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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB EX PARTE NO. 646 (Sub-No.1)  
SIMPLIFIED STANDARDS FOR RAIL RATE CASES

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PUBLIC HEARING COMMENTS OF THE  
U.S. DEPARTMENT OF AGRICULTURE

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Washington, D.C. 20250

Date: January 31, 2007

### **AUTHORITY AND INTEREST**

The Secretary of Agriculture is charged with the responsibility under the Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 to represent the interests of agricultural producers and shippers in improving transportation services and facilities by, among other things, initiating and participating in Surface Transportation Board (Board) proceedings involving rates, charges, tariffs, practices, and services.

### **USDA COMMENTS**

The Department of Agriculture (USDA) thanks the Board for holding this public hearing which provides participating parties another opportunity to express their views regarding the Board's proposed Simplified Standards for rail rate cases. In the prior three rounds of filings for this proceeding, parties have raised numerous issues that merit judicious consideration.

USDA applauds the Board's efforts to develop cost-effective, transparent, and fair rate appeal procedures for smaller shippers. The need for effective small-case rate appeal procedures is expected to become more important as rail prices increase in response to rail capacity constraints and as railroads attain revenue adequacy. Although railroads are nearing revenue adequacy, the U.S. Government Accountability Office (GAO) reported that the percentage of industry rail traffic traveling at rates over 300 percent of the railroad's variable cost increased from 4 percent in 1985 to 6 percent in 2004, indicating

a possible abuse of market power.<sup>1</sup> As a result, the Board's efforts to ensure effective, transparent, and fair appeal procedures are appreciated.

USDA's analysis demonstrates that the eligibility standards set forth in the proposed Simplified Standards for Rail Rate Cases could limit shipper access to cost-effective rail rate appeal procedures as envisioned by Congress, the *Staggers Act of 1980*, and the *Interstate Commerce Commission Termination Act of 1995* (USDA comments, pg. 5-8). Under the proposed standards, USDA believes that the eligibility criteria are set too low. Based upon its analysis, USDA recommended and still recommends that the eligibility threshold be raised to \$1.6 million for small cases and \$15 million for medium size cases. If the eligibility standards are set too low, shippers having meritorious cases could be prevented from appealing rail rates.

In agreement with comments expressed by the Department of Transportation and other parties, USDA supports the recommendation that the Board test the proposed SSAC procedure to verify its precision and to ensure a lack of bias (DOT rebuttal comments, pg. 5-6; Joint Shippers, Rebuttal Comments at pg. 5, 29-33). The true costs of pursuing rate cases under the proposed procedures have not been determined, and the Board has not tested the SSAC and Three Benchmark procedures to determine how closely the results of the procedures approximate those of the full SAC tests. Until the Board develops better information from testing the proposed procedures, USDA is hesitant to support lower thresholds for fear of harming shippers that have a meritorious case.

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<sup>1</sup> Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed, United States Government Accountability Office, GAO-07-94, October 2006, pg. 3.

The railroad industry may be concerned that if eligibility thresholds are set too high, frivolous rate appeals will result. However, USDA believes that the actual cost of making an appeal, as well as the risk of not prevailing, would be enough to discourage frivolous appeals. A rail rate appeal does not guarantee a favorable outcome to a shipper appealing rail rates. It only ensures that a shipper has the opportunity to exercise the right to present a case to the Board. The case would be decided based upon its merits—rates would still have to be shown to be excessive, according to the existing laws.

Successful rail rate appeals are not likely to have a large effect on railroad revenue adequacy. Although some rail rates may exceed the statutory limits, USDA believes that these are not as prevalent as many would believe. GAO, in its aforementioned study on Freight Railroads (p. 31), indicates that only 29 percent of railroad revenue is generated from traffic traveling at rates exceeding a revenue-to-variable cost ratio (R/VC) of 180. Furthermore, GAO reported that only 6 percent of railroad traffic, based on tons, moves at rates exceeding an R/VC of 300 percent.

The Association of American Railroads has criticized USDA's proposals for higher eligibility standards because they were calculated using a risk factor and shield complainants from risks (AAR, reply comments, pg. 9-11). The use of a risk factor is part of a cost-benefit analysis. If the Board were to accept USDA's proposed eligibility ceilings, it would not imply that the Board was subjectively judging the merits of the case. Conversely, setting the eligibility criteria by using a cost-benefit analysis helps to balance the possible benefits of a rate case with the expected costs. As such, it ensures that complainants have a reasonable opportunity to appeal rail rates. In addition, raising

the eligibility ceilings does not shield complainants from risks. Complainants still incur attorney fees, consultant costs and internal costs by appealing rail rates, as the appeal may not be successful or may result in much less relief than expected.

### **USDA RECOMMENDATIONS**

In light of the comments presented above, USDA reaffirms its recommendation that the eligibility ceiling for small cases should be increased to an MVC of \$1.6 million. For medium-size cases, the MVC should range from \$1.6 million to \$15 million. Large cases should have an MVC greater than \$15M.

In determining eligibility thresholds, a point of balance must be reached whereby meritorious cases can be brought forth and, at the same time, frivolous cases are discouraged or minimized. Given the fact that so few small rate cases have been brought forth, an appropriate balance clearly has not yet been reached. Among many shippers and other interested parties, it is perceived that the cost of bringing a case far outweighs any possible benefits in terms of rate relief. Given the available data and information, USDA's use of a cost-benefit analysis represents a step toward finding a balance that makes the appeals process more cost-effective for shippers and does not adversely affect railroad revenue adequacy.

USDA would also like to reemphasize its recommendations for changes to the procedural schedule. At a minimum, the small case procedural schedule should be reduced by 40 days. These days could possibly be taken out of the time allotted for the Board Decision on Eligibility, Discovery, Railroad's Final Tender, and Complainant

Rebuttal. In addition, the Board should consider similar reductions in the medium-size case procedural schedule if the case does not involve complex changes to the railroad parameters.

**CONCLUSION**

USDA thanks the Board for its efforts and thoughtful analysis in the development of the proposed Simplified Standards. USDA hopes that its additional comments prove useful to the Board as it continues to assess the effectiveness of the proposed standards. USDA appreciates the opportunity to participate in this important process and offers its assistance to the Board if additional information is needed regarding our submitted comments.

Respectively submitted,



for

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CERTIFICATE OF SERVICE

I, Arthur L. Neal, Jr., certify that on this 30th day of January, 2007, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, on all parties of record in STB Ex Parte No. 646, Sub No. 1.

A handwritten signature in cursive script, appearing to read "Arthur L. Neal, Jr.", written over a horizontal line.

Arthur L. Neal, Jr.  
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