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Cynthia Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Ex Parte No. 704 (Sub-No. 1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions

Dear Ms. Brown:

The Surface Transportation Board issued a decision (“Decision”) on September 30, 2020 in the above-captioned proceeding, inviting comment regarding a proposed new approach for evaluating market conditions in class-wide exemption revocation and exemption creation cases.¹ The Fertilizer Institute (“TFI”) hereby provides the following comments regarding the proposed new approach.

This proceeding began with a Notice of Proposed Rulemaking (“NPRM”) almost five years ago – on March 23, 2016 – in which the Board proposed to revoke the class-wide exemptions applicable to five specific commodity and traffic types: crushed or broken stone or rip rap; hydraulic cement; coke produced from coal; primary iron or steel products; and iron or steel scrap, wastes, or tailings.² In the nearly five years since the NPRM, there have been numerous rounds of comments filed, meetings with the Board, and more comments. Interested parties who were directly impacted analyzed the proposal, retained experts, expended significant funds, and developed an extensive record regarding the proposed revocations and a few others proposed by commenting parties. Despite this extensive record, the Board did not issue final rules with the Decision.

Instead, in the 68-page Decision, the Board described a complex new approach for evaluating commodity market conditions that was developed by its Office of Economics that could be used to evaluate not just exemption revocation requests *but also creation of new class-wide exemptions*.³ This last point compels TFI to submit comments in this proceeding to express

¹ The due date for comments was extended to January 29, 2021 in a decision served on January 7, 2021.

² The Board also invited parties to suggest other commodities whose exemptions should be revoked. NPRM at 3-4.

³ See, e.g., Decision at 1, 6, and 15.

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its serious concerns with the proposal. The proposed new approach involves complicated evaluations of large amounts of data from multiple sources, including the Confidential Carload Waybill Sample, the Army Corps of Engineers Institute for Water Resources, and Railinc's Centralized Station Master among others. It would require multiple steps to assemble, process, and calculate various data points as a means to evaluate whether intramodal or intermodal competition exists to a sufficient degree based on the model's algorithms that it would justify either a new exemption of a currently regulated commodity or revocation of an existing exemption. See Decision at 5-13. The proposal includes a number of assumptions in order to try and simplify the complicated analysis, but those assumptions may not reflect the true market conditions for a specific individual commodity, and parties would be required to dispute these assumptions and explain any needed deviations in litigation before the Board.⁴ This is especially true for the assumptions for inferred water and truck competition. Moreover, the indications to be gleaned from the model's results are not determinative and the parties will need to present other evidence concerning the transportation markets, and legal and policy considerations related to the exemption and revocation statutory requirements.

From the Decision, it is unclear if the Board plans to implement the proposed new approach itself in all covered proceedings, or if the Board would require participating parties to submit evidence using the proposed new approach. In either case, however, the proposed new approach would add significant complexity and litigation costs to every covered exemption proceeding due to the need to engage experts to analyze the application of the model to a given commodity, analyze the opposing parties' evidence (i.e., application of the proposed new approach by the opponents), develop responsive evidence, and verify the Board's implementation of the proposed new approach. It is reasonable to expect that these proceedings could quickly become unwieldy and extremely costly.

Most concerning to TFI is that the proposal would apply to requests for new class-wide exemptions. This is a significant concern for the fertilizer industry whose commodities and traffic types are currently subject to Board oversight but could be forced into Board proceedings to defend the regulated status of various fertilizer commodities. In other words, any railroad could file a request to exempt any currently regulated fertilizer commodity, and the affected shippers and industries would be forced to defend against the request to preserve Board oversight.

From 2005 to 2017, rail rates for carloads of anhydrous ammonia, the building block of all nitrogen fertilizers and one of the most efficient sources of nitrogen for farmers, increased 206 percent. This is more than triple the average increase for all commodities combined over the same period of time. Given this steep increase in rail rates, designed to de-market freight rail

⁴ Id.

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shipments of anhydrous ammonia, the Board may be unlikely to exempt ammonia or other fertilizer products from its oversight. Nevertheless, it would be a bitter twist of irony should TFI have to defend the regulatory status of anhydrous ammonia and/or other fertilizer products. Based on the process and procedures involved with application of the complex new approach, this defense could involve costs that are easily in the six figures. Failing to participate and defend oversight would not be an option given the risk that such non-participation would be interpreted as acquiescence in the proposed exemption proceeding.

TFI urges the Board not to adopt the proposed new approach based on the unintended consequences that could result from its application to requests for new exemptions. Railroad parties are “repeat players” in Board proceedings and could be motivated to seek new exemptions covering dozens or hundreds of commodities in a similarly large number of separate cases. Were that to occur, individual shippers of those commodities (or the relevant trade associations) would be forced to litigate at great expense and risk simply to protect and retain the current regulatory framework. Serious risk exists that some commodities might become exempt simply because shippers did not have sufficient funds to litigate the (complex and expensive) proposed new approach.

The possibility of applying the proposed new approach to new exemption requests is all the more concerning given its potential application to many fertilizer and other regulated commodities that were never implicated in this proceeding. This proceeding has been ongoing for several years, and TFI had no indication that new exemptions would be addressed until it was brought to our attention by our legal counsel. If the Board intends to modify the processes it uses to grant new exemptions it should do so in a separate proceeding that provides clear notice to affected shippers. By including the proposed new approach at the tail end of this proceeding dealing with the revocation of only several currently exempt commodities, it is very likely that many other industries involving non-exempt traffic that would be affected by the proposed new approach are not even aware of this proposal. This raises serious fairness and other concerns under the Administrative Procedures Act were the Board to adopt the new methodology for new exemptions.

Accordingly, the Board should not expand the scope of this proceeding at the last minute by inserting the issue of new exemptions into the debate. This proceeding should only focus on revocations. Should the Board decide that consideration of new exemptions is warranted, TFI urges the Board to do so in a separate proceeding. That said, TFI does not believe the Board should consider exempting more traffic from its purview. On the contrary, TFI is unaware of any reason to exempt any traffic from the Board’s oversight. The current exemptions went into effect a long time ago when the rail industry had more rail-to-rail competition and when certain regulatory burdens – that no longer exist – could be resolved with an exemption. Today, the rail industry enjoys strong market power and very limited competition where commodities depend on rail due to the characteristics of the commodity, infrastructure and

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commercial requirements or safety reasons. TFI believes that all exempted industries who use rail transportation should come under the Board's oversight, if that is what they want.

TFI appreciates the Board's efforts to refine and update its procedures for considering the role of commodity and traffic type exemptions in the rail industry. However, as described in this letter, TFI urges the Board to limit this proceeding to only revocations of existing exemptions. To the extent the proposed new approach is adopted, it should not be applied to requests for additional class-wide exemptions from regulatory oversight.

Respectfully submitted,

/s/ Karyn A. Booth

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