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FREIGHT RAIL REFORM: IMPLEMENTATION OF THE SURFACE TRANSPORTATION BOARD REAUTHORIZATION ACT OF 2015

FIELD HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

AUGUST 11, 2016

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ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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FREIGHT RAIL REFORM: IMPLEMENTATION OF THE SURFACE TRANSPORTATION BOARD REAUTHORIZATION ACT OF 2015

THURSDAY, AUGUST 11, 2016

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Sioux Falls, SD.

The Committee met, pursuant to notice, at 1:30 p.m. in Carnegie Town Hall, 235 West 10th Street, Hon. John Thune, Chairman of the Committee, presiding.

Present: Senator Thune [presiding].

OPENING STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

The CHAIRMAN. Good afternoon. I know it's not customary for any kind of congressional event to start early, but we actually have everybody here. So I'm going to call this hearing of the Commerce, Science, and Transportation Committee to order. Welcome, everybody. Thank you for being here.

From the farmers who help put food on our tables to the energy suppliers who help power our homes and fuel our cars, businesses and households in South Dakota and across the Nation depend on efficient and reliable freight rail. About 40 percent of our Nation's freight ton-miles moves by rail, including about 15 million tons that originate in South Dakota each year. In fact, about three times as many rail cars originate in South Dakota as terminate here in South Dakota, meaning that South Dakotans are disproportionately dependent on rail to get our products to market, to create jobs, and to grow incomes.

That's why it's so important that when problems arise in our Nation's rail system, we have efficient and effective oversight. Despite concerns from businesses about the burdensome processes at the Surface Transportation Board, or STB, which is the Federal Government agency responsible for overseeing the efficiency of our freight rail network, Congress had not reformed or reauthorized the agency since its creation in 1996.

Needless to say, Congress did not get it right on the first try. The Surface Transportation Board did not have the authority to proactively investigate issues of regional or national significance, hindering its ability to examine emerging issues. In addition, rate disputes before the Board have taken more than $5 million and more than three years to get resolved, and changes to rate reviews had not yielded sufficient results. And because the STB had three

members, and two members could form a quorum, members could not talk to one another about important regulatory and managerial issues without encountering procedural hurdles.

This committee took action to address those issues. Last year, following intensive oversight activity, I introduced the Surface Transportation Board Reauthorization Act of 2015 to make the STB a more efficient and effective agency. After working on a bipartisan basis with co-sponsor and Ranking Member Bill Nelson and working with my colleagues in the House of Representatives, I was pleased to see it signed into law by the President last December.

This hearing marks about 8 months since the enactment of my legislation, and it is an opportunity to examine completed and ongoing implementation work at the STB and hear about ways to maximize the law's benefits for the businesses that depend on rail. These benefits can be thought of, really, in three categories.

First, the law improves the way rate cases are handled. It expedites rate review timelines, and it expands voluntary arbitration to better serve as an alternative to lawsuits. The Board has already set those new timelines, and it has issued a proposal to implement the new arbitration procedures, which I expect to be finalized well ahead of the end-of-the-year deadline. The law also requires the STB to look at simpler ways to do rate reviews, and I understand this important study and work is ongoing. I encourage the Board to expansively survey possible alternatives to identify rate review options that make economic sense, particularly for small businesses.

Second, the law increases proactive problem solving and accountability. It provides the STB with the authority to launch investigations based on its own initiative, and the Board has published a proposed rule to implement this authority. It also requires the STB to submit quarterly reports on complaints and unfinished regulatory proceedings, and the Board has sent two versions of these quarterly reports already that have greatly increased transparency and enhanced congressional and public oversight of its work.

Third, the law creates a more functional and collaborative Board. It expands the Board from three to five members. I am hopeful that the next president will quickly nominate, and the Senate quickly confirm, these additional members. The bill also allows Board members to talk to one another about important policy issues. The Board has already used this new authority to hold group discussions, and I am eager to see further increased collaboration on regulatory proceedings and agency management between the Board and its members. The law also grants the Board administrative independence and authorizes the agency for the first time since its creation.

While many of the most important provisions of the law are still in progress, thus far the Board has met or is on track to meet each deadline in the legislation, a feat most other Federal agencies regularly fail to do, and I greatly appreciate their efforts. This activity comes as the Board makes progress on several other important regulatory proceedings, including a rule to make permanent certain rail performance metrics, with fertilizer included. I hope the Board will continue the good progress that they've made since enactment

of the legislation, and I expect this committee to continue its active oversight to maximize the benefits of the law.

This legislation is another example of the Senate getting back to work for the American people. That work includes the 5-year, $305 billion highway bill, FAA reauthorization and aviation security bill, and the pipeline safety bill as significant committee achievements within the past year to improve our Nation's transportation and infrastructure. All of those bills were signed into law by the President in the last 18 months.

With that said, I am eager to hear the perspectives of our first distinguished panel. I want to welcome today Mr. Skuodas, who is Vice President for Distribution and Business Development at POET, a South Dakota company and one of the Nation's leading biorefineries; Mr. Troy Knecht, who is Vice President of the South Dakota Corn Growers, who runs an outstanding diversified farming operating near Houghton, South Dakota; Mr. Tom Heller, who is the CEO of Missouri River Energy Services, a critical energy supplier with 12 municipal members in South Dakota; and Dan Mack, who is Vice President of Transportation and Terminal Operations for CHS, Inc., one of the Nation's largest rail shippers with over 900 employees here in the state of South Dakota.

South Dakota is consistently one of the top five states for the export by rail of farm products and ethanol to other states, and coal is the number one commodity imported into the state by rail, so we have a great panel that is representative of shippers in the state who depend on strong rail service.

After testimony and questions of this panel, I will convene a second panel with all of the Surface Transportation Board members who are here. I am pleased to welcome Chairman Dan Elliott, Vice Chairman Deb Miller, and Board Member Ann Begeman, all of whom have been working hard to implement the law day in and day out. Ann was born and raised on a farm near Humboldt, South Dakota, which means she not only understands agriculture and the importance of reliable rail service, but as a native South Dakotan, she can also help the other Board members find a good place to eat later today.

So I want to thank you all for being here. I want to thank our distinguished panelists for joining us, and I look forward to your testimony. I will start—let's go from my left with Mr. Mack and allow you to proceed. And if you could confine your testimony as close to five minutes as possible—we'll submit the entire written testimony for the record—it'll give us an opportunity to have some give-and-take with some questions and answers.

So, Mr. Mack, welcome.

STATEMENT OF DAN MACK, VICE PRESIDENT, TRANSPORTATION AND TERMINAL OPERATIONS, CHS INC.

Mr. MACK. Good afternoon and thank you, Chairman Thune. My name is Dan Mack. I am Vice President of Transportation and Terminal Operations for CHS Incorporated, the Nation's largest cooperative, headquartered in Inver Grove Heights, Minnesota, and owned by 600,000 producers and 1,100 member cooperatives throughout the United States.

CHS is a highly diversified Fortune 100 company that supplies energy, crop nutrients, grain marketing services, animal feed, food and food ingredients, as well as a range of financial and risk management services. We're also among the top rail shippers in the United States and one of the largest agricultural shippers on both the BNSF railway and Canadian Pacific railway. CHS currently employs approximately 12,500 people with 900 of those being located here in South Dakota.

I'm here on behalf of The Fertilizer Institute, commonly known as TFI. TFI is a national trade organization representing the fertilizer industry. TFI represents companies that are engaged in all aspects of the fertilizer supply chain. Research confirms that approximately 50 percent of the crop yields are attributable to the utilization of commercial fertilizer.

The fertilizer industry directly employs 1,500 people in South Dakota, with an economic impact of approximately $1.75 billion. The fertilizer industry depends greatly on a safe and efficient rail transportation network to deliver its products. The U.S. freight rail industry is an indispensable partner and key to our competitiveness in a global economy.

Given the importance of rail service to our business, CHS has greatly benefited from the collaborative work of TFI's partnership with the Rail Customer Coalition. RCC is an assortment of trade associations representing manufacturing, agriculture, and the energy industries. TFI and the Coalition are committed to practical reforms to modernize the Surface Transportation Board so that it works better for both railroads as well as its customers.

Fertilizer volumes are significant. In the year 2012 to 2013, 63 million material tons of fertilizer products were sold in the United States, much of that handled by railroads. Fertilizer is critical to crop yields and must move year round over great distances. All shippers, including CHS, experience logistical challenges from time to time. Practical reforms are critical to mitigating those challenges. One such example is the inclusion of fertilizer in the STB's rulemaking on railroad performance service metrics. We are pleased fertilizer is part of that rulemaking and urge that to become a permanent component in the final rule.

Regarding the subject of today's hearing, I want to especially thank Chairman Thune and Ranking Member Nelson and members of the Committee for your bipartisan work in passing the STB Reauthorization Act. As mentioned earlier, this is the first freight rail policy reform to pass Congress in a generation.

Equally important is the ongoing interest and oversight of Chairman Thune, Ranking Member Nelson, and their staffs. Their efforts are making a significant difference. They are vital to ensuring that STB Reauthorization Act is successfully implemented. The Commissioners of the Board have a big job in front of them as well. They have been working in good faith to get the job done in a transparent manner.

The STB Reauthorization Act makes common sense changes, perhaps the most obvious being that Board members can now meet in private to discuss agency matters. As the authority over rail rates and service disputes, being able to initiate its own investigations on issues of national and regional significance is another sensible

reform. The fertilizer industry is also pleased with the improvements made to the voluntary arbitration process, including the increase of the maximum damage awards that could be achieved.

TFI supports the comments submitted by the Rail Customer Coalition and looks forward to the issuance of the final rulemaking later this year. In addition, the monthly implementation of updates on proceedings, rulemakings, and other matters are also appreciated and are helpful. The STB Reauthorization Act also promotes ways to modernize methodologies to resolve rail disputes. This is an important task. To help address the need to modernize this essential oversight function, the STB Reauthorization Act requires a study on alternative methodologies related to rate issues, a proceeding on expediting cases, new timelines, as well as the alternative methodology.

Since enactment of the law, the Board has taken steps to provide a faster and less burdensome process to resolve rate disputes between shippers and railroads. The fertilizer industry supports the Board's proposal for allowing parties to use arbitration for such disputes. We further support the Board's ongoing effort to improve existing rate case methodologies.

The fertilizer industry is also encouraged by the recently proposed rulemaking on competitive switching. Competitive switching is a practical way to give rail customers access to a measure of competition where none currently exists today. The fertilizer industry looks forward to continued engagement in this important matter.

Thank you, Chairman Thune, for the opportunity to share TFI's view on freight rail reform and implementation of the STB Reauthorization Act of 2015.

Thank you.

[The prepared statement of Mr. Mack follows:]

PREPARED STATEMENT OF DAN MACK, VICE PRESIDENT, TRANSPORTATION AND TERMINAL OPERATIONS, CHS INC.

Good afternoon, Chairman Thune, Ranking Member Nelson, and members of the Committee.

My name is Dan Mack. I am Vice President of Transportation and Terminal Operations for CHS Inc., the Nation's largest farmer-owned cooperative. Headquartered in Inver Grove Heights, Minnesota, CHS Inc. is owned by more than 600,000 producers and 1,100 member cooperatives from around the United States, including 77,000 direct producer-owners. CHS is governed by a 17-member board of directors elected by our producer and member co-op stockholders. Our directors are all active farmers and ranchers with a broad range of experience in agribusiness.

CHS is a highly diversified Fortune 100 company that supplies energy, crop nutrients, grain marketing services, animal feed, food and food ingredients, as well as a range of financial and risk management services. We're also among the top rail shippers in the United States, and one of the largest agricultural users of both the BNSF and Canadian Pacific rail lines.

As a cooperative, CHS returns cash to our owners every year, based on the company's performance and the amount of business an owner conducts with CHS during the year. During its Fiscal Year 2016, CHS will distribute about $519 million to farmers, ranchers and cooperatives across the country. Between fiscal 2012 and 2016 CHS distributed a total of $2.7 billion in cash, a $544 million annual average.

CHS currently has nearly 12,500 employees worldwide, including 908 working here in South Dakota. I am proud to work for CHS and proud to serve our owners in rural America and to do our part to help feed the world.

I am here on behalf of The Fertilizer Institute (TFI), which is the national trade association representing the fertilizer industry. TFI represents companies that are engaged in all aspects of the fertilizer supply chain. This includes fertilizer manu-

facturers, wholesalers, distributors, brokers, and retailers. TFI's members play a key role in producing and distributing vital crop nutrients, such as nitrogen, phosphorus and potassium. These products are used to replenish soils throughout the United States and elsewhere to facilitate the production of healthy and abundant supplies of food, fiber and fuel. Fertilizers make it possible for farmers to grow enough food to feed the world's more than 7 billion people. Research confirms that approximately 50 percent of crop yields are attributable to the use of commercial fertilizers.

The fertilizer industry directly employs nearly 1,500 people in South Dakota with an economic impact in excess of $1.75 billion. I would be remiss if I did not highlight for the Ranking Member that TFI's members employ nearly 6,000 people in his home State of Florida. TFI maintains information on the impact of the fertilizer industry in each State and Congressional District and we are happy to provide it to members of the Committee.[1]

The fertilizer industry depends on a safe and efficient rail transportation network to deliver its products. While fertilizer shippers utilize waterways and motor carriers to move their products, the majority of fertilizer moves through the United States by rail.[2] The reason is simple: freight railroads are safe and a good way to transport our products to our customers. This is not to say there are not challenges from time to time, but the U.S. freight rail industry is an indispensable partner and key to our competitiveness in the global economy.

Given the importance of rail service to our business, CHS has greatly benefited from the collaborative work of TFI's partnership with the Rail Customer Coalition (RCC), which is an assortment of trade associations representing manufacturing, agricultural, and energy industries with operations and employees throughout the United States. Members of the coalition represent the largest users of freight rail that depend on the railroads to deliver reliable and affordable service. TFI and the Coalition are committed to practical reforms to modernize the Surface Transportation Board (STB) so that it works better for both the railroads and their customers.

In Fiscal Year 2012–2013, 63 million material tons of fertilizer products were sold in the United States. Fertilizer moves year-round by rail, and the timely delivery of fertilizer products is critical to farmers. If farmers do not receive their fertilizer in a timely manner, there are potential consequences for food security and the environment.

In terms of logistics, there are instances where fertilizer travels a short distance from a production facility to the farm. However, fertilizer often travels thousands of miles to its ultimate destination.

As I mentioned previously, fertilizer is critical to crop yields. It also must move year-round over great distances. All shippers, including CHS, experience logistical challenges. The added challenges of competing in a global economy underscore the importance of making practical reforms to enhance our Nation's distribution system. One such example is the inclusion of fertilizer in the Surface Transportation Board's (STB's) rulemaking on railroad performance service metrics. We are pleased fertilizer is part of this rulemaking and urge that it be part of the reporting requirements when the Board issues a final rule.

Regarding the subject of today's hearing, I want to especially thank Chairman Thune and Ranking Member Nelson and members of the Committee for your bipartisan work passing the STB Reauthorization Act of 2015 (S. 808). This is the first freight rail policy reforms to pass Congress in a generation and the first time the agency was reauthorized since its creation. The rail industry has changed a great deal over the past twenty years, and this law is helping to modernize the STB to better reflect this new reality.

Equally important is the ongoing interest and oversight of Chairman Thune, Ranking Member Nelson, and your staffs. Your efforts are making a big difference, and are vital to ensuring the STB Reauthorization Act is successfully implemented. To their credit, the Commissioners of the Board have a big job in front of them and they have been working in good faith to get the job done in a transparent fashion.

The STB Reauthorization Act makes common sense changes, perhaps the most obvious being that Board Members can now meet in private to discuss agency matters. As the authority over rail rates and service disputes, being able to initiate its own investigations on issues of national or regional significance is another sensible reform. The fertilizer industry is also pleased with the improvements made to the voluntary arbitration process, including the increase in the maximum damage awards. TFI supports the comments submitted by the Rail Customer Coalition, and looks

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[1] *https://www.tfi.org/advocacy/fertilizerjobs/data*

[2] In 2014, approximately 41 percent of fertilizer moved by rail on a per ton, per mile basis

forward to the issuance of a final rulemaking later this year. Moreover, the monthly implementation updates on proceedings, rulemakings and other matters are appreciated and helpful.

The STB Reauthorization Act also promotes ways to modernize methodologies for resolving rate disputes. This is an important task. In fact, an expert report by the National Research Council's Transportation Research Board concluded that the STB's rate review procedures are now "unusable by most shippers." The report went on to say that the system lacks a sound economic basis and "has the effect of safeguarding railroad revenues by making it too costly for most shippers to litigate a case."[3]

To help address the need to modernize this essential oversight function of the Board, the STB Reauthorization Act requires a study on alternative methodologies, a proceeding on expediting cases, new timelines, and an alternative methodology.

Since enactment of the law, the Board has taken steps to provide a faster and less burdensome process to resolve rate disputes between shippers and railroads. The fertilizer industry supports the Board's proposal for allowing parties to use arbitration for such disputes. We further support the Board's ongoing efforts to improve its existing rate case methodologies. However, it is increasingly clear that the Board's primary rate case methodology, the Stand Alone Cost (SAC) test, is too complex, costly, and burdensome.

The Board has also been making progress on initiatives that are not just directly tied to implementation of S. 808. The fertilizer industry is encouraged by the recently proposed rulemaking on competitive switching. It is already being done successfully in Canada. This may have contributed to comments made by Canadian Pacific Railway, which, during its recent proposed merger discussions with Norfolk Southern, stipulated its support for competitive switching and said it would allow competitive switching for its customers if it acquired Norfolk Southern.

Shippers often have access to only one major railroad, which can create a challenging power dynamic with the rail industry. Competitive switching is a practical way to give rail customers access to a measure of competition where none currently exists. The fertilizer industry appreciates the Board's efforts on competitive switching and looks forward to continued engagement on this important matter.

As I mentioned earlier, rail is a vital part of the transportation network. A competitive, safe and efficient rail industry allows TFI's members to successfully serve and supply America's farmers.

Thank you, Chairman Thune and Ranking Member Nelson, for the opportunity to share TFI's views on freight rail reform and implementation of the STB Reauthorization Act of 2015. TFI and its members look forward to our continued engagement with you and members of the Committee.

The CHAIRMAN. Thank you, Mr. Mack.

I'll now proceed to Mr. Heller.

STATEMENT OF THOMAS J. HELLER, CHIEF EXECUTIVE OFFICER, MISSOURI RIVER ENERGY SERVICES; AND BOARD MEMBER, FREIGHT RAIL CUSTOMER ALLIANCE

Mr. HELLER. Thank you, Senator Thune. My name is Tom Heller. I'm the CEO of Missouri River Energy Services here in Sioux Falls, South Dakota. I'd like to thank the Chairman and the members of the Committee for the invitation to speak today on the STB Reform Act of 2015.

My following remarks highlight the written testimony that was earlier submitted to the Committee. Not only am I pleased to testify on behalf of MRES, but also as a Board Member of the Freight Rail Customer Alliance, FRCA.

First, Missouri River Energy Services is a municipal power agency which supplies power and energy services to 60 municipal electric utilities in rural Iowa, Minnesota, and North and South Dakota. Western Minnesota Municipal Power Agency is our financing agent along with five other customer-owned utilities on a base-load

[3] *http://onlinepubs.trb.org/onlinepubs/sr/sr318.pdf*

coal plant called the Laramie River Station in Wheatland, Wyoming. LRS operating agent, Basin Electric Power Cooperative, pays BNSF Railway to transport substantial amounts of coal on a daily basis to LRS.

In 2004, LRS's contract with BNSF to deliver coal from the Powder River Basin mines to the LRS plant expired. We were unable to renegotiate an acceptable agreement with BNSF and they filed a rate tariff at the STB. LRS participants then filed for rate relief with the STB as well.

After 10 years and over $10 million in legal and consulting fees, we still had no settled rate. Several STB orders were followed by legal action by both LRS participants and BNSF. In May 2015, we successfully negotiated a settlement agreement with BNSF, ending the dispute at STB. Without our settlement, we firmly believe that we still may be fighting that case before the STB today.

Second, I'm here sharing views of FRCA, as I mentioned. Its members include large trade associations representing more than 3,500 manufacturing, agriculture, alternative fuels companies, electric utilities, and their customers. Based on the experience of MRES as a participant in the recent BNSF case involving LRS combined with the experiences of FRCA members, let me offer a few observations, if I may, please, on how the STB can work more effectively in today's economy.

First, we look forward to the release of the STB's survey and the study of rate case methodologies. It is our hope in its analysis that the consultant hired by the STB may provide recommendations that would allow the STB to use a more streamlined yet appropriate methodology to supplement the SAC test in appropriate cases. The length and cost of the current approach has proven to be an impediment to many rail customers obtaining rate protection under the STB rules.

Second, the STB has been moving ahead on developing rules regarding its authority to investigate rates and practices without a complaint. We believe this authority allows the STB to act in an expedited manner on unreasonable rates and practices.

Third, the development of arbitration procedures may allow for some cases to be even further expedited.

Fourth, we particularly thank you, Senator Thune, for the March 31 letter that was sent to all three members of the STB welcoming the Board's steps to complete rulemaking for data collection. FRCA, in particular, views data collection and timely access to data as a cornerstone in enhancing transparency and accountability.

And, fifth, the quarterly reports on unfinished regulatory proceedings have increased transparency and may have helped increase efficient use of limited resources at the STB.

In conclusion, MRES and FRCA applauds you, Mr. Chairman, Senator Thune, for holding this very important hearing on the implementation of the STB Reauthorization Act of 2015. I do want to finally say that we understand that there needs to be a balance between the financial health of the railroads so that they are able to maintain the current system and invest in the facilities and at the same time protect consumers from excessive costs. Your personal oversight is helping to make the difference in transforming the STB into a more effective, accountable, and transparent agency.

Thank you very much.
[The prepared statement of Mr. Heller follows:]

PREPARED STATEMENT OF THOMAS J. HELLER, CEO, MISSOURI RIVER ENERGY SERVICES; AND BOARD MEMBER, FREIGHT RAIL CUSTOMER ALLIANCE

Introduction

My name is Tom Heller and I am CEO of Missouri River Energy Services. I'd like to thank Chairman John Thune, Ranking Member Bill Nelson and the Members of this Committee for the invitation to speak with you today on "Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015".

Freight rail is a vital component of our Nation's economy to help our farmers produce, deliver grains and agricultural products to market, heat our homes and businesses, ensure our drinking water is safe, and enhance our global competitiveness. The *Surface Transportation Board Reauthorization Act of 2015* is helping our entire nation—the U.S. Congress, the Surface Transportation Board, railroads, shippers, and the communities we all serve—better meet today's freight rail shipping demands and expectations.

Not only am I pleased to testify on behalf of Missouri River Energy Services, but as a Board member of the Freight Rail Customer Alliance (FRCA).

Missouri River Energy Services *http://www.mrenergy.com/*

To begin, Missouri River Energy Services (MRES) is a municipal power agency which supplies power and energy, and energy services to sixty (60) municipal utility members throughout Iowa, Minnesota, North Dakota, and South Dakota. Each member municipal utility is owned by the customers it serves; likewise, MRES was created and is owned by the member communities that it serves. Also, like its member-owners, MRES is a not-for-profit, member-owned and member-

controlled public entity. MRES is a political subdivision of the state of Iowa, and is headquartered in Sioux Falls, South Dakota. It was created under the Iowa Code Chapter 28E.

As an Iowa 28E entity, MRES must use a separate entity for financing of generation facilities or similar projects; that financing entity is Western Minnesota Municipal Power Agency (Western Minnesota). Western Minnesota is a municipal corporation and political subdivision of the State of Minnesota. Western Minnesota finances and owns the generation and transmission facilities used to serve members of MRES under the terms of power supply and transmission capacity contracts between Western Minnesota and MRES. All output and capacity of Western Minnesota facilities is dedicated exclusively to MRES.

All 60 MRES members are in Iowa, Minnesota, North Dakota, and South Dakota. Our municipal utility communities range in size from nearly 40,000 to those with populations around 200 people. The average population of MRES member communities is about 5,000. In total, our members serve a population of approximately 300,000 people, with over 150,000 customer meters. The MRES member communities are spread widely over a geographic area which is primarily rural.

Fifty-eight of the 60 MRES members have allocations of Federal hydropower from Western Area Power Administration (WAPA) to supply some of their needs through 2050, and MRES serves the balance of each community's needs over and above the hydropower allocation. In addition to this hydropower, MRES members are also served by five wind energy projects located in Iowa, Minnesota, and North Dakota. These renewable energy investments mean that MRES members are served, on average, with 42 percent renewable energy.

In addition to wind energy projects, MRES relies on a single, base-load coal plant in Wheatland, Wyoming, called the Laramie River Station (LRS) to serve the needs of its members. The three units of LRS began commercial operations in 1980–1982, and generate 1,710 megawatts (MW). LRS has six owners: Basin Electric Power Cooperative (Basin), Tri-State Generation and Transmission Association, Lincoln Electric System, Heartland Consumers Power District, Western Minnesota, and Wyoming Municipal Power Agency. Western Minnesota is one of six owners of LRS, and it owns 16.5 percent of LRS, corresponding to approximately 282 MW.

LRS obtains its fuel from coal from the Power River Basin, located approximately 175 miles from LRS. In order to transport the coal to the plant, LRS, through its operating agent Basin Electric Cooperative (Basin), pays BNSF Railway to transport substantial amounts of coal daily to LRS. The owners of LRS own the railcars that the coal is shipped in; BNSF supplies the engines and engineers.

Based on the experience of MERS as a participant in a recent rate case involving LRS, let me offer of few observations on how future rate cases can be expedited.

STB Reauthorization Act Implementation and Expediting Rate Cases

Last year, the U.S. Congress passed, and President Obama signed into law, the *Surface Transportation Board Reauthorization Act of 2015* (the *Act*), P. 114–110 (S. 808, S. Rpt. 114–52).

Thanks to your steadfast leadership, Mr. Chairman, and support from your colleagues also serving on the Senate Commerce Committee, MRES strongly believes that there are aspects of the *Act* that may assist other shippers in future cases.

First, the STB has been working on streamlining rail rate cases and published the revised rate review procedural schedule in SAC tests (Docket No. EP 733, Advanced Notice of Proposed Rulemaking, Expedited Rate Cases). This new schedule is a step in the right direction at expediting rate reviews. However, MRES looks forward to the release of STB's survey and study of rate case methodologies. It is our hope that in its analysis, that the consultant hired by the STB, may provide recommendations that would allow the STB to use more stream-lined, yet appropriate, methodologies, to supplement SAC in appropriate cases.

Second the *Act* requires quarterly reports on unfinished regulatory proceedings. These reports have increased transparency and may have helped increase efficient use of resources at the STB, but they would be more useful and effective if they included additional detail such as delays or continuances, reasons for delays or continuances, and anticipated dates for procedural orders. It would promote not only transparency of the process to the parties and impacted customers, but it may assist the STB and staff in determining if there is a pattern in delays that can be addressed. For example, if delays are due to need for additional staffing, that is something that could be identified with the data and potentially addressed earlier rather than later, or not at all.

Third, the STB has also been moving ahead on developing rules regarding its authority to investigate rates and practices without a complaint being filed (Docket No. EP 731, Notice of Proposed Rulemaking, Rules Relating to Board-Initiated Investigations). We believe that this authority granted by the *Act* allows the STB to act in an expedited manner on unreasonable rates and practices, and look forward to seeing these proposed rules developed further during the current comment period.

Fourth, the development of revised arbitration procedures, as also specified in the *Act,* may allow for some rate cases to be even further expedited (Docket No. EP 730, Notice of Proposed Rulemaking, Revisions to Arbitration Procedures). Even though the case MRES was involved in would not have been eligible for arbitration, the availability of an effective and "usable" arbitration process may further expedite future cases to the benefit of the shipper, the railroad and the customers and also free up agency resources for those disputes where arbitration is not utilized. MRES also looks forward to seeing these proposed rules developed further during this promulgation period.

Freight Rail Customer Alliance *http://railvoices.org/*

As stated earlier, I am also sharing the views of the Freight Rail Customer Alliance (FRCA). An umbrella membership organization, FRCA members include large trade associations representing more than 3,500 manufacturing, agriculture, and alternative fuels companies, electric utilities, and their customers. Its membership base is expanding to include other industries and commodities.

FRCA is an alliance of freight rail shippers impacted by continued unrestrained freight rail market dominance over rail-dependent shippers. Its mission is to seek changes in Federal law and policy that will provide all freight rail shippers with reliable freight rail service at competitive prices.

As with MRES, FRCA thanks you Mr. Chairman for your continued commitment in helping to enhance our Nation's overall freight rail network. This includes your attention to and keen awareness of those issues and concerns unique to freight rail shippers—particularly those dependent upon receiving and distributing their products by rail.

FRCA was pleased to have actively supported the development of S. 808 during the legislative process—the first authorization for the STB since 1998. FRCA is continuing to work with the STB and industry stakeholders in helping to ensure that the *Act* is effectively implemented.

Considering FRCA' thoughts are aligned with the comments I previously shared on behalf of MRES, the remainder of my remarks will focus on other elements of the *Act* which are also proving helpful to freight rail shippers.

STB Reauthorization Act Implementation

Appropriations

For the past two decades, the STB's budget has remained essentially flat.

Even in our sustained difficult budget environment, the *Act* provides increased annual authorization levels for the STB. Without these levels providing the foundation, it would have been and will continue to be extremely difficult for the STB to secure the necessary funding for it to meet the new requirements specified in the *Act* and meet existing responsibilities.

For the current FY 2016, the *Act* sought to address this by authorizing an FY 2016 appropriation of $35 million. The subsequent increased funding for the STB approved by Congress in the FY 2016 Omnibus (P.L. 114–13) was a crucial step in helping to implement this new *Act.*

In addition for FY 2017, on May 19, the U.S. Senate approved H.R. 2577 (S. 2844, S. Rpt. 114–243) providing $37 million for the STB of which $2.046 million is directed to IT system upgrades and enhancements. This appropriations amount is above the level authorized in the Act and the current FY 2016 enacted level.

In a letter to the House Appropriations Committee, FRCA advised that STB needs to have the adequate annual appropriated funds to provide necessary and effective oversight over our country's growing reliance on freight rail. Freight rail is a vital component of our Nation's economy to help our farmers produce, deliver grains and agricultural products to market, heat our homes and businesses, ensure our drinking water is safe, and enhance our global competitiveness.

Further, FRCA stressed that of particular importance to its members is adequate funding of enhancements to the STB's outdated information technology (IT) system. Freight rail shippers heavily rely on industry data provided through the STB to help: (1) make vital daily and longer term operational decisions; (2) forecast industry emerging trends; and, (3) monitor a railroad's level of service and performance.

FRCA is pleased that the FY 2017 measure (H.R. 5394, H. Rpt. 114–640) passed by the House Appropriations Committee on May 24 also includes the $37 million for the STB and directs spending for IT improvements. FRCA remains hopeful that a final FY 2017 appropriations package will be realized providing this critical funding for the STB.

Data Reporting

FRCA applauds you, Mr. Chairman, and your colleague serving on the Senate Commerce Committee for instilling in the *Act* various provisions establishing new requirements or encouraging the completion of longstanding pending procedures before the STB. This is notably recognized in the *Act*'s commitment to update and enhance STB's information technology and data needs to help ensure transparency, consistency, timeliness, and ease of access.

FRCA particularly thanks you for your March 31, 2016 letter you sent to all three Members of the STB welcoming the STB's steps to advance the expeditious completion of the rulemaking for data collection [Docket No. EP 724 (Sub-No.4), Supplemental Notice of Proposed Rulemaking Rail Service Issues—Performance Data Reporting]. As stated earlier in the appropriations discussion, FRCA views data collection and timely access to data as a cornerstone in enhancing transparency and accountability. FRCA participated in Ex-Parte Communications and signed-on to comments submitted by the Western Coal Traffic League (WCTL), and others.

Unfinished Regulatory Proceedings

FRCA also welcomed your requests to the STB, as stated in your March 31, 2016 letter, regarding the required quarterly reports on Unfinished Regulatory Proceedings. FRCA appreciates the STB responding to some of your requests as included in the Board's most recent quarterly report issued July 1st. FRCA finds the listing of the pending Dockets and their respective status helpful and the fact that it easily accessible via this required quarterly reporting mechanism. The alliance looks forward to the STB continuing to enhance these quarterly reports which would include incorporating the other suggestions you made.

Informal and Formal Rail Service Complaints

FRCA could not agree with you more, Mr. Chairman, as you also stated in your March 31, 2016 letter, that the STB providing a brief description of the type of rail service associated with an informal complaint and a write-up of the guidance offered by STB would be helpful to shippers.

Rate Case Methodologies

FRCA echoes the comments I shared earlier on behalf of MERS pertaining to the *Act*'s direction to the STB to evaluate the cost-effectiveness of large rate case methodologies and potential, economically sound additional and alternative approaches to expedite particularly large rate cases. The length and cost of the current approach has proven to be an impediment to many rail customers obtaining rate protection under the STB rules. In addition to the report that is to be released by the

consultant that STB hired to conduct this analysis and report, the STB should consider similar reports that have been produced by sister governmental agencies.

As an aside, FRCA signed-on to comments filed by the WCTL, and others, in response to Docket No. EP 733, Advanced Notice of Proposed Rulemaking, Expedited Rate Cases.

Board-Initiated Investigations

FRCA is supportive of the STB having the authority to initiate its own investigations. The alliance looks forward to the further development of a process in the pending proceeding, Docket No. EP 731, Notice of Proposed Rulemaking, Rules Relating to Board-Initiated Investigations.

Revenue Adequacy Procedures

Another issue that you, Mr. Chairman, included in your March 31, 2016 letter to the STB Members was on the *Act's* Section 16, Criteria. FRCA greatly appreciates you clarifying for the STB and industry that Section 16 does not mandate the use of replacement cost methodologies when evaluating revenue adequacy.

In addition, FRCA submitted written comments in Docket No. 722, Railroad Revenue Adequacy, during public hearings that were held by the STB in July 2015.

U.S. General Accountability Office Study

Earlier this year, FRCA members met with analysists from the U.S. Government Accountability Office (GAO) on its study, as required in the *Act,* on rail transportation contract proposals that cover movements from multiple origins to multiple destinations (commonly referred to as "bundled" contracts).

FRCA members appreciated the opportunity to meet with the GAO analysts. While the focus of its study is on bundled contracts, the analysts sought information on a wider range of topics relating to shipper experiences in dealing with the railroads and the level of competition in the railroad industry. In response to questions regarding contracts, FRCA explained how efforts to standardize terms and conditions of service reduce the ability of shippers to obtain transportation arrangements that fit their particular needs and constraints in serving their customers.

Other STB Proceedings

Although the *Act* did not specifically address some items of concern to freight rail shippers, FRCA is pleased that the STB is making progress on several very important proceedings.

Competitive Switching

Of note, FRCA is pleased that the STB issued its Decision on a request to adopt revised competitive switching rules—a matter that has been pending before the Board since 2011 [Docket No. EP 711 (Sub-No. 1) a Notice of Proposed Rulemaking (NPRM), Petition for Rulemaking to Adopt Revised Competitive Switching Rules].

FRCA has long supported efforts at the STB to increase competition in the railroad industry and spread its benefits more widely, especially for rail-dependent captive shippers. Reciprocal switching is one avenue to help achieve this. FRCA views this NPRM as an important step. The alliance will be reviewing the proposal in the coming weeks and looks forward to the further development of revised rules during this rulemaking.

Commodity Exemptions

FRCA submitted comments in response to STB's Notice of Proposed Rulemaking, Review of Commodity, Boxcar, and TAFC/COFC Exemptions, Docket No. EP 704 (Sub-No. 1).

The alliance has long stated that exemptions are no longer needed and are counterproductive for the reasons stated in the STB's notice—these decisions were instrumental when the transition was being made from a heavily regulated industry to a less regulated industry, but there have been many economic market changes during the past 30 years. Also, FRCA encourages the STB to give meaningful consideration to reviewing and reducing or eliminating most or all or its other existing commodity, boxcar, and TOFC/COFC exemptions (this NPRM applies to certain Standard Transportation Commodity Code groups)

Additional Recommendations and Acknowledgements

Reports

As noted in my remarks on behalf of MRES, FRCA also recommends that the STB review and consider other reports or studies that could help meet the requirements of the *Act* and enhance its overall effectiveness.

One such report is *"Modernizing Freight Rail Regulation"* a study conducted by the National Research Council's Transportation Research Board (TRB) and National Academy of Sciences, released in June 2015. FRCA is pleased that many of the issues discussed and recommendations made mirror the positions advocated by the alliance over the years and were included in the *Act.*

Some of the issues discussed in the report, although not included in the *Act,* could be considered by the STB including reviewing and introducing means to improve the accuracy, utility, timeliness, and availability of the Carload Waybill Sample.

STB's Interactive Maps

FRCA would like to acknowledge the STB on its interactive mapping portal that can be accessed on its website. Again keeping in mind that FRCA members heavily rely on data, these interactive maps are extremely valuable and STB is encouraged to continue developing these tools.

Conclusion

MRES and FRCA applauds you, Mr. Chairman, for holding this very important hearing on the implementation of the *STB Reauthorization Act of 2015.* Your personal and steadfast oversight, accompanied by the efforts of your staff, is helping to make the difference in transforming the STB into a more effective, accountable, and transparent agency—desperately needed in today's market for both shippers and railroads as freight demands increase here at home and overseas.

Again on behalf of MRES and FRCA, thank you for providing me the opportunity to testify before you and the Senate Commerce Committee today.

I am more than happy to answer any questions you might have.

[Appendix Follows.]

APPENDIX

Rate Case

Missouri River Energy Services (MRES) relies on a single, base-load coal plant in Wheatland, Wyoming, called the Laramie River Station (LRS) to serve the needs of its members. The three units of LRS began commercial operations in 1980–1982, and generate 1,710 megawatts (MW). Western Minnesota is one of six owners of LRS, and it owns 16.5 percent of LRS, corresponding to approximately 282 MW.

LRS obtains its fuel from coal from the Power River Basin, located approximately 175 miles from LRS. In order to transport the coal to the plant, LRS, through its operating agent Basin Electric Cooperative (Basin), pays BNSF Railway to transport substantial amounts of coal daily to LRS. The owners of LRS own the railcars that the coal is shipped in; BNSF supplies the engines and engineers.

In 2004, Burlington Northern Santa Fe (BNSF) imposed one of the single largest rate increases for the 175-mile trek; the rate increase would have increased consumer bills by over $1 billion between 2004 and 2024.

On behalf of all of the owners of LRS, Basin and Western Fuels Association Inc., sought to moderate BNSF's rate actions by filing a rate complaint at the STB in 2004.

In the case, Basin proved it was entitled to substantial relief under the STB's very complex stand-alone cost (SAC) standards. These standards required Basin to model a "Stand Alone Railroad" (SARR) to show the full costs of building and operating its own theoretical railroad versus that of BNSF. Under SAC, the shipper bears the burden of proof of showing that the SARR provides an adequate replacement for the BNSF and does at a lower cost, taking into account each shovel of dirt, each section of rail, each employee, etc. Basin and the other owners in LRS met this burden and showed that they were in fact entitled to substantial relief.

However, the STB decided to change some key aspects of its SAC rules in 2006. In doing so, the STB applied the new rules retroactively to the pending LRS case, which the STB said "prejudiced" the case when it initially ruled in 2007. The STB permitted Basin and WFA to revise their SAC evidence, which resulted in a final 2009 decision in favor of Basin/WFA. At the time, it was the largest relief ever granted to a shipper in an STB rate case.

BNSF appealed that ruling to the D.C. District Court, which led to a multi-year ping pong match as the court remanded portions of the decision back to the STB, and even more appeals by BNSF. The STB again changed their SAC rules in 2013, and by 2015 Basin/WFA had spent more than $10 million and more than 10 years on the case, Basin/WFA entered settlement talks with BNSF to avoid further delays. A final settlement was entered into in May 2015.

The CHAIRMAN. Thank you, Mr. Heller.

You guys are all getting done ahead of your allotted five minutes here. So we'll give you bonus points or something for that. But, anyway, thank you.

We'll turn now to Mr. Skuodas. Please feel free to proceed.

STATEMENT OF MICHAEL SKUODAS, VICE PRESIDENT, DISTRIBUTION AND BUSINESS DEVELOPMENT, POET, LLC

Mr. SKUODAS. Thank you. Good afternoon, Chairman Thune. Thank you for the opportunity to speak to you today and provide the Committee with our perspective on the recently enacted Surface Transportation Board reform legislation. My name is Michael Skuodas, and I am Vice President of Distribution and Business Development at POET, LLC.

POET is headquartered here in South Dakota and is one of the Nation's leading biorefinery companies. Of our 27 refineries spread across seven states, 23 rely on rail transportation to deliver their many products to market. Today, nearly 70 percent of all ethanol produced in this country is shipped by rail. Similarly, a significant portion of ethanol co-products, like distiller grains and corn oil, rely on rail to reach market.

This makes our industry particularly susceptible to rail rate increases, of which there have been many over recent years. Because ethanol is used in nearly every gallon of gasoline sold in this country, these rates and any rail issues affecting service have a direct and immediate impact on consumers throughout the country. Likewise, distiller grains, or DDGS, are vital to the feed market for livestock production, as is corn oil for biodiesel.

If I could boil our position down into one sentence today, it would be that we support policy aimed at providing fair, efficient, and competitive rail services for our industry. Prior to the enactment of this critical legislation, the procedures and institutional barriers at the Surface Transportation Board made lodging legitimate complaints about rail service difficult and costly to execute. Timely, effective, and meaningful resolution to genuine issues was elusive for so many in our industry.

With this in mind, we're here to say thank you on behalf of POET, the ethanol industry, and shippers from South Dakota for your leadership in all of these key rail issues and, in particular, for your work to enact and implement the recent STB reform legislation. You, your Senate colleagues, and your staff gave us the opportunity to be heard. And while we still have work to do to ensure STB will fully implement the new regulations, we have reason to be optimistic that conditions will improve.

With the remainder of my time and in the spirit of this committee's mandate to oversee the rollout of its legislation, I would like to turn to a discussion of what we feel is important for this committee to focus on as the STB moves forward to address the needs of ethanol shippers. We continue to support the reporting of rail service data and the ability of the STB to proactively investigate rail service issues.

Chairman Thune, as you know, we in South Dakota experienced terrible rail service several years ago that impacted our industry as well as almost every rail shipper in the Northern Plains. By continuing this critical reporting and by giving the STB more author-

ity to investigate, we believe the STB and others can identify potential service problems before they snowball and impact larger sections of our Nation's economy as they did in late 2013 and throughout 2014.

As we have noted in previous comments, we support the inclusion of rate cases as matters eligible for arbitration, as well as increasing the cap of potential relief from $200,000 to $25 million for rate cases and from $200,000 to $2 million for practice disputes. We also support the ability of parties entering into arbitration to have the ability to concede the issue of market dominance by the railroad and continue to support the STB's work to streamline the process for these cases so they can be dealt with expeditiously.

Finally, we are very pleased to see the STB move forward with a competitive rail switching proposal. Our company competes each and every day in the national fuel market along with nearly 200 other biorefineries. But rarely do any of these plants have any sort of choice in rail service. We're hopeful that this rule can be implemented and our industry can start to see meaningful competition for rail service.

Chairman Thune, you've been instrumental in addressing the rail concerns of our industry including the service related issues in 2014 and now with enactment of STB reform. On behalf of all of our employees and their families we thank you. We look forward to continuing our work with you and your fellow committee members to implement these changes at the Board and to improve competition and service among railroads and rail shippers.

I would be happy to answer any questions you may have.

[The prepared statement of Mr. Skuodas follows:]

PREPARED STATEMENT OF MICHAEL SKUODAS, VICE PRESIDENT, DISTRIBUTION AND BUSINESS DEVELOPMENT, POET, LLC

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Today, nearly 70 percent of all ethanol produced in this country is shipped by rail. Similarly a significant portion of ethanol plant co-products, like distiller grains and corn oil, rely on rail to reach market. This makes our industry particularly susceptible to rail rate increases, of which there have been many over recent years. Because ethanol is used in nearly every gallon of gasoline sold in this country, these rates and any rail issues affecting service have a direct and immediate impact on consumers throughout the country. Likewise, DDGS are vital to the feed market for livestock production, as is corn oil for biodiesel. If I could boil our position down into one sentence today it would be that we support policy aimed at providing fair, efficient, and competitive rail services for our industry.

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We continue to support the reporting of rail service data and the ability of the STB to proactively investigate rail service issues. Chairman Thune, as you know, we in South Dakota experienced terrible rail service problems several years ago that impacted our industry as well as almost every rail shipper in the northern plains. By continuing this critical reporting and by giving the STB more authority to investigate, we believe the STB and others can identify potential service problems before they snowball and impact larger sections of our Nation's economy as they did in late 2013 and throughout 2014.

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I would be happy to answer any questions you may have.

The CHAIRMAN. Thank you, Mr. Skuodas.

We'll turn now to Mr. Knecht.

STATEMENT OF TROY KNECHT, VICE PRESIDENT, SOUTH DAKOTA CORN GROWERS ASSOCIATION

Mr. KNECHT. Mr. Skuodas left an extra minute out there. Could I use that?

[Laughter.]

The CHAIRMAN. You can snap it up. Go ahead.

Mr. KNECHT. Good afternoon. My name is Troy Knecht. I'm a fourth-generation family farmer from Houghton, South Dakota. I serve as Vice President of the South Dakota Corn Growers Association, and I appreciate the opportunity to be with you today.

Let me begin by thanking the Senate Committee on Commerce, Science, and Transportation in passing the Surface Transportation Board Reauthorization Act of 2015 and Chairman Thune for holding today's hearing and his leadership on this issue. On behalf of the 12,500 corn growers in South Dakota, I appreciate the opportunity to be here today to represent my association.

Agriculture is South Dakota's largest industry. Our great state has 43.3 million acres of farmland. Last year, South Dakota Corn Growers grew over 800 million bushels of corn. Corn Growers used the rail system to export over a billion gallons of ethanol, over 1 million metric tons of distillers grain, and over 300 million bushels of corn. Simply put, rail is our gateway to the marketplace.

Because of our proximity to the Pacific Northwest, exports are an enormous market for us. Ninety-nine percent of our corn moves on the Burlington Northern Santa Fe. Recently, the BNSF put over $4

billion in over 35,000 miles of tracks in the western United States, which was very appreciated by corn growers.

These investments are needed to address the growing demand for grain worldwide. According to the U.S. Grains Council, Japan has been the number one buyer of U.S. corn this decade, South Korea has been the number three, and Taiwan is number four. Japan alone purchased $14 billion worth of U.S. corn during the previous 5 years. China is the number one buyer of U.S. soybeans and currently ranks second in ethanol purchases. To successfully serve those Asian markets, it is imperative that we are able to smoothly transport our commodities from the middle of the U.S. to the Pacific Northwest, and we sincerely appreciate BNSF's vision in infrastructure.

South Dakota corn growers are grateful to Senator Thune for addressing rail concerns shared by everyone in agriculture. We appreciate his leadership in passing of the STB reauthorization bill. It is a critical piece of legislation that affects all major markets.

The STB Reauthorization Act was a needed piece of rail legislation. It had not been reauthorized since its formation in 1996 when it replaced the Interstate Commerce Commission. The legislation expanded the Board from three to five, enhanced the Board's ability to address rail issues as they arise, streamlined rate case procedures, and created an alternate dispute resolution process. All of these have major impacts to shippers and growers, but none more than the new authority to investigate rail issues having regional or national significance.

Over the past decade, the Government Accountability Office and the Department of Justice Antitrust Division have published reports raising concerns about the efficiency of rate review processes for shippers, particularly captive shippers served by a single railroad. Reports state that the rate review process, including the stand-alone cost test, is often burdensome and inefficient, costing millions of dollars to litigate and years to resolve.

So the ability of the STB to investigate rail issues is enormous to South Dakota, as we are the definition of a captive shipper. Our corn is railed on the Burlington Northern Santa Fe, the only Class One rail in South Dakota.

The Act empowered the STB to conduct investigations and required changes in the arbitration process. It is incredibly important that the STB Board has the ability to proactively investigate issues. It is equally important that they share that information in a transparent manner. We certainly appreciate the basic three-stage process proposed by the STB for implementing its new investigative authority, which would involve preliminary fact finding by the STB's staff, a board-initiated investigation, and initiation of a formal STB proceeding if the investigation warrants it.

South Dakota corn growers believe that the STB should adopt an appropriate degree of public transparency on the alleged issue or rail practice that potentially warrants an investigation, while still protecting the identity and reputation of the rail carrier and rail used involved. We would also ask the STB to provide an appropriate degree of public transparency and accountability to inform freight rail users about the outcome of investigations that are not

pursued or investigations that are not pursued or are discontinued, as well as the agency's general reasoning for its decision.

In the fall of 2013 and part of 2014, our state faced a significant rail crisis. The rail crisis not only affected South Dakota, but gripped the Nation. It opened up the need for transparency in our transportation industry.

Once again, I want to thank you for the opportunity to speak on behalf of the 12,500 corn farmers of South Dakota, and Senator Thune for his vision in addressing this issue. It has been over 20 years since Congress addressed STB legislation. It is critical that it is done right for everyone involved.

Thank you.

[The prepared statement of Mr. Knecht follows:]

PREPARED STATEMENT OF TROY KNECHT, VICE PRESIDENT, SOUTH DAKOTA CORN GROWERS ASSOCIATION

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Over the past decade, the Government Accountability Office (GAO) and the Department of Justice (DOJ) Antitrust Division have published reports raising concerns about the efficiency of rate review processes for shippers, particularly captive shippers served by a single railroad. Reports state that the rate review process, including the "standalone" cost test, is often burdensome and inefficient, costing millions to litigate and years to resolve.

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We certainly appreciate the basic three-stage process proposed by the STB for implementing its new investigative authority, which would involve preliminary fact-finding by the STB's staff; a board-initiated investigation; and initiation of a formal STB proceeding if the investigation warrants it.

The SDCGA believes that the STB should adopt an appropriate degree of public transparency on the alleged issue or rail practice that potentially warrants an investigation, while still protecting the identity and reputation of the rail carrier and rail used involved.

We would also ask the STB to provide an appropriate degree of public transparency and accountability to inform freight rail users about the outcome of investigations that are not pursued or investigations that are not pursued or are discontinued, as well as the agency's general reasoning for its decision.

In the fall of 2013 and part of 2014 our state faced a significant rail crisis. The rail crisis not only affected South Dakota, but gripped the Nation. It opened up the need for transparency in our transportation industry.

Once again, I want to thank you for the opportunity to speak on behalf of the 12,500 corn farmers of South Dakota, and Senator Thune for his vision in addressing this issue. It has been over 20 years since Congress addressed STB legislation. It is critical that it is done right for everyone involved.

The CHAIRMAN. Thank you, Mr. Knecht.

And I would just say that when I get into some of the questions here, I may specifically reference testimony from any one of the witnesses here. But feel free, anybody, to jump in if you've got a response to any of the questions that we put forward. And I would also reiterate that your entire written statements—I know you summarized some of those—will be included in the record for the hearing.

Mr. Mack, in your testimony, you noted that prior to the enactment of the law, the Transportation Research Board found the rate review procedures at the STB to be unusable by most shippers. You also noted the importance of the law's provisions for quicker rate case timelines, expedited administrative practices, and, as you mentioned, alternative rate review methodologies. I'm just wondering maybe if you could speak to the limitations or the burdens of the stand-alone cost test, which has been the standard sort of way of challenging some of these—dealing with these rate cases in the past, and the best way that you see the STB using the provisions of the new law to reduce some of those burdens.

So maybe you could talk about sort of where we are and how you see perhaps us being able to better address not only the shortcomings, but the burdens and barriers that existed in the past.

Mr. MACK. Sure. Thank you. The stand-alone cost rate component really is factored on and best utilized for something that is very high density in terms of rail shipments. So the more density you have, the more likely you're going to have a higher risk, in terms of risk financially due to a rate.

The challenges have been really around, as Mr. Heller had mentioned in his testimony, the time and cost that it takes to bring a stand-alone cost case. It's extremely burdensome. It's extremely costly and takes a tremendous amount of time. And during those periods of time that it takes to resolve some of those scenarios, of course, you've got shifts in the market and changes in the market, and what was relevant perhaps on day one may or may not be rel-

evant five or 10 years down the road. So that's one of the challenges, not to mention the overall cost.

If you look at agriculture, specifically, which is what I'm representing here today, you don't have the same origin-destination density that you might have in some other commodities. And probably the most common one that's always identified that fits best into the SAC methodology would be coal, where you have some fairly consistent high densities between an origin—in this case, a mine—and a power plant, where coal moves back and forth on a consistent basis.

In agriculture, what happens is you have multiple markets. You may have a single origin, but that grain, depending on the commodity, depending on the geography, depending on demand factors, shifts to many different markets, so you don't necessarily have that density. So the justification to be able to spend the number of years and the amount of money and the time and effort doesn't justify itself.

There are other methodologies, of course, that the Surface Transportation Board does provide that probably fit that better. But the challenges we've always continued to face is that, regardless, you're still running into the time, cost, and complications that result around it, as well as the possibility that markets will shift.

How you deal with that is the challenge that has been before the STB for quite some time. How do you balance the ability to make sure that the rail industry maintains its ability to reinvest, its ability to be profitable, its ability to serve a customer, but at the same time at a fair rate? So the challenge is really around how do you streamline the process in terms of what types of things need to be discoverable, and what are the criteria to determine what's a fair rate, and then how do you shorten the timeline?

I think some of the steps that have been taken so far, particularly around timeline, have been really positive. So there are some prescribed processes, prescribed timelines that I think are very relevant, probably very similar to how you would manage an arbitration type of process, where it's very prescriptive on what types of procedures, what types of information, and what type of timeline.

So if we can narrow that in even further, coupled with some additional emphasis around how do you determine—what do you use for benchmarking, what types of data that's required—I know the STB is working on their URCS platform, which is a key component to some of this as well. I think coupling a lot of those together can improve the process dramatically.

The CHAIRMAN. Just for purposes of people here in the audience who perhaps aren't familiar with what you just described, the stand-alone cost test—kind of describe, if you're going to contest before the Board a rate, how you would go about doing that, because it's a very complicated and, as you said, expensive and time consuming process. So that's what we have today available, so maybe just for purposes of—I'm sure you guys have been through it.

Mr. MACK. Actually, we have not as a company.

The CHAIRMAN. Oh, you have not?

Mr. MACK. We have not. But the way I look at it—and maybe Mr. Heller can share some of that as well—but, essentially, the concept is really around evaluating the cost of the actual movement

as if it was an individual stand-alone railroad that was put in place—so, obviously, a fictitious railroad—put in place essentially to move that product from the point of origin—the complaint describes the destination it describes. And it defines what it would actually cost to put that railroad in place. So that's kind of the foundation around the stand-alone cost.

So when you look at that, you say, "Well, that may have some relevance in terms of what the actual rate should be," but it's also a fictitious approach to the world. The market doesn't work that way. The scope and scale and efficiency of a railroad is based on handling multiple products, multiple geographies, multiple different scenarios. So really the big burden that has to be overcome is how do you create this fictitious railroad and how does that drive what the rate should be, which is really one of the challenges.

The CHAIRMAN. And my understanding of it is that you literally create out of thin air a railroad, and you would compare what that movement would be with a stand-alone railroad compared to what the rate structure is today.

So, Mr. Heller, you highlighted the importance of the study that's being done on simplifying the rate review methodologies as a supplement to that stand-alone cost test. So I'm wondering if maybe you could elaborate on your views, your ideas about the alternative rate review methodologies for simplifying this process and maybe in doing that describe your experience a little bit, how that stand-alone cost model worked. But I guess I'm more interested in where we go from here and what we can do as far as perhaps some alternatives.

Mr. HELLER. Thank you, Senator Thune. As you mentioned, we've had—or as I mentioned in my testimony, we have had experience with the stand-alone cost. It took us 10 years and $10 million and we still had no settled case. The stand-alone cost, from what I understand from information given to me by Ann Warner of the FRCA, our national association, actually was developed in 1985 by the ICC. So it predates, evidently, the Surface Transportation Board.

The stand-alone cost test, as you've been discussing, is a way—it's a model that's developed of designing out of thin air—designing, building, operating an imaginary railroad. The test here is to see what it would cost if there was a brand new railroad built, and the standard is to see then how much it would cost to operate that railroad, and are the rates reasonable, then, that are being charged on the real one. So it's kind of a comparison there.

From what we understand, there's no other economic regulatory agency in the United States or any other nation that uses this kind of a standard. I think it might have been—it had its place in time in 1985. But a lot of things have changed since 1985. We look forward to the consultant's report to address the alternatives to the SAC test.

You know, we're not sure we want to throw the whole thing out. We have had some real problems with it, but are there some things that can be done to supplement that stand-alone cost test to make the process faster and less expensive? And maybe the best thing to do is to throw it out. We look forward to working with the STB, providing comments to them when the report comes out.

You know, you look at the whole situation of creating an imaginary system—I mean, if we're an electric utility, and if our members were to increase rates, the burden—if you were to hold that same type of standard on electric utilities, the customers, then, would have the burden of proof to show that the utility had an excessively high and costly rate. And they would have to design a whole new electric system, submit that testimony to the utility board or regulatory agency to prove—the burden of proof is on the customers. They'd have to prove that it wrong. That's one of the problems with the SAC test—is that the burden of proof is on the shippers. The burden of proof of the rate is not on the railroads.

You know, I don't know—we don't have an answer to what it should be. But I can tell you for sure what we know it shouldn't be, and it shouldn't be just the SAC test by itself. We look forward to working with the Surface Transportation Board on future alternatives.

The CHAIRMAN. Thank you, Mr. Heller.

Mr. Knecht, could you speak to the issue of—if you're a typical grain shipper or some other shipper in South Dakota, speak to the accessibility of the current procedures for that shipper and ways maybe that the STB could improve accessibility for farmers. I mean, if you've got a big, kind of, utility company or something like that that has a lot of money that they can put out there and has the—you know, to pay for the lawyers and everything that it takes to construct a stand-alone railroad—but what if you're a grain elevator in a town in South Dakota that doesn't have those kinds of resources?

Mr. KNECHT. Right. I've obviously never been involved in a rate case. But it's too costly for a regular shipper, let alone a farmer. It's not reasonable to expect that they could take on the likes of a railroad.

I want to quote you, actually, Senator Thune. You read this from Myrtle McKenzie, and this is interesting. He was testifying before the Senate Commerce Committee in 1903, and this demonstrates how this is not a new issue. And he said—and you said, "What show has he to go into the courts to make the railroads pay for this? He has none. And even if he does succeed, it takes years to get it, and it costs him more than the whole thing is worth." I think that's the bottom line. It's just too costly.

The CHAIRMAN. I want to follow up, too, because in your testimony, you mentioned—and I think it's important to point this out—that there has been a $4 billion investment made by the Burlington Northern Santa Fe Railroad in the western United States and the importance of those investments to meet the growing demand for grain worldwide. And I would like for you, if you could, to speak maybe specifically to some of the investments that have been made in or near South Dakota that have been particularly important for rail service in the state.

I say that in fairness, because I think the railroads, in response to the challenges that we went through in 2013 and 2014, have aggressively upped their capital investment in cars and locomotives and rail improvements and all the things that are necessary. And, frankly, as I talk to shippers across South Dakota—and I do quite often—I think we're in a much better place today, and I think the

level of satisfaction in the shipper community is significantly higher, and I think that's partly—I think to be fair, we've got to give the railroads credit for the investments they've made. So maybe you could speak to that from a South Dakota standpoint.

Mr. KNECHT. Absolutely. You've got your core line that runs from Aberdeen to Sioux City, and that's 368 miles. I believe last year, BNSF made a $69 million investment to improve that, to do maintenance on that track. Since 2013, they've located 11 new or expanding facilities, and as you mentioned, the $4.2 billion investment, which is huge for us, to get us to the Pacific Northwest. That's imperative. They have been very proactive and responsive, I think, and, obviously, they should be commended for that.

The CHAIRMAN. Mr. Skuodas, you, in your testimony, pointed out that the legislation expanded arbitration procedures including increasing damage caps and making rate cases eligible for arbitration in order to better incentivize this alternative to what is a very costly litigation process. So what effects do you anticipate these changes having on the biofuels industry, if you can maybe speak to it from your perspective as someone who ships and is very dependent upon the railroad to get your product to the marketplace?

Mr. SKUODAS. Well, to kind of, I guess, sum it up just in a few words, it really ups the ante, and I think what it does is it encourages the carriers to act in good faith and be involved on the front end. You know, our disposition is always if we can work something out commercially, that's always the best alternative. We don't want to have an adversarial relationship that leads to arbitration and litigation, ultimately, the idea being if it's taken seriously, and the potential liability is big enough, it forces activity on the commercial side on the front end, so, hopefully, you never get to that point, just to sum it up that way.

The CHAIRMAN. One of the things that we really tried to highlight, too, is the importance of transparency in the fact finding and decisionmaking process. So I'll direct that to anybody that wants to respond to it. But maybe you could speak to the ways in which additional transparency could benefit the shipper community and maybe start, Mr. Knecht, with grain shippers since that's your area of expertise. Just more information, more—you know, what are the types of things that would be helpful in terms of just giving you more information to make good decisions.

Mr. KNECHT. Well, I think, you know, in my testimony, I mentioned that we want to make sure—be cognizant of the rail carrier and protect them. But transparency, as far as just information as to what's going on out there, why is it happening, what's the situation—I just think that to have that open transparency, to have that back-and-forth, the grain shipper won't feel like they're at a disadvantage. I just think it's just imperative. Maybe these guys have been involved with a little bit more, and maybe they can expand on that, I guess.

The CHAIRMAN. And I would add, just for the panel, too, as required by the law, the STB has now published two iterations of quarterly reports that track unfinished regulatory proceedings in rail service complaints, which is designed to increase transparency and help Congress and the public hold the STB accountable. So if any of the other panelists could maybe give your assessment of the

level of detail in those reports and what, if anything, the STB could do to increase their usefulness.

Mr. HELLER. Thank you, Senator Thune, and, again, thank you for the March 31 letter to the STB commissioners. That really spelled out that it would be more useful and effective if they could include additional details, such as delays, continuances, reason for delays or continuances, and anticipated dates for procedural orders. I think those three things would really be important. If they could be added, it would help transparency substantially.

The CHAIRMAN. Anything else?

Mr. Mack?

Mr. MACK. I think I'll take a perspective a little bit about what we had in place as recent as maybe a year or two ago versus what we have today. So I think we've come a long way when you think about the service metrics that are currently available that are collected by the STB and disseminated and provided to shippers, large and small, and I think that's an important distinction, because when you're a large shipper, you have opportunities that a small shipper doesn't have, or to the point of a single location, doesn't have that. So service metrics, I think, are important.

Second, just having the insight on where the procedural process is at. Oftentimes—and I'm a member of a number of organizations and associations, trade organizations, where I would serve on either committees or in leadership positions, and oftentimes, it was really kind of a guess as to exactly what the next steps would be, what the expected next action would be. You know, oftentimes, there was some insight that was provided. In some cases, that may have been the case. In some cases, it may not have been.

But now you have a kind of ability to follow—and it may not always be completely clear, but there are generally reasons why there may be some vagueness in that. But it's significantly improved around that, and then just really around how do you identify from a trending perspective what people are talking about as a shipper, and that kind of gets to this complaint tally, if you will, or concern tally, depending on how you want to call it. It gives you a sense as to maybe what are some of the things that are trending, and are you feeling the same.

Oftentimes, sometimes we feel that maybe if you're a single location or a couple of locations, it's just a regional small issue, or it's just about your particular location. But you start to see some trends, and you can start to make some analysis around that, and maybe that becomes something that gets dealt with quicker. So I think the transparency that's been provided has been really positive, and I think it has been a direct link to the reauthorization bill.

The CHAIRMAN. Mr. Skuodas, anything to add?

Mr. SKUODAS. I'll just say that it brings some consistency, I think, to it. We have locations throughout several states in the U.S. and deal with a lot of the different carriers, and in terms of service metrics, responsiveness, information, it was kind of hit and miss. This brings a little bit more consistency so you have a good idea what's going on, and I think that helps us in terms of the strategic planning, you know—do we need more rail cars, fewer rail cars,

should we ship into L.A. versus New York—those kinds of decisions. I think it helps us do a better job of that.

The CHAIRMAN. Mr. Mack, in your testimony, you mentioned the importance of including fertilizer in the forthcoming railroad performance service metrics final rule. I'm wondering if maybe you could provide some additional insight into the value of those metrics for logistical planning purposes.

Mr. MACK. When the first metrics came out, fertilizer was noticeably missing. I'm not sure if that was an oversight or if that was for a particular reason, but, certainly, when you look at the mix of movements of fertilizers—and it's really across the North American landscape, Canada, United States, Eastern movements, Western movements—it was just noticeably missing. Fertilizer ships in all different types and forms, single cars, unit trains. It ships 12 months a year. There's a peak season. There's a non-peak season. But it does move on a consistent basis throughout the year.

There has been a tremendous amount of investment made in South Dakota, as well as other locations, on receiving facilities that can handle unit train type quantities. The time periods that the farmer can put their crop in the ground have shortened every year, so that becomes much more sensitive, logistics becomes much more sensitive. And it just seemed very obvious that that was something that needed to be included so that fertilizer users, producers, farmers could basically use that as a gage on what the logistical expectations are in any given time period as it relates to crop nutrients and fertilizer products.

The CHAIRMAN. Let me ask—we have time maybe for one or two—if anyone on the panel has any additional comments or perspectives regarding these improvements in the way rate cases are handled as well as the proactive problem solving and transparency improvements in the STB.

Mr. MACK. I can start. I think when you think about that capability—and it has some limitations on it, certainly. But when you think about that capability, it's really kind of untied the hands of the Board. You know, there's a process that the Board has to deal with informal concerns and issues, service issues or what-not, and they've done a nice job of bringing that forward.

But you start to see trends over time, and I think we probably got a lot of experience in the last maybe two or three years ago, where you started to really see some clear trends. In the old scenario, an individual company or shipper would have to actually bring a complaint to really get the necessary traction to really start to get it, you know, really viewed as—is this a systemic issue, is it an unreasonable practice, is there a major service concern?

And in this scenario, if you start to get a trend, if the Board can see a trend, and they're starting to see a lot of consistency around some of the concerns that shippers are bringing forward, or others, they can go out and do some investigation. They can start to try and understand it better. They can probably have some further conversations about it. And it doesn't mean that it turns into a full proceeding, but it gives them the opportunity to be much more proactive and, hopefully, deal with the issues in a quicker and more efficient manner.

The CHAIRMAN. Anybody else want to add anything to that?

Mr. SKUODAS. I would just say it addresses the things we've brought up, the time and money. You know, it's proactively investigate, not necessarily to have to make a decision or do anything, but start the process, and maybe there's something there and maybe there's not. But it gives them the ability to do so.

The CHAIRMAN. All right. Well, listen, I think we've kind of covered most of the questions that I had for the panel. I appreciate very much, again, all of you being here, and I thank you for your expertise and your knowledge and your time. We're very interested in making sure that the legislation gets implemented in a timely way, which the STB, as everybody has pointed out, has been great about, and also that it's on the mark in terms of getting the things done that we intended when Congress passed it.

And, of course, it was shaped, as you know, with a lot of input from folks in the shipper community, and a lot of issues were raised that I think needed to be raised. As also was pointed out earlier, we haven't done this in 20 years, so we were due for a reauthorization and another look at what we could do better and what we could improve upon. So we thank you for that, and we've come a long way since Myrtle McKenzie.

For those of you who didn't get Mr. Knecht's reference, Myrtle McKenzie was the founder of my home town back in 1905 or 1906, sometime in that time frame, and he testified in front of the Senate Commerce Committee once years ago on some of these very issues. So that was the historical reference there for that. It's interesting to go back. There's a lot of—in the annals of time, you see a lot of the same issues debated and discussed that we're talking about today.

So that concludes our questions for Panel 1. Again, I want to thank each of you for your thoughtful testimony today and providing your insights about implementation of the STB Reauthorization Act. So I'm going to allow all of you to be excused, and we'll call up the Surface Transportation Board members and ask them if they would come up and take their seats, and we'll get into their testimony and some questions for them.

So thank you all very much.

As I mentioned in my opening statement, I very much appreciate the efforts of the Board today to implement the reauthorization bill in a timely manner, and I also appreciate the Board's responsiveness to the Committee. We have a shared goal of ensuring efficient, reliable, and competitive freight rail service, and I look forward to hearing your insights on implementation of the law and some of the emerging issues. So I'll start with the Chairman, Mr. Elliott, and allow him to make some comments, and then we'll proceed to Vice Chairman Miller and Board Member Begeman in that order.

So, Mr. Chairman, please proceed.

STATEMENT OF HON. DANIEL R. ELLIOTT III, CHAIRMAN, SURFACE TRANSPORTATION BOARD

Mr. ELLIOTT. Thank you very much. Chairman Thune and esteemed guests, I appreciate your invitation to testify at this hearing to provide an update on our agency's accomplishments in implementing the Surface Transportation Board Reauthorization Act of 2015.

I want to reiterate my thanks to you, Chairman Thune, for your deep interest in freight railroad issues both in South Dakota and throughout the Nation and your work with the Surface Transportation Board on rail service issues and for this committee's thoughtful oversight of the STB.

As a result of the Reauthorization Act, the Board has achieved greater transparency and efficiency. As you know, the STB has been providing voluntary monthly and required quarterly written updates to our congressional oversight committees and to our stakeholders. I would like to thank Chairman Thune, in particular, for this enhanced reporting provided by the Reauthorization Act.

As you may have seen, we have issued a number of major decisions in the first 6 months of this year. Significant credit for this development is due to the reporting established by the Reauthorization Act. The Act enhances our authorities and creates new responsibilities. Our first year working under reauthorization has been one of implementation. We are making steady progress in all of the major actions that the Board is undertaking to execute these enhanced responsibilities. To date, the Board has implemented the Act in a timely fashion and intends to continue to do so.

Here are some of the highlights of implementation. With respect to arbitration, on May 12, 2016, the Board issued a Notice of Proposed Rulemaking amending our procedures for the arbitration of disputes before the Board to conform to the statutory requirements in Section 13 of the Reauthorization Act. We are on track to deliver final rules by the end of September.

Regarding investigative authority, Section 12 of the Reauthorization Act gave our agency new power to investigate nationally or regionally significant railroad issues on our own initiative. On May 16, 2016, we issued a Notice of Proposed Rulemaking to establish procedures for these investigations. With our new authority, the Board is better equipped than it has been in the past to explore and resolve significant railroad issues such as the service problems that emerged in late 2013 and lasted through 2014. We intend to issue final rules on this proceeding by December.

Rate cases are another focus of the Reauthorization Act. First, Section 11 of the Act instructed us to look for ways to expedite rate cases by examining procedures available in court litigation. On June 15, the Board released an Advance Notice of Proposed Rulemaking to implement this element of the Reauthorization Act. The ANPRM raises numerous topics and suggests methods to expedite rate reasonableness cases, especially the stand-alone cost rate cases that were discussed earlier.

Also, on the subject of rate cases, I note that on March 9, 2016, we issued final rules amending our regulations to comply with the rate case procedural schedule set forth in Section 11(b) of the Act. In addition, we are working on our report on the sufficiency of STB rate case methodologies and alternatives as required under Section 15 of the Act, which we intend to complete by December of this year. My intent is to hold a hearing or hearings to discuss the report shortly thereafter in conjunction with our Section 11 expediting rate cases proceeding and, hopefully, a grain rate case rulemaking.

Last but certainly not least, the Board is close to a proposal on our grain rate case rulemaking. I'm acutely aware that the Board's rate complaint procedures need to be more accessible to grain shippers and smaller shippers, generally, and provide effective protection against unreasonable rates. I have heard the frustrations of farmers and elevators alike. Later this month, I hope to unveil a proposed new rate case methodology that is intended to be streamlined and small and that addresses the concerns I've heard from the agricultural community and today.

Moreover, Section 5 of the Act granted the Board the ability to hold nonpublic collaborative discussions related to agency matters that you heard discussed earlier. The Board has already held four of these Section 5 meetings, which have been extremely beneficial to me.

In closing, I want to thank you again for this opportunity to speak about the Board and its progress in implementing the STB Reauthorization Act. There's no doubt that freight rail transportation will benefit from the innovative provisions of this law. Behind this reauthorization is a message of transparency and increased efficiency, and that is what I intend to deliver to the public.

I'd be happy to answer any questions you might have, and, also, I'd like to make myself available after the hearing. If anybody has any questions, I'd be happy to meet with you.

[The prepared statement of Mr. Elliott follows:]

PREPARED STATEMENT OF DANIEL R. ELLIOTT III, CHAIRMAN, SURFACE TRANSPORTATION BOARD

Good afternoon, I am Dan Elliott, Chairman of the Surface Transportation Board.

Chairman Thune, Ranking Member Nelson, Members of the Committee, and esteemed guests, I appreciate your invitation to testify at this hearing to provide an update on our agency's accomplishments in implementing the Surface Transportation Board (STB) Reauthorization Act of 2015. I want to reiterate my thanks to you, Chairman Thune, for your deep interest in freight railroad issues both in South Dakota and throughout the nation, and your work with the Surface Transportation Board on rail service issues, and for this Committee's thoughtful oversight of the STB.

As a result of the Reauthorization Act, the Board has achieved greater transparency and efficiency, which directly benefits the stakeholders that we serve. As you know, the STB has been providing voluntary monthly and required quarterly written updates to our congressional oversight committees and to our stakeholders, tracking our steady progress in meeting the mandates of the Act. I would like to thank Chairman Thune in particular for the enhanced reporting provided by the Reauthorization Act. As you may have seen, we have issued a number of major decisions in the first six months of this year. Significant credit for this development is due to the reporting established by the Reauthorization Act and the support it provides to our continuing timeliness improvements.

This hearing will allow me to provide further information, and to elaborate on our efforts in response to any questions that you may have.

The Reauthorization Act made the STB a wholly independent Federal agency, terminating our administrative affiliation with the U.S. Department of Transportation. The Act also changed the agency and some of our processes in other significant ways. Most notably, the Act

- Increased the Board's membership from three to five Board Members;
- Directed the Board to adjust its existing voluntary arbitration procedures, including increasing the maximum damage awards;
- Shortened timelines applicable to large rate case proceedings, including limits on the time allowed for discovery and for development of the evidentiary record;

- Instructed us to initiate a proceeding to find ways to expedite major rate case proceedings;
- Allowed a majority of Board Members to meet directly in private to discuss agency matters, subject to certain requirements; and
- Bestowed authority on the Board to initiate investigations of railroad issues of regional or national significance.

The Act enhances our authorities and creates new responsibilities. Our first year working under reauthorization has been one of implementation. We are making steady progress in all of the major actions that the Board is undertaking to execute these enhanced responsibilities. To date, the Board has implemented the Act in a timely fashion and intends to continue to do so. Some of the highlights of implementation are as follows:

Arbitration

On May 12, 2016, the Board issued a notice of proposed rulemaking amending our procedures for the arbitration of disputes before the Board to conform to the statutory requirements in Section 13 of the Reauthorization Act. We are expanding our rules to encompass rate proceedings and raising the cap on damages to $25 million in rate matters and $2 million in other matters. The comment period closed on July 1, 2016. I have reviewed the thoughtful opening and reply comments we received and I am working on the changes we need to make to our proposed rules, as a result of those comments. We are on track to deliver final rules by the end of September.

Investigative Authority

Section 12 of the Reauthorization gave our agency new power to investigate nationally or regionally significant railroad issues on our own initiative. On May 16, 2016, we issued a notice of proposed rulemaking to establish procedures for these investigations. Our rules contemplate a three-stage process consisting of:

(1) preliminary fact-finding,

(2) Board-initiated investigations, and

(3) formal Board proceedings.

In fashioning our rules, we are working to ensure that we have incorporated appropriate protections for due process, separation of fact-finding versus adjudication and, very importantly, timely resolution of cases. We received opening comments on July 15, 2016, and I eagerly await what stakeholders have to say in reply comments, which are due by August 12, 2016. In determining what changes we need to make in the final rules, I will take into account the valuable input that stakeholders provide through the comments. With our new authority, the Board is better equipped than it has been in the past to explore and resolve significant railroad issues, such as the service problems that emerged in late 2013 and lasted through 2014.

Rate Cases

I have heard our stakeholders when they express their concerns about the complexity and expense of bringing a SAC case. During my first term, the Board initiated several reforms, including adopting rules that (1) clarified certain revenue allocation issues in large rate cases, (2) raised the award caps for smaller rate cases, and (3) changed the interest rate for damage awards. The Reauthorization Act directs us to build on these efforts.

First, Section 11 of the Act instructed us to look for ways to expedite rate cases by examining procedures available in court litigation. In preparing for this proceeding, we held informal meetings with attorneys, consultants, and stakeholders that have the most experience with these cases. On June 15, the Board released an advance notice of proposed rulemaking to implement this element of the Reauthorization Act. We proposed several measures, such as standardizing discovery requests and evidentiary submissions, limiting the scope of certain filings, and enhanced technical meetings between the parties and STB staff. The ANPRM raises numerous topics and suggests methods to expedite rate reasonableness cases, especially standalone cost rate (SAC) cases. First round comments were due August 1, 2016, and reply comments are due by August 29, 2016.

Also on the subject of rate cases, I note that on March 9, 2016, we issued final rules amending our regulations to comply with the rate case procedural schedule set forth in Section 11(b) of the Act. Second, we are working on our report on the sufficiency of STB rate case methodologies and alternatives, as required under Section 15 of the Act, which we intend to complete by December of this year. I hired independent outside experts InterVISTAS in 2014 to look at our current SAC method-

ology and our other rate reasonableness methodologies. We asked them to do a global search for potential other methodologies that are superior to SAC that could be used in the U.S. freight rail context. In particular, we directed them to look at alternatives that are likely to reduce the time, complexity, and expense of rate cases, and the scope of the search included regulation of other network industries in the U.S., as well as the approaches used by regulators around the world. InterVISTAS is putting the final touches on their report, and I look forward to delivering that to you and our stakeholders before the end of this year. My intent is to hold a hearing (or hearings) to discuss the report shortly thereafter in conjunction with our Section 11 Expediting Rate Cases proceeding and our grain rate case rulemaking.

Third, last year we also engaged the services of outside experts to help the agency look for process efficiencies in our rate reasonableness cases. We are taking much of what we learned and dovetailing that with our STB Reauthorization Expediting Rate Cases proceeding, as well as the shorter timelines laid out in Section 11(b).

Last, but certainly not least, the Board is close to a proposal on our grain rate case rulemaking. I am acutely aware that the Board's rate complaint procedures need to be more accessible to grain shippers, and smaller shippers generally, and provide effective protection against unreasonable rates. I have heard the frustrations of farmers and elevators. Later this month, I hope to unveil a proposed new rate case methodology that is intended to be streamlined and small and that addresses the concerns I have heard from the agricultural community.

Collaborative Discussions

Section 5 of the Act granted the Board the ability to hold non-public collaborative discussions related to agency matters. In my view, these Section 5 meetings have really given the agency greater flexibility and opportunity to discuss complex proceedings and issues that are before the Board. I have used this tool on several occasions already to have discussions on issues such as proposed rules for railroad performance data reporting, new arbitration rules, and rules for our new investigative authority, and it has proved to be very effective. My hope is to continue to have more Section 5 meetings in the coming weeks and months to further discuss Reauthorization Act initiatives like arbitration, investigations, and expedited rate case proceedings.

Because of the importance of the Reauthorization Act to our agency and our stakeholders, we have created a specific webpage on our website to disseminate information about the Act and our progress in meeting its requirements. You can find copies of monthly and quarterly status reports that we have submitted to our congressional oversight committees, including reports on formal and informal rail service complaints, pending and completed rate cases, and unfinished regulatory proceedings. We also post summaries of non-public collaborative discussions on this page.

Before closing my testimony, I would like to briefly comment on two matters, which I believe are of significant interest to the Committee. The first is that on July 27, we proposed regulations that would allow a shipper to seek rail service from another railroad. By doing so—in response to a petition filed by The National Industrial Transportation League—we are attempting to breathe life into a statutory remedy that was enacted by Congress, but which has been virtually dormant due to precedent established by our predecessor, the Interstate Commerce Commission. Our proposed rules mirror the language of the statute, which allows us to grant reciprocal switching when it is practicable and in the public interest or necessary for competitive rail service. My approach has always been to apply an even, balanced hand when regulating, and I look forward to reviewing comments on our proposal and meeting directly with stakeholders.

The second matter pertains to our jurisdiction over Amtrak under Passenger Rail Investment and Improvement Act of 2008 (PRIIA). On July 28, we issued two decisions. In the first, we decided to analyze on time performance (OTP) by looking at arrival and departure at all stations along a passenger train's route, as opposed to only the train's end point performance. After reviewing comments that we received in response to a proposed rule, issued in December 2015, we believe that "all stations OTP" is a superior metric that is more responsive to the traveling public. In the second decision, we decided to withdraw a proposed policy statement on the meaning of the term "preference" for purposes of cases under PRIIA. Comments revealed strikingly divergent viewpoints as to how preference should be defined, so we decided to examine the term on a case-by-case basis.

In closing, I want to thank you for this opportunity to speak about the Board and its progress in implementing the STB Reauthorization Act. Our stakeholders have waited 20 years for the Board to be reauthorized, and there is no doubt that freight rail transportation will benefit from the innovative provisions of this law. Behind

this reauthorization is a message of transparency and increased efficiency. That is what I will deliver to the public.

I am happy to answer any questions you might have.

The CHAIRMAN. Thank you very much, Chairman Elliott.

We'll turn now to Vice Chair Miller.

STATEMENT OF HON. DEB MILLER, VICE CHAIRMAN, SURFACE TRANSPORTATION BOARD

Ms. MILLER. Thank you. Let me begin by expressing my thanks to you, Senator Thune, as well as to Senator Nelson, and the Senate Committee on Commerce, Science, and Transportation, for your efforts and your doggedness in passing the Surface Transportation Board Reauthorization Act of 2015.

I very much appreciate your interest in freight and the freight rail industry and the shippers that depend on it, and I believe that the Act is already having a positive impact. Today, I want to talk about some of those positive impacts and provide my own perspective on the Act and on the Board. In my reading of the Act, I believe its primary goals are increasing the transparency, accountability, and collaboration of the Board, and those are goals that I wholeheartedly support.

The Act increases collaboration by increasing the number of Board members from three to five. This allows two members to communicate about pending matters. Secondly, it also allows a majority of the Board to meet under certain circumstances to discuss pending cases. Currently, the Board is very siloed, and I believe having the opportunity to have interaction between the members will improve our understanding of each other's perspectives, and I believe it will lead to better-reasoned decisions.

I would note that while these changes are very helpful, I believe the Board itself could increase collaboration by taking a more sensible approach to the Sunshine Act. I want to say that I certainly support the aims of the Sunshine Act, but I believe the Board has been overly conservative in its adherence. For example, the Board staff briefs all three members individually, increasing the time and workload of the staff, but also denying members the benefit of hearing the same presentation and the opportunity to hear the questions that are raised by other members.

Turning to the issue of transparency and accountability, I would say that the Act requires the Board to submit quarterly reports on various matters, the most significant being the report that requires an update on unfinished regulatory proceedings. Since joining the Board, the case backlog has troubled me. Thanks to this requirement, the Board has taken action on a number of rulemakings that have been pending for years and is on pace to move forward on others.

I'd like to see the Board apply some of the same principles of the Act's reporting requirements for regulatory proceedings to our other proceedings, particularly setting deadlines and prioritizing the order of the cases. One of the most common criticisms I hear from stakeholders is that the Board is too much of a black box. Once a proceeding is started, there's no way for parties to know where it stands or when it might be acted on.

I also believe the Board could increase our transparency and accountability through greater use of ex parte meetings. These are meetings where stakeholders can come in and discuss their position on pending Board matters. Commissioner Begeman and I have both advocated for ex parte meetings. As a result, the Board waived our prohibition in two proceedings.

I think these ex parte meetings are extremely important. They allow members to delve more deeply into the issues than reading pleadings will ever allow for. The ability to ask questions and resolve misunderstandings is so vital. For these reasons, I urge the Board to repeal our rule that prohibits these meetings rather than simply waiving them on a case-by-case basis.

Unrelated to the Reauthorization Act, I believe there is another way that the Board could increase its transparency and accountability, and that is by doing more of its work in public. This could include voting conferences or public work sessions in which staff provides briefings and reports to the members on key cases. Not only would this pay dividends to members and to our stakeholders, but once we have five members, it may be crucial to the ability of the Board to operate.

Another area where the Committee recognized changes were needed involves the Board rate case processes. We've clearly already heard a lot about that today from the shipper groups who were here. The Act requires us to consider expedited litigation in civil courts to see if that would be helpful to us. It reduces the timeline for processing cases, and, most importantly, it requires a study of whether or not there are alternatives to what's known as SAC, the stand-alone cost test methodology, and then to report those findings.

I believe that making improvements to SAC as well as giving serious consideration to alternatives to SAC is vital. The Board is already implementing improvements to our internal work flow processes for handling this, and the expedited rate case rulemaking which we have underway very likely will help reduce the time.

However, that does not resolve the serious concerns many stakeholders have about the SAC process itself, and I would have to say since my appointment to the Board, I've also developed concerns. I have concerns that are both practical and substantive. From the practical standpoint, as you've already heard, the SAC test is very complicated. It imposes significant costs on shippers and on railroads. From a substantive perspective, I question a test that requires a shipper to compare the hypothetical cost of building a new railroad at today's cost to the real-world, historic cost of an existing railroad. So I am very pleased that the Act has raised the issue of our looking at this.

Let me quickly end up by saying though the Board has engaged an outside consultant—thank you, Senator. I'm going to use Mr. Mack's extra minute.

[Laughter.]

Though the Board engaged an outside consultant to explore the academic literature and other regulatory schemes to look for options to SAC, I don't believe this report on its own is sufficient to respond to the Act's requirement. I have advocated that the Board release the report and allow our stakeholders an opportunity to

comment, perhaps in a hearing format. I think it's really important that we report to Congress that we have feedback from railroads and shippers, in terms of their reactions to it, that we're able to provide to the Committee.

Even if we as a Board end up concluding that there are no feasible alternatives to SAC, I think the only way shippers are going to regain any confidence and any faith in SAC is if they believe the Board has truly exhausted all options, and I don't believe yet we have done that.

I'd like to conclude by noting that Chairman Elliott has taken the implementation and the deadlines in this Act very seriously, and he has certainly been diligent ensuring that the Board works to meet those deadlines, and I'm pleased to see that, so far, we have stayed right on target. And I want to say that it has been a bit of a struggle for our staff—lots of new requirements. But they've done a marvelous job so far, and I appreciate the hard work that our staff has done. I know that we're also putting some burdens on our stakeholders who are having to keep up as well.

Although the implementation of the Act is still in the early stages, I do believe it's already having positive effects, and I believe that those effects will only grow as implementation continues. I also believe that the Board can and should take additional actions that are consistent with the spirit of the Act to increase its positive benefits. These changes are within the control of the Board, and I hope that we will utilize them.

Senator, thank you very much for having us here, and I'm, of course, happy to stand for questions when it's appropriate.

[The prepared statement of Ms. Miller follows:]

PREPARED STATEMENT OF HON. DEB MILLER, VICE CHAIRMAN, SURFACE TRANSPORTATION BOARD

Let me begin by thanking the Senate Committee on Commerce, Science, and Transportation, for their efforts in passing the Surface Transportation Board Reauthorization Act of 2015 (Act), as well as Chairman Thune for holding today's hearing. I appreciate the Committee's interest in the freight rail industry and its impact on shippers, and its willingness to take the necessary steps to help the Surface Transportation Board (Board) better do its job.

Prior to passage of the Act, the Board was operating under statutes that had not been revised in almost two decades and many of these provisions clearly needed updating. Under the leadership of Senators Thune and Nelson, the Committee was finally able to devise a bill that both railroads and shippers could support, where prior attempts had failed. The members of the Committee deserve credit for bringing the major stakeholders together to craft provisions most could agree on but that also effect real change. And I am glad to report that the Act is already starting to have a positive impact. The Act has significantly reformed many of the Board's functions in a way that is allowing the agency to streamline its processes and work more effectively. In this testimony, I want to provide my perspective on the progress the Board has made in implementing these reforms as well as my views on what additional steps the agency needs to take going forward.

Reading the Act, one of the primary goals appears to be increasing the transparency and accountability of the Board, an effort that I whole-heartedly support and applaud. The Act achieves this goal in a number of ways. Most notably, it increases the number of Board Members from three to five. The purpose of this change is to allow two members to communicate about pending Board matters without running afoul of the Sunshine Act, which requires that communications involving a majority of the Board (which currently would be two Members) to be publicly disclosed. While I understand that the Sunshine Act is needed to prevent Members from working in secret on important policy issues that impact the public, it also creates a number of difficulties. Since joining the Board, it has indeed been frustrating that I so rarely have an opportunity to communicate with my fellow Members.

As a practical matter, I think more contact between the Members will allow us to develop better working relationships. Today, the Members are essentially silo-ed from one another and can often go weeks without talking. Being able to communicate more directly with one another should also lead to better-reasoned decisions. Being able to speak directly with the other Members will ensure that we fully understand each other's views, perspectives, and concerns about matters before us. It should also make it easier to resolve disagreements.

Another important change made by the Act was to allow the Board to conduct meetings on pending cases in certain situations, which we have taken to calling "Section 5" meetings (as this was enumerated in Section 5 of the Act). In my view, this may be the most far-sighted and thoughtful changes made by the Act. Even with the increase to five Members, there will still be times were it is simply more practical for all the Members to meet jointly. The Act now provides us the ability to do so. We have held a handful of these meetings already and they have been helpful. In fact, I would like to see us take advantage of this opportunity more frequently. By not being able to communicate, the Members have to rely heavily on staff, which I believe oftentimes puts too much of the agency's responsibility in their hands. I think holding more Section 5 meetings would re-empower the Members to set the agency's direction.

Again, I commend the Committee for recognizing the difficulties that the Sunshine Act has presented and crafting clever ways of addressing the problem. I would note that even though these changes are extremely beneficial in reducing the obstacles created by the Sunshine Act, it is my belief that the Board itself needs to take a more sensible approach to the Sunshine Act. While I support the aims of the Sunshine Act, I believe that the Board has been overly conservative in its adherence. For example, because of Sunshine Act concerns, the Board staff currently briefs all three Members on cases individually. This means not only does the staff have to perform the same exercise three times (which, given scheduling issues, can add days if not weeks to the processing time of a case), but it means that the Board Members do not have the benefit of hearing the same presentation or the other Members questions and staff's responses. This holds true not only for pending issues before the Board but also for administrative issues like our budget. I do not believe that the Sunshine Act prohibits joint briefings, so long as the Members are careful not to express their views on a pending matter, even tacitly. At my suggestion, we have held a handful of joint briefings (subject to the restriction about expressing views) and I have found them to be helpful.

Another requirement the Committee recognized was necessary to improve transparency and accountability is for the Board to start submitting quarterly reports on various matters. The most significant of these reports is the one that requires the Board to give status updates on its unfinished regulatory proceedings (*i.e.,* rulemakings), including expected dates for next action. Since joining the Board, the number of proceedings that the agency has opened but not completed has troubled me. Many of these rulemakings appear to have been initiated without any sense of the ultimate goal, or timelines for when they would be completed. The Committee's vision to create a reporting requirement was extremely pragmatic. Absent the reporting requirements of the Act, I strongly suspect that many of these proceedings would still be in a state of regulatory limbo. Only after having to provide Congress with a report on when action would be taken was there any discussion given to deadlines and prioritization of proceedings. I think the positive results of the report are already being seen, as the Board has taken action on a number of rulemakings that had been pending for years and is on pace to move forward on several others. The only downside has been that the effort to move forward on all these proceedings simultaneously has placed a considerable strain on staff and likely on the parties as well.

As I recently noted in my separate comment in our competitive (reciprocal) switching proceeding,[1] I want the Board to apply some of the same principles of the Act's reporting requirement for regulatory proceedings to our other proceedings. This would give stakeholders more information regarding the status of their cases. One of the most common criticisms I hear from our stakeholders is that the Board is too much of a black box—once a proceeding is started, there is no way to know where it stands or what progress has been made. The Board might rule in three months or three years, but a stakeholder has no idea which it is likely to be. Although the Board needs to be careful about sharing too much information that could compromise its internal deliberations, stakeholders should be given some idea of where their matters stand when possible, particularly when important business de-

[1] *Petition for Rulemaking to Adopt Revised Competitive Switching,* Docket EP 711, *et al.,* (STB served July 27, 2016) (Miller comment).

cisions are at stake. As one of the goals of the Act was to improve transparency, this is one action the Board could take.

In addition, I think the Board could increase transparency on our own, as well as enhance our understanding of the issues before us, through greater use of ex parte meetings.[2] These are meetings with stakeholders to discuss their positions on pending Board matters. Although such meetings are permitted by law (subject to certain disclosure requirements), the agency many years ago imposed its own rule that prohibits all ex parte communications. At my and Commissioner Begeman's urging, the Board has waived this prohibition in two proceedings, including our Notice of Proposed Rulemaking on competitive (reciprocal) switching—though the meetings will not occur until this fall. In the other proceeding, which involves new data reporting requirements on the railroads, ex parte meetings were conducted between stakeholders and Board staff. I know that our staff found these meetings extremely helpful and I have heard positive reaction from the stakeholders as well. I think ex parte meetings are extremely useful. They allow the Members to delve more deeply into the issues than simply reading the pleadings will ever provide. The ability to ask questions and clarify misunderstandings would be very helpful. In my meetings with stakeholders, they also express a desire for more interaction with the Board. For this reason, I urge the Board to simply repeal our rule that prohibits these meetings, rather than waiving them on a case-by-case basis.

In terms of increasing transparency and accountability, I also believe that the Board should explore ways to conduct more of its work in public. This could include voting conferences or public work sessions, in which staff would provide briefings and reports to the Members on key cases. I will note that I am glad that the Board, at my suggestion, just this week announced that it would be hold a workshop in which staff will give a presentation and answer questions from stakeholders on a particularly technical proposal that the agency is making involving its Uniform Rail Costing System.[3] I think this workshop will help stakeholders better understand the proposal, which in turn will ensure that the Board receives more meaningful comments.

Another area where the Committee recognized that changes were needed involves the Board's rate case processes. The Act imposed three specific requirements on the Board. First, it required the Board to initiate a proceeding to assess whether procedures that are used to expedite litigation in civil court could be used in our rate cases. Second, it reduced the timeline for processing rate cases under our Stand-Alone Cost (SAC) methodology, most notably, by limiting the amount of time for the Board to reach a final decision after the close of the record from nine months to six months. Lastly, the Act required the Board to study whether there are other viable alternatives to the SAC methodology and report our findings to this Committee, and the House Committee on Transportation and Infrastructure.

I commend the Committee for including these requirements in the Act. In regard to the first two requirements, which are both aimed at speeding up rate cases, this past spring the Board conducted informal meetings with stakeholders to get their thoughts on ways this could be done. Out staff has reported that these meetings were very successful. Not only were stakeholders appreciative of the opportunity to provide input, but they offered a number of interesting and practical ideas on ways to streamline rate cases—many of which had not occurred to us. The Board then took these ideas and packaged them into a series of proposed reforms, which has now been put out for public comment.[4] The success of these meetings reinforces my belief that more face-to-face interaction with our stakeholders is beneficial.

The Board also continues working to implement a number of internal changes to our workflow process in rate cases. In FY 2014, the Board hired an outside consultant to perform a review of our process in these cases and to look for ways to make it more efficient. The consultant finished its assessment and provided recommendations in FY 2015. With the help of the consultant, the staff has begun employing a number of these recommendations in the two rate cases currently pending.

Although these reforms will hopefully result in quicker processing of rate cases, as I have now noted in the three rate case decisions in which I have participated, I still have significant concerns with the SAC methodology itself. My concerns are both practical and substantive. From a practical perspective, the SAC test has morphed over the last 30 years into an overly complicated analysis that imposes sig-

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[2] *United States Rail Sesrvice Issues—Performance Data Reporting,* Docket EP 724 (Sub-No. 4) (STB served Nov. 9, 2015) (Miller concurrence).

[3] *Review of the General Purpose Costing System,* Docket EP 431 (Sub-No. 4) (STB served Aug. 4, 2016).

[4] *Dispute Resolution Procedures Under the Fixing America's Surface Transportation Board Transp. Act of 2015,* Docket EP 734 (STB served July 28, 2016).

nificant costs on the shipper and railroad.[5] From a substantive perspective, I am concerned that the test requires a shipper to compare the hypothetical costs of building a "new" railroad against the real world "historic" costs of an existing system.[6] It was for these reasons that I was enthusiastic that the Act required the Board to conduct a review to determine if there are other approaches that could be used.

Prior to my joining the Board, it had engaged an outside consultant (different from the one reviewing our workflow process) to explore academic literature and other regulatory schemes to see if there were other approaches that had potential application to U.S. rail industry. It was my hope that the report would have been completed by now, particularly as a nearly completed draft was presented to me several months ago. More importantly though, I have advocated that the Board release the report and allow our stakeholders an opportunity to provide feedback, perhaps at a hearing.[7] My hope is that the Board will do so well in advance of the December 2016 deadline for our report to the Committees, so that we can incorporate not only the consultant's report, but other approaches that may arise out of stakeholder feedback. However, despite my continued requests, I have received no indication of the direction the agency intends to proceed. Given that we are only four months from having to submit our report, the window for obtaining stakeholder feedback seems to be closing. If the intent is to satisfy the requirement of the Act by simply forwarding the consultant's report to the Committee, I find that unfortunate. Even if we conclude that alternatives to SAC are not in fact feasible, the only way that shippers can regain faith in SAC is if they believe the Board has truly exhausted all other options.

The two other important changes to the Board's processes made by the Act are empowering the Board to conduct investigations and requiring changes to the arbitration process. I think that both of these changes are positive, particularly the investigative function. In order for the Board to properly carry out its regulatory mission, I think it is important that we have the ability to proactively go out and make inquiries, rather than simply rely on the parties to present issues to us. The investigative function will allow us to now do so. As for arbitration, I am a strong supporter of alternative dispute resolution and it is my hope that the changes the Board implements pursuant to the Act will help them overcome their reluctance to using arbitration.

Perhaps the biggest change mandated by the Act, at least from an administrative standpoint, was to make the Board independent from the U.S. Department of Transportation (DOT). Prior to the Act, the Board was decisionally-independent, but administratively housed under the DOT. This meant that the Board had to rely on DOT to perform a number of administrative and information technology (IT) functions, such as human resource services, procurement, payroll, auditing, and Internet access. By becoming independent, the Board will have to now assume these functions.

In the long-run, I hope this will improve the Board's administrative functions. Although I appreciate the work that DOT performed on the Board's behalf over the years (and that we have agreed to have them continue providing in certain instances), it is simply more useful for the Board to control these functions itself. We understand our needs and priorities better than an outside entity could, and I think that this will translate into greater administrative efficiency. Getting to the point that we can stand on our own though will require work and money. Right now, the Board is not equipped with the manpower or resources to take on a number of these functions. Our staff has performed admirably since the Act was passed to devise plans for us to do so, but it will take time. In addition, there will be a significant cost resulting from this independence. According to an estimate that the Board staff conducted prior to passage of the Act, it is conservatively estimated that the annual cost for assuming these functions will be $2.4 million.[8]

In addition to the costs of becoming independent, there are significant costs associated with some of the Board's new responsibilities. For example, the cost simply of adding two new Members (salaries, office space, staff) is estimated to be about

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[5] *Sunbelt v. Norfolk Southern,* Docket NOR 42130 (STB served June 20, 2014) (Miller concurrence).

[6] *E.I. DuPont de Nemours & Co.* v. *Norfolk S. Ry. Co.,* Docket NOR 42125 (STB served Dec. 23, 2015) (Miller concurrence).

[7] *Sunbelt* v. *Norfolk Southern,* Docket NOR 42130 (STB served June 30, 2016) (Miller concurrence).

[8] Chairman Elliott letter to Senators Thune, Nelson, Collins, and Reed, Dec. 15, 2015, attached Chart I.

$1 million annually.[9] There will also be costs for implementing our new investigative functions, reporting requirements, and rate case improvements. It also must be noted that the Board is in the midst of overhauling its IT infrastructure and will need funding to ensure that we can complete it. Accordingly, I am concerned that the total sum of these costs will likely exceed the amounts authorized in the Act. In addition, the Board's lease expires in February 2017, at which point the agency will either have to relocate to new office space, or reduce the footprint at its existing location by having its offices retrofitted (which would also require the Board to temporarily move to a "swing" space). Either way, there will be a substantial cost resulting from this process. Although it will be a one-time cost, if the Board does not receive funding for it in the next Fiscal Year, the money for the move/retrofit will have to come from money that is normally dedicated to our regulatory functions.

In conclusion, although implementation of the Act is still in its early stages, I think so far it has had a truly positive impact. However, there are additional steps that are within the Board's control that I hope we will take to ensure that the spirit of the Act is fully achieved. I believe that the reason the Board's major stakeholders and members of Congress overwhelming supported the Act's passage was that they shared the view that the Board needs to become more effective in carrying out its duties by changing the manner in which it does business. I personally believe that the Act should be seen as an opportunity for the Board to seriously rethink our processes and long-held practices which may be obsolete or inefficient.

One of these long-held practices is the very limited involvement of the Vice Chairman and Commissioner in developing policies and practices of the Board. Since joining the Board, I have been struck by how little involvement the other two Members have in these matters. As I noted earlier, the Members are limited in their communication on substantive issues, but those restrictions have oftentimes been expanded to non-substantive issues as well. While the Members have recently begun to hold meetings to discuss such matters, there are still too many instances where there is no collaboration or no input is sought, or if it is, it is done as an afterthought.

Another long-held practice that the Board needs to re-think is the manner in which it processes cases. One of my frustrations with the Board has been the lack of any systematic way of managing our caseload. Little effort is given to track how long matters have been pending and, as a result, decisions tend to sit for too long. Little thought is also given to how pending matters should be prioritized and, as a result, decisions are issued in no particular order, rather than based on their importance or duration. The reporting requirement for unfinished regulatory proceedings mandated by the Act has helped in this regard, but I believe that there is more the Board could do. During my time as Acting Chairman, I began two initiatives to try to address these problems: setting target dates for the completion of all pending matters in our formal proceedings and creating a set of internal performance metrics to measure how the Board is performing in terms of managing its docket. It was my hope that these initiatives would be continued, but they were not. This is unfortunate, as I believe that they would help the Board manage its workload better and issue decisions more timely, which would benefit our stakeholders.

These issues aside, Senators Thune and Nelson and the entire Committee drafted and passed an excellent bill and I think the Board has done an excellent job in carrying out the goals of the Act. I particularly want to express my gratitude and appreciation for the job the Board's staff has done over these last several months. The Board already had a substantial workload prior to passage of the Act, and that workload increased greatly once the Act was passed. I am pleased to say that our staff has risen to the occasion.

Again, I also want to thank the Committee for the interest they have shown in the work of the Board and the opportunity to testify today about the positive effect the Act has had. The Act has wisely addressed the need for the Board to be more transparent and accountable by allowing the Board Members to communicate more easily and by providing progress reports on its workload. I also appreciate the requirements under the Act for the Board to examine ways to improve our rate case processes and methodologies, which are long overdue. The addition of investigative power and changes to the arbitration process will also be beneficial, as they will give the Board additional means of resolving issues between railroads and shippers. Lastly, once the Board is able to complete the steps necessary to become fully independent, the Board will be able to carry out its administrative duties much more efficiently. The cumulative effect of these changes will only continue to result in positive developments for our stakeholders.

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[9] Chairman Elliott letter to Senators Thune, Nelson, Collins, and Reed, Dec. 15, 2015, attached Chart II.

ATTACHMENT

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

December 15, 2015

The Honorable John Thune
Chairman
Senate Committee on Science,
Commerce & Transportation
511 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Bill Nelson
Ranking Member
Senate Committee on Science,
Commerce & Transportation
716 Hart Senate Office Building
Washington, DC 20510

The Honorable Susan Collins
Chairman
Senate Subcommittee on Appropriations –
Transportation, Housing and Urban
Development, and Related Agencies
413 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jack Reed
Ranking Member
Senate Subcommittee on Appropriations –
Transportation, Housing and Urban
Development, and Related Agencies
728 Hart Senate Office Building
Washington, DC 20510

Dear Senators Thune, Nelson, Collins and Reed,

I am writing to provide funding information pertaining to the passage of Senate Bill No. 808, *Surface Transportation Board Reauthorization Act of 2015*. Once enacted, the legislation will significantly affect the functions of the Surface Transportation Board. In addition to reauthorizing the agency, S. 808 will establish the Board as an independent federal agency; expand the size of the Board from three to five members; empower the Board to initiate investigations; and enhance the Board's timeline for handling cases involving disputes over railroad rates.

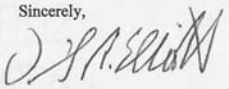
Thank you for your thoughtful oversight and interest in the Surface Transportation Board, especially in light of the challenges experienced by the Nation's railroad industry just one year ago. As S. 808 awaits President Obama's signature, I urge you to review the funding allocation for the agency to ensure that it provides the Board with the resources needed to successfully realize the objectives of the bill. Attached you will find a series of charts that provide an overview of what the STB estimates are the resources it will need to effectively exercise the bill's proposed powers and new responsibilities.

Although the Board is currently decisionally independent from USDOT, the Board is administratively aligned with USDOT and thus relies on it for many of its administrative functions, including activities relating to human resources, contracting, payroll, and auditing. As the Board transitions to fully independent status, the Board will bear the cost of these activities, whether performed in-house or outsourced to another entity. (See Chart I.) The increase in Board Members necessitates increases in office space, staffing, and other costs. (See Chart II). Similarly, exercising the Board's new investigative authority will require increased staffing and travel funding. (See Chart IV). S. 808's improvements to the Board's case processing timelines will require an increase in staffing to meet the new statutory deadlines. (See Chart III). As you will see from the enclosed summary chart, with the addition of these expenses, the Board's overall costs will significantly exceed the $33 million in funding authorized in S. 808 for the first year.

An overarching goal of S. 808 is the improvement of the STB's workflow, an objective that I have diligently pursued as Chairman. A critical step in achieving this objective is much needed improvement of our antiquated information technology (IT) system. At present, our agency is utilizing an IBM Notes platform that is no longer supported by much of the IT industry. This limited platform has frustrated our ability to launch two important and time-consuming projects: a redesigned website and a case management and tracking system. Weaknesses in the platform have led to inconsistent performance of our email network and periodic outages of our website. We have also suffered software and hardware failures, resulting in data loss and time-consuming recovery efforts. At the Board's current level of funding, we must choose between patching up the IT system or hiring much-needed staff to process our stakeholders' disputes. As a practical matter, we cannot have one without the other—and as mentioned above, we need staff to effectively exercise the new powers and responsibilities provided by S. 808. I respectfully urge the committees to consider funding for an IT upgrade at the STB, especially in light of the changes in S. 808.

I look forward to carrying out S. 808's important objectives. Please do not hesitate to contact me if you need further information about these estimates. My staff and I would be happy to provide additional thoughts and perspectives at your convenience.

Sincerely,



Daniel R. Elliott III
Chairman

Chart I

S. 808 STB Reauthorization Preliminary Estimate*
Section 3 - STB Becomes an Independent Agency

Office of the Managing Director				
Human Resources	**Grade Level**	**Salary**	**Cost**	**Out-Year Costs**
Human Resources Specialist	13	$ 102,932	$ 131,238	$ 132,551
Human Resources Specialist (Personnel Security)	12	$ 86,564	$ 110,369	$ 111,473
HSPD-12 Services/PIV Cards			$ 25,000	$ 26,250
Office (Office reconstruction, Furniture, IT equipment, etc.)			$ 25,406	$ -
			$ 292,013	**$ 270,273**

Financial Services	**Grade Level**	**Salary**	**Cost**	**Out-Year Costs**
Contracting Officer	15	$ 143,079	$ 182,426	$ 184,250
Financial Analyst	13	$ 102,932	$ 131,238	$ 132,551
Procurement System (PRISM)			$ 300,000	$ 315,000
Office (Office reconstruction, Furniture, IT equipment, etc.)			$ 25,406	$ -
			$ 639,070	**$ 631,801**

Chart I

Information Technology (IT)	**Grade Level**	**Salary**	**Cost**	**Out-Year Costs**
Information Assurance and Security Specialist	14	$ 121,635	$ 155,085	$ 156,635
Information Technology Specialist	9	$ 59,689	$ 76,103	$ 76,865
Email Migration			$ 214,000	$ 189,000
Lotus Notes Environment			$ 300,000	$ 100,000
Migration of Solution			$ 800,000	$ 200,000
Equipment Replacement			$ 50,000	$ 50,000
Website Update			$ 500,000	$ 100,000
Data Strategy Development			$ 250,000	$ -
Enterprise Architecture/Policy & Planning Consulting			$ 150,000	$ -
Data Warehouse			$ 350,000	$ -
Cable & Wireless Internet (TIC - Trusted Internet Connection & Router)			$ 110,000	$ 110,000
Voice (VOIP)			$ 218,000	$ 218,000
Information Assurance & Privacy			$ 70,000	$ 70,000
Cloud Licensing			$ 3,900	$ -
Office (Office reconstruction, Furniture, IT equipment, etc.)			$ 25,406	$ -
			$ 3,117,409	**$ 1,113,865**

Facilities Management	**Grade Level**	**Salary**	**Cost**	**Out-Year Costs**
Personnel Property & Property Management (Cenotrak)			$ 45,000	$ 45,000
			$ 45,000	**$ 45,000**

Managing Director	**Grade Level**	**Salary**	**Cost**	**Out-Year Costs**
Equal Employment Opportunity (EEO) Director	15	$ 158,700	$ 202,343	$ 204,366
Attorney (General)	14	$ 121,635	$ 155,085	$ 156,635
Office (Office reconstruction, Furniture, IT equipment, etc.)			$ 25,406	$ -
			$ 382,833	**$ 361,001**

TOTAL	$ 4,476,326	$ 2,421,940

** Figures represent best estimates and are subject to further review by the Surface Transportation Board (STB).*

Chart II

S. 808 STB Reauthorization Preliminary Estimate*				
Section 4 - Board Membership				
Office/Position	**Grade Level**	**Salary**	**Cost**	**Out-Year Costs**
Board Member	EX	$ 155,500	$ 198,263	$ 200,245
Attorney-Advisor	15	$ 143,079	$ 182,426	$ 184,250
Confidential Assistant	13	$ 102,932	$ 131,238	$ 132,551
Travel			$ 12,000	$ 12,000
Office (Office reconstruction, Furniture, IT equipment, etc.,)			$ 35,000	$ -
Board Member	EX	$ 155,500	$ 198,263	$ 200,245
Attorney-Advisor	15	$ 143,079	$ 182,426	$ 184,250
Confidential Assistant	13	$ 102,932	$ 131,238	$ 132,551
Travel			$ 12,000	$ 12,000
Office (Office reconstruction, Furniture, IT equipment, etc.,)			$ 35,000	$ -
TOTAL			**$ 1,117,853**	**$ 1,058,092**

** Figures represent best estimates and are subject to further review by the Surface Transportation Board (STB).*

ANALYSIS:
-In accordance with the reauthorization, the Board will need to add an additional six (6) FTEs specifically in response to Section 4. The six (6) FTEs will include two (2) Board members, two (2) attorney advisors (one for each new member), and two (2) confidential assistants (one for each new member). In addition to the FTE costs, each Board member will need an appropriate travel budget in order to fulfill his or her new duties. Further, the Board's current office construction will not be able to house the two (2) new members and their additional staff as it currently is configured. Therefore, office reconfiguration, inclusive of furniture, IT equipment, etc. will be needed for each new member and his or her staff.

Chart III

S. 808 STB Reauthorization Preliminary Estimate*				
Section 6, 11, & 15 - Reports & Procedures for Rate Cases				
Office/Position	**Grade Level**	**Salary**	**Cost**	**Out-Year Costs**
Branch Chief	15	$ 158,700	$ 202,343	$ 204,366
Attorney	14	$ 121,635	$ 155,085	$ 156,635
Attorney	13	$ 102,932	$ 131,238	$ 132,551
Attorney	13	$ 102,932	$ 131,238	$ 132,551
Attorney	13	$ 102,932	$ 131,238	$ 132,551
Attorney	13	$ 102,932	$ 131,238	$ 132,551
Industry Economist	13	$ 102,932	$ 131,238	$ 132,551
Industry Economist	13	$ 102,932	$ 131,238	$ 132,551
Industry Economist	13	$ 102,932	$ 131,238	$ 132,551
Case Management/RCPA Database			$ 500,000	$ 500,000
Office (Office reconstruction, Furniture, IT equipment, etc.,)			$ 105,000	$ -
TOTAL			**$ 1,881,095**	**$ 1,788,856**

** Figures represent best estimates and are subject to further review by the Surface Transportation Board (STB).*

ANALYSIS:
-The costs above represent a compilation of what the Board will need to carry out Sections 6, 11, and 15 of the reauthorization bill. Based on these sections, the Board believes it will need one (1) new Branch Chief in the Office of Proceedings, five (5) new Attorneys and three (3) new Economists.

These costs are attributable almost entirely to the change in processing timelines for stand-alone cost rate challenges in Section 11(b). The Board measures the current nine-month timeline starting from the date on which closing briefs are filed; Section 11(b) provides a six-month timeline starting 60 days before closing briefs are filed. Thus, Section 11(b) reduces the timeline for processing stand-alone cost rate challenges from nine months to four months

Chart IV

S. 808 STB Reauthorization Preliminary Estimate*				
Section 12 - Investigative Authority				
Office/Position	**Grade Level**	**Salary**	**Cost**	**Out-Year Costs**
Director	ES	$ 165,000	$ 210,375	$ 212,479
Deputy Director	15	$ 158,700	$ 202,343	$ 204,366
Senior Investigator	13	$ 102,932	$ 131,238	$ 132,551
Senior Investigator	13	$ 102,932	$ 131,238	$ 132,551
Junior Investigator	12	$ 86,564	$ 110,369	$ 111,473
Junior Investigator	12	$ 86,564	$ 110,369	$ 111,473
Attorney	14	$ 121,635	$ 155,085	$ 156,635
Attorney	14	$ 121,635	$ 155,085	$ 156,635
Administrative Officer	7	$ 48,796	$ 62,215	$ 62,837
Travel			$ 80,000	$ 80,000
Office (Office reconstruction, Furniture, IT equipment, etc.,)			$ 190,000	$ -
TOTAL			**$ 1,538,316**	**$ 1,361,000**

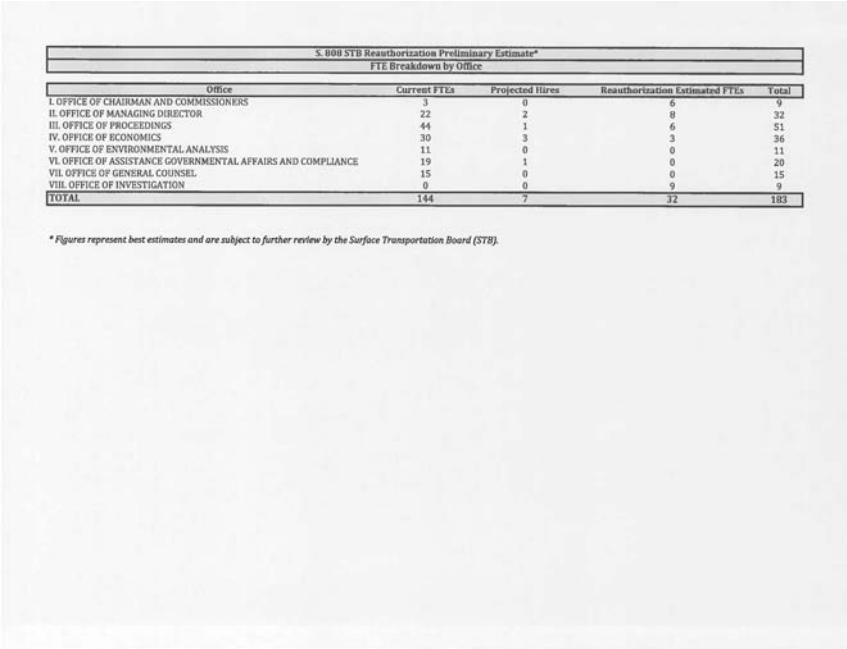
** Figures represent best estimates and are subject to further review by the Surface Transportation Board (STB).*

ANALYSIS:
-In accordance with the reauthorization, the Board will need to create an office dedicated to investigation and enforcement. It is estimated that a total of nine (9) FTEs will be needed. In addition to the FTE costs, each investigator will need a travel budget to fulfill his or her duties. Further, the Board's current office construction will not be able to house the nine (9) new FTEs as it currently is configured. Therefore, office reconfiguration, inclusive of furniture, IT equipment, etc. will be needed for each new employee.

Summary

S. 808 STB Reauthorization Preliminary Estimate*			
Summary of Additional FTEs & Costs			
Section	**FTEs**	**Cost**	**Out-Year Costs**
Section 3 - STB Independence	8	$ 4,476,326	$ 2,421,940
Section 4 - Board Membership	6	$ 1,117,853	$ 1,058,092
Section 6, 11, 15 - Reports & Rate Case Procedures	9	$ 1,881,095	$ 1,788,856
Section 12 - Investigative Authority	9	$ 1,538,316	$ 1,361,000
TOTAL	32	$ 9,013,591	$ 6,629,887

** Figures represent best estimates and are subject to further review by the Surface Transportation Board (STB).*



S. 808 STB Reauthorization Preliminary Estimate*
FTE Breakdown by Office

Office	Current FTEs	Projected Hires	Reauthorization Estimated FTEs	Total
I. OFFICE OF CHAIRMAN AND COMMISSIONERS	3	0	6	9
II. OFFICE OF MANAGING DIRECTOR	22	2	8	32
III. OFFICE OF PROCEEDINGS	44	1	6	51
IV. OFFICE OF ECONOMICS	30	3	3	36
V. OFFICE OF ENVIRONMENTAL ANALYSIS	11	0	0	11
VI. OFFICE OF ASSISTANCE GOVERNMENTAL AFFAIRS AND COMPLIANCE	19	1	0	20
VII. OFFICE OF GENERAL COUNSEL	15	0	0	15
VIII. OFFICE OF INVESTIGATION	0	0	9	9
TOTAL	144	7	32	183

*Figures represent best estimates and are subject to further review by the Surface Transportation Board (STB).

The CHAIRMAN. Thank you, Vice Chair Miller.

We're very proud here in South Dakota to have one of our own on the Surface Transportation Board and to represent our great state. So it's nice to welcome Ann Begeman back to South Dakota, and we look forward to hearing from you.

STATEMENT OF HON. ANN D. BEGEMAN, BOARD MEMBER, SURFACE TRANSPORTATION BOARD

Ms. BEGEMAN. Thank you very much, and thank you, Senator, for inviting all three of us here to talk with you about the STB Reauthorization Act implementation. As you've already heard, the new law really—we've already made some good progress on implementation, which is changing the way the Board works. Thank you to your committee, thank your staff. It's so appreciative.

I'm going to go into some of the specifics, which my colleagues have as well. But before that, I really appreciate—you know, you mentioned my South Dakota background, and I see a number of familiar faces in the room, many of you whom I actually know because of my current job at the Board. You've come in and have visited with us.

Mr. Heller, I certainly appreciated your testimony. I've known you for a number of years, and Mr. Mack as well—I'm not sure where he went—not just in my current job but my previous job as well.

As you know, I grew up on a dairy farm just south of Humboldt, about 20 miles west of here. I graduated from USD and went to work in Washington for my hometown Senator. My colleague was Lisa Richardson, Executive Director of the Corn Growers. I'm not

sure if she's here for my shout-out. She was. All right. Well, I'm going to use more than my five minutes, obviously.

When I worked in Washington for—I was in the Senate for about 20 years as a staffer. Much of my time there was working on transportation issues, including the legislation that created the STB in 1996. And I know it wasn't dig about the fact that it wasn't quite a perfect bill, but time does change things as well, and it's always good to have some really good oversight and fresh perspective.

One of the things I want to talk about first about the bill is—your new law, our new law—is the fact that we can now talk about things that are pending before us. Prior to that—I mean, could you imagine not being able to work with your colleagues on legislation or hearing from stakeholders what they think when something actually became pending? We could read what someone writes to us, as long as it's formally submitted, not just, you know, slipped under the door. You know, again, we were just following the law, the Sunshine Act, the concern that somehow we would be working in secrecy.

But thanks to the Commerce Committee and the full Senate and the House and the President for signing the law, we can become much more productive and effective and efficient for our stakeholders. So thank you for that.

I won't touch too much more on the fact that we've had a number of what we call Section 5 meetings, which allows us to speak. One thing that's very important to note, though, is we have to have—our general counsel joins us in our meetings. We then have to have summaries of those meetings posted on the website within 2 days of a meeting, unless it is on a particular regulatory proceeding. Then it will be in our final rule.

So, so far, we have two of those summaries posted, and I hope that as we get more posted, as we get more work done, we'll get some good feedback from interested stakeholders as to whether they think that it's providing them a good enough amount of information.

Another key provision which both of my colleagues have talked about is the requirement for quarterly public reporting. This is a game changer from my perspective. Stakeholders get to kind of know what we're up to. Even I know now what we're up to in terms of deadlines and, you know, the fact—and I think it helps the staff know what the expectation is, and I really think it's helped all of us to really kind of come together.

While we don't necessarily choose the deadline, the Chairman—he's in charge. He has special powers that the Vice Chairman and I don't quite have, but we certainly do our best to be collaborative, and he takes our input on—sometimes he ignores our input, but he certainly will listen to what we think as far as what could be timely, and I certainly appreciate that.

You know, some of the discussion has been on the arbitration revisions that we're making to our rules. The Board certainly wants that to be successful. We have an arbitration program. We've had it for years. It has not been called upon.

If I recall, Senator, one time you—you may be the only arbiter that has ever actually—the only case that ever had been arbitrated before the Board. So I thank folks for their input. I can't say much

more on it, because it's pending. But we plan to get out final rules, and, hopefully, people won't be too afraid to just dive in and try to give it a shot.

Because of the arbitration provision, which is trying to get things done without expensive litigation—I do want to highlight a program that is at the Board currently that some of you may not know about, and it really—I would say it's one of our biggest success stories. It's called the Rail Customer Assistance Program, and it's a group of really smart, capable staff. Some of them are former shippers. Some of them are former railroad workers. They really have total insight as to a lot of what's going on in the shipper and railroad community. Anyone can call in, ask a question about our jurisdiction, or how does a certain process work. They will also even try to do some informal mediation on your behalf. And it's not just a shipper with a problem, but a railroad. Maybe a short line railroad has a problem.

So we certainly are so proud of the staff that work on that program. We try to get our pamphlets out to bigger groups when folks go around the country and meet with people. But I really want to give a shout-out to that group. I know some of you in the room have used it, and some of you spread the word for us on your own website. So thank you for that.

Oh, I haven't even used up all my time. Oh, goodness.

The CHAIRMAN. Go ahead.

Ms. BEGEMAN. You know, one of the things that I would be happy to talk about if you'd like to ask questions on it later—but, you know, part of, I think, what prompted the Committee to do the investigative authority for us was, of course, the very difficult service crisis or service troubles, if you will, from 2013 and 2014. It really was probably the most difficult challenge that the Board has faced in my time, and I hope it stays that way. You know, I'm very proud of the work that the Board did to try to be responsive in a reasonable, pushing way. You know, the railroads certainly worked their tails off trying to get things—the network back moving, and in time, that has all worked out.

But we had a hearing—actually, we had two hearings. But the first hearing we had in April 2014—it was a South Dakota witness—and I believe he represented CHS with Mr. Mack—talked about fertilizer and the fact that, you know, if I don't get my fertilizer in the next week, I may not be able to plant. And then the rest of the shipper witnesses started chiming in, and it truly informed us about what was happening with this very important commodity.

We immediately did a directive for the two railroads that were most affected with the service issues at that time for them to tell us their plan to deliver and report to us until you have it done. And, again, I'm not in any way crediting the Board's action for saving the spring planting. But I really do think that it helped focus the railroads' and the shippers' attention so that they would know we were watching and we were expecting results. So thank you for that.

Finally, the topic of SAC and rate review processes. I will say that none of us are responsible for the creation of SAC. We do want to be responsible for the creation of new effective methods. And I

appreciate, Mr. Heller—you said that you don't know that you want to throw away the entirety of SAC out the door.

So we really do have a lot on our plate, but we need to find the best processes and put together the best methodologies so that a shipper can decide what process he or she may want to choose. The coal shippers, as I understand—they helped create the SAC process, and some of them are more comfortable with it, or at least some of their representatives are.

We also have something called the Three Benchmark Case, which is for the smallest of cases. We have a simplified SAC case, which no one has ever had the will to try. And one of the things that Chairman Elliott mentioned was the grain proceeding that we have been working on, and it actually was a result of a proceeding we had been looking at on all rate regulation reforms. And during that time in 2012 and 2013, we heard, particularly, from the ag community. It was like, you know, you have some great ideas, great changes you've put forward, and we aren't opposed to it, but it doesn't help us a bit.

So thanks to the Chairman's leadership, we announced that we would have a new proceeding to really hear ideas, to help us understand why doesn't—why don't these current processes work for you? What could we do to establish perhaps a different process? We had a hearing on this. I'm very hopeful that we will have a new proposal for people to provide comment on. It may not be perfect, but we welcome input, and I really hope that that will happen very soon. I note that on the quarterly reporting, it is due sometime this month. So let's not let ourselves down.

One last issue I want to talk about, which the Vice Chairman did a great job talking about, is our real interest in changing the way we are able to talk to people about ongoing matters. We have now waived two of our—in two of our proceedings waived the prohibition on ex parte communications. We did it late last year in the data rulemaking, which allowed staff to speak with a number of stakeholders. I actually wanted you to talk to me, but I didn't win that fight. But I certainly was pleased that we were able to let folks come in and talk with our staff, and it was really helpful in putting together the most recent proposal.

Two weeks ago or so, we announced in the 711 competitive switching proposal that we were going to waive this rule for both—for members and staff for a certain time period so that we can really hear from shippers, that we can hear from railroads. We really need to hear from all interested stakeholders so that we know what we are doing. I value the ability to hear ideas, thoughts, concerns, red flags. So please ring up my phone and I'll be happy to meet with you.

So, finally—I know I have more to say, but just thank you so much for giving us this opportunity, holding us accountable. We're OK to be held accountable. We want the Board to work better, and I think that we are starting to really go in the right direction, and I want to be—I don't always agree with the Chairman. I always agree with Deb.

[Laughter.]

Ms. BEGEMAN. But, really, the fact that we can start to spend some time, more time together, and try to hone in on some of the

problems, it can only result in more positive outcomes. And after all, this is about public service, and we need to improve the Board for all stakeholders. So thank you.

[The prepared statement of Ms. Begeman follows:]

PREPARED STATEMENT OF HON. ANN D. BEGEMAN, MEMBER, SURFACE TRANSPORTATION BOARD

Thank you, Chairman Thune, for inviting me to appear here today along with my colleagues, Chairman Dan Elliott and Vice Chairman Deb Miller. I appreciate your strong interest in the Board's work and your Committee's oversight of our ongoing efforts to implement the STB Reauthorization Act, which you championed. I believe the Board Members and the staff are fully committed to fulfilling the new law's directives, and importantly, meeting its deadlines. I can assure you that I am. And, I am pleased to report that the new law has already produced improvements in how the Board operates.

Since Chairman Elliott's testimony addressed each of the new law's directives and the actions the Board has taken over the past eight months to implement the STB Reauthorization Act, I will not repeat that information, but will offer my own views on the Board's implementation progress to date. In addition, I will offer my thoughts on additional actions that I would like the Board to take to further improve our way of doing business to better serve our stakeholders and the public. First, however, I'd like to briefly mention my background for those here in attendance who may not know that I am also a fellow South Dakotan.

I grew up 20 miles west of here, on a dairy farm south of Humboldt. After graduating from the University of South Dakota, I moved to Washington, D.C., to work for my hometown Senator. I worked as a Senate staffer for over 20 years until my appointment to the Surface Transportation Board five years ago. Much of my work in the Senate focused on transportation policy, including working on the legislation that created the STB in 1996. That background gives me as an STB Board Member a unique perspective. I know how important reliable and affordable rail service is to South Dakota's producers and the state's economy—and, indeed, its importance to shippers and economic prosperity across the country. And, I know how important it is to our stakeholders, Congress, and the Board for our agency to function effectively.

Frankly, I have had many frustrations serving as the Board's minority Member over the past five years. I certainly was aware of the Board's reputation for its sometimes glacial pace long before my appointment. But to experience it first-hand, in a position from which I expected to positively influence that pace through collaboration with my fellow Members—I was in for a big surprise.

While the Chairman serves as the "executive head" of the Board and has many important overall management responsibilities, I strongly disagree with the Chairman's stated view that he alone is "the person responsible for moving the docket forward."[1] I believe that all of us must share in that responsibility. All of the Board Members and the very capable staff must and can work together to make the agency more efficient and effective. I want to help improve the functioning of the agency, not embrace the status quo. Thanks to the STB Reauthorization Act, some long overdue progress is starting to be made.

STB Reauthorization Act (Section 5) allows for nonpublic collaborative discussions between a majority of Board Members; Summaries of such discussions must be made publicly available.

First, Board Members can now meet and talk about important pending issues. This has been made possible by Section 5 of the STB Reauthorization Act, which allows for nonpublic collaborative discussions among a majority of Board Members. Prior to that provision's enactment, we couldn't talk about pending issues unless it was in an open meeting, such as a hearing like this one, due to constraints imposed by the Sunshine Act. Such restrictions clearly hindered the Board's productivity.

We held our first "Section 5" meeting in February to discuss the pending data collection rulemaking to require Class I railroads to publicly file various weekly reports on their service performance in *United States Rail Service Issues—Performance Data Reporting,* Docket No.

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[1] *Sunbelt Chlor Alkali P'ship* v. *Norfolk S. Ry.,* NOR 42130, (STB served June 20, 2014) (Elliott separate expression).

EP 724 (Sub-No. 4). That meeting ultimately led to the inclusion of additional targeted data reporting in our supplemental proposed rulemaking than what was first under consideration. I won't comment further on that important rulemaking because it is pending, but I do want to thank you, Chairman Thune, for your interest in the rail service data collection, and want to note that a number of agricultural and other interests have provided helpful comments in response to our proposal. I am very hopeful that we will issue a final rule before the end of the year.

We have also held Section 5 meetings to discuss the Reauthorization Act's requirements concerning both arbitration and investigations and how best to implement those directives. In addition, we have made use of the new authority to meet and discuss the petition for rulemaking to adopt revised competitive switching rules in Docket No. EP 711, which the Board recently acted on.

When these meetings are held, the Board's General Counsel is required to be in attendance, and our meetings must be disclosed. I want to make clear that we can't meet together in secrecy, but instead, the Reauthorization Act promotes transparency by requiring that a summary be prepared and made public two days after a meeting, unless the meeting relates to an ongoing proceeding, and then it is made public on the date of the final Board decision.

I think it is very important that the Section 5 summaries be as informative as possible. Currently, meeting summaries have been posted regarding our discussions concerning the formal investigations rulemaking (April 5, 2016), and discussions concerning the voluntary and binding arbitration rulemaking (March 23, 2016). I hope that once a few more of the meeting summaries are made public, the Board will receive feedback regarding their adequacy. I expect we will continue to make good use of the new collaborative discussion authority and, again, want to thank you and your Committee for allowing us to do so.

STB Reauthorization Act (Section 15) requires quarterly progress reports on unfinished regulatory proceedings.

A second, key provision of the Reauthorization Act that has been a game-changer from my perspective is the requirement for deadlines and quarterly reporting of pending rulemakings. While the Chairman determines the dates that are established in the report, for the first time, I know that deadlines exist and the target dates for Board action. This information is not only helpful to Board stakeholders, but it is absolutely essential to me in trying to fulfill my responsibilities.

Several rulemaking proceedings identified in the quarterly report started before I joined the Board. One of those very dusty items has recently been acted on and is now off the Board's plate. A couple of other older proceedings have also received the Board's attention recently, which I believe is due largely to the prompting of the new law's quarterly reporting directive.

I thank you and the Committee for imposing this helpful, practical requirement.

STB Reauthorization Act (Section 13) requires the Board to establish a voluntary and binding arbitration process for rate and practice complaints.

The new law also requires the Board to establish a voluntary, binding arbitration process for rate and practice complaints. This directive has already resulted in the Board issuing a notice of proposed rulemaking on May 12, 2016, to alter our existing arbitration regulations, last updated in May 2013. We updated those regulations three years ago in an effort to make them more useful to stakeholders, but did not have authority then to include rate complaints among the issues that could be arbitrated. We also had a different process for selecting an arbitrator, so we need to amend the process to comply with the one established in the new law.

The Board wants to do whatever it reasonably can to make arbitration a viable and effective litigation alternative. Comments on the NPRM were filed in June and July, and the Board intends to issue new final rules before the one-year anniversary of the STB Reauthorization Act's enactment, as directed.

Another litigation alternative that deserves mentioning is the Board's existing Rail Customer and Public Assistance (RCPA) Program in which anyone can seek informal assistance from a group of Board staff regarding a wide range of matters, including getting clarification about the Board's jurisdiction and procedures. The RCPA Program also helps with informal dispute resolution through mediation. The RCPA Program really stands out in my view as an agency success story, and the more we can do to spread the word of its existence and the RCPA staff's willingness to help, the better. In my opinion, RCPA epitomizes one of your main themes of the STB Reauthorization Act, *i.e.,* to head off problems between rail customers and carriers whenever possible, and to quickly resolve them when they do occur. That is the RCPA Program.

STB Reauthorization Act (Section 12) allows the Board to initiate investigations on its own initiative, rather than only on complaint. Such investigations must be of regional or national significance.

Mr. Chairman, I am hopeful that the Board's new investigative authority provided by the Reauthorization Act proves very useful, should it be needed, to help the Board in its work to oversee the national rail network. It will be essential for the agency to use it wisely. The Board issued a proposed rulemaking in May, and the last round of comments are due tomorrow, August 12, 2016. I cannot say much more on it since it is pending, other than that the Board intends to issue final rules by the December deadline. I do, however, want to acknowledge the service crisis of late 2013 and 2014, which I think prompted your Committee to include the investigative provision in the Reauthorization Act.

I must say that the service crisis was probably the most important and difficult matter the Board has faced during my time at the agency. It was very difficult for shippers, for railroads, and for the Board. But I believe the Board worked to the meet the difficult challenges in a responsible way. Board Members and staff held countless meetings with rail officials and affected shippers. We held hearings in Washington, D.C., and in Fargo, N.D., to allow interested stakeholders to report on service problems, to hear from rail industry executives on their plans to fix the problems, and to explore additional options to improve service.

It was during the April hearing that witnesses from South Dakota and neighboring states alerted us to a very real danger that fertilizer would not be delivered in time for spring planting. I recall asking the agricultural witnesses if fertilizer wasn't delivered, despite the best of efforts of the carriers, "Is there a Plan B, a Plan C?" The answers were pretty grim, including one grower who indicated his alternative was not growing a crop, stating that "There is no plan B, no Plan C, no Plan D."

A few days after that hearing, the Board directed Canadian Pacific Railway Company and BNSF Railway Company to each report their plans to ensure delivery of fertilizer shipments for spring planting and to provide weekly status reports for a six-week period. While I don't suggest that the Board's action be credited with saving that crop year's spring planting, I do think we helped focus needed attention on the critical importance of the fertilizer deliveries.

Following the April hearing, I met with a group of staff on a weekly basis in an attempt to monitor service to determine whether it was improving. My strong preference was to give the rail carriers time to fix their problems, but with close Board oversight, rather than thinking government intervention or micromanagement could resolve things. But as I continued to witness the ever-growing backlog of rail car deliveries in the Midwest, particularly in North Dakota, South Dakota, Minnesota, and Montana, I thought we had no choice but to ratchet up our focus. At my urging, the Board directed CP and BNSF to publicly file their plans to resolve their backlogs of grain car orders, as well to provide us weekly status reports pertaining to grain car service, beginning in June 2014. Our attention to the service problems also led to the weekly rail service performance reporting, beginning in October 2014. And, as already mentioned, the Board is considering a proposed rulemaking to make service data reporting permanent.

Although that service crisis is behind us, I have not forgotten and will not forget the many difficulties experienced during that time, nor the lessons learned. That experience helps inform almost every decision that I make as a Board Member. The Board must be ever vigilant in overseeing the rail network, and the Board's new investigative authority targeted toward matters of national or regional significance could help the Board address looming trouble, should it be found necessary.

STB Reauthorization Act (Sections 11 and 15) establishes procedures for rate cases (directing the Board to maintain one or more simplified and expedited rate review methods; requiring expedited handling of rate cases and shortened rate review timelines, and instructing the Board to assess procedures available in litigation before courts that could be applicable to expedite rate cases.

Finally, I want to call attention to the Reauthorization Act's provisions that address the Board's rate case procedures. The new law directs the Board to resolve cases more quickly and provides shortened timelines for rate cases brought under the Stand-Alone Cost methodology, also known as SAC. It also requires us to maintain one or more streamlined processes for cases in which the SAC test is too costly—and it is costly. And, the Reauthorization Act also directs the Board to initiate a proceeding to assess procedures used in court litigation that may help in expediting rate cases before the Board.

During my service at the Board, I have often voiced my serious reservations and concerns about the Board's rate review processes, particularly SAC, so I welcomed Congress's attention to these important matters. The SAC process is too costly, too time consuming, and too unpredictable. And, based on what I have heard repeatedly from agriculture industry representatives, they do not believe that any of the Board's current rate reasonableness methodologies—Three Benchmark, Simplified SAC, or SAC—provide meaningful access for the agricultural community. Their concerns prompted me to urge the Board to open the current proceeding in Docket No. EP 665 (Sub-No. 1), *Rail Transportation of Grain, Rate Regulation Review*.

My objective in that proceeding is to ensure the Board's rate complaint procedures are accessible to grain shippers and provide effective protection against unreasonable freight rail transportation rates. After all, the Board has a statutory responsibility to ensure that any captive shipper—including a grain shipper—has access to rate review if the shipper wishes to pursue it. I am very hopeful the Board will soon move the ball forward on this important proceeding. Since opening that proceeding at the end of 2013, the Board has received over 20 written comments and suggestions, in addition to oral testimony received at a public hearing on June 10, 2015, when we met to hear interested stakeholders' views on whether the Board's rate complaint procedures are accessible for grain shippers. In my view, this proceeding is also responsive to the Reauthorization Act's directive for the Board to maintain one or more streamlined rate review processes for cases in which the SAC test is too costly.

With respect to assessing court litigation strategies, the Board initiated a proceeding on June 15, 2016. That proceeding, which was a directive of the Reauthorization Act, also invites ideas on ways to expedite SAC cases in particular. Before this proceeding began, the Board gathered information by informally meeting with stakeholders. Board staff met with 22 participants over the course of a month. These meetings were extremely helpful to the Board in preparing for this proceeding. And although I can't touch on substance, as it's a pending matter, I'll note that last week the Board received a number of comments in response to the Board's Advanced Notice of Proposed Rulemaking that appear to provide very constructive feedback.

I do want to mention that some actions have already been taken to improve the rate case process for pending cases, following on the heels of two very complicated and time consuming SAC cases. The Chairman has appointed a rate case project manager to help ensure rate cases do not get delayed. Other actions include the Board's recognition of the value of instructing parties on basic procedures for the format and submission of evidence (*see Consumers* [2]), the importance of holding technical conferences between Board staff and the parties (held initially at my urging), and the need to require supplements when presented with mismatched evidence (*see TPI* [3]). It is my strong hope that we will build on these improvements with the conclusion of the rate review directives of the Reauthorization Act.

Looking beyond the STB Reauthorization Act, there will always be more we can do to improve the functioning of the Board. If I had to point to the one thing that could provide the most bang for the buck (although it doesn't cost anything nor require Congressional action), it would be to change this Board's extreme ex parte communication regulations, which prevent Members and staff from discussing the merits of pending matters with any stakeholders or outside experts. I strongly believe that the Board needs to move into the 21st Century and embrace more interactive, timely, and responsive decision-making.

I am pleased to report that the Board has taken a couple of steps to make some changes on a case-by-case basis. The first action taken was last November when the Board waived the prohibition on ex parte communications to permit interested parties to meet with Board staff to discuss the proposed rules on railroad performance data reporting, and summaries of those meetings were posted on the agency's website. Although I would have preferred to have included the Board Members in that waiver, it certainly was a positive first step at opening up some needed dialogue on a pending rulemaking.

The second action was recently announced in the new proceeding on competitive switching, Docket No. EP 711 (Sub-No.1). There, the Board acknowledged that it would be beneficial for Board Members themselves to hear directly from stakeholders on the issues in that proceeding and to be able to ask follow-up questions. Special procedures will be followed to ensure that the public has a complete record

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[2] *Consumers Energy Co.* v. *CSX Transp., Inc.,* NOR 42142 (STB served July 15, 2015).

[3] *Total Petrochemicals & Ref. USA, Inc.* v. *CSX Transp., Inc.,* NOR 42121 (STB served May 18, 2015); *Total Petrochemicals & Ref. USA, Inc.* v. *CSX Transp., Inc.,* NOR 42121 (STB served July 24, 2015).

of the evidence and arguments that the Board will consider in its decision-making and to maintain both fairness and accessibility. The Board will disclose the substance of each meeting by posting a summary of the arguments, information, and data presented to the Board Member at each meeting (including the names/titles of attendees of the meeting) and a copy of any handout given or presented to the Board Member.

I hope this is only the beginning of the Board's efforts to alter its ex parte restrictions. It would be a definite benefit to the Board and the public for Members and staff to meet and hear directly from stakeholders during rulemaking and other proceedings so that we can establish the most informed policies and make the most informed decisions. We need to loosen the Board's ex parte shackles, and we can do so while being transparent about any non-public meeting.

Again, Chairman Thune, thank you for your efforts to reauthorize our agency and hold the Board more accountable to shippers, rail carriers, and the public. Because of you and your Committee's efforts, the agency can no longer operate under a "business as usual" mentality. I would be happy to answer any questions.

The CHAIRMAN. Thank you, Ms. Begeman.

Do you want to comment on that, Mr. Chairman?

Mr. ELLIOTT. No, I——

Ms. BEGEMAN. That's why he's over there.

[Laughter.]

Mr. ELLIOTT. I have no idea what Ann is talking about. We always agree.

The CHAIRMAN. Well, we're having a good spirited discussion, and we're not always on the same viewpoint coming into an issue.

Ms. Begeman, you mentioned that the new authority for Board members to talk to one another without procedural hurdles removes an impediment to productivity. You also noted that the Board has made use of the new authority a few times. I'm wondering maybe if you could speak to the process by which the Board decides to make use of this new authority. And could the authority be further utilized to enhance collaboration?

Ms. BEGEMAN. I think that we have been slowly feeling our way on how to make the best use of the authority. I really commend Vice Chair Miller. I think she was the first one to say, "Hey, will someone come meet with me?" Like, "Hmmm." And, you know, we started in February, and we've had meetings almost every month. We've had four different meetings. You know, I think that we are starting to really appreciate the value of those meetings and the fact that we've started to include the staff who are assigned to some of the particular proceedings that we are meeting on so that they can hear what we are saying to try to ultimately expedite drafting.

One of the things that we may want to consider is to sort of maybe every 2 weeks, like, "Hey, anything you want to talk about?" It doesn't just have to be on a rulemaking. You know, besides all of these things we've been talking about in the quarterly reportings, we have so many important hard cases, and I think it might be very useful to us to try to kind of get into some of the details and maybe figure out really where we want to end up sooner than—a lot sooner than where we ultimately end up.

The CHAIRMAN. And I understand that only a limited number of summaries have been posted. What's your assessment of the level of detail that's been conveyed in the summaries of each of those collaborative discussions, and what changes, if any, could the Board make to increase transparency?

Ms. BEGEMAN. You know, I don't get to have input on the—I don't write the summaries. As you can probably imagine, I like to have input. I like to make my mark. I like to, you know, add my comma. But they are written by our great general counsel, who is just an institution at the Board. He has been there since the 1970s, and he——

The CHAIRMAN. Did he write SAC?

Ms. BEGEMAN. If you like it, he did. If you don't, he didn't.

[Laughter.]

Ms. BEGEMAN. I think that maybe the first summary that I saw, I thought it was a little—I thought it could be more detailed, and I think that as we've gone forward in the meetings, they've gotten more detailed. I know that our ex parte summaries that the staff put together for the data rulemaking—they were really detailed, and I think that there's——

Ms. MILLER. Appropriately detailed.

Ms. BEGEMAN. They were appropriately—yes, thank you, Deb. You know, there's a fine line. We don't want to say so much that someone will be afraid to speak—Ann said X. But I think that we—it's sort of like implementation in what we're trying—we want to do a better job. So this is sort of a new thing, and I think that we can build on it. And, again, as folks read what the summaries say, I think no one is ever too shy to say, "Come on."

The CHAIRMAN. Are there any other near-term steps that you can think of that the Board could take to further promote and advance or increase the amount of collaboration between members?

Ms. BEGEMAN. Well, I think it's going to be very different when there are two more members, because then we don't have to have the big formal meetings. I don't think those formal meetings will go away. I think that they will always have value. But if I could just go down the hall and talk with Deb, and then I could go down the hall and talk with Dan—because as long as there are five people, that wouldn't be a—you know, we can have conversations one-on-one. I really think that is going to be another game changer.

The CHAIRMAN. And if anybody else wants to jump in here, feel free, on that subject.

But, Chairman Elliott, I have, as I said, greatly appreciated the inclusion of clear schedules and explanations for delays pursuant to the law's requirement for quarterly reports on unfinished regulatory proceedings. And I'm wondering maybe if you can provide a little bit more insight on how the deadlines are formulated, and after two iterations of reports, any views on ways to improve that process as it goes forward.

Mr. ELLIOTT. Sure. First of all, I'd like to start off by saying that as far as the unfinished regulatory proceeding reports themselves, I think they've been excellent. I think the results speak for themselves. You've seen things coming out of the agency at a pace that didn't occur in the past. So, personally, I very much appreciate that transparency, and it's created, I think, some great efficiencies at the Board that didn't exist before. So, you know, all in all, it has been great.

The way we get together to determine the deadlines, as was mentioned in some of the earlier testimony, kind of at a lower level, we get together with the directors and see what the—especially the di-

rectors obviously involved in the cases, and we have a discussion on what is feasible. We have internal timelines built in at the agency that we look at. So we bring that together. We try to reach a reasonable time.

And then the three of us have been working on those reports together, so we try to come to an agreement, and, apparently, Ann and I don't always agree on those dates, but we do try to come to some form of agreement. There's a little give and take, and I think it's worked out, I think, very well. So, as you can see, we've kind of spread out each big one over a monthly period, and, you know, I think, thanks to that guideline, those reports, we have the grain rate proceeding decision, hopefully, coming out this month, and I think a lot of that is owed to the guidelines—I mean, to the reports themselves.

I do want to mention one thing. Ann was very complimentary about the grain rate case proceeding. But she had a lot to do with that, you know, getting started. Her commitment to the ag community is unquestionable and has been a priority of hers, and she had a lot to do with bringing that. So I certainly don't want to take all the credit for it.

But as far as improvement, we have worked with your staff, and we did change the unfinished regulatory proceeding reports, and I think they've met to everyone's liking. We will continue to listen to the public to see if there are ways to improve it and make them—and be more responsive to what they need to follow our caseload. And, like Ann said, we're kind of working our way through some of these things. So, you know, it's early, but I think it's working very well.

The CHAIRMAN. We're glad she hasn't forgotten where she came from.

Mr. ELLIOTT. That's right.

The CHAIRMAN. Ms. Miller, you mentioned that a common criticism of the agency is that it has been a black box, and that the law's requirements for reports on regulatory proceedings has greatly enhanced transparency and accountability, and you suggested expanding those reporting principles to other types of proceedings. So could you elaborate on how you see this expansion working in practice? What agency business, for example, would you include and exclude along with the information on regulatory proceedings, and what do you view as the most critical elements for each action?

Ms. MILLER. Sure. I'd be happy to. You know, it's interesting that through this conversation with a lot of our stakeholders, what you hear about are the rate cases that cost millions of dollars. They take years. If, in fact, a stakeholder wins, you know, it might turn into hundreds of millions of dollars. So, clearly, they capture people's attention.

But, day to day, the work the Board is doing and the majority of the cases before us have to do with other issues, whether it's abandonments or a railroad that's building something or a question that people need help from the Board in terms of understanding how to apply the law. And we don't have a schedule, really, for how we're going to deal with those things.

My view, since I've come to the Board is that everything, when it comes in the door, should be assigned a schedule. It should be

very public to the staff. You can't always meet the schedule. It's like constructing a house or reconstructing a house. You find things beyond the walls you weren't expecting. But, still, there's no reason why you can't always have a publicly known schedule in terms of when you think you can get things done. I think in any public agency, it's simply what you owe to the people that you, in this case, regulate, and it's what you owe to the public, and, currently, the Board doesn't use that sort of a process.

I think, as you can see, it has spurred action on the part of the Board to pick up the pace on regulatory decisions, and I think by being very public in terms of the expectation we have for ourselves in terms of when we'll take action on other issues that have been filed before us, you would see some more things happening there as well.

The CHAIRMAN. Mr. Chairman, Ms. Miller noted her support for soliciting public feedback on the draft alternative rate review methodology report and for adding the Board's own views and findings prior to formally sending that report to Congress. So what are your views on soliciting public comment, and to what extent do you anticipate the STB will add to the report prepared by its outside consultants?

Ms. ELLIOTT. Sure. As I mentioned in my testimony, the Board intends to have a hearing shortly after we put out the report itself. And I'd just like to note one thing about the report. When that report was put out—I mean, it's an independent report, and I think that's very important, to an extent that we get feedback from someone who doesn't have any skin in the game. So, to me, the independence of the report is significant, I think, for our stakeholders to know that that's not coming from, you know, one side or the other or from the agency itself, which has a procedure in place which, you know, hasn't been satisfactory, to say the least.

So as far as the addition to the report, what I said was we first have the hearing, possibly comments beforehand or afterwards, and then we would use the report, that hearing and the comments as a springboard to, hopefully, look for alternatives to SAC. My opinion is no different than my fellow Board members, and I mentioned this in my confirmation hearing, that I think the SAC process itself is inherently unfair, and we're seeing more and more of that as we've been looking at some of the more recent cases and how complex they are.

And we also have, as I mentioned, the grain rate regulatory proceeding itself, and we also have the expedited—I guess the attempt to expedite rate case proceedings through court litigation, and we kind of broaden that a little bit. So what I'd like to do is, hopefully, meld all that together and search not just from the report but from some of these other sources and have something—a proceeding that comes out of that, and then go from there. So it essentially gets to the same place, but it's not exactly in the same timeline.

The CHAIRMAN. Anybody else on that subject?

[No verbal response.]

The CHAIRMAN. Ms. Begeman, in discussing the law's expanded arbitration procedures and your support for alternatives to litigation, you also noted that the Rail Customer and Public Assistance Program, which provides informal dispute resolutions through me-

diation, is one of the agency's successful stories. What more can be done to raise public awareness of that program as a potential resource for shippers and for railroads?

Ms. BEGEMAN. Well, you know, I know the three of us, when we go visit with folks out in the real world, we always—I don't want to speak for you, but I know I always take a big stack of pamphlets and spread them around. Our groups, such as the Rail Shipper Transportation Council—and we have Shelly from Lincoln Electric, who is our Chairman of the Rail Shipper Transportation Council, here. I know that she has talked with all of her folks—all the folks on the Council, and they have pamphlets.

It's a lot of word of mouth. It's on our website. We advertise it on the website. I think some of the shipper groups have tried to, you know, advertise it on their websites. I'm open to any other great ideas, and I know there will probably be really good ideas out there that I can't think of on my own—sky writing. You know, really, they can resolve a lot of things before we can.

Ms. MILLER. I have an idea.

Ms. BEGEMAN. Deb has an idea.

Ms. MILLER. I think we should use graffiti on the side of train cars.

[Laughter.]

The CHAIRMAN. That's good stuff. Lord knows, there's plenty of that. All right. This would be for the entire panel, but the Board has instituted interim rail service performance metrics, and it's currently moving forward with a rulemaking to make certain metrics permanent. Based on the results to date, could you speak to what you see as the value of those metrics, both for the Board's oversight functions and also for public use?

Mr. ELLIOTT. Sure. I mean, I think we heard the prior panel discuss some of the usefulness with respect to the shipper community and that it's a good way to understand what's going on in the industry and to anticipate any trends or to see any trends that are forming and, hopefully, take some action. I think it was mentioned in one of the testimonies that you would be able to look and see possibly if New York looks jammed up, maybe we'll take it over to the Pacific Northwest. I don't think that's probably the greatest example or if that ever happens. But that's my limit of geography.

Anyhow, I think it's very helpful along those lines. I also think it's helpful to us. You know, I think the last service crisis was a confluence of events that occurred, including things that were happening earlier on that may have been seen if we had that type of extensive reporting.

I think you made an example of the hearing and the testimony on fertilizer. You know, we really didn't know that that was going on until that hearing took place, and then all of a sudden, everyone was talking about fertilizer and were like, well, they're not going to get their fertilizer to the crops, and that's going to be—I can say that is something of regional or national significance. I mean, we need to have that stuff happening. So that's one of the great things.

And I think the most important thing that I—you know, I didn't really think about it until I was thinking about the Act a lot more closely in preparing for this hearing. But, you know, a lot of the big corporations out there, the railroads and the big shippers—you

know, they have access to a lot of data. They have a lot of money. They can go out and acquire that data. But, you know, the ag community, the farmer around here, isn't going to have the accessibility of that data. So I think that is one incredibly helpful thing. This brings that knowledge to everyone out there, not just the big corporations. So I think that, in itself, is very important.

The CHAIRMAN. Did anybody else want to talk about that?

Ms. MILLER. I would just add one thing, if that's OK. I think, one, from the beginning, I was a big advocate for requiring more data just in my public career. I've always found it to be important and useful. Information is a very powerful thing. People can make better decisions. I think that for shippers who are running their own business, when they have information, even if things aren't working the way they want them to work, they can make better decisions for their own business by having it.

And I think it's important to remember that while railroads are private entities and own their own land—their own railroads, their own track—I'll get there in a minute—own their own track, it is still a shared network. And as we saw in the service crisis, what happens on one portion of the network ends up impacting people on another portion of the network, and what might be to the benefit of one particular shipper in one part of the country might be to the detriment of other shippers. So that notion of shared impact, I think, is a really important one we need to keep in mind.

I think it calls for greater transparency in the data, which is one of the reasons why the Board acted. And I'm always pleased when I'm out and hearing shipper groups talk to hear what I think is confirmation that they believe as well that it's important to have that information, that they found it helpful.

Ms. BEGEMAN. If I could, you know, during those service difficulties, we established the fertilizer reporting requirement. A few months later, we had the railroads filing weekly reports on filling the grain car shortage, how they were getting cars allocated, keeping track of what the shortages—you know, I'm certainly not interested in making the railroads do more work or regulating them. But, as Mr. Heller said, there's a balance, and that's something I always strive for.

I recognize that the industry would prefer for the data rulemaking to not be made permanent. I read their filings. Frankly, I find the information invaluable. Every Wednesday, I log on, and I look to see what has been filed, just to see what it looks like, and then if we have a report for the trend of it.

But one of the filings that I go to first, actually, is the filing for what's going on in Chicago. Now, it's pretty boring, of course, in the summer, but it won't stay that way, and, you know, the—one of the catalysts for the service crisis was the Chicago winter. There will always be a Chicago winter. It just depends on how extreme.

But I think that has been—it has been helpful, and I hope that for the next Chicago winter that will affect service, we will all know more than we did before, and we will be able to plan accordingly. I'm not saying it's going to make it easier, but you won't have been in the dark. And the more that we can share information and promote that, I think, the better. So, again, I really think it's the right thing to do.

The CHAIRMAN. Yes. I think we all discovered how important Chicago is in the network a couple of years ago.

Mr. Chairman, your colleagues both noted that the Board spoke very positively of your action to waive ex parte communication restrictions, and both indicated support for broader changes to the rules to allow for more ex parte communications. And I have two quick questions for you. What is your assessment of the benefits and tradeoffs of the ex parte meetings conducted under waivers? And what's your view on changing the Board's rules to allow for more ex parte communication?

Mr. ELLIOTT. Sure. First of all, as far as the positives, I don't think—I think they've already been discussed here today. It's great to sit in an office and discuss difficult matters with your stakeholders and the participants. And the proceedings—I have found that to be very helpful. Staff have found it to be very helpful, especially in the data reporting proceeding that we just discussed. It's just—you know, people know so much out there, and it's great to get the benefit of their knowledge. So I think, you know, that part—the benefits pretty much speak for themselves. I mean, we'd all like to sit down and talk.

And, you know, I'd just mention that these ex parte rules have been in place for a long time. They've been in place since 1977, so for over 40 years. Nobody has ever waived these ex parte rules, and I learned that from our general counsel, who was around and who did not write SAC. But I did discuss that with him, and I said, "Has this ever happened before?" And it has not, so I'm glad that we are blazing this trail.

The tradeoff—and I think this goes back to my practicing law days—is that there's the Constitution, due process, and the right to a fair hearing, and that right to a fair hearing includes impartiality and integrity of the process. That's just a basic fact that you see in the courts, that you don't go in and talk to the judges behind doors without other people there, and that's how our system works, and it's supposed to be out in the public as much as possible as well. That's a very important principle, you know, in our judicial system that has transferred over into the regulatory agency itself.

So I take that very seriously. I, myself, believe that I'm very impartial, and I think that is something I'm not concerned about, but at the same time, there's an appearance to our stakeholders out there. So I just want to be careful in rolling this out. We've rolled it out in a few proceedings, and the feedback I have gotten has been very positive. I've heard no concerns about integrity or impartiality. So I'm very excited about what has happened so far. We intend to continue this process, and as it goes along, hopefully, we can make further advancements.

The CHAIRMAN. A final question for any of you that want to take a stab at it. What do you view as the most significant challenge facing the Board when it comes to implementation of the legislation, and how do you plan to address that? What's the hardest part of all this?

Ms. BEGEMAN. Managing expectations. I believe we, the three of us and the staff, are firmly committed to implementing it and meeting the deadlines. I don't want to meet a deadline just for the sake of meeting it if we can actually have a better product if it's

a week later. But, you know, we need to hold ourselves accountable. We need to hold our feet to the fire, and we need to be willing to say, "Oh, you know what? We need another week, or maybe we need two."

I don't want a delay, and I certainly don't want to be the cause of delay. I never have been. But I'm worried that folks may expect something that we haven't delivered as quickly, and they're going to say, "You see. There they go again."

The CHAIRMAN. Anything else?

[No verbal response.]

The CHAIRMAN. All right. Well, I don't want to cut anybody off here, but, you know, it's funny, but it was like 2 days after the bill was signed into law, I ran into a producer here in South Dakota, and he was complaining that it hadn't lowered his rates yet. He didn't think it was working. It wasn't—he wasn't seeing any improvement in the transportation cost or anything like that. So, anyway, you're right. Managing expectations is really important, and always under-promise and over-deliver.

Well, thank you all for your testimony, for your candid responses to the questions, and for taking the time to trip out here to South Dakota and be a part of this. We're very interested, as you are, in making sure that we get it right, and it is critically important to our economy here in South Dakota. I can't overstate just the importance of the freight railroads to this economy. We just can't live without them. So having an efficient, effective system with competitive rates is really critical.

I know that you have an incredibly important role to play in overseeing all this. And since you weren't there when they invented the SAC process, none of you can be held accountable for that. I'm still trying to figure out whoever dreamed that one up: let's create an imaginary railroad and see what that would cost.

But I do appreciate talking about something other than Presidential politics. So even if we have to talk about stand-alone railroads—and you can be glad that under your jurisdiction, you don't deal with—because one of the other areas that we deal with on our committee—we've got kind of what we call planes, trains, and automobiles, all the modes of transportation.

But, you know, in the aviation space, the whole issue of drones is something that we're going to be dealing a lot with, and I'd be willing to bet there were a lot of the shippers represented here today who in some way, form, or fashion are probably going to be looking to use those in the future. So that's a whole new area that we're going to be paying a lot of attention to.

I will just close by saying that the hearing record will remain open for 2 weeks, during which time if there are any additional questions, we'll make sure we get them to you and would ask that you submit any written answers to the Committee as soon as possible.

Again, thank you for your responsiveness. Thank you for the good work that you've undertaken in implementing the legislation, and I do see marked improvement, as I said, across the country in terms of the relationship, it seems, between the shipper community and the railroads. It's not perfect. There's always room for improvement. But, certainly, I think we've seen some significant gains.

So thank you. And with that, this hearing is adjourned.
[Whereupon, at 3:21 p.m., the hearing was adjourned.]

A P P E N D I X

STATEMENT OF BNSF

BNSF provides the following comments to supplement the record of the August 11, 2016, U.S. Senate Commerce Committee Field Hearing entitled Freight Rail Reform: Implementation of the Surface Transportation Board (STB). The hearing reviewed the status of the Surface Transportation Board Reauthorization Act of 2015, Public Law 114–110 and highlighted some of the directives of the Act and rulemakings that the STB is currently considering.

BNSF has been an industry leader in innovating its operations and marketing programs which enable producers in South Dakota and beyond to access new destination markets, including overseas markets, Mexico, or previously unreached domestic markets. The freight railroad economic regulatory policies discussed at the hearing directly impact BNSF's investment decisions. Those decisions, as was pointed out at the hearing, directly impact South Dakota's agricultural shippers, now and in the future.

South Dakota shippers, and all BNSF grain customers, benefit from agriculture sector-specific investments, like the purchase of grain cars. They also benefit directly from BNSF's regional investments like the recent $3.5 billion investment in the Northern lines that facilitate access to export markets in Asia and beyond.[1] South Dakota shippers can also benefit from specific projects that increase overall network reliability on rail lines in other regions because of the interconnected nature of its rail network. In 2014, shippers operating on BNSF's Central and Southern regions saw benefits of the increased overall velocity resulting from the significant investments made on the Northern lines. Of course, all shippers benefit from network-wide investments, such as locomotive purchases. Each of these capital investment decisions requires an analysis demonstrating an ability to generate a reasonable rate of return—simply put, will the projected returns justify BNSF making the investment? However, even BNSF's $2 billion investment in Positive Train Control technology, required by regulation and not based on return or productivity, benefits not only the shippers of the hazardous cargo that triggers the regulatory mandate, but others as well.

Since 2000, BNSF has invested $53 billion in capital across its network, and $15.3 billion over the last three years. These investments have taken place across business cycles, including periods when many farmers were storing grain in recent years. BNSF in 2016 plans to spend $4.2 billion on capital projects across its network to support maintenance and expansion. This includes $2.8 billion for network maintenance, $300 million for continued implementation of positive train control, and $600 million for locomotives, freight cars and other equipment acquisitions, the acquisition of 150 locomotives under a minimum purchase agreement with the manufacturer, and $500 million on various capacity expansion projects, primarily a continuation of projects that were started in 2015. This year's investments are being made in a present downturn in the freight economy which began in 2015.

Given the significant harvest that is expected this season, grain shippers will be a significant beneficiary of this decade of investment, particularly those made in the last several years. Since July, BNSF has seen record shuttle sales at levels that are expected to continue through the end of 2016 as U.S. grain farmers contend with supplies that are at their highest levels in almost 30 years. Week-over-week its velocity remains about 10 percent better than averages from a year ago, and the shippers we serve have been the recipients of this advantage in the global marketplace.

We know that the freight economy will continue to grow. Earlier this year, the U.S. Department of Transportation released new 30-year freight projections which

[1] Essentially, the Great Northern Corridor has been transformed to the functional capacity equivalent of the Los Angeles to Chicago Transcon Corridor, the busiest route on the BNSF network. The Great Northern Corridor now has two main lines on nearly 50 percent of the route between the Pacific Northwest and Chicago. BNSF additionally has added about 1,000 miles of Centralized Traffic Control (CTC), 16 sidings and extended 24 sidings.

show that freight tons moving on the Nation's transportation network will grow 40 percent in the next three decades. We expect growth, but also more volatility. Ongoing investment in a well-functioning network, therefore, is even more important to overcome this challenge, and to advantage all the shippers that are located on BNSF. While BNSF's belief in its customers' future growth has driven investment historically, a critical factor allowing these private sector investments to occur is the relatively stable economic regulatory environment conducive to investment.

The proposals to change rail rate review and to expand access ordered by the STB should be very carefully reviewed, if they are to be finalized by the Board. Potential perceived benefits for individual shippers could have dramatic impacts on railroad returns and, therefore, not just affect railroads, but also all customers. Potential consequences can be most significant for those shippers who depend on freight rail investment to run their businesses.

BNSF expects to participate and more fully provide its unique perspective in each of the many proceedings of consequence now pending before the STB. However, because these proceedings were discussed at the field hearing alongside discussions of BNSF investment and operations, we want to ensure that its concerns about the potential regulations and their impact on BNSF investment are reflected in the hearing record. BNSF is concerned about the proposals by some parties to create a separate rate reasonableness process for agricultural shippers that would replace market-responsive grain rates with formulaic, outcome-oriented regulatory intervention. Agricultural markets are highly competitive, and regulatory processes proposed in this proceeding would jeopardize the ability of the railroad to maintain the efficient market-responsive products agricultural customers want and need. Specifically, BNSF is concerned that the pervasive regime of cost-based rate regulation envisioned in these proposals would penalize railroads that seek to reduce costs and eliminate the incentive to innovate and make the investments in efficiency and productivity that are the hallmark of BNSF's agricultural program.

Also, the Board cannot ignore the cumulative effect of the various regulatory proceedings that it is currently weighing, including its modifications to arbitration and rate reasonableness review mechanisms, its recent reciprocal switching and exemptions proposals and its declared intention to issue a decision in the Revenue Adequacy docket in October. The Board should be concerned about creating overlapping layers of regulatory intervention that distort market signals in sophisticated commercial markets and require significant, resource-consuming activity by the Board in areas where markets are properly functioning. The totality of the impact of individual regulations under consideration must be taken into consideration, along with the changed economic outlook of the rail industry.

Balanced regulatory oversight is critical to the health of the freight rail industry and its customers who depend on BNSF to deliver consistent and cost-effective rail service. Any changes to this dynamic should provide clear benefits to the freight rail system, as a whole. The threshold question before the STB, and Congress, for any policy change affecting railroads should be: "What will be the consequence for investment?" BNSF is concerned that actions taken by the Board on pending matters can pose significant risk to its ability to invest in its network. Proposals for Board action in all of these proceedings should continue to be weighed against the public interest and the interest of its customers in continuing the significant investment necessary to maintain the national freight rail network.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. DANIEL R. ELLIOTT III

Question 1. What do you view as the most significant challenges facing the Board as it completes implementation of this legislation, and how do you plan to address those challenges?

Answer. Overall, implementation of the STB Reauthorization Act of 2015 is going very well. As I stated at the hearing in South Dakota, I provide monthly updates in addition to the required quarterly updates of the major actions that the Board is undertaking to execute the Act's provisions. These are available online for anyone who wants to track our progress. For the majority of initiatives, we are on track to completing implementation by the deadlines outlined in the Reauthorization Act.

The most significant challenge at the moment will be funding, specifically entering Fiscal Year 2017 as an independent agency at our current level of appropriation, $32,375,000. I assure you that this agency will operate in the most fiscally responsible manner to avoid or limit furloughs while carrying out its regulatory responsibilities. However, we are faced with an office move required by the General Services Administration and the arrival of two additional Board Members and their sup-

port staff. While we welcome these changes, I am hopeful that a budget will be passed for the Surface Transportation Board that covers these expenses and the additional costs of independence.

Question 2. What do you view as the greatest opportunities and challenges facing the rail industry over the period of this authorization and in the long-term?

Answer. Based on the latest projections by the U.S. DOT's Bureau of Transportation Statistics, freight tons moving on the Nation's transportation network will grow 40 percent in the next three decades. This includes total freight on all modes (rail, truck, vessel, pipeline and air), but the bulk of that freight is expected to move via truck and rail. Considering congestion challenges on our roads and highways, one would expect to see a larger share of the tonnage moving by rail. This presents a great opportunity for growth in rail business. Within that opportunity lies the challenge of building enough capacity to handle this growth.

Intermodal growth, which is closely related to the above, will probably outpace growth in other business areas as long-and mid-haul shipments are transferred from truck to rail. The railroads have invested considerably in this business and will have to continue to do so to grow capacity in order to handle the forecasted volume growth.

Another area of opportunity and challenge is the business and geographic shifts that we are currently seeing. We are all aware of the decline in coal shipments over the last few years as well as the growth and decline of oil shipments by rail. Energy markets especially have proven to be able to create massive shifts and are probably going to continue to be in flux given the global growth in demand for energy. The great challenge for railroads here is having the capability to quickly answer these types of market changes.

Question 3. Understanding the investigative authority rulemaking is an on-going proceeding and you cannot divulge information about the final rule, I have a couple of questions of clarification about the proposed rule.

a. Under the proposed rule, what do you anticipate as the timeline for the initial fact-finding phase? Under the proposed rule, how long do you think a fact-finding phase would typically take, and could you explain the policy or factors limiting the time of that phase?

Answer. Under the proposed rule, my goal in setting time frames for a fact-finding phase is two-fold: (1) to allow for the administration and logistics of travel, meeting with relevant stakeholders and time to organize and analyze gathered information; (2) to avoid undue delay or uncertainty for the industry in the decision-making process. As you state, the investigative authority rulemaking is an on-going proceeding, and I cannot pre-judge the matter. However, in my view, the time-frame must be as short as possible. As the STB experienced during the service challenges of 2014, time is of the essence if an issue of national or regional significance is occurring on the rail network. The STB must do everything possible to be agile in its assistance to our stakeholders in averting such challenges and to pose no further harm through regulatory intervention, if any is needed.

b. Under the proposed rule, how do you anticipate the agency will determine whether an issue is of national or regional significance?

Answer. An issue of regional or national significance is one where widespread harm is occurring across the rail network nationally or in a region of the United States. Without STB intervention, serious or far-reaching consequences could impair or disable the flow of goods and commerce in the U.S. economy.

The STB prides itself on its open lines of communication with stakeholders—railroads, shippers, congressional offices, trade associations, media outlets, and state and local communities. Due to frequent industry interaction and weekly railroad service data, I have confidence that we will be able to know when an event of regional or national significance is on the horizon.

Question 4. As you know, the law requires the Board to separate investigative and decision-making functions of staff to the extent practicable. Understanding that some hiring of investigative staff may depend on appropriations, in the near-term, what protections do you anticipate instituting to separate these functions and ensure due process is preserved?

Answer. Should the current state of the rail network change and an investigation become warranted, I anticipate choosing a team of investigators from current staff that would be walled off from any formal decision-making functions related to the on-going investigation. As an adjudicatory agency, this is not an uncommon practice. For example, our Rail Customer and Public Assistance staff working on informal service complaints are prohibited from working or sharing information with staff on the formal decision-making side so as to avoid any conflicts that could unfairly influence the outcome of a future formal proceeding. I am confident in our ability to keep

our investigative and decision-making functions separate, thereby preserving due process.

I have reviewed all comments in the record for the investigations proceeding, and the STB is on target to issue final rules by December 18, 2016.

Question 5. Understanding you may be somewhat limited by the on-going proceeding, could you speak to potential ways you believe the Board could improve its administrative handling of rate cases?

Answer. Improvements to the administrative handling of rate cases have been underway since before passage of the STB Reauthorization Act. In late 2014, I retained outside consultants to help the Board improve and streamline its processing of rate cases, specifically our stand-alone cost (SAC) rate reasonableness cases. We continuously look for ways to improve our processing of Stand-Alone-Cost (SAC) cases, which are among the most important and complicated matters adjudicated at the Board. Over the last year, we have been working on a set of "best practices" process guidelines to make sure that Board staff assigned to rate cases will have in place the most efficient team dynamic and collaboration tools to move the process forward. As one initial step in our best-practices review, we established a formal Rate Case Project Manager position, with the job of ensuring that the decision-making process is running smoothly and that process adjustments are made when necessary (*e.g.,* allocating staff, setting up required meetings, ensuring that quality reviews are completed on time). Additional steps to ensure best practices will continue to be implemented as we move forward.

The agency has also made concerted efforts to engage parties and stakeholders in helping to identify additional process improvements. For example, in a pending case, we recently held an early technical conference with the parties to discuss common evidentiary formatting issues, followed by an order documenting the formatting requirements in that case. In April 2016, Board staff held informal meetings with stakeholders to gather ideas about SAC process improvements. The Board used that feedback to develop the pending proceeding in EP 733, *Expediting Rate Cases,* which seeks to improve SAC processes in ways that would benefit both parties and the agency. Finally, as indicated in the Board's most recent budget request, another critical factor that impacts rate case process efficiency is the ability to hire additional staff.

I will continue this multi-pronged process improvement effort and am confident that the Board will make beneficial changes.

Question 6. S. 808 required the Board to make a report to Congress with recommendations on alternative rate case methodologies to reform the rate case process. I understand that a paid consultant has developed a draft report. Given that it is a report from the Board, I strongly encourage you to include the Board's views in the report to Congress, and to solicit comments from the public. Could you provide in detail the Board's plans for communication of its views on this matter and on the potential solicitation of public comment?

Answer. I retained independent consultants in late 2014 to conduct a report on alternative rate case methodologies, and I am pleased that the final report was delivered to Congress and released to the public through significant outreach efforts on September 22, 2016. The scope of work required InterVISTAS Consulting LLC to look for alternative methodologies to SAC that exist or could be developed and that could be used to reduce the time, complexity, and expense historically involved in rate cases; determine whether SAC is sufficient for large rate cases; and whether our simplified methodologies were appropriate alternatives to SAC.

I plan to hold an economic roundtable this fall to discuss the report's issues and conclusions with InterVISTAS and other independent economists, and the Board's own economists. I then intend to hold a public hearing at a reasonable time after the roundtable so that all interested stakeholders can participate in this important discourse. After consideration of stakeholder views from these public fora, the Board will deliberate on a path forward concerning large rate cases. The Board released the report without an overlay of commentary from the STB at this time so as not to delay the public's access to the report and not to deprive the Board of the benefit of public views on the report's findings before commenting.

Question 7. As the Board and the Federal Railroad Administration propose and finalize statutorily-required and discretionary rules on railroad stakeholders, I have a couple of broader questions.

a. Has the Board engaged, or considered engaging, in any interagency effort to assess cumulative regulatory burden or the cumulative effects of regulation on railroad investment, operations, and customers?

Answer. No, the Board has not specifically engaged in interagency efforts to assess cumulative regulatory effects of regulation on railroad investment, operations,

and customers. However, Board staff regularly meet with FRA and other Department of Transportation staff to keep each other abreast of current developments and regulatory efforts underway at each entity. The majority of the STB's regulatory proposals currently underway are either statutorily required or were instituted as a result of industry and congressional urging due to long-standing issues arising under the economic regulation of the railroads as opposed to safety regulation. I welcome all opportunities to interact and engage with our colleagues at the Federal Railroad Administration, and would be happy to discuss this topic further with the staff of the Senate Commerce Committee.

b. How does the STB ensure balanced regulation—providing shippers with meaningful access to regulatory remedies while allowing rail carriers to earn adequate revenues and reinvest in infrastructure—when proposals are considered together, as opposed to individually?

Answer. Balanced regulation is paramount in every action the Board takes. The various provisions in the U.S. Federal Rail Transportation Policy, 49 U.S.C. 10101, point to the importance of allowing rail carriers to earn adequate revenues to reinvest in their privately-owned networks, while ensuring that shippers have real access to rail service and regulatory relief. As such, I fully understand the importance of considering all of our proposals together.

The focus of my second term as STB chairman has been to proceed on regulatory matters and address transportation and STB efficiency/administrative issues that have remained open before the agency, in some cases, for years. It is a busy time at the STB, and I am cognizant of the number of issues we are placing before our stakeholders. The issues we are working through—competitive switching, revenue adequacy, commodity exemptions, expanding rate case access and methodology review, to name a few—are complex and need clarification or settlement. The only way to provide the regulatory certainty that the rail transportation industry deserves is to address these issues through a transparent, public process whereby stakeholders comment on STB proposals, and the Board takes action based on public input. And it is important to keep in perspective that our proposals are not final actions. They can morph and develop based on comments received, or depending on input from the comments, can be tabled. However, if the Board were instead to merely take no action, the agency would risk stagnation—something for which the Board has been sharply criticized for in the past. As balanced regulators, we see the larger picture and remain acutely aware that our proposals must be considered together.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. STEVE DAINES TO HON. DANIEL R. ELLIOTT III

Chairman Elliott, the ability for Montana farmers and others to efficiently move their goods to market is critical to the economic viability of our state and for the livelihood of thousands of Montana families. In the past, there have been capacity concerns on our freight railroads. Through investment and collaboration, freight railroads in Montana have been able to meet the demand for capacity and keep our agricultural products in addition to energy products moving safely. In working with the Montana Grain Growers Association (MGGA), they have raised the questions below about the implementation of S. 808, Surface Transportation Board Reauthorization Act of 2015.

Question 1. Regarding Section 11, can the Surface Transportation Board (STB) build a simple rate case model which contains enough detail to consider all the moving parts of a dynamic grain market?

Answer. During my tenure, I have focused considerable attention on improving the transparency and timeliness of STB decision-making. In particular, I have implemented several initiatives to improve our processes for reviewing the reasonableness of railroad rates in complaint proceedings. Despite improvements, I have been concerned that rate relief has not been readily available to grain shippers because even our streamlined processes are too complex or too costly for the smallest of rate disputes. Therefore, in December of 2013, I initiated a rulemaking proceeding specifically focused on grain-shipping stakeholders in order to find ways to make our rate review regulations more accessible and more viable for obtaining meaningful relief. After receiving public comment, the agency issued an advance notice of proposed rulemaking in August of 2016, which proposed a new method to judge rate reasonableness for small shippers, including grain shippers. The proposal includes a number of innovative ideas to simplify all facets of these cases from discovery through the parties' evidentiary presentations.

Question 2. How will you balance a looming rate case deadline against missing data which would be relevant in your decision?

Answer. In March of 2016, the Board issued final rules to align its deadlines for processing stand-alone cost (SAC) rate reasonableness cases with the deadlines established under the STB Reauthorization Act. The rules compress the timeline for these cases. Under the new timeline, the Board will have approximately five months from the parties' filing of closing briefs until a decision is due. I believe that this creates a tight timeline, but the Board issued an advance notice of proposed rulemaking in June aimed at expediting rate cases, including potential changes in methodology to allow us to meet the new timeline. Also, as part of my efforts to improve the Board's processing of cases, I have reviewed our internal procedures to make sure that our staff are coordinating their efforts, adhering to schedules, and working efficiently on our caseload. We have made great strides in these internal efforts, and I believe that these process improvements will also help to minimize the likelihood of encountering the kind of scenario that you describe.

Question 3. Regarding Section 12, is there a danger of unintended growth of the STB, since it now has investigative powers? How will you guard against this?

Answer. I believe that Section 12 of the Reauthorization Act greatly enhances the Board's ability to carry out its mission and provides the agency with an important tool, going forward. While I certainly understand and share your concern regarding "unintended growth," I believe that a key aspect of Section 12 is that it carries its own limiting principle: our investigative power can only be deployed for matters of "national" or "regional" significance. As I view this important limitation, it clearly means that the agency must be cautious and circumspect in invoking this authority. Proper subjects for investigation must reach beyond a single shipper or single event and affect the Nation as a whole or an identifiable region, such as the South or the Midwest. Even before taking this qualification into account, it is not my intention that the agency initiate investigations without a substantial basis for doing so, and I believe that the rules we proposed in May 2016, as modified based on comments received, will prevent us from doing so. Under the proposal, investigations would involve several distinct phases and there will be checks and balances to protect against unwarranted uses of the statute. Finally, I note that the Reauthorization Act did not modify Congressional policy for the agency, as enacted in the Rail Transportation Policy—our animating principles strongly caution against overzealous regulatory intervention and strongly promote competition and market forces. We understand that the rail industry has greatly benefited from successive waves of deregulation, starting in the late 1970s and continuing into the mid-1990s. I do not view the Board's investigative authority as a mandate to turn back the clock.

Question 4. Regarding Section 13, proving market dominance as a prerequisite to arbitration may be an expensive and protracted proceeding. Do you have streamlined procedures to allow for this? Would grain producers be considered a "relevant party" to an arbitration? Is the STB working on a plan to actively encourage participation in the full arbitration program?

Answer. During my tenure, I have consistently expressed my preference for private-sector resolution of disputes, as opposed to government intervention and regulatory outcomes. In my view, the private sector is far more likely to produce a win-win outcome, as opposed to a win-lose outcome that typically results from litigation. To this end, I have revised and updated our rules for arbitration and mediation, and I have promoted these programs as alternatives to litigation before the agency. In outreach to stakeholders in public settings, I have encouraged greater use of arbitration and mediation. I have also steered our stakeholders to the resources of our Rail Customer and Public Assistance program, which works informally to resolve disputes. Although we have conducted several mediations and RCPA has had many successes in its efforts, the Board's formal arbitration program is under-utilized. The response to the opportunity to "opt in" for arbitration of certain kinds of disputes was more limited than we expected. Grain producers generally speaking would have full access to our arbitration program.

In May 2016, we issued proposed rules to align our existing arbitration program with the requirements of the Reauthorization Act. As part of this rulemaking, we specifically sought comment on how to address the "market dominance" threshold for purposes of using arbitration in rate cases. We asked whether arbitration in rate matters should be made available only where the parties agree that the threshold has been met, and for other approaches to confronting this question.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. DEB MILLER

Forward-Looking Issues

Question 1. What do you view as the most significant challenge facing the Board as it completes implementation of this legislation, and how do you plan to address those challenges?

Answer. Implementation of the STB Reauthorization Act of 2015 (the Act) continues to progress well. However, a number of challenges still remain. The most significant is inadequate funding. As I noted in my written testimony, there will be a significant cost resulting from the fact that the Board is now independent from the U.S. Department of Transportation. The Act also directs the Board to issue decisions on rate cases more quickly and conduct investigations, which will require more staff. There are also the costs associated with adding two new Members, continuing to improve our IT infrastructure (where we have made significant progress), and moving/relocating to new offices. As noted in my written testimony, even by conservative estimates, there simply is not enough funding to do all of these things. Accordingly, the Board is going to have to make some tough choices over which functions, including certain aspects of the Act, get priority.

Another challenge to implementing the Act is the inefficient nature of the Board's processes. As I noted in my written testimony, the Board lacks a systematic way of managing our caseload. While the mandated reports on unfinished regulatory proceedings have helped speed up rulemakings, the Board currently has a significant number of non-rulemaking proceedings before it as well. Juggling all of these cases, along with the rulemakings and other requirements of the Act, will require greater organization and discipline.[1] The Board's processes are also currently too stovepiped. As an example, I noted in my written testimony that the Board staff currently briefs all Members on cases individually. This is difficult enough with three Members, but will be cumbersome with five.

While I support the Act's expansion of the Board to five Members, I am concerned that this change will not produce the intended benefits if the Board does not make some internal changes. In particular, the Board needs to improve communication and collaboration between the Members. The Chairman recently sent the just-completed rate methodology study from our consultant (InterVISTAS) to the House and Senate oversight committees, with a letter stating that the report satisfied the Act's requirement that the Board conduct a study on alternatives to the Stand-Alone Cost (SAC) test. This letter was sent without Board Member Begeman's or my knowledge, and it was done contrary to my preference that the Board provide its own analysis of InterVISTAS' conclusions before reporting to Congress. I believe that unilateral actions such as this are contrary to the reason Congress established a multi-Member Board. It eliminates the counterbalance that the other two Members are supposed to provide and creates confusion among our stakeholders over the direction the agency is taking.

Lastly, from a substantive standpoint, I think the most challenging aspect of the Act will be determining what actions, if any, the Board should take regarding the process for determining rate reasonableness. In my opinion, this is the most important issue that the Board will face in the months ahead. As I have made well-known in my separate expressions in rate cases, I have concerns about continued used of the SAC test. Many shippers have also clearly lost faith in the test, and even railroads, which for the most part see the economic underpinnings of the test as still sound, would be hard-pressed to deny that the cases have become increasingly cumbersome, expensive, and time-consuming.

The report from InterVISTAS did not uncover any "silver bullet" approaches—either in academic literature or from other countries—that could be used in SAC's place. However, that does not mean that the Board should give up on the idea of an alternative to SAC or looking for ways that the SAC test itself might be improved. The roundtable discussion that the Chairman recently announced will be an important first step—though it is important that it is not the last step—in pursuing this objective. In order to ensure that the Board obtains meaningful feedback on the InterVISTAS report, it will be important that the roundtable represent as wide a range of views as possible. Based on the feedback we receive at the roundtable, the Board will then have to determine how best to proceed.

Question 2. What do you view as the greatest opportunities and challenges facing the rail industry over the period of this authorization and in the long-term?

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[1] *See Tri-City Railroad Co.—Petition for Declaratory Order*, Finance Docket No. 35915 (STB served Sept. 14, 2016) (Miller separate comment) (urging the Board to apply the same principles for setting deadlines in regulatory proceedings to all proceedings).

Answer. The greatest challenge facing the railroad industry is the shift in the type of traffic that they haul. The fact that the railroads' coal business has significantly decreased has been well-publicized, and even if volumes recover, reports suggest that still are unlikely to return to levels close to those of just a few years ago. This loss in coal business though may provide the railroad industry an opportunity in the form of excess capacity, which could be used to grow other lines of business. However, for this to happen, in my view, railroads will need to have a greater customer-oriented focus.

Investigations

Question 3. Understanding the investigative authority rulemaking is an on-going proceeding and you cannot divulge information about the final rule, I have a couple questions of clarification about the proposed rule.

a. Under the proposed rule, what do you anticipate as the timeline for the initial fact-finding phase? Under the proposed rule, how long do you think a fact-finding phase would typically take, and could you explain the policy or factors limiting the time of that phase?

Answer. I appreciate the question, given that the concept of the fact-finding phase appears to have created a great deal of angst among our stakeholders. Because the rulemaking is still pending, I need to be careful to not make any statements that could be construed as prejudging the matter. I can say that, in most cases, I think the fact-finding will be so organic and unstructured that one could not easily assign a timeline to it. That being said, the parties to this proceeding have raised some valid reasons why a set time period would be helpful. In considering what the final rules should require, I will keep an open mind to the comments submitted by stakeholders on this issue.

b. Under the proposed rule, how do you anticipate the agency will determine whether an issue is of national or regional significance?

Answer. Again, I appreciate the question, as this is another aspect of the proposed rules on investigation that seems to have caused consternation among our stakeholders, but must again be careful about commenting too much. Given our limited resources, I think that when the Board uses this authority, it is likely to be on matters where we can have the greatest impact, which will mean matters that by their nature are without a doubt of national or regional significance. That being said, I understand the arguments raised by some parties in our rulemaking for why more guidance is needed on this issue. I will carefully consider those views in deciding on the final rules.

Question 4. As you know, the law requires the Board to separate investigative and decision-making functions of staff to the extent practicable. Understanding that some hiring of investigative staff may depend on appropriations, in the near-term, what protections do you anticipate instituting to separate these functions and ensure due process is preserved?

Answer. To ensure that the investigative and decision-making functions remain separate, the Board will have to be disciplined about keeping staff that work on each function separate and ensure that they do not communicate about the matter. While I cannot comment directly while the matter remains pending at the Board, no matter what path the Board ultimately chooses, I am comfortable that the Board will be able to properly comply with this mandate in the Act. The Board has a lot of experience separating such functions within the agency. The staff of our Rail Customer and Public Assistance section, which assists stakeholders and practitioners on matters that often turn into formal proceedings, are "walled off" from the rest of the agency. This means that they know not to discuss matters that they work on with anyone outside the section, and the rest of the staff knows not to ask them about such matters. The same restrictions apply when the agency uses Board staff as mediators. In my observation, the staff has taken these restrictions on communications very seriously.

Rate Cases

Question 5. Understanding you may be somewhat limited by the on-going proceeding, could you speak to potential ways you believe the Board could improve its administrative handling of rate cases?

Answer. I think that the steps needed to improve the administrative handling of rates cases are already being taken. The Board wisely hired a consultant in 2014 to review the workflow process in rate cases, after which time the consultant concluded that there essentially was no process. The consultant therefore issued a long list of recommendations that the Board should implement. During my time as Acting Chairman, I directed the agency to extend our contract with the consultant so that it could advise and assist the agency in the implementation. Although Commis-

sioner Begeman and I have generally not been part of discussions with the consultant, it is my understanding that they have worked with our staff to implement project management practices that did not previously exists. This includes the appointment of a rate case manager; establishment of rate case teams; defined roles and responsibilities for each team member; creation of a detailed schedule; identification and prioritization of significant "calls;" more structured meetings; and a more rigorous quality assurance process.

Ex Parte Communications

Question 6. Could you provide specific examples of proceedings where ex parte communication was not used but would have provided a great benefit?

Answer. I personally feel that ex parte communication would help in most rulemakings that involve complicated policy matters and that have broad, industry-wide implications. A few notable examples of where ex parte meetings would have been particularly useful are the Board's proceedings involving fuel surcharges, Amtrak on-time performance, and the original proceeding in which modifying the reciprocal switching standards were first proposed.

In the fuel surcharge proceeding,[2] the Board initiated an ANPRM to determine whether it should eliminate or modify its "safe harbor" program, which provides that if railroads base their changes in the amount of their fuel surcharges on the Highway Diesel Fuel Index, they are safe from legal challenge. Because this is still a pending matter, I cannot comment too specifically, but I do believe that this is a proceeding where ex parte communications would have had significant value.

The rulemaking setting standards for Amtrak on-time performance[3] is another example where ex parte communication would have helped, not just in terms of helping educate the Board, but allowing the Board to educate our stakeholders. Based on the comments received in the proceeding, I believe that there was significant confusion from many parties over the Board's proposal to use end-point arrival times as the threshold for initiating an investigation. Perhaps had the Board Members been permitted to engage in face-to-face dialogue with the stakeholders, they would have better understood the Members thinking, and the Members would have been more aware of the stakeholders' perception that using end-point arrival times implied a lack of concern about late arrivals at intermediate stops.

Finally, I think meetings would have been helpful in the docket in which the Board considered the National Industrial Transportation League's proposal rules for increasing use of reciprocal switching.[4] While the Board did hold two hearings there, in my opinion, conducting individual ex parte meeting with the parties, rather than directing them to submit multiple rounds of filings, would have been more useful. That being said, I am pleased that the Board is holding such meetings in the new docket on reciprocal switching.

Question 7. During the hearing, in discussing ex parte communications, Chairman Elliott mentioned the trade-off between the right to a fair hearing and more efficient communication. If ex parte communication rules are loosened, could you provide more detail on potential measures to reinforce principles such as the right to a fair hearing, impartiality, and transparency?

Answer. I should clarify here that while I have advocated that the Board eliminate its prohibition on ex parte communications, I do not advocate that such communications be utilized in every regulatory proceeding, nor that any of the protections that would be required to protect parties' rights to due process be ignored. There will certainly be proceedings where the value of ex parte communications would be limited and thus not worth pursuing. But if ex parte meetings are held, the Board should of course implement procedures to ensure that they are transparent and conducted in a fair manner. The measures that the Board can take include: having an attorney-advisor from the Board at the meeting to monitor the conversation and to cut off any discussion that may be improper; disclosing the date, time, and participants present for all meetings; placing written summaries of the meetings in the public record of the agency proceeding (as well as any materials shared by stakeholders); and providing an opportunity for parties to provide comments in response to the meeting summaries. As I noted in my written testimony, I would actually like to see the Board increase transparency by conducting more of its work in public through actions like voting conferences, public work sessions, and workshops.

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[2] *Rail Fuel Surcharges (Safe Harbor),* STB Docket No. EP 661 (Sub-No. 2).

[3] *On-Time Performance Under Sect. 213 of the Passenger Rail Investment and Improvement Act of 2008,* STB Docket No. EP 726.

[4] *Petition for Rulemaking to Adopt Revised Competitive Switching Rules,* STB Docket No. EP 711.

Cumulative Burden

Question 8. As the Board and the Federal Railroad Administration propose and finalize statutorily-required and discretionary rules on railroad stakeholders, I have a couple of broader questions.

a. Has the Board engaged, or considered engaging, in any interagency effort to assess cumulative regulatory burden or the cumulative effects of regulation on railroad investment, operations, and customers?

Answer. The Board frequently engages with the Federal Railroad Administration (FRA), but it is generally at the staff level. Our governmental affairs office meets with representatives from the FRA on a monthly basis; a member of the FRA participates in two of the Board's advisory committees; and our Office of Environmental Analysis works closely with the FRA staff on environmental reviews for railroad construction projects. However, there has been no coordinated effort to discuss the cumulative effects of regulatory efforts. It should be noted the STB and FRA have different statutory mandates, and as a result, the actions taken by one may not necessarily having bearing on the other. However, I can see value in making sure that each agency is kept apprised of the actions of the other, and I will discuss the idea of increasing discussions with the FRA with my fellow Board Members.

b. How does the STB ensure balanced regulation—providing shippers with meaningful access to regulatory remedies while allowing rail carriers to earn adequate revenues and reinvest in infrastructure—when proposals are considered together, as opposed to individually?

Answer. I appreciate this question, as the spurt of Board activity in recent months has been the subject of much recent conversation. In the Board's decision proposing to revise our reciprocal switching proposal, I expressed my philosophy on this issue:

> The Board's regulatory mission is set out in the Rail Transportation Policy (RTP) at 49 U.S.C. § 10101. Two important but competing goals in the RTP are to promote an efficient, competitive, safe and cost-effective rail network by enabling railroads to earn adequate revenues that foster reinvestment in their networks, attract outside capital, and provide reliable service, while at the same time working to ensure that effective competitions exists between railroads and that rates are reasonable where there is a lack of effective competition. As in all major rulemakings the Board undertakes, my goal here has been to develop a proposal for reciprocal switching that properly satisfies both of these goals.

So long as the Board adheres to the guidance set forth in the RTP, ensures that it develops comprehensive evidentiary records, is careful and thoughtful in its deliberations, and reaches decisions that are well-reasoned and based on sound evidence, I believe that the Board's actions—even when considered together—will strike the appropriate balance.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. ANN D. BEGEMAN

Forward-Looking Issues

Question 1. What do you view as the greatest opportunities and challenges facing the rail industry over the period of this authorization and in the long-term?

Answer. The industry is in the midst of responding to a large number of significant regulatory changes—both final and proposed rules—including those by the Federal Railroad Administration (FRA), the Pipeline and Hazardous Materials Safety Administration, the Environmental Protection Agency, and the Surface Transportation Board (STB or Board). For example, rail carriers are working to meet requirements for oil tank cars and locomotive engines, while responding to proposed changes to braking systems and crew sizes. The carriers are also adjusting to plummeting coal volume demand that is not likely to rebound. These and other challenges are coupled with the massive expense and significant technical demands associated with the creation, installation, testing, and day-to-day implementation of Positive Train Control.

Over my objection, the Board has also recently proposed altering several longstanding regulations that could greatly affect freight rail operations in the long term.[5] These proposals include new competitive switching rules (that are so vague as to invite more questions than answers) and regulating commodities that have

[5] EP 711(Sub-No. 1), *Reciprocal Switching,* (STB served July 27, 2016) (Begeman dissenting in part) and EP 704, *Review of Commodity, Boxcar, And Tofc/Cofc Exemptions,* (STB served Mar. 23, 2016) (Begeman dissenting)

been exempt from agency regulation for over 30 years. If merely pushed forward to final rules, the agency will impose the most significant regulatory changes since implementing the Staggers Act.

Maintaining successful rail operations, despite the ultimate requirements and impacts of all these regulatory changes combined, will be the greatest challenge facing the rail industry through 2020 and beyond. While I do not subscribe to a view that any regulation is too much regulation, I firmly believe that we, as regulators, must be very thoughtful and informed in our approach to regulatory change. And we simply must listen to stakeholders—including the rail industry—to ensure that what may be good regulatory intentions do not result in unintended harm to carriers and their shippers.

Investigations

Question 2. Understanding the investigative authority rulemaking is an on-going proceeding and you cannot divulge information about the final rule, I have a couple questions of clarification about the proposed rule.

a. Under the proposed rule, what do you anticipate as the timeline for the initial fact-finding phase? Under the proposed rule, how long do you think a fact-finding phase would typically take, and could you explain the policy or factors limiting the time of that phase?

Answer. The statute clearly states that the Board may only commence an investigation on its own initiative to investigate issues that are of "national or regional significance." In my view, that investigative criteria demands that the initial fact-finding be carried out expeditiously (*i.e.,* limited to no more than a 45 to 60-day period). It is important that the Board and its staff be held accountable at each phase of this new investigative process. Defined time frames would help ensure that investigations do not drag-on. Therefore, I hope the Board will embrace a limited initial fact-finding period so that it can then respond swiftly to any identified issues of national or regional significance.

b. Under the proposed rule, how [do] you anticipate the agency will determine whether an issue is of national or regional significance?

Answer. In identifying issues of national or regional significance, the Board could look for issues impacting operations at congested rail hubs, or issues that could disrupt services at moments of peak demand (*e.g.,* disruptions that could impact propane delivery before winter or fertilizer delivery before planting). In addition to following regional and national news reports, the Board should closely monitor any trends shown through the weekly data reporting of the Class I carriers, information provided to the Board's Office of Public Assistance, Government Affairs, and Compliance on monthly calls with the carriers, any trends shared on the Rail Customer and Public Assistance Program's call log, and information obtained from the Rail-Shipper Transportation Council and the Rail Energy Transportation Advisory Committee, and from meetings attended throughout the year by Board Members or staff.

Question 3. As you know, the law requires the Board to separate investigative and decision-making functions of staff to the extent practicable. Understanding that some hiring of investigative staff may depend on appropriations, in the near-term, what protections do you anticipate instituting to separate these functions and ensure due process is preserved?

Answer. Although the statute provides that the Board Chairman is responsible for administering the Board, I believe a Chairman should invite his or her colleagues' input on how best to fulfill the Board's obligations, including agency budgeting, staffing, and other determinations that could significantly affect the Board's overall productivity. With regard to how the Board will keep separate the staff investigative and decision-making functions, the Board's budget should be allocated in a manner that keeps the two functions separate as a matter of course. Should the Board find that circumstances have arisen requiring an overlap of staff duties for the fair and timely resolution of a particular matter—which I think would be a limited exception—I believe the Board would have to be transparent and inform the affected parties and the House and Senate Committees of jurisdiction.

Rate Cases

Question 4. Understanding you may be somewhat limited by the on-going proceeding, could you speak to potential ways you believe the Board could improve its administrative handling of rate cases?

Answer. I am a strong advocate for the Board's use of technical conferences, compliance orders, and other administrative tools to work with parties to ensure the successful submission of complete cases. The Board could interact much more with the parties to communicate expectations—especially when it comes to addressing novel issues presented in the pleadings. The Board could also do more to limit the

scope of contested issues between the parties and do so early in a case. Sometimes complainants and defendants go too far on novel evidentiary issues or obscure technical points that greatly expand the scope or impact of the case, yet the Board remains silent. The Board should actively manage rate cases to ensure that they will be handled within the time frame mandated by Congress, and should avoid asking parties for supplemental filings (imposing time and expense on the parties) and then choosing not to make a finding about the information sought.[6]

Ex Parte Communications

Question 5. Could you provide specific examples of proceedings where ex parte communication was not used but would have provided a great benefit?

Answer. The Board needs to embrace more interactive, timely, and responsive decision-making. In order to do so, this agency's extreme interpretation of its ex parte communication regulations must be changed. It would be a definite benefit to the Board and the public for Board Members and staff to meet and hear directly from stakeholders during rulemaking proceedings so that we can establish the most informed policies. If the Board were to more broadly engage with its stakeholders, it would be important to do so in a transparent manner by disclosing any contacts with individuals or groups and thereby avoid any appearance of bias or impropriety. Other agencies that balance adjudications and regulations have managed to strike an appropriate balance when it comes to ex parte contacts. The Board could and should do the same, and while I am pleased that we have taken a few recent steps in this direction, I think we should do so routinely.

With respect to proceedings in which a waiver of the ex parte communications would have been helpful, one example is EP 704, *Review of Commodity, Boxcar, and Tofc/Cofc Exemptions.* The record in this proceeding was created over half a decade ago, before two of the three current Board Members were even appointed (and my five-year term since expired). For this Board to take informed action, we should have asked interested stakeholders to update the docket and allow an opportunity for Board Members to hear first-hand from stakeholders. Doing so would have helped Board Members to better determine whether changes were necessary, rather than relying on a stale record and a staff analysis that would have been as relevant five years ago as when the majority issued its March 2016 proposal repealing certain exemptions and inviting comment on all exemptions. I believe an ex parte waiver could still be beneficial and better position each Board Member in preparation for the recently announced January 2017 "next action" in this proceeding.

Another ongoing proceeding that still could benefit from an ex parte communication waiver is the grain rate proceeding (EP–665). The Board started this proceeding at my urging back in 2013. Since then, the Board has sought multiple rounds of comments, held a hearing, and created a substantial record. Yet after all of that time and effort, the Board has proposed only the outlines of an approach, through an Advanced Notice of Proposed Rulemaking, which will now require the stakeholders to consider, analyze, and again participate in multiple rounds of additional comment. These new rounds of comment are necessary since the Board is using its formal rulemaking process without "ex parte" contact and therefore has limited opportunities for stakeholder interaction. But if the Board could have pulled in stakeholders from the beginning (with the requisite transparency) and gotten the specific information the Board needed about the market, the rate challenges faced by grain shippers, and the solutions proposed by the stakeholders, then this whole process may have been made much more efficient for the Board, the stakeholders, and the public.

Question 6. As the Board and the Federal Railroad Administration propose and finalize statutorily-required and discretionary rules on railroad stakeholders, I have a couple of broader questions.

a. Has the Board engaged, or considered engaging, in any interagency effort to assess cumulative regulatory burden or the cumulative effects of regulation on railroad investment, operations, and customers?

Answer. I am unaware of any interagency effort to assess cumulative regulatory burdens or the cumulative effects of regulation on railroad investment, operations, and customers. However, I would certainly embrace coordination with the FRA to perform cumulative regulatory analysis and thereby help to ensure that a fair regulatory balance is achieved. Of course, the Board would first have to propose a discernable regulatory scheme that can be reasonably assessed. For example, as I noted in my dissent on the Competitive Switching proposal, the majority proposed a program that lacked a number of important details. The Board instead committed

[6] See *Total Petrochems. & Refining USA, Inc.* v. *CSX Transp., Inc.,* NOR 42121, (STB served Sept. 14, 2016) (Begeman dissenting in part)

only to exploring certain matters through the rulemaking process and then establishing other key specifics through the course of individual adjudications. In the near term, that approach may enable the Board to avoid defending the likely true costs and impacts of its Competitive Switching proposal. Such an improvised approach makes the assessment of cumulative regulatory burden, the anticipation of cumulative effects on railroad investment, operations, and customers, and ensuring balanced regulation all but impossible.

b. How does the STB ensure balanced regulation—providing shippers with meaningful access to regulatory remedies while allowing rail carriers to earn adequate revenues and reinvest in infrastructure—when proposals are considered together, as opposed to individually?

Answer. Generally, I don't believe the Board, as a whole, has made any real attempt to ensure a "balanced" regulatory agenda. In fact, even when the Board initiated a regulatory review in 2011 to determine whether any of the Board's regulations are "ineffective, insufficient, or excessively burdensome, and how to modify, streamline, expand, or repeal them . . .," it failed to take any meaningful action as a result. Despite considerable stakeholder input, the Board merely replaced obsolete references and corrected spelling and other regulatory errors.[7] Certainly a broader view of the Board's regulatory activity is warranted, especially with the industry shouldering the significant challenges posed by so many Federal agencies in so many different ways as I noted in my response to Question 1.

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[7] See No. EP 712, *Improving Regulation and Regulatory Review* (STB Served Feb. 18, 2016) (Begeman commenting)