the standard deviation), the confidence level, and the number of observations.<sup>7</sup>

<sup>6</sup> See David Freedman, Robert Pisani, and Roger Purves, Statistics 3<sup>rd</sup> Edition, W.W. Norton & Company Ltd., 1998 for a detailed description of confidence intervals.

<sup>7</sup> A decrease in the margin of error increases the precision of the estimate.

### ***Variability/Spread***

Confidence intervals use the variability<sup>8</sup> of data to assess the precision or accuracy of estimated statistics regarding that data. The precision of such statistics depends in part on the variability in the data. A sample with lower variability will result in a tighter confidence interval with a smaller margin of error. A sample with higher variability will result in a wider confidence interval with a larger margin of error.

### ***Outliers***

The confidence interval is sensitive to outliers<sup>9</sup> because both the sample mean and standard deviation are sensitive to outliers. Outliers can disrupt the mean of the comparison group, thus eliminating these outliers will narrow the confidence interval and move it closer to the group mean.

### ***Confidence Level***

The level of confidence directly affects the width of the interval. The higher the confidence level, the wider the interval. Confidence intervals are constructed at a *confidence level*, such as 90, 95, or 99%. It indicates that if the same population is sampled on numerous occasions and interval estimates are made on each occasion, the resulting intervals would bracket the true population parameter in approximately 90, 95, or 99% of the cases. The 90% (or lower) confidence interval for an estimate is narrower than the 95% confidence interval; a 99% confidence interval is wider.

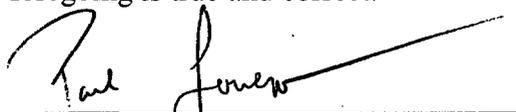
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<sup>8</sup> Variability/Spread is how much the individual data points differ from each other in the whole population.

<sup>9</sup> An outlier is any measurement that falls outside of three standard deviations, or 99 percent of all collected measurements.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 11, 2007

  
\_\_\_\_\_  
Paul S. Lowengrub Ph.D.

# **Exhibit 1**

# Paul S. Lowengrub, Ph.D.

Manager – Economic Consulting

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## Professional Affiliations

Adjunct faculty member,  
School of Professional  
Studies and Business  
Education, John Hopkins  
University

American Economic  
Association

American Finance  
Association

Financial Management  
Association

Journal of International  
Finance and Money

American Bar Association

## Education

Ph.D. in Economics and  
Finance, 1999, Arizona  
State University

B.A., History, 1993,  
Magna Cum Laude, Phi  
Beta Kappa, Kenyon  
College

Paul Lowengrub is a manager in the Network Industries Strategies group of the FTI Economic Consulting practice and is based in Washington D.C. Dr. Lowengrub specializes in corporate finance, applied econometrics, international finance, and applied microeconomics. He has taught both undergraduate and graduate courses in Finance and Economics.

Dr. Lowengrub has authored multiple articles for refereed financial journals and various legal publications. He is also the co-author of two chapters including a chapter in Modern Scientific Evidence: The Law and Expert Testimony entitled, Economic and Financial Expertise and Economic Damages and Advances in Financial Economics Volume 8.

Prior to joining FTI, Dr. Lowengrub was an economist and financial manager with The CapAnalysis Group, LLC and an Associate at Nathan Associates. Before joining Nathan Associates, he was an Assistant Professor of finance at The American Graduate School of International Management (Thunderbird):

He holds a Ph.D. in Economics and Finance. He is also an adjunct faculty member at Johns Hopkins University in the School of Professional Studies and Business Education.

## Professional Experience

### Securities/Corporate Governance

Stock Option Backdating (2005 – Current) – Used quantitative models to Investigate whether there is evidence of backdating, estimated the potential disclosure of such backdating, consulted with attorneys and internal council consulting regarding technical empirical issues related to the potential existence of backdating of stock option grants

Newby v. Enron (on behalf of Barclay's Bank) (2005- Current) – Consulted with attorneys on shareholder class action damages for bonds, options, and equity. Work involved quantitative and qualitative analysis using actual transaction, daily, and intra-day data to estimate aggregate and firm specific damages, analyze price formation, and critiquing of opposing expert's analysis, and assessing the case merits.

Barrick Gold (2002- 2004) - Consulted with the attorneys on shareholder class action including advice on damages theories, preparation of preliminary damages exposure estimates, critique of opposing expert's deposition, and assessment of case merits. Also developed empirical and economic analysis of gold derivatives and spot prices, and the supply and demand elasticity for gold.

Bre-X Minerals Ltd. (2002) – Consulted the attorneys on shareholder class action including advice on damages theories, preparation of preliminary damages exposure estimates, and assessment of case merits.

Cable & Wireless (2002) - Consulted the attorneys on shareholder class action including advice on damages theories, and assessment of case merits.



Digital Island (2002) - Consulted the attorneys on shareholder class action including advice on damages theories, preparation of preliminary damages exposure estimates, and assessment of case merits.

Enron (2002) – Consulted the attorneys and corporate client on corporate governance issues related to the case. Also, directed a special research project: the construction and analysis of a database that compares corporate governance policies and procedures of fortune 500 firms to Enron.

L90 (2002) - Consulted the attorneys on shareholder class action including advise on damages theories, and preparation of preliminary damages exposure estimates.

#### **Antitrust Actions**

Ameritech (2002-2003) - Performed statistical analysis of several variables relevant to the cellular phone industry in Ohio. Also helped developed an econometric model to estimate potential damages.

Amway (2003) - Performed statistical analysis of defendant and plaintiff's sales, tax returns, and other documents to determine the impact of the wrongdoing on the plaintiffs.

Bulk Vitamins (Chlorine Chloride) (2001) - Developed an econometric model to determine economic damages.

Monsanto (2001) - Developed an econometric and statistical model to determine the pass-through price from company to retailers to customers.

#### **Economic Impact Analysis**

Wal-Mart (2006) - Developed and used statistical models to determine impacts of various Wal-Mart Superstores entry and exit on a community.

Freddie Mac (2003) - Developed a scenario analysis to analyze the impact of impact of removing federal preemption law on interest rates.

Investment Company Institute (2002-2003) - Co-authored a report highlighting the various factors and deficiencies in the SEC's analysis of portfolio disclosure. The report provided a list of topics that should be addressed and recommended additional analyses that should be completed in order to prepare a comprehensive benefit-cost analysis of this regulatory proposal.

Verizon (2003) - Co-authored a report that utilized the event study methodology to estimate both the sign and magnitude of the impact of the Federal Communications Commission's February 20th, 2003 decision to approve new rules for the "unbundled network element" under-which incumbent telephone companies must resell their network facilities to competitors. Based on the results, estimated changes in market value (if any) for the Regional Bell Operating Companies (RBOCs), Unbundled-Platform Competitive Local Telephone Carriers (UNE-P CLECs), Inter-Exchange Carriers (long distance companies) (IXCs), other information technology companies that may have been affected by the decision.

## Mergers

Sunoco: Hart-Scott Rodino Review (2003) - Co-authored report about the economic impact of unexpected events on conventional and re-formulated gasoline prices in New York Harbor and Harrisburg, Pennsylvania. Statistical analysis included tests of stationary, lag length and cointegration. Also developed other econometric models, which incorporate the use of vector auto regressions, impulse response functions, Generalized Autoregressive Conditional Heteroskedasticity (GARCH), Granger Causality and the event study methodology.

## Intellectual Property

Chicago Board of Trade (2002) - Work included calculation of lost profits and reasonable royalties in an arbitration involving electronic trading systems and trademark infringement.

## Publications

### Articles

- Lowengrub, Paul S., "Restoring Investor Confidence in America's Financial Markets", *Directors Monthly*, December, 2005
- Lowengrub, Paul S., "The Impact of Sarbanes Oxley on Companies, Investors, and Financial Markets", *Sarbanes Oxley Compliance Journal*, December 6, 2005.
- Cuniff, Martin F., Paul S. Lowengrub, & Mark D. Wegner, "Fraud on the Market? Behavioral Finance Undercuts Efficient Market Hypothesis and Class Actions", *Legal Times*, pg. 43, November 15, 2004.
- Lowengrub, Paul S. "High Frequency Data: The Next Big Thing," *Expert Evidence Report*, Vol. 4, no. 17 (September 2, 2004) at 466-468.
- Lowengrub, Paul S. and Torsten Ludecke and Michael Melvin. "Does Corporate Governance Matter in the Market Response to Merger Announcements? Evidence from United States and German Merger Announcements." *Advances of Financial Economics Volume 8* edited by Mark Hirschey, Kose John, and Anil K. Makhija, New York, 2004. Paper was also presented at the Annual Financial Management Association Meetings, October 9-12, 2003 in Denver Colorado.
- Lowengrub, Paul S. "Fraud on the Market Theory and the Courts," *Expert Evidence Report*, Vol. 3, no. 11 (June 9, 2003) at 270-273.
- Lowengrub, Paul S. "Stock Trading Behavior & Securities Fraud," *Expert Evidence Report*, Vol. 3, no. 4 (February 24, 2003) at 97-101.
- Lowengrub, Paul S. "Daubert-Proofing Event Studies," *Expert Evidence Report*, Vol. 3, no. 3 (February 10, 2003) at 72-73.
- Lowengrub, Paul S. "The Concept of Present Value: A Primer for Lawyers," *law.com*, (October, 2002).
- Lowengrub, Paul S. "Using Event Studies to Measure the Effect of Securities Fraud on a Company's Value," *Class Action Litigation*, Vol. 3, no. 18 (September 27, 2002) at 624-625.
- Lowengrub, Paul S. "Using Event Studies to Measure the Effect of Securities Fraud on a Company's Value," *Expert Evidence Report*, Vol. 2, no. 14 (August 5, 2002) at 446-447.

- Lowengrub, Paul S. "Leveraging the Event Study Methodology in Securities Litigation," *Wall Street Lawyer*, Vol. 6, no. 2 (July, 2002) at 15-16.
- Lowengrub, Paul S. and Michael Melvin. "Before and After International Cross-Listing: An Intraday Examination of Volume and Volatility," *Journal of International Financial Markets Institutions, and Money*, (April, 2002). Refereed Journal.
- Lowengrub, Paul S. and Gary French and John Solow. "Damage Analysis in Litigation," *Modern Scientific Evidence: The Law and Science of Expert Testimony*, Vol. 3 (2002) at chapter 22.
- Lowengrub, Paul S. and Michael Melvin and Michael Hertz. "Information, Announcement and Listing Effects of ADR Programs and German-US Stock Market Integration," *Multinational Finance Journal*, (September - December, 2000). Refereed Journal.
- Lowengrub, Paul S. "The Retail Price Effect of Refinery Closures in the United States: Evidence from the Midwest, West and Northeast Regions." *Working Paper*.
- Lowengrub, Paul S. "The Effect of Price Changes on the Supply of Gold: A Dynamic Approach" *Working Paper*.
- Lowengrub, Paul S. "The Controversy with Loss Causation in Security Class Action Lawsuits" *Working Paper*.
- Lowengrub, Paul S. "High Frequency Data & Revising the Fraud on the Market Doctrine", *Working Paper*.
- Lowengrub, Paul S. "The Impact of the United States Supreme Court's decision in the Dura Pharmaceuticals Case on Shareholder Class Action Lawsuits", *Working Paper*.
- Lowengrub, Paul S. "Regression Analysis: A Primer for Lawyers", *Working Paper*.
- Lowengrub, Paul S. "Applications of the Event Study Methodology in Litigation", *Working Paper*.

### Speeches

- "A New Way to Teach Corporate Financial Theory to MBA Students," Johns Hopkins University, Baltimore, MD, May 2003 (Columbia Campus), June, 2003 (main campus).
- "Before and After Cross-Listing: An Intraday Examination of Market Integration," Depauw University, Greencastle, Indiana, March, 2000.
- "Information, Announcement and Filing Effects of ADR Programs," TIAA CREF, New York, NY, February 1999.
- "The Impact of ADR Programs in the Home Country," St. Mary's College, St. Mary's City, Maryland, February, 1999.
- "Information, Announcement and Filing Effects of ADR Programs," Arizona State University, Tempe, AZ, January, 1999.

### **Courses Taught In Finance**

Johns Hopkins University – Financial Management 2 (5 Sections, MBA Level) & Corporate Financial Theory (3 Sections, MBA Level)

American Graduate School of International Management (Thunderbird)– Corporate Financial Theory (5 Sections, MBA Level)

Arizona State University West - Financial Management (1 section, undergraduate)

### **Courses Taught in Economics**

Arizona State University Main:

Principles of Microeconomics (1 section, undergraduate)

Principles of Macroeconomics (1 section, undergraduate)

Intermediate Macroeconomics (3 sections, undergraduate)

Introduction to Graduate Level Macroeconomics (1 section, graduate (Ph.D.))

### **Experience**

#### **Corporate**

Cap Analysis LLC, Manager (2003-2005)

Nathan Associates, Associate (2000-2002)

American Express, Econometrician and Consultant (1999)

Coopers & Lybrand, Associate Analyst (1993 to 1995)

### **Faculty Appointments**

Johns Hopkins University, Adjunct Faculty Member, 2001 to - Present.

The American Graduate School of International Management (Thunderbird, AGSIM), Assistant Professor, Finance, 1999 to 2000.

Arizona State University West, Adjunct Faculty Member, 1999.

Arizona State University, Teaching Assistant, 1995 to 1999.

### **Education**

Arizona State University, Ph.D., Economics & Finance, 1999

Kenyon College, B.A., History, 1993, Magna Cum Laude, Phi Beta Kappa

**Professional Associations**

American Economic Association

American Finance Association

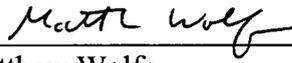
Financial Management Association

Journal of International Finance and Money

American Bar Association

## CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2007, I caused a copy of the foregoing Rebuttal Comments of CSX Transportation, Inc. and Norfolk Southern Railway Company to be served on all parties of record in this proceeding by first class mail, postage prepaid or more expeditious method of delivery.

  
\_\_\_\_\_  
Matthew Wolfe