

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 755

FINAL OFFER RATE REVIEW

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**OPENING SUPPLEMENTAL COMMENTS OF
THE AMERICAN CHEMISTRY COUNCIL, THE FERTILIZER INSTITUTE,
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE,
THE CHLORINE INSTITUTE, AND THE CORN REFINERS ASSOCIATION**

The American Chemistry Council (“ACC”), The Fertilizer Institute (“TFI”), The National Industrial Transportation League (“League”), the Chlorine Institute, and the Corn Refiners Association (“CRA”) (collectively the “Coalition Associations”) jointly submit these Opening Supplemental Comments in response to the Supplemental Notice of Proposed Rulemaking served by the Surface Transportation Board (“Board”) in the above-captioned docket on November 15, 2021 (“SNPRM”). The Coalition Associations strongly support Final Offer Rate Review (“FORR”), as modified in the SNPRM, subject to the modifications and clarifications discussed herein.

I. Summary of Comments.

The SNPRM solicits comments on certain modifications that the Board has proposed to the FORR process for determining rate reasonableness that the Board initially proposed in a Notice of Proposed Rulemaking served in this docket on September 12, 2019 (“NPRM”). The Coalition Associations submitted opening and reply comments that expressed strong support for the Board’s attempt to provide “a more accessible avenue for rate reasonableness review” in

smaller cases by “providing faster, less costly review of claims of unreasonable rates.”¹ They identified an urgent need for an alternative rate-case methodology that is accessible to carload shippers, expressed general support for the FORR concept, and suggested improvements to the FORR process to better accomplish the Board’s goals. They also staunchly defended FORR against rail industry objections to its lawfulness. The Coalition Associations are pleased that the SNPRM proposes to adopt many of their suggestions and rejects the rail industry objections.

There are two topics, however, that the Coalition Associations urge the Board to revisit or clarify. Those topics relate to market dominance and rate-relief caps.

As to market dominance, the Coalition Associations support the decision to permit non-streamlined evidentiary presentations in FORR cases, but the proposed process for non-streamlined cases is seriously flawed because it eliminates any opportunity for rebuttal evidence, despite the fact that the complainant bears the burden of proof on that issue. In contrast, the bifurcated, non-streamlined process offered by the Coalition Associations, but rejected by the Board, does not suffer from this flaw. Moreover, once the Board restores rebuttal evidence to its own proposal, the procedural schedule is only 15 days shorter than the Coalition proposal. The Coalition’s bifurcated approach is fairer to both parties and the overall FORR schedule remains more expeditious than any other rate-reasonableness methodology that the Board offers.

As to relief caps, the Coalition Associations request two clarifications. First, the Board should make clear that the \$4 million cap, which is designed to be the same as the Three-Benchmark cap, will be indexed from 2007 so that it truly is the “same” as the current Three-Benchmark cap. Second, in view of the very short two-year prescription period and the fact that many carload shippers are unable to secure the business to which the prescribed rate would apply

¹ NPRM at 7.

until after they prevail in a rate case, the Coalition Associations request that the Board declare that the two-year relief period begins on a date to be determined solely by the complainant; that complainant shall notify the defendant in writing of such date; and that, in the absence of written notice, the two-year relief period shall begin on the one-year anniversary of a final, appealable Board decision.

Finally, the Coalition Associations' support for FORR is tempered with concern over the Board's decision to link this rulemaking proceeding to the Notice of Proposed Rulemaking in Docket No. EP 765, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes* (served Nov. 15, 2021). The Board acknowledges that "the modifications to the proposed rule described in this decision are not the type that would necessitate additional notice and comment under the Administrative Procedure Act," but that it desires to consider FORR "in parallel with the proposal in Docket No. EP 765 to establish an arbitration program that could include an exemption from FORR for carriers that participate in the program."² That exemption, along with several proposed restrictions on the number and timing of arbitration cases, threatens to deprive shippers of the very benefits promised by FORR and replace it with a far less-accessible and less-efficacious arbitration process. Furthermore, regardless of whether the Board ultimately adopts the proposed FORR exemption, by linking these two dockets, it has delayed, and continues to delay, the benefits of FORR for years.³ The Coalition Associations detail their opposition to the FORR exemption, and address other

² SNPRM at 9.

³ See *id.* at 53 (Begeman, dissenting in part) (noting that a final rule adopting FORR has been ready for action since October 2020 and that linking these dockets has "come at the expense of shippers' ability to pursue formal rate relief while consideration of an arbitration proposal plays out.").

elements of the arbitration proposal, in their opening comments in EP 765, which are being filed contemporaneously with these supplemental opening comments.

II. The Board’s Proposed Process for Non-Streamlined Market Dominance Evidence in FORR Cases Will Continue to Impair the Accessibility of Rate Remedies for Most Carload Shippers.

The single greatest concern that the Coalition Associations have with the SNPRM is the Board’s proposal for non-streamlined market dominance evidence in FORR cases. The Coalition Associations strongly support the Board’s decision not to restrict FORR to cases where shippers invoke the streamlined market-dominance rules adopted in EP 756, *Market Dominance Streamlined Approach* (served Aug. 3, 2020) (“EP 756”); but the Board’s SNPRM proposal for handling non-streamlined cases will not advance its goal to provide a more accessible avenue for rate reasonableness review. By allowing shippers to use FORR with non-streamlined market dominance but denying them a process that is fair and practical, the Board has merely created the illusion that complainants can present non-streamlined market-dominance evidence in FORR cases.

The Board proposes to subject non-streamlined market-dominance determinations to the same expedited timelines that would apply when a shipper uses the streamlined procedures in an FORR case, with two exceptions.⁴ First, the Board grants defendants an additional 20 days to submit reply evidence and, second, it eliminates the complainant’s option to request an ALJ hearing. The Board rejected the Coalition Associations’ alternative proposal to add a separate round of pleadings for market dominance, which would have provided sufficient time for defendants’ reply evidence and preserved complainants’ ability to present rebuttal evidence.⁵

⁴ SNPRM at 41.

⁵ SNPRM at 41, n. 63.

The Board's reasoning to support its proposed process for non-streamlined market-dominance presentations and reject the Coalition Associations' proposal is irrational and incongruous.

The fundamental flaw in the Board's proposal is the elimination of rebuttal market-dominance evidence in non-streamlined cases.⁶ As a threshold matter, it is irrational and incongruous for the Board to permit rebuttal evidence in streamlined market-dominance cases but to prohibit it in non-streamlined cases. If there is any basis for such a differentiation between streamlined and non-streamlined cases, logic dictates the opposite. In EP 756, at pages 38-41, the Board adopted the ALJ market-dominance hearing as an alternative to written rebuttal evidence and placed the choice solely in the hands of complainants. In making that determination, the Board found "that the complainant, as the party with the burden of proof, should have the final evidentiary presentation" and thus "it is not inappropriate for the complainant to be the party that can request an ALJ hearing in lieu of filing written rebuttal."⁷ For streamlined market-dominance presentations in FORR cases, the Board has eliminated the choice between written rebuttal and an ALJ hearing, but it notably has retained the critical right to rebuttal through the ALJ hearing. Although the need for rebuttal is even greater in non-streamlined market-dominance cases, the Board inexplicably has eliminated even the ALJ hearing.

In EP 756, at page 39, the Board observed that, "[i]n a non-streamlined market dominance inquiry, a complainant is free to rebut the railroad's reply argument and evidence with its own counterevidence, so long as it meets the Board's standard for proper rebuttal

⁶ It is not clear that the Board intended to eliminate the ALJ hearing in non-streamlined cases because it never stated that it is doing so or offered any explanation. Nevertheless, the procedural schedule published on page 42 of the SNPRM plainly omits the steps for an ALJ hearing on market dominance published on page 39 for streamlined cases.

⁷ EP 756 at 40.

evidence in rate cases,” and that “the complainant may provide evidence on rebuttal refuting the railroad’s reply evidence, including evidence that was available to the complainant on opening,” even though the complainant may not have presented that evidence. Absent rebuttal evidence, complainants will not have that opportunity and, thus, must anticipate and address a defendant’s market dominance reply evidence in their opening evidence. Otherwise, portions of a defendant’s reply evidence would go un rebutted and cause complainants to fail in their burden of proof even when such reply evidence is utterly without merit. This would require complainants to anticipate the most outlandish and absurd transportation alternatives in their opening evidence or risk failing to bear their burden of proof due to the unavailability of rebuttal evidence. Consequently, most complainants who cannot use streamlined market dominance are unlikely to find the non-streamlined process proposed by the Board to be any more feasible if rebuttal evidence is not permitted.

In contrast, the Coalition Associations’ proposal for a bifurcated market-dominance presentation in non-streamlined FORR cases avoids this problem. Complainants’ opening market-dominance evidence would be due 14 days after the close of discovery, defendants’ reply evidence would be due 21 days later, and complainants’ rebuttal evidence 14 days after that.⁸ The presentation of rate-reasonableness evidence would begin 14 days thereafter with the simultaneous submission of opening evidence by both parties and then follow the same schedule as a streamlined FORR case. In addition to allowing rebuttal evidence, bifurcation enables the parties to focus their full attention on market dominance without the burden of simultaneously

⁸ “Opening Comments of the American Chemistry Council, The Fertilizer Institute, The National Industrial Transportation League, The Chlorine Institute, and the Corn Refiners Association,” STB Docket No. EP 755, *Final Offer Rate Review*, p. 14 (filed Nov. 12, 2019) (“Coalition Op.”). The Coalition Associations also proposed page limits for their bifurcated market-dominance proposal, which they still support as a critical component of an expedited bifurcated approach. *Id.* at 14 and n. 43.

preparing rate-reasonableness evidence, which enhances the feasibility of presenting non-streamlined market dominance evidence within these abbreviated time frames.

The Board rejected the Coalition Associations' proposal because it would be "disproportionate to FORR, which is intended to be simplified and expedited."⁹ But as illustrated in the attached Exhibit A, which compares the procedural schedules in the SNPRM for streamlined and non-streamlined market dominance cases against the Coalition proposal, the alleged disproportionality is greatly exaggerated. The record closes in streamlined cases on Day 73; for the STB non-streamlined approach on Day 79; and for the Coalition's non-streamlined approach on Day 108. The difference between the two non-streamlined schedules is just 29 days ($108 - 79 = 29$), but only the Coalition approach permits rebuttal evidence. If the Board decides to restore rebuttal market-dominance evidence to its own SNPRM proposal in response to the Coalition Associations' concerns presented above, that will add 14 days to the Board's own proposal, resulting in the Associations' proposal being just 15 days longer.¹⁰ Moreover, the 108 days required for the Coalition's approach still would be far more expeditious than any other rate-reasonableness methodology offered by the Board.¹¹

Bifurcation also has a distinct advantage over the Board's approach because it is fairer to both parties. The parties can devote their full attention to market dominance instead of simultaneously preparing both market-dominance and rate-reasonableness evidence. For this

⁹ SNPRM at n. 63.

¹⁰ Rebuttal evidence adds 14 days to the procedural schedule regardless whether the Board applies the ALJ hearing approach to rebuttal evidence or written rebuttal per the Coalition's approach. See SNPRM at 40 (noting that the ALJ hearing occurs 14 day after reply evidence); see also, Ex. A (ALJ hearing on Day 73 is 14 days after reply evidence on Day 59).

¹¹ The next most expeditious methodology, which is Three-Benchmark, would close the record on Day 150, and it too permits rebuttal market-dominance evidence. STB Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, slip op. at 23 (served Sept. 5, 2007).

reason, it is not necessary for the bifurcated approach to provide defendants with 30 days to prepare reply market-dominance evidence as the Board has proposed in the SNPRM by adding 20 days to the reply period.¹² The Board’s proposal adds 20 days, for a total of 30 days, to simultaneously prepare both rate-reasonableness and market-dominance reply evidence. The Coalition’s bifurcated approach separately provides 21 days for market dominance replies and 10 days for rate reasonableness replies (*i.e.*, the same 10 days allowed for streamlined cases), which combined exceeds the 30-day total that the Board has provided for defendants to simultaneously prepare both. Note that, under the Board’s proposal, a complainant, unlike the defendant, would have the entire 30 days to focus solely upon its rate-reasonableness reply evidence without the burden of also preparing market-dominance evidence. Thus, bifurcation is fairer to both parties.

The Board’s proposal that FORR should be available for non-streamlined market-dominance cases is predicated on its determination that FORR should be available “where market dominance can be established with relatively straightforward evidence (commensurate with the small disputes that FORR addresses with respect to rate reasonableness), even if the complainant is unable to use the streamlined approach,” and that “by choosing non-streamlined market dominance in a FORR case, the complainant would assume the risks presented by the short FORR timeline.”¹³ The Coalition Associations’ concerns, however, are not with the short timeline for non-streamlined cases, but with the elimination of rebuttal evidence. As demonstrated above, when compared to the FORR schedule for streamlined market-dominance presentations (*e.g.*, 73 Days), the addition of rebuttal evidence to the Board’s proposed schedule for non-streamlined FORR cases adds just 20 days to the FORR timeline (*e.g.*, 6 days in SNPRM + 14 days for rebuttal) and 29 days under the Coalition Associations’ bifurcated proposal (*e.g.*,

¹² SNPRM at 41.

¹³ SNPRM at 41.

108 days – 73 days), which is fairer to both parties than the Board’s non-bifurcated proposal.

The resulting process for non-streamlined market-dominance presentations under either proposal remains far more abbreviated than alternative rate-reasonableness methodologies. Complainants ultimately still must make a judgment call as to whether a non-streamlined market-dominance presentation under the FORR process is worthwhile after considering the expedited schedule and page limits,¹⁴ but the choice is more reasonable than the Board’s proposal, which will tend to be a *de facto* bar to using FORR when streamlined market dominance is unrealistic.

III. Certain Clarifications Are Needed as to the Relief Caps.

The Coalition Associations generally concur in the proposed rate relief limits, as clarified in the SNPRM. However, they seek two clarifications with respect to the actual amount of the relief cap today and when the two-year period for relief begins.

The NPRM, slip op. at 16, stated that “the Board proposes to establish a relief cap of \$4 million, as indexed annually using the Producer Price Index, which is consistent with the potential relief afforded under the Three-Benchmark methodology.” In the SNPRM, at n. 66, the Board further stated that, “[a]s proposed, the relief cap would incorporate indexing that has previously been applied to the Three-Benchmark cap, so that the cap for FORR is the same as the cap for Three-Benchmark.” [underline added] The original Three-Benchmark cap of \$4 million was instituted in 2007 and has been indexed annually through the present so that today it is a higher amount. The Coalition Associations ask the Board to clarify that the initial FORR relief cap equals the current indexed amount of the Three-Benchmark cap. Otherwise, the two caps will not in fact be the “same.”

¹⁴ The Coalition Associations’ bifurcated approach includes page limits on market-dominance evidence. Coalition Op. at 14, n. 14.

The Coalition Associations also seek clarification as to when the two-year window for applying the relief cap begins. The statute clearly allows for two years of reparations, which could result in the entire relief period occurring prior to the date of the complaint. It also is clear that a complainant could elect to forego pre-complaint reparations and apply the relief period from the date of the complaint. Many carload shippers, however, either cannot or for understandable commercial reasons choose not to solicit business unless and until they have obtained a reasonable transportation rate, which will not exist until the Board issues a final rate-reasonableness decision. Moreover, those shippers may have to wait several months after obtaining a rate prescription for the opportunity to bid on business that can use the prescribed rate. In such instances, a complainant could lose much of the 2-year prescription period before it can benefit from a favorable FORR decision. This would severely alter the cost-benefit analysis of pursuing even the expedited and less costly FORR process for many shippers. Therefore, the Coalition Associations ask the Board to declare that the two-year relief period begins on a date to be determined solely by the complainant; that complainant shall notify the defendant in writing of such date; and that, in the absence of written notice, the two-year relief period shall begin on the one-year anniversary of a final, appealable Board decision. The last of these provisions will ensure that the rate prescription will not become too attenuated from the Board's decision and the evidence supporting it.

IV. Conclusion.

For all the foregoing reasons and those set forth in their previous comments in this docket, the Coalition Associations support the proposed FORR process. However, they oppose the elimination of rebuttal evidence in non-streamlined market-dominance presentations that they strongly urge the Board to correct by adopting the proposal that the Coalition Associations made in their initial opening comments. They also request: (1) clarification that the relief cap is the

same as the current, fully indexed Three-Benchmark relief cap, and (2) a declaration that the two-year relief period begins on a date to be determined solely by the complainant; that complainant shall notify the defendant in writing of such date; and that, in the absence of written notice, the two-year relief period shall begin on the one-year anniversary of a final, appealable Board decision.

Respectfully submitted,

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Exhibit A

	STB Streamlined Market Dominance	STB Non-Streamlined Market Dominance	Coalition Non- Streamlined Market Dominance
Day -25	Complainant's Notice of Intent	Complainant's Notice of Intent	Complainant's Notice of Intent
Day 0	Complaint filed; discovery begins	Complaint filed; discovery begins	Complaint filed; discovery begins
Day 35	Discovery Ends	Discovery Ends	Discovery Ends
Day 49	Simultaneous filing of opening rate reasonableness evidence; Complainant's market dominance evidence	Simultaneous filing of opening rate reasonableness evidence; Complainant's market dominance evidence	Complainant's Opening market dominance evidence
Day 59	Simultaneous filing of rate reasonableness replies; Defendant's market dominance evidence		
Day 66	Complainant's letter electing evidentiary hearing on market dominance		
Day 70			Defendant's reply market dominance evidence
Day 73	Optional telephonic hearing before ALJ on market dominance		
Day 79		Simultaneous filing of reply rate reasonableness evidence; Defendant's market dominance evidence	
Day 84			Complainant's rebuttal market dominance evidence
Day 98			Simultaneous filing of opening rate reasonableness evidence
Day 108			Simultaneous filing of reply rate reasonableness evidence