

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 755

FINAL OFFER RATE REVIEW

ERRATUM TO

**PETITION FOR RECONSIDERATION OF
THE AMERICAN CHEMISTRY COUNCIL, THE FERTILIZER INSTITUTE,
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE,
THE CHLORINE INSTITUTE, AND THE CORN REFINERS' ASSOCIATION**

Earlier today, 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 submitted a Petition for Reconsideration pursuant to 49 C.F.R. §§ 1110.10 and 1115.3. The Coalition Associations have identified an error in their Petition that they are correcting with this erratum. The error occurs in the sentence that spans pp. 4-5 of the Petition. That sentence should be modified as indicated in the underlined and strike-through text below:

Because the Board consistently has granted rebuttal evidence in all non-streamlined market dominance presentations regardless of the rate reasonableness methodology employed, it cannot deviate from that precedent in FORR cases merely by concluding that there is a *greater* need for rebuttal market dominance evidence in non-streamlined presentations than in ~~non~~-streamlined presentations.

For the Board’s convenience, the Coalition Associations have attached a complete version of their Petition with the corrected sentence as Exhibit 1.

Respectfully submitted,

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January 24, 2023

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On Behalf of:

The Chlorine Institute

EXHIBIT 1

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On Behalf of:
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January 24, 2023

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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 this Petition for Reconsideration pursuant to 49 C.F.R. §§ 1110.10 and 1115.3. The Coalition Associations seek partial reconsideration of the final rules adopted by the Surface Transportation Board (“Board”) in the above-captioned proceeding in a decision served on December 19, 2022 (“Decision”). Specifically, they ask the Board to reconsider its rejection of a procedural schedule in Final Offer Rate Review (“FORR”) rate cases that provides the opportunity for complainants to submit rebuttal market dominance evidence in non-streamlined market dominance presentations. *See* Decision, slip op., at 27-28. The Coalition Associations assert that this Board action constitutes material error and is unsupported by substantial evidence.

I. BACKGROUND

In their Opening Comments to the Board’s Supplemental Notice of Proposed Rulemaking, served November 15, 2021 (“SNPRM”), the Coalition Associations presented the following three arguments to demonstrate the need for rebuttal market dominance evidence in

FORR cases that entail non-streamlined market dominance presentations, and they proposed a procedural schedule to accommodate such rebuttal evidence (see “Opening Supplemental Comments,” at 4-9 (filed Jan. 14, 2022)):

- First, “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.” *Id.* at 5.
- Second, the market dominance process proposed, and ultimately adopted, by the Board “merely created the illusion that complainants can present non-streamlined market dominance evidence in FORR cases.” *Id.* at 4. That is because the inability to submit rebuttal market dominance evidence requires Complainants to anticipate and address a defendant’s market dominance reply evidence or risk failing to bear their burden of proof. *Id.* at 6.
- Third, the Coalition Associations’ alternative FORR procedural schedule, which *incorporates* rebuttal market dominance evidence into non-streamlined presentations, adds just 29 days to the Decision’s procedural schedule for such presentations, which *does not incorporate* rebuttal evidence, and it is *at least* 21 days faster than the Board’s most expeditious existing small rate case process, Three Benchmark cases. *Id.* at 7. This brief extension to the Decision’s schedule would be fairer to both parties without undermining the intent of FORR to be simplified and expedited. *Id.* at 7-8.

II. ARGUMENT

In the Decision, at 27-28, the Board has offered three responses to the foregoing arguments as grounds for denying rebuttal evidence to complainants who make non-streamlined market dominance presentations in FORR cases. The following subparts demonstrate that each of the Board’s responses are predicated upon material error and unsupported by the record.

A. **The Board Committed Material Error by Deviating from Established Precedent that the Party with the Burden of Proof Should Have the Final Evidentiary Presentation.**

Although the Board acknowledges “the apparent incongruity” between the streamlined and non-streamlined market dominance procedures, it claims that “closer examination reveals that the procedure as proposed in the SNPRM is neither irrational nor incongruous.” Decision at 27. The Board offers two arguments to support this conclusion.

First, the Board states that “the optional hearing in a FORR case using streamlined market dominance is not solely an opportunity for the complainant to present rebuttal,” because “both sides would be permitted to present their market dominance positions.” *Id.* The salient point, however, is that the presentation of rebuttal is the primary reason for the optional hearing. The fact that both sides are permitted to present their positions at the hearing does not detract from the fact that the complainant can respond to positions that the defendant presents at the hearing *in addition to* those presented in reply evidence, whereas the complainant will have no ability to respond to defendant’s reply evidence *at all* in FORR cases when presenting non-streamlined market dominance evidence.

Second, in tacit acknowledgement that the foregoing rationale does not directly respond to the Coalition Associations, the Board avers that, “even to the extent the hearing allows for rebuttal, the Board disagrees...that ‘the need for rebuttal is even greater in non-streamlined market-dominance cases.’ (Coalition Associations SNPRM Comment 5).” *Id.* According to the Board, because the streamlined market dominance procedure contemplates a minimal opening submission by design, a “complainant will have a greater need for rebuttal after submitting so little in its streamlined market dominance opening, as opposed to a non-streamlined market dominance case where the complainant has an opportunity on opening to present its complete position regarding market dominance.” *Id.*

Whether the need for rebuttal is *greater* in streamlined market dominance presentations is not the dispositive question, however. Even if the Board is correct that streamlined cases have a greater need for rebuttal, that does not diminish the need for rebuttal in non-streamlined cases that has been long-established in the Board’s precedent. SNPRM at 41. Indeed, every other rate

case methodology established by the Board grants the complainant an opportunity to present rebuttal market dominance evidence.¹

In its decision adopting the streamlined market dominance rules, the Board acted consistent with this precedent when it stated that “the complainant, as the party with the burden of proof, should have the final evidentiary presentation (as it does in other aspects of the rate case process). . . .” *Market Dominance Streamlined Approach*, Docket No. EP 756, slip op. at 40 (served Aug. 3, 2020). There is no differentiation based upon degrees of need. Indeed, the Board plainly intended to extend the *same* rebuttal right in non-streamlined market dominance presentations to streamlined presentations:

In 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 evidence in rate cases. See Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 4-5 (STB served Dec. 9, 2016) (holding that the complainant was entitled to offer corrective evidence to demonstrate that the defendant carrier’s reply evidence on market dominance issues was unsupported, infeasible, or unrealistic). This standard would likewise apply to complainants using the streamlined approach.

Id. at 39. In the Decision, however, the Board inconsistently denies complainants the ability to submit rebuttal market dominance evidence when making non-streamlined market dominance presentations in FORR cases.

Because the Board consistently has granted rebuttal evidence in all non-streamlined market dominance presentations regardless of the rate reasonableness methodology employed, it cannot deviate from that precedent in FORR cases merely by concluding that there is a *greater* need for rebuttal market dominance evidence in streamlined presentations than in non-

¹ See 49 C.F.R. §§ 1111.9(a)(7) (applicable to stand-alone cost cases), 1111.10(a)(1)(i)(I) (simplified-SAC cases), 1111.10(a)(2)(i)(I) (three benchmark cases).

streamlined presentations. Taken to its logical conclusion, such a rationale could be applied to eliminate rebuttal market dominance evidence in all other types of rate cases. Therefore, the Board must at least explain why it is reasonable to deviate from its precedent solely for FORR cases. In the next two subparts, the Coalition Associations demonstrate that the explanations offered by the Board are unsupported in the record.

B. The FORR Procedures for Rate Reasonableness Determinations Do Not Support the Board’s Elimination of Rebuttal Evidence for Non-Streamlined Market Dominance Determinations.

The Decision dismisses the Coalition Associations’ concerns over the lack of rebuttal market dominance evidence by noting that they “have expressed strong support for FORR’s rate reasonableness procedure, which [also] does not include rebuttal.” Decision at 27. That observation, however, ignores significant differences between the FORR procedures for rate reasonableness and market dominance evidence that render the Decision’s rationale inapt. Failure to consider those differences constitutes material error.

The procedures adopted in the Decision for presenting evidence of rate reasonableness and market dominance in FORR cases are different in a very consequential way. The FORR procedures require the *simultaneous* submission by *both* parties of opening *and* reply evidence on rate reasonableness. For market dominance evidence, however, the FORR procedures require the *sequential* submission of opening evidence by the complainant followed by the defendant’s submission of reply evidence. Whereas there are two rounds of rate reasonableness evidence, which includes the opportunity for each party to reply to the other party’s opening evidence, the FORR procedures provide only one opportunity for each party to present market dominance evidence in non-streamlined cases, and because the complainant files its evidence first, it has no opportunity *at all* to rebut the defendant’s evidence, despite bearing the burden of proof.

Paradoxically, the Board proposed this sequential presentation of market dominance evidence over its original proposal for simultaneous evidence out of concern that defendants would be required “to anticipate in this opening submission what the complainant might present regarding market dominance....” SNPRM at 40. But by denying complainants the opportunity to present rebuttal market dominance evidence, the Decision imposes the same inequity on complainants by requiring them to anticipate the defendant’s reply evidence. This inability to address the defendant’s evidence *at all* is particularly prejudicial because of the complainant’s burden of proof. In contrast, the simultaneous presentation of two rounds of rate reasonableness evidence does not present a comparable risk.²

The Coalition Associations’ proposed approach to non-streamlined market dominance presentations in FORR cases retains the Board’s preferred sequential process for submitting market dominance evidence. But consistent with the Board’s market dominance procedures in all other types of rate cases, it includes rebuttal evidence, so that complainants’ ability to satisfy their burden of proof is not prejudiced. As discussed in the next section, the Coalition Associations accomplish this with only a short extension to the procedural schedule adopted in the Decision that remains consistent with the Board’s intent to establish an expedited and streamlined process through FORR.

² The Board determines rate reasonableness in FORR cases by deciding which party’s methodology best adheres to the rail transportation policies, the Long-Cannon factors, and appropriate economic principles. This process allows the parties to present and justify different methodologies in their opening evidence and to challenge the other’s methodology in their reply evidence. The Board then chooses one party’s methodology in its entirety as the one that best satisfies the requisite criteria. This differs from the Board’s other rate case procedures, in which the parties use the same methodology, and the Board can pick and choose between different elements of the parties’ evidence after considering complainants’ opening, defendant’s reply, and complainant’s rebuttal evidence. In all other rate cases, the same sequence of evidence also applies to non-streamlined market dominance presentations. In non-streamlined FORR cases alone, however, the Decision would eliminate the complainant’s opportunity for rebuttal.

C. The Board's Rejection of the Coalition Associations' Procedural Schedule for Non-Streamlined Market Dominance Presentations Is Unsupported by the Record.

Ultimately, the Board reaffirms its position in the SNPRM that the Coalition Associations' proposal "would substantially undercut FORR's use of short timelines to limit the volume and complexity of the evidentiary record." Decision at 27, *citing* SNPRM at 36. The basis for that assessment is that the 29 days that the Associations' approach would add to the procedural schedule would constitute "an expansion by greater than 30 percent" compared to the longest version of the procedural schedule contemplated in the SNPRM. *Id.* The Decision then declares that the Board "has heard rail customers' concerns about the duration of rate cases..., and FORR's simplified procedures is what permits its expedited timeline." *Id.* at 28 (citations omitted). This rationale, however, disregards the fact that those very same rail customers are the stakeholders who have proposed this procedural schedule.

The Coalition Associations are comprised of five large trade associations that represent hundreds of rail customers. Moreover, no other shipper organizations participating in this proceeding have opposed the Associations' proposal. The Coalition Associations' members are willing to accept this slightly longer procedural schedule (*i.e.*, 29 days) for non-streamlined market dominance presentations because the Board's slightly faster procedure substantially handicaps their ability to prove market dominance *at all*.³ They have balanced that extended duration against the utility of the Board's approach without rebuttal market dominance evidence and concluded that the benefits far outweigh the detriments. The Board's justification for rejecting the Coalition Associations' proposal as a response to rail customer concerns thus is

³ See Opening Supplemental Comments, at 4 ("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-streamline market-dominance evidence in FORR cases.").

inconsistent with the fact that the Associations collectively represent the largest number of rail customers in this proceeding.

The Decision asserts that the Coalition Associations' proposed procedural schedule "would *substantially* undercut FORR's use of short timelines to limit the volume and complexity of the evidentiary record" because it is a "greater than 30 percent" expansion over the SNPRM procedural schedule. Decision at 27 (*italics added*). A determination as to whether this expansion is *substantial*, however, requires context. In the context of rate cases, the full FORR procedural schedule under the Coalition Association proposal still would be *at least* 21 days *faster* than a Three-Benchmark case,⁴ which is the most expedited of the Board's existing rate case procedures, and it would be just 29 days longer than the schedule adopted in the Decision for non-streamlined market dominance determinations.⁵ In context, the importance of the opportunity for complainants to present rebuttal evidence on market dominance substantially outweighs any harm that may result from the less-than-30 additional days necessary to afford complainants that fair and reasonable opportunity.

Furthermore, shipper concerns with the Three-Benchmark approach have focused primarily upon the methodology for determining rate reasonableness and relief caps, not with the procedural schedule (*e.g.*, a methodology that compares the challenged rate with other captive

⁴ See 49 C.F.R. § 1111.10(a)((2)(i)(I) (Three Benchmark record closes on Day 150). This differential assumes additional time for motions to compel discovery in an FORR case, consistent with the Decision. Therefore, in cases without motions to compel, the Coalition Associations' proposal would be faster than Three Benchmark cases by *more than* 21 days.

⁵ See Opening Supplemental Comments, Ex. A (chart comparing Coalition proposed schedule for FORR cases using non-streamlined market dominance with STB proposal). Although Ex. A does not include additional days for motions to compel, the 29-day differential is not affected because the same number of days must be added to both the Coalition and Board schedules when there is a motion to compel.

rates, the presentation of “other relevant evidence”).⁶ Both the procedural schedule adopted in the Decision and the schedule proposed by the Coalition Associations improve upon the Three Benchmark procedural schedule. An FORR process that is *at least* 21 days faster than the Three Benchmark process, as proposed by the Coalition Associations, remains consistent with “the use of short timelines to limit the volume and complexity of the evidentiary record,” but without the prejudice resulting from the Board’s slightly faster timeline that does not allow rebuttal market dominance evidence in non-streamlined market dominance cases.

III. CONCLUSION

The Board’s denial of rebuttal market dominance evidence in FORR cases with non-streamlined market dominance presentations constitutes material error because it is an unjustified departure from precedent holding that the party with the burden of proof should have the final evidentiary presentation. Furthermore, in the SNPRM, at 41, the Board determined that “complainants should have the option of choosing between streamlined and non-streamlined

⁶ In one of the earliest filings that ultimately resulted in adoption of the Three Benchmark approach, a group of 17 shipper organizations, including three of these Coalition Associations, responded to a request from then-Chairman Roger Nober to submit a joint proposal and comments regarding rail rate challenges in small rate cases. “Joint Comments of American Chemistry Council *et al.*,” Ex Parte No. 646, *Rate Challenges in Small Cases* (filed July 11, 2003). They proposed a procedural schedule of 135 to 155 days that provided for opening, reply, and rebuttal evidence. *Id.* at 14. The Coalition Associations’ proposed schedule for FORR cases using non-streamlined market dominance in EP 755 compares favorably to that 2003 proposal and the Board’s final decision to close the evidentiary record in Three Benchmark cases on Day 150.

In the Board’s subsequent proceedings to consider ways to improve upon the Three Benchmark process, the focus of shipper organizations was on the rate reasonableness standards and relief caps, not a faster procedural schedule. *See, e.g.*, “Joint Opening Comments of ACC, *et al.*,” Ex Parte No. 715, *Rate Regulation Reforms*, at 27-30 (filed Oct. 23, 2012); “Comments of Joint Carload Shippers,” Docket No. EP 733, *Expediting Rate Cases*, at 3 (filed Aug. 1, 2016) (summarizing substantive problems with the Three Benchmark approach); “Comments of American Chemistry Council,” Docket No. EP 665 (Sub-No. 2), *Expanding Access to Rate Relief*, at 2 (filed Nov. 14, 2016) (criticizing STB’s proposed “revamp” of Three Benchmark for its focus on “costs and procedures” rather than the “most fundamental problem – its rate reasonableness standard.”).

market dominance in FORR cases” because “[l]imiting FORR in this way could effectively deny access to FORR for many potential complainants – those who are unable to satisfy one or more of the streamlined factors – which is contrary to FORR’s goal of improving access to rate reasonableness determinations.” But by denying complainants the opportunity to submit rebuttal market dominance evidence in non-streamlined FORR cases, the Decision effectively thwarts that central goal in service of a short time savings that shippers have not requested and do not need. The Decision’s rationale for doing so constitutes material error and is unsupported by the record, and the Board should modify the Decision to adopt the Coalition Associations’ reasonable proposal to allow an opportunity to present rebuttal market dominance evidence in non-streamlined FORR cases.

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