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SURFACE TRANSPORTATION BOARD**

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**JOINT PETITION FOR RULEMAKING TO ESTABLISH A VOLUNTARY
ARBITRATION PROGRAM FOR SMALL RATE DISPUTES**

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INTRODUCTION

CSX Transportation, Inc., The Kansas City Southern Railway Company, Norfolk Southern Railway Company, Union Pacific Railroad Company, the U.S. operating subsidiaries of Canadian Pacific, and the U.S. operating subsidiaries of Canadian National Railway Company (“CN”) (collectively, “Joint Carriers”) thank the Board for issuing a Notice of Proposed Rulemaking (“NPRM”)¹ in this proceeding. The Board’s willingness to explore the voluntary arbitration program proposed in the Joint Petition is greatly appreciated, and Joint Carriers believe many of the Board’s proposals in the NPRM have the potential to incentivize both carriers and shippers to use the program to resolve small rate disputes in an expedited and cost-effective manner.

The particularly welcome features of the Board’s proposal include the FORR waiver for participating carriers; the confidentiality of the process; relief and volume limits; withdrawal rights for a material change in law; and the ability to choose party-selected arbitrators from outside the Board’s 49 U.S.C. § 11708 roster (“11708 Roster”). With these features, the Board has proposed a voluntary arbitration program that has the potential to be a game-changing new step forward in accessibility to the Board’s rate review jurisdiction—an outcome shippers have requested for many years, and an outcome that is superior to the FORR proposal² in fairness, legality, and economic integrity.

Because Joint Carriers agree with many of the proposals in the NPRM, these Opening Comments will address only Joint Carriers’ suggested modifications to the

¹ Notice of Proposed Rulemaking, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, STB Docket No. EP 765 (STB served Nov. 15, 2021) (“NPRM”).

² See Supplemental Notice of Proposed Rulemaking, *Final Offer Rate Review*, STB Docket No. EP 755 (STB served Nov. 15, 2021).

voluntary arbitration program proposed by the Board (“Program” or “Proposed Program”). The Board is tantalizingly close to establishing a voluntary arbitration program for small rate disputes. The following technical modifications proposed by Joint Carriers would ensure the Proposed Program’s success:

- If the two party-appointed arbitrators cannot agree on the third, neutral arbitrator, an ALJ should select the lead arbitrator from a joint list of six arbitrators submitted by the parties;
- A Board decision on appeal should be non-precedential and binding only on the parties to the dispute; if not, such decisions must be subject to the withdrawal rights for a material change in law;
- Parties should have 30 calendar days to withdraw from the program due to a material change in law;
- The Board should postpone further arbitrations against a carrier who has 10 (or more) simultaneous arbitrations against it;
- Parties should engage in a brief period of mediation before arbitration commences;
- The Board should confirm that participating carriers who remain in the Program beyond the five-year opt-in term will remain in the Program on an at-will basis; and
- Joint Carriers applaud the recent decision by the STB not to require a commitment to participate at this stage; any commitment to participate from carriers must necessarily be made after knowing the parameters of the Final Rule.

Joint Carriers do not expect these technical modifications to be controversial as each would improve the Program for the reasons discussed below. This leaves,

however, the controversial question whether carriers must consent to the application of a system-wide revenue adequacy test to participate in the Program.

Joint Carriers are carefully weighing the Board's concerns with the Petition's initial proposal, including the proposed ban on evidence of system-wide revenue adequacy. At present, Joint Carriers' position is not yet definitive—more time is needed to come to a consensus. However, Joint Carriers urge the Board to examine the undeniable and material measurement errors in its current revenue adequacy measure and the fact that a unanimous chorus of leading economists have told the Board that any use of a system-wide revenue adequacy constraint to regulate rail rates would lack economic validity and be supremely unwise. The current test is also afflicted with radical uncertainty. If told to “consider” this test, an arbitration panel would have no idea where to begin—the panel would be cast adrift with virtually no guidance from the STB, a recipe for arbitrary and unsound decision-making. Some degree of uncertainty in ratemaking is inevitable, as each challenge is fact-specific to the customer, service, and markets in dispute. But the known unknowns around the revenue adequacy concept are crippling until resolved by the STB. Ultimately, with three pending rulemakings awaiting the Board's expertise on this highly contested issue, the Board should not force carriers to consent to an arbitration panel deciding the validity, definition, or application of a system-wide revenue adequacy test. And no customer would be harmed, as they would continue to be able to bring such disputes before the STB.

I. THE BOARD'S PROPOSED PROGRAM IS A HISTORIC OPPORTUNITY TO SIGNIFICANTLY IMPROVE ACCESSIBILITY.

Since 1997, the Board has sought to provide enhanced accessibility to resolve disputes subject to its jurisdiction via alternative dispute resolution (“ADR”).³ These laudable efforts have been stunted by a lack of participation tied to certain features of the prior programs—most notably, a lack of flexibility with regard to arbitrator selection, a lack of confidentiality in the arbitration process, and, in the context of rate disputes, the requirement that the Board first determine market dominance.⁴ The Proposed Program comes close to solving all of these issues (and with the modifications proposed herein, would succeed in doing so).

Importantly, the Program proposed by the Board is much more likely than prior programs to incentivize participation from both carriers and shippers. For shippers, there is enhanced access to the Board’s rate review jurisdiction without the time and costs associated with bringing a formal complaint, along with generous relief limits and substantial methodological flexibility. For carriers, the efficiency and cost-savings are also appealing, as are the fair volume limits, relief limits, and withdrawal rights due to a material change in law (which also benefits shippers). While Joint Carriers suggest several modifications below that would be key to the Program’s success, the Program proposed by the Board would significantly improve accessibility by offering an ADR option for smaller rate cases in which both carriers and shippers will participate.

³ See Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes, STB Docket No. EP 765 (filed July 31, 2020) (“Petition”), at 4–11 (providing history of Board’s past arbitration programs).

⁴ See Petition at 21–25.

A. An ADR Process Like the Proposed Program Is the Best Path Forward for Enhanced Accessibility.

An ADR process that incentivizes voluntary participation from parties on both sides of a dispute can be a powerful and efficient tool for resolving disputes, particularly disputes that do not necessarily justify the expense and higher level of accuracy of the Board's formal complaint process. As the Board has repeatedly stated, "the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, wherever possible," is favored by the Board.⁵ The key for a successful voluntary arbitration program is, of course, voluntary participation, and the Proposed Program has great potential for incentivizing broad participation, particularly due to its features of confidentiality to the maximum extent possible; fair relief and volume limits; broad methodological flexibility; flexibility with regard to arbitrator selection; and allowing the arbitration panel to determine market dominance. The Proposed Program offers a combination of access and protections that prior programs failed to offer. With such strong key features, Joint Carriers believe the Proposed Program is the most promising path forward to achieve the Board's goal of (and shippers' desire for) enhanced accessibility to potential rate relief in an affordable and expedited forum.

B. The Proposed Program Is What Shippers Have Long Requested.

Shippers and shipper associations have long advocated for effective ADR processes to resolve disputes in order to save time and money.⁶ As the Board

⁵ See NPRM at 8, proposed § 1108.22(a); Notice of Proposed Rulemaking, *Assessment of Mediation and Arbitration Procedures*, STB Docket No. EP 699 (STB served Mar. 28, 2012), slip op. at 2.

⁶ Comments of National Grain and Feed Association, *Assessment of Mediation and Arbitration Procedures*, STB Docket No. EP 699 (filed Oct. 20, 2010), at 1 ("NGFA and its members place tremendous value on access to effective and workable

explained in 1997, the adoption of “rules providing for informal dispute resolution through arbitration” was of “particular importance to small shippers” because it would increase cost-savings and decrease litigation burdens on the parties.⁷ In particular, shippers have requested an arbitration process with some methodological flexibility beyond Stand-Alone Cost (SAC) so that smaller rate disputes can be resolved more quickly and with less complexity and cost. That is precisely what the Proposed Program offers.

Market dominance has also been a prominent issue, with shipper associations correctly noting that requiring a Board determination of market dominance would be expensive and time-consuming.⁸ This, too, is solved by the Board’s Proposed Program by removing market dominance determinations from the Board to speed up the process and reduce costs. These features are likely to make

mechanisms to resolve ... disputes [between rail carriers and their customers].”); Comments of the Western Coal Traffic League, *Assessment of Mediation and Arbitration Procedures*, STB Docket No. EP 699 (filed Oct. 25, 2010), at 2 (“WCTL agrees with the Board that, private sector resolution of disputes as an alternative to the STB’s formal processes, where possible can provide the most favorable results for all involved parties.”); Comments of The National Industrial Transportation League and the American Forest & Paper Association, *Assessment of Mediation and Arbitration Procedures*, STB Docket No. EP 699 (filed Oct. 25, 2010), at 2–3 (“Like the Board, the Interested Associations strongly favor private resolution of disputes. They believe that mediation and arbitration hold much promise for quickly and cost-effectively resolving a wide variety of transportation claims.”).

⁷ Notice of Proposed Rulemaking, *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, STB Docket No. EP 560 (STB served Mar. 26, 1997), slip op. at 3.

⁸ See Reply Comments of the American Chemistry Council, *Revisions to Arbitration Procedures*, STB Docket No. EP 730 (filed July 1, 2016), at 1; Comments of the National Industrial Transportation League, *Revisions to Arbitration Procedures*, STB Docket No. EP 730 (filed June 13, 2016), at 2; Comments of the National Grain and Feed Association, *Revisions to Arbitration Procedures*, STB Docket No. EP 730 (filed June 13, 2016), at 3–4.

arbitration a viable and effective option for resolving rate disputes, something which has been a priority for shippers.⁹

II. THE BOARD, NOT ARBITRATORS, SHOULD RESOLVE THE UNCERTAINTY ABOUT THE USE OF REVENUE ADEQUACY IN RATE CHALLENGES.

The most contentious issue in this proceeding is the role of “revenue adequacy” in the Proposed Program. In the NPRM, the Board took issue with the Petition’s proposed broad prohibitions on any use of “revenue adequacy” in the Proposed Program, particularly the evidentiary ban.¹⁰ Joint Carriers understand the Board’s concerns. However, more time is needed for the industry to come to a consensus on how to resolve the Board’s concerns and also incentivize carrier participation in the Proposed Program. Joint Carriers are optimistic in this regard. The Board is so *close* to crafting a voluntary arbitration program for resolving smaller rate cases that would attract a five-year term participation from Class I carriers. There is no good reason to allow the revenue adequacy issue to spoil this historic opportunity.

In particular, the myriad questions surrounding the use of revenue adequacy in rate challenges—including validity and application of a revenue adequacy constraint and the very measurement of revenue adequacy itself—are currently

⁹ See Comments of the National Industrial Transportation League, *Revisions to Arbitration Procedures*, STB Docket No. EP 730 (filed June 13, 2016), at 2 (“We are pleased that rate disputes will now be eligible for arbitration.”); Comments of the National Grain and Feed Association, *Revisions to Arbitration Procedures*, STB Docket No. EP 730 (filed June 13, 2016), at 2 (“We believe expanding the Board’s arbitration process to address rail rates ... holds promise for enabling carriers, shippers and receivers to address additional sources of disagreement...”).

¹⁰ NPRM at 39–40.

pending before the Board in *other* proceedings.¹¹ An arbitration panel should not be addressing these momentous, complex, and highly contested questions. With the high level of uncertainty surrounding the use of “revenue adequacy” in rate challenges—and the highly contentious nature of those questions—the Board should reserve the use of any so-called revenue adequacy constraint under *Coal Rate Guidelines* to formal rate cases filed before the Board. Shippers would remain free to explore that concept before the Board, carriers would be incentivized to participate in the Proposed Program, and the Board would be free to determine the contours of the revenue adequacy concept for future rate challenges.

A. The Unresolved Flaws with the Use of Revenue Adequacy in Rate Challenges Should Foreclose its Use in Arbitrations Under the Program.

As the Board has heard from a chorus of leading economists in other proceedings, not only is the Board’s measure of revenue adequacy laden with material measurement errors,¹² any use of a system-wide revenue adequacy

¹¹ See generally, *Railroad Revenue Adequacy*, STB Docket No. EP 722; *Hearing on Revenue Adequacy*, STB Docket No. EP 761; *Joint Petition for Rulemaking—Annual Revenue Adequacy Determination*, STB Docket No. EP 766.

¹² See, e.g., Opening Comments of Union Pacific Railroad Company, *Railroad Revenue Adequacy*, STB Docket No. EP 722 (filed Sept. 5, 2014), Verified Statement of Kevin M. Murphy (“Murphy Sept. 5, 2014 V.S.”), at 7 (“[A]s historically implemented by the Board, the calculated measure of revenue adequacy does not ‘represent[] a reasonable level of profitability for a healthy carrier’ nor ‘assure shippers that the carrier will be able to meet their service needs for the long term.’”); Opening Comments of Norfolk Southern Railway Company, *Railroad Revenue Adequacy*, STB Docket No. EP 722 (filed Sept. 5, 2014), Verified Statement of Bradford Cornell (“Cornell Sept. 5, 2014 V.S.”), at 13 (“By not using economic depreciation and asset replacement values, the Board misstates ROI.”); *id.* at 19 (“The Board is more likely to find revenue adequacy when deferred taxes are deducted from the investment base, potentially restricting railroad investment.”); Reply Comments of the Association of American Railroads, *Railroad Revenue Adequacy*, STB Docket No. EP 722 (filed Nov. 4, 2014), Reply Verified Statement of Roger Brinner, at 5 (“[H]istoric cost measures of total invested capital grossly

constraint would be economically invalid, and, in fact, has been abandoned by regulators in other developed nations.¹³ At present, the Board has not resolved these serious flaws with the use of revenue adequacy in rate challenges. Permitting such a contentious and complex concept to be used in arbitrations under the Program would be inappropriate—particularly where these arbitrations are

understate the capital on which a return should be calculated by the STB and by investors.”); Reply Comments of the Association of American Railroads, *Railroad Revenue Adequacy*, STB Docket No. EP 722 (filed Nov. 4, 2014), Reply Verified Statement of Professor Joseph P. Kalt (“Kalt Nov. 4, 2014 V.S.”), at 8–9 (“[The Board’s current] measure of adequate revenues and returns ‘is fraught with shortcomings and severely short-sighted; and the cost of capital estimate it uses as a benchmark against which to judge adequacy is severely flawed as well.’ ... [T]his critique of the use of book values is not a matter of serious economic debate.”); *id.* at 15 (“[T]he STB’s exclusion of deferred taxes overstates the attractiveness of railroad industry investments.”).

¹³ Reply Comments of Union Pacific Railroad Company, *Railroad Revenue Adequacy*, STB Docket No. EP 722 (filed Nov. 4, 2014), Reply Verified Statement of Professor Kevin M. Murphy, at 3 (“[A] railroad’s overall financial condition, even if measured by return on current asset costs, provides no information about whether rates on particular shipments are noncompetitive.”); Kalt Nov. 4, 2014 V.S. at 18–19 (“A showing merely that a railroad is overall ‘revenue adequate’, even by reference to a properly conceived measure of ‘adequate’, would not constitute an economically coherent basis for regulatory intervention requiring that ‘additional differential pricing’ be capped and/or that putative ‘excess’ revenue be returned to shippers to be selected by the regulator. ... [S]uch regulation ... has been widely discredited and largely abandoned by the United States and other developed nations.”); *id.* at 28 (“The proper conclusion is that achieving revenue adequacy— on whatever basis— does not provide useful guidance in individual rate disputes.”); Cornell Sept. 5, 2014 V.S. at 3 (“Even if errors in measuring revenue adequacy could be corrected, a rate constraint based on system-wide financial health would have fundamental problems, including [that] ... [a] system-wide measure of a railroad’s financial health would fail to inform whether any particular rate is reasonable; ... [a] rate constraint based on historical performance would be backward looking and would fail to suggest optimal responses to current and future scenarios”).

intended to quickly and simply resolve smaller rate disputes, not determine contentious policy issues or questions of great import.¹⁴

While Joint Carriers do not wish to belabor the deficiencies with the “revenue adequacy constraint” in *Coal Rate Guidelines*, or to repeat the arguments about revenue adequacy that have been presented to the agency in two separate hearings and multiple rounds of comments,¹⁵ Joint Carriers will briefly summarize the four **core** concerns the rail industry has raised in the three ongoing proceedings related to the use of railroad system-wide financial performance to determine the reasonableness of individual rates. The litany of problems with the concept of a “revenue adequacy constraint” and the agency’s measurement of revenue adequacy are described in full in STB Docket Nos. EP 722, 761, and 766.

First, attainment of revenue adequacy is not a signal of market failure that justifies STB intervention. Revenue adequacy results from many pro-competitive reasons and thus does not mean that railroads are acting improperly or abusing market power. In fact, revenue adequacy is a sign of good health—it results from innovation, wise investments, and increased productivity—all the results of market forces in competitive environments. This truth is confirmed by the fact that other well-functioning industries routinely earn accounting returns on investment higher than their cost of capital. Indeed, almost all U.S. industries earn accounting returns above the cost of capital. The supposed “problem” evidenced by a railroad’s revenue adequacy that some say justifies a regulatory crackdown actually occurs across the board in every industry. Revenue adequacy is a widespread, normal, and expected

¹⁴ See Final Rules, *Assessment of Mediation and Arbitration Procedures*, STB Docket No. EP 699 (STB served May 13, 2013), slip op. at 10.

¹⁵ For background on how the “revenue adequacy constraint” came to be, see Comments of the Association of American Railroads, *Hearing on Revenue Adequacy*, STB Docket No. EP 761 (filed Nov. 26, 2019), at 32–34.

outcome in the economy—not a sign of market power abuse that warrants regulatory action. As Professor Kalt has previously observed, there is “no way in which one can look at accounting rates of return and infer anything about relative economic profitability or, a fortiori, about the presence or absence of monopoly profits.”¹⁶

Second, the STB has no authority to regulate system-wide earnings, either directly or indirectly. Earnings regulation is a discredited utility-style approach to regulation that Congress deliberately abandoned with the Staggers Act. “Congress deliberately chose to move away from a public utility model of regulation for the railroad industry.”¹⁷ Rather, “[i]n enacting the Staggers Act, Congress concluded that unnecessarily burdensome and rigid public utility-style regulation have prevented the railroads from responding to changing market conditions, as other businesses could, and taking actions that could help them to recover their costs and earn adequate revenues. The Staggers Act was intended to loosen this tight

¹⁶ Opening Comments of the Association of American Railroads, *Railroad Revenue Adequacy*, STB Docket No. EP 722 (filed Sept. 5, 2014), Verified Statement of Joseph P. Kalt (“Kalt Sept. 5, 2014 V.S.”), at 32 (“The infirmities of using accounting profitability and rates of return to infer market power or above-competitive returns, particularly for capital industries like railroading with long-lived equipment, are well known.”)

¹⁷ *Western Coal Traffic League—Petition for Declaratory Order*, STB Docket No. FD 35506 (STB served July 25, 2013), at 15–17; *see also Groome & Assocs., Inc. v. Greenville Cty. Econ. Develop. Corp.*, STB Docket No. NOR 42087 (STB served July 27, 2005), at 12 (“Congress directed [in the Staggers Act] that railroads be treated more like ordinary businesses than like public utilities.”).

regulatory grip....”¹⁸ Any form of revenue adequacy constraint is effectively rate-of-return regulation that Congress has not authorized.¹⁹

Third, the agency’s measurement of revenue adequacy is replete with material errors. These errors stem from decisions made by the ICC in the 1980s that have since been rebutted by modern leading economists. In particular, the Board’s current annual determinations do not measure return on investment against the current value of assets, which is the real metric for determining the type of financial health Congress was talking about in 49 U.S.C. § 10704(a)(2).²⁰ The Board is measuring *accounting* profit in its annual determinations, and accounting profits say nothing about the level of an “economic profit or return,” as the Board is required to measure under 49 U.S.C. § 10704(a)(2).²¹

The Board’s annual findings are further distorted because they remove accumulated deferred taxes from the investment base. This is contrary to basic valuation principles, results in misleading data, and overstates railroad financial health by assuming investors expect no return on assets “‘financed by’ deferred taxes”—which is not the case in the real world.²² The Tax Cuts and Jobs Acts of 2017 revealed just how distorted this treatment of deferred taxes is—because of a mere change in the corporate tax rate, the 2017 ROI for all Class I carriers

¹⁸ *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 201(a) of the Trucking Industry Regulatory Reform Act of 1994*, 1994 MCC LEXIS 104, at *275–76.

¹⁹ *Ark. Power & Light Co., et al. Petition to Institute Rulemaking Proceeding—Implementation of Long-Cannon Amendment to the Staggers Rail Act*, 365 I.C.C. 983, 989 (1982) (“The Commission does not regulate the overall rate of return for railroads.”).

²⁰ Joint Petition for Rulemaking to Modernize Annual Revenue Adequacy Determinations, STB Docket No. EP 766 (filed Sept. 1, 2020), at 25–29.

²¹ *See id.* at 27.

²² *Id.* at 19–20, 39–42.

skyrocketed—a result that grossly failed to reflect the real-world financial health of the carriers.²³

The Board’s annual findings also do not provide for a “reasonable and economic profit” as required by the statute.²⁴ Experts have testified in EP 766 that a “reasonable and economic profit” means (i) some amount of profit over and above the cost of capital when (ii) the cost of capital is measured using replacement costs. The Board’s current measure of revenue adequacy reflects neither. In concluding that a carrier is “revenue adequate” when its accounting returns equal the industry cost of capital, the Board veers far off course from its congressional requirement to include in any measure of revenue adequacy a “reasonable and economic profit or return (or both).” 49 U.S.C. § 10704(a)(2).

Carriers have proposed a benchmarking approach to correct these measurement errors in EP 766, but the agency has not yet advanced that proceeding. A voluntary ADR proceeding is ill-suited to resolve these complex measurement errors. Moreover, it would be inappropriate to permit the use of any revenue adequacy constraint in arbitrations under the Program before the Board resolves these distortions to the revenue adequacy determination itself.

Finally, there is no way to tie a metric of system-wide financial health to the reasonableness of an individual rate. It is impossible. The reasonableness of a particular rate rests, at its foundation, on the services and facilities the railroad uses to serve that customer. What a carrier earns on competitive traffic a thousand miles away is irrelevant. As multiple economists have testified to the Board, there is no economically valid basis for determining the reasonableness of a rate based

²³ *Id.* at 42. Ultimately, the Board chose to simply ignore the new legislation when calculating deferred taxes for that year. *Id.*

²⁴ 49 U.S.C. § 10704(a)(2).

purely on market dominance and system-wide revenue levels of a carrier.²⁵ The federal courts agree. As the D.C. Circuit correctly observed, a test of “system-wide revenue need” provides “no guidance” on the rates a customer should be charged for the particular facilities and services it uses.²⁶ Thus, system-wide revenue levels, deemed “adequate” or not, cannot determine the reasonableness of a rate—more specificity is required under “sound principles of rail regulation economics.”²⁷

B. The High Level of Uncertainty Regarding the Use of Revenue Adequacy in Rate Challenges Should Be Resolved by the Board, Not Arbitrators.

In the NPRM, the Board reasoned that a full-stop evidentiary restriction on any evidence relating to “revenue adequacy” (1) would be inconsistent with section 11708(c)(3); (2) would seemingly prohibit the use of the Three-Benchmark approach; and (3) might limit proper consideration of market factors.²⁸ Joint Carriers

²⁵ See, e.g., Kalt Sept. 5, 2014 V.S. at 5 (“overall revenue supra-adequacy, itself, would not justify the constraining of rates on specific traffic even if that traffic is found to be subject to rail market dominance”); Cornell Sept. 5, 2014 V.S. at 13 (“revenue adequacy reflects a railroad’s *overall* financial health without informing how particular rates for specific traffic should be regulated”); Murphy Sept. 5, 2014 V.S. at 27 (“Changes in [a railroad’s] overall rate of return provide little or no economic basis for the Board to conclude that there is a lack of competition or for a complaining shipper to petition successfully for reduced rates on (potentially market dominant) ... shipments”).

²⁶ *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 481 (D.C. Cir. 2006).

²⁷ 49 U.S.C. § 11708(d)(1); see, e.g., Cornell Sept. 5, 2014 V.S. at 30 (“[P]roperly measured revenue adequacy ... would not serve the regulator’s need to identify the appropriate rate that should be charged for *particular* traffic. More basic, a constraint based on this measure would not even convey whether a railroad is overcharging ... any *particular* shipper.”); Kalt Nov. 4, 2014 V.S. at 22 (“[S]hippers cannot now properly assert that individual regulated rates ... are *unreasonable* simply because the railroad as a whole is putatively revenue adequate. ... [T]he specific market conditions and cost-of-service attributes of each movement or relevant group of movements must be analyzed ...”).

²⁸ NPRM at 39–40.

appreciate the Board's points and, as stated above, are working to come to a consensus.²⁹ However, these three rationales relate to only the proposed evidentiary restriction—they are not grounds for rejecting the Petition's proposal that a system-wide rate constraint be litigated only before the STB and not an arbitration panel. Indeed, the agency offered no justification for allowing the use of an antiquated and ill-defined concept of rate regulation in an arbitration forum, particularly when the agency itself has yet to address or otherwise clarify these issues in its other pending regulatory proceedings.

The very existence of these three pending proceedings regarding revenue adequacy should foreclose the use of revenue adequacy in arbitrations under the Program because *the Board has not spoken on that issue yet*. There are questions about how to properly measure revenue adequacy, what the *Coal Rate Guidelines* rate constraint even means, and whether a system-wide revenue adequacy constraint is economically or legally valid, as well as whether the Board's answers to these questions would survive judicial review. With these questions and more currently awaiting Board (and judicial) determination, the Proposed Program should operate outside of these questions until they are resolved.

Moreover, the Board currently has before it a carrier proposal for reducing the significant errors in the Board's measure of revenue adequacy.³⁰ Carriers have offered the Board a solution that would—unlike the current measure—measure railroad financial health in a way that is consistent with 49 U.S.C. § 10704(a)(2) while accommodating the Board's preference for using book value, rather than the more economically valid replacement cost, to measure a railroad's investment base.

²⁹ See also, *infra*, § II.D.

³⁰ See Joint Petition for Rulemaking to Modernize Annual Revenue Adequacy Determination, STB Docket No. EP 766 (filed Sept. 1, 2020).

Adopting the carriers' proposal should be the Board's first step in modernizing its use of revenue adequacy. Sending parties to arbitration and allowing them to fight over the accuracy of the Board's revenue adequacy measure—much less the economic or legal validity of a system-wide economic restraint—is not appropriate in light of many parties awaiting the Board's determinations in this regard.

In any event, the fact remains that the *Coal Rate Guidelines*' revenue adequacy constraint has never been defined by the agency, and its contours are far from intuitive.³¹ As explained above, basic legal, economic, and public policy problems pervade this utility-style approach to rate regulation. Asking a panel of arbitrators to define what the agency has itself yet to define in over 40 years is inappropriate and will not work. The STB has yet to grapple with the problems raised in three separate rulemaking proceedings on this very topic. There is no reason to shove the debate into a voluntary arbitration proceeding over a specific shipper's rate with expedited timetables and limited appellate rights.

C. No Rail Customer Would Be Prejudiced.

The railroad industry is on record advocating the complete abandonment of this ill-advised system-wide revenue adequacy constraint. Indeed, using revenue adequacy as a means of system-wide rate of return regulation has been strongly critiqued by independent observers like the Transportation Research Board, which has dismissed the idea as “anachronistic,” “misguided,” “lack[ing] an economic foundation,” and “at odds with the deregulatory thrust of the Staggers Rail Act

³¹ See Cornell Sept. 5, 2014 V.S. at 11 (“The scope and boundaries of th[e] [revenue adequacy] constraint are vague because it has never been applied to railroads.”).

reforms.”³² It is for these precise reasons that use of the *Coal Rate Guidelines*’ revenue adequacy constraint should be expressly prohibited in the Proposed Program. The Board (and federal courts of appeals)—not a panel of arbitrators with unknown expertise—should be the forum for defining, as well as determining the legality and economic validity of, the revenue adequacy constraint. Indeed, the Board has previously acknowledged disputes that “implicate significant policy or regulatory issues ... are better suited for resolution using the Board’s formal adjudicatory procedures” rather than arbitration.³³ Moreover, Joint Carriers naturally are disinclined to voluntarily arbitrate disputes under a methodology they are actively opposing, particularly in a forum where their appellate rights are severely restricted understandably for the sake of efficiency.

Importantly, the prohibition on the use of the revenue adequacy constraint under the Proposed Program would not prejudice shippers in the least. While the Board determines the merits of the revenue adequacy constraint in the pending proceedings, shippers remain free—as they always have been—to litigate the revenue adequacy constraint in rate cases brought before the Board. The Board is the only appropriate forum for the use of such a highly contested and amorphous methodology, given the Board’s expertise, the precedential value of any Board decision on the matter, and the assurance of full appellate rights for defendant carriers.

³² TRANSPORTATION RESEARCH BOARD OF THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING & MEDICINE, SPECIAL REPORT 318: MODERNIZING FREIGHT RAIL REGULATION 28, 100, 101, 123–126 (2015).

³³ Final Rules, *Assessment of Mediation and Arbitration Procedures*, STB Docket No. EP 699 (STB served May 13, 2013), slip op. at 10.

D. The Proposed Evidentiary Ban Can Be Refined to Address the Board's Concerns.

In the NPRM, the Board pointed out that the Petition's proposal to ban all evidence of revenue adequacy "conflict[ed] with § 11708(c)(3)'s requirement that arbitrators give 'due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under section 10704(a)(2)).'"³⁴ The Board also observed that all of its existing methodologies for determining rate reasonableness, to some extent, consider railroad revenues—from SAC, to Simplified SAC, to Three Benchmark, which uses "the Revenue Shortfall Allocation Method (RSAM) benchmark to 'account[] for a railroad's need to earn adequate revenues, as required by 49 U.S.C. § 10704(a)(2).'"³⁵ And the Board raised concerns that a broad ban might conflict with the desire to permit market-based factors to be considered by the arbitrators.³⁶

The original five petitioners did not intend the proposed evidentiary ban to be overly broad and recognize it should have been drafted more narrowly. It was not their intent to prevent the panel from giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under § 10704(a)(2)). Sound economic approaches such as the SAC test, Simplified SAC test, or the Three Benchmark approach are all designed to comport with that requirement. Nor was it their intent to prohibit consideration of the Three-Benchmark test, nor to unnecessarily restrict consideration of market-based factors.

³⁴ NPRM at 39.

³⁵ *Id.* at 39–40.

³⁶ *Id.*

Joint Carriers continue to explore whether alternative evidentiary limits are needed but have yet to come to a consensus. Joint Carriers will consider the comments filed by other parties and may offer supplemental comments on this issue in reply comments.

* * *

In sum, Joint Carriers urge the STB to prohibit the arbitration panel from granting relief premised on the revenue adequacy constraint set forth in *Coal Rate Guidelines*, or any similar rate constraint that is premised merely on the system-wide financial health of the carrier. A test of “system-wide revenue need” provides “no guidance” on the rates a customer should be charged for the particular facilities and services it uses.³⁷ Rail customers who believe otherwise would remain free to pursue that claim before the STB. But until the STB grapples with the challenges leveled against the concept of a revenue adequacy constraint and the serious measurement errors in its annual findings, it should not allow arbitrators to decide these issues. Joint Carriers are working to come to a consensus on how to address the Board’s concerns that does not jeopardize this historic opportunity to improve the Board’s rate reasonableness tools—with all the compelling benefits it offers for a simple, cost-effective alternative dispute resolution process that would directly address longstanding shipper claims of lack of access to rate review.

III. THE PROCESS FOR SELECTING THE THIRD ARBITRATOR SHOULD BE REVISED.

In the NPRM, the Board chose not to include the Petition’s proposal “that the Chairman select the lead arbitrator if the party-appointed arbitrators are unable to agree,” as the Chairman would then necessarily become aware of the arbitration

³⁷ *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 481 (D.C. Cir. 2006).

during its pendency.³⁸ To avoid that situation, the Board instead proposed that, “if the party-appointed arbitrators cannot agree, they shall select from the Board’s roster of arbitrators using the alternating strike method”³⁹ Parties were invited to offer alternatives to the use of the Board’s roster of arbitrators. Joint Carriers understand and appreciate the Board’s concern regarding confidentiality. However, Joint Carriers have grave concerns about the use of the 11708 Roster of arbitrators.

Use of the Board’s 11708 Roster has been a key deterrent of carrier participation in the Board’s existing voluntary arbitration program, in part because the 11708 Roster is too small. Instead, Joint Carriers propose that, if the two party-appointed arbitrators cannot agree on the third, neutral arbitrator, the Board require the ALJ to select the lead arbitrator from a joint list submitted by the parties. This arrangement would prevent the Chairman, or other members of the Board, from learning of the arbitration, and would have a neutral third party—the ALJ—choose the lead arbitrator from the parties’ joint list. The Board has already proposed that the ALJ should rule on for-cause objections to party-selected arbitrators,⁴⁰ so it would be natural for the ALJ to also resolve any dispute over the selection of the lead arbitrator.

In addition, Joint Carriers propose that each party select three arbitrators per side for a joint list of six arbitrators. This will permit the parties to select a variety of impressive candidates to persuade the ALJ to choose the party’s preferred candidate.⁴¹ And, to guide the ALJ’s selection, Joint Carriers propose that, if the

³⁸ NPRM at 25.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ If the Board prefers a different even number, Joint Carriers are not wedded to the number six, but Joint Carriers do believe that *at least* six would provide the ALJ with enough options so that the parties would be incentivized to select high-quality, truly neutral candidates in their effort to persuade the ALJ to choose one of their

ALJ is called upon to choose the third lead arbitrator, the ALJ should be guided by the qualification requirements in 49 C.F.R. § 1108.6(b) in making their selection.⁴²

Joint Carriers' revised approach would instill confidence in the fairness and neutrality of the arbitration process under the Program and would likely enhance its effectiveness. Using a joint list created by the parties is a more fair and neutral way to determine the lead arbitrator, and if the ALJ is choosing among various options, parties will be incentivized to select the most highly qualified, truly neutral candidates, which will more likely result in an experienced and neutral lead arbitrator than if the Board's 11708 Roster were used.

IV. THE BOARD'S DECISIONS ON APPEAL SHOULD BE NON-PRECEDENTIAL AND BINDING ON ONLY THE PARTIES.

The NPRM proposes regulatory text at 49 C.F.R. § 1108.30 stating that “[a]rbitration decisions under this subpart shall have no precedential value.” Although the regulatory text itself does not specify, the NPRM's preamble suggests this bar on precedential value applies only to decisions by the arbitration panel, not Board decisions on appeal.⁴³ The Board should clarify that its decisions on appeal will likewise be non-precedential and binding only on the parties to the arbitration.

preferred arbitrators. If the ALJ must choose between two—or even four—options, the parties may be incentivized to test their luck with less neutral contestants.

⁴² Joint Carriers oppose the Board requiring any party-selected arbitrators (including the lead arbitrator if chosen by the party-selected arbitrators) to meet the qualifications of 49 C.F.R. § 1108.6(b). Allowing full flexibility for the parties to select their preferred arbitrators will incentivize participation and respects the voluntary nature of the forum. Moreover, the parties would have a mechanism to challenge party-selected arbitrators for cause, which should protect against clearly problematic and unfair selections.

⁴³ See *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surf. Transp. Bd.*, STB Docket No. EP 560 (STB served Sep. 2, 1997), slip op. at 9, 17.

Joint Carriers are concerned if Board decisions on appeal create binding agency precedent. Over 20 years ago, the Board, without in-depth discussion or analysis, decided that Board decisions reviewing an arbitrator award should be precedential under the general arbitration program.⁴⁴ As the Board is aware, that arbitration program has never been used. To create a program that incentivizes participation and is successful, the Board should clarify that no precedential value will be given to Board decisions on appeal from arbitration proceedings under the Proposed Program.

A. A Non-Precedential Board Decision on Appeal Is a Key Feature that Would Incentivize Use of the Program.

One of the key features of an arbitration program is the fact that it can resolve disputes without creating precedent. It is this very feature that promotes parties' willingness to use arbitration and reduces high-cost litigation tactics. The same principles which apply to decisions by arbitrators extend to Board decisions reviewing an arbitration award.

If Board decisions on appeal are precedential, they will create law and policy, which can impact both proceedings outside the arbitration context and future arbitration proceedings. This would undermine entirely the reason for making

⁴⁴ *See id.* In response to a comment suggesting that Board decisions on appeal should have precedential value, the Board modified the text of 49 C.F.R. § 1108.10 from what was proposed (“*arbitration decisions* rendered pursuant to these procedures shall have no precedential value”) to what was ultimately adopted (“*[d]ecisions rendered by arbitrators* pursuant to these procedures shall have no precedential value”). *Id.* (emphasis added); *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surf. Transp. Bd.*, STB Docket No. EP 560 (STB served Mar. 26, 1997), slip op. at 12 (emphasis added). The Board later reverted the language of § 1108.10 back to refer to just “arbitration decisions” without discussing whether a substantive change was intended. *See Assessment of Arbitration & Mediation Procedures*, STB Docket No. EP 699 (STB served May 13, 2013), slip op. at 31.

decisions by arbitrators non-precedential—namely, to lower the stakes of the case so that the parties can expend less time and resources litigating the dispute. Indeed, the prospect of the Board creating new policy and law in proceedings with such limited appellate rights will not only deter parties from participating, but it will encourage precisely the type of high-cost, high-stakes litigation tactics that arbitration is intended to avoid. Arbitration should be an alternative way to resolve specific disputes between specific parties. Decisions arising out of that process should be binding only on those parties.

B. The Board Should Exercise its Authority to Issue Non-Precedential Decisions and Enforce Limitations on Their Use.

The Board can decide to issue non-precedential decisions. Other agencies routinely issue both precedential and non-precedential decisions, as has been recognized by federal courts without issue.⁴⁵ And the Board has previously decided that certain aspects of its decisions are non-precedential.⁴⁶ The Board should clarify

⁴⁵ See *Martinez v. Holder*, 740 F.3d 902, 909–10 (4th Cir. 2014) (addressing Bureau of Immigration Appeals decision, which by regulation was non-precedential); *Arobelidze v. Holder*, 653 F.3d 513 (7th Cir. 2011) (same); *Quinchia v. U.S. Atty. Gen.*, 552 F.3d 1255 (11th Cir. 2008) (same); *Fogo do Chao (Holdings) Inc. v. Dep’t of Homeland Sec.*, 769 F.3d 1127 (D.C. Cir. 2014) (expressly non-precedential Administrative Appeals Office decision binding only as between the agency and the petitioner to whom it was issued); *Tangney v. Burwell*, 186 F. Supp. 3d 45 (D. Mass. 2016) (Medicare Appeals Council decision non-precedential according to regulations promulgated by the agency).

⁴⁶ See, e.g., *Policy Statement on Plain Language Digests in Decisions*, STB Docket No. EP 696 (STB served Sep. 2, 2010), slip op. at 2 (announcing that certain language in entire board decisions “may neither be relied upon as Board precedent, nor cited to or quoted from for any legal purpose”); *Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry.*, STB Docket No. NOR 42130 (STB served July 15, 2013), slip op. at 2 (stating that partial grant of railroad request “will not have precedential effect in other proceedings”).

that its decisions on appeal under the Proposed Program will be non-precedential and binding only on the parties.

Further, the Board should ensure its non-precedential decisions are not considered in future arbitration proceedings. First, the Board should add a disclaimer to its decisions reviewing arbitration awards. The Board already does this in certain decisions to ensure that non-precedential language is not cited to or relied upon in future proceedings,⁴⁷ as do some courts and other agencies.⁴⁸ Second, the STB should establish a remedy in the event a party does introduce a non-precedential decision to the panel. Joint Carriers suggest the remedy should be (at the discretion of the aggrieved party) the immediate dismissal of the arbitration without prejudice so as to ensure the panel is not improperly influenced.

C. If Board Decisions Remain Precedential, They Must Be Subject to the Withdrawal Rights for a Material Change in Law.

If the Board declines to make its decisions on appeal non-precedential, it would be arbitrary and capricious for the Board not to subject its precedential decisions to the Proposed Program's withdrawal rights for a material change in law. In the NPRM, the Board stated: "It would be reasonable for a carrier or shipper to withdraw from the proposed program, including any pending arbitration disputes, *should the Board materially change the rules of that program or one of its methodologies, which could inform the arbitrators' decision.*"⁴⁹ Whether the Board

⁴⁷ See *Policy Statement on Plain Language Digests in Decisions*, STB Docket No. EP 696 (STB served Sep. 2, 2010), slip op. at 2.

⁴⁸ For example, the Administrative Appeals Office clearly identifies non-precedential decisions as such on the first page of its decisions by including the following disclaimer: "Non-Precedent Decision of the Administrative Appeals Office." See <https://www.uscis.gov/administrative-appeals/aao-decisions/aao-non-precedent-decisions>.

⁴⁹ NPRM at 16 (emphasis added).

“materially change[s] the rules of the[] program or one of its methodologies” in a formal proceeding or on appeal from the Proposed Program makes no difference—the key is whether a material change in law has occurred.

Any precedential Board decision can result in a material change in law. Agencies can create new rules either through rulemaking or adjudication. Indeed, many of the Board’s current rules pertaining to rate reasonableness were created through adjudication. There is no plausible reason to interpret the withdrawal rights contained in proposed § 1108.23(c)(1) as limited to material changes in law made only via rulemaking. Any Board decision which makes a material change to this arbitration program or existing rate reasonableness methodologies should trigger the withdrawal right—including appeal decisions, if they are precedential.

Neither the Board’s narrow standard of review nor the parties’ limited appeal rights would prevent appeal decisions from creating law or policy. For example, one of the bases upon which the Board could review an arbitration award is whether the award is inconsistent with sound principles of rail regulation economics.⁵⁰ If the Board opines on what is or is not consistent with sound principles of rail regulation economics, that decision would create law if precedential and would impact not only future arbitration decisions but future formal rate cases before the Board.

For these reasons, if the Board ultimately decides its decisions on appeal will be precedential, it should clarify those decisions can constitute a material change in law that would trigger the withdrawal rights in proposed § 1108.23(c)(1).

V. OTHER TECHNICAL MODIFICATIONS WOULD IMPROVE THE PROPOSED PROGRAM.

Joint Carriers believe several additional modifications to the Proposed Program would improve its fairness, effectiveness, and attractiveness to parties.

⁵⁰ See *id.*, proposed § 1108.31(b).

A. The Time Frame for Withdrawing Due to Change in Law Should Be Longer to Permit Meaningful Consideration.

The Petition suggested shippers or carriers could withdraw their consent to arbitrate due to a change in law by filing a notice of withdrawal within 30 calendar days of the event which forms the basis for withdrawal. The Board shortened the time frame for parties to withdraw due to a change in law to 10 days, stating that “[p]arties should be able to decide whether to continue participating in the proposed small rate case arbitration program fairly quickly after a change in law is adopted.”⁵¹ Joint Carriers respectfully disagree. To the contrary, it is much more likely that, if there is a material change in law, parties will need time to understand the change and to analyze its broader, potential implications.

Indeed, a decision to exit the Proposed Program would be a significant strategic decision for a party—particularly for carriers who would potentially commit to the Program for a five-year term. There is also no way of knowing how complex or lengthy any future material change in law might be—complex legislation or a lengthy Board or court decision could take time and experts to understand and analyze.⁵² Thus the Board’s proposed 10 days is not a fair amount of time for a party to decide whether to withdraw from the Program based on a material change in law. Such a rushed timeline would also risk the withdrawal of parties who otherwise might have stayed in the Program if they had had more time to assess the material change in law.

⁵¹ *Id.* at 17.

⁵² Joint Carriers note, although the Board stated it saw “no reason that the [withdrawal] right should not also apply if there is a change in law resulting from Congressional or judicial action,” *id.* at 16, n.31, its proposed regulation at § 1108.23(c)(1) only refers to Board action. Joint Carriers agree with the Board that legislation or court decisions could result in a material change in law and suggest the Board conform the language of § 1108.23(c)(1) to its intent.

For these reasons, Joint Carriers urge the Board to provide parties with 30 days to analyze the change in law and determine if they wish to exit the Program.

B. The Board Should Include a Modified Version of the Volume Limit on More than 10 Simultaneous Arbitrations at Once.

Joint Carriers appreciate the Board proposing certain volume limits for the Proposed Program and believe those volume limits will ensure the effectiveness of the Program, ultimately offering enhanced access in a way that is sustainable and fair. In particular, the volume limits proposed by the Board will incentivize carrier participation by giving carriers some sense of the level of resources they may potentially be required to expend.

The Board chose not to include the Petition’s proposed right to withdraw when 10 (or more) simultaneous arbitrations are brought against a single carrier. The Board reasoned that a “one-case-per-shipper restriction and the 25-cases/12-month limit would be sufficient protections for carriers while ensuring shipper access to the process.”⁵³ Joint Carriers urge the Board to reconsider its rationale and consider Joint Carriers’ revised proposal with regard to this volume limit.

Contrary to the Board’s reasoning, the limit on 10 (or more) simultaneous arbitrations against a single carrier serves a unique purpose separate and distinct from the other volume limits—namely, by protecting carriers (particularly at the beginning of the Program) from being overwhelmed by a high number of arbitrations, all with expedited schedules. Neither the one-case-per-shipper, nor the 25-cases/12-month limit, can protect carriers from this type of circumstance.

However, Joint Carriers recognize and appreciate the Board’s disinclination to offer a withdrawal right based on volume limits and believe the Board’s approach for the other volume limits—*i.e.*, postponing arbitrations that exceed the limit—

⁵³ *Id.* at 18.

should be applied to this volume limit, too.⁵⁴ Postponing arbitrations that exceed the volume limit of 10 (or more) simultaneous arbitrations against a single carrier would maintain accessibility for shippers, because carriers would not withdraw from the Program. Rather, arbitrations exceeding that limit would merely be postponed.

C. The Board Should Require Brief Mediation.

The Petition proposed a pre-arbitration mediation period conducted outside any Board process to help save costs and facilitate a settlement that could resolve the dispute more quickly than the expedient arbitration process.⁵⁵ However, in the NPRM, the Board rejected this proposal and, instead, proposed “allowing parties to engage in mediation prior to the arbitration phase [only] if they mutually agree.”⁵⁶ In not requiring pre-arbitration mediation, the Board reasoned: “in some instances, the parties may have already engaged in extensive negotiations and therefore may wish to proceed directly to arbitration” and “requiring parties to engage serially in two forms of alternative dispute resolution as an alternative to adjudication could discourage parties from using the arbitration process in some instances.”⁵⁷

The Board should reconsider its proposal. Its rationale does not justify its decision. First, the original five petitioners agreed (and all Joint Carriers continue to agree) with NGFA’s proposal that the *parties could mutually agree* to skip the

⁵⁴ *See id.*

⁵⁵ The original five petitioners initially suggested at least a 30-day mediation period, but subsequently agreed to NGFA’s proposal that mediation be limited to 30 days. *See* Petitioners’ Supplemental Pleading, *Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes*, STB Docket No. EP 765 (filed Sept. 10, 2020) (“Petitioners’ Supp. Pl.”), at 5.

⁵⁶ NPRM at 21.

⁵⁷ *Id.* at 21–22.

pre-arbitration mediation.⁵⁸ This addresses the Board’s concern regarding parties who may have already “engaged in extensive negotiations”—even if mediation is required, such parties can simply agree “to proceed directly to arbitration.”⁵⁹ The Board’s concern that a 30-day pre-arbitration mediation requirement would discourage shippers from using the Program appears to be based on a single shipper comment and is otherwise unlikely in light of the significant benefits offered by the Proposed Program to shippers that would almost certainly outweigh the minimal time and cost that a 30-day mediation period would incur. The Proposed Program would be the fastest, cheapest avenue to potential rate relief for shippers with smaller rate cases; and, with the methodological flexibility the Program would offer, as well as its generous relief limits, it is not realistic that a mere 30-day mediation period would “discourage parties from using the arbitration process.”⁶⁰

Mediation is a valuable resolution tool that could both expedite the resolution of the dispute and save significant resources of both parties. For these reasons, Joint Carriers maintain the Board should require mediation as part of the Program unless the parties mutually agree to waive that requirement.

D. The Board Should Clarify the Length of the Opt-In Term and the Nature of Participation After Expiration of the Term.

In the NPRM, the Board proposed the initial opt-in term would expire “five years from the effective date of any final rule adopted in [this proceeding].”⁶¹ As proposed, it appears that, if a carrier opts into the program *after* the effective date, its participation will be for a term less than five-years. However, elsewhere the

⁵⁸ See Petitioners’ Supp. Pl. at 5.

⁵⁹ NPRM at 21.

⁶⁰ *Id.* at 21–22.

⁶¹ *Id.* at 61.

NPRM states the opt-in notices have five-year terms.⁶² Joint Carriers suggest the Board clarify that the initial opt-in term expires five years from when the carrier opts into the Program.

Additionally, in the NPRM, the Board recognized that “[u]nder Petitioners’ proposal, upon expiration of [the opt-in] term, a participating carrier remains within the program on an at-will basis” but did not say whether it agreed with this aspect of the proposal.⁶³ Joint Carriers urge the Board to clarify that participating carriers who remain in the Program beyond the five-year opt-in term will remain in the Program on an at-will basis and incorporate this into the regulations for the Program. Allowing carriers who participate for the initial five-year term to continue to participate on an at-will basis is appropriate because it will incentivize carrier participation at the outset. As part of the future review of the program,⁶⁴ the Board can always assess whether another term opt-in is needed or appropriate.

VI. JOINT CARRIERS’ COMMITMENT TO PARTICIPATE MUST NECESSARILY BE MADE AFTER REVIEWING THE FINAL RULE.

Joint Carriers commend the Board for rejecting Joint Shippers’ attempt to truncate the rulemaking process by requiring a commitment to participate from the carriers prior to opening comments, recognizing it would be premature to ask for a commitment “at this stage.”⁶⁵ However, Joint Carriers are concerned that the NPRM suggested the Board would not “enact” the arbitration proposal in this

⁶² *Id.* at 76.

⁶³ *Id.* at 11, n.21 (internal quotation marks omitted).

⁶⁴ *Id.* at 51.

⁶⁵ Decision, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, STB Docket No. EP 765 (STB served Dec. 29, 2021), slip op. at 4.

docket absent a commitment of all Class I carriers agreeing to participate in the Program for a term of no less than five years.⁶⁶

Joint Carriers are hopeful that all Class I carriers will ultimately agree to participate in this voluntary Proposed Program, should the Board ultimately adopt it. But requiring a commitment from the Class I carriers prior to knowing the Final Rule would be inappropriate and contrary to basic principles of fairness. The very purpose of notice-and-comment rulemaking under the Administrative Procedure Act is to ensure fairness to affected parties and to test proposed regulations via exposure to diverse public comment.⁶⁷ Joint Carriers urge the Board to consider fully the comments received and, as a result of that deliberation, make the needed modifications to the Proposed Program described above. It would be fundamentally unfair to ask carriers to agree to participate in the Program without knowing what, if any, modifications may be made as a result of the notice-and-comment process.

If the Board ultimately adopts the Proposed Program, with whatever modifications the Board chooses, the Class I carriers will make individualized decisions regarding participation. Joint Carriers remain optimistic, particularly if the modifications suggested herein are adopted, that all Class I carriers will ultimately agree to participate.

⁶⁶ See NPRM at 9.

⁶⁷ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011).

CONCLUSION

The arbitration Program proposed by the Board, with the modifications suggested herein, has the potential to incentivize strongly both carriers and shippers to use the Program to resolve smaller rate disputes in an expedited and cost-effective manner. A workable arbitration program has been a long-sought goal of the agency and would be an efficient tool for resolving rate disputes, particularly for smaller disputes that do not necessarily justify the expense of the Board's formal complaint process. Joint Carriers are hopeful the Proposed Program, with appropriate modifications, will enjoy broad support among both carriers and shippers.

Respectfully submitted,

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