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**SURFACE
TRANSPORTATION BOARD**

ATTORNEYS AT LAW

CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007-4492
TELEPHONE: 202/342-5200 FACSIMILE: 202/342-5219

RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D GREENBERG
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A ROLF
DAVID P STREET
KEITH G SWIRSKY
THOMAS W WILCOX

BRIAN J. HEISMAN
JASON SETTY

ROBERT N. KHARASCH **
JOHN CRAIG WELER **

MINNESOTA OFFICE.
700 TWELVE OAKS CENTER DRIVE, SUITE 204
WAYZATA, MN 55391
(T) 952/449-8817 (F) 952/449-0614

225978

WRITER'S DIRECT E-MAIL ADDRESS
TWILCOX@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER
202-342-5248

** OF COUNSEL

EXPEDITED CONSIDERATION REQUESTED

November 6, 2009



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VIA HAND DELIVERY

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Docket NOR 42114, U.S. Magnesium, LLC v. Union Pacific Railroad Company

Dear Ms. Quinlan:

Enclosed for filing in the above-captioned case please find the original and ten copies of a Petition for Reconsideration submitted by U.S. Magnesium, LLC in this proceeding. Also enclosed is an extra copy of the filing for stamping and return to our office.

Please feel free to contact me with any questions.

FILED

NOV - 6 2009

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Sincerely,

Thomas W. Wilcox
Counsel for U.S. Magnesium, LLC

Enclosure

cc: Michael L. Rosenthal, Esq. (counsel for Defendant)

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FILED

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**SURFACE
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US MAGNESIUM, L.L.C.

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY

Defendant.

225978

Docket No. NOR 42114

ENTERED
Office of Proceedings

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PETITION FOR RECONSIDERATION

Comes now, Complainant U.S. Magnesium, L.L.C ("USM"), pursuant to 49 C.F.R §1115.9 and/or §1117, and, for the reasons set forth herein, asks the Surface Transportation Board to reconsider its decision served on November 3, 2009 in this proceeding announcing that it intends to hold an oral argument in this case on November 23, 2009. As explained below, USM respectfully submits that it would be more appropriate under all the circumstances for the parties to instead submit final briefs, subject to a page limit established by the Board, which USM recommends should not exceed 15 pages, including any attachments. In support of this Petition, USM states the following:

USM commends the Board for its recently announced general policy of holding appellate type oral arguments in proceedings pending before it. However, USM believes

that this general policy, while commendable and valuable in most proceedings before the Board, is nevertheless inconsistent with the overall intent of the Three-Benchmark Methodology of the *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No.1)(“*Simplified Standards*”), and the specific issues and evidence in this case. There are two primary reasons for this. First, the Three-Benchmark Methodology is by design and intention, supposed to be an affordable, albeit imprecise means for a shipper with a rate dispute of relatively limited overall value to seek rate relief from the STB. While the litigation costs for a rail rate case utilizing the Stand Alone Cost analysis can be in the millions of dollars, when adopting the Three-Benchmark rules, the Board determined that the litigation costs for Three Benchmark Methodology cases will be “far less than” \$250,000 “once a body of precedent is developed to guide the analysis.” *Simplified Standards* at 93-94.¹ The discussion of litigation costs in *Simplified Standards* and the Board’s cost estimate was significant because it provided justification for the Board’s adoption of a \$1,000,000 cap in the total relief a complainant may receive over a five-year period for a particular Three Benchmark case.² Specifically, the relief cap of \$1,000,000 was in large part based on the Board’s determination that the cost of litigating these cases would be relatively low, thus providing shippers with smaller rate disputes justification for seeking relief under the Three-Benchmark Methodology. The costs of preparing for and participating in oral argument were not included in the Board’s cost estimates in *Simplified Standards*. Accordingly, adding the unanticipated additional costs

¹ Since a body of precedent interpreting this aspect of the *Simplified Standards* is still being developed, litigation costs for complainants remain on the high end of the scale, which has been USM’s experience in this proceeding.

² USM has asked in this case for the Board to increase the relief cap from \$1,000,000 to \$2,000,000. However, this request has no effect on the points raised in this Petition and is unrelated to the Board’s scheduling of oral argument.

of preparing for and participating in oral argument – which can be significant in a rail rate case³ - has the doubly negative effect in a Three Benchmark case of (1) increasing the overall cost of these cases contrary to the Board's intent in adopting the *Simplified Standards*, and (2) reducing the overall relief a complainant may receive.

The second reason for reconsidering the decision to hold oral argument in this case is that the highly confidential status of much of the evidentiary record will restrict the extent to which the oral argument can be open to the public. Specifically, several of the main areas of dispute concern the following areas for which documents and data have been designated Highly Confidential or Confidential by the parties pursuant to the Protective Order in this case: (1) commercial discussions between USM and UP, (2) commercial discussions between UP and its other customers; (3) UP internal marketing data and documents; (4) USM magnesium and chlorine production information; and (5) unmasked UP Waybill Sample data. Not only would the general public not be permitted to hear argument involving these and other confidential issues, under the Protective Order in this proceeding, the Highly Confidential status of some of the evidence would preclude the presence of employees of each party other than in-house counsel. This would be more prejudicial to USM than UP because USM has no in-house counsel, while UP has several in-house counsel involved in this case.

Notwithstanding the foregoing, USM nevertheless believes that the Board would benefit from additional input from the parties in this case on the primary issues of

³ Oral argument in this proceeding will require counsel and consultants to prepare not only summaries of their respective key issues, but also prepare to anticipate and respond to questions from the Board on all issues in the case, which include, but are not limited to: (a) the intent and purpose of the Three Benchmark rules; (b) the composition of their respective comparison groups; (c) the application of the "other relevant factors component, which includes an extensive amount of evidence and argument on Positive Train Control technology and costs; and (d) expert testimony on costs and economic theory. Added to these costs would be any travel costs associated with client representatives who desire to be present at the oral argument proceeding, to the extent they can be present.

concern to them. Accordingly, USM suggests that this goal can be more appropriately accomplished in this proceeding consistent with the issues set forth above by the parties submitting final briefs that (1) summarize the key points of their respective cases; and/or (2) address specific areas or questions identified by the Board. *See, e.g.* Docket NOR 42057, *Public Service Company of Colorado d/b/a Xcel Energy v. BNSF Railway Co.*, (served August 8, 2003)(where Board provided parties with nine areas to address in their post-evidentiary briefs). USM further submits that the Board should place an appropriate page limit on such filings, which USM suggests should be no greater than 15 pages, including attachments.

In conclusion, USM respectfully asks the Board to reconsider its decision to hold oral argument in this proceeding, and to instead require the parties to submit post-evidentiary briefs, subject to an appropriate page limitation.

Respectfully submitted,



Thomas W. Wilcox

Jason M. Setty

Brian J. Heisman

GKG Law, P.C.

1054 Thirty-First Street, NW

Suite 200

Washington, DC 20007

Phone: 202.342.5248

Fax: 202.342.5222

*Attorneys for Complainant US Magnesium
L.L.C.*

Dated: November 6, 2009

CERTIFICATE OF SERVICE

I do hereby certify that on this 6th day of November, 2009, I have served a copy of the foregoing Petition for Reconsideration by e-mail and regular mail upon counsel for Defendant at the following address:

Linda J. Morgan, Esq.
Michael L. Rosenthal, Esq.
Derek Ludwin, Esq.
Covington & Burlington LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004


Jason M. Setty