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**Before the
Surface Transportation Board**

STB Docket No. EP 756

Market Dominance Streamlined Approach

**Petition for Reconsideration by
the American Chemistry Council, Corn Refiners Association, The Fertilizer Institute,
the National Industrial Transportation League, and The Chlorine Institute**

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Dated: August 24, 2020

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The American Chemistry Council, the Corn Refiners Association, The Fertilizer Institute, the National Industrial Transportation League, and The Chlorine Institute (“Coalition Associations”) respectfully petition the Surface Transportation Board to reconsider its decision served on August 3, 2020 in the above-captioned proceeding (the “Decision”). Although the Decision adopts streamlined market dominance rules with the laudable goal of reducing the burden of rate reasonableness challenges in certain cases, various aspects of the rules are inconsistent with this objective due to material errors in the Decision.

Pursuant to 49 C.F.R. § 1115.3(b), the Board’s Decision is subject to reconsideration for material error, which is error that materially impacted the Board’s Decision. *Revisions to Arbitration Procedures*, EP 730, slip op. at 2 (STB served March 24, 2017). As explained more fully below, the Board committed material error in the following four determinations:

- Holding that a complainant may not submit a new rate case involving the same traffic using the non-streamlined market dominance approach because “precedent hold[s] that a complainant seeking to challenge the same rates at issue in a prior proceeding can do so only upon a showing of changed circumstance, new evidence, or material error.” Decision, p. 44. The Board erroneously held that complainants must file a new case if they cannot prove market dominance using the streamlined approach, as opposed to submitting additional evidence in the same case.
- Rejecting the Coalition Associations’ proposal for *a la carte* consideration of the prima facie factors. *Id.*, pp. 30-31. The Board’s assertion that the Coalition

Associations' proposal does not explain the procedural rules that would apply to their *a la carte* approach is demonstrably wrong and its related concerns about how this proposal would work in practice are addressed by that same explanation.

- Setting the movement length threshold at 500 highway miles between the origin and destination. *Id.*, p. 11. That determination is predicated upon the incorrect assumption that most shippers can truck their commodities without a return trip.
- Including exhibits within the page limits for streamlined market dominance evidence. *Id.*, pp. 41-43. The Board's solution of requesting a waiver for large exhibits is impractical, is inconsistent with its objectives to simplify and expedite market dominance determinations, and fails to account for electronic exhibits .

I. The Board Has Adopted Two Unnecessarily Restrictive Rules That Will Undermine Its Objectives To Reduce Burdens On Parties, Expedite Proceedings, And Make Rate Relief Procedures More Accessible.

The Coalition Associations seek reconsideration of two closely-related elements of the Board's Decision. First, they seek reconsideration of the Board's decision "that if [it] finds that market dominance has not been shown by a complainant that has used the streamlined approach, the complainant may not submit a new rate case involving the same traffic using the non-streamlined market dominance presentation unless there are changed circumstances." Decision, p. 44. This is a particularly odious consequence because, under the adopted rules, a complainant could be subjected to this bar even if it fails to prove just one of the seven *prima facie* factors. Second, the Coalition Associations also seek reconsideration of the Board's rejection of an *a la carte* approach that applies the *prima facie* factors on a modal basis. *Id.*, pp. 30-31. If unchanged, these two decisions will discourage complainants from invoking the streamlined approach in circumstances where there is the slightest uncertainty as to even one of the *prima facie* factors. This will undermine the Board's objectives to reduce burdens on parties, expedite proceedings, and make the Board's rate relief procedures more accessible, especially for complainants with smaller cases. The Board's decision as to each foregoing element was predicated upon a material error.

A. The Board committed a “material error” by assuming that complainants must file a new case if they cannot prove market dominance using the streamlined approach.

According to the Board, a complainant may not submit a new rate case involving the same traffic using the non-streamlined market dominance approach because “precedent hold[s] that a complainant seeking to challenge the same rates at issue in a prior proceeding can do so only upon a showing of changed circumstance, new evidence, or material error.” *Id.*, p. 44. This statement, while undoubtedly true in the circumstance described, i.e., a complainant seeking to challenge the same rates at issue in a **prior** proceeding, does not apply within the context of the **same** proceeding. Accordingly, the Board committed a “material error” by holding that complainants must file a new case if they cannot prove market dominance using the streamlined approach.

The Board need not require a complainant who fails to satisfy each of the prima facie market dominance factors to file a new case. Rather, the Board can permit an unsuccessful complainant subsequently to submit market dominance evidence in the **same** proceeding using the non-streamlined approach. If the Board concludes that the complainant has not satisfied one or more of the prima facie factors, it could issue a market dominance decision with those conclusions and establish a procedural schedule for submitting non-streamlined market dominance evidence. It could require the submission of evidence as to just those modes associated with the unsatisfied prima facie factors, similar to the Coalition Associations’ proposal for *a la carte* application of the prima facie factors by mode. Coalition Op. Comments at 7-8. After considering that evidence, the Board could render a final market dominance decision and, if market dominance exists, a rate reasonableness decision.

The foregoing approach closely resembles the summary judgment process employed by courts to determine whether there are disputed material facts that require a full trial. If summary

judgment is granted, the movant prevails on the issues covered by the motion and a trial is unnecessary. If summary judgment is denied, the parties then proceed to a full evidentiary trial. Summary judgment can be granted as to some issues and not others, thereby narrowing the issues for trial. A complainant who proves all the streamlined market dominance factors effectively is awarded summary judgment on the issue of market dominance. A complainant who fails to do so must make a more detailed evidentiary showing using the non-streamlined process to prove market dominance, which is the equivalent of a litigant having to prove its case in a full trial if summary judgment is denied. A litigant who is denied summary judgment is not required to file a new proceeding; rather, the full trial becomes the next step in the same proceeding. The Board can and should permit the use of streamlined market dominance in the same manner by allowing unsuccessful complainants to proceed with a full market dominance evidentiary presentation in the same case, if they fail to satisfy all the prima facie factors using the streamlined approach.

This approach will not inevitably lead to all, or even most, complainants attempting to use the streamlined approach. A complainant who unsuccessfully invokes the streamlined approach incurs the additional time and expense of subsequently having to make a non-streamlined evidentiary presentation. Therefore, complainants are likely to invoke the streamlined approach only when they have strong reasons to believe that they will prevail. This is consistent with judicial experience with summary judgment motions.¹

¹ According to a 2008 “Report on Summary Judgment Practice” by the Federal Judicial Center, litigants filed motions for summary judgment in approximately 17% of cases and approximately 65% of those motions were granted in whole or in part. <https://www.uscourts.gov/sites/default/files/sujulrs2.pdf>, Tables 4 & 6.

Complainants should not be compelled to gamble their entire case on the possibility that they might fail even a single prima facie factor, a risk that will discourage most complainants from invoking the streamlined process.

B. The Board’s rationale for rejecting the Coalition Associations’ proposal for *a la carte* consideration of the prima facie factors was predicated upon a “material error.”

The Board also should reconsider its decision to reject *a la carte* application of the prima facie factors on a modal basis. Decision, pp. 30-31. The Board declined to adopt an *a la carte* approach “at this time” because “The Coalition Associations’ proposal does not explain the procedural rules that it believes would apply to the ‘à la carte’ approach and regardless, the Board has concerns about how this proposal would work in practice.” Decision, p. 31. The Board should reconsider that conclusion for two reasons.

First, if as requested in the preceding section the Board reconsiders its decision prohibiting complainants who fail even one of the prima facie factors from subsequently submitting market dominance evidence using the non-streamlined approach, the resulting process described in that section readily permits consideration of market dominance solely as to the modes associated with the unsatisfied prima facie factors without any complication.

Second, independent of its action in response to the preceding section, the Board could allow complainants to submit *a la carte* evidence as to just some modes, based on the associated prima facie factors, simultaneous with a more detailed showing as to other modes. The Board’s rationale for rejecting the Coalition Associations’ proposal to do just that was material error. Specifically, the Board’s assertion that the Coalition Associations’ proposal does not explain the procedural rules that would apply to their *a la carte* approach is demonstrably wrong. In addition, the Board’s concerns about how this proposal would work in practice are addressed by the very explanation that the Board mistakenly claims the Coalition Associations did not provide.

The Coalition Associations provided a clean and redline version of the complete regulatory text for their proposal in Exhibit 1 of their Opening Comments. The core procedural rules for implementing the *a la carte* approach are the “Bifurcated Market Dominance” rules in proposed § 1111.12. In addition, the following proposed rules address the inter-relationship of those procedures with the prima facie factors for all current rate reasonableness methods and the proposed final offer rate review process (“FORR”): § 1111.13(a) and (b) (for all methods except FORR), § 1111.14(b) (for FORR). The Coalition Associations explained their proposed bifurcated market dominance approach at pp. 20-23 of their Opening Comments. Although the Coalition Associations proposed to make this bifurcated approach available to complainants in all rate reasonableness cases, they structured it such that a complainant would not opt for that approach in large cases involving many movements or cases with complex market dominance facts. Coalition Op. Comments, pp. 22-23.

The Board appears to have overlooked the crucial connection in the Coalition Association comments between *a la carte* consideration of the prima facie factors and their proposed bifurcated procedural schedule. In rejecting the bifurcated schedule, the Board summarily observed that “Parties may already request bifurcation in individual rate case proceedings, and they may continue to do so if using the streamlined approach.” Decision, p. 35. But that observation ignores the critical elements of the proposed bifurcated schedule, including its expedited timeline, special procedures for discovery disputes, and page limits, that are designed to complement streamlined market dominance based on the prima facie factors.² Ad hoc

² For example, because the expedited time line, discovery limits, and page limits are applied to the combination of streamlined and non-streamlined evidence under the bifurcated approach, complainants must be confident in their ability to present their entire market dominance evidence within those limits. Their ability to do so will decline with multiple movements and/or the need to present non-streamlined market dominance evidence for multiple transportation modes.

agreements to bifurcate market dominance from rate reasonableness in individual rate cases would require agreement of the parties to these procedures and, even with such agreement, will not override the Board's refusal to give *a la carte* consideration to the prima facie factors. This can only be accomplished through a rule.

If the Board adopts the summary judgment approach to streamlined market dominance, *a la carte* consideration of the prima facie factors would reduce the burdens associated with the subsequent presentation of non-streamlined evidence by focusing solely upon the modes for which the complainant failed to satisfy the applicable prima facie factor(s). But even absent a summary judgment approach, *a la carte* consideration would reduce the evidentiary burdens to just those modes covered by the unsatisfied prima facie factors. Moreover, it would eliminate the risk that the adopted rules impose upon complainants of losing their entire case based on failing to satisfy just one of the prima facie factors. Absent *a la carte* consideration of the prima facie factors, many or even most complainants will continue to be saddled with unnecessary market dominance burdens merely because they cannot satisfy just one or two of the seven prima facie factors or are unwilling to assume the risk that they be unable to do so. The Board mistakenly rejected a solution to these problems when it erroneously concluded that the Coalition Associations had not explained the procedural rules that would apply to their approach.

II. The Board's Decision To Set The Movement Length Threshold At 500 Highway Miles Is Predicated Upon "Material Error."

The Coalition Associations seek reconsideration of the Board's decision to set the movement length threshold at 500 highway miles between the origin and destination. The Board selected 500 miles upon concluding that trucks are not likely to provide effective competition where a motor carrier cannot complete a movement in one day and that a truck can typically transport a shipment up to 500 miles in one day. Decision, p. 11. In reaching this conclusion, the

Board rejected arguments that this distance should be halved to reflect the need for trucks to make a return trip in the same day because “not all shippers move traffic back-and-forth between a single origin and destination and would not be so constrained.” *Id.* That determination constitutes “material error” because the Board incorrectly assumes that most shippers can truck their commodities without a return trip. In addition, the Board has ignored the need for the driver and vehicle to return to their home base even when that base may be different from the origin. Those assumptions are unsupported and contrary to the requirements of most bulk commodities.

As the Board has witnessed in past rate cases, many commodities can be transported by truck only in highly-specialized trailers.³ Because of the specialized nature of most truck trailers, many bulk shippers own and maintain private fleets of trailers and rely upon motor carriers to provide the tractors and drivers. Carriers that do provide such trailers often do so on a dedicated basis. Both private trailers and carrier-supplied dedicated trailers, therefore, must return to their origin facilities after delivering their cargo to their destination. Even for commodities where a motor carrier routinely does supply a non-dedicated trailer (e.g., polymers), those trailers must be washed between trips, which typically requires an empty return movement to the origin or an out-of-route movement to a certified washing facility, unless the subsequent load involves a

³ See, e.g., Complainant’s Opening Evidence at II-B-46, *E.I. du Pont de Nemours & Co. v. Norfolk S. Ry.*, NOR 42125 (Apr. 30, 2012) (explaining that Bio-Propanediol must be transported in stainless steel tank trailers to avoid contamination and a sufficient fleet of this equipment is unavailable to provide effective competition); *id.* at II-B-94 (explaining that Dimethyl Sulfate requires specialized dedicated equipment because of its hazardous properties); *id.* at II-B-142 (explaining that Sulfur Trioxide must be transported in heated, insulated DOT-312 trailers that are equipped with a specialized pumping system due to the chemical properties of this commodity); *id.* at II-B-150 (explaining that Titanium Dioxide can only be transported in stainless steel tank trailers without rubber lining to avoid contamination and discoloration).

compatible material. Furthermore, the drivers must return to their home base which in all probability is close to the origin point.

This is no different from private rail cars that typically run round-trip between the origin and destination for each movement. Just like private rail cars return empty to their origins, so do private and dedicated truck trailers. Just like rail cars, both private and carrier-supplied, must be washed before switching commodities, so must private and carrier-supplied trailers. Thus, bulk shipments, both by rail and truck, are subject to similar equipment constraints that make empty return trips to the origin the norm as opposed to the exception. There is no basis, therefore for the Board's assumption that truck movements do not typically require an empty return trip when the equivalent rail movement would have that requirement.

Accordingly, it is imperative that the Board adopt mileage thresholds that reflect the foregoing factors. Contrary to the Board's assumption, most bulk truck movements do require a return trip to the origin. Therefore, given that 500 miles is the maximum distance the Board had determined a truck can travel in a day, it must adopt a mileage threshold of 250 miles to permit a complete round-trip to be made within a day.

Alternatively, at a minimum, the Board explicitly should solicit comment on these factors in its upcoming rulemaking on commodity-specific distance thresholds. But if the Board follows this path, it will be challenging to identify all the innumerable commodities that require a round-trip movement because that requirement is so prevalent and there are so many such commodities that only move infrequently. In other words, those are the truly small cases to which streamlined market dominance is especially targeted. Thus, to ensure that streamlined market dominance will make rate cases more accessible, it is preferable that the Board establish a default mileage threshold of 250 miles.

The Board should not be concerned that a minority of movements that do not require round-trips will permit some shippers to use the streamlined market dominance approach when they are not reasonably likely to lack effective competition. As the Board recognized in the Decision, the mileage threshold and volume threshold work in tandem to identify shippers that are reasonably likely to lack trucking options that provide effective competition. Decision, p. 11. Should the mileage threshold be set too low for those movements, the volume threshold will still ensure that the shipper is reasonably likely to lack effective competition.

III. The Board Committed Material Error By Failing To Consider The Coalition Associations' Page-Limit Comments And To Account For Electronic Workpapers In The Page Limits.

The Board should reconsider its decision to include exhibits within the page limits for streamlined market dominance evidence. The Board appears to have overlooked the Coalition Association's suggestion that page limits be set at 30 pages exclusive of exhibits, making no mention of this suggestion in the Decision. Decision, pp. 41-43. As the Coalition Associations explain in their comments on the proposed market dominance streamlining rule, their suggested page limits strike an appropriate balance between the need for brevity and a party's lack of control over the size of exhibits. *See* Coalition Op. Comments, p. 22.

Although the Decision explains that parties can file excerpts from exhibits or seek a waiver of the page limits for an exhibit, these options are impractical. Decision, p. 42. In the streamlined market dominance context, exhibits likely would involve engineering analyses for buildouts, shipment lists to support the truck volume factor, and third-party documents explaining modal competition. Large portions of these documents or their entire contents will likely be necessary to demonstrate market dominance. Further, the need for some of these exhibits will not be known until the reply or rebuttal phase, when there is little time for a party to seek a waiver and the Board to decide on it without delaying the procedural schedule.

Additionally, the Board does not explain how the page limits for market dominance evidence will apply to electronic workpapers. For example, parties are likely to use electronic workpapers to provide data relevant to the truck volume factor when a lane has high shipment volumes. Yet, no consideration has been given to how such electronic work papers would count against the page limits. The Coalition Associations' proposal renders this a moot issue by excluding exhibits from the page limit count.

To ensure that parties cannot "game" the narrative page limit by placing portions of their narrative in exhibits, they would be prohibited from using exhibits to present information created by the party for the litigation, such as studies graphs or charts; instead, all exhibits would be limited to public sources or material produced in discovery. This limitation was included in the Coalition Associations' comments and proposed regulatory text. *See* Coalition Op. Comments, p. 22 and Ex. 1, § 1111.12(f).

IV. Conclusion

For the foregoing reasons, Coalition Associations request that the Board grant this Petition for Reconsideration.

Respectfully submitted,



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