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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 756

MARKET DOMINANCE STREAMLINED APPROACH

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	UNION PACIFIC DOES NOT OBJECT TO THE USE OF A PRESUMPTION-BASED APPROACH TO MARKET DOMINANCE IN THREE BENCHMARK AND SIMPLIFIED-SAC CASES.	2
A.	The Board should make clear the burden of establishing market dominance remains on the complainant.....	4
B.	The Board should ensure defendants can mount a thorough defense.	7
1.	Changes to initial disclosure rules	7
2.	Changes to page limits	10
3.	Changes to hearing proposal	11
C.	The Board should consider changes to the proposed prima facie factors.....	12
III.	UNION PACIFIC OBJECTS TO THE USE OF A PRESUMPTION-BASED APPROACH TO MARKET DOMINANCE IN SAC AND FORR CASES.	13
IV.	CONCLUSION.....	15

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Union Pacific Railroad Company submits these comments in response to the Surface Transportation Board’s Notice proposing a streamlined approach for pleading market dominance in rate reasonableness proceedings. *See Market Dominance Streamlined Approach*, EP 756 (STB served Sept. 12, 2019) (“NPRM”).

I. INTRODUCTION

Union Pacific endorses Board efforts to expedite rate cases and reduce the burdens on parties, as long as they do not undermine the accuracy of results or encourage wasteful litigation. Our rates have not been challenged in years. This positive record reflects our diligent efforts to set rates based on market conditions and statutory rate reasonableness standards. We have no interest in long, costly, rate cases.

To that end, Union Pacific does not object to the use of a presumption-based approach to market dominance in cases under the Board’s Three Benchmark or Simplified Stand-Alone Cost methodologies. Our comments describe clarifications and changes to the proposed rules that are necessary to ensure a presumption-based approach does not undermine the market dominance inquiry’s critical role in regulatory policy.

However, Union Pacific objects to the use of a presumption-based approach in other rate cases. In Stand-Alone Cost cases, a presumption-based approach would serve no legitimate

purpose and would encourage wasteful litigation by shifting front-end evidentiary costs from shippers to railroads. In addition, as we discuss in other comments also submitted today, the Board's proposed Final Offer Rate Review methodology is unlawful and flawed. It would also be incompatible with the use of a presumption-based approach to market dominance, because its rushed schedule would not "provide[] ample opportunity for both parties to present evidence," NPRM at 4, and could not be implemented "without limiting railroads' ability to mount a thorough defense," *id.* at 12.

In Part II, we discuss the use of a presumption-based approach in Three Benchmark and Simplified-SAC cases. In Part III, we explain why the use of a presumption-based approach would be inappropriate in SAC and FORR cases.

II. UNION PACIFIC DOES NOT OBJECT TO THE USE OF A PRESUMPTION-BASED APPROACH TO MARKET DOMINANCE IN THREE BENCHMARK AND SIMPLIFIED-SAC CASES.

Union Pacific endorses the Board's efforts to expedite rate cases and reduce the burdens on parties. The Board must take care, however, not to undermine the market dominance inquiry's critical role in regulatory policy. If the Board could assess rates reasonableness with absolute certainty, there would be no need for a market dominance inquiry – shippers with effective competition would have no incentive to roll the dice by seeking a regulated rate.¹ However, Congress established the market dominance test in recognition that rate regulation is inevitably imprecise and thus should not be deployed unless a shipper first shows its rates are not constrained by effective competition. *See* 49 U.S.C. § 10701(d)(1). Any presumption-based approach to market dominance must ensure the burden of proving an absence of effective

¹ *Cf. Ass'n of Am. R.Rs. v. STB*, 306 F.3d 1108, 1111 (D.C. Cir. 2002) ("It is certainly plausible that some shippers would consider regulators' hands to be friendlier than invisible ones.").

competition remains on shippers and give railroads a fair opportunity to present evidence. A presumption-based approach that did not provide these basic protections – and thus increased the risk of regulating rates already constrained by effective competition – would conflict with the statutory framework for regulating rates. It would also collide with the rail transportation policy “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail,” *id.* § 10101(1), “to minimize the need for Federal regulatory control over the rail transportation system,” *id.* § 10101(2), and “to foster sound economic conditions in transportation,” *id.* § 10101(5).²

Union Pacific doubts the use of a presumption-based approach will prove worthwhile or attractive for shippers. The Board’s premise for proposing the new rules is that the current rules discourage shippers from filing cases. *See* NPRM at 4. But the Board expects the new rules to produce just one additional complaint annually. *See id.* at 20. The game does not seem worth the candle. In fact, the ICC previously tried and abandoned the use of presumptions for market dominance. *See Market Dominance Determinations*, 365 I.C.C. 118 (1981). Yet, the NPRM does not discuss the ICC’s negative experience or explain why the Board believes this time will be different. History and logic suggest the result will be the same.

The Board’s proposed rules will likely suffer the same fate as the ICC’s rules because, in practice, presumptions are rarely relevant. In our experience, when railroads clearly would be found market dominant, they do not waste time and money contesting market dominance, so

² A streamlined approach that led the Board to regulate rates already constrained by effective competition would not advance the policy “to maintain reasonable rates *where there is an absence of effective competition*.” *Id.* § 10101(6) (emphasis added).

presumptions are irrelevant.³ When shippers know railroads would not be found market dominant, they do not waste time and money filing rate cases, so presumptions are irrelevant. This leaves close cases. In close cases, there will be some evidence of effective competition – for example, evidence of practical options for trucking, transloading, or build-ins. When such evidence exists, shippers cannot simply rest on presumptions because they have the burden of proof and must offer evidence or lose the case – once again, presumptions are irrelevant.

Union Pacific recognizes the Board has a legitimate interest in ensuring all shippers have access to its procedures. We also recognize a well-designed presumption-based approach could provide shippers in *small* rate cases with inexpensive guidance regarding the likely outcome of the market dominance inquiry. However, if the Board follows this path, it should clarify its statement that the “burden for establishing market dominance remains on the complainant,” NPRM at 11, and should modify the proposed streamlined approach to ensure defendants will retain their “ability to mount a thorough defense,” *id.* at 12. We discuss the clarifications in Section I.A. and the modifications in Section I.B. We would oppose any presumption-based approach that would shift the burden of proof away from complainants or would not allow defendants to mount a thorough defense. Finally, in Section I.C, we provide our brief, preliminary reactions to the proposed *prima facie* factors.

A. The Board should make clear the burden of establishing market dominance remains on the complainant.

The Board appears to recognize the burden of proving market dominance must remain on the complainant. The NPRM says “the proposed approach would allow a complainant that can

³ See, e.g., *Arizona Elec. Power Coop. v. BNSF Ry. & Union Pac. R.R.*, NOR 42133, slip op. at 3 (STB served Nov. 22, 2011) (“The parties also agree that the Board’s qualitative market dominance test has been satisfied.”).

demonstrate the factors to make a prima facie showing that it has met its ‘burden of establishing the absence of effective competition.’” NPRM at 11 (quoting *Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc.*, NOR 42121, slip op. at 28 (STB served May 31, 2013)). At the same time, it appears to acknowledge a prima facie showing provides shippers only a limited benefit because the “burden for establishing market dominance remains on the complainant.” *Id.* Based on our understanding of the NPRM, if the railroad rebuts the prima facie showing, then the shipper cannot rest on presumptions and must offer additional evidence to carry its burden.

However, to reduce the possibility of future disputes, the Board should clarify how the proposed rules would play out in three basic scenarios in which the shipper has made a prima facie showing: (1) the railroad offers no evidence of effective competition; (2) the railroad refutes at least one of the prima facie factors; and (3) the railroad does not refute any of the prima facie factors but offers other evidence of effective competition. Specifically, the Board should make clear:

1. If the shipper demonstrates each factor in its initial presentation, and the railroad does not refute any factor and offers no other evidence of effective competition, the shipper prevails on the market dominance issue.

2. If the railroad refutes the shipper’s initial presentation by demonstrating that one or more of the six factors is not present, the railroad prevails on the market dominance issue. For example, the railroad would prevail if it shows the shipper miscalculated the movement length or percentage of recent movements by truck, or if it demonstrates a practical build-out option. The Board should also make clear that, in these circumstances, a shipper may not argue that it should prevail despite failing to demonstrate all six factors. Thus, if the railroad shows the movement length is 490 miles, the shipper *could not* argue on rebuttal that trucking is not effective for

movements of 490 miles. Similarly, if the railroad identifies a build-out option, the shipper *could* submit rebuttal evidence that the build-out is not practical, but *could not* submit rebuttal evidence to argue that the build-out would not provide effective competition. See NPRM at 10 (“The streamlined market dominance option would not be available when build-out alternatives are practical . . .”). And, such shippers “may not submit a new rate case involving the same traffic using the non-streamlined market dominance presentation unless there are changed circumstances (or other factors under 49 U.S.C. § 1322(c)).” *Id.* at 11.

3. If the railroad does not refute the shipper’s initial presentation but offers other evidence of effective competition, and the shipper does not convincingly rebut the evidence by doing more than point to the prima facie factors, the railroad prevails on the market dominance issue. For example, if the railroad offers evidence the issue commodity can be trucked more than 500 miles or a transload option exists, the shipper cannot prevail based solely on its prima facie showing. The shipper would have to offer its own evidence that trucking more than 500 miles or transloading is not practicable. Requiring more from the railroad, or less from the shipper, would unlawfully shift the burden of proof to the railroad. Moreover, a shipper that elected to use the streamlined approach *could not* submit evidence on rebuttal to show that truck or transload *pricing* precludes such competition from being effective. See NPRM at 9 (“Cases that require a review of the comparative pricing between truck and rail raise many complicated issues that do not appear to be suitable for a streamlined market dominance approach.”). In other words, once the issue becomes effectiveness of competition, rather than existence of a practical alternative, a shipper that elected to use the streamlined approach loses its case and is generally precluded from pursuing a new one. See *id.* at 11.

Union Pacific believes the clarifications described above are fully consistent with the NPRM. We note they identify a risk for shippers electing to use the streamlined approach; namely, shippers might be precluded in some cases from offering rebuttal evidence that would be necessary to prevail. However, the risk grows out of the Board's recognition that cases raising complicated issues are not suitable for a streamlined approach, and that shippers must decide whether or not to use a streamlined approach. By providing clarification now, the Board can avoid later claims by shippers that they were caught by surprise.

B. The Board should ensure defendants can mount a thorough defense.

Union Pacific appreciates the Board's recognition that its proposed streamlined approach must "provide[] ample opportunity for both parties to present evidence," NPRM at 4, and must be implemented "without limiting railroads' ability to mount a thorough defense," *id.* at 12. We believe the Board should make three changes to the proposed rules to advance these objectives. First, it should expressly identify three categories of documents that shippers must produce in their initial disclosures. Second, it should remove page limits on reply and rebuttal evidence. Third, it should allow railroads to request an evidentiary hearing in cases where shippers file rebuttal evidence.

1. Changes to initial disclosure rules

The Board's rules should specifically identify the categories of documents that shippers electing to use the streamlined approach must produce in their initial disclosures as:

1. Information regarding any use by the shipper or its affiliates of transportation alternatives (i.e., other railroads, trucks, barges, pipelines, transloads, build-ins/build-outs) for movements of the commodity at issue to/from the origin and/or destination at issue during the previous five years.
2. Information regarding any studies or consideration of transportation alternatives for movements of the commodity at issue to/from the origin and/or destination at issue by the shipper or its affiliates during the previous five years.

3. Any transportation contracts that could have been used for the issue traffic by the shipper or its affiliates during the previous five years.

Adoption of these disclosure rules would expedite proceedings, reduce litigation, and ensure railroads obtain relevant discovery in a timely manner. The proposed disclosure rules would expedite proceedings by ensuring market dominance discovery is largely complete when the complaint is filed. The rules would reduce litigation, and its associated costs and delays, by clearly establishing categories of relevant documents. If a shipper is considering initiating rate litigation, then it has likely already reviewed these same relevant documents and should be able to produce them without significant incremental burden. As a result, the rules would ensure railroads receive discovery to which they are entitled on a timely basis without creating an impediment to shippers initiating litigation.

The NPRM says shippers electing to use the streamlined approach must make the disclosures required under 49 C.F.R. § 1111.2(a) & (b). *See* NPRM at 11. Section 1111.2(a) requires shippers to provide a “narrative addressing whether there is any feasible transportation alternative for the challenged movements,” and Section 1111.2(b) requires them to provide “all documents relied upon in formulating [their] assessment of a feasible transportation alternative.” Shippers using the streamlined approach will produce a narrower range of documents than under the current approach, because the proposed rule reduces the transportation alternatives they must initially consider. In fact, allowing shippers to focus on the prima facie factors was a central objective of the proposed rules. *See* NPRM at 3. However, railroads are entitled to discovery that allows them not only to rebut the prima facie factors, but also to submit other evidence showing the issue traffic is subject to effective competition. For example, shippers using the streamlined approach are not required to consider competition via transloads, but the NPRM recognizes that transloads competition can be highly relevant. *See id.* at 9.

Even if the Board were to clarify that shippers using the streamlined approach still had to take a broad view of “feasible transportation alternatives” for purposes of their initial disclosures, identification of specific categories of documents required for initial disclosures would still be a much more effective approach than is found in § 1111.2(b). Section 1111.2(b) allows a shipper to limit its disclosures by performing only a cursory assessment of transportation alternatives: a shipper must produce only documents it “*relied upon* in formulating its assessment.” By contrast, the proposed rules would ensure railroads receive all documents relevant to shippers’ assessments of transportation alternatives. For example, the rules would ensure railroads obtain not only information regarding non-rail options for transporting the issue traffic from its origin to its destination, but also information about non-rail options for transporting the same commodity from the issue traffic’s origin to different destinations, or from different origins to the issue traffic’s destination – information potentially critical to an assessment of transload options. Similarly, the rules would ensure shippers’ production of studies regarding transportation alternatives are not unduly constrained by a strict focus on the issue traffic’s origins and destinations. We propose a five-year look-back period, consistent with the time period for assessing transportation alternatives the Board proposed in the NPRM. *See* NPRM at 10. Railroads are unlikely to be able to obtain such information from sources other than the complainant, and the complainant should be able to identify responsive information with minimal effort or expense.

In sum, Union Pacific’s proposed change to the initial disclosure requirement would help ensure that railroads receive meaningful disclosures, which would expedite proceedings, reduce litigation costs and delays, and help guarantee that railroads will be able to “mount a thorough defense.” NPRM at 12.

2. Changes to page limits

The Board's proposal to impose a page limit on replies is inconsistent with its goal of reducing the complexity of market dominance proceedings "without limiting railroads' ability to mount a thorough defense." NPRM at 12. The Board's main justification is that the streamlined approach "should help narrow the focus of arguments on reply and rebuttal." *Id.* However, a streamlined approach would only narrow the issues a complainant must address on opening. *See id.* at 3 ("[C]omplainants essentially have to predict what a defendant railroad might argue . . ."). Railroad replies would still have to contain all the same arguments and evidence as under the current market dominance approach. In fact, railroad replies would likely be even longer than they are now, because they would have to address the specific *prima facie* factors.

The Board also suggests that the availability of the "optional hearing" justifies imposing a page limit on railroad replies. *Id.* at 12. However, under the proposed rules, railroads cannot know when they file their replies whether there will be such a hearing – only the shipper can elect a hearing. *See id.* Moreover, as discussed in the next section, it seems unlikely a hearing before a non-expert Administrative Law Judge could replace written submissions to the Board.

Finally, the Board notes it has imposed page limits on petitions for reconsideration and briefs. *See id.* at 12 n.15. But, by definition, petitions for reconsideration and briefs are filed only after parties have filed their (unlimited) evidentiary submissions. Requiring the parties to focus their petitions and briefs "on the most important issues," *id.* at 12 (quoting *Expediting Rate Cases*, EP 733, slip op. at 12 (STB served Nov. 30, 2017)), after they have presented their evidentiary submissions is entirely different from limiting their evidentiary submissions.

The NPRM does not justify imposing a page limit on railroad briefs, and we do not believe a valid justification exists for limiting the evidence railroads can offer on the critical issue of market dominance.

3. Changes to hearing proposal

The Board's discussion of the proposed evidentiary hearing does not clearly state whether a complainant could elect to file rebuttal evidence *and* obtain an evidentiary hearing. See NPRM at 12. If complainants must choose one or the other, we have no objection to giving them that choice. But if complainants can choose both, then railroads should also be able to request an evidentiary hearing in addition to their reply filing. There is no justification for treating the parties differently.

In other respects, the hearing proposal is too underdeveloped to offer meaningful comments. The proposal does not identify when a complainant must request an evidentiary hearing. It does not identify who must participate in the hearing to provide the testimony the Board says will be "under oath." *Id.* It does not address important issues of basic procedural fairness. For example, it does not address how railroads will learn the identities of shipper witnesses. Indeed, it does not spell out any procedures at all – such as whether parties will conduct direct and cross-examinations of each other's witnesses, or whether only the ALJ will question witnesses. (It also seems unlikely, as a practical matter, the Board could find an ALJ sufficiently familiar with railroad market dominance issues to conduct "critical and exacting questioning." *Id.*) The proposal also does not appear to have considered important technical issues – for example, it seems unlikely a reliable transcript can be produced within four days of a hearing, especially when the participants are spread over multiple locations and communicating by telephone.

As a general matter, Union Pacific does not object to the use of evidentiary hearings, as long as railroads and shippers are treated fairly. However, we cannot discern whether the current proposal would provide that fair treatment.

C. The Board should consider changes to the proposed prima facie factors.

Union Pacific has no specific suggestions for changes to the proposed prima facie factors at this time, but our impression is that the hurdles are too low to be useful.⁴ We believe the use of prima facie factors will be helpful only if the factors identify situations in which no reasonable railroad could contest market dominance. Otherwise, shippers may find themselves drawn into evidentiary disputes where the streamlined approach precludes them from offering potentially critical evidence, as discussed in Section I.A.

The NPRM itself suggests several of the proposed hurdles are set so low they are likely to create problems. For example, the NPRM identifies no empirical evidence supporting the use of a 500-mile movement length. It offers only references to prior decisions and comments failing to identify any empirical support. *See* NPRM at 7–8. At the same time, the NPRM acknowledges the Board has actually found trucks provide effective competition for movement lengths greater than 500 miles. *See id.* at 8.⁵ Similarly, the NPRM identifies no empirical evidence supporting the use of the 10% factor for movements by truck, while acknowledging the Board has found effective competition where complainants shipped a smaller share of traffic by truck. *See id.* at 8–9. We suggest the Board seek empirical evidence and set higher hurdles, so the presumptions better assist shippers in identifying situations in which market dominance is not likely to be contested.

In addition, if one of the Board’s objectives is to provide guidance to shippers, the Board should consider developing factors a shipper must overcome with evidence before railroads are

⁴ Union Pacific does suggest the Board should add at least one prima facie factor to the list: absence of pipeline competition. We assume its omission was an oversight.

⁵ The NPRM’s parenthetical description of CSX’s comments in EP 665 (Sub-No. 2) is missing the words “a lack of ” before “market dominance.” *Id.*

even required to respond to complaints. For example, the Board could identify a mileage floor and provide that railroads are not required respond to complaints from shippers with shorter movements unless a shipper simultaneously submits evidence demonstrating an absence of effective competition. The Board could adopt a similar rule for shippers currently moving a specified percentage of the issue traffic using an alternative to a rail-only move. The Board might also consider adopting some screens that address geographic or product competition. Recognizing the Board's rules currently preclude consideration of geographic and product competition, we find it ironic that the case the Board cites to justify a streamlined approach, *Westmoreland Coal Sales*, was one in which the ICC quickly resolved the market dominance issue based on clear evidence of effective geographic competition. *See Westmoreland Coal Sales Co. v. Denver & Rio Grande W.R.R.*, 5 I.C.C.2d 751, 756–60 (1989).

III. UNION PACIFIC OBJECTS TO THE USE OF A PRESUMPTION-BASED APPROACH TO MARKET DOMINANCE IN SAC AND FORR CASES.

Union Pacific objects to the widespread adoption of a presumption-based approach to market dominance. The Board says its proposed streamlined approach “could reduce the cost and time required to bring a rate case.” *See* NPRM at 4; *id.* (“A less complex market dominance inquiry . . . would help ensure . . . that rate cases are processed more expeditiously.”). However, a presumption-based approach to market dominance would not expedite rate cases because the Board addresses market dominance and rate reasonableness in parallel, not sequentially. Notably, the Board is not proposing to shorten its rate case schedules.

As for reducing costs, as discussed in Part II, Union Pacific recognizes that a presumption-based approach could serve as a low-cost means of providing at least some information about the likelihood of success to shippers as they consider whether to file a rate case. However, as also discussed above, any cost savings would occur only where market

dominance is not a close case. In close cases, shippers would inevitably have to present rebuttal evidence going beyond the prima facie factors. Moreover, the Board cites no evidence that any shippers who might file SAC cases have been dissuaded by the cost of addressing market dominance in their opening evidence. Again, in any case in which market dominance is actually contested, a shipper cannot avoid the costs of litigating market dominance – the only difference would be timing.

With regard to timing, we strongly disagree with the Board’s apparent view that complainants are at a disadvantage in addressing market dominance issues on opening. *See* NPRM at 3. Shippers properly bear the burden of going forward and the ultimate burden of proof. They know much more about their transportation alternatives than railroads. They know more about shipping characteristics of their products, capabilities of their origin and destination facilities, and their opportunities to use non-rail modes of transportation. For these reasons, the costs to shippers of preparing initial market dominance evidence should be *lower* than the costs to railroads. No valid reason exists to shield shippers bringing SAC cases from the costs of submitting market dominance evidence on opening.

In fact, adoption of a presumption-based approach would encourage wasteful litigation by shifting the initial costs of addressing market dominance from shippers to railroads. Under the Board’s proposed approach, shippers could, with low up-front costs, file rate cases and thereby impose the costs of initially developing market dominance evidence on railroads. Armed with this new ability to impose litigation costs, shippers would have greater incentives to file rate cases to extract unjustified settlements. That result would not advance any rail transportation policies, and it would be inconsistent with the policy “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail,”

49 U.S.C § 10101(1), and “to minimize the need for Federal regulatory control over the rail transportation system,” *id.* § 10101(2).

Shippers’ use of a presumption-based approach to extract unjustified settlements would be an even larger issue if the Board adopted its proposed Final Offer Rate Review procedure. Under the proposed FORR schedule, railroads would have just ten days from shippers’ prima facie submission to prepare a full market dominance reply.⁶ Even if railroads began preparing market dominance evidence immediately upon receiving shippers’ notices of intent to initiate a case, they would have only 50 days to prepare their evidence, and shippers could simply refuse to provide discovery. The Board’s proposed streamlined approach could not be implemented in accordance with the proposed FORR schedule “without limiting railroads’ ability to mount a thorough defense.” NPRM at 12.

Union Pacific believes the absence of recent rate cases against Union Pacific is a clear, market-based sign we have internalized regulatory standards and our rates are reasonable. We understand the Board interprets the scarcity of rate cases as a regulatory failure. However, we hope the Board would agree that increasing the number of rate cases solely for the sake of increasing the number of rate cases is not a legitimate regulatory objective.

IV. CONCLUSION

Union Pacific does not object to the use of a presumption-based approach to market dominance in Three Benchmark or Simplified-SAC cases. However, the Board must not undermine the market dominance inquiry’s critical role in advancing rail transportation policy.

⁶ The proposed FORR schedule calls for “Simultaneous filing of market dominance presentations” on Day 35, but it is unclear what market dominance evidence a railroad would be expected to submit on opening. *Final Offer Rate Review*, EP 755, slip op. at 13–14 (STB served September 12, 2019).

Congress established a national policy “to maintain reasonable rates *where there is an absence of effective competition*,” 49 U.S.C. § 10101(6) (emphasis added), and “to require fair and expeditious regulatory decisions *when regulation is required*,” *id.* § 10101(2) (emphasis added). The Board deploys the market dominance inquiry to determine *where* “there is an absence of effective competition” and *when* “regulation is required.” The Board must ensure the market dominance inquiry remains robust. Otherwise, its regulatory activities will conflict with those policies, and with Congress’s policy “to allow, to the maximum extent possible, competition and the demand for service to establish reasonable rates for transportation by rail.” *Id.* § 10101(1).

Respectfully submitted,

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