

SK Snavely King Majoros O'Connor & Lee, Inc.
Economic and Management Consultants



January 11, 2007

By Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Room 700
Washington DC 20423

218426

RE: Ex Parte No. 646 (Sub-No. 1) – Simplified Standards for Rail Rate Cases
Rebuttal Comments of Snavely King Majoros O'Connor & Lee, Inc.

Dear Secretary Williams,

Enclosed for filing please find the original and twenty copies of the Comments of Snavely King Majoros O'Connor & Lee, Inc. submitted in the above captioned proceeding.

We have enclosed an extra copy to be date-stamped and returned to our messenger.

Respectfully submitted,

Kim N. Hillenbrand

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**Before the
Surface Transportation Board**

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

Simplified Standards for Rail Rate Cases

**Rebuttal Comments and Recommendations
Of Snavely King Majoros O'Connor & Lee, Inc.**

January 11, 2007

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I. Introduction

Snavely King Majoros O'Connor & Lee, Inc. ("SK" or "Snavely King") welcomes this opportunity to provide Rebuttal Comments on the Simplified Standards for Rail Rate Cases proposed by the Surface Transportation Board ("STB" or "Board") decision served on July 26th, 2006 in Ex Parte 646 (Sub No. 1) Simplified Standards for Rail Rate Cases.

Tom O'Connor and Kim Hillenbrand of Snavely King have filed a separate set of Rebuttal Comments on behalf of Olin Chemical and an earlier set of Reply Comments on behalf of BASF focusing on a specific issue: Maximum Case Value. In this more general set of Rebuttal Comments which Snavely King has filed on its own behalf, we reaffirm O'Connor and Hillenbrand's comments on Maximum Case Value and we offer additional comments on other key issues.

Snavely King submitted Opening Comments on October 24, 2006 in this proceeding and also submitted Reply comments on November 30 on behalf of BASF as well as a broader set of Reply comments on behalf of SK. OLIN requested that Snavely King prepare and submit Rebuttal Comments on its behalf focusing on a select set of issues. The focus issues for OLIN Chemical (Olin) center on the Maximum Value of the Case (MVC). OLIN's focus on this issue, like BASF's and Snavely King's focus on the Maximum Value of the Case during the Reply phase should not be construed as acceptance of or agreement with the remainder of Ex Parte No. 646 as proposed by the STB.

The focus on this issue reflects the fact that setting the Maximum Value of the Case at unrealistic levels can put the entire process out of reach and discard the years of effort invested in the Simplified Standards for Rail Rate Cases. The need for Simplified Standards for Rail Rate Cases has been evident for years to shippers, railroads and other interested parties, including Congress.

The development of a method for determining the reasonableness of small shipment rates was a directive from Congress in 1995.¹ As the Board noted in its July 26, 2006 decision, at that time only one shipper had filed a case under Simplified Guidelines. The parties settled the dispute, with the assistance of Board mediation, before presenting any evidence. BP Amoco Chem. Co. v. Norfolk S. Ry., STB Docket No. 42093 (STB served June 28, 2005)². More recently, a second shipper has filed a case under Simplified Guidelines. On November 22, 2006 Williams Olefins, LLC filed a Rate Complaint and

¹ In 1995, Congress directed the Board 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." 49 U.S.C. 10701(d)(3). In 1996, the Board adopted the guidelines set forth in Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004 (1996) (Simplified Guidelines).

² Snavely King participated in the first case, BP Amoco Chem. Co. v. Norfolk S. Ry., STB Docket No. 42093, as an expert witness on behalf of BP Amoco.

Request for Mediation v. Grand Trunk Corporation STB Docket No. NOR 42098. That case is now in the mediation process.³

The Board action in this proceeding contains many commendable initiatives which are steps in the right direction towards meeting the longstanding 1995 Congressional directive. The Board is seeking to meet statutory goals of providing captive shippers meaningful access to regulatory remedies for rail rates that are unreasonable, while recognizing the need for railroads to earn a reasonable return on their investments.

In the context of unparalleled levels of strong financial performance by the railroads, the time has clearly come for increased attention to the Board's statutory goal of providing captive shippers meaningful access to regulatory remedies for rail rates that are unreasonable.

As Snavely King noted in its Opening and Reply Comments, the development of a method for determining the reasonableness of small shipment rates has been a directive from Congress since 1995.⁴

The Board noted in its July 26, 2006 decision, that one shipper filed a case under Simplified Guidelines, and the parties settled the dispute, with the assistance of Board mediation, before presenting any evidence. BP Amoco Chem. Co. v. Norfolk S. Ry., STB Docket No. 42093 (STB served June 28, 2005)⁵. Snavely King advised BP Amoco and appeared as a witness on its behalf. More recently a second shipper, also advised by Snavely King, filed a case under Simplified Guidelines. On November 22, 2006 Williams Olefins, LLC filed a Rate Complaint and Request for Mediation v. Grand Trunk Corporation STB Docket No. NOR 42098.⁶

The Board action in this proceeding is a commendable initiative and a step in the right direction toward meeting that longstanding 1995 Congressional directive. The Board is seeking to meet statutory goals of providing captive shippers meaningful access to regulatory remedies for rail rates that are unreasonable, while recognizing the need for railroads to earn a reasonable return on their investments.

³ Snavely King participated in the second case, Williams Olefins, LLC v. Grand Trunk Corporation STB Docket No. NOR 42098 as an expert witness on behalf of Williams Olefins, LLC.

⁴ In 1995, Congress directed the Board 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." 49 U.S.C. 10701(d)(3). In 1996, the Board adopted the guidelines set forth in Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004 (1996) (Simplified Guidelines)

⁵ Snavely King participated in the first Small Shipment case as an expert witness on behalf of BP Amoco.

⁶ Snavely King also participated in the second Small Shipment case as an expert witness on behalf of Williams Olefins, LLC.

The Board proposed a three part plan for meeting its statutory requirement:⁷

1. **Create a simplified stand-alone cost (Simplified-SAC) procedure to use in *medium-size rate disputes* for which a full stand-alone cost (Full-SAC) presentation is too costly, given the value of the case.**
2. **Retain the “Three-Benchmark” method of Simplified Guidelines, with certain modifications and refinements, for *small rate disputes* for which even a Simplified-SAC presentation would be too costly, given the value of the case.**
3. **Establish *eligibility presumptions* based on the maximum value of the case to distinguish between large, medium-size, and small rail rate disputes.**

Under the Interstate Commerce Act, as revised by the ICCTA, the ICC and its successor agency the STB were charged with protecting individual captive shippers from unreasonable rate levels. The rate reasonableness determinations respond to the requirements of the Staggers Rail Act of 1980 and the three Long Cannon factors included by Congress in that landmark legislation.

The board recognized the need to reflect the Long Cannon factors in its July 26, 2006 decision proposing new simplified small and medium shipment rate reasonableness standards. In The Staggers Rail Act of 1980 the ICC and subsequently the STB was specifically directed to consider the Long-Cannon factors, set forth in 49 U.S.C. 10701(d)(2). These factors are:

- Long-Cannon- 1;** the amount of traffic transported at revenues which do not contribute to going concern value and the efforts made to minimize such traffic;
- Long-Cannon- 2** the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and
- Long-Cannon- 3** the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

The STB is also directed to ensure that carriers have the opportunity to earn revenues adequate to cover costs, allow replacement of needed assets, and provide a fair return on investment. We believe that the recommendations offered in our Rebuttal Comments will enhance the attainment of all of these objectives.

⁷ Ex Parte 646 (Sub-No. 1) Simplified Standards for Rail Rate Cases, page 3

II. Summary of SK and Other Rebuttal Comments on STB Proposals for Methodology for Small and Medium-Size Rail Rate Disputes

We noted that many other parties also addressed key issues Snavely King presented in its Opening Comments and Reply Comments. In these Rebuttal Comments⁸ we include brief summaries of Opening Comments of other parties as they relate to selected key issues we present.

□ Maximum value of the case (MVC)

OLIN and BASF both focused on the maximum value of the case (MVC) in their Comments.⁹ As indicated in Snavely King's comments we support BASF's and OLIN's position on MVC and we focus on MVC as a key issue in these broader Rebuttal comments filed by Snavely King.

Improperly setting the MVC could prevent access to needed and feasible STB regulatory relief by shippers whose shipment size was deemed not to meet an a priori threshold. Such shippers are already generally precluded on pragmatic economic grounds from meaningful access to the STB's more elaborate and far more costly Stand Alone Cost (SAC) rate reasonableness review. In considering access to rate reasonableness review it is essential to recall that STB rate reasonableness determinations respond to the requirements Congress mandated in the *Staggers Rail Act of 1980*. The rate reasonableness determinations should reflect the three Long Cannon factors included in that landmark legislation

□ Mediation:

- Snavely King has consistently proposed and supported The Board offering a 30-day mediation period at the initiation of every rate complaint. Similar recommendations were also made by many other parties during the course of this proceeding. Mediation helps resolve many of the concerns raised by railroad interests regarding small shipment rate reasonableness review. Simply put, the availability of effective mediation will diminish, rather than increase, the need for litigation.¹⁰
- Comments filed by both railroad and shipper parties affirm mediation as an effective and timely means of reaching agreement. Snavely King experience

⁸ Snavely King filed separate Reply comments on behalf of BASF dealing with the maximum value of the case. We reaffirm those comments in this filing. Snavely King also filed separate Rebuttal comments on behalf of Olin dealing with the maximum value of the case. We reaffirm those comments in this filing.

⁹ See Ex Parte 646 (Sub-No.1) BASF Opening Comments and Reply Comments. See also Ex Parte 646 (Sub-No.1) Olin Rebuttal Comments

¹⁰ Snavely King participated in both Small Shipment Rate Cases and we find the STB mediation to be effective.

indicates that the availability of effective mediation is essential to the success of small shipment rate reasonableness review.

□ Long-Cannon factors.

- Snavely King has consistently recommended that the STB rate reasonableness process should adequately address the Long-Cannon factors, and thereby meet the statutory mandate. SK reiterates its recommendations that the newly proposed standards should provide a simplified and expedited method for determining whether a railroad is exercising market power to charge more than necessary to earn adequate revenues.
- Comments filed by other parties suggest that the need for Long-Cannon factors railroad market power is very much in evidence, as the following excerpts indicate:
 - Comments of Other Parties
 - OxyChem stated that Eighty five percent (85%) of its [rail] spend represents moves have a Revenue to Variable Cost Ratio (RVCR) greater than 180%. Oxy noted that 94 of their current rates (or 5% of their rail movements) have an RVCR in excess of 500%.¹¹
 - DuPont currently moves cargo by rail in over 2300 lanes within the United States. Of these movements, DuPont estimates that 60 percent of the moves contain rates that exceed 180% of the incumbent railroad's variable cost. DuPont is also captive at 35 of its 35 active rail shipping locations.¹²

□ Access to Rate Reasonableness Review

- Snavely King found that the proposed eligibility criteria unrealistically and unnecessarily restricted access to both medium and small sized rate cases. As we, BASF, OLIN and many others have noted, the maximum value of the case is set much too low for both medium and small rate cases.
- Comments filed by many other parties strongly support the finding that access to rate reasonableness review would continue to be inadequate under the STB proposed eligibility criteria, as the following excerpts indicate
 - Comments of Other Parties
 - Occidental Chemical Corporation stated that the STB proposed thresholds are unrealistically low and would mean that only 1 % of Oxy's \$250 million

¹¹ Ex Parte 646 (Sub-No.1) OxyChem Opening Comments page 2

¹² Ex Parte 646 (Sub-No.1) DuPont Opening Comments page 2

dollar annual spend would be allowed to be presented as a small rate case. Oxy recommended raising the small shipment threshold to \$20 million¹³

- DuPont believes the proposed jurisdictional limits would prevent it and most of its US based chemical competitors from utilizing the proposed new rules to seek relief from excessive rail rates.¹⁴
- Cargill Incorporated stated that the Board's eligibility thresholds are too low "by a tremendous margin" and predicted that at the proposed eligibility cap, the small shipment procedures will never be used.
- US Department of Transportation urged the Board to consider whether the proposed maximum case value thresholds would be quickly exceeded¹⁵
- Interested Parties stated that the proposed eligibility standards are set such that most shippers would find themselves in the Full SAC category¹⁶
- National Industrial Transportation League stated that the proposed eligibility standards are set so low as to eliminate any access to rate reasonableness review for small shipments.¹⁷
- The Wheat and Barley Commissions stated that the Board should increase the eligibility thresholds for the small shipments. Wheat & Barley Commissions want this Board to fully understand that the proposed limits will result in the vast majority of grain shippers continuing to be denied access to rate reasonableness review.¹⁸
- US Steel stated that the current proposal is simply too costly, time consuming and complicated to justify bringing such a rate case.¹⁹
- ARC and PPL EnergyPlus state that because of the proposed segment cross subsidy test, captive shippers not located on high density main lines will have no hope of rate relief. Because most captive shipper are not located on high density main lines, this single feature of the Board's new proposals will render small rate case relief unavailable to most of the captive shippers....²⁰

¹³ Ex Parte 646 (Sub-No.1) OxyChem Opening Comments page 4

¹⁴ Ex Parte 646 (Sub-No.1) DuPont Opening Comments page 2

¹⁵ Ex Parte 646 (Sub-No.1) US Department Of Transportation Opening Comments page 9

¹⁶ Ex Parte 646 (Sub-No.1) Interested Parties Opening Comments page 9

¹⁷ Ex Parte 646 (Sub-No.1) NITL Opening Comments page 9

¹⁸ Ex Parte 646 (Sub-No.1) Wheat and Barley Commissions Opening Comments page 6, 7

¹⁹ Ex Parte 646 (Sub-No.1) US Steel Opening Comments page 5

²⁰ Ex Parte 646 (Sub-No.1) ARC and PPL EnergyPlus Opening Comments page 8

- Dow states that aggregating only a handful of its cases would quickly thrust Dow into the full SAC category, a category which is not economically justified²¹
- The procedural schedule
- Snavelly King finds the procedural schedule to be too extended. We recommend a more compact process.
 - Snavelly King notes that the Board makes several sequential determinations, and for each it proposed to allow itself three to six months. Since justice delayed is justice denied, the interest of justice would be better served if the Board expedited its decision process to shorten the procedural schedule of both the medium sized and small shipment proceedings. Moreover, the Board should allow flexibility for additional shortening of the schedule when circumstances allow.
 - The comments filed by many other parties support the finding that the schedule needs to be more compact, as the following excerpts indicate
 - Comments of Other Parties
 - US Department of Transportation stated that timeliness was an important criterion and that the time required to resolve cases must be reduced.²²
 - CF Industries advocated the Board adopting procedures that will permit determination of a complaint within 180 days.²³
 - US Steel stated that the STB proposal is simply too costly, time consuming and complicated to justify bringing a rate case.²⁴
- Use of Adjustment to URCS in a Three Benchmark case
- Snavelly King recommends that it is proper to use unadjusted URCS results with sufficient flexibility to replicate the actual operations as observed.
 - The need for this is particularly evident to reflect the actual rail operations often encountered with the shipper handling the switching at origin or destination or both. URCS assumes that the railroad performs both origin and destination switching. But this switching is often done by the shipper

²¹ Ex Parte 646 (Sub-No.1) Dow Opening Comments page 11

²² Ex Parte 646 (Sub-No.1) US Department Of Transportation Opening Comments page 2

²³ Ex Parte 646 (Sub-No.1) CF Industries Opening Comments page 1

²⁴ Ex Parte 646 (Sub-No.1) US Steel Opening Comments page 5

- Comments filed by both railroad and shipper parties offer similar recommendations, as the following excerpts indicate
- Comments of Other Parties
 - CSXT/NS proposed that adjustments to URCS be allowed as part of any final rate prescription in a Three Benchmark case. ... While CSXT/NS agree that unadjusted URCS is an appropriate tool to determine what revenue-to variable cost ratio should apply, they do not agree that unadjusted URCS costs should then be used when applying the revenue-to-variable cost ratio to calculate the rate(s) prescribed by the Board.²⁵
 - CSXT/NS recommended that the Board should consider all relevant evidence presented by the parties and apply its expertise and judgment to that evidence in order to determine a maximum reasonable rate. The Board's retention of flexibility would also allow it to consider information that either party may present concerning why the cost of the challenged move is significantly above or below the carrier's system average...²⁶
 - CN believes the Board should not preclude the use of movement-specific adjustments to URCS system average costs.²⁷
 - BNSF recommended that where movement-specific adjustments are required to produce a more accurate estimate of variable costs for the issue traffic and such adjustments would likely affect the level of any prescribed rate, a litigant should be permitted to demonstrate through clear and convincing evidence that such adjustments are warranted. The types of factors that might become relevant at this stage of the proceeding would include equipment and operating characteristics that are inconsistent with URCS system-average assumptions.²⁸
- Waybill Sample Access
 - Snavelly King recommended that the Waybill sample should be costed and available both with and without the make-whole cost adjustment.
 - The comments filed by other parties support this finding, as the following excerpts indicate
 - Other Comments Support This Finding
 - The Wheat and Barley Commissions stated that The Board must revise its procedures to permit access, under Standard Confidentiality Orders to

²⁵ Ex Parte 646 (Sub-No.1) CSX/NS Opening Comments page 20

²⁶ Ex Parte 646 (Sub-No.1) CSX/NS Opening Comments page 23

²⁷ Ex Parte 646 (Sub-No.1) CN Opening Comments page 3

²⁸ Ex Parte 646 (Sub-No.1) BNSF Opening Comments page 12

Unmasked Waybill Data prior to the filing of a case, thereby not handicapping smaller rail shippers.²⁹

□ Medium Sized Simplified SAC

- Snavely King found that neither SAC nor medium-sized simplified SAC as proposed is feasible for a rail distribution pattern of a single or few origins to numerous and widely distributed destinations.
- The comments filed by other parties support this finding, as the following excerpts indicate
- Comments of Other Parties
 - Occidental Chemical Corporation stated that it moves a small number of cars to multiple destinations and that the STB proposed thresholds are unrealistically low. Oxy recommended raising the small shipment threshold to \$20 million³⁰
 - National Industrial Transportation League stated that the proposed eligibility standards are “utterly unrealistic” for small, medium and large cases and would eliminate access to rate reasonableness review for small and medium shipments.³¹

□ Snavely King reaffirms its Opening Comments on the following issues related to Medium sized shipments. These comments are supported by the Opening comments of many of the parties.

- Much of the information required to mount a medium sized-simplified SAC case is not available to shipper complainants.
- The requirement that the shipper needs to demonstrate that the route selected has sufficient existing capacity is burdensome, unrealistic and unreasonable.
- It is unnecessarily restrictive to require that the test year be the latest four quarters preceding the filing of the complaint, without recognition of anomalous or atypical events.
- The internal cross-subsidy principle is ill-advised and impracticable even if the railroad bears the evidentiary burden. In effect, as noted above this would

²⁹ Ex Parte 646 (Sub-No.1) Wheat and Barley Commissions Opening Comments page 6

³⁰ Ex Parte 646 (Sub-No.1) OxyChem Opening Comments page 4

³¹ Ex Parte 646 (Sub-No.1) NITL Opening Comments page 8

preclude most access to medium sized shipment and full SAC rate reasonableness review

□ Snavely King also reaffirms its Opening Comments on the following issues related to Small Shipments.

- The simplified standards for rate case guidelines proposed by the Board are in many respects a significant improvement over the simplified guidelines adopted in 1996.
 - RSAM computation is an improvement over the previous RSAM ranges.
 - The R/VC total is an improvement over the R/VC > 180 that previously was used.
- The STB should be a proactive participant in the selection of the comparison groups.

Through the selection process the Board will have gained deep knowledge about both parties' comparison groups and will be able to apply its own analysis. There will be instances when the Board will have the opportunity to construct the best comparison group from the two parties' final comparison groups. Selecting the best comparison group would be in the public interest rather than selecting the comparison group of one of the two parties. The STB has commented that the process would enable each party to submit a reasonable comparison group. Both parties could submit reasonable comparison groups, but there could also be instances where both parties could submit unreasonable comparison groups, forcing the board to choose an inappropriate comparison group. Having both parties submit reasonable comparison groups is an ideal, but the reality is that neither party may find the others comparison group reasonable. Working with both comparison groups, the Board should be able to define the best comparison group. Limiting the choice to an "either/or" selection of comparison groups submitted by the two parties needlessly restricts a crucial part of the process

- The comparison group should be made up of all similar traffic, not just the traffic with R/VC over 180%.

Long-Cannon- 3 states that the carrier's mix of rail traffic should be analyzed to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues. By limiting the comparison group to traffic with an R/VC ratio over 180 percent, the Board effectively predetermines that the issue traffic will pay a higher share – and maybe an unreasonable share – of the carrier's overall revenues. The test of a reasonable rate should not be just that the rate matches the contribution of other captive traffic, but that the rate matches the contribution of similar traffic.

- Shipper representatives should be allowed access to the confidential waybill sample as part of the process of preparing complaints on behalf of shippers, subject to confidentiality/non-disclosure agreements. Otherwise, key information is unavailable to shipper representatives.

The proposed rate reasonableness process relies on the costed waybill sample. Since the costed Waybill Sample contains confidential information, under the proposed guidelines there is no way for practitioners and consultants to independently verify results without participating in a formal proceeding.

The Board's proposed guidelines present shippers with an impossible task or a "Catch 22". In order to establish eligibility, shippers must demonstrate that they have a reasonably persuasive case. In particular, they must show that the R/VC ratios for the issue traffic are unreasonably high relative to a comparison group of similar traffic. Yet, the data necessary to construct and cost an appropriate comparison group cannot be obtained under Board's proposed guidelines until the shipper's complaint has been accepted by the Board as offering a *prima facie* case.

- The apparent either/or choice between the current rate or the rate with the R/VC set at 180 percent is unrealistic, unreasonable, and a needless constraint on both the mediation and litigation process.

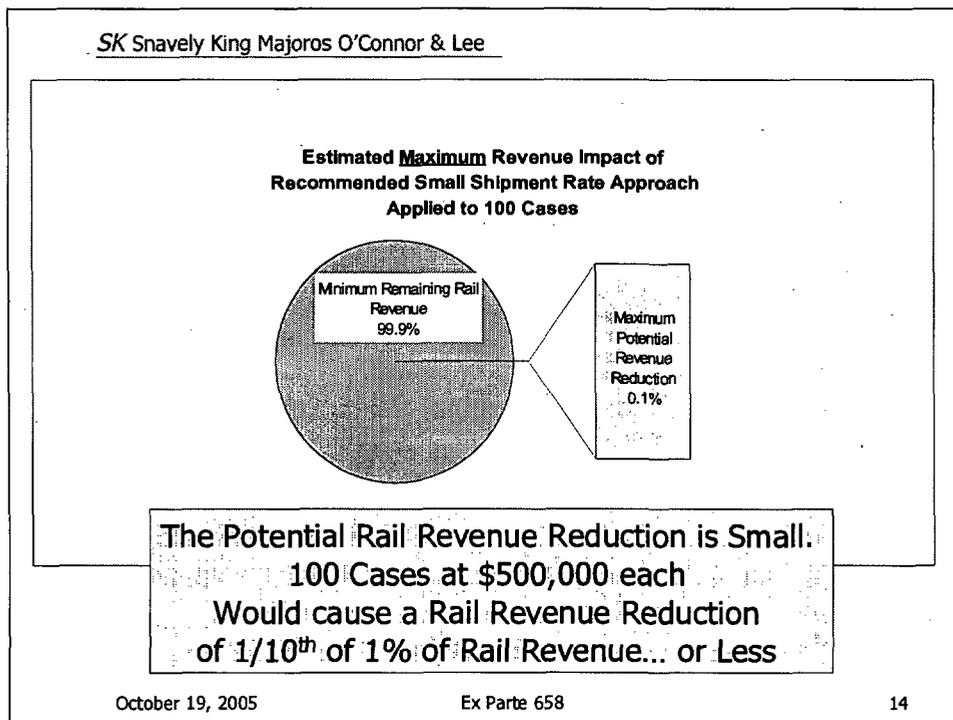
We and others recommend a more realistic process. Recognizing as eligible the entire range of rates between the existing rate and a rate generating R/VC 180 is one such realistic solution. It appears from the Board's comments that it may be considering an either/or choice between retaining the present rate, no matter how high, and prescribing a rate at an R/VC ratio of 180 percent. If so, then this is an unreasonable and unrealistic set of alternatives. Clearly, reasonable rates can be set above 180 percent R/VC but well below the present rate if that rate is excessive. In fact, rates in this middle ground often result from negotiations and mediation. SK urges the Board to make clear that it may prescribe rates above R/VC 180 percent but lower than the present rate.

- Shipper and railroad representatives should have access to the waybill sample and the STB workpapers that are used to calculate the upper boundary for the challenged rate.

It appears from the Board's comments that it may be considering a "black box" calculation of the confidence intervals used to determine the upper boundary of rates resulting from analyses of the comparison group. If so, this secrecy is not only unnecessary but obstructionist to both shipper and railroad parties in the proceeding. SK urges the Board to make clear that the computation of the confidence intervals will be transparent and available for review and analysis by all affected parties.

❑ Eligibility Requirements

- The \$200,000 five-year maximum for small shipment treatment would significantly reduce or perhaps even eliminate small shipment rate cases.
- \$500,000 per year is the minimum realistic eligibility threshold for small shipment rate cases. This value would equate to about \$2.5 million using the Board's standard of the maximum value of the case.
- We believe that the Three Benchmark method would provide a sufficient screen on access to the process without the likelihood of harm to the railroads. In prior testimony before the STB,³² we presented the example below which shows the potential revenue impact of 100 cases in a year with an average value of \$500,000 each. There would be virtually no impact on the revenue adequacy of the railroads.
- Alternatively we recommend merging the small shipment and medium shipment eligibility thresholds and allowing the shipper to select the basis under which to bring the case.



The data presented in the preceding graph is reported in the following table also excerpted from prior SK testimony on this issue:

³² See testimony presented to the STB by Tom O'Connor in the Ex Parte 646 July 2004 hearings regarding Small Shipment rates as well as the STB Ex Parte 657 April 2005 hearings, as well as testimony presented by Tom O'Connor and Kim Hillenbrand in the Reply phase of this proceeding..

SK Snavely King Majoros O'Connor & Lee

Line Item Description	Rail Revenue Amounts
Total Rail Revenue as reported in STB 2002 waybill sample	\$40,880,403,000
Small Shipment Cap on Rail Revenue Reduction	\$500,000
Capped Rail Revenue Reduction on one case as percentage of Total Rail Revenue	0.001%
Capped Rail Revenue Reduction on 100 small shipment cases as percentage of Total Rail	0.1%

April 26, 2005Ex Parte 65723

The Interested Parties' Reply Comments reiterated many of the recommendations offered in its Opening Comments. Interested Parties recommendations related to eligibility requirements included the following.³³ The Board should:

- Drastically revise upwards its proposed eligibility thresholds for the Three-Benchmark Standard and the Full-SAC standard, and consider changing the standard for determining eligibility.
- Eliminate the "aggregation" rule.
- Utilize the revised Three-Benchmark factors to determine the basic level of rate reasonableness for small cases, but permit parties to supplement the Three-Benchmark factors with other relevant evidence, including evidence of inefficiencies required to be considered by the Board under the statutory Long-Cannon provision.
- Revise the procedural requirements proposed for the Three-Benchmark standard to provide shippers with access to data needed for a proceeding before a complaint is filed,

Snavely King sees merit in these recommendations. We recommend expanding access to rate reasonableness review with sufficient screening to prevent frivolous complaints. The recommendations offered by Snavely King would accomplish this objective.

³³ Ex Parte 646 (Sub-No.1 Interested Parties' Reply Comments page 3

As the preceding summary indicates, shippers are consistent in their rejection of the STB's proposed MVC as a realistic or useful mechanism. Looking at MVC from the railroad's perspective can also be revealing, as the following excerpts indicate.

NS/CSX Reply Comments³⁴

- NS/CSX saw claims that the cost of litigating a Three Benchmark case will be too high to allow small cases to be brought under the Board's proposed eligibility thresholds as inconsistent with a complaint filed under the Board's existing Simplified Guidelines.

In our reply comments in this proceeding, we stated:

“..Since there have been no fully litigated small shipment rate cases, there is no public record of the cost of preparing, presenting and litigating such cases. It is very unlikely, however, that such cases could be pursued fully for less than \$50,000 in consulting and legal fees.”³⁵

Several points should be noted regarding our comments:

- ❑ First we stated clearly that “It is very unlikely, however, that such cases could be pursued fully for less than \$50,000 in consulting and legal fees.”³⁶. This means that \$50,000 is a cost minimum not an average cost and definitely not a cost maximum.
- ❑ Second, the SK experience base in this area reflects two cases that were settled in mediation or are in the process of being settled in mediation, rather than the longer and more expensive phase of litigation. The case NS/CSX refers to was handled in mediation, not litigation. Again, the relevant concept is a cost minimum not an average cost and definitely not a cost maximum.
- ❑ Third, in both Small Shipment cases in which Snavely King participated, we had extensive prior experience working on a variety of assignments for each of the clients. This lowered the cost by mitigating the need for research and preparation specific to the case.
- ❑ Fourth, both of these cases were designed to be resolved in mediation so SK's estimates of the litigation costs are just that, estimates.
- ❑ SK has proposed that the first step in this process should be mediation. An increased MVC would not necessarily result in more litigation but rather would provide a better process for small shipment rate disputes to be resolved without litigation.

Accordingly, it is incorrect to treat the \$50,000 estimate as indicative of either the average costs or the total costs of preparing, mediating and litigating such cases.

³⁴ Source: Ex Parte 646 (Sub-No.1) NS/CSX Reply Comments Pp 14-15

³⁵ Source: Ex Parte 646 (Sub-No.1) Snavely King Reply Comments, page 12

³⁶ Source: Ex Parte 646 (Sub-No.1) Snavely King Reply Comments, *ibid.*

III. Summary

As we have shown in our Opening Comments, Reply comments and again in these Rebuttal Comments, the Board's proposed Simplified standards for Rail Rate Cases, while containing many commendable initiatives and being a step in the right direction, need improvement to achieve the statutory goals for STB established by Congress in 1995. The goal, which we noted in both our Opening, Reply and Rebuttal Comments is for STB 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.”³⁷

To accomplish that goal Snavely King recommends the following modifications to the proposed standards:

- The Board should offer a 30-day mediation period at the initiation of every complaint.
- The Simplified standards and the STB rate reasonableness process should adequately address all three Long-Cannon factors.
- The proposed eligibility criteria should enable access to both medium and small sized rate cases. As proposed by the STB, the maximum value of the case would be set much too low for both medium and small rate cases. The limits on maximum value of the case for small and medium cases should be combined into a single threshold and increased. For any case with a Maximum Value below that threshold, the shipper should be allowed to choose whether to file the rate complaint as a small case or a medium case.
- The proposed procedural schedule is too extended. the schedule can be both more compact and more flexible
- Snavely King recommends use of unadjusted URCS results with sufficient flexibility to replicate the actual operations
- Snavely King recommends that the Waybill sample should be available to railroad and shipper representatives for both testing and presenting a case.
- Neither SAC nor medium-sized simplified SAC as proposed is feasible for a rail distribution pattern of a single or few origins to numerous and widely distributed destinations. Medium-sized simplified SAC needs modification if it

³⁷ Source: 49 U.S.C. 10701(d)(3).

is to meet this pattern which is found frequently in the chemical industry, grain industry and in many other industries.

- The internal cross-subsidy principle is ill-advised and impracticable. In effect, this would preclude most access to both medium sized shipment as well as full SAC rate reasonableness review
- The apparent either/or choice between the current rate or the rate with R/VC set at 180 percent is unrealistic, unreasonable, and a needless constraint on both the mediation and litigation process. The shipper should be allowed to propose a rate above 180% R/VC. That rate would be used to estimate the maximum value of the case.
- The STB's proposed \$200,000 five-year maximum for small shipment cases would significantly reduce or perhaps even eliminate small shipment rate cases. The eligibility criteria should enable not block access to needed rate review. The small shipment MVC should be merged with the medium shipment MVC and the shipper should be allowed to file a complaint under either the small shipment or medium shipment procedures for any lane or lanes below that merged MVC.

Respectfully Submitted,

Tom O'Connor
Kim Hillenbrand
Snavely King Majoros O'Connor & Lee, Inc.
1111 14th Street NW
Suite 300
Washington DC 20005
(202) 371-9149

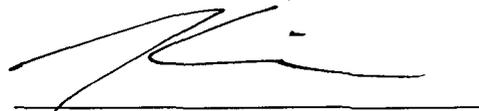
IV. VERIFICATION

We, Tom O'Connor, and Kim Hillenbrand, declare that the foregoing statement is true and correct and was prepared by us or at our direction. Further, we certify that we are qualified and authorized to file this statement.

Executed on January 11, 2007.



Tom O'Connor



Kim Hillenbrand

Subscribed and sworn to before me this 11th day of January 2007 in the District of Columbia.



Notary Public

My Commission expires:

March 14, 2011

V. Certificate of Service

I certify that this filing was served this day on all parties of record by first class US Mail or more expeditious method of delivery.

January 11, 2007.



Kim Hillenbrand

Resumes
Of
Tom O'Connor
And
Kim Hillenbrand

Snavely King Majoros O'Connor & Lee, Inc.

Suite 300
1111 14th St NW
Washington DC 20005

Tom O'Connor

Snavely King Majoros O'Connor & Lee, Inc., Washington, DC

- **Vice President (1988-Present)**

Mr. O'Connor has more than twenty-five years experience in business and economic analysis. His experience includes key and increasingly responsible management and policy positions with government agencies and private industry.

Mr. O'Connor has authored a series of guidelines on transportation negotiations and contracting and has conducted transportation negotiations and contracting seminars for a wide range of clients. Mr. O'Connor has also designed and helped lead transportation contract negotiations resulting in tens of millions in cost savings.

Mr. O'Connor has also appeared as an expert witness in successful Stand Alone Cost (SAC) transportation rate litigation, achieving millions of dollars in savings for the client.

He has also created and managed numerous computerized transportation management and regulatory systems to address complex problems and is a widely recognized expert on costing and economics.

He has conducted extensive analyses of truck transportation as well as analyses of tug and barge operations, both inland and off shore, for private sector clients.

Mr. O'Connor has conducted analyses for the Government of Canada used to shape policy for freight transportation and studies for the U.S. Government used to shape Freight and Passenger transport Policy.

For the Government of Bulgaria, in the Balkans, he developed the Master Plan for Management Information Systems, including telecom and computer facilities designed to operate, measure, manage and monitor both rail freight and rail passenger operations of the Bulgarian State Railways, in Bulgaria and the Balkan peninsula.

Mr. O'Connor has analyzed more than 45 rail merger scenarios and cases. He has provided expert testimony before state and federal courts and commissions in the U.S. and Canada on economic and policy issues. He has also testified as an expert on computerized transportation analytical systems, rail operations, anti trust issues and transportation economics and costing. Mr. O'Connor has served as an impartial and expert monitor of data and processes at issue in litigation on transportation.

Mr. O'Connor has also conducted management audits, focused on identifying the cause and effect relationships underlying claimed cost incidence. The management audits were directed toward testing the cost basis of claims asserted by major railroads.

His experience in telecoms spans the period since 1995. During this period, on a succession of government and commercial projects, Mr. O'Connor directed and participated in the review, design and operation of telecoms systems.

He also designed and developed the business and operations plan for an Eastern European telecoms startup company, BDZCOM. Mr. O'Connor designed and presented the plan and conducted liaison with international commercial, banking and government interests in the United States and Europe.

DNS Associates Inc., Washington, DC

- **Vice President (1982 - 1988)**

Mr. O'Connor directed and participated in numerous projects including merger analyses, transportation infrastructure analyses, plant and network rationalization and feasibility studies.

He designed and implemented mainframe and microcomputerized systems for analyzing rail, truck load, LTL and barge logistics. The computerized cost systems Mr. O'Connor created gained widespread use throughout the United States and Canada.

Mr. O'Connor also advised the U.S. Rail Accounting Principles Board on the costing aspects of regulatory reform policies. He provided expert testimony on coal rates, computerized data bases and cost systems and rail cost issues before the Interstate Commerce Commission.

Association of American Railroads, Washington, DC

- **Assistant Vice President, Economics (1979 - 1982)**

Managing a large staff of professionals, Mr. O'Connor designed and managed major economic analysis projects. He helped formulate industry economic policy positions culminating in the Staggers Rail Act of 1980. He submitted expert testimony on behalf of the railroad industry in numerous cases before the Interstate Commerce Commission and state regulatory commissions. He also appeared regularly in national forums on economic issues.

Mr. O'Connor directed the most significant computerized industry Costing System project in 40 years, URCS, the cost system now used by all major US railroads. He also conducted industry seminars on URCS and related economic issues.

Mr. O'Connor also testified before the Interstate Commerce Commission on the design and application of this pathbreaking rail cost system since adopted by the Commission and the rail industry.

He also directed development and installation of a commercial computerized economic and market analysis system now used by virtually all major US railroads.

Consolidated Rail Corporation, PA

- **Assistant Director, Cost & Economics (1977 - 1979)**

Managing a staff of about 30 professionals, Mr. O'Connor was responsible for all Conrail management and regulatory cost analyses in both freight and passenger areas. He testified before the ICC on the development of subsidy standards now widely used in the US railroad industry.

He also finalized the design, installed and managed Contribution Simulator and Calculator (COSAC), a computerized internal management economic analysis system at Conrail. The COSAC system uses specific management accounting data to develop economic costs. COSAC replaced earlier systems and was used to guide virtually all transportation management decisions, including service design, equipment acquisition, strategic initiatives, line abandonments and service discontinuance.

Mr. O'Connor also participated in cost allocation negotiations between Amtrak and Conrail on cost sharing of joint facilities on the North East corridor. He initiated and directed profit maximization and plant rationalization programs. He also designed and implemented computerization and improvement of a wide range of economic and cost analysis systems used to manage and turn around this multi-billion dollar corporation.

R.L. Banks & Associates Inc., Washington, DC

- **Consultant (1976 - 1977)**

Mr. O'Connor conducted and directed numerous transportation-related projects in the U.S. and Canada ranging from national logistics analyses to site-specific studies. He specialized in costing systems and appeared as an expert witness on such systems in a precedent setting proceeding before a Canadian Crown Commission.

U.S. Railway Association, Washington, DC

- **Manager, Local Rail Service Planning (1974 - 1976)**

In a project of unprecedented scope and historic implications, Mr. O'Connor developed, computerized, and implemented the light density lines cost analysis system, which defined Conrail. This system was used to reach line service decisions for thousands of miles of track, including service throughout New York. He served as liaison with congressional staffs and shipper groups, as well as federal, state, and local governments, and planning agencies. The system he created was a major element in the design and implementation of the streamlined Midwest-Northeast regional rail system. After leaving USRA, Mr. O'Connor subsequently was called back to appear as an expert witness to present and defend the operation of the USRA costing system.

Interstate Commerce Commission,

- **Economist, Washington, DC (1973-1974)**

Mr. O'Connor served as a staff economist and authored a report analyzing industry investment patterns and ICC regulatory policy, including ICC use of cost evidence.

Education

- University of Massachusetts, Amherst, B.A. Economics
- University of Wisconsin, Graduate Course Work, Economics
- University of Delaware, Graduate Course Work, Business Management
- The American University, Graduate Course Work, Computer Science

Professional Organizations

- Transportation Research Board
 - Past Chairman of the Transportation Regulation Committee
- Transportation Research Forum
 - Past President of the Cost Analysis Chapter
- National Defense Transportation Association
 - Past Member of Board of Directors, National Capital Chapter

Academic honors

- Phi Kappa Phi academic honors society
- Phi Beta Kappa academic honors society

Military

- U.S. Army; Sergeant, Combat Engineers

Security Clearance

- Secret

Tom O'Connor is Vice-President of Snavely King Majoros O'Connor & Lee (Snavely King), an economic and management consulting company. He has been engaged in the business of economic analysis for more than thirty years, beginning in 1973 as an economist with the Interstate Commerce Commission (now the Surface transportation Board) and later in economic consulting and management positions of increasing responsibility with the United States Railway Association, Conrail, the Association of American Railroads and, from 1982 through 1988 with DNS, Associates and since 1988 with Snavely King Majoros O'Connor & Lee, (Snavely King), an economic and management consulting company focusing on telecommunications and transportation. Mr. O'Connor was Vice President and principal at DNS Associates and has been Vice President and principal of Snavely King since joining the firm in 1988.

He has provided testimony in a number of proceedings before courts and regulatory commissions in the United States and Canada including:

- Interstate Commerce Commission,
- Surface Transportation Board,
- United States Railway Association,
- Regulatory Commission in Indiana,
- Regulatory Commission in New York,
- Regulatory Commission in Pennsylvania,
- State Court in Indiana,
- State Court in Montana,
- State Court in Virginia,
- Arbitration Panel in New York
- Mediation Panel in Massachusetts
- Mediation Panel in Washington
- Canadian Crown Commission.
- US District Court for Eastern District of Virginia,
- US District Court for Arizona

Tom O'Connor's practice centers on transportation with specific focus on litigation, negotiations and infrastructure issues including rationalization and redesign of the railroad infrastructure in the US as well as rebuilding of the railway infrastructure in Eastern Europe. Mr. O'Connor's work in Eastern Europe focused on both transportation and telecommunications.

Kim Hillenbrand

**Snavelly King Majoros O'Connor & Lee Inc
Washington, DC**

Analyst, Transportation (2003 to Present)

Mr. Hillenbrand provides analytical support to Snavelly King's clients and senior consultants. His responsibilities include cost modeling, operations simulation, financial analysis and reporting, database management and research. Mr. Hillenbrand's work has primarily been in Snavelly King's transportation group. His projects have included extensive cost and revenue analyses of rail freight movements, along with preparation of databases for use in rate negotiations with railroads. Mr. Hillenbrand has prepared action plans and presentations for clients including potential merger analyses, plant site locations, and rail service issues.

Mr. Hillenbrand also conducts research in the chemical, petroleum and transportation industries. Mr. Hillenbrand has assisted in the preparation of presentations and testimony before the Surface Transportation Board and Mr. Hillenbrand has assisted in the marketing of Snavelly King services to potential clients.

**Leventhal Seneter & Lerman PLLC,
Washington DC**

Legal Assistant (Spring 2003)

Mr. Hillenbrand assisted in the migration of Televisa's patent and trademark portfolio from Leventhal Seneter & Lerman to Televisa's in house counsel. Mr. Hillenbrand managed the distribution of incoming documents including from EEO and FCC filings from clients and assisted in all aspects of LS & L's broadcasting, media, and satellite practices.

**Skadden, Arps, Slate, Meagher & Flom LLP,
Washington DC**

Legal Assistant (2002)

While contracted with Skadden Arps, Mr. Hillenbrand assisted in a wide range of legal work. Mr. Hillenbrand coordinated a 750,000 page document production and privilege log for a Department of Justice antitrust filing for the Northrop Grumman-TRW merger. He also compiled and managed privilege logs and prepared document productions on behalf of clients for SEC investigations. Mr. Hillenbrand conducted first review of client documents for SEC and Congressional investigations.

**North American Securities Administrators
Association (NASAA), Washington DC**

Legal Assistant (Spring 2002)

Mr. Hillenbrand assisted in a wide area for projects for NASAA. He assisted state security regulators in the first settlement between New York State and Merrill Lynch regarding conflict of interest between their research groups and investment banking groups. Mr. Hillenbrand conducted verification and complaint checks of stockbrokers and Certified Financial Advisors for investors and answered questions regarding the Series 6 and 63 Exams.

**Acsys, Inc (2003)
Washington DC**

Law Resources (2001-2003)

Mr. Hillenbrand provided temporary work for law, financial, and real-estate firms.

**RVC (formerly Reuters Venture Capital)
London, England**

Analyst, Intern (2000)

Mr. Hillenbrand assisted on a survey of Asia venture capital markets in preparation for future venture capital and fund of fund investments in the region. The survey comprised of an analysis of sources of capital, major investors, and destinations of capital in Asia.

Education

Connecticut College, 2001

B.A. Economics

B.A. International Relations

Georgetown University, Summer 1999

Summer Course Work

Citizenship

United States

United Kingdom