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October 24, 2006

The Honorable Vernon A. Williams, Secretary
Office of the Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

RE: Ex Parte No. 646 Sub 1: Simplified Standards for Rail Rate Cases

Dear Secretary Williams:

Pursuant to the notice which was served on March 13, 2006, the **COLORADO WHEAT ADMINISTRATIVE COMMITTEE, IDAHO BARLEY COMMISSION, IDAHO WHEAT COMMISSION, MONTANA WHEAT & BARLEY COMMITTEE, NEBRASKA WHEAT BOARD, OKLAHOMA WHEAT COMMISSION, SOUTH DAKOTA WHEAT COMMISSION, TEXAS WHEAT PRODUCERS BOARD, WASHINGTON WHEAT COMMISSION, & NATIONAL ASSOCIATION OF WHEAT GROWERS and NATIONAL BARLEY GROWERS ASSOCIATION** collectively known as "*Wheat & Barley Commissions*" hereby submits its **SUPPLEMENTAL OPENING COMMENTS** in the above styled proceeding.

Respectfully submitted,



Terry C. Whiteside, Registered Practitioner

On behalf of **COLORADO WHEAT ADMINISTRATIVE COMMITTEE, IDAHO BARLEY COMMISSION, IDAHO WHEAT COMMISSION, MONTANA WHEAT & BARLEY COMMITTEE, NEBRASKA WHEAT BOARD, OKLAHOMA WHEAT COMMISSION, SOUTH DAKOTA WHEAT COMMISSION, TEXAS WHEAT PRODUCERS BOARD WASHINGTON WHEAT COMMISSION & NATIONAL ASSOCIATION OF WHEAT GROWERS**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 646 SUB 1

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

SUPPLEMENTAL OPENING COMMENTS OF

MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
NEBRASKA WHEAT BOARD
OKLAHOMA WHEAT COMMISSION
SOUTH DAKOTA WHEAT COMMISSION
TEXAS WHEAT PRODUCERS BOARD
WASHINGTON WHEAT COMMISSION
NATIONAL ASSOCIATION OF WHEAT GROWERS
NATIONAL BARLEY GROWERS ASSOCIATION

Comes now, the above listed parties, referred to as the Wheat & Barley Commissions, by and through its representative and submits these Supplemental Opening Comments in STB Ex Parte No. 646 (Sub No. 1), *Simplified Standards for Rail Rate Cases*, pursuant to the decision of the Surface Transportation Board served in this docket on July 28, 2006 and the promulgated rules proposed in that order.

The Wheat & Barley Commissions concur in the ***Joint Written Comments submitted by the American Chemistry Council, et al.*** and additionally the ***supplemental Opening Comments submitted by the National Grain Dealers Association, et al*** and of the ***supplemental Opening Comments of the Alliance of Rail Competition and PPL*** in this proceeding and would like to add further comment on matters germane to the wheat and barley producers.

1 This combined filing, by American Chemistry Council et al borders on historic.
2 Your practitioner cannot remember having ever been witness, in the last 32 years
3 before this Board, to a proceeding where, virtually all of the affected shippers
4 from so many disciplines, have combined to give this Board, for its review, such a
5 clear and concise and unified set of thoughts. The degree of unification should
6 signal to this Board the depth of passion and unanimity these rail customers have
7 to bringing fairness and reasonableness of procedure into these rate case rules.
8 The current rules don't work, and the proposed rules appear to be equally
9 unworkable, but the rail shippers want to assist the Board in this important
10 deliberation in obtaining simplified, expeditious and fair rules for obtaining rate
11 relief.

12
13 The Wheat & Barley Commissions find the proposed rules very troubling. The
14 Wheat & Barley Commissions thank the Board for developing proposed rules
15 which is long overdue. But we feel they have missed the mark by a long way. If
16 the Board was sighting in a rifle at a shooting range, this shot (newly proposed
17 rules) would have not only missed the bull's-eye but probably the whole target.
18 The proposed rules do not offer a forum for or an avenue to adjudicate excessive
19 rates for the grain producers in this country. The proposals in this Decision
20 would transform the current situation wherein no small rates cases have been
21 filed, into a situation that would result in leaving small shipment challenges
22 completely remediless and disenfranchised in the rate relief process. "Simplified"
23 is hardly a word that grain producers would use to properly describe the currently
24 proposed rules. Congress did not mandate two alternative methodologies, where
25 a Stand Alone Costs (SAC) case is prohibitively expensive. Nor did Congress
26 instruct or permit the Board to adopt alternatives to SAC that guarantee inferior
27 rate relief. Simply put, the eligibility standards have been established so low that
28 virtually no grain shipper would qualify to file a small case. This would leave
29 many small shippers in a medium size case which will be far more expensive,
30 time consuming and result in higher rate calculations than a Full-SAC case. This

1 adjudicatory premise would violate both the spirit and stated goal of the
2 Guidelines and the law.

3
4 We continue to look at the Federal Energy Regulatory Commission where
5 hundreds of rate complaints large and small are handled each year. Rate
6 complaints at FERC can be handled with simplicity, expeditiously and without
7 results that skew towards the regulated industry. The lack of small or large rate
8 complaints, when there are four major railroads controlling over 92% of the U.S.
9 rail business, cannot logically suggest that there is not grounds for complaints.
10 Former Chairman Roger Nober, in testimony before the Senate Commerce
11 Committee on October 23, 2003, stated:

12 "If no small rate cases are brought, this means that in
13 practice, only about 75 coal shippers have a meaningful
14 opportunity to challenge rail rates. This is unacceptable."
15

16 According to Senator Dorgan (ND), in the rail customer hearing held two years
17 ago in front of the Senate Commerce Committee, stated he believes there are
18 hundreds of complaints that could be adjudicated but the process and the
19 environment are not conducive to elicit action from the captive rail customers.
20 These newly proposed rules do not provide a process or an environment that will
21 elicit action from the captive rail customer community.

22
23 Collectively, the Wheat & Barley Commissions represent over 100,000 farm
24 producers. *Wheat and Barley producers do not have economic alternatives to*
25 *rail transportation.* They are captive and tied to rail transportation with no viable
26 alternatives. *Wheat and Barley producers are unique because they bear the cost*
27 *of freight transportation and cannot pass on increased transportation costs to*
28 *their customers.* This makes the transportation of wheat and barley truly unique
29 in the marketplace.

30
31 **Views of Wheat & Barley Commissions:**

- 32 • Fear of railroad economic power and potential retaliation against
33 captive rail customers for filing complaints coupled with the newly

1 proposed small case process which continues to be too complex and
2 fraught with dubious outcome are and will continue to be the main
3 reasons why rail customers have not been able to see their way clear
4 in the past and will not participate in the future, in the process. The
5 rate complaint process under these proposed rules rather than simplify
6 the process adds still more layers of complexity. SAC cases are far
7 too expensive and Congress mandated that this Board promulgate
8 Non-Coal Rate Guidelines to "establish a simplified and expedited
9 method for determining the reasonableness of challenged rail rates in
10 those cases in which a full stand-alone cost presentation is too costly,
11 given the value of the case." 49 U.S.C. § 10701(d)(3). The rules
12 promulgated in this instant proceeding do not establish a meaningful,
13 nor simplified, nor expedited method for determining the reasonable of
14 a small shipment challenge.

- 15 • This Board seems preoccupied in this proceeding in developing
16 standards that are a "Son of SAC".
- 17 • And in the proposed rules it appears that the proposed guidelines for
18 small and medium shippers result in rate levels considerably higher
19 than constrained market pricing (CMP) models. If that is fact and we
20 believe it is, then the Board is proposing standards that penalize
21 smaller and medium shippers and serve to disenfranchise them from a
22 fair/equitable rate adjudicatory process. The Board is developing a
23 bifurcated tertiary process for small shipments vs. large shipments that
24 yields marketedly different results based upon how small/large the total
25 shipments are from origin to destination.
- 26 • The newly proposed process is still fraught with uncertainty, and since
27 no one has filed a complaint under the old simplified guidelines (except
28 a single case that was settled without adjudication), all small shipment
29 challengers are fully aware that any decision that is released by the
30 STB under these rules is going to be challenged by the railroads, thus
31 a full appeal must be contemplated in any simplified small shipment

1 case. It is fully anticipated that the first few small rate cases decided
2 by the Board will be challenged by the Association of American
3 Railroads (AAR) and the respondent railroads in federal court,
4 contending that the guidelines do not fulfill the Congressional directive
5 to establish a simple and expedited method of determining rate levels
6 in small cases.

- 7 • With the STB's latest decisions in major rate cases, the study of rail
8 costs associated with mainlines vs. branchlines, has taken on a
9 paramount importance prior to filing a case and probably eliminated
10 many branchline points from future consideration for rate complaint
11 action. The recent PPL decision by this Board causes further
12 consternation to potential future rate complainants. The standards
13 continue to change and change creates uncertainty. Unless a small
14 shipment challenge is located on a high density line, there is little
15 chance that the challenge will be successful given these new Board
16 standards. With Cross subsidy, a small shipment shipper is being shut
17 out of the process due to his/her location on a low density line. Many
18 of the captive grain shippers are located on branchlines well away from
19 mainstreet America. See the *Alliance for Rail Competition/PPL's*
20 *Supplemental Opening Statement* in this proceeding.
- 21 • **The STB should recognize that many, if not most agricultural**
22 **small shipments do not originate on high density lines, thus the**
23 **Board's ruling in PPL will serve to eliminate small shipments from**
24 **real regulatory protection.**
- 25 • The STB actions suggest that it is continuing to focus on process
26 rather than substance.
- 27 • Most shippers that would contemplate a small rate case, with its
28 complexity, do not feel that adjudication can be justified economically
29 based upon the movement revenues potentially gained under the new
30 rules – see *ACC et al Joint Written Comments* and *National Association*
31 *of Grain Dealers et al Supplemental Opening Comments..* Indeed, what

1 the STB should be most concerned about is developing rules that will
2 invite rather than limit small shippers to avail themselves of Board
3 adjudication when their rates are unreasonable. That clearly will not
4 happen with the proposed rules as now constituted.

5
6 **Summary**

7 One must be mindful that rate cases, large and small, generally do not come
8 from non-captive rail customers.

- 9 • The Board should increase the eligibility thresholds for the small shipments in
10 line with the *Comments of the Interested parties in July 2004* and the
11 currently filed *Interested Parties Joint Comments, American Chemistry*
12 *Council et al.*
- 13 • The Board should abandon the triple standard proposed in the rules in favor of a
14 two tiered standard. Today this nation is faced with whole states that are captive
15 to single carriers, no excess rail capacity and a differential pricing system that
16 cannot be challenged by anyone except large single origin/destination shipments
17 capable of supporting \$3+ million rate cases. These rules should not be about
18 'small shippers' but about reasonable standards for 'small rate' cases – cases
19 which cannot justify a \$3+ million SAC case. The Board by its actions in these
20 proposed rules is dishing out rules that focus the target towards small shippers
21 as opposed to focusing on small rate adjudication. The Board's "Aggregation"
22 Rule unlawfully transforms what should be a "Small Case" category Into a "Small
23 Shipper" category.
- 24 • The Board must revise its procedures to permit access, under Standard
25 Confidentiality Orders to Unmasked Waybill Data prior to the filing of a case,
26 thereby not handicapping smaller rail shippers.
- 27 • The limit on the number of cars is so low that virtually none of the grain shippers
28 in the wheat and barley producing states would be considered small shipment or
29 even medium shipment under the standard. History has already proven over the
30 last 30 years that farm producers are effectively precluded from filing SAC cases
31 yet the rules as proposed effectively only contemplate such a result. As clearly
32 identified in the *Interested Parties Joint Comments* in this proceeding – page
33 10 – a calculated limit on each class of filing is:

Limit on the number of cars presumed to qualify for "small" case treatment (\$200,000 divided by \$1,450)	137 cars over five years, or shipment of just 2.3 cars per month
Limit on cars presumed to qualify for "medium" case treatment (\$3.5 million divided by \$1,450)	2,413 cars over five years, or 40 cars per month, or a little over 1.3 car per day
Number of cars presumed to qualify for large case treatment	Over 1.32 cars per day

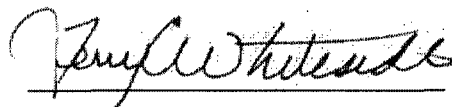
Wheat & Barley Commission's want this Board to fully understand that the proposed limits will result in the vast majority of grain shippers continuing to be denied access to rate reasonableness. The current drought of small rate case filings will continue if these proposed rules are not changed in line with the ***Interested Parties Joint Comments*** filed in this proceeding.

- The new proposed standards as written will effectively disenfranchise all grain shippers from being able to obtain reasonable rate relief from this Board.

Respectfully submitted,

Wheat & Barley Commissions

By their representative,



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