State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain federal assistance no longer available in SFHAs
Newton, Township of, Lackawanna County.	421756	July 2, 1979, Emerg; July 3, 1990, Reg; August 5, 2020, Susp..	.....do	Do.
North Abington, Township of, Lackawanna County.	422460	February 3, 1976, Emerg; August 10, 1979, Reg; August 5, 2020, Susp..	.....do	Do.
Old Forge, Borough of, Lackawanna County.	420535	July 25, 1974, Emerg; October 16, 1979, Reg; August 5, 2020, Susp..	.....do	Do.
Scott, Township of, Lackawanna County.	421757	January 19, 1979, Emerg; May 17, 1990, Reg; August 5, 2020, Susp..	.....do	Do.
Scranton, City of, Lackawanna County.	420538	January 12, 1973, Emerg; August 15, 1980, Reg; August 5, 2020, Susp..	August 5, 2020	August 5, 2020.
South Abington, Township of, Lackawanna County.	421758	July 29, 1975, Emerg; December 15, 1982, Reg; August 5, 2020, Susp..	.....do	Do.
Taylor, Borough of, Lackawanna County.	420539	March 26, 1974, Emerg; August 15, 1980, Reg; August 5, 2020, Susp..	.....do	Do.
Throop, Borough of, Lackawanna County.	420540	April 5, 1974, Emerg; September 28, 1979, Reg; August 5, 2020, Susp..	.....do	Do.
Waverly, Township of, Lackawanna County.	422453	January 14, 1976, Emerg; September 30, 1981, Reg; August 5, 2020, Susp..	.....do	Do.
Region V				
Illinois: Prairie du Rocher, Village of, Randolph County.	170578	June 25, 1974, Emerg; September 4, 1985, Reg; August 5, 2020, Susp..	.....do	Do.

*.....do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Katherine B. Fox,

Assistant Administrator for Mitigation, Federal Insurance and Mitigation Administration—FEMA Resilience, Department of Homeland Security, Federal Emergency Management Agency.

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SURFACE TRANSPORTATION BOARD

49 CFR Parts 1011 and 1111

[Docket No. EP 756]

Market Dominance Streamlined Approach

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (STB or Board) is adopting a final rule to establish a streamlined approach for pleading market dominance in rate reasonableness proceedings.

DATES: The rule is effective on September 5, 2020.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher at (202) 245–0355. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Rail shippers may challenge the reasonableness of a rail carrier's common carrier rate by filing a formal complaint with the Board. *See* 49 U.S.C. 10701(d); 49 U.S.C. 10702; 49 U.S.C. 10704(b); 49 CFR pt. 1111. However, before the Board is permitted to determine if the rate is reasonable, it must first find that the rail carrier has market dominance over the transportation to which the rate applies. 49 U.S.C. 10707(b), (c). Market dominance is defined as ''an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.'' 49 U.S.C. 10707(a). It is established Board precedent that the burden is on the complainant to demonstrate market dominance. *See, e.g., Total Petrochems. & Ref. USA, Inc.* v. *CSX Transp., Inc.,* NOR 42121, slip op. at 28 (STB served May 31, 2013) (with Board Member Begeman dissenting on other matters) *updated* (STB served Aug. 19, 2013.)

The agency has previously recognized the Congressional intent expressed in the market dominance statute and its legislative history, which ''envision[s] the market dominance determination simply as a practical threshold jurisdictional determination to be made without lengthy litigation or administrative delay.'' *Westmoreland Coal Sales Co.* v. *Denver & Rio Grande W. R.R.,* 5 I.C.C.2d 751, 754 (1989) (discussing 49 U.S.C. 10709, the predecessor of the current section 10707). In practice, however, the market dominance inquiry has often become a costly and time-consuming undertaking, resulting in a significant burden on rate case litigants. In smaller rate cases, in particular, the expense associated with the market dominance inquiry may be disproportionate to the remedy sought.

Accordingly, in a notice of proposed rulemaking issued on September 12, 2019, the Board proposed a streamlined market dominance inquiry. *Market Dominance Streamlined Approach* (*NPRM*), EP 756 (STB served Sept. 12, 2019).[1] Specifically, the Board proposed a set of factors that, if they could be demonstrated by the complainant, would establish a prima facie showing of market dominance.

The Board received numerous comments on the *NPRM*.[2] After

[1] The proposed rule was published in the **Federal Register**, 84 FR 48,882 (Sept. 17, 2019).

[2] The Board received comments and/or reply comments from the following entities: The American Chemistry Council, The Fertilizer Institute, the National Industrial Transportation League, the Chlorine Institute, and the Corn Refiners Association (collectively, the Coalition Associations); the American Fuel & Petrochemical Manufacturers (AFPM); the Association of American Railroads (AAR); BNSF Railway Company (BNSF); Canadian National Railway

Continued

considering the comments, the Board will adopt its proposal with the modifications discussed below.

Background

In January 2018, the Board established its Rate Reform Task Force (RRTF), with the objectives of developing recommendations to reform and streamline the Board's rate review processes for large cases and determining how to best provide a rate review process for smaller cases. After holding informal meetings throughout 2018, the RRTF issued a report on April 25, 2019 (RRTF Report), which recommended, among other things, that the Board develop ''a standard for pleading market dominance that will reduce the cost and time of bringing a rate case.'' RRTF Report 53. The RRTF concluded that an effort to streamline the market dominance inquiry was a necessary part of making rate relief available for smaller rate disputes. *Id.* at 52. After considering the RRTF Report and broader market dominance issues, *see NPRM,* EP 756, slip op. at 3–6, the Board issued the *NPRM* proposing a streamlined approach for pleading market dominance in rate reasonableness proceedings.

The Board's market dominance inquiry comprises two components: A quantitative threshold and a qualitative analysis. The statute establishes a conclusive presumption that a railroad does not have market dominance if the rate charged produces revenues that are less than 180% of its variable costs [3] of providing the service. *See* 49 U.S.C. 10707(d)(1)(A). However, a finding by the Board that a movement's R/VC ratio is 180% or greater does not establish a presumption that the rail carrier providing the transportation has market dominance over the movement. *See* 49 U.S.C. 10707(d)(2)(A). Accordingly, if the quantitative 180% R/VC threshold is met, the Board moves to the second component, a qualitative analysis of market dominance. In this analysis, the Board determines whether there are any feasible transportation alternatives sufficient to constrain the railroad's rates for the traffic to which the challenged rates apply (the issue traffic). *See, e.g., M&G Polymers 2012,* NOR 42123, slip op. at 2, 11–18; *Consumers Energy Co.* v. *CSX Transp., Inc.,* NOR 42142, slip op. at 287–98 (STB served Jan. 11, 2018).

As explained in the *NPRM,* EP 756, slip op. at 5–6, it is well established that the Board has the authority to review and modify its rate reasonableness methodologies and processes—including its market dominance inquiry—to ensure that they remain accessible to the complainants that are entitled to use them.[4] The *NPRM* described the Board's underlying reasons for its proposal: The time and cost associated with an evidentiary process that ''requires the complainant to prove a negative proposition on opening—that intermodal and intramodal competition are not effective constraints on rail rates''; the fact that such expense may be particularly out of balance with the remedy being sought in smaller rate cases; and that the time and cost of the market dominance inquiry could itself be a barrier to rate relief. *NPRM,* EP 756, slip op. at 3–4. The *NPRM* also described how its proposed streamlined market dominance approach would further the rail transportation policy (RTP) at 49 U.S.C. 10101 and would be consistent with clear Congressional directives in both that statutory provision and also the Surface Transportation Board Reauthorization Act of 2015, Public Law 114–110, 129 Stat. 2228. *NPRM,* EP 756, slip op. at 4–5.

With respect to the proposed streamlined market dominance approach, the *NPRM* proposed factors that, if demonstrated by the complainant, would constitute a prima facie showing of market dominance. The Board reasoned that the presence of these factors would constitute ''significant evidence about the status of effective competition,'' both intramodal and intermodal. *NPRM,* EP 756, slip op. at 7. However, the Board also explained that, under the proposed streamlined approach, rail carriers would still be ''permitted to refute any of the prima facie factors of the complainant's case, or otherwise show that effective competition exists for the traffic at issue.'' *Id.* at 12. The Board concluded that the proposed approach would ''have the benefit of reducing the complexity of market dominance presentations for many complainants without limiting railroads' ability to mount a thorough defense.'' *Id.*

The prima facie factors proposed in the *NPRM* are as follows:

- The movement has an R/VC ratio of 180% or greater;
- The movement would exceed 500 highway miles between origin and destination;
- There is no intramodal competition from other railroads;
- There is no barge competition;
- The complainant has used truck for 10% or fewer of its movements subject to the rate at issue over a five-year period; and
- The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

Id. at 6–7. For the factors pertaining to intramodal competition, barge competition, and build-out alternatives, the *NPRM* proposed that complainants could submit a verified statement from an appropriate official attesting that the complainant does not have such competitive options, or could otherwise demonstrate that those factors are met. *Id.* at 8, 10–11.

To further streamline the market dominance inquiry, the *NPRM* proposed that complainants would be allowed to request an on-the-record, telephonic hearing with an Administrative Law Judge (ALJ) at the rebuttal phase of the rate proceeding. *Id.* at 12. The purpose of the hearing would be to allow the parties to clarify their market dominance positions under oath, and to build upon issues presented by the parties through critical and exacting questioning. *Id.* The *NPRM* also proposed a 50-page limit (inclusive of exhibits and verified statements) on the parties' replies and rebuttals. *Id.*

The Board did not propose to limit the types of rate proceedings in which

Company (CN); CSX Transportation, Inc. (CSXT); Farmers Union of Minnesota, Farmers Union of Montana, Farmers Union of North Dakota, Farmers Union of South Dakota, and Farmers Union of Wisconsin (collectively, Farmers Union); Freight Rail Customer Alliance (FRCA); Indorama Ventures (Indorama); Industrial Minerals Association—North America (IMA–NA); Institute of Scrap Recycling Industries, Inc. (ISRI); MillerCoors; National Coal Transportation Association (NCTA); National Grain and Feed Association (NGFA); National Taxpayers Union (NTU); Norfolk Southern Railway Company (NSR); Olin Corporation (Olin); Portland Cement Association (PCA); Private Railcar Food and Beverage Association (PRFBA); Steel Manufacturers Association (SMA); Union Pacific Railroad Company (UP); U.S. Department of Agriculture; and Western Coal Traffic League (WCTL). The Board also received a joint comment from several members of the Committee for a Study of Freight Rail Transportation and Regulation of the Transportation Research Board (referred to collectively as the TRB Professors), as well an individual comment and reply from one member of that committee, Dr. Jerry Ellig (Dr. Ellig). That committee issued a report titled *Modernizing Freight Rail Regulation* (*TRB Report*) in 2015. *See* Nat'l Acads. of Sciences, Eng'g, & Med., *Modernizing Freight Rail Regulation* (2015), *http://nap.edu/21759.*

[3] Variable costs are those railroad costs of providing service that vary with the level of output. *See M&G Polymers USA, LLC* v. *CSX Transp., Inc.,* NOR 42123, slip op. at 2 n.4 (STB served Sept. 27, 2012) *corrected and updated,* (STB served Dec. 7, 2012) (*M&G Polymers 2012*). The comparison of revenues to variable costs, reflected as a percentage figure, is known as a revenue-to-variable cost (R/VC) ratio. *Id.*

[4] *See, e.g., Rate Reg. Reforms,* EP 715, slip op. at 1–2 (STB served Mar. 13, 2015); *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), *aff'd sub nom. CSX Transp., Inc.* v. *STB,* 568 F.3d 236 (D.C. Cir. 2009), *vacated in part on reh'g,* 584 F.3d 1076 (D.C. Cir. 2009).

complainants could utilize the streamlined market dominance approach.[5] Under the proposal, complainants would have the option to utilize the proposed streamlined market dominance approach or the non-streamlined market dominance approach. The Board stated that ''[i]f a complainant determines that it is not able to demonstrate one of the required factors, it would not choose this streamlined approach at the beginning of the case, but would instead need to choose a non-streamlined market dominance presentation with additional detailed information about its transportation options.'' *NPRM,* EP 756, slip op. at 11.

Final Rule

After considering the comments, the Board will adopt the rule proposed in the *NPRM,* with minor modifications. Below, the Board addresses the comments and discusses the modifications being adopted in the final rule. In Part I, the Board addresses general comments on the purpose of the rule. In Part II, the Board addresses comments regarding the prima facie factors proposed in the *NPRM,* proposals from commenters for other factors, and other suggested approaches to streamline the market dominance inquiry. In Part III, the Board addresses procedural issues. Lastly, in Part IV, the Board addresses other miscellaneous arguments. The text of the final rule is below.

[5] The Board's general standards for judging the reasonableness of rail freight rates, including the stand-alone cost test (referred to as Full-SAC), are set forth in *Coal Rate Guidelines, Nationwide,* 1 I.C.C.2d 520 (1985), *aff'd sub nom. Consol. Rail Corp* v. *United States,* 812 F.2d 1444 (3d Cir. 1987), as modified in *Major Issues in Rail Rate Cases,* EP 657 (Sub-No. 1) (STB served Oct. 30, 2006), *aff'd sub nom. BNSF Railway* v. *STB,* 526 F.3d 770 (D.C. Cir. 2008), and *Rate Regulation Reforms,* EP 715 (STB served July 18, 2013), *petition granted in part sub nom. CSX Transp., Inc.* v. *STB,* 754 F.3d 1056 (D.C. Cir. 2014). Complainants also have the option of challenging the rate under one of the Board's simplified processes—the Simplified SAC test or Three Benchmark methodology—as set forth in *Simplified Standards,* EP 646 (Sub-No. 1) (STB served Sept. 5, 2007) *aff'd sub nom. CSX Transp., Inc.* v. *STB,* 568 F.3d 236 (D.C. Cir. 2009), and *vacated in part on reh'g, CSX Transp., Inc.* v. *STB,* 584 F.3d 1076 (D.C. Cir. 2009), as modified in *Rate Regulation Reforms,* EP 715 (STB served July 18, 2013), *remanded in part sub nom. CSX Transp., Inc.* v. *STB,* 754 F.3d 1056 (D.C. Cir. 2014). The *NPRM* was issued concurrently with a separate notice of proposed rulemaking in *Final Offer Rate Review,* EP 755 et al. (STB served Sept. 12, 2019), in which the Board proposed an alternative procedure (Final Offer Rate Review or FORR) for challenging the reasonableness of rates in smaller cases, which would require complainants to utilize the proposed streamlined market dominance approach. *Id.* at 9. That proposal remains under review.

Part I—Purpose of the Rule

None of the commenters challenge the Board's authority to adopt a streamlined market dominance approach based on a set of prima facie factors, though some question whether certain aspects of the proposal are consistent with particular statutory provisions and the RTP.

Some rail interests generally support streamlining the market dominance inquiry, but suggest revisions to the proposal. (AAR Comment 1; CSXT Comment 2; NSR Comment 1 (adopting AAR's comment); CN Comment 1 (stating support for AAR's comment).) Other rail commenters do not oppose a streamlined market dominance approach but argue that its use should be limited to only smaller cases and also suggest revisions. (UP Comment 1–2; BNSF Comment 2.)

In addition, UP and BNSF question whether such an approach is beneficial or necessary. UP expresses doubt that the streamlined approach would prove worthwhile or attractive to shippers, as the Board anticipated in the *NPRM* that only one additional complaint would be filed annually based on adoption of the streamlined approach. (UP Comment 3.) UP states that a streamlined approach would not be useful because, when market dominance is clear, railroads do not contest market dominance, and when market dominance is a close case, shippers would not be able to use the streamlined approach because there would be some evidence of effective competition. (*Id.* at 3–4.) Nonetheless, UP recognizes that the Board's proposal could provide shippers in small cases with inexpensive guidance on the likely outcome of a market dominance inquiry. (*Id.* at 4.)

BNSF comments that competition is already pervasive in rail markets and discusses how it competes with multi-modal movements. (BNSF Comment 2–8; BNSF Reply, V.S. Miller 2–12.) BNSF also argues that product and geographic competition, even if not considered by the Board, are pervasive in rail markets and that ''[g]eographic competition is particularly strong in agricultural markets,'' because farmers must truck their product to elevators, which gives farmers a range of transportation options, and because shippers can choose to ship product to different export markets. (BNSF Comment 6–7; BNSF Reply, V.S. Miller 6–9.) BNSF states that the Board should avoid interfering with these market-based rates, as it could distort the markets of BNSF's shippers and affect BNSF's capital investments which, it argues, would adversely impact ''all shippers that rely on efficient rail transportation service.'' (BNSF Reply, V.S. Miller 12–14.)

Shippers and shipper groups agree with the *NPRM*'s conclusion that the streamlined market dominance approach would reduce burdens on parties, expedite proceedings, and make the Board's rate relief procedures more accessible. (*See, e.g.,* AFPM Comment 1, 3; Coalition Associations Comment 4–5; SMA Comment 10; MillerCoors Comment 12; Indorama Comment 10; IMA–NA Comment 10; Olin Comment 4–5.) The Coalition Associations dispute UP's and BNSF's assertions that streamlining would be generally unnecessary. (Coalition Associations Reply 4.) They claim that, even in cases where market dominance is clear, railroads' concessions of market dominance are the exception, not the rule. (*Id.* at 8.) They point to *Sunbelt Chlor Alkali Partnership* v. *Norfolk Southern Railway,* Docket No. NOR 42130, as an example, noting that there the railroad conceded market dominance only after the complainant filed extensive evidence, despite the shipper having submitted a request for admission on market dominance before evidentiary filings were due. (Coalition Associations Reply 8–9; *see also* Olin Comment 4–5 (explaining that the complainant in the *Sunbelt* proceeding included dozens of pages and statements from three witnesses addressing why theoretical alternatives would not work on opening, only for the railroad to concede market dominance in a single sentence on reply).) The Coalition Associations also assert that BNSF's argument that competition is pervasive in the transportation market, even if true, does not diminish the need for a streamlined approach in those instances where effective competition is absent. (Coalition Associations Reply 14.)

None of the criticisms described above warrant abandonment of the proposal. Although BNSF and UP contend that the streamlined market dominance approach will not have much benefit and is not necessary, they also state that they do not oppose a streamlined market dominance approach (at least in smaller cases). Further, as explained in the *NPRM,* EP 756, slip op. at 3–4, the market dominance inquiry for rate reasonableness cases is a costly and time-consuming undertaking and can limit access to the Board's processes, particularly affecting access in smaller cases. Numerous shippers agree that streamlining the market dominance inquiry would make the rate reasonableness review processes more accessible to shippers by reducing the

litigation burden in some cases. (*See* AFPM Comment 1–2; Coalition Associations Comment 2–3; IMA–NA Comment 1; Indorama Comment 1; NGFA Comment 2; MillerCoors Comment 1; Olin Comment 1–2; PCA Comment 1; SMA Comment 1.)

UP claims that railroads do not contest market dominance when market dominance is clear, but, as the Coalition Associations and Olin note, and as the experience in *Sunbelt* shows, a complainant may nevertheless bear significant cost and time burdens preparing and submitting extensive evidence before a railroad concedes market dominance. A streamlined market dominance approach would prove beneficial, including in cases where a railroad ultimately concedes market dominance, by easing the cost and time burdens complainants must bear for the preparation and submission of evidentiary pleadings. As for BNSF's assertion that competition is already pervasive in the marketplace due, in part, to product and geographic competition,[6] there is no dispute that some shippers lack effective competition. The streamlined approach adopted here should make the Board's rate reasonableness review processes more accessible to shippers when market dominance is more readily apparent.[7]

The Board also finds unpersuasive BNSF's argument that the streamlined approach could interfere with market-based rates. The final rule does not create a new right or remedy that did not previously exist but simply offers a streamlined way to demonstrate market dominance. The final rule does not impose a new limit on the type of relevant evidence a rail carrier can submit on reply to attempt to rebut a complainant's market dominance case. Further, the rule does not modify the Board's rate reasonableness methodologies. Accordingly, the Board does not expect the final rule to change the outcome that would have been reached under the non-streamlined market dominance approach. Rather, it expects the rule to decrease the burden in potentially meritorious cases, including the burden concerning a demonstration of market dominance that may otherwise unnecessarily limit the accessibility of the Board's rate review processes and therefore dissuade shippers from filing cases. As such, there is no basis for the suggestion that the streamlined approach would result in shippers obtaining rate relief that would inappropriately interfere with market-based rates.

For these reasons, the Board finds that a streamlined approach would further the RTP goal of maintaining reasonable rates where there is an absence of effective competition, *see* section 10101(6), by reducing the burden on complainants in certain rate cases. This in turn will make the agency's rate reasonableness review processes more accessible, particularly in smaller cases. Moreover, the streamlined approach would continue to ensure that the Board determines the reasonableness of rates only where there is actual market dominance, consistent with section 10101(1) (allowing, to the maximum extent possible, competition and the demand for services to establish reasonable transportation rates) and section 10101(5) (fostering sound economic conditions in transportation and ensuring effective competition and coordination between rail carriers and other modes).

Part II—Prima Facie Factors

As discussed below, the Board will adopt the prima facie factors largely as proposed in the *NPRM.* The Board will add language to the regulations to clarify the term ''appropriate official,'' to clarify the method of measuring the level of truck movements over a five-year period, and to include a factor to account for intermodal competition from pipelines.

A. R/VC of 180% or Greater

The Board proposed a prima facie factor that the movement has an R/VC ratio of 180% or greater. *NPRM,* EP 756, slip op. at 7. The Board proposed this factor because it is a statutory requirement, 49 U.S.C. 10707(d), and therefore must be established in any market dominance inquiry.

The Board received few comments pertaining to this proposed factor. The TRB Professors argue, as they did in the *TRB Report,* that the Board's Uniform Railroad Costing System (URCS)—which is used to calculate the variable costs for the R/VC ratio [8]—is flawed and, as a result, the R/VC ratios are unreliable. However, they acknowledge that, because the R/VC calculation is a statutory requirement that can only be eliminated through legislative change, the Board is required to use an R/VC ratio in the market dominance inquiry. (TRB Professors Comment 2–3.) NGFA states that it shares the criticisms of URCS and accordingly urges the Board to continue its efforts to improve URCS and/or develop a new and improved means to calculate the statutorily required R/VC ratio. (NGFA Comment 3.)

Use of the R/VC of 180% or greater is a statutory requirement, and the Board will adopt this aspect of the proposal.[9]

B. Movement Length Greater Than 500 Highway Miles

The Board also proposed a prima facie factor that the movement exceed 500 highway miles between origin and destination. *NPRM,* EP 756, slip op. at 7. The Board reasoned that movements greater than 500 miles are not likely to have competitive trucking options, as this is approximately the length of haul that a trucking carrier could complete in one day. *Id.* (citing *Review of Commodity, Boxcar, & TOFC/COFC Exemptions,* EP 704 (Sub-No. 1), slip op. at 7 n.12 (STB served Mar. 23, 2016)). Therefore, the Board proposed the 500-mile threshold as indicative of a movement that is more likely to be served by a market dominant rail carrier. The Board also invited comment on whether the mileage threshold could be varied by commodity groups and asked parties to provide detailed quantitative and qualitative information in support of any alternative mileage threshold. *Id.* at 8. The Board received comments relating to the appropriate mileage threshold, varying the threshold by commodity, and application to multi-rail carrier and transload shipments, which are addressed in turn below.

1. 500-Mile Threshold

Several shipper interests contend that the mileage threshold should be lowered to 250 miles, arguing that this

[6] Railroad arguments for inclusion of a prima facie factor that addresses product and geographic competition are discussed below in Part II (subpart G, section 5, ''Product and Geographic Competition'').

[7] UP notes that the agency previously tried to use presumptions in the market dominance analysis but eventually abandoned the approach. (UP Comment 3.) Here, presumptions are not being utilized as the streamlined market dominance approach requires a shipper to put forth an evidentiary showing to make its prima facie case for market dominance. Moreover, those presumptions were markedly different from the factors finalized here and were ultimately abandoned because of flaws with the presumptions themselves. *See Mkt. Dominance Determinations & Consideration of Prod. Competition,* 365 I.C.C. 118, 120–26 (1981).

[8] Variable costs are calculated using the URCS Phase III movement costing program, which requires the user to input certain information about the particular movement. Although disputes sometimes arise over these inputs that are used to calculate URCS, these disputes are generally less complicated than disputes regarding the qualitative component of the market dominance inquiry. This is because the inputs relate to objective data whereas the qualitative portion usually involves the presentation of more subjective arguments.

[9] To the extent that the parties raise general concerns regarding URCS, such issues are beyond the scope of this proceeding.

is the maximum distance that a truck driver could travel in a single day, given the need for a return trip and hours-of-service regulations mandated by the Federal Motor Carrier Safety Administration (FMCSA). (Coalition Associations Comment 12; ISRI Comment 7–8; Indorama Comment 11–12; *see also* Olin Comment 7; NGFA Reply 6; AFPM Comment 5.) Indorama states that, based on its experience, truck is unable to compete with rail at distances over 250 miles, in part because a railcar can carry four times the amount that a truck can carry and because per-mile trucking costs are increasing. (Indorama Comment 11–12.) The Coalition Associations and ISRI both note that they tried to collect data on an appropriate mileage threshold but that it proved too difficult and time-consuming for most of their members. (Coalition Associations Comment 9 n.9; ISRI Comment 9–10.) The Coalition Associations argue that in past cases the Board has found that trucks are competitive with rail at a range of 150 to 500 miles. (Coalition Associations Comment 12–13 & n.15.)

Rail interests take varying positions regarding the 500-mile threshold. AAR asserts that the threshold is conservative and that AAR ''generally supports the Board's determination that requiring a distance greater than 500 highway-miles strikes the right balance in today's competitive environment.'' (AAR Comment 8–9.) AAR also notes that the distances traveled by trucks in a single day are increasing, due to companies experimenting with platooning, remote operation, and autonomous trucks, as well as the trucking industry's efforts to increase truck size and weight limits. Accordingly, AAR suggests that the mileage threshold may need to be increased in the future to accommodate the increased truck competition at greater distances. (*Id.* at 9.)

BNSF argues that the Board should not consider any threshold less than 500 miles for any commodity, but also states that it sees ''strong truck competition for movements that significantly exceed 500 miles, which is consistent with reported statistics.'' (BNSF Comment 13.) Accordingly, BNSF suggests 750 miles as a more appropriate threshold, citing to United States Department of Transportation (USDOT) statistics that it states show that trucks carry the largest share of goods shipped in the U.S. and remain the primary mode for shipments moved less than 750 miles. (*Id.*)

UP and CN also argue that the threshold should be higher, and that the Board's proposed 500-mile figure lacks data to support its use as a threshold for a prima facie determination. (UP Comment 12; CN Comment 2.) UP suggests that ''the Board seek empirical evidence and set higher hurdles, so the presumptions better assist shippers in identifying situations in which market dominance is not likely to be contested.'' (UP Comment 12 (also noting that the Board has found that trucks provide effective competition for movements longer than 500 miles.)) CN submitted a verified statement from Dr. Michael Tretheway, Chief Economist and Executive Vice President of InterVISTAS, relying on data from the U.S. Census Bureau's Commodity Flow Survey (CFS), which it states ''shows that using 500 miles as a cutoff is too conservative'' and that ''rail and truck compete on equal terms'' in the 500–749 mileage band. (CN Comment 4, V.S. Tretheway 1, 3.) In its reply comment, CN submitted an updated verified statement from Dr. Tretheway, analyzing the same data but organized by commodity groups and distance bands. Based on this data, CN proposes either switching to an across-the-board 750-mile threshold, or using commodity-group-specific thresholds, with the thresholds being set at the distance at which the tonnage shipped by truck exceeds or is comparable to the tonnage shipped by rail. (CN Reply 4.) [10]

The Coalition Associations respond that ''[s]etting the highway-distance threshold high enough to exclude nearly every conceivable movement where a railroad may not have market dominance is neither desirable nor necessary,'' given that railroads would still have an opportunity to present evidence showing that there is effective competition. (Coalition Associations Reply 31.) In response to AAR's argument that daily truck distances are increasing due to technological advances, the Coalition Associations and ISRI state that these technologies do not impact driving speed or time, which are the two factors that affect driving distance, and commenters state, in any event, these changes are not expected to be implemented anytime soon. (Coalition Associations Reply 30–31; ISRI Reply 2–3.) In addition, the Coalition Associations and ISRI argue that both CN's analysis of the CFS data and BNSF's analysis of the USDOT data are flawed. The Coalition Associations and ISRI note that the CFS data is based on market share, but the Interstate Commerce Commission (ICC) long ago recognized that market share is a poor measure of market dominance because of the difficulty in calculating the appropriate market and because the competitive implications of market share vary from case to case. (Coalition Associations Reply 29 (citing *Mkt. Dominance Determinations,* 365 I.C.C. 118, 123 (1981)); ISRI Reply 2 (same).) The Coalition Associations and ISRI also argue that the USDOT data shows that the average distance for truck shipments is 227 miles, compared to 805 miles for rail shipments, thus undermining BNSF's assertion that 500 miles is too low a threshold. (Coalition Associations Reply 29; *see also* ISRI Reply 2.)

The comments have not presented sufficient evidence for either modifying or eliminating the 500-mile threshold at this time. Any threshold used for this purpose should strike a proper balance. On the one the hand, the threshold should not be too low, thereby allowing shippers that are not reasonably likely to lack effective competition to use the streamlined approach. On the other hand, the threshold should not be too high, thereby preventing shippers that are reasonably likely to lack effective competition from using the approach. Moreover, it bears noting that the mileage threshold is just one of two prima facie factors that would be used to evaluate trucking competition. The Board considered this factor in tandem with the trucking volume threshold factor (discussed in more detail in subpart E, ''10% or Fewer of Recent Movements by Truck,'' below) and intends that the mileage and volume thresholds together will identify shippers that are reasonably likely to lack trucking options that provide effective competition.

The Board concludes that using an estimate of the maximum distance that a truck can typically travel in a single day is a reasonable measure for a single mileage threshold, applicable to a wide range of shippers, and that 500 miles continues to be a reasonable calculation of this distance. Several shippers and shipper groups argue that the distance should be cut in half to 250 miles to account for FMCSA regulations and a return trip. However, in basing the threshold on trucking distance per day, it is more appropriate to use the *maximum* distance that a truck could travel. While 250 miles may be the practical limit for some shippers because of the need for return trips, not all shippers move traffic back-and-forth between a single origin and destination and would not be so constrained. Because the streamlined approach is intended to be used in situations in which the lack of alternative

[10] CN notes that there is a lag with the data but states that it is unavoidable. It argues that if the Board decides to rely on this data, it could update the mileage thresholds as new data is released. (CN Reply 3 & n.7.)

transportation options is clear on its face, the Board finds it is better to set the threshold around the outermost point of a one-day trucking shipment to ensure that only those shippers that are more likely to be found to lack effective competition can utilize it. In addition, although AAR has noted that the distance a truck can travel in a single day may increase due to certain technological advancements, these advancements have not been widely implemented. The Board acknowledges that such technological advancements may well have competitive implications, and the Board can revisit the mileage threshold once those advancements have been more widely implemented.

The Board also finds unconvincing the Coalition Association's argument that a lower threshold that errs on the side of being too low should not lead to inappropriate market dominance findings, as railroads would still have an opportunity to refute the prima facie showing on reply. (Coalition Associations Reply 31.) The streamlined market dominance approach is intended to reduce the litigation burdens on all parties in a rate case, and the Coalition Association's approach could result in railroad defendants needing to make reply arguments in cases where market dominance is not reasonably likely.

In addition, no party provided the Board with sufficient data to demonstrate that a higher mileage threshold would be more appropriate. The CFS data that CN relies on shows the share of U.S. freight traffic by transportation mode (by tonnage), broken out into distance bands. The data shows that for the 500–749 mileage band, rail has a 43% share of the traffic, while truck has a 39% share. CN argues that this indicates that rail and truck compete for traffic at these distances. According to CN, the Board should set the threshold based on the 750–999 mileage band, where rail's share increases to 57% and truck's share decreases to 28%. As a general matter, the Board has some concerns with relying on the CFS data for purposes of calculating the mileage threshold.

One concern is that the CFS data appears to combine full truckload and less-than-truckload (LTL) shipments into the same trucking category.[11] Unlike rail shipments, LTL involves transportation of small products that do not fill an entire trailer and that are often combined with other such products (or shipments) during transport. Rail shipments and LTL shipments, which typically have different service and product characteristics, are generally not comparable. In addition, the Board has identified some significant differences in the mileage trends between the CFS data and the Carload Waybill Sample, which the Board relies on for many regulatory purposes. In particular, the 2012 CFS data shows that 24% of rail tons moved under 100 miles, but the 2012 Waybill data shows that only 11.1% of rail tons move under 100 miles. In another example, the 2012 CFS data shows that 53% of rail tons moved under 500 miles, but the 2012 Waybill data shows 36% of rail tons moved under 500 miles. While these differences do not necessarily indicate that the CFS data is inaccurate, and may be due to the different survey populations and programs used to calculate rail mileages, they raise questions about relying on the CFS data here, at least for rail volumes and distances.[12]

In any event, the CFS data itself does not conclusively show that the 500-mile threshold is too low. Based on 2012 CFS data, in the 250–499 mileage band, truck has a traffic share (by tonnage) of 55%, compared to 29% for rail. In the 500–749 mileage band, the traffic share for rail rises to 43% and surpasses the traffic share for truck, which falls to 39%. While the 2012 CFS data shows that rail does not comprise a majority share of tonnage until the 750–999 mileage band, the data also shows that at 500 miles, rail holds certain efficiencies and advantages over truck, when considering commodities in aggregate. For example, notwithstanding the CFS data issues noted above, the data shows that rail transports more tonnage than truck in the 500–749 mileage band, and rail's share of tonnage substantially increases from the 250–499 mileage band to the 500–749 mileage band. As such, the CFS data does not undermine the Board's conclusion that 500 miles is a reasonable threshold for purposes of determining competitiveness of rail transportation versus truck.

The Board seeks to strike an appropriate balance. Given its determination that rail likely has efficiencies and advantages over truck in certain circumstances once a shipment exceeds the distance a truck can reasonably travel in a single day (*i.e.,* 500 miles), the Board concludes that a 750-mile threshold would exclude shippers that are reasonably likely to lack competition.[13] In addition, the mileage band is just one of two prima facie factors that would be used to evaluate trucking competition; the 10% or less trucking volume threshold serves as another constraint that effectively limits use of the streamlined approach to cases where shippers that are reasonably likely to lack effective truck competition. Thus, the 500-mile threshold, combined with the 10% or less trucking volume threshold,[14] will serve as a sufficient screen to identify movements that likely lack effective trucking competition.[15]

2. Commodity-Specific Thresholds

As noted above, the *NPRM* invited comment on whether the mileage threshold could be varied by commodity groups, and also asked commenters to provide detailed quantitative and qualitative information in support of any alternative mileage threshold. BNSF

[11] According to the Bureau of Transportation Statistics' explanation of the 2012 CFS data, ''[f]ull or partial truckloads were counted as a single shipment only if all commodities on the truck were destined for the same location. For multiple deliveries on a route, the goods delivered at each stop were counted as one shipment. . . . For a shipment that included more than one commodity, the respondent was instructed to report the commodity that made up the greatest percentage of the shipment's weight.'' *See* Bureau of Transp. Statistics, 2012 Commodity Flow Surv., *https://www.bts.gov/archive/publications/commodity_flow_survey/2012/united_states/survey* (last visited July 23, 2020) (see section titled ''Data Collection Method''). This appears to indicate that full truckload and LTL shipments are counted the same way under the truck category.

[12] In particular, the CFS is based on a survey of business establishments with paid employees that are located in the United States, whereas the Carload Waybill Sample gathers its data from the transportation providers. In addition, the CFS uses a program called GeoMiler to calculate rail mileages, *see* Bureau of Transportation Statistics, 2012 Commodity Flow Survey, *https://www.bts.gov/archive/publications/commodity_flow_survey/2012/united_states/survey* (last visited July 23, 2020) (see section titled ''Mileage Calculations''), while the Board's 2012 Waybill Sample used software called PC RailMiler, which is a routing, mileage, and mapping software for the transportation and logistics industry. *See DuPont 2014,* NOR 42125, slip op. at 266 n.1446.

[13] BNSF's reliance on the statement from the USDOT report that says that trucking ''remain[s] the primary mode for shipments moved less than 750 miles'' is also unavailing. (*See* BNSF Comment 13.) The report includes a table that shows that rail has a smaller share of ton-miles in the 500–749 mileage band compared to truck, but as with the CFS data, the Board has some concern about whether this information is appropriate for setting the mileage threshold. In particular, it appears that the graph may incorporate data from a broad range of shipments, including those that normally do not move by rail, and as such, it is difficult to draw a meaningful conclusion about either increasing or decreasing the mileage threshold.

[14] As explained below, the Board clarifies that the 10% threshold is based on volume rather than number of movements.

[15] For this reason, the Board rejects ISRI's proposal to combine the trucking volume threshold and 500-mile threshold into one factor, which a shipper could satisfy by showing that either of these thresholds is met (rather than both). (*See* ISRI Comment 11.)

generally opposes commodity-specific thresholds, arguing that it would run counter to the goal of simplification. (BNSF Reply, V.S. Miller 15.) Several commenters argued for commodity-specific thresholds.

The Board appreciates the comments submitted. Based on the input received, the Board agrees that the concept of creating commodity-specific thresholds has merit and is preferable to a blanket threshold. Several commenters presented credible arguments that, for some commodities, including, but not limited to, chlorine and agricultural commodities, trucking becomes less competitive at a distance shorter than 500 miles. Therefore, even though, as discussed in more detail below, the information submitted in this docket did not contain sufficient quantitative data to support the adoption of commodity-specific mileage thresholds at this time, the Board finds that this issue warrants additional consideration. Accordingly, while the final rule adopted here establishes a single mileage threshold of 500 miles, the Board plans to soon initiate a proceeding to further explore the adoption of various commodity-specific mileage thresholds.

ISRI argues for lowering the threshold to 200 miles for scrap metal shipments. (ISRI Comment 5.) Although ISRI cites a survey it conducted of its members in support, ISRI did not include the survey or accompanying data but rather summarizes its results. ISRI also provides some information regarding truck shipments, but only from four of its members. (*Id.* at 5–7; ISRI Reply 2 n.5.) ISRI also states that there are factors unique to the scrap metal industry that compel ISRI members to rely on rail for movements significantly less than 500 miles, such as the need for specialized trucking equipment. (ISRI Comment 7–8; ISRI Reply 2.) However, the Board would need more comprehensive and fully supported data before lowering the threshold for scrap metal shipments.

AFPM opposes the 500-mile threshold for fuel and petrochemicals, arguing that those materials are frequently shipped via unit train and that trucking substitutions for an entire train are likely to become non-competitive at a lower threshold. (AFPM Comment 5.) AFPM proposes a 250-mile threshold but provides no data to support that figure. (*See id.*) Accordingly, the Board will not adopt a lower threshold for fuel and petrochemicals at this time.

PCA states none of its members would ever be able to satisfy a 500-mile threshold for cement because shipping cement by truck becomes impracticable at distances far below 500 miles. PCA, however, does not propose an alternate threshold nor does it provide data to support its arguments. Rather, PCA claims that the Board itself acknowledged that cement cannot satisfy a 500-mile threshold in *Review of Commodity, Boxcar, and TOFC/COFC Exemptions,* EP 704 (Sub-No. 1) (STB served Mar. 23, 2016) (with Board Member Begeman dissenting). (PCA Comment 2–3.) PCA overstates that decision. There, the Board merely cited PCA's own assertion that shipments of cement move at a range of 250 to 300 miles while seeking comment on the possible revocation of the exempt commodity status of hydraulic cement. In citing this assertion from PCA, however, the Board did not make any definitive findings regarding the distances of such shipments.

Olin argues that the 500-mile threshold is unreasonable for its chlor alkali products and that this factor should be removed entirely for chlorine and other hazardous materials that cannot readily or feasibly move by truck. (Olin Comment 6–7.) Although chlorine, in particular, may rarely move by truck, Olin provides no data to support an alternative chlorine-specific threshold.[16] However, for chlorine, in particular, there is a sufficiently strong basis to consider modifying the threshold or eliminating it. The record here though does not contain enough information to determine if the mileage threshold should be lowered (and, if so, to what mileage) or eliminated. As discussed above, the Board will institute a proceeding in the near future to gather more information on commodity-specific thresholds for various commodities, including chlorine.

NGFA proposes that the mileage threshold be set at 200 miles for agricultural commodities, asserting that trucking generally is effectively competitive with rail for agricultural movements of only 200 miles or less. (NGFA Comment 3.) In its reply comment, NGFA cites to a chart from the 2010 National Rail Plan produced by the Federal Railroad Administration (FRA), which NGFA claims shows that rail's share for all freight starts to increase above 200 miles. The 2010 chart is for all commodities and is not specific to agricultural shipments. Moreover, it shows that for the 250–499-mileage band, truck has a majority share of traffic (based on tonnage). NGFA also cites to an academic study from 2010 conducted in coordination with AAR that found that ''rail clearly has the advantage for the bulk movements, even for the 50- and 200-mile moves.'' (NGFA Reply 4–5 (quoting from the study's report [17]).) However, the report's findings were more nuanced than the selected quote suggests. In the same paragraph, the report concludes that ''[t]he detailed results indicate that the rail market share increased *for lower value and longer distance movements.*'' Estimating the Competitive Effects of Larger Trucks on Rail Freight Traffic, at 12 (emphasis added). Again, despite not adopting a lower mileage threshold for agricultural commodities or any other commodities at this time, the Board intends to further explore in a separate proceeding whether various commodity-specific thresholds should be created, including for agricultural commodities, given the Board's long-standing concern that the Board's rate reasonableness review process is not readily accessible to many agricultural shippers.

As noted above, CN suggests, as an alternative to its proposed 750-mile threshold, using commodity-group-specific thresholds based on CFS data, with the thresholds being set at the distance at which the tonnage shipped by truck exceeds or is comparable to the tonnage shipped by rail. (CN Reply 4.) However, the CFS data relied on by CN for its commodity-group threshold is based on data at the two-digit Standard Transportation Commodity Code (STCC) level and is not granular enough to create commodity-specific thresholds (CN itself refers to its categories as commodity-*group*-specific thresholds).[18] (CN Reply 4.) In addition, as explained above, the Board has identified issues with relying on the CFS data for purposes of calculating mileage thresholds.

Finally, several commenters oppose the 500-mile threshold for coal. NCTA proposes that the Board use a lower

[16] In addition, for all other non-toxic-by-inhalation hazardous commodities, Olin proposes a ''sliding-scale'' approach for shipments up to 250 miles, which it states would take into account ''the nature of the product and the involved packaging and availability of equipment required for trucking.'' Olin further states that ''[i]n cases where the use of truck would require possible terminal storage and transloading, the measured distance for meeting the established prima facie should be lengthened on the sliding scale, to accommodate the expense and difficulties of transloading.'' (Olin Comment 7; *see also* FRCA Comment 2.) These approaches are not fully explained or supported.

[17] Carl D. Martland, *Estimating the Competitive Effects of Larger Trucks on Rail Freight Traffic* (2010), *https://www.aar.org/wp-content/uploads/2017/12/AAR-Estimating-Competitive-Effects-Larger-Trucks-2010-Report-TSW.pdf.*

[18] *See, e.g., Expanding Access to Rate Relief,* EP 665, slip op. at 13 (Sub-No. 2) (STB served Aug. 31, 2016) (stating that commodities at the five-digit STCC level ''would be similar enough'' for inclusion in a comparison group and that certain commodities, such as chemicals, may best be compared at the seven-digit STCC level).

mileage, such as 200 miles, for ''high volume, heavy commodities'' such as coal. (NCTA Comment 3.) WCTL proposes that the Board eliminate any mileage threshold for unit train transportation of coal entirely, arguing that it is not subject to competition from truck. (WCTL Comment 9–10.) It states that it is not aware of any case where the Board or ICC found that unit trains of coal were subject to competition from truck, even in cases where the origin-destination was far less than 500 miles. (*Id.*) [19] FRCA states that coal is seldom, if ever, trucked more than 100 miles and cites to a 2007 research paper from the National Research Council of the National Academies, which states that coal is hauled by truck on average only 32 miles. FRCA argues that 50 miles would be a generous threshold. (FRCA Comment 2.) It is generally well-understood that when coal is shipped in significant quantities it is unlikely to be shipped by truck. However, even if the Board determined that a coal-specific threshold was warranted, there is not enough information in the record to determine what threshold should be set. Again, this is an issue that the Board may examine further in the proceeding that it plans to initiate soon.

As described above, much of the evidence submitted was either anecdotal or limited to only a few shippers and did not include sufficient data for the Board to draw a conclusion with regard to any particular commodity as whole. In its future consideration of the issue of commodity-specific thresholds, the Board will expect proponents to support their arguments with more extensive data, beyond just a few examples, on shipping distances for rail versus truck for that commodity. As for the CFS data relied on by CN, while it was not granular enough to draw conclusions about the appropriate mileage threshold for specific commodities, parties that seek to rely on it in the future proceeding should address that granularity issue and whether adjustments could make its use more suitable for this purpose.

3. Multi-Rail Carrier and Transload Shipments

AFPM argues that the mileage threshold should be from origin to destination for multi-rail carrier moves. AFPM argues that a single carrier's portion of the move (*i.e.,* from origin/destination to interchange) should not be viewed in isolation, because when a rail carrier only has a short portion of the overall move, its ''behavior related to rate establishment becomes more aggressive and pushes the line of what would be considered reasonable.'' (AFPM Comment 5–6.) AFPM also indicates that if only an individual carrier's portion of the move is examined, it often would not meet the 500-mile threshold. (*Id.* at 6.) Similarly, FRCA argues that for short-haul rate cases involving transload shipments (*i.e.,* shipments that move on rail for only a portion of a move and are transferred to another mode of transportation for the remaining portion of the move), the distance threshold should apply from origin to destination, rather than from origin to interchange. (FRCA Comment 2.)

For purposes of the 500-mile threshold, the Board will treat multi-carrier movements the same as it does for rate reasonableness challenges. *See Cent. Power & Light Co.* v. *S. Pac. Transp. Co.,* 1 S.T.B. 1059 (1996), *clarified,* 2 S.T.B. 235 (1997), *aff'd sub nom. MidAm. Energy Co.* v. *STB,* 169 F.3d 1099 (8th Cir. 1999) (addressing when multi-carrier rates are subject to challenge). In particular, whether a rate (or rates) on a multi-carrier move are subject to challenge would depend on the type of rate being offered (joint through rate or proportional rate) and whether the rate (or rates) are subject to tariff or contract.[20] In addition, with regard to FRCA's comment, the Board will not make an exception to the way it assesses the 500-mile threshold for short-haul cases involving transload shipments where the rail portion of the move is 500 miles or less. As discussed further below, looking at market dominance from origin-to-destination on transload moves (*i.e.,* both the rail and non-rail portions together) would be contrary to statute and established Board precedent. *See infra* Part IV (subpart B, ''*DMIR* Precedent''). Moreover, if the rail shipment is less than 500 miles and can be transloaded, that may cast doubt on whether the shipper lacks transportation options. In such instances, based on the record here, the question of market dominance would be better determined through the non-streamlined approach.

C. Absence of Intramodal Competition

The Board proposed a prima facie factor that complainants demonstrate that there is no effective intramodal competition (*i.e.,* whether the complainant can use another railroad or other railroads to transport the same commodity between the same points). *NPRM,* EP 756, slip op. at 8. The Board explained that the complainant could satisfy this factor by submitting a verified statement from an appropriate official of the complainant attesting that it does not have practical physical access to another railroad. The Board defined ''practical physical access'' as encompassing feasible shipping alternatives on another railroad, including switching arrangements, where ''an alternative is possible from a practical standpoint given real-world constraints.'' *Id.* (citing *Total Petrochems.,* NOR 42121, slip op. at 4 n.9.)

Only a few commenters addressed this factor. The Coalition Associations argue that the Board should abandon the ''practical physical access'' standard and simply require complainants to demonstrate that they do not have ''direct'' physical access. (Coalition Associations Comment 19–20.) In other words, the Coalition Associations argue that the factor should not encompass reciprocal switching because, as demonstrated by testimony provided in *Reciprocal Switching,* Docket No. EP 711 (Sub-No. 1), the effectiveness of reciprocal switching depends on multiple factors under the railroad's control, as well as the alternative carrier's willingness to compete. (Coalition Associations Comment 19–20.) Along these lines, AFPM argues that even in some situations where a shipper has access to two carriers, some carriers choose not to provide competitive offers. (AFPM Comment 6.) Therefore, AFPM seeks clarification of the phrases ''complete absence of railroad competition'' and ''feasible shipping alternatives.'' (*Id.*) AFPM also seeks clarity and more detail on what is meant by ''an alternative is possible from a practical standpoint given real-world constraints,'' as shippers and railroads view the terms ''possible'' and ''practical'' differently. (*Id.*) AFPM also asks the Board to clarify what type of documentation in support of this factor would be acceptable and define or list who it deems to be ''appropriate officials'' that can submit the supporting verified statement. (*Id.*) [21]

[19] WCTL cites *Metro Edison Co.* v. *Conrail,* 5 I.C.C.2d 385, 413 (1989), in which the agency stated that ''[i]t is simply impractical to move [large] volume[s] of coal by truck.'' (WCTL Reply 2.)

[20] Accordingly, if the rate (or rates) for the entire origin-destination route are subject to challenge, the mileage threshold would be judged against the mileage of the whole origin-destination route. Conversely, if only a part of the rate (or rates) for the origin-destination route are subject to challenge, the mileage threshold would be judged against only that portion of the route.

[21] AFPM and other parties seek similar clarifications (regarding the contents of verified statements and the identify of ''appropriate officials'') with respect to other prima facie factors

The Board will adopt this factor as proposed in the *NPRM.* The Coalition Associations essentially argue that complainants should be able to satisfy this factor even if they have access to another carrier through a reciprocal switching arrangement. While the existence of reciprocal switching may not necessarily mean that a shipper has effective competitive options, it strongly suggests a lack of market dominance. Accordingly, in such situations, a determination of market dominance would be better explored through the non-streamlined approach, in which the shipper can present a full explanation as to why it believes there is market dominance despite an existing reciprocal switching agreement. The same rationale holds for AFPM's assertion regarding a lack of competition when there is direct physical access to two carriers.

In response to the comments, the Board provides the following clarification regarding the application of this factor. The most obvious scenarios where there would be practical physical access are where multiple carriers can directly serve the complainant's facility or where the shipper's facility is open to reciprocal switching. However, there could be other arrangements (such as haulage, terminal trackage rights, or interchange agreements) that would allow for multi-carrier access and therefore would constitute practical physical access. In some situations, practical physical access could also be found despite the absence of any such arrangement. For example, if a shipper has refused a rail carrier's bona fide offer to open a facility to reciprocal switching but the offer still stands, that would likely be considered to fall within the definition of practical physical access. As such, the Board would consider this evidence as part of its analysis as to whether this prima facie factor has been met. Leaving the definition as proposed in the *NPRM* will help to ensure that a complainant has accounted for all types of intramodal arrangements before deciding whether to use the streamlined market dominance approach.

D. Absence of Barge Competition

The Board proposed a demonstration of the absence of barge competition as another prima facie factor. *NPRM,* EP 756, slip op. at 8 (whether barge competition constrains market power). As with the intramodal competition factor, the Board stated that, in most cases, a complainant would satisfy this factor by submitting a verified statement from an appropriate official attesting that the complainant does not have practical physical access to barge competition.

Some shippers and shipper groups argue that the factor as proposed omits clear evidentiary standards and that requiring the complainant to file only a verified statement leaves complainants to guess how much evidence is enough to satisfy this factor. (Coalition Associations Comment 14–15; Olin Comment 8; AFPM Comment 7.) The Coalition Associations argue that the factor is indistinguishable from what must be shown in a non-streamlined market dominance inquiry. (Coalition Associations Comment 14.) Accordingly, these commenters propose that the Board adopt more specific criteria regarding barge competition. For example, the Coalition Associations propose that if the origin, destination, or both, are landlocked,[22] this would constitute an ''objective measure[ ]'' demonstrating that there is a lack of barge competition. (Coalition Associations Comment 15.) The Coalition Associations further propose that the factor would be satisfied if the complainant could show that the origin, destination, or both do not have barge facilities, or that they lack facilities capable of handling the issue commodity. (*Id.* at 15–16; *see also* Olin Comment 8 (proposing that barge competition requires an existing barge facility); AFPM Comment 7 (same).) The Coalition Associations also propose that this factor would be met if the complainant could show that the origin and destination are not located on interconnected navigable waterways. (Coalition Associations Comment 16.)

The Board will not adopt the modifications sought by the Coalition Associations and others but instead will issue the following guidance. The most obvious scenarios where there would be practical physical barge access are where the origin and destination have barge facilities that are capable of handling the issue commodity and are located on interconnected navigable waterways. Conversely, if the origin and destination are not located on interconnected navigable waterways, or if they lack barge facilities capable of handling the issue commodity, the Board would consider these facts in its determination of whether the prima facie factor regarding barge competition has been met.[23] Requiring, as proposed in the *NPRM,* an attestation that the complainant does not have practical physical access to barge competition (rather than adopting the specific criteria proposed by the Coalition Associations) will ensure that a complainant has accounted for all types of barge arrangements before proceeding under the streamlined market dominance approach. Therefore, the Board will adopt the proposal in the *NPRM,* under which complainants will be free to explain in their verified statements when the situations discussed by the Coalition Associations exist and how those facts demonstrate that this prima facie factor is met.[24]

E. 10% or Fewer of Recent Movements by Truck

The Board proposed a prima facie factor that the complainant must have shipped 10% or fewer of the movements at issue by truck over the last five years. *NPRM,* EP 756, slip op. at 8–10. The Board found that if a complainant meets this factor, it would be ''reasonably likely to have persuasive arguments for why trucking does not provide effective competition, including customer contracts, product characteristics, and price of the trucking alternative,'' and that the factor would therefore assist the Board in making a market dominance determination more expeditiously. *Id.* at 9. However, the Board noted that there were past cases in which it had found a lack of market dominance, even when trucking volumes were less than 10%. Accordingly, as with the 500-mile threshold, the Board invited parties to comment on whether an alternative truck movement percentage should be used and to include detailed quantitative and qualitative information in support. *Id.* at 9–10. The Board received comments addressing the necessity of the threshold, how the volume of traffic would be measured, whether the percentage should be changed, the appropriate lookback period, and routing issues. As discussed below, the Board will adopt this factor with a clarification to the measurement of the threshold.

proposed by the Board. All such comments are discussed below in Part III (subpart C, ''Disclosures and Verified Statements'').

[22] The Coalition Associations indicate that they define ''landlocked'' as ''not located on a navigable waterway.'' (Coalition Associations Comment 15 (''Barges would not be able to service traffic moving to or from a landlocked facility, which would encompass any facility that is not located on a navigable waterway.'').)

[23] In the latter scenario, to the extent that a practical build-out could create effective barge competition, the Board would consider that option under the build-out factor, which, as discussed below, continues to be included as prima facie factors under this final rule.

[24] For this reason, and because, as discussed below, the Board will not allow partial use of the streamlined process, the Board will not adopt Olin's proposal to allow a partial non-streamlined market dominance presentation for the barge factor. (*See* Olin Comment 8–9.)

1. Whether To Remove the 10% Threshold

AFPM and MillerCoors argue that this factor undermines the goal of the streamlined approach and should be discarded. (AFPM Comment 8; MillerCoors 13.) AFPM claims that the factor is ''redundant and excessive'' because the mileage-threshold factor alone serves as a sufficient basis for assessing the competitiveness of truck. (AFPM Comment 8; *see also* MillerCoors 13.) MillerCoors claims that analysis of this factor could be extremely complex, and inclusion of the factor would negatively affect RTP goals. (MillerCoors Comment 13, 14–16.)

The Board disagrees. The purpose of the market dominance analysis is to assess whether there is effective competition for the transportation to which the rate applies, 49 U.S.C. 10707(a), and, therefore, the volume that a shipper moves by another mode of transportation is one of the key indicators. The 500-mile threshold, although also intended to help determine whether a movement has competitive trucking options, is insufficient in and of itself. If a shipper with movements over 500 miles shipped a significant portion of its traffic by truck, it would not be reasonably likely to lack effective competition. Finally, although MillerCoors argues that the factor should be eliminated because it would require complex analysis, shippers that cannot satisfy the prima facie factors continue to have the option of using the non-streamlined market dominance approach.

2. Volume of Traffic

A few commenters interpreted the *NPRM* as proposing that the trucking volume threshold would be measured based on the number of movements. (NGFA Comment 5; Olin Comment 9; Coalition Associations Comment 9, ISRI Comment 9.) Those commenters correctly point out that volume would be the more appropriate measure. (*Id.*) Although the Board used the term ''movements'' in the *NPRM,* it intended that this factor would be measured based on volume, specifically, overall tonnage. Volume is indeed the better measure, as rail and truck shipments are not comparable for purposes of measuring quantity of traffic, given that one rail shipment is generally equal to multiple truck shipments. The Board will clarify the final rule in § 1111.12(a) by replacing ''10% or fewer of its movements'' with ''10% or less of its volume (by tonnage).'' *See* Final Rule below.

3. Percentage

Shippers and shipper interests argue that the Board should raise the percentage for this factor from 10% to up to 25%. (Coalition Associations Comment 10 (proposing 20%); ISRI Comment 9 (same); Olin Comment 9 (same); FRCA Comment 2 (same); NCTA Comment 3 (same and proposing that the Board use a higher percentage for ''high volume, heavy commodities'' such as coal); NGFA Comment 5 (proposing 20–25%); PCA Comment 2 (proposing 25% for all shippers or determined on an industry-by-industry basis using the unique characteristics for that industry).) These commenters, as well as USDA, generally argue that a 10% threshold is too low because issues such as the need for expedited shipments, rail service delays, and force majeure events may force shippers to use truck, pushing their trucking volume higher despite the existence of market dominance. (Coalition Associations Comment 10; PCA Comment 2; USDA Comment 9; NCTA Comment 3; FRCA Comment 2; PCA Comment 2.) NCTA also suggests that a higher percentage is warranted to account for situations where shippers resort to truck due to high rail rates. (NCTA Comment 3; *see also* FRCA Comment 2 (arguing that that a shipper should not be required to meet this factor if it can show a diversion occurred because of rail service inadequacies or high rates).) AAR disputes that higher trucking percentages may indicate market dominance, calling it ''flawed logic.'' (AAR Reply 5–6.)

UP suggests that the *NPRM* proposed too high a threshold and argues that the Board did not provide any empirical support for the 10% threshold, and that the Board also acknowledged that it has found effective competition where complainants shipped a smaller share of traffic by truck. (UP Comments 12.) UP argues that the Board should seek empirical evidence and set higher hurdles to a showing of streamlined market dominance. (*Id.*)

The Board will adopt the 10% threshold. The Board acknowledges that in certain situations, certain events, such as service issues, may cause truck volumes to increase. However, because volumes would be measured over a five-year period, any short-term spike in truck volumes would likely even out over the course of the five-year lookback period, a point that the Coalition Associations acknowledge. (Coalition Associations Comment 11 (''This time frame is essential to smooth out spikes in truck volume that occur due to factors other than competition.'').) In addition, the shippers' arguments seem to be premised on the notion that service issues are inevitable and will undoubtedly cause an increase in truck volumes. But that may not always be the case. Raising the threshold to 25% could lead to successful prima facie showings of market dominance by shippers who have moved a significant portion of their traffic by truck simply in the ordinary course of business. Commenters have not established why a threshold greater than 10% is necessary to account for service problems or other issues that may cause a complainant to use truck in some instances, even though truck does not provide effective competition.

The streamlined approach is intended for situations where market dominance can be demonstrated without the need for extensive evidence or explanation.[25] If a shipper cannot meet the 10% threshold due to service problems, high rail rates, or other issues, but believes it is subject to market dominance, it may still seek to prove its case through a non-streamlined market dominance analysis, which may explore these sorts of fact-specific issues. The impact of service issues, in particular, may not be clear-cut, as there could be genuine disputes between a shipper and rail carrier as to whether such issues in fact existed or, if they did exist, whether they caused a conversion of traffic from rail to truck. These types of disputes are not appropriate for the streamlined approach.

UP argues that the 10% threshold is not supported by empirical evidence. It suggests that ''the Board seek empirical evidence and set higher hurdles, so the presumptions better assist shippers in identifying situations in which market dominance is not likely to be contested.'' (UP Comment 12.) As part of the *NPRM,* the Board specifically sought evidence to support alternative thresholds. *See NPRM,* EP 756, slip op. at 9–10 (''The Board invites public commenters to include detailed

[25] Some commenters propose alternatives to meeting this threshold under certain circumstances. (*See* Coalition Associations Comment 11 (proposing a two-tiered threshold in which this factor would also be satisfied if trucks are used for 10–20% of volume at truck rates that exceed rail rates by more than 10%); FRCA Comment 2 (proposing that the factor would be satisfied if complainant can show a diversion to truck occurred because of rail service inadequacies or high rates); NGFA Comment 6 (proposing that the factor would be satisfied if complainant demonstrates that trucks do not provide effective competition for a specific movement).) However, these proposals would be contrary to the Board's goal of simplification and would be better explored through a non-streamlined market dominance analysis. *See NPRM,* EP 756, slip op. at 7.

quantitative and qualitative information in support of any alternative truck movement percentage threshold.''). However, commenters provided insufficient evidence to support an alternate threshold,[26] and the Board finds that 10% is an appropriate level at which to set the truck volume threshold. The Board explained in the *NPRM* that complainants that meet this factor ''despite rates with high R/VC ratios and the absence of intramodal and barge competition, are reasonably likely to have persuasive arguments for why trucking does not provide effective competition, including customer contracts, product characteristics, and price of the trucking alternative.'' *NPRM,* EP 756, slip op. at 9. Moreover, even shippers in a highly uncompetitive situation may, at times, need to rely on truck moves, so the threshold must allow some truck movement. UP does not call either of these premises into question. Setting the truck volume threshold lower than 10% would likely render the streamlined market dominance approach unavailable to shippers that are reasonably likely to lack effective competitive options but must resort to truck on rare occasions. On the other hand, setting the threshold higher than 10% could permit a shipper that chooses to ship a significant portion of its freight by truck in the ordinary course of business, and is therefore much less likely to lack effective competitive options, to nevertheless make a prima facie showing of market dominance. In addition, the Board reiterates that the truck volume threshold is just one of two prima facie factors, along with the 500-mile threshold, that would be used to evaluate trucking competition. The two prima facie factors in tandem will serve as a sufficient screen to identify movements that are reasonably likely to lack effective trucking competition.

4. Lookback Period

As noted, the Board proposed in the *NPRM* that volumes would be considered over the previous five years.[27] Only a few commenters address whether this is a sufficient period. PRFBA argues that five years is too long and instead proposes two years. (PRFBA Comment 1.) NGFA argues that the Board should use a five-year ''Olympic average,'' in which the highest and lowest years are dropped from the average. It claims that this would eliminate one-year anomalies that may skew the average. (NGFA Comment 5–6.) As noted, the Coalition Associations support using a five-year period. (Coalition Associations Comment 11.)

The Board will adopt the five-year period. The two-year period proposed by PRFBA is too short to capture a long-term trend in truck volumes or allow temporary fluctuations in volumes to even out. Although NGFA's proposal would exclude periods where service issues may have caused a complainant to rely more heavily on truck, as noted, use of a five-year period based on a simple average of tonnage would be sufficient to reduce the impact that any such periods could have on trucking volume percentage.

5. Routing Issues

The Coalition Associations also propose that transload shipments count toward truck volume only if the defendant railroad does not participate in the route. They argue that if the defendant railroad participates in the route, then that transload shipment is not serving as a potential constraint on the defendant railroad. (Coalition Associations Comment 11.) The Board finds that transload shipments should be included as part of the trucking volume calculation, as long as the transload shipment is serving the same origin-destination pair as the rate that is being challenged and involves a railroad other than the defendant. For example, if the rate at issue is for origin A to destination B, but there is a transload option where another railroad moves traffic from A to interchange X and the traffic is then trucked from X to B, that trucking volume should be included,[28] because the transload option would be directly competing with the railroad-only option, even if the defendant railroad itself is part of the transload routing. Conversely, the trucking volume from a transload routing should not be included if the origin-destination pair does not match the route of the rate at issue.[29]

NGFA also argues that the Board should amend this factor to clarify that the threshold applies to the origin-destination pair of the rate being challenged. (NGFA Comment 5.) For reasons discussed in Part IV (subpart B, ''*DMIR* Precedent''), under existing Board precedent, the Board only considers the portion of the shipment moving by rail pursuant to a tariff. As such, the Board would apply this factor to the entire origin-destination route only if the rate (or rates) subject to challenge are also for the entire origin-destination route. The Board therefore declines to adopt NGFA's proposed change.

F. No Practical Build-Out Option

The Board proposed that a complainant would have to satisfy a prima facie factor that there is no practical build-out option. As explained in the *NPRM,* the term ''build-out'' has been used by the agency to refer to possible competitive alternatives that could be accessed if the complainant makes certain infrastructure investments. *NPRM,* EP 756, slip op. at 10. This would again be demonstrated by a short plain statement in a verified statement from an appropriate official, or other means, that the complainant has no practical build-out option due to physical, regulatory, financial, or other issues (or combination of issues).

Some shippers and shipper groups argue that the build-out factor is too complicated and should be eliminated entirely. Citing several cases,[30] SMA, MillerCoors, Indorama, and IMA–NA all argue that, in the past, these hypothetical build-out options have become overly burdensome to shippers and have been extremely difficult to resolve. (SMA Comment 11; MillerCoors Comment 12–13; Indorama Comment 11; IMA–NA Comment 11.) They argue

[26] ISRI was able to obtain some data from three of its members for a three-year period. For their top volume lanes, these shippers state that they used trucks for 15%, 22%, and 29% of their shipping volume, respectively. ISRI acknowledges that this is a small sample. (ISRI Comment 9–10.)

[27] The Board notes that volume for purposes of this factor would be based on the cumulative tonnage over the five-year period. Although not specifically addressed in the *NPRM,* no party raised any concern in the comments over how the measure over the five-year period would be calculated. The Board will therefore adopt this clarification as part of the final rules.

[28] The same would be true if the routing were reversed, in that the traffic is trucked from origin A to interchange X, and then railed from X to destination B.

[29] This would include instances in which the rate at issue is part of a broader transload routing and there is an alternate whole-route option. For example, suppose the rate at issue is part of a broader transload routing in which the traffic moves by rail from origin A to interchange B, and then by truck from interchange B to destination C. Suppose also that there is an alternate routing in which the traffic could move by rail from origin A to interchange X, and then by truck from interchange X to destination C. In that scenario, the alternate transload routing (A–X–C) would not match the rate at issue (A–B) and therefore should not be included in the truck volume. Although the alternate transload option (A–X–C) might be serving as a competitive alternative to the whole-route (A–B–C), for reasons explained in Part IV (subpart B, ''*DMIR* Precedent''), the Board's current precedent is to not consider such whole-route options in the market dominance analysis and whether to overturn such precedent is outside the scope of this proceeding.

[30] *Consumers Energy,* NOR 42142, slip op. at 295–96; *Seminole Elec. Coop.* v. *CSX Transp., Inc.,* NOR 42110 (STB served May 19, 2010); *Tex. Mun. Power Agency* v. *Burlington N. & Santa Fe Ry.,* 6 S.T.B. 573, 584 (2003); *W. Tex. Utils. Co.* v. *Burlington N. R.R.,* 1 S.T.B. 638, 651 (1996), *aff'd sub nom. Burlington N. R.R.* v. *STB,* 114 F.3d 206 (D.C. Cir. 1997).

that a rate that is competitive due to a potential build-out is unlikely to be challenged and, even if challenged, is unlikely to be disturbed. (SMA Comment 13; MillerCoors Comment 14; Indorama Comment 13; IMA–NA Comment 13.) They further argue that eliminating the build-out factor would be consistent with provisions of the RTP, as well as the Congressional directive in the Railroad Revitalization & Regulatory Reform Act of 1976, Public Law 94–210, section 202(d), 90 Stat. 31, 36, that the market dominance procedures be easily administrable. (SMA Comment 12–14; MillerCoors Comment 14–16; Indorama Comment 12–14; IMA–NA Comment 12–14.) AFPM states shippers and railroads will have very different ideas of what constitutes ''physical, regulatory, financial, or other issues'' that could serve as obstacles to resolving whether a build-out option exists.[31] (AFPM Comment 8; *see also* PRFBA Comment 2.) Although they do not advocate eliminating this factor, the Coalition Associations note that the Board has never found that a potential build-out constitutes effective competition. They further claim that any feasible build-out opportunity in a given case likely will have been the subject of a feasibility study or communicated to the railroad in rate negotiations in any event. (Coalition Associations Comment 17.)

Some shipper groups also take issue with aspects of the build-out factor. The Coalition Associations argue that it is ''confusing and appears to do little to reduce a complainant's burden'' and that the ''scope of evidence necessary to demonstrate the factor is unclear.'' (*Id.* at 16.) In particular, they assert that it is not clear if the complainant can satisfy the factor simply by making an assertion in the verified statement, or whether the complainant must also submit some explanation and supporting evidence. (Coalition Associations Comment 16–17; *see also* AFPM Comment 9.) The Coalition Associations point out that if a complainant does have to submit evidence, then this factor is really no different than what must be shown in a non-streamlined market dominance presentation. (Coalition Associations Comment 17.) Accordingly, the Coalition Associations again propose ''objective standards'' that could be used to satisfy the build-out factor. The standards proposed by the Coalition Associations are that a build-out would be physically or economically infeasible if it: (a) Would be longer than two miles; [32] (b) would require the acquisition or condemnation of developed property in residential, industrial, or commercial areas; [33] or (c) would traverse waters of the U.S. that are under the jurisdiction of the United States Army Corps of Engineers.[34]

In response, UP contends that the Coalition Associations are seeking more than clarifications, and instead asking the Board to ''adopt presumptions for resolving factual disputes about the existence of effective competitive alternatives.'' (UP Reply 3.) It states that ''the mere satisfaction of a prima facie factor should not itself be sufficient where a railroad offers actual evidence that a competitive alternative provides effective competition.'' (*Id.* at 3–4.) BNSF notes that in some instances its rates have been constrained by the potential for a build-out. (BNSF Reply, V.S. Miller 17.)

In rate cases, railroad arguments that potential build-outs are available can significantly complicate market dominance presentations. *NPRM,* EP 756, slip op. at 10. However, here the Board seeks to increase simplicity, expediency, and efficiency in rate cases (*see* 49 U.S.C. 10101(2) and (15)) while at the same time allowing competition and the demand for services to establish reasonable rates for rail transportation (*see* 49 U.S.C. 10101(1)). Build-out options can serve, and sometimes have served, as a constraint on railroad pricing. For example, in *Seminole Electric Cooperative* v. *CSX Transportation, Inc.,* Docket No. NOR 42110, the defendant argued that there was effective competition through a barge/build-out combination, where the complainant would have needed to construct an unloading dock and a conveyor belt build-out to transport coal from the dock to its facility. (CSXT Reply, II–24 to II–33, *Seminole Elec.,* Jan. 19, 2010, NOR 42110.) Although the parties in that proceeding settled before the Board could issue a decision, the Board held an oral argument specifically on the issue of market dominance in the rate proceeding, suggesting that the build-out issue required close examination. *Oral Argument,* EP 693, slip op. at 1–2 (STB served May 19, 2010). Additionally, in merger cases, shippers often ask for conditions to preserve the competition that they claim exists due to their potential to build out to a competing carrier. *See, e.g., Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of Del. & Hudson Ry.,* FD 35873 et al., slip op. at 33–35 (STB served May 15, 2015); *Genesee & Wyo. Inc.—Control—RailAmerica, Inc.,* FD 35654, slip op. at 5–6 (STB served Dec. 20, 2012); *Canadian Nat'l Ry.—Control—EJ&E W. Co.,* FD 35087 et al., slip op. at 13–14 (STB served Dec. 24, 2008).

Shippers also argue that if the railroad's rate is effectively competitive due to a build-out, a shipper is unlikely to challenge the rate. But a shipper and railroad may have different views of the practicality of a build-out option and therefore whether the rate is effectively competitive. *See* Oral Argument Tr. 10:12–15, June 30, 2010, *Seminole Elec.,* NOR 42110 (complainant asserting that threat of build-out option did not affect defendant carrier's pricing); *id.* at 57:15–20 (defendant carrier asserting that potential build-out option had caused it to offer a lower rate); *see also Tex. Mun. Power Agency* v. *Burlington N. & Santa Fe Ry.,* 6 S.T.B. 573, 583–84 (2003), *recon. granted in part,* 7 S.T.B. 803 (making minor adjustments to rate prescription). Because the Board already considers whether build-outs are an effective form of competition, they should remain part of the market dominance analysis in the streamlined approach.

The streamlined approach should help eliminate overly costly and complex litigation in cases where build-out options are clearly impractical. In cases where a railroad argues that there are practical build-out options, the procedural constraints that are part of the streamlined approach—including page limits on filings and the complainant's option to utilize a hearing

[31] In addition, NTU offers a general suggestion that the Board work with other governmental agencies to reduce regulatory barriers to build-outs. (NTU Comment 4–5.) NTU does not, however, propose any modification to the proposed regulations.

[32] The Coalition Associations argue that build-outs exceeding two miles are generally cost-prohibitive. They base this claim on an analysis of Road Property Investment (RPI) costs from some of the Board's Full-SAC rate cases. According to the Coalition Associations, their analysis shows that a two-mile build-out would cost over $4 million, which would be greater than the relief in small rate cases or the litigation costs of large rate cases. (Coalition Associations Comment 17–18.) Similarly, FRCA supports the idea of a dollar limit on the cost of the build-out. (FRCA Comment 2.) In addition, USDA states that the Board could be more explicit about delineating at what distance a build-out is a practical, effective constraint. (USDA Comment 10.)

[33] The Coalition Associations claim the high cost for land acquisition in such areas is supported by data provided by the RRTF Report. (Coalition Associations Comment 18–19.) AFPM agrees that a shipper's ability to access land and obtain required permits for a build-out introduces too much uncertainty, though it supports simply eliminating this factor entirely rather than creating a more specific criterion. (AFPM Comment 9.)

[34] The Coalition Associations argue that such build-outs would go through wetlands and thus require expensive infrastructure and be subject to costly environmental review and mitigation. (Coalition Associations Comment 19.)

before an ALJ [35]—should help ensure that the complexity and cost of litigating the practicality of those options remains reasonable. The ALJ hearing option could be particularly useful in cases where a railroad challenges whether there are physical, regulatory, financial, or other issues (or a combination of issues) preventing a build-out, as the ALJ could directly question those assertions and challenge any potentially frivolous claims. In this way, the Board intends to achieve an appropriate balance between the competing RTP factors of allowing, to the maximum extent possible, competition and the demand for services to establish reasonable transportation rates, *see* 49 U.S.C. 10101(1), while still maintaining reasonable rates where there is an absence of effective competition, *see* 49 U.S.C. 10101(6).

As an initial matter, the Board clarifies that the practical build-out factor is not limited only to potential rail expansions, as the Coalition Associations seem to imply. (*See* Coalition Associations Comment 17–18 (proposing a presumption that build-outs longer than two miles are infeasible based on costs per *track* mile).) In the *NPRM,* the Board stated that build-outs ''refer to possible competitive alternatives that could be accessed if the complainant makes certain infrastructure investments.'' *NPRM,* EP 756, slip op. at 10. As such, any alternative option that would require an infrastructure investment should be considered as part of this factor, regardless of the transportation mode, as it is in a non-streamlined market dominance analysis. For example, any potential barge alternative that requires infrastructure investment should be addressed by the complainant under the build-out factor, not the barge competition factor.

The Board finds that it would be inappropriate to presume that a build-out option is not practical in the specific scenarios suggested by the Coalition Associations; instead, those scenarios must be evaluated on a case-by-case basis. While the Coalition Associations argue that a build-out option that exceeds two miles in length would cost at least $4 million and therefore be cost-prohibitive, there may be situations where the cost of a two-mile build-out would be viable given the amount in dispute. For example, if the shipper is seeking rate relief of $200 million over a 10-year period, then a $4 million build-out may not be a cost-prohibitive alternative. Accordingly, having the shipper submit a verified statement explaining why build-outs are not practical is the better course.

Commenters have raised concerns over the level of detail about potential build-outs that must be included in the verified statement. In the *NPRM,* the Board stated that the verified statement should explain in a ''short plain statement'' that it has no build-out options due to ''physical, regulatory, financial, or other issues (or combination of issues).'' *NPRM,* EP 756, slip op. at 11. As noted, because this factor is intended to ''limit the evidentiary burden and simplify the requirement for complainants,'' *id.,* complainants need not provide supporting evidence, such as any studies undertaken or other documentation, as part of their submission to the Board. However, the complainant must provide more than a conclusory statement that a build-out is not practical by simply citing to one of the barriers listed by the Board without further explanation. In requiring a short plain statement, the Board anticipates that the complainant's official would describe, in a page or two, what the physical, regulatory, financial, or other issues are that make a build out impractical. For example, in an especially obvious scenario, if a shipper satisfies the other factors and is located 50 miles from the nearest waterway, rail line, or pipeline,[36] an official might explain that, because of the physical location of the complainant's facility and the disproportionately high costs to construct infrastructure to cover this distance, build-out options are not practical.

Under the streamlined approach, a more detailed explanation should not be necessary, as the impracticality of the build-out options should be clear from the verified statement. However, complainants must remember that if the practicality of a build-out option is not clear and it elects to use the streamlined approach, it runs the risk that the railroad may challenge whether the build-out factor has been satisfied on reply. In that instance, the complainant would have to defend why that build-out option is not practical on rebuttal.[37]

G. Other Proposed Factors and Approaches

In addition to the prima facie factors proposed by the Board, some commenters proposed additional factors. Some commenters also offered variations of the streamlined market dominance approach.

1. Absence of Pipeline Competition

AAR, UP, and BNSF state that the Board should include lack of pipeline competition as a prima facie factor. (AAR Comment 10; UP Comment 12 n.4; BNSF Comment 14–15). BNSF argues that pipelines can be a constraint on its rates and states that products such as crude oil, propane, and other refined petroleum products often move by rail or pipeline. (BNSF Comment 14.) The Coalition Associations state that they do not object to adding a pipeline factor. (Coalition Associations Reply 28.) No other party addressed this issue.

The Board agrees that there may be circumstances where pipelines could serve as a competitive transportation alternative to rail. Adding a factor to account for pipeline competition should not be burdensome: Only certain commodities can move by pipeline and, in most cases, it should not be difficult to determine whether a facility has practical physical access to pipeline competition. Moreover, no commenter has objected to inclusion of pipeline competition as a consideration in the streamlined approach.

Accordingly, the Board will adopt an additional prima facie factor stating that the complainant must demonstrate that there is no pipeline competition as part of its prima facie showing under § 1111.12(a).[38] *See* Final Rule below. As with intramodal, barge, and build-out options, a complainant can demonstrate that this factor is met through a verified statement from an appropriate official that the complainant does not have practical physical access to pipeline competition. When addressing why there is no practical physical access to pipeline competition in the verified statement, the complainant must ensure it has accounted for all types of pipeline access. In addition, because pipelines will be considered part of the market dominance analysis, a shipper must address whether it has practical pipeline build-out options as part of the build-out factor.

[35] Page limits and the ALJ hearing are discussed below, in Part III.

[36] As discussed below, the Board is adding the absence of pipeline competition as an additional prima facie factor.

[37] AAR asks the Board to clarify what information must be contained in the proposed verified statement from shippers and specifically requests that complainants be required to disclose what steps it has taken to evaluate build-out options and submit all studies it has undertaken. (AAR Comment 11.) This request is addressed in Part III (subpart C, ''Disclosures and Verified Statements'').

[38] As the Board has stated with respect to the intramodal and barge competition factors, consistent with 49 U.S.C. 10707(a), the pipeline competition factor also relates to the absence of effective competition.

2. Rate Benchmarking

As discussed above, the TRB Professors contend that R/VC ratios are unreliable due to flaws in URCS but acknowledge that the Board cannot replace that requirement because it is mandated by statute. As a result, they recommend that the Board supplement the R/VC ratio requirement by adding a prima facie factor that uses rate benchmarking, similar to a concept that they recommended in the *TRB Report.*[39] They claim that using rate benchmarking would provide an indicator of railroad market power superior to R/VC ratios derived from URCS. (TRB Professors Comment 4.)

USDA also advocates use of a competitive benchmarking factor, though it goes further by proposing that the Board replace all the prima facie factors with benchmarking (except for the R/VC of 180%-or-greater factor, which is statutorily required).[40] (USDA Comment 10–11; *see also* Farmers Union Reply 4–5 (supporting USDA proposal).) Dr. Ellig opposes USDA's proposal to replace the prima facie factors with benchmarking, arguing that it could lead to findings of market dominance where shippers do in fact have competitive options. (Ellig Reply 4.) Dr. Ellig instead proposes that the Board first determine if rates are above a benchmark threshold (which would need to be determined by the Board). If the rate is above that benchmark threshold, the Board could then conduct a streamlined or non-streamlined market dominance inquiry. (*Id.* at 4.)

The Board declines to adopt a benchmarking approach similar to that proposed by the TRB for purposes of the streamlined market dominance approach. The Board finds that the prima facie factors that it is adopting account for various alternative modes of transportation and would be strong indicators where market dominance is reasonably likely. Adopting a benchmarking factor, which would require significant resources to develop, would therefore not add sufficient value in this instance. The Board will therefore not incorporate benchmarking into the streamlined market dominance approach.

3. R/VC Ratio Approach

A few commenters propose that, rather than rely on the proposed factors, the Board adopt a streamlined market dominance approach in which a complainant may make a prima facie showing by establishing that a movement has an R/VC ratio over a certain level. (PRFBA Comment 1 (proposing an R/VC ratio greater than the Board's annual Revenue Shortfall Allocation Methodology (RSAM) calculation as floor to show market dominance); AFPM Comment 5 (proposing either 280% or RSAM as floor); USDA Comment 11 (proposing 200% as floor); *see also* Farmers Union Reply 4, 5.) AFPM argues that this process would quickly and clearly show whether a rail carrier is market dominant. (AFPM Comment 5; *see also* USDA Comment 11 (arguing the process would be accessible and straightforward).)[41]

The Board will reject proposals to use an R/VC ratio in lieu of specific factors. These commenters do not provide support for the R/VC ratios that they have selected as threshold R/VC levels. Moreover, an R/VC ratio above 180%, by itself does not indicate clearly whether the complainant lacks effective competition from other modes of transportation. The Board also finds that it would not be reasonable to base a market dominance finding on a single factor. *See McCarty Farms* v. *Burlington N. Inc.,* 3 I.C.C.2d 822, 832 (1987) (''[E]vidence that rail revenues substantially exceed costs by itself does not indicate market dominance. . . .'').

4. ''À la Carte'' Approach

The Coalition Associations propose a variation on the streamlined approach, which they refer to as an ''à la carte'' approach. (Coalition Associations Comment 7–8.) According to the Coalition Associations, each of the proposed prima facie factors ''falls neatly within one of the three modal elements of qualitative market dominance: The 500-mile and 10% trucking factors address only the truck competition element; the intramodal and build-out factors address only the intramodal competition element; the barge factor addresses only the barge competition element.'' (*Id.* at 8.) Therefore, the Coalition Associations argue that a complainant should not be prevented from using a prima facie factor related to one modal element due to its inability to satisfy a prima facie factor related to a different modal element. (*Id.*) Instead, the Coalition Associations propose that complainants be permitted to demonstrate the prima facie factors for as many modal elements as possible and submit more extensive evidence to demonstrate market dominance for any remaining modal elements. (*Id.*) UP contends that the ''à la carte'' streamlined approach is not a logical outgrowth of the *NPRM.* It also argues that the approach is no different than what happens in practice today, in that parties generally focus their evidence on realistic competitive alternatives. (UP Reply 3.)

The Board declines to adopt the ''à la carte'' approach at this time. The Coalition Associations' proposal does not explain the procedural rules that it believes would apply to the ''à la carte'' approach and regardless, the Board has concerns about how this proposal would work in practice. Moreover, this approach could add complexity to the market dominance analysis, with some factors being presented under the streamlined approach and others being presented under the non-streamlined approach. For these reasons, the ''à la carte'' approach will not be adopted here.

5. Product and Geographic Competition

AAR, UP, and BNSF all argue that the streamlined approach should include a factor that would take into account product and geographic competition. (AAR Comment 10; UP Comment 13; BNSF Comment 12–13.) AAR argues that the Board should add a factor to limit the streamlined approach to instances where the shipper has shipped more than a significant percentage (*e.g.,* 75%) of the commodity at issue to the destination in the case.

[39] The TRB Professors state that ''[m]any rail rates are now competitively determined, and those rates can be used as benchmarks in rate review proceedings.'' (TRB Professors Comment 2.) A more detailed discussion of rate benchmarking as proposed by the TRB Professors is available in Chapter 3 of the *TRB Report.*

[40] USDA further argues that the prima facie factors are flawed because the ''fact that a shipper has alternative options at a given rail price does not mean that the railroad has no market power in setting that price. A market dominant railroad will set its price just below the price of the alternative option, say trucking, but the price of trucking may still be significantly above the railroad's cost of the move. Thus, even though trucking is a substitute for rail at the railroad's set price, the railroad could still be market dominant.'' (USDA Comment 10.) The prima facie factors are intended to identify those cases where market dominance is clear on its face. In the cases identified by USDA, where rail is priced just below the non-competitive trucking rate, the shipper still has the option of utilizing the non-streamlined market dominance approach, in which it can explain why trucking may not be competitive with rail.

[41] USDA notes while this process might be overly inclusive, it is better for the Board to err on the side of ''false positives,'' which it describes as an instance in which a railroad is found to be market dominant when it is not, while a ''false negative'' is when a railroad is found not be market dominant when it is. (USDA Comment 11.) USDA states that, in cases of false positives, the merits case on rate reasonableness still serves as a safeguard against the railroad having to pay rate relief. (USDA Comment 8, 11.) But the availability of the non-streamlined market dominance approach for a shipper that has the potential of getting a false negative (*i.e.,* a shipper who is ineligible to use the streamlined market dominance approach) eliminates the concern associated with quantitative false positives and false negatives.

(AAR Comment 10.) BNSF proposes that shippers would submit a certification that there is no product or geographic competition by a knowledgeable shipper business representative and that railroads would submit evidence of product or geographic competition on reply. (BNSF Comment 13.) The TRB Professors also recommend, as they did in the *TRB Report,* that the Board allow evidence on product and geographic competition. They state that excluding potentially relevant evidence puts fairness and accuracy at risk. (TRB Professors Comment 3–4.)

The Coalition Associations, ISRI, and WCTL oppose including product and geographic competition as part of the streamlined approach and argue that the proposals to do so do not address the difficulties that led the Board to eliminate these factors, as noted below. (Coalition Associations Reply 31–34; ISRI Reply 3–4; WCTL Reply 2–3.) The Coalition Associations also argue that there is no need to add product and geographic competition because a ''shipper is unlikely to challenge a rate that is effectively constrained by product and geographic competition because the cost of challenging the rate is high compared to the potential relief.'' (Coalition Associations Reply 34.)

The Board will reject the proposals to add a product and geographic competition component to the streamlined approach. The Board has found that ''the time and resources required for the parties to develop, and for [the Board] to analyze, whether it would be feasible for a shipper to change its business operations (by changing its suppliers, customers, or industrial processes) so as to avoid paying the challenged rail rate can be inordinate.'' *Mkt. Dominance Determinations—Prod. & Geographic Competition* (*Mkt. Dominance 1998*), 3 S.T.B. 937, 948 (1998) *remanded sub nom. Ass'n of Am. R.Rs.* v. *STB,* 237 F.3d 676 (D.C. Cir. 2001), *pet. for review denied sub nom. Ass'n of Am. R.Rs.* v. *STB,* 306 F.3d 1108 (D.C. Cir. 2002). The goal of the streamlined market dominance approach is to reduce the burden on parties and expedite proceedings, a goal that would not be met by reintroducing a requirement that the agency has repeatedly found to be too burdensome as part of the non-streamlined approach. *See, e.g., Pet. of the Ass'n of Am. R.Rs. to Inst. a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Mkt. Dominance Determinations for Coal Transported to Util. Generation Facilities,* EP 717, slip op. at 9 (STB served Mar. 19, 2013) (''[A]nalyzing and adjudicating a contested allegation of indirect competition is rarely straightforward and would require a substantial amount of the Board's resources to examine matters far removed from its transportation expertise and to determine if indirect competition effectively constrains rates to reasonable levels. . . .'').[42]

Part III—Procedural Issues

A. Applicability to Different Rate Reasonableness Methodologies

AAR, BNSF, and UP argue that the streamlined approach should be limited to only smaller rate cases. AAR would limit the streamlined approach to smaller-value cases challenged under the simplified procedures and cases with fewer than 10 origin/destination pairs, arguing that, consistent with the Board's stated goals, the Board should implement the streamlined market dominance procedures only in cases where the cost of a full presentation is not warranted due to the value or complexity of the case. (AAR Comment 7.) BNSF expresses concern that the streamlined approach would oversimplify the market dominance analysis of a complex case involving a large shipper, and therefore proposes a 1,000 carloads-per-year cap for shippers to be able to use the streamlined approach, though it notes that other caps based on revenue or market share could work as well. (BNSF Comment 10–11, BNSF Reply, V.S. Miller 16–17.) BNSF claims that, in its experience, ''[o]nce a shipper's volume exceeds 1,000 carloads, the shipper's leverage with a rail carrier changes'' and that such shippers have ''multiple ways to exercise market power,'' such as through commercial discussions and negotiations. (BNSF Reply, V.S. Miller 16–17.) UP states that it does not object to use of the streamlined approach for Simplified-SAC or Three-Benchmark cases, but it does object to its use in Full-SAC cases.[43] (UP Comment 1–2.) UP argues that the streamlined approach would not save time in Full-SAC cases, as market dominance and rate reasonableness would still be litigated simultaneously, not sequentially. (UP Comment 13.) UP also claims that the Board cites no evidence that any shipper who might file a Full-SAC case has been dissuaded by the cost of addressing market dominance. (UP Comment 14.) UP also disagrees with the Board's conclusion that shippers are at a disadvantage in addressing market dominance on opening, noting that the shipper knows more about its transportation alternatives than the railroad. UP claims the streamlined approach would also encourage wasteful litigation by allowing shippers to file cases with low up-front costs and impose the costs of developing market dominance evidence on railroads. (UP Comment 14.)

Shipper interests disagree with requests to limit the applicability of the streamlined approach. NGFA argues there is no basis for the limitation on the streamlined approach proposed by AAR. NGFA asserts that the streamlined market dominance approach should be available for use by any complainant filing a rate case. (NGFA Reply 9.) The Coalition Associations dispute BNSF's claim that large shippers can leverage competitive movements to protect against unreasonable rates and argue that the streamlined approach should be available to large shippers. (Coalition Associations Reply 12–14 (arguing that railroads are usually willing to lose competitive traffic rather than lower the rate on their non-competitive traffic).) The Coalition Associations also challenge UP's assertion that shippers are not dissuaded from bringing Full-SAC cases because of the costs associated with the market dominance inquiry. (Coalition Associations Reply 10–12.) They argue that unnecessary litigation burdens are a problem in Full-SAC cases because the high cost of a non-streamlined analysis reduces any relief the complainant might win. Conversely, ''[w]hen complainants lose, it is a multimillion-dollar penalty for making a good-faith claim.'' (*Id.* at 11 (footnote omitted).) The Coalition Associations also dispute UP's claim that the cost to shippers of preparing initial market-dominance evidence will be lower than the cost to railroads. (Coalition Associations Reply 10–11.)

The Board is not persuaded that it should limit the streamlined market dominance approach to smaller rate disputes. BNSF argues that the streamlined approach should be limited to small cases to ''avoid inappropriate interference in rail markets.'' (BNSF Comment 2.) However, as discussed in Part I, the streamlined approach is not less accurate than the non-streamlined approach, and therefore does not risk the negative market impacts raised by

[42] UP also proposes that the Board ''develop[ ] factors a shipper must overcome with evidence before railroads are even required to respond to complaints.'' (UP Comment 12–13.) However, the streamlined approach adopted here is intended to adequately ensure that only proceedings in which market dominance has been shown proceed to a determination of rate reasonableness.

[43] UP also objects to using the streamlined approach in FORR cases. Because FORR remains pending before the Board in Docket No. EP 755, the Board will not address those comments here.

BNSF. Rather, the Board is simply reducing the litigation burden on complainants when they can show that market dominance is more readily apparent and therefore does not require as extensive an evidentiary showing. The railroad still has a full opportunity to refute the complainant's showing under the streamlined market dominance approach. Accordingly, a finding of market dominance under the streamlined approach is no less valid than a finding of market dominance under the non-streamlined approach.

BNSF also asserts that larger shippers generally have greater leverage in rate negotiations. (BNSF Reply, V.S. Miller 16–17.) However, even if true, that in and of itself does not justify limiting large shippers from using the streamlined approach if they can satisfy the prima facie factors. The same holds true for AAR's argument that the streamlined approach should be limited to cases where the amount at stake is too low to justify the cost of a non-streamlined presentation, (AAR Comment 7), and UP's argument that shippers are not dissuaded from bringing Full-SAC cases because of the costs of addressing market dominance (UP Comment 14). The litigation costs associated with a non-streamlined market dominance presentation could act as a barrier to bringing a rate proceeding for any shipper; while the streamlined approach may be particularly useful for shippers with fewer resources, the streamlined approach would enhance the accessibility of the Board's rate review procedures more broadly. Even for shippers with greater resources, if the costs of pursuing a complaint would consume most or all of the expected recovery, then the remedy would be a hollow one for the complainant. A Full-SAC presentation would not be cost-effective unless the value of the expected remedy, at a minimum, exceeds the expected cost of obtaining the remedy. If the streamlined approach can reduce litigation costs in Full-SAC cases just as effectively and appropriately as in smaller cases, there is no reason not to allow use of the approach just because the shipper may be able to bear the cost of the non-streamlined approach.

UP's additional arguments that the streamlined approach should not be used in Full-SAC cases lack merit for the same reasons. Even if the streamlined approach does not reduce the length of the procedural schedule, the approach should have the benefit of reducing litigation costs for both parties. Finally, the Board disagrees with UP's claim that the streamlined approach will encourage ''wasteful'' litigation that may be intended to force settlements from railroads. If a case brought under the streamlined approach is not valid, railroads should easily be able to defend themselves against such claims. If the railroad does refute any of the factors or otherwise shows that effective competition exists, the shipper would be precluded from challenging the same rate again for several years, as discussed in more detail in Part IV (subpart C, ''Preclusive Effect of Dismissal''). A rate case is a significant undertaking, not just in terms of costs and resources, but in the way that it can negatively affect the business relationship between a shipper and rail carrier. Accordingly, the Board is not convinced that shippers are likely to file cases that they do not believe have merit, even when the costs of doing so are reduced.[44]

B. Schedule

NGFA requests that the Board clarify at what point the Board will ''make the determination that a complainant has met the requirements for a prima facie showing of market dominance and may proceed under the streamlined approach, as opposed to the final determination that the complainant has met its burden of demonstrating market dominance[.]'' (NGFA Comment 7.) The Board does not anticipate issuing an intermediate decision addressing the sufficiency of a complainant's prima facie market dominance case as a matter of course in each proceeding. After the close of the record, the Board would issue a decision on market dominance as part of its final decision. The Board may issue a decision earlier if its finds that the case should be dismissed for lack of market dominance.

The Coalition Associations propose that complainants have the option of litigating market dominance on an expedited, bifurcated procedural schedule, rather than simultaneously with the rate reasonableness portion of the case (though under the Coalition Associations' proposal, market dominance and rate reasonableness would still be decided in a single final decision). (Coalition Associations Comment 20–23.) Parties may already request bifurcation in individual rate case proceedings, and they may continue to do so if using the streamlined approach. *See, e.g., M&G Polymers USA, LLC* v. *CSX Transp., Inc.,* NOR 42123 (STB served May 6, 2011).[45]

Finally, some commenters suggest that the Board adopt procedural time limits for pleading the streamlined market dominance approach. (TRB Professors Comment 3; PRFBA Comment 2.) The *NPRM* proposed to incorporate the streamlined market dominance proposal into the standard procedural schedules governing rate cases. The Board finds that it is not necessary to establish separate procedural time limits for pleading the streamlined approach. Parties are free to request alternate procedural schedules, just as they may do under the non-streamlined approach currently. Moreover, the page limits the Board is adopting for streamlined market dominance filings is intended to encourage efficiency by the parties. *See NPRM,* EP 756, slip op. at 12 (stating that page limits will encourage parties to focus their arguments on the most important issues.)

C. Disclosures and Verified Statements

Under the Board's existing regulations, complainants in Simplified-SAC and Three-Benchmark cases must provide to the defendant, with their complaints, the URCS Phase III inputs used in preparing the complaint, ''[a] narrative addressing whether there is any feasible transportation alternative for the challenged movements,'' and ''all documents relied upon in formulating its assessment of a feasible transportation alternative and all documents relied upon to determine the inputs to the URCS Phase III program.'' 49 CFR 1111.2(a), (b). In the *NPRM,* the Board proposed expanding the applicability of these disclosure requirements to include any case in which a complainant utilizes the streamlined market dominance approach. *See NPRM,* EP 756, slip op. at 11.

WCTL objects to the Board's proposal to require complainants to make these disclosures in large rate cases where the streamlined approach is used. WCTL argues that, in such cases, issues regarding the URCS inputs are best addressed and resolved through technical conferences. (WCTL Comment 11.) WCTL also objects to requiring disclosure in large rate cases of all the market dominance evidence that the complainant relied upon, as this will

[44] When the filing fee for a Full-SAC case was reduced from $178,200 to $350 and for a Simplified SAC case from $10,600 to $350 in 2008, there was no noticeable increase in the number of rate cases filed at the Board. *See Regulations Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.—2007 Update,* EP 542 (Sub-No. 14) (STB served Jan. 25, 2008).

[45] If requesting bifurcation, parties need to address how the bifurcated schedule would impact the procedural timelines set out by statute, *see* 49 U.S.C. 10704, and the applicable Board regulations for the rate review process involved, *see, e.g.,* 49 CFR 1111.9, 1111.10.

add a substantial new burden on complainants that may discourage them from using the streamlined approach. WCTL claims that the disclosures are also unnecessary, as defendants can still obtain relevant evidence through discovery. (*Id.* at 12.) Lastly, WCTL asserts that a shipper in a large rate case may not decide whether to use the streamlined approach until it completes its market dominance discovery from the defendant carrier. (*Id.* at 13.)

UP argues that these disclosure requirements should be modified for cases in which the complainant elects to use the streamlined market dominance approach. (UP Comment 7–9.) UP argues that shippers using the streamlined approach will produce a narrower selection of documents than under the non-streamlined approach, because, according to UP, the proposed regulation reduces the transportation alternatives the shipper must initially consider. (*Id.* at 8.) UP claims that this could prevent railroads from obtaining relevant documents, to which UP states they are entitled, concerning effective competition. Accordingly, UP proposes different disclosure requirements.[46] It claims that its proposed disclosure requirements would be easy for a shipper to comply with, as they involve producing evidence that the complainant has likely already reviewed in deciding whether to bring a rate case. UP also claims that these requirements would expedite proceedings and reduce litigation. (*Id.* at 8.)

AAR also suggests that the shipper disclose all supporting information for its assertions of market dominance along with the filing of its complaint. In particular, AAR argues that complainants should be required to disclose what steps they have taken to evaluate the intramodal, barge, build-out, and pipeline options, including any studies they have undertaken, as part of the verified statement that they may rely on to demonstrate that these factors have been met. (AAR Comment 11; *see also* UP Comment 9 (arguing for broader disclosure requirements, including shipper studies of transportation alternatives, in streamlined approach cases).) AFPM asks the Board to clarify what type of documentation would be acceptable and define or list who it deems to be ''appropriate officials'' for purposes of submitting the verified statement. (AFPM Comment 6.)

The Coalition Associations state that they do not object to the concept of different disclosure requirements for the streamlined approach, but they believe that the proposals made by UP and AAR are too broad. (Coalition Associations Reply 23–24.) Accordingly, the Coalition Associations offer modified versions of the disclosure requirements suggested by UP. (*Id.* at 24.)[47]

After reviewing the comments and upon further consideration, the Board will not amend its regulations to extend the existing disclosure requirements of 49 CFR 1111.2(a) and (b) to all cases in which the streamlined approach is used, as it proposed to do in the *NPRM*.[48] The Board recently considered adding a disclosure requirement in Full-SAC cases but, after receiving input from stakeholders, concluded that allowing parties to engage in discovery would be more beneficial. *See Expediting Rate Cases,* EP 733, slip op. at 6 (STB served Mar. 30, 2017). The Board similarly finds that allowing for discovery in other non-simplified cases would be more effective. Moreover, the Board agrees with WCTL that shippers may not be able to decide whether to pursue a streamlined market dominance approach until discovery has been completed. Accordingly, the Board will maintain the separate evidentiary processes for simplified and non-simplified cases.[49]

The Board also declines to modify the disclosure requirements as they pertain to simplified standards cases (*i.e.,* Simplified-SAC and Three-Benchmark) in which the streamlined market dominance approach is used, as suggested by UP and the Coalition Associations. The Board has not proposed to change the language of 49 CFR 1111.2(a) or (b) that set forth the disclosure requirements in such cases. Accordingly, the language of § 1111.2—even when read in conjunction with § 1111.12 establishing the prima facie factors—would still require complainants to disclose documents pertaining to any feasible transportation alternative, even ones that are not specific to the prima facie factors. As a result, the information that must be disclosed in simplified standards cases will remain the same, regardless of which market dominance approach is used.

The Board also will not adopt AAR's suggestion to require complainants to disclose the steps they have taken to evaluate potential intramodal, barge, or build out options and submit all studies they have undertaken. As noted, complainants in Simplified-SAC and Three-Benchmark cases are already required to make certain disclosures regarding feasible transportation alternatives. Contrary to UP's assertion, the Board finds that, in Simplified-SAC and Three-Benchmark cases, these requirements are sufficient. For cases not brought under those simplified standards, a defendant can obtain access to any relevant evidence through discovery. In addition, the Board finds it is not necessary for a complainant to provide documentation with the verified statement. As explained in the Board's discussion of the build-out factor (*supra,* Part II, subpart F ''No Practical Build-Out Option''), the statement itself should be sufficient to demonstrate that the factors it supports have been met. While the Board will not preclude a complainant from submitting documentation if it wishes, the purpose of the streamlined approach is to reduce the litigation burden on complainants where a lack of effective competition is reasonably likely.

Lastly, in response to the AFPM's comment, the Board will add language to the regulation to clarify who constitutes an ''appropriate official'' to submit the verified statement. The official submitting the verified statement should be an individual who has either direct or supervisory responsibility for, or otherwise has knowledge or understanding of, the complainant's transportation needs and options. In the verified statement, the official should provide his or her title and a short description of his or her duties. These revisions will be made to § 1111.12(b), as set forth in the text of the final rule below.

[46] Specifically, UP proposes that a complainant disclose the following: (1) Information regarding any use by the shipper of transportation alternatives during the previous five years; (2) information regarding any studies or consideration of transportation alternatives during the previous five years; and (3) any transportation contracts that could have been used for the issue traffic during the previous five years. (UP Comment 7–8.)

[47] Specifically, the Coalition Associations propose that a complainant be required to disclose: (1) All shipments of the issue commodity by any mode made with any transportation provider other than the defendant railroad during the previous five years; (2) any transportation contracts that the complainant or its affiliates could have used to transport the issue traffic between the issue origin and issue destination and intermediate transloading points during the previous five years; and (3) all available studies or email correspondence in complainant's possession concerning transportation alternatives for movements of the issue commodity or commodities from each issue origin to the corresponding issue destination during the previous five years. (Coalition Associations Reply 24.)

[48] Accordingly, the *NPRM*'s proposed regulation at 49 CFR 1111.12(c) will not be adopted.

[49] In *Expediting Rate Cases,* EP 733 (STB served Nov. 30, 2017), the Board adopted regulations that require complainants and defendants in non-simplified standards cases to certify in their complaints and answers, respectively, that they have served their initial discovery requests on the opposing party. 49 CFR 1111.2(f) and 1111.5(f).

D. Rebuttal Evidence and Burden of Proof

Several commenters raise concerns regarding what evidence would be permissible on rebuttal under the streamlined approach. The Coalition Associations request that the Board clarify that, under the streamlined approach, a complainant may submit ''any evidence on rebuttal that is responsive to a defendant's reply evidence on the same factors regardless of whether such evidence was available to the complainant on opening.'' (Coalition Associations Comment 23–24.)

AAR argues that the Board should not allow shippers to produce new evidence on rebuttal or at the ALJ hearing when the shipper has elected to use the streamlined approach. (AAR Comment 14–15.) It states, however, that ''[o]f course, if a defendant railroad introduces evidence unrelated to the prima facie factors in its market dominance submission, complainants should be allowed to provide appropriate rebuttal evidence.'' (*Id.* at 15.)

UP asserts that the Board should clarify its statement in the *NPRM* that the ''burden for establishing market dominance remains on the complainant.'' (*Id.* at 4 (quoting *NPRM,* EP 756, slip op. at 11.) UP argues that the prima facie factors should not be evidentiary presumptions and that if the railroad offers other evidence of effective competition on reply, and the shipper does not convincingly rebut that evidence with its own evidence beyond the prima facie factors, the railroad should prevail on market dominance. (UP Comment 6; UP Reply 4.) UP also requests that the Board clarify that, if a railroad offers evidence of effective competition (*e.g.,* the issue commodity can be trucked more than 500 miles or a transload option exists), the shipper can only submit evidence regarding the existence of this factor (*e.g.,* the shipper could submit evidence showing that 500 miles or transloading is not practical, but the shipper could not submit evidence that truck or transload pricing is not practical). (UP Comment 6; *see also* UP Reply 4.)

The Coalition Associations object to UP's argument that complainants should be precluded from offering rebuttal evidence in response to a railroad's reply arguments on effective competition. They argue that ''[i]f a complainant who uses the factors would lose its ability to submit evidence on rebuttal in response to a railroad argument that effective competition exists, the factors would have no benefit.'' (Coalition Associations Reply 21.)

As an initial matter, the Board reiterates that the ''streamlined market dominance approach would not result in a shifting of the burden for market dominance'' and that the ''burden for establishing market dominance remains on the complainant.'' *NPRM,* EP 756, slip op. at 11. In addition, there is no limitation on what relevant evidence the railroad may submit on reply to make its market dominance case. *Id.* at 12 (''Carriers would be permitted to refute any of the prima facie factors of the complainant's case, or otherwise show that effective competition exists for the traffic at issue.'').

In a non-streamlined market dominance inquiry, a complainant is free to rebut the railroad's reply argument and evidence with its own counterevidence, so long as it meets the Board's standard for proper rebuttal evidence in rate cases. *See Consumers Energy Co.* v. *CSX Transp., Inc.,* NOR 42142, slip op. at 4–5 (STB served Dec. 9, 2016) (holding that the complainant was entitled to offer corrective evidence to demonstrate that the defendant carrier's reply evidence on market dominance issues was unsupported, infeasible, or unrealistic). This standard would likewise apply to complainants using the streamlined approach. If the railroad submits evidence to show that one of the prima facie factors has not been satisfied or that there is otherwise effective competition, the complainant may provide evidence on rebuttal refuting the railroad's reply evidence, including evidence that was available to the complainant on opening. As in a non-streamlined market dominance case, the Board may strike argument or evidence as improper either upon its own motion or upon motion by the parties.

As explained in the *NPRM,* EP 756, slip op. at 11, a complainant that meets each of the required factors will have made a prima facie showing of market dominance. On reply, a defendant railroad can refute the prima facie showing by presenting evidence of, for example, effective competition from other transportation providers and, in doing so, might rely on evidence that the complainant itself would have provided in a non-streamlined market dominance inquiry. But contrary to UP's assertion, the fact the railroad might rely on such evidence in support of its own argument does not amount to a shifting of the burden of proof.[50]

E. Rebuttal Hearing

The Board proposed in the *NPRM* that, as part of the streamlined market dominance process, a complainant would have the option to request an evidentiary hearing conducted by an ALJ. *NPRM,* EP 756, slip op. at 12. The hearing would be on-the-record and could be conducted telephonically.[51] The purpose would be to ''allow the parties to clarify their market dominance positions under oath, and to build upon issues presented by the parties through critical and exacting questioning.'' *Id.* The Board received several comments relating to the ALJ hearing process.

1. Clarification

UP asks the Board to clarify certain language in the *NPRM* describing the ALJ hearing and written rebuttal. (UP Comment 11.) The *NPRM* at one point stated that, if the complainant requested the hearing, it would be conducted ''within seven days after the due date of complainant's rebuttal,'' [52] *NPRM,* EP 756, slip op. at 12, which perhaps could be read to suggest that complainants would be required to submit a written rebuttal and then would also have the option to request the ALJ hearing. However, later, the *NPRM* stated that, ''[g]iven this hearing, the complainant may elect whether to file rebuttal evidence on market dominance issues . . . *or* to rely on the ALJ hearing to rebut the defendant's reply evidence.'' *Id.* (emphasis added). UP asks the Board to clarify and states that ''if complainants must choose one or the other, we have no objection to giving them that choice.'' (UP Comment 11.)

The Board clarifies that a complainant must choose whether to file a written rebuttal or request the ALJ hearing. An evidentiary hearing following written rebuttal is not required even under the non-streamlined approach and would increase the litigation costs for both the

[50] Additionally, the Board will not limit the complainant on rebuttal from relying only on evidence that it produced in discovery. There may be instances where the complainant has evidence available to it that is properly responsive to the defendant's reply argument but that was not sought in discovery (though the Board does not anticipate that there will likely be many instances where this occurs, particularly if the defendant has made sufficient discovery requests). Of course, if the complainant relies on evidence on rebuttal that was not produced in discovery, but which should have been, the defendant can file a motion to strike that evidence. *See Total Petrochems.,* NOR 42121, slip op. at 14 (granting defendant's motion to strike evidence on inventory carrying costs that complainant should have produced in discovery).

[51] As part of the *NPRM,* the Board proposed modifying its regulation that sets forth delegations of Board authority, 49 CFR 1011.6, to allow an ALJ to conduct such hearings.

[52] This language was similarly restated in the proposed rule of the *NPRM,* which included the proposed changes to the text of the regulations.

complainant and defendant. In contrast, allowing the complainant to utilize an ALJ hearing in lieu of a written rebuttal would give the complainant an additional means to potentially limit litigation costs while still allowing full development of the record. To the extent some parties expressed concern that the Board's proposal unfairly excludes defendants from requesting an ALJ hearing,[53] such concerns may have been attributed to the ambiguity in the *NPRM* as to whether the ALJ hearing was in addition to rebuttal or taking the place of complainant's written rebuttal. The Board further finds that the complainant, as the party with the burden of proof, should have the final evidentiary presentation (as it does in other aspects of the rate case process) and therefore it is not inappropriate for the complainant to be the party that can request an ALJ hearing in lieu of filing written rebuttal.

Given the clarification above that the ALJ hearing may be sought in lieu of submitting a written rebuttal, the Board will adopt as part of the final rule a requirement that the hearing be held on or about the same day that the written rebuttal on the merits of rate reasonableness is due. The complainant will be required to inform the Board in writing within 10 days after the reply is filed if it intends to utilize the ALJ hearing. This will give the complainant sufficient time to review the railroad's reply arguments on market dominance and assess whether it believes the written rebuttal or hearing is preferable, while still leaving the complainant sufficient time to draft its rebuttal filing if that is the option it chooses. This will also give the Board enough time to schedule the ALJ hearing, if necessary. The full text of the revised § 1111.12(d),[54] discussing the evidentiary hearing process, is set forth below.

2. Hearing Logistics

UP argues that the hearing proposal is too underdeveloped. Specifically, UP states that the *NPRM* does not identify who must participate in the hearing to provide testimony and does not address important issues of procedural fairness (*e.g.,* whether parties will conduct direct and cross-examination of witnesses, or whether only the ALJ will question witnesses). UP also questions if the ALJ hearing transcript can be produced within four days, as proposed by the Board. (UP Comment 11.) AAR expresses concern about which ALJs the Board would use and whether they have any substantive expertise in market dominance issues. Finally, AAR requests that the Board clarify that the ALJ will not rule on any market dominance issues and that the ALJ's role would be limited to presiding over examination of witnesses. (AAR Comment 14.) Shipper interests did not comment on these issues.

Based on the comments, the Board will make minor modifications to what was proposed in the *NPRM* concerning the ALJ hearing. It has been the Board's recent practice to participate in the federal ALJ Loan program to employ the services of ALJs from other federal agencies (currently the Federal Mine Safety and Health Review Commission) on a case-by-case basis to perform discrete, Board-assigned functions. In response to the comments received, the Board notes that it may, at its discretion, assign a member (or members) of Board staff to assist the ALJ.

With respect to the structure or format of the hearing, such matters will be left to the ALJ's discretion. However, the Board clarifies that the ALJ's role in the streamlined approach will be to preside over the evidentiary hearing (helping to gather information and evidence), while the ultimate market dominance determination will be made by the Board. The ALJ may, however, express his or her views of certain arguments or evidence.

Lastly, in response to UP's concern about the production of the hearing transcript, the Board will make a slight revision to the final rules. Specifically, the Board will increase the period of time by which it must provide the hearing transcript (either in draft or final form) from four days to five days.[55]

The full text of the revised § 1111.12(d), discussing the evidentiary hearing process, is set forth in below.

F. Page Limits

The Board proposed in the *NPRM* that if a complainant opted to use the streamlined market dominance approach, reply and rebuttal submissions would be limited to 50 pages, inclusive of exhibits and verified statements. *NPRM,* EP 756, slip op. at 12.

AAR suggests that the Board ''more carefully tailor the limitations on evidence to the complexity of the case'' and proposes ''a 50-page limit of narrative, excluding exhibits, for a one-lane case, with the limit increasing by 10 pages for each additional lane, up to a maximum of 100 pages.'' (AAR Comment 15.) UP argues that the Board should not impose any page limits on the railroad's reply. UP contends that the railroad replies will still need to contain all the same arguments and evidence as under the current market dominance approach or more given the need to address all of the prima facie factors. (UP Comment 10.) UP suggests that the Board's reference in the *NPRM,* EP 756, slip op. at 12 n.15, to limitations the Board has previously placed on petitions for reconsideration and briefs is misplaced because those filings are made only after parties have filed evidentiary submissions. (UP Comment 10; *see also* AAR Comment 15.)

The Coalition Associations oppose AAR's and UP's requests to expand the page limits. The Coalition Associations dispute UP's argument that a railroad would need to present the same arguments and evidence on reply as it does in a non-streamlined case. (Coalition Associations Reply 27.) FRCA expresses concern that 50 pages will not be sufficient for rebuttal filings, stating that a defendant may raise a multitude of issues and posit hypothetical and theoretical questions in its 50 pages that will require more than 50 pages for the complainant to rebut. (FRCA Comment 2; *see also* NCTA Comment 3.) In contrast, some shipper interests propose that the Board lower the page limit for replies and rebuttals to 25 pages. Their view is that a 50-page limit would leave too much room for overly burdensome arguments, whereas 25 pages would eliminate that abuse but still provide adequate opportunity to raise straightforward arguments. (SMA Comment 12–14; Indorama Comment 12–14; IMA–NA Comment 12–14.) AFPM states that it supports the 50-page limit. (AFPM Comment 10.)

A 50-page limit (including exhibits and verified statements) strikes the proper balance between narrowing the focus of the parties' arguments and providing sufficient opportunity for parties to address the substantive issues. Despite AAR's and UP's arguments, 50 pages should be sufficient to allow the railroad to address whether the prima facie factors are met and whether there is effective competition. Under the streamlined approach, the complainant is essentially making an opening presentation that market dominance is readily apparent. If that is not the case, then it should not require extensive argument and evidence for the railroad to refute this assertion. In response to

[53] AAR and BNSF argue that defendants should also be afforded an opportunity to request an ALJ hearing. (AAR Comment 14; BNSF Comment 15.).

[54] Section 1111.12(d) was proposed in the *NPRM* as paragraph (e) but is designated as paragraph (d) in the final rule.

[55] The Board typically receives a draft version of the hearing transcript and then reviews it for errors. The Board will endeavor to complete its review and provide the final transcript within the five-day period, but there may be occasions when it must provide the draft version pending its review.

AAR's concern that including exhibits in the 50-page would be problematic because such exhibits often include studies that approach or exceed 50 pages, the Board notes that parties can include excerpts from a study or request a waiver of the 50-page limit.[56]

The Board will also not adopt AAR's suggestion of expanding the page limit for cases with multiple lanes. The Board will respond to requests for a page limit extension in individual matters on a case-by-case basis.

As for FRCA's argument that more pages would be needed for the complainant's rebuttal, the purpose of the streamlined approach is to reduce the litigation costs for shippers. In deciding whether to use the streamlined approach, a shipper will have to weigh the risks and benefits of using the streamlined approach (including the 50-page limit on rebuttals).[57]

Finally, the Board rejects the argument from some shippers to lower the page limit to 25 pages. That limit would likely restrict a railroad's ability to present its arguments in sufficient detail and include the necessary supporting evidence, as well as the complainant's ability to rebut those arguments.

Part IV—Miscellaneous Issues

A. Limit Price Test

AAR and CSXT argue that the Board should affirmatively state that it will not apply the ''limit price test'' in any future rate case. (AAR Comment 16–17 (stating concern that the *NPRM,* by citing to a prior proceeding, implicitly endorsed the limit price methodology); CSXT Comment 3.) AAR and CSXT reiterate various arguments that railroads have raised in the past as to why the limit price methodology should be eliminated. (AAR Comment 16–17; CSXT Comment 3–4.) In response, the Coalition Associations state that the Board should not use this proceeding to either abandon or endorse the use of the limit price test and point out that interested parties have not had a full opportunity to comment on the issue. (Coalition Reply 35.)

The *NPRM* did not discuss the limit price test but merely cited to a prior proceeding for the general proposition that a qualitative market dominance analysis involves the determination of ''any feasible transportation alternatives sufficient to constrain the railroad's rates for the traffic to which the challenged rates apply.'' *NPRM,* EP 756, slip op. at 2. The limit price test's applicability to market dominance analyses in future cases is not under consideration as part of this proceeding, and as such the Board will not address this issue.

B. DMIR Precedent

AAR argues that, for the streamlined market dominance approach, the Board should not apply its *DMIR* precedent[58] in the same manner that the agency did in *DuPont 2014,* NOR 42125, slip op. at 25–29. (AAR Comment 12–14.) The *DMIR* precedent addressed how the agency should consider market dominance when the rate at issue is for a segment of a larger movement (a bottleneck segment). In *DuPont 2014,* the Board held that, under the *DMIR* precedent, the agency cannot consider, as part of the market dominance inquiry, transportation alternatives that cover the whole route when only the bottleneck segment rate is being challenged. *DuPont 2014,* NOR 42125, slip op. at 26–29 (also stating that this conclusion is consistent with a legislative directive to process rate complaints more expeditiously and the long-standing Congressional intent that market dominance be a practical determination made without delay; and stating the conclusion is consistent with the Board's statutory directives.) The Coalition Associations argue that the Board's decision in *DuPont 2014* was correct and that AAR is simply repeating many of the same arguments that were raised and rejected by the Board in *DuPont 2014.* (Coalition Associations Reply 17–20.)

The Board did not seek comment on the *DMIR* and *DuPont 2014* precedent as part of the *NPRM.* Moreover, AAR's objections to the *DMIR* and *DuPont 2014* precedent are not specifically tied to the streamlined approach, but to that precedent in general. As such, AAR's arguments go beyond the scope of this proceeding and the Board will not address the issue here.

C. Preclusive Effect of Dismissal

Olin and FRCA state that they ''disagree'' with the statement in the *NPRM,* EP 756, slip op. at 11, that if the Board finds that market dominance has not been shown by a complainant that has used the streamlined approach, the complainant may not submit a new rate case involving the same traffic using the non-streamlined market dominance presentation unless there are changed circumstances (or other factors under 49 U.S.C. 1322(c)). (Olin Comment 9–10, FRCA Comment 3.) Railroad interests did not comment on this issue. Board and court precedent hold that a complainant seeking to challenge the same rates at issue in a prior proceeding can do so only upon a showing of changed circumstance, new evidence, or material error. *See Burlington N. & Santa Fe Ry.* v. *STB,* 403 F.3d 771, 778 (D.C. Cir. 2005); *Intermountain Power Agency* v. *Union Pac. R.R.,* NOR 42127, slip op. 4 (STB served Nov. 2, 2012). Therefore, it is appropriate that a complainant cannot file a new complaint to challenge the same traffic where the Board has previously found no market dominance, absent a showing that one of these criteria are met.

D. Regulatory Impact Analysis

In his comment, Dr. Ellig proposes that the Board conduct a ''regulatory impact analysis'' (RIA), which is a form of a cost-benefit analysis, in this proceeding and in *Final Offer Rate Review,* Docket No. EP 755.[59] (Ellig Comment 3–4.) Dr. Ellig explains how the Board could apply the RIA framework to the rules proposed in these two proceedings. Other parties did not comment on the proposal. The Board is considering whether and how particular cost-benefit analysis approaches might be more formally integrated into its rulemaking processes.[60] While the Board need not conduct a formal RIA, the Board has, as described throughout this decision, carefully weighed the benefits and burdens associated with particular

[56] *See E.I. DuPont de Nemours & Co.* v. *Norfolk S. Ry.,* NOR 42125, slip op. at 2 (STB served June 11, 2014) (granting waiver of page limits on petitions for reconsiderations due to complexity of the case).

[57] NCTA argues that a defendant could require a complainant to provide more evidence than the complainant can provide within the limited scope of a 50-page rebuttal and therefore requests that ''restrictions also be placed on the amount of information that a defendant can request in its response to a complainant.'' (NCTA Comment 3.) To the extent that NCTA is proposing that restrictions be placed on the evidence that a defendant can obtain through discovery, the Board will deny this request and finds that the standards for discovery that would apply under the non-streamlined approach should continue to apply here, and that discovery disputes can be addressed on a case-by-case basis.

[58] AAR refers to ''the *DMIR* case.'' (*See, e.g.,* AAR Comment 12.) What the Board refers to here as ''the *DMIR* precedent'' is actually two decisions: *Minnesota Power, Inc.* v. *Duluth, Missabe & Iron Range Railway,* 4 S.T.B. 64 (1999) and *Minnesota Power, Inc.* v. *Duluth, Missabe & Iron Range Railway,* 4 S.T.B. 288 (1999).

[59] Dr. Ellig submitted his comment in this docket, *Final Offer Rate Review,* Docket No. EP 755, and *Expanding Access to Rate Relief,* Docket No. EP 665 (Sub-No. 2), as well as in *Association of American Railroads—Petition for Rulemaking,* Docket No. EP 752.

[60] *See Assoc. of Am. R.Rs.—Pet. for Rulemaking,* EP 752, slip op. at 1 (STB served Nov. 4, 2019); *see also Village of Barrington, Ill.* v. *STB,* 636 F.3d 650, 670–71 (D.C. Cir. 2011) (stating that ''neither the Board's authorizing legislation nor the Administrative Procedure Act requires the Board to conduct formal cost-benefit analysis.'').

aspects of the streamlined market dominance approach, which as noted below, has been designated as non-major. *See, e.g., supra,* at 3–4, 7–8, 10–11, 13, 22, 26–27. Further, in this proceeding, the Board is not creating a new right or remedy but is merely streamlining an existing process. As noted above, the Board does not expect the streamlined approach to change the outcome that would have been reached under the non-streamlined market dominance approach. Rather, it expects the rule to decrease the burden in potentially meritorious cases, including the burden that may have unnecessarily limited the accessibility of the Board's rate review processes and therefore dissuaded shippers from filing a case.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. sections 601–604. In its final rule, the agency must either include a final regulatory flexibility analysis, section 604(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' section 605(b). The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

In the *NPRM,* the Board certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.[61] The Board explained that its proposed changes to its regulations would not mandate or circumscribe the conduct of small entities. Indeed, the proposal requires no additional recordkeeping by small railroads or any reporting of additional information. Nor do these proposed rules circumscribe or mandate any conduct by small railroads that is not already required by statute: the establishment of reasonable transportation rates when a carrier is found to be market dominant. As the Board noted, small railroads have always been subject to rate reasonableness complaints and their associated litigation costs, including addressing whether they have market dominance over traffic.

Additionally, the Board concluded (as it has in past proceedings) that the majority of railroads involved in these rate proceedings are not small entities within the meaning of the Regulatory Flexibility Act. *NPRM,* EP 756, slip op. at 13 (citing *Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 33–34. Since the inception of the Board in 1996, only three of the 51 cases filed challenging the reasonableness of freight rail rates have involved a Class III rail carrier as a defendant. Those three cases involved a total of 13 Class III rail carriers. The Board estimated that there are approximately 656 Class III rail carriers. Therefore, the Board certified under 5 U.S.C. 605(b) that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

The final rule adopted here revises the rules proposed in the *NPRM;* however, the same basis for the Board's certification in the proposed rule applies to the final rule. Thus, the Board certifies under 5 U.S.C. 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

In this proceeding, the Board is modifying an existing collection of information that was approved by the Office of Management and Budget (OMB) under the collection of Complaints (OMB Control No. 2140–0029). In the *NPRM,* the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3549, and OMB regulations at 5 CFR 1320.8(d)(3) regarding: (1) Whether the collection of information, as modified in the proposed rule, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. One comment was received, as discussed below.

In the only comment relating to the PRA burden analysis, Dr. Ellig questions the factual basis for the Board's estimate that there would be one additional complaint per year due to the new streamlined market dominance procedures. (Ellig Comment 12.) The Board appreciates Dr. Ellig's comment on this point. For most collection renewals, the Board uses the actual number of filings with the Board over the previous three years and averages them to get an estimated annual number of those filings to use in its PRA burden analysis. For new rules, however, the Board may not have historical data that allows for such averages, so it must estimate based on its experience, often considering analogous regulatory changes made in the past. Here, while the streamlined market dominance procedures are new, market dominance has long been a litigated issue in rate reasonableness cases. Based on its substantial experience with the complexities of prior market dominance litigation, and how such complexities had impacted the number of rate reasonableness complaints filed each year, the Board estimated that it would receive approximately one additional complaint due to the streamlined market dominance approach. As no party submitted any specific information that would lead to a more precise estimate, the Board continues to find that the streamlined approach to market dominance will likely lead to approximately one additional case per year.

Dr. Ellig also comments that the Board did not provide a source for its estimated PRA burden hours or non-burden costs (*i.e.,* printing, copying, mailing and messenger costs) for the existing types of complaints and the one additional complaint expected to be filed due to the new streamlined market dominance procedures. (*Id.*) These burden hours and non-burden costs were derived from the burden hours and non-burden costs the Board estimated for existing complaints in its 2017 request to OMB for an extension of its collection of complaints. *See* STB,

[61] For the purpose of RFA analysis for rail carriers subject to Board jurisdiction, the Board defines a ''small business'' as only including those rail carriers classified as Class III rail carriers under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regulatory Flexibility Act,* EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of $20 million or less in 1991 dollars, or $40,384,263 or less when adjusted for inflation using 2019 data. Class II rail carriers have annual operating revenues of less than $250 million but in excess of $20 million in 1991 dollars, or $504,803,294 and $40,384,263, respectively, when adjusted for inflation using 2019 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 CFR 1201.1–1; *Indexing the Annual Operating Revenues of R.Rs.,* EP 748 (STB served June 10, 2020).

Supporting Statement for Modification & OMB Approval Under the Paperwork Reduction Act & 5 CFR pt. 1320, OMB Control No. 2140–0029 (Mar. 2017), *https://www.reginfo.gov/public/do/DownloadDocument?objectID=72159101.* In its supporting statement for that request, which OMB approved, the Board explained that its burden estimates were ''based on informal feedback previously provided by a small sampling (less than five) of respondents.'' (*Id.* at 2, 3.) The Board has been provided no other data upon which it could adjust its estimate.

This modification and extension request of an existing, approved collection will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11. The request will address the comments discussed above as part of the PRA approval process.

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule as non-major, as defined by 5 U.S.C. 804(2).

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the **Federal Register**.

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

3. This decision is effective September 5, 2020.

List of Subjects

49 CFR Part 1011

Administrative practice and procedure; Authority delegations (government agencies); Organization and functions (government agencies).

49 CFR Part 1111

Administrative practice and procedure; Investigations.

Decided: July 31, 2020.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Jeffrey Herzig,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board amends parts 1011 and 1111 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1011—BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

■ 1. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 1301, 1321, 11123, 11124, 11144, 14122, and 15722.

■ 2. Amend § 1011.6 by adding paragraph (i) to read as follows:

§ 1011.6 Delegations of authority by the Chairman.

* * * * *

(i) In matters involving the streamlined market dominance approach, authority to hold a telephonic evidentiary hearing on market dominance issues is delegated to administrative law judges, as described in § 1111.12(d) of this chapter.

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

■ 3. The authority citation for part 1111 is revised to read as follows:

Authority: 49 U.S.C. 10701, 10702, 10704, 10707, 11701, and 1321.

■ 4. Amend § 1111.9 by revising paragraph (a) to read as follows:

§ 1111.9 Procedural schedule in stand-alone cost cases.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedule will apply in stand-alone cost cases after the pre-complaint period initiated by the pre-filing notice:

(1) Day 0—Complaint filed, discovery period begins.

(2) Day 7 or before—Conference of the parties convened pursuant to § 1111.11(b).

(3) Day 20—Defendant's answer to complaint due.

(4) Day 150—Discovery completed.

(5) Day 210—Complainant files opening evidence on absence of intermodal and intramodal competition, variable cost, and stand-alone cost issues.

(6) Day 270—Defendant files reply evidence to complainant's opening evidence.

(7) Day 305—Complainant files rebuttal evidence to defendant's reply evidence. In cases using the streamlined market dominance approach, a telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(d) of this chapter, will be held at the discretion of the complainant in lieu of the submission of a written rebuttal on market dominance issues. The hearing will be held on or about the date that the complainant's rebuttal evidence on rate reasonableness is due.

(8) Day 335—Complainant and defendant file final briefs.

(9) Day 485 or before—The Board issues its decision.

* * * * *

■ 5. Amend § 1111.10 by revising paragraph (a) to read as follows:

§ 1111.10 Procedural schedule in cases using simplified standards.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedules will apply in cases using the simplified standards:

(1)(i) In cases relying upon the Simplified-SAC methodology:

(A) Day 0—Complaint filed (including complainant's disclosure).

(B) Day 10—Mediation begins.

(C) Day 20—Defendant's answer to complaint (including defendant's initial disclosure).

(D) Day 30—Mediation ends; discovery begins.

(E) Day 140—Defendant's second disclosure.

(F) Day 150—Discovery closes.

(G) Day 220—Opening evidence.

(H) Day 280—Reply evidence.

(I) Day 310—Rebuttal evidence. In cases using the streamlined market dominance approach, a telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(d) of this chapter, will be held at the discretion of the complainant in lieu of the submission of a written rebuttal on market dominance issues. The hearing will be held on or about the date that the complainant's rebuttal evidence on rate reasonableness is due.

(J) Day 320—Technical conference (market dominance and merits, except for cases using the streamlined market dominance approach, in which the technical conference will be limited to merits issues).

(K) Day 330—Final briefs.

(ii) In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.

(2)(i) In cases relying upon the Three-Benchmark methodology:

(A) Day 0—Complaint filed (including complainant's disclosure).

(B) Day 10—Mediation begins. (STB production of unmasked Waybill Sample.)

(C) Day 20—Defendant's answer to complaint (including defendant's initial disclosure).

(D) Day 30—Mediation ends; discovery begins.

(E) Day 60—Discovery closes.

(F) Day 90—Complainant's opening (initial tender of comparison group and opening evidence on market dominance). Defendant's opening (initial tender of comparison group).

(G) Day 95—Technical conference on comparison group.

(H) Day 120—Parties' final tenders on comparison group. Defendant's reply on market dominance.

(I) Day 150—Parties' replies to final tenders. Complainant's rebuttal on market dominance. In cases using the streamlined market dominance approach, a telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(d) of this chapter, will be held at the discretion of the complainant in lieu of the submission of a written rebuttal on market dominance issues. The hearing will be held on or about the date that the complainant's rebuttal evidence on rate reasonableness is due.

(ii) In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.

* * * * *

■ 6. Add § 1111.12 to read as follows:

§ 1111.12 Streamlined market dominance.

(a) A complainant may elect to pursue the streamlined market dominance approach to market dominance if the challenged movement satisfies the factors listed in paragraphs (a)(1) through (7) of this section. The Board will find a complainant has made a prima facie showing on market dominance when it can demonstrate the following with regard to the traffic subject to the challenged rate:

(1) The movement has an R/VC ratio of 180% or greater;

(2) The movement would exceed 500 highway miles between origin and destination;

(3) There is no intramodal competition from other railroads;

(4) There is no barge competition;

(5) There is no pipeline competition;

(6) The complainant has used truck for 10% or less of its volume (by tonnage) subject to the rate at issue over a five-year period; and

(7) The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

(b) A complainant may rely on any competent evidence, including a verified statement from an appropriate official(s) with knowledge of the facts, in demonstrating the factors set out in paragraph (a) of this section. An appropriate official is any individual who has either direct or supervisory responsibility for, or otherwise has knowledge or understanding of, the complainant's transportation needs and options. The official(s) should provide his or her title and a short description of his or her duties in the verified statement. In demonstrating the revenue to variable cost ratio, a complainant must show its quantitative calculations.

(c) A defendant's reply evidence under the streamlined market dominance approach may address the factors in paragraph (a) of this section and any other issues relevant to market dominance. A complainant may elect to submit rebuttal evidence on market dominance issues. Reply and rebuttal filings under the streamlined market dominance approach are each limited to 50 pages, inclusive of exhibits and verified statements.

(d)(1) Pursuant to the authority under § 1011.6 of this chapter, an administrative law judge will hold a telephonic evidentiary hearing on the market dominance issues at the discretion of the complainant in lieu of the submission of a written rebuttal on market dominance issues.

(2) The hearing will be held on or about the date that the complainant's rebuttal evidence on rate reasonableness is due. The complainant shall inform the Board by letter submitted in the docket, no later than 10 days after defendant's reply is due, whether it elects an evidentiary hearing of lieu of the submission of a written rebuttal on market dominance issues.

(3) The Board will provide an unofficial copy of the hearing transcript no later than 5 days after the conclusion of the hearing. The Board will provide the official hearing transcript shortly thereafter. The hearing transcript will be part of the docket in the proceeding.

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