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November 12, 2019

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
325 E Street, SW
Washington, D.C. 20423

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RE: STB Docket No. EP 756, Market Dominance Streamlined Approach

Dear Ms. Brown:

The Portland Cement Association (PCA) appreciates the opportunity to comment on the Surface Transportation Board's (Board) proposal to streamline the approach for pleading market dominance in rate reasonableness proceedings.¹ The Board's efforts to streamline the pleading process are critical steps toward ensuring that the nation's shippers have access to fair and equitable railroad rates and practices.² As discussed in the comments, PCA recommends additional changes and modifications to the proposed framework to ensure it takes into account the unique circumstances and challenges of different commodities.

PCA is the premier policy, research, education, and market intelligence organization serving America's cement manufacturers. The cement industry operates manufacturing plants in 33 states, with distribution terminals in all 50 states. PCA members rely on the railroads to meet their essential shipping requirements for hydraulic cement, and frequently have no practical, feasible alternatives to railroad service for their specific service needs. Roughly 50 percent of cement shipped annually is shipped by rail and 35 percent by barge. A large percentage of cement shipped by rail is captive to one specific rail carrier. PCA supports steps to protect hydraulic cement shippers from market dominance abuses. For these reasons, the cement industry appreciates the Board taking steps to streamline the approach for a complainant to demonstrate market dominance.

¹ Surface Transportation Board, Docket No. EP 756, Market Dominance Streamlined Approach; Notice of Proposed Rulemaking (Decided: September 11, 2019)("Streamlining Proposal").

² While manufacturers and shippers of hydraulic cement remain exempt from rate protections under a 1995 decision, see Rail General Exemption Authority – Exemption of Hydraulic Cement, Ex Parte No. 346 (Sub-No. 34) (ICC served July 26, 1995), the Board is currently considering a proposed rule to revoke the existing class exemption for hydraulic cement. See Review of Commodity, Boxcar, and TOFC/COFC Exemptions, EP 704 (Sub-No. 1) (Board served March 23, 2016)("Cement Revocation Proposal"). With this in mind, and with the hope that the Board will act quickly on the proposed revocation, PCA and the cement industry have a strong interest in this and other proceedings to reform railroad rates and practices.

PCA supports the Board's proposal to allow a complainant to make a prima facie showing of market dominance when it can demonstrate specific and well delineated factors. In some cases, the current proposal would unnecessarily exclude shippers and rate cases based on overly narrow definitions or standards that are inconsistent with the nature of specific commodities and their transportation systems. To address these issues, PCA recommends the following amendments to the proposed criteria.

The Streamlining Proposal would require a complainant to demonstrate they have used truck shipping for 10 percent or less of its movements for the issue traffic over a five-year period. This metric emerges from a recommendation in the Rate Reform Task Force Report recommending that "[a]ny truck movements are used only in rare situations, at times of supply chain duress." If so, the 10-percent constraint appears overly narrow and fails to recognize the range of reasons why a shipper could be forced to resort to noncompetitive truck shipping to address supply chain constraints or customer demands.

In many cases, cement must be shipped under expedited scheduling conditions in order to meet state or municipal deadlines or logistics constraints that do not allow for the use of rail under the scheduling constraints imposed by its rail carrier. Shippers select trucks not because they are cost competitive, but because they are the only option to meet customer demands and timeframes. A 10 percent threshold, even when averaged out over a period of five years, ignores the fact that large projects can result in unexpected surges and lulls in demand that manufacturers must address in real time.

To the extent that the Board believes a set percentage threshold is necessary to support a streamlined prima facie finding, it should either raise the truck use threshold to at least 25%, either for all shippers or on an industry-by-industry basis, based on unique circumstances associated with industry operations.

Second, the NPRM would set a 500-highway-mile threshold as a factor to identify when trucking is not likely to provide effective competition. In theory, the 500-mile threshold appears to relate to the practical distance a truck carrier can travel in a single day. In practice, however, the 500-mile figure would effectively prohibit cement shippers from using the streamlined approach in the entirety. The Board appears to recognize this possibility, noting that a "500-highway-mile threshold may be underinclusive for certain commodities that are more difficult to move by truck (e.g., particularly heavy commodities)."³

Such is the case for hydraulic cement and related cement products. Shipping cement by truck long distances becomes impracticable far below 500 miles due to the heavy, low-value

³ Surface Transportation Board, Docket No. EP 756, Market Dominance Streamlined Approach; Notice of Proposed Rulemaking (Decided: September 11, 2019)("Streamlining Proposal").

commodity nature of cement. As the Board recognized in its 2016 proposal to revoke the hydraulic cement exemption, “cement shipments now range between 250 to 300 miles, yet truck transportation is not an economical mode of transport beyond 100 to 125 miles.”⁴ In most cases, even shipping cement by rail is generally not economically viable beyond 300 miles.

PCA recommends that any mileage threshold established for the purpose of this rule be tailored to the specific commodity involved, or include specific exemptions for high weight, low margin commodities like cement.

The cement industry appreciates the opportunity to comment on the Board’s proposal to streamline the approach for pleading market dominance in rate reasonableness proceedings. Before finalizing a final rule, the cement industry supports making modifications to the proposed framework to take into account the unique circumstances of different commodities.

Sincerely,



Charles L. Franklin
Vice President & Counsel
Government Affairs

⁴ Surface Transportation Board, Docket No. EP 704 (Sub-No. 1), Review of Commodity Boxcar, and TOFC/COFC Exemptions (Decided: March 23, 2016).