

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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MARKET DOMINANCE STREAMLINED APPROACH

**OPENING COMMENTS OF
THE AMERICAN CHEMISTRY COUNCIL, THE FERTILIZER INSTITUTE,
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE,
THE CHLORINE INSTITUTE, AND THE CORN REFINERS ASSOCIATION**

The American Chemistry Council (“ACC”), The Fertilizer Institute (“TFI”), The National Industrial Transportation League (“League”), the Chlorine Institute, and the Corn Refiners Association (“CRA”) (collectively the “Coalition Associations”) jointly submit these Opening Comments in response to the Notice of Proposed Rulemaking served by the Surface Transportation Board (“Board”) in the above-captioned docket on September 12, 2019 (“NPRM”). The NPRM proposes a streamlined approach for pleading market dominance in rate reasonableness proceedings. This approach is intended to “reduce burdens on parties, expedite proceedings, and make the Board’s rate relief procedures more accessible, especially for complainants with smaller cases.”¹

I. Statement of interest and summary of comments.

Collectively, the Coalition Associations represent a broad spectrum of shippers across multiple industries that depend upon meaningful and accessible regulation to prevent railroads from abusing their market power to charge unreasonable rates. They strongly support the actions the Board has proposed to make rate reasonableness remedies more accessible to a greater

¹ NPRM at 1.

population of captive shippers, in this docket and in Docket Nos. EP 755, *Final Offer Rate Review* (served Sept. 12, 2019), (“EP 755”) and EP 761, *Hearing on Revenue Adequacy* (served Sept. 12, 2019). They also believe that these proposals must be part of a broader, holistic effort to reduce the need for regulation of rail rates through enhanced competition.

In these comments, the Coalition Associations propose modifications to the Board’s market dominance streamlining proposal to foster better access to rate relief and to reduce unreasonable burdens associated with the market dominance inquiry. These modifications include permitting the use of prima facie factors on an a la carte basis to establish market dominance by mode; developing clearer and more objective prima facie factors; and making an optional bifurcated procedural schedule available in all rate cases. Finally, they request a procedural clarification regarding the proper scope of rebuttal market dominance evidence when a complainant uses the prima facie factors in its opening evidence. In Exhibit 1, the Coalition Associations have presented both clean and redlined versions of the proposed regulations in Appendix A of the NPRM to reflect their proposed modifications to the Board’s proposals.²

II. Streamlining the market dominance inquiry is necessary to increase access to rate relief.

The Board’s market dominance streamlining proposal is an important step toward making rate relief more accessible. As the Board recognized in the NPRM, the market dominance inquiry has grown costly and time consuming. This not only deters many shippers from exercising their right to rate review, but also places a costly and often unnecessary burden on complainants who bring rate cases.

² Due to some overlap between the Coalition Association proposals in this proceeding and EP 755, the proposed rules in Exhibit 1 should be considered in concert with the proposed rules in Exhibit 1 of the Coalition Associations’ opening comments in EP 755.

The market dominance inquiry requires complainants to demonstrate an “absence of effective competition from other carriers or modes of transportation.” This inquiry too often requires complainants to prove a negative, i.e., that a mode of transportation that they seldom, if ever, use, or even cannot use, is not an effective competitive constraint upon their rail rates. A complainant may spend substantial time, money and effort to address a non-existent, but theoretically possible, transportation option in their opening evidence only to have the railroad not even raise it on reply.³ Yet a complainant who omits such alternatives from its opening evidence, no matter how unrealistic, does so at its own peril because it may be denied a full opportunity to rebut the railroad’s evidence when the complainant had knowledge of the issue on opening but did not present it. This also provides incentives for railroads to raise as many issues as possible in their market dominance presentation.

There is a need for clear objective standards and procedural limits to prevent the market dominance inquiry from being too costly and time consuming. Complainants who satisfy those objective standards in their opening evidence should be deemed to establish a prima facie case of market dominance, thereby placing a burden upon the railroad to rebut that prima facie showing on reply to avoid a determination that market dominance exists. Complainants, when they have made the prima facie showing on opening, also must be permitted to respond to the railroad’s reply evidence with any rebuttal evidence that is responsive regardless of whether the complainants could have presented such evidence on opening. Otherwise, the objective of establishing prima facie factors is defeated.

³ Compare Complainant’s Opening Evidence at II-B, *SunBelt Chlor Alkali P’ship v. Norfolk S. Ry.*, NOR 425130 (STB served June 20, 2014) (including over 50 pages of evidence focusing on hypothetical barge transportation options) with Def.’s Reply Evidence at II-B, *id.* (asserting that defendant does not dispute market dominance).

The need for objective prima facie standards is especially important for carload shippers. These shippers are most likely to challenge rates for commodities that can and do move by modes other than rail even though those modes seldom are effective constraints upon rail rates. This is especially true of truck transportation. A deeper dive into the facts often shows that the vast majority of truck moves occur between origins and destinations where rail is not an option, over shorter distances than typical rail moves, when shipments must be expedited or rail-service is delayed, during times when force majeure conditions preclude rail transportation, to customers who receive smaller volumes, to customers who need the rail car for storage, or to customers with other special needs that preclude trucks. Complainants are obliged to engage in the development of extensive evidence on all the foregoing matters to anticipate railroad reply arguments that may or may not be raised regardless of how unrealistic such arguments may be. The development of such extensive evidence is a costly undertaking that includes reviewing years of shipment and rate data, and interviewing plant, sales, and logistics personnel, to ascertain whether rail service issues, weather events, plant production issues, or other facts prompted the use of non-rail modes in circumstances that reflect an exception to the predominant use of rail transportation for the issue traffic. Certain objective measures like the prima facie standards proposed in the NPRM usually are indicative of the foregoing circumstances and thus can be a less costly and resource intensive way to make a prima facie showing that an alternative mode is not an effective competitive constraint.

Even when the issue traffic has no history of transportation by alternative modes at all, defendants have nothing to lose by posing hypothetical transportation options, however infeasible or ineffective they may be. In past rate cases, defendants have posed various hypothetical transportation options from build-outs to multiple transloads. This effectively

requires complainants to identify and investigate hypothetical transportation options in anticipation of defendants raising them on reply. Moreover, the investigation of these hypothetical transportation options is an expensive and time-consuming undertaking because it includes identifying any commodity- or facility-specific limitations on the use of the hypothetical option; forecasting the ramp-up period necessary to transition to that option; and obtaining cost estimates for the transportation, any necessary facility modifications or additions, and any additional transportation equipment.

The Board has stated that “[t]here is a compelling need for a more objective approach to resolving market dominance.”⁴ Streamlining the market dominance inquiry with meaningful procedural limitations would focus the litigants’ evidence on issues that are truly material to the Board’s market dominance inquiry, thereby reducing the cost and time necessary to develop evidence. In addition, rebuttable presumptions could provide objective thresholds reflecting situations where market dominance is likely to be found. These thresholds would narrow the scope of complainants’ opening evidence in appropriate situations, thereby eliminating unnecessary expense from the market dominance inquiry.

III. The Board’s market dominance streamlining proposal must be broader in scope and application to materially increase access to rate relief.

The Coalition Associations applaud the Board’s initiative to create a streamlined market dominance approach. The Board’s proposal, however, is unnecessarily narrow. The principal, if not sole, benefits are the potential simplification of a complainant’s opening market dominance evidence and the 50-page limit on reply and rebuttal evidence. But to obtain these benefits, complainants must gamble that they can prevail on all six mandatory criteria after the submission of more extensive reply and rebuttal evidence by both parties. If the complainant gambles

⁴ *Id.* at 3.

incorrectly on any one of the six criteria, it loses the case and is denied any attempt to present a more detailed market dominance case using the non-streamlined process.⁵ If the complainant opts not to take this gamble, the Board's proposal does nothing to address the burdens of the existing market dominance process. Consequently, a complainant who satisfies some, but not all, of the criteria – or even all but one – is stuck with pursuing market dominance under the status quo procedures. The Board can and should streamline all market dominance presentations without forcing complainants into this gambit.

In lieu of creating a distinctly separate streamlined market dominance process, the Board should adopt a single approach that is applicable to all rate cases to address the broader problems identified in the NPRM.⁶ Because those problems are not limited to the circumstances to which the Board would apply its proposed streamlined approach, a solution that addresses those problems in all cases is needed.

The Coalition Associations offer a proposal to accomplish this objective in three parts. First, they propose to permit complainants to satisfy the five qualitative market dominance prima facie presumptions in the NPRM for all rate cases on an a la carte basis that associates each factor with an alternative transportation mode.⁷ Any complainant using any rate case methodology should be able to make a prima facie case as to each mode of competition by satisfying the applicable criteria in its opening evidence. This will permit complainants who can satisfy some, but not all, of the five factors to recognize some of the benefits from streamlining. Second, the Coalition Associations offer modifications to certain of the proposed prima facie

⁵ NPRM at 11.

⁶ NPRM at 3-4.

⁷ A sixth factor is the 180% R/VC requirement. But that is a statutory prerequisite in all rate cases, not a rebuttable presumption.

factors to render them more objective and to improve their accuracy as indicators of the absence of effective competition. Finally, they propose an optional bifurcated market dominance process that would be available to all complainants in all cases, not just a few who can satisfy all of the prima facie factors. Page limits on opening, reply and rebuttal evidence would apply to this bifurcated process.

A. The Board should allow complainants to use the prima facie factors on an a la carte basis to establish market dominance by transportation mode.

The Board's proposal to use prima facie factors is structured in a manner that unduly narrows the number of rate cases that could benefit from reducing the burdens associated with market dominance evidence. Specifically, it requires complainants to demonstrate *all* the proposed prima facie factors to benefit from the streamlined process, even though each factor can be applied on an a la carte basis to establish a prima facie showing of qualitative market dominance for different modal alternatives to rail transportation by the defendant. The Coalition Associations therefore propose to permit a complainant to make a prima facie showing by mode when it demonstrates the prima facie factors associated with that mode.

Since the Board eliminated product and geographic competition from the market dominance inquiry, qualitative market dominance effectively has centered upon three modal options: (1) an absence of effective competition from other railroads; (2) an absence of effective competition from trucks; and (3) an absence of effective competition from barge.⁸ Accordingly, a prima facie showing on market dominance as a whole requires complainants to make independent showings on each of these modal elements of market dominance.

⁸ Air transportation is generally deemed too expensive to compete with rail transportation and pipelines are almost always favored over rail when available. Nevertheless, the parties would remain free to address these modes without presumptions when relevant.

The Board's proposed prima facie factors could be used on an a la carte basis to establish a prima facie showing of market dominance as to individual modal elements. Each of the proposed factors falls neatly within one of the three modal elements of qualitative market dominance: the 500-mile and 10% trucking factors address only the truck competition element; the intramodal and build-out factors address only the intramodal competition element; the barge factor addresses only the barge competition element. A complainant's inability to demonstrate one of the truck factors has no bearing on the presence of barge or rail competition and, thus, should not prevent the complainant from using the prima facie factors related to barge and rail competition to establish a prima facie market dominance showing as to those transportation modes. Demonstrating the prima facie factors for a modal element therefore should be deemed a prima facie showing that the underlying transportation mode does not provide effective competition, regardless of whether the complainant can demonstrate a prima facie factor for a different mode.

Application of this proposed use of the prima facie factors would be straightforward. Complainants would demonstrate the prima facie factors for as many modal elements of market dominance as possible and be deemed to have made a prima facie showing concerning those modes. For the remaining modes, a complainant would need to submit more extensive evidence to demonstrate market dominance, just as it must today.

B. The prima facie factors should be revised to be more objective and to capture additional situations where market dominance is substantially likely to exist.

The Coalition Associations support the use of prima facie factors to narrow the scope of evidence that complainants must submit on opening. To be effective, however, those factors need to be objectively measurable. Some of the proposed factors satisfy that standard, but a few do not. In the following subparts, the Coalition Associations provide multiple suggestions to

ensure that each factor embraces clear evidentiary thresholds that can be satisfied by a broad range of facts that strongly indicate the defendant has market dominance over the issue traffic.⁹

1. 10% Trucking Factor.

The Board has proposed that “a complainant that shows that it has used trucking for 10% or fewer of its *movements* subject to the rate at issue over a five-year period will have made a prima facie showing for this factor concerning the absence of effective truck competition.”¹⁰ While the Coalition Associations believe that a metric that compares the percent of the issue traffic that moves by truck versus rail over five years is reasonable, the proposed unit of measure, i.e. movements, is inappropriate. The proper unit of measure should be the *volume* of the issue traffic that moves by truck.

A single rail movement typically transports four times the volume of a single truck movement. As such, a comparison based upon 10% of truck movements will give each truck movement a disproportionately excessive weight relative to each rail movement. For example, in a lane with a history of four trucks and four rail cars, truck movements constitute 50% of the total movements but just 20% of the total volume transported.

⁹ The Coalition Associations had intended to address the two factors related to trucking through an analysis of data from their members. Obtaining and analyzing such data, however, has proven to be far more difficult and time consuming than initially anticipated. Less than a handful of members were able to supply even a portion of the requested data on their rail and truck movements. Those who provided any data at all could only provide one or two years. For example, members have indicated that they could not retrieve and process 5 years of data relevant to the 10% trucking factor in the period for providing comments in this proceeding because there was insufficient time to do so and complex processing would be necessary to enable correlations between their rail and truck data. There also was very little overlap in the commodities covered by each member’s data. As a result, the data could not be aggregated and proved to be insufficient on an individual basis to draw significant conclusions. Thus, the Coalition Associations are unable to submit the data sought by the Board in this proceeding.

¹⁰ NPRM at 9 (emphasis added).

Also, a movement-based threshold does not represent a consistent threshold of truck competition. The number of truck shipments needed to replace a railcar shipment sometimes varies by commodity because of commodity-specific equipment needs and other factors. For example, chlorine has a 3-to-1 truck-to-rail ratio. Thus, a movement-based threshold may represent a higher level of truck competition on lanes where the commodity requires a low number of truck shipments to replace a single railcar shipment as opposed to lanes where the commodity requires a high number of truck shipments to replace a single railcar shipment. This misleadingly makes trucks appear more competitive with rail transportation on lanes where a higher number of trucks are necessary to replace a single railcar shipment.

A focus on shipment volumes, which is a common variable among rail and truck shipments, ensures an apples-to-apples comparison of truck and rail use on a lane. Further, it is a more consistent indicator of truck competition across all commodities because it is not impacted by commodity-specific truck-to-rail conversion rates.

Additionally, the proposed threshold of 10%, when applied to truck volume, is too low. Truck volumes closer to 20% are warranted based upon the experience of the Coalition Association members. Even on lanes where rail rates are well below truck rates for equivalent volumes, customers still may receive up to 20% of their volume by truck due to their need for expedited shipments, rail service delays, and force majeure conditions. Furthermore, on lanes where truck rates are below rail rates, truck capacity restrictions often require the shipper to still use rail, except when absolutely necessary to use truck, so that truck capacity is available in lanes without a rail option. A 20% threshold, therefore, is highly indicative of market dominance, whereas a 10% threshold will be significantly under-inclusive. Because a 20% threshold would establish only a rebuttable presumption, railroads will have the opportunity to show that a lane

within that threshold nevertheless is not market dominant due to lower truck rates and enough truck capacity, among other factors.

Alternatively, the Board could consider a two-tiered volume threshold. The complainant could satisfy this factor by showing *either* that trucks handled 10% or less of the total issue traffic over five years *or* that trucks handled between 10% and 20% of the total issue traffic over five years at truck rates that exceeded the rail rates by more than 10%. This alternative threshold would indicate that the use of trucks at this higher level was not attributable to competitive factors. This alternative is less desirable than simply raising the threshold to 20%, however, because it only captures situations when shippers use trucks despite higher costs because they have little option, but not circumstances where truck capacity constraints restrict the shipper's ability to use trucks even at a lower cost.

In calculating this proposed 20% volume threshold, the Coalition Associations would count truck volumes that are part of a rail-to-truck transload as moving 100% by truck if the defendant railroad does not participate in the route, otherwise those volumes would be counted as 100% rail. Unless the transload is accomplished without the defendant's participation, those transload truck volumes should not be considered a potential constraint upon the defendant's rates.

Regardless of the threshold level chosen, the Board is correct to take this measure over an aggregate five-year period. This time frame is essential to smooth out spikes in truck volume that occur due to factors other than competition. Such factors include prolonged rail service problems, such as those associated with the implementation of Precision Scheduled Railroading, and weather-related delays and service outages, such as those associated with hurricanes, floods, and severe winter weather.

2. 500-Mile Highway Distance Factor.

The Coalition Associations agree with the use of highway distance as a *prima facie* factor but propose that the factor not exceed 250 miles. Not only is this more consistent with driver constraints, but it also is consistent with the distance thresholds at which the Board has found truck competition.

As the Board has indicated, trucking becomes less viable when movements cannot be completed in a day.¹¹ It is unlikely, however, that a driver could complete a movement exceeding 250 miles in a day under the Federal Motor Carrier Safety Administration's driver hours of service rules, even assuming the FMCSA adopts its recent proposals to ease these rules.¹² The hours-of-service rules limit a driver to 11 hours of driving per day,¹³ but a driver likely would not accept a day trip of 11 hours because any delay would prevent the driver from completing the trip. Thus, reserving 1 hour of the driving time for delay and conservatively assuming the driver drives at 55 mph for 10 hours,¹⁴ the total *roundtrip* distance cannot exceed 550 miles. Moreover, this roundtrip distance does not account for the driver's need to drive to the origin before starting the trip. Also, if the driver uses the complainant's equipment, the roundtrip distance must include the drive to the driver's duty reporting location after returning the equipment at the origin.

This 250-mile daily driving limit comports with the distance thresholds the Board has identified for competition from truck transportation. In rate case market dominance determinations and other proceedings, the Board has found that trucks are competitive with rail

¹¹ NPRM at 7.

¹² See Hours of Service of Drivers, 84 Fed. Reg. 45,950 (Sept. 3, 2019).

¹³ A driver may exceed 11 hours upon taking 10 hours of additional off-duty rest during the day. Doing this to accommodate a movement would effectively convert the movement into a multi-day trip.

¹⁴ See U.S. Dep't of Transp, Freight Facts and Figures 2010 at 37, tbl 3-8 (2010).

at distances predominately within a range of 150-500 miles.¹⁵ Nearly all of the cited decisions at or near the 500-mile mile mark, however, pertain to exempt commodities over which the Board does not exercise rate jurisdiction because the Board’s predecessor concluded decades ago under vastly different market conditions that regulation is not needed to protect those shippers from the abuse of market power.¹⁶ Furthermore, most of those decisions are over 20 years old, which reflects a time when Class I railroads possessed excess capacity that generated a greater willingness to compete with trucks at longer distances. As railroads faced growing capacity constraints in the early to mid-2000 decade, they increased rates significantly — as would be

¹⁵ See e.g., *Union Pac. R.R.—Abandonment—In New Madrid, Scott & Stoddard Counties, MO*, STB Docket No. AB-33 (Sub-No. 261), 2009 STB LEXIS 268, at *11 (STB June 17, 2009) (UP argues that trucks are competitive in “similar short-haul markets” of 280 miles); *Rail Gen. Exemption Auth.—Exemption of Paints, Enamels, Lacquers, Shellacs, Etc.*, Ex Parte No. 346 (Sub-No. 33), 1998 STB LEXIS 107, at *8-9 (STB April 20, 1998) (noting CMA testimony that 300-600 mile hauls preclude trucks as viable competitors); *Dep’t of Transp.*, 3 S.T.B. 62, 64 n.5 (1998) (scrap metal moving less than 600 miles is vulnerable to truck competition); *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, 1 S.T.B. 233, 392 (1996) (KCS study considers trucks non-competitive above 500 miles); *Rail Gen. Exemption Auth.—Exemption of Grease or Inedible Tallow, Etc.*, 10 I.C.C.2d 453, 461 (1994) (adopting 500 mile threshold for truck competition); *Rail Gen. Exemption Auth. Exemption of Rock Salt, Salt*, 10 I.C.C.2d 241, 246 (1994) (trucks are dominant mode at 100-150 miles); *Rail Gen. Exemption Auth.—Pet. of AAR to Exempt Rail Transp. of Selected Commodity Groups*, 9 I.C.C.2d 969, 975-77 (1993) (exemptions granted where most traffic moves at distances under 200 miles, which are less than the system averages); *Union Pac. Corp. —Control—Mo.-Kan.-Tex. R.R.*, 4 I.C.C.2d 409, 442-43 (1988) (finding that trucks can be effective competitors for grain up to 250 miles); *CSX Corp—Control—Sea-Land Freight Serv., Inc. & Intermodal Sys., Inc.*, 3 I.C.C.2d 512, 530 (1987) (rail has “a decided competitive edge over motor carriers for COFC movement of about 500 miles or longer”); *Chi., Milwaukee, St. Paul and Pac. R.R.—Reorganization—Acquisition by Grand Trunk Corp.*, Finance Docket No. 28640 (Sub-No. 9), 1984 ICC LEXIS 288, at *206 (ICC Sept. 12, 1984) (truck competition not effective above 425 miles); *CSX Corp.—Control—Am. Commercial Lines, Inc.*, 2 I.C.C.2d 490, 548-49 (1984) (“trucks compete effectively for [grain] traffic on movements of [150-200 miles]”); *Nationwide Increased Freight Rates & Charges*, 1977, 359 I.C.C. 312, 331 (1978) (truck competition for caustic soda exists up to 200 miles).

¹⁶ 49 U.S.C. § 10502(a)(2)(B). The continuing validity of those conclusions as to several groups of exempt commodities has been contested in Docket No. EP 704 (Sub-No. 1), *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, in light of market changes that have occurred in the two decades since those exemptions were granted. This further calls into question the current validity of prior findings that trucks are competitive even for those exempt commodities at distances up to 500 miles.

expected when demand outstrips supply — resulting in less willingness to compete with trucks at longer distances. Consequently, 250 miles is a far more reasonable distance threshold above which railroads are far less likely to compete with trucks for non-exempt traffic.

The Board also has asked whether the highway distance threshold should vary by commodity.¹⁷ The factors discussed above generally apply regardless of commodity. There are other factors, however, that could merit an even lower highway distance threshold for some commodities. Most notably, it is undesirable to transport certain hazardous materials over long distances by truck when non-highway options exist. This is most true for commodities that the Department of Transportation has designated “material poisonous by inhalation or toxic by inhalation,” as defined at 49 C.F.R. § 171.8. Class 3 flammable liquids are another hazardous material with properties that tend to favor rail over truck transportation even at shorter distances. For such commodities, it would be reasonable to establish a lower distance threshold as a *prima facie* market dominance factor.

3. Barge Competition Factor.

The Coalition Associations propose modifications to the barge competition factor to make it more objective. To ensure the barge factor reduces the burdens on the parties, it should be based on clear evidentiary thresholds that indicate the complainant is reasonably likely to have persuasive arguments for why barges do not provide effective competition. But the Board has described the factor in terms consistent with the general market dominance standard, stating that “if a complainant can demonstrate the absence of [barge] competition . . . , it would assist the Board in making a determination more expeditiously as to whether barge competition

¹⁷ NPRM at 8.

constrains market power.” The factor, thus, omits clear evidentiary thresholds and is indistinguishable from the traditional market dominance inquiry into barge transportation.

The Board correctly recognizes that, when the shipper, receiver or both, are land-locked, barge transportation is unlikely to provide effective competition. While this is an objective standard, it is too narrow. Although the NPRM appears to recognize that a complainant could allege other factors to also benefit from this presumption, complainants are faced with significant uncertainty if they do so, which is counter to the objectives of the NPRM. This ambiguity is not cured by the Board’s suggestion that a complainant submit a verified statement attesting that no practical physical access to barge competition exists because the suggestion leaves complainants to guess how much evidence is enough to satisfy the factor.

To ensure sufficiently broad, objective thresholds are available to satisfy this factor, the Coalition Associations propose the following objective measures upon which complainants should be permitted to rely:

- The origin, destination, or both are landlocked. A landlocked origin or destination is strong evidence of the absence of barge competition. Barges would not be able to service traffic moving to or from a landlocked facility, which would encompass any facility that is not located on a navigable waterway.
- The origin, destination, or both do not have barge facilities, or lack facilities capable of handling the issue commodity. Barging is unlikely to effectively compete when the origin or destination does not have existing barge facilities capable of handling the issue commodity. Substantial investment often is required to construct the necessary facilities to use barges in these situations. Thus, it makes little sense to require complainants to incur the time and expense of investigating and pricing such construction to make a prima

facie showing. Moreover, if a defendant believes that barge competition provides effective competition in these situations, it can make that assertion backed with evidence on reply, and the complainant can respond to that evidence on rebuttal.

- The origin and destination are not located on navigable waterways that are interconnected. Even if both the origin and destination are on navigable waterways and have barge facilities, barge is not an option if the two navigable waterways are not interconnected. For example, an origin on the Missouri River and a destination on the Columbia River should still be entitled to the presumption despite both being navigable waterways. Barging between them is not feasible because barges would have to transit the Gulf of Mexico, Panama Canal, and Pacific Ocean.

The Coalition Associations' proposal would promote a more efficient determination of barge competition because it focuses on clear scenarios that can be established by identifying a narrow set of facts. Each of the scenarios strongly indicates that barging is infeasible.

4. Build-Out Factor.

The Board's proposal for demonstrating the absence of a practical build-out option is confusing and appears to do little to reduce a complainant's burden. This factor is supposed to reduce litigation costs by removing uncertainty about how much information to include in opening evidence. But the scope of evidence necessary to demonstrate the factor is unclear in the NPRM. The Coalition Associations, therefore, propose objective standards for the Board's consideration.

The Board proposes that the build-out factor is satisfied when a complainant submits "a short plain statement in a verified statement," or "otherwise demonstrate[s]," that the it has no

practical build-out alternative “due to physical, regulatory, financial, or other issues.”¹⁸ This standard provides little guidance on the extent to which complainants must provide supporting evidence for an issue they contend makes the build-out impractical. Is it sufficient to merely assert physical, regulatory, financial, or other issues, or must there be some explanation and supporting evidence? If the latter, how much explanation and evidence is required and how does this presentation differ from a full-blown approach to market dominance?

The fact is that build-outs are extremely costly, making them unlikely to provide effective competition except in very rare circumstances. Indeed, a survey of the Board’s market dominance decisions has not uncovered a single instance where a proposed build-out was deemed to constitute effective competition.¹⁹ Furthermore, if a build-out has the potential to provide effective competition, the complainant probably already would have conducted a feasibility study or communicated this to the railroad to gain leverage in rate negotiations. Thus, it is desirable that the Board identify objective indicators of physical and/or economic infeasibility upon which complainants can rely to invoke this presumption.

The Coalition Associations have identified the following indicators that a build-out is either physically or economically infeasible and urge the Board to adopt these as objective standards for invoking the build-out presumption:

- A build-out distance longer than 2 miles should be presumptively infeasible. Buildouts exceeding this distance are prohibitively expensive for most locations due to insufficient traffic volumes from which to recover the enormous construction costs through lower

¹⁸ NPRM at 10.

¹⁹ *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142, slip op. at 3, 295-98 (STB served Jan. 11, 2018); *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 573, 583-84 (2003); *Wis. Power & Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955, 962-63 (2001); *W. Tex. Utils. Co. v. Burlington N. R.R.*, 1 S.T.B. 638, 650-51 (1996).

rates. Using Road Property Investment (RPI) costs from past western rate cases as a proxy for build-out costs, costs per track mile exceed \$2 million.²⁰ Western rate cases provide a conservative estimate because their RPI costs are generally lower than those in eastern cases.²¹ Those estimates also are conservative because they reflect the absence of any barriers to entry that would add costs that the Board does not consider in stand-alone cost (“SAC”) cases.²² Thus, a 2-mile buildout would cost well over \$4 million dollars. In rate cases with relief caps, this cost would equal or exceed the \$4 million cap. In SAC cases without relief caps, this cost quickly would exceed the SAC litigation costs as the build-out distance increases above 2 miles. For carload shippers who cannot count on the reliable traffic volumes of unit train shipments year-after-year to recover their investment in a SAC case, the same hurdles to recovering a build-out investment through lower rail rates would render such build-outs ineffective competitive constraints.

- A build-out route that requires the acquisition or condemnation of developed property in residential, industrial, or commercial areas, even if less than 2 miles, should be presumptively infeasible. Table B-1 of the April 25, 2019 Report of the Board’s Rate Reform Task Force illustrates this point well, showing that agricultural land costs in past

²⁰ See *Ariz. Elect. Power Co’op v. BNSF Ry.*, NOR 42113 (STB served Nov. 16, 2011) (\$1.9 million per track mile); *AEP Tex. N. Co. v. BNSF Ry.*, NOR 41191 (STB served Sept. 10, 2007) (\$1.9 million per track mile); *W. Fuels Ass’n v. BNSF Ry.*, NOR 42088 (STB served Sept. 10, 2007) (\$1.9 million per track mile); *Simplified Standards for Rail Rate Cases*, EP. 646, slip op. at 39 (STB served July 28, 2006) (quoting RPI costs per track mile from various western cases).

²¹ See *Simplified Standards*, EP 646, slip op. at 39. Although the Board decided not to use total RPI costs per mile in *Simplified Standards* because it found them inaccurate due to regional differences, it stated that RPI costs per mile in western cases were generally consistent. It also provided cost information indicating that costs were generally lower in western cases.

²² *Rate Regulation Reforms*, EP 715, slip op. at 5 (STB served July 25, 2012). See, e.g., *Consumers Energy*, NOR 42142, slip op. at 200 (omitting costs to relocate and protect utilities where not incurred by the incumbent).

rate cases were on average multiple factors lower than land costs for residential, industrial, and commercial property. In addition, there are added costs associated with condemning developed land, political costs, and demolition costs above and beyond rail construction costs.

- A build-out route that traverses waters of the United States, as defined by the U.S. Army Corps of Engineers at 33 C.F.R. § 328.3, should be presumptively infeasible even if less than 2 miles. This threshold reflects that buildouts through wetlands require bridges and other infrastructure that tends to increase construction costs and are subject to costly environmental review, regulation and mitigation.

Any complainant who shows one or more of the above factors should be entitled to a presumption that a build-out is physically or economically infeasible without having to submit additional evidence. As with all of the prima facie factors, this presumption would be rebuttable by a railroad in its reply evidence.

5. Intramodal Competition.

The Board should further simplify the proposed prima facie factor for establishing the absence of intramodal competition. To invoke this presumption, a shipper should only have to demonstrate that it does not have direct physical access to a second railroad. The Board should abandon the “practical physical access” standard in the NPRM.²³ That standard, which includes reciprocal switching options, would preclude a complainant from invoking this prima facie factor. But as the Board well knows from the comments and testimony in EP 711 (Sub. No. 1), *Competitive Switching*, the competitive effectiveness of reciprocal switching depends upon multiple factors within the control of the incumbent railroad, such as the switch rate and

²³ NPRM at 8.

operational factors, and upon the competitiveness of the alternative carrier's route for the issue traffic. In those circumstances where reciprocal switching affords true competition, it is highly improbable that a shipper would challenge the incumbent's rates. Therefore, it is reasonable to focus this factor upon direct physical access to a second carrier and require the railroad to rebut that presumption on reply with evidence that reciprocal switching is an effective competitive constraint.

C. An expedited procedural schedule should be available for all market dominance presentations.

To ensure that the market dominance inquiry remains efficient in cases where few material issues exist, the Coalition Associations propose that the Board offer complainants the option of litigating market dominance on an expedited bifurcated procedural schedule instead of simultaneously with rate reasonableness. To be clear, this proposed bifurcation applies solely to the presentation of market dominance evidence; the Board still would decide market dominance and rate reasonableness together in the same final decision.²⁴ Otherwise, the time lost awaiting a market dominance decision would render this process too long to be of much benefit.

This bifurcated approach would adhere to the following timeline:

- All market dominance discovery must be completed 35 days after the railroad's Answer is due or, in final offer rate review ("FORR") proceedings, after filing of the Complaint.²⁵

²⁴ If the Board concludes that there is no market dominance prior to the full submission of rate reasonableness evidence, it could issue a market dominance decision to avoid the expenditure of additional resources by the both the parties and the Board on rate reasonableness questions that are rendered moot by the market dominance decision.

²⁵ This 35-day timeline matches the discovery period that the Coalition Associations have proposed in their comments in EP 755.

- Discovery disputes would be resolved in the same manner that the Coalition Associations have proposed in their EP 755 comments for FORR proceedings. Specifically, each party would be permitted to file a single motion to compel that aggregates all the discovery disputes with the other party. Both parties should be required to file their motions to compel ten days prior to the close of discovery. During the pendency of such motions, the procedural schedule would be tolled. Each party would be permitted seven days each for reply and rebuttal evidence, and the Board would endeavor to issue its decision in seven days. The Board would apply the same standards for assessing the reasonableness of discovery that it has proposed for FORR proceedings in EP 755. Upon the Board issuing a decision, the procedural clock would resume, and any party ordered to respond to discovery must do so within the remaining ten days in the discovery period.
- A complainant's opening market dominance evidence would be submitted 14 days after the close of market dominance discovery; the railroad's reply evidence 21 days after that; and complainant's rebuttal evidence another 14 days thereafter.

The entire time required to complete this bifurcated process for submitting market dominance evidence would be either 84 days or 105 days, depending upon whether there are motions to compel discovery. Because the parties will continue to conduct rate reasonableness discovery during this time, this does not lengthen the duration of the overall procedural schedule, except in FORR cases, which the Coalition Associations address in their EP 755 comments. This bifurcated approach also has the potential to improve the efficiency of submitting rate reasonableness evidence pursuant to whatever methodology applies to their case because they

can focus solely on reasonableness without the distraction, time and effort to simultaneously prepare market dominance evidence.

All three rounds of evidence would be limited to 30 pages of narrative, inclusive of verified statements and material created for the litigation, but there would be no page limit on exhibits. Exhibits, however, must be limited to only public sources or material produced by either party in discovery; a party cannot use exhibits to present information created by the party for the litigation, such as studies, graphs or charts, to circumvent the 30-page limit. The reason for excluding exhibits from the page limits is that a party cannot control the size of a relevant document that might be produced in discovery or in the public domain. Because exhibits have been removed from the page limits, the Coalition Associations have set the narrative page limit at 30 pages instead of 50 pages. Page limits on market dominance evidence can reduce wasteful litigation and make the Board's review of the evidence less burdensome. As the Board stated in the NPRM, page limits encourage parties to focus their evidence on material issues.²⁶ Page limits also are commonly imposed by courts to accomplish the same objectives as the Board in this proceeding.

A complainant is likely to select this bifurcated market dominance process only if it can make a prima facie case within the proposed page limits and time constraints. As such, this process is most likely to be used in cases where the complainant can successfully invoke one or more of the modal presumptions and in smaller cases involving less than a handful of traffic lanes. Large cases involving scores of traffic lanes and cases with complex market dominance facts that fall outside the presumption factors are likely to require more time and pages for the complainant to satisfy its burden of proof and, therefore, the complainant would be less likely to

²⁶ NPRM at 12.

choose this approach in such cases. In FORR cases, the complainant also must weigh these benefits against a procedural schedule that is slightly longer.

Although this bifurcated process would be at the complainant's option, the defendant will not be prejudiced. The defendant is granted the same number of pages on reply as the complainant has on opening. Additionally, the defendant can focus its reply evidence on the one transportation option it believes provides effective competition, whereas a complainant still must address all potential options in its opening evidence.

IV. A complainant who establishes a prima facie showing using the prima facie factors should be permitted to submit any rebuttal evidence that responds to a defendant's reply.

The Coalition Associations ask the Board to clarify that complainants who present opening evidence based upon the prima facie factors may submit any evidence on rebuttal that is responsive to a defendant's reply evidence on the same factors regardless of whether such evidence was available to the complainant on opening. The complainant could not, however, use information in its possession that it did not produce in response to discovery.

Prohibiting complainants who use the prima facie factors from introducing evidence on rebuttal to address a defendant's reply would render the prima facie factors useless. The purpose of the prima facie factors is to reduce the time and expense necessary to establish market dominance by enabling the complainant to focus its opening evidence on facts that strongly indicate market dominance exists. If the complainant must address all issues known to it on opening, the factors would have no impact on the complainant's opening evidence.

Nevertheless, Board precedent suggests that complainants may have to address all known market dominance issues on opening, even if they plead the prima facie factors. The Board has

been clear that complainants must put forth their best and most complete case on opening²⁷ and complainants cannot “hold back to see the railroad’s reply evidence.”²⁸ Moreover, the Board has stricken evidence that a complainant submitted on rebuttal in response to an issue that the defendant raised on reply and the complainant was aware of on opening.²⁹ If the Board were to do the same to complainants who rely upon the prima facie factors on opening, it would completely undermine the objectives of this proceeding.

A clear statement that a complainant who uses the factors could submit additional evidence on rebuttal that is responsive to the defendant’s reply would address this dichotomy and ensure that the prima facie factors will reduce unnecessary burdens of the market dominance inquiry.

²⁷ *Total Petrochemicals & Refining USA, Inc. v. CSX Transp. Inc.*, NOR 42121, slip op. at 12 (STB served May 31, 2013).

²⁸ *Duke Energy Corp. v. Norfolk S. Ry.*, 7 S.T.B. 89, 101 (2003).

²⁹ *Total*, NOR 42121, slip op. at 12 (striking product integrity evidence responsive to the defendant’s reply because the complainant was aware of the issue on opening).

Respectfully submitted,

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November 12, 2019

Exhibit 1

Appendix A Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1011 and 1111 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1011—BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

1. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 1301, 1321, 11123, 11124, 11144, 14122, and 15722.

2. Amend § 1011.6 by adding a new paragraph (i) to read as follows:

§ 1011.6 Delegations of authority by the Chairman.

* * * * *

(i) In matters involving the streamlined market dominance approach, authority to hold a telephonic evidentiary hearing on market dominance issues is delegated to administrative law judges, as described in § 1111.142~~(ce)~~ of this chapter.

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

3. The authority citation for part 1111 is revised to read as follows:

Authority: 49 U.S.C. 10701, 10702, 10704, 10707, 11701, and 1321.

4. Amend § 1111.2 by revising the last sentence of the introductory text in paragraph (a) and (b) to read as follows:

§ 1111.2 Content of formal complaints; joinder.

(a) *General.* * * * If the complainant seeks to use the simplified standards, the bifurcated market dominance approach, or the streamlined market dominance approach, it should support this request by submitting, at a minimum, the following information:

* * * * *

(b) *Disclosure required with complaints in simplified standards cases and in cases using the streamlined or bifurcated market dominance approaches.* The complainant must provide to the defendant all documents relied upon in formulating its assessment of a feasible transportation alternative and all documents relied upon to determine the inputs to the URCS Phase III program.

* * * * *

5. Amend § 1111.9 by revising paragraph (a) to read as follows:

§ 1111.9 Procedural schedule in stand-alone cost cases.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedule will apply in stand-alone cost cases after the pre-complaint period initiated by the pre-filing notice:

- (1) Day 0 - Complaint filed, discovery period begins.
- (2) Day 7 or before - Conference of the parties convened pursuant to § 1111.11(b).
- (3) Day 20 - Defendant's answer to complaint due.
- (4) Day 150 - Discovery completed.
- (5) Day 210 - Complainant files opening evidence on absence of intermodal and intramodal competition, variable cost, and stand-alone cost issues.
- (6) Day 270 - Defendant files reply evidence to complainant's opening evidence.
- (7) Day 305 - Complainant files rebuttal evidence to defendant's reply evidence.
- ~~(8) Day 312 — In cases using the streamlined market dominance approach, a telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(e) of this chapter, will be held at the discretion of the complainant within 7 days after the complainant's rebuttal evidence on market dominance issues is due.~~
- ~~(9)(8)~~ Day 335 - Complainant and defendant file final briefs.
- ~~(9)~~ Day 485 or before - The Board issues its decision.

* * * * *

6. Amend § 1111.10 by revising paragraph (a) to read as follows:

§ 1111.10 Procedural schedule in cases using simplified standards.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedules will apply in cases using the simplified standards:

- (1)(i) In cases relying upon the Simplified-SAC methodology:
 - (A) Day 0 - Complaint filed (including complainant's disclosure).
 - (B) Day 10 - Mediation begins.
 - (C) Day 20 - Defendant's answer to complaint (including defendant's initial disclosure).
 - (D) Day 30 - Mediation ends; discovery begins.
 - (E) Day 140 - Defendant's second disclosure.
 - (F) Day 150 - Discovery closes.
 - (G) Day 220 - Opening evidence.
 - (H) Day 280 - Reply evidence.
 - (I) Day 310 - Rebuttal evidence.
 - ~~(J) Day 317 — In cases using the streamlined market dominance approach, a telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(e) of this chapter, will be held at the discretion of the complainant within 7 days after the complainant's rebuttal evidence is due.~~
 - ~~(K)~~(J) Day 320 - Technical conference (market dominance and merits, except for cases using the streamlined market dominance approach, in which the technical conference will be limited to merits issues).
 - ~~(L)~~(K) Day 330 - Final briefs.
- (ii) In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.
- (2)(i) In cases relying upon the Three-Benchmark methodology:

- (A) Day 0 - Complaint filed (including complainant's disclosure).
- (B) Day 10 - Mediation begins. (STB production of unmasked Waybill Sample.)
- (C) Day 20 - Defendant's answer to complaint (including defendant's initial disclosure).
- (D) Day 30 - Mediation ends; discovery begins.
- (E) Day 60 - Discovery closes.
- (F) Day 90 - Complainant's opening (initial tender of comparison group and opening evidence on market dominance). Defendant's opening (initial tender of comparison group).
- (G) Day 95 - Technical conference on comparison group.
- (H) Day 120 - Parties' final tenders on comparison group. Defendant's reply on market dominance.
- (I) Day 150 - Parties' replies to final tenders. Complainant's rebuttal on market dominance.

~~(J) Day 157 - In cases using the streamlined market dominance approach, a telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(e) of this chapter, will be held at the discretion of the complainant within 7 days after the complainant's rebuttal evidence is due.~~

(ii) In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.

* * * * *

7. Add a section § 1111.12 to read as follows:

§ 1111.12 Bifurcated Market Dominance.

(a) Procedural Schedule. A complainant may elect to bifurcate the presentation of market dominance evidence from rate reasonableness evidence in any case that challenges the reasonableness of a rail rate. Absent a specific order by the Board, the following general procedural schedule will apply to the presentation of bifurcated market dominance evidence:

(1) Day 0 – Answer filed, except in Final Offer Rate Review cases this shall be the date the Complaint is filed.

(2) Day 35 – Market dominance discovery closes.

(3) Day 49 – Opening market dominance evidence.

(4) Day 70 – Reply market dominance evidence.

(5) Day 84 – Rebuttal market dominance evidence.

(b) Discovery Disputes. The following procedures shall apply in bifurcated market dominance proceedings, in lieu of the procedures in § 1114.31 of this Chapter, if a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under § 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to § 1114.26(a):

(1) Day 25 – Each party may file a single motion to compel concerning all market dominance discovery disputes, if any. Such motion must be filed with the Board and served on all parties.

(2) Day 25 + 7 – Replies to motions to compel.

(3) Day 25 + 14 – Rebuttals to motions to compel.

(4) Day 25 + 21 – Board decision.

(c) The procedural schedules in paragraphs (a) and (b) of this section shall run concurrent with the procedural schedule for the applicable rate reasonableness methodology selected. The procedural schedule in paragraph (a) of this section shall be tolled if there is a discovery dispute subject to paragraph (b) of this section and shall resume on the date the Board issues its decision under paragraph (b). Tolling of the bifurcated market dominance procedural

schedule in paragraph (a) of this section shall not toll the applicable rate reasonableness procedural schedule. This paragraph will not apply to cases under Final Offer Rate Review.

(d) In Final Offer Rate Review cases where the presentation of market dominance evidence is bifurcated, discovery as to both market dominance and rate reasonableness shall occur within the same 35-day discovery period and shall follow the discovery dispute procedures at § 1114.31(a)(3) of this Chapter. Opening evidence on rate reasonableness will be due 14 days after rebuttal market dominance evidence, at which point the normal procedural schedule for Final Offer Rate Review cases will resume.

(e) When a complainant elects to utilize the bifurcated market dominance process, and in Final Offer Rate Review cases regardless of bifurcation, it must provide the initial disclosures found in § 1111.2(a) and (b) of this Chapter, regardless of the rate reasonableness methodology selected (including stand-alone cost cases).

(f) Opening, reply and rebuttal evidence under the bifurcated market dominance approach shall be limited to 30 pages of narrative, inclusive of verified statements and material created for the litigation (e.g., studies, graphs, charts). Exhibits that consist of material reproduced from public sources or produced by any party in discovery are not subject to page limits.

8. Add a section § 1111.13 to read as follows:

§ 1111.13 Prima Facie Market Dominance Factors

(a) In all rate reasonableness cases, including cases where the complainant has elected to bifurcate the presentation of market dominance evidence pursuant to § 1111.12 of this Chapter, the Board will find a complainant has made a prima facie market dominance showing as to the ineffectiveness of specific transportation modes in its opening market dominance evidence when it can demonstrate the following with regard to the traffic subject to the challenged rate:

(1) as to intermodal truck competition (including transloading), that both
(i) the movement would exceed 250 highway miles between origin and destination, and

(ii) the complainant has used truck for 20% or less of its movement volume subject to the rate at issue over a five-year period (counting transload movements as truck volumes if the defendant did not participate in the transload movement);

(2) as to intermodal barge competition, that either
(i) the origin, destination or both are landlocked,
(ii) the origin, destination, or both do not have barge facilities, or lack facilities capable of handling the issue commodity, or

(iii) the origin and destination are not located on navigable waterways that are interconnected;

(3) as to intramodal rail competition, that both
(i) the origin, destination, or both have direct physical access only to a single railroad, and

(ii) a build-out to achieve direct physical access to a second railroad either
(A) exceeds a distance of two miles,

(B) would require the acquisition and condemnation of developed property in residential, industrial, or commercial areas, or

(C) traverses waters of the United States, as defined at 33 C.F.R. § 328.3.

(b) In all rate reasonableness cases, including cases where the complainant has elected to bifurcate the presentation of market dominance evidence pursuant to § 1111.12 of this Chapter, the Board will find that a complainant has made a prima facie showing on market dominance when, with regard to the traffic subject to the challenged rate, it makes a prima facie market dominance showing as to each transportation mode identified in paragraphs § 1111.13(a)(1) through (a)(3) using the factors specified in those paragraphs and it demonstrates that the movement has an R/VC ratio of 180% or greater.

(c) A complainant may rely on any competent evidence, including a verified statement from an appropriate official(s) with knowledge of the facts, in demonstrating the factors set out in paragraph (a) of this section.

(d) A defendant's reply evidence on market dominance may address the factors in paragraph (a) of this section and any other issues relevant to market dominance.

(e) If a complainant's opening evidence has established a prima facie case as to any transportation mode in accordance with paragraph (a) of this section, the complainant may present any rebuttal evidence as to that mode in response to any matter in the defendant's reply evidence; provided, however, that a complainant may not rely on information within its possession or knowledge that it did not provide in response to a discovery request that encompassed such information. In all other respects, complainants' rebuttal evidence will be subject to the Board's general rules as to the proper scope of rebuttal.

9. Add a section § 1111.14 to read as follows:

§ 1111.142 Streamlined Market Dominance.

(a) A complainant in Final Offer Rate Review cases may elect to pursue the streamlined market dominance approach to market dominance if ~~the it can make a prima facie showing on market dominance pursuant to § 1111.13(b) of this Chapter~~ challenged movement satisfies the factors listed in paragraphs (a)(1) through (a)(6) of this section. The Board will find a complainant has made a prima facie showing on market dominance when it can demonstrate the following with regard to the traffic subject to the challenged rate:

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

(b) The procedures for bifurcated market dominance determinations in § 1111.12 of this Chapter shall apply to the streamlined market dominance approach, except for subpart § 1111.12(a). The procedural schedule for the streamlined market dominance approach shall run concurrent with the Final Offer Rate Review procedural schedule in § 1111.10(a)(3) of this Chapter. A complainant may rely on any competent evidence, including a verified statement from an appropriate official(s) with knowledge of the facts, in demonstrating the factors set out in paragraph (a) of this section. In demonstrating the revenue to variable cost ratio, a complainant must show its quantitative calculations.

~~When a complainant elects to utilize the streamlined market dominance approach, it must provide the initial disclosures found in § 1111.2 (a) and (b) of this chapter, regardless of the rate reasonableness methodology selected (including stand-alone cost cases).~~

~~A defendant's reply evidence under the streamlined market dominance approach may address the factors in paragraph (a) of this section and any other issues relevant to market dominance. A complainant may elect to submit rebuttal evidence on market dominance issues (in cases that provide for rebuttal, i.e. cases not brought under the Final Offer Rate Review procedure). Reply and rebuttal filings under the streamlined market dominance approach are each limited to 50 pages, inclusive of exhibits and verified statements.~~

(c) Pursuant to the authority under § 1011.6 of this chapter, an administrative law judge will hold a telephonic evidentiary hearing on the market dominance issues at the discretion of the complainant ~~within 7 days after the complainant's rebuttal evidence is due. In Final Offer Rate Review matters, the hearing will be held within 7 days after the parties' replies are due.~~ The Board will arrange to receive the hearing transcript within 4 days of when the evidentiary hearing is held. The oral hearing transcript will be part of the docket in the proceeding. Market dominance determinations will be made by the Board.

Appendix A Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1011 and 1111 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1011—BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

1. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 1301, 1321, 11123, 11124, 11144, 14122, and 15722.

2. Amend § 1011.6 by adding a new paragraph (i) to read as follows:

§ 1011.6 Delegations of authority by the Chairman.

* * * * *

(i) In matters involving the streamlined market dominance approach, authority to hold a telephonic evidentiary hearing on market dominance issues is delegated to administrative law judges, as described in § 1111.14(c) of this chapter.

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

3. The authority citation for part 1111 is revised to read as follows:

Authority: 49 U.S.C. 10701, 10702, 10704, 10707, 11701, and 1321.

4. Amend § 1111.2 by revising the last sentence of the introductory text in paragraph (a) and (b) to read as follows:

§ 1111.2 Content of formal complaints; joinder.

(a) *General.* * * * If the complainant seeks to use the simplified standards, the bifurcated market dominance approach, or the streamlined market dominance approach, it should support this request by submitting, at a minimum, the following information:

* * * * *

(b) *Disclosure required with complaints in simplified standards cases and in cases using the streamlined or bifurcated market dominance approaches.* The complainant must provide to the defendant all documents relied upon in formulating its assessment of a feasible transportation alternative and all documents relied upon to determine the inputs to the URCS Phase III program.

* * * * *

5. Amend § 1111.9 by revising paragraph (a) to read as follows:

§ 1111.9 Procedural schedule in stand-alone cost cases.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedule will apply in stand-alone cost cases after the pre-complaint period initiated by the pre-filing notice:

- (1) Day 0 - Complaint filed, discovery period begins.
- (2) Day 7 or before - Conference of the parties convened pursuant to § 1111.11(b).
- (3) Day 20 - Defendant's answer to complaint due.
- (4) Day 150 - Discovery completed.
- (5) Day 210 - Complainant files opening evidence on absence of intermodal and intramodal competition, variable cost, and stand-alone cost issues.
- (6) Day 270 - Defendant files reply evidence to complainant's opening evidence.
- (7) Day 305 - Complainant files rebuttal evidence to defendant's reply evidence.
- (8) Day 335 - Complainant and defendant file final briefs.
- (9) Day 485 or before - The Board issues its decision.

* * * * *

6. Amend § 1111.10 by revising paragraph (a) to read as follows:

§ 1111.10 Procedural schedule in cases using simplified standards.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedules will apply in cases using the simplified standards:

- (1)(i) In cases relying upon the Simplified-SAC methodology:
 - (A) Day 0 - Complaint filed (including complainant's disclosure).
 - (B) Day 10 - Mediation begins.
 - (C) Day 20 - Defendant's answer to complaint (including defendant's initial disclosure).
 - (D) Day 30 - Mediation ends; discovery begins.
 - (E) Day 140 - Defendant's second disclosure.
 - (F) Day 150 - Discovery closes.
 - (G) Day 220 - Opening evidence.
 - (H) Day 280 - Reply evidence.
 - (I) Day 310 - Rebuttal evidence.
 - (J) Day 320 - Technical conference (market dominance and merits, except for cases using the streamlined market dominance approach, in which the technical conference will be limited to merits issues).
 - (K) Day 330 - Final briefs.
- (ii) In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.
- (2)(i) In cases relying upon the Three-Benchmark methodology:
 - (A) Day 0 - Complaint filed (including complainant's disclosure).
 - (B) Day 10 - Mediation begins. (STB production of unmasked Waybill Sample.)
 - (C) Day 20 - Defendant's answer to complaint (including defendant's initial disclosure).
 - (D) Day 30 - Mediation ends; discovery begins.
 - (E) Day 60 - Discovery closes.
 - (F) Day 90 - Complainant's opening (initial tender of comparison group and opening evidence on market dominance). Defendant's opening (initial tender of comparison group).
 - (G) Day 95 - Technical conference on comparison group.

(H) Day 120 - Parties' final tenders on comparison group. Defendant's reply on market dominance.

(I) Day 150 - Parties' replies to final tenders. Complainant's rebuttal on market dominance.

(ii) In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.

* * * * *

7. Add a section § 1111.12 to read as follows:

§ 1111.12 Bifurcated Market Dominance.

(a) *Procedural Schedule.* A complainant may elect to bifurcate the presentation of market dominance evidence from rate reasonableness evidence in any case that challenges the reasonableness of a rail rate. Absent a specific order by the Board, the following general procedural schedule will apply to the presentation of bifurcated market dominance evidence:

(1) Day 0 – Answer filed, except in Final Offer Rate Review cases this shall be the date the Complaint is filed.

(2) Day 35 – Market dominance discovery closes.

(3) Day 49 – Opening market dominance evidence.

(4) Day 70 – Reply market dominance evidence.

(5) Day 84 – Rebuttal market dominance evidence.

(b) *Discovery Disputes.* The following procedures shall apply in bifurcated market dominance proceedings, in lieu of the procedures in § 1114.31 of this Chapter, if a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under § 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to § 1114.26(a):

(1) Day 25 – Each party may file a single motion to compel concerning all market dominance discovery disputes, if any. Such motion must be filed with the Board and served on all parties.

(2) Day 25 + 7 – Replies to motions to compel.

(3) Day 25 + 14 – Rebuttals to motions to compel.

(4) Day 25 + 21 – Board decision.

(c) The procedural schedules in paragraphs (a) and (b) of this section shall run concurrent with the procedural schedule for the applicable rate reasonableness methodology selected. The procedural schedule in paragraph (a) of this section shall be tolled if there is a discovery dispute subject to paragraph (b) of this section and shall resume on the date the Board issues its decision under paragraph (b). Tolling of the bifurcated market dominance procedural schedule in paragraph (a) of this section shall not toll the applicable rate reasonableness procedural schedule. This paragraph will not apply to cases under Final Offer Rate Review.

(d) In Final Offer Rate Review cases where the presentation of market dominance evidence is bifurcated, discovery as to both market dominance and rate reasonableness shall occur within the same 35-day discovery period and shall follow the discovery dispute procedures at § 1114.31(a)(3) of this Chapter. Opening evidence on rate reasonableness will be due 14 days after rebuttal market dominance evidence, at which point the normal procedural schedule for Final Offer Rate Review cases will resume.

(e) When a complainant elects to utilize the bifurcated market dominance process, and in Final Offer Rate Review cases regardless of bifurcation, it must provide the initial disclosures found in § 1111.2(a) and (b) of this Chapter, regardless of the rate reasonableness methodology selected (including stand-alone cost cases).

(f) Opening, reply and rebuttal evidence under the bifurcated market dominance approach shall be limited to 30 pages of narrative, inclusive of verified statements and material created for the litigation (e.g., studies, graphs, charts). Exhibits that consist of material reproduced from public sources or produced by any party in discovery are not subject to page limits.

8. Add a section § 1111.13 to read as follows:

§ 1111.13 Prima Facie Market Dominance Factors

(a) In all rate reasonableness cases, including cases where the complainant has elected to bifurcate the presentation of market dominance evidence pursuant to § 1111.12 of this Chapter, the Board will find a complainant has made a prima facie market dominance showing as to the ineffectiveness of specific transportation modes in its opening market dominance evidence when it can demonstrate the following with regard to the traffic subject to the challenged rate:

- (1) as to intermodal truck competition (including transloading), that both
 - (i) the movement would exceed 250 highway miles between origin and destination, and
 - (ii) the complainant has used truck for 20% or less of its movement volume subject to the rate at issue over a five-year period (counting transload movements as truck volumes if the defendant did not participate in the transload movement).
- (2) as to intermodal barge competition, that either
 - (i) the origin, destination or both are landlocked,
 - (ii) the origin, destination, or both do not have barge facilities, or lack facilities capable of handling the issue commodity, or
 - (iii) the origin and destination are not located on navigable waterways that are interconnected.
- (3) as to intramodal rail competition, that both
 - (i) the origin, destination, or both have direct physical access only to a single railroad, and
 - (ii) a build-out to achieve direct physical access to a second railroad either
 - (A) exceeds a distance of two miles,
 - (B) would require the acquisition and condemnation of developed property in residential, industrial, or commercial areas, or
 - (C) traverses waters of the United States, as defined at 33 C.F.R. § 328.3.

(b) In all rate reasonableness cases, including cases where the complainant has elected to bifurcate the presentation of market dominance evidence pursuant to § 1111.12 of this Chapter, the Board will find that a complainant has made a prima facie showing on market dominance when, with regard to the traffic subject to the challenged rate, if it makes a prima facie market dominance showing as to each transportation mode identified in paragraphs § 1111.13(a)(1) through (a)(3) using the factors specified in those paragraphs and it demonstrates that the movement has an R/VC ratio of 180% or greater.

(c) A complainant may rely on any competent evidence, including a verified statement from an appropriate official(s) with knowledge of the facts, in demonstrating the factors set out in paragraph (a) of this section.

(d) A defendant's reply evidence on market dominance may address the factors in paragraph (a) of this section and any other issues relevant to market dominance.

(e) If a complainant's opening evidence has established a prima facie case as to any transportation mode in accordance with paragraph (a) of this section, the complainant may present any rebuttal evidence as to that mode in response to any matter in the defendant's reply evidence; provided, however, that a complainant may not rely on information within its possession or knowledge that it did not provide in response to a discovery request that encompassed such information. In all other respects, complainants' rebuttal evidence will be subject to the Board's general rules as to the proper scope of rebuttal.

9. Add a section § 1111.14 to read as follows:

§ 1111.14 Streamlined Market Dominance.

(a) A complainant in Final Offer Rate Review cases may elect to pursue the streamlined market dominance approach to market dominance if it can make a prima facie showing on market dominance pursuant to § 1111.13(b) of this Chapter.

(b) The procedures for bifurcated market dominance determinations in § 1111.12 of this Chapter shall apply to the streamlined market dominance approach, except for subpart § 1111.12(a). The procedural schedule for the streamlined market dominance approach shall run concurrent with the Final Offer Rate Review procedural schedule in § 1111.10(a)(3) of this Chapter.

(c) Pursuant to the authority under § 1011.6 of this chapter, an administrative law judge will hold a telephonic evidentiary hearing on the market dominance issues at the discretion of the complainant within 7 days after the parties' replies are due. The Board will arrange to receive the hearing transcript within 4 days of when the evidentiary hearing is held. The oral hearing transcript will be part of the docket in the proceeding. Market dominance determinations will be made by the Board.