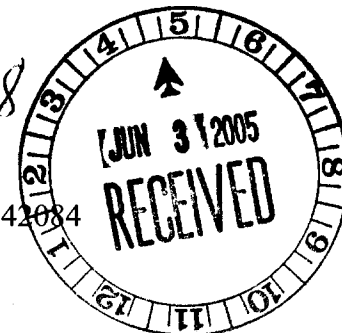


ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE
SURFACE TRANSPORTATION BOARD

CFI Industries, Inc.)
Complainant)
)
v.)
)
Kaneb Pipe Line Partners, L.P.)
)
and)
)
Kaneb Pipe Line Operating)
Partnership, L.P.,)
Respondents)
)
Dyno Nobel, Inc.)
Complainant)
)
v.)
)
Kaneb Pipe Line Partners, L.P.)
Respondent)

214128
Docket No. NOR-42084



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Docket No. NOR-42081 - 214127

**Initial Brief of Kaneb Pipe Line Partners, L.P.
and Kaneb Pipe Line Operating Partnership, L.P. Supplementing Oral Argument**

Pursuant to the May 20 Order of the Surface Transportation Board (the "Board"),¹ Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P. (collectively, "Kaneb"), submit this Initial Brief Supplementing Oral Argument.

As the Board intended, the May 11 oral argument crystallized the issues. First, this proceeding covers only the narrow issue of whether the rate prescription should be vacated. Any issue outside of that narrow scope is properly reserved for another proceeding.

¹ CFI Industries, Inc. v. Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P., Docket No. NOR-42084, slip op. and Dyno Nobel Inc. v. Kaneb Pipe Line Partners, L.P., Docket No. NOR-42081 (May 20, 2005) ("May 20 Order").

Second, the Board's Constrained Market Pricing ("CMP") principles protect captive shippers by emulating market constraints. Nonetheless, CF Industries, Inc. ("CFI") and Dyno Nobel Inc. ("DNI") want the Board to scrap 17 years of uniform, successful application of the CMP principles in favor of a system that will perpetuate the below-market rates that CFI pays – rates that have not changed in 18 years.

Third, circumstances have changed. Kaneb now owns the pipeline, after paying \$140 million for it in an arm's-length negotiation. The Board should vacate the prescription in the Koch Decision,² level the playing field, and restore ratemaking initiative to Kaneb, while allowing the CMP principles to continue to protect the rights of captive shippers.

I. The Purpose of CMP is to Protect Captive Shippers

The purpose of CMP is to protect captive shippers by emulating market constraints found in contestable markets. If a carrier lacks market power the Board does not apply CMP and instead relies on market forces to constrain rates to a just and reasonable level. If there are no captive shippers, there is no reason to apply CMP. The market protects the shippers. Nonetheless, CFI argues that CMP works fine except when there are captive shippers. CFI's argument is without merit and ignores prior Board precedent regarding the proper application of CMP.

The Board and its predecessor, the Interstate Commerce Commission, (collectively, "Board") have used CMP since 1988 to decide railroad and pipeline cases where captive shipper rates have been at issue.³ CMP is sound economics, sound policy and best achieves the Board's

² CFI Indus., Inc. v. Koch Pipeline Co., 4 S.T.B. 637 (May 9, 2000) ("Koch Decision"), aff'd CFI Industries, Inc. v. S.T.B., 255 F.3d 816 (D.C. Cir. 2001).

³ See, e.g., Pub. Serv. Co. of Colorado v. Burlington N. and Santa Fe Ry. Co., 2005 S.T.B. LEXIS 23 (Jan. 19, 2005); CF Indus. Inc. v. Koch Pipeline Co., 4 S.T.B. 637 (2000), aff'd. sub nom CFI Indus., Inc. v. S.T.B., 255 F.3d 816 (D.C. Cir. 2001); Ashley Creek Phosphate Co. v. SF Phosphates Ltd., et al., 1996 S.T.B. LEXIS 367 (Oct. 28, 1996).

goal of protecting captive shippers by emulating the constraints found in competitive markets.⁴ The main principles of CMP work together to protect captive shippers and allow a carrier, for the sake of its investors, an opportunity to recover a fair return on its investment: (i) the Revenue Adequacy Constraint is based on acquisition price (as a proxy for replacement cost) and ensures that the current investors are not earning excessive returns; (ii) the Stand Alone Cost ("SAC") Constraint ensures that captive shippers are not paying more than they would incur to provide the service themselves;⁵ and (iii) the Management Efficiency Constraint protects captive shippers from paying for avoidable inefficiencies. Together, the SAC Constraint and the Management Efficiency Constraint protect CFI against the alleged purchase price imprudence that forms the core of CFI's argument.

As the Court of Appeals ruled in Burlington Northern v. STB,⁶ CMP meets the Board's "dual objectives" of providing the carrier the prospect of attaining revenue adequacy while protecting captive shippers from excessive rates. Under CMP, SAC protects a captive shipper from having to pay a rate any higher than the cost of providing efficient service in a perfectly contestable market assuming the maximum economies of scope and scale. CMP ensures that the carrier's rates will not be higher than the cost that the captive shipper would incur in providing the service for itself. Moreover, the Revenue Adequacy Constraint provides the captive shipper

⁴ Most economists accept that contestable market theory, the basis for CMP, provides the best mechanism by which a regulator can replicate the consequences of effective market forces. See, Baumol, William, Willig, Robert, "Contestability: Developments since the Book" Oxford Economic Papers, New Series Vol. 38 (Nov 1986) 9-36.

⁵ Arizona Pub. Serv. Co. & PacifiCorp v. The Burlington Northern and Santa Fe Ry. Co. ("APSC v. Burlington Northern"), 2004 S.T.B. LEXIS 787, *2 (Dec. 13, 2004) ("The objective of a SAC analysis is to simulate the competitive rate that would be available to the captive shipper in a contestable market environment.").

⁶ Burlington Northern and Santa Fe Ry. Co. v. STB, et al. ("Burlington Northern v. STB"), 403 F.3d 771, 773 (D.C. Cir. 2005), citing Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 524-25 (1985), aff'd sub nom. Consol. Rail Corp. v. U.S., 812 F.2d 1444 (3d. Cir. 1987).

with the opportunity to pay less than SAC level rates as long as the carrier's investors are being allowed to earn a reasonable return on their overall investment.

CMP is based on sound economic theory and is universally applicable, but CFI would limit its application to railroads and then only to situations where only a small percentage of a rail carrier's business is attributable to captive shippers.⁷ This makes no sense and is inconsistent with the Board's prior application of CMP. A captive shipper is captive whether the carrier is a railroad or a pipeline, and whether 10% or 95% of the carrier's business is attributable to captive shippers. Moreover, as discussed above, the Board only applies CMP to captive shippers. Economic principles are not muted because the mode of transportation is different or because the population of non-captive shippers is larger or smaller. It is of no comfort to a captive shipper that 95% of a carrier's shippers are not captive. If CMP works in one situation, it will work in the other. Its purpose is to protect captive shippers. It is not needed to protect shippers who have market alternatives. CFI's argument that CMP should be abandoned for pipelines is economic nonsense.

CFI's proposed alternatives to CMP for calculating investment base are two results-oriented methodologies whose only purpose is the short-term benefit of CFI. First, in its Supplemental Brief CFI proposes to set

. . . the investment base using the lower of the purchase price or book costs if the pipeline is market dominant. If the purchase price is below the book costs, the Board should establish the investment base using the purchase price. Since the investor has no stake in the prior book costs, the investor would only be entitled to a return on its investment.⁸

⁷ Transcript, at 52 (distinguishing between use of purchase price in revenue adequacy analysis for railroads and pipelines on the basis of the number of captive shippers).

⁸ CFI Supplemental Brief, Docket No. 42084, at 5 (Feb. 4, 2005) ("Supplemental Brief").

Thus, CFI has proposed a "Kaneb loses, CFI wins" methodology. Under CFI's circular reasoning, shippers get the benefit of a lower rate base when a purchase occurs at a price below book value, and they get the benefit of book value when the purchase occurs at a higher price. As the ICC noted in specifically rejecting use of the lesser of purchase price or predecessor cost in Ex Parte No. 483, such a proposal would "potentially shortchange recent investors."⁹

Next, CFI argues throughout the Transcript that the Board should use only Koch's book value.¹⁰ Under CFI's second proposed methodology, the answer in any context is simple: low transfer prices are correct and higher transfer prices are incorrect. CFI asks the Board to just accept that as fact. No need to apply CMP principles to test its truth. "Kaneb paid too much," says CFI.¹¹ CFI knows that without applying any type of economic analysis. CMP and economic theory in general provide ways to test CFI's assertion: if Kaneb's purchase price exceeds its SAC then Kaneb paid too much and its rates should be limited to SAC. As noted elsewhere, this determination is an issue properly left for a rate case, if and when such a proceeding occurs. At this time, however, CFI has presented no evidence beyond its own speculation to support its claim that Kaneb paid too much for the asset, or that the price Koch paid 18 years ago, less 18 years of depreciation, remains the proper way to value these assets.

CFI asserts that the Board should accept the use of Koch's book value on faith because, if the investment base is based on Koch's book value, purchase price can never be a changed circumstance. Under CFI's proposal, purchase price, the price that the market bears in future

⁹ "No one suggests that we use old book values in cases where railroads are sold for more than those book values. Such an approach would potentially shortchange those recent investors who have paid a premium above the old book value with a return below the cost of capital for their investment." Railroad Adequacy -- 1988 Determination, Ex Parte No. 483, 6 I.C.C. 2d 933, *17 (Jul. 30, 1990) ("Ex Parte No. 483").

¹⁰ See, e.g., Transcript Oral Argument: CF Industries Inc. v. Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P. and Dyno Nobel Inc. v. Kaneb Pipe Line Partners, L.P. ("Transcript"), at 53 (May 11, 2005).

¹¹ Transcript, at 45.

transactions, can never be taken into account. As Commissioner Mulvey noted, "book value can . . . include . . . a lot of historic value which may . . . very much understate the value . . . of the firm."¹² CFI is merely paying lip service to the Board's effort "to try to mimic what will happen in a competitive market."¹³

To support its argument, CFI cites Conrail,¹⁴ where the Board rejected the use of book value and endorsed the use of above-book value purchase price – precisely the outcome Kaneb seeks and CFI wishes to avoid in this proceeding.¹⁵ There, the Board found that if it were to "adopt a policy of using the predecessor book value of property obtained through a merger or consolidation for various regulatory purposes, then this could deter efficiency enhancing transactions . . . carriers cannot attract and retain capital unless they are given the opportunity to be compensated for the *real value* of the property, not just the *book value*."¹⁶ Moreover, the Board found that purchase price negotiated at arm's length is a more accurate reflection than book value of the value of property because book value reflects accounting estimates that "may vary significantly from the current economic value of the assets."¹⁷

Further, CFI would like the Board to use prior revenues dating back to Koch's ownership of the pipeline in order to show that Kaneb is revenue adequate.¹⁸ However, the Koch Decision has made clear that in calculating a revenue adequacy analysis, a party may only rely on the costs

¹² Transcript, at 78.

¹³ Transcript, at 46.

¹⁴ CSX Corp. and CSX Transp., Inc., et al. ("Conrail"), 3 S.T.B. 196 (Jul. 20, 1998).

¹⁵ Transcript, at 57.

¹⁶ Conrail, 3 S.T.B. at *142 (emphasis added). See also, Ex Parte No. 483. In the process of choosing purchase price the ICC determined purchase price was the best proxy for fair value. The ICC considered historic cost and rejected it because it did not accurately reflect the expectations of the current investors. The ICC also looked at replacement cost for revenue adequacy purposes and determined it was too complex. There is no reason to depart from these past decisions adopting purchase price.

¹⁷ Conrail, 3 S.T.B. at *142-143 ("Protestants have submitted no evidence to support the notion that the purchase price that was negotiated at arm's length for Conrail is not an accurate reflection of the worth of that property. Certainly it is a more accurate reflection of value than Conrail's historic book value.")

¹⁸ Transcript, at 81 ("It's not about one year. It's about over time. The Board said no snap shots, and we'll need to look at a pipeline that has been historically very successful.").

and revenues of the current owner and may not reach back to those of a previous owner.¹⁹ Further, the Board has made clear that parties must use future projections in CMP analyses.²⁰ To do otherwise would constitute retroactive ratemaking.

II. Hope Supports the Use of CMP to Protect Captive Shippers

Hope's historic holding – the proposition that Hope stands for – is that agencies like the Board have broad discretion in determining what is reasonable as they exercise their statutory authority to set rates or, in this case, vacate a prescription:

We held in Federal Power Commission v. Natural Gas Pipeline Co., *supra*, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of "pragmatic adjustments." And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. . . . It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.²¹

CFI claims that Hope "required book value."²² For emphasis, CFI repeats the phrase. All one needs to do is read Hope to see that CFI's claim is false. No amount of interpretation or "spin" can overcome Hope's clear words. The Board has the discretion to use CMP to protect captive shippers.

In keeping with its holding that gives a regulatory agency broad discretion, Hope found that the Court of Appeals should not have held that the Federal Power Commission was required to find that a utility's "present fair value" was its rate base.²³ The term, as defined by the Court

¹⁹ Koch Decision, at *47 (finding that Koch could not rely on Gulf Central's costs in its revenue adequacy analysis).

²⁰ APSC v. Burlington Northern, at *4-5, *15.

²¹ F.P.C. v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) ("Hope").

²² Transcript, at 54.

²³ Hope, 320 U.S. at 601.

of Appeals, would have required the FPC to consider reproduction cost and trended original cost.²⁴ The Supreme Court noted in passing that present fair value, as defined by the Court of Appeals, was not a particularly good way to determine rate base, hardly an observation that negates Hope's historic holding and requires the Board to abandon 17 years of consistent application of CMP.²⁵

Although the rates CFI is paying Kaneb have been spiraling sideways for 18 years, CFI raises the specter of an upward rate spiral if Kaneb's purchase price is used rather than Koch's book value.²⁶ CMP puts any such concerns to rest. Use of purchase price will not create such a spiral.²⁷ CMP allows the Board to limit a carrier to a return based on the *lesser* of purchase price or the cost that the hypothetical entrant would face (*i.e.*, SAC),²⁸ thus breaking the alleged "fatal circularity" problem of employing purchase price.²⁹ Moreover, if evaluating revenue adequacy based on Kaneb's 2002 purchase price suffered from a fatal circularity, this circularity would be equally fatal to use of the price Koch paid for the pipeline in 1988.

III. Changed Circumstances Require that the Koch Rate Prescription be Vacated.

The August 12 Order provided that in order to vacate the rate prescription imposed in the Koch Decision, Kaneb must show that the factual and legal bases underlying the prescription are

²⁴ Id., at 600.

²⁵ Id., at 601.

²⁶ Transcript, at 54.

²⁷ In its appeal of Ex Parte No. 483 to the DC Circuit in Assoc. of American R.R. v I.C.C., 978 F.2d 737 (1992), the petitioner argued that using purchase price when this price is below original cost could result in a downward spiral of rates. The court rejected this argument, stating that "the use of [a fair market value] purchase price does not result in a fatal circularity."

²⁸ As noted in Conrail, at *141, Revenue Adequacy is only one of the constraints that protects captive shippers. "Neither the Board nor the ICC has ever decided a maximum rate case based upon whether the defendant carrier or carriers was or was not revenue adequate. The fact that a carrier is revenue inadequate has never been used as a reason to deny or limit the scope of maximum rate relief."

²⁹ October 7 Response, at 18; DNI Opposition, at 5.

no longer valid.³⁰ The record has ample evidence of significantly changed circumstances to warrant vacation of the rate prescription. The record establishes that Kaneb purchased the pipeline assets from Koch in November, 2002, for approximately \$140 million³¹ and that these are substantially the same assets that the Board examined when it set the rate prescription in the Koch Decision.³² Kaneb has established by uncontroverted evidence that its due diligence review and financial valuation supported the purchase price of \$140 million as a fair representation of the market value of the assets.³³ That suffices to establish, for purposes of this proceeding, that Kaneb's purchase price is a changed circumstance sufficient to warrant vacating the prescription. Moreover, Kaneb obtained an independent valuation from Corporate Valuation Advisors, Inc., a professional appraisal firm. That independent valuation values the acquired assets at \$150 million.³⁴

The record contains the complete Koch/Kaneb Asset Purchase and Sale Agreement, Exhibit H of which contains an itemized valuation of the assets Kaneb purchased.³⁵ The transaction was conducted at arm's length, and Kaneb has no affiliate relationship with Koch.³⁶ Koch and Kaneb were of equal bargaining power throughout the negotiations;³⁷ and Koch did not receive a percentage of earnings from the pipeline assets and did not retain an interest in the pipeline assets.³⁸

³⁰ CFI Industries, Inc. v. Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P., Docket No. 42084, slip op. at 2 (Aug. 12, 2004) ("August 12 Order").

³¹ Kaneb Pipe Line Partners, L.P.'s and Kaneb Pipe Line Operating Partnership, L.P.'s Opening Evidence and Argument ("Evidence"), Exhibit A, at 3 (Sept. 13, 2004).

³² Evidence, Exhibit A, at 4.

³³ Evidence, Exhibit B, at 3.

³⁴ Bates Nos. KNB-00367-KNB-00411.

³⁵ Evidence, Exhibit E.

³⁶ Evidence, Exhibit B, at 2.

³⁷ Evidence, Exhibit B, at 3.

³⁸ Evidence, Exhibit B, at 2.

Further, since the acquisition, Kaneb has incurred significant increases in both operating costs and capital expenditures that exceed those that the Board examined in the Koch Decision.³⁹ Volumes shipped on the pipeline and, therefore, revenues have declined.⁴⁰ As a result of all of these changed circumstances, Kaneb's return on investment is significantly lower than the return on investment that underlies the Koch Decision rate prescription, and it is significantly lower than Kaneb's cost of capital.⁴¹

Neither CFI nor DNI has submitted any evidence disputing Kaneb's evidence. All they have done is mount an ineffective prudence challenge, which, as discussed in section IV, is properly reserved for a rate case. They do not dispute that Kaneb's purchase prices substantially exceed the pipeline asset valuation underlying the Koch Decision prescription. They do not dispute that the assets Kaneb acquired from Koch are substantially the same assets that the Board examined in Koch. They do not dispute that the Koch/Kaneb asset purchase and sale was an arm's-length transaction. They do not dispute that Kaneb's operating costs and capital expenditures exceed the operating costs and capital expenditures the Board examined in the Koch Decision. They do not dispute that volumes and revenues on the pipeline have declined since the Board imposed the Koch Decision rate prescription. Because CFI has not presented any evidence to counter Kaneb's showing, and because its prudence challenge is incomplete, ineffective and more properly addressed in a rate case, the Board must find changed circumstances and vacate the prescription.

³⁹ Evidence, Exhibit A, at 5-6.

⁴⁰ Evidence, Exhibits A, at 6-7 and C, at 1. At the oral argument Vice Chairman Buttrey asked if rate reductions would be a proper response to volumes lost to competitors. Transcript, at 25. Kaneb agrees. It has reduced its rates to certain competitive destinations where the shippers benefiting include CFI. See, e.g., S.T.B. No. 8, effective February 15, 2005, in which Kaneb has discounted its rates from Donaldsonville, LA to Palmyra, MO and Terra Haute, IN. Because the Koch Decision prescribed "maximum reasonable rates," rather than a single prescribed rate, Kaneb is free to charge less than the prescribed rates.

⁴¹ Evidence, Exhibit D.

The recently remanded Burlington Northern v. STB case addressing the standard for vacating a prescription has no effect on the instant proceeding. It stands for a proposition that is not at issue in the Kaneb proceeding, the proposition that in order to justify vacation of a rate prescription, the party – shipper or carrier – must show changed circumstances. It does not address the issue of the proper standard for changed circumstances.⁴²

IV. Equity Requires That the Koch Rate Prescription Be Vacated

As a result of the rate prescription, Kaneb's ability to increase CFI's rates above 1987 levels is indefinitely suspended. It can never recover the revenues it is losing. It is suffering irreparable harm.

In the past the Board has recognized and rectified the irreparable harm of leaving a prescription in place. In APSC v. Burlington Northern, the Board saw the value of "simply vacating the prior rate prescription. . . . This restores control to Burlington Northern and Sante Fe Railway Company ("BNSF"), and permits Arizona to challenge the reasonableness of BNSF's chosen rate, using a . . . SAC analysis of Arizona's choosing."⁴³ This is precisely the remedy that Kaneb seeks. The Board should act now to vacate the prescription and put the parties back on equal footing so the market and the regulatory regime can work. Indeed, in that case the Board went a step beyond and crafted protection for the parties when, as here, circumstances have changed significantly but the Board needs more time to complete its work. The Board provided BNSF interim relief by vacating the prescriptive effect of a rate while determining whether to vacate the prescription. It ordered the parties to maintain status quo and once the prescription

⁴² Burlington Northern v. STB, 403 F.3d at 775. In Burlington Northern v. STB, the Board found that while a carrier had to show changed circumstances to lift a prescription, "the complaining shipper should be entitled to have that prescription vacated upon request, without having to show that the prescription is now defective." The Court of Appeals found that the changed policy allowing a shipper to no longer show changed circumstances before vacating a prescription was arbitrary and capricious and was not based on reasoned decision making. Id., at 778.

⁴³ APSC v. Burlington Northern, at *17.

proceeding was resolved, the party owed money would be made whole.⁴⁴ Kaneb seeks similar relief. Kaneb continues to suffer the irreparable harm that the Board sought to avoid in APSC v. Burlington Northern. The Board should vacate the prescription without further delay, level the playing field, and place CFI and Kaneb in the positions accorded to the Arizona Public Service Commission and BNSF.

Prudence would be more properly addressed in a rate case than in a hearing regarding vacating a rate prescription.⁴⁵ Prudence is, after all, closely related to the CMP constraints. It requires factual development that can best be pursued if the parties are on a level playing field, where one party does not have an inordinate incentive to delay resolution. The Board should put CFI and Kaneb on equal footing by removing the rate prescription. Once the rate prescription is vacated, for a rate case to occur, Kaneb must decide to raise its rates to a level that either CFI or DNI finds unreasonable, and that party must complain. If that occurs and CFI or DNI invokes CMP, the Board can assess the prudence of Kaneb's purchase price.

If that rate case occurs, CFI's legal argument as it now stands, based on no facts of its own, on 100% hindsight and on selective references emphasizing some of the facts known to Kaneb at the time and ignoring others, would not meet the legal standard for determining that a regulated company's investment was imprudent. In National Fuel, the D.C. Circuit cited with approval FERC's statement of the standard for determining prudence: "'while in hindsight it may be clear that a management decision was wrong,' [FERC's] task was to review the prudence of a utility's actions and the costs resulting therefrom based on the particular circumstances existing

⁴⁴ APSC v. Burlington Northern, at *9.

⁴⁵ See, e.g., Ashley Creek at *32-38 (analyzing operating costs to include only those resulting from efficient, i.e. prudent, operation and management). In the Transcript, page 81, CFI concurs that prudence is properly left for a rate case: "I agree at purchase price, they are not revenue adequate. But they have also been inefficient, which is another part of constrained market pricing that we'll have to deal with if we get to a rate case, in paying that much inefficiency or imprudence."

either at the time the challenged costs were actually incurred, or the time the utility became committed to incur those expenses."⁴⁶ Therefore, CFI would have to prove that Kaneb was imprudent at the time and in the context it purchased the pipeline from Koch. CFI has not done that. CFI's implication that because it chose not to purchase the pipeline from Koch somehow Kaneb's purchase price was imprudent is evidence of nothing.⁴⁷ CFI merely made a different business decision. Further, the evidence regarding prudence has not been properly developed on this record and, as such, may not be decided by the Board. If the Board vacates the prescription, if Kaneb raises its rates and if CFI complains, that will be the time to develop the record for and decide the prudence of Kaneb's business decisions.

V. There is No Rate Contract Between Kaneb and DNI

To summarily dispose of a proceeding, the Board must "view in the light most favorable to the nonmoving party . . . granting summary judgment only if there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."⁴⁸ On the record as it exists, the Board cannot summarily find for DNI. There are too many genuine issues of material fact when the record is viewed in the light most favorable to Kaneb. A fundamental issue of material fact is whether there is a contract at all. Kaneb contends that no contract exists; DNI argues the opposite. The many reasons why no contract exists have been well documented in the record for the Board to review.

DNI's oral argument highlights the fact that issues of material fact remain that disqualify DNI from obtaining summary disposition. In the Transcript, at page 102, DNI contends that "any subsequent proceedings," as used in Note 195 of the tariff sheets, clearly means

⁴⁶ National Fuel Gas Supply Corp. v. FERC, 900 F.2d 340, 347 (D.C. Cir. 1990) ("National Fuel").

⁴⁷ Transcript, at 46-47.

⁴⁸ Breen v. DOT, 282 F.3d 839, 841 (D.C. Cir. 2002).

proceedings related to vacating the prescription. DNI asks, rhetorically "[w]hat other subsequent proceedings, other than Petition for Cert. or something, could they have in mind?"⁴⁹ In fact, as Kaneb previously discussed, "subsequent proceedings" did mean further appellate proceedings, including, inter alia, to the Supreme Court. The tariff language refers only to the then current appeal, which was the proceeding in the Court of Appeals. Had Koch so chosen, upon denial in the Court of Appeals, Koch could have taken the appeal to the next level. The subsequent proceeding at the Supreme Court level makes much more sense than DNI's interpretation, which would essentially last indefinitely. DNI's interpretation, as Kaneb previously argued, runs counter to the plain language of the tariff.⁵⁰

DNI stresses that Note 195 corroborates the "key durational language."⁵¹ Yet, the tariff sheets attached to DNI's Complaint as Exhibit B do not contain Note 195, nor is Note 195, which DNI thinks is essential corroborating evidence, mentioned in the Complaint.⁵² If Note 195 were, as DNI contends, clear evidence of the term of the contract and of the tie between the tariff and the agreement, it should warrant at least a mention in the Complaint and should be included with the other tariff sheets submitted with the Complaint. Further, while DNI claims that Exhibit B is part of Exhibit A, there is nothing on the face of Exhibit A, the letter agreement that DNI claims is the contract that binds Kaneb today, that ties it to Exhibit B. In fact, the letter agreement refers to an attached rate sheet, but none is attached. To make matters more confusing, in addition to omitting Note 195, the tariff sheets included as Exhibit B to the Complaint were issued January 29, 2001, to be effective February 1, 2001 – approximately three months after October 25, 2000,

⁴⁹ Transcript, at 102.

⁵⁰ Response of Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P. to Reply in Opposition to Motion to Dismiss And Counter-Motion for Summary Disposition ("Response to Motion to Dismiss"), Docket No. NOR-42081, at 7 (Oct. 2, 2003).

⁵¹ Transcript, at 101.

⁵² Verified Complaint ("Complaint"), Docket No. NOR-42081, at Exhibit B (Jun. 16, 2003).

the date of the letter agreement, making it implausible that they were, in fact, attached to Exhibit A. Compounding its, and our, confusion, in its September 12 Reply, DNI includes for the first time tariff sheets that do include Note 195. They have an effective date of October 1, 2000 – twenty-four days prior to the date of the Exhibit A letter agreement – but are not attached to it.⁵³ Thus, without explanation, DNI urges the Board to accept that inconsistent tariff sheets issued and effective almost a month before or three months after the letter agreement (the Board can take its pick) memorialized the terms of the agreement and were attached to the agreement – although that is, from all Kaneb can tell, contrary to fact. Since DNI, as the movant, cannot seem to figure out which tariff sheets allegedly memorialize the agreement, it would be impossible for the Board to rule in DNI's favor on the basis of the evidence it presented.

VI. Specific Findings

Kaneb requests the following specific findings:

1. The Board should immediately vacate the rate prescription imposed by the Koch Decision and put CFI and Kaneb back on equal footing.
2. The Board should find that genuine issues of material fact exist such that it may not summarily dismiss Count 1 in favor of DNI.

⁵³ Reply in Opposition to Defendant's Motion for Dismissal of Count I of the Complaint, And Counter-Motion for Summary Disposition on Count I Directing Compliance with Rate Agreement, Docket No. NOR-42081 (Sept. 12, 2003) ("September 12 Reply").

VII. Conclusion

WHEREFORE, for the foregoing reasons, Kaneb respectfully requests that the Board vacate the rate prescription imposed in the Koch Decision, based on materially changed circumstances, and restore ratemaking initiative to Kaneb. Further, Kaneb respectfully requests that the Board reject DNI's request for summary dismissal of Count I on the basis that genuine issues of material fact exist in the proceeding.

Respectfully submitted,

 *by Amv*

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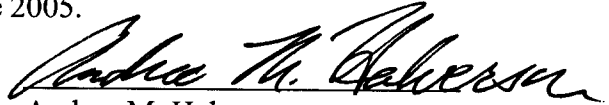
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June 3, 2005

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon all parties of record in these proceedings by hand delivery.

Dated in Washington, D.C this 3rd day of June 2005.

A handwritten signature in cursive script, reading "Andrea M. Halverson".

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