

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. EP 756

MARKET DOMINANCE STREAMLINED APPROACH

STEEL MANUFACTURERS ASSOCIATION COMMENTS

The Steel Manufacturers Association (“SMA”) respectfully submits its comments in the above-captioned proceeding in accordance with the Notice of Proposed Rulemaking (“NPRM”) served on September 12, 2019. In the NPRM, the Surface Transportation Board (“STB” or “Board”) proposed a streamlined approach for pleading market dominance in rate reasonableness proceedings. The Board expects that this streamlined approach would reduce burdens on parties, expedite proceedings, and make the Board’s rate relief procedures more accessible, especially for complainants with smaller cases. SMA commends the Board for taking this action to make rate cases more accessible to rail shippers but asks it to eliminate one of the prima facie factors -- “no practical build -out option” -- in its streamlined approach because of its inherent complexity that could spoil the positive effects of this proposal. It also asks the Board to shorten the page limit from 50 pages to 25 pages.

IDENTITY AND INTEREST

SMA is the largest steel industry trade association in the United States and is the primary trade association representing North American electric arc furnace (“EAF”) steel producers, often referred to as “minimills.” EAF steelmakers account for almost 70 percent of

domestic steelmaking capacity using an innovative, 21st century production process that is less energy-intensive and has lower carbon emissions than traditional steelmaking. SMA's 25 producer members and over 100 associate members have operations in 43 states.

The member companies of SMA rely on the railroads to transport inbound movements of raw materials, inter-plant movements of in-process products, and outbound movements of finished products. Especially given the current state of the steel industry in the United States, which is suffering from a dramatic surge in steel commodity imports from a number of countries around the world, much of which is dumped and subsidized, SMA's members have a significant interest in moving their inbound and outbound materials and products efficiently and cost effectively.

Rail transportation costs are a substantial component of the cost of doing business for SMA's members. Railroad rates for steel commodities have been steadily increasing in recent years, and many members are without adequate modal competitive options for their shipments. Railroad market power and lack of feasible, competitive options for steel manufacturers in many instances have had an adverse impact on the ability of steel manufacturers to compete in the marketplace, and to obtain adequate service, especially during periods of railroad service problems.

While SMA members move exempt commodities, the exemption does not apply in situations where the member is subject to railroad market dominance. 49 C.F.R. 1039.11 ("Excluded from this exemption are any movements for which a finding of market dominance has been made.") As a result, SMA has a very strong interest in seeing the market dominance process streamlined in EP 756 as proposed by the Board and in having an accessible rate case process. SMA commends the Board for taking an interest in promoting policies that remove barriers to accessing regulatory protection remedies and are pleased that the Board has proposed a streamlined market dominance process.

THE BOARD'S MARKET DOMINANCE PROPOSAL

The Board's market dominance inquiry is comprised of two components: a quantitative threshold and a qualitative analysis. The statute establishes a conclusive presumption that a railroad does not have market dominance if the rate charged produces revenues that are less than 180% of the variable cost of providing the service. 49 U.S.C. § 10707(d)(1)(A). However, a finding by the Board that a movement's R/VC ratio is 180% or greater does not establish a presumption that the rail carrier providing the transportation has market dominance over the movement. 49 U.S.C. § 10707(d)(2)(A). Accordingly, if the quantitative 180% R/VC threshold is met, the Board moves to the second component, a qualitative analysis. In this analysis, the Board determines whether there are any feasible transportation alternatives sufficient to constrain the railroad's rates for the traffic to which the challenged rates apply (the issue traffic). *See, e.g., M&G Polymers 2012*, NOR 42123, slip op. at 2, 11-18; *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142, slip op. at 287-98 (STB served Jan. 11, 2018).

To reduce the burden on the parties, the Board proposed to establish that a complainant has made a prima facie showing of market dominance when it can demonstrate the following:

- The movement has an R/VC ratio of 180% or greater;
- The movement would exceed 500 highway miles between origin and destination;
- There is no intramodal competition from other railroads;
- There is no barge competition;
- The complainant has used truck for 10% or fewer of its movements subject to the rate at issue over a five-year period; and
- The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

The Board stated that these proposed prima facie factors are relevant to the Board's consideration of the existence (or lack) of effective competition for a rail movement and would be sufficient to make a prima facie showing of market dominance. If a complainant could demonstrate each of the factors listed above, the Board explained that it would have significant evidence about the status of effective competition, without requiring a more complicated

evidentiary showing by the complainant or the railroad. Complainants that cannot make a showing under the six factors—and therefore choose not to attempt a streamlined market dominance showing in the first place—would be required at the outset to establish market dominance in a non-streamlined market dominance presentation by introducing additional detailed evidence regarding effective competition. In either scenario, the Board noted that defendant railroads would continue to have the opportunity to rebut the complainant’s evidence or argue against a finding of market dominance based on other factors.

With respect to procedure, the Board proposed a 50-page limit, inclusive of exhibits and verified statements, on each of the parties’ reply and rebuttal submissions on market dominance in proceedings where the complainant uses the streamlined approach. “The Board believes the page limit will encourage parties to focus their [arguments] on the most important issues.” *Expediting Rate Cases*, EP 733, slip op. at 12 (STB served Nov. 30, 2017).

To help facilitate building the record under the streamlined approach, the Board also proposed a new delegation of authority under 49 C.F.R. § 1011.6 to an Administrative Law Judge (“ALJ”) to hold an on-the-record telephonic market dominance evidentiary hearing, at the complainant’s option, within seven days after the due date of complainant’s rebuttal (or in the case of a matter brought under the Final Offer Rate Review procedure within seven days after the due date of the parties’ reply). The ALJ’s role would be to allow the parties to clarify their market dominance positions under oath, and to build upon issues presented by the parties through critical and exacting questioning. Given this hearing, the complainant may elect whether to file rebuttal evidence on market dominance issues (in cases that provide for rebuttal, i.e. cases not brought under the Final Offer Rate Review procedure) or to rely on the ALJ hearing to rebut the defendant’s reply evidence. Within four days of the evidentiary hearing, a transcript of the hearing would be entered into the docket. The Board would take the entire record into consideration, including the transcript from the ALJ hearing, when reaching its final conclusion on market dominance. The Board’s determinations would occur in accordance with the deadlines set out in 49 C.F.R. § 1111.9 and 1111.10, and, if adopted, the new deadlines proposed in *Final Offer Rate Review*, Docket No. EP 755 et al.

The Board concluded that the proposed approach would have the benefit of reducing the complexity of market dominance presentations for many complainants without limiting the railroads' ability to set forth a thorough defense. The Board found that the availability of a streamlined market dominance approach would reduce unneeded burdens that could dissuade complainants from bringing cases. Moreover, it stated that reducing the time and expense associated with litigating market dominance is particularly important for smaller rate disputes. The Board asserted this proposal would achieve the statutory requirement to ensure the expeditious handling of challenges to the reasonableness of railroad rates, 49 U.S.C. § 10704(d)(1), and further the rail transportation policies of providing for the expeditious handling and resolution of all proceedings, § 10101(15), fostering sound economic conditions in transportation and ensuring effective competition, § 10101(5), and maintaining reasonable rates where there is an absence of effective competition, § 10101(6).

MARKET DOMINANCE HISTORY SUPPORTS THIS SIMPLIFIED APPROACH

In 1976, the Interstate Commerce Commission ("ICC"), the predecessor to the STB, adopted its market dominance rules, setting out the factual situations that would trigger a rebuttable presumption of market dominance. *Special Proc. for Findings of Market Dominance*, 353 I.C.C. 875 (1976). In developing the rebuttable presumption test, the ICC explained that the R.R. Revitalization & Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31, granted the agency broad discretion to devise rules to implement the market dominance concept, and that any rules needed to be practical and capable of prompt administrative application. *Id.* at 886. Accordingly, the ICC declined to consider the effects of product and geographic competition on a railroad's ability to set its rates, out of concern that the introduction of such considerations would require extensive fact-finding and produce lengthy antitrust-type litigation. *Id.* at 905-06, 942-43.

On judicial review, the United States Court of Appeals for the District of Columbia Circuit upheld the ICC's general approach but remanded the case for the limited purpose of clarifying one of the presumptions. *Atchison T. & S.F. Ry. v. ICC*, 580 F.2d 623 (D.C. Cir. 1978). In response to arguments that it was error for the ICC not to consider product and geographic

competition, the court found "sufficient basis in the statutory language and purpose to merit our deferral to the [ICC's] view." *Id.* at 634. The court recognized that consideration of product and geographic competition could embroil the agency in highly complex evidentiary proceedings, thereby delaying the market dominance determination. *Id.*

Then, Congress enacted the Staggers Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980), to further reform railroad regulation. In the Staggers Act, Congress added a new provision exempting from regulation rail rates yielding revenue/variable cost ratios below certain levels, but otherwise left it to the agency's discretion how to administer the market dominance test. See 49 U.S.C. § 10707(d)(2).

Following enactment of the Staggers Act, in 1981, the ICC replaced its original presumptive scheme for making market dominance determinations with guidelines that explicitly provided for evidence on intramodal, intermodal, product and geographic competition. *Market Dominance Determinations*, 365 I.C.C. 118 (1981). This decision to consider product and geographic competition was judicially challenged. On *en banc* review, the full court concluded that the statute did not preclude consideration of evidence on product and geographic competition. *Western Coal Traffic League v. United States*, 694 F.2d 378 (5th Cir. 1983).

Under *Market Dominance Determinations*, the complainant had the burden of establishing that intramodal and intermodal competition do not effectively constrain rail rates, as well as the burden of demonstrating that any product and geographic competition that has been identified by the railroad would not effectively limit the defendant carrier's rates. 365 I.C.C. 118. However, shippers encountered difficulty trying to prove a negative proposition -- that product or geographic competition identified by a railroad was not an effective constraint on rail rates. To address this problem, the ICC in 1985 modified the market dominance procedures to make them more practical, by shifting the burden of establishing the effectiveness of product and geographic competition to the railroads. *Product and Geographic Competition*, 2 I.C.C.2d 1 (1985). The agency hoped that this reallocation of the burden of proof

would "reduce discovery disputes and expedite the market dominance phase of maximum rate reasonableness proceedings." *Id.* at 15.

In applying its revised market dominance guidelines, the ICC found that product or geographic competition provided effective competition for certain traffic in several cases. *E.g.*, *Consolidated Papers, Inc. v. Chicago & N.W. Transp. Co.*, 7 I.C.C.2d 330 (1991); *Coal Trading Corp. v. Baltimore & O.R.R.*, 6 I.C.C.2d 361 (1990); *Westmoreland Coal Sales Co. v. Denver & Rio Grande W.R.R.*, 5 I.C.C.2d 751 (1989). However, in each case, it took years to collect the evidence and make that determination.

In the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), Congress retained both the market dominance requirement and broad agency discretion to revise the market dominance guidelines as appropriate. *See* H.R. Conf. Rep. No. 422, 104 Cong., 1st Sess. 173 (1995) *reprinted in* 1995 U.S.C.C.A.N. 858 ("Although the conference provision does not disturb the existing statutory standard or the current agency regulations implementing the market-dominance standard, the Conference recognizes that the agency has broad discretion to consider additional factors such as the availability of other forms of transportation and other economic alternatives, and to revise and supplement its existing standards and regulations as appropriate.") Congress also stressed the need to expedite cases. It added a new provision to the national rail transportation policy calling for the "expeditious handling and resolution of all proceedings." 49 U.S.C. § 10101(15). It further instructed the Board to establish "procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates. The procedures shall include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings." 49 U.S.C. 10704(d). Congress also placed time limits on deliberations in rate reasonableness cases. 49 U.S.C. 10704(c).

In response to the statutory directive to find ways to expedite rail rate cases, the STB imposed new documentation and processing requirements on parties, altered the evidentiary and discovery procedures, and eliminated layers of administrative review. *Expedited*

Procedures For Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings (“Expedited Procedures”), Ex Parte No. 527 (STB served Oct. 1, 1996 and Nov. 15, 1996), *aff’d sub nom. United Transp. Union-III. Legis. Bd. v. Surface Transp. Bd.*, 132 F.3d 71 (D.C. Cir. 1998).

Despite the STB’s best efforts and these expedited procedures, rail rate cases continued to take unreasonably long periods to litigate. See *West Texas Util. Co. v. Burlington N. R.R.*, No. 41191 (May 3, 1996)(it took nearly two years to build the evidentiary record); *Arizona Pub. Serv. Co. v. Atchison, T.&S.F.R.R.*, No. 41185 (July 29, 1997)(it took over two years to develop the evidentiary record). The product and geographic competition issues contributed significantly to the length and complexity of both of those cases. And in the first rate case filed after the *Expedited Procedures* rules were put into place, disputes over product and geographic competition extended the discovery period far beyond the 75-day period contemplated in *Expedited Procedures*. See *FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company*, NOR 42022 (STB served Mar. 11, 1999).

As a result of this constant delay, in *Market Dominance Determinations—Product & Geographic Competition* (*Product & Geographic Competition 1998*), 3 S.T.B. 937, 938 (1998), the Board examined whether product and geographic competition should be considered in market dominance inquiries and eliminated it. The Board concluded that “it appears that the burdens associated with litigating product and geographic competition issues may serve to deny captive shippers with valid claims access to the Board and thus their only avenue of rate relief.” *Id.* at 949. In a subsequent decision, following remand from the U.S. Court of Appeals for the District of Columbia Circuit for consideration of the rail transportation policy, the Board reaffirmed its elimination of product and geographic competition from consideration, stating that “Congress has directed us to apply the market dominance provision in a practical manner.” *Product & Geographic Competition 2001*, EP 627, slip op. at 2 (STB served Apr. 6, 2001). The Board stated that “the complications and delays resulting from consideration of product and geographic competition are contrary to the Congressional directive that the administrative market dominance procedures be easily administrable.” *Id.* at 8 (citing *Ass’n of Am. R.Rs. v. STB*, 237 F.3d 676, 680 (D.C. Cir. 2001); Rail Revitalization & Regulatory Reform Act of 1976, Pub. L.

No. 94-210 § 202(d), 90 Stat. 31 (1976)). Most significantly, the Board found that elimination of product and geographic competition from consideration advanced the equally important goal of expediting rate cases. *Id.* (citing 49 U.S.C. § 10101(2), (15)).

In affirming the Board's 2001 decision, the D.C. Circuit noted that it is up to the Board to arrive at a reasonable accommodation of the conflicting policies set out in the Staggers Rail Act of 1980, and that Congress had expressly required the Board to provide for the expeditious handling and resolution of all proceedings. *Ass'n of Am. R.Rs. v. STB*, 306 F.3d 1108, 1111 (D.C. Cir. 2003). The court found that the Board's construction of the statute furthered its statutory mandate "to establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates, including 'appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings.'" *Id.* (emphasis omitted) (citing 49 U.S.C. § 10704(d)(1)).

Similarly, the D.C. Circuit affirmed the Board's decision in *Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1), slip op. at 60 (STB served Oct. 30, 2006), to eliminate "movement-specific adjustments" to the uniform method for determining the variable costs in the quantitative market dominance inquiry. *BNSF Ry. v. STB*, 526 F.3d 770, 776-77 (D.C. Cir. 2008). Prior to the decision in *Major Issues*, parties to rate cases were permitted to make movement-specific adjustments to the Board's standard variable cost calculations generated by the Uniform Railroad Costing System. In *Major Issues*, the Board eliminated the use of those movement-specific adjustments in market dominance presentations, finding that they made proceedings "inordinately complex, time consuming, and expensive, and [did] not necessarily result in more reliable results." *Major Issues*, EP 657 (Sub-No. 1), slip op. at 60. In affirming the Board's decision, the D.C. Circuit found that the elimination of movement-specific adjustments "balances inherently incommensurable cost and benefits," and is a decision that "falls within the expertise of the agency." *BNSF Ry.*, 526 F.3d at 776.

As is evident from this market dominance history, Congress, the courts, the ICC, and the STB have all have found the market dominance test to be a process that requires expeditious handling with minimal administrative burden to provide shippers access to the rate case

process. The ICC and STB have been engaged in an ongoing battle in an attempt to keep the market dominance process from becoming so complex that it begins to deter and even preclude persons from bringing legitimate rate cases. The STB now is at another turning point where the market dominance process has become so burdensome to shippers that access to rate cases has clearly been hindered and often precluded in direct conflict with Congressional intent. The Board wisely has sought out how to stop the market dominance process from deterring rate complaints as it has done in the past with product and geographic competition.

SMA'S CHANGES TO THE PROPOSED RULES

The fix the Board has proposed here is the streamlined market dominance test set forth in the NPRM discussed above. The Board should be commended for bringing forth this solution to a long existing problem. As the Board discussed, the market dominance inquiry is a costly and time-consuming undertaking, resulting in a significant burden on rate case litigants.

Given the hypothetical nature of some competitive options proposed by defendant railroads in past cases, complainants now essentially have to predict what a defendant railroad might argue regarding potential, but unused, competitive options—all without knowing precisely what constitutes a prima facie showing of an absence of effective competition. In the most recent rate reasonableness case, *Consumers Energy Co. v. CSX Transportation, Inc.*, Docket No. NOR 42142, the parties' market dominance presentations alone (throughout their filings) exceeded 200 pages of narrative discussion and included multiple expert reports. *See also Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42121 (including over 340 pages of narrative discussion on market dominance). In two cases where the market dominance inquiry was bifurcated from the rate reasonableness inquiry, the market dominance procedural schedules alone were three months long. *See M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 5 (STB served May 6, 2011); *Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc.*, NOR 42121, slip op. at 7-8 (STB served Apr. 5, 2011).

Consequently, SMA suggests further streamlining the market dominance process to fulfill the intent of Congress by making it more expeditious and less likely to be subject to abuse

through extensive discovery and argument. First, SMA asks the Board to remove the last prong of the test regarding “no practical build-out option”. As noted above, these hypothetical build-outs proposed by railroads in their market dominance arguments in the past have become overly burdensome to shippers who bring rate cases. These build-out hypothetical arguments have been used by railroads in several recent proceedings and have been extremely difficult to resolve. *See, e.g., Consumers*, NOR 42142, slip op. at 295-96 (STB served Jan. 11, 2018) (finding an alternative which would require building additional rail infrastructure to be not feasible); *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 573, 584 (2003) (finding that constructing a 13.5-mile spur track to reach a competing railroad that would cost at least \$49 million was not feasible); *W. Tex. Utils. Co. v. Burlington N. R.R.*, 1 S.T.B. 638, 651 (1996), *aff’d sub nom. Burlington N. R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997) (finding two potential rail line build-out alternatives costing \$62 million and \$79 million to not be realistic); *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, NOR 42110 (STB served May 19, 2010)(oral argument notice regarding build-out hypothetical by CSX).

These hypothetical build-out arguments have become the new product and geographic competition arguments of our time. They have created a blockade to many shippers’ ability to bring a rate case because the cost of litigating this type of issue in addition to the stand alone cost test has become insurmountable and makes very little business sense to shippers when reviewing ways to lower unreasonable rail rates. The Board has an opportunity here to remove this factor from its prima facie case test and follow its precedent of not allowing overly complex issues to destroy the market dominance test.

Moreover, the new procedural approach by the STB proposed in the NPRM intends to narrow the focus of arguments on reply and rebuttal. Accordingly, the Board proposed the imposition of a 50-page limit, inclusive of exhibits and verified statements, on each of the parties’ reply and rebuttal submissions on market dominance in proceedings where the complainant uses the streamlined approach. “The Board believes the page limit will encourage parties to focus their [arguments] on the most important issues.” *Expediting Rate Cases*, EP 733, slip op. at 12 (STB served Nov. 30, 2017).

Again, SMA commends the STB for this proposal to limit the threshold for parties to provide argument on market dominance and believes it will encourage better focus on relevant arguments. However, SMA urges the Board to take even more aggressive action by limiting the page limit to 25. A 50-page limit would still open the door for the overly burdensome arguments that concern SMA as discussed earlier. A 25-page limit would eliminate that abuse but would provide a railroad adequate opportunity to raise straightforward arguments on intermodal and intramodal competition. This shorter page limit fits more closely with the intent of Congress to have an expeditious market dominance test.

THE RAIL TRANSPORTATION POLICY SUPPORTS SMA’S SUGGESTED CHANGES

A prima facie test as amended by SMA without the buildout factor and with the shorter page limit would be more in line with the Rail Transportation Policy (“RTP”) which the Board must take into consideration when making its decisions. The RTP set forth in 49 U.S.C. § 10101 contains 15 separate and sometimes conflicting policy goals that together establish the framework for regulatory oversight of the rail industry. *Coal Exporters Ass’n v. United States*, 745 F.2d 76, 98 (D.C. Cir. 1984). No special significance attaches to the order in which these various policy goals are set out in the statute, and no single element of the RTP takes precedence to the exclusion of the others. *Intramodal Rail Competition – Proportional Rates*, EP No. 445 (Sub-No. 2) (ICC served Apr. 17, 1990). *See Railroad Exemption—Export Coal*, 367 I.C.C. 570 (1983), *vacated and remanded*, *Coal Exporters*, 745 F.2d at 98 (RTP in section 1 “must be read in conformity with the other provisions and policies of the Act”).

In administering the statute, the STB must weigh and balance the various RTP elements. *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 115 (D.C. Cir. 1987). In doing so, the STB is “guided by the canon of statutory interpretation that all statutory provisions should be given effect and that no provision should be interpreted in a way that reads other provisions out of the statute... To the extent that there is tension among different policy goals, we must balance the competing interests in a way that gives effect to each policy.” *Market Dominance 2001*, EP 627, slip op. at 7.

First, excluding the buildout factor from consideration in the market dominance analysis is not inconsistent with 49 U.S.C. § 10101(1) (“RTP-1”). The policy of RTP-1 is “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” Indeed, limiting the STB’s market dominance analysis in this way should have little, if any, effect on the RTP-1 policy of allowing the marketplace to establish rates. That is because a competitive rate is unlikely to be challenged and, even if challenged, is unlikely to be disturbed. *See Coal Exporters*, 745 F.2d at 98 (the policy “of establishing reasonable rates ‘to the maximum extent possible’ through reliance on competition and the demand for services’ ... must be read in conformity with the other provisions and policies of the Act.”)

Experience has shown that consideration of hypothetical buildouts has a demonstrable negative effect on relevant RTP goals. *See, e.g., Ass’n of Amer. R.Rs.*, 237 F.3d at 680. The complications and delays resulting from consideration of buildouts are contrary to the Congressional directive that the administrative market dominance procedures be easily administrable (4R Act §202(d)) so that the processing of rate cases can be expedited in accordance with the policy of 49 U.S.C. 10101(2) (RTP-2) and 49 U.S.C. 10101(15) (RTP-15) to resolve disputes expeditiously. *See also* 49 U.S.C. 10704(c), (d); *Ass’n of Am. Railroads*, 237 F.3d at 680 (discussing the same issue with respect to product and geographic competition).

Moreover, the policy of 49 U.S.C. 10101(6) (RTP-6) provides that rates be limited to reasonable levels in the absence of competition. Shippers must have practical, not merely nominal, access to the rate review process to give real meaning to that policy. With respect to buildouts, this factor that thwarts a shipper’s ability to pursue a valid complaint is clearly inconsistent with RTP-6.

The Board also asserted in the NPRM that this proposal would further the rail transportation policy of fostering sound economic conditions in transportation and ensuring effective competition. *Id.* at § 10101(5). The removal of the buildout factor would only enhance this rail transportation policy.

Similarly, shortening the page limit would support these same rail transportation policies.

Accordingly, considering all of the relevant policy goals of the statute, the scale tilts heavily in favor of excluding buildouts from consideration in the market dominance process. Because exclusion of this factor should have little effect on a railroad's ability to set rates in a competitive environment (the goal of the RTP-1) but should significantly advance the equally important goals of expediting cases (the goal of RTP-2 and RTP-15), fostering sound economic conditions in transportation and ensuring effective competition (the goal of RTP-5), and ensuring reasonable rates in instances where effective competition is absent (the goal of RTP-6), the most appropriate administrative course of action is to eliminate the buildout factor and shorten the page limit to 25 to best balance and accommodate all the relevant statutory policy directives.

CONCLUSION

SMA thanks the Board for this opportunity to address its proposed streamlined market dominance process and for its earnest efforts to remedy the broken, existing process. SMA only urges the Board to take a couple more steps by eliminating the build-out factor and shortening the page limits to ensure that this proposed process also is not abused by elaborate arguments that overly burden this preliminary test in the rate case process. This initial step by the Board is a good one and only should be slightly changed to ensure the process is simple as Congress intended.

Respectfully submitted,

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