

COMMISSIONER MORGAN: Mr. Smith, now that you have looked at all the other comments that have been filed in the proceeding, do you have any particular comments on behalf of the Department relative to any of the suggestions that have been made as to how we could improve our process? You have laid out some general tenets which certainly I appreciate and understand, but putting those tenets to use with respect to particular proposals is what we need to move to now. So do you have any comments on anything that has been suggested?

MR. SMITH: I am afraid the devil will always be in the details. With the kind of very preliminary record that we have, we have been pleasantly surprised by some of the suggestions made, some of them taken, for example, from the reforms you just instituted in the major rail rate cases. We think those are certainly worthy of consideration, perhaps downsized, if you will, to fit the lesser amounts involved, the lesser time that one would hope that a small rate case would take, and so on and so forth.

But, beyond that promising nature of some of them that I have mentioned, there hasn't been a full exposition by parties, the way there often is before such a hearing as this, with comments and reply comments. We have not had, as we often do, meetings with interests throughout the affected parties.

So we haven't been able ourselves to fasten upon a specific one or more that is likely to be better or more successful than another. I wish I could be more detailed, but the circumstances just don't allow for that right now for us.

COMMISSIONER MORGAN: But I do hear you saying that, following up on our procedures, expedited procedures, for the larger cases, some of what we have done with respect to mediation and discovery and timeframes, and so forth, certainly you would suggest that we look carefully at those options as they might relate to the smaller case process?

MR. SMITH: I would think so. The core of those reforms, yes, I think would be very worthwhile to investigate, again, scaled down a bit in terms of the timing that is allowed, perhaps some shortcuts that might be appropriate given, again, the fact that there is much less at risk in these cases than in the CMP cases.

COMMISSIONER MORGAN: Thank you. I would like to ask Mr. Clark a question.

CHAIRMAN NOBER: Please go ahead.

COMMISSIONER MORGAN: I have been to your State a couple of times. We have never actually met before, but thank you for being here and for taking the time.

COMMISSIONER CLARK: Thank you.

COMMISSIONER MORGAN: I certainly have studied all of the suggestions that you have made. If you were to pick -- and I know this is a hard question to ask, but it is something we have to do when we are looking at a record with so many suggestions -- if you had to pick the most important thing that you would want us to fix right now, as far as our guidelines are concerned?

COMMISSIONER CLARK: I just get one choice?

(Laughter.)

COMMISSIONER MORGAN: Well, you can give me as many as you want, but start, if you have a No. 1, start with that.

COMMISSIONER CLARK: Sure. Mr. Chairman and Commissioner, I would say that probably the thing that would be most helpful to, for example, the State, as we ponder bringing a small rate complaint case before the Board, is a greater amount of certainty with regard to the non-CMP processes. The technical experts on our staff have some difficulty right

now deciding if that's going to be the right way to go. Part of it is because it hasn't been tested yet, but part of it is that they fear that they may get into a proceeding that is protracted regarding whether they actually qualify, depending on how we proceed with the case for those particular guidelines.

The mediation/arbitration discussion I think has also been a helpful one. The Commission itself has favored arbitration more than mediation in these small rate complaint cases. It has been our experience that, typically, there has been, although informal, a lot of mediation that goes on before you get to the actual point that it would come before the Board. We fear that a mandatory mediation may just become one sort of more hurdle that has expense and timelines involved with it, that may not achieve any meaningful results at the end of that mediation.

COMMISSIONER MORGAN: So you would be more inclined toward arbitration than mediation, is what I --

COMMISSIONER CLARK: We would, yes. As my experience sitting on your side of the bench in the world of telecom, for example, there are both mediation and arbitration provisions when two telephone companies agree to interconnect. We find that mediation has not been particularly helpful in those instances, but arbitration, with a very strict-set guideline with timelines and things like that, has been very helpful in that world, and I think sort of the same type of proceeding may have some applicability here.

COMMISSIONER MORGAN: Thank you.

CHAIRMAN NOBER: I have a couple of questions, if I might. I would start with one really for you, Commissioner Clark, which is in your testimony one of the issues that you raise several times over is what should be considered a small rate case. That's one that certainly folks on this side of the dais have been struggling with for a generation: What is a small rate case? Is it a small amount of goods or is it a large amount of goods from a small entity? I confess that we are still struggling with that, and our current guidelines don't really provide a lot of clarity as to what would be a small shipper.

The statute speaks in terms of value, where the cost of a standalone case would be too expensive to bring. So one thought would be, rather than peg it to an amount of goods, peg it to a value of a shipment. If we were to do that, what would be a threshold that you think would be reasonable?

COMMISSIONER CLARK: Mr. Chairman, Commissioner, I haven't thought about that level of detail. I would have to talk with my technical staff, but we would certainly be more than happy to kind of consider those and offer you further testimony on that.

CHAIRMAN NOBER: Okay. Now, secondly -- and I would address this to both of you -- another area where our current guidelines have been, where issues have been raised many times by the parties today is the test we have for determining what the reasonable rate is. Do you all agree with the current test in the guidelines or would you like to see it changed?

MR. SMITH: Do you mean the benchmarks, Mr. Chairman?

CHAIRMAN NOBER: The three benchmarks.

MR. SMITH: I think that it would have to be at least modified, if not changed, in a qualitative sense. Because of the disuse of those benchmarks, there has been such uncertainty about so many aspects of them that, if they would be retained, they would have to be refined and made far more clear in their application and, to the extent possible, this requires some billable precedent, some ability to gain predictive qualities, because one of the comments made again and

again in the record to date was that we not only don't know whether we qualify, but we don't know how to even assess, if we do, how it would turn out for us.

COMMISSIONER CLARK: We would concur. As our folks have looked at going down this road, we almost have to, we are pondering that we have to, look at both the CMP and non-CMP methods just to compare whether we want to go down the non-CMP route, and doing so doesn't achieve a lot of cost savings for us, if we have to do that type of analysis.

CHAIRMAN NOBER: Well, let me just follow up on one thing that you mentioned, which is the value. I mean, DOT is an administrative agency itself, and you do lots of adjudications. How can we propose a test that would have predictive certainty for a litigant? I mean, it is a proceeding. Isn't that, by its nature, uncertain?

MR. SMITH: You would be far more easily able, I should think, to do that with respect to the qualifications or eligibility for the use of a test, whether it's the benchmarks or not.

I recognize that in terms of the outcome, that would require some bit of a precedent, and it is unavoidable, I think, at least to some extent, that it will take a couple of cases before anybody knows with the kind of probabilities or risks that people are comfortable with which way they might think about or advise their clients to go on a case.

But, to the extent that to get there, to get to that outcome, the procedures can be faster and less expensive, that would help to lower that barrier toward even taking the chance to see what the final result is.

CHAIRMAN NOBER: So am I to understand from the two of you that you would both be in favor from a threshold perspective of who could use the simplified guidelines of a bright-line test, just for us to set out fairly clearly whether it's value or carloads or some mix of the two? Would you both see that as a step forward?

COMMISSIONER CLARK: Mr. Chairman, again, the devil is always in the details, but certainly that would be helpful, more of a bright-line type of test.

With regard to an earlier comment, you know, perhaps there is some value in an entity like a state government sort of taking the first hit on this one, because we have greater resources than a small shipper might, and perhaps as the process is adjudicated out, it does provide certainty for those cases that follow in its wake.

CHAIRMAN NOBER: You know, as we look at this, we are, ourselves, I mean the Board is somewhat constrained by the kinds of things that we can adopt. I mean, we have Court of Appeals decisions that limit the types of tests that we can look at, and we have practical limits on us as well as to who would qualify.

So I would urge those of you to take a look at those, and if you think that there are suggestions that could be made to our tests, to our three tests, a better way of doing it, submit them to us. If you think that there is a better, you know, a good, bright-line threshold that would make sense for going forward, suggest it to us. I mean, if folks could get us those suggestions within 60 days, we would appreciate it.

Because I confess that people who are a lot smarter than me have been looking at this for a generation and haven't been able to come up with -- I mean, you have seen the best efforts that the Board has come up with. Obviously, they have never been used, and that speaks volumes.

We have constraints over what we can do. Any practical suggestions for a specific test and a specific threshold that folks would have -- and I will make this same request of all the witnesses today -- we would appreciate.

Commissioner Morgan?

COMMISSIONER MORGAN: I think the Chairman has made an important point. With respect to the eligibility issue, it is very important because, obviously, when you are talking about providing access or not, you have to base it on some legitimacy in the statute or some record that's very clear.

One of the things that we were faced with with the original guidelines was a record replete with suggestions as to what that test would be, but certainly no consensus. So I think as we move ahead and try to deal with perhaps creating more certainty in this process, I think the more the record can be clearer and based on some sort of foundation in the statute, the more likely that we can pursue something more specific and be upheld in court.

CHAIRMAN NOBER: Commissioner, could I just follow up with one more issue before we let you go? That's on mediation and arbitration. Now some have suggested that we require non-binding mediation in small shipper cases, whatever those might be, similar to what we just required in large shipper cases. I take it from your comments that you are not sanguine about that?

COMMISSIONER CLARK: Mr. Chairman, we believe the prospect for non-binding mediation would probably not be particularly helpful in the end. If there's nothing binding on the parties, we are concerned that shippers will spend at least some deal of time and expense in going through the mediation process with no particular helpful conclusion at the end of this process.

Now if the record that is built in the mediation procedure helps to expedite an eventual STB proceeding, if it perhaps helps clarify the issues and speeds up that latter process, then there may be some potential value in that, but we are concerned that it would just be sort of one more hurdle for people to cross.

CHAIRMAN NOBER: Another suggestion I just wanted to follow up on was the Office of Consumer Advocate or Consumer Advocacy. After I saw your testimony, and some other folks raised it as well, I asked our staff if the ICC had ever had one before, because we go back to the 1880s. It turns out that we have had several, including Louis Brandeis was at one point a Special Counsel as a consumer advocate. So it is both a new idea and an old idea here.

But it is certainly something that we could do administratively. Do you think it would be helpful if we did that, and what kinds of help do you think it would provide?

COMMISSIONER CLARK: I believe that, especially in the small shipper-type proceedings, rulemakings, things like that, where folks in that community may not feel that they have a great ability to connect with the Board, I can use our own State's example. There are a number of ways that such offices can be set up.

In North Dakota, when we have a rate proceeding on a utility matter, we actually split the staff, where we have a portion of the staff which becomes advocacy staff and who the Commissioners cannot talk to on that matter, and then you have a portion of the staff which is Commission advisory staff who we deal with in working out the case. That is one way of doing it without setting up a formal Consumer Advocacy Office.

A number of other states actually set up a separate office within state government, whether it's in the Attorney General Office or somewhere else, that actually is separate from the Commission itself. I think either of those two approaches can work.

CHAIRMAN NOBER: Do you have one at DOT?

MR. SMITH: There is not a formal one. There is the separation of functions among the staff on some occasions, where some are advocacy staff and some are advising staff.

CHAIRMAN NOBER: One final question and then I will let you go. Another option for expediting the matters before us would be for us to bring back another old concept, which are Administrative Law Judges who could handle cases in the first instance and perhaps be able to render an initial decision quicker.

I think some of the folks on the next panel have suggested returning to that. Do you think that would be helpful?

COMMISSIONER CLARK: Mr. Chairman, that may have some value. We would need to perhaps study that idea a little bit more before we submitted formal comments on it.

MR. SMITH: I agree. I think at first glance it appears to me to be another layer or level of time and expense gone by, but it may be that, if relative to what was in place before and if there is an appeal, if that could be, again, tailored, scaled down to be quicker, then it might not be that way.

CHAIRMAN NOBER: Okay, and if I asked you this already, I apologize. Does DOT have a view on what the threshold for a small shipper should be?

MR. SMITH: We think the Board needs to -- the quick answer is no. The longer answer is, we think the Board needs to clarify whether, in fact, it is going to be focusing upon the size of the shipper or the size of the shipment or whether it, in fact, could use both of those factors, depending upon the circumstances in front of it.

Of course, the language of the legislation goes to the value of the shipment. So you are running some pretty good basis to use that, but I would suggest that as you have some discretion in your application of the statute and to look at its purpose and your purposes in this respect, that you wouldn't be confined to that necessarily. You could use other factors as well.

CHAIRMAN NOBER: And do you have a view on how we should come out on that balance?

MR. SMITH: You mean focus on the size of the shipper versus --

CHAIRMAN NOBER: Should we look at the size of the shipper? You know, we could have a company, one of the 10 largest in America, shipping small amounts or we could have a very small grain elevator shipping near unit-train quantities. How should we mediate that balance?

MR. SMITH: From what I understand, the chemical industry has its share of commercial giants certainly, but the way its distribution systems work to get their product to the various users of it, again, it is much unlike coal. So they share in some respects the more traditional mom-and-pop shipper, whomever that might be.

So the size of the shipper doesn't itself, it seems to me, lend itself to being the single factor that you have to look at. You have to look at what that shipper does. It may have lots of small shipments individually.

CHAIRMAN NOBER: Commissioner Morgan, anything else?

COMMISSIONER MORGAN: No.

CHAIRMAN NOBER: Well, again, thank you all for coming. Commissioner Clark, I know you traveled a long way, and thank you for coming.

COMMISSIONER CLARK: Thanks.

CHAIRMAN NOBER: I am hoping to get to North Dakota. I appreciate the invitation, and I am planning on coming.

COMMISSIONER CLARK: We would love to have you anytime.

CHAIRMAN NOBER: Well, thank you.