

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

248947

Docket No. EP 756

MARKET DOMINANCE STREAMLINED APPROACH

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Comments of American Fuel & Petrochemical Manufacturers

I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) is pleased to provide its comments to the Surface Transportation Board’s (“STB” or “the Board”) Notice of Proposed Rulemaking (“NPRM”) entitled “Market Dominance Streamlined Approach.”¹ AFPM applauds STB’s work to date, including the formation of a Rate Review Task Force (“RRTF”) and the recent RRTF Report, which lays out various recommendations to improve the rate dispute process.²

The RRTF report included a recommendation that STB develop “a standard for pleading market dominance that will reduce the cost and time of bringing a rate case,” stating that the market dominance inquiry for rate reasonableness cases was a “costly and time-consuming undertaking.”³ This recommendation is consistent with a 2015 study by the Transportation Research Board (“TRB”) on modernizing freight rail regulation that identified a need to streamline the process and suggested that “strict timelines for reviews are fundamental in preventing delays in market dominance inquiries.”⁴

AFPM agrees with the prevailing sentiment that market dominance inquiries have become far too complex and time consuming, particularly in cut and dry cases where market dominance is clear. AFPM supports the RRTF’s conclusion that an effort to streamline the market dominance inquiry is necessary.⁵ After considering the recommendations related to market dominance issues, STB issued this NPRM proposing a streamlined market dominance approach that would be available to complainants for rate cases under all of the Board’s rate dispute processes. AFPM is encouraged by STB’s movement on this serious issue, and thanks STB for this and its related proposals.

¹ See 84 *Fed. Reg.* 48882, “Market Dominance Streamlined Approach.” Notice of Proposed Rulemaking, Docket No. EP 756 proposed September 17, 2019, <https://www.govinfo.gov/content/pkg/FR-2019-09-17/pdf/2019-20087.pdf>

² See “Rate Reform Task Force, Report to the Surface Transportation Board” (“RRTF Report”). Published April 25, 2019, https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf

³ RRTF Report at 52-53.

⁴ National Academies of Sciences, Engineering, and Medicine 2015. *Modernizing Freight Rail Regulation*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/21759>.

⁵ RRTF Report at 52.

II. AFPM INTEREST IN THIS PROPOSAL

AFPM is a trade association representing virtually all the U.S. refining and petrochemical manufacturing capacity. Our members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. To produce essential goods, AFPM members rely on a safe, reliable, and efficient rail system to move materials to and from refineries and petrochemical facilities. Rail transportation is vital to our members, as well as to manufacturers and customers downstream who depend on our products. Approximately 3.7 million carloads of our members' feedstocks and products — crude oil, natural gas liquids, refined products, plastics, and synthetic resins — are delivered by rail.⁶ To that end, three principles guide AFPM's efforts around transportation and infrastructure issues impacting our members:

1. **Safety & Security** - Ensure the ability to ship feedstocks and products, safely and securely.
2. **Free & Open Markets** - Promote free and open energy markets that benefit the U.S. economy.
3. **Ability to Build & Repair** - Ensure the ability to build, use, repair, maintain, and replace energy infrastructure.

Refineries and Petrochemical manufacturers across the country require a robust, competitive rail network as an essential part of their supply chains. Yet over 75% of refiners and petrochemical manufacturers are only served by a single railroad (*e.g.*, captive), and thus have been negatively impacted by excessive freight rail rates, escalating and poorly communicated demurrage fees, and lack of competitive rail service for too long.⁷ STB's streamlined Market Dominance proposal, when paired with other rate dispute options, is a positive step toward improving how the Board addresses freight rail problems. AFPM is eager to work with STB commissioners and their staff on modernizing and streamlining outdated regulations.

The following comments address STB's proposal to establish a streamlined market dominance determination process as part of rate dispute cases. Streamlining the market dominance inquiry would also be consistent with Congressional directives not only in the rail transportation policy, but also in the Surface Transportation Board Reauthorization Act of 2015 ("STB Reauthorization Act").⁸ Section 11 of the STB Reauthorization Act modified 49 U.S.C. 10704(d) to require that STB "[m]aintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates." Section 11 also shortened the time for deciding rate cases brought under the Stand-Alone Cost ("SAC") methodology. STB believes, and AFPM agrees, that appropriate Board-imposed measures to avoid delay in the discovery and evidentiary phases of rate proceedings, especially on a threshold issue like market dominance, fulfill those Congressional directives.⁹

⁶ Rail Traffic Data - Association of American Railroads. (2019). <https://www.aar.org/data-center/rail-traffic-data/>, accessed November 6, 2019.

⁷ See Escalation Consultants, "Competition at U.S. Freight Rail Stations by State." <https://railvoices.org/wp-content/uploads/2012/12/US-Map.pdf>. Accessed October 24, 2019.

⁸ Public Law 114-110, 129 Stat. 2228

⁹ See, *e.g.*, 49 U.S.C. 10704(d)(1).

AFPM acknowledges that STB has an important oversight role in looking at the impact of freight rail policies on rail shippers and are encouraged that the Board is seeking ways to improve the rate dispute process, including the timeliness of the market dominance determinations, in line with the intent of Congress. While in this document we provide comments and suggested improvements on the streamlined market determination process, we encourage STB to examine any and all rate review improvements at its disposal. We are confident the streamlined market dominance process will help improve dispute resolution and promote free and open rail and energy markets.

III. BACKGROUND

Challenging a rate before STB is often prohibitively expensive and complex, and it is especially burdensome to rail shippers. Under the Staggers Rail Act of 1980, a railroad can set the rate for a shipment at any level. Determining the reasonableness of challenged rail transportation rates is one of the Board's core functions.¹⁰ A rate can be challenged if it exceeds a legislatively defined value and the railroad is found to lack effective competition in the market for this shipment, which is defined in the law as the railroad having “market dominance.”¹¹ A rate that is eligible for challenge could still ultimately be judged legal, or “reasonable,” by regulators if the railroad was not found to be market dominant. Only when the legislative rate threshold is violated and the railroad is found to be market dominant, is the rate subject to regulation.

In order to adjudicate the reasonableness of a rate, STB must first find that the defendant rail carrier has market dominance over the transportation to which the rate applies.¹² Market Dominance inquiries have proven to be an overly complicated and costly endeavor, so much so that the process itself serves as a barrier to rate relief, even in cases where there is no effective competitive restraint on rail rates. The difficulty of market dominance inquiries, paired with a burdensome rate reasonable process, are so onerous rail shippers do not see this process as a viable and realistic option, outside of the most egregious cases of abuse. While efforts have been made to simplify the rate review process and market dominance determinations, they still are not viable options in most cases for rail shippers of all sizes.

As STB notes in the NPRM, a less complex market dominance inquiry that provides ample opportunity for both parties to present evidence would help ensure that the burden of the process will not dissuade complainants with meritorious cases from bringing those cases to the Board, and that rate cases are processed expeditiously. In this vein, STB is proposing a streamlined approach for pleading market dominance in rate reasonableness proceedings. STB expects that this approach would reduce burdens on parties, expedite proceedings, and make rate relief procedures more accessible, especially for complainants with smaller cases. STB proposes to establish that a complainant has made prima facie showing of market dominance when it can demonstrate it meets all six specific criteria. STB proposes six factors including:

¹⁰ See 49 U.S.C. 10101(6).

¹¹ 49 U.S.C. 10707(a).

¹² Market dominance is defined as “an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” See also 49 U.S.C. 10701(d)(1), 10707(b), (c).

- The movement has a Revenue to Variable Cost (“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).

Per the NPRM proposal, if a complainant could demonstrate each of the six factors, STB would have significant evidence on the absence 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) 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. STB concludes that the proposed approach would reduce the complexity of market dominance presentations for many complainants without limiting railroads’ ability to mount a thorough defense. AFPM believes this approach is a step in the right direction but falls far short of eliminating all the barriers to pursuing a rate case. In these comments, we offer recommendations to improve the proposal as well as factors that we believe are duplicative or unnecessary.

IV. COMMENTS ON STREAMLINED MARKET DOMINANCE

AFPM applauds STB for taking action to ensure the rate review process meets the intent of Congress and the Board’s commitment to improving the nation’s freight rail system. AFPM offers these comments to help improve the streamlined market dominance approach, which are organized by each of the six *prima facie* factors. These comments focus on providing clarity on ambiguous provisions, ensuring timeliness, and seeking opportunities to improve market dominance determinations. In the Appendix, AFPM also provides recommended updates to the proposed regulatory text that reflects our comments.

A. REVENUE TO VARIABLE COST RATIO

STB’s market dominance inquiry is comprised of two types of components: a quantitative threshold and a qualitative analysis. The enabling statute for STB¹³ establishes the quantitative threshold that a railroad does not have market dominance if the rate charged produces revenues that are < 180% of the variable costs of providing the service (“R/VC”).¹⁴ This is the first requirement for quantitative market dominance and must be established, even under a streamlined approach. In demonstrating the R/VC ratio, a complainant must show its quantitative calculations.

¹³ 49 U.S.C. § 10707(d)(1)(A).

¹⁴ The revenue portion of the ratio is taken from the tariff rate plus applicable fuel surcharge and escalation clauses. The variable costs of a particular movement are based on user-supplied information using the Board’s Uniform Railroad Costing System (“URCS”) Phase III program.

AFPM believes the Board should consider all avenues to streamline the market dominance determination, especially when dealing with clear scenarios where a shipper is captive. In particular, AFPM understands the board must include R/VC as one of the six factors but the board should consider an automatic determination of market dominance when a shipper is clearly captive, and the 180% R/VC threshold is met.

AFPM suggests that STB also consider a secondary threshold related to R/VC ratios at a higher level. Should this higher threshold be met, “market dominance” would automatically be met, and the remaining prima facie would not need to be examined or proven. AFPM members cited examples of incredibly high R/VC ratios that clearly show a rail carrier is market dominant. AFPM therefore suggests that STB adopt regulations stipulating that when a R/VC ratio of greater than 280% is demonstrated, market dominance is declared automatically without consideration of any other factors. AFPM contends this is a fair threshold and could vastly improve the time it takes to determine market dominance. As an alternative to R/VC ratio, a Revenue Shortfall Allocation Method threshold could also be considered.¹⁵

B. MOVEMENT LENGTH

STB proposed as its second factor “a 500-highway-mile threshold ... to identify when trucking is not likely to provide effective competition.” STB previously indicated that “[t]rucking becomes less viable when the length of haul exceeds 500 miles because any transport over that threshold, in many instances, could not be completed in one day.”¹⁶ STB believes that given the reduced likelihood of effective truck competition for movements exceeding 500 highway miles, rail movements that meet this criterion are more likely to be served by market dominant carriers. Based on this rationale, STB seeks to establish this prima facie factor.

AFPM supports a threshold to determine effective truck competition for movements; however, we oppose the blanket 500-mile threshold for all commodities given that transportation options and scenarios can vary extensively between commodities and geographically. For example, our members frequently ship materials via unit train configurations, which has a vastly different transportation profile than rail manifest shipments. In fact, trucking substitutions for an entire train are likely to become non-competitive movements at a much lower threshold. AFPM would support a lower 250-mile threshold to account for differences in transportation scenarios. This could include commodity-based designations and / or delineation between types of service (i.e., unit vs. manifest).

AFPM also believes the railroad system needs to be examined as a network, not solely as individual railroads. For example, the 500-mile limit needs to include multi-line haul movements. In other words, the threshold should be based on the origin and final destination of the movement, not simply a single railroad’s portion of the haul. When an origin railroad knows they only have a short piece of the overall line haul, our members have observed their behavior

¹⁵ Revenue Shortfall Allocation Method (RSAM), measures the average markup that the railroad needs to charge all of its “potentially captive” traffic in order for the railroad to earn adequate revenues as measured by the Board under 49 U.S.C. § 10704(a)(2)

¹⁶ Review of Commodity, Boxcar, & TOFC/COFC Exemptions, EP 704 (Sub-No. 1), slip op. at 7 n.12 (STB served Mar. 23, 2016).

related to rate establishment becomes more aggressive and pushes the line of what would be considered reasonable. This is a factor that should be addressed when establishing such a threshold and is another reason that a 500-miles is too long. A 500-mile limit per railroad will eliminate the potential to challenge railroads with a short haul movement.

C. ABSENCE OF INTRAMODAL COMPETITION

STB also proposed that if a complainant can demonstrate the complete absence of other railroad competition, it would assist STB in making a market dominance determination more expeditiously. The Board notes they expect that, in most cases, the complainant would demonstrate the absence of intramodal competition by submitting a verified statement from an appropriate official attesting that the complainant does not have practical physical access to another railroad. Practical physical access encompasses feasible shipping alternatives on another railroad, including switching arrangements, where “an alternative is possible from a practical standpoint given real-world constraints.”¹⁷

AFPM agrees with this in principle, but believes additional clarity and detail is needed. Specifically, AFPM seeks clarity on the phrases “complete absence of other railroad competition,” “feasible shipping alternatives,” and “an alternative is possible from a practical standpoint given real-world constraints.” Proving absence of other railroad competition, even for captive locations, is a potentially complex and controversial issue. STB should consider providing more detail or defining in regulation what constitutes “possible” and “practical,” as those terms are likely to be viewed drastically differently between shippers and rail carriers. The fact that for non-captive shippers, individual carriers may choose not to provide a competitive offer, even though connected, should also be considered (*i.e.*, price themselves out as a way to refuse shipments).

As seen with the spread of Precision Scheduled Railroading and the associated rise in demurrage fees, rail carriers often define “practical” and “possible” very liberally, particularly when the cost of compliance is borne by rail shippers. For example, rail carriers have interpreted convoluted and alternative routes that add significant mileage and time to a trip as “practical” for a rail shipper. In relation to storage, AFPM members have experienced similar situations where a railroad considers storage expansion – at the extensive cost to the rail shipper – as reasonable, when it clearly is not economical feasible. At what hurdle rates and cost does a project to connect to another carrier become “impossible” or “impractical?” It would be difficult to establish an acceptably accurate level in a short time frame, and STB should consider how it will determine if this *prima facie* factor has been met.

Finally, the NPRM proposes a “verified statement” from an “appropriate official” should be submitted to prove this factor is met. AFPM requests that STB further define what type of documentation would be acceptable or expected and define or list who it deems to be “appropriate officials.” This factor clearly must be considered in concert with the open rulemaking regarding competitive switching. AFPM urges STB to expeditiously act on

¹⁷ Total Petrochemicals. 2013, NOR 42121, slip op. at 4 n.9.

competitive switching (EP 711),¹⁸ however, absent action on competitive switching, STB must consider the ramifications of adopting this factor on that pending action.

D. ABSENCE OF BARGE COMPETITION

STB notes that if a complainant can demonstrate the absence of barge competition (e.g., because the complainant or receiver, or both, is landlocked), it would assist the STB in deciding more expeditiously as to whether barge competition constrains market power. STB has therefore proposed absence of barge competition as a factor and expects that the complainant would demonstrate this factor by submitting a verified statement from an appropriate official attesting that the complainant does not have practical physical access to barge competition.

AFPM believes simply having “access” to water is not appropriate threshold to determine an entity’s ability to use the expedited rate process. The required permitting and investment to build-out needed infrastructure (dock, lines to/from docks, tankage, vapor recovery, etc.) may not be feasible, particularly when fossil fuel un/loading terminals have been challenged and even halted by state permitting agencies and legal challenges. For example, the Port of Corpus Christi has just recently undertaken a dredging process to deepen the channel there. The permitting process for that project began in 1990.

Moreover, AFPM notes that all water traffic is the same and consideration of ocean verses inland waterway access be considered and not simply if a facility is landlocked. AFPM requests clarification on whether this factor is inclusive of all possible destinations or viewed on a lane by lane basis. The fact that a refinery on East Coast has access to the ocean, doesn’t mean barge competition is an option to move that shipment to the West Coast. Therefore, AFPM strongly suggests STB provide additional parameters beyond simply having “access.”

The NPRM also proposes a “verified statement” from an “appropriate official” to be submitted to verify compliance with this factor. Like with rail competition, AFPM requests that STB further define what type of documentation would be acceptable or expected as well as define or list what it considers “appropriate officials.”

E. RECENT TRUCK MOVEMENTS

STB notes that traffic regularly and routinely moving by truck or truck-rail transloading is less likely to be served by a market dominant rail carrier. Per STB, this belief is supported by several cases.¹⁹ Still, STB acknowledges that market dominance can still be found in cases where truck competition exists if the truck competition is found not to be a constraint on the defendant railroad’s rates.

¹⁸ See 81 *Fed. Reg.* 51149, “Reciprocal Switching.” Notice of Proposed Rulemaking, Docket No. EP 711 proposed August 3, 2016, <https://www.federalregister.gov/documents/2016/08/03/2016-17980/petition-for-rulemaking-to-adopt-revised-competitive-switching-rules-reciprocal-switching>

¹⁹ See, e.g., *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry. (E.I. DuPont)*, NOR 42125, slip op. at 307-08 (STB served Mar. 24, 2014), corrected and updated (STB served Oct. 3, 2014); *M&G Polymers 2012*, NOR 42123, slip op. at 48.

STB proposes showing that minimal truck movements for the issue traffic would be a factor used to determine market dominance. STB proposes that if a shipper could show that truck movements for the issue traffic are less than 10% over the previous five-year period, then the rate would be eligible for streamlined market determination.

AFPM does not support this factor and recommends deleting it. AFPM opposes this 10% level, as it is redundant and excessive consider the prima facie factor related to movement lengths already examines highway competition. Further, addition of this factor undermines the stated purpose of the NPRM to “streamline” market dominance determinations. Specifically, the movement length factor helps determine whether trucking is a viable option already, and thus renders this factor an unnecessary exercise. AFPM believes the mileage threshold, with some modifications, would be a much better predictor of real-world highway competition and improve accuracy of the market dominance determinations. AFPM suggests removal of this factor.

F. PRACTICAL BUILD-OUT OPTION

The final prima facie factor proposed relates to the option for a practical build-out. The term “build-out” is used by STB to refer to possible competitive alternatives that could be accessed if the complainant makes certain infrastructure investments. Under this prima facie factor, the complainant would need to demonstrate, by a short plain verified statement from an appropriate official or other means, that it has no practical build-out option due to physical, regulatory, financial, or other issues (or combination of issues).²⁰

The streamlined market dominance option would not be available when build-out alternatives are practical, although a complainant could still attempt to show in a non-streamlined market dominance presentation, that the build-out does not provide effective competition. In cases where there is no practical build-out option, it would assist the Board in making a market dominance determination more expeditiously.

AFPM does not support this factor and recommends deleting it. AFPM has concerns that the use of terms “feasible,” “possible,” or “practical” are not helpful in a threshold factor because they are vague. Further, STB plans to base its determination on broad categories of “physical, regulatory, financial, or other issues” related to buildouts. As underscored earlier, rail carriers and rail shippers often define this type of terminology very differently based on who burdens the cost of compliance. Moreover, the infrastructure investments can be initiated by both shippers and carriers. AFPM sees a factor examining just a rail shipper’s “feasibility” to invest as incredibly one-sided. There is no corresponding review or inquiry of a railroad’s ability to invest in a new switch or additional track, and thus there should be no such investigation on the shipper’s part.

A protracted theoretical examination of potential infrastructure buildout options is already required in SAC cases and the Board has frequently heard from rail shippers that this

²⁰ Physical issues include geographic constraints, such as the inability to obtain a right-of-way to the connecting carrier. Regulatory issues include legal barriers, such as prohibitive environmental permitting processes. Financial issues include a determination that the expense of the build-out is not cost effective in light of the potential transportation rate savings.

type of analysis is precisely the reason current rate dispute methodologies are unwieldy and not viable. Introducing the same type of exercise into a streamlined market dominance process undermines the stated goal of creating an efficient process.

Putting aside financial feasibility, AFPM members transport fossil fuels and petrochemical feedstocks. Infrastructure projects and buildouts, such as un/loading and storage facilities, are often vigorously opposed and legally challenged, resulting in delays and cancellations of projects. Would this type of issue be considered as reasonable rationale under the streamlined market dominance process? AFPM believes the ability to access land and required permits provides too much uncertainty.²¹ With ongoing disagreement on what is “feasible,” “possible,” or “practical,” AFPM believes this streamlined process would be saddled in challenges, thereby undermining the stated purpose improved efficiency. Presumably, if the carrier thought a reasonable investment by the shipper was all it took to avoid a market dominance determination, it could raise it by way of defense. This is precisely what transpired in *Consumers Energy Company v. CSX Transportation*,²² Such a factor could also invite additional disputes, and further slow this and other important STB work.

G. MECHANICS OF MARKET DOMINANCE PROCESS

The NPRM provides the mechanics and process by which STB would evaluate market dominance. If STB agrees the complainant meets all the factors, the complainant would then have access to all rate dispute processes. Conversely, if a complainant is not able to demonstrate just one of the required factors, it would not be permitted to use the streamlined approach but would instead need to choose a non-streamlined market dominance presentation with additional detailed information about its transportation options.

If a complainant elects to use the streamlined market dominance approach and the Board finds that market dominance has not been shown, the complainant may not submit a new rate case involving the same traffic, using the non-streamlined market dominance presentation, unless circumstances have changed (or other factors under 49 U.S.C. § 1322(c)). AFPM supports this process and believes giving complainants a single opportunity to prove streamlined dominance is consistent with the stated purposes of the NPRM: to improve efficiency of the rate dispute process.

In the NPRM the Board notes that “[i]t is established Board precedent that the burden is on the complainant to demonstrate the lack of effective competition. See, e.g., *Total Petrochemicals & Ref. USA, Inc. v. CSX Transp., Inc.* (Total Petrochemicals. 2013), NOR 42121, slip op. at 28 (STB served May 31, 2013) (with Board Member Begeman dissenting on other matters).” While

²¹ Two STB decisions demonstrate how consideration of infrastructure investments as part of Board decisions can be problematic and complex. Both cases involved hypothetical building projects to create water access at facility. See “*Consumers Energy Company v. CSX Transportation*”, Docket No. NOR 42142 and “*Seminole Electric Cooperative, Inc v. CSX Transportation, Inc.*” Docket No. EP 693.

²² *Consumers Energy Company (Consumers) v. CSX Transportation*, Docket No. NOR 42142 slip op. at 287-298. , In this case CSX proposed a “Direct Water Alternative” and the “Cobb-Rail Alternative” to ship coal to a Consumers plant. Each of the plans required extensive infrastructure buildouts the cost of which would have been borne on Consumers. Ultimately, both plans were determined infeasible by the Board due to these buildouts.

the STB believes the burden for establishing market dominance is on the complainant, AFPM takes issue with this assumption. The proposed approach allows a complainant to make a prima facie showing that it has met its “burden of establishing the absence of effective competition from other rail carriers or modes of transportation for the traffic to which the challenged rate applies.”²³ AFPM believes in clear cases where a shipper is captive the burden of establishing, or refuting, market dominance should be on the rail carrier.

In an effort to further simplify the process, STB is proposing to impose a 50-page limit, inclusive of exhibits and verified statements, on each of the parties’ reply and rebuttal submissions on market dominance in proceedings using the streamlined approach. AFPM supports this limit.

To help facilitate building the record on market dominance under the streamlined approach, the Board proposes a new delegation of authority under 49 C.F.R. § 1011.6 to an Administrative Law Judge (ALJ). Under this authority, the ALJ would hold an on-the-record telephonic market dominance evidentiary hearing, at the right of the complainant, 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. The Board would take the entire record into consideration, including the transcript from the ALJ hearing, when reaching its conclusion on market dominance. AFPM supports this delegation of authority.

V. CONCLUSION

AFPM appreciates the significant role STB plays in ensuring equitable and competitive rail markets, especially for captured shippers. STB should continue providing numerous pathways for rail shippers to access timely and thorough mechanisms for adjudicating what is a reasonable and fair rail rate. AFPM shares STB’s goal of ensuring the flow of commerce on our nation’s rail system and looks forward to continued collaboration. AFPM thanks STB for its time and consideration of these comments relating to the streamlined market dominance approach. Please contact me at (202) 457-0480 or rbenedict@afpm.org if you wish to discuss these issues further.

Sincerely,

A handwritten signature in blue ink that reads "Rob Benedict".

Rob Benedict,
Senior Director Petrochemicals, Transportation,
and Infrastructure
American Fuel & Petrochemical Manufacturers

²³ Total Petrochems. 2013, NOR 42121, slip op. at 28.

VI. APPENDIX – PROPOSED REVISIONS TO REGULATORY TEXT

Below AFPM provides suggested edits to the regulatory text based on, and supporting, our comments above. These comments are in redline format to ease STB's review. AFPM has no proposed edits on sections not listed.

§ 1111.12 Streamlined Market Dominance.

A complainant may elect to pursue the streamlined market dominance approach to market dominance and 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:

(a) the challenged movement proves the movement has an R/VC ratio of 280% or greater;
or

~~(ab) A complainant may elect to pursue the streamlined market dominance approach to market dominance if~~ The challenged movement satisfies the factors listed in paragraphs (ab)(1) through (ab)(64) 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~~ 250 highway miles between origin and destination ~~or other commodity or service-based threshold determined by the board;~~
- (3) There is no intramodal competition from other railroads; ~~and~~
- (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).~~

~~(cb)~~ 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 paragraphs (a) ~~and~~ (b) of this section. In demonstrating the revenue to variable cost ratio, a complainant must show its quantitative calculations.