

## § 1111.12

intervention and, if so, the nature of such disputes.

[82 FR 57379, Dec. 5, 2017, as amended at 88 FR 318, Jan. 4, 2023]

### **§ 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

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market dominance issues except in cases under Final Offer Rate Review, which does not provide for rebuttal. 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. In cases under Final Offer Rate Review, which does not provide for rebuttal, the telephonic evidentiary hearing is at the discretion of the complainant.

(2) The hearing will be held on or about the date that the complainant's rebuttal evidence on rate reasonableness is due, except in cases under Final Offer Rate Review, where the hearing will be held 14 days after replies are due unless the parties agree on an earlier date. 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 in lieu of the submission of a written rebuttal on market dominance issues. In cases under Final Offer Rate Review, the complainant shall inform the Board by letter submitted in the docket, no later than 7 days after defendant's reply is due, whether it elects an evidentiary hearing 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.

[85 FR 47697, Aug. 6, 2020, as amended at 88 FR 318, Jan. 4, 2023]

### **PART 1112—MODIFIED PROCEDURES**

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AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49558, Nov. 1, 1982, unless otherwise noted.

### § 1112.1 When modified procedure is used.

The Board may decide that a proceeding be heard under modified procedure when it appears that substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony. Modified procedure may be ordered on the Board's initiative, or upon approval of a request by any party.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

### § 1112.2 Decisions directing modified procedure.

A decision directing that modified procedure be used will set out the schedule for filing verified statements by all parties and will list the names and addresses of all persons who at that time are on the service list in the proceeding. In this part, a statement responding to an opening statement is referred to as a "reply", and a statement responding to a reply is referred to as a "rebuttal". Replies to rebuttal material are not permitted. The filing of motions or other pleadings will not automatically stay or delay the established procedural schedule. Parties will adhere to this schedule unless the Board issues an order modifying the schedule.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 58491, Nov. 15, 1996]

### § 1112.3 Default for failure to comply with schedule; effect of default.

If a party fails to comply with the schedule for submission of verified statements, or any other requirements established by the modified procedure

decision, that party will be deemed to be in default and to have waived any further participation in the proceeding. Thereafter, the proceeding may be disposed of without notice to and without participation by parties in default.

### § 1112.4 Petitions to intervene.

(a) The Board may grant a petition to intervene in a proceeding set for modified procedure if intervention:

(1) Will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and

(2) Would not unduly broaden the issues raised in the proceeding.

(b) The petition to intervene shall set out:

(1) The petitioner's interest in the proceeding;

(2) Whether the petitioner supports or opposes the relief sought or the action proposed or is otherwise concerned with the issues presented in the proceeding; and

(3) The petitioner's request, if any, for relief.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

### § 1112.5 Joint pleadings.

Parties with common interests are encouraged to prepare joint pleadings whenever possible.

### § 1112.6 Verified statements; contents.

A verified statement should contain all the facts upon which the witness relies, and to the extent that it contains arguments, they should be based only on those facts. Parties filing reply and rebuttal verified statements will be considered to have admitted the truth of material allegations of fact contained in their opponents' statements unless those allegations are specifically challenged. Rebuttal statements shall be confined to issues raised in the reply statements to which they are directed.

### § 1112.7 Records in other Board proceedings.

If any portion of the record before the Board in any proceeding other than the proceeding at issue is offered in

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evidence, a true copy should be presented for the record.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

### § 1112.8 Verification.

The original of any pleading filed must show the signature, capacity, and seal, if any, of the person administering the oath, and the date thereof.

### § 1112.9 Sample verification for statement of fact under modified procedure.

State of \_\_\_\_\_,  
County of \_\_\_\_\_,  
SS:

\_\_\_\_\_ being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

Signed \_\_\_\_\_.  
Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_.  
Notary Public of \_\_\_\_\_.  
My Commission expires \_\_\_\_\_.

### § 1112.10 Requests for oral hearings and cross examination.

(a) *Requests.* Requests for oral hearings in matters originally assigned for handling under modified procedure must include the reasons why the matter cannot be properly resolved under modified procedure. Requests for cross examination of witnesses must include the name of the witness and the subject matter of the desired cross examination.

(b) *Disposition.* Unless material facts are in dispute, oral hearings will not be held. If held, oral hearings will normally be confined to material issues upon which the parties disagree. The decision setting a matter for oral hearing will define the scope of the hearing.

[61 FR 52712, Oct. 8, 1996]

### § 1112.11 Authority of officers.

Except to the extent that they apply only to the conduct of a public hearing, the officer assigned to handle a proceeding under the modified procedure shall have the same authority as officers assigned to conduct oral hearings as described in § 1113.3(a) and (b).

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AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49559, Nov. 1, 1982, unless otherwise noted.

### § 1113.1 Scheduling hearings; continued hearings.

(a) *Assignment; service and posting of notice.* In those proceedings in which an oral hearing is to be held, the Board will assign a time and place for hearing. Notice of hearings will be posted on the Board's Web site, will be served upon the parties and such other persons as may be entitled to receive notice under the Act, and will be available for inspection at the Board's office.

(b) *Requests for changes in assignment.* Requests for postponements of date of hearing will be granted only in exceptional circumstances.

(c) *Continuances.* (1) A continuance may be granted at the discretion of the presiding officer.

(2) If the presiding officer announces the time and place of a continued hearing on the record, no further notice need be given.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 74 FR 52907, Oct. 15, 2009]