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SURFACE TRANSPORTATION BOARD

49 CFR Chapter X

[Docket No. EP 665 (Sub-No. 1); Docket No. EP 665 (Sub-No. 2)]

Rail Transportation of Grain, Rate Regulation Review; Expanding Access to Rate Relief

AGENCY: Surface Transportation Board.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (Board) is seeking comments and suggestions through this Advance Notice of Proposed Rulemaking (ANPR) regarding the Board's effort to develop a new rate reasonableness methodology for use in very small disputes, which would be available to shippers of all commodities.

DATES: Comments are due by November 14, 2016. Reply comments are due by December 19, 2016.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the "E-FILING" link on the Board's website, at "http://www.stb.dot.gov." Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 665 (Sub-No. 2), 395 E Street, S.W., Washington, DC 20423-0001.

Copies of written comments and replies will be posted to the Board's website and will be available for viewing and self-copying at the Board's Public Docket Room, Room 131. Copies will also be available (for a fee) by contacting the Board's Chief Records Officer at (202) 245-0238 or 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Allison Davis at (202) 245-0378. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: In the Interstate Commerce Act, Congress charged the Board with protecting the public from unreasonable pricing by freight railroads, while fostering a sound, safe, and efficient rail transportation system by allowing carriers to earn adequate revenues. See 49 U.S.C. 10101. In the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, and subsequent legislation, including the ICC Termination Act of 1995 (ICCTA), Pub. L. 104-88, 109 Stat. 803, Congress established a careful balance between these two important yet conflicting goals. On the one hand, Congress permitted differential pricing and removed regulatory controls over railroad pricing for traffic with effective competition so that carriers would have greater ability to earn the revenues necessary to attract capital and reinvest in the network. On the other hand, Congress made clear that railroad rates for traffic without effective competition must be reasonable (see 49 U.S.C. 10702, 10707), and that shippers of grain, in particular, are entitled to some additional protections (see, e.g., 49 U.S.C. 10709(g) (providing that shippers may file a complaint with the Board asking it to review agricultural contracts on certain grounds)).

By decision served in Rail Transportation of Grain, Rate Regulation Review, Docket No. EP 665 (Sub-No. 1) on December 12, 2013, the Board invited public comment on how to ensure that the Board's existing rate complaint procedures are accessible to grain shippers and provide effective protection against unreasonable freight rail transportation rates, including proposals for modifying existing procedures or new alternative rate relief methodologies. The Board received opening and reply comments from interested shipper, railroad, and government entities. The Board then held a public hearing on June 10, 2015, to further examine issues related to the accessibility of rate relief for grain shippers and to provide interested persons the opportunity to comment on the suggestions made during the public comment period. Following the hearing, the Board received supplemental comments from three parties.

The Board has considered all of the written comments and oral testimony received in Docket No. EP 665 (Sub-No. 1).[1] A number of issues raised during the public comment period—related to the accessibility of the Board's existing rate review processes, modifications to those processes, and alternative rate review processes set forth by parties—merit further discussion, and the Board is seeking further comment on those issues.[2] Based on the comments and testimony received, the Board believes that the existing rate review processes present accessibility challenges for not only grain

[1] For a list of the numerous parties that have participated in Docket No. EP 665 (Sub-No. 1) at various stages, see Appendix A. To the extent this decision refers to parties by abbreviations, those abbreviations are listed in that appendix.

[2] We note that other significant issues have been raised in this proceeding, such as the Board's regulations concerning agricultural rate transparency and the standing required to bring a rate complaint. The Board will address these issues in a subsequent decision.

shippers, but also small shippers of any commodity. The Board also recognizes that for small rate disputes, regardless of commodity, the litigation costs required to bring a case under the Board's existing rate reasonableness methodologies can quickly exceed the value of the case. Therefore, the Board is opening a proceeding in Docket No. EP 665 (Sub-No. 2) to develop a new rate review process that would be more affordable and accessible to shippers of all commodities with small disputes.

Before discussing ideas for use in a new rate reasonableness methodology, we will discuss the Board's existing rate reasonableness standards and the comments received in Docket No. EP 665 (Sub-No. 1).

CURRENT RATE REASONABLENESS STANDARDS

Statutory Framework

Where a railroad has market dominance—i.e., there is an absence of effective competition from other rail carriers or modes of transportation—its transportation rates for common carrier service must be reasonable. 49 U.S.C. 10701(d)(1), 10702, 10707(a). The Board is precluded, however, from finding market dominance if the revenues produced by a challenged rate are less than 180% of the carrier's "variable costs"[3] of providing the service. 49 U.S.C. 10707(d)(1)(A). If, upon complaint, the Board finds a challenged rate unreasonable, it will order the railroad to pay reparations to the complainant for past movements and may prescribe the maximum rate the carrier is permitted to charge. 49 U.S.C. 10704(a)(1), 11704(b).

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[3] Variable costs vary with the level of traffic and are developed in rate proceedings using the Board's Uniform Railroad Costing System (URCS). See Adoption of Unif. R.R. Costing Sys. as Gen. Purpose Costing Sys. for All Regulatory Costing Purposes, 5 I.C.C.2d 894 (1989).

In carrying out its regulatory functions, the Board is guided by the rail transportation policy set forth at 49 U.S.C. 10101. And in assessing the reasonableness of rail rates, it must also give due consideration to the "Long-Cannon" factors contained in 49 U.S.C. 10701(d)(2)(A)-(C). The Board must recognize that rail carriers should have an opportunity to earn "adequate revenues," which are defined as those that are sufficient—under honest, economical, and efficient management—to cover operating expenses, support prudent capital outlays, repay a reasonable debt level, raise needed equity capital, and otherwise attract and retain capital in amounts adequate to provide a sound rail transportation system. 49 U.S.C. 10701(d)(2), 10704(a)(2).

As part of ICCTA, Congress added a new provision to the rail transportation policy calling for the "expeditious handling and resolution of all proceedings." 49 U.S.C. 10101(15). Congress further instructed the Board to establish procedures for rail rate challenges in particular, including "appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings." 49 U.S.C. 10704(d). Congress directed the Board to "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. 10701(d)(3). In the Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110, 129 Stat. 2228 (2015), Congress directed the Board to "initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases." 129 Stat. 2228. That proceeding is currently pending before the Board. See Expediting Rate Cases, EP 733 (STB served June 15, 2016).

Regulatory Framework

Under the theory of "constrained market pricing" (CMP), adopted by the agency in 1985 to judge the reasonableness of rail freight rates, a captive shipper should not be required to pay more than is necessary for the carrier involved to earn adequate revenues, nor should it pay more than is necessary for efficient service, and a captive shipper should not bear the costs of any facilities or services from which it derives no benefit. Coal Rate Guidelines, Nationwide (Guidelines), 1 I.C.C.2d 520, 523 (1985), aff'd sub nom. Consol. Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987). CMP contains three main limits on the extent to which a railroad may charge differentially higher rates on captive traffic: the revenue adequacy constraint, the management efficiency constraint, and the stand-alone cost constraint.[4] Of these three limits under CMP, the stand-alone cost (SAC) constraint has been the most widely utilized before the agency.

A SAC analysis seeks to determine whether a complainant is bearing costs resulting from inefficiencies or costs associated with facilities or services from which it derives no benefit. The SAC analysis does this by simulating the competitive rate that would exist in a "contestable market."[5] Under the SAC constraint, the rate at issue cannot be higher than what a hypothesized stand-alone railroad (SARR) would need to

[4] A fourth constraint—phasing—is intended to limit the introduction of otherwise-permissible rate increases when necessary for the greater public good. Guidelines, 1 I.C.C.2d at 546-47. For a more detailed discussion of CMP, see Guidelines, 1 I.C.C.2d at 534-547.

[5] A contestable market is defined as one that is free from barriers to entry. See Guidelines, 1 I.C.C.2d at 528 (citing William J. Baumol, John C. Panzar & Robert D. Willig, Contestable Markets and the Theory of Industry Structure (1982)). The economic theory of contestable markets does not depend on a large number of competing firms in the marketplace to ensure a competitive outcome. Guidelines, 1 I.C.C.2d at 528. In a contestable market, even a monopolist must offer competitive rates or potentially lose its customers to a new entrant. Id.

charge to serve the complaining shipper while fully covering all of its costs, including a reasonable return on investment. The principal objective of the SAC approach is to restrain a railroad from exploiting market power over a captive shipper by charging more than it needs to earn a reasonable return on the cost of the infrastructure used to serve that shipper. A second objective of the SAC constraint is to detect and eliminate the costs of inefficiencies in a carrier's investments or operations. See id. at 542-46.

The agency recognized that the SAC methodology adopted in Guidelines could be expensive and impractical for certain shippers. The agency therefore adopted in 1996 a simplified methodology, the Three-Benchmark methodology, under which the reasonableness of a challenged rated is determined by examining that rate in relation to three benchmark figures. Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004 (1996), pet. to reopen denied, 2 S.T.B. 619 (1997), appeal dismissed sub nom. Ass'n of Am. R.Rs. v. STB, 146 F.3d 942 (D.C. Cir. 1998). A decade passed, however, without any shipper bringing a case under that methodology. Accordingly, in 2007, the Board modified the Three-Benchmark test and created Simplified-SAC—a simplified alternative under CMP where a full SAC analysis was too costly given the value of the case. See Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), aff'd sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir.), vacated in part on reh'g, 584 F.3d 1076 (D.C. Cir. 2009).

In Simplified Standards, EP 646 (Sub-No. 1), slip op. at 13, the Board acknowledged that it is the second objective—in which the complaint seeks to detect and eliminate the cost of inefficiencies in carrier's investments or operations—that turns the case into an intricate, expensive undertaking. Accordingly, the Board limited the inquiry under the Simplified-SAC method to the first objective of SAC: whether a captive shipper is being forced to cross-subsidize other parts of the railroad's rail network. The Simplified-SAC test does so by comparing the costs and revenues of the actual operations and services provided under the assumption that all existing infrastructure along the predominant route used to haul the complainant's traffic is needed to serve the traffic on that route. Rate Regulation Reforms, EP 715, slip op. at 1 n.2 (STB served Mar. 13, 2015); see also Simplified Standards, EP 646 (Sub-No. 1), slip op. at 5. The core analysis in a Simplified-SAC proceeding addresses the cost to build the existing facilities used to serve the captive shipper and the return on investment a hypothetical SARR would require to replicate those facilities. The Board then determines whether the traffic using those facilities is paying more than needed to cover operating expenses and a reasonable return on the cost of those facilities. To hold down the cost of a Simplified-SAC presentation, various simplifying assumptions and standardization measures were adopted.[6] Such an approach is a less thorough application of CMP in that it would not identify inefficiencies in the current rail operation.

Under the Three-Benchmark method, the reasonableness of a challenged rate is determined by examining that rate in relation to the following three benchmark figures, each of which is expressed as a revenue-to-variable cost (R/VC) ratio: (1) Revenue Shortfall Allocation Method (RSAM), which measures the average markup over variable cost that the defendant railroad would need to charge all of its "potentially captive" traffic (traffic priced above the 180% R/VC level) in order for the railroad to earn adequate

[6] Simplifying assumptions are used in, for example, the issue traffic's route, the configuration of the SARR, the traffic group, operating expenses, the test year, and the discounted cash flow analysis.

revenues as measured by the Board under 49 U.S.C. 10704(a)(2); (2) $R/VC_{>180}$, which measures the average markup over variable cost currently earned by the defendant railroad on its potentially captive traffic; and (3) R/VC_{COMP}, which is used to compare the markup being paid by the challenged traffic to the average markup assessed on other comparable potentially captive traffic. Rate Regulation Reforms, EP 715, slip op. at 11 (STB served July 25, 2012).

In Three-Benchmark cases, each party simultaneously proposes an initial comparison group, and, after critiquing the other side's proposal, a "final offer" comparison group. After receiving simultaneous rebuttal filings, the Board selects without adjustment one of the two "final offer" comparison groups. Each movement in the comparison group is adjusted by a revenue need adjustment factor, which is the ratio of RSAM ÷ $R/VC_{>180}$ (each of which is a four-year average calculation). The Board then calculates the mean and standard deviation of the resulting adjusted R/VC ratios (weighted in accordance with the proper sampling factors). If the challenged rate is above a reasonable confidence interval around the estimate of the mean for the adjusted comparison group, it is presumed unreasonable and, absent any "other relevant factors," the maximum lawful rate is prescribed at that boundary level. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 21.

Since Simplified Standards, only a few Three-Benchmark cases have been decided by the Board, while no complaint has been litigated to completion under the Simplified-SAC alternative.

There is no monetary limit on relief for a complainant that elects to use the SAC or Simplified-SAC methods, see Rate Regulation Reforms, EP 715, slip op. at 3 (STB served July 18, 2013) (removing relief limit on Simplified-SAC cases), though rate relief in SAC cases is limited to a 10 year period, see Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 62-66 (STB served Oct. 30, 2006), and relief in Simplified-SAC cases is limited to a five-year period, Simplified Standards, EP 646 (Sub-No. 1), slip op. at 27-29. The maximum potential rate relief available to a complainant that elects to use the Three-Benchmark method is limited to no more than $4 million per case over a five-year period. See Rate Regulation Reforms, EP 715, slip op. at 2 (STB served Mar. 13, 2015); Simplified Standards, EP 646 (Sub-No. 1), slip op. at 27-29.

COMMENTS RECEIVED IN DOCKET NO. EP 665 (SUB-NO. 1)

The shipper community argues that the Board's current rate review processes are not useable to test the reasonableness of agriculture commodity rail rates. Shippers argue that the Board's existing methodologies are cost-prohibitive. (ARC Opening 21-22; NGFA Opening 13-15; AAI Reply 2.) For example, NGFA argues that even the simplest of the Board's rate reasonableness methodologies, the Three-Benchmark approach, is ineffective because railroad defendants raise numerous expert-intensive "other relevant factor" arguments and arguments for the use of current waybill data in the possession of the defendant railroad, which greatly increase the complexity and costs of those cases. (NGFA Opening 15.)

Even if the Three-Benchmark methodology were not cost prohibitive, shippers argue that a comparison group approach is ineffective for agricultural commodities because carriers have applied "across-the-board" pricing. (ARC Opening 23; NGFA Opening 15; AAI Reply 2.) Specifically, shippers claim that carriers use their market power to impose a uniformly high rate across-the-board for certain commodities or groups of commodities. (ARC Opening 23; NGFA Opening 15.) As a result, shippers argue that the R/VC_{COMP} benchmark is inherently problematic for grain shippers and producers because railroad grain rates generally produce R/VCs that are uniform, or uniform in geographic areas, for states or regions. (ARC Opening 23, V.S. Whiteside 12.) According to NGFA, the fact that only defendant traffic may be included in a Three-Benchmark comparison group compounds this flaw. (NGFA Opening 15.)

NGFA also argues that SAC and Simplified-SAC are inaccessible because many grain shippers are on low-density rural branch lines or secondary lines, and the Board's holding regarding cross-subsidies in PPL Montana, LLC v. Burlington Northern & Santa Fe Railway, NOR 42054 (STB served Aug. 20, 2002) and Otter Tail Power Co. v. BNSF Railway, NOR 42058, slip op. at 11-13 (STB served Jan. 27, 2006) have essentially eliminated the ability for grain shippers to use SAC rules to test the reasonableness of rates for agricultural commodities. (NGFA Opening 13-14, 21.)

Shippers propose both modifications to the existing methodologies and new processes for rate review. Regarding the existing methodologies, several shipper groups argue for changes to the Three-Benchmark methodology. ARC argues that the comparison groups in the Three-Benchmark method should include non-defendant traffic for grain and grain products shippers because limiting comparison groups to defendant traffic eliminates a significant amount of traffic with similar demand characteristics. (ARC Opening 22-23, V.S. Fauth 23.)[7] NGFA and ARC both argue that expanding the comparable traffic group to include non-defendant traffic would also address "across-the-board" pricing practices. (ARC Opening 23; NGFA Opening 15, 28, V.S. Crowley 9-11.) As NGFA notes, the inclusion of non-defendant traffic in a comparison group approach would establish a "market" rate, and thereby address, to some extent, the current practice of the Class I railroads to limit the ability of a captive shipper or a group of captive shippers to reach desired markets by setting rail rates that largely dictate where the shipper's commodity goes on that railroad's system. (NGFA Opening 28, V.S. Crowley 9-11.)

Shippers also argue that comparison groups in the Three-Benchmark methodology should include non-captive traffic, i.e., traffic priced below the 180% R/VC level.[8] (ARC Opening 23-24, V.S. Fauth 23-24; NGFA Opening 29.) According to NGFA, including movements with R/VC ratios below 180% is essential because captive agriculture commodity producers and elevators compete in the marketplace against other agriculture commodity shipments with rates both above and below the 180% R/VC threshold. (NGFA Opening 29.) Likewise, ARC argues that restricting the comparison group to traffic moving at an R/VC ratio greater than 180% significantly reduces the amount of traffic available for the comparison group because the majority of grain and grain products move at R/VC levels below 180%. (ARC Opening 23, V.S. Fauth 23-24.)

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[7] NGFA also includes non-defendant traffic in its proposed new methodology, which is discussed in more detail below.

[8] NGFA also incorporates traffic with R/VC ratios below 180% into its proposed new methodology, which is discussed in more detail below.

In addition, ARC proposes two adjustment factors that the Board could apply in rate challenges related to grain shipments. First, it proposes a Grain Cost Adjustment Factor (GCAF), which would be applied to the Board's URCS Phase III costing program for railroad movements of grain and grain products. ARC claims the GCAF would more accurately reflect the fact that these movements generally have certain lower costs than the system average costs, including switching, crew, locomotive, and car costs. (ARC Opening, V.S. Fauth 7.) ARC also proposes an export grain rate adjustment that takes into account the economic relationship between grain prices and grain exports. (ARC Opening, V.S. Fauth 30-31.)

ARC and NGFA also each propose new rate review processes. ARC sets forth a "Two-Benchmark" approach for revenue adequate railroads, which would eliminate the R/VC_{COMP} benchmark (and rely only on the RSAM and $R/VC_{>180}$ benchmarks by carrier).[9] According to ARC's witness, the R/VC_{COMP} benchmark is designed to reflect demand-based differential pricing and is inappropriate under the revenue adequacy constraint announced many years ago in Guidelines, 1 I.C.C.2d at 520. (ARC Opening, V.S. Fauth 25.) ARC, therefore, argues that the R/VC_{COMP} benchmark should have no application in assessing the rates of revenue adequate carriers because it provides a means of reflecting demand-based differential pricing principles and differential pricing should not affect rates on captive traffic to the extent those rates provide revenues above revenue adequacy levels. (ARC Opening 17-19.) Under ARC's proposed Two-Benchmark test, if grain shippers have rates which generate R/VC ratios in excess of the

[9] As indicated earlier, ARC also proposes to expand the comparison group in Three-Benchmark cases to include both non-defendant traffic and traffic moving at an R/VC ratio below 180%. (ARC Opening 20-24.)

180%, then the R/VC ratio could not exceed the RSAM level. (ARC Opening, V.S. Fauth 26.)

NGFA proposes an alternative method called the Ag Commodity Maximum Rate Methodology (ACMRM). (NGFA Opening 27-31, V.S. Crowley 6-17.) Under ACMRM, the issue traffic would be compared against all railroads (not just the defendant railroad) and movements with R/VC ratios less than 180% (although, the maximum reasonable rate produced by the analysis would be subject to the statutory 180% floor). (NGFA Opening 28-29, V.S. Crowley 9-11.) Under NGFA's proposal, the comparison group would be based on certain default factors, including a mileage band, commodity type, railcar type, railcar ownership, and movement type. (NGFA Opening, V.S. Crowley 6-7.) ACMRM also would eliminate the confidence interval adjustment and the "other relevant factors" analysis so that captive agriculture commodity rate cases could be decided quickly and at reasonable cost. (NGFA Opening 31.) The rate prescription period would be 5 years, and there would be no limits on the amount of relief that the complaining shipper or group of shippers could receive if a rate challenge is successful. (NGFA Opening 31.) ACMRM also includes a commodity-specific Revenue Adequacy Adjustment Factor, which would be used to adjust the R/VC ratio of each movement in the comparison group to account for the revenue adequacy status of each railroad. (NGFA Opening 31.)[10]

Carriers, on the other hand, argue that grain rates are not unreasonable and the Board's existing rules provide ample opportunity for grain shippers to pursue rate relief.

[10] The formula for determining the RAAF is set forth in Exhibit 5 of the verified statement of Crowley. (NGFA Opening, V.S. Crowley Exhibit 5.)

(BNSF Opening 1, 26-29; UP Opening 19-20.) Carriers cite the lack of grain rate litigation as evidence that most grain rates are reasonable or not subject to the Board's jurisdiction (R/VC ratios below 180%, contract movements, or exempt commodities). (BNSF Opening 26-29; UP Opening 20; AAR Reply 9-10; CSXT Reply 4; NSR Reply 24-25.) According to carriers, rail rates for grain are effectively constrained by competition from truck, barge, and other railroads, as well as by the competitive global market for grain sales. (BNSF Opening 17-23, 27-29; UP Opening 15-20; CSXT Reply 2-3.)

Carriers also argue that the Board has already sufficiently addressed shippers' concerns by limiting its market dominance inquiry to direct competition (i.e., not allowing product or geographic competition), creating two simplified rate reasonableness methodologies, and eliminating or increasing the relief caps for those methodologies. (AAR Opening 18-19; BNSF Opening 24-26; UP Opening 20; CSXT Reply 8.) CSXT notes that the Board also eliminated the use of movement-specific adjustments to URCS to reduce litigation costs. (CSXT Reply 6 (citing Major Issues, EP 657 (Sub-No. 1), slip op. at 59-60).) BNSF and CSXT also dispute the shippers' allegations that railroads impose uniformly high rates for certain commodities or groups of commodities. (BNSF Reply 14-15; CSXT Reply 8-9.) According to BNSF, shippers' concerns about broad, industry-wide rate increases are purely speculative and inconsistent with market realities. (BNSF Reply 14.)

Generally, carriers advocate maintaining the Board's current rate review processes and ask the Board to reject the modifications and alternatives set forth by the shipper community. (See AAR Opening 18; BNSF Opening 24-26; NSR Opening 6; UP

Opening 2.) Carriers argue that NGFA's proposal would result in a "ratcheting effect," whereby, through repeated successful rate challenges, rates charged to captive shippers could be systematically lowered to the jurisdictional floor. (BNSF Reply 21, 24-25; NSR Reply 14-15; UP Reply 23-24.) Carriers also argue that the Board should reject NGFA's proposal because the methodology is not supported by sound economics and is inherently biased for grain shippers. (CSXT Reply 2, 10; NSR Reply 13-14.) According to CSXT, NGFA's proposal would eliminate demand-based differential pricing for grain traffic, prevent the Board from determining appropriate contribution to fixed costs, and "adjust" URCS in ways that would blatantly favor grain shippers over other shippers. (CSXT Reply 10-11.) Carriers also oppose the unlimited relief available under ACMRM. (BNSF Reply 29; UP Reply 34-35.)

Carriers also find flaws in ARC's proposal. Specifically, they argue that ARC's proposal would create a disincentive for railroads to expand competitive traffic through good business practices and would result in an overall degradation of rail service, contrary to the public interest. (AAR Reply 21-22; BNSF Reply 31; UP Reply 21-22, 37.) UP further argues that ARC's proposal is inconsistent with the competitive market principles embodied in the Board's governing statute and with basic railroad economics because it disregards the railroad's need for differential pricing to recover their joint and common costs. (UP Reply 35; see also AAR Reply 16.)

The carriers also argue that modifications to the Three-Benchmark approach, such as inclusion of non-defendant or non-captive traffic in the comparison group, lack sound economic support. Railroads dispute the idea of including non-defendant traffic in comparison groups, arguing that comparisons that include traffic moving on other railroads do not accurately establish the appropriate contribution to the defendant railroad's fixed costs. (AAR Reply 17-18; BNSF Reply 27.) BNSF further argues that including all traffic in the proposed comparison group eliminates a railroad's ability to engage in differential pricing, contrary to the basic economics of the railroad industry. (BNSF Reply 23.) NSR notes that expanding the comparison group would not simplify rate reasonableness determinations, but rather would increase the cost and complexity of the Three-Benchmark approach by requiring examination and evidence based on rates and costing from other railroads. (NSR Reply 29.)

Likewise, carriers oppose the inclusion of non-captive traffic in the comparison group. According to NSR, there is no basis for comparing traffic over which the railroad is potentially market dominant to traffic over which the railroad is not market dominant by statute. (NSR Reply 17.) According to BNSF and UP, by seeking to include in the comparison group traffic with competitive alternatives, NGFA seeks to eliminate a railroad's ability to engage in differential pricing, contrary to the basic economics of the railroad industry. (BNSF Reply 23; UP Reply 24-26.) According to BNSF and UP, including movements with R/VC ratios below 180% in the comparison group will also lead to a ratcheting down of R/VC ratios until the180% R/VC ratio becomes the rate ceiling. (BNSF Reply 24-25; UP Reply 23-24.)

USDA also provided comment, arguing that a new approach is necessary and warranted, and should be explored, and that agricultural shippers require specifically designed rail rate challenge procedures. (USDA Opening 2.) USDA argues that none of the current rail rate appeals procedures are suitable for agricultural shippers because they are much too costly, complex, and time consuming, and agricultural shippers do not move large enough quantities to justify the cost of these procedures. (Id. at 6.) USDA also argues that, by the time a decision could be rendered, the routes or rates may have changed to fit new agricultural market conditions, nullifying most of the benefits from winning the case. (Id.) USDA estimates that a rate reasonableness methodology must have costs no greater than $50,000 in order to be a viable option for agriculture shippers. (Id. at 7-8.)

Based on the comments and testimony received in this proceeding, the Board is persuaded that the existing rate review processes present accessibility challenges not only for small shippers of grain, but also for small shippers of any commodity. The Board recognizes that, for small disputes, the litigation costs required to bring a case under the Board’s existing rate reasonableness methodologies, even the Board’s most simplified method, Three-Benchmark, can quickly exceed the value of the case. The Board appreciates receiving the alternative methodologies proposed by ARC and NGFA; however, we are not convinced that the alternative methodologies as proposed strike the proper balance between the Board’s statutory goals of providing captive shippers meaningful access to regulatory remedies for unreasonable rail rates, while permitting railroads to earn a reasonable return on their investments so that they will have the resources to make the investment needed to continue to serve the transportation needs of their customers.

Although the Board has concerns with the proposals set forth by ARC and NGFA, several of the ideas that parties have raised as part of these methodologies, or on how to modify the Three-Benchmark methodology, warrant further exploration. In particular, if the Board could develop a process that reduces the litigation burden on parties even more than the simplest existing rate reasonableness methodology, it could achieve the goal of creating more accessible rate review processes for small disputes where even a Three-Benchmark case would be too costly, given the value of the case. Accordingly, we are considering developing a set of procedures that could comprise a new comparison-based rate reasonableness methodology for use by shippers of all commodities in very small disputes. The Board is considering a new process that would entail the following key elements.

First, the process would include a preliminary screen that would limit its application to shippers that are more likely to be considered captive and to have rates that are outliers. Such a screen might allow for the Board to make market dominance and rate reasonableness determinations based on an abbreviated evidentiary process. Second, the process would contain a comparison-based analysis in which the Board develops an initial comparison group and then allows parties to propose modifications. By having the Board set the initial comparison group, based on pre-determined criteria, the evidentiary process could be simplified, as parties would only have to present evidence on modifications rather than creating their own comparison groups (as is currently the case in Three-Benchmark cases). Third, the process would contain other procedural modifications that help expedite and streamline the comparison-based assessment. In particular, the Board is considering ideas such as limiting discovery, establishing mandatory disclosures, limiting the length of filings, and establishing an evidentiary hearing in lieu of rebuttal evidence. Finally, because the process would only be intended for small disputes, the Board would limit the amount of relief available.

It is the Board's goal that procedures evolving from this ANPR would shorten the case timeline and reduce litigation costs, while achieving the same objectives as the existing rate methodologies and minimizing the loss of precision. The Board is guided by the concerns raised during the public comment period in Docket No. EP 665 (Sub-No. 1), namely that the Board's current rate review processes are cost-prohibitive for grain and other shippers with small disputes, and by the rail transportation policy set forth at 49 U.S.C. 10101. The Board must balance the shippers' interest in being protected from unreasonable rates, see 49 U.S.C. 10101(6), against the need to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, see 49 U.S.C. 10101(3), 49 U.S.C. 10701(d)(2). We must also consider all parties' needs for expeditious handling of proceedings, see 49 U.S.C. 10101(15).

We are seeking comment in a new docket, Docket No. EP 665 (Sub-No. 2), as we believe this methodology should be available to shippers of all commodities, not just grain, with small disputes. Many of the concerns raised about the accessibility of the Board's existing rate reasonableness procedures are general in nature. Indeed, some commenters expressly acknowledged that such concerns may be equally applicable to shippers of other commodities (see, e.g., ARC Opening 9-10 ("Many of the deficiencies in the status quo may not be unique to grain")), while others argued that limiting the availability of a methodology to a subset of shippers or commodities would be arbitrary (see, e.g., NSR Opening 6 ("nothing in the Board's governing statutes or prior considerations of rate regulation . . . suggests that the economic basis or soundness of a [rate] methodology . . . should vary based on the shipper or commodities at issue")).

Thus, we are exploring how best to develop a new methodology available to shippers of all commodities.

The Board seeks comment on whether the procedures set forth in this decision—or variations on these procedures—would provide a reasonable yet accessible methodology for use in very small rate disputes. The Board also welcomes comments on other means the Board could implement to keep the costs of a new process low.

NEW METHODOLOGY IN DOCKET NO. EP 665 (SUB-NO. 2)

I. Availability of New Methodology

Although the concerns expressed by the agricultural community in Docket No. EP 665 (Sub-No. 1) and elsewhere have been instrumental in informing the Board of the need for a new approach, we do not believe that a new methodology should be limited to small shippers of only agricultural products. Instead, as discussed above, we are exploring how best to develop a new methodology that would be available to shippers of all commodities with small disputes.

We are considering limiting this methodology, however, to disputes involving only Class I rail carriers. The Board does not envision that the new process would apply to purely local movements of a Class II or Class III carrier, which would be consistent with the Three-Benchmark methodology. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 102 (explaining limitations of methodology with respect to Class II and III carriers). However, we seek comment on whether this methodology, if adopted, should or should not be applicable to Class II and III rail carriers.

II. Comparison Group Approach

The new methodology the Board is considering would utilize a comparison group approach to determine the reasonableness of the challenged traffic's rate. Under such an approach, the issue traffic would be compared against a comparison group of similar traffic drawn from the preceding four years of data in the Board's Waybill Sample. In order to reduce litigation costs, the Board would determine an initial comparison group based on default parameters established in a rulemaking, rather than having parties develop and tender a proposed comparison group, as is done in Three-Benchmark cases. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 18. As discussed in more detail below, both the complainant and the defendant would have the opportunity to present arguments regarding the appropriateness of the initial comparison group determined by the Board and propose modifications to the group. After considering the arguments proposed by the parties, the Board would determine which movements would comprise the final, adjusted comparison group, which the Board would use in its rate reasonableness analysis.

The Board is considering the following default parameters for selecting the initial comparison group and seeks comment on each.

Traffic at or Above 180% R/VC. The Board is considering including other potentially captive traffic, i.e., traffic priced at or above the 180% R/VC level, in the comparison group, but not traffic priced below the 180% R/VC level. Excluding traffic with an R/VC level below 180% would be consistent with the Board's explanation that only captive traffic over which the carrier has market power should be included in the comparison group in the Three-Benchmark methodology. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 17 (“[t]he purpose of the R/VC_{COMP} benchmark is to use the R/VC ratios of other ‘potentially captive traffic’ (i.e., traffic priced above the 180% R/VC level) as evidence of the reasonable R/VC levels for traffic of that sort. . . . The rates available to traffic with competitive alternatives would provide little evidence on the degree of permissible demand-based differential pricing needed to provide a reasonable return on the investment.”). Although the shipper community presented arguments in favor of including traffic below 180% R/VC in comparison groups, the Board is concerned that including shipments below 180% R/VC may be contrary to the principle of demand-based differential pricing. The Board invites comment on the advisability of including or excluding non-captive traffic in comparison groups.

Traffic With Similar Shipping Characteristics. The comparison group would also include traffic that shares similar shipping characteristics as the issue traffic, as rail rates typically depend, at least in part, on the length of haul, shipment type, and the type of commodity being shipped. The Board, therefore, is considering limiting comparable movements to those movements that satisfy all of the following criteria:

a) the movement is within a +/- 15% mileage band around the actual miles travelled by the challenged traffic,
b) the movement is of the same shipment type (e.g., unit train traffic or non-unit train traffic), and
c) the movement is of a commodity classified under the same Standard Transportation Commodity Code (STCC).

With respect to the last of these parameters, the Board believes that the most appropriate method of determining which commodities should be used in the comparison group is to use the same five-digit STCC as the issue traffic. Commodities listed at the five-digit STCC generally should be similar enough in characteristics for inclusion in the comparison group. However, certain other commodities differ at an even more granular level, such as chemicals (i.e., any commodity with a STCC starting with 28), and therefore may best be limited to comparisons to the seven-digit STCC. Chemicals are highly varied at the five-digit STCC designation and therefore may require a finer degree of distinction when selecting the initial comparison group.

The Board invites comment on these comparison group procedures, and also on which commodities would be appropriately compared at the seven-digit STCC. The Board also invites comment on whether the Board should consider expanding the comparison of commodities beyond the five- or seven-digit STCC level in the event that this parameter would result in the initial comparison group containing insufficient observations. In order for any study to be statistically valid, the study sample must contain a minimum number of observations, and that minimum number varies depending on the type and complexity of the analysis to be undertaken. For the purposes of comparison-based rate reasonableness analyses, the Board is concerned that fewer than 20 observations would be insufficient. See e.g., E.I. du Pont de Nemours & Co. v. CSX Transp., Inc., NOR 42101, slip op. at 13 (STB served June 30, 2008) (deciding a Three-Benchmark rate case where the comparison group included 23 observations and the sample size was uncontested). Therefore, the Board seeks comments on whether the Board should, in instances where there are insufficient observations, relax the default STCC limitation to the next most specific STCC level that yields sufficient observations for the comparison group. For example, if a comparison group based on a seven-digit

STCC code contains too few observations, we could examine the corresponding five-digit STCC, then the four-digit STCC, and so on, until the comparison group includes greater than 20 observations.

The Board invites comments on this possible approach of broadening the STCC limitation in this manner and on whether a 20-observation minimum would be an appropriate requirement.

Contract and Tariff Traffic. The comparison group would include contract and tariff traffic from the defendant carrier, excluding the issue traffic. As the Board noted in Simplified Standards, EP 646 (Sub-No. 1), slip op. at 83, excluding contract movements from the comparison group may leave insufficient movements from the Waybill Sample to perform a statistically meaningful comparison analysis. The Board is considering applying a common carrier adjustment to the comparison group to account for the contract traffic similar to the one applied in U.S. Magnesium, L.L.C. v. Union Pacific Railroad, NOR 42114, slip op. at 18-19 (STB served Jan. 28, 2010), aff'd sub nom. Union Pacific Railroad v. STB, 628 F.3d 597 (D.C. Cir. 2010). The Board invites comment on the inclusion of contract traffic and a common carrier adjustment. Additionally, the Board invites parties to propose alternative means of calculating a common carrier adjustment.

Non-Defendant Carrier Traffic. The Board seeks comment on whether to expand the comparison group in this new methodology to include traffic from non-defendant carriers[11] operating in the same URCS region[12] as the defendant carrier. The Board has, in the past, acknowledged that varying joint and common costs can lead to inevitable differences in R/VC ratios among different carriers. See Simplified Standards, EP 646 (Sub-No. 1), slip op. at 82-83. We are mindful of the concerns raised by the railroads, and previously acknowledged by the Board, about comparing R/VC ratios across carriers. However, shippers have also raised arguments as to why the Board should include non-defendant traffic. (See, e.g., NGFA Opening 28-29; ARC Opening 23.) Notwithstanding the Board's previously stated concerns and the concerns raised by the railroads, the Board seeks comment on whether it should reconsider this issue. Additionally, the Board is considering whether, for the purposes of a new methodology, it may be appropriate to include non-defendant traffic in the comparison group to ensure that the Board can perform a statistically meaningful comparison analysis. Including non-defendant movements could help ensure that the initial comparison group includes sufficient movements from the Waybill Sample on which the Board can base its rate reasonableness determination.[13]

The Board notes, however, that, including non-defendant traffic in the comparison group likely would necessitate third-party discovery (as to whether cost structure differences between carriers make certain movements inappropriate for the comparison

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[11] Because the Board is considering a new rate review process for use against Class I carriers, the comparison group would likewise include only rates charged by other non-defendant Class I carriers.

[12] In calculating regional data, URCS defines each of the reporting Class I carriers as being either in the Eastern Region or Western Region. The Eastern Region includes CN, CSXT, and NSR. The Western Region includes BNSF, CP, KCS, and UP.

[13] The Board intends to propose modifications to the Waybill sampling rate in a subsequent decision, which would also help ensure sufficient observations.

group) and would affect whether parties would be required to hire outside counsel to manage the receipt of confidential Waybill Sample data from other carriers. See 49 CFR 1244.9. We recognize that these issues would add a layer of complexity to the process, potentially increasing the time and expense required to bring a case.[14] We seek comment on the advisability of including non-defendant traffic in all or limited circumstances under this simplified methodology, and how such inclusion would affect the time and costs to bring a case.

III. Procedural Considerations

The Board recognizes that it is essential that any procedures comprising a new rate reasonableness methodology be both more streamlined and less costly than the Board's existing rate review processes. As a result, the Board is considering the procedures set forth below with the goal of achieving a shortened procedural schedule and including measures addressing concerns that the existing procedures for challenging a rate are cost-prohibitive.

1. Preliminary Screen

Given the abbreviated evidentiary presentation in a simplified, lower-cost process, the Board is considering requiring that challenged traffic meet certain threshold criteria in order to be eligible to be reviewed under the new methodology. This preliminary screen would seek to identify those movements for which truck transportation alternatives are unlikely and the rates are significant outliers, allowing the Board to make market dominance and rate reasonableness determinations based on the abbreviated evidentiary

[14] The necessity for third-party discovery, and what that might entail, is discussed in more detail in section III(2), Limits on Discovery, below.

submissions described below. The issue traffic would, of course, have to be priced above the 180% R/VC level, which is the statutory floor for regulatory rail rate intervention. See 49 U.S.C. 10707(d).

Additionally, the Board is considering the following criteria for the issue traffic as a preliminary screen and seeks comment on each of the following potential criteria.

Issue Traffic Length of Haul. The origin and destination of the issue traffic would be required to be located a certain minimum distance apart. As noted in Review of Commodity, Boxcar, and TOFC/COFC Exemptions, EP 704 (Sub-No. 1), slip op. at 7 n.12 (STB served Mar. 23, 2016) (with Commissioner Begeman dissenting), trucking becomes less viable when the length of haul exceeds 500 miles because in many instances a transport over that threshold cannot be completed in one day. Thus, it may be appropriate to require that the origin and destination be more than 500 highway miles apart. Traffic moving fewer than 500 highway miles between origin and destination would not be eligible to be challenged under the new methodology because trucking alternatives for those movements are more likely. Such a criterion could allow the Board to consider making market dominance determinations on an abbreviated evidentiary presentation.

Issue Traffic Revenue Per Ton Mile. As noted, part of the preliminary screen would be to determine if rates are significant outliers. The Board is considering using revenue per ton mile to make this determination. Specifically, the Board could require the revenue per ton mile of the challenged traffic to be in the top 10% or 20% of the initial, Board-determined comparison group. Another possibility would be to require the issue traffic to be at least one standard deviation above the mean revenue per ton mile of the comparison group.[15] Analyzing how a movement's revenue per ton mile compares to the revenue per ton mile earned on similar movements would help identify movements with outlier rates. The Board would complete this revenue per ton mile analysis following the receipt of the defendant's answer, in which the defendant would provide the actual miles traveled by the challenged traffic. The Board invites parties to comment on these or other measures that would achieve the same objective of identifying movements in which rates are significant outliers.

Prior Litigation. Lastly, the Board is considering a requirement that the complainant must not have brought a case against the defendant under this methodology within a certain number of years. This limitation could correspond to the maximum rate prescription available under the new process, which is discussed in more detail in the section related to limits on relief below. By including this limitation, the Board intends to prevent attempts to divide a large dispute into multiple smaller disputes.

2. Limits on Discovery

The Board also is considering limiting discovery in order to reduce litigation costs for very small disputes. In particular, the Board could require that parties file certain initial disclosures with their complaint and answer. Concurrent with the filing of its complaint, the complainant could be required to disclose the nine standard inputs for the

[15] A standard deviation is defined as a measure of spread, dispersion, or variability of a group of numbers equal to the square root of the variance of that group of numbers. The variance of the group of numbers is computed by subtracting the mean, or average, of all the numbers, squaring the resulting difference, and computing the mean of these squared differences.

URCS Phase III costing program.[16] The complainant could also be required to provide a preliminary estimate of the variable cost of the challenged movements, using the unadjusted figures produced by the URCS Phase III costing program on the Board's website,[17] to demonstrate that the Board's jurisdictional threshold has been met. The complainant could also be required to provide to the Board and the defendant all documents that it relied upon to determine the inputs to the URCS Phase III costing program. The Board invites parties to comment on whether the URCS Phase III costing program should be used as described, or whether the availability of this new process would be improved by some alternative, such as by creating a paper form for submitting URCS Phase III inputs to the Board.

With regard to qualitative market dominance, the complainant could also be required to make certain required disclosures. For example, in a verified statement by a company official, the complainant could be required to submit: (i) a statement that the issue traffic has not moved more than a de minimis amount on alternative transportation modes between the same origin and destination within a certain number of years, and (ii) a statement whether the complainant has made any inquiries to, or received any responses

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[16] The nine inputs include: (1) the carrier; (2) the type of shipment (local, received-terminated, etc.); (3) the one-way distance of the shipment; (4) the type of car; (5) the number of cars; (6) the car ownership (private or railroad); (7) commodity type (by STCC); (8) the weight of the shipment (in tons per car); and (9) the type of movement (single-car, multi-car, or unit train). In the event that a complainant does not have access to the actual miles of the length of haul, a showing of highway miles between the origin and destination pair would be sufficient for the purposes of the complainant's initial disclosures.

[17] The current version of the URCS Phase III costing program is available at http://www.stb.dot.gov/stb/industry/urcs.html.

from, alternative transportation providers for the issue traffic within a certain number of years, including copies of any such communications (if available).

The defendant could likewise be required to provide initial disclosures to the complainant concurrent with filing its answer. Like the complainant, the defendant could be required to produce its preliminary estimate of the variable cost of the challenged movement, using the unadjusted figures produced by the URCS Phase III costing program. To the extent that the defendant disagreed with any of the URCS inputs provided in the complaint, it could also be required to provide the inputs that it used. The defendant could also be required to provide to the Board and the complainant all documents that it relied upon to determine the inputs used in the URCS Phase III costing program. Finally, the defendant could be required to disclose the actual route miles for the issue traffic and provide supporting data to the Board and, upon request, to the complainant.

Another limit on discovery could be to limit the amount or type of party-initiated discovery or eliminating such discovery altogether, given that the need for such information would be significantly reduced by the simplifications discussed here. For example, the fact that the initial comparison group would be set by the Board (based on defined criteria) and not the parties would eliminate one need for the parties to seek discovery. In terms of limiting discovery, in preparing its answer, the defendant could reply with information that is either disclosed by the complainant in its complaint or opening evidence, or developed independently by the defendant, but the defendant would not be permitted to seek additional discovery from the complainant. Likewise, the complainant would not be permitted to serve any discovery on the defendant in preparation of its evidentiary submissions.

Additionally, as noted above, if the Board were to include non-defendant traffic in the comparison group, the Board is concerned that it would be required to permit discovery from the non-defendant carriers whose traffic is included in the comparison group. In that case, the Board could consider limits, such as five interrogatories (including subparts) and five document requests (including subparts) per party for each non-defendant carrier, and could require that such discovery be completed by a specific number of days. Such third-party discovery would occur prior to the submission of each party's evidence.

We therefore seek comment on whether to mandate certain initial disclosures and, if so, what those disclosures should be, and any other ways to limit or eliminate party-initiated discovery in a new, streamlined comparison group methodology for small disputes.

3. Submission of Evidence

The Board seeks comment on the following procedures it is considering for use in a new simplified rate reasonableness methodology.

Complaint. A party would initiate a case by filing a complaint with the Board. In its complaint, the complainant would be required to: (i) allege that the rates for certain traffic are unreasonable, (ii) allege that the defendant has both quantitative market dominance (i.e., the issue traffic must move at rates above 180% R/VC) and qualitative market dominance (i.e., other modes of transportation are not feasible); and (iii) submit the required initial disclosures, as described above in the section on limits on discovery.

The complaint and initial disclosures would include information sufficient for the Board to determine that the issue traffic meets a preliminary screen, discussed in more detail above. Additionally, with its complaint, the complainant would submit a signed confidentiality agreement. The agreement would be standardized specifically for cases brought under the new process and available for download on the Board's website. By asking parties to submit the confidentiality agreement early in the process, the Board could expedite the distribution of the comparison group. The Board invites comment on the appropriate content or other issues related to the filing of the complaint.

Answer. In its answer, the defendant would be required to admit or deny each of the allegations in the complaint and submit its initial disclosures, described above. The defendant would also file with its answer a signed copy of the standardized confidentiality agreement. The Board invites comment on the appropriate content or other issues related to the filing of the answer.

Opening Evidence. Unlike in Three-Benchmark cases, the Board envisions sequential rather than simultaneous filings of each party's evidence. In its opening evidence, the complainant would address both qualitative market dominance[18] and the appropriateness of the initial comparison group. With respect to qualitative market dominance, given the information derived from the preliminary screen and the initial disclosure requirements, the complainant would be permitted to present an abbreviated evidentiary submission, but must explain why the use of other transportation modes is not

[18] Under the procedures envisioned, quantitative market dominance would be decided by the Board prior to the filing of opening evidence based on the information provided in the complaint and answer.

feasible. The complainant could also expand on its initial disclosures to the extent necessary.

In its opening evidence, the complainant would also have the opportunity to state whether the initial, Board-determined comparison group is appropriate. The complainant may propose adjustments to the default initial comparison group and present "other relevant factors" evidence, such as a density adjustment or PTC adjustment, among others.

Reply Evidence. The defendant's reply would likewise address both qualitative market dominance and the appropriateness of the default initial comparison group. Specifically, in its reply evidence, the defendant would have the opportunity to reply to the complainant's qualitative market dominance evidence. As noted above, we are considering limits on discovery as it relates to qualitative market dominance. For example, in formulating its response to the complainant's qualitative market dominance evidence, the defendant could be limited to information disclosed by the complainant with its complaint or opening evidence or developed independently by the defendant.

The defendant would also have the opportunity to respond to the complainant's arguments regarding the appropriateness of any proposed adjustments to the default initial comparison group. The defendant could also propose its own adjustments to the default initial comparison group and set forth "other relevant factors" evidence.

Limitations on Opening and Reply Evidence. In order to minimize the time and expense associated with litigating a small rate dispute, the Board is considering placing limitations on the opening and reply evidence, such as imposing word or page limits on the complainant's opening evidence and the defendant's reply evidence. The Board seeks comment on whether to include a word or page limitation and if so, what the appropriate limitation would be.

We recognize that, even with a word limit and limits on or exclusion of discovery, allowing parties' presentations to include "other relevant factors" evidence could substantially increase the cost and time required to prepare for submission of a case. For instance, we do not expect that the examples noted above—a density adjustment or PTC adjustment—could be easily calculated by a small entity without hiring outside consultants. Therefore, the Board invites comment on the advisability of allowing parties' presentations to include "other relevant factors" evidence. The Board also invites parties to comment on the appropriateness of sequential as opposed to simultaneous filings of each party's evidence, a reasonable time-frame for considering qualitative market dominance arguments, a reasonable word or page limit for opening and reply evidence, and any other issues related to the filing of opening and reply evidence.

Evidentiary Hearing. In an effort to make the new process cost-effective for small disputes, the Board is considering offering an evidentiary hearing following the submission of opening and reply evidence, in lieu of formal rebuttal filings and final briefs. The evidentiary hearing, which would take place before Board staff, would permit the Board to further examine and develop the evidentiary record without requiring the parties to take on the higher litigation costs associated with formal written submissions. At the evidentiary hearing, the complainant would have the opportunity to rebut the defendant's reply and respond to Board staff's questions. The defendant would also participate in the hearing and could respond to any questions from Board staff. Board staff would have the opportunity to further explore the parties' arguments regarding the appropriateness of the comparison group. A court reporter would be present, and the transcript would become part of the record. The evidentiary hearing could also take place by conference call. We invite parties to comment on whether an evidentiary hearing in lieu of rebuttal filings and final briefs would help minimize the time or expense associated with litigating a case under a new rate methodology for small disputes.

4. Board Determinations

Under the procedures being considered as described in this decision, the Board would issue two decisions. First, following receipt of the defendant's answer, the Board would issue a preliminary decision in which the Board would (i) resolve any URCS Phase III input disputes, (ii) determine whether the challenged traffic meets the preliminary screen based on the initial comparison group, and (iii) make a final determination on whether the defendant carrier has quantitative market dominance over the movements at issue. In the event that the issue traffic fails to meet the preliminary screen based on the initial comparison group, the Board would dismiss the complaint without prejudice. For challenged traffic that satisfies the preliminary screen, the Board would provide the initial comparison group data pursuant to the standardized confidentiality agreements previously filed by the parties.

Second, following the evidentiary hearing, the Board would issue a final decision addressing qualitative market dominance and rate reasonableness. With regard to qualitative market dominance, the Board expects that its qualitative market dominance analysis could be far more limited than in other rate reasonableness methodologies given the preliminary screen and initial disclosure requirements. In particular, because the screen would help identify movements that are more likely to be captive, the Board envisions determining qualitative market dominance without as extensive an analysis as under the current methodologies. The Board seeks comments on specific qualitative market dominance factors it could consider for this type of new rate reasonableness methodology.

If the Board finds that the defendant carrier has qualitative market dominance over the challenged traffic, the Board would address each of the parties' arguments regarding the appropriateness of the initial comparison group and adjustments thereto. If the comparison group is adjusted, the Board would reevaluate the challenged traffic to ensure that it continues to satisfy the preliminary screen based on the adjusted comparison group. In the event that the issue traffic fails to meet the preliminary screen based on the adjusted comparison group, the Board would dismiss the proceeding with prejudice to the complainant challenging the same movement under the new method for a certain period, but without prejudice to the complainant challenging the same movement under one of the Board's other rate review processes.

For the rate reasonableness determination, the Board would compute the maximum R/VC ratio for the issue traffic in a manner similar to the Three-Benchmark analysis, although with a potential modification. Specifically, the Board would apply a revenue need adjustment—which is the ratio of RSAM ÷ $R/VC_{>180}$ (each of which is a four-year average calculation)[19]—to each movement in the final comparison group. The Board would then calculate the mean and standard deviation of the R/VC ratios for the

[19] The jurisdictional threshold for rail rate regulation, $R/VC_{>180,}$ also serves as the floor for regulatory relief because the Board cannot prescribe a rate below the jurisdictional threshold. See 49 U.S.C. 10707(d); W. Tex. Utils. Co. v. Burlington N. R.R., 1 S.T.B. 638, 677-78 (1996), aff'd sub nom., Burlington N. R.R. v. STB, 114 F.3d 206, 210 (D.C. Cir. 1997).

adjusted comparison group (weighted in accordance with the proper sampling factors). If the challenged rate is above a reasonable confidence interval around the estimate of the mean for the adjusted comparison group, it would be determined unreasonable and the maximum lawful rate would be prescribed at that upper boundary level.[20]

However, the Board is considering departing from Three-Benchmark precedent with respect to the revenue need adjustment. As noted, in a Three-Benchmark case, each movement in the final comparison group is adjusted by a revenue need adjustment factor. During the public comment period in Docket No. EP 665 (Sub-No. 1), NGFA proposed the creation of an alternative revenue need adjustment factor—a Revenue Adequacy Adjustment Factor (RAAF), which would be commodity-specific and would account for the revenue adequacy status of each railroad. NGFA argues that the RAAF is superior to the Board's current revenue need adjustment factor because it takes into consideration the amount of issue commodity traffic that is ostensibly captive to the railroad and allocates the burden of a revenue need adjustment factor to those commodities that provide the most revenue. (NGFA Opening, V.S. Crowley 12.) There may be merit to NGFA's suggestion that our current revenue need adjustment factor could be adapted to reflect the

[20] The confidence interval would be a function of the number of movements in the comparison group and the standard deviation of those (potentially adjusted) R/VC ratios. A small standard deviation or large number of observations would produce a tighter confidence interval, so that we could have more "confidence" in the accuracy of our estimate of the mean of the comparison group. Using the mean (R/VC_{COMP}) and standard deviation (S) of the adjusted comparison group, along with the number of movements in the comparison group (n), the upper boundary of a reasonable confidence interval around the estimate of the mean would be derived as follows: Upper Boundary = $R/VC_{COMP} + t_{n-1} \times (S \div (n-1)^{½})$. The Student's t-distribution parameter, t_{n-1}, will range from 3.078 to 1.28 depending on the number of movements in the comparison group. The precise number can be found in statistical tables for the Student's t-distributions.

differences in rates and revenues carriers obtain from various commodity groups. Thus, the Board is considering whether it could make the revenue need adjustment factor commodity specific. However, if the Board were to adopt a commodity specific revenue need adjustment factor, we must ensure that we establish the most appropriate formula.

Therefore, we seek comment on whether the Board should modify its revenue need adjustment factor to be commodity-specific, and if so, how we can effectively disaggregate the existing RSAM on a commodity-by-commodity basis. Because some commodities have a higher R/VC ratio than others, the adjusted revenue need adjustment factor should allocate the revenue shortfall in ways that reflect the different demand elasticities faced by different commodities. However, the weighted average of all commodities when totaled should equal the overall RSAM.

We believe that, on average, differences in demand elasticities are reflected in R/VC ratios—those with higher R/VC ratios tend to enjoy less direct and indirect competition while those with lower R/VC ratios tend to enjoy somewhat more competition. In an individual proceeding, we would consider applying a commodity-specific RSAM where the resulting figure reflects this intuition. We believe such a mark-up could be done in a manner consistent with Ramsey pricing principles.[21] If the Board

[21] Ramsey pricing refers to the pricing principals first advocated by the British mathematician and economist Frank P. Ramsey, whose economic pricing model was published in A Contribution to the Theory of Taxation, 37 Econ. J. 47-61 (Mar. 1927). "Ramsey pricing" is a widely recognized method of differential pricing—that is, pricing in accordance with demand. Under Ramsey pricing, each price or rate contains a mark-up above the long-run marginal cost of the product or service to cover a portion of the unattributable costs. The unattributable costs are allocated among the purchasers or users in inverse relation to their demand elasticity. Thus, in a market where shippers are very sensitive to price changes (a highly elastic market), the mark-up would be smaller than in
(continued . . .)

were to adopt such a modified revenue need adjustment factor, we also seek comment on whether the reliance on a single year's data would be inappropriate. Because profits are pro-cyclical, we believe an approach that considers a longer period of time may be more appropriate. Finally, we also seek comment on whether application of a modified revenue need adjustment factor, if adopted, should be limited to a new methodology.

5. Limits on Relief

Because of the abbreviated nature of the process described in this decision, the Board is considering limiting relief available under this process. The ideas presented in the ANPR describe a process that would be significantly more streamlined than the process required to bring a Three-Benchmark case. As such, the relief available under this method would likewise need to be significantly less than the relief available under the Three-Benchmark approach. The Board invites parties to comment on the amount of relief that should be available and why that amount of relief would be appropriate.

The limit on relief would apply to the difference between the challenged rate and the maximum lawful rate, whether in the form of reparations, a rate prescription, or a combination of the two. Any rate prescription would automatically terminate once the

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(. . . continued)
a market where shippers are less price sensitive. The sum of the mark-ups equals the unattributable costs of an efficient producer. See Guidelines, 1 I.C.C.2d at 526-527.

While Ramsey pricing represents the most efficient way to price above marginal cost, reliance on pure Ramsey pricing clashes with the Long-Cannon factors because it would not maximize the revenue contribution from traffic with more-elastic demand (competitive traffic) before calling on traffic with less-elastic demand (captive traffic) to make a differentially higher revenue contribution. For these reasons, the Board has not adopted pure Ramsey pricing theory. Rather, in SAC cases, the Board allocates stand-alone costs *in accordance with* Ramsey pricing principles, by which the SARR (and therefore the carrier) is permitted to engage in demand-based differential pricing to recover the total SAC costs. Major Issues, EP 657 (Sub-No. 1), slip op. at 12-13.

complainant has exhausted the relief available. Thus, the actual length of the prescription may be less than the prescription period if the shipper ships a large enough volume of traffic so that the relief is used up in a shorter time. The complainant would be barred from bringing another complaint against the same rate for the remainder of the prescription period.

Where the shipper exhausts all of its relief before the end of the prescription period, the carrier's rate making freedom would be restored with a regulatory safe harbor at the challenged rate for the remainder of the prescription period, with appropriate adjustments for inflation using the rail cost adjustment factor, adjusted for inflation and productivity (RCAF-A). See R.R. Cost Recovery Procedures—Productivity Adjustment, 5 I.C.C.2d 434 (1989), aff'd sub nom. Edison Elec. Inst. v. ICC, 969 F.2d 1221 (D.C. Cir. 1992). If, however, a carrier establishes a new common carrier rate once the rate prescription expires, and the new rate exceeds the inflation-adjusted challenged rate, the shipper may bring a new complaint against the newly established common carrier rate.

THE REGULATORY FLEXIBILITY ACT

Because this ANPR does not impose or propose any requirements, and instead seeks comments and suggestions for the Board to consider in possibly developing a subsequent proposed rule, the requirements of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612 (RFA) do not apply to this action. Nevertheless, as part of any comments submitted in response to this ANPR, parties may include comments or information that could help the Board assess the potential impact of a subsequent regulatory action on small entities pursuant to the RFA.

CONCLUSION

The Board seeks public input on how best to establish a new rate reasonableness process for use in small disputes, available to shippers of all commodities, to provide shippers with small disputes meaningful access to regulatory relief in those cases where even a Three-Benchmark case is too costly, given the value of the case. The Board welcomes comments from interested parties on the issues and considerations presented in this decision.

It is ordered:

1. Comments are due by November 14, 2016. Reply comments are due by December 19, 2016.

2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

3. Notice of this decision will be published in the Federal Register.

4. This decision is effective on its service date.

Decided: August 30, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller commented with a separate expression.

Kenyatta Clay,

Clearance Clerk.

VICE CHAIRMAN MILLER, commenting:

Today's decision is an important step forward for the Board. Despite the agency's well-intentioned efforts over the years to create simpler, timelier, and less costly rate dispute processes, I believe that they are still inaccessible to shippers with small disputes, denying them the opportunity to obtain rate relief. This decision focuses on filling that gap in our processes.

While I applaud the Board for today's action, we still have work to do. Even if the Board is able to develop an abbreviated rate case methodology that can be used by shippers with small rate disputes, it will not resolve the concerns that have been raised about the SAC test. The methodology here is only intended to address small rate disputes for shippers that meet certain criteria. As such, the Board still needs to consider alternatives to the SAC test for shippers with larger disputes. A reasonable starting point to address this issue would be for the Board to publicly release the report prepared by our outside consultant on SAC alternatives and conduct a hearing to obtain feedback and reaction from our stakeholders on the report's conclusions.[22] Hopefully the report will be issued soon and stakeholders given an opportunity to comment.

Note: The following appendix will not appear in the Code of Federal Regulations.

APPENDIX A—PARTICIPANTS IN DOCKET NO. EP 665 (SUB-NO. 1)

The Board received written comment and testimony from the following parties in Docket No. EP 665 (Sub-No. 1).

Opening comments were received from:

- Alliance for Rail Competition (ARC) (joined by Montana Wheat and Barley Committee, National Farmers Union, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Grain Producers Association, Idaho Wheat

[22] Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry., NOR 42130, slip op. 44 (STB served June 30, 2016) (Miller concurrence).

Commission, Montana Farmers Union, North Dakota Corn Growers Association, North Dakota Farmers Union, South Dakota Corn Growers Association, South Dakota Farmers Union, Minnesota Corn Growers Association, Minnesota Farmers Union, Wisconsin Farmers Union, Nebraska Wheat Board, Oklahoma Wheat Commission, Oregon Wheat Commission, South Dakota Wheat Commission, Texas Wheat Producers Board, Washington Grain Commission, Wyoming Wheat Marketing Commission, USA Dry Pea and Lentil Council, and National Corn Growers Association)

- Association of American Railroads (AAR)
- BNSF Railway Company (BNSF)
- CSX Transportation, Inc. (CSXT)
- National Grain and Feed Association (NGFA)
- Norfolk Southern Railway Company (NSR)
- Union Pacific Railroad Company (UP)
- U.S. Department of Agriculture (USDA)

Reply comments were received from:

- AAR
- Agribusiness Association of Iowa, Agribusiness Council of Indiana, Agricultural Retailers Association, American Bakers Association, American Farm Bureau Federation, American Feed Industry Association, American Soybean Association, California Grain and Feed Association, Corn Refiners Association, Institute of Shortening and Edible Oils, Kansas Cooperative Council, Kansas Grain and Feed Association, Grain and Feed Association of Illinois, Michigan Agribusiness

Association, Michigan Bean Shippers Association, Minnesota Grain And Feed Association, Missouri Agribusiness Association, Montana Grain Elevators Association, National Council of Farmer Cooperatives, National Farmers Union, National Oilseed Processors Association, Nebraska Grain and Feed Association, North American Millers' Association, North Dakota Grain Dealers Association, Northeast Agribusiness and Feed Alliance, Ohio Agribusiness Association, Oklahoma Grain and Feed Association, Pacific Northwest Grain and Feed Association, Pet Food Institute, South Dakota Grain and Feed Association, Texas Grain and Feed Association, USA Rice Federation, and Wisconsin Agribusiness Association (collectively, AAI)

- ARC (joined by the same parties that joined its opening comment as well as the Nebraska Corn Growers Association)
- BNSF
- CSXT
- Kansas City Southern Railway Company (KCS)
- NGFA
- NSR
- Jay L. Schollmeyer for and on behalf of SMART-TD General Committee of Adjustment (SMART-TD)
- Texas Trading and Transportation Services, LLC, dba TTMS Group, together with Montana Grain Growers Association (TTMS Group)
- UP
- USDA

Testimony at the June 10, 2015 hearing was received from:

- AAR
- ARC
- BNSF
- Canadian National Railway Company (CN)
- Canadian Pacific Railway Company (CP)
- CSXT
- Michigan Agri-Business Association[23]
- Montana Department of Agriculture
- NGFA
- NSR
- SMART-TD
- Transportation Research Board of the National Academy of Sciences
- TTMS Group
- UP
- USDA

Supplemental comments were received from:

- AAR
- ARC (joined by the same parties that joined its opening comment)
- NSR

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[23] Written testimony only.

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